THE HIGH COURT

FAMILY LAW

[2024] IEHC 30

RECORD NO 2023/ 26 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 THE INHERENT JURISDICTION OF THE COURT

AND IN THE MATTER OF 'U' (A MINOR)

BETWEEN:

UGO

APPLICANT

-AND-

FPO

(Also known as 'FPP')

RESPONDENT

Judgment of Ms. Justice Nuala Jackson delivered on the 11th January 2024

Introduction

1. This is an application by a father ("the father") for the return of his child, who I will refer to as 'U' for the purposes of this judgment. There have already been extensive court proceedings in England relating to U. The proceedings before this Court were commenced by Special Summons issued on the 14th September 2023 seeking relief pursuant to the Hague Convention on the Civil Aspects of International Child

Abduction 1980 ('the Convention'), as introduced into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991. The father seeks the return of U to England. It is acknowledged by the Respondent mother ('the mother') that the requirements of Article 3 of the Convention have been met, namely that the child was habitually resident in England at the time of removal from that jurisdiction, that the father has and had at that time rights of custody in respect of U, which rights he was exercising. On this basis, the mother acknowledges that there was a wrongful removal of the child pursuant to Article 3 of the Convention. This is sufficient for a determination pursuant to Article 12 of the Convention that a return order should be made in respect of U, absent any applicable defence.

2. There was some suggestion by the mother in the course of argument herein and in her first Affidavit sworn herein that there had been a change of habitual residence of U over the course of time since the date of removal from England. It is difficult to see the basis upon which it might be asserted that there had been such a change of habitual residence on the part of the child given that:
   (a) There was a declaration that U was habitually resident in England in the consent order of the English courts of the 16th May 2023;
   (b) That same order clearly states that no person may remove the child from the United Kingdom without the written consent of every person with parental responsibility for the child or the leave of the court;
   (c) There was clearly no consent or acquiescence of any kind on the part of the father to the removal of the child and he took urgent steps in respect of locating the child proximate to the disappearance of the child and her mother in or about June 2023;
   (d) The removal and retention of the child from her acknowledged place of habitual residence was accompanied by a lack of any information being provided to the father in relation to the whereabouts of the child and a lack of any contact being afforded to the child to the father. It required the considerable assistance from the authorities, including court orders both in Ireland and in England, to locate the child. While this period will be further addressed in this judgment, the precise chronology of the child's movements remains unclear. The mother had indicated to the father in early June 2023 that she was taking the child on holiday with her to Brighton (in breach of the order of the English courts). It is unclear but appears unlikely that this

occurred. Despite two lengthy Affidavits, the itinerary of the child between May and September 2023 remains far from transparent. The mother would appear to have travelled to Northern Ireland with the child initially and to have stayed with a relative there for a period of time. Thereafter, the mother brought the child into the jurisdiction of this Court. It would appear that there was an involvement by relatives in County Meath for a period of time and that the mother and U stayed with them. The mother deposes to having travelled to Dublin initially (Paragraph 33 of her Affidavit of the 14th November 2023) although there may also have been some confusion as to the county in which a particular location was situated. With reference to Exhibits GB6 and GB7 in the Affidavit of Grainne Brophy of the 5th October 2023, there is a change of address on a bank account (obtained by court order of this Court in the context of endeavouring to locate the child) indicating an address in Leitrim which change of address was, it would appear from the statements thus obtained, notified to the financial institution concerned between the 26th May 2023 and the 11th July 2023. There was a further change of address subsequently notified (on the 17th July 2023) to the financial institution concerned indicating an address elsewhere in Ireland, being the home of the deceased maternal grandmother. Notwithstanding the notification of this address to the financial institution by the mother and its continued usage on an account with another financial institution up to at least the 19th September 2023, in the course of investigations in the context of the within proceedings, it transpired that this property had been sold in or about December 2022. Inquiries of the new owners did not yield information concerning the whereabouts of the child. It is perplexing that the mother would have continued to use this address on one account and would have notified this address to another financial institution subsequent to the abduction if this address related to a property owned by third parties with whom she had no contact or involvement. Ultimately, following an Order of this Court requiring the attendance of a relative of the mother to assist in the location of the child and such attendance taking place (again yielding no information as to the whereabouts of the child), the mother commenced engagement with these proceedings. An Appearance was entered on her behalf on the 1st of November 2023**.** She did so in circumstances in which she insisted that the child's address not be disclosed to the father. In consequence of the foregoing, the father had no contact with U between late May/early June 2023 and the commencement of remote access in November 2023.

Additionally, in consequence of the foregoing, the father, a parent with parental responsibility in respect of U and extant court orders for access made by the courts of the place where it is acknowledged U was habitually resident at the time of their making, has not known the place where U is living since late May/early June 2023. This continues to be the position (this is admitted by the mother at Paragraph 23 of her Affidavit of the 14th November 2023).

(e) Based upon the foregoing and on the evidence before this Court which will be further detailed hereinafter, I find that U has at all material times been habitually resident in England and remains so habitually resident and that she was wrongfully removed from her place of habitual residence in breach of the extant and exercised rights of custody of the father and that, since that time, she has been wrongfully retained from her place of habitual residence in breach of the extant and exercised rights of custody of the father.

3. Article 12 of the Convention provides for a return "forthwith" in such circumstances, but this is subject to the defences in Article 13 of the Convention. Two such defences have been invoked by the mother herein being (a) grave risk and (b) the objections of the child.

> *"Article 13*
>
> *Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—*
>
> > *(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*
> >
> > *(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*

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

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

(Underlining added)

Factual Background

4. The father and mother were married in 2013 and U is the only child of that marriage. U was born on the [redacted] 2019 and is aged four and a half years. The parties lived together as a family in England throughout the marriage and both continued to live in that jurisdiction, albeit separately, since their separation in 2020. The father is Welsh by origin and has family members who continue to live there. The mother is Irish by origin and has family members who continue to live in Ireland. Their joint lives together would appear to have been substantially, if not exclusively, in England. A *Decree Nisi* of Divorce was granted on the [reacted] 2021, which Decree was made absolute on the [redacted] 2022. There have been acrimonious proceedings between them post-separation over a number of years. In relation to the factual circumstances of their inter-relationship and of the relationship between U and the father, there is little agreement. There have been prolonged legal proceedings in England and court orders have been made and there has been significant involvement by a number of authorities (including the police, CAFCASS, various local authorities) and other professionals and a number of reports have been prepared resulting from assessments completed. These facts are not contested, and it is not contested that the various assessments were carried out and reports completed although the mother does take issue with outcomes.

5. I am cognisant of the evidential limitations which arise in a hearing such as the present which has been advanced on the basis of affidavit evidence only, upon which there has been no cross-examination. I am also cognisant of the objectives of the Hague

Convention which have been usefully expounded by Gearty J. in ***J.K. v. L.E.*** [2022] IEHC 733:

"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. There, 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 up to date information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary 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 signatory 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 re-settlement of parents in different countries. It is recognised as an important policy objective for contracting states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her 4 habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.*

6. I have been provided with a very comprehensive documentary overview of the legal proceedings concerning U, the court orders made and assessments carried out in that and in other contexts as well as other documentation which might be described as independent in nature in form of exhibits. It is useful to detail this evidence (which was not disputed as between the parties although the mother, as stated, is dissatisfied as to the outcomes and conclusions therefrom), having regard to the analysis to be undertaken by me.

7. Court proceedings and Orders:

(i) Court proceedings were instituted by the mother on the 24th February 2021 in which she sought a determination as to the level of contact between the father and the child referencing "anger issues" which she alleged and also seeking permission to relocate to Ireland. Concerns about risks of harm which were alleged included 'any form of domestic abuse', 'child abuse', 'drugs, alcohol or substance abuse' and 'other safety or welfare concerns'. The mother in her initiating documentation stated that she had separated from the father in February 2020 and 'left the family home with our daughter because his angry and volatile behaviour became intolerable to live with'. Details given referenced the father being 'quick to anger' and 'aggressive, threatening and disparaging'. Supervised contact was sought. The application indicates that no urgent hearing or *ex parte* hearing is required. See also (iv) below.

