THE HIGH COURT

FAMILY LAW

[2021] IEHC 515

[Record 2021 No. 4 HCL.]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003

AND

IN THE MATTER OF S.A.H.O. (A CHILD)

BETWEEN

J.A.H.O.

APPLICANT

AND

M.R.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 23rd day of July , 2021

Background to the Case

1. The minor the subject of these proceedings was born in Italy and is ten years old. He is the only son of the parties, who are not and never have been married to one another. The parties freely accepted that they could be described as an international family, although they ceased cohabiting in December 2014 and only resumed their relationship for a period of time thereafter. They were not cohabiting at the time of the alleged abduction/wrongful retention. As to the question as to whether the Applicant has rights of custody within the meaning of The Hague Convention and *Brussels II* bis regulation in respect of the minor, the Respondent does not dispute that the Applicant has rights of custody and, in this regard, the Applicant relies upon the Order of the Court of Padua, Italy of the 7th day of November, 2017 made by consent of the parties. This order granted both parties joint parental responsibility of the child, who would have his primary residence with his mother. The said order directed that the parties would discuss all matters concerning his welfare and that the father was to have access to him every second weekend and that he was to give 72 hours' advance notice of the dates of his access visits to the mother. The parties agreed and it was ordered that summer holiday access would include the possibility of the father staying with the mother and the child at their holiday residence. The balance of the said order dealt with financial matters between the parties in respect of the child.

2. A further order dated the 7th day of May, 2019 was made by the Court in Padua, which essentially reiterates the above order and sets out that the father would have access on alternate weekends continuously from Friday to Sunday evening and admonishing the Respondent to refrain from engaging in conduct prejudicial to the child or causing an obstacle to the correct unfolding of the procedures for custody. The regime of visits had been agreed at the interlocutory stage and the court noted the will of the parties to have the father attend to the child and maintain a balanced and continuous relationship

between parent and child, in a manner that took into account the peculiarities of the father's work commitments and the needs of the child. Access two weekends a month was reiterated with the father giving at least 72 hours' notice before arrival in order that the length of the stay and method of attendance that was in compliance with the child's commitments could be agreed upon. These methods of visit are not currently practicable by the Applicant father due to the difficulties in the relationship between the parties. The father, in compliance with point four of the Padua Decree of the 7th November, 2017 was to communicate the calendar of his commitments to allow the planning of the visiting rights. The order admonished the mother to comply with the correct unfolding of the methods of custody and costs were ordered against her.

3. The Respondent does not dispute that the Applicant has rights of custody in respect of the child nor does she dispute that the Applicant was exercising his rights of custody/access at the time of his relocation to Ireland. The parties assert that the habitual residence was Belgium immediately prior to his relocation to Ireland. Where they are in dispute concerns whether this case is a case of wrongful retention and so, whether the Applicant had consented to or acquiesced in his relocation to Ireland; whether there is a grave risk to the child, and whether his return to Belgium would expose him to physical or psychological harm, were he to be removed from a European court's jurisdiction or would otherwise place him in an intolerable situation; whether the child objects to being returned to Belgium and, if so, whether it is appropriate to take account of his views having regard to his age and degree of maturity and how the application of the principles set out in *Neulinger v. Switzerland* (Application No. 41615/07 ECHR) and *X v Latvia* [GC], no 27853/09, ECHR 2013 apply in the circumstances of the within proceedings.

Background of the Parties

4. The Applicant is a businessman and professional sportsman and, although he carries on business in Belgium, he is a non-EU citizen with temporary Italian residency.

5. The Respondent describes herself in her first affidavit of the 23rd February, 2021 as a mother and a manager of a sports related enterprise in Ireland. She is also the owner of a farm in Belgium which, in turn, is owned and operated by a Belgian company. In her affidavit, she describes herself by way of background, as being a 32 year old Italian national, having met the Applicant in January 2010 and states that she began cohabiting with him in April, 2010. She abandoned her university studies by reason of her relationship with him at that time. She took a managerial role in working with the Applicant. She describes him as being rarely resident in any one country for more than a short period of time, save for a period when he had a serious accident in or about November, 2019 and he had to recuperate.

6. Prior to the birth of their child, the parties moved to live in Italy so that the Respondent could be near her mother at the time of the birth of the infant. The Respondent lived in Spain for many years and spent a six-month period on a yacht in the Mediterranean, accommodation provided by the Applicant for her and their son, and where access was enjoyed liberally by the Applicant. The Respondent contends that it was agreed between herself and the Applicant that she would move to live in Ireland permanently, before the

Applicant's accident in 2019. He was discharged from a hospital into her care in Spain where she had a rented property and it was she who cared for him during his recuperation. To facilitate the continuance of his recuperation, his business chattels were moved from Spain to a property she owned in Belgium. Her move to Belgium with the child was intended to be only temporary, on her case, and totally to facilitate the Applicant's recovery, being his main caregiver at that time when he could not look after himself physically.

7. The Respondent describes her son as being intelligent and proficient in English, Italian, Spanish and French. Both parties agree that the relationship between them effectively ended in December, 2014, with the Applicant describing a 'heated altercation' after a family gathering in Bologna, Italy but the Respondent described this incident as a violent end to their relationship when the Applicant assaulted her, causing her to suffer a broken cheekbone, a broken nose and injuries to her eye. The Respondent contends that this required medical attention and surgery, including plastic surgery to repair the damage. The incident was reported at the time to the police in Italy and criminal proceedings have issued. The injuries sustained required the Respondent to undergo treatment for what is described in the criminal prosecution as *"craniofacial trauma with fracture of the left orbit"* which not only caused hospitalisation lasting 80 days but also permanent weakening of the organ of vision and the permanent deformation *("asymmetry")* of the face. The medical documentation on the court file includes a CT scan provided by Dr. Ciraso Giovanni (p.351, 2A exhibits of the affidavits). Given the severity of the injuries suffered by the Respondent, an immediate and automatic complaint was mandatory on the part of the hospital to the criminal authorities. Page 357 of the said book of exhibits 2A at tab. 4 illustrates the pattern of litigation in this case. The complaint on the 24th December, 2014 is described as the *ex officio* Italian DPP bringing the complaint seeking relief in the form of criminal punishment in Italy in respect of the said assault of the 24th December, 2014 which was still ongoing on the 23rd March, 2021. (This is referenced at para. 19 in the special summons).

8. Paragraph 31 refers to a complaint of the Applicant made on the 1st December, 2016 and seeking seizure of the child's passport. This complaint was a criminal complaint made in Italy which was rejected.

9. Paragraph 33 of the special summons refers to a complaint by the Applicant made on the 1st January, 2017 in relation to custody and guardianship and access, again made in Italy in the Family Court, resulting in a decree in November, 2017 by agreement of the parties.

