THE HIGH COURT

Record No: [2015/4HLC]

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 ASPECT OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF L.F

BETWEEN:

F.F

APPLICANT

AND

C.B

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 14th day of July, 2015.

1. This case concerns an application for the return of a child, LF, to the jurisdiction of the United States pursuant to article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980 (hereinafter referred to as the "Convention").

2. The applicant's position is that LF has been wrongfully removed to this jurisdiction in breach of the custody rights of the applicant and the courts of the State of New York, County of Nassau, New York. The respondent accepts that the child was habitually resident in the United States at the time of the alleged wrongful removal to Ireland. Moreover, the respondent accepts that the applicant had rights of supervised access in respect of LF. However, the respondent disputes the applicant's contention that he was exercising rights of access and/or assisting in maintaining the child at the time of the alleged wrongful removal on or around 10th October, 2011.

3. In response to the claim that she wrongfully removed LF to this jurisdiction, the respondent claims the following:

(a). The applicant acquiesced in the removal of LF to this jurisdiction.

(b). The applicant consented to the removal of LF to this jurisdiction.

(c). A return of LF to the United States would cause a grave risk otherwise place the child in an intolerable situation.

(d). LF objects to an order for his return to the United States and;

(e). LF is well settled in this jurisdiction.

4. The case was listed for a two-day hearing on Wednesday the 1st July, and Tuesday 2nd July, 2015, before this Court. The matter was dealt with on affidavit evidence only. By open correspondence dated the 11th June, 2013, notice was given to the respondent's solicitors that the applicant was intending to travel to Ireland for the hearing of this case, and wished to avail of access with the infant while he was in this jurisdiction. Access proposals were set out in this letter and agreement was sought in principle for access to take place on specific dates in early July 2015.

5. Solicitors on behalf of the respondent set out with reference to the 11th June, 2015, correspondence, that they had instructions that the respondent was not in a position to agree to access between the infant and the applicant.

6. A notice of motion was issued returnable to the 1st July, 2015, seeking interim access pending the final determination of these proceedings. However, the applicant had decided not to attend Court or travel to this jurisdiction. Counsel for the applicant indicated that the motion for access was not being pursued.

Evidence of the Parties.

7. Both parties have filed extensive affidavits in these proceedings. No viva voce evidence was proffered during the course of these proceedings.

8. The infant, the subject of these proceedings, LF, was born in New York, USA on the 8th February, 2008. LF will be sixteen years of age on the 8th February, 2024. Thus, LF constitutes a "child" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

9. The parties are agreed as to the parental status of the child, namely that the applicant is the father of LF and the respondent is the mother of the said infant. The parties are further agreed that they were married to each other and were divorced shortly thereafter.

10. As stated above, both parties agree that LF was habitually resident in the USA at the time of the alleged wrongful removal of the said infant to Ireland, which said removal occurred on the 10th October, 2011. Moreover, it is accepted by the parties that the

applicant had rights of supervised access regarding the infant at that time. However, the parties dispute whether the applicant was actually exercising rights of custody over LF at the time of the alleged wrongful removal.

11. On the 20th of August, 2008, the Honourable Stacy Bennett JFC ordered that the respondent mother should have custody of LF, subject to the applicant's visitation which was granted. This visitation was to be conducted under the supervision of the applicant's aunt, every Tuesday and Thursday for one hour from 8pm to 9pm at "S Diner".

12. On the 27th April 2010, the Family Court of the State of New York, County of Nassau, made an order by consent of the parties, whereby the respondent was granted custody of the child, and that from the 1st May, 2010, until 1st November, 2010, the applicant was granted supervised access every Tuesday and Thursday and alternating Saturdays and Sundays. From the 1st November, 2010, the respondent's access with the child was to have been unsupervised, provided certain conditions were met as set out in the said order. The conditions set out by consent of the parties gave rise to an order that the father should co-operate with the Treatment Assessment Screening Center (T.A.S.C), and if T.A.S.C did order a substance abuse treatment programme, the applicant was to attend narcotics anonymous meetings or another similar programme for six months beginning the 1st May, 2010. There were a number of other consent orders on the logistics of how access was to take place between the applicant and LF, along with a consent order that any additional visitation could take place as agreed between the parties. This order was dated the 21st May, 2010 and signed by his Honour Christopher Pizzolo, Special Referee. The order is described as a final order of custody and parenting time.

13. The respondent swore an affidavit dated the 23rd June, 2015, and claims that she found herself unable to agree with any of the applicant's friends or family supervising the access visits with the child following TM, the applicant's aunt, informing the respondent that she no longer wanted to supervise the access. The respondent points out that notwithstanding that the applicant has produced drug-testing results, which show him as negative for drug taking, subsequent to her coming to Ireland, she points out that this does not attest to the situation that pertained prior to that time. The affidavit evidence reflected many fraught instances concerning the access situation prior to her coming to Ireland with the child. This Court notes that on the affidavit evidence, the applicant was consuming drugs and was turning up to access visits under the influence of drugs.

14. The respondent's case was that there was intermittent exercise of visitation rights by the applicant up and until the 30th November, 2010. The respondent claims that the applicant was arrested in January 2011, and the Court cancelled that access at that time. The respondent claimed that the applicant was released in February 2011. In her affidavit, the respondent contends that she saw the applicant for the last time in March 2015, as he was re-arrested in April 2011 and was detained until September 2011.

