THE HIGH COURT

FAMILY LAW

APPROVED **REDACTED**

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 OA AND OB, MINORS

(CHILD ABDUCTION: RIGHTS OF CUSTODY AND HABITUAL RESIDENCE)

[2021 No.13 HLC]

BETWEEN:

L.B.

APPLICANT

AND

A.H.

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on the 23rd of August, 2021.

1. Introduction

1.1 This is a case in which the Applicant father seeks the return of his sons (named OA and OB for the purposes of this judgment) to the jurisdiction of England and Wales. OA was born in 2017, in Ireland, and OB in 2019, in England. The Respondent is their mother and the parties separated in 2019. The Respondent brought the children to Ireland in September of 2020 and now hopes to settle here. She asks the Court to refuse the application to return her

children on three main bases: that the Applicant does not have custody rights in respect of OA, that the Applicant consented to the Respondent's return to live in Ireland, and that the children should not be separated as they have always lived together and to separate them would be to put them in an intolerable situation. There is a grave risk argument which was not pressed in submissions though it will be addressed as it involves a common misunderstanding as to a court's function in child abduction cases.

1.2 The application is made under the Hague Convention of the Civil Aspects of International Child Abduction [the Convention]. The Convention ensures international cooperation in respect of legal issues concerning child custody and welfare. The animating principles of the Convention include that decisions about child welfare be made in the country in which the children reside and that unilateral decisions to take children to another country should be discouraged. As a corollary of these objectives, the Convention requires that signatory states trust other signatories in terms of their social services and the operation of the rule of law in their respective nations. The Convention was created to combat the problem of the wrongful removal of children, usually by a parent, from the country in which they habitually reside, to the detriment of the child's relationship with the other parent. This international agreement recognises the normal incidence of relationship breakdown, which leads to the division of families between households and, given the ease of global re-settlement, between countries. One of the Convention's most important policy objectives is to ensure that parents respect the rights and best interests of their children and the custody rights of any co-parent or guardian in deciding to move to another jurisdiction, taking the children from their habitual residence and, potentially, from social and familial ties in that jurisdiction.

2. Summary of the Law: The Applicant, the Burden of Proof, and the Defences Raised

2.1 The Convention requires an Applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights at the relevant time and that the child was habitually resident in the relevant requesting country at the time of removal or retention. These issues are in dispute in this case in respect of OA, the older of the two children. It is not disputed that OB was born in England, was resident in England and that the Applicant was exercising custody rights in respect of OB at the time of removal.

2.2 If the Applicant succeeds in proving these matters, the burden then shifts to the Respondent who must satisfy the Court that the Applicant consented to their removal or that the defence of the children being at grave risk or placed in an intolerable situation arises if they are returned to England. If any defence is established, the Court has a discretion as to whether or not the child is returned. As a matter of law, the Court has no discretion in respect of return if the Applicant proves the matters set out in respect of custody rights, there is no proven defence and the application has been brought within a year of the wrongful removal or retention; in that event, the child must be returned. Here, the application to the English Central Authority was made on the 17th of February, 2021. The application, therefore, was made within one year of the removal of the boys to this jurisdiction.

2.3 The law in respect of each child is different as each was born in a different jurisdiction. OA, is an Irish born child, has an Irish birth certificate and spent the first two months of his life in this jurisdiction. His parents then moved to England for the summer for seasonal work in which both were involved. They returned to Ireland some months later. There is a dispute as to whether or not the Applicant has custody rights in respect of OA.

2.4 The parties were never married to one another, but the Applicant was named as the father in each case. The Respondent mother does not contest the fact that he is a parent but contests his rights of custody in respect of OA. She raises the defence of consent in circumstances where the Applicant drove her and their children to the ferry when she left for Ireland and knew that she did not have return tickets. She also avers that the children will be at grave risk if returned and, in support of these defences, she avers that the Applicant was physically violent towards her and very controlling generally.

