THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 227

Record Number: 2019/250

Whelan J.
McCarthy J.
Costello J.

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 signed at the Hague on the 25th day of October, 1980

And in the matter of W & S (Minors)

BETWEEN/

C.M.W.

APPLICANT/RESPONDENT

- AND -

S.J.F.

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of July 2019

Introduction

1. This is an appeal against the judgment and orders of Ms. Justice Donnelly in child abduction proceedings brought pursuant of the provisions of the Hague Convention on International Child Abduction (hereinafter the Hague Convention) directing the summary return of two minors, named in the title above, to the State of British Columbia in Canada pursuant to Art. 12 of the Hague Convention.

Background

2. The background history of the parties is set out in detail in the judgment of the High Court and will not be repeated herein. The appellant is the mother and the respondent is the father of the said minors. The parties are married to one another. The daughter W. was born in May 2015 and the daughter S. in September 2017 in British Columbia, Canada. The minors were at all material times habitually resident within the jurisdiction of the Courts of Canada for the purposes of the Hague Convention. Difficulties arose in the relationship between the parties. The respondent is the holder of rights of custody within the meaning of the Hague Convention in respect of both minors.

3. On the 11th January, 2019 the respondent instituted proceedings seeking to prevent the appellant from removing the minors from the jurisdiction of the Courts of British Columbia. On the 14th January, 2019 the matter was heard before the Supreme Court of British Columbia and an order was made restraining the removal of the minors from the jurisdiction of the said Courts without the express consent of both parents, or further order of the Court. The said order remains in full force and effect and has not been varied or altered to date.

4. The appellant brought an *ex parte* application before the Courts of British Columbia in early February, 2019 seeking to relocate with the minors to Ireland but never secured such an order. It appears that from mid-January 2019 to about the 19th February, 2019 negotiations took place between the parties and their respective advisors in relation to their matrimonial issues. On the 21st February, 2019 the appellant called the police alleging an assault upon her by the respondent. He was arrested and subsequently released on giving an undertaking not to contact the appellant or the minors. Subsequently, the appellant did not pursue the allegation.

5. On the 24th February, 2019 without the respondent's knowledge or consent, and without leave of the Court, the appellant removed the minors from the jurisdiction of the Courts of British Columbia to Ireland and they have been resident here since. The respondent first became aware of the removal on foot of a letter from the appellant's solicitors to his legal advisers on the 28th February, 2019.

Chasing Orders

6. The proceedings were re-entered by the respondent before the Supreme Court of British Columbia, which ordered on the 4th of March, 2019 that the respondent be granted sole custody of the two minors, and further directing their immediate return to British

Columbia, the place of their habitual residence prior to their wrongful removal. Difficulties were encountered in effecting service upon the appellant of the said order in the first instance by reason of lack of information as to her exact whereabouts.

Hague Convention proceedings

7. The respondent, invoking the provisions of the Hague Convention, sought the assistance of the Canadian Central Authority to effect the summary return of the two minors to British Columbia. It was contended that, not alone was the removal wrongful in that it breached the rights of custody of the respondent pursuant to the laws of their habitual residence, but also breached rights of custody vested in the Supreme Court of British Columbia in circumstances where that Court was actively seized of proceedings concerning the parties and the minors and had made orders which subsisted and were operative at the date of the removal of the minors which expressly prohibited such removal. A request for a return was received by the Central Authority in this jurisdiction and arising therefrom, proceedings were instituted by way of special summons before the High Court on the 15th March, 2019 seeking, *inter alia*, the summary return of the minors pursuant to Art. 12 of the Hague Convention to the place of their habitual residence.

Position of the appellant before the High Court

8. It was not in contention that the minors were habitually resident in the State of British Columbia prior to their removal by her on the 24th February, 2019. It was argued that the respondent had not been exercising rights of custody arising from an undertaking he had given to police on the 21st February, 2019 to refrain from communicating directly or indirectly with the appellant and the two minors. The appellant further contended that a return to Canada would give rise to a grave risk, leaving her personally in an intolerable situation which in turn would give rise to an intolerable situation for the minors within the meaning of Art. 13(b) of the Hague Convention.

9. In a detailed affidavit sworn on the 10th April, 2019 the appellant outlined her perspective of the history of the relationship between the parties. Of particular relevance is para. 88 of same where the appellant identified fifteen distinct reasons which, she contended, would put her in an intolerable situation if ordered to return. The issues identified as giving rise to intolerability were, briefly, as follows: -

(i) The appellant would have nowhere to live.

(ii) The respondent had procured an order subsequent to her departure with the minors granting him sole custody.

(iii) The respondent was not available to care for the minors on a day to day basis.

(iv) The respondent had been unsuccessful in his attempts to abstain from alcohol/drugs.

(v) The appellant had no income.

(vi) The respondent had provided the appellant with insufficient financial support.

(vii) The appellant had no legal aid.

(viii) The appellant cannot afford private legal representation in Canada.

(ix) There was no equality of arms in relation to access to justice before the Canadian Courts.

(x) The minors and appellant would be exposed to grave risk of psychological and physical harm.

(xi) The appellant had not received financial support since she removed the minors to Ireland.

(xii) The respondent had "used his family funds to bring harm upon us".

(xiii) After her removal of the minors from Canada the respondent had not returned to live in the family home until the 13th March, 2019.

(xiv) The respondent had sought to have the appellant prosecuted for abduction of the minors.

(xv) If "forced to return to Canada" the appellant has nowhere to live, no legal aid, no money, the minors will be with the respondent, the appellant would be facing criminal charges and is ineligible for any welfare support.