15. On the 8th August, 2012, the parties were granted a decree of divorce by the Family Court of the State of New York, County of Nassau. In those proceedings, the Court directed that the custody and access order by the Family Court of the State of New York, County of Nassau. Moreover, the Family Court directed that the custody and access order made on the 27th April, 2010, was to continue. However, the extent of the respondent's knowledge of these divorce proceedings is contested and will be discussed further below.

16. In the respondent's affidavit sworn on the 16th March, 2015, she exhibited an affidavit of parental consent. The affidavit is titled, "Affidavit of Parental Consent for Travel Outside the United States of a Minor Child Without Both Birth Parents Travelling". The affidavit is signed by the applicant consenting to the respondent taking LF to England and/or Ireland on the 16th November, 2009. Although there is a section for a return date on this form, the section remains blank. It was submitted by the applicant that the note of consent was for a specific visit.

17. The respondent claims that in March 2011, the applicant told her to take the child to Ireland. The respondent outlined that the applicant told her to relocate, as he believed that he would not be liable to pay child support if the child was residing in another jurisdiction. Her case rests on the applicant's petition to modify a support order in which he sought to freeze his contribution for the child for the duration of his incarceration in a state prison. The application was dismissed and it is argued that the applicant remains in significant arrears of maintenance for the infant named herein.

18. This Court notes the affidavit evidence of the respondent where she sets out that from June 2008 until October 2011, she made nine visits to Ireland with LF, to her Irish relatives. The respondent's case is that the applicant was aware of these trips and that he told her to go to Ireland, which would relieve him of the burden of paying child support.

19. The applicant claims that he recalls only two occasions when the respondent travelled to Ireland. The applicant claims that the parties had planned that he would travel with the respondent and their child to Ireland. In his affidavit of the 11th June, 2015, sworn at Hicksville, County of Nassau, State of New York, the applicant alleged that on the respondent's first trip to Ireland, once the passport for the infant had been secured he was uninvited at the last minute by the respondent (at para. 9 of the affidavit). In addition, the applicant claims that when the respondent left for the second trip, his aunt expressed concern about his emotional condition and invited him to join her and her family on their trip to Aruba which he did for five days.

20. The respondent accepts that on the 15th September, 2009, she filed and served divorce proceedings on the applicant, she says that her case is that she has no knowledge of the subsequent proceedings following her move to Ireland and she was not present for the divorce hearings. It appears to this Court on examining the exhibits, that the divorce was granted on the applicant's (who was the respondent in the divorce proceedings) counterclaim in the divorce proceedings. The respondent asserts that she was unaware of subsequent orders concerning the divorce proceedings until she received the special summons herein dated the 23rd February, 2015.

21. The respondent's U.S. attorney in New York, who had acted for her in the Family Law proceedings, withdrew from those proceedings in December 2011. The respondent claims that she was unaware of orders of the Family Court, State of New York, County of Nassau made on the 27th December, 2011, the 11th January, 2012, the 8th August, 2012. On the 27th August, 2013, the applicant sought and was granted sole custody of LF by the Family Court of the State of New York, County of Nassau. The respondent submits that the applicant knew or ought to have known, on any reasonable inquiry, where she and the child reside currently. Moreover, the respondent deposed that the applicant should have advised the relevant authorities as to her location and address and had these been provided, the respondent could have met the various court proceedings and orders.

22. There is a further dispute between the parties in that the applicant asserts that he had served a subpoena on her father to ascertain her whereabouts. The respondent denies this, and contends that her father was not the subject of a subpoena. The respondent's father has since died.

23. Interestingly, in the applicant's replying affidavit (at para.25), the applicant contends that JB, Nassau County Deputy Sheriff and brother of the respondent, has an office in the Nassau County Family Court building. The applicant asserted that JB was avoiding him when he was in the Family Courts subsequent to the alleged wrongful removal of the child. However, the question arises as to why

did the applicant not take positive steps to approach JB, who was a person in a position of authority in the area and request his assistance in ascertaining the whereabouts of the respondent. Likewise, the respondent contends that when the applicant met her mother he thanked her for looking after the child. The respondent's contention is that the applicant did not specifically ask her mother as to her whereabouts.

24. His Honour Anthony Fallanga, Supreme Court Justice of the Supreme Court of the State of New York was specifically told that the Court had appointed an investigator at the request of Ms. Bernheim to try and locate the respondent and the infant, whom the applicant believed was in Ireland. On the 6th December, 2011, the applicant was asked by his Honour Anthony J. Falanga whether that was that correct. The relevant section of the transcript reads as follows:

> "***The Court***: *Good morning, counsel. Good morning Mr. F. Please be seated.*
>
> *So we have I think the same thing we had last time. We have an attorney without a client, a client without an attorney and we have the youngster, L, who is represented by his attorney. We have appointed an investigator at the request of Ms. Bernheim to try to locate Mrs. F and L, whom you believe is in Ireland; is that correct?*
>
> ***Mr F***: *No. They are home. I've been past the house. I've seen the vehicle.*
>
> ***The Court***: *So they are home?*
>
> ***Mr. F***: *Yes*.
>
> ***The Court***: *Whether or not they were in Ireland is academic right now, but as far as you know, she's where? What location?*
>
> ***Mr. F:*** *No x H L [redacted address].*
>
> ***The Court***: *Which is where?*
>
> ***Mr. F:*** *Levittown."*

25. The applicant claims to have served the respondent with the proceedings by Federal Express at that address. The Court then asked Ms. Bernheim had the investigator been able to determine that the respondent was in Levittown. Ms. Bernheim replied that she had not obtained the order but that once she obtained it, she would contact the investigator and would notify him of all the addresses she had. On that date, there was no parenting schedule in place as confirmed because the previous order terminated visitation as the applicant was incarcerated.

