THE HIGH COURT

IN THE MATTER OF AN APPLICATION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

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

[2018 No. 2 H.L.C.]

BETWEEN

V. R.

APPLICANT

AND

C.O'N.

RESPONDENT

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 16th day of April, 2018.

Background facts

1. This is a case in which the applicant mother seeks the return of a child to the Commonwealth of Australia. The child the subject of the proceedings, A. , is a 9-year-old boy (date of birth: 29th October, 2008). The parties, that is to say the applicant mother and respondent father, started a relationship in Ireland quite some years ago, but their relationship broke down early in the child's life. There is a long history of litigation between the mother and father.

2. It is clear and I wish to put this on record at the outset that the child has a deep and loving relationship with both of his parents. This is not a custody proceeding and I do not have the jurisdiction to make choices about with whom the child should live long-term or what the access of the other parent should be. But insofar as it is relevant to the issues I have to decide for the purpose of this application under the Hague Convention, I want to make clear that I accept on the basis of the evidence put before me that both parents clearly have a great love for their child and that this is reciprocated by the child. This appears in particular from the report of the psychologist, Dr. Fiona Moane, prepared for this Court.

3. Early in the child's life the mother, who is Australian, took the child from Ireland to Australia on a long-term basis. At this stage the father of the child commenced Hague proceedings in the Australian Courts. As I understand the position, the mother of the child then came to Ireland and there was litigation in the District Court, which resulted in an order of the Irish District Court dated the 12th October, 2010. This order gave the mother liberty to relocate to Australia with the child and was made following a full hearing at that time.

4. The father then revived his Hague proceedings in Australia and, as I understand the position, they merged with more general family law proceedings in that jurisdiction. In 2013, an interim order was made by an Australian family court, directing that the child would reside with his mother, and that his father would have a access.

5. I have also been shown a final order that was made in February 2015 and this appears to have been made by the Australian Court after a very thorough investigation of the situation of the parties. That court had, among other things, the benefit of a very long psychological report, a copy of which I have read. The report was, I note, to quite a large degree critical of the mother insofar as she was viewed as very controlling in the relationship with her son and wishing to exclude or limit the father/son relationship. Be that as it may, the final order of the Australian Court at that time in February 2015 was one confirming that the child would continue to reside with his mother.

6. However, the order did go on to say that the respondent father would have a considerable amount of access and I think it is fair to say that it reflected a view that the role of the father in the son's life was a very significant and important role. Various scenarios were envisaged under this court order and these included scenarios under which the father might at times be out of Australia. One of the circumstances envisaged was that the child might visit his father on holiday outside of Australia, and provision was made for a three-week period of holidays during which the child could do so, subject to the period involving no more than twelve days out of school. There was also very liberal and general access for the father for any period during which when he was living in Australia and I think it is fair to say that the court tried to give the father as much of a role in the child's life as was possible in the circumstances. I think it is also fair to say that from the evidence laid before me that the father did as much as he could to use that time with his child to the maximum extent when he was present in Australia.

7. At the heart of the proceedings before me is the situation regarding the father's access to Australia and the question of visas. He was granted a series of visas in 2015 and 2016. I am told that each was refused at first instance and then granted subsequently on appeal. Again, as I understand the position from the evidence laid before me, there were three tourist visas, one for eighteen months and then two further visas for three months each. There was also a bridging visa of nine months, which, as I understand it, was granted to him to enable him to participate or pursue the litigation in Australia. All of these visas came to an end in January, 2017 and at that time, the father had to leave Australia. Although the mother said on affidavit that it was her view that the father had caused his own visas problems by overstaying, it seems more likely on the evidence before me that he did not overstay his visa periods. An official decision on his most recent visa application, to which I will refer in further detail below, suggested that he was never unlawfully in Australia and had always complied with his visa requirements. Nonetheless, it appears that he was refused access on an application for a tourist visa in November 2017, and I will return to this issue in due course. This caused major practical problems when the father went to collect the child for a holiday in November, 2017.

8. The father was to have the child in Ireland for a holiday period in November, 2017 and what was agreed was that the child would be returned from Ireland to Australia at the end of the holiday on the 29th November, 2017. In fact, the father did not return the child at that time but instead kept him in Ireland following the conclusion of the permitted three-week period. He had various communications with the child's mother in which he promised to return the child to her at certain later dates. It seems that there may have been medical issues from the father's own point of view and that he is undergoing various medical tests currently. Nonetheless,

he never returned the child and it is clear that, even if there were or continue to be medical issues in the background, the father's position is that he fundamentally believes that the child should not be returned to Australia and that any such return would be detrimental to the child's welfare because it would damage the relationship between him and his son.

