THE HIGH COURT

FAMILY LAW

[2023] IEHC 495

[2022 No.22 HLC]

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

AND

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

AND

IN THE MATTER OF DARYNA, A MINOR

(CHILD ABDUCTION: EFFECT OF MARTIAL LAW ON CUSTODY RIGHTS, GRAVE RISK, TEMPORARY PROTECTION)

BETWEEN:

I.F.

APPLICANT

AND

J.G.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 25th of July, 2023

1. Introduction

1.1 In February of 2022, Russia invaded Ukraine. Weeks later, a 7-year old child, called Daryna for the purposes of the judgment, was taken from her

home during an access visit and brought to Ireland by her mother, the Respondent in these proceedings. Daryna's father is the Applicant.

1.2 The Applicant did not consent to Daryna's removal and claims that a resolution issued shortly after the war began, which permitted the Respondent to bring Daryna across the border without his notarised consent, did not permit her to remove Daryna from Ukraine generally, in that it did not amend or extinguish his custody rights or affect his or Daryna's rights under the Hague Convention.

1.3 The Respondent mother relies on this resolution which gives explicit permission to a parent to cross the Ukrainian border without notarised consent from the other parent. She claims that this not only justifies Daryna's removal but also permits her to retain the child in Ireland.

1.4 The Respondent further argues that the fact that Ukraine is at war with Russia amounts to a defence of grave risk even if the removal was wrongful. She submits that Daryna would be at risk of physical injury and at risk of serious psychological harm if she was returned to her home city, given the daily siren alerts and missile attacks on various targets of strategic importance in the region. The Respondent points to comments in the independent psychological assessment of Daryna to support this argument.

2. Objectives of the Hague Convention

2.1 The Hague Convention on the Civil Aspects of Child Abduction ("the Convention"), implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991, is an international treaty. It was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians), and was

designed to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home as quickly as possible. There, the courts where the child lives and where all relevant records are held and witnesses are available, can make decisions about her welfare with complete and accurate information which can be assessed more readily than a summary hearing on affidavit permits. The Convention vindicates the rights of the child and of the left-behind parent and ensures comity between signatory states. The Convention also bolsters the rule of law, providing an effective, speedy 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 contracting 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 resettlement of parents in different countries. It is recognised as an important policy objective for signatory 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 in that jurisdiction and from daily contact with the other parent.

2.3 Under the Convention an applicant must 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. If he succeeds in establishing these matters, the burden then 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 the defence. If the application was made within one year of the wrongful

removal, the Court is obliged to return the child unless a defence is established, in which case the discretion arises. The Convention contemplates a speedy, summary return process. The best interests of the child, including those interests protected by the Convention, must be considered. This aligns with the constitutional imperative in Ireland: Daryna's best interests are the paramount consideration for this Court.

3. Matters at Issue

3.1 There is no issue in this case about habitual residence; Daryna has always lived in Ukraine. Nor is there a dispute about custody rights; both parents have custody rights and both were exercising these rights at the time of Daryna's removal to Ireland in 2022. Daryna has been assessed by an independent psychologist who reports that the child would like to go home and wants to see her dad. Daryna's views align with the main objectives of the Convention and are outlined in more detail in parts 8 and 11, below.

3.2 The issues in dispute here all arise out of the fact that Ukraine is at war. The Court must first decide whether the removal of the child to Ireland, or her retention here, is lawful as a result of a Ukrainian governmental decree in 2022. If the Court determines that it was wrongful to remove the child, or to retain her in Ireland, the final issue is whether the removal or retention was nonetheless justified under the Article 13 (b) defence, namely, that there is a grave risk to Daryna if she is returned to Ukraine. The Respondent relies on the doctrine of legitimate expectation in this regard also, urging the Court to consider the Temporary Protection Directive, as implemented here in the International Protection Act of 2015, insofar as these provisions are said to constitute assurances of security and protection by the Irish State, which created certain expectations on the part of the Respondent, such that

it would be unfair to now withhold protection from this Respondent and her daughter.

4. Relevant Facts

4.1 The Applicant father and Respondent mother are Ukrainian nationals who were married and had one child, Daryna, who was born over eight years ago. The parties separated after their daughter was born. Daryna remained with her father by agreement between the parties. This settlement was made an order of the relevant local Ukrainian court in 2019, with access arrangements for the Respondent; weekend access every second week and a month of access every summer. While there is some dispute surrounding an earlier period of two years, from the date of this settlement until her removal to Ireland, Daryna resided primarily with her father, his wife, and her siblings, who are all under 16 years old, one considerably younger.

4.2 Daryna suffers from a particular medical condition which requires regular ultrasound reviews and twice monthly tests. She has undergone several separate surgeries in this regard, all in her native city and taking place over a period of three years from 2016 to 2018.

4.3 The court order setting out the separation agreement includes a provision that the Applicant will not seek any financial assistance or maintenance from the Respondent. It also states that the Respondent is entitled to spend her time with Daryna "*in any way at her own discretion in any place in the territory of Ukraine*" but provides that if she takes their daughter out of her home city, she must inform the Applicant of the purpose and location of the trip. The implicit but inexorable conclusion from the wording of this agreement is that Daryna would not be removed from Ukraine.

4.4 Daryna had access to her mother without issue prior to the Russian invasion of Ukraine. Following that invasion, access became less frequent, with divergent views arising between the Applicant and Respondent on their daughter's safety in their home city.

4.5 Within two months of the outbreak of war, the Respondent exercised outdoor access with Daryna near the Applicant's home, took this opportunity to remove her from her father's custody and left the jurisdiction of Ukraine with Daryna shortly thereafter. They travelled to Ireland.

4.6 There is a dispute about whether the Respondent sent video evidence to the Applicant via the police and there is no exhibit to support her averment to this effect. There is no dispute about the fact that the Respondent did not notify the Applicant of her intention to leave with their daughter, nor did she tell him of their safe arrival in Ireland for a period of months.

4.7 In Ukraine, the parties resided in a city with a somewhat larger population than Cork. That city is located in a region comparable with Munster, in terms of population, with over 250,000 people living there. It is described as an industrial city; there are significant public utilities there (including sites containing important infrastructural and energy services) which make the area one of strategic significance and thus a target in the current war. One public utility site in the city has been bombed several times and, in a separate attack, a commercial centre was hit by a missile shortly before this hearing. Martial law was declared across much of Ukraine and had extended to this region and city at all the relevant times of this case.

