COURT OF APPEAL

CIVIL

Record Number. 2022/285

Neutral Citation Number: [2023] IECA 104

Donnelly J.

Ní Raifeartaigh J.

Binchy J.

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

IN THE MATTER OF THE HAGUE CONVENTION AND

IN THE MATTER OF A.B., A CHILD

BETWEEN/

D.B.

APPLICANT/APPELLANT

AND

H.L.C.

MOTHER

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 28th day of April 2023

Introduction

1. This is a case involving the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention") and the Child Abduction and Enforcement of Custody Orders Act 1991. It involves an appeal in respect of an order of the High Court refusing to make an order for the return of a child to the United Kingdom on the basis of the "grave risk" defence. The case raises an issue which arises relatively frequently but which is nonetheless very difficult, namely the assessment by a court in a Convention application, which is summary in nature, of allegations of domestic abuse, together with the question of whether the protective measures in the requesting jurisdiction would be sufficient to reduce a risk below the characterisation of "grave" in the particular circumstances of the case. The issue of protective measures is of the greatest importance in this case by reason of certain messages (a text, and a social media posting) written by the (applicant) father. The mother contends that these messages, taken in conjunction with the father's history, demonstrate that no protective measures in the requesting jurisdiction could have the necessary deterrent effect upon this particular individual.

2. It is not in dispute that the appellant father has custody rights in respect of the child, that he was exercising his custody rights, that the jurisdiction of her habitual residence is the United Kingdom, that the removal to Ireland of the child was without his consent, and that it was a wrongful removal within the meaning of the Convention. The sole issue in the case is whether the High Court judge was correct in reaching the conclusion that there was a "grave risk" that an order returning the child to England would expose the child to physical or psychological

harm or otherwise place the child in an intolerable situation within the meaning of Article 13(b) of the Convention.

3. Much of the appeal concerns the conclusions of fact reached by the High Court judge on the basis of the affidavit and exhibits before the court, and it is therefore necessary to set out a relatively detailed account of the evidence in the case.

The evidence before the court

4. The respondent mother (hereinafter "the mother") was born in the United Kingdom but lived in Ireland between the age of 12 and 19. She returned to the United Kingdom when she was 19 years of age. After her return to England, she started a relationship with the appellant father (hereinafter "the father"), who is an English national. She became pregnant and gave birth to a daughter in May 2021. The evidence establishes that they lived together as a couple before she left the jurisdiction for Ireland in April 2022, when the baby was 11 months old.

5. While they were living together as a couple, they were living in a house purchased by the mother. She had purchased the house in a particular location in England with some inheritance money without a mortgage. He had previously lived in a different location but moved to the n house with her. As a result, some of the information, in particular from the police, comes from two different police forces, corresponding to the two different locations.

6. It is clear from all the affidavits that when the child was born in May 2021, the mother received a visit in hospital from a social worker and police officer who informed her they had concerns for the safety of the baby because of her partner's history.

The child protection case conference of 28th May 2021

7. On the 28th May 2021, both the mother and father attended a child protection case conference with the local social services. It is not in dispute that the mother's position at that meeting was that there were no problems between her and the father at that time or previously.

8. I will here briefly describe some of the contents of the case conference report of the 28th May 2021. I would observe that some caution has to be exercised with regard to this report because some of the contents consist of opinion and hearsay which would not be admissible in court proceedings, and further, there was some inconsistency in terms of the information within it.

9. It is an 18-page document with an additional 6-page document attached, entitled "Initial Child Protection Plan". Those present at the meeting included a social worker, a midwife, a health visitor and a representative from the police. Various views were expressed at this meeting. For example, in terms of the mother's social support, the social worker thought that the mother had good links with neighbours, had already received a visit from some relatives, and had a large family who planned to visit, whereas the midwife thought that the mother was isolated with no family support/social network, although this was improving, and the health visitor said that she was "extremely isolated in [name of social area]". Thus, it can be seen that there was a range of opinion even on this issue.

10. On the issue of domestic violence, the report contains a number of different indications. The report records the mother as saying that everything was going well and she had no issues. However, the views of the social worker appear to have been more guarded; she said that while there were no reports of domestic abuse between them, they had not lived together before as a couple, and she suggested that the father had not followed the advice of social workers in respect of contact with his older child from another relationship. She mentioned his past use of cocaine and said that it was not clear whether there was any current drug use, and mentioned a history of alcohol abuse which "*may or may not have been addressed*". Reference was made at the meeting to the father's history of PTSD (arising from his experiences in the British Army), and that he had suffered from depression and anxiety.

11. The police contributed precise information about the father's previous convictions. These included two assaults occasioning actual bodily harm in 2013 (described as punching a male to the face, and punching a male causing cuts to head, respectively); and a battery in 2011 (involving verbal abuse, homophobic words, and spitting on the victim). There was also a conviction for battery in 2017 which involved an assault in a hospital on a health professional. There was also a conviction for damage to property in 2014, which involved his smashing the kitchen window at his mother's address when she refused him entry because of his behaviour.

12. Under the heading of "Reprimands/Warnings/Cautions" there was one battery in 2010, which involved being drunk and abusive in a shop, and two public disorder offences in 2010.

13. Obviously, given the dates, these convictions and reprimands dated from some years before the father had entered a relationship with the mother. The father maintained that all his violence was in the past.

14. The report of the meeting as a whole shows that there were concerns as to whether the father's violent tendencies had been consigned to history, as he claimed, or whether domestic violence incidents might begin to occur as time passed, given that the relationship was still in its early days. A formal child protection plan was drawn up because it was concluded that criteria for child protection were met, although it was "*fully acknowledge[d] that there has been no recorded domestic violence incidents in this relationship*".

15. There were some references to domestic violence in the narrative of the report, but it is important to acknowledge that there were no convictions recorded for domestic violence. The references or opinions may have been based on the fact that allegations of domestic violence had previously been made but had not resulted in charges or convictions.

The narrative as continued in the mother's affidavit

16. Turning to the mother's affidavit in these proceedings, she acknowledges that she indicated at that case conference meeting of 28th May 2021 that she had not suffered any

domestic violence at the hands of the father. (Indeed, it may also be noted that in a contemporaneous text messages from the mother to the father, she said: "…*I've just had a baby, had a major operation, haven't slept in days….and had to meet with social workers and cried to them telling them how lovely and amazing you are and there's absolutely no reason to worry about me or my baby*", and "*I told them it's not fair on you continuously bringing this s***. up"*).

17. In her affidavit, the mother goes on to mention the various risk factors identified at the meeting concerning the father, already described above (PTSD, criminal convictions, use of cocaine and so on). One particular averment in her affidavit was the subject of much comment by the father's counsel at the appeal hearing. This was her averment that the father had been accused of sexually assaulting his older child from a previous relationship; the allegation was made by his former partner. In fact, although the allegation was investigated, this did not lead to any charge, and importantly the father gained unsupervised access to the child in question from by court order dated the 22nd June 2021, such access to be every alternate weekend. The father's counsel laid considerable emphasis upon the fact that, at the time the mother swore her affidavit, she knew this. It was submitted that in those circumstances, her averment in the affidavit in these proceedings could only have been to prejudice the court against him and that the court should see it as a red flag in terms of her credibility generally. I would agree with the submission that it is hard to understand why this averment was included other than for this reason in circumstances where she knew the outcome of the investigation and the court order, and failed to mention those.

18. In terms of the situation within their own relationship, the mother averred that violence started to come into their relationship some months after the baby was born, in or about August 2021. She says that from this time, the father started to have violent outbursts, which she says

increased in frequency and escalated between then and April 2022, to the point where they were occurring on a daily basis. She also avers that he was using cocaine at the time.

19. Although she says that the violence started to escalate in August 2021, she described a particular incident of physical violence on the 16th July 2021. In a graphic description, she said that the father assaulted her by pulling her hair and biting her head while the baby was asleep in the pram. She sought help from a neighbour and exhibited a contemporaneous exchange of texts between herself and the neighbour in which she said, "*Can you get Ray to get [the father] out of my house. He's just pulled me by the hair and bit my head*". There is also an exchange of texts with the father in which she says "*You pulled me by the hair and bit me on the f**ing head while I was stood next to my baby. No chance in hell we will ever be together*" and "*All the s***you have done and I've let slide, that was the final straw*". I consider these contemporaneous texts to be of assistance in assessing what was going on between the parties at the time.

20. In her affidavit, she then described a number of violent incidents between August 2021 and April 2022, culminating in events on the 11th April 2022. I do not propose to list these here. I note that the social services were involved with the mother until January 2022, when they closed the file, a fact which the mother herself acknowledges. It was a matter of comment by counsel on behalf of the father that the mother had not mentioned these alleged incidents to them contemporaneously. It was submitted said that the absence of any contemporaneous complaint of violence to those services during the relevant period was significant in circumstances when they were actively engaged with her, and that the absence of any contemporaneous complaints to them undermined the credibility of her later allegations of physical violence.