Decision of the High Court

10. Having duly considered the extensive affidavit evidence of the appellant and the detailed and comprehensive written and oral legal submissions advanced by counsel on behalf of the appellant, together with the arguments on behalf of the respondent, the High Court judge delivered her judgment on the 24th May, 2019 concluding that there had been a wrongful removal of the minors by the appellant. The appellant had contended that the totality of the grounds identified by her at para. 88 of her said affidavit as outlined above, gave rise to "an intolerable situation". Having duly considered each of the defences advanced on behalf of the appellant the trial judge concluded that she was not satisfied that the appellant had established a grave risk to the minors pursuant to Art. 13(b) should they be returned to Canada. (para. 136)

11. The Court noted that the appellant had invoked Art. 20 of the Hague Convention contending that a summary return was impermissible by reason of the fundamental principles of Bunreacht na hÉireann. Paras. 63 - 69 of the judgment analyse the contentions and the jurisprudence, particularly the decision of the Supreme Court in *Nottinghamshire County Council v. B.(K)* [2013] 4 I.R. 662. She considered in detail the judgment of O'Donnell J., particularly at paras. 60 and 61, 64 and 65, concluding: -

"…it is not possible to lay down a single encompassing theory as to when the return will be prohibited on the basis of Article 20. What is clear however is that the return will only be prohibited when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court that the Court must refuse return. That requires more than a simple comparison with the foreign legal provision and procedures. It must be much more fundamental than a mere comparison."

12. The Court noted in the judgment (paras. 70 and 71) that the respondent had offered undertakings to facilitate a smooth return of the minors and to protect their wellbeing upon their immediate return to British Columbia and pending an application to the courts of that jurisdiction in respect of their future care and welfare. She observed that the mechanism of undertakings had been approved by the Supreme Court in decisions such as *P.v.B* [1994] 3. I.R. 507 noting at para. 71: -

> "According to Denham J., the undertakings relate to the short duration between the order of the Irish Court pursuant to the Hague Convention and the exercise of jurisdiction by the family law court of habitual residence."

The judge observed –

> "The [appellant's] objection to that undertaking is that the undertaking only extends until the matter comes before the Canadian courts. The Court is quite satisfied that the undertaking is sufficient to allow any further matters of care and custody to be made by the courts of the place of habitual residence." (para. 78)

The trial judge noted that the respondent had undertaken to pay for the return flights of the minors, and that this offer had been extended through his counsel to pay for the appellant's flight also. He also undertook to pay a once-off sum to cover the immediate costs on return, and suggested this would cover the period of three to four weeks at the end of which the Canadian courts would be seized of the matter. The appellant said that this was insufficient. The respondent has no money of his own, "he does however have the offer of money from his mother." (para. 93)

The trial judge concluded: -

> "It is not necessary for the protection of the children to accept this undertaking but to ease the return of the children, I would make the order subject to that undertaking in respect of payment of flights and for such sum as would be reasonable to cover a 4 week transition period. This latter sum is to be agreed between the parties (the respondent in pursuing her objection has not engaged with an amount but has criticised the applicant for not nominating an amount) and in default of such agreement the Court will fix an amount."

13. A significant aspect of the appellant's objections to returning was her contention that she did not have an entitlement to legal aid and legal representation and the absence of a comprehensive civil legal aid scheme in British Columbia. She had received initial legal representation on an emergency basis and an allotment of forty-five hours which she had, apparently, exhausted. Arguments were advanced based on the European Convention on Human Rights including *Airey v. Ireland* (1979) 2 E.H.R.R. 305 and at para. 110 the trial judge observed that pursuant to the principles set out in *P.L. v. E.C.* [2009] 1 I.R. 1: -

> "An abducting parent is required to show on the balance of probabilities that for the reason, in this case, of the absence of legal aid, that the Canadian Court is unable or unwilling to protect the welfare of the children."

She observed –

> "However, where the issue is at a certain remove from the return, as for example where it relates to the question of legal representation in the courts of the country of habitual residence when deciding issues of custody and financial provision, the principle remains that in the absence of evidence that the courts are unwilling or unable to protect the welfare of the children, they should be returned."

She ordered a summary return of the minors, declaring them to have been wrongfully removed from the place of their habitual residence. The appellant appealed that determination.

Grounds of Appeal of the appellant

14. The appellant advanced four grounds of appeal: -

> (1) The High Court judge was wrong in law and made erroneous findings of fact in not refusing to make a summary order for the return of the minors based on Art. 20 of the Hague Convention. This failure is incompatible with the rights of the appellant under Irish law.
>
> (2) The High Court erred in its application of the relevant legal principles, having made erroneous findings of fact and ought to have refused to order the summary return of the minors arising from the defences pursuant to Art. 13(b) of the Hague Convention.
>
> (3) The High Court erred in accepting hearsay evidence in relation to a promise of financial support from the respondent's own mother.
>
> (4) State parties to the Hague Convention on International Child Abduction are expected to endeavour to resolve the dispute of the parties within six weeks of receiving an application for summary return from the Central Authority. Such an expectation and commitment of Contracting States should not interfere with the constitutional rights of the appellant to fair procedures and to access to justice.

The respondent opposed the appeal.

Ground (i) Article 20

15. The appellant contended that the High Court was wrong in law and made erroneous findings of fact in its failure to refuse to make an order for the return of the minors based on Art. 20 of the Hague Convention. The said failure was incompatible with the rights of the appellant under Irish law she argued. In particular, issue was taken with the determination of the High Court judge that notwithstanding that the lack of legal aid in family law cases in British Columbia is an issue of some concern within the province, and documentation exhibited by the appellant demonstrated that this issue had been challenged as a violation of the Canadian Charter on Fundamental Rights, the judge nonetheless concluded at para. 112 of the judgment: -

> "No evidence has been put before the Court of any report from an international tribunal or monitoring body or statutory body in Canada such as an Ombudsman or Human Rights Commission criticising the lack of legal representation."

16. The appellant in her submission placed reliance upon a selection of reviews including by the United Nations concerning Canada's compliance with the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights. In respect of both, Canada has been criticised for its legal aid regime in relation to family law matters. Reliance was placed, *inter alia*, on excerpts from the 2016 review of Canada by the United Nations Committee on the Elimination of Discrimination against Women and the 2006 review of Canada by the UN Committee on Economic, Social and Cultural Rights together with the review in 2018 of the UN Human Rights Council which incorporated repeated recommendations previously made in 2013 emphasising the need to ensure access to justice, particularly for vulnerable members of society.

17. The appellant contended that the provisions of Art. 20 of the Hague Convention were engaged such that the summary return of the minors pursuant to Art. 12 of the Hague Convention ought to be refused as impermissible having regard to the appellant's rights pursuant to: -

(i) Art. 40 and 41 of the Constitution;

(ii) Art. 8 of the European Convention on Human Rights;

(iii) the provisions of the UN International Covenant on Economic, Social and Cultural Rights, Arts. 3 and 10;

(iv) The United Nations Convention on the Elimination of all forms of Discrimination Against Women, reliance being placed on Arts. 2 and 15 in particular;

(v) The UN International Covenant on Civil and Political Rights, Arts. 23 and 26,

(vi) UN Convention on the Rights of the Child, Arts. 3, 9, 16 and 27.