10. Paragraph 39 of the special summons refers to a further complaint by the Applicant on the 1st December, 2018, seeking to vary the custody situation in Italy in the Family Court and, again, a decree was made on the 7th May, 2019 by consent. On the 1st April, 2019, the Respondent sought to vary custody in Marbella in the Family Court and this was rejected due to lack of jurisdiction and, notwithstanding the Respondent's appeal and further complaint of the 1st May, 2019 by her as against the Applicant for breach of a

maintenance order in Marbella which was treated as a criminal matter, these last two matters were settled by the parties.

11. On the 1st September, 2019, again referenced at para. 39 in the special summons, debt recovery was initiated in the Belgian Civil Court by the Respondent and was settled in November, 2019. As referenced in para. 52 of the special summons, on the 5th May, 2020, the Applicant sought to vary custody in the Family Court in Padua, Italy and this was rejected by the Italian Court for lack of jurisdiction and noted on the 18th November, 2020.

12. With reference to para. 58 of the special summons, on the 30th June, 2020, the Applicant brought High Court proceedings in this jurisdiction against the Respondent in respect of chattels and this was settled following mediation on the 2nd September, 2020.

13. In accordance with para. 60 of the special summons, on the 10th July, 2020, the Applicant sought the return of the child in the Italian jurisdiction by way of criminal complaint. The Respondent was not aware of the application at the time of that, but, since then, it has been rejected for lack of jurisdiction. In the same paragraph, the Applicant references that on the same date he made an application to vary custody in Italy in the Family Courts and the Respondent contends that she was served on the 18th February, 2021 for the first time, in relation to that matter.

14. Paragraph 61 of the special summons refers to the 13th July, 2020 and to an application in the Commercial Court in Ireland brought by the Applicant against the Respondent, and settled on the 2nd September, 2020.

15. Paragraph 63 refers to the Respondent's application on the 4th October, 2020, seeking authorisation to register the child in an Irish school and this was made to the Italian Embassy in Ireland as a family matter. As referenced in para. 63, on the 5th October, 2020, again concerning authorisation through the Italian Embassy on the family law side and dispensing with the Applicant's consent, she was granted a decree in that regard in November, 2020. Paragraph 63 of the Applicant's affidavit refers to the 1st June, 2020, concerning the recovery of the chattels, a civil matter which is ongoing, where the Respondent had to attend the investigation hearing on the 5th February, 2021 in Belgium.

16. Paragraph 66 in the special summons is somewhat unclear and the outcome is not known to the Respondent. On the 1st December, 2020, the Applicant sought debt recovery in Belgium on the civil side which was rejected. On the 3rd February, 2021, child abduction proceedings were brought in Ireland, the subject matter of this litigation.

17. The Applicant submits that the following facts establish Belgium as the child's place of habitual residence;

    - The minor had been living in Belgium for six months.

    - The minor had been living in a property owned by his mother in Belgium (the only property which she had owned since his birth).

- The minor had been attending school in Belgium.
- In December 2019 his parents had both agreed that he would live in Belgium.
- The family's possessions had been transported from Spain to Belgium.
- The Applicant's chattels (their livelihood) had been transported from Spain to Belgium.
- Each of the parties was operating a business in Belgium.
- The minor's long time childminder moved to Belgium.
- The Respondent's personal chef moved to Belgium.
- The Respondent had surrendered her rental property in Spain.

Applicable Law

18. Article 3 of The Hague Convention states:-

"The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

19. This case concerns the application for the return of a child between two European Member States and, therefore, the Convention must be interpreted harmoniously with Council Regulation (EC) No.: 2201/2003 of the 27th November, 2003 on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility ("*Brussels II bis*"). In this regard, *Gt v. K.A.O.* [2008] 3 IR 567, McKechnie J. stated (at p. 597, para. 41):-

> *"It seems to me that Brussels II bis takes precedence only where there is a direct conflict between any of its provisions and the Convention or where the Regulation deals more extensively with rights or obligations than the Convention. In all other respects Brussels II bis and the Convention should be seen as complimenting each other with the provisions of both instruments being read and applied in a consistent and harmonious way, if that is at all possible. On the question of child abduction, it seems to me that the objectives of both the Convention and the Regulation are the same and that the latter was adopted so as to buttress the Convention where that was thought necessary. I therefore believe that their relationship must be looked at in this light."*

20. Article 2 of the Regulation defines the term "*wrongful retention*" as follows:-

"11. the term "wrongful removal or retention" shall mean a child's removal or retention where:

a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

If this Court concludes, therefore, that the Respondent has wrongfully retained the child, the court must consider its obligations under Article 12 of the Convention which states:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

21. In this case, the Respondent has raised defences under Article 13 as follows:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

22. All of the defences are invoked by the mother in her attempt to justify the retention of the child in this State.

The Defence of Consent – Article 13(a)

23. The Defence of Consent is relied upon by the respondent in the terms of same as laid out in *S.R. v. M.M.R*. [2016] IESC 7, pp. 5-6, Denham J. who delivered judgment on behalf of the Supreme Court approving the following principles enunciated by Hale J. (as she then was) in *Re K (Abduction: Consent)* [1997] 2 FLR 212:-

> *"(i) the onus of proving the consent rests on the person asserting it; and*
>
> *(ii) the consent must be proved on the balance of probabilities; and*
>
> *(iii) the evidence in support of the consent needs to be clear and cogent;*
>
> *(iv) the consent must be real; it must be positive and it must be unequivocal;*
>
> *(v) there is no need that the consent be in writing;*
>
> *(vi) it is not necessary that there be proof of an express statement such as "I consent". In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."*

24. In *J.V. v. Q.I.* [2020] IECA 302, Whelan J., delivering judgment on behalf of the Court of Appeal, outlined in similar terms the factors to be considered by a court when addressing the defence of consent, concluding at para. 64:-

> *"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."*

25. The Respondent claims that the Applicant knew of the intention she had to relocate to Ireland with her two children and that the Applicant agreed to the move, having initially refused, but he denies this. The Applicant relies on the fact that the Respondent issued proceedings in Spain in April, 2019 seeking leave of the Spanish Court to relocate to Ireland (para. 42 of the second affidavit of the Applicant). In the Spanish Court the Applicant objected to that application where he contended that the Spanish Court did not have jurisdiction and they found in his favour on the jurisdictional point. The Respondent appealed that decision but it was after that series of events that the Respondent contends that the Applicant consented to the child relocating to Ireland. The Respondent further contends that after that event, she acted on the Applicant's agreement that she would relocate to Ireland, in that she would withdraw her appeal on the refusal. The Respondent avers that the relationship was good between the parties in the early part of 2020, mainly because the Applicant had a serious accident which left him partially paralysed, and being discharged from hospital into the care of the Respondent who was willing to care for him until he got well again. This she did until April, 2020 when she asked him to leave her property. Her claim was that agreement was reached in or about January or February,

2020 and, at that stage in December, 2019, she had moved with the Applicant and their chattels to her farm in Belgium to assist him recuperate and, also, that she was agreeable to facilitating his business enterprises in Belgium. But the Respondent contends that she agreed to help him out on the understanding that she and the child would relocate to Ireland when he was well again.

