THE HIGH COURT

RECORD NO: 2016/28 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 N.F., A CHILD

P.F.

PLAINTIFF

AND

C.R.

DEFENDANT

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 13th March, 2017

1. This is a case in which the applicant, a United States citizen, the father of the child the subject matter of these proceedings, seeks the return of his son to New York pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction, 1980 (the 'Hague Convention') and the provisions of the Child Abduction and Enforcement of Custody Orders Act, 1991. The respondent, who is the mother of the child and an Irish citizen, has been in Ireland with the child since the 19th/20th December, 2015. At the time of the hearing before the Court, the child was three years old. I will refer to the applicant and respondent as the father and mother in this judgment. There was a serious conflict of evidence in the case concerning many matters, and the parties were cross-examined on their affidavits over a two-day hearing. Among the key issues in the case were whether the father gave his consent to the mother's departure with the child to Ireland for an indefinite period as distinct from a period of short duration, and, if not, whether he subsequently consented or acquiesced in the child's retention in the jurisdiction indefinitely if and when it became clear that it was the mother's intention to so retain the child in Ireland. Issues relating to change of habitual residence, and the defence of 'grave risk' pursuant to Article 13 of the Convention were also raised on behalf of the respondent mother.

2. While it is possible to construct a broad chronology from the evidence in the case, there was a factual dispute about almost every interaction or set of interactions between the parties within that chronology. In addition to the grounding affidavit of the solicitor on behalf of the applicant father, the father and mother each swore three affidavits. The exhibits to the affidavits included a large number of texts, certain photographs, and a consent form regarding travel. Each of the parties was cross-examined at some length. To give a flavour of the degree of conflict of evidence, there was a conflict regarding matters such as the following:

(a) the father's reaction to the mother's pregnancy;

(b) the degree of the father's involvement in the child's life while they were living in New York;

(c) the degree of the father's financial contribution to the child's upkeep;

(d) whether the father had a particular firearm in the apartment, and whether and when he disposed of it;

(e) the father's understanding of the mother's reasons for travelling with the child to Ireland on the 19th December, 2015, and what preisely he consented to at that time;

(f) whether a travel consent form he signed at that time was filled in or not when he signed it;

(g) what conversation took place between them on the telephone on the 3rd January, 2016, about her staying on in Ireland;

(h) what was said in the course of numerous conversations over the phone between them in the following months of 2016 and what his understanding was of her position regarding the marriage and the child;

(i) what discussion they had about his getting a solicitor upon receipt by him of her judicial separation documents;

(j) the impact of the father's dyslexia on his ability to read documents, including legal documents; and

(k) whether or not the father was aware that the mother had shipped her computer to Ireland prior to her departure.

3. In general terms, it is probably fair to say that counsel on behalf of the mother launched a direct and all-out attack on the father's credibility, and relied on particular aspects of his evidence to suggest that he was not to be believed on anything that he said. Counsel on behalf of the applicant did not engage in such a direct challenge to the mother's honesty, but sought to undermine her credibility and reliability with reference to, in particular, contemporaneous evidence such as texts, as well as what was said in judicial separation papers filed on her behalf.

4. I do not propose to resolve every conflict of fact, as it is not necessary to do so for present purposes. The scope of these proceedings is limited to matters relevant to the Hague Convention. These proceedings do not involve any long-term decisions about where the child will live and matters relating to his care. They relate, instead, to the sole issue of whether or not the child should be returned to the United States pursuant to the Hague Convention regime. I will, of course, make findings of fact relevant to key issues which are relevant to the Hague Convention issues arising. I would say in general, however, that I did regard the general credibility of the applicant with some scepticism, having regard in particular to his evidence in relation to a firearm, which will be discussed later in this judgment. However, I am also of the view that the respondent mother's evidence was contradicted by, or shown to be inconsistent in a number of respects, with contemporaneous texts. Accordingly, this was not a straightforward case of simply preferring one person's evidence over another; it has involved a careful consideration of the affidavits, the exhibits, and the oral evidence, in order to reach findings on the balance of probabilities for the purposes of the issues in these proceedings.

Relevant Chronology

Background to the mother's departure from New York

5. The applicant father, who is an American citizen, and the respondent mother, who is Irish, were married to each other in New York in 2007. They had met in 1999. Until the events which gave rise to these proceedings, they lived in New York for the duration of their marriage. They have a child, N., who is the subject matter of these proceedings and who was born in November, 2013, in New York. Both parents were working in New York. Thus, there is no doubt that the centre of gravity of the couple for many years was New York, as was that of the child prior to the events the subject of these proceedings.

6. The conflict of evidence between the parties extends back in time to the mother's pregnancy. The mother states that the father complained "bitterly and repeatedly" throughout her pregnancy that he did not want to be a father and that she had tricked him into having a baby. The father, to the contrary, stated that he was "as excited as I was scared", and that he attended as many parental appointments as his work schedule allowed and that he was present for the birth of the child.

7. The mother says that after the child's birth, "he had nothing to do with [N] after he was born, unless he absolutely had to". The mother says "He slept in the bed about once a month and conducted his affairs and spent his time in the boatyard without reference to me or [N]. He even maintained his status on his Facebook webpage as single". She said that the father brought N. to see his mother about four times in 2015, that if they were in the apartment together he might pick N. up and take a photograph of them in the mirror but that he never gave up any time for him or took him anywhere and that he would often agree to family activities but not follow through on such agreements. The mother says that they "became virtual strangers in the apartment" and that she "ended up effectively a single mother." She did all the day to day activities with N. and her husband was "rarely present and had no involvement", even at weekends. She also asserts that he attended only one of twelve paediatrician appointments during their time in New York.

8. The father said that the allegation that he had played no caring role for his son was a "ridiculous claim". He stated that the mother "tends to be very over protective and sometimes controlling", further stating that she refused to let him take responsibility for many of the basic duties of child care. He said that she had more flexibility in her work and that he attended every one of N.'s paediatrician appointments when he was not working. He accepted that he was out a lot but stated that he lived with N., saw him on a daily basis, and used to do things such as taking him to visit his mother (N.'s grandmother). He also pointed to a series of messages sent by him, to the mother, which he exhibited to his affidavit of 27th November, 2016, to indicate his active involvement in N.'s life, which included expressions of his love for N. and indications that he misses him, requests for photographs of N., queries in relation to N.'s wellbeing and requests to go on Skype to see N.. The mother claimed that her role as primary carer and the lesser involvement of the father was unrelated to her parenting style and that it was due to a lack of interest on the part of the father.

9. The mother asserts that when she attempted to question him on his failure to spend time with his son and other personal matters, such as her suspicions of infidelity on his part, he would "stand in front of me in my personal space, shout and scream at me and point his finger in my face." She stated that the father told her that "if I did not like it I could go back to live in Ireland" and that he always reminded her that she had said in the past that the education system in Ireland was better and that she and N. should go and live in Ireland.

10. In response, the father asserts that while he did sometimes tell her that she could go back to Ireland if she did not like it in New York in the course of arguments between them, he did not say this after N. was born and he never said that she could move back with N. The mother states that he made this remark on numerous occasions, both before and after N. was born. He also asserted that he was never unfaithful to her, but admits that there is a "grain of truth" to her allegations that he would scream at her, asserting that they "both have tempers". The mother, in response, said that she is by contrast a "calm and fairly timid person" and her usual response to his outbursts would be that she would start crying. In his oral evidence, the father accepted that he was a "loud" person and that he did sometimes scream at her.

11. The mother said that she was in fear of him, referring to one occasion in which she claimed that he stated "that he was [of a particular nationality who] don't believe in divorce and that he had three acres upstate in New York and no-one would ever find my body." She continued, "[t]his put me in profound fear, a fear that was accentuated by my discovering that he had kept a gun and ammunition in the apartment, together with what looks like a loaded clip, despite the fact that he is a convicted felon and is not permitted to own a gun." She said that it was for these reasons she did not initiate a conversation with the father before leaving New York. In her first affidavit, she exhibited photographs of a firearm inside a drawer, which she averred showed the firearm in *situ* in the apartment.

12. The father did not accept the mother's assertion that she was in fear of him and said that she was "well able to stand up for herself". He pointed out that no complaints of abuse were ever made by the mother to the authorities in New York.

13. As regards the firearm, the father stated in an affidavit sworn on the 27th November, 2016: "*I previously owned a black powder pistol, which is what is pictured in [the mother's] affidavit*". Thus, he accepted that the exhibited photo did show the firearm that he owned. He says that he did have a felony conviction from when he was 17 years old which he believed was 'sealed' because he was a minor at the time. However, black powder pistols, he said, are classified by the federal administration as "antique firearm[s]" and "novelty item[s]", which he could purchase legally on the internet. He further stated that he no longer owns the pistol, as he duly disposed of it on the mother's request in January, 2017, that he do so before she and N. returned.

14. In a further affidavit, the mother responded to these claims by asserting that the firearm was not, as suggested by the father, an antique, and she exhibited further photographs of the firearm. She said that the firearm in question is a Hi-point model CF-380 pistol, which is a polymer-framed semi-automatic, blowback-operated pistol, and not a novely item. Next to the gun, in the photograph, was a loaded magazine. She said her concern about the gun was not his felony conviction but the fact that he kept it in an unlocked drawer and that N. used to open the drawers and play. She exhibited photographs of the child standing on a stool in front of the drawers. She said that she found the gun in November, 2016, and was afraid of its presence in the drawer, so she moved it to a small lock box that she had and hid the key. She added that it was there until April, 2017, at which point the father asked her where the key was, and she told him. She denied the alleged January conversation about the gun. She stated that she is unsure of whether he did in fact get rid of the gun.

