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Neutral Citation Number: [2008] IEHC 212

THE HIGH COURT
FAMILY LAW

2007 No. 25 HLC

IN THE MATTER OF THE CHILDREN ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991
AND IN THE MATTER OF THE HAGUE CONVENTION
AND IN THE MATTER OF COUNCIL REGULATION 2201/2003
AND IN THE MATTER OF H. T. T. AND N. R. T.

BETWEEN

R. T.

APPLICANT

AND
S. M.

RESPONDENT

Judgment of Mr. Justice John MacMenamin delivered the 4th day of July 2008.

1. The applicant was born in Ethiopia but is now an Australian citizen. He moved to Australia in early adolescence. He is now in his early twenties. The respondent is an Australian national and an Irish citizen. The parties commenced a relationship while in their mid teens in 1998. They have resided together in Queensland since the year 2000. There are two children of the relationship namely, H. T. T. born in 2001, and N. R. T. born in 2004. The said children will attain the age of 16 years in 2017, and in 2020, respectively. I will refer to the elder child as T. and the younger child as Ra. T. was born in Brisbane. Ra. was born in Ireland when the parties were here previously on a twelve month working holiday, between 2003 and 2004. The place of habitual residence of both children has been with their parents in Queensland. The applicant as father and respondent as mother both have parental responsibility rights for the said children pursuant to the laws of Australia. The applicant seeks an order directing the return of the children to Queensland pursuant to the Hague Convention and Council Regulation 2201/2003.

2. The case comes before the courts arising from the following immediate averments as to fact.

3. In or about December, 2006 the respondent's grandmother who lived in Ireland fell ill. On 17th December, 2006, the respondent and the children left the family home in Australia for Dublin on a visit on the understanding they would return to Australia on the 8th January, 2007.

4. On 31st December, 2006, the applicant phoned the respondent to enquire as to their wellbeing. The respondent said that she was not returning to reside in Queensland and that she intended to retain custody of the two children in Ireland with her.

5. Since the 8th January, 2007, the applicant says that he has made numerous efforts to contact the respondent and the children. Since that date there has been limited contact. The applicant says this is as a result of the respondent's lack of co-operation.

6. Early in 2007 the applicant learned from the respondent's Australian employers that she had terminated her employment in Queensland without notice. He says that he learned from the respondent's brother S., (who resided in Brisbane) that she intended to travel to Iran in the future. Why she would wish to do so is unclear. The issue did not arise in cross-examination.

7. On the 14th March, 2007, the applicant completed a questionnaire for the purpose of seeking the assistance of the central authority in Ireland. On the 29th August, 2007, application was made before this court (Hanna J.) seeking an order directing the respondent to surrender her passport to the court and restraining her from removing the children from the jurisdiction. That order remains in being. It was reaffirmed at the conclusion of this hearing. On 25th October, 2007, the children's passports were returned to the respondents' solicitor who has undertaken to retain them pending the determination of the proceedings.

8. The matter came before Finlay Geoghegan J. for directions on the 20th February, 2008. The respondent was granted liberty to serve and file a notice of cross examination on the applicant's affidavit. A similar order was made as against the respondent. It was ordered that a psychologist's report be admitted in evidence. This is referred to below.

9. On the 28th April, 2008, Finlay Geoghegan J. directed that the only objection to the order for return of the children which might be pursued at the full hearing was the respondent's defence of grave risk "that the return of the children would expose the children to physical and psychological harm or otherwise place the children in an intolerable situation" within the meaning of Article 13(b) (of the Hague/Luxembourg Convention). It was ordered that the respondent's case be presented first and that the cross examination of the respondent be during her own case and that the cross examination of the applicant be during the presentation of the applicant's case. Arrangements were made for the latter cross examination to be carried out by video link with Brisbane.

Conflicts in Evidence

10. In reply to affidavits filed by and on behalf of the applicant, the first affidavit sworn by the respondent consisted of some seventy five paragraphs. It dealt with a very wide range of matters arising from the total relationship between the parties. Only part of it deals with the issue which is necessary for the court to address. An exchange of very lengthy affidavits followed. The respondent was not then represented by her present legal advisors.

11. I would observe that affidavits in these applications should be confined only to matters which relate to the issues which are, or might reasonably be anticipated to fall within the scope of such hearing. The probable consequence of "widening" the issues (which occurred in this case) was a tendency to address extraneous issues under the guise of "credibility", which issues properly fell to be determined in full or interlocutory custody, access or maintenance proceedings. This observation applies a fortiori to the cross examination.

12. The evidential remit of the court is clearly identified under the Hague/Luxembourg Convention and the Council Regulation. The cross examination was largely (but not completely) a process of assertion or denial on both sides. It was of little assistance in advancing the case of either party save in one area, that of undertakings. This is dealt with later in the judgment.

