THE HIGH COURT

FAMILY LAW

[2019 9 HLC]

IN THE MATTER OF THE CHILD ABDUCTTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991, AND IN THE MATTER OF THE HAGUE CONVENTION, AND IN THE MATTER OF ASHLEY AND ROSEMARY (CHILDREN)

BETWEEN

AA

APPLICANT

AND

RR

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 24th day of May, 2019

1. The applicant and the respondent are married. They are the parents of two children aged almost four years and nineteen months respectively. The parents married, had their children and lived together in Canada up to the 24th February, 2019.

2. On the 24th February, 2019, without the applicant's consent or knowledge, the respondent brought the children to Ireland. She did so at a time when there was a court order from [a province] in Canada preventing her from removing the children from that jurisdiction.

3. The applicant brought these proceedings seeking relief under the Child Abduction and Enforcement of Custody Order Act, 1991, by special summons dated 15th March, 2019. The proceedings were heard on the 3rd May, 2019 and 7th May, 2019. The Court was assisted by helpful written and oral submissions of counsel for both parties. Judgment was reserved.

4. There is no dispute in this case that the children were habitually resident in Canada at the time they came to Ireland. The respondent does not accept however that her removal of the children to Ireland was wrongful within the meaning of the Hague Convention on the Civil Aspect of International Child Abduction ("the Hague Convention").

5. Counsel for the respondent also submitted that there is a grave risk that the return of the children would expose her and the children to physical or psychological harm or otherwise place her (as primary carer) and the children in an intolerable situation. In oral submissions, the respondent placed most emphasis on the risk of her being placed in an intolerable position on the return and therefore placing the children in an intolerable situation.

Wrongful Removal

Exercising custodial rights?

6. The respondent did not accept that the removal was wrongful because she said that at the time of the removal on the 24th February, 2019, the applicant was not actually exercising his custodial rights. This arose in circumstances where the respondent had made an allegation of assault against the applicant on the 21st February, 2019. The applicant was arrested. Later on the same date, the applicant entered into an undertaking at the police station in order that he may be released from custody. That undertaking included an undertaking to abstain from communicating directly or indirectly with the respondent and with the children. Those criminal charges were not proceeded with subsequently.

7. As the applicant was effectively precluded from exercising custody rights, the respondent submitted this was not a case which comes within Article 3 of the Hague Convention. Article 3 requires that custody rights were actually exercised at the time of the purported wrongful removal.

8. Article 5 of the Hague Convention states that for the purposes of the Convention:

> *"rights of custody" shall include rights relation to the care of the person of the child and, in particular, the right to determine the child's place of residence."*

9. Counsel for the applicant and the respondent both referred to case law establishing that the courts will take a liberal view as to what will constitute the exercise of custody rights. The Hague Convention requires demonstration by a parent that he or she either did, or attempted to, maintain contact or a relationship with the child.

10. The facts of this case are that the parties were married, an incident occurred in November, 2018 which caused a rift between the parties, proceedings were instituted by the applicant and still in being at the time of removal of the children that included matters of care/custody for the children, at the time of the giving of the undertaking to the police in order to gain his release from custody, the applicant did not waive or expressly indicate that he was ceasing any attempts to maintain contact or a relationship with the children. On those facts alone it can be seen that the applicant was actually maintaining a relationship with the children. As a matter of law, the applicant had rights of custody over the children within the meaning of the Hague Convention.

11. Moreover, in this particular case, the applicant had also obtained an order preventing the removal of the children from Canada. That order remained in place at the time of his arrest and his release on the undertaking. He was therefore still exercising the right to determine the residence of the children and thus had rights of custody.

12. In all of those circumstances I am satisfied that there has been a wrongful removal of the children.

Grave risk

13. The respondent's defence to these proceedings is that a forced return to Canada would leave her in an intolerable situation. She submitted that by extension this would lead to an intolerable situation for the children. The respondent set out in a very lengthy affidavit, the history of the relationship, the history of the marriage, the relationship of both parties with the children, the genesis of

the martial breakdown and details of the proceedings in Canada prior to her wrongful removal of the children. The applicant filed his own affidavit in respect to that. In the affidavits claim is met with counterclaim. The nature of these proceedings does not permit or require the Court to decide on most of these points of contention.

14. In the course of the respondent's affidavit, she set out in fifteen bullet points what she said would be the primary reasons as to why it would be intolerable to return her to Canada. These reasons overlap to a large extent. Her objections are that she would be financially destitute on return, she would have no legal aid in circumstances where she cannot afford legal representation, she will be prosecuted on her return and that the applicant would be the one in theory left with the children, the applicant is unfit to care for the children and that she and the children have suffered, and will, suffer psychologically and physically by virtue of the actions of the applicant and can only be safeguarded by remaining in Ireland with the support of her family. In submissions, she raised issues about her own deteriorating mental health and the effect of return on the children.

15. The respondent also claimed that the totality of the circumstances of the case meant that it would be intolerable to return the children. The Court intends to deal with the grounds individually and then deal with the issues arising out of this claim that cumulative factors amount to a grave risk that the return would be intolerable for the children.

Relationship history

16. The respondent is an Irish citizen born of non-resident Canadian citizens. She lived in Ireland from 1985 up to September, 2009. At that stage she travelled to Canada following the financial crash and major downturn in the Irish economy. She met and fell in love with the applicant in October, 2010. The applicant and the respondent married on the 1st February, 2014.

17. The respondent went back to education in 2013 and acquired a qualification. She worked up to the birth of the first child and thereafter took various time off in respect of child care and pregnancy. She set up and ran her own successful home based practice which provided a modest income. She was in work from January, 2018 and continued to work up until February, 2019.

18. The applicant pursues a career in what may be widely acknowledged as being in the artistic field. Prior to the birth of their first child, he gave up employment to pursue his career full time. It appears he also uses the family home for the purpose of his career. He appears to have little or no income and the family has been supported by his mother. The applicant and respondent are in dispute about the time he spends away from home each year. From the applicant's affidavit the total period of time was between 45 and 83 days a year away from home. These were shorter periods than indicated by the respondent. On occasion the respondent would join him in a particular location.

19. The applicant and respondent jointly own the family home save for a 1% share by the applicant's mother. The family home is subject to a mortgage. The applicant's mother is a co-signee on the mortgage and a share in the home was required for that purpose. There is, according to the respondent, a mortgage of about $269,000. The respondent exhibited an email to her mortgage adviser where she stated the house might sell for $450,000 leaving an equity of about $190,000.

20. The trigger for the breakdown appears to be that in or around the 23rd November, 2018, the respondent caught the applicant using Grindr, an app she described as being "*to facilitate hook-ups for casual and anonymous gay sex*". The respondent claimed that the applicant initially denied this, and accused her of being insecure and paranoid. She said that this was an example of his emotional and controlling behaviour towards her. She said that the applicant eventually admitted to what she had suspected. She said he tried to excuse this on the basis of intoxication and that he was using it as a form of role play or fantasy. Apparently, the applicant had disclosed to her early on in their relationship a past involving anonymous gay sex, drug and alcohol addiction in addition to negative interpersonal relationships.

21. The respondent claimed that the applicant had been physically aggressive towards her during their relationship. She gave two instances only of his alleged physical aggression. On the first such incident on the 26th November, 2018, it appeared that she asked the applicant to leave the house due to his above behaviour. She said that the children were sleeping upstairs. He refused to leave and the situation became very confrontational. In a moment of feeling completely helpless and intimidated she reached down to grab a plastic doll's house with the intent of throwing it to the floor. She said that the applicant lunged towards her jumping up and over a couch that separated them, and with a downward action of both arms, he smashed the doll's house out of her hands. She said that she suffered an injury to the top of her hand on the middle finger. That incident was not reported to the police as she said she was emotionally distraught.

22. The applicant's version is quite different. He said he was in the basement of their home and received a text telling him to get out. When she came down to the basement, she appeared to be under the influence of alcohol. She engaged in an emotionally charged conversation in which she demanded he leave the family home. At one point the respondent ran towards a table which was between them and picked up a doll's house and prepared to strike him with it. He raised his arms in a defensive position and deflected her in a downward blow. He said she repeated the action with a second doll's house and he similarly deflected it to the ground. From his perspective it was not apparent that she was struck by either object during the incident. On the other hand, he said he was struck twice in the forearms as he attempted to protect his face. He said that following that incident he called his mother and the respondent called her father and he spent the evening in a hotel.