26. Not only does the Respondent contend that the Applicant agreed that Ireland would be good both for the education of the child and for his sports training, she further contends that he had agreed that she could leave Belgium for Ireland when the Applicant had sufficiently recovered in order to be able to take care of himself. COVID restrictions prevented them travelling to Ireland until June, 2020. A persuasive affidavit sworn by Ms M., a childminder, avers to having witnessed conversations between the parties whereby they discussed the merits of the child relocating to Ireland for both his education and sports training. She avers:-

> *"It is my clear recollection that the Applicant confirmed he was happy for him to relocate to Ireland with the Respondent and* [the Respondent's second child]." (names omitted)

This is an affidavit sworn by a woman whom the child regards as a second mother to him.

27. She describes the commencement of her relationship with the family beginning in March, 2011 and that she had been ten years in the employment of the Respondent at this stage. She moved with the Respondent and the child to Belgium and said she is currently in Belgium. She also had been, for a time, in Italy but, because of COVID, the embassy in Rome temporarily suspended processing work visas and, for that reason, she could not travel to Ireland. Interestingly at para. 4, she describes the two children as having a very close relationship, as being very bonded and very interdependent. This witness was not cross examined.

28. In context, the deponent describes having resided in Italy, Holland, Spain and Belgium with the Respondent and the two children. She said up until the 13th June, 2020, she assisted the Respondent in caring for the child. She describes the Respondent as the primary carer and says that, following the separation of the parties, the Applicant was rarely present, perhaps a few days a month and that, when they were in a relationship, the Applicant was often travelling abroad.

29. She describes the move to Belgium as being only temporary and her understanding was that they would be moving from Belgium to Ireland. She said she witnessed conversations between the parties where they discussed the merits of the Respondent and the children relocating to Ireland, including schooling and that particular emphasis was placed on the Respondent's sports business and the opportunities for the child to engage in sports training (para. 8). She says that it is her clear recollection that the Applicant confirmed that he was happy for the child to relocate to Ireland with the Respondent and the second child. The Applicant disputes this.

30. At para. 9, she describes that when they were moving from Marbella to Belgium, she was asked to pack boxes of the children's belongings, with certain boxes for immediate use in Belgium and other boxes envisaged to ultimately travel to Ireland. Her recollection was that mention of the fact of the child relocating to Ireland was made on a number of occasions prior to the Applicant moving out of the Brussels property and that the Applicant never once in her presence disputed the fact of his relocation to Ireland. She said during the conversations he was fully engaged and she said that at no point did she witness any dissension on his part, indeed, the opposite was the position and that both parents appeared to be engaged with the progress which would be achieved by him in relation to his sporting activities when he moved to live in Ireland. It is noted that a well-known Irish sports trainer had actually travelled to train the child in Belgium well before their relocation to Ireland. This deponent understood the Respondent to be in Belgium to assist the Applicant with his recovery and that the plan was to move to Ireland as soon as the Applicant's recovery permitted this. The conversations in relation to the move to live in Ireland focused on the business activities of the parties as well as the sporting activities which the child would undertake and the school that he would attend in order to maintain his engagement with a similar type of English school system which the child had begun in Spain in 2017 and up to the time he lived in Belgium. She described this move to Ireland as being a habitual topic and the Applicant was always in agreement with it. He was very positive about the advantages, particularly in relation to the sporting activities that living in Ireland would afford the child. This deponent goes so far as to say that there were discussions directly between herself and the Applicant where the Applicant indicated his support for this relocation and that she never heard him make any negative comment or be oppositional to such a move.

31. Ms. C, an employee who was packing up a trailer in June 2020, preparing it by moving children's toys and other items in preparation for the move, supports the Respondent's recollection of events. Ms. C specifically recalls that the Applicant was a regular visitor to the yard of the Respondent's premises in Brussels although he had ceased residing at the property. On the 6th June, 2020, the Applicant arrived at the yard of the Respondent's premises in Brussels when she was packing items belonging to the family and items relating to a specific sporting activity. She says that the Applicant had a clear line of sight of other items including children's bicycles, a stroller, a skateboard and several boxes of family belongings which were in the course of being loaded onto the truck. She also says that the essential sporting chattels were being transported that day and she says that no objection or enquiry in relation to them was made of her by the Applicant on that occasion. The Respondent asks the court to take into account the fact that there was discontinuance of her appeal in Spain in relation to a relocation to Ireland because she had reached an agreement with the Applicant to relocate there and that everything points towards supporting her recollection of events.

32. She says this amounts to clear informed and unequivocal consent to the child relocating to Ireland. It must be noted that despite what the Respondent says about ceasing to instruct the particular lawyer who sent the letters in relation to a weekend stay, that the

Respondent then appeared to have taken a lease on a house in Ireland and was proposing to divide her time between Italy, Ireland, La Maddalena and Belgium.

33. The fact that both Deponents aver to the topic being one which was raised on multiple occasions indicates that there may have been some reticence originally but it was talked through on multiple occasions and the Applicant would have had many opportunities to make his objections clearly known. Apart from the affidavit of Ms. M, there are no specific examples of words spoken by the Applicant to denote consent. There is a complete dispute on the affidavits and each contention is specifically refuted by the Applicant with supporting affidavits.

Previous Disagreements

34. Various contentions are made by the Applicant as against the Respondent, many of which are part of the normal types of dispute between a couple. There are some startling examples, however. In para. 17 of the Respondent's affidavit, on her case she informed the Applicant of a trip to New York in December, 2016 to visit her brother and she contends that the Applicant consented to the child travelling to New York for the holiday period. She claims that the Applicant was well aware that it was a holiday and that they would be returning. Three weeks after the return to Italy, the Applicant made a criminal complaint about that trip. The court in Italy dismissed the case. The Respondent said, at that time, the Applicant was well aware that she and the child were living in Marbella since February 2015 and that the child was attending Montessori school there. However, they did travel for holidays elsewhere. The effect of that complaint was that herself and the child were unable to leave Italy and that the child could not return to that school in Marbella until the passport was returned by the Italian authorities in or about the month of March 2017. Reference is made to the Italian Order of the 16th November, 2017 in which it is clearly recited that she lived in Spain at that time. Many issues concerning money and possessions are referenced in this case but the focus of this Court cannot be on such matters. The court has been informed in the course of the submissions on behalf of the Applicant that the issues concerning the disputed chattels have been settled following mediation in this jurisdiction.