Legal Issues arising
9. From a legal point of view, it is accepted on behalf of the respondent father that the child was habitually resident in Australia prior to his holiday here in Ireland, that his mother had rights of custody and was exercising them, and that she gave no consent to the child staying in Ireland beyond the agreed holiday period. None of those issues are dispute in the present proceedings, and accordingly it is clear that there was an unlawful retention of the child in Ireland for the purpose of the Hague Convention. What is central to these proceedings are the issues raised on behalf of the respondent father, which are whether there is a grave risk of psychological harm or of an intolerable situation under article 13(b) of the Hague Convention if the child were returned to Australia, and whether the provisions of article 20 of the Hague Convention present an obstacle the return of the child. He also raises Article 8 of the European Convention on Human Rights. At the core of the respondent father's case is that he believes he is very unlikely to get a visa to return to Australia which means, he says, that in reality he will not be able to see his son, and that this would create a risk of psychological harm and an intolerable situation for this particular child, given the closeness of the relationship between the father and son.

10. The respondent was unable to get legal aid until very shortly before the proceedings, something which was relied upon by counsel on his behalf, particularly in the context of producing evidence regarding the Australian visa situation. However, he was represented at the hearing, as usual very eloquently and skilfully, by Mr. Finn BL. The hearing (which had been scheduled for the 9th April, 2018 and which was itself the third hearing date fixed in the matter) was adjourned for some short number of days in order to make sure that he was not disadvantaged in terms of the presentation of his case by the lateness of the arrival of his counsel into the case. The hearing took place on the 11th April, 2018.

The report of Dr. Moane in relation to the child's views
11. I have mentioned that there was a psychological report prepared for the present proceedings, to which I now wish to refer. The report of Dr. Fiona Moane, a clinical psychologist, is dated the 16 March, 2018. She described the child as quiet, but friendly and polite, and said that he was willing to co-operate as best as he could. She said that he was somewhat guarded, but remained calm and contained. She described him as a sensitive, intelligent and reflective child, and certainly that is the impression one gets from the overall description from the report. The child gave a description to her of his life in Australia, which seemed to be a very ordinary or "normal" life; going to school, having friends in school, interacting with some limited number of relatives on the maternal side, and enjoying time with his dog, Cassie. He talked about coming to Ireland, and how he was happy to see his father, because he missed him. He said that his main concern coming to Ireland was about the length of the journey. He said he missed his mother and that although he talked to her on Skype twice a day, he wanted to go back to see his new house, his friends, his mother and Cassie the dog. He said that he did enjoy the school in Ireland and he had a favourite subject, sports. Clearly from that description the child's own view is that he has a very normal life in Australia; also, that he is very deeply bonded with each of his parents. I have truncated the account of his life in Australia and his relationship with his parents contained in the report, but there seems little doubt but that both parents are extremely important to this child.

12. He was asked about where he would like to live in the future and responded by saying that both of his lives were equally fine, which Dr. Moane described as "indicating a hesitancy on his part to choose". She asked him if he had a magic wand what would he wish for and the child replied that he would want his mother and father to live together in Australia and his father to be Australian so that he could come to Ireland whenever he wanted. However, he acknowledged that his parents did not get on well and that this was not going to happen. He was asked if he had to choose a country to live in which would he choose, and, as Dr. Moane reported, "he initially said that he would love both countries to get back together as one big piece of land, then he sobbed, hiding his face in his hands and said he was not able to pick." This particularly sad part of Dr. Moane's report in my view shows the degree of conflict for this child in being asked to choose between his parents and between countries so far apart. The psychologist empathised with him about how difficult this decision would be and the child responded that it would be simpler if his mother lived in Ireland because he could then see her all the time and added that if his father could get over to Australia easily then that would be the best of all scenarios. They talked about various scenarios: returning to live in Australia, staying in Ireland, and the role of each parent in each scenario. The child wondered if he could do one year with his mother and one year with his father and then he talked about how difficult it would be if he could only see his mother for a few weeks every year. Alternatively, if he lived with his mother in Australia, he would like to see his father perhaps for two months at a time. Again, this part of the report suggests to me that the degree of conflict and difficulty for this child who deeply loves both parents and ideally wants a situation where he can have both of them in his life as much as possible.

13. The psychologist's conclusions were that he was mature for his stated age and was an intelligent, articulate and reflective boy, who was generally happy and well-adjusted. She said he was deeply sad about his parents separating and his strongest wish was for them to be together again so that he could see each of them equally. She was of the view that, given his attitude to each of the parents, they had both been good parents to him and he appeared to have internalised strong values of fairness in the way he talked about each of them. She concluded that it was not appropriate that he be overly involved in the decision about where he should reside because this would be a very difficult decision for him, exacerbated by the logistical challenges presented by the distance between Australia and Ireland. She said that a firm decision needed to be made for him. She also commented that he had adjusted well to life in Ireland but clearly missed his life in Australia.