2.5 The Respondent points out that the children have never been separated and if, as she argues, the Applicant does not enjoy rights of custody in respect of the older child, that boy should not be separated from his brother as may happen if one is made the subject of an order to return to England and the other is not. This would amount to putting the boys in an intolerable situation, which is a basis on which the Court can, and should, it is submitted, refuse to return both children.

3. Rights of Custody and Habitual Residence

3.1 The significance of the concept of custody rights in this context is that a person with custody rights in respect of a child has the right to decide where the child will live and must consent, therefore, to any permanent removal of that child to another jurisdiction or the child may be summarily returned. Central to this decision is another factual issue, which is that of where the child habitually resides. The habitual residence of the child dictates the law which applies to the definition of custody rights. The case law defining the term also helps to determine whether or not the removal of a child amounts to a permanent move.

3.2 The father of a child born in England automatically has custody rights (known as parental responsibility) once he is named on the English birth certificate. This is confirmed by the relevant English legislation (The Children Act of 1989) and by a letter from the Central Authority of England and Wales, both of which are exhibited by the Applicant.

3.3 A child born in Ireland is (typically and leaving aside any unusual circumstances) habitually resident in Ireland from that time and Irish law determines whether his father has rights of custody in respect of that child. Under Irish Law, an unmarried father enjoys no automatic right of custody in respect of his child. He must apply to a family court to become a guardian of the child, which legal role would give him rights of custody. But he can acquire the rights in various other ways. One of these is a combination of co-habitation with the mother and with the child under section 2 (4A) of the 1964 Guardianship of Infants Act (as amended). This subsection provides that guardianship is acquired where an unmarried father (otherwise not entitled to guardianship) has cohabited with the mother for at least one year and with the mother and the child for a period of at least 3 consecutive months. There is no requirement that the co-habitation be in Ireland.

3.4 Here, the Applicant has established that there was co-habitation with the mother for over a year and with the child for at least 3 months. The problem in this case arises because the couple moved together to England in 2017 when OA was only 2 months of age. This, the Respondent says, was a change of habitual residence for the family. If OA *changed* habitual residence when he was 2 months old, as is argued by the Respondent, then the 1964 Irish Guardianship Act ceases to apply as OA became a resident of England before his father could acquire custody rights in Ireland. If this submission is correct, England became, from that point, the jurisdiction which dictated the rights of the various parties in respect of OA. If this

is the case, OA's birth certificate, as an Irish document, is not recognised by the Children Act of 1989 and the same parental rights do not vest in the Applicant in respect of OA as he acquired automatically by English law in respect of OB.

3.5 The first disputed question of fact, therefore, is whether or not the child moved habitual residence in May of 2017. The law in that respect is set out in various cases but most helpfully in *Mercredi v Chaffe* C-497-10 PPU (22nd December, 2010), which decision has been followed in Ireland in numerous cases in which the issue has arisen both under the Council Regulation (EC) No 2201/2003 and in Convention cases. The term appears in both and should be consistently applied across different international instruments thus the passages quoted are applicable to this case.

3.6 In *Mercredi,* the First Chamber Court gave the following guidance para. 51:

> *"....in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence ... Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."*

Having confirmed that the age of the child was an important factor, the Court concluded, at para. 56:

"...To that end where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State...."

3.7 The affidavits establish the following facts in this case: when OA was a 2-month old baby, his parents travelled to England for seasonal work in May of 2017. This stay was for a specific purpose and, while the Respondent argues that it was a permanent resettlement, the family returned to Ireland in September, 2017 and stayed at the maternal grandmother's home until Spring of the following year. During this period also, the Applicant was employed in Ireland and paid taxes here. In 2018, having returned again for the same type of seasonal work, the family on this occasion lived in a mobile home for a year and registered for public housing in England which they obtained in 2019.

3.8 In the words of the Court in *Mercredi,* there is nothing in this scenario to indicate that the parents had it in mind in 2017 to establish the permanent centre of their interests in England at that time. Further, the return to stay with the mother's family in 2017, by contrast with the position the following year, confirms the impression that the move in 2017 was a temporary one only at that time. There is no evidence (such as the later application for public housing) to indicate an intention to move permanently to England in 2017 and to settle there.

