

THE HIGH COURT**Record No: [2015/15 HLC]****IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991****AND****IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION****AND****IN THE MATTER OF COUNCIL REGULATION 2201/2003****AND****IN THE MATTER OF CP (A MINOR)****BETWEEN:****R.P.****APPLICANT****AND****L.N.****RESPONDENT****JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 24th day of July, 2015.****Background to the Current Proceedings.**

1. These proceedings concern an application for the return of CP to the United Kingdom pursuant to article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "the Convention").
2. The parties were married in the United Kingdom in 2000.
3. CP was born in the United Kingdom on the 11th September, 2002.
4. The applicant is the father of CP and the respondent is the mother of the said child.
5. In or around 2012, the relationship between the parties deteriorated and broke down. At this point, the parties were residing in the United Kingdom.
6. The separation of the parties was acrimonious, with both parties living apart and claiming that they were subjected to domestic violence by their respective spouse. During this period, CP was residing with the respondent.
7. The applicant claims that following the separation of the parties, he began to experience difficulties exercising access with CP. During this period, the respondent made a number of allegations against the applicant that he was physically abusive to her and CP. In response, the applicant issued proceedings before the Courts of England and Wales seeking access with CP.
8. On the 19th October, 2012, the respondent was found to have attacked CP after she alleged that CP had kicked her. CP was placed by U.K. social services into a weekly boarding school and temporary foster placement at weekends with the respondent's cousin.
9. In September 2013, the parties were granted a decree of divorce by the Courts of England and Wales.
10. On the 22nd November, 2013, Gilford County Court made an order directing that CP reside with the applicant from the 6th December, 2013. The Court directed that the respondent was to have supervised access with CP.
11. On the 20th March, 2015, an application for unsupervised access was brought by the respondent before Guildford County Court. On this date, the applicant also brought an application for leave to re-locate to New Zealand. It is important to note that on the 8th July, 2015, the applicant informed Guildford County Court that he would not be pursuing his application to relocate with CP to New Zealand.
12. It is alleged by the applicant that the respondent wrongfully removed the parties' child from the jurisdiction of the Courts of England and Wales to this jurisdiction on the 2nd May, 2015 during a supervised access visit.
13. An application was made before the Family Court at Guilford, England, on the 5th May, 2015. At the hearing, his Honour Judge Nathan ordered the return of CP to the jurisdiction of the Courts of England and Wales. On the 27th May, 2015, the applicant made an *ex-parte* application for a certificate of enforceability pursuant to article 42 of Council Regulation (E.C.) No:2201/2003 of the 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial proceedings and the matters of parental responsibility, repealing Regulation (E.C) No: 137/2000 (hereinafter referred to as the "Regulation"), seeking recognition and enforceability of the order directing the return of CP to the jurisdiction of the Courts of England and Wales. The application was granted by his Honour Judge Nathan, and a certificate was issued accordingly.
14. On the 26th June, 2015, the English Court of Appeal granted a stay on the order directing the return of CP to the jurisdiction of England and Wales. Lady Justice Black granted the aforementioned stay as article 42 of the Regulation provides for the recognition and enforcement of an order for return pursuant to article 11(8) of the Regulation where an order for return is made on foot of a judgment pursuant to article 13 of the Hague Convention on the Civil Aspects of Child Abduction 1980. At that point in the proceedings, no order for return pursuant to article 11(8) of the Regulation had been issued by any court. Moreover, an article 42 certificate can only be issued where the provisions of article 42(2) of the Regulation are satisfied. Article 42(2)(b) of the Regulation

stipulates that a certificate of recognition and enforceability shall only be made if the parties were given an opportunity to be heard. As the applicant made an application for an article 42 certificate on an *ex-parte* basis, the requirements of article 42(2)(b) were not satisfied.

15. The stay granted by the Court of Appeal of England and Wales was not intended to prejudice these proceedings. Rather, the stay was granted on the order of his Honour Judge Nathan so as to facilitate the respondent to make an application to vary or discharge the said order. This is clear from Lady Justice Black's order for a stay dated 26th June, 2015.

16. On the 6th July, 2015, the applicant applied to Guilford Family Court seeking a discharge of the article 42 certificate and requested a certificate pursuant to article 39 of the Regulation.

17. On the 7th July, 2015, the respondent applied to Guilford Family Court for, *inter alia*, the following orders:

- (a). A child arrangements order transferring custody of the child to the respondent;
- (b). Withdrawal of Hague Convention/ Brussels II certificate for return and set aside contempt of court;
- (c). Set aside the request by the applicant for leave to remove the child to New Zealand;
- (d). Prohibited steps order with no direct or indirect contact by the respondent with the child until the outstanding criminal investigation has concluded and the professionals and the child agree;
- (e). A stay on all further family law proceedings until the criminal case has concluded;
- (f). A transfer of jurisdiction to the Irish High Court;
- (g). An allowance of an intermediary for the respondent so as to ensure no direct or indirect contact between the applicant and the respondent;
- (h). A "91.14" order against the applicant;
- (i). An order limiting the respondent's correspondence to two letters a week;
- (j). An order permitting the child to be a party to the proceedings through Ms. Peggy Ray of Goodman Ray.

18. On the 9th July, 2015, the Guilford Family Court dealt with the respondent's application to set aside the order of return dated the 5th May, 2015 together with the applicant's application for a discharge of the article 42 certificate issued on the 27th May, 2015. On the 9th July, 2015, his Honour Judge Cushing made the following determination/orders relevant to the current proceedings:

- (a). The respondent's application to set aside the order of return dated the 5th May, 2015 is dismissed.
- (b). The respondent's application for permission to appeal is dismissed.
- (c). The article 42 certificate issued on the 27th May, 2015, is discharged.

The Current Application

19. This current application was heard before this Court on the 22nd July, 2015, and the applicant seeks, *inter alia*, an order for the return of CP from this jurisdiction to the jurisdiction of the Courts of England and Wales pursuant to article 12 of the Convention. Furthermore, the applicant seeks a declaration that the respondent wrongfully removed CP from the jurisdiction of the Courts of England and Wales within the meaning of article 3 of the Convention.

20. The respondent is a litigant in person, and resists this application on the following grounds:

- (a). On any prospective return to the jurisdiction of the Courts of England and Wales, CP would be subjected to grave risk that would expose her to physical or psychological harm or otherwise place her in an intolerable situation for the purposes of article 13(b) of the Convention.
- (b). CP objects to any prospective order for return for the purposes of article 13 of the Convention, and she has reached an age and degree of maturity at which it is appropriate for this Court to take account of her views.
- (c). Any prospective order of return under the provisions of article 12 should be refused by this Court under article 20 of the Convention as such a return would not be permitted by the fundamental principles of this State relating to the protection of human rights and fundamental freedoms.