4.8 In Ukraine, Daryna lived with her father and siblings. The Applicant has exhibited two psychological reports on his daughter, one dated before she was removed, one after removal. In the reports, the psychologist notes that Daryna refers to the Applicant's wife as her mother and to her half-siblings

as siblings. In other words, these are the people whom she considers as her family. Noting this, when the word "*family*" is used in a third report, prepared for the Court, this is likely to be the unit to which Daryna is referring and not to the Respondent, albeit that they also have a very close relationship.

4.9 In Ireland Daryna attends her Ukrainian school online for a couple of hours and her Irish school, in person, for half of the school day. She does not speak English and was described by the court appointed assessor who saw her in June of 2023 as having no understanding of English, even of basic terms. That interview was conducted through an interpreter. Her mother describes a local friend, the child herself mentions only her siblings in Ukraine.

4.10 In reporting the views of the child, the independent court assessor notes that Daryna wants to go home to her father. Her views are set out in more detail below, in section 11, headed: Best Interests of the Child.

5. Wrongful Removal and the Resolution of 29th of March 2022

5.1 The pleadings in this case outlined a case of wrongful removal. This term is used in the Hague Convention and it is a term of art. For the purposes of Article 3 of the Convention, removal is considered wrongful where it is in breach of a parent's rights of custody under the law of the State in which the child was habitually resident prior to removal, and at the time of removal, those rights were actually being exercised or would have been but for the removal. At hearing, it was argued that the issue of wrongful retention was also important as there was, on the face of it, a clear statement of law in Ukraine, in a resolution of general application, that the

Respondent was entitled to remove Daryna by taking her across the border, without the consent of her father, notarised or otherwise.

5.2 The Applicant initially applied to amend the summary summons in order to specifically argue that, if the removal was lawful, the retention of Daryna in Ireland was unlawful. An affidavit of laws was filed jointly. That expert gave evidence in respect of her understanding of the relevant Ukrainian law. A second affidavit of laws was filed in which a second expert set out her understanding of the custody rights of the Applicant in this case and the application of the Convention in Ukraine. That evidence is summarised in more detail below.

5.3 On the 23rd of February 2022, the day after the Russian invasion began, a list of regions was declared to be in a state of emergency. Daryna's province was on this list. The state of emergency was, initially, for 30 days and has been renewed from time to time. This special regime includes restrictions and practical measures one would expect to see, including provision for curfews, evacuations, inspections, prohibition of mass events and limits on transmission of information by various means.

5.4 On the 29th of March 2022, Resolution number 383 was passed, amending a 1995 resolution about the rules in respect of crossing the Ukrainian border. Paragraph 12 of the 1995 Resolution, as amended ["the Resolution"], provides that children under the age of 16 years, if accompanied by an adult and authorised by one of their parents, are permitted to cross the Ukrainian border without notarised consent from the other parent. In each case, the National Social Service is required to notify the Ministry of Foreign Affairs of Ukraine within 3 days of approving the travel plans for children, indicating the state in which the children will be staying. This is translated in the relevant exhibit as "*the state of the final stay of the children*". The

accompanying adult is required to notify the relevant Ukrainian diplomatic institution in the receiving state in order that the child can be placed on a temporary consular register.

5.5 The Applicant pointed out that there was no explicit restriction or removal of parental rights of custody in Resolution 383. The Resolution referred specifically to the removal of the need for notarised consent at the border. If, it was argued, that resolution was also intended to remove custody rights from parents, this is such a far-reaching impact that the Resolution should refer to the Constitution or, indeed, to the Convention.

5.6 Before turning to the affidavits of laws, it appears as a matter of interpretation that the remaining paragraphs of the Resolution, set out at paragraph 5.4, above, make it clear that the provision is a temporary one. It is envisaged that children will be taken to a third country, where they will be entered on the temporary consular register. The clear intention of the Resolution is to arrange for the urgent and temporary removal of children so as to ensure their safety. In the resolution itself, at the top of page 16, is a reference to the guarantee that the children will be returned to the territory of Ukraine. This supports the conclusion that the measure is intended to be an emergency and temporary measure and not a permanent change to domestic laws in relation to custody rights.

5.7 As a matter of statutory interpretation in Ireland, if a provision is intended by the legislature to make a radical change to existing laws or practices, it should do so explicitly. If a measure can be interpreted narrowly without stretching its plain meaning and without thereby incorporating sweeping changes to the law without express provision for, or any reference to, those changes, then the narrow interpretation should be preferred. This principle

arose in a Supreme Court decision which was handed down just after the hearing date in this matter: *DPP (Varley) v. Davitt* 2023 IESC 17.

5.8 In *Varley*, Dunne J. cited, with approval, the following passage from Dodd, Statutory Interpretation in Ireland (Bloomsbury Professional 2008) paragraph 4-110: "*It is presumed that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. Where provisions give rise to plausible alternative constructions, one of which is a narrow interpretation and one of which is a wider interpretation that radically changes the law, the narrow interpretation may be preferred. It is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment. The more radical a change, the more weight may be assigned to the presumption. There are many examples of this presumption being applied in Ireland*."

5.9 Even by comparison with the change under discussion in *Varley*, (whether a well-established system of court prosecution by garda officers had been abolished by the use of the word "and" without the word "or") the changes argued for by the Respondent here would be radical indeed.

6. <u>Ukrainian Law and the Resolution</u>

6.1 An affidavit of laws was prepared and submitted jointly by the parties to assist the Court in interpreting the relevant Ukrainian law. Both sides had proposed a particular lawyer. The Court ruled that the expert proposed by the Respondent, who had more experience in family law and more years in practice than the alternative expert, was the more appropriate witness.

6.2 It emerged clearly from this expert's evidence that it is permitted for one parent to take a child over the border without the consent of the other, that the Convention is still applied in Ukraine, that she knew of cases where children had left Ukraine with no documents at all, due to the conditions of war, but knew of no case where a child was returned to the Ukraine.

6.3 These principles were distilled from evidence which the Court has concerns about. It is sufficient to say that, while the affidavit was clear, the oral evidence was not. This was perhaps owing to difficulties in translation between English and Ukrainian, but some of the responses in oral evidence were answers to different questions and others did not address the questions asked coherently. This limited the weight that could be attached to that evidence. Due to these concerns, when the issue of retention was raised and the parties agreed to prepare a second affidavit of laws, the second expert, initially proposed by the Applicant was asked to prepare this document.