23. The other incident of alleged violence, occurred on the 21st February 2019, at the end of the period of time in which the applicants were residing together. The respondent was seeking to leave the house. There was a confrontation and she told him that they would not be home that night and were going to a hotel. The applicant said "*You're not leaving; I'm taking the car".* He ran past her out the door and in the course of that, assaulted her, using force to block her from getting into the car. She said that he traumatised the older girl by trying to pull her out of the car through the window. She said the daughter was upset and was yelling "*Please don't take me out Dad*".

24. She said that she was going to call the police and the applicant's response was "*Go ahead, I'll just give them my lawyer's card".* She called the emergency services on 911 and in the meantime the applicant had called his lawyer while standing beside the car. She said that the police attended within a short period and the applicant was arrested for assault. He was bailed to appear on the 7th March, 2019 with conditions not to contact her or the children. The applicant called the respondent's allegation of assault a fabrication and that there was only a brief incidental contact when she brushed by him as he walked to the car. He said that he never attempted to remove his daughter by pulling her through the car window.

25. Prior to that incident, with the consent of the applicant, the respondent had spent Christmas 2018 in Ireland with the children and her family. On reviewing all of the evidence in the case, it appears that the respondent was on antidepressants for some time, apparently going back to 2010. It appears that she attended her GP a couple of days after the incident in November 2018, and received medication for stress and anxiety. The detail of that medication is not apparent from the report. The respondent has made

claims about the applicant's mental health, but it appears that at least one of the messages that she relied upon was actually a response to a statement she had made concerning her own ongoing depression.

26. The respondent now claims that as the applicant is a chronic abuser of drugs and alcohol, he is an unfit person to care for the children. That is strongly denied by the applicant and he also said that the respondent drank with more frequency than he did during the relationship. It appears that prior to the breakdown of the marriage in November, 2018, the respondent was aware of, and had not been particularly concerned about, the applicant's use of certain drugs, cannabis, (now legal in Canada) or magic mushrooms. Both parties rely on affidavits they exhibit from friends/neighbours who attest to certain behaviours but, as none of these persons were available for cross-examination, the parties and the Court have treated these as inadmissible hearsay.

27. The respondent claimed that the children changed since January, 2019. She was also trying to wean the youngest child from breastfeeding but the tension in the home caused the youngest child to need to nurse more.

28. The respondent made lengthy complaints about the applicant's financial dealings with the money in their shared accounts. She complained that the applicant "maxed out" the overdrafts of the shared bank account on the day he was released from the bail conditions. She said that he also changed their Netflix password and was doing everything in his power to cause her stress. The financial dealings between the parties are in dispute. It appears that the applicant has little income and the respondent's income is relatively small and dependent on using the home as her base for offering [professional] services.

Legal proceedings in Canada

29. While the respondent was still in Ireland, she applied for legal aid in [a province] in Canada. She did so because she had decided at that point that the marriage had broken down and that exposing the children to the applicant's risky behaviour and mental health decline was no longer something she could do. Legal aid was initially declined as she was not in the home with the applicant at the time she applied.

30. The applicant instituted proceedings for divorce at the Supreme Court on or about the 11th January, 2019. In that application, the applicant sought an order of joint custody and equal access. He also asked for an equal division of family property and family debt. The applicant is legally represented in these proceedings. His legal fees are apparently being paid by his mother.

31. Apparently unbeknownst to the applicant, the respondent had filed an application as a lay litigant to [a Provincial] Court on the 9th January, 2019 seeking a protection order and leave to live in Ireland as a result of the applicant's behaviour. The respondent said she had filed this application on the advice of a lawyer at the Justice Centre in (a place in Canada). She had been advised by the same lawyer to appeal her legal aid decision, as she should be covered for her family law matter given there was a safety concern and previous violence.

32. On the 15th January, 2019, she was approved for legal aid to cover family law matters and found a lawyer to take her case, because of the work she had done in advance. She said that she had to call almost every lawyer in (a place in Canada) before she found one lawyer accepting legal aid cases. The evidence before the Court indicated that a person gets approved for legal aid, but then has to find a private lawyer willing to accept legal aid cases. Furthermore, there are a limited number of hours of legal aid to which a person is entitled.

33. She said that she was advised by her legal aid lawyer not to proceed with that application and he indicated that he would instead seek "*interim sole possession of the matrimonial home"*. She said she trusted her lawyer and followed his advices and therefore did not serve the application on the applicant. She said she had been assured that the lawyer would take care of withdrawing the application but apparently this was not done.

34. On the 14th January, 2019, the applicant sought and obtained from [a Provincial] Supreme Court, an *ex parte* order preventing the respondent from taking the children out of the jurisdiction and preventing the sale of the house until he agreed. The respondent complained that she was not given notice of the application prior to that even though the applicant was fully aware of where she was living. According to the respondent, the applicant's action in seeking these orders was malicious.

35. When she received that order on the 15th January, 2019, the respondent said she felt effectively trapped in Canada and in a home with the applicant. She immediately packed a bag and left for a friend's house with the children. Within an hour of leaving she had received another email from the applicant's lawyer, a "*cease and desist*" email with advice on how she should conduct herself around the applicant and their children and not to post anything publicly that would defame him. She said that she found the lawyer's insistence on serving and communicating with her irrespective of whether she had a lawyer, intimidating and very depressing.

36. It appears that on the 21st January, 2019, the respondent's lawyer offered the applicant a consent agreement that included him vacating the family home. This was rejected by the applicant. The respondent claimed that the manner of rejecting it was done solely for the purpose of exhausting her legal aid hours.

37. The respondent said her application for "sole possession of the matrimonial home" on an interim basis came before the Supreme Court on the 14th February, 2019. The Supreme Court rejected her application and her appeal the following day. The respondent claimed her application and appeal were rejected because the applicant had been the one to file first for divorce proceedings so she would have wait until after 1st May, 2018 before she could apply for anything. It appears from the exhibited document from the court's registry that the reason given for the rejection was due to the case being assigned to a JCC (which is understood to be a judicial case conference), as a JCC was considered to be well suited to determine the issues raised. The parties were directed to seek an early JCC date. A further order then stated that: -

> *"The notice of family claim was filed by the husband Jan 11 2019. The wife did not commence the proceedings. By the time the applications she seeks is able to be heard within the time limits of the rules, the JCC date will be close at hand".*

38. It appears to this Court, that the order was simply stating that the judicial case conference would be heard almost as soon as any application for interim relief would be heard. In the observation of this Court, there is nothing particularly surprising by that turn of events. A court is entitled to decide the question of urgency in respect of matters before it.

39. The respondent said that in a desperate attempt to get some space, peace and safety in the family home, she made one final attempt to be heard by the courts and filed as a lay litigant due to exhaustion of her legal aid for a protection order at [a Provincial] Court. She said that the judge saw her briefly on the 19th February, 2019 but adjourned her application to the following day and she had to notify the applicant and his lawyer, who appeared in court. The respondent complained that she was not given an opportunity to present her case. She said that her case was dismissed out of hand simply on the basis that the substantive proceedings were

before the Supreme Court and the court she had applied to did not want to complicate proceedings that were already in progress in a higher court. She was told to wait until May, 2019, when the first Supreme Court hearing would consider all matters at a preliminary stage.

40. After the refusal of that application she felt she had no alternative but to go to a hotel with the children. It was after the refusal of that application that the incident on the 21st February, 2019, described above occurred.

41. She said that she sought further legal advice in light of the assault that she said occurred on the 21st February, 2019. However, she said that her lawyer indicated they were prohibited from seeking relief from the court until the hearing in May, 2019. She said he further advised her that her allocated legal hours were exhausted. She said she could not face going to a refuge shelter with the children as she could not bear to put the children through that. She also feared that the applicant would find them as (a place in Canada) was not a big town and only had two women's shelters.

42. She said that the applicant had mocked her limited provision of legal aid at every opportunity and accused her lawyer of wasting her legal aid hours. She believed this was an unequal fight in terms of the consequences of failure for her.

43. She said that as the applicant was not at that time permitted by the conditions to exercise his rights of custody in relation to the children, she booked their plane tickets on their Visa card. She arrived in Ireland on the 25th February, 2019. The respondent said she saw her doctor when she arrived and she was prescribed Xanax for anxiety and panic attacks. She said she saw her doctor again on 3rd March, 2019 and was prescribed antibiotics, steroids, more anxiety medication and sent for a chest X-ray. She was diagnosed with pneumonia.