26. It seems to this Court that the applicant had a view at that time that the respondent was in this jurisdiction but he failed to follow this up. In the context of the divorce proceedings in the USA, the respondent was given permission by the Court to revert to her maiden name and she has used that name since that time.

27. The respondent further maintains that, by way of court order, she retains custody of her infant and enjoyed and exercised her rights of custody in the United States, where her child was habitually resident immediately prior to the removal of the said infant to Ireland. At the time of his removal, the respondent contends that the applicant was not exercising his rights of access.

28. In the respondent affidavit of the 14th May, 2015, the respondent refers to the applicant's affidavit and claims that the applicant requested herself and her lawyer to draw up an agreement to relinquish his parental rights when he was released from incarceration(para 9. of the affidavit of the 14th May, 2015). The respondent asserts that her lawyer did not demand that he give up his parental rights as he sets out in the applicant's affidavit but rather, he was presented with this agreement as previously requested by him. The respondent accepts that she left the USA with LF on the 10th October, 2011, and that on the 14th December, 2011, she became an Irish citizen. In the respondent's affidavit dated the 14th May, 2015, in the context of the judgment on the divorce between the parties, the presiding judge, the Honourable Stacy D. Bennett, ordered that the respondent was to have custody of LF. This order is dated the 8th August, 2012.

29. The respondent purchased a new home in Ireland within three months of her arrival to this jurisdiction. The respondent contends that she has been resident in Ireland with the infant for three years and eight months, and that the applicant was aware of her many visits to Ireland as he signed passport forms for the infant in 2008. The respondent contends that the applicant was aware that she and the infant were living in Ireland, that she had used her maiden name and the child was registered using his surname, and that they lived here openly. She further avers that she did not appear at the various court hearings outlined by the applicant because she had moved to Ireland, a move encouraged by the applicant. The respondent further sets out that the applicant never enquired over the past three and a half years as to her whereabouts, nor did the applicant display any interest in contacting either her or their son. The respondent claims that the applicant could have traced LF without any great difficulty.

30. The respondent outlines that LF has attended a local primary school and has had a consistent level of attendance for the years 2012, 2013, and 2014. On the 5th November, 2013, LF was assessed by a psychologist on the recommendation of his teacher at the local primary school. The respondent claims that the psychologist concluded that LF required help for his emotional trauma and social interactions.

31. In her affidavit dated the 16th March, 2015, the respondent outlined that LF was diagnosed with ADHD co-morbid with emotional trauma. The respondent claims that LF is well settled in this jurisdiction as he has settled into school along with making new friends and participating in the community. The respondent exhibited two letters from the local parish priest and primary school to the Court which reflects that LF has been assigned a special needs assistant who shadows him for full days at school.

Evidence of Ms Anne O'Connell.

32. By order dated the 25th March, 2015, this Court ordered Ms. Anne O'Connell, Consultant Clinical Psychologist and Clinical Neuro-Psychologist, to interview LF, in relation to certain matters and to report to the Court on the interview for the purposes ensuring the child is given an opportunity to express his view in the proceedings. LF was interviewed on the following matters:

> (a). The circumstances in which he was living prior to coming to Ireland in October 2011; and
>
> (b). The circumstances in which he was removed to Ireland in October 2011, and his awareness of the reasons for the

decision not to return him to New York, USA; and

(c). His wishes in relation to his future care, his education and living arrangements including where he would like to live; and

(d). If those wishes do not include living in New York, whether he has any objection to returning to live in New York; and

(e). In the event of any objection to returning to live in New York being expressed, his reasons for the objection; and

(f). If he were to live in New York any wishes as to how and when the return would take place; and

(g). Should the child stay in Ireland or return to New York, what role does he envisage for the non-resident parent in his future life; and

(h). Any other information he may wish the Court to take into account in deciding the application that he be returned to New York.

33. It was further ordered that in the course of the said interview that Ms. O'Connell assess LF and report to the Court with her professional views on the following matters and with the reasons therefore:-

(1) The decree of maturity of the child.

(2) Whether the child is capable of forming his own views and if so, a general description of the type of matters about which he appears capable of forming his own views.

(3) Whether the child objects to being returned to New York.

(4) If the child does object to being returned to New York:

(a) The grounds of such objection and in particular whether it relates to:
(i) an objection to living in New York and/or a desire to remain in Ireland.

(ii) an objection to living with or living in the vicinity of a particular parent and/or wish to live with the other parent.

