THE HIGH COURT

FAMILY LAW

[2023] IEHC 183

[2022 No.18 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 TOM, DAVID AND CIARA (MINORS)

(CHILD ABDUCTION: GRAVE RISK AND CUMULATIVE EFFECT)

BETWEEN:

Q.

APPLICANT

AND

Q.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 8th of February, 2023

1. Introduction

1.1 The parties are Irish nationals who married and moved to a country in South East Asia in 2019. The Applicant seeks an order for the return of his

three children to that country. The Respondent mother removed the children, bringing them to Ireland, in 2022. The Applicant had no fixed employment in Asia on the hearing date and, as recently as last year, he had considered moving back to Ireland. The Respondent removed her children without their dad's consent, after she had made an application in the relevant South East Asian court for protection from him. She now argues that she is at risk of harm in that jurisdiction and that they are happier here.

1.2 The grave risk defence is raised in circumstances where there is no allegation of direct physical violence made against the Applicant, but multiple allegations of controlling conduct which are said to combine to create a grave risk, or amount to an intolerable situation for the Respondent. The allegations are well supported in the affidavits. The cumulative effect of that evidence establishes an ongoing risk to this mother's mental health.

1.3 The nature of the risk is different to that which usually presents in such cases; one or two examples of the Applicant's conduct might not cause concern but the cumulative effect of different types of controlling behaviour, repeated over years, is potentially very harmful. There is a lack of insight on the part of the Applicant as to the effect of his actions, which carries an increased risk that the relevant conduct will continue.

1.4 The conduct in this case was compared in submissions to the offence of coercive control, which is not recognised as a criminal offence in the Asian country in question. In such cases, a victim often suffers an erosion of her ability to effectively assert herself. Here, however, the Respondent was capable of instigating proceedings for a protection order and many exhibits show her ability to stand her ground in discussions and arguments with the Applicant. There is medical evidence of harm to the psyche of the Respondent. In the circumstances, however, the evidence of risk to the

Respondent is insufficient to establish that the children are at immediate risk or are likely to be placed in an intolerable situation if they are returned.

1.5 One of the three children of the couple objects to returning but this alone would not justify an order refusing to return all three of the children.

1.6 The legal system of the relevant country is capable of mitigating the risks to the Respondent and the children but the Court also requires undertakings from the Applicant as to her security on her return to the family home.

2. Objectives of the Hague Convention

2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home swiftly. The courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most recent information. The Hague Convention ensures comity between signatory states and bolsters the rule of law generally, providing an effective, speedy remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in contracting states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the resettlement of parents in different countries. Two vital policy objectives for signatory states are firstly, vindicating the rights of the child in respect of her relationships with both parents and secondly

vindicating the custody rights of a parent where a co-parent moves to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

2.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If he succeeds in establishing these matters, the burden then shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence. The Respondent has argued that the children remained habitually resident in Ireland throughout their stay in South East Asia and further, or in the alternative, that they object to being returned and that the adverse effects of returning them are one element in the establishment of the grave risk defence, also supported by evidence of damage to her health since 2019.

2.4 The children returned to Ireland in July of 2022. This application was made in August, therefore, under the terms of Article 12 of the 1980 Hague Convention, a return of the children is mandatory unless one of the defences is established. The clear objectives of the Convention in such summary applications usually require the return of children who have been wrongfully removed and defences are often referred to as applying in only exceptional cases. This is clear from the examples often used to illustrate cases of grave risk to the children, namely, situations of violence or war. While it is possible to identify cases, including Irish cases, in which the courts have refused to return children due to the conduct of an applicant, this must combine with an inability or unwillingness on the part of the authorities to address the risk in the country of habitual residence. The

required combination, of grave risk and a finding of fact that a signatory state cannot address the risk, make this a very difficult defence to establish.

3. Family and factual background

3.1 The Applicant and Respondent are married and have three children; David, Tom and Ciara (whose names have been changed to preserve the family's anonymity). David and Ciara have special needs, all are under 12 years old, and all were born in Ireland.

3.2 The family lived in Ireland until 2019. The Applicant started a new job in South East Asia that year, obtained a work visa, and the Respondent and the children were entitled to join him as his dependants. The Applicant was made redundant in 2022 and his employment ceased on the 1st of August 2022. Notification that this was pending was received in early 2022. At that time the couple appear to have discussed options, including returning to Ireland or moving to Bali. The Respondent brought the children to Ireland in July of 2022, without the consent or knowledge of the Applicant.

3.3 Both the Applicant and the Respondent have exhibited evidence of mental health difficulties and both take prescribed medication. Each has a history of drug and alcohol misuse, but both aver that they no longer abuse either drugs or alcohol.

3.4 The Respondent argues that the family never abandoned their habitual residence in Ireland, which would lead to the conclusion that there was no wrongful removal. She also points to examples of the Applicant's conduct which, she argues, create a grave risk to her and to their children should they be returned to Asia. She submits that the Court should consider various factors cumulatively to assess the overall risk. This argument is the one which attracted most attention from both sides and was the subject of a

huge number of exhibits. Finally, the Respondent relies on the objections of one of the children to returning to Asia and asks the Court to exercise its discretion not to return them.

4. <u>Habitual Residence</u>

4.1 Article 3(a) of the Hague Abduction 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…*"

4.2 The term 'habitual residence' is not defined in the Hague Convention, nor in Regulation (EC) No. 2201/2003 which applies the Convention in EU Member States. While the Regulation does not apply in this case as the country in question is not in the EU, the case law in that regard aligns with the Convention law. In *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309, the First Chamber of the European Court of Justice considered the interpretation of 'habitual residence' for the purposes of the Regulation, which uses the same phrase, in the same context.

4.3 That Court observed, at paragraph 44, that "*[i]t merely follows from the use of the adjective 'habitual' that the residence must have a certain permanence or regularity.*" At paragraphs 46-56, the test is described as one of fact, in the context of a Regulation aimed at identifying the relevant jurisdiction in light of the best interests of the child. The concept is intended to reflect some degree of integration by the child in a social and family environment. The conditions and reasons for the child's stay are relevant, the child's age is important, along with indications as to whether presence is temporary or

intermittent. A parent's intentions may indicate a transfer of habitual residence. No minimum duration of stay is required to indicate a transfer.

4.4 In *Hampshire County Council v. CE and NE* [2020] IECA 100, at paragraph 77, Whelan J. took the view that *Mercredi* and further decisions of the CJEU suggest, in the context of ascertaining a child's habitual residence, a non-exhaustive list of factors which may be relevant. She concluded that: "*It is the child's habitual residence which is in question, not the parents', and it is the child's level of integration, rather than the parents', in a social and family environment which must be analysed by the court determining the question.*" Whelan J. referred to the linguistic, social and familial circumstances in each case and the nationality of the child, along with the stability of the child's environment. That Court referred to the see-saw analogy used by Lord Wilson in *Re B.* [2016] UKSC 4, who noted that one cannot have two countries of habitual residence. As the child puts down roots in one country, he disengages from the former country of habitual residence.