Summary of the legal submissions on behalf of the applicant
14. Counsel for the applicant emphasised in the first instance that there had been three court orders in the history of the litigation between the child's parents, all of which had awarded custody or primary care to the mother of the child. She accepted that there were criticisms of the mother in the psychological report prepared for of the Australian court but pointed out that despite these criticisms, the Australian court had decided to leave her in the position of primary carer of the child. Counsel pointed out that the child had always lived with his mother. She submitted that there had been an egregious violation of those court orders by the father by his conduct in retaining the child in Ireland. She emphasised the policies underlying the Hague Conovention of deterrence and the importance of placing the child back into his habitual environment as soon as possible.

15. Secondly, counsel for the applicant submitted that the evidence did not support the kinds of risk envisaged in article 13(b) of the Convention, and submitted that to take the child from his primary carer would in fact cause much greater risk to his psychological welfare than to return him to her in circumstances where the courts had repeatedly granted her custody. She noted that the Australian court order had explicitly envisaged that there may be times in the child's life when the father would not be living in Australia.

16. Thirdly, she submitted that it would be grossly overstating the position to say that the father would inevitably not get a visa for

re-entry to Australia and that the father/son relationship would inevitably be ruptured if the child were returned to that jurisdiction. She submitted that technology, such as video link, could assist in his participating in court proceedings even if he were not in the country to do so physically. She also pointed out that handovers of the child for holidays would not necessarily have to take place in Australia itself. Finally, she submitted that this was not a situation in any way close to reaching the threshold required by article 20 of the Hague Convention. She submitted that the approach to immigration and the granting of visas in Australia and Ireland respectively were not so fundamentally different as to satisfy the test set out in the Supreme Court in the *Nottinghamshire v K.B.* [2013] I.R. 662 as to when article 20 of the Convention would come into play.

17. In summarising the submissions of counsel for the respondent, I think it is fair to say that at their core was a submission that there was what counsel described as "a very strong likelihood" that Mr. O'N would not get a visa to enter Australia in the future; that this in turn would prevent him having access to the child and that the father/son relationship would then be ruptured; and that the overall effect of this situation would be intolerable for this particular child given the closeness and the importance of the father/son relationship to him. Emphasis was laid repeatedly by counsel on the depth of the relationship between the father and son.

18. It was also submitted that it was not appropriate to expect that any court applications concerning custody and access could be dealt with remotely by video link. Counsel submitted that, unlike certain previous proceedings in which this had been done, what would in issue would be a full custody hearing and that it would be unjust if Mr. O'N had to fight his part of that proceeding by way of remote access via video link to an Australian court.

19. Counsel also submitted that Mr. O'N had not received legal advice until very late in the day and therefore did not have expert evidence on the visa issue which might have been advised on by a lawyer, if a lawyer had come into the case earlier. He submitted that the court should adjourn the proceedings to facilitate the obtaining of expert evidence in that regard.

20. Counsel also laid considerable evidence on the best interests of the child and the manner in which that must be factored into the Court's decision, as set out in the European cases of *Neulinger and Shuruk v Switzerland* (App. No. 41615/07) (2012) 54 EHRR 31 and *X. v. Latvia* (App no. 27853/09) [2013] ECHR 1172.

21. It was finally submitted that the mother was in a position to relocate to Ireland, because she had no visa barriers to doing so. Therefore, it was submitted, if the Court made an order for non-return, the mother was perfectly free come to live in Ireland and the child could then have ready access to both parents.

The Authorities referred to by counsel

22. Quite a number of authorities were referred to by counsel during the proceedings. I will refer first of all to some authorities which deal with the general principles in the area, and will then deal with certain authorities which concern more particularly the situation where the 'abducting' parent in Hague Convention proceedings had a visa or other problem with regard to re-entering the jurisdiction from which the child was taken.

23. At the level of general principle, counsel on behalf of the applicant said that a starting point for the courts' assessment was the Irish decision of *P.L. v. E.C.* [2009] 1 IR 1., In which it was said in the course of his judgment by Fennelly J. at para. 55 as follows:-

> "The correct approach to the treatment of this issue is very well established in the case law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

And later at para. 57, he continued:-

> "Denham J. also cited with approval from the judgment of Wall J. in Re. K. (*Abduction: Child's Objections*) [1995] 1 F.L.R. 977, where the relationship between courts of the two jurisdictions was explained as follows, at p. 987:-
>
> > 'The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the U.S.A. under the Convention for their future speedily to be decided in that jurisdiction."