3.9 This Court finds a matter of fact, on the balance of probabilities, that the child's habitual residence remained Ireland for the first year of his life. This being the case, the

Applicant acquired rights of custody by virtue of the 1964 Act, having co-habited with the mother for over a year and with the child for over 3 months, consecutively, at a time when the child remained habitually resident here in Ireland throughout. The family changed habitual residence at some point between 2018 and 2019 and it is not necessary to decide when that change occurred as it was after the 3 months which, under the 1964 Act, the Applicant father must live with the child in order to acquire rights of custody in Irish law.

3.10 Ireland is a signatory of the 1996 Hague Convention on Parental Responsibility and the Protection of Children [the 1996 Convention]. Article 16(3) of the 1996 Convention provides that *"Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State."* In other words, the custody rights of a parent travel with the child when he becomes habitually resident in a new state and the 1996 Convention requires that these custody rights be recognized in the new home. Therefore, the Applicant's custody rights travelled with OA when the family moved, in 2018, to the UK and he enjoys parental responsibility for the child as a result.

3.11 OB was born in England and there is no issue in this regard; he habitually resides in England and his father has parental responsibility and, therefore, custody rights in respect of OB. The Applicant is named on his birth certificate and the law provides that he automatically acquires parental responsibility thereby. The parties were granted social housing in April of 2019 and the family lived at the same address, in England, from that time until the date of removal to Ireland in 2020.

4. Exercise of Custody Rights

4.1 The next issue is whether or not the Applicant was exercising his custody rights. The law sets a relatively low bar for a parent in this situation. Ms. Justice Ní Raifeartaigh in *N.J. v E. O'D* [2018] IEHC 662 reviewed the authorities and summarised the situation saying that the courts must take a liberal view on the question of the exercise of custody rights and that the focus of the inquiry should be on whether the parent sought to have a relationship with the child, not merely on issues of financial assistance.

4.2 In a recent decision of this Court, *W.B v S. McC & Anor* [2021] IEHC 380, overnight access alone, some months before the application was brought for the return of the child, provided sufficient proof that the applicant in that case had exercised his custody rights.

4.3 In her affidavit this Respondent confirms that the family resided together until the date of removal in September, 2020. While she may have been the primary carer, there was clearly regular contact between the Applicant and the children. This alone is sufficient to establish that the Applicant was exercising his custody rights at the relevant time.

5. Consent

5.1 The burden of proving consent to removal of the children, on the balance of probabilities, is on the Respondent as she seeks to raise the defence. The term "consent" was considered by the Supreme Court in *B v B (Child Abduction)* [1998] 1 I.R. 299, where that Court made it clear that even if the defence is successfully raised, the Court retains a discretion to return the child nonetheless.

5.2 In the Respondent's affidavit there are three paragraphs which are relevant to this issue and it is helpful to quote them in full. The Respondent states that:

"I left on the 20th September 2020 with OA and OB and returned home to Ireland. The Applicant was aware of this. The Applicant drove OA to the ferry port in his van while I drove with OB in my car. He said goodbye to us at the ferry."

She then refers to her mental health and to messages with a friend before concluding:

"I had booked a one-way ferry journey with the boys, which the Applicant was aware of, and I clearly stated I would not be giving a return date. I have not continually promised to return to England. I told the Applicant before Christmas 2020 that I would not be returning with OA and OB. The Applicant said he would move to Ireland in order to be closer to OA and OB and I said that would be fine with me."

5.3 Later in the same affidavit the Respondent avers: *I say that I did not remove the children from England without the Applicant's permission, the Applicant knew I was leaving and had not been given a return date at any point.* And finally, at para. 33 of the affidavit, the Respondent returns to the issue of consent stating:

"We often discussed, and my mother was a witness to this conversation multiple times, that if we ever broke up and I moved back to Ireland, that we would sort out custody between us. We always said that we would do every other Christmas and I said I would travel over for school holidays."