4.5 The three children in question moved from Ireland to their new home in 2019, to facilitate the Applicant's new employment in Asia. The global pandemic ensued but there was no evidence that the family tried to leave their new home during that time or were keen to do so. The family rented the same property throughout their time there. They remained there for over 3 years, they had a local doctor there and the children went to school there. The family dog, originally the Respondent's dog, had been flown over to join them.

4.6 One child had a significant medical procedure in Ireland during that time, but this does not change the weight of evidence in favour of the proposition that the children had moved their habitual residence from Ireland to the relevant South East Asian country. While the family never adopted new

citizenship rights or abandoned Irish bank accounts and other links, a change of residence need not be permanent to be habitual.

4.7 The Applicant has now been made redundant, a decision confirmed in July just before the Respondent left. The couple discussed moving to Chicago or to Bali. The Applicant sent some messages in which he indicated a desire to spend more time in Ireland (exhibited at paragraph 89 of the Respondent's second affidavit) and there is a text message reference to having a discussion about moving to Ireland at that time. Neither the prospect nor the fact of his redundancy, however, transferred the habitual residence of the family to Ireland. His current job prospects are irrelevant to this issue, which is a retrospective question.

4.8 When all three children were interviewed by an independent assessor and asked about the circumstances in which they moved to Ireland, all three described their daily lives in Asia in some detail and one referred to the trip as being a holiday to Ireland initially, or at least that was her understanding.

4.9 Apart from the nationality of the children and the intention of the Respondent, most factors support the conclusion that these children were habitually resident in the relevant South Asian country on the date of their removal. Most significantly of all, none of them is an infant whose habitual residence might change with that of a primary carer. The children are all old enough to attend school, to form friendships and to have views of their own about what is "home". It was no longer Ireland in July of 2022; two of the children were so young when they left here that they did not appear to recall any detail about life in Ireland before the move in 2019. Their habitual residence was in South East Asia by the relevant time in 2022, and the removal by the Respondent, without the consent of the Applicant, was wrongful.

5. Grave Risk

A. The Legal Test

5.1 The Convention provides, at paragraph 13(b), that:

> "*the requested State is not bound to order the return of the child if the person [who] opposes its return establishes that …*
>
> *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.*"

5.2 Ms. Justice Finlay Geoghegan set out the legal test for grave risk in *C.A. v. C.A.* [2010] 2 IR 162, at paragraph 21:

> *"[T]he evidential burden of establishing that there is a grave risk … is on the person opposing the order for return … and is of a high threshold. The type of evidence which must be adduced [must be] 'clear and compelling evidence*'."

5.3 Case law establishes the kind of risk that has persuaded a court to refuse to return a child; a risk of violence to the child (usually based on evidence of previous violence), a risk of suicide to either the child or to the respondent, or evidence of an event such as famine or war which would render the child's position unsafe, as set out by Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, at paragraph 57.

5.4 According to the Supreme Court in *P.L. v. E.C.* [2009] 1 I.R. 1, [2008] IESC 19, this Court must consider the facilities available in the requesting State to assess or mitigate the risk presenting. That too was a case governed by the Convention rather than the Regulation. The Court must place trust in the courts of the country of habitual residence to protect the children, an approach emphasised by Finlay-Geoghegan J. in *R. v. R.* [2015] IECA 265.

Throughout these judgments there is continued adherence to a fundamental proposition: this Court is not deciding the future of the family, it is returning the children to a place where their future will be decided by courts better placed to make that decision, if their parents cannot agree on the issues of custody and residence.

5.5 In *M.L. v. J.C.* [2013] IEHC 641, the Respondent removed her children from America to Ireland, alleging that her husband, the Applicant, subjected her to an abusive and controlling relationship. The Respondent suffered from depression and was admitted to a psychiatric hospital as a result of a serious mental health breakdown. The main concern of White J. was "*the mental stability of the respondent and how any order of return will affect her.*"

5.6 There was no doubt, the Court found at paragraph 68, that "*a refusal to make an order for return is an injustice to the applicant, and will mean a much more restricted relationship with his children. The Court is faced with a finely balanced decision which it makes by refusing an order of return.*" White J. considered that if the Respondent, as primary carer of the children, were to suffer a mental health breakdown on return to the USA, this would be an intolerable situation for the children. While there was no guarantee that the Respondent's mental health would remain stable in Ireland, and while it was very difficult to predict the degree of risk if White J. ordered a return, the respondent's mental health history in that case indicated that the risk to her would be grave. She was ordered to ensure continued contact between the applicant and the children.

5.7 In *D.H. v. L.H.* [2018] IEHC 317, the applicant sought an order for the return of his two children to the Czech Republic. The respondent submitted that there was a grave risk that return of the children would create an intolerable situation insofar as she would, if returned, have no job, no social welfare,

no accommodation and no financial support from that applicant. By contrast, in Ireland, the respondent had a job and accommodation, and the children appeared to be well settled and happy at school.

5.8 In considering the grave risk defence, Ní Raifeartaigh J. had regard to the applicant's financial situation. Upon the separation of the parties, the applicant failed to make any provision for the financial support of the children. The applicant's affidavit gave no information about whether he had employment or had given financial assistance at any time in the past, and an email containing his undertakings regarding the provision of accommodation and maintenance support failed to provide any information which would give the court comfort that he had employment and would be in a position to follow through on his undertakings.

5.9 On those grounds, the Court exercised its discretion to refuse return of children. Ní Raifeartaigh J. concluded, at paragraph 16, that: "*notwithstanding the high threshold for establishing 'grave risk' within the meaning of article 13 of the Convention … there is a grave risk of what could be described as an intolerable situation for these particular children in these particular circumstances if they were returned to the Czech Republic.*"

5.10 In *A.A. v. R.R.* [2019] IEHC 442 the respondent mother, in breach of a Canadian court order, removed her children to Ireland. The respondent submitted that if she was forced to return, this would give rise to a grave risk that she and her children would be exposed to physical or psychological harm or otherwise place her and the children in an intolerable situation. While the respondent justified this argument by reference to five individual factors (behaviour of the applicant, effect of return on the mother, financial circumstances, lack of legal representation, risk of prosecution), it was those factors taken cumulatively, she argued, which amounted to a grave risk

5.11 While in *A.A. v. R.R.* the cumulative factors did not amount to a grave risk, Donnelly J. accepted, at paragraph 134, that such a test could be applied, saying:

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

5.12 The *A.A.* case is comparable to this one in that the same argument is raised, namely that each respondent emphasises the risk of her being placed in an intolerable position on return, thereby placing the children in an intolerable situation. There are some distinctions, however, some of which have been mentioned in the introduction, above, and the details of the exhibits set out in subparagraphs (a) to (e), below, illustrate the contrast further.

5.13 *A.A.* involved conduct at a different level of alleged frequency and of potential harm to the conduct established in this case. Significantly, there, the conduct had not only been notified to the courts in Canada, it was being managed effectively in Canada. In *A.A.*, there were two disputed allegations of violence in the four months before the respondent mother left Canada. After the second incident, during which he was alleged to have tried to pull his daughter through a car window, the applicant father was arrested and released on bail, on conditions including a prohibition on contact with his wife or children. That respondent mother removed the children the following week, without his consent, and took them to Ireland.