(ii) An application in respect of child arrangements to include times to be spent with each parent and arrangements for handovers and communications was brought by the father on the 20th April 2021. He references contact as having been 'ad hoc' since separation. He referenced attempted mediation but that the mother had decided 'matters could not be resolved through mediation and confirmed she will not be attending any further meetings.' He references the mother 'being unwilling to engage in any further communications (whether directly or through solicitors to try and put arrangements in place.' He states that it has been eight weeks since he saw the child. He states "Furthermore, I do not know where either [U] or the Respondent are living as the Respondent has refused to share her address with me since we separated." A hearing 'as soon as possible' is requested.

(iii) An Order was made by the Central Family Court (Judge Kushner) on the 6th August 2021. This Order noted the father's willingness to undertake alcohol testing and to enrol in an anger management class but states '[t]hat the Court has indicated that the Court has not made any decisions regarding domestic abuse, anger management or alcohol abuse but that the above measures will provide reassurance to both parties'. A detailed Order/Judgment has been provided. The Court commented on the counter-allegations as between the parents and the potential harm to the child resulting from either position being correct. This Order provided for access on a gradually increasing basis going

from supervised daytime access to unsupervised day time access to overnight access.

(iv) At a hearing on the 28th January 2022, the mother requested that the relocation application referenced at (i) above be withdrawn. By application on the 14th April 2022, she sought to reinstate this application for relocation, indicating in the initiating document that she had made the decision to withdraw in the aftermath of the death of her mother and in the context of such bereavement. She sought that the CAFCASS report, the assessment for which was in train, would include the relocation issue. At this hearing on the 28th January 2022 (Deputy District Judge Kelly-Edwards), unsupervised access was ordered to include overnight access. Domestic violence allegations were considered, and the court was satisfied that the arrangements for the child made by the order, including any contact, protected the safety and wellbeing of the children and the parents with whom they are living.

(v) Hearing 18th May 2022 Central Family Court (Judge Barrie). Orders were made including unsupervised contact orders. It is clear that there was judicial disapproval of a visit to Ireland by the mother without the knowledge or consent of the father in the weeks prior to this hearing and a Prohibited Steps Order was made. The mother was represented by Counsel.

(vi) An application was instituted by the mother on the 31st May 2022 seeking permission to bring U on a visit to Ireland for a one week period in the summer of that year. It is clear in this application that the father has ongoing access with U at this time, including overnight access for multiple nights. Compensatory access to the father is referenced in the application. There is no reference to access difficulties or behavioural difficulties on the part of the father.

(vii) The financial ancillary reliefs orders were made on the 30th June 2022 by the Central Family Court (Judge Hess).

(viii) An application was brought by the mother in July 2022 for the reinstatement of supervised access, unsupervised access having been granted by Order of the 18th May 2022. The reason stated was to allow for investigation by social services of 'concerns over injuries' sustained by U. The circumstances are detailed in the application.

(ix) An application for the enforcement of a child arrangements order was brought by the father on the 21st July 2022. This sought to enforce the Court Order of

the 18th May 2022. There would appear to be some overlap between this application and the previous of the mother. Reference to several breaches of access orders by the mother are made therein. The safeguarding concerns and the position that access will be discontinued unless supervision is agreed to by the father is set out. The father states also '[the mother] has followed this pattern of behaviour this before and there has never been any evidence to support her false claims. [The mother]'s actions are serious breaches of the order in place, and I seek immediate action and redress. She is harming my daughter by her actions. I have not seen my daughter since 10 July'.

(x) Hearing 22nd July 2022 (Deputy District Judge Grant) – access to continue per Order of the 18th May 2022 but on a supervised basis.

(xi) The mother brought an application on the 4th August 2022 for a continuation of the suspension of access (it would appear that there had been no access between the 22nd July and this date and weekend access was due to take place on the 5th August 2022). The allegations made in this application concern assertions of sexual misconduct against the father. The mother seeks that contact be temporarily suspended 'until the investigation is complete and a hearing takes place.'

(xii) Hearing 22nd August 2022 (Recorder Roscoe) – access on a supervised basis to continue per the May 2022 order commencing 30th August 2022.

(xiii) Hearing 20th September 2022 – order (Judge Barrie) that unsupervised access resume.

(xiv) Order 16th May 2023 – this was a consent order. Terms agreed to by the parties and drafted by Counsel jointly retained by them were submitted to the Court and Orders made by the Central Family Court (Judge Barrie). In the context of this consent order, the mother did not proceed with her application to relocate. The report of the local authority of January 2023 indicates that the mother did not submit her proposal in this regard which was to be filed by 18th October 2022 and that she had emailed the local authority dealing with the matter on the 21st December 2022 informing it of her decision to withdraw this application. This would appear to have been confirmed by her in a statement of the 12th January 2023.

In the context of the foregoing, it should also be recited that there were a number of Court orders made in England in the context of the difficulties locating U after she went missing with her mother in June 2023. These will be detailed below.

Assessments/Reports

8. I have been provided with a large number of reports and assessments which have been carried out by the relevant authorities in the place of habitual residence including three such by CAFCASS and two by local authorities.

    (i) CAFCASS – January 2022 (Assessor 1): this report is of limited use as there had been little engagement between the reporter and the family (apparently due to illness). It is relevant, however, in that it references the fact that there had been previous supervised access (prior to October 2021) but that this had moved to unsupervised access following 'positive reports from the supervising independent social worker'. These supervision reports were provided to me also and are referenced hereinafter. This report also references the cessation of access at the instigation of the mother following an incident reported to [REDACTED] Local Authority. I have also been provided with a report from [REDACTED] Local Authority.

    (ii) CAFCASS – May 2022 (Assessor 2): this is a more substantive report and comprehensive inquiries are referenced therein. Recommendations including overnight access were made. (There is a reference to awaited results in relation to alcohol testing of the father which further assessment provided indicates revealed no concerns. These results are detailed in the Report at (iv) below).

    (iii) Report of [REDACTED] Local Authority – August 2022 (Assessor 3): this report (which included a detailed interview with the child) concluded 'In summary concerns about [the mother's] emotional wellbeing and the impact on U were substantiated, concerns about sexual harm were not substantiated and concerns about physical harm were not substantiated and need further exploration.'

    (iv) CAFCASS – September 2022 (Assessor 2): this was an addendum report which was prepared in the context of the reinstated application to relocate by the mother and following on from orders made by the Central Family Court (Judge

Barrie) on the 18th May 2022. This report indicates a degree of withdrawal by the mother from the assessment process undertaken by the Local Authority. This report indicates that U has an allocated social worker. This report states, inter alia:

"18. I do have concerns regarding [the mother's] ability to promote and facilitate time with [the father] if U relocates to Ireland. Whilst [the mother] states that she sees the value of [the father being in U's life, arrangements between U and [the father] have been interrupted many times since the parents separated, with [the mother] making unilateral decisions in regard to U, such as giving up her tenancy and moving to Ireland in May. It is also clear that despite the thorough investigation by the Local Authority, [the mother] does not accept their outcome and maintains that U is not safe with her father. I am worried that U may be picking up on her mother's worries about her father and that over time this will influence her desire to spend time with him. I would suggest that the Local Authority considers the impact that these issues could have on U and report to the Court with a plan of work to manage the concerns."

(v) Report of [REDACTED] Local Authority - January 2023 (Assessor 4): this very comprehensive report presents a positive picture of the relationship between U and her father. Both parents were observed in their interactions with U. There is a very clear "Evaluation of the Evidence" section in this report. For the purposes of the application before me, Paragraph 42 is particularly important:

"The alleged incidents of physical and sexual abuse have been referred and open to two section 47 investigations, which have explored concerns with U, the professional network and both [the father] and [the mother]. The outcomes from both previous involvements have indicated that the alleged incidents had not occurred as referred and identified that following the video evidence of the incidents with a reasonable explanation deemed the incidents to be accidental. I therefore feel that U has not come to any non-accidental harm during contact with [the father and that [the father] has not previously attempted to harm U during their contact."

