THE HIGH COURT

FAMILY LAW

[2024] IEHC 122

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

AND

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

AND

IN THE MATTER OF T. AND M., MINORS

(CHILD ABDUCTION: GRAVE RISK)

BETWEEN:

S.O.

APPLICANT

AND

A.B.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 12th of February, 2024

1. Introduction and Procedural Ruling

1.1 This is an application by a father for the return of his sons, called T and M for the purposes of this judgment, who are already the subject of family law proceedings in Germany. The defence of grave risk is raised. The children are too young to determine their views on the question of a return to Germany.

1.2 A preliminary issue arose about the admissibility of evidence in a final affidavit sworn by the Respondent. The case was relatively unusual procedurally in that the originating affidavit was sworn, as is commonly done, by the Applicant's solicitor. The Respondent's reply was a very substantial one and the Applicant replied to this with a lengthy affidavit. In circumstances where several new matters were raised by the Applicant in this substantive affidavit, I permitted the Respondent to reply to this but directed that she should confine herself only to new matters raised by him. In this supplemental affidavit, the Respondent averred that the Applicant had committed a fraud on the relevant Welfare Office in Germany by collecting child benefits there while the boys were here.

1.3 The Applicant objected to the affidavit being admitted, confining his objections in submissions to the offending paragraphs in respect of child benefits. I upheld this discreet objection. The averment in respect of collecting child benefit was of such tenuous relevance that it could be of very little assistance to the Court in determining the question of grave risk and this decision might have been different if the new matter raised was highly relevant or supported by exhibits, or both. The procedural rules governing the exchange of affidavits are important and there is always a balance to be struck between directing and managing the exchange of pleadings and ensuring that the Court has sufficient information to make the most effective and appropriate rulings in any case involving the alleged abduction of a child.

2. Objectives of the Hague Convention

2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most up to date information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in signatory states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective for contracting states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties there, and from daily contact with the other parent.

2.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If he proves these three matters, none of which is in issue in the current case, the burden shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return the child, as a result of that defence. Here, the defence raised is that of grave risk.

3. <u>Grave Risk: The Legal Test</u>

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

"*the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that …*

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

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

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

3.2 The kind of risk that has persuaded courts to refuse to return a child in the past include: a risk of violence to the child, usually based on evidence of previous

violence; a risk of suicide to the child or to the respondent; evidence of an event such as famine or war which would render the child's position unsafe, per Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, paragraph 57.

3.3 In *C.T. v. P.S.* [2021] IECA 132, Collins J. summarised several cases offering a comprehensive analysis of the objectives of the Convention. He concluded:

"*…there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention.*

This explains why the burden of establishing the defence is heavy and why a discretion remains for the judge, even if a grave risk to the child is identified.

3.4 In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J., noting that the risk in that case was of physical harm to a child, emphasised the trust to be put in the courts of the home state to protect the child even in such an extreme situation. In *S.H. v. J.C.* [2020] IEHC 686, this Court rejected the argument that the risk of children being placed in foster care in the requesting state constituted a grave risk in the context of Hague Convention cases, concluding at paragraph 6.11:

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

amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention.

3.5 In this context, it is worth quoting (as Denham J. did in *R.K. v. J.K.* [2000] 2 I.R. 416) from La Forest J. in *Thomson v. Thomson* [1994] 3 SCR 551 at p.596:

"In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause 'or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation."

3.6 Thus, to paraphrase the conclusion of Denham J., whereas any movement of children from one country to another is upsetting and may involve harm, that is not the level of risk contemplated by the Hague Convention.

3.7 Finally, and importantly, in assessing risk the Court must consider the facilities available in the requesting State to assess or mitigate the risk presenting. As noted by Fennelly J. in *P.L. v. E.C.* [2008] IESC 19, [2009] 1 I.R. 1, the real issue for this Court under this heading is whether, given that the German courts have embarked on a welfare hearing, there is evidence to suggest that those courts are unable or unwilling to protect T and M if they are at grave risk of harm.