The events of 11th April 2022 as described by the mother in her affidavit and police statements respectively

21. The mother described the events on the 11 April 2022 in both (a) her affidavit and (b) two statements to the local police on that date. The latter provide useful contemporaneous evidence of the complaints she was making at that time.

22. In her first statement to the police, the mother describes an exchange of sharp words between them that morning over breakfast, following which he threw his cereal bowl at her and it hit the wall beside her. Her daughter was sitting on the floor next to her and the milk from the cereal over them both. The child jumped and was scared. The mother said she told the father that she was ringing the police as she was "*not doing this any more*". A short time later, she alleged, he broke her phone. She went to her laptop to send a message to her mother, and he started shouting at her, so she gave it to him. She said: "He said he deleted the message you sent you to your mam (sic) and I've changed your password on Facebook". This may be noted in light of the later allegation by her on affidavit that he had sent an email seeking her mother's address, pretending to be her. She said she grabbed some food and said she was going to nieghbours, and he was shouting at her to get back inside, and then said: "Get back inside or I'm going to stab you". She said she waited outside for 5 minutes to leave him to calm down.

23. In this statement to the police, she also gives a history of their relationship. She describes how the visit from the social worker and police officer in the hospital but says that everything was fine at that time, and it was only later that he started shouting at her and getting angry. Interestingly, she does not say anything about being hit or bitten or physically assaulted in any way. Indeed, on the contrary, she said that the father "*has never assaulted me*", although she added that he "*breaks everything I own for no reason*". She also said that he was loud and scared the baby, and that he constantly insulted her. She said he was a loving dad who cares

for the child, but that she could not keep "*living like this*." She wanted to separate from him and while she felt said for the child, she felt it was "*unhealthy*" for her to live in a family like this. She said that now she had come to the police station, she felt scared and he would react. She said "I am scared for [the child] and myself. I fear further violence from him". She said she was contemplating going to Ireland to stay with her family as she was fearful that if he were released and came back to the house, "things will escalate".

24. In her second statement to the police on the 11th April 2022, she said that on the same day at 9.45pm she was at the kitchen sink in her home when she heard the front door open. She turned around to see the father standing in the house, which startled and scared her as she did not expect to see him. He told her he had not been charged with anything and would stay there until he found somewhere. He told her he was not angry but he wanted to say goodbye to the child. She gave him the child and then took her back upstairs. When she came back, he was reading on the screen of her laptop that she had booked tickets to go for Ireland. He then smashed the laptop beyond repair. As he started to leave, he took the keys from the front door and she asked for them back. He threw them past her into the kitchen and as he walked out he shouted, "*I'll just break in tomorrow anyway*". He walked away and out of sight. She went to a neighbour and phoned the police, who then took this second statement.

25. In her affidavit in these proceedings, the mother provided an account of the above events on the 11th April 2022. She referred to these statements but apparently did not have them in her possession while swearing the affidavit because she says she was awaiting the actual statements from the police at the time.

26. During the appeal, counsel on behalf of the father drew attention to a particular paragraph in her affidavit, which he submits was intended to paint a misleading portrait insofar as it tried to imply that the father was not supposed to come back to the house. The passage in question says:

> "While your deponent remained out of the house the police attended the scene and arrested the applicant who was taken in for questioning. The police then sent out members of the force to change the locks of your deponent's property that evening. The police had indicated to your deponent, whose phone had been broken earlier in the day by the Applicant, that they would call out to her and let her know if the Applicant was released from custody. Whilst your deponent was tidying the home the Applicant walked back into the house. A further incident occurred whereby he wanted to hold baby A. Your deponent has (sic) terrified and coaxed him out of the doorway of the house and eventually he left. Your deponent then attended a neighbour's house and called the police again. The police arrested the Applicant for a second time while he was sitting in his car down the road from your deponent's house".

It may be noted that the High Court judge considered that the return of the father to the house in those circumstances to be significant. The father's description is noted below.

Events after the 11th April 2022 as described by the mother

In her affidavit, the mother said that she then went to stay with her uncle and aunt, and that the [named] Police made arrangements that she would be supported at Holyhead by a liaison officer who escorted her from the train to the ferry. The police also alerted the port authorities to ensure that the father was not buying a ticket to follow her. They also alerted Tusla, who carried out an initial screening but decided that no child protection and welfare service was indicated and that the referral would be closed. The support of the police in the United Kingdom in this regard is of interest for a number of reasons. It shows that the English police were taking her concerns very seriously indeed. It also, arguably, supports the view that the system in the United Kingdom is capable of protecting the mother when necessary. Curiously, it also seems that the police were assisting the taking of a child out of the jurisdiction without the consent of the father. The non-molestation order

27. On the 22nd April 2022, the mother obtained a non-molestation order on an *ex parte* basis from the Family Court. It is not clear whether or not the mother was still in the United Kingdom on this date. The matter was made returnable to the 6th May 2022.

28. On the 6th May 2022, the father consented to the finalisation of the non-molestation order on the 6th May 2022. He accepts that he consented to the non-molestation order but denies that he admitted that there was any reason for it to be made.

29. Importantly, the non-molestation order forbade the father from using or threatening any violence towards the mother; threatening, intimidating, harassing or verbally abusing her; going to her home address or going to any property at which he was aware she was living; sending any threatening or abusive, letters, emails, texts or voicemail messages to her; making any threatening or abusive telephone calls to her; communicating with by any means including all forms of social media except through her solicitors; or damaging or attempting to or threatening to damage any property belonging to her or the contents of her home.

30. The father brought his own application before the family courts for a child arrangements order. The court made an "indirect contact order" whereby the mother was to send pictures, information and welfare updates about the child to her aunt, who would then forward it on to the father.

31. A court order dated 18th May 2022 records the fact that it was informed that the mother had travelled to Ireland on or about the 23rd April 2022 as a temporary measure and hoped to return to her home in England when "*it is safe and appropriate to do so*". The court considered that it did not have sufficient information to determine the application and made certain directions, which were subsequently revoked, and the proceedings were adjourned generally, presumably because of the Hague Convention application in this jurisdiction.

32. An averment in the mother's affidavit upon which the High Court judge laid some emphasis was as follows. She believed that the father had changed her passwords and recovery phone numbers for her social media and email accounts, which resulted in his being able to block her out of two of her email addresses. She also believed he had "impersonated her" while in control of her social media and email accounts by contacting her grandmother, seeking the current address of her mother in Ireland, where she herself was residing. She exhibits the message in question (which I will refer to as "the alleged personation message"), dated 18th April 2022. She says that she at all times knew where her mother resided and never sent that message. As we shall see, the High Court judge accepted that the father had in fact taken control of her account and sent this message.

33. The father issued proceedings under the Convention on the 6th July 2022. On the same date, he posted a message which said:

> "People need grow up, made your bed lay in it, using kids as weapon vile people abduct my daughter to another country and think it's all a game well **gunna be all alone in the uk now ain't she."**

(Emphasis added)

As we shall see, there was a dispute as to whether this message should be admitted into evidence at the High Court hearing.

The father's position

34. The appellant swore an affidavit in which he denied the allegations made by the mother in her affidavit. As regards the allegation made by his former partner that he had sexually abused their child, he said that he himself contacted the relevant police force who carried out appropriate investigations and concluded that no charge was warranted. He said that he underwent a six-month parenting assessment and at the end of that, was awarded access to the child every alternative weekend. He exhibited the court order in question. He said that the mother was with him throughout this process and was aware of the outcome.

35. He said that he has in the past been convicted of two offences of actual bodily harm: both of which occurred in 2013 and both of which were against other males, at a time he was in the Army and suffering from undiagnosed PTSD. In connection with a third assault, it appears that his explanation was that he woke up in hospital and instinctively assaulted the hospital worker because he was in pain. He says he told the mother about these and was honest with her from the beginning of their relationship. He said he was never convicted of any domestic violence.

36. He says that social services remained in contact with them until January 2022. He admits that he "*did not engage positively with them, as I felt their involvement was unwarranted and overly intrusive*". He had recently gone through the parenting assessment in respect of the other child and felt he had been subjected to enough scrutiny. He was also upset that they visited the mother within days of the child's birth by Caesarian section. He says that they visited the mother at home at least five times to ensure her safety and that of the baby, and closed the file in January 2002 because they were satisfied he did not pose a danger.

37. The father said that he had now re-engaged with the social services and confirmed that he would cooperate with any assessment or investigation they feel necessary. He said he has engaged in intensive counselling to deal with his PTSD and exhibits a letter from a support worker in this regard. He accepted that he has shouted when angry, but maintained that he never touched the mother or any other woman in anger. He said that the pattern of escalating violent outbursts described by her is untrue, and said that they were both guilty of shouting at each other during rows, but that their disagreements did not escalate beyond this.

38. He denied all allegations of violence between them, save for an incident in May 2021 where he accepted he broke a glass door in her house: "*She had been following me around the house, as she often did, goading and berating me. I tried to get away from her, but she would not leave me alone. I lashed out at the door, attempting to escape, but did so with too much force, and caught the glass. I apologised for this incident at the time, and it was soon forgotten*".