Ground (ii)

18. The appellant contended that the trial judge had failed to have regard to the fact that financial hardship would ensue for the appellant in the event of a summary return and in turn this would cause psychological harm and result in an intolerable situation for the minors. The trial judge erred in assuming that Canada had an adequate safety net for women and minors from the financial perspective. Reliance was placed, *inter alia*, on the 2006 Review of Canada by the UN Committee on Economic, Social and Cultural Rights.

19. It was further argued that the trial judge erred in failing to pay sufficient attention to the effect that a summary return would have on the appellant, and the consequent risk of psychological harm that this could pose for the minors in the context of the "likely severe emotional strain the Family Court proceedings would place on the [appellant] in the absence of any further legal aid and facing the extreme inequality of arms arising from the respondent's access to privately funded legal representation."

20. The appellant contended for and invoked an unenumerated constitutional right "not to have one's health endangered by the State" and she further invoked the provisions of Art. 8 of the European Convention on Human Rights, Arts. 3, 9, 16 and 27 of the UN Convention of the Rights of the Child, Arts. 3 and 10 of the UN International Covenant on Economic, Social and Cultural Rights, Arts. 2 and 15 of the UN Convention on the Elimination of All Forms of Discrimination against Women and the provisions of the UN International Covenant on Civil and Political Rights which both Ireland and Canada have ratified, Arts. 23 and 26.

Ground (iii) - the undertakings

21. In her third ground of appeal she argued that the High Court was wrong to accept hearsay evidence in relation to a promise of financial support from the respondent's mother. Reliance was placed on the statement in para. 93 of the High Court judgment to the effect that the respondent had no money of his own but he did have an offer of money from his own mother. It was contended on behalf of the appellant that "the logic of the judge on this point in accepting an unverified promise of money from a third party who was not present or represented in court must be contrasted with the statement made by the judge in paragraph 26 in deciding to exclude various affidavits from friends and neighbours of the parties who are not available for cross-examination. In this part of the judgment the judge declares that the court had treated these as "inadmissible hearsay". The appellant contended that the approach of the trial judge breached the rules of evidence under Irish Law.

Ground (iv) – expedition and Article 11

22. The fact that State High Contracting Parties to the Hague Convention are expected to endeavour to resolve the dispute within six weeks of first receiving a request for return from the Central Authority of the State of habitual residence of a minor the subject of an application pursuant to the Hague Convention potentially breaches the appellant's rights, she argued. It was contended that the expectation and commitment of the Contracting States ought not interfere with the constitutional rights of the appellant in this case to fair procedures and to access to justice. She cited in particular Arts. 2 and 11 of the Hague Convention. She contended that she and her counsel had not received the final affidavit from the respondent until close of business on the 1st May, 2019 and that she was required to have her affidavit in response filed by 2pm the following day. She contended she had inadequate time to respond to each of the points in the respondent's said affidavit.

23. The appellant also posited that she had not received a copy of her own counsel's submissions and the respondent's submissions had not been received until the first day of the hearing. There was a lack of adequate opportunity to research case law being relied upon by the appellant, she argued.

24. The appellant claimed she has insufficient time to obtain an independent psychiatric evaluation of herself in this jurisdiction –

"…to fully and fairly defend her argument of grave risk due to mental health grounds of the children's primary caregiver."

The appellant complains that the evidence exhibited in paper form regarding Canada's violation of ratified UN treaties was only mentioned in oral submissions by her counsel, resulting in the High Court not referencing it at all in the judgment.

25. The appellant considered that the hearing and events leading up to it had been stressful and rushed, and crucial medical evidence had not been correlated, resulting in the threshold for grave risk under Art. 13 not being considered to have been met by the evidence in the view of the trial judge. In that behalf, the appellant invoked her constitutional rights under Art. 40 of the Irish Constitution and in particular, the unenumerated constitutional right to fair procedures in decision making arising under the provision

of Art. 40.1 that –"All citizens shall, as human persons, be held equal before the law."

In consequence, the appellant seeks an order refusing the summary return of the minors to the requesting State.

Position of the respondent

26. The respondent opposes the appeal on all grounds. In regard to the first ground it is contended that the appellant has failed to meet the threshold to engage Art. 20 as specified in the Supreme Court decision *Nottinghamshire County Council v. K.B.* It was argued that the appellant is incorrect in suggesting that there is any automatic constitutional entitlement enjoyed by her under Irish law to legal aid in this State. It was contended that the trial judge had correctly noted that the ECHR in *Airey v. Ireland* had recognised that there was no general entitlement to legal aid.

27. With regard to the appellant's contention that the trial judge erred in failing to determine that the minors ought not to be returned to the jurisdiction of the Courts of British Columbia by reason of grave risk and that a summary return will expose them to harm within the meaning of Art. 13(b) based on the health issues of the appellant and the financial hardship she contends will be visited upon the minors in the event of a summary return, the respondent contends that the trial judge correctly directed herself on the burden of proof in relation to the establishment of a defence under Art. 13(b) and had regard to the relevant case law. It was contended that the case of Re. *S. (a Child) (Abduction: Rights of Custody)* [2012] 2 A.C. 257, which the appellant had sought to rely upon in support of a contention that a summary return would have such a significant adverse impact on her psychological wellbeing and that her mental health would suffer greatly and this in turn would cause psychological harm to the minors of such a degree that warranted a refusal to order the return, was distinguishable.

28. It was argued by counsel that the aforementioned decision of the UK Supreme Court was distinguishable by reason of the acute degree of psychological frailty of the mother that was proven before the Courts in the *Re. S. (a Child) (Abduction: Rights of Custody)* case which contrasted with the facts in the instant case.

29. With regard to the appellant's contention of financial hardship in the event of her being required to return by reason that she had no entitlement to any income support in Canada, the respondent contested that claim observing that at paras. 86 and 87 of the High Court judgment the trial judge had found that the evidence did not support such a claim that the appellant would receive no State payments. On the contrary, there was evidence that there is available to the appellant some level of financial assistance. It was contended that even if the appellant is correct that she will have no legal representation at all before the Canadian courts in the event of her return, the lack of legal representation does not of itself give rise to a grave risk that meets the standard of Art. 13(b) of the Hague Convention.

