Neutral Citation: [2013] IEHC 641

THE HIGH COURT

FAMILY LAW

2013 12 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION AND THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND IN THE MATTER OF R,C, AND N, MINORS

BETWEEN/

M.L.

APPLICANT

AND

J.C.

RESPONDENT

JUDGMENT delivered this 2nd day of September, 2013, by White, Michael J.

1. These proceedings were commenced by special summons on the 4th March, 2013. An application had been made to the U.S. Central Authority on the 31st January, 2013, by the applicant in respect of the failure of the respondent to return from a holiday in Ireland with the three children. The application was remitted from the U.S. Central Authority on the 1st February, 2013, and received by the Department of Justice and Equality in Ireland on the 4th February, 2013. The solicitor for the applicant swore a grounding affidavit on the 4th March, 2013.

2. The proceedings were served on the respondent on the 6th March, 2013, and an appearance was entered on her behalf on the 9th April, 2013, together with her replying affidavit on that date. The applicant swore a further supplemental affidavit on the 19th April, 2013, and the respondent swore and filed a supplemental affidavit on the 7th May, 2013.

3. This Court made an order on the 8th May, 2013, directing a psychologist to interview the children and provide a report to the court on their maturity and their v1ews.

4. A further short supplemental affidavit was sworn by the respondent on the 28th May, 2013, exhibiting medical records and a further supplemental affidavit of the applicant was sworn on the 1th June, 2013, and filed.

5. The case was heard by this Court on the 8th and 11th July, 2013, and judgment was reserved.

6. The Court does not have a history of how the parties met or the early part of their relationship. The Court also has little information about the applicant's background.

7. The respondent was brought up in Ireland. She emigrated to the USA and worked for a substantial period of time before she met the applicant in 2003. Their son R was born in 2004. The parties married in March, 2006. Their twin sons C and N were born in 2006.

8. The children are U.S. citizens and their habitual residence has been the USA. They were retained in Ireland by the respondent after a family holiday.

9. There is disputed evidence about the nature of their relationship and their behaviour.

10. The respondent has had mental health difficulties, the reasons for same being in dispute. She was admitted as an inpatient to a psychiatric hospital in May, 2006 and March, 2012. The respondent claims she was only ever hospitalised for depression after meeting the applicant and attributes a lot of her problems to what she alleges was an abusive controlling relationship on the part of the applicant. He disputes that strongly.

11. The parties briefly separated in late 2008 for a short period of time.

12. They permanently separated in October, 2009 and subsequent to that separation a number of orders were agreed after mediation dealing with custody of and access to the children and financial matters. A decree of divorce has not yet been finalised.

13. The parties were reconciled in the middle of 2011. The respondent states this reconciliation occurred on the basis that the family would return to Ireland in September, 2011 and reside there permanently. The applicant does accept that he agreed to return to Ireland and to reside as a family there but changed his mind in or around October/November, 2011 because of the respondent's erratic behaviour.

14. Both parties make a number of allegations in respect of this period of time of reconciliation about the other's behaviour.

15. The respondent suffered a serious mental breakdown in March, 2012. She was an inpatient at a hospital in America during March, 2012. She subsequently attended as an outpatient for therapy for approximately five weeks. I will refer to the respondent's mental condition and treatment in detail later.

16. Prior to the parties attempted reconciliation, they had lived in separate residences for approximately two years and there was a custody agreement in place. Discussions about reconciliation commenced in March/April, 2011. It is somewhat unclear when the

parties decided to abandon this attempted reconciliation. The applicant in his affidavit of the 19th April, 2013, at paragraph 12 stated that at the time of their attendance at the applicant's work Christmas party in December, 2011 they had abandoned any hope of formally reconciling. However the respondent in her affidavit of the 7th May, 2013, at paragraph 12 stated that the parties had spent Christmas together in the applicant's dwelling house and visited his parents and extended family for a Christmas holiday and that they continued to be romantically involved at that time and throughout early 2012.

17. It is by no means clear from the pleadings when the attempted reconciliation failed but the Court assumes that it was completely at an end by the time the respondent was admitted to the psychiatric hospital in March, 2012. From an examination of the respondent's medical notes in respect of her inpatient and outpatient treatment there are a number of references to the difficult marital relationship between the parties.