39. He accepted that he struggled "*somewhat*" with mental health issues as a result of the PTSD. He says that this was exacerbated during his relationship with the mother when she controlled his movements and "*refused to allow me work away from home and rendered me incapable of looking after the family financially*".

40. The father exhibits some text messages between them during May 2021-March 2022, but said that the police took his phone during the investigation of her allegations of harassment and "*it seems that the phone has been lost somewhere between [the two police forces involved].*

41. H said that his work took him away from home for extended periods, which would have provided her with numerous opportunities to seek assistance or change the locks if she wanted to, but she never did. On the contrary, she was frustrated with him being away so much. He said that whenever they had rows, she would insist that he return to her.

42. He denied that he was a frequent user of cocaine. He alleged that the mother was a frequent user of cannabis and would sometimes ask him to source drugs for her, and refers to a text in which she asked him to "*get me a joint please and hurry up*".

43. He accepts he had a need for anger management counselling and was prepared to do it to save the relationship.

44. He specifically denied various individual incidents described by the mother in her affidavit. He says that as regards April 2022, she had been considering relocating to Ireland and wanted him to move with her, but it was impossible to do so because of his care arrangement in respect of his older daughter. Two weeks before the 11th April 2022, she was pressing him to relocate but he refused; and two days before the arrest, "*she asked me what I would do if she had me arrested and used that opportunity to move to Ireland*", and he told her he would not allow his daughter to be taken abroad.

45. He said that the allegation made to the police on 11th April 2022 was false. He drew attention to the tone and content of her texts in March 2022 and suggested they are not consistent with someone being subjected to abusive or controlling behaviour.

46. As regards the events on the 11th April 2022, he said:

> "I say that the police attended the Mother's home on the 11th of April and arrested me. I was brought to the Station for questioning and was released with no conditions. This means that, contrary to what the Applicant implies, I was not precluded from returning home. I returned to collect my belongings and hug my daughter goodbye. When I arrived, the Mother took the baby upstairs while I gathered my belongings. She then came down and grabbed my face, digging her nails into it. Her laptop, which was sitting on the arm of the sofa, fell to the ground. I went out to my car and messaged some friends to see if I could stay with them. While I waited for replies the police arrived again and arrested me. The mother had alleged to the police that I had deliberately broken her laptop. On this

occasion I was released with the bail condition that I do not attend the mother's home, which condition I complied with".

47. It may be noted that the High Court judgment records that the "released without bail" note regarding the 11th April 2022 was provided to the court by the Central Authority after the High Court hearing.

48. The father denied that he was charged with stalking or domestic violence incidents. He said that on 30th June 2022, while he was working in Swansea, the police arrested and questioned him in respect of her further complaint of harassment. Nothing further came of that and he received a message to confirm that all charges had been dropped. He exhibited this message. On its face, it refers to an investigation by one of two police forces involved which was discontinued.

49. The father denied that he ever gained access to the mother's social media accounts or passwords, and he that he composed or sent the 'personation message'. He said that the date of the message shows that it was sent before she left England, and it was quite possible that she did not know her mother's new address.

50. As regards the posting on 6th July 2022, he said that "*What I tried to convey in that message was how much I abhor what she has done, and how despicable it was. It was in no way a threat to her safety as well she knows. When the Mother abducted my daughter, I was deeply hurt, distressed and far away from family support. I felt more alone than ever so when I put this on Instagram I was just very hurt. I meant nothing by it other than to let the Mother know she might feel in similar circumstances*".

51. The father denied that the mother was isolated and without family or social support when they were living in her house in England.

52. He also said that the mother had shown herself to be well capable of seeking the assistance of the courts and the police and that they were capable of protecting her against any

threat or risk (which he denied in any event). He said he lives some distance from her home, and would be happy to offer any undertaking that might be considered necessary to ensure her safety pending the matter resuming in the courts in England.

The mother's supplemental affidavit

53. The mother was given permission to swear a further affidavit. Counsel on behalf of the father objected that this went beyond the terms of the permission granted in terms of its content. This issue was raised on his behalf with Gearty J one month before the hearing, and reserved to the hearing itself.

54. In her supplemental affidavit, the mother addressed the issue of whether there was a live police investigation still in existence. She said that there were ongoing live investigations being conducted by the second police force in connection with stalking, breach of a non-molestation order and harassment (of her, the mother). She exhibited correspondence in this regard. She accepted that one of the police forces was not investigating him.

55. The mother also exhibited a text he sent to her on the 19th June 2022 at 5.23 am asking for pictures of the baby and saying "*Please don't tell the police I have messaged. I can get 5 years in jail. I promise I will keep the pictures off social media and I won't tell anyone about you sending them*…". In the same text he says "…*I am so down baby, I tried to commit suicide last week, my mate cut me down….you know how my mental health is, please just keep me in my baby's life I beg you*…". The father objected to the admissibility of this passage in the affidavit. As we shall see, the High Court judge ruled it admissible and relied upon it in his conclusions.

56. She also said that he was convicted in July/August of possession of cocaine in his motor vehicle along with having a false number plate and no insurance or no tax. The father also objected to the admissibility of this. Nothing turns on this as the High Court judge does not appear to have placed any reliance upon it.

57. The mother stated her belief that if returned to the UK, no restraining order would ever prevent the father from trespassing in her home and taking her daughter, given his volatile nature, mental health difficulties and drug problems.

58. It is apparent from the above summary that there are many allegations and counter-allegations which cannot be resolved by the Irish courts on a Hague Convention application. The proper approach to the evidence will be discussed below. There is some objective evidence insofar as there are some contemporaneous documents: (1) the case conference report of the 28th April 2021,; (2) the statements of the mother to the police on the 11th April 2022; (3) contemporaneous texts and (4) court orders. However, some of these need to be treated with caution insofar as they contain hearsay, the expression of opinion, and (in the case of the statements to the police dated 11th April 2022) were created at a time when, according to the father, the mother had already decided to abandon the relationship and relocate to Ireland.

The High Court Judgment

The High Court's analysis of the legal principles

59. In his detailed and careful judgment, the High Court judge conducted an impeccable analysis of the overarching legal framework concerning the Hague Convention and fact-finding in that context. He addressed many relevant authorities on the "grave risk" defence, including leading authorities such as *A.S. v. P.S.* [1998] 2 IR 244; *P.L. v. E.C.* [2009] 1 IR 1; *C.A. v. C.A.* [2010] 2 IR 162; *I.P. v. T.P.* [2012] 1 IR 666; *In re E* [2011] UKSC 27, [2012] 1 AC 144; *R v. R* [2015] IECA 265; and *In the matter of W and X (minors*) [2021] IECA 132.

60. The High Court judge was careful to note that it was important to consider the protection that could be offered by the requesting State, and that this was inherent to the principle of trust inherent in the Convention system. He noted that in *A.S. v. P.S.*, where it had been alleged that the left-behind parent had sexually abused one of the children, the Supreme Court accepted

there would have been a grave risk of harm if the children were to be returned to his custody, but that this was not the only option. It noted that England had a sophisticated family law legal system, and made an order for the return of the children on condition that the father provide specified undertakings, including to vacate the family home in England to enable the mother and children to live there pending and during the custody hearing.

61. He also noted that in *P.L. v. E.C.*, also a case where allegations of sexual abuse were made, the Supreme Court had said that it was implicit in the policy of the Convention that "*our courts must place trust in the fairness and justice of the courts of the other country"*. The court held that it was for the Australian court to "*test the strength and veracity of the allegations of sexual abuse*" and that they "*conduct adversarial proceedings in a manner remarkably similar to our own*" and were "*capable of protecting the interests*" of the child. In those circumstances, a "*grave risk*" had not been made out and the court made a return order but one which was conditional on an undertaking by the left-behind parent that he would not exercise rights of access to or contact with the child other than in accordance with the order of the family court of the country of habitual residence.

62. Simons J commented:

> "As appears from this judgment, 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." (para 26)

And

> "This approach of directing the inquiry on a return application to the availability and effectiveness of protective measures has been consistently applied by the Irish Courts"

63. He quoted relevant passages from a number of judgments on this specific point, including the judgment of Finlay Geoghegan J in *I.P. v. T.P.* in which she quoted from the judgment of

the United Kingdom Supreme Court *In re E.,* and the recent judgment of Collins J in *CT v. PS.* [2021] IECA 132

64. He summarised the position as follows at paragraphs 31-3:

> *"In summary, the approach adopted to date in this jurisdiction is as follows. The court hearing an application for the return of a child does not attempt to resolve conflicts of fact. This reflects the need for expedition in such proceedings, and also respects the animating principle of the Hague Convention, which is that issues of custody and access should, generally, be determined by the courts of the child's habitual residence. Instead, the requested court should take the allegations at their height (save possibly in cases where the allegations lack any credibility). The court should consider whether, on the assumption that the allegations are well founded, the effect of same is to expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This requires a consideration of the nature of the allegations themselves: in some instances, same will fail to reach the threshold of harm envisaged by Article 13. The term "grave" qualifies or modifies the risk, not the apprehended harm. It is not necessary for the apprehended harm to be grave, provided that it meets the high threshold of being intolerable.*
>
> *The court must attempt to evaluate the level of risk of harm which would arise in the event of a return order being made. This is a forward-looking exercise. The circumstances to which the child will be returning may be very different than those which had previously obtained. As part of this exercise, the court should carefully consider the effectiveness of the protective measures available in the country to which the child is being returned.*

33. This pragmatic approach ensures that the requested court does not discount allegations of domestic violence on the basis of what might be described as a paper-based assessment, conducted by reference to limited affidavit evidence which has not been tested by cross-examination. Instead, the focus of the inquiry will be directed to the effectiveness of the protective measures available in the country of the child's habitual residence, i.e. the country to which the child is being returned."