Ground (iv)

30. In submissions before this Court at the hearing of the appeal it was contended that the arguments advanced by the appellant amount to an exaggeration and did not fairly reflect the facts. It was contended that this case in its conduct before the High Court was unusual insofar as the appellant had been granted legal aid and counsel had been appointed to represent her ahead of the first return date of the special summons before the High Court Child Abduction List. According to the standard practice of the High Court, even had legal aid not been granted she would have been generally required to file her substantive affidavit within two weeks. Further, her counsel had actively sought and obtained an additional three or four days' extension of time for the delivery of the primary affidavit of response by reason of the substantial volume of exhibits which had been relied on by the appellant.

31. Regarding the appellant's complaints surrounding the time frame for delivery by her of a supplemental affidavit, the deadline indicated was lunchtime on the 2nd May, 2019. It was contended that the said affidavit was limited in its purpose and merely for joining issue on any new fact as had been raised by the respondent in his then most recent affidavit. It was argued that the said supplemental affidavit ought to have been confined to any new matter raised by the respondent in his most recent affidavit in respect of which she sought to join issue. The respondent argued that the appellant's final affidavit failed to identify any new substantive issue in the respondent's affidavit. It was contended that the appellant had used the supplemental affidavit as a vehicle to exhibit a letter of referral from her GP.

32. With regard to the appellant's complaint that she had insufficient time prior to the hearing to obtain an independent psychiatric evaluation to establish her mental health issues it was contended by the respondent that she had failed to advance any such complaint before the High Court, nor had she demonstrated that she had taken any steps to adduce such evidence from the date of service of the proceedings upon her on the 16th March, 2019 to the date of the hearing. It is contended that in the course of the hearing in the High Court the appellant had relied on fifteen issues specified in para. 88 of her affidavit as indicators of "an intolerable situation" within the meaning of Art. 13(b) in the event of a summary return. She had further cited forty-four bases for her claim of an intolerable situation in her written submissions; only one of which had obliquely alluded to her mental health issues. It was argued that the appellant's appeal ought to be dismissed on all grounds.

Application to adduce new evidence

33. During the course of the hearing of the appeal the appellant, by then a litigant in person, sought to put new evidence of an extensive nature particularly in regard to medical and health matters, before the Court. This Court did not admit such evidence. Its voluminous nature, ranging over an extensive period of time, suggests that it may be of relevance in regard to welfare issues between the parties or to the substantive issues that will fall to be determined in regard to the apparent breakdown of the relationship between the parties; but it is not material which a Court dealing with summary proceedings pursuant to the Hague Convention at an appeal stage could entertain.

The approach of this Court

34. The primary objective of the Hague Convention is to ensure the prompt return of minors who have been wrongfully removed from the State of their habitual residence so that the courts of the latter State can consider and rule on the merits of rights of custody in accordance with domestic law. Such orders are directed to the return of the minors and do not compel an abducting parent to return. The limits of the Hague Convention, 1980 are to be found in its full title. The instrument is only concerned with the international situation of minors and is not involved either in criminal issues regarding child abduction or any assessment of the long-term best interests and welfare of minors.

35. Certain issues are not in contention in this appeal; the respondent is the holder of rights of custody. The minors were habitually resident in Canada at all material times prior to their removal from the jurisdiction of the Courts of British Columbia by the appellant on

24th February, 2019. The removal was in breach of orders of the Supreme Court of the State of British Columbia which were operative at that date. They expressly prohibited removal of the minors. Whether a removal breaches rights of custody is to be determined in accordance with the domestic law of the requesting State.

36. There was clear evidence, and it is not meaningfully contested in the appeal, that the respondent was the holder of rights of custody, and further that rights of custody were also vested in the Supreme Court of the State of British Columbia by operation of law in relation to the minors immediately before their removal from Canada. From an international law perspective, whether these rights are properly to be characterised as constituting "rights of custody" within the meaning of the Hague Convention is an issue of international law and depends on the application of an autonomous meaning to the phrase "rights of custody" as understood by the courts in this jurisdiction. In fact it is not contested in the appeal that the rights in question were rights of custody attributable in the first instance to the respondent.

37. Whilst the appellant had contended before the High Court that the respondent was not actually exercising rights of custody at the time of the removal arising from events in the days prior to the removal of the minors, there is ample authority for the proposition that even where a parent is imprisoned, or hospitalised, it does not follow for the purposes of the Hague Convention that such a left-behind parent is not exercising rights of custody.

38. The key issue is whether the applicant parent has rights that fall within the definition of Art. 5(a) of the Hague Convention which specifically states that rights of custody include rights relating to the care of the person of the child, and, in particular the right to determine the child's place of residence. Such rights, as Art. 3 states, may arise by "operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Since there is litigation pending concerning the minors before the Courts of the State of British Columbia and the respondent is an active participant in the said proceedings, his prosecution of that litigation *per se* clearly amounts to the actual exercise of rights of custody in relation to the minors for Hague Convention purposes. The contentions of non-exercise in this case are not sound and are not maintainable.

Ground (i)

The ruling of the Grand Chamber of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [2011] 1 F.L.R. 122 has made clear that human rights arguments can be taken into account in appropriate cases in considering whether the summary return of a minor under the Hague Convention would be a disproportionate interference with the Article 8 right to respect for the family life of a particular parent with the minor or as between siblings.

39. Art. 20 of the Hague Convention provides: -

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

40. As was pointed out by counsel for the respondent, in *Nottinghamshire County Council v. B (K)* O'Donnell J. in the Supreme Court considered the operation of Art. 20. It is noteworthy that O'Donnell J. cited the reference in Art. 29.1 of the Constitution to the ideal of "friendly cooperation amongst nations" and proceeded to express the view that the Constitution did not demand compliance with Irish constitutional standards by other countries as a prize for their interaction with this State. In his judgment in the said case O'Donnell J. articulates a clear test for the application of Arts. 41 and 42 in cases of international child abduction. His approach, in my view, restricts the ability of non-nationals to rely on the Constitution's provisions to thwart or defeat the decisions of foreign authorities. O'Donnell J. considered that: -

> "… The Constitution prohibits the return of children [to a requested State] under article 20 when the adoption or other care proceedings in the requesting state are so proximately and immediate a consequence of the Irish court's order of return, and are so contrary to the scheme and order that the Constitution envisages and guarantees within Ireland, that the order of return would itself be a breach of the court's duty to uphold the Constitution." (para. 164)

O'Donnell J. observed at para. 207 that Art. 29 affirms this State's devotion to the ideal of friendly cooperation among nations and that such cooperation–

> "…necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies."