44. The respondent communicated with her lawyers as to the reasons why she had returned to Ireland. She sent him a reply when her lawyer told her that if she did not notify him when she would be returning to Canada, he would apply to remove himself from the case. On the same day, her lawyer informed the applicant's lawyer of her departure and of his intent to remove himself, and enclosed the response and counterclaim to the substantive proceedings that had been prepared on her behalf.

45. On the 4th March, 2019, the Supreme Court of Canada granted the applicant an ex parte order giving him sole custody of the children and removing all of her parental responsibilities. The respondent made considerable complaint about the making of this order. She said that Canadian family law claimed to put the best interests of children first but the court had given the applicant sole custody despite a charge for assault, a no contact order which included the children, the applicant having no income of his own to support the children, the children having never spent more than five or six hours alone with the applicant, the youngest child was still breastfeeding, the applicant intending to go on tour with his band on the 15th March, 2019 and without having given her any opportunity to defend herself. It appears that they had also given the applicant the right to redirect the government child support to him despite the children not being in his care.

46. The order of the 4th March, 2019 was an interim order and the respondent has a right to apply to the court in respect of the same. It appears also to be common in cases of wrongful removal for the remaining parent to seek and obtain such an order for custody.

47. The respondent complained that the applicant made no effort to contact the children since they had left Canada. However, on the 13th May, 2019, the applicant had sent an email to her mother and father. She complained about that email as she said it was an attempt to portray her as a kind of mad woman. It also, she said, made clear that he fully intended to remove the children from her care. She complained that the legal system in Canada failed her and the children.

The relevant law

48. Article 12 of the Hague Convention requires a court to order the return of the child where there has been a wrongful removal within one year preceding the commencement of the proceedings.

49. In so far as relevant to the present case, Article 13 of the Hague Convention provides:

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

50. The law relating to grave risk in Ireland is well established. There was little, if any dispute, between the parties as to the fundamental principles. As was stated by Denham J. in the Supreme Court in *A.S. v. P.S.* [1998] 2 IR 244, the test for successfully invoking the defence is high:-

> *" The law on 'grave risk' is based on art.13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interests 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." (para. 259).*

51. In written submissions, the respondent sought to identify a move away from a very strict approach to the defence set out in Article 13 of the Hague Convention. In the view of this Court, it is appropriate to highlight the more recent authoritative statements from the Superior Courts. In some cases, principles set out in recent case law from England and Wales have been cited with approval.

52. The focus of the courts enquiry in Hague Convention cases was set out in *P.L. v E.C.* [2009] 1 I.R. 1. The abducting mother had concerned about access being granted in a case involving sexual abuse. In dismissing the mother's appeal, Fennelly J. on behalf of the Supreme Court stated:

"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 enquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of the child's 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 the policy for the Courts must place trust in the fairness and justice of the Courts of the other country." (para. 55).

53. In the case of *I.P. v. T.P.* [2012] IEHC 31, Finlay Geoghegan J. cited with approval certain dicta of the UK courts when she held:-

"Intolerable is as has been stated "a strong word" and when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" in re D *[2007] 1 AC 619 at para 52. In* In re E *the Court, at para 34, having referred to this definition observed, "Every child has to put up with a certain amount of rough and tumble, discomfort and distress . It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse or neglect of the child herself." I respectfully agree with this observation and would add in relation to the facts of this case that discomfort and distress may be almost inevitable for a child whose parents are in dispute."* (para. 44).

54. Finlay Geoghegan J. held that:-

"this Court should first ask whether, if the allegations are true, there would be a grave risk that the child would, following the summary order for return be placed in an intolerable situation. If so, the Court should then ask how the child can be protected against the risk." (para. 43).

55. Finlay Geoghegan J. considered the threshold that needs to be met for the reliance upon this defence to be accepted by the court. Finlay Geoghegan J. concluded that:-

"…..the defence provided for in Article 13(b) of the Hague Convention is one which should be given a restricted application but that does not mean it should never be applied at all. The burden of proof normally lies with the person who opposes the child's return. The standard of proof is the ordinary balance of probabilities. It is for them to adduce the evidence to substantiate the exception…."." (Para. 40).

The Court of Appeal, in a judgment also delivered by Finlay Geoghegan J, in the case of *V.R. v C.O'N* [2018] IECA 220, confirmed the above burden and standard of proof. The Court of Appeal, in *R v R* [2015] IECA 265 at para. 52 also quoted with approval the dicta that there are some matters that is it no reasonable to expect a child to tolerate.

The European Convention on Human Rights – Article 8

56. The application of the Hague Convention must also be considered in the context of Article 8 of the European Convention on Human Rights ("ECHR") which grants everyone the right to respect of his or her private and family life. The Grand Chamber of the European Court of Human Rights ("ECtHR") addressed the issues that arise regarding the Hague Convention and Article 8 of the ECHR in *Neulinger v Switzerland* [2010] 28 BHRC 706. At para. 137 the ECtHR stated:

"In other words, the concept of the child's best interests in also the underlying principle of The Hague Convention. … The court takes the view that Article 13 should be interpreted in conformity with the Convention."

57. At para. 138, the ECtHR then stated:-

"It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when The Hague Convention is applicable. The child's best interests, from a personal development prospective, will depend on a variety of individual circumstances, in particular, his age and level of maturity, the presence or absence of his parents and his environment and experiences … For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities which often have the benefit of direct contact with the persons concerned. "

58. The matter was also considered in the case of *Re: E (Children)* [2011] UKSC 27. The UK Supreme Court stated:

"The most that can be said, therefore, is that both Mamousseau and Neulinger acknowledged that the guarantees in Article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the National Court does not order return automatically and mechanically but examines the particular circumstances of the particular child in order to ascertain whether a return will be in accordance with the Convention; but that is not the same as a full blown examination of a child's future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the Article 8 rights of the child or either of the parents. The violation in Neulinger arose, not from the proper application of The Hague Convention, but from the effects of subsequent delays".

59. In the case of *X v Latvia* [2014] 1 FLR 1135, the Grand Chamber of the ECtHR examined the question again. At paragraph 107, the ECtHR said:-

"In consequence, the Court considers that 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 strictly (see Maumousseau and Washington, cited above, § 73), 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".

60. In *V.R. v C.O'N.* the Court of Appeal at para. 13 cited with approval the following extract from the judgment of Ní Raifeartaigh J. in the High Court (*V.R. -v- C.O'N.* [2018] IEHC 316):-

> *"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 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".*

61. In the view of this Court, that is the approach that this Court must take to the assessment of grave risk and the best interests of the children. The Court is alive to the necessity to maintain the appropriate balance between the various interest and policies that must be applied to this case.

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

Article 20 – The Hague Convention

63. The respondent also relied upon Article 20 of the Hague Convention which provides as follows:-

> *"The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."*

64. The respondent submitted that her personal rights will be affected by an order for the return. She submitted that the state must guarantee its citizens from unjust attack and that as things stand, she will be without legal representation to defend herself. She has also relied upon the guarantee for her right to respect for her family life. She also relied upon the fact that she has stable accommodation for the children here in Ireland with adequate financial assistance and medical cards.

65. The respondent relied upon, in particular, the High Court judgment in the case of *Nottinghamshire Co Council v B(K)* [2010] IEHC 9, a case which involved the return of a child at risk of adoption to the UK where different adoption laws applied. In the High Court, Finlay Geoghegan J. concluded:-

> *"57. From all the above, I derive the following principles in relation to reliance on Article 20 in this jurisdiction:*
>
> *(i) The onus is on the person opposing the order for return to establish that Article 20 applies.*
>
> *(ii) Article 20, similar to Article 13, is a rare exception to the general principle of return and, as such, must be strictly or narrowly construed.*
>
> *(iii) A Court may only refuse to return a child where the fundamental principles of its law do not permit the return of the child. Where, as in this case, reliance is placed on the Constitution it must be established that the relevant article of the Constitution does not permit the return of the child."*

66. Although the respondent referred to the appellate judgment of the Supreme Court in that case, in my view she has failed to engage with the *ratio decidendi* of that decision. O'Donnell J., delivering judgment for the Supreme Court in *Nottinghamshire County Council v. KB* [2013] 4 I.R. 662, upheld the High Court's decision that the threshold to invoke Article 20 had not been met. While the Supreme Court accepted that Article 20 did not so much create an exception as recognise one and it provided a mechanism which avoided a conflict between the international obligations imposed by that Convention, and the dictates of the domestic Constitution, where there is a conflict with the Constitution, surrender cannot be ordered. The Supreme Court went on to consider however, the constitutional order which includes Ireland's international obligations as recognised under the Constitution. It was that constitutional order that required focus on the correct issue- namely the return of the child to the country of habitual residence.