6.4 The second expert confirmed that she spoke English and could be cross-examined if any questions arose. They did not and this expert's affidavit was admitted as evidence in the case without the need for cross-examination. Unlike the affidavit of the first expert, therefore, whose affidavit evidence was undermined by difficulties with the oral evidence, the second expert was not challenged on the contents of her affidavit. Further, it was clear, cogent and supported by references to numerous Ukrainian cases.

6.5 The caselaw is mentioned in this context because it was a cause of concern to hear the opinion of the first expert that no child had been returned when, in one of only three reported international cases relied upon (by both sides) in this case, a child had been returned. In the second affidavit of laws, the

expert referred to domestic cases in which Ukrainian courts had, in most instances, refused to order the return of children removed from Ukraine but had, in several cases, returned a child to Ukraine despite the war, due to concerns about domestic violence in the opposing party's history.

6.6 According to the second expert, the Ukrainian legal system is governed by the Constitution of Ukraine, the Family Code, the Civil Code, and international treaties such as the 1989 Convention on the Rights of the Child and the 1980 Hague Abduction Convention. The affidavit draws attention to the fact that Ukraine's legal system is a civil law system, and that court cases are not a source of law there, as they are in common law countries which observe the doctrine of precedent. The case law discussed nonetheless serves to illustrate the application of the relevant legislation.

6.7 One question addressed by this expert was whether the current state of martial law had any effect on the Applicant's custody rights (within the specific Convention meaning of that term). In the opinion of this second expert, the answer was no. While the special regime imposed in Ukraine allowed for the temporary circumscription of certain rights, such as limiting the freedom of movement of citizens, Ukrainian legislation made no provision for any restrictions on the scope of custody rights over any child.

6.8 Apart from the rights of custody issue, a further question posed was whether *exercise* of the father's custody rights was affected by martial law. According to the second expert, the left-behind parent retains the right, not limited in any way, to participate in any decision on the determination of the child's place of residence, including a decision on the removal of the child from Ukraine.

6.9 The expert was also asked: "*What is the relevance of the current state of emergency and/or martial law for the child's removal from Ukraine generally?*"

According to the expert, as it is now lawful for one parent to remove a child absent the usual notarised consent, and where it is nonetheless the case that rights of custody, including the procedure for determining the place of residence of the child, remain unchanged, disputes between parents regarding the return of their children to Ukraine have become more widespread. In considering such cases, the expert avers, the Ukrainian courts determine the parent with whom the child lived prior to departure, as well as which place of residence corresponds most closely with the best interests of the child. While war was one factor, all circumstances of the case had to be considered, according to the expert's affidavit.

6.10 The final question answered by the second expert was "*What is the relevance of the current state of emergency and/or martial law for the Applicant's entitlement to object to the child's removal from Ukraine and/or demand her return?*" The expert's view was that the introduction of martial law in Ukraine in no way affects the right of the Applicant to object to the removal of the child or to demand her return; the Family Law Code of Ukraine provides that where one parent changes the child's place of residence without consent, including by means of abduction, "*the court at the request of the interested person has the right to immediately issue a decision on the removal of the child and its return to the previous place of residence*."

6.11 In many Ukrainian cases concerning residence issues, the children in question were safely staying with their mothers outside the Ukraine and their fathers were refused orders for return on the basis that the children's best interests lay in being safe during the war. In three exceptions, one in the same region as Daryna's home, the courts ordered the return of children to Ukraine as the father applicants in other, safer jurisdictions had, in each case, a history of domestic violence. In every case described in the affidavit, save one, the children were returned to or remained with, their mothers. In

the one exception, the Supreme Court ordered that the children remain with their father, a conscientious parent, in Ukraine as the mother, who applied to have the children live with her in Georgia, lived in a "turbulent and unstable environment" to use the words in the affidavit.

6.12 The second expert concluded that the fact of a full-scale war in Ukraine is not assessed separately from the other circumstances in each case and is not an obstacle to determining that a child should reside there. This conclusion is in line with the principles applied in Convention cases, which are highly fact-specific; there are no "blanket" conclusions on any metric.

7. The Hague Convention and the Resolution: Conclusions

7.1 It is useful to return to the primary source of the law in this case: the Convention itself. Under Article 3, removal or retention is described as wrongful where it is in breach of rights of custody under the law of the requesting state, here, Ukraine. The argument is made that crossing the border was lawful for this Respondent, therefore, the rights of custody enjoyed by the Applicant were extinguished by the Resolution which permitted any parent to cross the border without the consent of a co-parent.

7.2 This argument is not persuasive as it ignores the separate, albeit overlapping, systems of law at play in this case: domestic law, governing both family law and immigration law, and international law governing the abduction of children. The interpretation of this emergency measure as being one which amends domestic family law and affects rights under an international convention is disproportionate to the apparent aim of the Resolution, namely, to allow children to be brought to safety in emergency situations. The argument suggests that the Resolution trumps all existing domestic and international laws, including those that safeguard the best

interests of the child and those that safeguard the rights of the other parent. Prime amongst those laws is the Hague Convention. The Court agrees with Counsel for the Applicant that this Resolution did not, and could not, amount to the abandonment of international treaty obligations. The Court cannot transpose domestic immigration measures into an international family law treaty; the obligations exist in separate systems.

7.3 The new rules about border control do not, and cannot, permit and legitimise the abduction of children from their homes. One need only consider the argument in circumstances where the adult with the child is not a parent. This is permitted under the Resolution in that other specified adult relatives can bring a child across the border with the permission of one parent. It would be outlandish to claim that the Resolution strips custody rights from the parents such that they cannot apply for the return of a child held abroad after one had authorised initial removal of the child.

7.4 There are two affected persons in any such case: the child and the left-behind parent. The best interests of the child and the custody rights of that parent are relevant to the question of whether the Resolution affects the Convention. A rule which allows lawful crossing of a border without notarised consent must have some context. In other words, a change in the law in respect of the legal requirements at border control is simply that. If it was intended to set aside substantive laws in respect of custody rights and international law as set out in the Convention, with all the consequent limitations on the rights of Ukrainian citizens, the Resolution would have made such a dramatic change in the law explicitly and clearly.