The threshold identified by O'Donnell J. is high.

41. Further, Murray J. in his judgment in the said case referred to Art. 1 of the Constitution as affirming the power of the State to enter into international agreements with a view to promoting the common good as envisaged by the Preamble of the Constitution and with a view to protecting rights.

42. A primary basis for the appellant's contentions that a summary return of the minors is not permitted by the fundamental principles of the Irish Constitution relating to the protection of human rights and fundamental freedoms is that she will be ineligible for legal aid and will not have access to legal representation to pursue litigation on her return to British Columbia and as such, this creates an "inequality of arms" between her and the respondent. She argues that this offends her constitutional rights of access to justice, fair procedures and equality. The matter of the existence of a constitutional right to civil legal aid was considered by the Supreme Court in *Magee v. Farrell* [2009] 4 I.R. 703 where the plaintiff contended she had a constitutional right to legal aid in relation to an inquest. Finnegan J. in his judgment considered that the constitutional right of the claimant was to have the statutory scheme for civil legal aid administered fairly and in such a manner as to fulfil its purpose. The unanimous decision of the Supreme Court in that case puts an end to any possibility of arguing that, by virtue of any provision of the Constitution, a right to civil legal aid exists independently of the provisions of the Civil Legal Aid Act, 1995.

43. The appellant's contentions that the absence of a satisfactory civil legal aid scheme in British Columbia violates her rights under the fundamental principles of the Constitution are not supported by any authority. It will be recalled that the decision in *Airey v. Ireland* itself recognised that there is no general right to civil legal aid: -

> "To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either

because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case…"

44. The appellant sought to rely on reports of, *inter alia*, the United Nations and an independent Canadian body and the observations contained in them in relation to Canada's non-compliance with the UN Convention on the Elimination of all Forms of Discrimination Against Women, the UN International Covenant on Economic, Social and Cultural Rights and the UN International Covenant on Civil and Political Rights. A Court is entitled to attach importance to relevant reports from independent human rights bodies, however it is noteworthy that none of the material provided and which was receivable in evidence by this Court, identifies any deviation of a material nature between the nature and extent of the civil legal aid scheme operative in this jurisdiction, and the one available in the State of British Columbia.

45. Even if the civil legal aid regime is different in the State of British Columbia and subject to all of the limitations of which the appellant complains, nonetheless she has failed to demonstrate that the scheme in operation is so contrary to the fundamental principles relating to the protection of human rights and fundamental freedoms in this jurisdiction as would necessitate a refusal to order the summary return of the minors for the vindication of her constitutional rights.

46. Part of the appellant's contentions was that the family home of the parties in British Columbia will be sold in the context of the breakdown of the marriage. However, as counsel for the respondent observed, in her own defence delivered in the divorce proceedings the appellant seeks the sale of the family home and an unequal division of the proceeds of sale. The sale of a family home and the distribution of the net proceeds of sale as between the parties to a failed marriage routinely arises in matrimonial proceedings in this jurisdiction. There is no basis for a contention, as was advanced, that it could be anticipated in this jurisdiction that she would likely obtain custody or have any entitlement to remain in the family home until the youngest child attained the age of majority.

47. It is noteworthy that the appellant did not have civil legal aid under the legal aid scheme operative in this jurisdiction for the purposes of conducting her appeal before this Court. This merely underlines the fact that there is no general entitlement to civil legal aid in this jurisdiction and objections based on a contrary proposition as were advanced by the appellant are wholly misconceived. The absence or severe limitation of civil legal aid representation does not reach a threshold as would engage Art. 20 and neither do the various reports advanced by the appellant in their totality meet the high threshold identified by the Supreme Court in *Nottinghamshire County Council v. B.* before a court must refuse a summary return of minors by virtue of constitutional rights established pursuant to Art. 20 of the Hague Convention.

48. Whilst the appellant seeks to rely on the provisions of the UN Convention on the Rights of the Child, the provisions of the said Convention are selectively invoked. Art. 7(1) encompasses the right of a child to know and be cared for by his or her parents. The provisions of Art. 9(1) as invoked by the appellant operate equally in favour of the respondent and impose an obligation on the State to ensure that a child is not separated from his or her parent/s except –

"… when competent authorities subject to judicial review determine, in accordance

with applicable law and procedures, that such separation is necessary for the best interests of the child."

Clearly the pending proceedings in the State of British Columbia, the State of habitual residence of the minors, is such a "judicial review" and is the correct forum for the determination of such issues.

49. Art. 10(2) encompasses the right of a child whose parents reside in different States to have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents. Art. 11 addresses the illicit transfer and non-return of minors and provides: -

"[1] States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

[2] To this end, States Parties shall promote the conclusion of bilateral or

multilateral agreements or accession to existing agreements."

Art. 18(1) provides –

"States Parties shall use their best efforts to ensure recognition of the

principle that both parents have common responsibilities for the

upbringing and development of the child."

50. The provisions of the 1980 Hague Convention are consistent with those of the UN Convention on the Rights of the Child in that both seek to protect and vindicate the rights of the child to have a relationship with both parents and to have decisions pertaining to welfare determined in the most appropriate forum in circumstances where disputes arise between the holders of the rights of custody.

51. No ground is established by the appellant which engages the provisions of Article 20 of the Hague Convention.

Ground (ii) grave risk

52. Article 13 of the Hague Convention states: -

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

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

The appellant contends that a summary return would result in grave risk and would also place the two minors in an intolerable situation; firstly, arising from financial hardships that would be encountered by the appellant, and secondly by reason of the health of

the appellant which she contends would be so adversely impacted as to have a serious negative impact on her mental health which in turn would give rise to an intolerable situation for the minors, both of whom have at all material times from birth been cared for by her. It was further contended that such is the degree of her own psychological vulnerability that she will not contemplate returning to Canada herself, hence on a summary return the minors would be separated from her as a natural and inevitable consequence of the order.