5.4 At most, this suggests that the Applicant had been notified or warned of her plans in a general way. The final averment goes so far as to suggest that he may have indicated, also in a general way, that there would be no dispute over custody even if the Respondent moved to Ireland. This is as far as the consent argument goes.

5.4 No written or explicit consent to the removal of the children is referred to or exhibited by the Respondent. The law does not require written consent, but it must be explicit. No conduct which might indicate consent on the part of the Applicant, save that of driving her to the ferry knowing that she had not purchased return tickets, is referred to by Respondent. This is equally consistent with a short but indeterminate visit. The height of the Respondent's evidence is that there were discussions in the past in respect of her returning to Ireland with the children if the relationship broke down. There was no evidence of an explicit consent to a permanent return on this specific occasion of her trip to Ireland. Positive evidence of consent is required, not a unilateral decision which is unspoken and relies in part on historic discussions or agreements in respect of hypothetical situations.

5.5 In *Re K (Abduction: Consent)* [1997] 2 FLR 212, the High Court of England and Wales held that consent to removal must be positive, unequivocal, clear and cogent: the Applicant has offered an undisputed averment that he did not consent to the children's removal and the burden rests on the Respondent to prove consent. Even if her averments as to discussions about future living arrangements are true, while acknowledging that this application may therefore have surprised the Respondent, such discussions do not prove that the Applicant consented to the permanent removal of the children to Ireland in September 2020.

5.6 In this context I have also considered the acquiescence argument of the Respondent, again, acknowledging that these proceedings may have come as a surprise to her if the conversations to which she has referred took place. The Court notes the comments of Finlay Geoghegan J. in *F.L. v C.L.* [2006] IEHC 66, to the effect that a finding of acquiescence should be made where, having regard to all of the circumstances, the Court concludes that the wronged parent, either actively or passively, accepted the changed circumstances such that it

would be reasonable that he would be bound by it and that it would be inconsistent for him to rely upon his rights under the Hague Convention to have the children returned summarily.

5.7 The delay in that case was just over three months. The delay here, taken from September, when the children were removed, to February when the application was made to the Central Authority, was a comparable 5 months. It does not appear to this Court that this time period is sufficient, in and of itself, to establish acquiescence on the part of the Applicant. His text messages, exhibited by the Respondent, show that she could not have been under the illusion that he was consenting to or acquiescing in the removal, in particular given his references to having retained a solicitor.

6. Grave Risk

6.1 A court may refuse to order the return of a child if there is a grave risk that to order return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In the introduction to this judgment, the Court referred to a common misunderstanding in respect of the term "child abduction". It is important to deal with this misperception in this judgment as various exhibits to the Respondent's affidavit show that family members, and perhaps the deponent herself, understand the term as it is used in ordinary language rather than as a legal definition.

6.2 In ordinary speech, we consider a child abduction to be a kidnapping, often importing some level of violence; if not to the child, then at least in the circumstances of the taking. In the context of Hague Convention cases, this is usually far from the true situation. The most common circumstances in abduction cases involve one parent taking the child on a holiday or, having taken the child away, not returning to the erstwhile home. The Convention was created to discourage such unilateral action. An important principle upon which the

Convention insists, and which signatory states do their best to enforce, is that the courts of the child's home country are usually best placed to make decisions about the welfare of the child.

6.3 In her habitual residence, usually, the state has the medical history, school reports and social welfare records of the child. The child's family and friends, teachers and relevant social workers or medical personnel are more readily available should a factual dispute arise about the child's welfare. In the state of habitual residence the records of one or both parents are usually easy to access and so it is there, bearing in mind that all these matters may be relevant to the welfare of the child, that the courts are in the best position to gather and consider all relevant information, to understand it in its social and cultural context and to apply it to the circumstances of the case in deciding what is in the best interests of the child.