7.5 The clear conclusions of the second affidavit of laws, which I prefer to the first insofar as it is necessary to note this, and for the reasons set out, is that the Applicant's custody rights were not affected by the Resolution in 2022.

The decisions of the Ukrainian courts as set out in that affidavit are not binding on the Court, nor indeed on Ukrainian courts, but they are instructive insofar as none of the case descriptions refers to the Resolution.

7.6 These Ukrainian cases, as set out in the second affidavit of laws and summarised above, assist in identifying the scope of the domestic law: no court appears to have considered the initial removal of a child lawful due to the effect of the Resolution. It may be that the point has not been argued but that, in itself, is telling. If that is so, the Resolution has not affected the application of family law in Ukraine at all, to the point that it has not even been considered relevant. If argued, it has not been a successful argument.

7.7 The affidavit also states that the Supreme Court in Ukraine has confirmed that in a question of relocation, the interests of the child must be determined first, and, if it does not violate her interests, the interests of the parents are then taken into account (case no. 756/13187/17, 30th March, 2021). In each case of international relocation described, there is careful reasoning by the domestic courts as to whether a child should be returned. In each case, the court considers the circumstances of the child and the effect of the war on the child before making a decision based on that child's best interests. None of these considerations appears to have been replaced or affected by a blanket permission to remove children under the Resolution.

7.8 It was submitted that the Court should make a request to the Ukrainian Central Authority under Article 15, which provides that a court of the requesting State, here, Ireland, can apply directly to the authorities of Ukraine for a determination as to whether removal or retention was wrongful. Here, the submission was that it is not clear how the Resolution had affected custody rights under the Convention according to domestic, Ukrainian law.

7.9 In *G. v. P.* [2017] IECA 269, Peart J. made such a request. He noted the absence of consensus in the affidavits of laws as to what Moldovan law provided. But there was no lack of consensus in the affidavits in this case: neither lawyer suggested that the operation of the Convention or the domestic custody rights of the citizens had been suspended by the Resolution. The most that the first expert would hazard in this regard was that the Applicant father's rights were not absolute. There is no dispute in that regard. Neither lawyer went so far as to suggest that the Applicant's custody rights could not be vindicated by the courts in Ukraine or by this Court. The Convention continues to be enforced in Ukraine.

7.10 A request under Article 15 is not necessary. The issue of wrongful removal has been resolved by the evidence of laws in the case. Considering the affidavits of laws and the Ukrainian case law, as set out in the second such affidavit, all of these confirm the following view: the Resolution could not have had, and did not have, the wide-ranging effect argued for.

7.11 Finally, as Baroness Hale noted, in *In re D* [2006] UKHL 51, in the context of the Article 15 procedure, the ultimate decision as to whether removal is wrongful under Article 3 of the Convention is for the requesting (Irish) and not requested (Ukrainian) court to make. Considering the evidence of both experts in this case and the outline of recent Ukrainian cases in the second affidavit, Daryna's removal, without her father's knowledge or consent, was wrongful within the meaning of Article 3 of the Convention.

7.12 This Court is satisfied that the child was habitually resident in Ukraine at the time of her removal, that her removal was in breach of the Applicant's custody rights and that he was exercising his custody rights at the relevant time. Any other conclusion would enable widespread abduction of children

from Ukraine under the guise of crossing the border in an emergency and I am satisfied that this was not the intention of the Resolution of March 2022.

7.13 Art.12 of the Hague Convention requires the return of the child forthwith where a wrongful retention is established unless the Respondent can establish one of the defences set out in the Convention, at which point the Court has a discretion as to whether or not the child should be returned.

7.14 The defence of grave risk has been raised. Any exercise of discretion in the case, if it arises, must be exercised with a view to vindicating Daryna's best interests, which are paramount. The Court will also consider the effect of Article 20 of the Convention and the doctrine of legitimate expectation and its application in the context of international protection measures.

8. A. Grave Risk – The Law

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

> *"[T]he 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.*"

8.2 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:

> *"[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'.*"

8.3 In past cases, the level or type of risk that has persuaded a court to refuse to return a child includes a risk of domestic violence to the child (usually based

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

8.4 In *C.T. v. P.S.* [2021] IECA 132, Collins J. outlined the history of the cases relevant to an understanding of the aims 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.*"

The burden of establishing such a defence is a heavy one and a discretion remains for the deciding judge even if a grave risk is identified.

8.5 Later in the same judgment, Collins J. referred to the case of *J.V. v Q.I.* [2020] IECA 302 in which Whelan J. had outlined the kind of evidence necessary to establish a grave risk to a child under Article 13 when the issue was contested and had to be determined on affidavit evidence. While not a situation of war, the broad facts are worth recalling: There, as Collins J. outlined, objection was made to the return of children to Belgium on the basis that the children would be at greater risk of contracting the Covid virus if returned to Belgium, both due to the statistical risks in Belgium and the risks of international travel generally. Whelan J. noted the global effects of the pandemic and, in evaluating the extent of the risk presenting there, she commented that the court was entitled to have regard to "*the international nature of the pandemic, the uncertainty regarding its duration, whether measures are being taken within the jurisdiction of the requested State to protect the health of the citizenry including children and to evaluate whether a sensible and pragmatic solution may be achieved to address any concerns through the imposition of undertakings on the applicant directed towards the protection of*

the welfare, health and safety of the children in the context of ascertained risks of the pandemic attendant on their summary return to the jurisdiction of the requesting State….". She found that as there was no evidence before the court, other than media reports, from which one could draw a conclusion that either Ireland or Belgium was more or less safe, this Court had been correct to conclude that there was no factual basis for a fear that the children were at more risk in Belgium than in Ireland, if returned to their home.

8.6 In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J. emphasised the trust to be put in the courts of the child's habitual residence to protect the child even in a situation where physical harm was a risk faced by that child. The Court must, therefore, consider the facilities available in Ukraine to assess and to mitigate the risk presenting. It is also necessary to consider her family's ability to protect Daryna or to mitigate any risk to her, including the possibility of sensible or pragmatic solutions which might address any concerns that the Respondent has in the event of a return.

8.7 Most of the earlier cases which refer to conditions of war as an example of the kind of situation sufficient to constitute grave risk rarely describe such conditions so as to assist in assessing the situation in a case such as this one. The most recent international cases involving children from Ukraine and considering the ongoing war in that country are very helpful in this regard. As Counsel submitted, and I agree with this assessment, this case lies somewhere between the gravity of the risk faced in one case where return was refused and in another case where the child was returned.