65. Simons J. accepted that a risk to a child may in principle arise from domestic violence directed at a parent, citing *A.A. v. R. R.* [2019] IEHC 442, and the *Guide to Good Practice*. He noted that the *Guide*, in discussing protective measures in the context of domestic violence allegations, said that

"They cover a broad range of existing services, assistance and support including access to legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence as well as responses by police and through the criminal justice system".

66. Simons J also referred to the facts and outcome in *C.A. v. C.A.*, where the High Court was satisfied that there were protective measures available in England which were sufficient to protect the mother and children from violence in the event of their return. He noted that emphasis was placed on the fact that the mother had obtained a non-molestation order against the father the previous year, and there was no evidence this order had been breached. Simons J commented this had an "*obvious resonance*" with the present case and that "*the crucial distinction between the two cases is that in the proceedings before me there is evidence that the father has breached the non-molestation order*".

67. He went on to say that the circumstances of the present case appeared to be closer to the New Zealand case of *LRR v. COL* [20202] NZCA 209, where a return order was refused.

Having set out a quotation from that judgment, he qualified this by saying that "*the circumstances of the New Zealand case were more extreme than those of the present case*", noting that the father in that case had been convicted of assaulting the mother, that the mother's mental health was frail, that she had a history of depression and substance abuse, and that the court considered there to be a very high risk that the return of the child would cause a relapse in her mental health and substance abuse. Simons J acknowledged that there were no such features in the present case. Nonetheless, he said, it was instructive in that it provided a "*concrete example*" of a return order being refused because the left-behind parent had repeatedly violated protection orders. I would observe that it is manifestly clear that the High Court judge was aware of the precise differences between the facts of the New Zealand case and the case before him.

68. He also noted that the *Guide* stated at para 59 that courts may deem legal protection and services to be insufficient to protect the child from the grave risk, "*for example where the left-behind parent has repeatedly violated protection orders*….".

69. In my view, it is clear from the above that the High Court correctly identified the relevant authorities and principles; that he was aware of the burden to be discharged by the mother if she were to establish the defence of "grave risk"; that he was acutely aware of the need to consider the issue of whether the United Kingdom system could protect the mother (and therefore her child) as part of the risk assessment; and that he was aware of the factual distinctions between the case before him and the New Zealand case. There was no error in this legal analysis. He turned then to the application of the principles to the facts before him. This was, in truth, the area where counsel on behalf of the father concentrated their challenge on appeal, suggesting that he placed too much reliance on the mother's allegations on affidavit and failed to sufficiently evaluate the reliability of those allegations. Accordingly, it is

necessary to examine the High Court judge's approach to assessing the evidence and his conclusions in that regard.

The High Court's fact-finding and assessment of whether there was a grave risk

70. Concerning the objection to the admissibility of evidence of the text on the 19th June 2022, the judge ruled it admissible on a number of grounds: (i) there was nothing in the order made by the "list" judge before the trial (order dated 8 September 2022) restricting the matters which could properly be raised in the replying affidavit; (ii) the father could have replied on affidavit if he had wished to do so as there was ample time to do so before the hearing; (iii) this aspect of the affidavit was highly relevant to one of the principal issues in the proceedings, namely the effectiveness of the non-molestation order as a protective measure; and (iv) the father could not be taken by surprise since it was a message he himself had written and should himself had drawn to the attention of the court; instead he had untruthfully averred that he complied with the non-molestation order. On balance, and particularly having regard to factors (iii) and (iv), I would not disagree with the judge's ruling in this regard.

71. With regard to the judge's recital of the factual background, I note that he referred to the allegations of domestic violence in the mother's affidavit but did not comment on the fact that she had never made allegations of being pulled by the hair, bitten or hit on her head in her statements of 11th April. As noted earlier, in those statements she described incidents of verbal anger and smashing of property but did not describe any assault upon her other than the throwing of the cereal bowl which took place the day she went to the police. Nor did he comment on the fact that she had never complained of such acts of violence to the social services even though they were engaging with her until January 2022 (and therefore, on her account, after some of those incidents).

72. I also note that he set out an extract from the case conference report of 28 May 2021 in which there was reference inter alia to "a history of domestic violence". Simons J also said

that the health visitor had recorded a concern that he had "*an extensive police record relating to a violent past*" which included "*domestic violence towards an intimate partner, violence toward his own family members and at least one recorded assault on a health care worker*" He further noted that the father had four convictions for offences against the person, two of battery and two of assault occasioning actual bodily harm, together with a conviction of smashing a rear kitchen window at his mother's house. He did not specifically advert to the fact that two of the assault convictions concerned male-on-male, or that one of the batteries arose in rather unusual circumstances (the father waking up in hospital and assaulting a health care worker).

73. Simons J noted that the child's mother averred that the father had perpetrated acts of domestic violence against her since May 2021 and referred to her catalogue of incidents of domestic violence as set out in her first affidavit. He then said:

> *The approach which this court is required to adopt when adjudicating on a "grave risk" defence in the context of allegations of domestic violence has been discussed earlier: see, in particular, paragraphs 34 to 46 above. In brief, the court is required to take the allegations made at their height. The acts of domestic violence alleged against the father are such as to present a risk of physical and psychological harm to the child. Indeed, the existence of this risk has been recognised by the social services and police in England since the time of the child's birth. The escalation of the acts of violence in April 2022 prompted the police to arrest the father and to change the locks on the mother's dwelling house.*
>
> *The English Courts made a non-molestation order against the father on an ex parte basis on 22 April 2022 and confirmed this order on 6 May 2022*

74. It may be noted that the father's principal complaint on appeal was that the High Court judge had too readily accepted that the mother's narrative without adequately evaluating

whether it was necessarily true in all respects, even within the confines of the exercise which must be summarily conducted in an Convention application.

75. Simons J then turned to the protective measures available in the English system and whether they would be sufficient to mitigate the risk of the apprehended harm. He observed that the assessment is "*forward looking*" and that the domestic arrangements would be very different from those previously prevailing, because the parties would be no longer cohabiting, and "*crucially*" the father would be prohibited by the non-molestation order from going to the mother's house and from contacting her. He noted that it was a criminal offence punishable by up to five years imprisonment to breach a non-molestation order.

76. The High Court judge acknowledged that it was "*very difficult to make an accurate prediction*" of whether the existence of the non-molestation order would constitute a sufficiently protective measure to reduce the risk of "*further domestic violence*" to "an acceptable level i.e. to reduce the risk to one which is less than grave". I cannot but agree that this is an extremely difficult exercise, rendered all the more difficult by the fact that the court is conducting fact-finding in a limited manner in what is a summary procedure, and that assessing the risk is intimately connected with knowledge of what has in fact occurred to date. A court is much more likely to find a future risk of domestic violence if it has concluded that there has already been a degree of such violence in the past; the converse is also true.

77. In assessing the risk, the High Court judge relied upon four key points in reaching his overall conclusion that the risk amounted to a "grave risk":

(1) evidence of breaches of the non-molestation order on two occasions;

(2) the father's behaviour on the 11th April 2022 after his first arrest by the police;

(3) his previous convictions; and

(4) the 'personation' email.

78. Regarding the breaches of the molestation order, the judge considered that the first of these was the text of the 19th June 2022 in which the father contacted the mother, seeking photographs of the child. It was clear from the content of the text that the father actually knew that, in contacting her, he was in breach of the order and that a breach exposed him to a potential prison sentence of five years. The judge commented: "*The fact that he was undeterred from breaching the order is a cause of grave concern*". He also commented that while an attempt might be made to minimise the breach by saying that all he was requesting was photographs of the child, in reality "*the overall tone of the message – in particular the reference to suicide-is manipulative and indicative of coercive control*". I entirely agree with the judge's comments in this regard.

79. The second breach consisted of the posting of 6th July 2022 in which the father referred to the mother being alone in the United Kingdom upon her return. The judge considered that the mother's averment that she felt threatened by this posting was an "*entirely reasonable reaction*" and that, while it was open to two interpretations, both of them were "menacing" (the first, being the implication that the child would be taken away from her, thus leaving her all alone; the second being that she would be on her own and thus isolated and vulnerable). Again, I agree with the judge that this communication was open to a most sinister interpretation.

80. The judge also considered the father's averment on affidavit that he had never breached the non-molestation order to be untruthful and entirely inconsistent with his own acknowledgement of the breach within the text of 19th June itself. Further, the fact that he showed no remorse for the breaches was "*a cause of grave concern and undermines any confidence in his complying with the order in the future*". Again I agree with the judge in this regard.