(b) Whether any objections expressed have been independently formed or result from the influence of any other person including a parent or sibling

(5) Any other matter which Ms. O'Connell considers should be brought to the attention of the Court arising out of the said interview and assessment for the purposes of its decision in these proceedings.

34. This Court also ordered that the pleadings and relevant affidavits be made available to Ms. O'Connell for the purposes of her interview with LF and subsequent report. The Court also directed that Ms. O'Connell refrain from interviewing or having any contact with the applicant or respondent save for the purpose of making practical arrangements to consult with LF.

35. Ms. Anne O'Connell, assessed LF and she set out the history of the case as per the pleadings and further that the infant attended montessori school in Co. S and began junior infants at his local national school in September 2012. Ms. O'Connell sets out that LF was referred for a psychological assessment shortly thereafter, and it been determined that he was showing evidence of Attention Deficit Hyperactive Disorder, as well as emotional and social problems. According to the assessment of Ms. O'Connell, LF consults with several team leaders of the local CAMHS service and has a full time special needs assistant in school.

36. In her report, Ms. O'Connell describes the interview and states that LF was accompanied by his mother during the assessment at the child's request. The respondent's presence at the interview was at LF's request. She described the respondent as encouraging him to co-operate. At times, Ms. O'Connell describes LF as making statements such as he would kill himself if he had to go back to his father. During these moments, Ms. O'Connell noted that the respondent reminded him to tell the truth, and he then said he would not kill himself.

37. Ms. O'Connell described LF's behaviour during the interview as impulsive and restless and noted that his mother intervened in terms of his behaviour to calm him down and to request more co-operative behaviour.

38. With regard the circumstances in which LF was living prior to coming to Ireland in October 2011, the child described that in New York he had a bed in his mother's room and that he saw a lot of his "pappy" and his mother's father and uncle. Ms. O'Connell describes the child as indicating that the applicant in this case was mean to him and that he said "Daddy was very mean to me and that he said mean stuff, that he would burn my bed and the house and kill my Mum. He threw my toys in the bin". However, it was unclear how many times this happened. According to LF, the applicant slept on a couch while a woman looked after LF (this seems to have been during access visits). It is noted that LF recounts that while in the applicant's house, if the applicant was awake and LF was talking (even quietly) he was told to "shush".

39. On the issue of the circumstances in which LF was removed to Ireland in October 2011, and his awareness for the reasons not to return him to New York, the child stated that he and his mother left New York because of his father. Moreover, LF recounted that neither his mother nor himself were happy that his father wants to control him and "boss" him around. He also said that he had stabbed himself once with a pen (so my Dad wouldn't hurt my Mum"), and put his face in the fire rather than go on an access visit.

40. Ms. O'Connell's report notes LF wishes in relation to his future care, education and living arrangements including where he would like to live and with whom. Prior to answering the question as to where he would like to live, LF stated that he hated being with his father and said that he would kill himself so he does not have to go back. His mother requested him to tell the truth and he modified this statement to say that was how strongly he felt. When LF was asked if his wishes do not include living in New York and whether he had any objection to returning there, he replied that he does not wish to live anywhere near his dad. When LF was asked about his reasons for the objections, LF's answer is stated "as above". When LF was asked if he were to return to New York, did he have any wishes as to how and when the return would take place, his answer is noted as "No".

41. When LF was asked should he stay in Ireland or return to New York, what role does he envisage for the non-resident parent in his future life. His answer to this question was that he could not envisage any role for his father at the current time.

42. Ms. O'Connell asked LF whether there was any other information he may wish the Court to take into account. Ms. O'Connell noted in her report that LF was very familiar with Ireland prior to October 2011. He had previously visited up to twelve times, staying for three or more weeks at a time. LF relayed to Ms. O'Connell that he had a lot of cousins in Ireland and that he gets on well with his extended family in Ireland. LF claimed to have nightmares about going back to the New York.

43. Ms. Anne O'Connell assessed LF's degree of maturity. She used the Wechsler Intelligence Scale for Children. She found that LF scored a verbal comprehension index in the high average range (75th percentile) and a perceptual reasoning index score in the superior range (93rd percentile). Ms. O'Connell noted that LF's working memory and processing speed are in the average range, and this underperformance is considered to be due to his over activity and inattention. Academically, LF scored poorly, and below his chronological age, but his concentration was waning at that stage. Ms. O'Connell notes that LF's writing is large, untidy and poorly formed (consistent with his diagnosis).

44. In her report, Ms. O'Connell observed that LF insisted on writing his name as "Tommy B", indicating a strong desire to shed his American identity and start afresh. Ms. O'Connell found LF's copies of the Bender Designs show perceptual immaturities and clear evidence of ADHD. His free drawings show evidence of feelings of insecurity, and a strong need to be nurtured by his mother. Ms. O'Connell noted that LF refused to draw his father.

45. Ms. O'Connell describes LF as being an emotionally intelligent and articulate boy, but with behaviour that is also childish and typical of a child who is fixated at an earlier stage of emotional development. Ms. O'Connell reported that prior to the respondent's and LF's relocation to Ireland, LF had witnessed some distressing incidents. On relocating to Ireland, Ms. O'Connell notes LF found it difficult to leave these distressing events behind him. Ms. O'Connell found LF to express a strong fear of his father and found that he did not wish to be separated from his mother.