8.8 In *Q. v. R.* [2022] EWHC 2961 (Fam) Mr Justice Williams held that:

> "*It seems to me one has to avoid generalities, and in so far as is possible evaluate the particular risk to this particular child in a return to this particular area, rather than to apply a general or a broad brush; one must apply a rather more*

detailed and finer brush to this. Of course, if it were suggested that E were to return to Izyum or one of the other areas which has just been liberated, or which may soon be more directly in an area of active war, would plainly bring with it a grave risk of harm. However, when a return is to somewhere quite different, that requires a different consideration."

8.9 In that case, the applicant had argued that war was unpredictable and that President Putin was unpredictable. Williams J. commented that these were very general and legitimate comments but did not address the position in the town where the child would live, if returned. There, the nearest hostilities had been over 100 miles away and there was no strike on the town itself. While there had been an impact on the town, this was mainly due to the many thousands of displaced Ukrainians who had moved there. Life went on, if not as normal, with limited disruption. Williams J. went on to return the child to the Applicant mother, who was a Hungarian citizen in a town which was in west Ukraine, near the Hungarian border.

8.10 Williams J. considered that the risk was below the threshold of grave and that the undertakings given by the mother to continue contact with the father and her concrete plans to remove the child should the risk increase, informed his final decision to return the child to Ukraine.

8.11 In *N.W. v S.W.* [2023] EWHC 602 (Fam) similar issues arose in an application for the summary return of two children to Kyiv. Dexter Dias K.C., sitting as Deputy High Court Judge, noted that the decision in *Q. v. R.* was persuasive and not binding and that the decision to be made was intensely fact specific. Dias K.C. considered the risk levels around Kyiv, focusing on the most reliable and authoritative sources while noting that they nonetheless contained "*hearsay, opinion and interpretation as well as factual reportage*". Dias K.C. noted the suggestion of Williams J. that the focus should be on the specific child and her circumstances and concluded that,

"*the real question is to ask what risk the children will face in the part of the country they will return to and whether that will imperil them unacceptably*".

8.12 In this context, Dias K.C. emphasised the importance of an evaluative assessment of any allegations of grave risk. This aligns with the relevant Irish case law which binds this Court, most recently from the Court of Appeal in *C.T. v P.S.* where Collins J. outlined the requirements of the defence, confirming that in Ireland, as in England and Australia, the onus of proof is on the respondent. Citing *In re D* [2006] UKHL 51, [2007] 1 AC 619, and referring to Lady Hale's principal speech, he concluded at paragraph 58: "*It is not enough that the risk be 'real', it must reach such a level of seriousness as to be characterised as 'grave'. While that threshold applied to the risk rather than the harm 'there is in ordinary language a link between the two.'*"

8.13 In *N.W. v S.W.*, Dias K.C. held that the Art.13(b) exception had been established and there was a grave risk of physical harm to the children if they returned to Kyiv. Further, he held that there were no protective measures to mitigate the obviously grave risk of return. Dias K.C. stated that it was "*important to emphasise that nothing in this judgment creates or reflects any general or blanket policy this court has towards the situation in Ukraine*".

8.14 These are important guideline cases for this Court. The decisions by which this Court is bound are those of the Irish Court of Appeal and Supreme Court but, as acknowledged by Collins J. in *C.T. v P.S.* in his comments on grave risk, there is little difference between our superior court judgements on this topic and those emerging from other common law jurisdictions and from the courts of our fellow member states of the European Union.

B. Grave Risk: the Facts

8.15 The factual situation in Ukraine is well known on one, very general, level. The country is at war with its neighbour, Russia. The war has lasted (at the time of writing) for over 500 days and has had a devastating effect on the country. However, the war has not destroyed civilian life or civilian spirits. There has been mass movement of people as citizens seek to avoid the worst effects of various battles and surges in the level of violence. Many people, including children, have left the country for their own safety. Many others are internally displaced, seeking a safer place but within the borders of Ukraine, which is a very large land area where many regions are moderately safe and some are comparatively secure. Nonetheless, the travel advice to Irish citizens is that nobody should travel to Ukraine. Over 8 million people have fled from the war, according to documents exhibited by the Respondent. Over 80,000 have been welcomed here in Ireland.

8.16 The Respondent exhibited a number of harrowing reports about the effects of the war on the people of Ukraine. These reports were all from reputable sources such as international news agencies or bodies such as the United Nations. Many of the reports were published last November and December, predicting a harsh winter with risks of many casualties. There were general reports about disruption to services right across the vast country, including hospital services and energy supplies.

8.17 Recent reports included references to the region and the city in which the Applicant lives, to which he wants Daryna to return. These included confirmation of strikes on at least two targets in her home city. There were articles in which the threat of a nuclear disaster was discussed as a real risk. In the most recent affidavit, some of the material was speculative, such as the potential effect on civilians in the city if a particular site was hit by a missile or the potential for the use of particular types of devastating missile.

8.18 Looking at the numbers of casualties, perhaps the most striking statistic for the purposes of this case was the reference in a speech by the Under-Secretary General of the UN, made in New York in November 2022, which was exhibited by the Respondent. General Secretary di Carlo referred to those Ukrainian children who had been killed or who were missing as of that date. She stated that over 400 children had died as a result of the war and 279 had been reported missing. Naturally, these figures have increased since then. A more recent report, in respect of May 2023 in Exhibit i, in the last affidavit of the Respondent, referred also to the deaths of over 400 children across the country and to hundreds more who had been injured.

8.19 One exhibit, said to support the averment that there were over 60 civilian deaths in a named city in June, is a report about the production of cruise missiles which may be deployed by Russia next Autumn but are not yet in use. Other exhibits confirm deaths and missile strikes in the city in which the Applicant lives with his family.

8.20 The Respondent also argues that Daryna is at grave risk of developing psychological harm if she is returned home. The Respondent has exhibited a schedule of siren alarms, sent automatically to her phone, which show the persistent warnings to citizens of the region to which Daryna would be returning, urging them to go to a bomb shelter. The alarms for the region do not necessarily equate with those for the city but if they do, this suggests that there is a siren almost every day, and sometimes more than one a day.

