[2020] IEHC 504

THE HIGH COURT
FAMILY LAW

[2020 No. 5 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 P.I., A MINOR

BETWEEN:

M.I.

APPLICANT

AND

M.B.R.

RESPONDENT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 25th day of August, 2020.

1. This is an application for the return of the child, P.I., to Italy pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ("*the Convention*") as enacted by the Child Abduction and Enforcement of Custody Orders Act, 1991.

2. The applicant and the respondent met in London in 2009. They were married in Italy on 24th May, 2013 and have resided in Bracciano. The child was born on the [REDACTED] in Italy. He was removed from Italy by his mother, the respondent, on or about the 22nd October, 2019. It is claimed that the child was habitually resident in Italy and that his removal took place without the consent of the applicant father, in breach of rights of custody enjoyed and exercised by him at the time of removal. The applicant father is an Italian national, the respondent mother an Irish national. The subject child is of dual nationality.

3. The application is grounded on the affidavit of Ms. Grainne Brophy, solicitor representing the applicant sworn on the 21st April, 2020. Affidavits have also been sworn by the applicant.

4. It is not in dispute that save for a short holiday period in Ireland, prior to his removal, the child has resided in Italy since birth. The permanent residence of the parties was in Bracciano, although for a number of weeks prior to the removal of the child to Ireland the parties and the child resided in temporary accommodation when the family home was undergoing renovations.

5. The applicant maintains that he received a WhatsApp message from the respondent on 23rd October, 2019 stating that her mother, who resides in Ireland, was unwell and that she and the child were travelling here for a few weeks. He claims that the respondent has failed to return with the child, despite his attempts to persuade her to do so. By letter dated 20th March, 2020, the applicant's Italian lawyers formally demanded the return of the child once the Covid-19 crisis abated.

6. The respondent alleges that the applicant has been aggressive, has made threats and that he has a drug addiction. These allegations are denied. She made a criminal complaint to the authorities in Italy of domestic violence and drug abuse. The proceedings were initiated by the respondent by means of a formal written complaint, *denuncia queraela.* The applicant states that these proceedings were dismissed because, inter alia, he proved by hair sample analysis that he had not abused drugs. The respondent disputes his. She submits that the proceedings came to an end because she feared for her safety if she attended in Italy for questioning and further submits there are inconsistences in relation to the applicant's claim as to the provision and testing of any such hair sample.

7. The applicant completed an application for the return of the child to the Central Authority in Italy on 11th March, 2020. On 24th March, 2020 he also instituted proceedings before a court in Italy in which he seeks, inter alia, separation from the respondent and custody/access arrangements in respect of the child.

8. Ms. Brophy avers to her belief that the applicant enjoys formal rights of custody under Italian law by virtue of being the marital father of the child. It is contended that the applicant was exercising his rights of custody for the purposes of the Convention and Council Regulation (EC) No. 2201/2003 ("*the Regulations*") . She exhibits extracts from the relevant portions of the Italian Civil Code in support.

9. WhatsApp messages which were exchanged following the child being brought to Ireland are exhibited and it is stated that they illustrate that the applicant was keen for the child and the respondent to return. He stated in the course of those messages that her continuing failure to bring the child back to Italy was causing him distress. In one exchange the respondent wrote that the applicant had tried to kill her and the child if she ever left him. She stated that this is why, for their safety, she could not give him her address. In reply, the applicant stated that this was not true and that the respondent knew that he would never do anything bad to either the respondent or the child and that he loved his son more than anything. He also stated that he had loved the respondent throughout the years and that all he wished for was to have the child's father and mother close to him and complained that the child had been kidnapped.

10. On 12th March, 2020, the solicitor for the respondent wrote to the applicant's lawyer in Italy confirming the respondent's address and stating that the applicant was welcome to come to Ireland to see the child but pointing out that Covid-19 had caused difficulty in this regard. It was made clear that the respondent was not failing or refusing to allow the applicant to see the child but it was also stated that proceedings were in existence in Italy which had not yet been prosecuted.

11. In a replying affidavit sworn by the respondent on 25th May, 2020, she alleges that the applicant had become an abusive husband with violent tendencies exacerbated by the use of illicit drugs. She fled the family home with the child on 3rd September, 2019 and returned on 5th September, 2019 on the applicant's undertaking that he would seek professional help with his drug addiction and, it is also alleged, under pressure from the applicant's mother. Renovations were carried out on the family home between the 23rd

September, 2019 and 30th September, 2019 when the respondent resided in Airbnb accommodation with the child. She avers that during that week she realised that the applicant had not sought professional help for his drug addiction as promised and his behaviour continued to be unstable. She concluded that it would not be safe to return to reside in the family home and she entered into a long-term rental contract to reside at another property in Trevignano Romano, Italy. Both she and the child resided at that address for two weeks. It seems that next-door neighbours commenced renovation work and the premises became unsuitable for them. They then resided at a studio flat owned by an elderly friend of the respondent. Her father was with her during this period and on 22nd October, 2019 she returned to Dublin with her father. She avers that he had to return due to her mother's deteriorating ill-health and that in his absence she was fearful of the applicant. She further avers that she was unable to secure any interim protective relief under Italian law.