At para. 58 Fennelly J. went on to refer to *R.K. v. J.K.* (*Child Abduction: Acquiescence*) [2000] 2 I.R. 416, and cited with approval the following passage from the judgment of the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrick* (1996) 78F 3d 1060:-

> "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

24. I was referred to the English decision of *Re E. Children Abduction Custody Appeal* [2012] 1 A. C. 144, in which the following principles were set out with regard to the test of "grave risk" under article 13(b) of the Hague Convention:-

> • The standard of proof is the ordinary balance of probabilities;
>
> • The burden of proof rests upon the person opposing the child's return; it is for that person to produce evidence to substantiate the defence raised;
>
> • "Grave" qualifies the risk of harm rather then the harm itself, but there is a link between the two concepts; the risk to the child much have reached such a level of seriousness as to be characterised as grave;

• A relatively low risk of death or serious injury might properly be qualified as grave whereas a higher level of risk might be required for other less serious forms of harm;

• The situation faced by the child on return depends crucially upon the protective measures which could be implemented so as to avoid the risks that the child would be harmed or otherwise face an intolerable situation;

• Inherent in the Convention is the assumption that the best interests of the children as a primary consideration are met by return to the country of their habitual residence following a wrongful removal;

• That assumption is capable of being rebutted only in circumstances where an exception is made out;

• Psychological and physical harm is not defined; however meaning can be given indirectly to these terms when one looks at the alternative "or otherwise placed in an intolerable situation". Lady Hale, in *Re D. (Abduction: Rights of Custody)* [2007] 1 F.L.R. 961 said:-

"Intolerable is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate."

25. Counsel on behalf of the respondent referred me to the Irish decision in *I.P. v T.P* [2012] 1 IR 666. This was a case in which the child who was habitually resident in Poland was removed by her father to Ireland. The applicant was the mother of the child and had been awarded custody by a court in Poland upon her divorce from the respondent. The psychologist's report to the court indicated that the child was very definite that she did not want to return to Poland. The main reasons for this view were allegations of abusive conduct made against the applicant and also the positive aspects of living in Ireland where the child had more friends and family. The respondent presented evidence of inappropriate and abusive behaviour on the part of the applicant. He argued that there was, *inter alia*, a grave risk that the return of the child to Poland would expose her to physical or psychological harm or otherwise place her in an intolerable situation. Finlay Geoghegan J. said at paras. 50 and 51:-

"[50] The policy of the Hague Convention referred to includes that the child's best interests are served by the courts of her habitual residence determining any custody dispute between the parents and its purpose in deterring child abduction. This has been reconsidered in the context of the decision of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* (App. No. 41615/07) (2012) 54 E.H.R.R. 31. Whilst such decision was not expressly referred to in the judgment of the Supreme Court delivered by Denham J. in *A.U. v. T.N.U.* (Child abduction) [2011] IESC 39, [2011] 3 I.R. 683 it appears that the court must have been aware of the *Neulinger* decision in *Neulinger and Shuruk v. Switzerland* (App. No. 41615/07), and the current approach of the Supreme Court, which is binding on me, where children's objections to return have been established, is as stated at para. 32 by Denham J.:-

'The trial judge was entitled to have regard to the children's stability and contentment in determining what policy of the Convention should prevail. The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views.'

[51] The general policy of the Hague Convention that the best interests of the child are served by disputes in relation to her custody being determined (if they cannot be agreed between the parents) by the courts of her habitual residence applies to the facts of this case. I am satisfied that it is in the best interests of Anna that any continuing dispute in relation to her custody between her parents, if necessary, be decided by the courts of Poland."

She went on to explain why and then added at the conclusions that:-

".. as pointed out by Denham J., the policy of the Convention also includes that in exceptional cases, a court may refuse to return a child if the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of his or her views. It also forms part of the policy of the Convention that if the court determines that there is a grave risk that a summary order for return would place the child in an intolerable situation, a court may refuse to make an order for return. There are inherent conflicts within the different aspects of those Convention policies and those conflicts must be resolved on the facts of the individual case in the best interests of the particular child."

26. Counsel for the applicant sought to distinguish the facts of *I. P. v. T. P.* from the present case on the basis that the mother in *I.P. v. T.P.* had certain difficulties and that the child did not want to go back to her, whereas in the present case the child A. had nothing negative to say about his mother in Australia and life in Australia appeared to be entirely normal.