13. I would not wish these observations to be interpreted as meaning that the affidavit sworn by the respondent did not raise issues which, if established, could be of critical importance to the welfare of the children. These included averments that: (a) the applicant

had been arrested for drug dealing and possession, violence and vandalism; (b) had habitually carried weapons including guns; (c) assaulted a police officer; (d) had been a heroin addict; (e) had been diagnosed as suffering from mild schizophrenia and drug addiction; (f) had family connections, now in Queensland who were engaged in 'black magic'; (g) was paranoid; (h) had trained dogs to attack on command; (i) had denied paternity of the children; (j) intimidated the respondent and verbally abused her; (k) admitted that he had shot a man; (l) sexually assaulted the respondent on a regular basis (on one occasion with a gun) threatening to kill her.

14. Specifically with regard to the children it was alleged that the respondent had ill treated them, rowed with the applicant in their presence, and subjected them to an over harsh disciplinary regime. This was said to be particularly so in relation to the older child, T. It was alleged the applicant had in the past verbally abused him, locked him in his room, and mistreated him. In cross examination the applicant denied that he had engaged in such inappropriate conduct. He accepted from time to time having physically disciplined the children.

15. The applicant avers that he was born on the 19th June, 1984, in Ethiopia. An issue arises as to his birthdate.

Matters not in dispute
16. The parties first met at high school in Brisbane in 1998. They began a relationship at the young age of fourteen years. Both came from unstable and insecure backgrounds. They continued attending high school until the year 1999. In the year 2000 they began residing together in a *de facto* relationship. They were aged sixteen years at that time. The applicant then worked in a factory. The respondent undertook an apprenticeship in an office. She then worked in childcare. They lived in a suburb of Brisbane. When in 2003 the applicant, the respondent and their first child T. travelled to Ireland for a working holiday, the applicant worked here as a federal security officer and the respondent as an administrator.

17. In 2004, Ra., the second child was born in the Rotunda Hospital in Dublin. He is an Australian citizen by descent. In December, 2004 the parties returned to Brisbane with the intention that the applicant would pursue a career with the Royal Australian Airforce. This project did not succeed. He undertook an apprenticeship as a boilermaker.

Name and age of the applicant
18. The respondent states that the applicant was actually born R. G. in Ethiopia on the 28th June 1982 and not on the 19th June 1984. If true, he would be twenty six years of age. She states that, (in circumstances unexplained) the applicant's mother changed his name and forward-dated his date of birth to "R. T." born on the 19th June 1984 in order to qualify for Australian citizenship. She says that when the applicant arrived in Australia in August 1995 he was thirteen years of age which would have exceeded the age limit for him to be put on an application form for citizenship if his original date of birth had been correctly made out. She says an arrangement was made for a birth certificate setting out a later date of birth. No details are provided as to the arrangements, or whether it was officially sanctioned or if it occurred, its consequences. This court is not in a position to make any finding on this point.

19. The respondent is an Australian citizen of Irish parents. Both her parents are natives of Co. Tipperary. Her parents separated when she was aged four. Her father now lives in the Philippines where he is remarried. Her mother lives in Dublin. She has a maternal half-brother, who is Australian, whom she has never met. Her paternal brother S. is said to live in Australia. Her youngest paternal half brother, Ti. lives in the Philippines. She has met him only on one occasion.

20. The following averments are recited in summary form as they do not relate to issues to be decided by this court, but form part of the background.

21. The respondent states that she was the subject of sexual abuse by a number of her parents' friends during childhood. This may have included abuse by her own father. She says she became involved with the applicant, while she was immature, that the relationship progressed rapidly while they were both in school, and that the applicant acquired a psychological dominion over her.

Where should this case be heard?
22. Were the allegations the respondent makes proved as a matter of probability in an Irish court after an appropriate hearing they would have a significant bearing on the issues of custody and access of the children. But there is a simple conflict of evidence on the affidavits. This Court cannot make any finding on these points where there is, as here, stark and unresolved conflict as to fact. Additional affidavits, sworn by friends of the parties, also conflict. In cross examination each of the allegations earlier outlined was met with strong denial. No additional material was placed before this Court which might assist in resolving these issues, many of which lie beyond the scope of this hearing. Only a trial before a court of competent jurisdiction in which evidence both in support or in rebuttal of these propositions is available, can finally resolve these questions, which obviously require urgent resolution. The obvious answer to how this dilemma should be dealt with is provided in the habitual residence rationale for the Convention and Regulation. *Prima facie* these matters should be resolved in Queensland, but this subject to the respondent's objection that to return the children to Queensland would expose them to a "grave risk" of psychological harm or an intolerable situation, (Act 13(b) of the Convention).