(vi) Email from Assessor 4 dated 27th September 2023 confirming the views of the assessors *'that U has a strong and loving attachment with [the father] as her Father. That she would often enjoy spending time with [the father] and [the father's] extended family. U had reflected that [the father] are a strong safety*

factor in her life. When she was observed at [the father's] property, a safe and loving relationship was observed with playing games, having good routines and understanding U as a child and her likes/dislikes. It was initially recommended as 50/50 contact as she found her time with you to be very positive and no concerns for your care were identified, we felt that the allegations made by [the mother] were made in a potentially malicious manner to gain favour of the courts.'

(vii) Social Work Supervision Reports (from 2021) – these revealed no inappropriate or concerning behaviour. On the contrary, a positive relationship between father and U was reported. No concerns were reported.

Other reports

(i) U's GP (UK) – January 2022: this report recites what was told to the doctor by the mother and the results of assessments carried out on U. It references the mother's allegations in relation to an event of December 2021 and that investigations were being carried out by the social work team and the police.

(ii) U's GP (UK) – July 2022: it is unclear if U was seen alone or with her mother. There is reference to a scratching injury and the child reporting that "daddy pushed me". This predates the matter returning to court and access continuing on a supervised basis while investigations were ongoing. This report states that *'[The mother] is worried that if she goes against the court order visitation plan that this will anger her ex-partner, who ultimately may not agree to [the mother] and U going to live in Ireland.'* It is difficult to understand this statement in circumstances in which access was ceased thereafter and the matter brought back before the Court, and it was the Court which was charged with deciding the then extant relocation application.

(iii) U's GP (UK)– September 2022: there is little of relevance in this report save that it confirms that U's hearing was normal and that her 'speech difficulties resolved, and she has now caught up entirely in terms of age-related parameters and made significant progress in this area.' There is reference to the mother wishing to explore the option of a Paediatric psychology review/assessment for U prior to review by the social work team. This does not appear to have been

progressed. There is reference to the mother suffering 'anxiety and distress' and that 'many of her efforts have been driven around being sure her concerns are fully explored and taken into consideration.'

(iv) Report of RC, Osteopath – a report dated the 12th November 2023 was exhibited from Mr. C, a registered osteopath. U would appear to have attended for four appointments, brought by her mother. The reason for the visits is stated to be because of constriction of her breathing, a cough and an umbilical hernia. The information in the report appears to be entirely based upon reportage from the mother. There would not appear to have been any involvement of the father or communication with him. The osteopathic treatment provided to U is not outlined.

Mental health of the mother

9. The report of Dr. N of the 1st March 2022 references the mental health challenges which the mother has experienced in the past. Treatment in this regard had ceased since 2015 per this report and the doctor indicated that there were no current concerns as of the date of the report. The GP report at (iii) above references the mother as suffering from anxiety and distress in or about September 2022 but no further details are provided in this regard. The report of Mr. C speaks of the mother being *'incredibly stressed'* and that he had *'rarely met someone in such a state of stress and despair as [the mother] at this time. It is my genuine belief that she was petrified for the safety, short and long term, of her daughter and that having panicked on one occasion and gone against protocol (I understand there was an unsanctioned trip to Ireland) she might have jeopardised her daughter's future safety. Also, from my experience of her, I do not doubt that Ciara, loves her daughter enormously and has her best interests at heart'* but no further details are provided nor is it indicated whether any treatment was proffered or advised.

The Evidence before the Court

10. A number of affidavits have been filed by or on behalf of the parties with numerous exhibits attaching thereto. In the context of the admission made by the mother that Article 3 requirements have been complied with (Paragraph 19 of her Affidavit of the

14th November 2023) and that I must examine the defences of grave risk and child's objections only, I have sought to extract from the Affidavits of the mother the matters most relevant to these issues.

11. Affidavit of 14th November 2023

(i) Paragraph 9 – that the mother felt under pressure to agree to the terms as the Judge did not previously afford her a fair hearing. She felt she had little choice but to agree to much of what the father wanted.

(ii) Paragraph 9 - Allegation of U having been harmed at access on the 15th May 2023.

(iii) Paragraph 9 - Anger of the father in relation to finances causing her to relinquish maintenance.

(iv) Paragraph 20 – significant concerns about the father having any access with U due to his behaviour 'during our marriage and following the breakdown of our marriage'.

(v) Paragraph 27 – allegations of physical, sexual and emotional abuse against U with 'the authorities in England [having been] taken in by the Applicant's manipulative behaviour and did not properly investigate U's disclosures'.

(vi) Paragraph 30 – serious issues arose after the Order of the 16th May 2023 (sent to the Central Family Court a few days prior to this date).

(vii) Paragraph 43 – emotional abuse by the father towards the mother prior to separation including criticism, bullying and insulting behaviour.

(viii) Paragraph 43- Physical assault of the mother on at least two occasions prior to separation. Abusive behaviour towards U prior to separation.

(ix) Paragraph 43 – increasing anger towards U and escalating emotional, physical and sexual abuse towards U.

(x) Paragraph 43 – the father was self-centred and could not adapt to things not going his way.

(xi) Paragraph 44 – the mother left the family home due to the abusive behaviour of the father. Importantly, there is a reference to the matter having been reported to a named Detective Constable and advice having been received. There is no contemporaneous corroborative evidence of this and there is no evidence of any

action been taken by the mother (or the police) consequent upon this advice. The exhibited document at FO1 is a court application document submitted by the mother in excess of a year after the events alleged in the Affidavit (it is dated the 8th March 2021). In Section 5 of the form exhibited, no domestic violence relief is sought but rather relocation to Ireland and conditional access between U and her father.

(xii) Paragraph 45 – behavioural concerns in relation to U, sleep disturbance and language regression. The Affidavit continues on to set out medical investigations which were carried out. It would appear that professional assessments did not disclose concerns.

(xiii) Paragraph 47 – access was agreed in June 2021 and orders were made. I have not had sight of a June 2021 order. It is clear from Exhibit FO3 in Paragraph 49 that access orders providing for a gradual increase in access to daytime unsupervised contact with overnight contact to be encouraged after a period of a number of weeks. This Order would appear to have envisaged overnight unsupervised contact by November 2021.

(xiv) Paragraphs 51 and 52 – allegations of abusive behaviour on the part of the father in September/October 2021. These are uncorroborated. There are a number of exhibits in Paragraph 52 which require consideration. It is clear that the mother contacted the National Centre for Domestic Abuse in October 2021. She received advice from them and the offer to pass the case onto a panel member solicitor. It would appear that this offer was not availed of and the mother indicated a decision to seek assistance from her own private solicitor. However, there is no evidence that any relief in respect of domestic violence was sought (whether through the good offices of the National Centre for Domestic Violence or the mother's private solicitors) or granted to the mother (Exhibit FO5). Exhibit FO6 is described by the mother as a 'police report'. The first page has few details and appears to be dated the 6th December 2021. The second page is a letter to the mother dated the 9th December 2022 from a PC. S to the mother. This letter seems referrable to the same crime number as is on the first page of the exhibit. This letter seeks further details from the mother. There is no evidence that this letter was replied to or that any further steps were taken in this regard by the mother or by the police. Indeed, the father's solicitor

confirmed following contact with PC. S that no further action was being taken (Exhibit UGO12 referenced below at (e)).

(xv) Paragraphs 56 – 58 – a series of allegations of physical abuse by the father towards U leading to a unilateral cessation of access by the mother in December/January 2021 (she deposes to this being on the advice of the police). This resulted in enforcement proceedings by the father. It would appear from the Affidavit of the mother (Paragraph 58) that in person access had resumed by mid-January 2022 and further allegations of abuse, including physical abuse and sexualised behaviours, are made for the period January – early March 2022. Importantly, at Paragraph 64 the mother says she did not inform the CAFCASS assessor of these issues of sexualised behaviour in the context of an April 2022 visit due to the professional having been 'dismissive when I said of the physical harm'.