81. The second factor relied upon by the judge concerned the events on the 11th April 2022:

> The second factor which supports the characterisation of the risk as "grave" relates to the conduct of the father on 11 April 2022. On that date, the father, upon his release from police custody, re-entered the mother's dwelling house notwithstanding that the police had changed the locks for the mother's safety. It also appears that the father damaged the mother's laptop. The father suggests, unconvincingly, that this was the result of the laptop accidentally falling to the ground from the arm of the sofa.

82. I will return to this aspect of the judge's remarks below.

83. The third factor which the High Court judge referred was the father's record of convictions for offences against the person, as well as the conviction for smashing his mother's window; commenting that "*The fact that the father committed such an act against a close family member is a cause of grave concern*".

84. The High Court judge also considered, fourthly, that there was "*strong, credible evidence*" that the father had gained access to her emails accounts and changed the password and then posed as the mother to find out her whereabouts. Again, I will return to this below.

85. In light of these factors, the High Court judge concluded that in all the circumstances there was a grave risk that the father would continue to breach the terms of the non-molestation order; and in particular that he would continue to contact and harass the mother, and may attempt to enter her home and repeat the type of domestic violence which he had perpetrated in the past. This would expose the child to harm and an intolerable situation and the present case was one of the "*truly exceptional cases*" where a return order should be refused. . He commented (para 98):

> The Hague Convention does not oblige the taking parent and child to tolerate such a grave risk. A non-molestation order will only be regarded as an effective protective measure where it can reasonably be anticipated that it will have a deterrent effect on the abusive parent. As stated by the New Zealand Court of Appeal in *LRR v. COL* [2020]

> NZCA 209, the unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim… . It goes without saying that this is not intended as a criticism of the English police or social services. The chronology of events confirms that both agencies have been solicitous to ensure the wellbeing of the child since her birth. The difficulty is that there are limits to what even the most diligent police force and social services can do to guard against a recalcitrant domestic abuser who has previously violated court orders.

The first issue: whether the trial judge erred in assessing the evidence

86. The bulk of the grounds of appeal concerned the manner in which the High Court judge had approached the evidence before reaching his conclusion on "grave risk". The grounds included that he had erred in summarising *CT v. PS* as authority for the proposition that a court should not attempt to resolve conflicts of fact and should simply take allegations at their height, when the court had made it clear that some evaluation of the strength and credibility of the evidence was required unless the allegations entirely lacked credibility; that he erred in preferring the affidavit of one party without further analysis, where there was a direct conflict of evidence on a point that is crucial to the outcome of the case; that he had reached the conclusion that the threshold for grave risk had been reached on insufficiently strong evidence; that there was no credible evidence to support the mother's averment that no restraining order would prevent the father trespassing at her home and take the child. Other grounds of appeal including an over-reliance upon the New Zealand case of *LRR v. COL*; that the judge had relied on previous convictions of some antiquity and which did not relate to domestic violence; and in finding that there had been breaches of the non-molestation order. There was also a ground of appeal relating to the admissibility of the entirety of the supplemental affidavit of the mother.

87. In submissions to this Court, the father contends that the High Court judge did not engage in a properly nuanced evaluation of the evidence and instead merely assumed that matters alleged by the mother could be taken at their height. He submits that Collins J in *CT v. PS* made it clear that at last some degree of evaluation was required, citing the following passage from the judgment:

> As the UK Supreme Court noted *in In re E,* the summary nature of the Hague Convention process imposes limitations on the capacity of the courts in the requested state to evaluate and resolve disputed issues of fact. There was, the Court noted, "a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true." In In re E the children's mother alleged that the father (who was seeking the return of the children to Norway) had been guilty of serious psychological abuse over many years and that she and the children had lived in fear of him. The father denied those allegations. That dispute could not be resolved by the English courts within the parameters of Hague Convention proceedings. In such circumstances, the Court focused on the sufficiency of the protective means which could be put in place to mitigate the alleged risk to the children if returned, pending the resolution by the Norwegian courts of all disputed issues regarding their welfare and protection.
>
> 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 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.

(footnotes omitted)

88. The father invites the Court to be sceptical about the mother's credibility having regard to a number of matters:

i. He draws attention to her averment that he had been accused of sexual assault of his child from another relationship in circumstances where she knew, at the time she made the averment, that the case was closed on this allegation and the father was now having court-ordered unsupervised access with the child in question every alternate weekend.

ii. He points out that although she now makes allegations of repeated violence, she made no such allegations to the social services or the police during the period, despite their involvement with the family.

iii. He submits that her narrative initially implied that the police had changed the locks and the father had broken into her house on the 11th April 2022, but that this claim evaporated on closer scrutiny.

iv. He completely denies the accusation that he tampered with her email addresses or passwords.

v. He queries why she did not seek protection from the Irish courts, suggesting that her failure to do so undermines her concern that she was afraid of violence.

89. The father submits that there was no report of misbehaviour to police, no court order of any kind sought, no medical evidence, and no indication of anything awry until this series of

events took place in April 2022. The father therefore submits that in reality, the case on grave risk, when stripped to its essentials, consists of no more than the text of the 19th June and the posting of 6th July.

90. The mother stands over the judge's reasoning and points to the material in the case conference report, the mother's affidavit, and the breaches of the non-molestation order. The mother submits that, notwithstanding the references to taking the mother's allegations at their height, the High Court judge did in fact engage in an evaluation of the evidence.

Analysis of the High Court judge's conclusions on the evidence

91. It is necessary first to mention the appropriate parameters within which this Court should consider the fact-finding of the High Court judge. In *AK v. US*, Murray J discussed the standard of review applicable in a case where an appellate court is addressing alleged errors by a trial judge in a number of different scenarios. One of these was where the findings were based on affidavit or documentary evidence alone or where the court was reviewing 'secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven otherwise than by way of oral testimony' (per Humphreys J. *Minogue v. Clare Co. Council* at para. 100). Murray J described the appropriate standard of review as "*somewhat deferential*" and referred to the explanation provided by Henchy J. in *Northern Bank Finance v. Charlton* [1979] IR 149 at p. 192 for this approach. He also referred to *Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11 and *McDonagh v. Sunday Newspapers Ltd.* [2018] 2 IR 1 at para. 163 to 164). He said that in this type of case, the appellate court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. He continued:

> It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be

necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. This, I should observe, reflects the standard of review referred to by Finlay Geoghegan J. in D.E v. E.B [2015] IECA 104 at paras. 39 and 40, while taking account of the decision in Ryanair Ltd. v. Billigfluege.de GmbH to which she also referred.

92. The position is also slightly more complicated in the present case because it was not merely an exercise of fact-finding in the usual sense but also an exercise of risk assessment. Fact-finding is an exercise directed at ascertaining whether certain events have occurred in the past. Risk assessment is directed towards the future and is of its nature inherently uncertain, as it attempts to predict what may happen and the level of likelihood of it happening. Combining the two, that is to say combining fact-finding of a summary nature (which is a feature of Hague Convention applications) with risk assessment, is a particularly difficult exercise. Further, the risk-assessment exercise, as the High Court judge also correctly identified, involved two distinct phases: first, to assess whether there was a risk of future domestic violence to the mother (with consequent impact on the child) and secondly, to assess whether protective measures in the United Kingdom could adequately mitigate that risk.

93. It perhaps bears commenting that those matters are inter-related. Whether protective measures can reduce a perceived risk depends in part on the degree of risk identified in the first place, which in turn depends on what facts have been found regarding past behaviour. For that

reason, the High Court judge's conclusions on the facts, which grounded his assessment of risk, were crucially important in this case.

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. For that reason, the fact-finding which underlies the overall risk assessment is particularly important.

98. It may be helpful, in order to assess the High Court's evaluation of the facts, to draw a distinction between two different time periods: (1) the father's behaviour in the past, prior to his having met the mother; (2) the findings concerning his behaviour after he and the mother were living together, including on the 11th April 2022.

99. As the first of these periods, I am of the view that the judge was undoubtedly correct in having regard to the father's history of criminal convictions for assault, and criminal damage to his mother's house, and his general history of mental health and substance abuse difficulties. Whether the father had engaged in domestic violence in the past is a little more problematic. The High Court judge quoted from the case conference report which recited a history of domestic violence; however, this comment in the report was not borne out by the actual criminal convictions recorded, with the exception, perhaps, of the incident involving the smashing of a window at his own mother's house. On the other hand, the High Court judge repeatedly focussed on the actual criminal convictions of the father and it is difficult to say whether or not he was influenced by those references to a pre-existing history of domestic violence.

100. Concerning the second period, namely when the parties were living together, I also have some concern that the judge did not apparently take into account (a) the fact that the mother had never made any complaint to the police or social services during the period, notwithstanding that there was undisputed evidence that these services had continued to engage with her until January 2022; and (b) the absence of any reference to physical violence in her statement to the police on 11th April 2022 and indeed a positive statement to the contrary effect, namely that he had "*never assaulted her*". On the other hand, it is also true that there were

contemporaneous texts concerning the biting incident (which she also did not refer to in her police statement of 11th April 2022).