18. Although the applicant refers in his affidavit of the 19th April, 2013, at paragraph 12 to having to get the police to do welfare checks on the children and to seek advice from the Child Protective Services in the U.S. on several occasions, the only information exhibited in the pleadings is in the affidavit of the respondent of the 7th May, 2013, at paragraph 9 when she refers to having reported her concerns to the Child Protection Services and exhibits a copy of the report received from that service. It is clear from that report from the Department of Family and Children Services that the respondent had made a number of complaints about the behaviour of the applicant and his treatment of the children. There was attempted contact by the service with the applicant by telephone on three occasions when voicemail messages were left but the applicant did not respond.

19. From the medical notes furnished to the Court and the exhibits it is obvious there were serious issues between the parties prior to the decision of the respondent to retain the children in the Republic of Ireland without the consent of the applicant.

20. In respect of a number of allegations made by both parties in their affidavits the Court has formed the view that they are both exaggerating for their own ends the alleged misbehaviour of the other about their relationship and their relationship with the children. There is no evidence to suggest the respondent has abused alcohol. The allegation in the affidavit of the respondent of the 9th April, 2013, at paragraph 5 that the applicant masturbated in the children's presence seems remarkable as this was not brought to the attention of the Social Services.

21. While this Court is not in a position to determine issues of disputed fact between the parties as to the various allegations, it is certainly satisfied that both parties are exaggerating the nature of the allegations for their own ends.

History of Mental Health of the Respondent

22. The Court has had the benefit of two written reports from an Irish doctor from May, 2013, and June, 2013. This Irish doctor also gave sworn evidence to the Court.

23. The Court has also read the detailed hospital notes from a hospital in the U.S. where the respondent was hospitalised, totalling 108 pages which are legible.

24. The Court has also seen notes from a psychiatric clinic in the U.S. which dealt with the treatment of the respondent from June, 2012 up to November, 2012. Unfortunately these notes are difficult to read being nearly illegible. A doctor's report from May, 2013 refers briefly to the treatment of the respondent as an outpatient in 1997 for depression due to previous relationship difficulties.

25. She was first admitted as an inpatient into psychiatric hospital in May, 2006. There are no medical notes available to the Court for this admission. The respondent refers to it in her affidavit of the 9th April, 2013, at paragraph 4 when she states:-

> "In or about May 2006 shortly after my marriage I was admitted to a psychiatric hospital suffering with a complete mental breakdown. At that time the applicant had begun hitting the children and I believed that it was my fault because I was not able to protect them. In or about this time the applicant told my doctor that I was threatening to hurt R which was of course untrue."

26. The applicant does not refer to this hospital admission in his affidavits.

27. In detailing her history on admission to the hospital in the U.S. in March, 2012, the respondent referred to the hospitalisation in May, 2006 when she stated she was under a lot of stress a few weeks after they were married.

28. The assessment on admission from March, 2012 was that:-

> "she had no history of psychotic symptoms or recurrent psychotic symptoms, no psychomotor agitation or retardation, her insight and judgement was fair and her cognition appeared grossly intact. The assessment was that she was a patient who was an Irish/American woman who presents extremely depressed in the context of conflict with her husband from whom she is separated. His controlling abusive interaction has become overwhelming for her and she did not see a way out. She had planned to kill herself last week and made significant plans including having a fun weekend with her son, taking him to day care and then driving to the store to get a rope. She had second thoughts when she was there, thinking of the problems that would cause for her son and not wanting her son to find her. She currently continues to have suicide ideation but slightly more hope by the end of the evaluation."

29. The plan outlined in the medical notes was:-

> "The patient was being admitted and she would be restarted on Wellbutrin because it appeared to help in managing her interactions with her husband. We will also start Lamictal to help with depression in case this is more of a bipolar disorder but has not been responsive to standard unipolar depressive medication. There has been no history of manic symptoms nor of any psychotic symptoms in post partum, I feel that it would be safe to treat her with Wellbutrin without a mood stabiliser. I did discuss with her "Abilify" in case she starts to have any symptoms of hypomania or severe anxiety that needs more management. She will be evaluated by the Medical Consultant I will have a conference when the patient is able to interact with her husband in a more productive fashion. We will consider discharge to PHP as the patient needs additional support and structure to be able to navigate her difficult psycho social situation".