6.4 In a Convention case, by contrast, while the Court is of course concerned with the welfare of the child, it begins with the animating principles of the Convention and it is in that context that the child's welfare is considered. Therefore, while many of the exhibits and averments of the Respondent might constitute cogent evidence as to why she may be the best parent for these boys (indeed no argument is made that the Applicant should be the primary carer), this Court has no function in that regard. The decision that there has been a wrongful removal does not involve any judgment as to parenting ability or past behaviour other than as it may affect a defence such as consent or grave risk. This Court has a binary choice: to return or not to return in respect of each child. The children's welfare is a key concern but, unlike a court holding a welfare hearing, this Court must consider the fundamental importance of discouraging unilateral removal of a child and trusting in the courts of the country of habitual residence.

6.5 In other words, even if most or all of what the Respondent alleges in respect of the Applicant is true, if the matters are capable of resolution by the courts of England and Wales without putting the children at grave risk of harm by allowing those courts to make the necessary decisions as to welfare, the children must be returned there to have those matters resolved in the appropriate venue. The only lawful way in which this Court can intervene to prevent such a return is if the alleged facts are sufficient to prove that the children, if returned, would be at grave risk. This is a more serious risk than those outlined by the Respondent and, usually, relates directly to the children rather than to the parent who has removed the child.

6.6 In *CA v CA* [2010] IEHC 460, 2 I.R. 162, [2009] Finlay-Geoghegan J. described the Article 13(b) defence of grave risk as a "*rare exception*" to the requirement to return which "*should be strictly applied in the narrow context in which it arises.*" The kind of situation which may constitute a grave risk to a child was considered in *RK v JK (Child Abduction: Acquiescence)* [2000] 2 I.R. 416, where Barron J. cited with approval the formulation from the United States Sixth Circuit of Appeals in *Friedrich v Friedrich* 983 F.2d 1396 (6th Cir. 1993) (at p.451):

> "*... 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.*"

6.7 Collins J. in *C.T. v P.S.* [2021] IECA 132 outlined the history of cases relevant to an understanding of the objectives of the Convention and concluded at para. 61, "*there cannot be*

any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention."

6.8 The Respondent in her affidavit gives numerous examples of what she alleges is the Applicant's excessive drinking. She characterises their relationship as toxic and describes the reasons why she had to end the relationship. Significantly, she describes suffering post-concussion syndrome as a result of an assault by the Applicant and she avers that the children were in the flat on the night of that attack in September, 2020. This is denied by the Applicant.

6.9 It is also noted, at para. 26 of the Respondent's affidavit, that she informed the relevant social services of what was going on and that she told social services that she was leaving to come back to Ireland. She further states that the move was made on the advice of both her doctor and a social services health visitor. It is argued that this supports her argument in respect of grave risk and demonstrates that her relocation with the children was not underhand.

6.10 While much of this is denied by the Applicant, for the purposes of the application, the Court will consider the effect of these allegations if they were all true. It should be noted in this context that there is no supporting documentation from the social services, the doctor or the health visitor in question. To be clear, the Court makes no such determination on the facts as it is not necessary or desirable. The Court has, after all, heard no witnesses cross-examined on these issues but, more importantly, given the nature of the allegations, it is not necessary to determine whether or not they are true.

6.11 Even if the matters set out in her affidavit were all true, including allegations of a serious assault and controlling conduct, they fall short of the kind of conduct that might

constitute a grave risk to the children such as would justify a refusal to return them to England. Again, bearing in mind the vital importance to every child of having a meaningful relationship with both parents, the signatory states to the Convention have agreed that the courts in the child's habitual residence will assess the risk of harm to a child if one parent (or indeed, both parents) falls short in their conduct towards the child.