101. I would have some concern that the judge appears to have reached somewhat more definite conclusions concerning events on the 11th April 2022 than I would consider warranted by the evidence, although I would agree that, on balance, the return of the father to the house immediately after his release from arrest – albeit an unconditional release – was at least unwise; and that his subsequent alleged smashing of the mother's laptop gives rise to a concern which must be factored into the risk assessment. It is notable that the father does not deny that the laptop was broken on this occasion. He gives an explanation for it which is somewhat implausible.

102. I would also have a concern that the judge reached a somewhat definitive conclusion on the "personation email". I would consider the evidence concerning that email to be less conclusive and would not factor that into my analysis. For example, given that it is unclear on what date the mother left for Ireland, it is not clear whether this email was sent before or after she left, which in turn may affect the likelihood of his having sent it.

103. There are some facts in the case which are not in dispute, as follows:

i. The father has four convictions for assault and/or battery, and one for criminal damage involving the smashing of his mother's window. He has no convictions for domestic violence, or assaults on women, specifically, although the smashing of his mother's window when she refused him entry because of his behaviour might arguably fall under the rubric of domestic violence.

ii. All of his convictions predate his relationship with the mother, some by many years.

iii. The father has suffered (and may continue to suffer) in the past from PTSD, anxiety and depression, and has anger management issues.

iv. The father in the past, at least, engaged in cocaine use.

v. There were sufficient concerns on the part of the authorities in the United Kingdom about the father's history for them to make contact with the mother at the time of the child's birth in May 2021, and they continued to engage with her until January 2022. Further, the father (by his own admission) did not engage positively with them.

vi. The father acquired the right to unsupervised access to a child from a previous relationship after the investigation of allegations made against him, and this access was continuing at the time of his relationship with the mother in this case.

vii. The authorities/services closed the file on the family unit, so to speak, by disengaging from January 2022.

viii. The mother made no complaint to the services or the police prior to 11th April 2022 despite that fact that the services were engaging relatively closely with her until January 2022.

ix. The mother made two statements to the police on 11th April 2022. She described a litany of angry incidents, shouting, insults and an incident (the "cereal bowl" incident) that morning, the smashing of her phone and the smashing of a laptop. She denied that he had subjected her to physical violence.

x. The police arranged for the mother to be escorted from the train to the ferry when she was leaving England for this jurisdiction with the child.

xi. A non-molestation order was obtained on consent from an English court.

xii. No protective court order was sought in this jurisdiction.

xiii. There was no history of hospitalisation.

xiv. There was no history of seeking refuge outside the home (which, incidentally, was owned by the mother).

104. Regarding other matters in dispute, I would be prepared to accept the following specific allegations on th balance of probabilities, for the purpose of these proceedings:

i. It seems likely there was a violent incident of some kind on the 16th July 2021 involving a bite to the mother's head, which was recorded in contemporaneous texts.

ii. There was likely an incident involving throwing a cereal bowl on the 11th April 2022, being the incident about which the mother made a complaint to the police on the same day.

iii. It seems likely there were various incidents in which the father smashed items of property belonging to the mother.

iv. It seems likely there was a history in the relationship of his becoming angry and shouting and insulting during the relationship, at least in the later stages. I

v. I note the allegation of the mother to the police on 11th April 2022 that he threatened to stab her.

105. For present purposes, I am not prepared to accept all of the allegations of violence in the mother's affidavit in circumstances where she expressly denied any physical violence prior to 11th April 2022 in her first police statement of that date, and appears not to have complained to the social services at any time despite the fact that they were actively engaged with her from May 2021 to January 2022; and in circumstances where she never sought the protection of the police prior to the 11th April 2022; never sought refuge away from the father prior to that date; and never sought the protection of any court prior to the 11th April 2022. I also note that she knew that the father had court-ordered unsupervised access to a child from a previous relationship when she swore the affidavit in these proceedings referring to allegations that had been made against him in respect of that child.

106. Similarly, and for present purposes, I am not prepared to find that the "personation email" was sent by him from her email account to her mother.

107. Whether my slightly different assessment of the evidence s should disturb the High Court's overall conclusions discussed in the next section of this judgment.

The second issue: Grave risk

The submissions of the parties on the "grave risk" issue

108. The father submits that in *CT v. PS* [2021] IECA 132, Collins J emphasised the "*narrow scope*" and "*heavy burden*" on a mother who relies upon the grave risk defence. He submits that the mother failed to establish either that the factual circumstances could lead to inference of grave risk, and that any risk which was identified could not be addressed by protective measures available in the English legal system.

109. He relies in this regard upon Irish authorities, including *CA v. CA* [2010] 2 IR 162, where the High Court concluded that the defence of grave risk was not made out, even though the mother had been subjected to violence and lived in refuges, because it had not been established that the English system would be unable to protect her if she were returned to that jurisdiction. He also refers to *NJ v. EO'D* [2018] IEHC 662 which was to similar effect. The father submits that *LRR v. COL* is distinguishable on its facts as the father had actually been convicted of breaches of court orders, and the mother had mental health difficulties; the picture was therefore much more complex than that presented by the facts of the present case.

110. He submits that his convictions for assault were of some antiquity and unrelated to domestic violence.

111. With regard to the remaining matters, the Court's attention is drawn to the matters said to undermine the mother's credibility, as already described above. It was submitted that this

underlined the necessity for factual determinations to be made by the court of habitual residence.

112. The father also points out that the police appear to have been very "hands on" in the present case, including escorting the mother to the ferry, and that the social services were on hand from the beginning. There was no reason therefore to assume that the authorities in the requesting jurisdiction would be unable to provide appropriate protection. He also submits that the court should take into account what remedy is available in the event that a person fails to comply with a court order, and notes that the penalty for breach of a non-molestation order in the United Kingdom is one of maximum five years imprisonment. Counsel relied on *W.B. v. McC* [2021] IEHC 380 in which Gearty J found that the "grave risk" defence was not made out and observed that " *one of the guiding principles of the Convention is that the country of habitual residence must be trusted to safeguard the best interests of children in that jurisdiction*" (para 11.10).

113. Counsel for the father did not concede that the posting by the father dated the 6th July amounted to a breach of the non-molestation order. It was submitted that it should not be interpreted as a threat but rather that it should be read in the context of the father's then emotional state at discovering that the child had been abducted.

114. The father queries why the mother did not invoke the protection of the Irish courts upon her arrival and suggests that her failure to do so this undermines her allegations of fear of violence.

115. The mother submits that the High Court Judge was clearly aware of the burden of proof in 'grave risk' cases and applied the principle correctly. She also submits that although there are sometimes references to it being a "heavy" or a "high" burden, in reality the legal standard is on the balance of probabilities.

116. The mother submits this case falls into the "exceptional" category identified by the authorities. She submits that the risk of violence was established by the cumulative factors identified in the mother's affidavit (and supporting documents), and that there had been breaches of the English court order (the text, and the posting).

117. Counsel for the mother submits that the father's failure to accept that he had breached court orders by his text and posting, and/or his submission that any such breaches were at the lower end of the spectrum, were revealing, and urged the Court to consider that this provided further insight into his attitude.

118. Concerning the capacity of the English system to protect the mother in the future, the Court inquired what greater protection the authorities in this jursdictiond could offer the mother, as compared with the English system, and whether in reality he was simply relying on the greater physical distance as the key protective factor.. Counsel for the mother in effect accepted that to an extent, this was so, but submitted that distance in itself was an important protection.

119. On the issue of why she did not seek the protection of Irish courts, counsel submits that the mother at the time of her arrival in Ireland thought she was coming for a temporary period only (as recorded in the one of the English court orders), and there was no suggestion that the father would follow her here.

The Court's analysis and decision on grave risk

120. The Court's attention was not drawn to any reported Irish (or English) authority in which a court refused to make an order for non-return on the basis of domestic violence allegations. In *C.A. v. C.A.*, the High Court considered the defence of grave risk in the context of the mother's evidence that the applicant had in the past been violent towards her and that this had caused her and the children to move to women's refuges. The court concluded even if the court accepted the mother's evidence in relation to the applicant's violence towards her and the effect

this had on the children, the "grave risk" defence would not apply as there was no evidence that the English courts and other relevant authorities were not in a position to protect the children and the mother from any potential threat. Finlay Geoghegan J said:

> In so considering the evidence, I am not making any finding in relation to the alleged behaviour of the father but merely wish to demonstrate that the mother has failed, even if her factual evidence were to be accepted, to meet the necessary threshold. Since the mother commenced proceedings in the English courts in 2008, and obtained a non-molestation order against the father, *there is no independent evidence that he has acted in breach of such order.* The English court orders produced make no reference to any such alleged breach or any determination that the father has acted in breach of the non-molestation order. There is no evidence before this court of the inability of the English courts and other authorities to protect the children and mother (if necessary) from any threats of violence by the father.
>
> (emphasis added)

121. A similar conclusion was reached in *NJ v. EO'D*, although it is fair to say that the discussion was very brief because it was merely an alternative to the primary conclusion, and no detailed argument as to the adequacy of protective measures in the requesting jurisdiction is recorded.