21. The respondent has raised other ancillary objections in these proceedings, namely that the current custody and access arrangements, order for return and certificate of enforceability should not be recognised and enforced in this jurisdiction under article 23 (a)-(b) of the Regulation.

22. It should be noted that the Courts of England and Wales have jurisdiction on the issue of custody and access of CP. It seems that the respondent claims that an order for the return of CP to the jurisdiction of the Courts of England and Wales should be refused under article 15 of Regulation on the basis that this Court is better placed to determine issues of custody and access.

The Applicable Law

23. Article 3 of the Convention states:-

"The removal or the retention of a child is to be considered wrongful where:

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”

24. As this case concerns an application for the return of a child between European member states, the Convention must be interpreted harmoniously with the Regulation. The synchronous interpretation and application of the Convention and the Regulation was noted by McKechnie J. in *G.T v K.A.O* [2008] 3 I.R 567 (at p.597, para.41.)

25. Article 2 of the Regulation defines the term "wrongful removal" as follows:

"the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.”

26. In order for this Court to grant a declaration that CP was wrongfully removed by the respondent on or about the 2nd May, 2015, within the meaning of article 3 of the Convention and article 2 of the Regulation, the applicant must establish on the balance of probabilities that:

(a). CP was habitually resident in England immediately before the 2nd May, 2015;

(b). on the aforesaid date, the applicant had rights of custody in respect of CP under the laws of England and Wales;

(c). the respondent's alleged removal of CP to the Republic of Ireland on or about the 2nd May, 2015, was in breach of these rights of custody, and

(d). the alleged custody rights of the applicant were exercised or would have been exercised but for removal or the retention.

27. If the Court concludes that the respondent has wrongfully removed CP, the Court must consider its obligations under article 12 of the Convention, which states;

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

28. In resisting the application to return CP to England, the respondent raises the defence of "grave risk" under article 13(b) of the Convention. Article 13 of the Convention states as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

(a). the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b). there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

29. In considering the defence of grave risk in these proceedings, the Court must take cognisance of article 11(4) of the Regulation which stipulates:

"A court cannot refuse to return a child on the basis of Article 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

30. The respondent, in resisting the application for return, claims that CP objects to any prospective return and that she has reached an age and degree of maturity at which this Court should take cognisance of her views. Article 13 of the Convention states:

"...The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

31. Furthermore, the respondent claims that this Court should refuse the order for return of CP to the jurisdiction of the Courts of England and Wales under article 20 of the Convention, as a return of the child to the aforesaid jurisdiction is not permitted by the fundamental principles of the State relating to the protection of human rights and fundamental freedoms. Article 20 of the Convention states 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."

Uncontested issues

32. The respondent does not dispute that CP was habitually resident in the United Kingdom at the time of the alleged wrongful removal to the Republic of Ireland on the 2nd May, 2015.

33. Moreover, it is not disputed by the respondent that the applicant had custody rights at the time of the wrongful removal, and he was exercising these rights or would have exercised these rights at the time of CP's removal from the jurisdiction of the Courts of England and Wales.

34. Thus, this Court can conclude that, on the balance of probabilities, CP was wrongfully removed from the jurisdiction of the Courts of England and Wales to the Republic of Ireland for the purposes of article 3 of the Convention. As this Court has concluded that CP was wrongfully removed from the jurisdiction of the Courts of England and Wales for the purposes of article 3, this Court has a mandatory duty to make an order for the return of the CP to England pursuant to article 12 of the Convention. However, prior to issuing any order for return of CP under article 12 of the Convention, this Court must determine whether the defences raised by the respondent under article 13 of the Convention would obviate an order for return of CP. In addition, the respondent has requested that the Court consider the provisions of article 20 of the Convention before issuing any order for the return of CP to England pursuant to article 12.

The Respondent's Position on the Defence of Grave Risk.

35. The respondent has raised the defence of grave risk under article 13 of the Convention. Thus, the respondent claims that CP should not be ordered to return to the United Kingdom as it would expose the child to grave risk of physical or psychological harm or otherwise place the child in an intolerable situation.

36. The respondent has alluded to investigations by TUSLA (the Child and Family Agency) and An Garda Síochána. It seems that these investigations relate to allegations that the applicant abused CP. These investigations were not concluded at the time of these proceedings. Moreover, it is important to state at the outset that it is not appropriate for this Court to embark upon a welfare hearing of CP for the purposes of determining arrangements for custody and access, or determining whether either parent is fit to exercise custody and access rights over CP.

37. In her affidavit sworn on 29th June, 2015, the respondent claims that there was a history of domestic abuse, child abuse and coercive control during the course of the parties' marriage.

38. The respondent alleges that the applicant was physically, verbally and emotionally abusive to her and CP. As a result of the alleged abuse, the respondent claims to have suffered from Post-Traumatic Stress Disorder and reactive depression.

39. In her affidavit, the respondent refers to a number of incidents whereby she alleges that the applicant physically abused CP. The respondent highlighted that a number of these incidents of alleged abuse were the subject of a fact-finding judgment of his Honour Judge Nathan dated the 1st May, 2013. These were as follows:

(a). In November 2008, the respondent alleges that the applicant held down CP by the neck causing finger marks on the child's neck. In his judgment, his Honour Judge Nathan concluded on this allegation as follows: *"There is absolutely no evidence for the mother's [the applicant in these proceedings] original assertion that suggested he strangled or tried to strangle CP, or that he deliberately placed his hands on her neck. It was possible that in physically restraining her by, as he accepts, holding CP down on the bed by her shoulders, that his hands bruised the lower part of her neck. In my judgment, he did not do this in order to harm her. It was nonetheless an inappropriate and disproportionate use of force."*

(b). In January 2009, the respondent alleges that the applicant dislocated the child's elbow in a local shopping centre. In his judgment, his Honour Judge Nathan concluded on this allegation as follows; *"I have no reliable evidence that he actually either shook CP or pushed her to the floor. His admission that he was sufficiently persuaded to examine her arm in order to form a view as to whether it had been dislocated makes it more probable than not though that he did something that was another disproportionate reaction to CP's difficult behaviour. What he actually did is something I make no finding about."*

(c). In December 2011, the respondent alleges that the applicant hit the child on the head resulting in bruising. The respondent claims that applicant made contact with the child by punching her. In his judgment, his Honour Judge Nathan concluded on this allegation as follows; *"I have no reliable evidence that he punched her. I have no evidence that he deliberately wanted to hurt her. I do not accept that the explanation that he gave was the same false explanation of a ring-mark he had previously given in relation to the Mother. I make no finding as to which hand he used or how he held his hand at the time. What I do find is that he must have used a significant degree of force to have caused the bruise that both parents later wanted to cover up. I also find that the force was disproportionate and inappropriate. I also find that the Father's very limited admission in his response to threshold, namely; 'The Father accepts that he could have handled this better' is a regrettable understatement and is indeed an example of how he has attempted to understate his reaction to CP."*