15. The father responded by way of further affidavit, this time stating that the gun shown in the exhibited photographs was not his. He said that he no longer has the black powder pistol, which he did own. He said that he was troubled by the photographs exhibited, which he described as "staged", and questioned why the mother had taken these photographs if she was merely going to Ireland for a vacation.

16. In a further affidavit, the mother said that she took the photographs because her husband had a history of "gas-lighting" her i.e.

of denying facts and questioning her memory. She was also worried, she said, about the chemicals for his vaporizer, which are also visible in the photographs, being in a place where the child could access them. She said that she kept the photographs so that he could not in the future deny what she had seen.

17. The father was cross-examined about the matter of the firearm. His position in his oral evidence was to maintain that the firearm in the photograph exhibited to the mother's first affidavit was not his, even though he had accepted in his first affidavit that it was. It was put to him that he had changed his position on whether it was his gun only after her affidavit exposed the fallacy of his explanation that it was an antique gun. His explanation of having originally accepted that it was his gun was that "I screwed up", "it's a misprint", "I didn't read that particular thing", and "I messed up with the wording". Having regard to the evidence and demeanour of both parents, it did not seem to me even remotely likely, as he alleged, that the mother planted a different firearm in the drawer and staged photographs of her son in front of the drawers at some point before she left for Ireland, and that the applicant had a different gun, which was not photographed, which was an antique, and that he made a mistake when he saw the photograph in the first affidavit and admitted that it was his gun. He was emphatic at the oral hearing that this was not his gun and this was, in my view, a clear untruth. This led the Court to regard the rest of his evidence with a considerable degree of care.

The mother's departure from New York with the child

18. The mother left New York with N., on the 19th December, 2016. The father drove them to the airport. She took two suitcases and arranged for her laptop to be shipped to her in Ireland. In his evidence the father said he had no knowledge of her shipping the laptop, and that he did not notice it as missing from the apartment until April. He was subsequently cross-examined intensively as to how likely it was that he would not notice a missing laptop.

19. The mother had a return ticket. However, while she says the father did not know this until later, the father says he did know this at the time of departure.

20. In her first affidavit, the mother says that on each of the previous occasions when she had travelled with N. to Ireland, she had always made arrangements with her husband for her return, advising him of the date and making arrangements with him to be collected from the airport. On this occasion, she says, they made no such arrangements. The father disputed that this was their usual practice, and exhibited text messages from 2015 to support the view that they made collection arrangements while the mother was in Ireland on previous occasions.

21. Some of the focus on the case was on a consent form signed by the father on the morning of their departure. The form, which was exhibited by the mother, is a standard one-page printed form with blanks that have to be filled out. The blanks were in fact filled out in her handwriting, which is not in dispute. Details such as names, address, and birthdays are given. The key portion is that it says that the child "has my/our consent to travel with" the mother to Ireland. Where it says "during the period of" with a blank to be filled out to indicate the period of the stay, it was left blank. It was signed by the father, which fact is also not in dispute. What was disputed was whether or not the form was blank when he signed it as well as the significance of the document to the issue of consent, given that it did not indicate any defined end-date to the visit to Ireland.

22. The mother said on affidavit that she downloaded the form from the U.S. Department of Justice website and, about a week before she left, told her husband that she would need him to sign it. She said that she gave him the form on the morning of her departure, and that he read it and signed it. She said that she had never asked the father for his written consent before taking N. to Ireland on any prior occasion. The father said that the mother handed him the form as he was walking out the door to go to work and that she said that he should sign it to enable N. to get on the plane as: "they were getting stricter about flying with a kid out of the country if the other parent wasn't there, and I trusted her, so I signed it". He stated that the form was not filled out at all at that stage and that "I certainly did not sign the form with the intention of consenting to [C.R.] taking [N.] out of the country indefinitely". The mother, in response, stated that his claim that the consent form was blank when he signed it was false.

23. As regards the understanding between them at the time of her departure, the mother said that she had been in fear of confrontation with her husband from the time of her pregnancy, and was afraid to point out to him that she was going back to Ireland indefinitely. She stated that she expected him to raise the issue when he drove them to the airport but, although the journey to the airport was, "pregnant on my side with expectation", nothing was said. She said that her husband drove them to the airport, walked them to the check-in desk and drove away: "if he was not actually relieved that we were leaving he was at most indifferent to that reality". Later in her first affidavit, she said that she did not initiate a conversation with her husband before she left New York becuase of her fear of him and how he intimidated her into accepting their married life on his terms.

24. The position of the father was that, at that time, the mother had taken N. to Ireland for what she claimed was a temporary visit to spend Christmas with her family and attend a family wedding, and that it was discussed by and agreed between the parties that the mother would bring N. home to New York on the 4th January, 2016. He also said that he did not raise any issue on the way to the aiport about them staying indefinitely in Ireland because he had no reason to believe that this was her intention at that time. She had taken two suitcases only and left most of her and the child's belongings at home.

The telephone conversation of the 3rd January, 2016

25. A telephone call took place between the mother and the father on the 3rd January, 2016, some two weeks after she had arrived in Ireland. Again, the parties' descriptions of this conversation involves a direct conflict of evidence, including who actually made the call to whom, quite apart from its content.

26. The mother's account of that conversation is as follows:

> "Whilst in [a given location] over the Christmas and New Year period, leading up to [the family wedding] I was uneasy that nothing had been said about my staying with [N] in Ireland. It is true that [P] had read the consent form before signing it and did not comment on the fact that the period for which he was consenting was unlimited. But before I cancelled our return tickets I wanted to be sure that [P] knew we would not be coming back. Consequently I telephoned him on the evening of 3rd January to tell him that I needed time away from our relationship and did not want to come back unless and until things were resolved between us. In the course of the conversation he acknowledged that I was unhappy in our marriage, that he understood my position and did not object to my staying in Ireland. We agreed to talk more. Whilst I had never mentioned the fact that I had booked return tickets to Ireland and doubt he was aware of them up to that point, in light of our joint decision I told him I would cancel those tickets and duly did so the following day."

27. Later in her first affidavit, she said "[h]ad he said 'no' and insisted we come back I would not have cancelled the airline tickets

and we would have returned to New York".

28. In his affidavit evidence the father initially said that he initiated the phone call to arrange to pick her and N. up at the airport the next day. In cross-examination, it was pointed out to the father that in the grounding affidavit sworn by his solicitor, to whom he must have given these instructions, it was stated that the mother had initiated this phone call. He accepted that this was correct, and said it was a mistake, that he had forgotten. It was put to him that he had inserted this false detail in his own affidavit (i.e. that he had initiated the conversation) to support his story that their normal practice was to communicate with each other about the return arrangements while she was in Ireland, not before her departure from New York. He denied this and said that he thought it was an insignificant detail.

29. As to the content of the conversation, he said that she told him that she wanted to extend her visit for a few weeks because the demands of the holidays and her sister's wedding had precluded her and N. from enjoying sufficient time to relax with her family. He said that she additionally stated that she needed time off from work and from their marital conflicts but that she did not say she wished to stay in Ireland to make things work between them. He stated that he asked her on what date they would return and she said she had not yet decided, but that she would get back to him with a date. He said that if he had been aware at this time that the respondent did not intend to return to New York with N., he would not have given his consent to the child remaining in Ireland beyond the 4th January. He exhibits the following text messages exchanged between the parties on the 4th January, 2016:

> "C.R.: Just talked to Aer Lingus. Return flight was for tomorrow. I cancelled it and they gave me a credit towards the next flight reservation.
>
> C.R.: If you download Skype u could say hi to [N.]
>
> P.F.: on my way to work going to see if one of the guys can get it to work I downloaded skype glad you got a little credit but that doesn't tell me when you're planning on coming home
>
> P.F.: If they get the Skype to work when will be a good time to Skype
>
> C.R.: Anytime between 10am and 8pm (IRL) so 5am and 3pm (NYC) should usually work
>
> C.R.: I haven't booked a flight- told you that I need some time off. Easy enough to get flights once the holidays are over tho.
>
> P.F.: I know you need time off time off from work or time off from me"

On the 5th January, 2016, the mother replied, "[a] time off from the whole situation". Further messages are exhibited in relation to the period which followed.

Communications between the parties in the period January to September 2016

30. A striking feature of the present case is the degree of communication between the mother and father over the course of a number of months from the time she arrived in Ireland, which was intensive. The parties exchanged text messages and had conversations on the phone and through Skype. The Court was provided with print-outs of the texts between them. This presented the Court with two parallel streams of evidence; (a) the contemporaneous texts; and (b) the parties' evidence about the telephone conversations between them and about their states of mind and intentions throughout the period.

31. The mother said on affidavit that these were lengthy telephone conversations in which their marriage difficulties were discussed extensively. The mother describes that she often "spoke for up to three hours with him", and the conversations were "usually very stressful" on account of the frequent outbursts of the father. Her own mother swore an affidavit averring to the lengthy conversations and the emotional impact of them upon her daughter. The father disputed the length of the conversations, but accepted that they were intense and emotional in content.

32. The mother said that during these phone calls, the father became angry when she challenged his behaviours and encouraged him to attend counselling. She also said that on other occasions he acknowledged certain of his behaviours. She said that, throughout these conversations, he accepted that it was her decision whether to return to New York. She stated that on one occasion he said he had always known she would leave him and on another, "before I had made my final decision not to return", he told her that she had decided to leave and not come back. She said that while they did discuss events taking place in Ireland and things she was doing, it was not correct that she told him she was staying on for a succession of short periods. She said that she "maintained the position that unless and until I felt there was some chance of our saving the marriage, I would not be returning to New York", and that, until she received the letter from his solicitor (discussed below) dated the 19th September, 2016, he did not withdraw his consent.