30. The respondent did make progress as a hospital inpatient and subsequently in treatment in group therapy as an outpatient.

The Evaluation of the Evidence and Reports of the Examining Doctor in Ireland

31. While the Irish doctor in her reports and in evidence referred to matters of a subjective nature, in the history from the respondent

in respect of her relationship with the applicant, the Court is satisfied that the Irish doctor was a careful witness and attempted objectively to determine the current status of the respondent's mental health and the effect upon her of an order for return with the children to the United States of America. The Irish doctor has formed the opinion that a forced return to the USA would have a serious detrimental effect on her mental health and that it was essential for her continuing good health and that of her children that she be allowed to remain in Ireland with the support of her family of origin. The Irish doctor in particular emphasised in her oral evidence the need for substantial extended family support for the respondent to sustain her, which she stated she felt was absent in her previous residence in the U.S. The Irish doctor was of the opinion that the respondent was very isolated in the U.S. and this exacerbated her mental condition.

32. The applicant has referred in his affidavit of the 17th June, 2013, to the reports of the Irish doctor and invited the Court to treat same with the greatest caution as they had been prepared in the context of the respondent's attempt to avoid a return order being made in respect of the children to the USA.

The Reports on the Views of the Children
33. The Court has considered the psychological reports of a psychologist in respect of R, C, and N from May, 2013.

34. Subsequently the psychologist prepared separate supplemental reports on each child assessing any possible influence on their views.

35. It can be stated from the outset that N was not happy to be interviewed or to leave his mother and he presented as being timid, immature and lacking in confidence and anxious. It was the opinion of the psychologist that he was not emotionally mature enough to understand the significance of any wishes that he had expressed and accordingly those should be interpreted with caution.

R
36. R is the oldest child being now 8 years of age. The psychologist administered a number of psychometric tests in respect of intelligence, emotional development and a perception of relationship test. He formed the view that R was a lovely child who cooperated with the interview and was well aware of its purpose, that no significant and emotional disturbance was indicated but that R was experiencing significant stress.

37. His conclusion was that R was a child of average intelligence who had adequate reasoning ability and problem solving skills and that his emotional development was age-appropriate and that he was able to express his feelings with the one concern that he had at interview feelings of stress. He found that R was closer to his mother psychologically than to his father. During the interview R expressed the wish to remain in Ireland and live with his mother. He did not want to stay with his father and he regards the USA as being unsafe.

38. In his second report in June, 2013 relating to any influence on R he was of the view that R had given positive information about his father and did not mention him as the reason for not wanting to go back to the USA or for wanting to remain in Ireland. His main reason for wanting to remain relates to being unhappy with where he previously lived with his mother in the USA, having perceived his accommodation as unpleasant and dangerous. The psychologist was of the view that it was possible that the children influenced each other in regard to the accommodation in the U.S. and it is also possible that the dangers referred to were discussed by the family prior to meeting with him.

C
39. In respect of the tests administered, the psychologist found that C had adequate reasoning ability for his age, that he was friendly and outgoing and stable although experiencing some insecurity. There were no indications of significant emotional disturbance. In respect of the perception of relationship with his parents the psychologist found that C was closer psychologically to his father than to his mother. He wanted continuing contact with his father.

40. C stated that he did not want to go back to the USA but wanted to stay with his mother in Ireland but he did indicate a closer relationship with his father and included his father in the family drawing. The psychologist also formed the view that there may have been some negative discussion within the family regarding living in the USA.

41. In respect of being influenced, the psychologist found that C presented as an intelligent boy who was able to give accurate information regarding his present situation. He had no difficulty in expressing himself and he presented as emotionally stable. However at this age if told that there were better toys in Ireland and that there are dangerous things in the USA he could and probably would be influenced to choose to live in Ireland.

The Disputed Evidence
42. There is a very serious dispute between the parties as to the nature of their relationship, the cause of the breakdown of their relationship, the behaviour of each party and serious allegations have been made by each party against each other. This Court is not in a position to resolve those disputes of fact other than to reiterate that the Court has formed the view that both parties have decided to exaggerate substantially their complaints and allegations against the other party, which is not a healthy state of affairs.