(d). On the 3rd January, 2012, the respondent alleges that the applicant grabbed the child and shook CP into a door. In his judgment, his Honour Judge Nathan concluded on this allegation as follows; *"There is insufficient reliable evidence to enable me to make any findings beyond firstly, the Father's limited admission that he restrained CP, and secondly, that the force he used was excessive and disproportionate, because it caused, as he accepted, a horseshoe-shaped mark."*

40. The respondent accepts that the judgment of Judge Nathan makes findings that are detrimental to her position. These findings are as follows:

(a). *"On the 19th October, 2012, the respondent kicked and slapped CP in response to CP refusing to go to school; calling her names and kicking her. That in essence is admitted, and I find it proved."*

(b). *"The mother has exposed CP to her negative views about the Father and has spoken to CP in detail about the Father's alleged emotional and physical mistreatment of both herself and CP. In consequence, CP has become parentified and displays an inappropriate knowledge of and preoccupation with the issues between her parents."*

(c). *"The Mother has a diagnosis of reactive depression and on occasion exhibits, personality traits which exacerbate other aspects of her behaviour, for example her tendency to over-dramatise and exaggerate."*

(d). *"The mother has failed to protect CP from her anxiety and behavioural and emotional excesses. For example:*

(i). The Mother has on occasions shown an exceedingly heightened anxious response to CP's diagnosis of allergic problems.

(ii). CP has utilised the same strategies of self-harm and threats of suicide as her mother to deal with difficult situations.

(iii). On the 17th July, 2013, the Mother failed to protect CP from her distress when CP underwent a minor operation; the Mother's distress was about herself and not about CP."

41. The respondent alleges that the domestic violence services in the United Kingdom have been involved with the family since September 2014. The respondent alleges that the police informed her that the applicant was escalating and he would lose total control at the end of the supervision order. The respondent claims that she was told to get a non-molestation order against the applicant, but she was unable to do so as the local authority social workers would view this step as an increase in acrimony by the respondent towards the applicant.

42. The respondent also alleges that CP was exposed to adult themes on a mobile phone while in the care and custody of the applicant. Furthermore, the respondent alleges that while CP was in the care of the applicant, the child found a sex toy belonging to the applicant, and she disposed of the said apparatus.

43. The respondent alleges that on the 1st May, 2015, the child expressed concerns that when she was residing with the applicant, she unable to wake up fully and would find finger mark bruises on her upper arms and thighs. According to the respondent, it seems that this allegation is the subject of an investigation by An Garda Síochána. The Court has not been furnished with any documentation by An Garda Síochána that confirms that these allegations are the subject of an investigation. However, the respondent maintains that the aforesaid allegation is the subject of an investigation by An Garda Síochána and that the child has been interviewed for the purpose of the investigation. The Court notes a letter from Mr. John Moore, social worker for the Child and Family Agency dated the 14th July, 2015, where he alludes to CP being interviewed by An Garda Síochána regarding the allegations of abuse. However, it has not been verified independently by documentation from An Garda Síochána to the Court that the allegations are the subject of an investigation by An Garda Síochána.

44. The respondent claims that she removed the child from the United Kingdom as the relevant authorities in that jurisdiction did not take adequate steps to protect CP's welfare. Thus, the respondent decided to remove the child from the United Kingdom so as to protect CP from the allegations outlined above.

45. In her affidavit sworn on 29th June, 2015, the respondent outlined that she brought CP to a trauma psychotherapist soon after their arrival in Ireland. The said psychotherapist confirmed that CP was well adjusted with no signs of depression or anxiety. In support of this proposition, the respondent submitted a letter from Dr. Pradeep K. Chadha. The letter confirms that on the 20th May, 2015, Dr. Chadha consulted with CP for an interview. Dr. Chadha opines in the letter that CP is well adjusted to life in Ireland and living with her mother. Moreover, Dr. Chadha observed that CP did not present as having symptoms of depression or anxiety at the time of the interview. Dr. Chadha notes that CP stated and used the word "abuse" when discussing the period in which she lived with her father.

46. The respondent claims that if CP is returned to the United Kingdom she would be exposed to grave risk for the purposes of article 13(b) of the Convention as she believes that the relevant U.K. authorities will not pursue protective measures to ensure that CP is sheltered and removed from the abuse as alleged above. Furthermore, the respondent asserts that if CP is returned to the jurisdiction of the Courts of England and Wales, CP will be placed into foster care or into the care of the applicant. The respondent claims that if CP enters either care arrangement, she will engage in self-harm and in turn, be exposed to grave risk for the purposes of article 13(b) of the Convention.

47. The respondent also resists an application for the return of CP to the United Kingdom pursuant to article 12 of the Convention under article 20 of the said Convention. Article 20 of the Convention outlines that a Court may not effect a return pursuant to article 12 of the Convention if any such return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. The respondent claims that this Court should exercise its discretion to refuse an order for return of CP to the United Kingdom under article 20 of the Convention as any such return would warrant a breach of CP's right to be free from torture or inhuman or degrading treatment or punishment under article 3 of the European Convention on Human Rights.

48. The respondent submits that this Court must take cognisance of the European Convention of Human Rights in making any determination to return CP to the United Kingdom. In support of this position, the respondent relies on the decision of Sheehan J. in *J.J v. L. McL* (Unreported, High Court, 26th July, 2013) where the learned judge held (at para 36):

"This Court must thus be cognisant of the obligation to interpret and apply any statutory provision or rule of law in a manner compatible with this jurisdiction's obligations under the Convention. In that regard this Court has considered the recent relevant jurisprudence emanating from the European Court of Human Rights. The most recent relevant judgment of the Grand Chamber is that given in the case of *Neulinger and Shuruk v Switzerland* 41615/07 [2010] ECHR 1053. The Court held, by 16 votes to 1, that basic norms of human rights – at least as expressed in the European Convention of Human Rights – require (a) that courts in every case under the Hague Convention must consider the best interests of both the child and the child's family and (b) that a child should not be returned to its habitual residence, even if that is required by the Hague Convention, if it is not in his or her best interests to do so."

The Applicant's Position on the Defence of Grave Risk.

49. The applicant swore an affidavit dated the 17th July, 2015, for the purpose of these proceedings. Within the said affidavit, the applicant denies the allegations of abuse as alleged by the respondent and CP as contained in the respondent's affidavit. Moreover, the applicant claims that the respondent made the aforesaid allegations to the relevant authorities and Courts in the United Kingdom. In particular, the applicant referred to the judgment of his Honour Judge Nathan dated the 1st May, 2013 and a report dated the 12th March, 2015 which was conducted pursuant to section 7 of the Children Act, 1989.

50. The applicant claims that the judgment of his Honour Judge Nathan rejected the allegations made against him in the main.