3.8 The evidence available to the Court in respect of this defence is almost invariably on affidavit. As noted by Ní Raifeartaigh J. in her judgment in *D.B. v. H.L.C.* [2023] IECA 104, on the issue of evaluation of evidence in such cases,

there is no requirement for independent evidence in order to prove grave risk, nor is it sufficient for a court to simply take allegations of risk at their height and assess that situation. The Court is obliged to engage with, and weigh, the evidence in order to reach a view as to the credibility of the allegations.

4. **Agreed Facts**

4.1 The parties were married in Germany and have two children. The Respondent has family members in Ireland and had brought the children to visit their relations here on occasion. The oldest child, T, is under 5 years old and the youngest, M, is under 3 years old.

4.2 The couple separated and reconciled at least once. The Respondent went on holidays to Ireland with the boys in early 2023, returning to Germany to live with the Applicant. The parties continued to cohabit until mid-2023 when they separated. At that point, the relevant Youth Welfare Office became engaged.

4.3 In May of 2023 the local District Court, following a contested hearing involving both parties, made an interim order directing that the Applicant have the sole right to determine the place of residence of the eldest boy. In June, the Respondent collected T for access and obtained his passport. The Applicant had consented to a day trip to the Czech Republic. The Respondent took both children to Ireland. Later that month, a District Court in Germany made an order conferring the right to determine the place of residence of their son, M, on the Applicant and ordering the Respondent to surrender the child to him.

4.4 In July of 2023 the local Court prohibited the Respondent from taking the children outside the territory of Germany and outside the territory of member states of the Schengen Convention, albeit after the fact of removal. These proceedings under the Hague Convention were instituted on 17th July 2023 seeking the return of both children to Germany.

5. <u>Evidence of Grave Risk</u>

5.1 The Respondent has raised the defence of grave risk, offering a list of various allegations at exhibit AB3 which, she says, comprise the Appellant's previous conduct towards her forming the basis for her claim that the children will be at grave risk of harm if returned to Germany. AB3 lists, as headings, physical and sexual violence, and financial abuse, all said to have been inflicted on the Respondent by the Applicant.

5.2 The Respondent submitted that her averments describing violent incidents were supported by her exhibits which show multiple attendances with a therapist and a period of separation in 2021. Most of the counselling took place in 2021 though she also attended more recently before she removed the children. It was urged on the Court that the history of counselling was evidence of more than conflict or depression and could amount to grave risk.

5.3 A letter from the Respondent's lawyer from 2021 supports her submissions. Insofar as it repeats the Respondent's concerns it is not independent, but it is mildly supportive in the sense that it is consistent and pre-empts some of her

current complaints. The Applicant himself admits to what was described as a relationship of *"high intensity and a lot of shouting"*. The Applicant also admits two examples of physical contact. In particular, he concedes that he did throw a shoe or slipper at the Respondent and once pinned her arms to her sides.

6. <u>Contemporaneous Messages</u>

6.1 Numerous contemporaneous messages between the parties were exhibited, most of which were helpfully included in chronological order in one exhibit. This is important evidence comprising messages between the parties, many exchanged before proceedings began, and less likely to have been written to create a false impression but showing the real viewpoints of the parties rather than the version of events they might later wish to present to a court.

6.2 A limited number of messages from 2021 was exhibited. In one exchange early in the year the Respondent told the Applicant that the marriage was over. This was before the birth of their second child and it contains one reference in the sequence to physical violence. This is the incident that both parties describe during which the Applicant threw a shoe or slipper at the Respondent. She refers in their text exchange to this shoe incident as him hitting her, he denies that this qualifies as the item was thrown, he did not hold it in his hand.

6.3 At the very end of 2021 there is another exchange which indicates that the Applicant yelled at the Respondent in public to which he replies, I'm sorry. There is bickering and name-calling in the messages in between, more often by the Applicant who calls the Respondent arrogant and stupid, but no single

serious incident. The tone of the messages is aggrieved, tired and exasperated, in respect of both parties. By way of example, the Respondent begins:

"R: And I wanted a normal relationship. A man who respects me, loves me, appreciates me, and supports me I want…

A: - you don't get that if you behave like you do. You are not interested in others needs.