Psychological Reports
23. Mr. Eamon Butler, Clinical Psychologist, assessed the respondent. He furnished a report dated 5th October, 2007. What follows is the summary of his report. They are not the findings of this court, as they are in dispute. His only source of information was the respondent. He did not interview the children.

24. He says the respondent first presented for assessment in February, 2007. Her approach to him for psychotherapy followed from a recommendation by her solicitor that she access psychological assistance with regard to her situation. She had sought legal advice from her solicitor, having decided to remain in Ireland. The respondent informed Mr. Butler that she came to Ireland with her sons in 2006 to see her maternal grandmother who was unwell at the time. Her grandmother has unfortunately since died. When she was here for a number of weeks she decided not to return to Australia. Her reason for this was that she had wanted to be away from the relationship with the applicant for some time but could not leave. She said that the applicant had threatened to kill her if she ever spoke to anyone about what was happening in the relationship. She also said that he had threatened to kill her mother.

25. The respondent described the applicant to Mr. Butler as violent and controlling, a person whose moods can change without warning. She said she was terrified of his anger and that it was a constant feature of his personality and behaviour. She recounted how on one occasion he became so angry that it took a number of his relatives to restrain him.

26. She stated that having left the applicant she had come to enjoy not being "tortured every evening after work" and "not being bullied every day" by the applicant. She stated that the applicant was physically abusive in the name of discipline towards their sons particularly the older, T., who he beat frequently. She said that the applicant had been violent towards T. on the flight from Australia to Ireland in 2003. She stated that on occasions when she intervened in the boys defence she was also beaten. She said that she

could not even question the applicant without him hitting her. The applicant is also said to have frequently beaten the family dog which was chained in their back yard in front of the boys.

27. The respondent informed Mr. Butler that the applicant had always been a troubled man. She said he was removed from his mother by his father when he was one year old and re-united with her in Australia at the age of thirteen. He was again removed to care following the alleged re-emergence of violence. At the age of fourteen she said he spent some time in a rehabilitation facility for the treatment of heroin abuse during which time it was stated that he had been diagnosed as being mildly schizophrenic. She stated that he had two official dates of birth in the Australian system. She stated that on his 1982 date of birth he has a police record for possession of drugs and an arrest for violent behaviour towards a police officer. He frequently moved from site to site at work because of difficulty in getting along with co-workers.

28. The respondent said she first met the applicant at school when she was aged thirteen years. She began to date him at the age of fifteen years. She described him as being involved in drugs and weapons and being very possessive. She says the violence did not begin until she became pregnant. She described the applicant stating that he could hear voices in his head. The respondent described to Mr. Butler a series of violent incidents including the applicant grabbing her by the throat. She also described him applying pressure points on the neck, arms, shoulder and behind the ears of the children. She stated that he always had a gun in the house. She described one occasion following their youngest son's birth when she refused him sex. He is said to have responded by sexually assaulting her with the gun. He is said to have done this to another woman prior to their relationship.

29. The respondent described a further incident when the applicant threatened her with his gun and put it to the side of her head. She stated that on one occasion he had gone to a local park and held his gun to the head of a man who is said to have made enquiries about him.

30. She told Mr. Butler that when they lived together she was not allowed to have a key to their home, she was not allowed to know the code to the home alarm. She stated that the applicant had installed a CCTV into their living room and the kitchen. She stated that he wanted to extend it to the front door area and have the system linked to his car so he could monitor behaviour when away from the house. The respondent stated that the applicant had been evicted from his current residence. She says this might have the effect that he cannot rent again. As her name was also on the lease she has also been "blacklisted". Consequently she informed Mr. Butler neither he nor she can now easily provide the boys with a place to live in Australia.

31. None of the serious allegations as to conduct have been proved. Some were put to the applicant in cross examination. He denied them. In one affidavit he refers to many of the allegations as fanciful.

32. Mr. Butler reported the respondent had attended for appointments on eleven occasions. She had been slow to engage into the therapeutic process. She appeared slow to appreciate also that she had been in an abusive situation and did not have a clear perception of what had happened to her. She stated that she had stayed with the applicant because he had threatened to kill her if she left.

33. The psychologist commented that the respondent appeared to have had very little emotional support available to her. Her mother returned to live in Ireland when she was aged sixteen, leaving her behind in Australia with a year to finish school and a new baby to care for.

34. The respondent indicated to Mr. Butler that she was afraid of the applicant and was keeping her address secret. The Irish police had been advised as to the situation. She was fearful that she would again fall under his control were she to return to Australia. She said she was also fearful that she would again be subject to physical abuse so as to protect the boys, and terrified that the applicant would eventually kill her for defying him.