53. A leading authority in this jurisdiction on the threshold for establishing grave risk is the decision of the Supreme Court in *A.S. v. P.S* [1998] 2 I.R. 244, which emphasised that the test is a high one. Denham J. cited with approval from the judgment of Wall J. in *Re. K. (Abduction: Child's Objections)* [1995] 1 F.L.R. 977 wherein it is stated that grave risk "is not, of course, to be equated with consideration of the paramount welfare of the child." In that case the allegations centred on child sexual abuse.

54. In the Supreme Court decision *P.L. v E.C. (Child abduction)* [2009] 1 I.R. 1, which also involved allegations of child sexual abuse, it stated at paras. 54-55: -

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

55. The burden to establish intolerability is a stringent one because of the actual terms of Art. 13(b) of the Hague Convention. The standard of proof is that of the ordinary balance of probabilities. In evaluating the evidence, the Court must have regard to the limitations necessarily involved in summary proceedings pursuant to the Hague Convention process.

56. It is clear from the jurisprudence of the Supreme Court that a potential defence pursuant to Art. 13(b) offers an exception to the requirement pursuant to the Convention to return a child summarily to the jurisdiction of habitual residence once wrongful removal has been established. It is an exception furthermore that must be narrowly construed in light of the plain language of the sub-section. The burden of proof rests on a respondent to Hague Convention proceedings to discharge the evidential burden of establishing that a summary return, in and of itself, would result in grave risk of the minor being exposed to either physical or psychological harm, or being otherwise placed in an intolerable situation. The concept of intolerability connotes substantial and not trivial circumstances. Art. 13(b) must be construed within the human rights framework and in light of the decision in *Neulinger and Shuruk v. Switzerland* it must be interpreted having regard to the child's best interests.

57. The word "grave" in Art. 13(b) characterises the risk rather than the harm as was observed by Lady Hale and Lord Wilson in delivering the judgment of the UK Supreme Court in *E.(Minors)* [2011] U.K.S.C. 27.

58. The appellant sought to rely on the decision in *Re. S. (a Child) (Abduction: Rights of Custody)* where an abductor adduced evidence before the Courts of England and Wales from her treating psychologist and GP in Australia as to her psychiatric condition for the purposes of establishing that a summary return would expose the minors to an intolerable situation.

59. The appellant also relied on the decision in *M.L. v. J.C.* [2013] I.E.H.C. 641 where White J. had refused to order the summary return of minors in circumstances where there was evidence of a long history of mental ill health, including admissions to a psychiatric hospital, in respect of the mother and there was cogent evidence before the High Court that a summary return would have a serious detrimental effect on the mother's psychiatric health. That decision was brought to the attention of the trial judge who concluded that there was no evidence of a like nature or degree concerning the appellant before the High Court in the instant case. Para. 81 of the High Court judgment observed: -

> "Undoubtedly these are stressful times for her and it is important that she has access to medical care, but the evidence does not reach the level of grave risk of a return being intolerable for her and by extension intolerable for the children."

<u>Intention of the appellant not to return</u>

60. Regarding the appellant's contention that she will not return with the minors in the event that the Court directs their return to Canada and this will result in the likelihood of the minors residing full-time with the respondent, the respondent contended that this was a new argument which had not been advanced before the High Court. She had never before asserted that she did not intend returning with the minors in the event of an order for return being made. Further, it was contended that her objections had no substance unless she refuses to return with the minors since the respondent has undertaken to vacate the family home to allow her and the minors to reside there and not to enforce his interim sole custody order which he procured following her departure with the minors and further, he has undertaken not to pursue any criminal prosecution of her pursuant to British Columbia's domestic law. Reliance was placed on the decision of this Court in *C.D.G. v. J.B.* [2018] I.E.C.A. 323 as authority for the proposition that the risk of arrest or even prosecution in respect of an alleged abduction of minors does not reach the threshold of intolerability within the meaning of Art. 13(b) such as would warrant the Court in exercising its discretion to refuse a summary return of the minors pursuant to Art. 12.

61. Assuming that the appellant makes good on her threat not to return with the minors to Canada this will inevitably cause some distress and disruption to them. It must be borne in mind that such a decision on the part of an abducting parent represents a very powerful weapon which can be deployed to overcome the summary return mechanism of the Hague Convention. Nevertheless, the minors have since birth resided in the home with the respondent as well as the appellant. He is their father and is well known to them. The Courts of British Columbia are actively seized of proceedings pertaining to their welfare. There was no evidence before the High Court of any risk of psychological harm befalling the minors in the event that they returned to the care of the respondent if the appellant elects to remain in this jurisdiction. It is appropriate to have due regard to the practical consequences and effect of a return order being made in circumstances where the appellant decides not to return with the minors, particularly minors of tender years as in the instant case.

62. Such a state of affairs will be more stressful for both minors than were she to return with them. The question arises, is it desirable for a mother to create a psychological risk and then seek to rely upon it for the purposes of Art. 13(b) of the Convention where no other ground of defence has been established which would warrant refusal of the summary return of abducted minors to the state of their habitual residence? These are very young children. Having reviewed all the papers once more in light of the stated intention of the appellant not to return, I am satisfied in the circumstances that assuming the appellant holds steadfast to her position as adopted for the first time in the course of the appeal that she does not intend returning to Canada in the event that an order for the summary return of the minors is made, nevertheless the practical consequences of such a course of action do not give rise to a grave risk that the minors will be exposed to psychological or physical harm or otherwise be placed in an intolerable situation such as would warrant this Court exercising its discretion pursuant to Article 13(b) in lieu of the High Court to refuse to direct the return of the minors. All aspects of the minors' welfare can be dealt with very expeditiously before the Courts of British Columbia in Canada in early course.