5.14 The financial balance of power between the couple in *A.A.* was also very different to that presenting here. That couple owned their home jointly, and the applicant had an income that was meagre, albeit supplemented by his

mother, while the respondent had what was described as a "*modest income*" from her home-based business. They had lived as a family in Canada for over 5 years with no apparent intention to relocate elsewhere. As the detailed judgment delivered by Donnelly J. in that case reveals, there had been multiple court applications and the removal of the children occurred after an adjournment to permit the parties to attend a conference at which it was hoped their issues could be resolved.

5.15 In *D.B. v H.C.* [2022] IEHC 627, a recent case involving grave risk, Simons J. set out a comprehensive account of the law in this area and concluded, notwithstanding the high standard of proof required, that the defence had been made out. There, it was argued that the courts were ineffective to protect that respondent. That applicant was already the subject of a protection order, which he had breached at least once. This was a crucial factor in that Court's decision not to return the child in question.

5.16 Finally, in considering the relevant law in the assessment of grave risk, the case of *Neulinger v. Switzerland* [2010] 28 BHRC 706 remains an essential consideration for the Court. This authoritative ruling, followed by subsequent international and Irish judgments, confirmed that the rule that courts act in the best interests of the children remains the underlying principle of the Hague Convention. At paragraph 138 in *Neulinger*, the ECtHR stated: "*It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when The Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular, his age and level of maturity, the presence or absence of his parents and his environment and experiences … For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities which often have the benefit of direct contact with the persons concerned.*"

B. Facts and Assessment of Risk

5.17 From 2019 to 2022, the children lived with both parents and attended school locally. The Applicant employed a woman who is described as both housekeeper and nanny, who had significant responsibilities in relation to the children, particularly at times when their mum was working. The Respondent worked full time for some periods but it appears to this Court, from the affidavits, including contemporaneous messages and transcripts exhibited, that she was responsible for more of the household and childcare tasks, such as bedtime routines, than the Applicant, who was always in full time employment during the relevant period. It is also clear from the independent assessor's report that the children had an excellent relationship with both parents and, while one child noted that the Applicant was not often around, all referred to him in loving terms and identified bonding activities and events they shared with him.

5.18 The Respondent argues that the Applicant's reliance on prescribed drugs puts their children at risk, particularly given his habit of grinding the medication in order to snort it and keeping it in a case to which the children may have had access. These allegations are refuted by the Applicant although there is some support for the Respondent's averments in relation to the former habit in Exhibit TAB 69, a transcript of a conversation taped by the Applicant. However, given that there is no evidence of any of the children directly accessing medication, witnessing such an event as taking drugs by snorting them cannot reach the high threshold required to justify a finding that they are at risk in some way, let alone at grave risk of harm.

5.19 In cases such as this, allegations are often made of physical violence and there is no way of testing the veracity of the allegations. In such cases, the

court must assess the risk as if the allegations of violence were true. Here there is no allegation of physical assault but considerable evidence of psychological abuse. Many aspects of this evidence are supported by the Applicant's evidence and by the manner in which he has met the case. The Applicant does not accept that his conduct is problematic, as is clear from the conversation recorded and then exhibited by him, at TAB 69. Therefore, both the classification of his admitted conduct in the relationship, and the potential risk to the children are contested in this case.

5.20 The main complaint made by the Respondent can be summarised, neutrally, by describing the Applicant's behaviour as controlling. When this occurs to an extreme extent, the conduct in question can constitute a criminal offence in this jurisdiction, that of coercive control. As this is a civil case, it is unnecessary to consider the proofs required to make out that offence but this fact is noted as it is a relatively new offence and there is no equivalent offence in the Asian country in question, which may bear on the issue of the capacity of that country to mitigate harm arising from coercively controlling conduct.

5.21 The creation of an offence of this nature is significant as it has helped to change modern thinking on the effect of what are sometimes termed "micro-aggressions". Any one of the kinds of behaviour detailed below would not be sufficient to establish harm but the combination, particularly when repeated and normalised in a relationship, can cause serious damage to the psyche of the person so targeted. Common effects are that the person so controlled loses a sense of self, becomes less able to make healthy decisions and becomes fearful of the one who maintains this control by various means. Many of the hallmarks of this conduct are apparent in this case. The Court is conscious of the different levels of proof which would be required in a criminal case and any findings of fact made in this regard refer

to the lower civil standard of proof, namely, proof on the balance of probabilities only. This Court is also concerned only with conduct that is sufficient to cause harm to the children involved. The evidence in this case establishes a number of the generally accepted hallmarks of control to a sufficiently regular degree as to lead to the conclusion that the conduct which is already normalised in this relationship can be labelled controlling.

5.22 There are five significant factors which lead to the conclusion that the Applicant's conduct, on the balance of probabilities, controls the Respondent to an extent that he poses a grave risk to her mental health:

(i) the Applicant admits recording conversations with the Respondent,

(ii) he has accessed, retained and used private and intimate material,

(iii) he has used the criminal legal process against her,

(iv) he controls her access to money, and

(v) he has made demands that she shows her contrition for harming him, while he accepts no responsibility for problematic behaviour, despite a history of using what he refers to as "sex workers" and taking drugs.

5.23 It is crucial, in understanding each element of the following section of the judgment, to recall the backdrop against which these individual actions occurred: the Applicant earned a significant salary, which was multiples of the Respondent's salary; the Respondent was permitted to remain in the country as a dependant of the Applicant who was the only party with an employment visa; neither spouse has any family member in the country; neither refers to many close friends in the country, save one mutual friend who held the children's passports and the housekeeper who is referred to fondly by all; the housekeeper is noted by the Applicant to be his employee and at one point a message was sent to the Respondent advising her not to

give the housekeeper any instructions directly but to advise him, the Applicant, if she has requests in relation to the housekeeper.

5.24 Further to this background, it is also relevant that the early years of the parties' relationship was marred not only by drug abuse by both parties, but by regular visits to sex workers by the Applicant. While he avers that this practice has ceased, that is contested by the Respondent and the current situation cannot be confirmed with any clarity by this Court without testing the affidavit evidence. Nonetheless, it is accepted by the Applicant that this was an issue earlier in the marriage, whether or not it continued. That is relevant, in the Court's view, as one of the factors which bears on the Respondent's ability to assert herself in this relationship and the prospects of her maintaining her mental health if she returns to live in proximity to the Applicant without adequate support.

(i) Recording Conversations

5.25 The evidence in respect of the Applicant recording his conversations with the Respondent is uncontested and indeed the Applicant has exhibited some transcripts of the conversations. In one such transcript, the Respondent has identified and listened to the recording and provided her own transcript which is different to that in the Applicant's affidavit. This casts a doubt on the strict accuracy of the transcripts provided, which have not been verified. Leaving the accuracy of the transcripts aside, the fact of a husband recording his wife in the family home and elsewhere (e.g. while on a trip with the children), for the express purpose of making a stronger case against her, makes it impossible for the couple to share a home and parent their children appropriately and without acrimony. While any conflict will affect children, this provocative, ongoing measure erodes basic

trust and will inevitably have a negative effect on the couple and, by extension, their children.