67. O'Donnell J. stated at paras 60 and 61:-

> *"60. If the Irish constitution is viewed solely through the lens of the reported cases, a somewhat distorted picture might emerge. It is natural that most constitutional litigation and commentary has focussed upon the important provisions of the Constitution contained in Articles 40-45. But the Irish Constitution is much more than simply a vehicle for the fundamental rights provisions. It regulates the relationship between the People and the State they created. It establishes the machinery of government and allocates responsibility between the different branches, and importantly for present purposes, it seeks to locate the State in an international context. In this regard, the Irish Constitution is not unique. In truth it can be said that every constitution regulates the relationship between a state and its citizens and indeed those obtaining the benefit of the society created and maintained by the state. But it follows in my view, that any question of interaction between Irish law and events occurring abroad, and in particular events occurring pursuant to the law of another state, raises issues of constitutional dimensions. To say that an adoption, carried out as it would be in accordance with the law of the United Kingdom, and in respect of persons who were subjects of that jurisdiction, is nevertheless itself contrary to the Irish Constitution should raise an alarm.*
>
> *61. The true question for an Irish Court is whether what is done within this jurisdiction can be said to be contrary to the Constitution. This is why Article 20, can be seen to precisely focus attention on the correct issue. That is whether the return (and not the adoption) would itself be a breach of the Irish Constitution. Now, if the law was that an Irish Court could not return a person if there was a possibility of some event occurring which would, if it occurred in Ireland, be a breach of the constitutional rights of the citizen, then this would be a merely verbal distinction. However framing the issue as to whether the return itself would be a breach of the Constitution focuses attention on the very issue of whether the Irish Constitution does, or does not, distinguish between events occurring abroad and those occurring in this jurisdiction. There is no a priori answer to this question. It is a matter of constitutional interpretation."*

68. O'Donnell J. proceeded to state at paras 64 and 65:-

> *"64. It seems plain however, that the Irish Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us. First and most obviously, the Constitution simply does not say so. Indeed it might be expected that such a sensitive issue would be dealt with if that was the intention of the drafters and thus the people who adopted the Constitution. Furthermore, the historical context in which the Constitution was introduced was one in which international relationships were to the forefront of public concerns.*
>
> *65. Article 29 of the new Constitution addressed the position Ireland was to take in its international relations. This in itself was a significant departure from the 1922 Constitution and a conscious attempt to assert nationhood. The significance of this Article, particularly in its historical context, was explored by Mr. Justice Barrington in his Thomas Davis lecture, The North and the Constitution. As he points out, it is of some significance that Mr. deValera was the President of the League of Nations in 1936 when the Constitution was being drafted. Indeed it appears that some of the values of the Covenant of the League of Nations were reflected in the Constitution and in particular in Article 29. The Article affirmed Ireland's devotion to the "The ideal of .... friendly cooperation amongst nations". In one sense accession to the Hague Convention can be seen as a particular example of such cooperation. Such cooperation necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies. This together with the Constitution's recognition of the territorial boundaries of the State and the reach of its laws are important parts of the Constitution to which regard must be had when it is contended that the return of a child in another contracting state is not permitted by the Constitution. This is why in my judgment the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return."*

69. As the Supreme Court recognised in the above case, it is not possible to lay down a single encompassing theory as to when the return will be prohibited on the basis of Article 20. What is clear however is that the return will only be prohibited when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the court that the court must refuse return. That requires more than a simple comparison with the foreign legal provision and procedures. It must be much more fundamental than a mere comparison.

Undertakings

70. In *P v B* [1994] 3 IR 507, the Supreme Court approved of the mechanism of undertakings. Denham J. (as she then was) reviewed the questions at para. 520 of her judgment:

> *"In other countries which are parties to the Hague Convention undertakings have been accepted by courts.*
>
> *In Re C. (A Minor) (Abduction) [1989] 1 F.L.R. 403 the Court of Appeal in the United Kingdom considered the question of undertakings. Butler-Sloss L.J. at p. 408 stated:—*
>
> > *"These undertakings are crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was 3 for all but access periods, his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return."*
>
> *After undertakings which the court required as a prerequisite for the return of the child were given, the court ordered the return of the child to Australia.*
>
> *Similarly, in Re G. (A Minor) (Abduction) [1989] 2 F.L.R. 475 the Court of Appeal accepted undertakings given by the father, not in any way to influence the court of competent jurisdiction, the Family Court in Australia, but to protect the child from grave risk of psychological harm until an application had been made to that Court. Butler-Sloss L.J. stated at p. 485:—*
>
> > *"In carrying out the Hague Convention, this court has the duty under art. 13, as indeed the Australian court would have if a similar application were made to the Family Court, to consider the welfare of the child. The undertakings in this case are designed to protect the child from the grave risk of psychological harm as set out by Thorpe J. in his second judgment until, and only until, an application can be made to the Australian Court.""*

71. It has been acknowledged by the High Court and Supreme Court in *S.R. v M.M.R.* ([2006] IEHC 10 and [2006] IESC 7), that it is not appropriate for this Court to seek undertakings or impose conditions that go further than seeking to achieve a smooth return for the children and their wellbeing in the immediate period after return, pending an application to the courts of their habitual residence. According to Denham J., the undertakings relate to the short duration between the order of the Irish Court pursuant to the Hague Convention and the exercise of jurisdiction by the family law court of habitual residence.

Behaviour of the Applicant/Unfit to care for the Children

72. The respondent has made general claims that it would be intolerable for the children to be forced to return to a situation where the children would either be in the custody of the applicant or, if successful, in overturning the interim custody order, he would have access to them. She relied on his behaviour which included accessing the Grindr app in the sitting room which was not far from the bedroom of the children. She also complained about the physical assaults on her, the attempt to pull the older child out of the car, his addictions, his mental health and his controlling behaviour in particular as regards the legal proceedings he brought in Canada.

73. The evidence regarding the alleged physical assaults do not come near the threshold to establish that there will be a grave risk of physical assault on return. Leaving aside that they are disputed, they took place against a background of distress and dispute between the parties in the context of the applicant's alleged use of the Grindr app. The respondent's own lawyer had advised her that the first alleged assault was not worth reporting to the police. The second allegation taken at face value, is an assault *de minimis*, committed in the context of moving past her. Criminal proceedings were discontinued. As the Court must be forward looking, the allegations even if true, do not establish that there is a grave risk of physical assault on the respondent or the children if an order of return is made.

74. The Court is conscious that matters of controlling behaviour can have significant psychological effects. The respondent has not reached, however, the standard of establishing grave risk here. The main evidence she pointed to was in the context of the applicant taking court proceedings against her. Those proceedings were taken following the breakdown of the marriage because of the incident in November, 2018. Both parties independently of each other sought to take proceedings. Furthermore, the obtaining of the *ex parte* order on the 4th March, 2019 in the aftermath of the wrongful removal by the respondent of the children, cannot in the circumstances be considered an example of controlling behaviour. On the contrary, it is an indication of a concerned parent who is anxious to preserve his rights of custody to his children. In the context of the question that the Court has to resolve, namely grave risk in the event of return, the Court is satisfied that the grave risk of an intolerable situation for the children has not been established on the evidence before me.

75. On the issue of the applicant's unfitness to care for the children, I am also satisfied that the evidence placed before the Court does not establish a grave risk of the children being placed in an intolerable situation on return as a result of the impugned unfitness of the applicant. It is not without significance that on the 19th February, 2019, while the respondent went to court to seek sole occupancy of the house on the basis of the respondent's alleged violence, she requested the applicant to fulfil their "duty-day obligation" in their elder daughter's pre-school, which he did fulfil. This is not put in issue by the respondent in her second affidavit. Thus, even at a time when all the events she points to had taken place as to his unfitness, the respondent was prepared to let him have care obligations over their elder daughter and her pre-school colleagues. The issue of unfitness simply did not arise for her at that time. The Court is not satisfied that the respondent has discharged the burden of establishing that the applicant is unfit to care for the children.