12. The respondent also outlines the employment history of the parties in Italy, the state of her health and a previous miscarriage in 2015. She contends that the applicant never offered financial support or maintenance for the child even when they were living together. While it is averred that the applicant had employment of a sporadic nature, the respondent maintains that she was the principal earner and supporter of the child. During extended periods of the applicant's unemployment, which included a period between January, 2014 and April, 2017, it is alleged that he began to smoke increasing amount of cannabis. She avers that he worked temporarily between April, 2017 and July, 2018 and casually since then. She contends that he found it very difficult to get through the day without smoking cannabis which led him to experience mood swings. It is alleged that on 20th July, 2017 the applicant destroyed the downstairs area of the home because, it is contended, he complained that she was not listening to him. It seems that the applicant had returned from work and the respondent states that he would not have smoked during the day which contributed to a loss of control and instability.

13. Controversy surrounds the manner in which the complaint was dealt with by the Italian authorities. Ultimately, the respondent, who had sought and was refused a remote hearing, did not attend for questioning on 3rd February, 2020. The prosecutor applied to dismiss the application by way of a motion for discontinuance dated 10th February, 2020. The motion emanated from the public prosecutor's office at the court in Civitavecchia and was addressed to the preliminary investigations judge at that court. In this motion, reference was made to certain offences under the Italian criminal code and to the complaints made by the applicant, many of which are repeated in these proceedings. The motion includes the following:-

" - *the injured party complained that since 2017 she had been a victim of aggressive behaviour on the part of the suspect who being under the influence of drugs on numerous occasions insulted and threatened her, he also destroyed her movable property inside the apartment, eventually causing the injured party to leave their family home together with her son born from the relationship with the suspect.*

- *after she had left, the suspect called many times either ensuring her about his profound affection or threatening her, so that she felt under strong stress and fear for her own safety. The injured party stated that due to the fact that she couldn't afford to rent the flat where she could live together with her minor son, and also given her mother's health problems, she decided to move to Dublin where she stays on to this day.*

- *as it was necessary to interrogate the injured party in relation to the reported offence, a criminal police officer was instructed to perform an interrogation, but unfortunately, with no effect as the woman left abroad with her son and she had no intention of coming back to Italy as she was afraid of the suspect and she was concerned about her mother's health condition.*

- *in order to clarify and confirm the charges pressed by the woman, a pre-trial hearing was requested and she was asked to specify a date of the hearing at her own discretion. Nonetheless, the injured party refused to appear explaining that she was "greatly afraid about her and her son's safety".*

- *In the light of the above, there is no sufficient cause to sustain the charges against the suspect, given that during the investigation the woman referred to aggressive behaviour only in a generic way that has never transferred into physical violence (the reason why there are no medical records that might confirm suffered injuries), there are no witnesses, no notes referring to any interventions made by the criminal police at the family home or any complaints made by the injured party in relation to suffered injuries. The persons interviewed during the proceedings, who had any knowledge on the matter, referred only to assurances made by the woman herself or, in the case of witness [named], to behaviour of the suspect describing his regret about the end of their marriage. Also, direct messages exchanged by the parties are not decisive on the matter."*

14. It was noted that as it was not possible to 'confront' the injured party statement against any objective elements and given the difficult personal relations between the parties and issues regarding custody "*causing the in-depth feeling of resentment which prevents the injured party from making an unbiased judgement*", the preliminary investigations judge was requested to close the investigation. No follow-up document, order or direction of the investigation judge has been exhibited in these proceedings or opened to this court.

15. Ms. R states that the purpose of the court hearing on 3rd February, 2020, was to examine her in respect of her complaint. An order to this effect had been made by the preliminary investigations judge on 4th December, 2019. She outlines her understanding of this procedure in Italian law that when a woman files charges against a man, prior to a protection order being issued, she must be first interrogated within the legal system. When the charges were filed it was explained that all communications with her had to go through her Italian solicitor because of the nature of the charges and the danger which she states she was in. She maintains that the local police clearly had not read the document in full and mistakenly came to the family home looking for her to inform her