However, the applicant does accept that Judge Nathan did make findings against him, namely that he did not attempt to strangle CP in November 2008 but, he had attempted to restrain CP using inappropriate and disproportionate force. The applicant directed the Court to an excerpt of Judge Nathan's concerns that there was no independent evidence that substantiated CP's allegations of physical abuse. Rather, Judge Nathan formed the view that the majority of the evidence relating to the allegations of physical abuse stemmed from the respondent.

51. Moreover, the applicant directed the Court's attention to passages of Judge Nathan's judgment where he raises concerns that the respondent had exposed CP to inappropriate discussions and documentation concerning the family law litigation, and in turn, CP's allegations may have been tainted by the influence of the respondent.

52. The applicant also referred to a section 7 report conducted by U.K. social workers where it was reported that no further action was being taken by the police or local authority with regard to the allegations that the applicant physically abused CP. Furthermore, the applicant directed the Court to a passage within the report that recommends that CP should continue to live with the applicant with supervised access to the respondent.

53. In his affidavit, the applicant claims that he was subjected to verbal and physical abuse by the respondent. In particular, the applicant recounts an occasion where he was struck in the face and threatened with a knife by the respondent.

54. The applicant denies that CP was exposed to adult themes or sexual apparatus while she was in his care and custody. Moreover, the applicant denies the allegation by the respondent that on the 1st May, 2015, CP made disclosures that while she was sleeping in the applicant's home she was unable to wake up fully and would find finger mark bruises on her upper arms and thighs.

55. The applicant denies that the domestic violence services were involved with the family since September, 2014. The applicant claims that he was not contacted by the domestic violence services or by the police. The applicant admits that he attended a voluntary interview on the 25th February, 2015, following a complaint of domestic violence made by the respondent. The applicant asserted that the U.K police concluded that no further action was required with regard to the allegation of domestic violence and that they were not pursuing any investigation against him. In support of this position, the applicant submitted an email from Detective Inspector Richard Pegler of the Gloucestershire Constabulary dated the 12th May, 2015.

56. On the issue of the respondent's reliance on the defence of grave risk, counsel for applicant directed the Court to the decision of the Supreme Court in *A. Bu v. J. Be No.2* (Unreported, Supreme Court, Denham J., 20th May, 2010), where the Supreme Court held that the onus is on the appellant to establish that the return of the child would expose that child to physical or psychological harm or otherwise place the child in an intolerable situation, that the concept of "grave risk" is of a "serious risk", and if the risk can be obviated through protective measures or undertakings pending the substantive custody hearing in the original state of habitual residence then an order of return of the child should be effected. In particular, counsel for the applicant relied on remarks of Denham J., where she states(at paras 34-37):

"34. There is an onus on the appellant to establish that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The High Court held that the appellant had not established such a situation. While there were allegations made in the High Court these were denied vigorously by the respondent. On all the facts of the case, including the history of the parents and child, I would dismiss the appeal on this ground. The appellant has not established that there would be a grave risk in returning the child to Latvia. The concept of "grave risk" is of a serious risk.

35. In *K. v. K.* (Unreported, Supreme Court, 6th May, 1998) I stated, of the issue of "grave risk":-

"The grave risk contemplated in the Hague Convention is that of a serious risk. In *Thompson v. Thompson* [1994] 3 R.C.S. La Forest J. of the Supreme Court of Canada stated:

'In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation.'

"The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the Court Orders in the requesting country then the policy of the Convention to return children to the Country of their habitual residence will be met. Also, the particular children affected by the Convention in a case will have their interest protected."

"36. In this case the appellant made assertions which were vigorously denied. This does not meet the burden of proof required, and indeed illustrates the merits of having the court of the habitual residence determine the custody of and access to a child.

37. This point was made by McGuinness J. in *M.S.H. v. L.H. (Child Abduction: Custody)* [2000] I.R. 390, where at p.404:-

"The difficulty with the defendant's evidence of risk, in my view, is that it is indeed very general and lacking in detail; indeed it highlights the paucity of factual evidence on either side as to the circumstances of the children either before they left England, during their residence in Galway, or prospectively if they return to England. This situation serves to illustrate the wisdom not only of the policy of the Hague Convention but also of the former rule that the question of the welfare of children is best decided by the courts of the jurisdiction with whom they have the closest real connection, in general the courts of their habitual residence.'

This principle applies to the case before the Court.

"38. I am satisfied that the learned trial judge did not fall into any error in his decision on the issue of "grave risk". I would dismiss this ground of appeal."

57. Counsel for the applicant claims that the respondent has failed to show that any prospective return of CP to the United Kingdom would expose her to physical or psychological harm or otherwise place the child in an intolerable situation. In addition, counsel for the

applicant claims that the respondent has failed to satisfy the Court that the grave risk as alleged amounts to a serious risk. Furthermore, counsel for the applicant submits that the respondent has failed to show that the local authority in the United Kingdom or the Courts of England and Wales would not be in a position to provide effective protection to CP if returned to the United Kingdom.

58. Counsel for applicant submitted to the Court that the question of CP's best welfare interests would be best determined by the Courts of CP's country of habitual residence, namely, the Courts of England and Wales. In support of this proposition, counsel for the applicant relied on the decision of the Supreme Court in *P.L v E.C.* (Unreported, Supreme Court, Fennelly J., April 11th, 2008), and the Court was directed to the pertinent passage of the judgment of Fennelly J. where he stated (at para 55):

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

59. In coming to the conclusion that the best welfare interests of the child are best determined by the courts of the child's country of habitual residence, Fennelly J. went on to state that in order for the Court to vitiate an order for return of the child on the defence of grave risk, the appellant would have to persuade the Court that the courts of the child's habitual residence would make orders that would in effect expose the child to grave risk, or that the Courts of the state of habitual residence were unable or unwilling to protect the welfare of the child (at para 62):

"In order to meet the test laid down in the cases, the appellant must persuade the Court that the Australian court has decided, in advance of argument from counsel, to make orders exposing C to a risk of sexual abuse and that, for that reason, that court is unable or unwilling to protect the welfare of C."

Fennelly J. goes on to state further (at para 65):

"It is for the Australian court, not this court, to test the strength and veracity of the allegations of sexual abuse. It has heard oral evidence from both parties, tested by cross-examination, over a period of eight days. It has also heard expert witnesses and received their reports. The Australian courts conduct adversarial proceedings in a manner remarkably similar to our own. They are capable of protecting the interests of C. If the appellant is dissatisfied with a decision of the Family court, she will have a right of appeal. For these reasons, I am satisfied that the appellant has not made out the case of grave risk."