6.12 Where grave risk is properly raised, as it is here, and there is no cross-examination of the parties, the Court should approach the evidence as though it were true in its initial assessment of the situation. It would be impossible for this Court, without detailed cross-examination, to decide if the allegations were true. What this Court can assess, however, is the level of risk involved if the allegations were true. In other words, whether such conduct would be sufficient to establish that the children, if returned, would be at grave risk of harm such that they could not be protected in England. In this case, the answer to that question must be no. Not only is there no allegation of violence against the children by their father, there is no other evidence of grave risk to the children which cannot be assessed and addressed by the courts and social services in England.

6.13 In *R v R* [2015] IECA 265 Finlay Geoghegan J, noted the trust which must be placed in the courts of the state of habitual residence to protect a child and in *S.H. v J.C.* [2020] IEHC 686, this Court rejected the argument that the risk of children being placed in foster care in the requesting state constituted a grave risk within the meaning of the Convention. At para. 6.11 of that judgment the following conclusion is expressed:

> *"It is clear that the courts in England are both willing and competent to vindicate the rights of these children and safeguard their welfare. It cannot be argued, tenably, that returning the children to a situation where Interim Care Orders are now in place, made by a court of*

competent jurisdiction with the sole aim of protecting the children, amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention."

6.14 To paraphrase Donnelly J. in *A.A. v R.R.* [2019] IEHC 442, it does not diminish the seriousness of the concerns of the Respondent, to conclude that the issues that have been raised by her are not such as would give rise to the children being placed in an intolerable situation or put at risk of grave physical or psychological harm if they return to England.

6.15 It is worth recalling the words of Barron J in the case of *RK v JK (Child Abduction: Acquiescence)* [2000] 2 I.R. 416 when he remarked, at p. 451;

> *"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."*

6.16 In this case, and assuming that there was a serious assault by the Applicant on the Respondent, the Applicant was trusted to drive one of his children to the ferry and the Respondent has not argued that the Applicant poses a risk to the children such that he should not have access to them. On the contrary, she emphasises that she has always facilitated access between the Applicant and the boys. This tends to refute her position that the Applicant poses such a grave risk to the children that they should not be returned to England, even if it is not anticipated that they will be placed in his care.

6.17 The Court is aware of the argument that the case of *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122 [*Neulinger*], requires a detailed focus in Convention cases on the welfare of the children, to ensure that their interests remain paramount. The effect of *Neulinger* has been

considered in a similar context by Collins J. in the Court of Appeal in *C.T. v P.S.* [2021] IECA 132. Nothing in that case absolves the Court of the necessity to be guided by the overarching principles of respect for signatory states and the efficient operation of the rule of law in their jurisdictions and the urgent need to discourage the unilateral removal of children from their homes without the explicit consent of a co-parent. The application of those principles is consistent both with *Neulinger* and with earlier authorities and requires, in this case, an order to return the children. This Court has carefully considered the facts of the case in the context of the custody rights argument and the consent and grave risk defences put forward. Its decision to return is not mechanical or automatic but based on the legal principles applicable to the facts of this case, all of which have been set out in detail so that the parties and any court, on appeal, may know exactly what considerations persuaded the Court, in each instance, to reach the conclusions set out herein.

6.18 Given the findings of fact on the custody rights in respect of OA, the argument that he should not be separated from OB does not arise on the facts of the case as the issues as to consent and grave risk apply in identical manner to both children and the Court has found that the defences are not made out. Counsel for the Respondent is right; children such as these brothers should not be separated. But here, this mandates the return of both boys, given the findings of fact set out above.

6.19 Equally, the alternative submission as to the return of OA, had the Applicant not acquired custody rights under s.2 (4A) of the 1964 Guardianship Act, is not considered here in any detail and the Court will not make any finding in that regard in the circumstances.

6.20 In *P v B* [1994] 3 I.R. 507, Denham J. (as she then was) discussed the question of undertakings. There, the Supreme Court endorsed the practice of accepting undertakings as

to assistance for a mother in returning with her child. It was emphasised that this is a measure taken for the welfare of the child during the transition from one jurisdiction to another rather than for the direct assistance of the mother. The Supreme Court also acknowledged that such undertakings might be of particular relevance to very young children.