that she had to attend court to be interrogated on the charges. As a result of this mistake on their part, the applicant became aware that she had filed charges and what was intended to be an *ex parte* application or procedure could not proceed as such as the applicant was on notice. A local police captain apologised to her solicitor for this. She fears that if she had been in Italy at that time she would have been placed in grave physical danger from the applicant. As a result of the respondent becoming aware of the process, she maintains that this led her to fear for herself. She contends that she was not afforded and will not be afforded protection by the Italian Courts. She states that her Italian solicitor informed her that the ruling could be reversed only if she attended court in person. She requested video link facility on two occasions, but this was denied. She avers that she was fearful of returning to Italy for that hearing as she did not have a protection order in her favour. She also maintains that the "*finding*" referred to in the notice of discontinuance did not take into account details of a recorded telephone conversation in which, she states, the applicant admitted to a threat to kill her and to "*taking that substance*". She was fearful of providing her address to the applicant and states that since her current address was provided to him she has suffered nightmares and is attending counselling to deal with post-traumatic stress disorder. When she received the communication from the court, she felt bereft and fearful of returning to Italy because, she maintains, domestic abuse has to culminate in serious physical violence before it is considered domestic abuse. On 30th January, 2020, the respondent wrote to her Italian lawyer apologising for her inability to attend a pre-trial hearing. Her reasons for not so doing included lack of financial resources in respect of the travel, that she could not leave her son behind in Ireland because he was still breastfeeding, but most importantly that she was unable to attend because of the great fear for her safety and that of the child. While she wished the respondent to be in the child's life, she stated that it was open to him to visit the child.

16. Ms. R also disputes the applicant's contention that the proceedings were discontinued based on a drug test or a psychological report and maintains that the dismissal occurred because of her non-attendance. She attended a women's aid centre but they could not find a safe place for her. She also avers that she was informed that pursuant to Italian law she was obliged to keep seeing the applicant with the child and therefore to keep putting him in a dangerous, unstable situation. She avers to her belief and information that the concept of a protection order as it exists in Ireland does not exist in Italy and that as a mother she felt she had no choice but to bring the child to a safe place in Ireland. Ms. R complains that the 'ruling' (*i.e*. the contents of the motion document) in referring to "*aggressive behaviour only in a generic way that has never transferred into physical violence*" diminishes the seriousness of the threats made against her and punishes her for leaving before the onset of imminent physical violence. She contends that this also diminishes the damaging emotional abuse that both she and her son were suffering while living with the respondent and refers to a statement of a named person regarding what she witnessed at an access meeting on 20th October, 2019.

17. The respondent also refers to other incidents such as aggressive pushing of the child's pram, aggressive shouting, inconsistency in the applicant's care of the child and the

manner in which he responded to the danger posed to the child by pebbles during the course of the access visit on 20th October, 2019. Particular emphasis is placed on threats made by the applicant threatening to "*cut their throats*" if the respondent ever left him.

18. In an affidavit in response sworn on 30th June, 2020, the applicant maintains that the narrative deposed to by the respondent is calculated to paint an inaccurate and deceptive picture of him. He vehemently denies that his son was ever in danger from him and avers that at all times he was a very affectionate and loving father. He denies that he has an illicit drug problem in the manner alleged and avers that he only ever smoked a form of cannabis light which is legal in Italy. He states that he submitted a drug test report to the court in Italy to prove that he was not taking illegal substances.

19. Dealing with the recorded conversations, which I shall address in more detail below, the respondent avers that he was manipulated and his words were extorted in circumstances where he was traumatised as a result of the respondent leaving with the child in what he describes as a unceremonious manner on 3rd September, 2019 on the pretext of going to the supermarket. He states that he would have conceded and admitted to anything just to secure their return. Despite the fact that he denies that he has a drug problem he accepts that he said that he would seek professional help for his drug addiction but further states that this was done only to assuage the respondent. He states that he was agreeing to everything the respondent said and requested in an effort to resolve the situation. He wished to de-escalate matters rather than to appear oppositional. He denies that his mother placed pressure on the parties.

20. The applicant also maintains that the respondent has provided inconsistent explanations for her reason to return to Ireland, such as by stating that she had to leave Italy with her father because her mother had health problems, that she could not feel safe without her father and that she wanted to spend time with her family. He also points to certain text exchanges which were exchanged on 6th October, 2019 as evidence that the respondent had intended leaving Italy with the child. He believes that he was effectively 'set up' with witnesses who might later testify against him. Mr. I denies that the Italian legal system does not make provision for adequate protection. He accepts that it is clear that the marital relationship is at an end and that the respondent and the child will not be returning to live with him. He is prepared to give whatever undertaking the court may feel appropriate on a without prejudice basis not to harass or place the respondent in fear in order to assist in the smooth transition of the child back to his life in Italy. He instituted proceedings in Italy and the matter is fixed for hearing on the 22nd September, 2020. He points out that the reliefs include an order that the respondent live with the child in the family home from which he would move; provision for custody and access and he refers to his offers to pay maintenance for the support of the child in accordance with Italian law. The translated Italian proceedings which have been exhibited by him show that he seeks sole custody of the child and in the alternative, joint custody. He states that in the event of the child returning with the respondent prior to the conclusion of those proceedings that he would undertake to remove himself in the family home in Bracciano which will be for the sole use of the respondent and the child and that in the event of an

order for return being made he is willing to give such undertakings until an Italian court makes orders.

21. In a further affidavit sworn by the respondent on 15th July, 2020, she denies that she did attempted to manipulate the applicant. She commenced recording conversations on the advice of an Italian Women's Aid Centre in Italy. The respondent also states that she does not now have an independent income to support herself and the child as she had been doing in Italy.