60. Counsel for the applicant submits that in this case, CP was in the care of the applicant since the 6th December, 2013, until the wrongful removal of the said child on the 2nd May, 2015. In turn, counsel for the applicant claims there is no issue as to psychological harm, which may arise if CP is returned to the United Kingdom. It is highlighted by counsel for the applicant that there are ongoing access and custody proceedings in the Courts of England and Wales with further applications concerning the child listed before Guilford Family Court on the 6th August, 2015. Moreover, the Courts of England and Wales have overseen the production of section 7 and section 37 reports for the purposes of the Children Act 1989 relating to the welfare of CP. Thus, counsel for the applicant submits that the Courts of England and Wales are best placed to deal with issues concerning the welfare of the child.

61. Counsel for the applicant submitted to the Court that, although the allegations by the respondent and CP are denied by the applicant, the local authority and Courts of England and Wales could implement protective measures so as to obviate any risk that would impinge upon the welfare of CP if returned to the United Kingdom.

The Voice of the Child.

62. CP was born on the 11th September, 2002, and is twelve years of age.

63. On the 3rd June, 2015, this Court ordered that Ms. Anne O'Connell, Consultant Clinical Psychologist, conduct an interview with CP for the purposes of providing the child with an opportunity to express her views and be heard in these proceedings. This interview was ordered by this Court so as comply with its obligations under article 11(2) of the Regulation.

64. The objectives of the interview with CP were to ascertain the following:

- (a). The circumstances in which CP was living prior to coming to Ireland on the 2nd May, 2015.
- (b). The circumstances in which CP came to Ireland on that date and remained here, and her awareness of the reasons for the decision not to return to England.
- (c). CP's wishes in relation to her future care, education and living arrangements including where she would like to live.
- (d). If those wishes do not include living in England, whether she has any objection to returning to live in England.
- (e). In the event of any such objection, her reasons for the objection.
- (f). If CP were to return to live in England, any wishes as to how and when the return would take place.
- (g). Should CP stay in Ireland or return to England, what role does she envisage for the non-resident father in her future life.
- (h). Any other information she may wish the Court to take into account.

65. Ms. Anne O'Connell was also directed to assess CP's degree of maturity, whether CP was capable of forming her own views, and whether those views were formed independently.

66. This Court gave leave to Ms. O'Connell to contact the social workers that were involved in this case due to the severe acrimony

between the parties. This would ensure that Ms. O'Connell would have a holistic understanding of the case so that she could conduct an efficient and effective interview and report as to the views of CP.

67. Ms. Anne O'Connell provided a report dated the 24th June, 2015, and provided testimony to this Court on the 15th July, 2015. From the outset of her testimony, Ms. O'Connell outlined that she was in contact with Ms. Debbie Singleton of National Youth Advocacy Service (NYAS) and Ms. Clare Glennerster of the relevant local authority in the United Kingdom. In addition, Ms. O'Connell was in contact with Mr. John Moore, social worker with the Child and Family Agency in Ireland.

68. Ms. Anne O'Connell reported that CP informed her that she had lived with her father prior to coming to Ireland. CP expressed the view that her relationship with her father was tumultuous and referred to instances where he had allegedly abused her physically. CP claimed that, when living with the applicant, she was so miserable that she resorted to self-harming on three occasions. Moreover, CP claimed that each time she had access with the applicant, she begged the respondent to take her away. According to CP, the respondent planned her removal to Ireland, but told CP that she could change her mind at any time, or return to England if CP so wished. CP reported that she enjoys living in Ireland and that her education in this jurisdiction is progressing well. CP was asked to give her views as to why the applicant wanted her to return to England. In response, CP outlined that the police and social workers believe him when he states that CP should not live with her mother. CP claimed that the authorities in the United Kingdom do not listen to her or believe her allegations. CP expressed the concern that the U.K. authorities do not like her mother. In addition, CP claimed that her father has told her that her mother is unstable.

69. Ms. O'Connell noted that CP stated that she never wants to see her father again. CP claimed that if she was to live in England, she would refuse to see her father. Ms. O'Connell noted at this stage of the interview that CP stated that she would kill herself rather than visit her father. Ms. O'Connell opined that CP statements regarding suicide are more dramatic gestures than genuine intent.

70. Ms. O'Connell noted that CP objects to a return to England on the basis that she does not want to see the applicant. Moreover, CP objected to any prospective return to England as she believes that the authorities in the United Kingdom have failed to address her allegations that she had been subjected to physical abuse by the applicant.

71. As to CP's degree of maturity and ability to form independent views, Ms. O'Connell placed CP's intellectual development at the ten-eleven year old level, with consistent immature behaviours and thinking processes. In addition, Ms. O'Connell opined that CP forms strong views for or against certain people or ideas, and then does little to consider or adapt such views in relation to changing circumstances. Ms. O'Connell expressed the view that CP is co-dependent on the applicant, and will not think about any event or behaviour which might contradict CP's need to gain security through being close to the applicant. Ms. O'Connell noted that CP states that she and her mother do not discuss the case with each other. Ms. O'Connell noted that this proposition is contradicted by the social worker observations of increased complaints when CP is with the respondent.

72. Ms. O'Connell reports that CP is angry with her father and has accused him of acting towards her in a violent manner. However, Ms. O'Connell notes that these allegations have not been substantiated.

73. In her conclusion, Ms. O'Connell noted that Mr. John Moore of the Child and Family Agency expressed a concern that the respondent's mental health issues were "rubbing off" on CP. However, a letter was submitted to the parties from Mr. Moore dated the 14th July, 2015. The letter was submitted to the Court. In his letter, Mr. Moore confirmed that the respondent was being assessed by the Child and Family Agency for the purpose of ascertaining whether the respondent has the capacity to safeguard and protect CP. Mr. Moore also claimed that CP had expressed to him that she objected to a return to the United Kingdom, but if she was returned to that jurisdiction, she would prefer to be placed in care rather than in the care of the applicant.

74. Furthermore, Ms. O'Connell expressed the opinion that CP is showing evidence of significant emotional stress, co-dependence and anger at being caught between two warring parents. As a result, CP remains in a fixed state of emotional immaturity. Ms. O'Connell opined that CP's parents should resolve their legal and financial issues as soon as possible as ongoing animosity between them is impeding CP's progression. Ms. O'Connell noted that CP's ambivalence is due to her parent's difficulties as much as her core beliefs and, at some level, she is attempting to keep them both happy by professing loyalty to the closest parent.

75. In terms of a prospective return to the United Kingdom, Ms. O'Connell expressed the view that the situation in Ireland is less stable than the one CP left in the United Kingdom. Ms. O'Connell concluded that CP would struggle to fit into second level education in Ireland.

76. Ms. O'Connell outlines that if CP was returned to the United Kingdom, she would not support CP moving into the applicant's home directly. Rather, Ms. O'Connell supports the mooted option of placing CP in foster-care for a interim period pending the custody and access hearing in the United Kingdom and CP rebuilding her relationship with the applicant.