35. Mr. Butler's conclusions were based entirely on the applicant's narrative. He described the respondent's early family life as being suggestive both of abuse and neglect. Her descriptions suggested to him an absence of consistency of emotional support and appropriate guidance. Consequently she appeared to have moved seamlessly from this situation into her relationship with the applicant, pregnancy and cohabitation with him. Nothing in her early life, he states would have equipped her with the sense that the applicant's violent excesses were anything other than what was to be expected from life. Once the violent dynamic was established in the relationship, Mr. Butler considers that the respondent found herself entirely subservient to her partner and unable to escape his excessive control and domination. He commented:-

> "That she has been able to escape from the relationship is not typical of such situations and is commendable in its intent if not in its execution."

Mr. Butler comments:-

> "The impact of (the respondent's) alleged behaviour on her and her sons clearly suggests that he is an extremely dangerous man whose violence is most likely to continue and, if allowed to do so, would have long term and possibly fatal consequences for her and the children."

All these comments are based on his contact with the respondent. They do not represent the view or conclusion of this Court. Mr. Butler does not appear to have spoken to the children as to their attitude to their father.

36. An affidavit sworn by Patricia English, Consultant Psychologist, deals with T.'s levels of cognitive ability. He is experiencing difficulty in the school curriculum in Ireland. He is now repeating senior infants as he does not know the junior infant programme. His mother reported a considerable improvement in T.'s speech since they moved back to Ireland. T. has problems with memorisation, concentration and aspects of speech and spatial awareness. His mode of development is reported to be improving but is still underdeveloped. His concentration is average in familiar tasks but very poor on new material. He is reported to be mostly obedient in class but can be distracted at times. He has very limited knowledge of letters and has no sight words. He is easily influenced by rowdy, giddy, behaviour and has great difficulty using the class textbooks due to lack of spatial awareness including inability to distinguish between top and bottom of a page. T. appeared to have difficulty following instructions and his vocabulary appeared to be limited. It was observed that his pencil grip did not appear to be well developed. In performance tasks he did not appear to be able to manipulate pieces with ease and had difficulty understanding what was asked of him despite visual demonstrations been given. In a word-reading test he told the examiner he did not know how to read; his verbal tests are very considerably below average as are his performance tests. In a wide range of tests, his IQ score appears to be between 60 and 64 and these results are described as being exceptionally low. Overall results indicate that T. is currently functioning within the mild general learning disability range of cognitive ability.

These matters were not put in issue. Ms. English does not report on the children's attitude to their father.

37. The applicant attributes T.'s slow language development to the fact that in Ireland, English is still spoken with a different accent, that he was being raised bi-lingually in English and Amharic and that it is unsurprising he would have difficulties in lessons in the Irish language.

38. While the parties began living together when they were sixteen, and are now twenty three years, affidavits do little to describe the sequence of events or evolution of the relationship. Some of the alleged incidents are not dated. Their contents are recorded here without any finding by this Court.

Further Affidavits
39. A number of other affidavits have been sworn and filed.

40. The first, in support of the applicant is that of I. O. Mo. She states that she had known the applicant, and the respondent from the time they returned to Australia from a year in Ireland. This would have been in the year 2004. She says that she had continuously seen both the applicants throughout that period until the respondent's departure. She describes the applicant and respondent on their return from the year in Ireland moving into a house in which she and her partner J. R. stayed with them for a period of four to six months. During this period the respondent's mother paid an extended visit when her son S., the respondent's full brother, was released from prison in Brisbane. At this point Ms. Mo. and Mr. R. found their own accommodation although they continued to see the applicant and respondent frequently as often as every day.

41. Ms. Mo. states that she frequently witnessed episodes between the respondent's mother, her brother S., his girlfriend, the applicant and respondent. She says that on such occasions the applicant's response was to leave the house to escape the tension. The affidavit suggests that one of the sources of disharmony between the applicant and the respondent was the presence of the respondent's mother in the house. She stated that the respondent had volunteered to her that such domestic disharmony had invariably been instigated and fuelled by her mother. After the respondent's mother's departure, the applicant and the respondent moved into a new house across the street from Ms. Mo. and Mr. R. She states that she saw the respondent both alone and with her partner. The respondent told her on a number of occasions that her relationship with the applicant was not always ideally happy; but she also said that she firmly intended she would remain with the applicant at least until the children were grown. Ms. Mo. states:-

> "At no time during the period J. and I lived with the respondent, the applicant and the children in their house or at all, did I see any signs that the applicant had physically or mentally abused the respondent or the children in any way."