27. The manner in which the best interests of a child are to be factored into a decision concerning the Hague Convention was, as noted by Finlay Geogeghan J above, analysed in *Neulinger & Shuruk v. Switzerland*, a decision of the Grand Chamber of the European Courts of Human Rights of 6th July 2010. It was also subjected to scrutiny in *X. v. Latvia*, also a decision of the Grand Chamber of the European Courts of Human Rights, dated 26th November, 2013. I have also been referred to a more recent decision of the European Court of Human Rights, *G.S. v. Georgia* [2015] ECHR 2361/13. The latter case refers to *Neulinger* and *X v. Latvia* and summarises the relevant principles as follows:

"41. In *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131-140, ECHR 2010) and *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013) the Court articulated a number of principles which have emerged from its case-law on the issue of the international abduction of children, as follows:

42. In the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child of 20 November 1989, and of the relevant rules and principles of international law applicable in relations between the Contracting Parties;

43. The decisive issue is whether the fair balance that must exist between the competing interests at stake: those of the child, of the two parents, and of public order, has been struck, within the margin of appreciation afforded to States in

such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child";

44. There is a broad consensus, including in international law, in support of the idea that in all decisions concerning children their best interests must be paramount. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of 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 (Article 13, first paragraph, (b));

45. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development;

46. In the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 § a) and the existence of a "grave risk" (Article 13 § b), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). This task falls in the first instance to the national authorities of the requested State, which have, inter alia, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation which, however, remains subject to European supervision. Hence, the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8;

47. A harmonious interpretation of the European Convention and the Hague Convention can be achieved, provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention; and

48. Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a 'grave risk' for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted, is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

49. In addition to the principles outlined above, the Court has repeatedly stated that effective respect for family life requires future relations between parent and child to be determined solely in the light of all the relevant considerations, and not by the mere passage of time (see *Maumousseau and Washington v. France*, no. 39388/05, § 73, 6 December 2007; *Lipkowsky and McCormack v. Germany* (dec.), no. 26755/10, 18 January 2011, and *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 177, 27 September 2011). Ineffective, and in particular delayed, conduct of judicial proceedings may give rise to a breach of positive obligations under Article 8 of the Convention (see *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 127, 1 December 2009, and *S.I. v. Slovenia*, no. 45082/05, § 69, 13 October 2011), as procedural delay may lead to a de facto determination of the matter at issue (see *H. v. the United Kingdom*, 8 July 1987, § 89, Series A no. 120). Therefore, in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence, in view of the risk that the passage of time may result in a de facto determination of the matter. This duty, which is decisive in assessing whether a case has been heard within a reasonable time as required by Article 6 § 1 of the Convention, also forms part of the procedural requirements implicit in Article 8 (see, for example, *Süß v. Germany*, no. 40324/98, § 100, 10 November 2005, and *Strömblad v. Sweden*, no. 3684/07, § 80, 5 April 2012)."

28. Having regard to the above authorities setting out the general principles, it is clear that in a case where the article 13(b) defence is raised, the various policies underlying article 13(b) of the Hague Convention may be to a degree in conflict with each other. The threshold for establishing a grave risk of an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child. The decision as to the appropriate balance between the various interests and policies is a nuanced and delicate one which will depend upon the particular facts of each case.

29. Counsel also referred me to a number of authorities in which the "abducting" parent had visa or other difficulties with regard to re-entering the jurisdiction from which the child was taken. In *Re L.* [1990] 1 F.L.R. 433, a Danish mother had wrongfully removed the children (3-year old twins) from Florida and taken them to Denmark. Before a Hague Convention order obtained by the father in Denmark could be implemented, the mother disappeared a second time with the children to England. Before she was tracked down, she was charged by the Florida authorities with the criminal offence of international parental kidnapping and a warrant issued for her arrest. She was identified in England and when Hague Convention proceedings were brought in that jurisdiction, she raised two defences. One of these was that because she would be arrested and taken into custody on arrival in Florida, a return of the children to Florida would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Nonetheless, the children's return was ordered under the Hague Convention. The court held that neither the criminal proceedings nor the spectre of the mother's arrest and removal at the airport created a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It said that although there were uncertainties associated with

the criminal proceedings, there was no reason to believe that the Florida authorities would fail to take into account the children's interests in the course of those proceedings. The judge dealing with the case said at p. 8 of the judgment:-

> "I will not pretend to relish the prospective scene at the U.S. Airport upon the arrival of the mother and children. The father would presumably be present in order to look after the children. In the very short term if each parent could show a measure of co-operation and self control and the police could act in a sensitive manner and convey the mother as swiftly as possible to a judge who could grant her bail the event need not be damaging to the children in the very short term. At all events, the mother has failed by a long way to establish that this spectre together with the uncertain effects of the criminal proceedings in the longer term creates a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation."