8.21 The Respondent also points to Daryna's medical condition and argues that she cannot get the medical care she needs, or at least risks disruption to that care, due to the ongoing war. In this regard, the Applicant points out that the hospital where she attends, and her treating doctors, all continue to work as before and that her treatment was not affected by the war.

8.22 Daryna's school building is currently closed, and the children attend online. It is due to reopen this coming September but of course this cannot be guaranteed. The current plan is that it will reopen, however.

8.23 Counsel for the Respondent has frankly conceded that the risk to Daryna is from two sources: the child has been affected by the war and by a long separation from her family. He submitted that it was impossible to determine which has had the greater effect on her.

8.24 Daryna has been seen by a psychologist in Ukraine in March of 2022 and again by an independent assessor in Ireland in June of 2023. The first report was conducted at the behest of her father, the Applicant, who was keen to protect all his children from the effects of the war and sent them for counselling. That expert reported that Daryna had confided in her about an incident when her mother was shouting and that she told the psychologist that she did not want to stay with the Respondent, but with her father. The report concludes that Daryna has anxiety and feelings of fear. The psychologist also reports that Daryna has told her "*Now is the war. But with dad it is not scary and together we have a lot of fun and relax*". Daryna describes the Respondent throughout by using her name. She refers to the Applicant's wife as "*mother*". The psychologist noted a marked affection for her dad and a less pronounced bond with her mother, the Respondent.

8.25 When Daryna first attended the court-appointed assessor in April of 2023, she was too upset to engage with her. On her second visit in June of 2023, she was more composed and engaged more easily.

8.26 The purpose of the assessment was to explore Daryna's attitude to a possible return to Ukraine. This assessment, while conducted for the purpose of obtaining a view on a specific question, also reveals other aspects

of the child's thinking and sheds light on what has harmed her in the past and may do so in the future if repeated or prolonged.

8.27 On every occasion when the assessor asked her about her family, and her dad in particular, Daryna cried. She also expressly told the assessor how much she missed him and her family. As noted above, the word "*family*" clearly refers to the Applicant, his children and his wife, with whom this girl has lived for most of her life.

8.28 Daryna was asked about the war and said she understood why she was in Ireland and wants the war to end but as regards immediate wishes, she would like to go home. At no point, while describing war, sirens or being in a bunker, did she become upset. Using this obvious evidence as to what is causing her distress today, it is her continued separation from her family and not the war in Ukraine, despite the fact that Daryna probably has some anxiety in this regard and her daily life in Ukraine was affected by the war.

8.29 The Respondent has averred that Daryna was affected by sirens and has exhibited a record of attendances at a counsellor since she arrived in Ireland. It is notable that there is no report from this counsellor so there is no further support for her averment that the child is distressed by the war, or is at future risk of grave psychological harm due to the ongoing war. What is established clearly is that this child is in current distress, over a year since her departure from home, due to her separation from her father and family.

8.30 The Court, therefore, cannot agree with the submission that one cannot identify which is the current cause of the child's distress: the war or her separation from her family. Given the report of the assessor and the child's inability to speak of her father and family in Ukraine without emotion, given that the Respondent has not exhibited anything to support her averment in respect of the child's distress being caused by sirens or other

signs of war, it seems probable that the most significant cause of the child's anxiety is her separation from her family. Given that Daryna has spent the greater part of her life and all recent years, until her removal, with this family, this is not surprising.

C. Conclusions in respect of the Risk to this Child

8.31 In order to prove grave risk, in a situation where there is an ongoing war, one must prove that there is a specific risk to this specific child. This appears to the Court to require more than a statistically insignificant risk. Even though there may be a higher risk to a child's life in Ukraine than in Ireland, Ukraine is a country of over 40 million people. The numbers of casualties reported remains in the thousands and the evidence provided to me of risks to children is as set out above and remains in the hundreds. While this evidence makes for tragic reading, the casualties constitute disasters for thousands of families, and the overall situation in the country is terrifying in places, the defence of grave risk must be established in each specific case.

8.32 Evidence of individual strikes on buildings or sites is not sufficient to establish the level of grave risk required under the Convention without evidence of actual and statistical risk to civilians and to children in that area, or of psychological harm to this particular child. The evidence is that hundreds of children have died in Ukraine but this tragic fact does not establish a grave risk to Daryna if she is returned to her home. A real risk, certainly, but the issue for this Court is whether the evidence establishes a grave risk. In a country of more than 40 million people, this is one of the cities to which other Ukrainians have moved to avoid the ravages of this war. This specific child is at no more risk of death than the majority of children who remain at home in Ukraine.

8.33 The city in question is of strategic significance and has been targeted but it has not been the subject of daily or even weekly attacks. There is a siren system for the region but, even though siren alarms to alert citizens are common, daily even, lasting for anything from 20 minutes to over an hour, they do not equate with missile strikes. They are warnings. At least two identified targets in the city have been hit several times. It is reasonable to assume that more will be hit in the future. However, despite the unpredictable nature of any war, there is no evidence of a statistically significant risk that Daryna or her family will not survive this war.

8.34 Ukraine is not a safe country at present but the test is whether a grave risk, rather than real risk, has been established. As the gravity of the risk relates to the risk, not the potential event, therefore the statistics must inform the conclusion as to the actual risk to this child. While there is a real risk for all civilians in Ukraine, and it is a risk up to and including a risk of death, there is insufficient evidence, statistically and for this child, of a grave risk that she will be physically harmed, still less that she will be killed, as a result of the war. One can only base this on statistics to date and acknowledge that war is unpredictable. My assessment of the risk includes the possibility of more frequent strikes and deployment of more lethal weaponry by Russia.

8.35 There is a real risk to Daryna arising from the war. This is the risk that faces all citizens of Ukraine in the face of an unpredictable aggressor but it is significantly less in some regions than in others. The risk is of very serious consequences, but it is the consequences that are potentially grave, not the current risk to Daryna. There is a second risk in this case, however, and its effects are currently causing more distress to Daryna than the distress she suffered while living through the war in her country. Daryna appears, from the evidence before the court, to be in more distress here because she is not in Ukraine. This arises from continuing separation from her family and

failure to integrate fully here, and not from the war. The risk of her distress becoming a serious psychological problem if she stays in Ireland amounts to a more serious risk of harm to Daryna at this time, in this Court's view, than the possible effects of the war, should she be returned to Ukraine.