(xvi) Paragraph 65 – it would appear that compensatory access was agreed in the context of a visit by the mother (with U) to Ireland.

(xvii) Immediately following return from Ireland, further allegations of abuse are made against the father in the April 2022 – May 2022 period.

(xviii) Paragraph 72 – the mother removed U on a holiday to Ireland without the consent of the father for a period of approximately two weeks in early May 2022.

(xix) Paragraph 72 – the matter was before the Central Family Court on the 18th May 2022 and the mother was 'admonished' for her behaviour at (xviii) hereof. It must be noted that from the Orders which I have seen, this was the first time that the case had been dealt with by Judge Barrie (ref. (i) above). There is no suggestion that any application for recusal was ever made to Judge Barrie or that there was an appeal brought from the Order of the 18th May 2022, both of which options were available to the mother. The matter was again before Judge Barrie on the 20th September 2022. At Paragraph 104, the mother states that she was 'dismayed' by reports and "I felt under duress to accept the findings at the September 2022 hearing". However, the Order indicates that the mother had legal representation by counsel at this hearing. It is noteworthy that, contrary to the allegations made against Judge Barrie, it would appear that at the May 2022 hearing, the mother was facilitated in relation to her new accommodation which was a considerable distance from London.

(xx) Paragraphs 73 and following detail allegations of abuse subsequent to the Order of May 2022. Of huge concern is the fact that these allegations relate also to sexual abuse. Importantly, it is clear that the mother was in a position to obtain early access to a court and access was modified pending investigation. I have been provided with two orders of the 22nd July 2022 and the 20th August 2022 both of which afforded safeguarding provisions in the context of access pending investigation, the allegations having bee denied by the father.

(xxi) Paragraph 81 – the mother is critical of the process used by social worker, LD of [REDACTED] Social Services – "Ms. D asked me about the police in the presence of U and U shut down."

(xxii) Paragraph 84 – "I found PC B to be a bit dismissive of my concerns."

(xxiii) Paragraphs 89 and 91 – assigned social worker, LE, "did not seem to take it seriously or believe me and I was accused of having had a history of stopping and staring access" and "was not at all supportive".

(xxiv) It appears that unsupervised access recommenced following a hearing before Judge Barrie in September 2022. Further allegations of physical abuse are made in respect of the October/December 2022 period.

(xxv) Paragraph 100 – there is reference to the Local Authority report of Mr. E of the 24th January 2023 and it is exhibited. There is no complaint made against Mr. E as to his manner or process. There is no averment in relation to the conclusions of Mr. E.

(xxvi) Paragraph 101 – the mother references her agreement to the shared custody arrangements, ruled and made orders by Judge Barrie of the Central Family Court without the presence of the parties on the 16th May 2023.

(xxvii) Paragraphs 102 – 103 – further allegations of abuse post the consent order of May 2023 are set out.

12. An affidavit in reply to this affidavit was filed by the father, sworn on the 4th December 2023. I have likewise sought to extract from this affidavit only averments and exhibits (where not previously referred to herein) pertinent to the defences under consideration. The narrative of this affidavit consists significantly of denials of allegations of abuse made by the mother. Such allegations are comprehensively and categorically denied.

(a) Paragraph 7 – the father refers to the dissatisfaction of the mother with any outcome which did not restrict his access with U. He references constant and

repetitive criticism of lawyers and social workers and Judge Barrie by the mother. Reference is made to the absence of appeal of the orders made (Paragraphs 9 and 28 of the father's affidavit).

(b) In response to the assertion of pressure being placed on the mother in respect of the consent order of May 2023, correspondence between the parties leading up to terms being agreed is exhibited indicating that the terms were agreed in the context of *inter partes* discussions from March 2023 (Exhibit UGO1). It is clear from the exhibits that the mother did not simply capitulate to the wishes of the father but that there was negotiation (on occasion relatively robust in nature) between them.

(c) Paragraph 21 – the father avers "I have patiently permitted all investigations that were initiated following her allegations to be completed without complaint. On each and every occasion I have been exonerated in relation to all complaints made."

(d) Paragraph 29 synopses the situation from the perspective of the father – "There have been over three years of family court proceedings in England (generated by the malicious allegations of the Respondent, her inability to tell the truth to her own legal representatives, the court, the police, social workers of CAFCASS; and her wilful breaching of every court order that has ever been granted in this case). Her various accusations have been investigated and no evidence has been found to support any of her allegations. She is now repeating a rehashed version of these allegations to a different court in the hope that this court will disregard all the independent evidence in the matter and all court determinations made in England."

(e) In response to Paragraph 52 of the mother's affidavit of 14th November 2023, referencing police reports (these are referred to at (xiv) above as being somewhat unfinished, at Paragraph 60 of his responding affidavit, the father exhibits (at UGO12) an email from his solicitor confirming that PC. S has been contacted and has indicated that 'no further action' will be taken.

(f) The father references undated photographs and the lack of contemporaneous complaint in relation to allegations subsequently advanced. It is noteworthy that both parties agree that the nursery denied that U had made any complaint to her nursery teacher concerning abuse. (Ref. Paragraph 102 of the Affidavit of the mother and Paragraph 119 of the Affidavit of the father) although the mother is

firm in the view that such complaint was made and this is reiterated in her final affidavit.

13. A further Affidavit was sworn by the mother on the 12th December 2023. The admission of this Affidavit was objected to by the father on the basis that it had been proffered too late and there was no liberty to file such further affidavit granted in the context of case management. A hearing and determination in relation to the admission of this Affidavit was made by Jordan J. on the 19th December 2023 and he ruled in favour of admitting the Affidavit. As indicated previously, I have sought to extract from this affidavit the averments relevant to the defences being advanced. I am mindful that the father indicated that he would have wished to reply thereto but could not do so due to the late provision of same. It is, of course, an incontrovertible fact that affidavits must conclude at some point and concerns are usually expressed by the party who does not have the last word. I have to confess that I did not find this Affidavit to be of any significant assistance. It substantially consisted of a repetition of previous allegations, usually in more robust terms, and hearsay, indeed, it unashamedly so states. No affidavits were filed by the third parties concerned and they did not give evidence nor was an application made that they should do so. The affidavit states that third party statements are exhibited so that the father would be aware of what these third parties would say if requested to attend court. They did not attend court and no request was made that they would do so.

14. There is a lengthy narrative concerning the financial situation of the parties and, allegedly, their respective positions and behaviours in relation to finances post-separation. The relevance of this information to this application is questionable and, furthermore, it is clear that a financial reliefs hearing in respect of their separation was heard and determined before the Central Family Court (Judge Hess) on the 30th June 2022. This order was not appealed. There is no evidence before me that either party sought to return to court in this regard, whether in the context of enforcement or otherwise. The reports from the GP at [name redacted] have been referenced hereinbefore. I have also considered the report of Mr. C, Osteopath. This too has been referenced previously in this judgment. I was concerned by this report. Mr. C would appear to be a registered osteopath with the appropriate statutory body in the United Kingdom namely the General Osteopathic Council. The professional practice of osteopathy is stated by this organisation to involve:

'a system of diagnosis and treatment for a wide range of medical conditions. It works with the structure and function of the body and is based on the principle that the well-being of an individual depends on the skeleton, muscles, ligaments and connective tissues functioning smoothly together.

Osteopaths use touch, physical manipulation, stretching and massage to increase the mobility of joints, to relieve muscle tension, to enhance the blood and nerve supply to tissues, and to help your body's own healing mechanisms. They may also provide advice on posture and exercise to aid recovery, promote health and prevent symptoms recurring.'

15. It is unclear from the report what treatment was afforded U within the professional expertise of an osteopath. This report is primarily made up of narrative from the mother as reported to Mr. C. The involvement of this professional does not appear to have known or consented to by the father and the professional does not appear to have sought to involve the father in his treatment process in relation to U. Importantly, however, the report sets out a narrative stated to be an excerpt from what mother had reported to Mr. C. Many of the allegations being made and comments attributed to the father in the context of this report do not accord with allegations made in the course of the within proceedings and in other documents provided to me. The mother is described as "incredibly stressed" and later as being in a state of stress and despair. However, Mr. C admits that "I can only relate what was repeated to me" although he states that he believes what he has been told by the mother. It is noteworthy that the attendances with Mr. C were between 21st December 2022 and April 2023 and yet the mother does not appear to have informed him of the agreement which had been or was being negotiated between herself and the father which would appear to have been significantly concluded around this time.