The Undisputed Evidence
43. The undisputed evidence in this case is that the parties have had a very difficult relationship. There was a separation of two years and then an attempted reconciliation which ultimately failed.

44. There was at one time an agreement to move permanently to Ireland which the applicant did not consent to as he was entitled to do.

45. There are concerns on the part of the respondent about the parenting skills of the applicant, which predates her decision to move the children to Ireland.

46. The Court has not formed the view that the respondent engaged in a conspiracy over a substantial period of time to bring the children to Ireland without the applicant's consent.

47. There is no doubt that the last admission to hospital of the respondent in March, 2012 has influenced her decision-making.

48. Objectively the respondent suffered a very serious mental breakdown in March, 2012, which she attributes to the ongoing

pressures of the breakdown of the relationship between the parties and the ongoing care and custody of the children.

49. The Court is satisfied that this was not an issue of parasuicide where the respondent was trying to attract attention to herself and did not intend to commit suicide.

50. Objectively the Court has to be very concerned about the suicide ideation of the respondent at the time of her admission to hospital in March, 2012. The Court has formed the view that at that time the respondent had suicidal ideation, which posed a significant risk to her life at that time.

51. She did respond to the treatment in the USA and certainly stabilised.

52. The Court has formed the view that the opinion given by the Irish doctor in evidence is soundly based on the history of the respondent, and is not in the nature of a professional opinion purely given for the purposes of litigation. The Court has some concern that she has placed over-reliance on the subjective allegations of the respondent about the applicant's behaviour. The Court believes that if there is an order for return to the USA, a risk of recurrent mental breakdown affecting the respondent is a very real risk.

53. The Court does not place huge weight on that aspect of the defence of the respondent to the return based on the views of the children. It does carry some weight however as R is an articulate young boy who was able to express his views and based on the physical circumstances that he lived in the USA, he is not anxious to return. Although he did refer to aspects of the applicant's behaviour, I am of the view that R still has a constructive relationship with his father.

54. The main concern of the Court is the mental stability of the respondent and how any order of return will affect her and applying the provisions of the Hague Convention and case law to that particular issue.

55. The difficult issue for the Court is:

> "Does the increased risk of mental breakdown come within the definition of a grave risk that the respondent's return would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation?"

CONSIDERATION OF THE CASE LAW.

56. It is appropriate in this context to consider the case law on this matter before finalising the Court's decision.

57. Counsel for the respondent has raised two defences: the grave risk defence set out in Article 13 (B) of the convention and also the defence that the court may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

58. Counsel has opened two English cases, which she has argued are persuasive authority on the Court that it should take into account the psychological state of the respondent, her concerns about the relationship and also the views of the children.

59. In *In re E Children Abduction Custody Appeal* [2011] UK SC 27, the UK Supreme Court when dismissing an appeal by a mother and half sister for the return of children from England to Norway held that,

> "(1) Although the best interests of the child had not expressly been made a primary consideration in Hague proceedings, both the Hague Convention and Brussels II Revised had been devised not only for the benefit of children generally, but also with the aim of serving the best interests of the individual child, not for the benefit of adults. In Hague Convention cases there was a general underlying assumption that unilateral action by one parent should not be permitted to pre-empt or delay resolution of any dispute about any aspect of the future upbringing of the child, in respect of which the interests of the individual child should be of paramount importance, and also a general underlying assumption that the best interests of the child would be served by a prompt return to the child's country of habitual residence; however, both these assumptions were rebuttable in certain circumstances.
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> (2) As acknowledged by the European Court of Human Rights at Strasbourg in both Mannousseau and Washington v. France (Case No 39388/05 (unreported)) 6th December, 2007, and Newlinger and Shuruk v. Switzerland, the guarantees in art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (the European Convention) were to be interpreted and applied in the light of both the Hague Convention and the United Nations Convention on the Rights of the Child, 1989, all were designed with the best interests of the child as a primary consideration; national courts did not return a child automatically in Hague Convention cases in which the question was raised, but examined the particular circumstances of the particular child, albeit without conducting a full-blown examination of the child's future; and it was, to say the least, unlikely that proper application of the Hague Convention should involve a violation of art. 8. As explained by the Strasbourg Court, in this context the best interests of the child had two aspects; to be reunited with parents; and to be brought up in a 'sound environment' in which they were not at risk of harm. The art. 8 violation in *Newlinger* itself had arisen not from the proper application of the Hague Convention, but from the effects of subsequent delay.
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> (3) There was no need for article 13(b) to be constructed narrowly, its words were plain and needed no further elaboration or gloss. The risk of the harm must be grave, and the harm in question must involve something it was not reasonable to expect a child to tolerate; this, it was now recognised, might include exposure to the harmful effects of seeing and hearing the physical or psychological abuse by one parent of another. Although grave characterised the risk rather than the harm, there was a link between the two, so that a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
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> (4) In evaluating evidence the court would be mindful of the limitations involved in the summary nature of the Hague Convention process, it would rarely be appropriate to hear oral evidence or allegations made under art. 13(b), and it followed that neither of these allegations nor their rebuttal would usually be tested in cross examination. Newlinger did not require a departure from this normal summary process, provided that the decision made was not arbitrary or mechanical. The tension between the court's inability to resolve factual disputes between the parties and the possible risks to the child could be resolved if the court first considered whether, if true, the allegations would fall within art. 13(b), and if so, then asked how the child could be protected against that risk, taking into account not only the child's immediate future, but also any ongoing need for effective protection. Without such protective measures the court might have no option but to do the best it could to resolve the disputed issues. Where there were disputed allegations that could neither be tried