76. Moreover, in my view, these are all issues which can and should be resolved in the courts of Canada. The Court is conscious that the ECHR case law requires the Court to bear in mind the best interests of the child. As has been said by the Court of Appeal in *C.D.G. v J.B.* [2018] IECA 323:-

> *"The whole basis of the scheme detailed in the Hague Convention and EU Council Regulation 2201/2003 is to leave substantive decisions on issues of custody and access, and related fact-finding, to the court of the place of the habitual residence of the child, while conferring on the court to which the child has been wrongfully removed a more limited scope for examining the facts and refusing return based on this examination."* (para. 25).

Although this is not an EU regulation case, the same principle applies in the current case.

77. [A Provincial] Supreme Court is seized of these matters. Without diminishing the seriousness of the concerns of the respondent, the types of issues that have been raised by her are not such in the context of a return to [a province] in Canada that give rise to a grave risk of the children being placed in an intolerable situation or at risk of physical or psychological harm. They are matters that require resolution by the courts of the place of habitual residence. As the Supreme Court said in *P.L. v E.C.*, the normal presumption is that these types of issues will be decided by those courts. Indeed, as noted by the Supreme Court in that case, it is the fundamental objective of the Hague Convention to discourage the abduction of children form the jurisdiction of the courts which have jurisdiction to decide those issues and the requested court is not entitled to refuse to make such an order based upon the general consideration of the welfare of the child. The issues raised by the respondent are considerations concerning the welfare of the child and must be dealt with in the court of habitual residence.

78. The Court is however also satisfied that to ensure a smooth return for the children and their wellbeing, it is appropriate to accept the undertaking of the applicant not to act on the sole custody order that he has in his favour. The respondent's objection to that undertaking is that the undertaking only extends until the matter comes before the Canadian courts. The Court is quite satisfied that the undertaking is sufficient to allow any further matters of care and custody to be made by the courts of the place of habitual residence.

Effect of return on the mother

79. The respondent relied upon *M.L. v J.C*. [2013] IEHC 641, a decision of White J., that examined the impact of the medical and psychological health of the abducting parent on the children. In that decision, White J. held that the respondent had been the primary carer of the children and "[*i]f her mental health were to break down on a return to the USA that would be an intolerable situation for the children*." On the evidence before him, he held that there was a grave risk within the meaning of Article 13.

80. The respondent pointed to her ongoing mental health issues and the stress of her altercations with the applicant as reasons not to surrender her. In my view, the facts of the present case are entirely unlike the facts in the case of *M.L. v J.C*.. In that case there was a long and documented history of mental ill-heath where the respondent had on occasions been admitted into a psychiatric hospital. Furthermore, there was evidence from a doctor in this jurisdiction as to her current status and the effect on her mental health of a return to the United States of America ("USA"). There was also evidence that a forced return would have a serious detrimental effect on her mental health.

81. In the present case there is no evidence of that nature. The respondent has visited doctors here and has been prescribed an antidepressant and an anxiolytic. She has been referred to a psychiatrist. The letter making that referral is exhibited in a disputed late affidavit of the respondent. There is nothing however in that letter which addresses any concern about her ability to keep parenting or any risk to the children. Undoubtedly, these are stressful times for her and it is important that she has access to medical care, but the evidence does not reach the level of grave risk of a return being intolerable for her and by extension intolerable for the children.

Financial Circumstances

82. In making her submission under this heading, the respondent relied upon two decisions of Ní Raifeartaigh J. relating to financial circumstances. The first decision is *D.H. v L.H*. [2018] IEHC 317 in which the children had been removed from the Czech Republic. In that case Ní Raifeartaigh J. held that:-

> *"notwithstanding the high threshold for establishing "grave risk" within the meaning of article 13 of the Convention, there is, in this case, a grave risk that if the mother were forced to return to the Czech Republic with these children, they would be facing a situation without accommodation and with no guarantee of any source of income. In contrast, they are currently living in Ireland where their mother has a job, accommodation, and the children appear to be well settled and happy at school. In those circumstances it seems to me that there is a grave risk of what could be described as an intolerable situation for these particular children in these particular circumstances if they were returned to the Czech Republic."*

83. The respondent also relied upon an unpublished *ex tempore* judgment of Ní Raifeartaigh J. in which she also referred to financial constraints as to a basis for finding "grave risk". Her decision was a preliminary decision as the Court sought further information arising

out of the claims made. The applicant objected to this case being relied upon as it was not "authoritative" in light of its unpublished nature. In light of the earlier decision in *D.H. v L.H.,* it is not necessary to rely upon it in order to establish that financial matters can amount to a situation of "grave risk". Moreover, the facts of another case are rarely determinative of the question at issue, namely whether the present facts actually amount to a grave risk. That issue is distinct from the legal principle that financially constrained circumstances are capable of amount to a grave risk as has already been decided in *D.H. v L.H* above. The assessment of grave risk is a fact specific exercise in every case.

84. It is necessary to bear in mind the relevant legal principles when making that assessment. *In Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 Butler-Sloss L.J. dealt with an argument by the mother that financial hardship on return to Israel amounted to grave risk, as follows:

> *"I have no doubt that if an order requiring the children to return to the country of their habitual residence was demonstrated to result in young children being left actually homeless, on the street and destitute without recourse to State benefits, a court would be likely to find that Art 13(b) had been met.*
>
> *It is, however, important to recognise, to my knowledge at least, no English court has yet found circumstances to meet the stringent requirements under Art 13(b), nor do I believe they have been met in the Convention countries with which we are principally concerned, such as the USA, Canada, Australia and New Zealand."*

85. It is necessary to analyse carefully whether the respondent has demonstrated on the balance of probabilities that there is a grave risk of being left destitute. The respondent claimed that she is not entitled to employment benefits because she did not pay her social insurance contributions as required by her self-employed status. She has exhibited webpages from a Government of Canada website regarding 'Employment Insurance Regular Benefits'. This website specifically stated that if the person is not entitled to employment insurance benefits they should use the 'Benefits Finder' to find other Government of Canada, provincial or territorial benefits.

86. In submissions, counsel for the respondent sought to translate this into a statement that she was not entitled to any "social welfare". The evidence in the affidavit does not support that contention. In oral submissions, counsel submitted that her instructions were that there was "no safety net" in Canada in terms of social welfare. In my view, the evidence is entirely inadequate to establish that there is no safety net and that she would not be entitled to any other "benefits" or "welfare" of any kind.

87. Furthermore, the applicant in his replying affidavit, exhibited a letter from the Central Authority of [a province] in Canada which said with respect to available income assistance programs:-

> *"the [REDACTED] Ministry of Social Development and Social Innovation administers the Employment and Assistance legislation, under which eligible residents of [a Province in Canada] may receive financial assistance for shelter and living costs. Applicants with an immediate need are dealt with on an urgent basis".*

This is sufficient to establish that there is at a minimum a "safety net" available. It certainly rebuts the respondent's contention that because employment benefits may not be available no other assistance is available.

88. The respondent has made a complaint that the child benefit was stopped by the applicant. The applicant has responded by saying that she misrepresented the facts by omission. It is neither possible nor necessary to resolve that dispute. The respondent ultimately had the child benefit paid into her sole account beginning January, 2019. She complained that the applicant has obtained the right to re-direct the Government child benefit to him despite the children not being in his care. She does not however say that this has been done or that she could not challenge this if she was to return to Canada with the children and have them in her custody. I am satisfied that she has not established any grave risk as regards a lack of child benefit. It must also be observed that it is a common case that the child benefit payable in Canada is considerably higher than is paid in Ireland. There has been no evidence about cost of living expenses but it does indicate that if the children are living with her, there will be a considerable financial income from the child benefit.

89. With respect to the family home, the respondent's main complaint is that she will not be entitled to live in the house with the children until they reach their majority as the policy in Canadian family law is to distribute the property at an early stage. She exhibited email correspondence from her lawyer setting out what was likely to happen, especially as regard the sale of the house and the division of the proceeds. The respondent said that she cannot afford to buy out the applicant's share as she will not have the income to pay the new mortgage.

90. The Court notes that should the house be sold the respondent will at least have a significant share of the equity according to her own evidence and this should provide for her in terms of accessing rental property. At present, there is no order banning her from the house. She is entitled to live there. She averred that she could not live there with the applicant but she rejected the alternative arrangements for emergency care that she could have availed of for the reasons set out above. In my view, this is insufficient to establish a grave risk to the children. The evidence put forward does not, in the context of the relationship as a whole and the behaviour alleged against the applicant, support the contention that there was grave risk to her and by extension to the children should she have availed of shelter. Furthermore, there were matters that were before [a Provincial] Supreme Court and that court did not consider it necessary to make an interim sole occupancy order. That court was best placed to make the assessment and it is necessary for this Court to place trust in the fairness of that court.