77. The respondent objected to Ms. O'Connell's report on the basis that she only assessed CP for a period of thirty minutes. However, Ms. O'Connell did not have the requisite scheduled time to assess CP as the respondent was late to the appointment with the said child. The respondent claims that she was late for the said appointment as she was in Court. However, on the date of the scheduled assessment, the applicant was before the Court on an ex-parte application. There was no necessity for the respondent to be present in Court on that date. Rather, the respondent's priority should have been to bring CP to Ms. O'Connell's assessment on time.

78. This Court noted the respondent's objection. On the 15th July, 2015, the Court directed that Dr. Patrick Randall complete an interview with CP pursuant to article 11(2) of the Regulation so as to ascertain CP's view on any prospective return to the United Kingdom. Dr. Randall was directed by this Court to conduct his interview and report on the same parameters as Ms. Anne O'Connell, as outlined in paragraph 52 of this judgment. The Court directed that the special summons, affidavits and exhibits were to be released to Dr. Randall by the applicant's solicitor, but no extraneous material was to be provided.

79. Dr. Patrick Randall compiled a report dated the 21st July, 2015. Dr. Randall's interview with CP and subsequent report was conducted on the same parameters as Ms. O'Connell's assessment in terms of ascertaining CP's views on any prospective order for return to the United Kingdom.

80. In terms of CP's clinical presentation, Dr. Randall noted that CP presented as a mature, articulate and engaging twelve year old. He reported that CP presented with exaggerated affect with dramatic gestures, but that these presentations were common in young adolescents. Dr. Randall reported that CP's demeanour appeared superficial, but that this was not unusual for children when they are addressing issues they find difficult or stressful.

81. In terms of CP's degree of maturity, Dr. Randall opined that CP was an intelligent and articulate child and had maintained her

composure when describing what she termed as abusive experiences she had been subjected to by the applicant.

82. On the issue of whether CP was able to form her own views and whether those views were formed independently without influence from others, Dr. Randall reported that CP concluded her views were her own and were formed independently. Dr. Randall noted that CP expressed disappointment and concern that the professionals in the United Kingdom had not considered her views and that her father's version of events would be believed and her account of events discredited.

83. Dr. Randall recounts explaining to her that the interview was an effort to determine her views and to ensure they were represented. CP accepted this proposition, but noted that this had been done by another psychologist, namely Ms. Anne O'Connell.

84. Dr. Randall noted that CP objects to any prospective return to England on the basis that her father had allegedly abused her in a physical, verbal and emotional manner. Moreover, Dr. Randall reports that CP objects to any prospective return on the basis that the relevant authorities in the United Kingdom have not investigated the allegations of abuse adequately.

85. In his report, Dr. Randall notes that CP claimed that she had self-harmed in the past. Dr. Randall reports that CP demonstrated how she engaged in self-harm and disclosed superficial scars from such self-harm. However, Dr. Randall concluded that the injuries suffered by CP were superficial with negligible prospects of causing serious harm. Dr. Randall opined that CP's self-harm should be viewed as an attempt to express her emotional overwhelm and not a purposive attempt at self-harm.

86. Dr. Randall concluded that CP's wishes were to remain in Ireland and refrain from having access with her father on the basis that she finds him physically, verbally, and emotionally abusive. Dr. Randall opined that CP had experienced a traumatic three and half years at a critical developmental period. Moreover, it was important that she be afforded a secure, predictable and nurturing base at this juncture. Dr. Randall expressed the view that CP requires appropriate boundaries and the psychological freedom to engage in her life unhindered by anxiety in relation to her home life and parental conflict.

87. In relation to CP's objections to an order for return to the United Kingdom, counsel for the applicant submits that the defence of objection by the child under article 13 of the Convention only arises where two conditions are met; firstly, the child objects to a prospective return and second, the child has reached an age of degree and maturity at which it is appropriate for the Court to take cognisance of her views. Counsel for the applicant submitted that once these conditions are met, the Court has a discretion to refuse an order for return, but in exercising its discretion, the Court may consider the nature and strength of the child's objection, whether the objections were formed independently or whether the objections were the product of the influence of the abducting parent. In support of this proposition, counsel for the applicant directed the Court to the decision of the Supreme Court in *A.U. v. T.N.U. (Child abduction)* [2011] 3 IR 683, where Denham C.J. cited the English decision in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, and held (at para 27-28):

"27. A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence.

28. The range of considerations may be wide. As was stated in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, at p. 1308:-

"[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are: 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

88. Counsel for the applicant submits that there is no evidence that the child objects to her return to England and Wales, and any such objections of CP to a prospective return to England and Wales are the product of the influence of the respondent.

89. The respondent submitted to the Court that CP has formed her views independently and objects to a return to the United Kingdom on the basis that the applicant has subjected CP to physical, verbal and emotional abuse. In turn, the respondent submits that this Court should take account of CP's objections to a prospective return to the United Kingdom and refuse any prospective order for return pursuant to article 13 of the Convention. In support of this proposition, the respondent relies on the decision of the English High Court in *M.R v. HR* [2015] EWHC 234 (Fam), where the Court refused an order of the return of a child due to his objections to the said return. In particular, the respondent directed the Court to comments of Theis J. where she states at (para.49):

"The views expressed by D are in my judgment clear. His objection to being sent back to Ireland is founded on the violence he reports he suffered from his father, and he genuinely believes he would not be safe. I accept Ms Brooks' assessment as to the genuineness of his views and those fears. He has had direct experience of protective measures in Ireland not working. His emotional state is particularly concerning and it is clearly important that he continues to receive the support he is currently receiving, with as little disruption as possible. It is right to carefully consider his age and level of maturity and what is said about his level of understanding, but it is clear in the way he expressed himself to Ms Brooks he had a rational base for his views. It was noteworthy that he expressed considerable anxiety when he thought details of his current school might be disclosed to his father and his fears did not reduce when he was asked to consider a return to Ireland with his mother."

Conclusion

90. It is not disputed by either party that CP was habitually resident in the United Kingdom prior to her removal to this jurisdiction on the 2nd May, 2015. Moreover, it is not disputed by the parties that the removal of CP to this jurisdiction was in breach of the applicant's custody rights. Thus, this Court can conclude that the removal of CP to this jurisdiction was wrongful within the meaning of article 3 of the Convention.

91. The respondent has raised two primary objections in these proceedings. Firstly, the respondent claims that the current custody and access arrangements, order for return and certificate of enforceability should not be recognised and enforced in this jurisdiction under article 23 (a)-(b) of the Regulation. The proceedings before this Court are not enforcement proceedings under the Regulation. An application raising issues under article 23 of the Regulation would be suitable to enforcement proceedings as described. Rather, these proceedings concern an application made before this Court for the return of CP to the jurisdiction of the United Kingdom pursuant to the Hague Convention and the Brussels II *bis* Regulation. Thus, the respondent's objection under article 23 of the Regulation is dismissed.