35. The Respondent contends that on occasion the Applicant failed to attend the child's birthday parties in the past and that she has never inhibited contact between the child and his father, subject also to the child's safety. The Applicant was invited to attend the First Holy Communion of the child, held on the 3rd November, 2020 but did not do so. In July 2020 during ongoing mediation discussions, the child was brought to Dublin to meet the Applicant at the time of the mediation, however, the Applicant did not engage with the child even though they were in the same building.

36. According to the Respondent, the plan was that when the Applicant was sufficiently recovered, she would move with the child and his little sister to Ireland. On the 22nd April, 2020, in the Respondent's case, although she had been happy to provide such assistance as she could during the time of his illness she felt that there was not an appreciation of the care she was giving the Applicant who wanted to move between her accommodation and other accommodation he had sourced nearby with his partner.

Correspondence shows that the Respondent did seek to engage the Applicant on the issue of the child's education going forward in the best interests of the child, but that the Applicant refused to engage. The Italian counsel was aware of this issue and of the correspondence and determined that she ought to be able to dispense with the consent of the Applicant and enrol the child in a particular school in Ireland. The Applicant rejected the Respondent's offers of access in Ireland in July/August 2020.

37. The Respondent contends that the Applicant is officially legally resident in Italy and that he holds a temporary Italian residency card, a condition of which is that he must be permanently resident in Italy. He has an official place of residence in Italy. A letter written as recently as the 25th June, 2020 by the Applicant's Italian solicitors to the Respondent's Italian solicitors states:-

> "*In addition to being the owner of a building in Bologna, Mr. H.O. has recently obtained a residence permit as a business owner also in Italy and is subject in due manner, to the relevant Italian tax regime. Further he does not even answer to the truth to the assumption that he is not entitled to stay in Belgium. He being Mr. H.O. If Ms. R. were entitled to settle permanently with his son in Italy she would certainly not find any kind of opposition on the part of my client*." (child's name omitted)

The court notes that the Respondent herself has renounced her own Italian residency on relocation to this jurisdiction which, under Italian law, she is obliged to do. The Respondent's case is that the Applicant, having agreed to the child relocating to Ireland, has changed his mind and sought to have him relocate to Italy where the Applicant is technically permanently resident. The court notes, however, for the purpose of these proceedings only, at the start of this case the Respondent did agree to treat the case as one of habitual residence being in Belgium.

38. The Applicant can be said to vigorously and completely refute this interpretation and version of events and contends that when they left Belgium originally he never consented to the relocation to Ireland beyond the short holiday that he had envisaged it to be, as when they had left Belgium originally. In support of this version of events he has included an affidavit of his lawyer and friend who attempted to act as a mediator between the parties when tensions had arisen when they lived together in the Belgian residence. While no actual mediation had taken place at the time due to a scheduling conflict, the lawyer rejects any possibility of the consent having existed as it would make his entire beginning negotiation position nonsense. The said lawyer referred to the chattels dispute and terms thereof, despite a confidentiality clause.

39. The Applicant also further states that the residence in Belgium had been agreed by a mutual agreement between the parties. Even though they had been a family which had frequently moved around over the years, evidence of the move to Belgium being intended as a permanent one was based on their businesses' staff and all their belongings being moved to Belgium in an attempt to set down roots and, as the legal submissions stress, the Applicant vigorously denies that there had been any consent given to the possibility of

the child's movement to Ireland. He also exhibited a number of communications between himself and the Respondent which indicate that she had attempted to reassure him that there was not an attempt to cut off the access of the Applicant to the child and that it was not a kidnapping as he had characterised it. He also exhibited an affidavit from the Respondent's chef who indicated they did not have any indication of a move to Ireland before it had happened.

40. The Applicant did cause a solicitor to indicate by letter dated the 25th June, 2020 to the Respondent's lawyer advising of his strong objection to the removal of the child to Ireland. The Applicant contends that despite that, the Respondent removed the child on the 1st July, 2020 and has retained him in this jurisdiction since. The Applicant emphatically denies that he ever consented either as the Respondent says in the period between January and February, 2020 when the parties were living in Belgium or, alternatively, in December in Spain in 2019. He also denies that she agreed to move with the children and Applicant to Belgium whilst he recuperated from his injury and, in return, he agreed to the child's relocation to Ireland thereafter.

41. While the Applicant contends that Ms M is "*clearly very dependent*" on the Respondent, this does not appear to have been a particularly fatal bias for the Applicant as he attempted to hire her through a WhatsApp message sent on the 25th July, 2020. She describes how he had consoled her when she was distraught at being unable to receive a visa to allow her to travel to and work in Ireland. This indicates that Ms M has a good relationship with both parties and appears to act as a second mother to the child, as described by him.

42. With reference to the Defence of Consent and the checklist as referred to in para. 23 of this judgment, clearly the onus of proof of the consent rests on the Respondent, who in this case is asserting consent. The standard of proof is on the balance of probabilities with evidence in support of same which has to be both clear and cogent. It is also not necessary that the consent be in writing, nor is it necessary that there is proof of an express statement such as "*I consent*". To decide whether consent may be inferred from conduct in this case, we have to look at what words and actions there were of the Applicant who is said to have consented to the removal of the child, viewed as a whole and his state of knowledge of what was planned by the other parent. The Respondent contends that, on a number of occasions, agreement was finally reached in or about January and February, 2020 and it was on foot of that that she instructed her Spanish lawyers to withdraw her appeal, and this is set out at para. 29 of the Respondent's second affidavit. As far as she was concerned, she had reached agreement with the Applicant that, as soon as he was sufficiently recovered, she and the children would leave Belgium for Ireland. The Applicant vacated the Respondent's property in Belgium at her request in April, 2020 and, because of the COVID restrictions, they only travelled to Ireland in June, 2020. On her case, as agreed with the Applicant, this is referenced at para. 24 of her first affidavit. The Respondent relies on the affidavit of Ms. M and Ms. B, who were witnesses to conversations in which the Applicant was either positive about this move or in agreement to the child relocating to Ireland. Ms. C's affidavit sets out that the

Applicant, on her evidence, could not but have been aware that this move was taking place on the occasion when he was in the yard of the Respondent's business premises and was observing the packing of both personal items and chattels for the child, which were being packed up for the move. The Applicant disputes the alleged facts however. In the letter of the 25th June, 2020 the Applicant clearly objects to the removal of the child to Ireland. It is the finding of this Court, without being able to resolve conflicts on the various affidavits furnished by both sides, that there was not a clear unequivocal consent. It is noted that the open letter dated the 25th June, 2020 makes it very clear that the Applicant was not consenting to the removal of the child at that point. The Respondent left for Ireland with the child on 1st July, 2020. The Respondent wrongfully removed the child.