8.36 There is a risk for every citizen who chooses to remain at home when a country is at war. That risk varies from place to place and, for some, the trauma of displacement and separation from their family is worse than remaining at home and risking injury or even death as a missile might hit their home at any time. While it is possible, it has not been established that Daryna's home is likely to be hit or destroyed in the course of this war, nor has it been shown that her father cannot protect her from the current effects of the war. On the contrary, her own words to a psychologist in March of 2022 about how her father was creating a feeling of security for Daryna and her siblings. Further, the Applicant has averred that he has plans for his family should the situation in their city deteriorate and it is appropriate that the Court seek undertakings in this regard so as to reassure the Respondent that all will be done to keep Daryna as safe as possible.

8.37 In assessing the gravity of the risk presenting here, it is also notable that the city in question is one of those into which tens of thousands of Ukrainians have relocated over the past months. In other words, while it is not as safe as an Irish city, it is considerably safer than other parts of Ukraine. As a sign of that relative normality, the hospital in which Daryna has been treated is still functioning and there is no evidence that she could not receive appropriate treatment for her condition if she is returned to Ukraine.

8.38 It is also relevant to this question that Daryna has not yet learned to speak English. If Daryna is not returned to Ukraine, she is likely to remain in a state of limbo here, waiting for the war to end and not assimilating into this country or integrating so as to enjoy her childhood.

8.39 In summary applications to return a child, the application is often defeated as the application is made late or, as happened after the recent pandemic, the hearing is delayed or a family's plans change so that the child has integrated fully into the new country and a court exercises its discretion to allow the child to stay; in such a case it may no longer be in the child's best interests that she return home or she may have acquired a new habitual residence. These considerations do not arise here. Daryna has shown little sign of integration in Ireland.

8.40 In all the circumstances of the case, considering the conditions on the ground in this industrial city and the conditions of this family in particular, the state of mind of Daryna and the comparative security of her family, and bearing in mind that this family unit has been the only family she has known for almost all her life, it is more damaging to Daryna to permit her to remain here than to refuse to return her. She is returning to a moderately safe city, albeit in a country at war, and she is returning to her family who can be trusted to keep her as safe as possible.

8.41 During the hearing, the Court made the comment that the two parties in this case appeared to have different appetites for risk. This was the probable cause of the decision to remove Daryna. There was an averment to the effect that the Respondent appeared to be motivated by the prospect of obtaining social security benefits if she moved here with her child, but this is not supported by any evidence, and it appears cynical to attribute this motive to a mother who has moved across Europe to flee from war. Nobody doubts the seriousness of the situation in Ukraine and the pain of a decision to move to a new country where one has no roots or connections. It seems to me more likely that the Respondent is motivated by genuine fears.

8.42 In this case, the Court has considered the effect of reviewing the facts afresh in circumstances where an applicant mother sought the return of her child

from a father who had access every two weeks. to test any possible bias in the decision-making process. Had a child's mother sought her return home, in circumstances where she had been removed from Ukraine by her father, a man who had not lived as primary carer with the child for years, a culturally significant (and unfair) bias in favour of children remaining with their mothers might have made this a more obvious case for Daryna's return. It would be intuitively easier to return a hypothetical child, removed by her dad from her mother's home, which she shared with her siblings, seeing her dad only every two weeks, to a country where she did not speak the language and had no ties.

8.43 Returning to this case, the gender switch in that hypothetical example not only exposes the fact that this Court, despite conscious efforts to reduce or eliminate bias and despite a logical and conscious commitment to equality, is as prone to cultural influence and years of experience of gender bias as everyone else. The exercise is instructive; it confirms my view that it is the better course to return this child to her father and her family in Ukraine.

8.44 Finally, and significantly, if Daryna is not returned, she will be separated, indefinitely, from her siblings. The Respondent has not established a defence of grave risk, in that she cannot show such a high risk of harm to Daryna if she is returned that it outweighs the aims of the Convention. The more serious risk for Daryna is the risk that she will become estranged from her father, stepmother and siblings if she remains in Ireland, with all the consequent and serious risks of psychological damage inherent in such an estrangement. This risk is one of the dangers the Convention exists to prevent and minimise. The importance of sibling relationships was discussed by Murray J. in the Irish Court of Appeal in U.S. v A.K. [2022] IECA 65, where he considered the sibling relationship in that case pivotal to the integration of a child in addressing the issue of habitual residence.

9. Article 20: Fundamental Freedoms

9.1 Article 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.*"

9.2 The purpose and effect of Article 20 was set out by the Supreme Court in *Nottinghamshire County Council v. K.B.*, [2013] 4 I.R. 662, [2011] IESC 48. O'Donnell J., delivering the principal judgment, noted the significant difference between Articles 20 and 13: Article 13 prescribes a limited exception to the rule that a child be returned swiftly whereas Article 20 does not create an exception, but recognises one. A court in a Contracting State may not order the return of a child if such an order is not permitted by the constitutional order of that State. Article 20, in the words of O'Donnell J., "*provides a mechanism whereby the necessary flexibility is built into the Convention to avoid a conflict between the international obligations imposed by the Convention, and the dictates of the domestic constitution*."

9.3 The Respondent argues that return of the child in this case would fall foul of Article 20 insofar as it would threaten the rights to life and bodily integrity of the child, which rights are amongst the fundamental rights and freedoms protected by the Irish State. No evidence or submissions distinguished between the harm caused by physical injury and that caused by psychiatric or psychological injury. The Court understands this argument to be that Daryna's bodily integrity should be protected, from injury by physical harm due to a missile strike and from injury by psychological damage due to sirens and other effects of war, which

undoubtedly cause anxiety, and worse effects, in all citizens and have already caused anxiety in Daryna's mind.

9.4 Given the Court's findings on grave risk, there is no suggestion or basis for finding that her rights or freedoms would not be protected by a return order. Rather, it appears that a vindication of her rights and freedoms under our constitutional system requires an order for her summary return.

10. <u>Temporary Protection and Legitimate Expectations</u>

10.1 A further argument made was that the Irish State, in extending temporary protection to the Respondent and Daryna under the Temporary Protection Directive, 2001/55/EC, has represented that it will not act to jeopardise their safety. This representation, it is argued, gave rise to a legitimate expectation, enforceable against the State, that it will not return Daryna to Ukraine.