nor objectively verified, the focus of the inquiry was bound to be on the sufficiency of any protective measures to be put in place and the clearer the need for protection, the more effective such measures would have to be."

60. In arguing that the Court was entitled to and should take into consideration the psychological impact on the respondent if ordered to return to the USA with the children based on her previous history of mental illness, counsel for the respondent relied on a further U.K. Supreme Court case *In re S (A Child)(Abduction: Rights of Custody)* [2012] 2 A.C. p. 257 when it was held by the Court when allowing a mother's appeal against an Order for return of a child to Australia:-

> "that the terms of article 13(b) of the Hague Convention were plain, needing neither elaboration nor gloss, that the critical question, where on an application under article 12 a defence under article 13(b) was raised, was what would happen if, with the parent who had wrongfully removed him, the child were returned; that if the court concluded that, on return, that parent would suffer such anxieties that their effect on her mental health would create a situation which was intolerable for the child, the child should not be returned, and it mattered not whether these anxieties would be reasonable or unreasonable, although the extent to which there would, objectively, be good cause for such anxieties would nevertheless be relevant to the court's assessment of her mental state if the child were returned, that it was for the trial judge, whether or not he had received oral evidence, to make the judgement about the level of risk which article 13(b) required, and an appellate court should not overturn his judgement unless, whether by reference to the law or to the evidence, it had not been open to the judge to make it; that, although he had not heard oral evidence, he had carefully studied the written evidence which revealed that several of the allegations made by the mother against the father were admitted or could not realistically be denied; that it had been open to the judge to decide that in the light of all the evidence the interim protective measures offered by the father did not obviate the grave risk to the son if he were returned to Australia; and that, accordingly, it had been open to the Court of Appeal to substitute its contrary view for that of the judge."

61. In referring to the subjective perceptions of the respondent, counsel further referred to paragraph 27 of *In re S* at p. 268 which states:-

> "*In re* [2012] 1 A.C. 144 this Court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para. 34, it recorded, with approval, a concession by Mr. Turner QC, who was counsel for the father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: e.g. where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para. 49, the court turned its attention to the facts of the case, it said that it found:-
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> > 'no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real. '"

62. In respect of the second part of the defence, the objection of the children, the Court accepts the dicta set out at para. 21 of the Supreme Court case In the Matter of *ANU and AWU children AU applicant v TN U respondent* [2011] 3 I.R. at p. 694.

63. However in this case the Court has concerns about the weight to be attached to the children's views. The Court has formed the view that there were discussions between the respondent and the children in respect of the living environment in the USA and while the views of R and C in respect of their wishes is a matter which the Court does take into consideration, the Court views that the weight it should attach to this evidence is not ultimately persuasive.

64. Counsel for the applicant argued that the threshold of the article 13(b) defence is a very high one and that this threshold has not been crossed by the respondent.