30. In the case of *Re C.* [1999] 1 F.L.R 1145, the mother had failed to return two children to California after a holiday in England and their father sought their return to the United States. The children were living with the mother, step father and half sister in England and the step father was not permitted to enter the U.S.A. Accordingly the return of the children would inevitably involve the splitting up of the family. There was also a risk that the mother would be prosecuted in California for the removal of the children. There was evidence that the father had hit the children in the past. The father had given an undertaking not to promote the prosecution of the mother if the children were returned, but the court considered it likely that the father would change his mind on return. There was evidence that the children themselves were reluctant to return. The judge at first instance refused to make an order for the return of the children. However, the Court of Appeal allowed the appeal, and emphasised that a high threshold had been set to establish grave risk of physical or psychological harm or the placement of child in an intolerable situation. It held that there should be clear and compelling evidence of a grave risk of harm or other intolerability, and that it should be substantial and not trivial and of a severity which was much more than was inherent in the inevitable disruption, uncertainty and anxiety which followed an unwelcome return to the country of habitual residence. In this case, the Court said the severity of harm had not satisfied the stringent test to be applied. The potential splitting up of the family was a situation created by the mother and step father, as was the possible criminal prosecution of the mother, and it would be wrong to allow the mother to rely on adverse conditions which she had created by way of defence. Commenting on this authority, it was correctly pointed out on behalf of the respondent in the present case that the visa difficulties of the respondent father Mr. O'N, were not in any way of his own making, unlike some of the difficulties faced by the mother in the C case.

31. I was also referred to a Court of Appeal decision from 1989, namely *Re T (a Minor),* 26th June, 1989. The mother, who was HIV positive, applied for and obtained a 30 day visa to return to New York. It seems from the judgment that the defence sought an adjournment of the appeal so that they could attempt to obtain clearer evidence to support the proposition that the mother would not get an extension of her 30 day visa. Refusing this, the court said:-

> "I refer first of all to the question of the American emigration authorities refusing an extension of the visa which has in fact been granted for 30 days, if in fact that would on its face achieve a denial of justice within their own courts in the state of New York. Secondly, I find it difficult to envisage that the family court in New York itself would remain ideal if that attitude was threatened by the emigration authorities in the United States. As Mr. Tisbury submitted the family court is the appropriate, experienced court to deal with these questions and if the position was reached where justice could not be done without some interim order made by the court which would enable the mother to return to this country with the child having given appropriate undertakings to return to New York when called upon to do so with the child, I find it very unlikely that the American court would not act to protect the mother."

32. Counsel for the applicant relies upon that case as showing that a court dealing with a Hague application should have a degree of trust in the state authorities and courts of the requesting jurisdiction, and that it should not readily assume that they would allow an unjust situation to arise for children by reason of a visa problem facing a parent. The respondent counsel points out that in the T case, the mother had a 30- day window within which she could physically be present in the United States in order to make her case, whereas Mr. O'N in the present case has no such window or opportunity.

33. I was referred to the case of *C. v. S.* [2014] E.W.H.C. 3799, which involved an application for the return to Australia of a 14-year old boy. Essentially the case for the mother, who was resisting the return of the child, was that she was "not confident that she and her children would be permitted to re-enter Australia". The court considered the situation, *inter alia*, on the basis that the child might have to return to Australia without his mother and would have to live in his father's home. In that context, the court nonetheless concluded that he would not be at risk of an intolerable situation within the meaning of the Convention. Considering the factual background as to how the child's relationship with his father had been promoted throughout his life and the various positives notes in the evidence, it was really "quite impossible to conclude that a return into the father's household would fulfil the criteria for the establishment of an Article 13(b) exception".

34. Finally, the case of Re W. (*Child Abduction: Intolerable Situation*) [2018] E.W.C.A. Civ 664, was the subject of considerable focus by counsel on behalf of both parties before me. It was a case in which the children were aged 5 and 3 and the mother was the primary carer. It appeared on the evidence before the judge that the mother would be unlikely to be able to obtain a visa to enter the United States, the jurisdiction in which the father was living. The mother contended that it would cause the children grave harm to separated from her, she being the primary carer of the children who were very young, and she said that the father had never looked after the children for long periods of time and that the children would be "bereft" if they had to leave her. The evidence indicated that the mother had no right to re-enter the United States and was probably subject to a 10-year bar by reason of having previously overstayed by more than one year. In the judge's opinion, she would be "highly unlikely" to obtain a business or pleasure visitor visa, although she might be entitled to entry on a humanitarian basis, but it was not clear how long the determination of this issue might take. The judgment at first instance was that the children should be returned to the United States of America with their mother if she could obtain a visa and without her if she could not. The Court of Appeal held that the trial judge had fallen into error because she had not sufficiently or extensively analysed the mother's case on this aspect of matters. At para. 57 the courts decision was as follows:-

> "Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the Court would be enforcing their separation from their primary carer for an indeterminate period of time. It would be indeterminate because the Court has no information as to when or how the mother and the children would be together again. These children, aged 5 and 3, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of *this* case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk."