122. Although the father relied upon the decision of the High Court (Gearty J) in *W.B.,* I also do not consider it to be of great assistance, at least in factual terms, in circumstances where the factors relied upon by the abducting relatives (who were, unusually, the child's aunt and uncle) were multiple: the child's lack of verbal ability upon arrival in Ireland, allegedly traumatised or disrupted behaviour, the applicant father's history of criminal convictions, alleged failure to make medical appointments for the child, failure to immunise the child, and alleged violent

behaviour by the father to the mother. There was insufficient evidence to substantiate the allegations, and with regard to the alleged violence by the applicant father towards the mother, the court noted that she had sworn an affidavit specifically refuting this. Even taking account of the possibility that she might have a motive in covering up physical abuse in the hope that she might be reunited with her son, the court found that the evidence did not sustain a finding that the father was "violent to the extent that he poses a grave risk to his son". Therefore there was considerably less evidence to support the allegations of physical violence in that case.

123. This brings me to the New Zealand decision in *LRR v. COL* [2020] NZCA 209, the only case drawn to the attention of the court in which a non-return order was made on the basis of (inter alia) domestic violence allegations. In this case, a mother brought her two-year old son from Australia to New Zealand without the consent of the father, who lived in Australia. New Zealand is a party to the Convention and the position is regulated by legislation, as it is in this jurisdiction. The father sought the return of the child to Australia under the Convention but ultimately the Court of Appeal refused to order his return.

124. The relevant factual background was very different from the present case, as appears from the following. The mother had always been the primary carer of the child, and it was common case that if the child were returned, the mother would return with him. The relationship between the mother and the father was dysfunctional and volatile. The mother claimed that the father subjected her to psychological and physical abuse throughout the relationship, culminating in an incident in July 2017, which was one month before she took the child to New Zealand. She said he was also psychologically violent to H, and physically and psychologically violent to C, his child from a previous relationship, who lived with the parties for a period in Tasmania.

125. The father denied all of these allegations, and said that the mother had a serious drinking problem and was violent when intoxicated. He said that either the mother was inventing the

allegations she makes against him about violence targeted at her and others, or if she believed them then this cast doubt on her mental health and her fitness to take care of H.

126. Family violence orders had been made against the father by the Australian courts on a number of occasions. At the time the mother and H left Australia, the father was facing charges of assaulting the mother, and breach of family violence orders.

127. While the father was remanded in custody the mother moved out of the apartment they were renting and went to a women's shelter. She sought assistance with obtaining financial support and obtaining legal aid for relocation proceedings to enable her to move with H to New Zealand. She encountered difficulties in obtaining financial support through the Australian welfare system, because she was a New Zealand citizen on a visa, and she also encountered difficulty in obtaining legal aid for relocation proceedings. In August 2017 she took the child to New Zealand.

128. On 15 January 2020 an Australian court delivered a decision on the charges against the father relating to incidents in June 2017 and July 2017, and alleged breaches of the interim family violence orders and bail conditions in November 2017 by contacting the mother via Facebook. The father was convicted of common assault and breach of a family violence order by punching the mother in the eye on 4 June 2017. He was convicted of breaching family violence orders and bail conditions by his conduct in November 2017. He was acquitted of the charges relating to the 13 July 2017 incident. On 17 March 2020 he was sentenced to 77 hours of community service and 12 months of probation, including completing a men's behavioural change programme.

129. The mother's mental health was frail. She had a history of depression and substance abuse. At the time she left Australia with the child, she was suffering from depression, severe anxiety, and stress, which were either caused or exacerbated by the dysfunctional relationship and the family violence she was experiencing. She was drinking to excess.

130. In its judgment, the court identified eight propositions concerning the 'grave risk' defence, which are similar to those appearing in the Irish authorities. I would draw attention to three of those, however. The first proposition was as follows:

> First, as noted above, there is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold. It adds nothing but confusion to say that the exception should be "narrowly construed". As this Court said in HJ v Secretary for Justice, "there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercises involved when one or more of the exceptions is invoked".

131. This contrasts with the language of some of the Irish decisions but, in truth, I am not convinced that there is in reality any difference of substance. I venture to suggest that the Irish judgments merely serve to emphasise that the "grave risk" exception should not be expanded beyond its proper and narrow remit.

132. The New Zealand court's second proposition was as follows:

> [88] Second, the court must be satisfied that return would expose the child to a grave risk. This language was deliberately adopted by the framers of the Convention to require something more than a substantial risk. A grave risk is a risk that deserves to be taken very seriously. That assessment turns on both the likelihood of the risk eventuating, and the seriousness of the harm if it does eventuate. As the United Kingdom Supreme Court said in Re E:34
>
> … Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

133. The deliberate choice of the word "grave" in the phrase "grave risk" is of importance. I also agree with the 'linkage' as described in *Re E*.

134. The court's fourth proposition is also of some particular importance in the present context:

> [90] Fourth, the inquiry contemplated by this provision looks to the future: to the situation as it would be if the child were to be returned immediately to their State of habitual residence. The court is required to make a prediction, based on the evidence, about what may happen if the child is returned. There will seldom be any certainty about the prediction. But certainty is not required; what is required is that the court is satisfied that there is a risk which warrants the qualitative description "grave".

135. The court also made comments about the difficulty of resolving conflicts of fact similar to those made in the authorities already referred to, and quoted from *Re E* concerning the importance of examining potential protective measures in the requesting jurisdiction. In this regard, it is interesting to note the court's comments, having quoted para 36 of *Re E*, which emphasise that protective limits may be of little comfort if a parent has already demonstrated that these do not act as a deterrent:

> [112] As this approach underscores, an important factor in determining whether return will expose a child to a grave risk of an intolerable situation will often be the protective measures that can be put in place in the requesting State. If there is cogent evidence that return would expose the child to a grave risk of an intolerable situation, the court needs to consider whether protective measures can be put in place in the requesting State to protect the child from that risk. These measures may take the form of orders made (or to be made) by the courts of the requesting State, on the initiative of the left-behind parent or as a result of judicial cooperation in connection with the application. They may take

the form of undertakings given by the left-behind parent, if the court is satisfied that those undertakings are enforceable and will be practically effective.

[113] The court can expect that the legal systems of other Convention countries will generally be designed to protect children from harm. But even where the system is unexceptional, the practical ability of the system to protect the child from the relevant risks is a highly material consideration. This Court's decision in A v Central Authority has been read by some as suggesting that the inquiry is confined to systemic factors affecting all cases in the requesting State. But the focus on systemic issues in that decision reflected the matters in issue in that case. The decision should not be read as confining the inquiry to systemic issues, and removing the need to consider whether, although the system in the requesting State is unexceptional — or even admirable — there is a grave risk that the system will not in practice be able to protect the child from the relevant harm. The assessment of risk, and of the effectiveness of suggested protections against that risk, should always focus on the specific case. It is not appropriate to make assumptions about the effectiveness of protective measures in the requesting State to protect a child against a grave risk that has otherwise been made out.

[114] *So, for example, where a parent has in the past breached court orders designed to protect the child or the other parent from harm it cannot be assumed that such orders will provide effective protection in the future. The fact that such orders are available in the requesting State, and are already in place or likely to be made in the future, provides little comfort if such measures have previously been ineffective.*

(Emphasis added)

136. In terms of the facts, there is no doubt that there were considerable differences between that case and the present one. In reaching its conclusion that "the risk is sufficiently high, and the consequences sufficiently serious, that the risk can properly be characterised as grave…", the Court of Appeal referred to a considerable number of factors (see paras 131-146):

a. That the mother would not be entitled to the same level of financial support in Australia as an Australian citizen, and that her access to other forms of publicly funded support (such as medical care) would also be limited. Such limited information as the Court had about the father's financial position suggested he was most unlikely to be able to provide meaningful financial support and he had not made any concrete proposals in that regard.

b. It was not clear where the mother would live, and what their financial position would be, immediately on their return to Tasmania. In the medium term, H and his mother would be in a precarious and stressful financial and housing situation.

c. It was unclear whether the mother would receive legal aid to initiate and pursue a relocation application.

d. There was no evidence about how long proceedings before the Family Court concerning care of H, and relocation to New Zealand, are likely to take to be resolved, and the impact of a return to Tasmania needed to be assessed bearing in mind the likelihood of the mother needing to care for H in Tasmania for a substantial period, whatever the eventual outcome of those proceedings might be.

e. The mother feared for her safety in Tasmania, where she would be living in proximity to the father and would probably be forced to interact with him to some extent in connection with arrangements concerning H. This fear was "well grounded in fact", given that the father was recently convicted for assaulting the mother and for breaching family violence orders and bail conditions. In this regard,

the court pointed out that "*The unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim*."

f. The mother would be socially isolated in Tasmania, where she had no family, close friends or other personal support mechanisms.

g. The mother would be likely to receive some support — for example, advice and counselling — from social sector agencies, as she did before her departure but it could not prevent the mother from experiencing isolation, stress and anxiety.

h. It was common ground that the mother's mental health was frail. She had a history of depression and substance abuse, in particular alcohol abuse. She was coping well in New Zealand at present. The court considered that the risk that return of the mother and H to Tasmania would cause a relapse in terms of her mental health and substance abuse is very high. On this point, the court had evidence from a clinical psychologist that the mother's return to Tasmania would not only place her mental wellbeing at risk, but also her sobriety. The psychologist expressed significant concern about the risk of suicide should the mother return to Tasmania.

i. The very serious risks to the mother's mental health constituted risks to H's wellbeing.