33. The father swore on affidavit that from the 3rd January onwards, he constantly texted his wife saying that he loved and missed her and wanted them to come home to New York. The text communications exhibited in this case certainly bear this out. Although she never responded in kind, she did not, he says, say or write anything that suggested to him that she was not planning to come home. He says that in or around the 1st February, 2016, they had a big talk about the future of their relationship and "it started to dawn on me that [C.R.]'s reasons for extending the visit probably had more to do with avoiding me than her family obligations in Ireland".

34. He said that in March, 2016, she said she was going to stay a little longer, this time to help another sister with a house being renovated in Dublin. He said, "of course I started to wonder if [C.R.] was hiding something from me" and wondered if she had met someone else and was deciding whether or not to end the marriage. He said, however, that he assumed she would eventually return, "especially because she had not left her job in New York but was simply working remotely from Ireland". He said that throughout the period she never suggested that she intended to keep N. in Ireland permanently.

35. At paragraph 18 of his third affidavit, the father said:

> "Prior to receiving the judicial separation papers on 20 August 2016, I did discuss my situation with a number of friends (mutually to [C.R.] and me) and family members. They were all supportive, but every one of them pointed out that what she had done was illegal parental kidnapping. In the Spring, around the time I was beginning to seriously question [C.R.]'s true intentions, I happened to discuss my situation with an acquaintance at the boat club who was a lawyer. Although he

> did not practice in family law, he informed me that [C.R.] could face severe, criminal consequences for what she had done. This scared me. As much as I wanted [N.] (and, admittedly, [C.R.]) to come home, I was extremely reluctant to open up the possibility of criminal abduction charges against her, and mostly, subjecting [N.] to his mom's criminal prosecution. Ruling out the options which I deemed to be too extreme, I decided that I would have to trust [C.R.]. Perhaps foolishly, I still believed that she would work on our marital difficulties when she returned".

36. At one point in his evidence, the father said that the date on which he "stopped consenting" was "probably around my birthday", which he told the Court was April 24th. When asked about a text on the 22nd March, 2016, in which he had said: "I really need you guys home I'm losing it I miss you guys and want you guys back I can't take it no more I'm going to have to do something", he said that he had "spoken to people", and that "they did not give me very good information, well, information that I was comfortable using". When it was put to him that he had spoken to a lawyer at that stage, he responded that he had spoken to "a lawyer of sorts", who was not a "hired lawyer" and whose exact profession he was unsure of. He said again that around the time of his birthday, "that's when things got serious". He said the person he was speaking to was a laywer who was a friend of a friend at the boat club. It was put to him that he accepted the situation from that time, and he denied it; but he went on to say that he was waiting until the 11th September to do anything, because that was his mother's anniversary and "a very important date by us in New York". He said that he was concerned about the potential impact of his actions on C.R. because she could be in trouble in the United States, that "they take this very seriously, it's on tv all the time, on the news, all the time". He said later that he did not want his son to be motherless.

37. I have examined the text messages for the entire period January to June, 2016, to see if its sheds light on their thoughts and intentions around this time, and in particular from April onwards. I note that on the 22nd April, 2016, he texted: "You need to make a decision this can't go on forever we have to work on it together or not". She responded "I know. It's just that you hurt me so badly. All I asked was for you to talk to a therapist to find out why you want me, then push me away….If you don't know why, you'll do it again". I note another text exchange on the 29th April, 2016, where he said: "…I still miss you guys and wish you guys were home" followed by another text: "Not waiting much longer". She answered: "I know. Even though you've been saying all the right things, I still feel that you need to see a therapist for a while before I book a flight or anything. You say you love me, but you haven't wanted to be around me in years and it's been very upsetting….". In his reply, he said, inter alia, "you seem to be so fixated on making me a better husband but there's things about you that need to be better too also I think we should be doing it together if that's the problem". On the 21st May, 2016, during a text exchange, he said "…I wanted you guys home it's been 6 months", to which she replied "I'm just trying to figure out if I've the strength to go back and start again. I'm scared and stressed out because I want to make the right decision". He answered, "…I don't know what you're stressed out about you are the one that did this….you're the one that did this you just decided never to come home". In a replying text, she said "….I'm trying to figure out if I'm strong enough to give it another go. I know you need to see [N.] soon. I know this is all really hard on you". The messages continued up until the 2nd June, 2016, with his continuing to express how he missed them and each of them exchanging bits and pieces of news. She continued to send to photographs of their son in various places and with various relatives.

38. The mother stated on affidavit that because of the stress of the situation surrounding her marriage, she attended her G.P. in March, 2016, who prescribed her Xanax and recommended that she see a counsellor. She started counselling in June, 2016. She said that the counselling sessions made her understand that her hopes of being reconciled with her husband would not be realised. She says that it was not until June, 2016, that she decided finally that the marriage was over. She said that throughout the period, her husband knew she had decided to stay in Ireland and that unless, through counselling or otherwise, there was a future for them, she would not be returning to New York.

39. It may be noted that the father did not visit Ireland during the period in question. In his affidavit, he said:

> "I make good money especially for someone who did not finish High School but the flip side is that I have no job security. I am essentially an independent contractor and if I miss work – for any reason – I don't get paid. I can take a few days here and there but taking extended periods away means I lose my job meaning not only can I not travel to Ireland, I can't take off long stretches to spend with [N.] in New York over summers or when he is off from school."

He confirmed this in his oral evidence.

40. As regards the period overall, the father said:

> "I have tried to sit it out waiting for [C.R.] to finally bring [N.] home and hoping against all odds that when she did we would all be a family together again. If she decided that our marriage was truly over, I reasoned, I would accept it and we would work out a parenting schedule so that [N.] and I could spend as much time together as possible when I was not at work and [N.] was not at school. I hoped that we would come to an agreement."

The mother responded by suggesting it would be more accurate to say that, rather than attempting to wait her out, he was attempting to grind her down with "outbursts of temper and expressions of love". She stated that:

> "At any time, at least up to the time I attended for counselling if not until I decided to issue the judicial separation proceedings, he could have told me that we had to come back to New York without any further delay, and I would have done so. But he did not do so."

The commencement of judicial separation proceedings by the mother

41. On the 4th of July, 2016, a notice of family law civil bill was issued by the respondent mother in the Circuit Court and affidavits of means and welfare were sworn by her. On the 15th July, 2016, an order was granted giving her leave to issue and serve the notice of family law civil bill. The civil bill issued on the 19th July, 2016. On the 9th August, 2016, the mother informed the father during a telephone conversation that she wanted a separation. On the 20th August, 2016, he received the notice of family law civil bill.

42. In her first affidavit, the mother said that when the judicial separation proceedings were served on her husband, they discussed them and "at his request I provided him with the names of solicitors who he could engage. Looking back now, his reaction was strange but he seemed to accept my decision at that stage". She also said that around this time her husband asked her to bring the child for a visit, and she suggested that he come and visit them in Ireland. The father disputed that he aksed her for the names of lawyers in Ireland and said that he told her that he would be getting a New York lawyer.

43. On the 22nd August, 2016, the applicant completed an application to the U.S. Central Authority for the return of the child.

The letter of the 19th September from the husband's attorney

44. On the 19th September, 2016, a letter was sent by the attorney on behalf of the father to the mother which provided, inter alia, the following:

> "My office has been retained by your husband, Mr. [P.F.], to assist him concerning a matter of the most extreme urgency and seriousness that places you and those who are assisting you in very substantial jeopardy.
>
> […]
>
> 13. We cannot stress strongly enough the grave danger that you, the people who have assisted you, and the people who are now assisting you, face if you persist in your abduction of [N.] and continue to retain him outside the United States of America.
>
> 14. [P.F.] demands you return [N.] immediately to […] New York."

It went on to state:

> "17. Indeed, New York possesses exclusive jurisdiction to enter orders concerning [N.]'s custody. Moreover, New York courts place great weight on a custodial parent's ability and willingness to foster a child's relationship with the other parent, and your wilful interference with [P.F.]'s access to [N.] may support a legal conclusion that you are unfit to remain [N.]'s primary custodian.
>
> 18. Notwithstanding the foregoing, if you voluntarily return with [N.] to New York, [P.F.] is prepared to consent to your having primary physical custody of [N.].
>
> 19. However, if you persist in your refusal to return [N.] to his home state and habitual residence of New York, [P.F.] will, forthwith, commence a case in the Family Court of the State of New York, […] seeking a Writ of Habeas Corpus and orders of sole legal and primary physical custody of [N.].
>
> 20. Should you fail to comply with any such orders that may be issued, you would be in contempt of court, which may eventually lead to your imprisonment.
>
> 21. [P.F.] has not yet made any formal criminal charges against you, and, indeed, he is highly disinclined to do so. However, if you fail to take the steps demanded in this letter, we will instruct him to do so as a matter of the greatest urgency."

It goes on to set out the definition of "international parental kidnapping" under the relevant U.S. legislation and referred to various case law in that regard, alleging that "it appears that you may have committed this felonious crime, which is an extremely serious matter".

Commencement of the present proceedings

45. The present proceedings were issued by way of special summons, on the 5th October, 2016.

The Legal Issues

46. Having set out the above factual chronology as best I can, I turn to the legal issues in the case and the governing legal provisions. Article 3 of the Hague Convention provides:

> "The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

47. Article 12 of the Hague Convention provides, *inter alia*:-

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

48. Article 13 of the Hague Convention provides:-

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The State in which the child was habitually resident immediately before the removal or retention
49. I have no doubt on the evidence that the child, N., was habitually resident in New York prior to the 3rd January, 2016. He was born in New York and lived there with his married parents, with the exception of some short trips to Ireland, until that date. There was no real dispute in the case on this issue. Dispute centred around whether his habitual residence changed at some later date between January and September, 2016. I will return to that issue later in this judgment.