92. Secondly, the respondent submitted that an order for return of CP to the jurisdiction of the Court of England and Wales should be refused under article 15 of Regulation on the basis that this Court is better placed to determine issues of custody and access. It is not disputed by the parties that CP was habitually resident in the United Kingdom prior to the wrongful removal of the said child to this jurisdiction. Moreover, it is clear from the documentary evidence in this case that the Courts of England and Wales along with the relevant U.K. authorities have had an extensive role in the general family law litigation that raises issues of custody and access. This is evident in the existence of the judgment of Judge Nathan dated the 1st May, 2013, and section 7 and section 37 reports produced by the U.K. social work authorities. This Court does not accept the submission of the respondent that proceedings relating to custody and access of CP should be transferred to this Court because the Child and Family Agency and An Garda Síochána have commenced an assessment and investigation on the allegations that the applicant abused CP. The Courts of England and Wales would be the appropriate Courts to hear an application by the respondent under article 15 of the Regulation so as to determine whether the Courts of Ireland would be better placed to hear issues of custody, access and child protection relating to the parties and CP.

93. The respondent has raised the defence of grave risk pursuant to article 13(b) of the Convention. In raising this defence, the respondent bears the legal burden of proof of satisfying this Court that, on the balance of probabilities, CP would be subjected to grave risk if returned to the jurisdiction of the Courts of England and Wales. Moreover, the respondent must meet the evidential burden of satisfying the Court that a prospective return of CP to the United Kingdom would expose her to grave risk. The evidential burden or threshold that must be satisfied for the purposes of a defence under article 13(b) of the Convention is clear and compelling evidence that the child would be exposed to grave risk and/or would be placed in an intolerable situation if returned to their country of habitual residence. In *C.A v C.A (otherwise C.McC)* [2010] 2 I.R. 162, Finlay Geoghegan J. stated (at pg.170):-

"It is common case, in accordance with the decisions of the Supreme Court, and in particular those in *A.S. v P.S (Child Abduction)* [1998] 2. I.R. 244 and Minister for Justice (*E.M*) v (*J.M.*) [2003] 3 I.R. 178, that the potential defence provided for in article 13(b) is a rare exception to the requirement under the Convention to return children who have been wrongfully removed from their jurisdiction of habitual residence and that it is an exception which should be strictly applied in a narrow context in which it arises. Further, it is common case that the evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence"."

94. In *R.K v J.K* [2000] 2 I.R. 416, the Supreme Court endorsed the dicta of the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich* (1996) 78 F. 3d 1060, where it was held that grave risk exists in two situations. Firstly, grave risk will be established for the purposes of the Convention where there is an imminent danger to the child before the resolution of the custody dispute. Secondly, grave risk could be established for the purposes of the Convention if the factual matrix of the case reflected serious abuse, neglect or extraordinary emotional dependence of the child and, in turn, the court in the country of the child's habitual residence was incapable or unwilling to provide adequate protections to the child. The observations of Baron J. are noteworthy (at p.451):

"In my opinion the following passage from *Friedrich v. Friedrich* (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is as follows:-

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

95. In *In re E (Children)* [2011] UKSC 27, [2012] 1 A.C. 144, the U.K Supreme Court outlined the procedural requirements that must be satisfied by a party opposing the return of a child on the grounds of grave risk under article 13(b) of the Convention. Baroness Hale of Richmond and Lord Wilson JJ. SC held that the burden of proof rests on the party opposing the order for the return of the child to its country of habitual residence, and that the standard of proof is on the balance of probabilities. Moreover, the Court emphasised the importance of the adjudicating court of, on analysing the evidence, remaining cognisant of the summary nature of Hague Convention proceedings (at para 32):

"First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination."

96. In its judgment, the Court distinguished the concept of "grave" risk from that of "real risk, and explained that the concept of physical and psychological harm and intolerable situation must be assessed subjectively with regard the particular circumstances of the case and the particular characteristics of the child (at para 33-34):

"33.Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm

34. Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in *Re D*, at para 52, "Intolerable" is a

strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. 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. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."

97. Importantly, the Court identified that in assessing grave risk for the purposes of the Convention, the Court's assessment must be prospective (at para 35):

"Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist".

98. Thus, this Court must, in determining whether the defence of grave risk has been established, evaluate whether protective measures can be established to obviate the grave risk as alleged.

99. In this case, there has been a number of allegations of abuse made by the respondent and CP against the applicant. The majority of these allegations were the subject of a fact-finding judgment of his Honour Judge Nathan dated the 1st May, 2013. In his judgment, Judge Nathan held that the allegation that the applicant violently abused CP and the respondent lacked sufficient evidence. Rather, the Court came to conclusion that the incidents of violence reflected a disproportionate use of force by the applicant against CP in order to chastise the child's difficult behaviour. This Court finds that it is significant that Judge Nathan had concluded in his judgment dated the 1st May, 2015, that the respondent had exposed CP to negative views of the applicant and spoke to the said child about the alleged emotional and physical mistreatment of both herself and child in detail. Moreover, this Court believes that it is significant that Judge Nathan concluded that CP had utilised the same strategies of self-harm and threats of suicide as the respondent to deal with difficult situations, and that CP has developed a co-dependent relationship with the respondent.

100. The respondent claims that CP will self-harm if returned to the United Kingdom. On this issue, Ms. Anne O'Connell concluded that CP's statements regarding suicide were more a dramatic gesture than genuine intent. In his report, Dr. Patrick Randall concluded that CP's statements regarding suicide was an attempt to express her emotional overwhelm and not a purposive attempt at self-harm.

101. Furthermore, the respondent claims that CP made a disclosure on the 1st May, 2015, that, while sleeping at the applicant's home, she had difficulty waking up and on waking, the child found finger mark bruises on her upper arms and thighs. During these proceedings, the respondent claimed that this particular allegation was the subject of an investigation by An Garda Síochána. It was confirmed to the Court through Mr. John Moore's letter dated the 14th July, 2015, that CP was interviewed by An Garda Síochána regarding a series of allegations that CP had made against the applicant. However, this Court has received no documentation from An Garda Síochána as to whether the subject matter of the interviews are being pursued by further investigation by An Garda Síochána. This Court is of the view that the policy objectives of the Hague Convention and the Brussels II bis Regulation would be subverted if an abducting parent could defeat an application for the return of an abducted child by merely making a complaint to policing authorities in the requested state.

102. On the 20th May, 2015, the respondent brought CP to Dr. Paradeep K. Chadha, Psychiatrist and Psychologist for an interview and consultation. The respondent described Dr. Chadha as a trauma psychotherapist. In his letter, Dr. Chadha concluded that for the purposes of his interview with CP, the child exhibited no signs of depression or anxiety. This Court finds it peculiar that Dr. Chadha could come to the aforesaid conclusion if CP was the subject of the severe abuse as alleged (with such abuse being disclosed as early as nineteen days prior to Dr. Chadha's interview with CP).