6.21 These comments apply in this case as it is clear that children of 4 and 2 years of age would not be expected to return without their mother. It is welcome, therefore, that without prejudice to any denials in respects of specific allegations made, this Applicant has indicated that he is willing to enter into reasonable undertakings to ensure a smooth return for these children. This will require undertakings as to financial aid for the return trips and, while the Court again notes the relevant denials, will nonetheless hear counsel as to whether further undertakings in terms of a smooth and safe transition are required in this case.

6.22 The reference by the Grand Chamber in the case of *X v Latvia* [2014] 1 FLR 1135, to *"tangible protective measures"* in the case of a known risk may apply to the parties of this case as there appears to be a measure of acceptance that, in the past and at least partly due to their work, abuse of alcohol was a feature of their lives. Again, the Court emphasises that where, as here, allegations and counter-allegations are made on affidavit and with no way to test their weight and veracity, it is prudent to consider the risk to the children as if each such allegation was true. It is in this context that undertakings appear to be appropriate in this case.

7. Conclusions and Orders

7.1 Bearing all of these matters in mind, but in particular the overarching concern of the Convention to ensure that the courts in the country of habitual residence make welfare decisions and to support the relationship of children with both their parents as being, usually,

overwhelmingly in their best interests, this is not an appropriate case in which to refuse a return. The children's relationship with their father may be adversely affected by the recent relocation and having found that the removal was wrongful within the meaning of the Convention, the children must be returned. The Court makes a summary return order for their sake and not for his, having noted also the Respondent's argument that the Applicant has not chosen to visit the children since their move to Ireland. Again, allegations and counter-allegations address the reasons as to why this may be so and it is not appropriate for this Court to make any finding of fact in that regard. The more detailed welfare decisions as to the best custody and access arrangements for these children, including whether the family relocates, should be decided after a full hearing by the courts where the children habitually reside. This can only be achieved if the children are returned to England.

7.3 The action of removing the children without explicit consent was not an appropriate way to achieve the objective of moving to a new home and may do irreparable harm to the children's long-term psychological health if their relationship with their father is thereby abruptly severed or if resulting disharmony between the parents affects the children, which disharmony is difficult to avoid in such cases. The Court notes and understands that the Respondent may have relied upon historic and even repeated conversations about the plans for her to move home to Ireland, but this apparently permanent move was a significant step to take and one which ought to have been discussed specifically and not just in the abstract.

7.4 The Respondent's submission that the children will be at grave risk if returned to England is not borne out on the facts of the case bearing in mind the excellent social welfare and court system in operation there. Her fears in respect of her own mental health have also been considered by the Court and, again, given the imperatives of the Convention and the

lack of supporting documentation such as a medical report confirming a grave and immediate risk to her health, the Court cannot refuse to return these children, who must otherwise be the subject of a summary return, on this basis.

7.5 The Court will hear the parties as to how the proposed return is to be achieved, including any application for a stay if that arises.

7.6 The facts of this case prompt some final comments in respect of the decision of the parties to litigate these issues. It remains an option for the parties to negotiate, with their lawyers and with a mediator if necessary, so that the future of the children is decided by them rather than by a judge such as myself who has never met these boys. Such a decision may be ruled on by the Court and could be given the same force as a court order. While an English judge will have more information on which to make decisions as to the children's future, the parents of the boys know them best and know what will be in their interests.

7.7 There is ample evidence in the affidavits before the Court to suggest that the parties had, in the past, discussed solutions to any problems that they might encounter should they separate. One thing on which they could now agree is that if they were to reach a solution together, their sons would thank them in the future for reducing the inevitable acrimony of court proceedings and putting aside their differences so as to agree joint custody and access arrangements in respect of their boys. Nothing would be more conducive to the future happiness of these children and both parties should consider what they do next; this judgment is only one step in a lengthy and potentially damaging process that only they, together, can circumvent by stepping away from litigation and working towards an arrangement that both can accept in order to support the healthy and happy development of their children.