Exercise of the Rights of Custody
50. Again, there is no doubt that the father had legal rights to custody of his son. However, a dispute arose as to whether the father was *exercising* his rights of custody prior to the mother and child leaving New York. It is unusual for this matter to arise in a context where the child was living with both parents in the family home (an apartment in New York). More usually, a dispute on this particular issue will arise in a context where the parents live apart and the child spends most of his or her time with one parent, and the extent of the interaction between the child and other parent is disputed. In the present case, the respondent mother alleged that although she and her husband lived in the same apartment, and while he had unbdoubted legal rights of custody, he did not exercise them. She said that he had almost no interaction with his son and spent most of his time either at work or at the boatyard. The father accepted that the mother was the primary carer, but said that he did have involvement with his son when he could, that he loved him, and that the mother over-stated the position as regards his lack of interaction with his son.

51. In *M.J.T. v. C.C.* [2014] IEHC 196, consideration was given by Finlay Geoghegan J. to the concept of the 'exercise of custody rights' as follows:

> "20. There appears to have been limited consideration by the courts of this issue and as to what facts will be considered as preliminary evidence of the actual exercise of custody rights for the purposes of Article 3(b) of the Convention. Nevertheless, it is possible to discern from the decisions to which my attention was drawn by counsel and one other that, firstly, the courts take a very liberal view as to what will constitute the exercise of custody rights, and, secondly, that it does require the demonstration by an applicant/parent that he either did or attempted to maintain contact or a relationship with his child.
>
> 21. In *Re H.; Re S. (Minors) Abduction: Custody Rights* [1991] 2 A.C. 476, Lord Brandon observed at p. 500:-
>
> > 'In my view article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control.'
>
> 22. *In Re W. (Abduction: Procedure)* [1995] 1 F.L.R. 878, Wall J. in the context of considering a defence raised pursuant to Article 13(a) of non-exercise of rights of custody, rejected a contention that the agreement of a mother who held sole rights of custody that the child live with his father was not a continuing exercise of the mother's rights of custody. He considered that the approach he took was supported by the observation of Lord Brandon to which I have referred.
>
> 23. In *Friedrich v. Friedrich* 78 F. 3d 1060 (6th Cir. 1996) in the U.S. Court of Appeals for the Sixth Circuit, Boggs J. put it thus:-
>
> > 'Enforcement of the Convention should not to be made dependent on the creation of a common law definition of 'exercise'. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.'
>
> 24. In this jurisdiction, McGuinness J. in the Supreme Court again considered the actual exercise of rights of custody in the context of a defence raised pursuant to Article 13(a) of the Convention in *M.S.H. v. L.H.* [2000] 3 I.R. 390. The applicant father in that case had been imprisoned in England. During the period of imprisonment, the children had been brought to see the father from time to time. In upholding the High Court Judge's conclusion that the respondent had not established that the applicant was not exercising his rights of custody at the time of removal of the children to Ireland, McGuinness J. at p. 403, stated:-
>
> 'Whether or not the plaintiff was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition his application to the Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody.'"

52. I have no doubt, from observing the demeanour of the mother when giving evidence, that this particular issue was a matter of deep distress to her, namely that in her view, the father did not care enough about his son when they were living together or spend enough time interacting with him. However, as is clear from the above authorities, the threshold for the exercise of custody rights pursuant to the Convention is a liberal one and, even accepting that the father had little interaction with his son, I am not prepared to conclude that he was not exercising any of his custody rights at all in circumstances where they were all living in the same apartment and there was at least occasional interaction between father and son, such as visits by the father with his son to his own family home, and an occasional family trip with his wife and son.

Consent or acquiescence to the removal of the child from the jurisdiction
53. The authorities concerning the nature of the consent that is required for the purposes of Article 13(a) of the Convention make it clear that the burden of proof is on the 'removing' parent in this regard, and that the consent must be shown to be clear and unequivocal. In the recent Court of Appeal decision in *K.W. v. P.W.* [2016] IECA 364, Ryan P. said:

> "28. The criteria of true consent identified by Denham J. in *S.R. v M.M.R.* [2006] IESC 7 cited above are applicable in this case. The onus of proving the wife's consent rests on the husband and must be proved on the balance of probabilities; the evidence in support of the consent needs to be clear and cogent; the consent must be real; it must be positive and it must be unequivocal; there is no need that the consent be in writing; it is not necessary that there be proof of an express statement such as "I consent". In appropriate cases, consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent. In my judgment, the consent of the wife in issue in this case

fails these tests."

54. Counsel on behalf of the respondent mother argued that, notwithstanding the above, the onus of proof regarding consent lay on the applicant father in this case, because there was no doubt that a consent was present, but the nature of the consent (i.e. for what duration of time it extended to) was in dispute. It was also argued that where it was alleged that consent had been obtained by deception, the onus of proof fell upon the person alleging deception. The allegation of deception arose, it was said, from the fact that the applicant was alleging that the mother had made her decision to stay in Ireland on the 3rd January, but had not communicated this to the father, and instead had used delaying tactics and excuses to mask the fact that she was not returning. In reply, counsel on behalf of the applicant father relied upon the following passage from the judgment of Denham J. (as she then was) in *B v. B.* [1998] 1 I.R. 299, at page 312-3, as constituting a rejection of this argument:

> "Counsel for the respondent made reference to the recently reported decision of the English High Court, Family Division, in *Re O (Abduction: Consent and Acquiescence)* [1997] 1 F.L.R. 924. Bennett J. referred to the analysis of the issue of consent in *Re C (Abduction: Consent)* [1996] 1 F.L.R. 414, and to the judgment of Holman J., part of which has been cited in this judgment previously. He stated (at p. 940):-
>
> > 'If Holman J. in *Re C* is stating a principle that consent must always (my emphasis) come within Article 13 (a), then I respectfully disagree with him. On the facts of Re C,the matter did fall to be dealt with under art. 13 (a).'
>
> The reasoning of Bennett J., at p. 940, was:-
>
> > 'In my judgment, whether 'consent' comes within Art. 3 or Art. 13 (a) will depend on the facts of each case. If the 'non-removing' parent asserts or effectively has to concede that on the face of it he gave his consent, but asserts that it is vitiated by deceit or threats or some other vitiating factor, which he must raise in order to establish that his consent was no true consent, then the matter falls to be dealt with under Art. 3. If, on the other hand, the very fact of consent is in issue, as it was in Re C ,then the matter comes within Art. 13 (a), and the burden falls upon the person who asserts consent to prove it.'
>
> *I disagree with this analysis* and prefer that of Balcombe L.J. and Donaldson M.R. in *Re A (Minors) (Abduction: Acquiescence)* [1992] 1 All E.R. 929, previously quoted. Article 13 is an exception, which is itself for the benefit of children; their welfare is the paramount consideration. The essence of the exceptions is to give judges discretion. Article 13 is not limited by arts. 3 or 12. It is an article "notwithstanding" article 12. It is an article enabling the fundamental concepts of the Hague Convention to be achieved through the discretion of the courts or administrative authority where relevant.
>
> Also, in this case the "very fact of consent" was in issue so on that ground also I would not apply *Re O (Abduction: Consent and Acquiesence)* [1997] 1 F.L.R. 924. I am satisfied that art. 13 is appropriate and relevant to this case". (emphasis added)

55. Counsel on behalf of the mother also pointed out that the above passage had been referred to with approval by the Court of Appeal in *Re P (A Child) (Abduction: Custody Rights)* [2005] 2 W.L.R. 201, where, having referred to the above passages from the decision of the Irish Supreme Court, it was stated, at page 214:

> "We prefer the views expressed by that majority of opinion. If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal, consent is not so limited in article 13 and must, therefore, include permission which is given before the removal. If clear unequivocal and informed consent is given to the removal of a child, then it is difficult to see why the court should not exercise the discretion conferred by article 13 to permit the child to remain in the country to which it was agreed he or she should go. The policy of the Hague Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. *If a child is removed in prima facie breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Hague Convention and article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention*. Mr Nicholls cannot be entirely surprised that we reach this conclusion because it coincides with views expressed in the excellent textbook International Movement of Children, Law Practice and Procedure (2004), p 308, para 17.44 written by him, Professor Nigel Lowe and Mr Mark Everall QC." (emphasis added)

56. Having regard to the authorities referred to, it seems to me that the burden of proof falls upon the respondent mother, pursuant to Article 13, to prove on the balance of probabilities that the father either consented or acquiesced at the time of the child's departure to Ireland to his staying there indefinitely with his mother, or subsequently so consented or acquiesced. I do not consider, from the authorities referred to, that an allegation of deception by the applicant father changes the position regarding the burden of proof, nor does the fact that it is accepted that some kind of consent was given and that the dispute centres on precisely what was consented to. It seems to me that the law requires the respondent, the mother in this case, to prove that there was a consent or acquiescence in the true sense of that term; in the case of a *removal* of a child to another jurisdiction for the long-term, this requires an understanding that this is what is in issue and a consent or acquiescence to that; and, similarly, in the case of a consent or acquiescence to a long-term *retention* of a child, what is required is an understanding that this is what is in issue and a consent or acquiescence to that. Having arrived at these conclusions on the correct approach to the burden of proof, I turn to applying the law to the facts in this particular case.

What, if anything, was agreed before the mother left New York?