46. In her report, Ms. O'Connell notes that LF's school has picked up on his atypical behaviour and recommended assessment shortly after they met him. It is noted by Ms. O'Connell that LF's behaviour does not seem to have stabilised appreciably in the past couple of years, and he was at a marginal level of self-control during part of the assessment. Ms. O'Connell reports that LF shows poor impulse control, and he has difficulty in applying himself to specific activities and needs consistent handling and reminding as to how to behave. Ms. O'Connell opined that the respondent provides this guidance to LF, and she is a necessary support for him.

47. Ms. O'Connell assesses whether LF is capable of forming his own views and if so, she endeavoured to provide a general description of the type of matters about which he appears capable of forming those views. While Ms. O'Connell found LF verbally bright, she felt that his emotional development has not kept pace and he is acting as a much younger child. Ms. O'Connell felt LF was not capable of predicting into the future, or of dealing with his problematic (neglect, conflict) memories in any adaptive way. She felt that he would continue to express fear of his absent parent and will need ongoing therapy to try to help him settle better in emotional terms.

48. Ms. O'Connell found that LF felt safe in Ireland and would like to keep the respondent to himself. LF also expressed a desire for the respondent to be happy and does not see this as possible with the applicant. Ms. O' Connell notes that LF would like the status quo to continue, as he has found some degree of contentment in this jurisdiction.

49. In her report, Ms. O'Connell notes that LF continues to object to a return to New York. In particular, Ms. O'Connell asked LF whether he held any objection to living in New York and, in particular, whether it relates to an objection to living in New York and/or a desire to remain in Ireland. LF's response was that he feels safe in Ireland, away from his father. Furthermore, LF was asked whether he had any objection to living with or in the vicinity of a particular parent and/or wish to live with the other parent. LF's response to this enquiry was that he wishes to live with his mother.

50. In her assessment, Ms. O'Connell addressed the issue of whether the objections expressed by LF have been independently formed or resulted from the influence of any other person including a parent or sibling. In this regard, Ms. O'Connell opined that she did not believe that the respondent had coached LF to say negative things about his father. Ms. O'Connell notes the respondent's attempts to temper LF's extreme remarks about killing himself with the truth, seemed natural and genuine on her part. Ms. O'Connell noted a close bond between mother and son, and that both found great comfort in the paternal relationship. Moreover, Ms. O'Connell observed that LF's emotional immaturity renders him dependent on his mother.

51. In the final aspect of her report, Ms. O'Connell was asked to look at any other matter that she considered should be brought to the attention of the Court. Ms. O'Connell noted remarks in LF's school reports which detail the huge efforts the applicant has made to access appropriate services and therapies for LF. Ms. O'Connell's opinion was that she found LF in grave need of such an advocate and felt that it is probable that LF will react badly to any changes in his environment, such as a move of country. Ms. O'Connell describes LF's behaviour as challenging and needs consistency of handling. Ms. O'Connell expresses apprehension with placing LF in a position of dual access as such consistency may not be guaranteed. Thus, LF's present hard won progress, and future potential, could be at grave risk. Ms. O'Connell notes that LF has started new medication, which, it is hoped, will have a calming influence on him.

Conclusion.

52. This is an application seeking the return of LF to the United States pursuant to article 12 of the Convention. Article 12 of the Convention states as follows:

> "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.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

53. This Court notes that it is precluded from becoming embroiled in the merits of rights of custody until the issue of the return of the

child has been determined by the Court. Article 16 of the Convention states as follows:

> "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

54. From the outset it should be noted that Council Regulation (EC) No: 2201/2003 of 27th November, 2003, on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II *bis*") is not applicable to the present proceedings as this case concerns an alleged wrongful removal of a child from the United States to Ireland. Rather, Article 3 of the Hague Convention on the Civil Aspects of Child Abduction 1980 addresses the issue of wrongful removal in international cases, and states as follows:

> "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.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

55. The respondent accepts that the applicant had rights of supervised access in respect of the child. However, the respondent disputes that at the time of the alleged wrongful removal, the applicant was actually exercising custody rights over LF.

56. This Court accepts the submission made on behalf of the applicant citing Brandon L.J in the case of *W v. W* [1993] 2 FLR that exercising rights of custody must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control.

57. This Court notes that in *Friedrich v. Friedrich* (1996) 78 F. 3d 1060, the US Court of Appeals for the Sixth Circuit gave guidance on the interpretation of the word "exercise" for the purposes of Article 3 of the Convention. The Court held;

> "Enforcement of the Convention should not be made dependent on the creation of a common law definition of "exercise". The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find " exercise" whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child"

The US Court of Appeals for the Sixth Circuit viewed non-exercise as arising in circumstances where there was unequivocal abandonment or unexplainable neglect of the child.

58. It is clear from the Court orders issued by the Family Court of the State of New York, County of Nassau, that the applicant had rights of custody. It is the view of this Court that, on the affidavit evidence submitted and on the balance of probabilities, the applicant would have exercised his custody rights over LF but for the removal of the child to this jurisdiction on the 10th October, 2011.