5.26 In some cases, recordings were made openly, although various transcripts reflect her requests to him to stop the recording. In other instances, the recording was done secretly although the Respondent may later have been advised that the conversation was recorded. In one exhibit, the Respondent asks the Applicant to send the recording of their conversation and the video, saying "*this was the only reason*" she gave consent to being recorded ("*this*" being to obtain the video, is the clear meaning of her words). He replies that they are all in the same folder, showing a Google Drive link. (Exhibit Tab 90, a WhatsApp exchange). This exchange is later referred to by the Applicant as an agreement to being recorded. That is not my impression of the exhibits. The transcripts appear to the Court to be evidence of a pattern of controlling the Respondent, in this instance by recording her conversations in her home and elsewhere, despite her requests to stop, the effect of which is to control the tone and content of her speech in private conversation. While he argues that recording her is necessary to disprove allegations she may make, the negative effect of recording conversations in the home is more significant, in this Court's view, than the potential risk that one spouse may exaggerate what another has said in later proceedings.

5.27 Finally, in this regard, the Applicant argues that he only made a limited number of recordings and that the Respondent consented. The number of recordings was not known to the Respondent and is beside the point. The consent referred to, TAB 90, refers only to her having consented for a specific purpose and does not constitute consent before the fact. The effect of this conduct would be chilling in any context and is particularly so in the parenting relationship.

(ii) Accessing and Retaining Private and Intimate Material

5.28 This is a troubling feature of this case as the Respondent and the Applicant have both exhibited sensitive material. In the case of the Respondent, there is at least one document which comes from the Applicant's medical records, Exhibit EM9. There is also a tenuous relevance in showing the money he spent on sexual services over the years, and, as the Applicant has not denied the fact that he paid for sexual services over a long period this renders the exhibit unnecessarily intrusive and of minimal relevance in the case.

5.29 In the Applicant's first affidavit he refers to the exhibiting of his medical report and surmises (probably correctly) that she obtained it from his computer without his consent. He also complains that she appears to have obtained access to messages and bank details by accessing his computer.

5.30 The Applicant is vigilant to protect his own privacy and protests at the use of records obtained without his consent. Despite this clear awareness of boundaries and the need for privacy, he shows no respect for the Respondent's privacy but, having possession of recordings of conversations with her, copies of entries in her journals, messages and notes written by her he exhibits these in transcripts, photographs and screenshots. The Applicant refers to and exhibits an exchange of intimate messages which, he maintains, prove that both parties had a healthy libido.

5.31 The Applicant has also retained an intimate video of the Respondent, filmed at a hotel. She disputes that the video was consensual, arguing that she was afraid to refuse to take part. The Court cannot determine which is the correct version of the genesis of the recording but it is clear that she wants to delete it and has done for some time (see her affidavits and, for instance, TAB 90 in the Applicant's first affidavit). There is no legitimate need for

any party to retain such a video when asked to delete it, even if it was created at a time when both parties consented.

(iii) Criminal Proceedings against the Respondent

5.32 In June of 2021, the Applicant's watch was missing. He avers that he knew the Respondent had taken it. He gave her two weeks within which to confess, having asked her if she knew anything about it, then made a report to the police. The watch is valued at several thousand euro (in the equivalent local currency). The Applicant appears to have known that this would prompt a criminal investigation into his wife, who still shared his home and cared for his children.

5.33 In the Applicant's second affidavit, he states: "*She says I tried to prosecute her for stealing my watch when I exhibit the police report I made reporting the watch lost.*" He has accepted in the body of the first affidavit, however, that he knew she had taken the watch so what he says in the police report is irrelevant and what he infers in the second affidavit is misleading. Given his own admission in this regard, what she says is probably correct in this respect: he did, effectively, prosecute her.

5.34 That investigation is still open despite the fact that the Respondent, who had taken the watch, posted it to him after she left for Ireland. The Applicant states that this shows she has a sense of entitlement to what is his, but the Court does not agree with this assessment. When one feels a sense of entitlement, one is less likely to hide the result; a person who felt entitled to a watch is less likely to hide the fact that she took it. The more likely explanation is that given by the Respondent; she wanted money and planned to sell it but was afraid of the consequences and posted it back.

5.35 The Applicant has also accused the Respondent of tampering with his computer and deleting certain files. One of the potential targets of her

search was the intimate video recorded and referred to above. In Tab 92, there is a screen shot of the Applicant's iPad which he uses to demonstrate support for his averment that she did so, confirming he was out on his bike on a day in June of 2022, at a time when a number of files were deleted. The exhibit also shows, on page 9 of the pdf document, that he not only accused the Respondent of deleting the files but pointed out that it was a criminal offence to "*access, modify or delete information from a computer without the authorisation of the owner*". This information, written in this context and bearing in mind the police report already made, amounts to a threat to the Respondent that another set of criminal proceedings may follow. In other words, it is not an idle, albeit indirect, threat but one the Respondent is likely to take seriously.

5.36 In 2022, the Respondent went to a local court to make an application for a protection order. This requires stating the evidence on which an applicant will rely, including any police or medical reports. There are no such reports in this case. In response, the Applicant responded and made detailed allegations against her, effectively countering her application with a more comprehensive one of his own. There are two relevant responses in his document, at TAB 126. Where she has claimed not to feel safe at home and to fear the Applicant, he responds that he cannot comment on her feelings or her sense of safety, adding: "*She certainly seems to be on edge a great deal of the time.*" In response to the allegations that he calls her a bad mother, he says that he does not recall doing so but apologises if he has. However, his affidavits repeatedly make allegations which make it clear that he questions her parenting ability, while stopping short of using the term *bad mother*.

5.37 In the same document he accuses her of abandoning the children when there was a scheduling problem and his mother had to mind the children. In response to accusations of isolating her, manipulating her and controlling

her, the Applicant responds: "*I don't believe I do*." He goes on to refer to her mental health difficulties and lists, over three pages, how she has harassed him, describing unwarranted allegations, accusations of not taking care of the family, demands to do things he is not comfortable with. The examples he gives in this regard include asking to see his personal spending and asking for money. Under the heading aggressive behaviour, more than 6 types of conduct are outlined, listed here in approximate order of frequency: talking over him, refusing to stop an interaction, the silent treatment, slamming doors, shaking her fist, grabbing his phone.

5.38 It is clear from paragraph 75 that the Applicant expected this document to be the grounds for a successful protection application against her. This Court does not share his confidence. The specifics outlined, while unpleasant and potentially justified as complaints as to why a marriage must be terminated, are the common allegations made in a failing relationship and not usually grounds for a court to offer protection to the aggrieved party. There is no claim that the Applicant felt unsafe or in fear, for instance, as there is in the Respondent's initial application.

5.39 This application required the Respondent to attend in court to answer his claims, which she did not do as she had left for Ireland before he lodged his document. The arrest warrant, issued when she did not appear, was posted to her at their former home. Exhibit EM50, a message from the housekeeper, shows that the Applicant opened this letter, addressed to his wife, and laughed openly when he saw what it contained. In an email to his wife the following day, the Applicant told her that some post had arrived which appeared to be from the police. He offered to open it for her and scan it to her. It is clear from Exhibit EM50, however, that he had already opened the document and knew exactly what it contained. That warrant has not been cancelled. Thus, two sets of criminal proceedings continue against the

Respondent, both effectively instigated by the Applicant and a third has been mentioned, though not expressly threatened.