At para 58, it went on to say:-

> "It is therefore clear to me that if the judge had analysed all the circumstances from the children's perspective she would have come to the conclusion that to return the children to the USA when the mother had been refused a visa would be to place them in an intolerable situation."

35. It seems to me that the authorities referred to above suggest that it is only in rare circumstances that visa or similar problems on the part of the "abducting" parent are permitted to stand in the way of an order for return in a Hague Convention case. The striking features of the W case, in which return was refused, were that the children were very young (aged 5 and 3), their mother had always been their primary caregiver, and there was a high degree of certainty about the fact that she would not be permitted re-entry to the United States on a visa because she had overstayed by 1 year on a previous occasion. Accordingly, these very young children would have faced the prospect of being separated for an indeterminate period from their primary carer if an order for return were made. The facts of the present case are very different; the respondent father is not the primary carer of the child who is aged 9, and he has never overstayed his visa periods in Australia. The authorities also emphasise that a degree of trust must be placed in the systems within the requesting State to consider and respect the best interests of the children.

36. As regards the article 20 aspect of the case, I was referred to *Nottinghamshire Co Council v B (K) & B (K) [*2013] 4 IR 662, a decision of the Supreme Court. In that case, the applicants contended that article 20 of the Convention and Article 41 and Article 42 of the Irish Constitution prohibited the return of the children to the United Kingdom, because the law in that country permitted the adoption of children of married couples in circumstances not permitted in Ireland. The Supreme Court held that a difference in the legal regimes, even a constitutional difference, did not suffice to trigger article 20. The test was whether what was proposed or contemplated in the requesting state was something that departed so markedly from the scheme and order envisaged by the Constitution and was such a direct consequence of the court's order that return was not permitted by the Constitution. It was indicated that it was not sufficient to show that some aspect of the law of the requesting State was different from this jurisdiction, or even that some aspect of that law if enacted in this jurisdiction would be unconstitutional. It was necessary to go further and show that the manner in which children would be dealt with in the requesting jurisdiction would necessarily offend against the provisions of the Irish Constitution if administered in an Irish court.

37. It is clear from that Supreme Court decision that the bar for successfully invoking article 20 of the Convention is extremely high indeed. Counsel for the applicant submitted that it could not be said that Irish policy concerning matters of immigration and the grating of visas was so fundamentally different from Australian policy that the situation presenting in this case could be said to fall within the article 20 exception. Counsel on behalf of the respondent did not particularly press the article 20 issue in argument and did not point to any particular differences between the legal regimes that would ground a submission under article 20.

Decision in the Present Case

38. The present case essentially turns on one narrow issue, namely whether, by reason of the father's visa situation regarding entry into Australia, an article 13(b) situation has been established by him on the balance of probabilities. The factual case with regard to the intolerable situation defence is that he maintains that it is "highly unlikely" that he will get a visa into Australia. He has in fact obtained several visas previously, albeit that this was only after he pursued appeals in respect of them. The high-point of his case seems to be that he was recently refused one particular visa on one occasion, namely an application for a tourist visa in the October/November period. It may be noted that his visa application on that occasion was unsupported by the mother; there was a particular history to this refusal to support insofar as it appears that the mother had asked for certain assurances from him, which he was not prepared to give, and in those circumstances she refused to support his application. The mother initially in her affidavits in the present proceedings indicated sentiments that would suggest that she would not be supportive in the future of a visa application. However, at the hearing, a formal undertaking was given to the court on her behalf that she would support a visa application by the father.

39. I wish to refer to an exhibit in the case which is a written decision of the Department of Immigration and Border Protection in Australia. I refer to this in particular because there was a conflict of evidence as between the mother and father in the present case on affidavit conflicted as to his visa situation historically (i.e. as to whether he had previously overstayed visas or not), and it seems to me that this document is the most impartial or neutral evidence in that regard. The decision is dated the 2nd November, 2017. Among other things the document records as follows:-

> "An eVisitor cannot be granted unless the relevant criteria specified in the Migration Act and the Migration Regulations are satisfied. I have considered the fact that he would have visited Australia previously and that you appear to have abided by the conditions of your visa on that visit."

I pause to note that according to the official record, therefore, there is no indication that Mr. O'N overstayed any of his visas, which is in accordance with his own evidence on the matter.

40. The official document then continues:-

> "However, departmental records show that you have recently returned from a long period of stay in Australia as a visitor. That you have spent more time in Australia as a visitor recently than your home country. Department records show that since 24th October, 2013 you have spent 1187 days in and 239 days out of Australia. Typically, a visitor is expected to spend an equal amount of time out of Australia as in Australia. Given that you have now applied for a further stay visa in Australia, I find that you intend something more alike to a *de facto* residency in Australia rather than a genuine temporary stay."