65. He referred to the Supreme Court decision of *P.L. v E.C.* [2008] I.E.S.C. 19 paras. 55 to 59 which state:-

> "55. 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.
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> 56. In her judgment in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, Denham J. cited from a judgment of Hale J. She said, at p. 261:-
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> > 'The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in *Re HB (Abduction: Children's Objections)* [1997] 1 F.L.R.
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> > 392. Hale J. held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned."
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> 57. 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.'

58. In *R.K. v. JK. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416, Barron J., at p. 451, 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 reason 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.'

59. This principle was further developed in the judgment of Denham J. in *Minister for Justice (E.M.) v. J.M.* [2003] 3 I.R. 178. That case concerned an abduction of children by the mother from England to Ireland, without the consent of the father. There had been evidence before the High Court that one of the children suffered from autism and that the programme of treatment that he was receiving in this jurisdiction would be disrupted if he were to be returned to England. On this ground the High Court made a finding of "grave risk" and refused to make the order for return. Denham J., delivering the unanimous judgment of this court, held that the High Court had fallen into error. She cited with approval the passage from the judgment of Barron J. in *R.K. v. JK. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416, cited above and stated at p. 189:-

'This is a classic issue, a classic balance to be achieved, in cases of custody and access, matters for hearing in custody cases, not appropriate to the summary hearing envisaged by the Hague Convention. I am satisfied that the High Court Judge fell into error in this case in his application of the grave risk exception under the Hague Convention.'"

66. Counsel for the applicant also referred to an English case *Re S (a child) (Abduction; Custody Rights)* [2002] EWCA (Civ) 908. In that case the English Court of Appeal ordered the return of a child to Israel even though the court accepted this presented psychological difficulties for the mother because of the security situation and threat of violence.

67. At paras. 91 and 92 the court stated:-

"91. We bear these observations fully in mind. We are prepared to accept that the mother does suffer as has been described and that the situation in Israel is worrying enough to her for that suffering to be exacerbated if she returns. There is, however, no evidence before the court which would suggest that she is not likely to receive satisfactory medical attention there though we accept that she will need more treatment in Israel than in this country. The question is whether the child is at grave risk of harm from the breakdown in the mother's health. She has not satisfied us that the child will suffer to that extent. The matter will be reviewed by the Israeli court and full account will be taken, we have no doubt, of the difficulties she is there experiencing. We emphasise that we are not deciding this question with the welfare of the child our paramount consideration. We have to suppress the views we might hold were that the question we have to resolve. We are, however, clear that an Article 13(b) defence is not made out on that ground. That is why we took the view that an appeal against Bracewell J.'s order would eventually fail.

Thirdly: is the situation in Israel intolerable for the child?

92. We turn to consider finally whether or not, looking at the matter in the round, we are persuaded that the return of this child to Israel would be a return to an intolerable situation. We are satisfied the mother will find it intolerable but that is not the test. The question is whether, having regard to the purpose of the Convention, the limited exception with which we are dealing and the international obligations that arise under it, this court can be satisfied that the scale of violence and the mother's reaction to it have produced a situation which this young child should not be required to endure. The word "intolerable" is so strong that by its very meaning and connotation it sets the hurdle high. We are not satisfied that the very real and worrying problems which will confront mother and daughter in Israel do produce a situation which can be said to be intolerable.

DECISION.

68. The respondent has been the primary carer of the children. If her mental health were to break down on a return to the USA that would be an intolerable situation for the children. There is no guarantee that her mental health will remain stable in Ireland but the present position is positive, and the Irish doctor is of the opinion that it will remain so in her present environment. It is very difficult to predict the degree of risk if the Court ordered a return, but the Court would certainly regard it as grave based on her mental health history. There is no doubt that a refusal to make an order for return is an injustice to the applicant, and will mean a much more restricted relationship with his children. The Court is faced with a finely balanced decision which it makes by refusing an order of return.

69. One major concern of the Court is the abject failure of the respondent to ensure contact between the children and the applicant. There is no excuse for it, and having retained the children in Ireland the onus was on her to ensure contact was maintained not the other way around.

70. This judgement should not be used as an excuse to refuse access both in Ireland and the USA. The fact that the respondent did not proceed in the proper way by seeking permission to relocate from the American courts cannot now be relied on as a reason to refuse the children access visits in the USA. The court rejects the criticisms of the American courts by the respondent.