16. I do not find the hearsay statements of third parties, many of whom are relatives of the mother and who have assisted her in the wrongful removal of U and must, in consequence, be viewed as partisan, to be of assistance. In addition, regard must be had by me to Order 40 rule 8 of the Rules of the Superior Courts. This is not an interlocutory hearing. The Rule aforementioned states:

"8. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on

interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed.

Referencing the predecessor to this Rule, Delany and McGrath on Civil Procedure (4th Ed) states, at paragraph 21-81:

"21-81 Order 40 rule 4 also lays down the important principle that, except on interlocutory applications, an affidavit should be confined to facts within the first hand knowledge of the deponent, i.e. a deponent cannot give hearsay evidence on affidavit. An affidavit (or paragraph of an affidavit) that contain hearsay evidence are inadmissible and may be disregarded by a court. As Irvine J. commented in Director of Corporate Enforcement v. Bailey

"Order 40, r. 4 appears almost mandatory in it terminology when referring to non-interlocutory matters, and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence.""

17. Issues pertaining to matters such as play therapy or any other therapeutic interventions which might benefit the child are not for me to determine but obviously may be matters which quite properly and necessarily arise for consideration by the court determining future care arrangements for U. There are, in addition, uncorroborated averments about the impact of remote access on U. However, I must have regard to the fact that supervised, in person contact was ordered by me on the 19th December 2023 and access on this basis occurred on the morning of the 20th December 2023 with this matter being again listed before me later that day. No adverse outcomes were reported by either party in consequence of such in person contact between the father and U. The Affidavit contains a full scale attack on the personality, behaviour and motivations of the father. These are matters which cannot and ought not to be addressed in the context of the within proceedings but rather in the context of cross-examination at a full, substantive hearing in relation to the best interests and welfare of U in the appropriate jurisdiction save to the extent that issues raised are relevant to the defences being considered. The mother has had ample opportunity to address these matters in a more broad based context and, indeed, will have such opportunity in the future. It is furthermore noteworthy that while

the mother accuses the father of seeking to and successfully using her previous mental health problems to undermine her position, it was the mother who first mentioned her mental health concerns in the within proceedings (Paragraph 111 of her Affidavit of the 14th November 2023), circumstances to which the father had not alluded prior to her so doing.

18. **Chronology of Events since the removal of U from England**

(i) 31st May 2023 – the father had last contact with U. The mother indicated by email of in or about the 4th June 2023 that she wished to bring U with her on holiday to Brighton contrary to the consent order of the 16th May 2023 and the father objected to this and wished to have compliance with the order. U disappeared thereafter.

(ii) 5th June 2023 – the mother left England, taking a flight to Northern Ireland with U. This only became known to the father following a disclosure order made by the English High Court on the 22nd June 2023.

(iii) 6th June 2023 – application submitted by the father to the Central Family Court in relation to access breach.

(iv) 20th June 2023 – the mother and U travelled to this jurisdiction from Northern Ireland (this is known from her Affidavit of the 14th November 2023).

(v) 21st June 2023 – Central Family Court (Judge Barrie) referred the matter to the High Court.

(vi) 22nd June 2023 – Orders of English High Court (Theis J.) including Location Order and Disclosure Orders made under the inherent jurisdiction of that court.

(vii) 27th June 2023 – application for relief under the Child Abduction and Custody Act, 1985 (UK) made by the father to the English High Court.

(viii) End of June 2023 – Access was gained by the English Police to the mother's accommodation there and it appeared that she had left the property.

(ix) 4th July 2023 – further Disclosure Orders made by the English High Court (Morgan J.) directed to [redacted] (re accommodation of the mother), Halifax, Bank of Scotland, HSBC and Integrar.

(x) 10th July, 17th July, 28th July, 21st August and 24th August 2023 – matter listed before the English High Court (Morgan J. and Moor J.) and adjourned. Further Disclosure Orders were made during this time.

(xi) 1st September 2023 – application for return signed by the father and submitted to the English Central Authority.

(xii) 8th September 2023 – it became known to the father that the mother and U had travelled from Northern Ireland to this jurisdiction.

(xiii) 14th September 2023 – *ex parte* orders made by this Court (Bolger J.) including, *inter alia*, Orders for the production of the passport of U and freezing orders in respect of two accounts of the mother with financial institutions in Ireland.

(xiv) 18th September 2023 – *ex parte* orders made by this Court (Mulcahy J.) including, *inter alia*, Orders for the attendance of a relative of the mother before this Court for the disclosure of information pertaining to the whereabouts of U, for substituted service of proceedings and orders (by email and text) and disclosure of information by financial institutions.

(xv) 20th September 2023 – ex parte orders made by this Court (O'Higgins J.) including, *inter alia*, extended disclosure and freezing orders directed to financial institutions.

(xvi) 5th October 2023 – ex parte orders made by this Court (Gearty J.) including, *inter alia*, further orders for substituted service (a different email address having emerged from disclosure orders made previously), a disclosure order directed to the Department of Foreign Affairs, an Order that An Garda Siochana instigate the Child Rescue Ireland Alert System immediately, an Order for the production of the child with ancillary orders in support of this production order directed to An Garda Siochana and Tusla together with an Order authorising An Garda Siochana to bring before the Court any persons with relevant information pertaining to U. On this date, a relative of the mother with whom she had had contact was cross-examined but no information pertaining to the whereabouts of the child was forthcoming, the relative indicating that she had no such information. It is to be noted that this is the same relative who was proffered by the mother as an access supervisor when the matter came before me on the 20th December 2023.

(xvii) 19th October 2023 – ex parte orders made by this Court (Gearty J.) including, *inter alia*, joinder of the Commissioner of An Garda Siochana as a Notice Party.

(xviii) 31st October 2023 – *inter partes* orders made in the context of the engagement of the mother with the proceedings.

(xix) 1st November 2023– Appearance entered on behalf of the mother.

(xx) November 2023 – first contact between the father and U since May 2023 this being by way of remote contact only.

(xxi) 19th December 2023 – in-person supervised contact ordered by me which commenced on the 20th December 2023.

The Defences

19. With regard to the defences being advance in this application, the onus of proof is on the respondent and in this instance the mother must establish the following (Article 13):
    (a) there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In the event that any concerns can be alleviated by undertakings from the father then the Court must take this into consideration in the exercise of its discretion. [Article 13(b)]

    (b) If the Court finds (as opposed to the Respondent establishes) that the Child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views, the Court may refuse to order a return.

20. If the mother establishes any of the aforementioned defences or the Court finds that the child's wishes should be taken into account, I have a discretion as to whether to make an Order for return. (Article 13)

Grave Risk

<u>The Law</u>

21. The law relating to grave risk in Ireland is well established and was clearly stated by Denham J. in the Supreme Court in ***AS v. PS*** [1998] 2 IR 244, wherein she stated at page 259: -

> *"The law on 'grave risk' is based on art.13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interests to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."*

She continued at page 264:

> *"[…] The strong thread through all the case law is the fundamental concept of the Hague Convention that (except in rare cases) the issues of custody and access should be determined in the jurisdiction of the children's habitual resident. Thus, if children are abducted or retained across state lines they should be returned to their habitual residence. The exception to this fundamental concept carries a heavy burden, the test is a high one. It is not a case of determining where the custody and access should lie, what is the paramount interest of the child in that regard. It is a question of enforcing the Hague Convention which has at its core the paramount interest of the child that it should not be wrongfully removed or retained across state borders."*

This was a case in which sexual abuse was alleged by the Respondent and involved an application for return to England. The Supreme Court, recognising that "*England had a sophisticated family law legal system which can deal with issues of custody, access and child abuse*" directed a return of the children subject to undertakings.