Relevant provisions of the Convention and Regulation

22. Article 3 of the Convention provides:-

"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."

23. Article12 of the Convention provides:

"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…"

Article 13 of the Convention provides 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.

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."

Article 11(4) of the Regulations provides as follows:-

"4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

Habitual Residence and Exercise of rights of custody

24. While not matters of dispute, on the evidence I am satisfied that the child was habitually resident in Italy until the date of his removal in October, 2019, that the applicant enjoyed rights of custody and that they were being exercised by him at the time of the removal. The last occasion of access before the child's removal took place on the 20th October, 2019. The proceedings were commenced within twelve months of the child's removal. I am also satisfied that the applicant did not consent to the removal of his son from Italy nor has he acquiesced in the removal *ex post facto*.

25. The Convention provides that, in normal circumstances, children should be returned to the country of their habitual residence, following a wrongful removal. The contracting parties to the Convention have determined, as a matter of general principle, that a prompt return is in the child's best interests. Therefore, as a matter of law, and as is apparent from the authorities considered below, and in the circumstances of this case the child should be returned to Italy unless the respondent establishes the defence which she advances under Article 13 of the Convention and that the court deems it appropriate to exercise its discretion to refuse to make an order for the return of the child. The respondent thus seeks an order refusing the return of the child to the Republic of Italy pursuant to pursuant to Article 13(b) on the basis that there is a grave risk that his return will expose him to physical or psychological harm or otherwise put him in an intolerable situation. The respondent also seeks the leave of the court to cross-examine the respondent on his affidavit and submits that the true extent of such grave risk will thereby be tested and become apparent.

Grave Risk

26. In the context of a '*grave risk'* defence, it is evident from the authorities that the principal concern and focus of the Court is on the child and the situation greeting the child on return. It seems that the parties' marriage is at an end. Divorce proceedings have been issued by the applicant in Italy. The respondent has instituted judicial separation

proceedings in this jurisdiction. It seems unlikely, therefore, that the parties will reside together in the future.

27. The respondent makes allegations of abuse of illicit drugs and aggression by the applicant. The most significant and serious allegations made by the respondent concern threats to life, which it is contended, the applicant has admitted to having made. The respondent exhibits transcripts of certain conversations with the applicant. These are:

    (a) a transcript of a telephone conversation which was recorded without the applicant's knowledge on 18th October, 2019; and

    (b) a transcript of a conversation which occurred between the parties during the course of an access visit on 20th October, 2019. Again, it appears that this conversation was recorded without the knowledge of the applicant.

28. Extracts from the transcript of the translated telephone conversation upon which particular emphasis has been placed, include the following exchanges:-

> *"love I said exactly the words, I'll tear your head off, I'll kill you, but whoever I talked to, who was coming back from, just to mention one, who was coming back from I don't know where and asked me to pick up and his cousin…*
>
> *[Respondent]: I have to feel safe 100% to come back.*
>
> *[Applicant]: love I would never do anything, lay a finger on you, unfortunately I lost a little patience also due to the fact of certain behaviours at home with the child and between us but these things love are very normal. Everyone has said to me look [applicant], even [the Doctor] has said [applicant] my husband and we should, but if there is the desire to be together we return together. The Doctor told me [applicant] we throw dishes at each other, the table, which among other things I did once, but there was no child, these are normal things, but before calling it quits, marriage, husband… but for the sake of the child among other things… Apart from out love the one between us that I hope you still have love, love, because I have it… I still have it.*
>
> *[Respondent]: It was for the child that I left home because I was afraid for me and for him…*
>
> *[Applicant]: yes I have understood, but I have so much fear that you want, you wanted to end everything. We are not fifteen years old, love, that we break up and then come together. Everyone told me [applicant] look there are a thousand… it is normal, these are problems that add up because it is normal for everyone so you think about, you a find a thousand ways before thinking about…*
>
> *[Respondent]: Okay but you understand that I need some time to feel safe after what happened…*

[Applicant]: love listen to me, it is if you were in front of me and you were looking at me in the eyes so many weeks have passed and so many people have told me [applicant] you must send the letters because it is not fair. People are scandalized that I don't know where my son is, that is they said but you don't know where your son is, but physically a residential address. If I were to send you a letter from a lawyer, for example, no, one that says Madam what do you want? Because your husband wants to be with you and we need to know that the house is safe and the child is well. Your husband needs to know the address these are really basic rights.. because.. you know me I am too good a person and altruistic that is under a lot of pressure but people are really scandalized, that is, I have some friends that I know…

[Respondent]: Listen to me, listen to me, what I care about is to be safe and not be threatened, let me finish, with violence…

…

[Applicant]: with verbal violence, but this violence is verbal, it happens in all homes.

[Respondent]: I have to…

[Applicant] It happens in all homes

[Respondent]: No it doesn't happen in all homes.