She adds:-

> "At no time did I see any indication that the children were in any way uncomfortable with the applicant. They were cheerful and happy children who frequently demonstrated their affection for their father as he did for them."

In addition she deposed:-

> "At no time, right up until the respondent and the children departed for Ireland did she give any indication that she had any intention other than to return them home to Brisbane immediately after her visit with her sick grandmother."

She concluded:-

> "When she departed her words of farewell were to the effect that she would see us when she returned some few weeks hence. Indeed she asked what gift she might bring me on her return."

42. The affidavit of J. R. is in similar terms. He adds that on several occasions the respondent and he reminisced about their adolescent years and that the respondent frequently mentioned that both she and the applicant were calmer and happier since the children's birth. He states that at no time did he see any signs that the applicant had physically or mentally abused the respondent or the children in any way or that the children were uncomfortable with the applicant. To the contrary they openly displayed love and affection for them.

43. In response there is an affidavit from C. G. who resides in New Farm in Queensland. She states that she has known the applicant and the respondent since 1997 having had a close friendship with the respondent during primary school. She describes a female friend having been involved in a relationship with the applicant prior to the commencement of the relationship between the applicant and the respondent. This female friend appears to have informed her that the applicant had sexually assaulted her with a gun. She states that the applicant later told the deponent personally that he had carried out a sexual assault of this nature. He had also brought the gun to school with him a few times. She saw it was a handgun. The applicant told her that he had sold a few handguns at school. She states that at the start of year 10, that is 1999, the applicant and the respondent started dating. The applicant was rarely at school. He was apparently at that time living in emergency housing having been thrown out of his home by his mother. Ms. G. describes the applicant in school smoking marijuana, taking "speed" and injecting heroin.

44. The applicant and respondent ultimately obtained permanent housing in 1999 and they moved in together. Ms. G. describes being with the applicant in 2002, when they were in his garage. He moved some things around and she states that she that she saw glass pipes with white residue in them with black burn marks on the bottom of them which she took to be crack cocaine pipes. She states that the applicant offered to sell her stolen property. On the last year of school in Queensland, (2001) she describes the applicant coming up to her pointing at gun in her back and saying "don't move bitch" and yelling "bang". She describes this as being a terrifying experience.

45. She states that on one occasion she encountered the applicant with others, with a bandage wrapped around his wrist and his hand. The applicant told her that the respondent had taken T. with her to stay in her dad's house. The applicant apparently stated that he had tried to kill himself to stop the respondent from leaving him and had cut his wrist and sliced his hand. She describes other alleged abuse of incidents prior to the applicant and the respondent leaving for Ireland in 2003 and returning in late 2004. The deponent states that the applicant showed her photographs of T. in Ethiopia. There were a large number of photos of him holding different types of guns including rifles and machine guns. She describes the applicant and respondent living at a home in Redbank Plains. The house had a security pin. The respondent was unable to enter the house as she did not have the security pin and on occasion had to wait outside with the children. She describes the applicant speaking to the respondent in a rude and humiliating manner on a number of occasions. Ms. G. states that approximately two months before they left for Ireland she saw a big bruise on T.'s inner right arm which the respondent had attributed to the applicant. She also describes the applicant alleging that he had

stabbed his brother W. with a knife.

46. Ms. G. states that in late January 2007, she received a text from the respondent stating that she was not coming back. She telephoned the applicant. He was very angry. She states they spoke for about ten minutes during which time the applicant made graphic threats to the life of the respondent. She states that during another telephone call the applicant kept asking her questions about what she was doing about the Irish Court case and that the applicant had said to him that if she got involved she would be sorry. She felt threatened by this. In a statutory declaration also filed in these proceedings, which largely corroborates the contents of the affidavit, Ms. G. concluded:-

> "As far as I am concerned, the respondent and her sons are better off without the applicant."

The affidavit does not date some of the alleged incidents.

The cross examination of the applicant
47. While I cannot draw conclusions on the basis of the stark conflict in the affidavit evidence, a rather different situation obtains in relation to certain other evidence, material to this application, relating to the circumstances in which, an order if granted, might be affected.

48. I permitted a number of more general questions to be put, as they related to issues which might be the subject matter of undertakings which might be given to the court by the applicant in the event of acceding to his application.

49. One of those issues would clearly be the financial support available to the children, and in particular whether there would be funds available to support the respondent and the children pending the resolution of proceedings in Queensland.

50. While the respondent was previously in employment the question must now surely arise as to how she and the children would be supported during the pendency of legal proceedings in Queensland. No such proceedings have yet been initiated. These will take some time as legal proceedings always do. Some information is available as to the manner in which the Queensland Child Support Agency operates. That information is by no means full.