5.40 This list does not include any abduction allegation although the Applicant has indicated that he is willing to give an undertaking in that regard. He avers that while he has asked the police to close one of the investigation files, they have confirmed that this is no longer a matter for him and that the case must proceed now, even if it results in a minor sanction.

(iv) Controlling the Finances

5.41 The Respondent alleges that the Applicant controls her access to money and the Applicant refutes this, countering that she is the one who is controlling and abusive. The submission was made on his behalf that such an allegation usually describes those who literally hold the purse strings i.e. the husband doles out pocket money to the wife either from her own funds or, if he is the sole earner, as housekeeping money. It is statistically unlikely for the subject of such control to be a husband, hence my gendered example which mirrors that used by counsel.

5.42 This argument does not appear to me to reflect the modern world adequately. It is not necessary for all of the family finances to be entirely under the control of one party for his spouse to have limited access to those funds. Here, the evidence establishes that the Applicant earned by far the largest portion of the family finances. Despite this, and bearing in mind that he was the person on whom the whole family depended for visas and sufficient funds to maintain a comfortable lifestyle, he refused to allow the Respondent access to his bank accounts and she did not, and does not, know exactly how much he earned. While the Applicant has averred that she was told about his bonuses and job details, there is ample evidence from his own affidavits that he did not want to share the details of his bank accounts with

his wife. There was no joint account other than in Ireland. The Respondent was given a credit card, but this had a spending cap and was cancelled or restricted on occasion when he took the view that she had spent too much. In his second affidavit, the Applicant describes a period when she was permitted access to passwords but "*misinterpreted*" some entries and after that, he said he gave up what he referred to as "*this radical transparency*".

5.43 While the Respondent was permitted to keep her own money, in many of the exhibits of contemporaneous exchanges, the Applicant makes it clear that he considers her money to be money which should be used for the benefit of the family, not just for her. In sum, therefore, he had complete control of his own money, he did not permit her to have knowledge of what was available to the family, he controlled her credit card insofar as it was funded from the money he earned, and he insisted on her making contributions to the family funds from her much smaller earnings. While this is not the equivalent of holding the purse strings, the effect is very similar. The Applicant kept control of, and knowledge of, the bulk of the family income to himself allowing only occasional access to the Respondent, which access he controlled carefully.

5.44 The Applicant refers to exhibit EM7 in the Respondent's affidavit in order to support his contention that she was the one who controlled the finances, not him. The exhibit has the opposite effect, in this Court's view. In this email exchange, the Applicant repeatedly asks that the Respondent maintain a respectful tone and refutes her assertions that she does not have enough money while not addressing her specific concerns and her claims that most of what he is classifying as personal spending or credit card spending is food, groceries, household items for the family and clothing for the children and sometimes for him. The impression created by reading this portion of the affidavit and the 10-page exchange in EM7 is that he has

detailed knowledge of her spending and earning capacity, and he does not consider that she is entitled to know what he earns or what he spends it on as he contributes to the family sufficient funds to keep the household going. When she raises specific items such as children's activities, which she is now paying for, he does not refer to the specifics but accuses her of leaving her job and taking money from him or asks her to adopt a respectful tone rather than addressing the issues she raises of how she is to pay for various items. There is little sense, from his replies, that they are a family with joint expenses instead he, despite having access to far more money, repeatedly insists that she contribute more than she does to the family unit and criticises her expenditure on items that are personal to her. When she raises his expenses, he tells her that he will not be cross-examined on his spending saying that it is clearly appropriate (she has asked about taxis, about hotels where he stays on trips abroad, grooming and other expenses, for instance). His estimate of her earnings, which she says is inflated, was considerably less than one fifth of what he appears to earn. She left her job in October 2021, after which point she was dependent on the Applicant. He did not respond to her protestations in the same email exchange that she left her job as the children needed her at home and that she now spends more time with them, to their benefit and so that he does not have to prepare or serve their meals as she now does.

5.45 At paragraph 63 of his first affidavit, the Applicant avers that he made the Respondent choose between having his personal account details and their marriage. He argues that she disingenuously manipulated him by saying he considered the privacy of his financial information to be more important than the marriage when, in fact, that is a fair interpretation of his ultimatum.

5.46 In his second affidavit, the Applicant avers at paragraph 37 that she did have access to his financial details and that he offered to open an account in

their new city but that she didn't. The suggestion that she had Dropbox access to his accounts is at odds with his own averments in relation to radical transparency, above, as well as being in conflict with her affidavits.

5.47 The Court concludes, on the balance of probabilities, that the Respondent knew, broadly speaking, what the Applicant was earning. She had, however, limited access to the Applicant's money and relatively little access to the details of the Applicants' bank accounts. There was no joint bank account in the relevant country, even if it had been offered initially, and she had a credit card which he controlled, which had a cap to reduce her monthly spending and which he occasionally prevented her from using. The argument made at paragraph 30 of the first affidavit, that the Respondent had a privileged lifestyle, may appear to run counter to the finding that the Applicant was controlling her access to money but the lifestyle of this family was relatively privileged and a comfortable lifestyle does not refute the claim that one party in a marriage is suffering the effects of excessive control. Financial control is but one factor in the cumulative effect of other methods of control and, albeit with access to funds that would be significant for others, this Respondent was required to provide goods and services for this family, living in an expensive city, while under the constant, critical supervision of the Applicant and, for much of the relevant time, with no independent source of funds. This is the essence of the allegation of financial control, which is not an allegation that the Respondent was not given any money or was given insufficient money for basic necessities.

5.48 The Respondent took a watch of considerable value from her husband, intending to sell it. While not condoning that conduct, the Court considers that this supports the Respondent's contention that she did not have sufficient access to money to support her own and the family's expenditure.

From reading EM7, there is less evidence of her having lavish habits or expenses than of the Applicant having such expenses. While he is entitled to spend his own money, the Applicant's insistence that his earnings were none of her business, together with his criticism of her having left her job and requiring her to contribute to medical and household expenses support her claims that he exercised full control over the finances of the family.

(v) Demanding Contrition from the Respondent

5.49 In paragraph 31 of his first affidavit, the Applicant accepts that he is far from perfect also but states that the Respondent is abusive and controlling. In order to support this contention, he exhibits several items. One is Exhibit Tab 32. This is a 4-page, handwritten document. Here, the Respondent apologises to the Applicant for being abusive, starting arguments, breaking a broom on him and not respecting his boundaries, amongst other things. There are other similarly contrite exhibits in this paragraph, all asking for his forgiveness.