The Issue of Acquiescence

The Legal Position

43. The next issue for this Court is the defence of acquiescence. In *K v. K* [2000] 2 IR 416, the Supreme Court addressed the defence of acquiescence in child abduction proceedings. Denham J. (as she then was) quoted with approval from the previous *dicta* of Waite J. in *W v. W (Abduction: Acquiescence)* as follows (pp. 429 to 430):-

> *"The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under The Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return."*

In *Re H (Abduction: Acquiescence)*[1998] A.C. 72, Lord Browne Wilkinson referred to the position as to acquiescence at p.90 :-

"(1) For the purpose of Article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In re S. (Minors) (Abduction: Acquiescence) [1994] 1 FLR. 819 at p. 838:

> *'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.'*

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent;

(3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law;

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

A submission is made on behalf of the Respondent that (1) to (3) might be described as subjective acquiescence whereas point (4) above can be described as objective acquiescence. A contention is then made that the Applicant's acts or omissions can come into play in terms of objective acquiescence. On behalf of the Respondent, it is contended that the court need not be concerned with what the Applicant thought or intended but, indeed, can have regard to what the Respondent believed the Applicant's position to be arising from his or her conduct. Reference is made to the decision of Finlay Geoghegan J. (as she then was) in *F.L. v. C.L*. (Child Abduction) [2007] 2 IR 630 at 640-641:-

> *"…a finding of acquiescence should be made by the court where, having considered all the relevant circumstances, the court concludes that the wronged parent either actively or passively accepted the changed circumstances such that it is reasonable that he or she be bound by it and it would be inconsistent for that parent to rely upon his or her rights under the Convention to have the child or children returned summarily. The same considerations appear to underlie the exception envisaged by Lord Browne Wilkinson where even in the absence of any finding of acceptance by reference to the subjective intent of the wronged parent the conduct of that parent may be such that it has lead the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and is inconsistent with a summary return of a child."*

The burden of proof rests with the Respondent and the standard of proof is the balance of probabilities. A number of factors must be looked at in the context of this case with regard to acquiescence.

44. In the aforesaid judgment, *F.L. v. C.L.*, reference is made by Finlay Geoghegan J. to the case of *B v. B (Child Abduction)* [1998] 1 IR 299, where the Supreme Court determined that where a defence under Article 13 of the Convention is made out, then the court has a discretion as to whether or not an order for the return of the children should be made. In that case, Denham J. set out factors to be considered by the court in exercising its discretion at pp. 313 to 314:-

"Factors to be considered include:

(1) The habitual residence of the child at the time of the removal.

(2) The law relevant to her custody and access.

These two first factors raise the issue of the comparative suitability of the competing jurisdictions: whether the decisions as to the best interest of the child should be taken in an English or Irish court: in light of the Hague Convention.

(3) The overall policy of the Convention and its objective to secure protection for rights of access.

In this latter regard the fact that the mother of a two year old girl has not had access other than on the day of the court hearing of the child is a relevant consideration, though not decisive on its own.

(4) The object of the Convention to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

(5) The circumstances of the child, information relating to the social background of the child, as stated in the final paragraph of art. 13 of the Hague Convention.

(6) The nature of consent of the appellant. Was it consent to the removal of the child from England for some time or in effect a waiver of custody of the child until she was 16? In this regard the circumstances of the making of the consent are relevant.

(7) The litigation in England and the decision on the 5th August, 1996, by the English High Court, Family Division, that V.B. be a ward of court, that the respondent return the child to that jurisdiction, and that V.B. reside with the appellant.

(8) The matter of undertakings, which are settled law in this jurisdiction, especially in relation to very young children."

Features of Note

45. This Court notes that on the 13th June, 2020, the Applicant instituted proceedings in the Irish High Court Commercial List against the Respondent in relation to the chattels, which he alleged had been stolen by her on the 7th June, 2020 and he says that, on the 1st July, 2020, the Respondent travelled with the child from Belgium to Ireland without his knowledge or consent. On the 10th July, 2020, the Applicant filed a criminal complaint in Italy in respect of what he said was the Respondent's abduction of the child to Ireland. Litigation continued in the Commercial List in the High Court in Ireland to expedite the matter and took place in the first two weeks in August in Ireland but, interestingly, proceedings seeking the return of this child were instituted as recently as the 10th February, 2021, some seven months after the alleged abduction. The Applicant makes no comment in relation to a second child who was also relocated to Ireland. The Applicant is not the natural father of the second child. What is clear is that the Respondent returned at the end of June to Belgium with the child so that he could enjoy a period of access with his father. Thereafter, they came back to this country.

46. The Applicant lodged a criminal complaint in Italy concerning the relocation of the child on 10th July, 2020. Viewed objectively, he must have known that the Italian authorities had no jurisdiction concerning the removal from Belgium where the Applicant contended the child was habitually resident. He must have known and/or been advised that the Italian authorities had no power to return the infant to any jurisdiction other than to Italy where clearly the Applicant accepted that the child was not habitually resident. The Applicant did not notify the Respondent of the submission of his complaint to the Italian authorities. It is very hard to understand why he made the criminal complaint in Italy in respect of the Respondent. It is clear from open correspondence from his lawyers that, had there been a removal of the child to Italy, it would not have been a problem, he would not have objected.

47. This Court notes that in 2019 the Respondent made an application in the Spanish courts to relocate to Ireland, and this was refused. The Respondent withdrew her appeal on the basis of the applicants alleged promise to agree to her relocation to Ireland with the child. Points against acquiescence include the Applicant's filing of the criminal complaint in Italy on the 10th July, 2020 in response to the removal of the child. The investigation of this complaint remains ongoing. Correspondence between the Respondent's solicitor and the Italian Embassy reflect the fact that the Applicant was opposing registration of the child on AIRE in or about June 2020 and to the enrolment of the child in a school in Ireland without his knowledge or consent. On the 25th November 2020 the Applicant's Italian lawyer also lodged an application with the Central Authority in Italy.

48. The Applicant refers to *G (V) v. McD (P)* [2006] IEHC 69 in which Finlay Geoghegan J. (as she then was) relied on the judgment of Barron J. in *R.K. v. J.K.* [2000] 2 IR 416 at p. 451:-

> *"…A common thread is emerging from the cases. Whether there has been acquiescence depends upon the answer to the question, did the wronged parent really intend to accept what had occurred? This gives rise to a consideration of all the relevant factors. If the answer is no, that is the end of the matter unless there is apparently a clear and unequivocal acceptance wholly inconsistent with seeking a summary return of the child."*

49. The Applicant agrees that on the 25th November, 2020, his Italian lawyer lodged an application with the Central Authority in Italy even though he had already been deemed not to be resident there. The Applicant relies on the principles established by the case law as being very clear so far on the Convention in that they are not enquiries into all aspects of custody and access or a full blown examination into a child's situation. It is further illustrated that the purpose of Convention cases is not to decide upon contested issues of fact and that the law requires the return of the child to the jurisdiction of habitual residence for the determination of issues such as custody or access except in exceptional circumstances and, even in such circumstances, the court must still exercise its discretion to return a child. In *P.L. v. E.C*. [2008] IESC 19 , Fennelly J. stated at para. 118:-

"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 Applicant does have a residence number and address in Italy. Proceedings seeking relief in this jurisdiction were brought on the 10th February, 2021, seven months after the alleged wrongful removal from Belgium.