91. The Court is not satisfied that she has established that the existence of a different regime from the Irish regime, which may lean towards permitting the primary carer to reside in the family home until the minor children reach their majority, demonstrated a grave risk of an intolerable situation for the children on their return. Moreover, even if the regime is different in Canada, the respondent has not demonstrated that the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of return, that the Court would be justified, and indeed required, to refuse return. The distribution of financial property, including the family home, in the context of child welfare issues in a manner apparently different from our Constitution does not mean that it is a violation of the respondent's fundamental rights or the children's fundamental rights to order the return of the children where those matters will be determined in accordance with the law of the country of habitual residence. These are matters properly within the remit of the Canadian courts. There is no requirement that they dovetail with Irish law.

92. Finally, even if I am wrong and it may amount to a grave risk that the children will be placed in an intolerable position on return because the respondent will be homeless as she cannot occupy the family home while the applicant is there, I am satisfied that this risk can be protected against by the acceptance of the undertaking by the applicant to vacate the house pending a further court order in Canada. The respondent, correctly in my view, has not pushed the case that the applicant's word cannot be accepted. There is nothing to indicate that it could not be accepted; he has not breached court orders before. Instead, the respondent has focussed

upon the short period of time within which that undertaking would last. In my view, the undertaking is to last for as long as the Canadian courts decided otherwise. That is sufficient because at that time the Canadian courts must be trusted to make appropriate decisions having regard to the welfare of the children.

93. The respondent also undertook to pay for the return flights of the children in his affidavit, but this was extended through his counsel to pay for the respondent's flight also. He also undertook to pay a once off sum to cover the immediate costs on return and suggested this would cover the period of 3/4 weeks at the end of which the Canadian courts would be seized of the matter. The respondent said that this is insufficient. The applicant has no money of his own (he does however have the offer of money from his mother).

94. In my view, it is not necessary for the protection of the children to accept this undertaking but to ease the return of the children, I would make the order subject to that undertaking in respect of payment of flights and for such sum as would be reasonable to cover a 4 week transition period. This latter sum is to be agreed between the parties (the respondent in pursuing her objection has not engaged with an amount but has criticised the applicant for not nominating an amount) and in default of such agreement the Court will fix an amount.

Lack of Legal Representation

95. The respondent claimed that because she will have no right to legal aid and no ability to pay for legal representation, this will amount to a grave risk of an intolerable situation for the children. This is particularly so where the applicant will have private legal representation and there will therefore be an inequality of arms.

96. In response, the applicant relied upon the Supreme Court judgment of *P.L. v E.C.,* to the effect that the court hearing a case under the Hague Convention must respect and have faith in the legal procedures and authorities in the requesting state who have responsibility for the welfare of children. The applicant submitted that there is no recorded judgment to support the argument that a lack of legal representation in the country of habitual residence can give rise to a defence of grave risk, but that there is authority in the UK to the contrary.

97. In the case of *Re K (Abduction: Psychological Harm)* [1995] 2 FLR 550, the English Court of Appeal responded to the argument as follows:-

> *"The point does not appear, however, to be a forceful one so far as the requirements of the Convention are concerned. Nothing in Art 12 makes the return of a child to a requesting country dependent upon the availability to the child or his or her parent, of legal representation in that country. It appears to me that any court such as the relevant Texan court can well see that justice is done, even if the mother proves not to be able to obtain legal representation. One has only to contemplate…, what the position would be were the countries to be reversed and were this court or a court of the Family Division to be invited to determine whether justice could be done for a litigant who was not legally represented, to see what attitude to that prospect a court in Texas would be likely to take.*

98. The lack of legal aid for family law cases in [a province] in Canada is clearly an area of some concern within the province. I accept that the exhibited legal proceedings demonstrate that it has been challenged as a violation of the Canadian Charter on Fundamental Rights. The question is what effect, if any, that challenge has on the present situation. That must be assessed in light of the legal and factual situation.

99. The evidence before me establishes that the Legal Services Society provide a 'Family Contract' to those who are eligible for legal aid, providing it appears their budget allows. The respondent qualified for this. A lawyer is entitled to spend 25 hours reviewing the case, discussing the case, preparing documents, negotiating, attending case conferences, preparing for interviewing witnesses/experts and preparing for hearings. It is then said that in addition, the lawyer will have enough time to go to court for the person. It appears that the lawyer may spend certain extra time preparing for certain hearings and processes. The contract stated that extra hours are available but this is dependent on funding.

100. The respondent has exhibited an email from her lawyer stating that the total emergency allotment to her was 45 hours which she has exhausted. It is said that she can apply for "extended services" but there is no guarantee that this will be granted. The respondent's lawyer has now come off record because of her actions in leaving Canada despite the court order.

101. The respondent has also relied upon the pleadings in the legal aid case. The plaintiffs had pleaded that "extended services" could be granted subject to funding. The Legal Services Society in its defence in fact stated that those policies had been amended in January, 2017 due to budgetary constraints and it no longer grants extended coverage in family law. I am satisfied that it appears her own lawyer may have not been aware of that change to the policy and that it is, in fact, no longer available.

102. The central authority by letter exhibited by the applicant has stated that legal aid is available in family law matters. In my view that response does not provide a complete answer to the issues raised by the respondent. She has demonstrated that her hours for preparation of the divorce proceedings have been exhausted. On the other hand, the central authority has also said that there are various other organisations providing free legal services to the respondent, including 'Access ProBono' and the 'Courthouse Duty Counsel Program'. Still other organisations offer free legal information by telephone and internet. This would at least represent the possibility of gaining legal representation but the respondent does not appear to have engaged with this proposition in her replying affidavit, an affidavit I have considered despite the objection of the applicant.

103. On the basis of the evidence before me, I accept that the respondent has utilised her initial set out hours for preparatory work and that her lawyer has now come off record. While she may have legal aid for a lawyer to appear for her at the court, it is difficult to see how a lawyer could so appear without any preparation hours. On the other hand, the preparatory work has now been completed, even her response and counterclaim have been filed. She has received advice about Canadian law and from her affidavit and the exhibits she has filed, it is clear that she has an ability to do basic legal research. From the reply of the central authority there are also *pro bono* lawyers who may assist with specific queries as well as a duty courthouse lawyer.

104. The wider issue is whether those facts amount to a grave risk that to return the children would be intolerable. In this jurisdiction, following *Airey v Ireland* [1979] 2 EHRR 305, a decision not opened, legal aid for family law litigants unable to afford representation is generally available as part of the right of access to the courts as set out in Article 6 and to respect for family rights as set out in Article 8 of the European Convention on Human Rights. The ECtHR in *Airey* recognised that there was no general right to legal aid and that each case would turn on its facts including the complexity of the case.

105. The ECHR cases cited above and the decision in *V.R. v C. O'N.*, recognise that the requested court in a Hague Convention case

must consider the best interests of the child in a balance with the obligations under Article 13 of the Hague Convention. This has to be considered in the context of the policy position outlined in *P.L. v E.C.,* that with regard to courts of habitual residence being the appropriate forum for dealing with general considerations of child welfare, *"[i]t is, naturally, implicit in the policy that our courts must place trust in the fairness and justice of the courts of the other country".*

106. The factual situation in *V.R. v C. O'N.* was quite different but is nonetheless relevant as a point of principle. In that case, the abducting parent argued that he would be "highly unlikely" to be granted a visa to enable him re-enter Australia. This was in effect an access to court argument although legal representation did not figure. The High Court held that on the balance of probabilities he did not establish his case regarding the visa but that in any event he could litigate remotely. In the Court of Appeal, the decision was upheld. Finlay Geoghegan J observed at para. 2:-

> *"… Furthermore, the proceedings before the Irish courts are not custody proceedings. The child at all times relevant to this appeal was habitually resident in Australia and it is the Australian courts who have jurisdiction to take decisions as to with whom the child should live long term and the access he is to have with the parent with whom he does not primarily live. In these proceedings the mother simply seeks an order for the summary return of the child for the purpose, inter alia, of enabling the Australian courts exercise that jurisdiction."*

107. Therefore, if the summary return is for the purpose of *inter alia*, enabling the Canadian courts to exercise their jurisdiction as to the divorce, the division of the family home and the care and custody of the children, then the lack of legal representation before those courts is not a matter that gives rise to a grave risk of the children being returned to an intolerable situation in the absence of specific evidence that the trust in the fairness and justice of those other courts is misplaced. Thus, it would appear that the absence of legal representation *of itself* does not demonstrate that there is a grave risk of the children being returned to intolerable conditions.