5.50 In Tab 31, a text exchange in 2019, the Applicant asks how the Respondent is going to improve, says she is aggressive and contemptuous and that her behaviour is hurting him. In response, she apologises, agrees that it is her fault and that she is in the wrong. In Tab 34, a text exchange, the Respondent acknowledges "*problematic behaviour*" such as "*pushing my bad mood, anger, upset on to you*" and controlling and manipulating him. He replies: "*It's a good start but it needs to be much more specific*" and asks if she is committed to change. She replies that she is and that she hopes it shows. He replies: "*not really that's why I keep asking.*"

5.51 Rather than supporting his argument, the impression created by these letters and exchanges is that he is dictating how she should behave and what she should say. His is the dominant voice. The Court's conclusion is

that the controlling party in these exchanges is the Applicant, not the Respondent. The Respondent exhibits a similar exchange in EM 18, again a list from the Applicant of what she is doing wrong and demands for change, reminding her of her failures and repeatedly referring to her controlling him, with the Respondent agreeing that she is in the wrong and promising to change. The effect, however, is to reinforce the impression that he is in control, not her.

(vi) Other Allegations Relevant to Grave Risk

5.52 The Applicant and Respondent made many allegations in relation to mental health matters, money, drugs and previous arguments and incidents. Most of these do not affect the Court's view as to whether or not a return should be ordered but support the assessor's view that these children will require support wherever they live; their parents are exposing them to chronic conflict and all the affidavits reinforce that impression. There are conflicting accounts in respect of the housekeeper and whether or not she was due to leave her employment and again, while instructive as to her role generally, this will not determine the application in relation to return. The description of her duties, together with exhibits referring to bedtimes and meal times, confirm the Court's impression that the Respondent was the primary carer for the children, despite the Applicant's averments to the contrary.

5.53 The Applicant lists some specific incidents, for example a drunken incident where a woman was knocked over at a wedding in 2010, and allegations of aggression on the part of the Respondent, particularly in 2014. He avers that she put pressure on him to pursue an international career in 2018. In 2020 he accepts that he had been drinking to excess and using sex workers, to use his phrase. The following paragraphs deal with allegations of cycles of abuse between the two at that time and thereafter. At one point, for

instance, he recalls her interrogating him about an affair and giving him "*the silent treatment*". He describes her writing to him afterwards saying she had failed and "*asking for daily reminders of her bad behaviour to prevent relapse*". He finishes, "*I was beginning to lose confidence in her ability to change.*"

5.54 It would not be fair to characterise the current dysfunctional relationship as being the fault of the Applicant alone and these paragraphs reflect and describe how distrust between the parties began and continued. Nonetheless, the relevant exhibits from 2019 onwards and some of the averments (as in the example above) have a consistent and dominant tone and it is of his being in control, insisting on his boundaries being respected and criticising her, while she appears to be repeatedly apologising to him either at his direct request or because this is now her habit. It is worth reiterating that this material is mostly in exhibits of the Applicant, which he considers proof that he is the one being abused and controlled. What this Court is primarily concerned with is the current dynamic, not the history, between the parties, and the reality of their financial and personal situation.

5.55 The subsequent paragraphs of his first affidavit detail the recordings made and have been mentioned already, above. They are relevant in this context also as the pattern of behaviour is seen here too. Exhibit TAB 59 is a WhatsApp exchange in which she is begging him to come home, and he is giving detailed instructions as to how she can work on her behaviours and listing her faults. The Applicant tells her to check the recording when she denies an aspect of the description. He tells her that he is emailing her therapist in 5 minutes. That email, to the therapist, explains that he is recording her as she is not respecting his boundaries and in the email itself, he acknowledges that the man is her therapist, not a couples' therapist.

5.56 In paragraph 35 of his first affidavit, the Applicant refers to reading her journals and emails. He claims to have consent to do so, referring to an email in December of 2020. This is refuted by the Respondent; she says she only allowed access to one journal, not to all her notebooks. I accept her account as more likely. He used similar reasoning in respect of the recordings, which was not supported by the exhibits on which he relied and it seems that he considers consent to one item constitutes general consent.

5.57 The Applicant refers also to his concern that the Respondent was sharing unwarranted and untrue allegations about him with the children. The Court shares his concern about material that has been shared but it must be noted that the evidence available to the Court shows that the material, sadly, is true. The children are aware of his having had intimate relations with other women, a fact that he accepts in the context of having paid for sexual services. They know that the Respondent may be arrested if she returns to their erstwhile home. This is not unwarranted or untrue, but is the effect of the various prosecutions, already outlined above. Nonetheless, it is very disturbing that this information has been shared with children.

5.58 The Applicant explains that this is why he stayed in the marriage i.e. to protect the children. He goes on to explain that the Respondent's conduct is also the reason for the protection order he sought. I do not find this explanation persuasive. The ostensible reason may have been to protect them, but the surrounding facts establish, on the balance of probabilities, that this was an application made to thwart her request for protection from him. The timing of the court application for protection and the lack of any proof of a serious threat to him or to the children in the months preceding the application satisfy me that either he hoped to persuade her not to continue with her protection order application or that he does not recognise the effects of his controlling conduct on her. The aggressive behaviour he

describes is listed above in the description of his court proceedings, the relevant exhibit is TAB 126. Very few of the issues he raised in this application relate to the children and none appear to be strong grounds for seeking court protection had he not been responding to her claims.

5.59 One incident the Applicant points to as support for his averment that he required court protection is an argument in front of one of the children and, again, does not appear to me to justify an application for a protection order on his part. In TAB 72, one can see a similar allegation (i.e. an accusation against their mum) being made by the Applicant himself in front of one of his children. Equally, this would not justify an application for protection. On the other hand, the conduct of the Applicant in recording all these conversations, including that at TAB 72, is one element of the evidence that could justify the Respondent's application for protection from him.

5.60 In TAB 72, the Court reads that the Respondent was trying to agree joint custody. She repeatedly asks him to stop recording. He refuses. The exchanges appear to be about allowing the Applicant to do what he wants and continuing to control his money. He refers to letting her see the finances after this discussion. The exchange clearly takes place in front of one of the younger children, during which he accuses her of lying to the children. She points out that he is making that accusation in front of one of them. While it is clear that she too has revealed such information to the children, this exchange and numerous others like it, show no evidence of the Applicant needing protection from the Respondent.

5.61 The Applicant describes the argument that preceded his decision to end the marriage, but this did not lead to his making a protection application. The direct catalyst for that appears to the Court to be the Respondent's application for protection. The Applicant also describes, at paragraph 53 of

his first affidavit, an incident with one child in the bath. This, at its height, falls short of the allegation of assault he makes and is not supported in terms of any fear or apprehension as regards this child's feelings towards her mother insofar as these are set out in evidence. If true (and the Court cannot determine this without testing the evidence by cross-examination), the incident shows a lapse in terms of approach to hygiene and communication with her child, but one which is typical of almost all parents and is far from the kind of evidence that might suggest a child is at risk.

5.62 Paragraphs 54 and 55 criticise aspects of the Respondent's parenting and, again, while not every parent would agree to a child sharing a parent's bed, for example, this does not show her to be a bad parent. Nor does the exhibit TAB 88 show anything that supports the contention that the Respondent resisted a particular diagnosis about her child.