57. I have little doubt, having observed the parties giving evidence, that the mother was afraid of confrontation with the father, and with good reason. When giving evidence in this Court, he was hot-tempered and physically demonstrative. He resented certain lines of questioning and took issue with counsel's right to ask the questions. Even when he was listening to the mother giving her evidence, he was reacting with facial and physical expressions to such an extent that I intervened at one point to request him to desist. He said himself that he was a "loud" person. There is little doubt but that he is an assertive, pugnacious individual. The mother's demeanor was tearful and depressed, and she physically kept her head down throughout the hearing. The father also accepted that he had, at times, when they lived together in New York, screamed at her and pointed his finger in her face, until she ran into the

bedroom crying. Having observed the parties in court, it was not difficult to imagine this scenario. It is in this context that I note the comments in the mother's affidavit, referred to above, where she says that she did not wish to explicitly raise the issue of her staying in Ireland with him before she left New York for fear of confrontation. She also describes the "pregnant silence" while they were driving to the airport, during which she expected him to raise the issue, but he did not. In my view, the reality of the situation before she left New York was that there was no explicit conversation about her staying indefinitely in Ireland before she departed, but that she thought that her husband had probably deduced it from all of the circumstances. This is also consistent with her explanation of why she phoned him on the 3rd January; she says herself that she was "*uneasy that nothing had been said about my staying with [N.] in Ireland",* which in my view is inconsistent with a clear consent to a long-term change of N.'s residence having been given prior to her departure from New York.

58. I am of the view, also, that the printed consent form itself could not be regarded as a written consent to removal of the child to Ireland indefinitely, even leaving aside the conflict as to whether it was filled out or not before being signed by the father. It was a form presented to him to sign on the morning of the mother's departure, with a view to facilitating her travel, without (even on her own evidence as described in the preceding paragraph) a surrounding discussion of a long-term plan. In and of itself, it could not constitute a written consent to the child being removed to Ireland indefinitely; at best, it could be supportive of an inference that such agreement already existed between the mother and father arising from a conversation to that effect. However, the mother herself says that she was afraid to confront the issue directly before she left and in those circumstances the written consent form cannot bear the weight upon which the respondent's counsel sought to place on it. In all of the circumstances, I find that there was no clear consent or acquiescence by the father prior to the departure having taken place to a long-term indefinite change of N.'s country of residence.

59. I do not think it is hugely significant whether the form was blank or filled in when the father signed it. It may be that there was an implicit suggestion that the mother was somehow devious in getting him to sign a blank form, in an attempt to colour the Court's view of her, or that he expected her to fill in the return date, which she did not. But if she were devious, and a blank form had been signed, she could, for example, have strengthened her position by writing in the word 'unlimited' in respect of the duration of stay, yet it was blank in this regard, so this issue does not particularly assist the Court one way or another.

60. Accordingly, I find on the balance of probabilities that the father had not given a clear and unequivocal consent, prior to the departure of the mother and child from New York, to a long-term indefinite change of N.'s country of residence.

The position as of the 3rd and 4th January, 2016

61. More difficult is the reaching of a conclusion as to what was said and agreed during the telephone conversation of the 3rd January, 2016. Obviously, there is no contemporaneous record of what was actually said in that conversation. The mother said that she made it clear that she, and therefore the child, because they were a unit, were not coming back unless and until their marriage difficulties were resolved, and that the father agreed to or accepted this. The father said that in this conversation he agreed only to a short further stay on the basis that she told him she wanted to relax a little longer with her family.

62. The text messages from the 4th January, 2016, set out above at paragraph 30, are contemporaneous evidence from which inferences may be drawn as to what had been said in the telephone conversation the night before. As set out above, in the text message the next morning, the mother told him she had cancelled the tickets, and got some credit from the airline company. The father said that he was glad she got a little credit "*but that doesn't tell me when you're planning on coming home".* This is more suggestive of an expectation on his part of a reasonably imminent return rather than an agreement having been reached the day before that she would never be returning to New York with the child unless they could work through their marriage difficulties. Her response "*easier to get flights after the hols*"' is, in my view, also more consistent with his position on this conversation than hers. Counsel on her behalf sought to argue that "*after the hols*" is open-ended and could mean any time after Christmas. While this is true in literal terms, it needs to be read in the context of the whole exchange. She also said "*I haven't booked a flight – told you that I need some time off*", to which he responded "*I know you need time off time off from work or time off from me*", to which she replied the next day "*A time off from the whole situation*". In my view, this language and the overall exchange is not supportive of there having been a clear agreement in the telephone conversation the evening before that her stay in Ireland would be long-term unless they could resolve their marriage difficulties. The phrase "*some time off*" suggests a short rather than an indefinite long-term period. It also suggests that the purpose of the visit was to create a temporary respite from the situation in New York, in which she could think things over, a 'holding period', as it were.

63. I also note the terms of the Indorsement of Claim to the Family Law Civil Bill issued on behalf of the mother. This does not reference any agreement between the parties that she and the child were to stay long term in Ireland. Counsel on the mother's behalf sought to argue that this omission may have been due to the fact that the Civil Bill would have concentrated on matters necessary to show the basis for a judicial separation rather than Hague proceedings. However, and somewhat curiously, the Indorsement uses quite detailed language which is more suggestive of a unilateral decision or intention on the mother's part rather than an agreement with the father. It says at paragraph 2: "*The [mother] returned to this jurisdiction in or about December 2015 and had the intention of remaining in this jurisdiction on and about the 4th January, 2016*". At paragraph 7 it states:

> *"On or about the 4th January 2016 the [mother] made the decision that she would not return to the United States of America and made the decision to remain in this jurisdiction. The [mother] advised the [father] as to her decision by way of text message on the 4th January 2016. Consequently, the [mother's] domicile changed from the United States of America to the Jurisdiction of this Honourable Court on or about the 4th January, 2016".*

I find this languge curious because this rather emphatic description not only does not reference any agreement between the parents, but is also inconsistent with the mother's oral evidence that she did not finally decide that the marriage was over until she attended counselling in June, 2016. For present purposes, however, it is the absence of any reference to consent from the father that is particularly noteworthy.

64. Notwithstanding the above findings, I do not agree with the father's contention in this case that the mother made a firm decision not to return to the United States early in January, 2016, and then decided to 'string him along' with lies and obfuscation, as was suggested. No doubt this view on his part was influenced by the terms of the Family Law Civil Bill referred to above, which describes a unilateral decision taken by her in early January, 2016. Notwithstanding its terms, having seen the mother giving evidence, and having regard to the lengthy telephone conversations in which she sought to work on their marriage, and her decision to go to counselling, I think that she had not reached a final decision in early January 2016 and that she was genuinely seeking to repair the marriage if possible at that stage. I do not think there was a firm decision to stay in Ireland permanently in early January, followed by deliberate deception, on her part. I think that her mind had not been made up in January, 2016, as to where her future lay.

65. Further, having regard to the text messages on the 4th and 5th January, 2016, and the terms of the Indorsement of Claim, I am also not persuaded on the balance of probabilities that, in early January, 2016, the father gave to the mother, in the telephone conversation or otherwise, a clear and unequivocal consent to her and the child, N., remaning indefinitely in Ireland, never to return, unless and until their marriage could be salvaged. In my view, the situation was very fraught and much more fluid than either party remembers, or is prepared to concede.

66. As discussed above, my understanding of the authorities is that, under the Hague Convention, the burden of proof falls on the respondent, in this case the mother, to establish with cogent evidence that there was clear and unequivocal consent by the father to the child's remaining indefinitely in Ireland. I find that that, for the purposes of these proceedings, it has not been established to the requisite standard of proof that the father consented on the 3rd January, 2016, to the child staying indefinitely in Ireland.

Was there a subsequent consent or acquiescence to the retention of the child in Ireland?

67. It does not seem to me that the matter ends with the answer to the question of whether the father consented or acquiesced to a long-term or indefinite stay in Ireland at the beginning of January. Given the period of some 8 months which elapsed before the father gave a clear indication of his non-consent to the child's retention in Ireland, by way of his attorney's letter on the 19th September, 2016, it is necessary to consider whether on any date subsequent to the 3rd January, 2016, he consented or acquiesced to the child's retention in Ireland on a long-term basis.

68. In this regard it is necessary for the Court to bear in mind the correct approach to the issue of acquiescence, as summarised by Finlay Geoghegan J. in R v. R [2015] IECA 265:

> "22. The proper approach to a Court determining whether or not on the facts presented, a respondent had established that there has been acquiescence by the wronged parent, in this instance, the Father, was set out by the Supreme Court per Denham J. (as she then was) in *R.K. v. J.K.* [2000] 2 I.R. 416 at 429/430. In that judgment, Denham J. stated "Acquiescence means acceptance, acceptance of the removal or retention of the child". She agreed again (as she had previously done in P. v B. (Child Abduction: Undertakings) [1994] 3 I.R. 507) with the approach set out by Waite J. in *W. v. W. (Abduction: Acquiescence)* [1993] 2 FLR 211 , where, at p. 217, he stated:
>
> > 'The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.'
>
> Denham J. then observed in *P. v B.* 'The test is objective not subjective and made on all the circumstances of the case.'
>
> 23. In *R.K. v. J.K* . Denham J. at p. 430, also agreed with the then more recent summary of the position as to acquiescence set out by Lord Browne-Wilkinson in the House of Lords in *Re H (Abduction: Acquiescence)* [1998] AC 72 , where at p. 90, he stated:
>
> > 'To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In *re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 at p. 838: …"the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact." (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.'
>
> 24. Denham J. concluded having considered these authorities, 'the matter of interpreting the term 'acquiescence' under The Hague Convention should be approached on a strongly factual basis with a common sense interpretation of the term applied'."