108. I do not accept however that the situation may be as absolutist as that set out by the English and Welsh Court of Appeal in *Re K* above. In this Court's view, the absence of legal representation may in certain circumstances amount to a relevant factor that could contribute to the creation of a grave risk to justify the refusal of the children's return. However, it requires a case by case assessment of the evidence in light of fundamental rights concerns. The Court of Appeal of England and Wales did not consider the *Airey v Ireland* judgment or indeed any aspect of the rights arising under the European Convention on Human Rights. That is perhaps unsurprising as it was decided before the Human Rights Act, 1998 was enacted in the United Kingdom. On the contrary, as set out by Ní Raifeartaigh in *D.H. v L.H*, the best interests of the child under Article 8 of the ECHR must be factored into the assessment of whether there is grave risk.

109. As stated above, an appropriate balance must be found between the various interests and policies. In assessing those interests and policies the Court has to take into account the general position that the best interests of the child are that welfare issues are determined in the courts of habitual residence and that trust must be placed in the ability of those courts to carry out that task fairly unless there is cogent evidence to displace that trust. While the principle of trust requires the Court to place trust in the fairness and justice in the courts of Canada, this is not an absolute or blind trust. It may be displaced on the evidence.

110. Under the principles set out in *P.L. v E.C.*, an abducting parent is required to show on the balance of probabilities that for the reason, in this case, of the absence of legal aid, that the Canadian court is unable or unwilling to protect the welfare of the children. The respondent submitted that the approach of the court in *R.K. v J.L.* [2000] 2 IR 416 from whence that test applies, has been softened by later pronouncements. In my view, the later pronouncements of the Court of Appeal in particular have addressed the areas which might be considered as grave risks, and these go beyond the original list of returning a child to a zone of war, famine or disease. It is clear that it would be intolerable to return a child into a situation where there is violence and abuse between the parents, and if it is established that on return the children will be exposed to such a risk, return is not mandatory. However, where the issue is at a certain remove from the return, as for example where it relates to the question of legal representation in the courts of the country of habitual residence when deciding issues of custody and financial provision, the principle remains that in the absence of evidence that the courts are unwilling or unable to protect the welfare of the children, they should be returned.

111. I have to assess whether the principle of trust that this Court must place in the Canadian court's willingness and ability to protect the children no longer applies because of the apparent lack of legal representation. I have referred to 'apparent' lack of legal representation because I am not entirely satisfied on the balance of probabilities that the respondent will have no legal representation. There are *pro bono* legal representatives available and she has not, on the evidence, made any enquiries of them. She has also had the benefit of significant legal advice and preparation of pleadings.

112. In the present case, the evidence is that of the pleadings in a case before [a Provincial] Supreme Court concerning the lack of legal aid provision in family cases. The claim is that s. 7 (life, liberty and security of the person) and s. 15 (equality rights) of the Canadian Charter of Rights and Freedoms have been violated. No evidence has been put before the Court of any report from an international tribunal or monitoring body or statutory body in Canada such as an Ombudsman or Human Rights Commission criticising the lack of legal representation. The fact that the case has been taken in [a province] in Canada does not prove that there is a violation of the rights, although it is accepted that the fact of the case being taken raises a concern that the legal aid provision may be inadequate.

113. The respondent complained that she will not have equality of arms but an inequality of arms does not, *of itself*, make a connection as to how that proves that the return would place the children in an intolerable situation. The gap between the two concepts has simply not been bridged. The Canadian courts are in charge of the procedures. This Court must place trust in their willingness and ability to protect the children even in circumstances where one party is legally represented and the other is not unless there is evidence that there is a risk that such protection will not occur.

114. The other point in the pleadings is that the lack of legal representation violates life, liberty and security. The *Airey v Ireland* judgment was based upon right of access to the courts under Article 6 and the respect for family life under Article 8 of the European Convention on Human Rights. The respect for family life and its absence through lack of legal representation would not appear to translate directly into a grave risk that the children would be placed in an intolerable situation on return. The right of access to the court in *Airey v Ireland* was violated because of *inter alia* the complex nature of Irish family law and also the emotional difficulties of presenting a case by a lay litigant. In a Hague Convention case, the Court is concerned with whether there is a grave risk that the return will place the children in an intolerable situation. I must consider is it has been demonstrated that a lack of legal representation means that the courts are unable or unwilling to protect the children?

115. In [a province] in Canada legal aid proceedings there are three plaintiffs; the NGO, Nicola Bell and AB. Ms. Bell and AB are women with children who claim that they did not receive sufficient legal aid. In the pleadings relating to Ms. Bell, the lack of access to legal aid is based upon adverse psychological and physical impacts to the plaintiff but not to her child. The pleadings do not contain any

reference to particular failings on behalf of the courts in [a province] in Canada arising out of the lack of legal representation. In particular, it does not appear to be alleged that any orders were made that should not have been made or were not made that should have been made due to her lack of legal representation at a material time.

116. The pleadings relating to AB make similar claims of adverse psychological and physical impacts on the mother arising from the stress. Again there is no claim relating to the inadequacy of court orders, but the plaintiff claims for increased stress "*from the burden of taking on additional paid work and the need to reduce services and activities for her children."* It is noteworthy that there is no claim being brought on behalf of stress sustained by the children.

117. The pleadings in [a province] in Canada legal aid case do not demonstrate that the lack of legal aid has impacted on the quality or otherwise of the court orders that have been made in family law cases. The proceedings are directed towards the stress of having to conduct the cases. Undoubtedly, there is significant stress on a lay litigant in conducting a legal case. This is particularly so in a family law case where the issues are by their nature intimate, personal and not "merely" economic. It may be the case that in certain circumstances that to require a person to prepare and present a legal case concerning the care and custody of their children and related financial issues could, due to the stress on the lay litigant parent especially when having to appear against a lawyer, amount to a grave risk that the children are being returned to an intolerable situation.

118. In the circumstances of this particular case, I am not satisfied the respondent has demonstrated on the balance of probabilities that the restrictive access to legal aid in [a province] in Canada amounts to a grave risk that the children will be placed in an intolerable situation if they are ordered to return to Canada. These circumstances include the fact that she has had significant hours of legal advice and preparation of pleadings to date, where *pro bono* services are in existence as well as a courthouse duty counsel system and she has not established on balance that she would have no access to those services, where she is a well-educated person who has shown from all the documentation before me an ability to do basic legal research and has shown a capability to document and demonstrate relevant incidents. There is also no evidence to support the contention that there is a direct link between a lack of representation and a failure to protect the interests of the children. The Court must be mindful of the trust it has to place in the courts of [a province] in Canada.

119. It should also be observed that as regards her situation as to imprisonment, the respondent has not established that there is no legal aid with respect to any criminal procedures that may be brought against her. With regard to any civil contempt proceedings, she has also not established as a matter of probability that she will not be entitled to legal aid in respect of that matter. In any event, she has not established that the Canadian approach to her own situation would be intolerable for the children because she may not have that access.

120. I am also satisfied that although the legal aid provisions in [a province] in Canada may not be the same as those provided in this jurisdiction, they have not be demonstrated to be so contrary to the scheme and order envisaged by the Constitution that the Court would be justified and indeed required to refuse return. Moreover, the necessary link between lack of legal aid and grave risk on return has not been established.

Separation because of Conduct: Possible Prosecution

121. The respondent has raised issues that because of the risk of prosecution for the criminal offence of abduction or indeed the possibility of imprisonment for contempt, that the resultant separation from the children would amount to a grave risk of psychological or physical harm to them or be intolerable. In *C.D.G. v J.B.*, the Court of Appeal ordered the return of a child to Sweden, into the sole care of his father, who had only enjoyed limited access from the time of the parties' separation almost three years earlier.

121. While the father in that case had undertaken not to enforce his sole custody order, this was overtaken by the issue of a European Arrest Warrant during the currency of the proceedings. Therefore, a return to Sweden was more likely to amount to a return into the care of the father. The court found that the mother had adduced no evidence that the Swedish courts were incapable of protecting the child's welfare, as is required by the *P.L. v E.C*. judgment.