5.63 The affidavits in this case contained an unusually large amount of material which was irrelevant to the issues of habitual residence or grave risk to the children. The Applicant's first affidavit concludes with averments about his disappointment in respect of the access his family have been offered since the children returned to Ireland. This is hard to justify and the Respondent should address this, in the interests of the children. The only victims in this case are the children where the adults repeatedly share information about the breakdown of the relationship. This applies also to the Applicant and similar material is contained in some of the letters he sent to his children.

5.64 The Court makes no findings in respect of whether the Applicant's paying for sex has continued. This conduct, insofar as it is admitted, probably did affect the dynamic in the relationship over the years and may have been a factor in damaging the Respondent psychologically. This alone would not justify a failure to return the children, however. Nor does the court make

any finding in respect of the Respondent's claim that he induced her to take drugs. This is not relevant in terms of the interests of these children and though again, it may have informed the dynamic of the Respondent's relationship with the Applicant, this alone would not have justified a failure to return if it were proven. However, the Court does not have enough evidence, or any tested evidence, to make findings in that regard.

5.65 The accumulated evidence of recent events in the case establishes, in this Court's view, that while the Respondent has not been blameless in the breakdown of the relationship and undoubtedly was wrong to remove the children, the Applicant persistently engages in conduct which is harmful and pervasive in terms of his control of his wife's life and finances, such that he has created an intolerable situation for her, albeit one that does not affect the children in the same way. This finding is made in the knowledge that she herself has not behaved well on many occasions, including in particular exposing the children to information that they should not hear anything about. The Applicant's conduct, however, appears to be different in degree and in frequency. He also appears not to recognise the harm that he causes, whereas she has repeatedly apologised for general and specific failings.

5.66 The Applicant does not appear to understand that recording his wife and insisting on more detail in the written apologies she sends him is not normal behaviour. The tone he takes in exchanges throughout the exhibits and even, on occasion, in his affidavits, is best described as highly controlling. While the Applicant may see these events as normal financial measures, factual messages or reasonable requests, taken together with all the other evidence and seen against the backdrop described above, the impression created is of a man who is involved in every detail of his partner's life, who refuses to admit that he has contributed to the breakdown of the relationship and who insists on the Respondent admitting to specific

breaches of trust and breaches of his boundaries to the extent that she is now doing so as a matter of course, and whose sense of self will be eroded by this dynamic, a process that has probably already commenced given the conciliatory tone of many of her replies to him.

5.67 I have considered the authorities in respect of grave risk, in particular *A.A. v. R.R.* The medical evidence produced by the Respondent supports the proposition that she was suffering the psychological effects of being dependent on and controlled by the Applicant and has begun to recover while in Ireland. The support for her case is more cogent than that in *A.A.* or in the case of *C.M.W.* [2019] IECA 227 (see further, below). This medical evidence, combined with well-supported allegations of controlling conduct and the responses of the Applicant, confirming much of what the Respondent alleges, suffice to establish a grave risk to the Respondent.

5.68 The difficulty is that it is not possible to establish a corresponding risk to the children. After the exhaustive consideration of the evidence, above, one factor that is notable by its absence is a real picture of how the children were affected. This comes most clearly from the independent assessor's report and what he advises is that they are offered professional support.

5.69 The authorities oblige this Court to consider the facilities available in the children's habitual residence to mitigate any risk to them. Not only is there no direct evidence of risk, the evidence establishes indirect risk from both parents, in my view. There is not only the controlling conduct of the Applicant to consider, there is also the inappropriate sharing of information by the Respondent. The affidavits in this case have focussed to a very high degree on the conflict between the two adults. The Court is obliged to address their arguments but considers that the subject matter of the case, the children, received scant attention by comparison.

5.70 That said, and bound by the cases set out above, it is clear that there is insufficient evidence to establish a grave risk to these children if they are returned such as cannot be met by the appropriate professional help and assistance for them and for the Respondent. This is considered further below.

5.71 The *Neulinger* case, which refers courts back to the best interests of the children in all such cases, also prompts the comment that the children are relatively young and the only life they have known to date has been in this South East Asian City. The teachers and doctors who know the children best are there and are best positioned to address these risks, should this family return to Asia.

6. The Views of the Children

6.1 The legal test in this regard has been set out and approved in numerous cases. In short, the Court retains a discretion not to return if a child objects to that outcome. In such a case the child must be mature enough that the Court should consider and act upon the objection even after balancing that view against the main objectives of the Convention, which tend to favour immediate return.

6.2 As noted above, one of the three children objects to returning and speaks in quite vehement terms in this regard. The child's age is relevant: the child is over 10 years old but under 12. The Court is always concerned to take these views into account and does consider that the maturity of the child, as set out by the assessor, coupled with the child's age, make it incumbent on me to consider this objection carefully.

6.3 There are several matters to note: the first is that this child is still relatively young. In the case of an older child, the weight of the views in question is greater. Secondly, the child appears to have been informed by the Respondent about many issues which have coloured the child's responses to the assessor. There are references to the Applicant's conduct both generally and specifically. This child has a stronger attachment to mum rather than to dad but this is normal where the Respondent appears to have spent more time caring for the children and where she has been critical of the Applicant in front of this child.

6.4 The assessor summarises the information that all three children have as being "*a general narrative surrounding conflict, infidelity and the arrest of [the Respondent].*" Despite this, all children still wish to have as much contact as possible with both parents.

6.5 As a matter of fact, this child has expressed an objection rather than a preference and the child is sufficiently mature that I should take these views into account. However, much of the substance of the objection is informed by the Respondent's views. This reduces the weight of the objection considerably. The assessor has concluded that, wherever the children are to live long term, the children of this family require assistance from the relevant child support agencies. This is hard for any parent to read and it must be noted that both parties bear some responsibility for this. The chronic conflict referred to in the independent report is the major source of concern for the assessor and some of the examples of conduct referred to earlier in this judgment, implicating both the Applicant and the Respondent, have exposed the children to unnecessary acrimony.

6.6 The independent assessor, commenting on whether there was any influence on the child's objections, noted the inappropriate sharing and the likelihood

that this child had received more such information than the others. The overall objectives of the Convention are so important that, in the circumstances of this case, an objection to return based largely on information which should not have been shared with this child, is not sufficient to persuade the Court to act on that objection alone. There is no specific criticism of home, school or people in the habitual residence and, apart from commenting that it is too hot, the objections appear to mirror the mother's concerns.

6.7 The two remaining children have no objection to leaving Ireland and, as set out above, all speak in very loving terms about both parents. One child has expressed interesting views. His description of events is such that it supports the view that the best interests of these children, particularly this young child, require them to stay with their mum. Referring to the prospect of returning, he accuses dad of child abduction, not mum, saying: "*I really do (wish to return …) but I can't. My mom would have to come with me. The police will find my mom and arrest my mom.*" The child then became agitated and was critical of his father.

6.8 This is a significant response. Following a long line of similar authorities most recently confirmed by the Court of Appeal in *A.K. v. U.S.* [2022] IECA 65, this Court has held in various cases that it is most unusual to separate siblings such as these who have lived in the same family for their entire lives. It is an uncontroversial starting point to say that the children should not be separated. The next question is whether, having noted one objection, the views of the other two children should be added into the balance. In this case, it does not appear to the Court to be necessary as the objection stated cannot outweigh the Convention objectives but, should that be incorrect, it appears that the views of the two other children, both of whom would prefer to return to the life with which they were familiar, tend to

favour return. The balance of factors, therefore, swings against acting on the objection of one child, particularly where the child has reflected the Respondent's views rather than the child's own views in answering some of the relevant questions.