41. It seems clear to me from this decision that what happened was that Mr. O'N applied for a temporary visa and that the official who determined the matter at first instance took the view that because of the length of time he had previously been physically present in Australia (albeit lawfully), he could not be considered to be genuinely applying for a temporary stay but was likely to stay there on a long-term basis. I do not have evidence before me as to precisely what the official was told in the application for the visa, or whether, more particularly, the official was told about the precise details of the court order enabling the respondent father to have various forms of access in respect of his child.

42. The nub of the respondent's case is that, in light of this single refusal of an application for a temporary visa, the father is "highly unlikely" (the phrase used by his counsel at the hearing) to get a visa in the future and that this will in turn disrupt the important relationship between himself and his son.

43. Having regard to the history of the respondent's visa applications, and the circumstances in which the most recent visa

application (unsupported by the mother) was refused, I do not think that the evidence in this case goes so far as to support a conclusion on the balance of probabilities that it is highly unlikely that he will ever be able to get into Australia in the future to see or collect his son. The authorities referred to above emphasise the need for the court seized of a request under the Hague Convention to place a certain degree of trust in the systems, including the justice system, within the requesting jurisdiction and in particular to trust that the relevant authorities will factor in the children's best interests when deciding on issues such as visas. In this case there is already in existence a detailed Australian court order giving Mr. O'N generous access to the child. I find it difficult to accept on the evidence that, if the situation were properly brought to the attention of both the immigration authorities in Australia and the Australian Family Court dealing with his family, some kind of arrangement could not be arrived at in order to enable him to exercise his rights of access to the child in accordance with an order made by the Australian court itself. Given the importance of the proceedings before me being determined within a suitably swift time-frame, together with the factual matrix underpinning the case, I do not consider it appropriate to adjourn the case to enable the respondent to obtain expert evidence concerning the visa situation.

44. It also seems to me that the potential availability of technology to give Mr. O'N a right of audience in court proceedings in Australia is relevant. I am not persuaded by the suggestion that video-link is an inadequate aid where serious matters such as child custody are in issue. Video- link evidence is often used in matters of extreme gravity in this jurisdiction and even in criminal matters, and I do not accept that it is a form of evidence of such a lesser quality that would create a risk of injustice in the Australian proceedings.

45. The fact of the matter is that, unlike other parents in some of the authorities referred to above, Mr. O'N has not in any way "burned his bridges" from a visa point of view by overstaying in the past. It appears that his presence in Australia in the past has always been on a lawful basis, and this must be likely to count heavily in his favour in terms of his seeking access to Australia in the future. Further and in any event, he does not necessarily have to enter Australia in order to see the child. The Australian court order envisages out-of- jurisdiction access, and the handover of the child could take place outside of Australia.

46. Further, it is a fact in this case that the mother has always been the primary carer of this particular child. To say that is not in any way to deny that the father has a deep and loving relationship with his child. But the fact is that the child has always resided in Australia, or for at least as long as the child can remember. That is where his life is rooted, with his school, his home and his friends. I cannot accept that a return to this entirely normal environment where he would be cared for by his primary care-giver meets the threshold of what is described in article 13(b) as an intolerable situation. Rather, I think that an order for non-return would be more likely create this situation because it would separate him on a long-term basis from his familiar environment and his primary carer.

47. Finally, I do not think this Court is entitled to make a choice which, in effect, forces the mother to come and live in Ireland. This in my view would be close to stepping into the role of a court deciding the custody dispute itself. Under the Hague Convention, this Court has to be mindful of its limited role. It is simply deciding, on the facts as they currently appear from the evidence presented, whether there has been an unlawful removal or retention (which there clearly has been), and whether one of the limited defences has been made out.

48. I should add for completeness that I do not consider that the situation comes anywhere near the threshold required by article 20 of the Convention. I have referred to the *Nottinghamshire* case above which makes it clear how high the threshold is before article 20 comes into play and nothing has been put before the court to suggest that article 20 applies in the present situation.

49. Accordingly, having regard to the evidence as a whole, including the evidence regarding the visa issue, and that the child has always lived in Australia with his mother in what appear to be entirely normal circumstances, it seems to me that the defence of article 13(b) has not been established, even taking into account the best interests of the child from the point of view of the close bond he has with his father. Accordingly I am of the view that I should make the order for the return of this child to the jurisdiction of the Commonwealth of Australia.

50. I would like to add, without wishing to overstep the boundaries of my role, that it would seem to me that it is in the best interests of this child that the immigration authorities in Australia would look favourably upon the granting of the appropriate visas to enable the father to exercise the rights of access envisaged by the Australian court order, and that it would be disappointing, not to mention detrimental to the welfare of the child, if the father-son relationship were disrupted simply because of immigration/visa barriers. This is an only child, for whom the company of each of his parents is precious.