[Applicant]: it happens in all homes, love.

…

[Applicant]: And then I never laid a finger on you physically… the thing is that you…

[Respondent]: I thought you were about to.. to, touch me the other time… I was afraid.

[Applicant]: Absolutely love I understand this.

[Respondent]: Okay, just to say that it is not normal, I need time.. okay? I need some time…" (emphasis added)

An extract from the transcript of the conversation between the applicant and the respondent on the 20th October, 2019, exhibited to the supplemental affidavit of the respondent sworn 15th July, 2020, records the following:-

"[Applicant]: Tomorrow I'll go to the police. Tomorrow I'll tell the police what's the situation… the baby… Carabinieri will come looking for you, I'm sorry… I'm sorry.. I promise. You've lost your mind. You suffer from depression. It is so sad, so sad. I'd kill you, I'd kill you like that, wouldn't I? do you think nobody says these kinds of things in private?

[Respondent]: With your fists, your fists lifted in my face,..

[Applicant]: But your face what…

[Respondent]: … shouting I'll kill you, I'll smash your head in.

[Applicant]: You're talking nonsense. I said those words.. when they are said, in ever family they say…

…

[Respondent]: Will you let me breastfeed the baby?

[Applicant]: it is important, I mean you're throwing away my love, 10 years of my life. Because we shouted at home? I mean, I can't believe you ran away from home with the baby. I mean, I have friends who really quarrel at home, they shout, the break stuff, but they come back together, they speak…" (emphasis added)

29. It is also part of the respondent's case that she has not been protected by the Italian legal system and that she cannot obtain a protection order in that jurisdiction. Counsel for the applicant, Mr. Finn B.L., suggests that this contention is based on what he describes as a very problematic engagement by her with that system. He points out that she declined to appear to give evidence at the hearing but now complains that she did not succeed in obtaining the relief of protection which she sought. He further submits that there is no history of calls to the police or evidence of any failure by the applicant to abide by any order of the Italian Courts that he stay away from the respondent.

General Principles

30. The parties in written submissions have referred the court to a number of authorities in which the relevant legal principles have been considered. The threshold regarding the defence of grave risk was outlined by Barron J. in *R.K. v. J.K. (Child Abduction: Acquiesence)* [2000] 2 I.R. 416 at p. 451 as follows:-

> *"Prima facie the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state. In my opinion the following passage from Friedrick v. Friedrick (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.'"

31. In *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, Fennelly J. observed that "*[t]he authorities are clear that the burden here is on the mother and that the test is a high one*". He distinguished the concept of grave risk and the paramount welfare of the child and stated as follows at para. 57:-

> *"The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their futures' speedily to be decided in that jurisdiction."*

In that case allegations of sexual abuse had been made by the respondent against the applicant father and at the time of the removal, access was suspended. Fennelly J. in adverting to the trust which ought to be placed in the courts of habitual residence, observed that it was not the purpose of the Convention that hearings of applications for return should turn into enquiries as to the best interests of the child. He commented:-

> *"54. Such disputed allegations form the normal material for ruling by the family courts in the jurisdiction of habitual residence. However, the appellant says that the Australian court has clearly already ruled on the issue, that it has prejudged the question of access. That was the reason for her leaving Australia. Put shortly, her submission amounts to saying that this Court should not trust the Australian courts to protect the interests of C.*
>
> *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."*

He later noted:-

"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."

32. In *A.U. v. .T.N.U*. [2011] 3 I.R. 683 Denham C.J. observed:-

"… It is also the case that in interpreting and applying Article 13 of the Convention, Courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the Courts in such a country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance."

33. Similarly in *R v. R* [2015] IECA 265 Finlay Geoghegan J. stated at para. 40:-

"Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return."

34. In *Z.D. v. K.D*. [2008] 4 I.R. 751, MacMenamin J. considered an allegation against prosecuting authorities. At paras. 97 and 98 of his judgment he observed:-

"The Respondent's contention that the Courts of Poland may not adequately be in a position to protect the welfare of the child, was based on an allegation against the prosecuting authorities. No cogent evidence whatsoever has been adduced to this effect. The allegations have been denied by the Applicant. One would have thought that, in the circumstances, if this was a clearly defined fear, clear specific evidence would have been adduced by the Respondent."

35. He observed at p 30:-

"the Philosophy of the Convention is based on the general trust or comity between the contracting States in the knowledge that the appropriate mechanisms exist in the requesting States to secure the welfare of the child."