63. The appellant referred to the ECHR decision of *G.N. v. Poland* (App. No. 2171/2014) arguing that she did not have access to effective legal services in Canada. The Court said in *G.N.* at para. 61: -

> "In addition to restating consistently that the exceptions to return under the Hague Convention must be interpreted strictly…, this Court has also specifically held that the harm referred to in Article 13 (b) of the Hague Convention cannot arise solely from separation from the parent who was responsible for the wrongful removal or retention. This separation, however difficult for the child, would not automatically meet the grave risk test…"

That decision does not assist the appellant in her contentions that the trial judge erred in finding that she had not met the threshold in respect of any defence pursuant to Art. 13(b) of the Hague Convention.

64. Counsel for the respondent had correctly argued that the judgment of the High Court had already adverted to a situation where the minors would in fact be separated from the appellant by reason the appellant had contended she faced a prosecution and the possibility of incarceration in the event of her return to British Columbia. The trial judge, referring to the Courts of British Columbia, had concluded: -

> "There is nothing to suggest that the Supreme Court will be unable or unwilling to protect the rights of the children even in those circumstances. Naturally it would be very distressing for the children if their mother was to be arrested immediately on return, but in the circumstances, I do not consider that it has reached a level that it could be said to be intolerable."

Discretion

65. It has to be borne in mind that even if evidence is adduced that meets the standard of proof envisaged by Art. 13(b) of the Hague Convention, same does not in and of itself warrant a refusal to order a summary return of abducted minors. Establishing an Article 13(b) defence merely opens the door to discretion and the Court would then have to proceed to exercise its discretion as to whether to order the summary return and to address any grave risk grounds that have been established, by means of undertakings or otherwise for the purposes of alleviating same so as to facilitate the satisfactory and effective operation of the Hague Convention.

Right to an effective legal remedy

66. The appellant contends that deficits in legal representation in Canada will violate her rights pursuant to Art. 40.3 and in particular her right to an effective legal remedy. However, this Court has had the opportunity of observing the appellant conduct her appeal as a litigant in person, in the course of which she demonstrated significant skills in marshalling the facts and identifying a vast breadth of material, both internationally and domestically, which she invoked in support of her contentions that a summary return of the minors ought not be ordered and that the High Court judge erred in directing their return to the State of British Columbia. It is noteworthy that in the Supreme Court decision *Y.Y. v. The Minister for Justice* [2017] I.E.S.C. 61 O'Donnell J. reserved for a future occasion the issue as to whether there exists an unenumerated right to an effective remedy pursuant to Bunreacht na hÉireann in the first place.

Health of the appellant

67. With regard to her medical history, it is clear from her submissions and arguments that the appellant, in the language of counsel for the respondent, has sought to some extent to "mould her case around the case law"; and in particular has sought to align her circumstances with the facts of the High Court decision of *M.L. v. J.C*. and the English authority of *Re. S (a Child) (Abduction: rights of Custody.*

68. In regard to issues of the appellant's health and the extensive evidence sought to be adduced by her in the course of the appeal, it is noteworthy that in her lengthy grounding affidavit sworn on the 10th April, 2019 at para. 88 outlined above the appellant relies on fifteen distinct grounds to support her claim that an order for the return of the minors to Canada would leave her in an intolerable situation. However, viewed in the round, the evidence in its totality bears no relationship to the exceptional medical history and circumstances that obtained and facts proven in the case in the matter of *Re. S. (a Child) (Abduction: Rights of Custody)* on which she seeks to rely. Furthermore, that decision is relevant insofar as the United Kingdom Supreme Court observed in the course of delivering its judgment that the assessment as to the level of risk is one primarily for the judge at first instance, and should not be overturned on appeal unless, whether by reference to the law or to the evidence, it was not open to the judge to make her determination in the first place – a view with which I entirely agree.

69. In *M.L. v. J.C.* White J. had evidence of a history of psychiatric illness, including hospitalisations and in-patient treatments in relation to the respondent. There was before the Court one hundred and eight pages of detailed hospital notes in connection with her hospitalisations in the United States, and further notes from a psychiatric clinic which had treated her in the months prior to the removal of the minors. The Court was satisfied that there was objective evidence that she had suffered a very serious mental breakdown some months prior to the removal of the minors. The Court was satisfied that the respondent mother had met the heavy burden required to be proved to meet the threshold required by Art. 13(b) as outlined in the judgment of Denham J. in *A.S. v. P.S.* The Court exercised its discretion based on the exceptional facts to refuse to make an order for return. Neither case avails the appellant as she does not meet the threshold in Article 13(b).

Financial circumstances

70. The appellant contended that she would lack any income in Canada. However, as is clear from the judgment of the trial judge there was evidence, in particular, paras. 86 - 87 that she would have some entitlements to payments in Canada. Such issues can be

addressed in the context of the matrimonial proceedings that are in being before the Canadian Courts between the respondent and the appellant at this time. The appellant has failed to meet the threshold to establish grave risk on any ground pursuant to Article 13(b).

Ground (iii) Hearsay evidence

71. The appellant characterises the promises of financial support which would ultimately be discharged by the respondent's mother as "hearsay evidence". She contends the Court ought not to have attached any weight to same. The practice of the courts in this jurisdiction has been to accept undertakings to alleviate grounds which might otherwise give rise to an intolerable situation. The Supreme Court has endorsed this approach over many years, including the landmark decision of *A.S. v. P.S.*

Undertakings

72. Undertakings are mechanisms to ensure that the return of a minor is made easier, and provides for their security and safety pending matters coming before the local courts in the State of their habitual residence where all issues concerning welfare will be addressed. The High Court is entitled to have regard to whether any risk of harm can be alleviated or extinguished by an appropriate undertaking. Undertakings are not intended to provide any long-term solutions, but rather to be of short duration pending the courts of the minors' habitual residence resuming the hearing of the proceedings that are in being concerning their welfare. In particular, the ambit of the undertakings should not trench on the jurisdiction of the Courts of British Columbia as to what orders might ultimately be made in the context of the pending matrimonial litigation.

73. As was made clear by the Supreme Court in *P. v. B (No.2) (Child Abduction: Delay)* [1999] 4 I.R. 185 undertakings as to short-term matters such as accommodation and maintenance are entirely compatible with the Hague Convention and international law, but embarking on a process of making orders concerning long-term maintenance are not compatible with the Hague Convention and trench on the jurisdiction of the courts of the requesting State to enter upon a determination and make orders in regard to all aspects of welfare.