69. It was argued on behalf of the applicant that the present case was similar to *A.S. v. P.S.* [1998] 2 I.R. 244, in which the Supreme Court, allowing an appeal, reversed the High Court's decision on acquiescence and held that although there had been delay in initiating the proceedings, this did not, in the circumstances, indicate acquiescence on the part of the requesting parent. The parents in that case had two daughters and lived in England. In July, 1996, the defendant mother took the children to Ireland with the consent of the plaintiff. She had monthly return tickets with no fixed date of return and the plaintiff drove her and the children to the railway station. He found a note at home which in a general way indicated that the defendant needed to get away and think things over and from which it was quite clear that the defendant was uncertain as to whether the marriage could survive. On the 3rd August, 1996, the plaintiff was informed by the defendant that she was staying in Ireland with the children and was not returning to England. Notwithstanding that clear statement of intention, the plaintiff delayed a further two months before bringing an application under the Hague Convention. A draft separation agreement was sent to him which would have involved the children remaining with the defendant in Ireland and he ignored it. He had regular telephone conversations with the plaintiff and with the children. There was also correspondence which passed between them.

70. Denham J., as she then was, noted that there had been no oral evidence in the case and that, therefore, the Supreme Court was in as good a position as the High Court to assess the affidavit evidence. She said:

> "In the two months relevant in this case the plaintiff was using the time to seek to reconcile the marriage and have the defendant and children return to England. There was no acceptance of the state of affairs[…]

> Applying the test to the facts and the circumstances there was neither active nor passive acquiescence by the plaintiff in the two months from the 3rd August, 1996, to the 10th October, 1996. Nor was there any real acquiescence. It is clear that throughout that time the plaintiff was seeking to reconcile the marriage which would have the effect of restoring the defendant and the children to England, their habitual residence. This was his intent. Also, on a survey of the circumstances, including the letters, viewed objectively, he did not acquiesce in the children remaining in Ireland. Nor did he take any action inconsistent with his later application under the Hague Convention. Consequently I am satisfied that he did not acquiesce in the retention of the children in Ireland. I would allow the appeal on this ground."

71. I noted above that it was a striking feature of the present case that there was, throughout the relevant period, regular, at times daily, interactions between the parties. This communication took place by way of telephone or skype conversations, of which there are no records, and by way of text messages, of which there are records. The parties have given oral evidence in addition to their affidavits as to the content of the telephone conversations and their own states of mind as they evolved throughout the period. In this regard, the primary focus must be on what the father thought was happening and therefore consenting to. As described in *Re H (Abduction: Acquiescence)* [1998] AC 72, approved in the Irish authorities, it is his subjective intention that is in issue.

72. There is no doubt that, in broad terms, there are numerous texts throughout the period in which the father is repeatedly expressing the view that he wishes the mother and child to return to New York and that he loves her and N. Taken at face value, these appear inconsistent with his having consented to their remaining indefinitely in Ireland. The texts also involve her sending regular updates about what the child was doing and photographs of him in various places and with various relatives.

73. It was argued on behalf of the mother, however, that these texts should not be taken at face value and that this was a frustrating response on his part to long and difficult telephone conversations in which she was trying to get him to talk through their marriage problems; that his response, instead of addressing those challenges, was to simply assert his love for her without making any effort to change his ways or to attend counselling, behaviour she described as "love-bombing". It was argued that the texts were not representative of the telephone conversations they were having, in which her intentions were repeatedly made clear to him. She said that she had stopped putting matters of substance into her texts because of an occasion when he had forwarded her text to his mother, which resulted in mockery from his family. It was agreed that there had been an occasion when he forwarded a text to his mother.

74. Certain portions of the father's evidence could perhaps be interpreted as supporting the view that, even if he did not know this at the outset, he gradually realized that her intention was a long-term, indefinite stay in Ireland. In particular, as described at paragraphs 36 and 37 above, around March and April 2016, having had (he said) several reasons given to him for her non-return, he reached a point where he was starting to take a serious view of her staying on in Ireland. He says that he started to ask people for advice about the situation, and was concerned by the replies he received to the effect that she could be in serious trouble because what she had done could be 'child abduction'. He said he did not take formal legal advice at this stage but relied on informal advice from friends at his boatclub. He then describes taking a decision to wait until September before taking any steps. This is relied upon by counsel on behalf of the mother to support the view that he consented or acquiesced to her staying in Ireland from April onwards.

75. I have carefully considered the text messages between them throughout the period. Again, these are helpful because they are contemporaneous evidence not only of what he was thinking, but of what she was saying to him. I note for example the text on the 22nd April, 2016, when he said "*You need to make a decision this can't go on forever we have to work on it together or not*". I note her reply to a text on the 29th April, 2016, where she sayid " *…I still feel that you need to see a therapist for a while before I book a flight or anything…".* On the 21st May, 2016, she said *"I'm just trying to figure out if I've the strength to go back and start again. I'm scared and stressed out because I want to make the right decision"* and *"I'm trying to figure out if I'm strong enough to give it another go. I know you need to see [N.] soon. I know this is all really hard on you".*

76. I also take into account that until the summer of 2016, the mother continued to work at her New York job, remotely from Ireland, using her computer. She also continued to live with her parents and did not, apparently, seek alternative accommodation.

77. Having regard to the above, what, if anything, did the father consent or acquiesce to during those months? This aspect of the case has given me the most difficulty. Having regard to all of the evidence, it seems to me that the following is the most likely description of events, from the father's subjective point of view. He knew that they were going through marriage difficulties before his wife left New York. At the latest, from the time of the telephone conversation on the 3rd January 2016, he knew that she needed "time off" (her phrase in the texts at that time) from the marriage and wanted to spend time in Ireland with her family. At first, he thought the time off would be relatively short; but as time went on, and she did not return, he gradually realized that the problem was deeper than he had realized and that she might well reach a decision that the marriage was over. He decided that his best option, rather than try to force the issue by seeking the return of the child, having spoken to people about the consequences of taking steps in that direction, was to 'wait out' the situation and hope that she would decide to return and give the marriage another go. It was not until she informed him of the judicial separation papers in August that he realized that she had made her decision, and that it was a decision that was terminal to their marriage.

78. In legal terms, this suggests that what he was consenting or acquiescing to was that she would remain with the child in Ireland *until she had made a decision about the marriage.* I do not think that this amounts to a consent or acquiescence to a long-term change in his son's country of residence. The distinction is nuanced, but, in my view, one of substance. It seems to me likely that the mother simply assumed that, because she had always been the primary carer, if she decided to end the marriage and stay in Ireland, the child would stay with her in Ireland, without the necessity to go back to the New York courts. However, the father may have assumed that if the marriage was over, she would return to New York to sort matters out and they would then go to the New York courts to have issues relating to custody, access and property ruled upon. He said something to this effect in his evidence. It seems to me that the whole period between January and August, 2016, was, in effect, viewed by him as a 'holding period' while she was making important decisions, and that he was prepared to consent to his son staying in Ireland with the mother while that was happening, without prejudice, to use legal language, to what decisions might be made in the future. It was only when the separation papers issued from an Irish court that he realized that what was now being proposed was that an Irish court would rule on matters relating to the end of the marriage, including where his son would live. His response, albeit a month later, was emphatic. There can be no doubt about the absence of consent expressed in the letter from Ms. Glatz. As to the passage of time between the 20th August, the date on which he received the court papers, and the 19th September, 2016, the date of the letter from Ms. Glatz, this is not an unreasonable period of time for a person to consider the implications of such news, take formal legal advice in light of it, and decide upon and implement a course of action.

79. Accordingly, I am of the view that the mother has not discharged the legal burden of proving that the father consented or acquiesced to the retention of the child in Ireland within the meaning of Article 13 of the Convention. In my view, on the balance of probabilities, he consented only to the child being in Ireland for a particular purpose, namely to give the mother an opportunity to

make up her mind about the future of the marriage. He learned of her decision first, informally, in early August, when she told him, and then, formally on the 20th August, 2016, when he received the judicial separation papers. A month later, he made his views known in no uncertain terms through his attorney's letter dated the 19th September 2016, and followed this up with the issue of proceedings on the 6th October, 2016.

80. For the avoidance of doubt, I am also of the view that the situation does not fall within the fourth category described by Neill L.J. in In *re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819. There is nothing in the text messages or the evidence of either party to suggest that he clearly and unequivocally gave her to understand that he had no objection to N. staying permanently in Ireland. It seems to me that everything he said is consistent with a view that he hoped she would decide to give the marriage another go and would return with the child, and not that he was prepared to give the child up to live in Ireland on an unconditional basis.

81. The case has some similarities with *A.S. v. P.S.*, insofar as the delay in the father's taking action to return the child was because of attempts to sort out marriage difficulties, but in the present case, it seems to have been more a case of the father giving the mother space (time in Ireland with her family) to reach her decision, rather than proactively trying to resolve the marriage problems himself.

82. Accordingly, I find that the child was wrongfully retained in Ireland, within the meaning of Article 3 of the Convention, from the date on which the father received the judicial separation documents, and that there was no consent or acquiescence to the child's retention beyond that date within the meaning of Article 13 of the Convention.