21. The defence of grave risk was considered by the UK Supreme Court in 2011 in the oft cited and approved case of ***In Re: E (Children) (Abduction: Custody Appeal)*** **[**2011] 2 FLR 758**.** At paragraphs 32 -35 the test is set out in summary:

    (i) *The burden lies with the person opposing the return;*

    (ii) The risk to the child must be grave. A relatively low risk of death or really serious injury might qualify as grave whilst a higher level of risk might be required for less serious forms of harm;

    (iii) The words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. Intolerable is a strong word, but when applied to a child must mean a situation which this particular child is in these particular circumstances should not be expected to tolerate. As was said in Re D, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

    (v) *Article 13(b) is forward looking as to what the position would be on a return to the place of habitual residence.*

22. The correct approach to be taken in the application of this defence was set out by the Supreme Court (Fennelly J.) in ***P.L. v E.C.*** [2008] IESC 19, [2009] 1 IR 1, a case also involving allegations of sexual abuse, at paragraph 55 of the judgment:

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

The Court continued:

58. In R.K. v J.K. [2000] 2 I.R. 416, Barron cited with approval the following passage from the judgment of the United States Court of Appeals Sixth Circuit in Friedrick v. Friedrick (1996) 78F 3d 1060: "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

23. In the present case, it is clear that it is the second situation which is engaged, and I must address whether or not the evidence before me supports (a) that there is a grave risk and (b) whether the English courts may be incapable or unwilling to give the child adequate protection. As Fennelly J. further stated:

    "60. The court must apply these principles to the facts of this case. It is indisputable that a risk of sexual abuse is a grave risk. The learned High Court judge has said that there was prima facie evidence of sexual abuse before the Australian court. It is undoubtedly the case that the appellant has made such

allegations before the Australian court. However, as the learned judge correctly said, that court has not yet ruled on the allegations. The High Court did not hear any direct evidence on the issue but was informed of the nature of the evidence before the Australian court. I am not sure that it is right to rule on the quality, even at a prima facie level, of the evidence before the court of the other country. It is clear that there was a great deal of oral evidence before the Australian court, but this court has seen none of that. Nonetheless, this court must take note of the fact that such an allegation has been made and that it awaits adjudication before the Australian court. It is also clear that the allegation is strenuously denied. It is not possible to go further.

61. The real issue concerns the position that this court should adopt in relation to the fact that the identical allegations are the subject of proceedings before the Australian court. The appellant submits that she has produced evidence to satisfy the test that the Australian court is unable or unwilling to protect the interests of C."

The "real issue" for determination in that case was not unlike that in the present case.

Is there a grave risk?

24. As the Supreme Court stated, it is indisputable that a risk of sexual (or, indeed, physical) abuse is a grave risk. The difficulty is how is this to be determined by a Court in the context of an application such as the present with little opportunity for the testing of evidence. The authorities seem to support an approach which involves a blending of the questions to be determined as set out at (a) and (b) above. As Simons J. stated in ***D.B v. H.C.*** [2022] IEHC 627 at paragraph 26:

> *"…, an appraisal of the availability and effectiveness of protective measures in the country of habitual residence forms an integral part of the overall assessment of a "grave risk" defence. Rather than attempt to reach any findings, even on an interim basis, on the allegations of sexual abuse made against the left-behind parent, the Supreme Court instead considered whether protective measures were in place which would ensure that the child would not be exposed to physical or psychological harm on their return."*

25. Simons J. went on to comprehensively consider the authorities as to the approach to be taken in assessing the availability and effectiveness of protective measures and referenced the useful guidance of Finlay Geoghegan J. in ***I.P. v. T.P*** [2012] IEHC 31, [2012] 1 IR 666, of N Raifeartaigh J. in ***S.S. v. K.A.*** [2018] IEHC 795 and of Gearty J. in ***In the Matter of OA and OB, Minors (Child Abduction: Rights of Custody and Habitual Residence)*** [2021] IEHC 849. From these decisions, the following principles may be extracted:

- Based on the evidential limitations, the court should not attempt to resolve factual disputes;
- The issue of risk is forward-looking in that it is assessing the future position in the event of a return. Ni Raifeartaigh J. in ***D.B. v. H.L.C***. [2023] IECA 104 states at paragraph 92:

  > *"..., the risk-assessment exercise, ..., involved two distinct phases: first, to assess whether there was a risk of future domestic violence ... and, secondly, to assess whether protective measures in the United Kingdome could adequately mitigate that risk."*

- The issue to be addressed is whether, if the allegations are true, there is a grave risk that, if returned, the child would be in an intolerable situation. This has sometimes been stated as an exercise in taking the allegations "at their height"[1] or "assuming the alleged risk of harm at its highest"[2] but the Court of Appeal has confirmed that some degree of interrogation of the allegations is permissible. Collins J. in ***In the Matter of W and X (Minors)*** [2021] IECA 132 at paragraph 60 states:

  > *"60. The approach in In re E involves, in cases where there is a conflict of fact as to the existence and/or extent of a risk of harm to a child if returned to the requesting state, assuming the alleged risk of harm at its highest and then, if that assumed risk meets the threshold of "grave risk" in Article 13(b), going on to consider whether protective measures sufficient to mitigate such (assumed) risk of harm can be identified. That approach was endorsed in this jurisdiction in IP v TP: see paragraphs*

[1] *S.S. v. K.A.* [2018] IEHC 795; *D.B. v. HC.* [2022] IEHC 627 at paragraph 31.
[2] *In the Matter of W and X (Minors)* para. 60

41-43. Subsequent authority from England and Wales suggests that In re E does not have the effect of excluding any consideration of the evidence or any evaluative assessment of the credibility or substance of the allegations: see (inter alia) Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 and UHD v McKay (Abduction: Publicity) [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159."

Ni Raifeartaigh J. in ***D.B. v H.L.C.*** [2023] IECA 104 states:

"94. I agree with the submission on behalf of the father that while it is true that there are references in the authorities to taking allegations at their height, this does not preclude some degree of evaluation of different sources of evidence, as mentioned by Collins J. in CT v. PS., notwithstanding that this is a summary procedure conducted (usually) on affidavit evidence.

95. This is not to suggest that the High Court in a child abduction application should seek to sift and parse all the evidence minutely, but rather to suggest that the statements in the authorities about "taking the allegations at their height" does not mean, either, that any and all allegations made by respondents in support of a "grave risk" defence should always be uncritically accepted. For example, if there are obvious inconsistencies between two accounts by the same person, or, conversely, clear corroborative evidence of aspects of an account, that may be taken into consideration by the court. In the present case, an example of the former is the mother's statement to the police on the 11th April 2022 insofar as she did not mention, and indeed expressly denied, that there had been any prior physical assaults upon her. An example of corroboration is, as regards the 'biting' incident, the contemporaneous texts which were strongly corroborative of this having happened.

96. Where the "taking the allegations at their height" approach is most useful, perhaps, is where a court is of the view that, even if the allegations are taken at their height, the protective measures which

would be available in the requesting jurisdiction are sufficient to ameliorate the risk below the level of "grave". In such a case, it is not necessary to evaluate whether all the allegations are in fact reliable or true, because it does not affect the outcome.

97. However, this case is one of the more difficult cases where, the issue of whether protective measures would ameliorate any risk sufficiently is squarely in issue. This is by reason of the father's behaviour, as will be discussed below."

26. The appropriate approach to fact finding in proceedings such as the present was also considered by Whelan J. in ***J.V. v Q.I.*** [2020] IECA 302, albeit in relation to the issue of consent:

"63. The court is entitled to scrutinise the surrounding facts and available evidence including circumstantial, particularly in circumstances such as emerged in the instant case where there was a fundamental dispute between the parties as to the very existence of consent on any basis and where the validity of the document produced by the appellant for the first time in September 2020 was impugned by the father who asserted his signature was a forgery.