74. The acceptance of undertakings which will normally emanate from the applicant, are based on the understanding that the courts of the country to which the minors are to be returned can properly – and are invariably best placed to – make orders in respect of all aspects of the welfare of the minors. That undertakings are directly enforceable in the requesting State has never been a pre-requisite in this jurisdiction. The undertakings to the High Court were given in writing by the respondent and this Court has no reason to doubt the *bona fides* of same. It is not appropriate to enter upon an investigation regarding same or to adopt a stance premised on an expectation that they are not intended to be complied with. To do so is to ascribe motive to the respondent unmoored from fact. Should they not be complied with, that would be a serious matter which could be considered by the Courts of British Columbia in the context of the pending proceedings in that jurisdiction.

75. Further, as the trial judge correctly concluded, the mechanism of undertakings are available and have been well established in this jurisdiction as mechanisms to minimise or obviate significant concerns pending all issues concerning welfare of the minors in question coming before the courts of their habitual residence which is the appropriate forum wherein all issues of welfare are to be determined

Ground (iv) expedition of proceedings

76. The appellant contended that she had inadequate time to assemble material and that the expeditious conduct of the proceedings undermines her fundamental rights pursuant to the Constitution as well as her ECHR rights pursuant to Art. 8.

77. Article 11 of the Hague Convention provides: -

> "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ..."

78. The appellant contends for a general right to legal representation. However, that point has been addressed earlier and demonstrably no such entitlement exists pursuant to the Constitution as of right in the manner contended for by the appellant. While she contends for a right to fair procedures in decision making, same has demonstrably been afforded to her. Extensive materials were exhibited by her and very detailed written submissions advanced by her. A very detailed written judgment was delivered by the trial judge. She invokes her rights pursuant to Art. 8 of the ECHR as well as the provisions of the UN Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of all Forms of Discrimination Against Women, the UN International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.

79. The Supreme Court has frequently reiterated the need to pursue the most expeditious procedures in connection with applications brought pursuant to the Hague Convention. In *P. v. B. (No.2) (Child Abduction: Delay)* [1999] 4 I.R. 185 the Court stated: -

> "Time is of the essence in cases under the Act of 1991: see approach in *C.K. v. C.K.* [1994] 1 I.R. 250 at p. 269. It is important that both in the State from where a request comes and in the requested State that all parties and professionals address these cases speedily."

80. The respondent further seeks to rely on the decision of *Carlson v. Switzerland* (App. No. 49492/2006) with regard to expedition. It is a decision of the European Court of Human Rights and the following excerpt was cited: -

> "The Court is entirely in agreement with the philosophy underlying
> the Hague Convention. Inspired by a desire to protect minors, regarded as
> the first victims of the trauma caused by their removal or retention, this
> instrument seeks to deter the proliferation of international child abductions… . In this kind of case, the adequacy of a measure is to be judged by the swiftness of its
> implementation, as the passage of time can have irremediable consequences
> for relations between the child and the parent with whom it does not live…"

81. I am satisfied that the appellant is not correct in her contentions regarding expedition. This stems from her approach which is in effect to seek to have the courts in this jurisdiction embark upon a wide-ranging assessment of welfare and best interests of the minors. This is an impermissible approach under the scheme of the Hague Convention and was correctly not embarked upon by the trial judge.

Conclusions

82. There is no evidence that the trial judge erred in her findings of fact or in her application of the legal principles to the salient facts in this case. The matter did proceed expeditiously as is mandated by the terms of the Hague Convention itself, as well as by extensive jurisprudence from the Supreme Court and this Court together with the practice and procedures now well established in the High Court but same fully respected the appellant's rights to fair procedures. Expedition is critical for the fundamental premise underlying the Hague Convention, that all issues of welfare and considerations with regard to the evidence of same must be placed before the courts of the habitual residence of the minors which enjoy exclusive jurisdiction to make all decisions pertaining to their welfare. The appellant's constitutional rights were fully vindicated and no breach of fundamental constitutional rights occurred such as would engage the provisions of Article 20 of the Hague Convention.

83. The High Court was entitled to accept hearsay evidence in relation to commitments embodied in the undertakings. The undertakings were not given by the mother in law but by the respondent. There is no reason to doubt the *bona fides* of the respondent in that regard, or indeed his mother. Were such undertakings improperly provided it would merely offer assistance to the appellant in the event she engaged with proceedings pertaining to the welfare of the minors now pending before the Courts of British Columbia.

84. I am satisfied that the High Court was correct in its application of the relevant legal principles in regard to Art. 13(b). The lack of financial resources and the non-availability of legal representation appears – to some extent at least – to have been overstated. Even if demonstrated to be correct, and even had they reached the threshold of giving rise to a grave risk, which they demonstrably did not, it would have merely opened the door for the trial judge to exercise a discretion as to whether to make an order for summary return or not. In such circumstances, any grave risks identified would likely have been the subject of undertakings to alleviate same in the short term pending the courts in Canada determining the issues between the parties.

Comity and breach of foreign orders

85. It is highly relevant that the appellant removed the minors to this jurisdiction in clear breach of the terms of an order of the Supreme Court of British Columbia, of which she was aware. That order continues in full force and effect. The trial judge was correct in arriving at a conclusion that having taken each of the assertions advanced by the appellant in evaluating them cumulatively, they did not establish the existence of a grave risk that the return of the minors would place them in an intolerable situation within the meaning of Art. 13(b).

86. The totality of the reports from human rights bodies, United Nations bodies and otherwise, together with the provisions of the International Conventions and agreements cited by the appellant in support of her claims both pursuant to Art. 13(b) and pursuant to Art. 20 of the Hague Convention, do not meet the threshold as established by the jurisprudence under either Article. The statement of the trial judge to the effect that reports from an international body criticising the lack of legal aid in British Columbia was not put before the Court was, strictly speaking, inaccurate. Nevertheless, having duly considered the said material referenced and alluded to throughout the appellant's written legal submission, and whilst it is appropriate to have due regard to the contents of such material insofar as relevant, I am satisfied in its totality the material falls far short of establishing a valid defence, either pursuant to Art. 13(b) or Art. 20 of the Hague Convention.

87. Accordingly, I would dismiss the appeal on all grounds. The return of the minors ought to be effected forthwith subject only to appropriate undertakings duly adjusted to reflect any material changes in circumstances that have arisen since the hearing before the High Court.