36. Further, in the event that the court concludes that there is a grave risk, the court must consider whether, in any event, in the exercise of its discretion under the Convention, the

child should nevertheless be returned. In *B v. C* [2015] IEHC 548, McDermott J. described the discretion vested in the court under Article 13(b) as being very limited. He observed that the court is dealing with the summary application for the return of the child and that when allegations are made that the return will give rise to a grave risk of physical or psychological harm, or an intolerable situation for the child, it is not for the court in this jurisdiction to determine whether the alleged incidents relied upon did or did not occur. Such an issue is in large measure the subject of the proceedings before the family court in the country of habitual residence. He continued:-

> *"The proper approach to be adopted under Article 13(b) is set out in the decision of the Supreme Court in A.S. v. P.S. [1998] 2 I.R. 244 in which Denham J. (as she then was) in delivering the judgment of the Court stated (at page 259) that:*
>
> > *'The law on "grave risk" is based on Article 13 of the Hague Convention, … It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.'*
>
> *This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across State borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."*

37. As McDermott J. also pointed out, Article 13(b) imposes a heavy burden of satisfying the court of a grave risk of substantial harm if a child were to be returned. Referring to the decision in *Re. HV (Abduction; Children's Objections)* (1997) 1 FLR 392, he noted that the Supreme Court considered that the court in this jurisdiction is entitled to have regard to the practical consequences of directing the return of the child and whether any risk of harm could be reduced or extinguished by undertakings or by reliance on court procedures in the Convention State.

38. In *X. v. Latvia* [2014] 59 EHRR 3 it was stated that in the assessment of the child's best interests:-

> *"this task falls in the first instance to the National Authorities of the requested State, which have, inter alia, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation, which however remains subject to a European supervision whereby the court reviews under the Convention of the decisions that those authorities have taken in the exercise of that power."*

39. In *AA v. RR* [2019] IEHC 442, Donnelly J. held at para. 76:-

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

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

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

40. The court must also consider the likely effect of the return of the child in line with the principles outlined in the decision of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [2012] 54 EHRR 31, in its application to Convention proceedings and as discussed in this jurisdiction in authorities such as *R v. R* [2015] IECA 265 where Finlay Geoghegan J. observed that, particularly in the context of assessing grave risk:-

> *"Nevertheless, notwithstanding the requirement that the child's best interests are considered it remains clear that the requested court is not required to conduct a full welfare assessment as to what is in the best interests of the child. The best interests of the child must be evaluated in the context of the nature of the application and the exception in the Hague Convention being relied upon."*

41. It seems to me that the authorities establish that to ensure the proper functioning of the Convention, to ensure compliance with the State's obligations thereunder and on the basis of mutual respect and comity, courts in this jurisdiction must as a matter of principle have, and place, trust in courts in other Convention signatory countries, to protect the child at the centre of the application. This is particularly the case where the country in question is a member of the EU, is a signatory to the European Convention on Human Rights and the Convention on the Rights of the Child.

42. To deal in the first instance with the protection, or alleged lack thereof, afforded by the Italian legal system, given the burden of proof which lies on the applicant, I am not satisfied that she has adduced cogent evidence of failures on behalf of the prosecuting authorities such as have exposed, or will expose, her or the child to grave risk. At most, if there was a failure, on which I do not conclude, it arose from an attendance and/or service of documents on an address upon which it was unwise to have served them or upon which they should not have been served, thus making the applicant aware of the proceedings. In my view, this falls considerably short of establishing a failure on the part of the authorities, or the system, such as to expose, or leave the applicant and the child on return, exposed to grave risk within the meaning of Article 13, or to establish a failure or unwillingness on the part of the authorities or the system in that jurisdiction to provide protection. In so far as there are alleged shortcomings in available reliefs and protections under the Italian legal system, the court is also left with little by way of cogent evidence that a *lacuna* exists such as to give rise to a grave risk within the meaning of Article 13.

43. With regard to the conduct of the applicant, which it is alleged places the child in grave risk in the event of an order being made for his return, the respondent has applied to cross-examine the applicant on his affidavit. Ms. Kennedy B.L., on behalf of the respondent, submits that the nature and extent of the grave risk to which the child is likely to be exposed, if returned, requires to be tested fully through cross-examination. This is resisted by the applicant. Counsel for the applicant submits that the notice to cross-examine is in general terms and does not identify specific issue upon which cross-examination is sought. He refers to O. 133, r. 5(2) RSC as inserted by the Rules of the Superior Court (Jurisdiction, Recognition, Enforcement and Service of Proceedings), S.I. 506 of 2005 which provides that *"[a]pplications shall be heard on the basis of affidavit evidence only. The Court, at its discretion, may, in exceptional circumstances, direct or permit oral evidence to be adduced."* He submits that no exceptional circumstances arise and further submits that where cross-examination is permitted it tends to be in relation to the facts concerning habitual residence, or issues such as consent or acquiescence

44. I accept as correct, the general proposition advanced on behalf of the applicant, that proceedings under the Hague Convention and the Regulations are summary in nature and are directed towards the expeditious return of a child to the State of his or her habitual residence. The court must also resist any temptation to enter upon a consideration of the merits of rights of custody. Article 16 of the Convention provides:-

> *"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."*

45. With regard to cross examination, in *I.P. v. T.P.* [2012] IEHC 31 Finlay Geoghegan J. observed at para. 41:-

"41. There are limitations imposed on a court in evaluating evidence on an application for summary return pursuant to the Hague Convention. It is rare to hear oral evidence or even cross-examine deponents and a court will not normally attempt to resolve factual disputes. There was no oral evidence and no cross-examination in this application and the Court, as already stated, should not and will not attempt to resolve the dispute as to whether the alleged incidents did or did not occur."