J. Article 13 – Consent

64. The court will have regard to whether the evidence, viewed in the round, supports an alleged consent being operative and enforceable at the time of actual removal or whether intervening facts and circumstances are likely on balance to have superseded any such an agreement. The court is entitled to have regard to the immediate facts and circumstances surrounding the removal of the children in the context of the lived realities of the family and to scrutinise the acts and representations of each parent contemporaneous with and immediately subsequent to the removal, bearing in mind that the burden of proving on the balance of probabilities a valid operative consent rests on the parent who asserts affords a defence to an otherwise wrongful removal. Each case will proceed on its own facts and considerations such as the passage of time or intervening events such as intervening court proceedings or subsequent court orders pertaining to the children, which are either inconsistent with or substantially or materially undermine any purported agreement will all be

relevant. The court must be satisfied that the left behind parent gave a consent embodied in the asserted agreement which in substance was freely given, informed, unequivocal and that it was operative and actively relied upon at the date of removal. In particular the consent must operate and be clear as to its intent and that it was not for the purposes of some temporary or short-term arrangement."

Application of Law to Facts

27. The factual circumstances arising in the present case are far removed and very much distinguishable from those in the ***D.B. v. H.L.C.*** case. In that case, the High Court and the Court of Appeal determined on the balance of probabilities that there were a number of specific allegations of domestic violence which could be accepted on the balance of probabilities as constituting a grave risk (there was some deviation between the Courts in relation to the specific allegations to be accepted). Consideration then moved on to the effectiveness of protective measures.

28. The situation here is very different. I am mindful of Ni Raifeartaigh J's dicta in relation to uncritical acceptance of allegations made by a respondent in relation to grave risk and, in particular, the second category of circumstance referenced by her namely where there is '*clear corroborative evidence of aspects of an account, that may be taken into consideration by the court'.* Independent, objective evidence may serve to corroborate the absence of grave risk as well as its presence. In the present case, it is extremely difficult to accept the allegations made by the mother herein as, on the balance of probabilities, evidencing grave risk given the degree of investigation and assessment which has occurred, the consistency of conclusion reached by the courts of the habitual residence and by such numerous independent professional assessors. There is an absence of corroboration of the allegations made. It is impossible not to observe that each and every time access arrangements between the father and the child progressed, further new allegations were made indeed allegations with heightened seriousness. Further independent assessment and court review thereafter (with protective mechanisms put in place in the interim), did not support the veracity of the allegations. Additional to this are the inconsistencies in the approach of the mother. She brought

two applications to relocate both of which she withdrew. She entered into consent terms in circumstances in which opportunities for a full hearing before a court were readily available to her. At hearing there were accusations of disillusionment with the court system and with a particular judge who would appear to have seisin of the matter. However, no appeal was brought nor was there an application for recusal even at times when the mother had legal representation. Regrettably, this disillusionment appears to be founded upon a refusal of the court and the authorities to agree with her point of view rather than any fault or deficit in the system itself. It is my determination that the allegations of grave risk being proffered here have not been proved by the mother on the balance of probabilities. It is my determination that the vast amount of evidence from independent, objective sources is corroborative of the father's evidence herein.

29. However, even if contrary to my assessment above, the allegations of the mother are taken at their height, it is my view that the evidence overwhelmingly supports the adequacy of protective measures available to the mother. The case being advanced by the mother herein would appear to be based upon allegations of institutional failure operating across the judiciary, police and social services substantially attributable to over-arching significance having been placed upon prior mental health challenges of the mother disclosed by the father for his advantage. I have found no evidential support for this contention. In addition, the mother admits to having mental health treatments and challenges in the past so that they are clearly a relevant factor in any investigation although they do not appear to have been afforded undue weight or significance. There has been ready access to court hearings available to her. These court hearings have resulted in curtailed access (suspension or supervision) pending investigation. It was clearly open to the mother to bring an application to relocate if she so wished. She instituted such applications on two occasions and withdrew them. There is no evidence that it was not open to her to fully litigate all and any issues she wished to and, in that context, to cross-examine such witnesses as she desired. On the contrary, the mother fully participated in the ruling of and was a party to consent terms only to wrongfully remove U from her place of habitual residence shortly thereafter. If the allegations which she makes pertaining to the period May/June 2023 are correct, there is no evidence that she could not have returned to court and have had these matters addressed as she did in the summer of 2022 (it being noted that the allegations from 2022 were

investigated and found not to be of substance). There has been comprehensive investigation and assessment services available. Most importantly, it cannot be overlooked in this case that (a) there is no evidence of any breach of any Order by the father; (b) there is no evidence that the father did not fully and completely co-operate with the assessment processes (indeed, on the contrary, he appears to have facilitated tests despite his denial of the allegations which grounded them e.g. in relation to alcohol (which test results did not support the allegations being made) and he undertook courses the need for which he denied (anger management), which were acknowledged by the Court to be to 'provide reassurance' (Order of the 6th August 2021)). On the other hand, there is some evidence of a lack of full co-operation on the part of the mother; (c) there is no evidence of any domestic violence relief having been sought or granted to the mother. It is noteworthy that the mother insisted upon the address at which the child is residing in Ireland not being disclosed to the father notwithstanding that there was absolutely no evidence that he had ever previously used such information to behave in a negative or inappropriate manner; (d) there is no evidence of any criminal investigation resulting in further steps being taken or sanction against the father. Indeed, the exhibited documentation seems to conclude with a letter to the mother from the police authorities seeking further information and an email from the father's solicitor who had ascertained that the police were taking no further action.

30. In these circumstances, I find that the defence of grave risk as provided for in Article 13(b) has not been established by the mother on the balance of probabilities.

Objection of Child

31. In the case of ***CA v CA (otherwise CMcC)*** [2010] 2 IR 162, Finlay Geoghegan J approved the dictum of Potter P. in ***Re M. (Abduction: Child's Objections)*** [2007] EWCA Civ 260, wherein he set out the applicable test for assessing the objections of a child, adopting a three stage approach to a consideration of the child's objections:

> "*60. Where the child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second*

is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established), Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return."

Finlay Geoghegan J. went on to clarify that:

"the first two stages identified are primarily questions of fact or inferences from primary facts for decision by the trial judge. It is the third question which most often presents a court with complex and difficult issues."

32. An independent Court Assessor was appointed in this case with a view to meeting U and preparing a report setting out her views. This appointment was made pursuant to the Order of Gearty J. of the 21st November 2023. The report is dated the 5th December 2023 and is based upon an interview between the Assessor and U which occurred on the 27th November 2023. U was accompanied to the interview by her mother. At that time, she was four years and five months old and had not commenced formal education (she was attending an early learning facility). U had not seen her father in person for a period of six months at this time. Remote contact had very recently recommenced.

33. The Assessor reported that:

    (i) U had age-appropriate communication skills for a child of her age and stage of development. She did not provide free narrative relating to any topic. U appeared to find the assessment process stressful.

    (ii) Very importantly, the Assessor reports that U had a limited understanding of place and time.

    (iii) U stated that she wanted to stay in Ireland because she would miss her mama. Her responses in this regard were somewhat unclear which was not unexpected given her age. She appears to have said that she wanted to stay in Ireland because she would miss her mother if returned to England and yet when questioned about returning to England with her mother, she stated "I don't want that. I just don't want to go back I just miss my mother." There is clearly

confusion here as it would appear clear from the report that U would not want to be in Ireland without her mother.

(iv) Importantly, when asked if her father was nice to her, she replied in the positive while being negative about her father's behaviour towards her mother. This is in conflict with the allegations made by the mother in this case where she has repeatedly referenced bad behaviour by the father towards U and U's reported upset arising from this. The Assessor's report does not support these allegations.

(v) She was unable to provide a narrative about her life in England, her father or her mother.

(vi) She appears to have been reluctant to engage in the assessment and this reluctance seems to have increased as the assessment continued.

(vii) She is reported to have been inhibited and to have found the interview stressful.

(viii) The Assessor concluded that U became inhibited when conversation sought to address her parents or life in England. The Assessor concluded that to suggest a cause for such presentation would be speculative.