50. In *F.L v. C.L. (Child Abduction)* [2007] 2 IR 630 Finlay Geoghegan J. (as she then was) agreed with the characterisation by Balcombe L.J. in *Re A. (Abduction: Custody Rights)* [1992] Fam. 106 concerning the time taken in which to commence proceedings:-

> *"…of an object of the Convention being the immediate and automatic return of children who have been wrongfully removed or retained to their State of habitual residence. Also, that the purpose of the exceptions are directed to the interests of the children as distinct from the parents. The object of an immediate return requires both that the wronged parent make a prompt request for the return of the child and that the national authorities and courts adopt expeditious procedures."*

She notes that *"Whilst Article 12 applies to proceedings commenced within one year this does not mean that a parent is permitted to await commencing proceedings until shortly before the expiry of the year"* and she notes that "*…a parent may be found to have acquiesced within the meaning of Article 13 through inactivity*". She then goes on to discuss the purpose of the exceptions as is stated by Balcombe L.J. as to avoid distress to a child and *"Where a defence under article 13 is established it does not automatically follow that there will not be an order for return". She points out that "Acquiescence or any other defence simply gives to the requested court a discretion as to whether or not to make an order for the return of the children in accordance with the decision of the Supreme Court in B. v. B. (Child Abduction) [1998] 1 I.R. 299"*. She notes that:-

> *"The creation of such a discretion by establishing a defence appears to [her] consistent with the above analysis of Balcombe L.J. for the purpose of the exception or defence of acquiescence in the context of the objects of the Convention":-*
>
> > *'Acquiescence will normally mean that the child has been left in the country to which he or she has been wrongfully removed or retained for a longer*

period than is envisaged by the requirement for prompt applications and expeditious procedures under the Convention. The Convention, in the interests of the child in such circumstances gives the requested court a discretion which permits it to take into account the then position of the child albeit in a context of the objects of the Convention'."

In that case, Finlay Geoghegan J. referred to "*Inactivity and delay in commencing an application under the Convention for approximately 9 months*". She did not find herself satisfied that acceptance in that case by the mother, who was the applicant, *"should be inferred from such inactivity and delay"* for reasons particular to that case. In that particular instance, fifteen months was the period during which the children were away from their place of habitual residence and she noted that *"it was important that the return of the children be carried out in a way which is appropriate and in their interests*". On the particular facts of that case, the necessity for the mother to find accommodation in the place of habitual residence placed a stay on the order being made and put the matter in for mention at a later date to hear submissions as to the necessity for any undertakings by either party regarding the return and the timing of the coming into effect of the order for return.

51. With reference to *G (V) v. McD (P)[*2006] IEHC 69, Finlay Geoghegan J. (as she then was) stated that *"…inactivity and delay in commencing an application under the Convention for approximately 9 months may be a fact from which a court will infer passive acceptance"* however in this case she found that there was no active acceptance by the mother, who was the applicant in that case, of the removal of the children notwithstanding that there had been nine months of inactivity and delay in commencing child abduction proceedings.

52. In reference to the primary concern of the court in determining acquiescence as stated in *R.K. v. J.K. (Child Abduction:Acquiescence)* [2000] 2 I.R. 416, In *Re H and In Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 and para. 43 of this judgment, the court asks itself was the subjective intention of the wronged parent on the question of fact to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

53. There is one exception and that is where words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced. The Court's finding is that while the Applicant tried other avenues first, he still instituted proceedings within one year, seven months to be precise, of the wrongful removal of the child. His motivation in alleged conversations and his various court applications in a number of countries, are matters for the place of habitual residence.

54. In April, 2020, the Applicant left the Respondent's property in Belgium at her request because he had recovered sufficiently and he was in a continuing relationship with a third party. The question is whether the wronged parent either actively or passively accepted the changed circumstances such that it is reasonable that he or she be bound by it and it

would be inconsistent for that parent to rely upon his or her rights under the Convention to have the child or children returned summarily. When the Applicant did institute proceedings he litigated this case forcefully. His motivations are matters for consideration in another forum. This Court is not entitled to engage in a value judgment on either party. This Court finds that the Respondent has not proven on the balance of probabilities that the Applicant acquiesced in that past 1st July 2020, the Applicant never acted in a way which would be inconsistent with seeking a summary order for the child's return. The onus of proof is on the Respondent. The evidence viewed as a whole does not conclusively prove acquiescence and from the 10th February 2021, the legal steps taken could not be construed as acquiescence.

55. This is not a case where the Respondent at any time concealed her whereabouts. She had business interests in Ireland since 2019 and had formed a company here and was carrying on business here. The defence of grave risk under Article 13(b) is a forward looking defence and the court now looks at the risk of exposure to physical or psychological harm, or otherwise the placing of the child in an intolerable situation. Applying the reasoning in *C.T. v. P.S.* [2021] IECA 132, paras. 49-62 at para. 60, Collins J. referred to the UK Supreme Court judgment in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27:-

> *"The approach in In re E involves, in cases where there is 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 41–43."*

Interestingly, the Applicant has not referred to any protective measures which might address past admitted violence against the Respondent which he referred to as a "heated altercation". The Respondent indicated in her response that the violent incident ended their relationship in circumstances where she suffered severe facial injuries requiring an 80-day stay in hospital.

Grave Risk of Physical or Psychological Harm, or Otherwise place a Child in an Intolerable Situation

56. In considering the defence of grave risk, the court must take cognisance of Article 11.4 of the Regulation which stipulates:-

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

57. The Supreme Court decision of *A.S. v. P.S. (Child Abduction)* [1998] 2 IR 244 identified grave risk, as per Denham J., as follows:-

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

In assessing the best interests of the child the European Court of Human Rights in *X. v. Lativia* [2014] 59 EHRR 3 stated at para. 101 of its judgment:-

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

In *C.D.G v. J.B.* [2018] IECA 323 Whelan J. stated that:-

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

In *Neulinger and Shuruk v. Switzerland* [2012] 54 EHRR 31the European Court of Human Rights outlined the principles that need to be applied when assessing the effect of the return of the child which Finlay Geoghegan J. observed in *R v. R* [2015] IECA 265 when assessing grave risk:-

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

McGrath J. in *M.I. v. M.B.R.* [2020] IEHC 504 highlighted the trust courts in this jurisdiction must have in courts in other Convention signatory countries:-

> *"It seems to me that the authorities establish that to ensure the proper functioning of the Convention, to ensure compliance with the State's obligations thereunder and on the basis of mutual respect and comity, courts in this jurisdiction must as a*

matter of principle have and place, trust in courts in other Convention signatory countries, to protect the child at the centre of the application. This is particularly the case where the country in question is a member of the EU, is a signatory to the European Convention on Human Rights and the Convention on the Rights of the Child."