122. While the *C.D.G. v J.B.* case concerned a European Union country, and involved arguments about the application of Council Regulation 2201/2003, the same principles apply to the Hague Convention and the following statement of Whelan J. is apt:-

> *"A limb of the appellant's argument is based on a threat that on return to Sweden Oscar will be placed in an intolerable situation. Many Convention/Regulation cases turn on an argument that a return order will mean separation from the custodial parent, thereby creating a grave risk. In this case, the sole court with jurisdiction to decide substantive matters concerning Oscar's custody has decided, in exercise of its full welfare jurisdiction, that he should be placed in the primary care of the father with the appellant mother exercising access to him. To conclude that this order would place Oscar in an intolerable situation in the particular circumstances of this case would be entirely to undermine the function of the 2003 Regulations. The proposition is not supported by any cogent evidence"* (para. 80).

123. In *GN v Poland* [2016] ECHR 667 the Polish courts refused to order the return of a child to Canada because separating the very young child from his mother would engage Article 13(b) of the Hague Convention. The Ontario courts had awarded the father sole custody and refused the mother relief on appeal. Notwithstanding the custody order, and an outstanding warrant for the mother's arrest, the ECtHR found that the Polish courts were not justified in refusing to order the child's return. The ECtHR found that the "*extent of criminal sanctions awaiting her upon return, if any were not determined"* (para 64), and "*nothing indicated that the applicant might have actively prevented (the mother) from seeing her child in Canada, or that she would not have access to effective legal remedies in that country to ensure the defence of her interests and those of her child, should this have become necessary*" (para 63).

124. There are other authorities, here and in the UK, that clarify a risk of prosecution is not sufficient to defeat the objects of the Hague Convention. Clearly, to permit a defence in such circumstances, a return to any country which criminalises child abduction would become unachievable. In *Re L (Abduction: Pending Criminal Proceedings)* [1999] I FLR 433, an order was made for the return of children to the USA, where there were outstanding extradition proceedings against the mother. The return order was made notwithstanding the high degree of probability that criminal proceedings would be commenced against the mother following her return.

125. That case was more recently approved in *C v D (Abduction: Grave Risk of Harm)* [2014] 2 FLR 724, where an argument of possible prosecution in Spain was rejected as a ground to refuse an order for return. Bodey J. cited the following extract from Re L (above):

> *"…there is no reason to think that, when deciding whether to continue with the prosecution following any return of the mother and children, the state prosecutor would exclude consideration of the interests of the children; nor that in*

deciding whether to grant bail or, in the event of conviction, whether to sentence the mother to any term of imprisonment the Floridian judge would fail to pay significant regard to their interests." (para. 15).

126. In both *R. v R.* and *C.D.G. v J.B.* the Court of Appeal ordered the return of children, where European Arrest Warrants had been issued against the mothers. In those cases, the prospects of imprisonment were real as the criminal cases had progressed further to the extent of warrants being admitted against them.

127. In the present case, it is not established that there is a warrant for her arrest for the criminal offence of abduction. There is however an order that permits a police officer to arrest her on reasonable and probable grounds that she was in breach of the order prohibiting her from removing the children from Canada. The order required the respondent to be brought promptly before [a Provincial] Supreme Court to be dealt with on inquiry to determine whether she had committed a breach of the order. It will be a matter for the Supreme Court to decide whether there has been a breach and if so, what sanction, if any, is appropriate in relation to that breach. No evidence has been put forward to suggest that she will not be entitled to legal aid if she is at risk of imprisonment. In any event, there is nothing to suggest that the Supreme Court will be unable or unwilling to protect the rights of the children even in those circumstances. Naturally it would be very distressing for the children if there mother was to be arrested immediately on return, but in the circumstances I do not consider that has reached a level that it could be said to be intolerable.

128. It is noted that Irish courts have been willing to accept undertakings regarding non-prosecution of offences concerning the abduction. The acceptance of undertakings has the possibility of amounting to a troubling encroachment on the public policy of discouraging child abduction. Child abduction is discouraged by the civil procedure of the Hague Convention. It is also discouraged in many countries by the provision of criminal sanction as well as possible civil sanction for breach of court orders. Public policy in this jurisdiction is expressed by provision for possible criminal and civil sanctions where parental child abduction takes place. In this state, a parent who takes, sends or keeps a child out of the state in defiance of a court order or without the consent of a parent or guardian commits an offence under s. 16 of the Non-Fatal Offences Against the Person Act, 1997 and is liable to a sentence of up to 7 years imprisonment. This penalty is a direct statement by the legislature of how seriously cross border parental child abduction is viewed.

129. The prosecution of crime is a public matter and is not driven solely by the desire of a particular person. In certain situations, a person may be under an obligation to give evidence or even make a statement in criminal proceedings. It would not accord with public policy for one country to require undertakings from a person that would require a breach of legal obligations by that person in the other country. This has been recognised by the inclusion in undertakings that they do not apply where there is a legal obligation to assist. Nonetheless, the provision of any undertaking not to assist unless legally obliged is an encroachment on a public policy of another country as the courts of the returning sate are actively encouraging the non-application of sanctions for a wrongful removal.

130. There are also public policy considerations concerning the rights of victims. The parent with custody rights over the abducted child is not the only victim of an abduction. The children themselves are victims where there has been a criminal abduction. Their right to be considered as victims during the investigation and prosecution stage is recognised now in Irish law. It is not entirely clear whether the only persons who may exercise those rights are the parents, one of whom has been a transgressor and the other who may find his or her immediate interest in securing the return of the child overrides any consideration of the child's rights as a victim of crime. In any event, their status as potential victims is a public policy consideration that a court should have regard to when considering whether undertakings are acceptable.

131. A party to proceedings may, on the other hand, control whether contempt proceedings are brought or pursued in respect of an apparent breach of a court order, against another party or person with knowledge of the court order. As the imposition of sanctions for breach of court orders may be driven by a party to the proceedings, the public policy considerations in seeking undertakings may be somewhat different.

132. All these public policy considerations feed into the policy behind the Hague Convention, that it is generally in the best interests of a child to have welfare issues decided in the courts of habitual residence. Even under Article 8 of the ECHR, it is recognised that there may, at times, be positive obligations with regard to the brining of criminal prosecutions in order that personal and family rights are respected. It would not therefore be in the best interests of a child routinely to set aside the careful protections that Hague Convention countries, including Ireland and Canada, have put in place through it criminal and civil protections, by imposing undertakings that may directly or indirectly nullify them.

133. In the present case, the respondent is still breastfeeding one of the children. It is not contested that she had a strong role in the daily care of the children (the extent of the applicant's role is in dispute although he clearly played a role when present in the home). I am satisfied in this case that in order to ease the return of the children it is in their best interests to accept in this case the undertakings that have been offered by the applicant not to initiate or pursue a prosecution against the respondent. This must be without prejudice to any legal requirement on the applicant to assist in any such prosecution. The undertaking must also expressly state that he will not bring or pursue any court order in respect of a breach of the court order of 14th January, 2019 not to remove the children from Canada and will withdraw any such contempt or enforcement proceedings that he has already taken. The precise wording of these undertakings can be addressed further by counsel.

Cumulative effect of all the circumstances

134. Despite the applicant's objections, I am satisfied that, even when taken individually each factor would not amount to a grave risk that to return a child to an intolerable situation, if the cumulative effect of all the circumstances is that such a grave risk is established, then an order for return must be refused. In making that determination, the Court must apply the correct test and standard of proof.

135. I have rejected each individual factor. I have considered how they interact. I acknowledge that the respondent is stressed and has been stressed by the events that have occurred and that she has been prescribed medication on top of an ongoing antidepressant. The stress that the respondent is undoubtedly under, which may be increased by having to return and to act for herself in the legal proceedings, has not in the circumstances of this case established that on the balance of probabilities there is a grave risk that the children will be placed in an intolerable situation. The cumulative factors do not when added together establish a grave risk of the children being placed in an intolerable situation.

Best Interests of the Child

136. From the foregoing, it can be seen that I have not been satisfied that the respondent has established a grave risk to the children under Article 13(b) of the Hague Convention should they be returned to Canada. In so concluding I have kept to the forefront of my considerations, the best interests of the children and have been satisfied that the risk has not been established. Even in those areas where a different view might be taken and it can be said a grave risk has been established, I am satisfied that the protections

apparent through the undertakings are sufficient to guard against that grave risk and to reduce it below the threshold. Insofar as there is a discretion concerning return where a grave risk has been established, I am satisfied, bearing in mind the best interests of the children, that any potentially intolerable situation that they may be placed in has been resolved by other considerations including the giving of undertakings. In the present case, I am satisfied that it is in the best interests of these children to be returned to Canada.