34. It was argued before me that U had voiced an objection to returning to England. This was based upon the report in general and in particular Paragraphs 41 and 42 of it:

> *"41. U said she that she does not want to be returned to the jurisdiction of England and Wales because she would miss her mother.*
>
> *42. When asked how she would feel if her mother went with her, U said she still wouldn't want to return to England. When I tried to explore this with U, she repeated: "I don't want to tell you that" and asked to return to her mother."*

35. U is a small girl who has had her mother as her primary carer throughout her young life and she has lived primarily with her mother since the separation of her parents. Her contact with her father has been sporadic. It is clear from the reports exhibited in affidavits before me that U has lived a somewhat peripatetic lifestyle since the separation of her parents due to her mother's many changes of residence. It is difficult to understand how a child who has a limited understanding of place and time could form an objection to returning to a particular place. It is also clear that U has not been in England for some time and demonstrates a reluctance to talk about this. Whether this

is based on memory, or a lack of memory is impossible to ascertain from the evidence before me. At its height, I find that U expresses an attachment to her mother and a reluctance to do anything which would involve being separated from her. It is an entirely age-appropriate concern which is being expressed when a perceived disruption of her link with her primary care giver is placed before her for discussion. This is a very long way from being an objection to returning to England. U's lack of comprehension is obvious from her confusion when asked to consider returning to England without her mother, at which point her response seems to be more of a mantra-type response.

36. Even if the narrative from Paragraphs 41 and 42 could be interpreted as amounting to an objection, it is my view based upon the evidence before me, including the Assessor's report, that has not attained an age and degree of maturity at which it is appropriate to take account of her views. In ***M.N. v. R.N*** [2009] IR 388 (where the child was six years of age), Finlay Geoghegan J. stated:

> *"It appears to me unavoidable that a judge making such a decision must rely on his or her own general experience and common sense."*

37. In ***U.A. -v- U.T.N*** [2011] IESC 39, (where the children were 7 and 8), the Supreme Court stated:

> "*The report presents clear evidence as to the maturity of the children. ……..The report gives clear evidence of the objection of the children to going to New York, for clear, cogent reasons. This report was also convincing in demonstrating that the children were not coached or unduly influenced by the mother so that their views were clearly their own and that their objection to returning to New York stemmed from previous unhappy experiences which the children had when in the company of their father….*"

38. The situation in the present case is in sharp contrast to this. There is no such clear evidence in the report either as to U having the requisite maturity or as to there being

an objection to returning to her place of habitual residence. The report reflects a small child wanting to be with her primary carer.

39. I am mindful that U did express a view (as opposed to an objection) which was contrary to returning to England albeit that there is an absence of clear or cogent reasons and the assessor found that attributing a cause to U's inhabitation in respect of discussion of England would be speculative. I am mindful and cognisant of the role of the best interests of the child in the context of child abduction proceedings and of the decisions in ***Neulinger and Shuruk v. Switzerland*** 54 EHRR 1087 (2010), ***X v. Latvia*** [2014] 1 FLR 1135. I have found the discussion of the law in this regard by Collins J. in ***C.T. v P.S.*** [2021] IECA 132, paragraph 73, to be particularly informative. In the context of the present case, I am of the view that Paragraph 139 of the ***Neulinger*** decision is engaged:

> *"139. In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see Tiemann, cited above, and Eskinazi and Chelouche v. Turkey (dec.), no. 14600/05, ECHR 2005-XIII). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see Maumousseau and Washington, cited above, § 74)."*

40. In the event that there was a finding of objection and of the requisite maturity, the third part of the assessment, being the exercise of discretion, was considered by the Court of Appeal in ***M v M*** [2023] IECA 126 where Donnelly J. stated:

> *"... the task of the judge in the exercise of her discretion is not to weigh the child's views against the Convention principles or objectives that favour prompt*

return but to assess the individual circumstances of the objecting child in light of those principles and objectives which require return. This exercise must be carried out in light of all of the evidence. When one considers the exercise in that light it becomes clear why the child's views are not determinative. Those views are but one part of the assessment of the child's individual circumstances which must be considered against the background of the Convention's policies and objectives. Thus, the fifteen-year-old child in the Youthcare case who strongly objected to return was none the less returned because of the assessment of the overall circumstances of the case.

The court went on to explain that:

"The particular objective of the Convention/Regulation which is to deter child abduction rightly weighs heavily in the balance of the discretion here as does the policy of prompt return. The child's objection also has to be considered. All those things are of undoubted importance in the balancing exercise, but they are not the only matters. In one sense, it can be said that they form the outer ends of the balance beam, but a judge is required to move inwards from those set parameters and consider all of the relevant circumstances that need to be considered. Sometimes the relevant factors may be those factors which form part of the child's objections but, on many occasions, the relevant factors may include issues to which the child has not adverted …."

41. In the exercise of my discretion and having regard to paragraph 139 of ***Neulinger***, I would, in any event, direct that U return to England as I believe that England is the appropriate jurisdiction in which to determine future arrangements pertaining to her wellbeing. This was the home of the family throughout its existence prior to the events resulting in these proceedings, while I do not in any manner purport to carry out any in depth assessment of financial resources, the disclosure in the course of the within proceedings shows that both parties have the financial resources to support their residence in England and, most importantly, there has been very considerable engagement by the courts and social care authorities in that place and it would be fundamentally unfair to U to upset all these interventions and assessments which have occurred over many years of her young life. There are no factors in this case which I have found would contra-indicate a return being the appropriate outcome in this case.

However, in order to address the *'constant concern for determining what the best solution would be'* for U, I am seeking one undertaking which it was indicated to me by Counsel for the father at hearing would be forthcoming if required. I am seeking an undertaking that access will take place on a supervised basis pending review by the court of habitual residence. U is a young child. She is clearly very attached to her mother, and it is vital for her well being going forward that she has the full engagement of both her parents in decision-making pertaining to her life. Reminiscent of the judgment of Judge Kushner of the 6th August 2021, I seek this undertaking to provide reassurance to the mother in the interim period pending review by the English courts.

Conclusion

42. Having assessed the evidence before me, however, it is my view that the best interests of U will be served by her return to the place of her habitual residence in order that the courts of that place may address arrangements for her custody and access going forward. I have made the following findings:

    A. The mother has failed to prove on the balance of probabilities that there are grave risks arising in the context of such return;
    B. Even if such grave risks arise, no situation of intolerability arises as there are ample effective protective measures available before the courts of England and Wales to address such risks;
    C. While I have reservations that the report of Ms. More O'Ferrell discloses an objection to return to England, if it does so, it is my finding that U has not attained an age and degree of maturity at which it is appropriate to take account of her views.
    D. I would, in any event, exercise my discretion in favour of returning U to the jurisdiction of her habitual residence.
    E. Mindful of the importance of full engagement by both parties in advancing the best possible arrangements between U and both her parents going forward and to provide reassurance, I am going to seek an undertaking from the father that he will exercise access on a supervised basis only following the return of U pending this matter coming before the English courts. I seek this undertaking with some reservation, but I do so in circumstances in which I am reassured that an early hearing may be obtained, the father having so stated in his application for return documentation.

However, I wish it to be very clear that this undertaking is being sought as a condition of return should not be considered in any way to be by way of a negative assessment of the father but rather by way of reassurance to the mother in all of the circumstances.

F. Given the prolongation of the resolution of issues pertaining to this wrongful removal/retention which prolongation was due to the actions of the mother between June and November 2023, I am directing that the return would occur no later than four weeks from the date of this judgment. This is to afford the mother a period of time to arrange accommodation in England. However, in the event that the mother does not wish to return to England, I will vacate the requirement of an undertaking as provided for at E. hereof and order that U may be brought back to England by her father. If U returns to England with her father, I will require his undertaking to have this matter listed before the appropriate court in England at the earliest possible opportunity. Pending the return, access between U and her father should continue as ordered by me prior to the Christmas vacation.

G. I will list this matter for 11 am on Wednesday the 17th January 2024 in order to address any issues which may arise from this judgment.