46. The UK Supreme Court in *In re E (Children)* [2011] UKSC 27 referred to the "*tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true*". Finlay Geoghegan J. approved this approach and stated at para. 43:-

> *"It appears to me that the pragmatic solution to the tension referred to by the Supreme Court of the United Kingdom is of use to resolve the tension herein. The solution is that this court should first ask whether, if the allegations are true, there would be a grave risk that the child would, following the summary order for return, be placed in an intolerable situation. If so, the court should then ask how the child can be protected against the risk."*

47. In my view, this is the appropriate approach to adopt in this case. I should first ask whether, if the allegations are true, there would be a grave risk that the child would, following the summary order for return, be placed in an intolerable situation. If so, the court should then ask how the child can be protected against such risk. I am therefore not satisfied that the court should enter upon a consideration of the veracity of the matters alleged or denied though examination and cross examination of witnesses. The applicant maintains that the overall context in which he admitted to making such threats colours their seriousness and he avers that he has not, nor will he, conduct himself in a manner which has been injurious to the child; and that when so considered it is clear that there is no intention or substance to the threats. Thus, this is not simply a case of the resolution of a factual issue of whether a threat was made or not made. There is evidence of admission by the applicant to having made such threats or at least acknowledging that they were made. Following the first leg of the test outlined by Finlay Geoghegan J., I am satisfied that I should accept, for the purposes of the application, that the allegations are made out, particularly the admission of the making of threats.

48. In my view, such threats, or admissions thereof, must be afforded serious weight in the court's assessment of the gravity of the allegations. Applying the first leg of the test outlined by Finlay Geoghegan J., in the context of the application to cross-examine, I am satisfied, without so deciding, that this threat ought to be considered to have been made out and that such a threat or admissions of threats gives rise to a grave risk to the child within the meaning of Article 13.

49. I must now address the second stage of the test and ask how the child's welfare might be protected, if the allegations are true.

50. In *P v. B Re J* [2015] EWHC 1160 (Fam) Pauffley J:-

"45. The situation which will be faced by J on return depends crucially upon the protective measures which could be implemented so as to avoid the risk that the child will be harmed or otherwise face an intolerable situation.

46. In this instance, the father has offered a series of undertakings so as to provide J with a 'soft landing' and mitigate the impact upon both her and the mother of return to Texas. His written evidence stated that he would not seek to remove J from the mother's care pending the first inter partes court hearing. In response to an inquiry from me, the father went further. He indicated he would " not pursue an application for primary care of J unless at some future date there is significant inability on the mother's part to care for J." Mr Devereux confirmed that the father wishes to do his best to settle the mother and J.

47. To that end, his other written offers are these – not to seek to enforce the Texan Court orders from earlier this year; and not to seek to prosecute the mother in relation to alleged child abduction. The father confirms there are no outstanding criminal proceedings and that he will not pursue a civil remedy in relation to child abduction. He strenuously denies he has ever been abusive but nonetheless gives an undertaking not to be so. The father agrees to meet the cost of J's return flight to the US and also to arrange for and provide suitable accommodation within the proximity of Austin, Texas for the mother and J to a level, so I was told, of $900 per month. The father also agrees to pay child support of $900 per month and to meet J's medical insurance.

48. Ms Renton submits there is " no way the mother should be ordered to return to the child to the US until the father has provided evidence that he has discharged the Texan court orders." She claimed there had been " enormous problems with undertakings" inferring they are essentially worthless.

49. I am bound to say that I can see no proper justification for proceeding in the manner suggested by Ms Renton. Judges in this jurisdiction must be entitled to accept in good faith solemn undertakings given after advice proffered by specialist Solicitors and Counsel. I have deliberately related the detail of those matters to which the father has already given his commitment so that anyone reading this judgment will know the position."

51. Mr. Finn B.L. submits that the mechanism of undertakings has been approved of in this jurisdiction. In *P v. B* [1994] 3 I.R. 507 Denham J. (as she then was) observed at p. 520 of her judgment:-

> *"In other countries which are parties to the Hague Convention undertakings have been accepted by courts.*
>
> *In Re C. (A Minor) (Abduction) [1989] 1 F.L.R. 403 the Court of Appeal in the United Kingdom considered the question of undertakings. Butler-Sloss L.J. at p. 408 stated:—*

> *'These undertakings are crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was 3 for all but access periods, his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return.'*

After undertakings which the court required as a prerequisite for the return of the child were given, the court ordered the return of the child to Australia.