Was there a change of Habitual Residence during the period January to September 2016?
83. Counsel on behalf of the respondent mother argued that, even if the father did not consent or acquiesce to the removal or subsequent retention of the child, the habitual residence of N. had in any event changed sometime between the 3rd January and 19th September, 2016. He argued that the applicant had failed to establish that N. had retained a habitual residence in New York throughout the period, and therefore that the applicant had failed to satisfy the conditions set out in Article 3 of the Convention. It was argued that while various approaches have been adopted at different times to the concept of habitual residence, the more modern approach, following the approach of the CJEU, is to place a greater emphasis on the centre of the child's interests than on the parents' joint and settled intentions, the latter being at the heart of such decisions as *P.A.S. v. A.F.S.* [2004] IESC 95. Counsel referred to *D.E. v. E.B.* [2015] IECA 104, and *C.G. v. M.G.* [2015] IESC 12, as supporting this child-centred view of habitual residence. The latter case involved a situation where a mother had brought a child from France to Ireland at a time when she had permission from a French court to do so, although the decision was under appeal by the father, and in circumstances where a French court subsequently held the habitual residence to be France. In my view, it is not directly relevant to the present case as the focus was on the impact of the French court proceedings rather than the attitude of the other parent. The case of *D.E. v. E.B.* is more pertinent, but, in my view, does not support the respondent's argument. In that case, the mother was Irish and the father French. The father consented to the child going to Ireland with the mother for what he thought was a visit. The mother, unknown to him, had formed an intention to stay in Ireland long-term. There were a number of visits back to France by the mother and child before the 20th July, 2014. On that date, the father became aware of her long-term intention and refused his consent to retention of the child. There was clear lack of consent to retention and therefore an unlawful retention. The mother sought to argue that, notwithstanding the father's lack of consent, the habitual residence of the child had changed in the interim. She sought to rely on the jurisprudence of the CJEU in this regard. The High Court rejected her argument and this was upheld by the Court of Appeal. Finlay Geoghegan J. said:

> "31. In my view, the CJEU in paras. 55–57 of its judgment in *C. v. M*. makes it clear that, where a national court is determining habitual residence for the purposes of Article 2(11) of the Regulation, part of its assessment of "all the circumstances of fact specific to the individual case" must include the conditions under which the child moved and reasons for the child's stay in the Member State to which it has been removed. On the facts of *C. v. M*. the relevant conditions and reasons which the CJEU identified were the court judgment authorising the removal, albeit one which could be provisionally enforced and the fact that it had been appealed against. In assessing the move by the mother of N from France to Ireland the conditions and reasons under which the move happened were that the father, who holds parental authority and rights of custody, gave consent to the child travelling to Ireland only for visits of limited duration during what he believed to be the mother's parental leave from her French employment and did not give consent to a change of ordinary residence of N. The CJEU in para. 56 of its judgment in that case makes clear that such factors are to be 'weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal such as those mentioned in para. 52 of this judgment ….'
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> 32. Accordingly, in my judgement, counsel for the mother is not correct in her submission that when a national court such as the High Court is assessing "all the circumstances of fact specific to the individual case" an overriding consideration must be as to where in fact the centre of interests of the child at the relevant time lies, in particular by reference to her integration in a social and family environment in the Member State to which she has been removed and in which she is living at the relevant time for the assessment. It is rather the case that, as appears from the judgment of the CJEU in *C. v. M* , all of the relevant factors must be taken into consideration, including of course the centre of interests of the child at the relevant time and where relevant, one weighed against the other. The reasons for the child's move and conditions under which she came to be in the second Member State are also relevant factors. *In a case such as the present — where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live — a consent given for a visit of limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors. It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given an overriding consideration.* The weight to be attached to each will depend on the facts of the individual case. Differing considerations will apply depending on all the different factors identified by CJEU.
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> 33. *It is accordingly clear from the case-law of the CJEU that a court should properly take into account as a factor the absence of consent of one parent who holds parental responsibility to a move of the habitual or ordinary residence of the child to another Member State. It follows that the court must weigh that factor against other relevant matters of fact identified which — as the CJEU put it in C. v. M. — might demonstrate a degree of integration of the child in a social and family environment in the State to which she has moved*. Those latter facts may include the intention of the other parent to settle permanently with the child in the other Member State as manifested by steps taken and all the other potential factors identified by CJEU in paras 50–53 *of C v.M. The question of parental authority may be of particular relevance to an assessment of the intention of the other parent who may wish to settle permanently with the child in the new Member State but may not be in a position to make that decision unilaterally if the other parent also holds parental authority.*

> 34. *If it were otherwise it could set at nought the entire concept of wrongful retention. In all cases of alleged wrongful retention, the child will have spent time in the Member State to which it has moved. It is of the essence of wrongful retention, as distinct from wrongful removal, that the child moved lawfully from its Member State of habitual residence to another State but has not returned at the end of the period for which the permission or consent was given. Wrongful retention will only arise if at the end of the permitted period the child remains habitually resident in its State of origin. Unless a court may give appropriate weight to the conditions and permissions under which or reasons for which the child moved together with all other relevant identified factors in assessing habitual residence it is difficult to envisage wrongful retention as a concept surviving*." (emphasis added)

She also said:

> "Hence another of the objectives of the Regulation is that the prompt return of a child pursuant to the Convention in case of a wrongful retention continues to apply. *The grounds of jurisdiction based on habitual residence under the Regulation cannot be intended to apply so as to undermine the concept of wrongful retention or the summary return of a child who has been wrongfully retained out of its Member State of habitual residence*. The prompt return of a child wrongfully removed or retained is itself based upon the Convention policy that, in general, such a return is in the best interests of a child. There are of course exceptions where that is not so and it is permissible to refuse an order for return."

It is clear from the above passages that the non-consent or acquiescence of a parent to the long-term change in the child's country of residence is a factor which is relevant to the court's determination of the location of the child's habitual residence, and it cannot be simply "trumped" by the child's integration into the new country.

84. More recently again, the issue of consent to a change of habitual residence was addressed by the Court of Appeal in *K.W. v P.W.* [2016] IECA 364. In that case, Hogan J. said:

"33. It is clear from the case law that the concept of habitual residence under the Hague Convention is not fixed and probably eludes precise definition. As Fennelly J. said in *PAS v. AFS* [2004] IESC 95 , [2005] 1 I.L.R.M. 306, 316:

> 'The Convention deliberately left the notion of habitual residence undefined. The courts of the contracting states have to be free to apply to it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable.'
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> […]
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> 35. The authorities establish that young children can lose their habitual residence where the family makes a settled decision to leave one country (in this instance, Australia) in order to take up residence in another country (in this case, Ireland) and do in fact take up residence in that other country: see, e.g., in re *B (Minors: Abduction) (No.2) [1993] 1 F.L.R. 993 ; PAS v. AFS [2004] IESC 95 , [2005] 1 I.L.R.M. 306* and *AS v. CS (Child Abduction) [2009] IESC 77 , [2010] 1 I.R. 370* . On the other hand, it is clear from the judgment of this Court in *DE v. EB* [2015] IECA 137 that a unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence." (emphasis added)

85. In the course of his judgment in the same case, Ryan P. said:

> "31. The starting point of the consideration of the case is that the children had a habitual residence in Australia and the question was whether the wife had freely consented to move to *Ireland with a view to establishing habitual residence here on an unconditional basis. It would not have sufficed for the court to have decided that the wife came here on a tentative, provisional and conditional basis. The fact is that the wife decided to come to Ireland to give it a go, to use the husband's expression, but it has to be recognised that that was necessarily a conditional decision giving her the entitlement to change her mind if things did not work out*. I do not think that she could have been so committed by agreement in advance that she did not have any right to opt out in favour of Australia. That would not actually have made sense because the longer the family stayed here in Ireland the more committed they would all have been and the more firm would have been the case for habitual residence being in Ireland. Moreover, the fact that the wife actually expressed the pressure she was under – as was acknowledged by the husband – and the anxiety that she had, must be taken into account. And if anything further were needed, the fact she was in Australia with her younger child while the husband was in Ireland with the older boy was on any basis a compelling reason why the wife should be agreeable to come to Ireland. It is difficult in those circumstances to see how she could have decided otherwise than to move to Ireland."

86. In the present case, I have concluded that the father, in consenting to the child staying in Ireland while the mother made decisions on the future of the marriage, did not thereby consent or acquiescence to a change in the child's long-term residence. In circumstances where the father had rights of custody and decision-making about where his child should live, this absence of consent or acquiescence weighs heavily in the balance against a change in habitual residence having taken place, in accordance with the decisions referred to above.

87. It also seems to me from all the evidence, that, until the mother made a decision about her marriage, she herself did not have a firm settled intention as to her own future. She did not give up her New York employment until the summer of 2016, and did not seek to find accommodation for herself and her son separate from that of her parents. There was no evidence before the Court as to where she plans to live or work in the future.

88. It is true that, since his arrival in Ireland, N. has developed relationships with his extended Irish family, including grandparents, aunts, uncles, and cousins. He started pre-school and integrated well there. Accordingly, the only world that he remembers and knows since December, 2015, is his Irish world, bearing in mind that he is only two and a half years old. In addition, his mother has always been his primary carer. Not only that, but the father, while he said the mother exaggerated the absence of interaction with his son, did accept that because of his work he had limited involvement in N.'s life when he was living in New York. The only reference made to relatives on the father's side were to his paternal grandmother, who he is said to have visited four times in a year. The respondent mother said that he had no interaction with any cousins on his father's side. The child's personal relationships, therefore, appear to be primarily Irish-centred.

89. However, even giving due weight to the matters set out in the preceding paragraph, and having regard to all of the circumstances including the father's lack of consent, I do not think it can fairly be said that the child's habitual residence for the purpose of the

Hague Convention was altered on a date prior to the 19th September 2016.