59. Notwithstanding, this Court's finding that the applicant would have exercised custody rights over LF, it is clear from the affidavit evidence and the exhibits that the Family Court of State of New York, Nassau County, was exercising custody rights over LF by virtue of the custody proceedings in which they were seised and the orders they issued in those proceedings.

60. This Court adopts the reference in the applicant submissions in the case of *Coventry City Council v. (M) S* (Unreported, High Court, McMenamin J., 27th of July, 2010) where the High Court found that the Courts of England and Wales had custody rights once they became seised of issues concerning the welfare of the child. McMenamin J. applied the principles set out in *G.T. v. K.A.O.* [2007] 3 I.R. 567 stating (at para. 52):

> "52. I do not consider that the issue is affected by the fact that there was no actual court order in being at the time of the child's removal. In that regard, the facts of the instant case bear a strong resemblance to those in *G.T. v. K.A.O.* [2007] 3 I.R. 567 where the mother took twin boys from Ireland to her parents place of residence in England without the consent of the natural father who was the applicant. At some point thereafter the mother made a decision not to return to the family home. The applicant instituted proceedings in the courts of Ireland and the courts of England. Although these proceedings post dated the children's departure, the High Court (McKechnie J.) granted a declaration that the retention of the children in England was wrongful under the Hague Convention and that their removal from the jurisdiction was wrongful under Brussels IIR. He considered that circumstances could arise where a removal or retention would be wrongful as having been in breach of rights of custody vested in the court itself. He found that for rights to so vest there must have been an application to the Court which raised matters of custody, that the jurisdiction of the court only became established when the originating document had been served (as it had been) on all relevant parties; and once invoked the District Court became definitively seised of the application and thereafter its jurisdiction continued until such time as the proceedings had been disposed of or determined. In G.T. it was held that the District Court, by a date no longer than the first return date of the proceedings initiated thereby held rights of custody with regard to the children the subject matter of those proceedings. He held that the court had, from that date, exercised its rights by reason of the pending application in which it reserved for itself the decision of the children's welfare and where, when and with whom they would reside."

61. This Court notes that the Supreme Court declared in this case that the retention by the respondent of the children was a wrongful retention within the meaning of Article 3 of the Hague Convention as it was in breach of rights of custody attributed to the District Court.

62. In this case, the Family Court of the State of New York, County of Nassau, made an order by consent between the parties whereby the respondent was granted custody of LF, and that from the 1st May, 2010, until the 1st November, 2010, the applicant was granted supervised access. The Court stipulated in the order made on the 27th April, 2010, that the applicant's access with LF would be unsupervised provided that the applicant fulfilled certain conditions set out in the order. By order dated the 27th December, 2011, the respondent was directed to appear before the Family Court of the State of New York, Nassau County on the 11th January, 2012. On the 11th of January, 2012, the Family Court made an order whereby the applicant was granted unsupervised access with the child every Thursday and Saturday. The respondent did not attend the hearing. On the 8th of August, 2012, the parties were granted a decree of divorce by the Family Court of the State of New York, County of Nassau. The Court directed that the custody and access order dated the 27th April, 2010 was to continue. On the 27th August, 2013, the Family Court, of the State of New York, County of Nassau made an order granting the applicant sole custody of LF. Thus, it is clear from the foregoing, that the Family Court of the State of New York, County of Nassau was seised with the issue of custody of LF. In turn, this Court finds that the Family Court of the State of New York, County of Nassau was exercising custody rights over LF at the time of the wrongful removal.

63. As this Court has found that on the balance of probabilities, both the applicant and the Family Court of the State of New York, County of Nassau were exercising custody rights at the time of the LF removal to Ireland, this Court holds, as a natural corollary, that the respondent's removal of the LF to this jurisdiction was wrongful for the purposes of article 3 of the Convention.

64. The general rule under article 12 of the Convention is that provided the application is brought within twelve months of the removal, and the removal is deemed wrongful for the purposes of article 3 of the Convention, the Court must order the return of a child, unless one of the defences is established under the Convention. However, the onus is on the respondent to establish any such defence. The respondent has raised a number of defences in the form of consent and/or acquiescence and grave risk. Moreover, the respondent claims that the child objects to a return to the United States and is well settled in this jurisdiction.

65. The defence of consent and acquiescence was raised by the respondent. Article 13(a) 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 of retention;

66. In *R (S) v R (MM)* (Unreported Supreme Court, Denham J, 16th of February, 2006), Denham J. addressed the relevant principles on the defence of consent. The learned Judge stated as follows:

> "In considering the appropriate approach to the issue of consent the learned trial judge referred to *Re K. (Abduction: Consent)* [1997] 2 F.L.R. 212 and a decision of Hale J. (as she was then). The trial judge concluded that the relevant principles to be applied are as follows:
>
> (i). the onus of proving the consent rests on the person asserting it; and
>
> (ii). (the consent must be proved on the balance of probabilities; and
>
> (iii). the evidence in support of the consent needs to be clear and cogent;
>
> (iv). the consent must be real; it must be positive and it must be unequivocal;
>
> (v). there is no need that the consent be in writing;
>
> (vi). it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."
>
> I am satisfied that this is a correct analysis of the principles to be applied on the issue of consent and I would affirm, adopt and apply the principles."