Similarly in Re G. (A Minor) (Abduction) [1989] 2 F.L.R. 475 the Court of Appeal accepted undertakings given by the father, not in any way to influence the court of competent jurisdiction, the Family Court in Australia, but to protect the child from grave risk of psychological harm until an application had been made to that Court. Butler-Sloss L.J. stated at p. 485:—

> *'In carrying out the Hague Convention, this court has the duty under art. 13, as indeed the Australian court would have if a similar application were made to the Family Court, to consider the welfare of the child. The undertakings in this case are designed to protect the child from the grave risk of psychological harm as set out by Thorpe J. in his second judgment until, and only until, an application can be made to the Australian Court.'*

I am satisfied that undertakings may be given by a party to proceedings under the Act of 1991 and accepted by the Court. They are entirely consistent with the Act of 1991 and the Hague Convention, they are for the welfare of the child during the transition from one jurisdiction to another. Undertakings may be of particular relevance to very young children.

Undertakings in this situation are compatible with the Act and international law which have as their objectives the desire to protect children internationally from the harmful effects of their wrongful removal from the country of their habitual residence and the establishment of procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access.

Furthermore, undertakings which are for the welfare of the child are in accord with the constitutional protection of the child and its welfare.

Undertakings may also protect parents in their role and in the exercise of their rights under the Constitution. Consequently I am satisfied that undertakings may be accepted in cases under the Act of 1991."

52. I am therefore satisfied that consideration must be given to the undertakings offered by the applicant and to the protective measures which might be put in place pending the return of the child, and on his return, and which may assuage any concerns of grave risk.

The applicant has offered to undertake that the respondent and the child will have sole use of the family home until further order of an Italian Court and he is willing to give such undertaking in whatever form the court sees fit to secure the return of the child.

53. It also appears to me to be proper to take into account a number of other factors in the assessment of the determination of whether any risk to the child may be ameliorated or protection given. First, proceedings are already extant before the court in Italy in which relief is sought in respect of custody and access, as has been stated. Comity and authority dictate that this court should place its trust in the courts of the Republic of Italy, having given the matter full consideration, to take such action as it considers necessary to safeguard the child's welfare. I should also note that this court has been informed that the respondent has instituted proceedings for judicial separation in this jurisdiction to which the applicant has entered a conditional appearance. Copies of these proceedings were not produced to the court on this application. Jurisdictional issues therefore, may have to be first determined. Second, it seems that the evidence points to the marriage now being at an end and appropriate arrangements will require to be put in place in particular in respect of the residence of the child. Third, I am satisfied, on the authorities that this court enjoys a limited jurisdiction in relation to the imposition of a stay on the order for return. Taking all of the above factors into account, and when viewed in their totality, I am satisfied that the safety and welfare of the child is capable of being safeguarded prior to and on his return and that this is an appropriate case in which to direct the return of the child and that it is in the best interests of the child to do so, but on terms.

Conclusion

54. Where an applicant for the return of the child has established habitual residence and the exercise of parental rights or rights of custody, that there is a heavy onus on the respondent who wishes to resist the return of the child on the grounds of grave risk, to establish that risk. The default position, in line with the State's international obligations under the Convention and the Regulations, is that a child who has been wrongfully removed from a Contracting State should be returned in an expeditious manner.

55. As a matter of principle, where there are factual disputes in relation to the conduct of the parties during the course of their relationship which may impact upon the safety or welfare of the child, the default position again is that the court of the country of habitual residence is best positioned to resolve such disputes. In this case, there are disputed issues of fact in relation to the parties' respective conduct, particularly the conduct of the applicant. *Prima facie*, the resolution of such disputes is for the court in Italy which, in my view, is likely to be best positioned to determine all issues of fact including not only what was said, but why it was said and the context in which it was said. Nevertheless, given the evidence which is before the court in relation to the admission by the applicant of having made threats, and the content of such threats, these are matters which must be taken seriously and to which the court gives great weight. To the extent that the respondent seeks to cross-examine the applicant, adopting the approach of Finlay

Geoghegan J., I accept for the purposes of this application that the allegations made by the respondent have been established.

56. I am satisfied, however, that in the consideration of the second leg of the test of Finlay Geoghegan J., that this is an appropriate case in which the proffered undertakings ought be considered and accepted.

57. The court is concerned to ensure that pending the return of the child, and on the child's return, and pending any further order of the court in Italy, the applicant will not threaten, or attempt to threat or conduct himself in such a way as to pose a threat, physically or verbally, to the safety and well-being of the child or the respondent and that he will remain away from the respondent and the child, subject to access arrangements being agreed or determined.

58. The court notes that in the applicant's affidavit, he avers that a hearing has been fixed for 22nd September, 2020 in respect of the proceedings which have been instituted in Italy. It may be that jurisdictional issues will have to be addressed before the court, if it so decides, enters upon a consideration of the issues pertaining to the child's welfare. Given the existence and imminence of these proceedings I am also of the view that a stay should be placed on the return of the child pending receipt by this court of further information concerning the likely time within which such issues will be addressed by the court in Italy.