Grave Risk
90. Counsel on behalf of the respondent mother argued that the circumstances of the case disclosed a situation falling within Article 13 (b) of the Convention, namely 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 was based upon the evidence concerning the firearm in particular, together with the evidence of situations where the applicant had screamed at the mother until she ran into the bedroom crying. There were (disputed) allegations that he held her so roughly on such occasions that she was bruised. The Court was invited to take the view that the the applicant had a hot temper, as displayed when giving evidence, and had little regard for the safety of his own child, as evidenced by his having kept a gun in an unlocked drawer while the child was living there, along with chemicals using for 'vaping'. The Court's attention was drawn to a phrase used by the applicant in an affidavit, that he had a "mental blockage", in relation to which it was suggested that it appeared he had some untreated psychiatric problem. The submission was also founded upon the attorney's letter of 19th September, 2016, where there were numerous references to potential criminal charges against the mother. It was argued that a situation could arise where the mother was removed from the company of the child, who would then be left in the sole care of an unstable, hot-tempered father.

91. Counsel on behalf of the applicant pointed out that the mother had never sought the assistance of, or made complaint to, any official authority such as the police in New York while living there for many years with the applicant. Also, that although she had visited Ireland a number of times over the years, she had always come back to New York. Further, it was noted that the respondent had said several times that if the applicant had at any time asked her to come back during the relevant period, she would have done so, which was inconsistent with an apprehension on her part of the sort now relied upon. It was noted that in his last affidavit, the father had undertaken not to press charges against the respondent mother, although it was accepted that this was on the condition that she return the child 'voluntarily'. Counsel at the conclusion of the hearing indicated that he now had instructions that the father would give an undertaking not to press charges against the mother in New York in the event that the Court ordered a return of a child.

92. Two Irish authorities are of note in addressing some of the issues raised above. In *E.H. v S.H.* [2004] 2 I.R. 564, the respondent opposed the return of a child on the basis that this would place the child in an intolerable situation by reason of an alleged history of violence between the applicant and the respondent. The mother averred that if she were living in London in proximity to the applicant, by reason of their history and his alleged dominance over her, she would be unable to protect herself and the child against the threat of violence from him and would be unable to seek effective protection from the authorities in the United Kingdom. Finlay Geoghegan J., rejecting the argument on this ground and ordering the return of the child, said:

> "… counsel for the applicant sought to rely upon the majority decision of the Court of Appeal in *T.B. v. J.B.* [2001] 2 F.L.R. 515 and, in particular, the judgment of Arden L.J. At issue in that case was an allegation of grave risk to the children, the subject matter of the application, if an order for return to New Zealand were made. There was evidence that the respondent, in the past, had been unwilling to avail herself of the protection of the courts of New Zealand. In the High Court, Singer J. proceeded on the basis that the mother was likely to make the same choice in the future. The correctness of this approach was at issue before the Court of Appeal. At p. 542 Arden L.J. stated:-
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> > 'The policy of the Convention as set out above seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk. The onus would thus be on the mother in this case to show that, even if she took all reasonable steps, she would not be adequately protected from Mr. H. in New Zealand.'
>
> I agree with the above as a general statement of the approach which this court must take to the assessment of grave risk. The facts of this case are different to *T.B. v. J.B.* [2001] 2 F.L.R. 515 insofar as it is not an unwillingness to seek protection which is alleged but rather an inability to do so by reason of psychological frailty resulting from the alleged violence and dominance of the applicant. However, even in such differing circumstances it appears to me that the principle as stated by Arden L.J. must be considered, at a minimum, to be the starting point of any consideration by this court. A respondent who attempts to persuade this court of an inability to seek protection from the courts of the habitual residence of the child by reason of the respondent's own psychological frailty would have to establish by clear and compelling evidence that, on the particular facts pertaining to her (including her psychological frailty), it would be reasonable for her not to seek the protection from the courts of the habitual residence of the child. I am not satisfied that the respondent has so established on the facts of this case."

Not only is there no suggestion of psychological frailty on the part of the respondent mother in this case, there is no suggestion that the risk has ever been at a level that the mother needed to seek protection, or that the mother would not be in a position to take reasonable steps to seek protection from the courts of New York.

93. As to the issue relating to the possible prosecution of the mother of the child for abduction, in *Z.D. v K.D.* [2008] 4 IR 751, a European arrest warrant had been issued in respect of the respondent on foot of two offences of child abduction, and was pending before the Irish High Court at the date of hearing. The Irish High Court had no information before it as to precisely what would happen to the respondent upon her return to Poland. The Court was informed of the possibility of the respondent applying for "safe conduct", but there was no evidence that she made such an application. The respondent contended that upon her return to Poland she would be arrested and, as a consequence, separated from D. and that this constituted a grave risk of psychological harm to D. In the course of his judgment, McMenamin J. said:

> "A number of authorities are relevant in relation to the question of the return of the child bringing about a separation for the primary care giver. In *Re. L. (Abduction: Pending Criminal Proceedings)* [1999] 1 F.L.R. 433, Wilson J. in the High Court of England, having considered the possibility of arrest and imprisonment, observed at p. 440:-
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> > 'Many Contracting States, including England and Wales, buttress the provisions of the Convention with criminal sanctions against parental kidnapping of children out of their jurisdiction. Following the mother's second abduction and prolonged disappearance, it was entirely predictable that criminal proceedings would be launched in Florida; indeed, it seems to have been the warrant for arrest pursuant thereto which triggered the international police activity that led to the location of the mother and children in England. There is no reason to think that, in deciding whether to continue with the prosecution following any return of the mother and children, the state prosecutor would exclude consideration of the interests of the children; nor that, in deciding whether to grant bail, or, in the event of conviction, whether to sentence the mother to any term of imprisonment, the Floridian judge would fail to

pay significant regard to their interests.'

A similar approach was taken in *Re. C. (Abduction: Grave Risk of Psychological Harm)* [1999] 1 F.L.R. 1145 and *Re. K. (Abduction: Psychological Harm)* [1995] 2 F.L.R. 550.

There is no reason to conclude in this case that the courts in Poland have not had recourse to the psychological services. Quite clearly, the contrary is the case and these again can be put in place to safeguard the child. I do not consider that the respondent has adduced any evidence to the contrary, nor has she specified any arrangement that she requires the Polish authorities to put in place. She has taken no steps in relation to a "safe conduct" provision."

94. Again, this Court cannot assume that the New York courts would not sufficiently take into account the welfare of the child, including the harmful impact upon him if he were to be separated from his mother, if they were to return to New York. However, I will return to the issue of an undertaking from the father in respect of criminal charges shortly.

95. Having regard to the high threshold under the Convention to meet the 'grave risk' standard in Article 13(b), together with the comments in the authorities referred to above, I am of the view that the respondent has not met the relevant threshold in this case.

Relief, Stay and Undertakings

96. It follows from the above that this Court is obliged to make an order for the return of the child to the jurisdiction of the United States pursuant to Article 12 of the Convention. It will be for the courts of that jurisdiction, presumably New York, to make the decisions on matters relating to the child's custody and long-term living arrangements which arise from the ending of the marriage.

97. However, I will put a stay on this order, during which time attention should be given to certain matters. In the first instance, the Court was concerned about the content of the letter of the 19th September, 2016, together with the references in evidence by the applicant to the attitude of the United States authorities to child-abducting parents, which could be interpreted as a veiled threat to the mother. It is true that in his last affidavit, he had undertaken not to press charges against the respondent mother, but this was on the condition that she returned the child 'voluntarily'. It was only at the end of the hearing that further instructions were taken and an indication given that he would undertake not to press charges against her in the United States in the event that the Court ordered a return of the child. Inquiries should be made and steps taken to ensure that, as far as it is possible to do so, the father enters a written undertaking to this effect which, if he were to renege on it in the United States, would operate as some kind of estoppel to a change of mind on his part. Secondly, steps should be taken to initiate appropriate proceedings in the New York courts as soon as possible to deal with the termination of the parties' marriage and related matters, including the future living arrangements of N. The Court would also like to be informed of the proposed living arrangements for the mother and child in the period following their return and until the New York court's decision, which must of course involve a living arrangement in which there is no risk to the safety of the child.

98. I would like to add, for the avoidance of any doubt, that this is not a case where a parent took a child from one country to another in flagrant defiance of the other parent's wishes, or a court order, or anything of that kind. This is a case in which the parents were having marital difficulties and, in that context, the mother, with the agreement of the father, took the child to Ireland in order to have some breathing space while she decided whether the marriage had a future or not. In my view, she made genuine and *bona fide* efforts to rescue the marriage on an ongoing basis over a period of six months. The parties had regular and ongoing contact by skype/telephone and text while this process was ongoing. The efforts to save the marriage ultimately proved unsuccessful. It seems to me that the mother probably assumed that if the decision was ultimately reached that the marriage would end, the child would be allowed to stay with her in Ireland long-term. This was not an unreasonable assumption, given that she had always been the primary carer for the child and the father appears to have had little enough interaction with him prior to his departure from New York. However, the Hague Convention requires clear evidence that the parent in the country of origin consented or acquiesced, whether at the time of removal or later, not just to a short-term or conditional stay in another country, but that the child would stay permanently in the other country. The evidence did not reach that threshold in this case. However, in reaching the legal conclusion that there was a wrongful retention of the child within the jurisdiction for the purposes of the Hague Convention, I am very far from saying that there was any moral turpitude on the part of the mother. On the contrary, I suspect that in the uncertainties and stresses of the period, there was a high potential for crossed lines and misunderstandings to arise between the parties. I wish to make it clear that I do not think there was any deception on her part as to her true intentions. My finding of lack of consent or acquiescence on the father's part is based on my conclusion as to his subjective perception of the situation, which appears to have been different from hers. It seems to me that any suggestion that she engaged in criminal behaviour in those circumstances is unsustainable and inappropriate.