R: And criticizing someone all the time is right to keep them down?

A: Think what you want. You span your bow without measure."

6.4 There was a lengthy exchange on 5th December 2022, when the Respondent was ending the relationship, but the Applicant still wanted to talk it out. There is no reference to physical or sexual violence. This is in exhibit SO15.

6.5 Other messages refer to the fact that, as M was very young, it was also difficult for them after the birth of T, and the Applicant suggests they give it some more time until the youngest is older. The Respondent, at one stage, says "*Neither of us are perfect, no one says that you can deal with and live with my misconduct, but unfortunately I cannot with yours … I think that we both fell in love with an illusion of what the other person was like but unfortunately that's not how it is in reality".*

6.6 Again, while unhappy, she does not suggest any violence in these exchanges in December 2022. From the message above, the misconduct in question appears to be on both sides, and it is never clearly identified. In one message the Respondent identifies the Applicant's "*insults, senseless and absurd jealousy"*. She says that she feels imprisoned in the marriage and describes it as disappointing.

Very late at night there is the following exchange, starting with the Applicant. Messages in brackets are being replied to directly below:

6.7 *"A: (You said yourself that it's not easy with two children and show me a family that doesn't argue… those were your words recently)*

R: Yes, I always want to believe that what we have in the relationship is somewhat normal, but it's not true. I have to accept … nothing good comes from this relationship (A: That's how it is at the moment, but we also said to ourselves that it's not easy with two small children and that we'll give therapy a chance… I don't know, you're talking like this today, like this tomorrow…)

R: I don't want to try it. What a bigger disappointment it can be. I'm going through therapy and then you're still just as closed off and so stupid in some of your views?! Why do I have to do this to myself?? I would much rather invest the time and energy in the children and other areas of life.

A: (You do not even know that. I'm so insecure with you at the moment that I don't even dare to come out of myself or try something new… maybe if we understand our language of love better and circumstances get better and we have good methods it will work again?)

R: No, it doesn't work. Unfortunately, we are too different and anything that would lead to happiness for you would only make me feel sorry".

6.8 A series of messages from March of 2023 were relied upon by the Applicant and probably formed one of the bases for the German courts' decisions in respect of the custody of the two children, which they effectively granted to the

Applicant, ordering that he alone can determine where the children live. In these messages, the Respondent describes having a very bad couple of days with the two young children, the older boy in particular. The Applicant's replies are very supportive. The Respondent does not show any surprise about receiving his support and the exchange finishes with her telling him that she loves him. There are references by her to going into a clinic for therapy and letting the Applicant have the children.

7. <u>Doctor, Lawyer and Counsellor</u>

7.1 The Respondent exhibits an email from her doctor. The doctor appears to confirm that the Applicant dictates what the Respondent should wear in order to hide her bruises and that he does not let her out of the house. The same doctor has signed an exhibit for the Applicant, a copy of the same email, confirming that she never wrote it. The burden of proof lies on the Respondent. Given the directly contradictory evidence from the same witness, she has not proven this aspect of her case. This conclusion is supported by the lack of reference to injuries or to imprisonment at any stage in the lengthy exhibits of exchanges between the parties, samples of which are referred to above.

7.2 In a letter from the Respondent's lawyer, the writer refers to *"aggressive behaviour"*. No specific incident or type of conduct is identified. There is no allegation of physical assault in the letter. This is weak support for the

averments of the Respondent. At most, the letter provides evidence of consistency but only in respect of general complaints of verbal aggression.

7.3 The Respondent refers to a note from her counsellor which confirms that she was diagnosed with an adjustment disorder and it was submitted that this was due to domestic violence. The note does confirm the diagnosis of an adjustment disorder but it refers to prolonged marital conflict, not to domestic violence.