7. The Protection of the Respondent

7.1 It has not been confirmed whether or not the Respondent will return if the children are ordered to return. Given the answers of the children, particularly one who is quoted above, to the assessor, if the children return without their mum, this could create an intolerable situation for at least one child. The child refers to returning as something that can only happen if his mother returns with him, and it is difficult to disagree with his views in this regard. He is under 6 years old, his primary carer is clearly the Respondent and, while it has been damaging to this child to hear negative views about his dad, happily he still loves the Applicant very much so there is a prospect of this being mitigated by appropriate intervention and access.

7.2 It was argued that the housekeeper was, de facto, the primary carer for these children and that she is capable of continuing to provide security for them. The housekeeper was undoubtedly a hugely important figure in the lives of the children but it is clear from their answers to the assessor that their parents, quite naturally, are the most important adults in their lives. Quite apart from their own views, it is in the best interests of all children to grow up with a real relationship with both parents. Financially and practically, given the location of this country, it is most unlikely that they would see their mum often if she does not return to the country in question.

7.3 The medical evidence in this case does not go so far as to suggest that she cannot return with her children if this is the order made in the case. The

Court also proposes, by way of the undertakings suggested below, to enable the risks to the Respondent to be greatly reduced so as to ensure that she can return safely.

7.4 If the children are to be returned, the relevant undertakings must be given. If that is done, it is likely that the Respondent can return with them in safety. The Applicant argues that as she will not return to the same residence, therefore, any harmful conduct within the relationship on which she relies to justify remaining in Ireland cannot affect her as she will be living separately to the Applicant. But whether or not they share the one roof is not the only consideration in this case. If the Court is obliged to order the return of the children, it must be in circumstances where undertakings are given in respect of their housing and security, pending proceedings before the local courts and where the Respondent is protected from further risk.

7.5 Firstly, the Applicant is currently unemployed. By the time this judgment issues, he may have obtained employment and indeed this is likely given his excellent work history. However, it is by no means clear if he will remain working in the same city. If he does obtain a job there, it is likely to be reasonably well paid. However, there is no such evidence in respect of the Respondent. As has been the case to date, her security in the country will depend on the Applicant if this family returns to Asia.

7.6 Secondly, the Respondent has little or no independent means. While she is capable of earning a living, the evidence established that it was the Applicant's salary that paid for the children's housing, schooling, medical bills, clothing and of course for the housekeeper. All of these expenses will remain and the Respondent has no current means to support this house. While of course the local courts would be eminently capable of making decisions as to how much maintenance should be paid and where the

children should live, for the Respondent to remain in the same city and subject to his visa is a difficult prospect for a person who has already lived under various different types of control exerted by this Applicant.

7.7 Thirdly, there are criminal proceedings outstanding against the Respondent. The use of the court system against the Respondent is likely, on the balance of probabilities, to continue if the children are returned and she returns with them, unless this too is the subject of undertakings.

7.8 Finally, the effects of previous control on the Respondent are such that it is not simply living in the same house as the Applicant which may pose a threat to her wellbeing. His ability to control her life will probably remain considerable even if it is diminished by the couple living in separate homes.

7.9 Many of these concerns could be met by the furnishing of appropriate undertakings, such as the Applicant leaving the family home so as to allow the children to live there with their primary carer, assisting her with legal fees and undertaking to assist in bringing an end to the criminal proceedings. I note that the Applicant has suggested that he and the housekeeper will be able to care for his children if they are returned without their mother, which argument itself causes the Court some concern on the facts of this case. The situation for the children will be made tolerable, in the Court's view, by the suggested undertakings including that they return to the home they know, with the parent who spent most time with them, i.e. the Respondent.

7.10 The Applicant relies on the case of *C.M.W. v. S.J.F.* [2019] IECA 227, where Whelan J. confirmed an order to return two children to Canada despite the financial constraints on the mother who also argued that her children would be in an intolerable situation as she would not return with them.

7.11 Unlike the mother in *C.M.W.*, this Respondent has provided evidence that her reluctance to return is based on the conduct of the Applicant rather than seeking to rely on a tactic of non-return. Again, by way of contrast to that respondent, this Respondent already faces at least two criminal charges on her return, which cases the Applicant avers he has been unable to halt, having started the prosecutorial ball rolling. This Court has every faith in the legal process in the relevant country, though in this particular case it is the continuing use of the system to control the Respondent that is anticipated and asking for an undertaking about prospective and existing legal proceedings is more problematic than undertakings about provision of financial assistance. Nonetheless, I am prepared to consider submissions on what form of reassurance might be offered in this regard.

8. Conclusion

8.1 The law requires that the children must be returned in order for the relevant applications to be made to the appropriate courts in South East Asia. The Court will hear the parties as to how and when that is to happen.

8.2 The cumulative effect of the Applicant's conduct establishes a continuing and prospective grave risk of harm to this Respondent. This alone is not sufficient to justify refusing to return the children, as the key feature of any Hague Convention case is that children are returned to their habitual residence to enable substantive decisions on their welfare to be made. The Respondent will be entitled to raise these issues in the local courts and indeed had started that process before she removed the children.

8.3 While the Respondent has produced medical evidence, it does not establish any risk in respect of the children. Despite the grave risk established in

respect of the Respondent, there is insufficient evidence that the children are at risk.

8.4 The Respondent is in a precarious financial situation. This can be addressed by undertakings from the Applicant and I will hear the parties in this regard. An undertaking to leave the family home, allowing the Respondent and her children to return to home without fear of her being recorded or of being subject to any demands would be an appropriate starting point.

8.5 There are features of this case that bear further comment. While the family's habitual residence in 2022 was in the relevant Asian country, on the facts of this case, no member of the family was expecting to spend another year there. When the Applicant learned in 2022 that he would be made redundant later in the year, the couple looked at alternatives, none of which were in that country. It was not until these proceedings were precipitated by the wrongful removal of the children that this city reasserted itself as their medium to long term habitual residence, so to speak. The family not having chosen their next residence, the Court has no hesitation in confirming that it remained their habitual residence in 2022 but the parties should be mindful of the relatively recent discussion about moving back to Ireland when considering the long-term implications of this judgment.

8.6 The Applicant made it clear that he wanted to go back to Ireland as recently as February of 2022. This Order will not preclude the parties from agreeing that Ireland is where the future of their children lies. While the Court is obliged to return the children on the facts of this particular case given Ireland's obligations under the Convention, it is nonetheless open to the parties, even at this stage, to consider how they will proceed from this point.

8.7 The independent assessor has advised that these children will need professional support wherever they are living. This too is something that

the parties should consider before acting to enforce a Court Order that will uproot them once more. At the very least, when they first return home these children should be with their primary carer and returning to the home they know. It is clear that the parties cannot share a home, it is clear that only one of them can afford to support the family and it is important that they now consider where they all want to be and where their children will be happiest and most secure in the coming years.