103. The respondent claims that if CP is returned to the United Kingdom, she will be exposed to grave risk as the relevant U.K. authorities will not pursue active steps to prevent the child from being subjected to abuse. It is clear from the documentation that has been submitted to this Court, that the relevant U.K. social work authorities along with the Courts of England and Wales have taken positive steps to secure the welfare of CP. This Court accepts the submission of counsel for the applicant that the United Kingdom has the sufficient infrastructures, social services and supports to protect CP if returned to the jurisdiction of the Courts of England and Wales. Such a proposition is axiomatic considering that the United Kingdom is a signatory to the Convention.

104. This Court concludes that on the balance of probabilities, the respondent has not raised "clear and compelling" evidence to support a defence of grave risk under article 13(b) of the Convention, which would vitiate an order for the return of CP pursuant to article 12 of the Convention.

105. The respondent resists an order for return of CP to the United Kingdom under article 20 of the Convention on the grounds that a return of the child would be in violation of her right to be free from torture or inhuman and degrading treatment or punishment under article 3 of the European Convention on Human Rights. It must be acknowledged that the relevant U.K. authorities and the Courts of England and Wales are subject to the Human Rights Act 1998, and are obliged to apply their policies and the law of England and Wales in a manner that is compatible with the European Convention on Human Rights. This Court finds that the authorities have taken positive steps to ensure that the welfare of CP is secured and her human rights protected and vindicated.

106. In this case, the respondent submitted that CP objects to an order returning her to the United Kingdom, and that CP has reached an age and degree of maturity that warrants this Court to take cognisance of her views on any prospective return to the United Kingdom. It is clear from the reports of Ms. O'Connell and Dr. Randall that the child objects to a return to the United Kingdom. However, this Court has reservations as to whether CP's objections were reached independently and were not the product of influence of her co-dependent relationship with the respondent. With regard the degree of maturity of the child, CP is twelve years of age. Ms. O'Connell opined that CP's intellectual development was at level comparable to a ten-eleven year old. Ms. O'Connell opined that CP displayed consistent immature behaviour and thinking processes. Conversely, Dr. Randall described CP as presenting as an intelligent articulate child somewhat more mature than her years. This Court finds that CP does object to a return and has a sufficient degree of maturity for this Court to take cognisance of her views. However, such a finding does not result in an automatic refusal of

an order for return pursuant to article 12 of the Convention. Rather, this Court has a discretion as to whether or not to refuse an order for the return of the said child. This proposition is supported by the erudite judgment of Finlay Geoghegan J. in *C.A v C.A (otherwise C.McC)* [2010] 2 I.R 162 (see para. 31). In *C.A*, Finlay Geoghegan J. provided guidance as to the policy considerations that come into play in the exercise of the court's discretion (at paras.32-34):

"32. Counsel for both parties referred me to a number of decisions in which the courts in Ireland and England have reviewed how they should exercise their discretion under art. 13 where a child's objections to return have been made out. Amongst those is the judgment of Sheehan J. in *S.R. v. S.R.* [2008] IEHC 162, (Unreported, High Court, Sheehan J., 21st May, 2008), in which he reviewed and cited a number of relevant passages from those authorities. He expressed the view (with which I agree) that the court should be particularly mindful of the judgment of the Supreme Court in *B. v. B. (Child Abduction)* [1998] 1 I.R. 299, and be influenced by the view expressed by Baroness Hale of Richmond in *In re M. (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, where, at p. 1307, she stated:-

"[42] In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

"33. Counsel for both parties were in agreement, correctly, that the children's objections are not determinative but rather must be taken into account and balanced against the general policy of the Convention. Counsel for the mother made two further submissions in relation to how the court should approach the exercise of its discretion. First, he submitted that there is an increasing policy requiring courts to have regard to the views of the child. He referred in particular to art. 12 of the United Nations Convention on the Rights of the Child 1989 to which Ireland has acceded, albeit not implemented into Irish law, and art. 11(2) of the Regulation which applies to this application. I accept that there is such a policy and this appears to be a matter which has already been considered by the courts in their approach to the exercise of discretion under art. 13 where a child's objections are made out. Baroness Hale of Richmond in *In re M. (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, at p. 1308, stated:-

"[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

"34. I would respectfully agree with the above and, in particular, the nuanced approach suggested to considering the balance to be achieved on the particular facts of each case, and having regard to a number of factors including the nature and strength of the child's objections, the extent to which they are "authentically her own" or may have been influenced by others and the age and maturity of the child."

107. This Court also takes cognisance of the Supreme Court's decision in *A.U. v. T.N.U. (Child abduction)* [2011] 3 IR 683 (at para 27-28) on the issue as to how this Court is to exercise its discretion with regard to ordering a return of the child where the child objects to the order for return.

108. In this case, this Court has significant reservations as to whether CP's objections were formed independently as opposed to being a product of influence of the abducting parent. These concerns are exacerbated by the reality that CP shares a co-dependent relationship with the respondent. The impact of this co-dependent relationship was a subject of concern for Ms. Anne O'Connell on the issue of whether CP's objections to a return to the United Kingdom were formed independently. Moreover, the nature of the co-dependent relationship between CP and respondent was also a subject of concern for his Honour Judge Nathan when he was attempting to assess the veracity of the allegations made by the respondent against the applicant in the proceedings before the Courts of England and Wales. Notwithstanding this proposition, this Court believes that the welfare interests of CP would be best decided in the jurisdiction of the Courts of England and Wales where the Courts and the relevant authorities have had an extensive role in assessing and securing the welfare of CP. In turn, this Court exercises its discretion to issue an order for the return of CP to the jurisdiction of the Courts of England and Wales.

109. On the foregoing, this Court grants (i) a declaration that on or about the 2nd May, 2015, the respondent wrongfully removed the minor, CP, to the Republic of Ireland within the meaning of article 3 of the Hague Convention on Child Abduction and article 2 of Council Regulation (E.C) No. 2201/2003 (Brussels II *bis*) and (ii) an order for the return of CP to the jurisdiction of the Courts of England and Wales pursuant to article 12 of the Hague Convention on Child Abduction and Part II of the Child Abduction and Enforcement of Custody Orders Act 1991.

110. This Court notes that the applicant provided an open offer at the commencement of these proceedings whereby he was amenable to the respondent voluntarily returning CP to the United Kingdom and remaining in her care pending the custody and access hearing before the Courts of England and Wales. If the respondent did return with the child to the United Kingdom voluntarily, the applicant claimed that he would not initiate criminal proceedings against the respondent or would withdraw any proceedings regarding the abduction of CP to this jurisdiction.

111. I will hear the parties on the form of order and/or undertakings that are required.