7.4 The Applicant submits that the Respondent raises concerns about his treatment of T but gives T into his care after her return from Ireland in early 2023 and again, after an initial separation for three weeks, in mid-2023. After their first separation, the Respondent moved to live within minutes of the Applicant's home. These choices are unusual if the Respondent is in fear of the Applicant.

7.5 The Court is aware of the phenomenon whereby victims of violence return, time and again, to their home or to the relationship in the hope that something will change. Here, however, despite evidence from a doctor, a counsellor and pages of exchanged messages, there is no evidence of that dynamic, no evidence of coercive control such as to wear down the will of the Respondent, and no evidence of a risk to the children. There were two incidents that can be described as physical violence to the Respondent and many examples of conflict, but none of this appears to be in the presence of the children.

8. Conclusions as to Grave Risk

8.1 While the exhibits support the conclusion that the marriage was an unhappy one, there is very little support for the conclusion that there was a risk of violence to the Respondent at the hands of the Applicant and even less support for the proposition that the children were at risk or may be at risk if returned. The local Welfare Office has been engaged with this family since their separation in 2021 and welfare officers met with both parties. Their reports are exhibited. No concerns were raised by the Respondent at that time, no risks noted by that Office in 2021 or when engaged with this family again in 2023.

8.2 The majority of the allegations made by the Respondent, in the list exhibited at 'AB3' are not borne out by corroborative evidence and are contradicted in part by the Respondent's own exhibits. In particular, there is no record of any complaints of sexual or financial abuse in the relationship, no independent verification of such allegations and nothing to support either claim.

8.3 I have read the contemporaneous messages between the parties which were exhibited by both. It was urged on me that they bore a more sinister meaning when read in chronological order than might otherwise appear. While they make unhappy reading, I cannot agree with the submission that the messages corroborate a violent or abusive relationship. Furthermore, the messages, taken together with the averments and other exhibits, do not establish a grave risk to these children such as would persuade me not to return them to Germany.

8.4 The contemporaneous messages are more reliable than the broad references to aggression or conflict in the exhibits relied upon by the Respondent. Her exhibits confirm conflict, but do not support allegations of aggression or of violence such as to suggest the Respondent is at risk if she returns to Germany. There is nothing to suggest that the children are directly at risk. Her counsellor's note is entirely in line with the messages exhibited. Conflict and violence are very different, and the messages certainly confirm the conflict, but not violence, still less violence which creates a grave risk for the boys.

8.5 The two examples of physical contact relied upon pre-date the Respondent's move to Ireland by a significant period of time and could not, plausibly, be the basis for a decision to move here due to a fear of the Applicant.

8.6 The Respondent relied on cases which, it was submitted, were examples of a respondent claiming violence without independent support for her claims. This is not so. The *Van de Sande v. Van de Sande* [2005] USCA 7 667; 431 F.3d 567 case involved serious and regular beatings, witnessed by the children. The support for these claims was provided in affidavits by parents, a sibling and a friend. That respondent had reported the beatings to local police but not to her doctor. This is far removed from the factual circumstances of this case.

8.7 In *Baran v. Beaty* [2008] USCA for the Eleventh Circuit No. 07-12762; 526 F.3d 1340, again it is submitted that there was no independent support for that respondent's claims but it is more accurate to say that she had not reported the violence she described in her evidence. This is in line with modern

understanding of the phenomenon of domestic violence: it often goes unreported as many women hide it rather than report it or seek help.

8.8 In *Baran v. Beaty*, the Respondent gave evidence before the relevant District Court, including that the applicant was a heavy drinker. She described notably violent incidents, such as physical attacks on her both generally and specifically while pregnant, throwing furniture around the house, and shouting. Some of these events occurred in the presence of their son. An ex-wife of the applicant confirmed a similarly violent relationship with the same man, also including the throwing of furniture. The respondent had secretly taped one of their conversations which supported her evidence. It was this combination of evidence which led the District Court to accept her version of events on the balance of probabilities, which facts were accepted by the Appeal Court. Again, there is nothing to compare with these incidents here: the exhibits fall short of the averments and there is no party who confirms acts or words of violence on the part of the Applicant, save his own admission as to the two incidents referred to above. These are very different from the events outlined in *Baran v Beatty* or *Van de Sande*.