51. As I understand the position, in the event of an order being made there would be available to the respondent and the children an income supplement over and above what may be contributed by the applicant to them for subsistence.

52. When cross examined the applicant stated that he was in the business of importing and exporting. He stated that he imported goods to Australia such as electronics and car parts, and that he sent products to Africa and that these activities should be "going on" shortly. He said "what I do to survive right now is I import goods to just Brisbane and I sell them in the markets as well as importing it to shops and supplying to customers". The respondent said that he was trying to export medicines to China and that he was seeking to import/export electronics to Ethiopia. When asked specifically for what goods he presently held orders, he replied laptops and phones. He named one customer in laptop computers. He stated that he had another person, who had a shop, who wanted him to import some watches and glasses. This person was not named. The applicant also stated that he had other friends who wanted to get him products, although this was not now making him money. He was vague as to the herb exportation project to China.

53. While one must be guarded and tentative at this stage, I was unable to form the view that the applicant was engaged in an established business yielding anything like a significant income, or sufficient in itself to support the respondent and the children (even temporarily) in Brisbane, pending a court hearing here.

54. These concerns were not assuaged when it came to a consideration of any undertakings that the applicant might make in these circumstances. For the purpose of calculation, two Australian dollars were taken as the (very rough) equivalent of one euro.

55. The court was first informed that the applicant was offering support in the amount of €150 per week pending an application to the Child Support Agency during which time that agency could ascertain whether or not that would be appropriate amount. This was subsequently clarified. The offer was actually in Australian dollars. There is a significant difference. I did not form the impression that this issue had been adequately addressed by the applicant. There was no evidence adduced on any funds which might be available to the respondent herewith in the event of an order being made.

56. The court was informed that Mr. T. was in receipt of welfare of $340 weekly, supplemented by $300 income from his business giving rise to a total income of $600 Australian dollars per week. Thus, in euro the applicant's income is approximately €300 - €400 a week from all sources. From this the applicant first undertook to pay $150 Australian per week for the respondent and her two children that is in euro the sum of €75 out of a total income of €300. I considered this first offer inadequate.

57. The court was informed that the applicant has rent to pay. This was not quantified. The applicant was also said to be paying back a debt of $38,000 Australian dollars incurred by the parties. It is not said on what rate of repayment. No evidence was furnished to the court as to how long it would take to make an application to the Child Support Agency. There is no information available to the court as to where the respondent and children might live pending the outcome of any proceedings in Queensland.

58. The court adjourned to allow the applicant to give further instructions to his solicitor and counsel by video. He improved the offer to $200 Australian dollars a week, that is, approximately €100. There was no evidence of his other commitments. The concerns which I have regarding care and uptake of the respondent and children pending hearing in the event of an order for their return to Queensland have not therefore, been dealt with.

59. The court was informed that it would take approximately two weeks to process an application through the Child Support Agency. There was no evidence as to how, precisely, the respondent and the two children would live during that period. It may be the respondent has funds or that her family may be in a position to help. She is presently working part time in Ireland. She receives lone parent allowance and has a mortgage-free house available to her, free of rent. This was from her mother and her mother's husband in Co. Tipperary. She receives a lone parent allowance of €250 per week. She also earns an additional €100 a week, while looking after two small children. Her total income at present is therefore €350.00, or $650 Australian dollars per week.

60. So far as the applicant was concerned, it was for the respondent to apply for accommodation through the social services in Queensland for this purpose. His adoption of this position may have been because in any negotiation the respondent refused to countenance the possibility of returning to Queensland at all.

61. If the respondent's allegations are found to be groundless that is matter which may be dealt with in the Queensland courts. If on the other hand, her apprehensions are well founded, she and the children would deserve to be properly protected and accommodated pending the outcome of any hearing. I have no information as to the potential elapse of time between the initiation of court proceedings in Queensland and the determination of custody access and maintenance on either an interlocutory or permanent basis. The respondent has undertaken to pay the children's airfares. As a general principle I think the court in such circumstances should err on the side of greater caution, is to say to adopt the course which minimises or reduces risk to the children.

Grave Risk

62. It is now necessary to consider the sole legal issue to be tried, that of 'grave risk'.

63. Article 13(b) of the Convention provides that the requested State is not bound to order the return of the child if the respondent establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place a child in an intolerable situation. There is a high evidential threshold.

64. In the leading case of *A.S. v. P.S.* [1998] 2 I.R. 244, the Supreme Court ordered the return of children to England and Wales even notwithstanding an issue that the father had abused one of the children. The court found that while there was a grave risk of danger to the children if they were returned to the care of their father, there was no such risk in returning them to the jurisdiction of England and Wales where there are well developed protected mechanisms. The test for a grave risk is an extremely high one. Denham J. observed at p. 259:-

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

The purpose of the Convention is clear; it is that these issues should be determined in the place of habitual residence save in very exceptional circumstances.