137. It is clear therefore that the facts in the New Zealand case were very different to those in the present case; not only did the father have convictions for assault of the mother and breach of court order, but there were a myriad of other issues including the mother's own frail mental health, and the precarious financial and housing situation that would face her and the child if she were returned to Australia. The present case is not at all comparable in that regard.

138. That said, the High Court judge was in my view well aware of the differences between the two cases and laid emphasis on the case only because it was, as he said, a "concrete

example" of a non-return on the basis of allegations (inter alia) of domestic violence. Further, the New Zealand judgment contains a helpful analysis of how to approach such cases in principle, as described above. I would reject the suggestion that the High Court judge placed undue emphasis on the decision as he explicitly stated that it was a more extreme case than the one he was dealing with.

Conclusion on Grave Risk

139. Ultimately, each case must be decided on its own facts having regard to the principles concerning the defence of "grave risk". I have summarised above the undisputed facts in this case together with the facts I would be prepared to accept for the purposes of these proceedings. It is now necessary to apply the principles to those facts, by asking the question in two stages: (1) Has the mother proved on the balance of probabilities that there is a "grave risk" of an intolerable situation, leaving aside the question of protective measures in the requesting jurisdiction? (2) Has the mother proved on the balance of probabilities that the "grave risk" exists notwithstanding the protective measures that might be adopted in the requesting jurisdiction?

140. Regarding the first of these, I would conclude that, if one were to leave aside the question of protective measures: (a) there is a risk of further violence to the mother if she and the child were to return to England, and (b) the risk can be characterised as grave. In this regard, I take into account the factors referred to above at paragraphs 103 and 104, where I have listed the facts not in dispute as well the facts I am prepared to act upon for present purposes. I also take into the account the fact that his violent behaviour appears to have been escalating before the cereal bowl incident, and now there are additional factors such as the fact that she went to the police in England to make a complaint, and that she took the child to Ireland, necessitating these proceedings on his part. These factors are likely to inflame rather than calm the father down.

141. I should perhaps state explicitly that I consider that a household climate of violence to the mother would create an intolerable situation for the child in question; as they are effectively a unit, violence to one is intolerable for the other. If there is a grave risk of violence to the mother, there is a grave risk of an intolerable situation for the child.

142. I move therefore to the second question, namely whether protective measures in the requesting jurisdiction could provide a sufficiently robust protection to reduce the risk below the level of grave.

143. Undoubtedly, if the child were returned to the requesting jurisdiction, and the mother went back with her, the protection that would be offered in England would be of a very high quality, as already demonstrated by the past responses of the police, courts and social services towards the mother. It is also important to note, for example, that the mother owns her own house in England and presumably appropriate orders could be made to exclude the father from that house if the courts considered this to be appropriate. No issue of financial precariousness or inability to access the courts or mental vulnerability arise.

144. However, the various authorities can only do what is reasonable and cannot, for example, provide 24-hour protection. They previously considered it necessary to escort the mother from the train to the ferry. They cannot post a policeman permanently outside her front door. She cannot stay permanently within her house. Any legal system depends substantially on its deterrent effect; but the deterrent impact varies from person to person. What does the evidence in this case establish?

145. It is true that there has been no ruling by an English court of any breach of the non-molestation order, but this arises in circumstances where the non-molestation order was obtained by the mother on or about the time she was leaving that jurisdiction for this jurisdiction. Despite the absence of any such court ruling, in my view, there was (as the High Court judge found) a clear breach by the father of the non-molestation order; consisting of his

text of 19th June 2022 in which he sought photos of the child (and engaged in what I would consider to be an attempt at emotional manipulation). The non-molestation order clearly forbade the father to communicate with the mother. He did so by text.

146. Moreover, the text itself contains an explicit indication of the father's awareness that the text constituted a breach of the court order, and of the penalty of five years potentially attaching to such a breach. Thus, most unusually, we have clear evidence of his awareness of the criminal nature of a breach, and the potential penalty, neither of which appear to have had any deterrent effect upon him.

147. I note also that the father swore on affidavit to this Court that he had not breached the non-molestation order. This is difficult to reconcile with his own explicit acknowledgment in the text that he was doing so by virtue of the text itself and his avermentn , shows a lack of respect for this Court's proceedings. Already, these matters bring the case into different territory to the *CA* case, where Finlay Geoghegan J noted that there was no independent evidence of a breach of court order.

148. I would also agree with the High Court judge that the posting of the 6th July was "menacing" insofar as it referred to her being "alone" in the United Kingdom, the implication being that he might go to her while she was alone in her house. In my view, the timing of this message is also of significance, it having been posted on the same day as the proceedings issued on his behalf in this jurisdiction. This also shows a lack of respect for court procedures and suggests that, more generally, court processes and orders which are made in the future may have limited deterrent effect upon this man.

149. It might be argued that the breach by text was, at its height, a communication, and not, as might occur in other cases, a physical interaction with the mother, let alone a violent one. A similar point might be made with regard to the Facebook posting. These are both, it might be said, at the lower end of the scale, as such cases go. In this regard, I think it important not to

lose sight of the context. It is not simply a question of a single text and a single posting by an individual with no relevant prior history. These fall to be considered in the context of the father's previous assault/battery convictions (albeit convictions of some antiquity), his history of mental health issues, his history of cocaine abuse, and the nature of his conduct in the course of his relationship with the mother in more recent times (the "biting" incident, the cereal bowl incident, smashing items including a phone and a laptop). The indications from this history are that the father is a volatile man whose is prone to violent outbursts about whom the authorities continued to have considerable concern in the recent past. The text and posting should be seen in that context. Moreover, their existence, and his attitude towards them in these proceedings, diminish the likelihood that this might be a suitable case where undertakings might usefully be put in place as part of a protective regime for the mother and child, were the Court to order the child's return. There is little reason to think that he has any insight to what he has done, or that future court orders would have the necessary deterrent effect.

150. One might also note the mother's report to the police in her 11th April statement that he said that he would break into her house. This also has a resonance with his previous attempt to gain unwanted entry to his own mother's house by smashing a window.

151. Reaching a conclusion in this case is difficult, not least because of the relative dearth of authority for when a non-return may be appropriate on the basis that a perpetrator's attitude indicates that the protections available in the requesting jurisdiction may not be sufficient to deter this particular individual from acts of violence. This case is undoubtedly a long way from the facts of the New Zealand case, but that case does not necessarily exhaust the possibilities of when it is appropriate to refuse to return a child to a requesting jurisdiction on the basis of "grave risk" of domestic violence. As the court observed in that case, the " *unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim*." When, on the spectrum of

possible cases, does the balance tilt away from placing trust in the system of the requesting jurisdiction in favour of a conclusion that this particular individual would continue to pose a "grave risk" despite the other jurisdiction's best efforts? Even taking account of the fact that at the heart of any such conclusion is a prediction or a risk assessment, the legal answer is inter-related with the standard of proof: both of which lie on the respondent who relies upon the defence of "grave risk".

152. Taking all of the factors discussed above into consideration, I have no doubt that the risk is a real one and a significant one; but the crux of the matter is whether it is grave. Ultimately this is a judgment call in light of one's view of the facts, and I have ultimately reached the conclusion that the risk would continue to be grave notwithstanding any undertakings that might be given by the father and/or protective measures taken in England. I am of the view therefore that, on balance, the High Court judge was correct in considering that the respondent mother had established on the balance of probabilities that such a "grave risk" did exist, notwithstanding the potential protective measures that could be used in the requesting jurisdiction, in light of the father's conduct to date taken in its entirety, This was an exceptional case in which the usual assumption that protective measures in the requesting jurisdiction would be sufficient was displaced by the evidence of the father's conduct, including his conduct following the making of an English court order and the issue of proceedings in this jurisdiction. I should say that while I consider that the factual situation here is distinguishable from previous cases, and sufficient to meet the test of grave risk, I do not thereby intend to depart from, or expand, the legal position as outlined in previous authorities. The outcome may be unique in the Irish line of caselaw to date, but that is because of the unusual facts. Finally, while the establishment of a defence of "grave risk" merely opens the door for the exercise of discretion, I am of the view that in view of the particular type of risk in question, discretion should be

exercised against the return of the child. I would therefore uphold the decision of the High Court judge and dismiss the appeal.

153. As this judgment is being delivered electronically, Donnelly J. And Binchy J. have asked me to record their agreement with it.

154. I would ask the parties to communicate with the Court Office if it is necessary to address any outstanding matters in the case, including costs. If no such communication is received with 7 days, no order as to costs will be made.