8.9 Finally, in respect of *Achakzad v. Zemaryalai* [2010] ONCJ 318, this case was cited to support the proposition that the order of return might still be refused where there are no findings or charges against the left-behind parent in the place of habitual residence. This is undoubtedly the case. But it does not serve the Respondent here as, not only are there no findings or charges against this

Applicant in Germany, there is no evidence to support her averment that he has been violent towards her such as to justify a fear of him. Contrast this with the facts of *Achakzad:* that applicant for a restraining order had never reported her husband though their families had tried to manage a situation in which he had become increasingly violent towards her. The respondent husband had instituted Hague Convention proceedings when his wife left California for Toronto and both called family witnesses to support their respective cases. The applicant wife had photos of injuries that she testified were caused by her husband. The court accepted her evidence, rejecting the respondent's evidence.

8.10 The court found, after a *viva voce* hearing, that the husband's violence towards his wife had culminated in him pointing a loaded firearm at her and her child. The court also held that the man's parents were no longer able to control him and found that they had committed perjury on his behalf. In those circumstances, while having no issue with the justice system in California, the Canadian court refused to return the child to a situation in which the applicant wife could not be protected from her husband. Again, these are very different facts to those presented in this case.

9. <u>Mental Health of the Respondent</u>

9.1 I was urged to consider that the children may be in an intolerable situation if returned as they are likely to be in the sole custody of the Applicant. There is no evidence to suggest that this will cause an intolerable situation for the

Respondent or the boys. The authorities relied upon to support this argument (such as *M.L. v C.J.* [2013] IEHC 641 and in *Re E (Children)(Abduction: Custody Appeal)* [2011] 2 FLR 758) featured respondents who had medical reports confirming mental health difficulties showing how intolerable it would be for them to be returned, with consequences for the children involved. There was no comparable evidence here.

9.2 It was also submitted that: "*It is clear from her affidavits that the Respondent greatly fears returning to Germany, to the proximity of the Applicant. The level of this fear, whether justified or not, is such that it is likely to undermine her mental and psychological health*.". This is not a tenable argument. The most a court can find when presented with a sense of fear, as gleaned from an affidavit, is that the deponent may be in fear. The concession made, effectively, that the fear may not be justified, makes the argument weaker still though it does have the benefit of being in line with the facts: there appears to be no evidence such as would justify fear on her part. To move from this position to positing mental health effects as a result of the asserted fear is a leap in logic without any support.

9.3 In order to establish, let alone prove, the proposition that a deponent is in fear, such as might affect her health if she is returned, she must produce medical evidence, not a speculative conclusion based on averments without support. This is an especially weak argument in a case with multiple exhibits of contemporaneous exchanges, none of which supports the view that the Respondent is, or was, in fear of the Applicant.

9.4 The Respondent has averred that she attended a psychotherapist as a result of the damaging effects of her relationship with the Applicant, however no report from this person is exhibited to support this. The Applicant has also referred to previous mental health issues which he associated with post-natal depression. Without any expert report or supporting letters from treating professionals, this Court cannot determine what problems, if any, this Respondent currently faces. She carries the evidential burden of proving grave risk and there is insufficient evidence to prove that defence in this case.

9.5 While the Respondent has been the primary carer of both children for most of their lives, she has trusted the Applicant before now with the care of the children and there is no evidence of any risk to them in that regard. Given that they are very young and have spent some months without their father, it may be that undertakings will be appropriate in respect of the manner of return. Thereafter, however, it will be a matter for the German courts.

9.6 In the circumstances, it is not necessary to consider the capacity of the German courts and the local authorities to protect the children.

10. <u>Conclusions</u>

10.1 Both children will be returned to Germany forthwith.

10.2 I will hear the parties on the question of undertakings and on costs. My preliminary view is to make no order as to costs.