65. The habitual residence of the two children is the State of Queensland. Just as the Supreme Court in *S. v. S.* considered that in the jurisdiction of England and Wales there are well developed protective mechanisms, equally (this court may take judicial notice) these are to be found in Queensland. It is necessary then only to address again one simple question: Where can the serious issues which so urgently require to be resolved be best dealt with? The question allows for only one answer, that is, in the jurisdiction which allows or affords the greatest opportunity for sufficient evidence to be called to make a determination as to the validity of the case as advanced by the applicant and the respondent. This practical conclusion is of course without prejudice to the policy considerations outlined in the Convention and Regulation which lay down the duty of the court.

66. The height of the evidential threshold in grave risk cases is demonstrated in *R.K. v. J.K.* [2000] 2 I.R. 416, where Barron J. quoted with approval at p. 451 the following passage from *Fredrick v. Fredrick* (1996) 78 F. 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. This is a very high threshold."* Emphasis added.

67. Although not cited, these two authoritative decisions are illustrative of the evidential requirement to be met.

68. There is no doubt that the respondent's case raises very substantial issues regarding the conduct of the applicant. These issues relate not only to the respondent herself but also to the children. However, no specific psychological or psychiatric evidence on the key issue of the extent or risk to the children in the context of their father has been addressed, save Mr. Butlers report which focuses largely on the respondent. This ommission is surprising in that the welfare of the children is to be a prime consideration.

69. In *O'D v. P.B.* (Unreported, High Court, Quirke J., 31st July, 1998) Quirke J. dealt with a situation where the respondent mother testified that she was in fear of her life of the applicant and that she was convinced that the applicant would kill her if she returned to the United States. She refused to return to accompany the two children in the event of an order for a return to the requesting State. She adduced evidence from a consultant psychiatrist the effect of which was that the return of the young children to the United States, unaccompanied by their mother, would certainly give rise to a grave risk of serious psychological damage. In *O'D.*, Quirke J. observed that the United States courts were "better equipped to make fully informed and comprehensive decisions relating to the children's welfare and custodial and other interests than the courts within this jurisdiction". That judge observed that when considering the 'grave risk' argument the court is not concerned with the interests, health or welfare of the plaintiff or the defendant except in so far as such matters may have a bearing upon the psychological health of the two children and that in deciding the issue it is solely concerned with the interest, health or wellbeing of the children. It is noteworthy that in the Supreme Court decision in *E.M. v. J.M.* [2003] 3 I.R. 178 Denham J. again reiterated that "the grave risk exception arising under 13(b) is one that should be strictly applied in the narrow context in which it arises." That judge expressly approved the analysis of the defence cited by Barron J. in *R.K. v. J.K.* and derived from the American test of *Friedrick v. Friedrick*.

70. *On the evidence*, I am unable to conclude that a grave risk of harm or intolerable situation would arise such as would put the children in imminent danger or an impossible situation prior to the resolution to the custody dispute such as the circumstances identified in *Friedrick* such as a war zone, famine or disease. There is no evidence at all that the courts in the country of habitual residence would be incapable or unwilling to give the child adequate protection. The onus lay upon the respondent on these issues.

71. It was submitted that T. might be less robust to withstand an intolerable situation or harm. However there is no evidence before the court in support of this contention. The evidence is that T. is functioning within the mild general learning disability range. The question as to whether he would be less robust to withstand an intolerable situation or harm than a child with normal I.Q. is simply not addressed in the reports, which do not deal with the childrens attitude to their father in any detail.

72. A further indication of the evidential threshold may be gleaned from the observation of Geoghegan J. in *S(A) v. H(E) and H(M)*

[1999] 4 I.R. where he observes that:-

> "In a large number of convention cases an order for return could result in some psychological harm. It is a question of degree. It is well established by the authorities that article 13(b) is intended to cover only serious psychological harm…"

73. The evidence adduced by the respondent simply does not approach the level required. I conclude that there is no sufficient basis for a claim that article 13(b) applies in these circumstances. While there is evidence from the respondent and C. G., she is a friend of the respondent. It is disputed. There is no independent psychological evidence to support the respondent's claims as to the children. Mr. Butler report is entirely reliant on the respondent as to its content. Some of his considerations are unjustified in court. The respondent did not support any of the matters put in cross examination with any appropriate medical evidence, or by material from a police or legal authority in Queensland. No corroborative evidence from these sources have been adduced. Such evidence whether it favours the applicant or the respondent would of course be available in Queensland.