58. In *R.K. v. JK. (Child Abduction Acquiescence*) [2000] 2 I.R. 416 Barron J. approved the basis upon which a defence of grave risk might succeed as set out 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."*

In *C.A. v. C.A.* [2010] 2 IR 162, Finlay Geoghegan J. (as she then was) stated that grave risk is a rare exception to the State's obligation under the Convention to return wrongfully removed children back to their jurisdiction of habitual residence and noted that, in order to make out this defence, "clear and compelling evidence" was required in which respect, the evidential burden of proof rests on the person opposing the order for return.

59. In *I.P v. T.P*. [2012] IEHC 31 Finlay Geoghegan J. approved the approach adopted in *re E (Children)* [2011] UKSC 27:-

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

60. MacGrath J. in *M.I. v. M.B.R.* [2020] IEHC 504 looked at the twofold test set out in *I.P. v. T.P.* by Finlay Geoghegan J.:-

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

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

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

61. This Court finds that while there are risks in this case the situation can be protected by allowing the Respondent to seek protective orders prior to her return with the child. Secondly, it is understood that the child is very close to his mother and that the child might not be removed from her care pending further orders in the Belgian Courts.

62. The Applicant is agreeable to lodging a bond as a protection against his removal of the child to any other place or country within or outside the E.U.

The undertakings will be put in place to ensure the position pending court hearings abroad. It is noted that the Respondent contends that there is over €600,000 outstanding in maintenance arrears.

63. Reference is made in *I.P. v. T.P*. as follows:-

"Intolerable" is as has been stated "a strong word" and when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" citing in re D [2007] 1 AC 619 at para. 52 and In re E, the Court, at para. 34, having referred to this definition observed, "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. Amongst these, of course, are physical or psychological abuse or neglect of the child herself." I respectfully agree with this observation…"

64. Peart J. in *G. v. R*. [2012] IEHC 16, at para. 44, stated:-

"The phrase "intolerable situation" is vaguer still in my view. Given that it is provided for in the Article as an alternative to either physical or psychological harm, it must embrace a wide range of situations, factors and circumstances in the place of habitual residence, which, though falling short of being likely to cause physical or psychological harm, may yet amount to situations which the child ought not to be expected to endure. I take "intolerable" to mean "unbearable" or "other than what the child should reasonably be expected to endure"."

65. The Concept of an Intolerable situation was also considered in the judgment of Barron J. in the case of *R.K. v J.K* which was quoted above in the section dealing with acquiescence He said at pg. 451:

> *"In my view the words "intolerable situation" relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed."*

He then went on to quote the American case of *Friedrick v. Friedrick* (1996) 78F 3d 1060 which included a parent's emotional dependence on the child as a factor which would go towards grave risk.

66. The Respondent contends that the Applicant has been both physically and mentally abusive to the Respondent and to the child in the past and that to order the return of the child to Belgium would place him at grave risk of further harm at the hands of the Applicant or otherwise place him in an intolerable situation.

67. The above conditions for return ought to protect the situation.

Dr. O'Connor's Report and Evidence

68. Gearty J., by order of the High Court dated the 25th March, 2021, directed Dr. Colm O'Connor to prepare a report in relation to the wishes of this child. This child, at pp. 5 and 6 of Dr. O'Connor's report under the title "*[Minors] disclosures and preferences*", expressed a clear view that he wanted to stay "*in Ireland*". At item 2, he referred to his childminder, Ms. M and envisaged her moving to Ireland rather than returning the child to Belgium so that she could assist in his care.

69. Under item 3, his clear view was that he would like to live with his mother and would not like to live with his dad, that he likes living with his mum.

70. In his report, Dr. O'Connor uses the word objection which is later clarified in evidence. At item 4 in relation to a possible return to live in Belgium, he said he did not really like Belgium, he would prefer to stay here really and that there was no way that he would want to live with 'dad', "I did not like it there in Belgium" and that his favourite places to live in would be, in order of preference, (1) Ireland, (2) Spain, (3) Belgium. Item 5 shows his unwillingness to return to Belgium even for access when he suggests that he does not want to travel there for contact with his father but would prefer his father to travel to Ireland for contact. Under the title "Impressions and Conclusions", at pp. 6 to 8, and under item 9, the conclusion of the report is "[minor] does not wish to return to Belgium".

He was asked to give three wishes to change his life and he only exercised one, that was to live in Ireland and Dr. O'Connor was of the view in his report that this was a clear objection to returning to Belgium.

71. In relation to the childs's maturity, Dr. O'Connor found his views to be age appropriate, rational and consistent. He recorded not just what the child said but how he said it and he felt that his disclosures were consistent and congruent with his emotions and narrative. He described the child as not showing any signs of experiencing psychological distress. He found the child to be consistent, pragmatic, a clear-headed young boy whose answers to questions were immediate and clear and that he felt that he had the maturity at age ten to declare his preferences and presented as being mature and intelligent. He did not present non-verbal signs or signals of inconsistency, stress, sadness or anxiety and seemed capable of forming his views. He felt that he showed intellectual and emotional intelligence which was age appropriate and congruent and that his answers were honest and child-appropriate. The view of this assessor was that this child should have his views given significance given that it was this child who would have to live with the consequences of the court's determination in these proceedings. Dr. O'Connor noted that the Applicant did not contradict the Respondent's contention and averments as to the child's intelligence, maturity and progress at school, and Dr. O'Connor noted that the school reports show that the child has an ability to understand the issues discussed with him and express an informed view.

The child does appear to have a manifest connection with Ireland, he referenced his home, his mother, his grandmother and his sister, his school, his friends, his activity and, most notably, his involvement with GAA in the form of hurling and football. It was significant and stark that this child could not recall the name of the school he attended in Belgium (p. 6 of the report of Dr. O'Connor). He had the maturity and ability to compare living in Ireland, Spain and Belgium and ranked them in order of preference, (1) Ireland, (2) Spain, (3) Belgium. Dr. O'Connor confirmed that he did not observe the child to be manipulated or influenced in a negative way and he had no sense that the child was coached (p. 8). In his summary on p. 9, he noted the child to be happy, safe and content and that there was no evidence to suggest that he is coerced or wanting to return to Belgium or that he regrets that they have come here.