67. The conclusion this Court has come to on the contested facts on affidavit, is that while there was certainly a consent on behalf of the applicant to the effect that the respondent was free to travel to Ireland on a number of occasions, this Court finds, on the balance of probabilities there was no unequivocal consent given by the applicant to the respondent permitting her to relocate to this jurisdiction with LF. The Court finds it significant that the applicant was unwilling to sign the necessary forms while he was incarcerated, and although he had sought to be presented with the documentation to revoke his parental rights voluntarily, when he was presented with the said documents he refused to sign same. It seems to this Court that there was a pattern of behaviour on the part of the applicant that he would take some steps towards a full consent to the removal of his child from the United States to this jurisdiction. However, the applicant would withdraw those consents. Therefore, the Court finds that the applicant's consent was not unequivocal.

68. This is a difficult case to resolve insofar as, on the issue of whether acquiescence existed or not, it is certainly the case that the respondent was in a position where she had to interpret quite mixed signals from the applicant in that he told her to go to Ireland on her evidence and that he would thereby save maintenance, he believing that he would not have to pay same if she left the United States. At the same time, the applicant signed a document giving her permission to travel to England and Ireland which was an open-ended document. Conversely, the applicant invited documents to be prepared in which he intended relinquishing his parental rights, he then failed to sign these documents when they were presented to him. In addition, the applicant pursued access and custody of LF in the Family Courts in Nassau County. On the 27th August, 2013, the Family Courts of the State of New York, County of Nassau made an order granting the applicant sole custody of LF. The applicant claims that the respondent left the United States with LF without any notice to the applicant. The applicant averred that he made repeated enquires to locate the whereabouts of the respondent and LF. This Court has concluded that the applicant did not make exhaustive efforts to locate the respondent. Moreover, the Courts finds it peculiar that that the applicant did not consult with JB as to where the respondent had relocated given that JB was in a professional position to provide guidance to the applicant as to the respondent's whereabouts. Nonetheless, this Court finds that the

applicant did make efforts to secure custody of LF and to locate the respondent and the child. In turn, this Court finds on the balance of probabilities that the applicant did not acquiesce in the removal of the LF for the purposes of article 13(a) of the Convention.

69. On the issue of the child's objections to a prospective return, 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."

70. This Court ordered that LF be interviewed by Ms. Anne O'Connell, Psychologist, for the purposes of these proceedings. The purpose of the interview and subsequent court report was to ascertain the child's views as to a prospective return to the United States. There was another report concerning the child which was authored by the Health Service Executive. However, this Court did not consider that particular report as part of the hearing of this case as to do so would be to embark upon a welfare hearing. The said report was simply relied on by the respondent at an earlier hearing to support the contention that a psychologist be appointed to hear and access the voice of the child for the purpose of these proceedings. Ms. Anne O'Connell is highly experienced in carrying out reports in the context of child abduction cases.

71. This Court considers that LF is mature enough to have his voice heard and considers that not only is it important to attach great weight to his voice but also to the view of the assessor as set out above in her report. In *N(M). v. N(R)* (Unreported, High Court, Finlay Geogehegan J. 3rd of September, 2008), the case concerned an application for the return of the child pursuant to article 12 of the Convention. Finlay Geogehegan J. found that the views of the child, who was aged six, should be heard whilst stressing the weight to be given to such views was a separate issue. Moreover, the learned judge held that, *prima facie*, the child was able to form its own views with regard to the prospect of a return to the original state of habitual residence.

72. This Court ordered an interview of the child with confined parameters. This ensured that the interview did not trespass onto the area of a custody and/or an access hearing.

73. This child, at seven years of age, has reached the threshold where his view would be ascertained in this jurisdiction and the assessment of the psychologist who regularly prepares such reports for this Court in child abduction cases, carefully sets out the complex make-up of this child. He is described as a bright child with an underlying ADHD problem and an emotional fixation.

74. This child objects to being returned to the United States, and it is quite clear from this assessment and report that the child has clear psychological difficulties arising from his experiences in early life. It seems to this Court that this is a child who is sufficiently mature to give his view and that account should be taken for this view in the complex circumstances of his make-up given his underlying condition of ADHD and his previous experiences.

75. In deciding what weight to give to the voice of this child in terms of his objection, it is the considered view of this Court that this child must have his voice heard very carefully in this case, as it is clear from the psychologists report that he has a fixated issue as yet unresolved arising out of previous experiences as a young child.

76. This Court takes the view that it is quite clear that this child objects to being returned to the United States, and that his objections have been consistent and that he has formed his own views and does not wish to return.

77. The respondent contends that more than a year has elapsed between the removal of the child from the USA and the commencement of proceedings in this jurisdiction, and it can be demonstrated that the child is now settled into his new environment with reference to article 12 of the Convention.

78. It is very clear and there is ample evidence in the affidavits of the respondent, to suggest that this child is exceptionally well settled in his new environment, as is the respondent. This Court accepts the respondent's affidavit evidence in that regard. The respondent has gone to great lengths to secure the child's well-being, given his complex needs. It seems to this Court that the respondent lived in Ireland openly, having attained Irish citizenship immediately on her arrival, at a house which she purchased using her maiden name and registering her child using the applicant's surname. The respondent and the child have lived in this jurisdiction for three years and eight months. During this period, LF has attended school, secured a special needs assistant, formed a number of friendships and family bonds, and has participated fully in his local community. He has expressed views that he feels safe and contented in this jurisdiction. Thus, on the foregoing, this Court finds that LF is well settled in this jurisdiction for the purposes of article 12 of the Convention.