74 The respondents referred to the decision of the Family Court of Australia sitting in Brisbane in the case of the *Director General, Department of Families v. RSP* (2003) FLC 93 – 152. but there the facts were quite different. In RSP the mother produced evidence from a consultant psychiatrist and psychologist from which Warnick J. found there to be a real risk that if the child, SSP, was returned to the United States the mother would commit suicide. There was thereby a grave risk of psychological harm to the child. Whilst ordering that the child should not be removed to the United States, Warnick J. commented:-

> "I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoptional stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern cannot be to disregard evidence, but rather to scrutinise it with great care."

75. The central authority appealed this decision. Dismissing the appeal the full court held that the trial judge had been entitled to accept *the unchallenged and only evidence of the harm to the child that might follow a suicide by the mother* and then to go on to conclude that there was a grave risk of psychological harm to the child. There is no such evidence here at all. It is not suggested there is a suicide risk in this case.

76. The upper court added that it accepted that there may well be cases where the imposition of conditions upon which the return of a child is to occur would be a proper exercise of the discretion, notwithstanding that a case of grave risk might otherwise have been established. However, SSP was not such a case. Here it is different, I consider conditions in the form of undertaking can assist the solicitor.

77. For the reasons I have outlined, I have to accede to the application, but will have regard to the well established principles as to undertakings as to conduct, welfare and support.

78. I formed the strong impression that the applicant had not given sufficient thought to the financial and other arrangements which would be necessary were the respondent to be directed to return to Queensland. This impression was in no way diminished by the fact that it was necessary (more than once) for the applicant to furnish further instructions to his Irish solicitor and counsel during the course of the hearing. To allow this, it was necessary to adjourn on a number of occasions. I do not think that matters of this importance can or should be determined "on an ad hoc" basis.

79. This overall vagueness and lack of clarity must be one of the balancing factors to which this court will have regard in its determination, not as to the form of the order, but its timing and circumstance, in other words when and how.

80. In applying a precautionary principle, and for the purposes of the formulation of the orders, I consider that on balance, this court should (without in any way reaching a conclusion) proceed for the moment upon the tentative basis that the respondent's account may be probable. But it is not proved. The undertakings given are to minimise risk. The matter thereafter falls within the jurisdiction of the Queensland courts.

81. For the moment (and having regard to that part of the applicant's evidence upon which this court can make a determination) the path of greater caution in the interests of the children is to ensure that if there are to be legal proceedings, they are conducted with minimal risk, and with similar undertakings in Queensland pending a hearing there.

82. I will grant a declaration that the respondent has wrongfully removed the said children from the place of their habitual residence into the jurisdiction of the Courts of Ireland within the meaning of article 3 of the Hague Convention. I will further grant an order pursuant to article 12 of the Convention for the return of the children named in the title hereof in the company of their mother to the place of their habitual residence, that is to say, the Australian State of Queensland. I propose to place a stay on this order for the purposes of securing the welfare of the children named in the title. There will therefore be

> (a) A stay on the making of the order until there is full compliance the undertakings made by the applicant as to the airfares, that is to say a payment into this court of a sum of money sufficient to permit the purchase of air tickets for the children.
>
> (b) Evidence as to a timetable for proceedings in the Queensland Courts.
>
> (c) Evidence in relation to suitable accommodation for the respondent and the children in a protected location in Queensland pending a court hearing.
>
> (d) Suitable evidence that there will be available maintenance whether from the applicant or from the Child Support Agency or herself which will be sufficient to provide for her and the children pending the resolution of the urgent issues.
>
> (e) an undertaking from the applicant both here, and on a similar basis in the Queensland Court in proceedings between the parties, not to attend or molest or disturb the respondent or the children at any place pending any further order from the Queensland Family Court. It will be necessary to institute proceedings in Queensland for the purpose of that undertaking. This condition of course can in no way bind the jurisdiction of the Queensland Family court once it has seisin of the case.

83. The situation in the instant case will require the applicant to satisfy this Court that these, and all other necessary arrangements, have been put in place for a speedy trial in Queensland, at least on an interlocutory basis. When all these matters have been put in hand I will then remove the stay. Pending these issues being resolved I will continue the injunction against the respondent (granted

previously) restraining the respondent from taking the children out of the jurisdiction.

84. Notice of the making of this order will also be brought to the attention of the passport office and the Garda Síochána in the locality in which the respondent presently resides in order to provide assurance on the question of application for other passports.

85. I will grant liberty to apply when these matters have been dealt with.

86 I will direct that a copy of this judgment be made available to the parties' legal advisors in Queensland for the purposes of applications to the court there.