72. Regarding happy memories with his mother, he said *"my happiest memories with my mum is that I have happy memories everyday"*. Interestingly, in the last paragraph of this report, it notes the following:-

> *"What was disclosed was said at this point in time and does not mean that his relationship with his father cannot be improved in some ways. In having to attend at this interview [the child] was required to make declarations and state preferences that in normal life children should not have to do. Normally things evolve and children are afforded the freedom to change their minds, to let things unfold and do not have to make declarations about their lives or futures. Therefore this report must be understood in that context. It is important that contact and*

rapport is re-established with his father even if from Ireland and that the long-term benefits of this contact be honoured as a matter of principle accepting the fact that he seems happy with his mother."

Importantly, the assessor notes the following:-

"My hope is that he will not be held to account for what he has said and that he is afforded the freedom that children, to find their way in life. That he is, at this point in time, somewhat distant from his father should not deprive him of the freedom to allow this to change or evolve overtime, nor should his disclosures be interpreted as an objective assessment of his father of a definitive prognosis for the future."

At para. 9 of the report, the child described the worst fight his parents had when he was four and, that after that, they lived in different houses and described them as shouting and roaring and that that was the worst.

73. This Court decided that it was important to hear Dr. O'Connor's evidence before finally deciding this case simply and solely because the court had a concern at his use in his summary report of the word "objection" in terms of the child, which gave the impression that this was a formal objection by the child even though the wording in the report refers to preferences. For the sake of completeness, the court sat specifically to hear this evidence and asked Dr. O'Connor about this issue. It was quite clear that Dr. O'Connor himself, while he had undertaken some child abduction interviews, explained that these were very much focused on the terms of the questions put, but it was also clear to the court that he did not make, nor is he expected to make, a legal distinction himself between objection in terms of its meaning in Hague Convention law and preferences as we understand same. He clarified his report in his evidence by saying that the child had no particular objection to going back to Belgium but his very strong preference was to remain in Ireland. The court asked Dr. O'Connor the hypothetical question as to whether explaining to him that the order attaches to the child if a return order is made and that would apply whether or not the mother decided to travel. The court fully accepts that this was not an issue canvassed, but nor was it ever claimed by either party, and he reiterated his opinion that this child saw the mother as a primary identity figure and that she was his primary carer, and that this would be a matter which would need to be further teased out were the child himself simply to be returned on his own. He also noted that this was in no way a psychological assessment, but felt that the child was mature and was a normal ten-year-old and these are the main features of that interview. This Court accepts this evidence from Dr. O'Connor, as correctly interpreting the views of this child.

Conclusion and Findings of Fact

74. This Court is very well aware of the importance of Ireland's commitment to The Hague Convention and to the *Brussels II bis* Regulation. On the balance of probabilities the Respondent has agreed to treat Belgium as the place of habitual residence given that that is where the parties were for approximately six months prior to the removal of the child to Ireland and he had lived there for various periods of time over the years. The child is one

of two children of the Respondent and the second child is not a child of a relationship with the Applicant. That has some significance in this case. The evidence must be looked at in its totality. Quite a number of affidavits have been sworn by people who work for either one or both parties and that is also a matter of some concern and some are sworn by family members and, again, naturally, certain caution has to be observed in assessing these affidavits. It does seem to this Court, however, that the Respondent had considerable discussions with the Applicant about a relocation to Ireland and this Court concludes, prior to her moving to Ireland, that while there may have been consent to her travelling witnessed by the fact that there were numerous conversations witnessed by third parties, an indication that it was not an agreement which was easily achieved, this Court finds, that at some point then thereafter, that the Applicant changed his mind about that, therefore, there was not unequivocal, clear and cogent consent. This Court is not entitled, however, to make a moral judgment on either party. The Hague Convention and Regulation sits firmly on top of existing domestic legislation and for good reason.

Findings of Fact

75. This Court accepts that the parties resided in Belgium.

- ☐ January to November 2010.
- ☐ April 2011 to November 2013.
- ☐ September to December 2014.
- ☐ December 2019 to July 2020.

This Court finds that they both have accepted Belgium as the place of habitual residence.

That the Belgium Court is where matters at issue between them ought to be decided.

On the balance of probabilities the Respondent did not successfully raise a defence of consent given that there was no cogent, clear, unequivocal consent given. There was a wrongful removal of the child and he was therefore wrongfully retained in Ireland.

This Court finds that during the initial seven months post removal the Applicant was not idle, making criminal complaints in Italy as well as an application to the Central Authority there. Nor did he agree with the registration of his child in an Irish school. When the Applicant instituted his proceedings, once he did so he pursued same with vigour and he did not acquiesce, on the balance of probabilities. He pursued relief in Italy firstly, for reasons perhaps of preference related to his own status there, but it is not for this Court to decide on his preferences or motivations. Rather these are matters for another forum.

Many issues were raised regarding grave risk and the question of the child's objections. This Court finds that the threshold in Convention terms is not reached. Preferences do not meet the legal test of objection.

Any complaint regarding the defence of grave risk can be dealt with by the use of undertakings and by a stay on the order to ensure an orderly and safe return of the child to Belgium.

The child is very close to his mother. It was never canvassed that she would refuse to return with him to Belgium but time must be afforded to effect an orderly and appropriate form of return.

I find that while there is a level of risk, not amounting to grave risk, same can be managed by using undertakings. The child remaining in the mother's care pending said return, ensures his wellbeing and protection pending return.

No free standing defence of objection exists. I find that this child does not object to returning to Belgium so long as his mother is with him and he also has a half-sister. It is the clear understanding of the Court that the mother is likely to return with this child and his half sibling. The order for return is predicated on time being given for the mother to seek protective orders / initiate proceedings in Belgium for protective orders and such other relief as is deemed appropriate.

The child is found to be mature and sensible, has a strong preference to live in Ireland and that issue is surely a matter for the Belgian Court. He is sufficiently mature in age for his views to be taken into account but does not object to the return.

Many issues / facts are in dispute and must be resolved by the other forum. Belgium is best placed to resolve such disputes. Many complaints are made about the Applicant's behaviour. Belgium is best placed to resolve and determine all such issues, not only what was said but why it was said and the context in which it was said. Given that the Respondent has failed to meet the high threshold required under Convention law, this Court has no discretions and the child does not object to return.

The Applicant describes a "heated altercation". The Respondent described a violent end to their relationship and a C.T. scan to prove same and referred to an 80 day stay in hospital to repair injuries to her face. This is an outstanding matter still before the Italian Court, on the criminal law side.

This is very serious and must be given great weight. The appropriate court/courts will deal with this matter both in a civil and criminal law context.

A stay will be put on this order pending further, more precise information concerning the likely time within which these issues will be addressed by the court of the country of habitual residence, and in order to hear the parties on the issue of such undertakings as are deemed appropriate.