79. The respondent also raises the defence of grave risk/and or intolerable situation under article 13(b) of the Convention. Article 13(b) 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 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."

80. This Court must assess with regard to the affidavit evidence and the evidence of Ms. O'Connell whether any prospective return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In carrying out this analysis, this Court must refrain from embarking on a custody and access hearing. This Court places great weight on the report of Dr. O'Connell in which she expresses concern that LF is likely to react badly to any changes in his environment. Moreover, Ms. O'Connell expressed apprehension with placing LF in a position of dual access as such consistency may not be guaranteed. Thus, LF's present hard won progress, and future potential, could be at grave risk. In her report, Ms. O'Connell refers to LF's challenging behaviour and the necessity for the consistency of handling such behaviour, which according to Ms. O'Connell's report, the respondent is providing. While it might be argued that it may be possible to obtain a special needs assistant for LF on a one to one basis as he has in Ireland, the difficulty this Court sees is not with the fact that it would not be possible to do this in the USA, which of course it would be, but it is the grave risk which, on the balance of probabilities would prevail given the child's view and given his complex needs at this time.

81. The risk to the child must be grave rather than harm, but there is in ordinary language, a link between the two. Thus, I adopt the submission of counsel for the respondent in this regard that a relatively low risk of death or really serious injury might properly be qualified as grave, while a higher level of risk might be required for other less serious forms of harm, an intolerable situation which this particular child in these particular circumstances should not be expected to tolerate.

82. . If the Court concludes that there is a grave risk and/or intolerable situation, the Court has to look at the adequacy of such protective measures which might be put in place to vitiate any grave risk and/or intolerable situation on the child's return. This Court is therefore bound to look at the sufficiency of any protective measures that can be put in place to reduce the risk. The greater the need for protection, the more effective the measures will have to be. Reference is made to *Re S (a child)* [2012] UKSC 10. In this case, the child was born to an Australian father and a English/Australian mother. It was acknowledged in that case that the father had been a heroin addict prior to meeting the mother, and during the course of their relationship there were issues of the father's alcohol abuse and alleged domestic violence. The mother moved the child to England without the father's consent. The father issued proceedings for the return of the child and offered undertakings to assuage the mother's anxiety about returning. A return order was refused on the grounds that, notwithstanding the undertakings and protective measures available, the child would be exposed to grave risk under article 13(b) of the Convention. The father's appeal was upheld by the Court of Appeal. The mother appealed to the Supreme Court. It was held, allowing the mother's appeal and refusing the return that, although it was "inconceivable" that the Court would order a return where an article 13(b) defence had been made out, the Court nonetheless had discretion to order the return. Moreover, the Court held that anxieties that were subjective as opposed to an objective risk, such as those of the mother, could in principle meet the article 13(b) exception. Furthermore, the Court held that the fact that those risks were subjective should not be afforded lesser weight, and it does not matter whether those anxieties were reasonable or unreasonable. In turn, the Court held that where a trial judge found the protective measures did not obviate the grave risk to the child, it was not open to the Court of Appeal to substitute its contrary view.

83. This Court has to ask itself whether the undertakings offered would ameliorate the situation sufficiently to a point where this Court should exercise its discretion and order a return of this child. It seems to this Court that the normal undertakings, include those offered, would not sufficiently protect the wellbeing of this child from an intolerable situation and indeed would not protect this child from the grave risk which would otherwise occur. This Court recognises that in normal circumstances, undertakings would cover such a situation but the particular difficulties and circumstances of this child, as verified in the psychologists report, make it clear that undertakings would in no way suffice to alleviate the grave risk/intolerable situation which would otherwise ensue on return of this child to the United States.

84. In the instant case, it is the considered view of this Court that to return the child to the State of New York, given the child's present circumstances and given his complex needs and difficulties would be to place this child in an intolerable situation. This Court takes the view that there are great risks posed to the child should this Court order his return to the United States at this time.

85. It seems to this Court that regardless of what protective measures might be put in place, the extraordinary emotional dependence of this child could not be protected even for the short period between return and a custody hearing in the United States, given the particular fragility of the child concerned as evidenced in the report of Ms. Anne O'Connell, Psychologist.

86. This Court finds as a matter of fact that this child objects to being returned to the United States and has attained an age and degree of maturity at which it is appropriate to take account if its views. This Court further takes the view that such a return on the terms set out above, would cause grave risk on the balance of probabilities and would expose the child to psychological harm or otherwise place the child in an intolerable situation.

87. Thus, on the basis that LF is well settled in this jurisdiction for the purposes of article 12 of the Convention, along with his complex needs and consistent objections to being returned to the United States, this Court concludes that a return of LF to the United States, notwithstanding the great respect this Court places on the comity of courts doctrine, would place the child in an intolerable situation for the purposes of article 13(b) of the Convention. Accordingly, this Court refuses the order sought.