10.2 The doctrine of legitimate expectation was explained in *Daly v. Minister for the Marine* [2001] 3 IR 513, by Fennelly J., as follows:

> "*Those who come within the ambit of an administrative or regulatory regime may be able to establish that it would be unfair, discriminatory or unjust to permit the body exercising a power to change a policy or a set of existing rules, or depart from an undertaking or promise without taking account of the legitimate expectations created by them. However, the very notion of fairness has within it an idea there is an existing relationship which it would be unfair to alter.*"

10.3 Fennelly J. returned to the concept in *Glencar Exploration plc v. Mayo County Council* [2002] 1 IR 84 , holding that to succeed in a claim based on legitimate expectation, one first had to show that a public authority had "*made a statement or adopted a position amounting to a promise or representation*", and

furthermore that *"[T]he representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation.*"

10.4 The Respondent in this case submits that she and her child meet the above requirements, positing that the State has made a statement to them (extending temporary protection), that they come within the ambit of an administrative regime, form part of an identifiable group of persons, and have acted on the faith of what has been represented to them. The Respondent argues that it would be unjust, given the risk of harm to her fundamental rights and those of her child, for the State (taken to include this Court as established under the Constitution), to act inconsistently with the legitimate expectation it has given rise to by ordering the return of the child.

10.5 Recital (8) of the Temporary Protection Directive of the European Union (Directive 2001/55/EC) ["the Directive"] reads as follows:

> "*It is therefore necessary to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons*."

10.6 The Directive provides that persons in affected states will have a right of residence in receiving states as a matter of EU law. The regime referred to by the Respondent is that which allows temporary residence permission for persons from Ukraine, in this instance. This Temporary Protection Directive in respect of Ukraine was activated by the European Council on the 4th of March 2022 by Council Decision 2022/382/EU.

10.7 The Directive had already been transposed into Irish law by the International Protection Act of 2015. Section 2 of that act is the interpretation section, which provides that a person eligible for protection means a person who, if returned to her country of origin "*would face a real risk of suffering or serious harm and who is unable or… unwilling to avail… of the protection of that country*." In other words, the test under which asylum seekers are admitted to Ireland under immigration law, as applied generally, is different to that which is applied under the Hague Convention. To be eligible for protection under the 2015 Act, a person must face a real risk of serious harm. That is undoubtedly the case for all Ukrainians. To successfully defend the wrongful removal of a child, however, the Respondent must show a grave risk if returned, a risk of different level.

10.8 Council Decision 2022/382/EU was made to facilitate mass movement of Ukrainian citizens to Member States. Paragraphs 16 and 17 read as follows:

"*Temporary protection is the most appropriate instrument in the current situation. Given the extraordinary and exceptional situation, including the military invasion of Ukraine by the Russian Federation and the scale of the mass influx of displaced persons, temporary protection should allow them to enjoy harmonised rights across the Union that offer an adequate level of protection. Introducing temporary protection is also expected to benefit the Member States, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus the risk of overwhelming their asylum systems, as they reduce formalities to a minimum because of the urgency of the situation. Furthermore, Ukrainian nationals, … are able to choose the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union. This will in practice facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems...*

This Decision is compatible with, and can be applied in complementarity with, national temporary protection schemes, which can be considered as implementing Directive 2001/55/EC. If the Member State has a national scheme that is more favourable than the arrangements set out in Directive 2001/55/EC, the Member State should be able to continue applying it, ... However, should the national scheme be less favourable, the Member State should ensure the additional rights provided for in Directive 2001/55/EC."

10.9 I agree with the Applicant's submissions that this decision to offer temporary protection to Ukrainian citizens does not relieve states of their obligations under the Hague Convention. While it may have allowed faster and more favourable conditions of entry than those under the national scheme, there is nothing in this Council Decision which indicates a representation of protection to any group, beyond what is contained in this State's international protection scheme generally and certainly no representation which might lead an asylum seeker to understand that the European Council has suspended the operation of the Convention as between Ireland and Ukraine, and there is no evidence or submission before me to support the view that the Council has any legal authority to do so.

10.10 These issues reflect those already considered in respect of applying immigration laws to family law without consideration of context or scope. Temporary protection measures are enacted to provide exactly that: temporary protection to people in emergency situations. Such measures do not, and usually cannot, affect other legal rights and obligations without doing so expressly. In any such case, the body in question must have the power to amend or abrogate the other provisions.

10.11 Again, a practical hypothetical example suffices to expose the weakness of the argument that this protective measure creates a legitimate expectation:

if a Ukrainian adult fleeing the war brings her niece to Ireland, but without the permission of either of the child's parents, she cannot rely on the Directive and the Council Decision to argue that she has a legitimate expectation that the child will not be returned. A temporary protective measure does not offer protection against all possible events. Any other conclusion would enable widespread abduction of children from Ukraine.

10.12 Finally, it is difficult to see how the Respondent could have a legitimate expectation that the child, whom she had no authority to take out of Ukraine without her father's permission, would be protected in Ireland, even from an order returning the child to her father. While the Irish State has, through the Council Decision, made representations that it will protect those fleeing the war by providing a speedy asylum process, it has not undertaken to shield them from requirements arising from Ukrainian or international legal obligations. The international obligations on this Court, taking the relevant Ukrainian laws into account, require that Daryna be returned.

11. <u>Views of the Child and Best Interests of the Child</u>

11.1 The Irish courts act in light of the constitutional imperative that Daryna's best interests are paramount. This case does not involve a welfare assessment; it is a summary hearing as to whether Daryna should be returned. The Convention operates on the basis that children who have been removed from a parent must be returned quickly to their country of habitual residence. This is usually, though not always, in her best interests. In truth, there is rarely any tension between the tests to be applied and this was analysed in *C.M.W. v S.J.F.* [2019] IECA 227, by Whelan J. who

summarised the relevant cases in respect of grave risk and noted the impact of *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122 as follows: -

"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 … 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."

11.2 While Daryna's views have been expressed, these may not necessarily align with her best interests and this aspect of the case should be considered. In April of 2023, Daryna was assessed by a psychologist here in Ireland. At that point, she did not speak or understand basic English although she had been here, at that stage, for over a year.

11.3 As set out above, Daryna was very upset when she attended her first interview with the assessor. She was not able to engage in the assessment at any level. At her second appointment, Daryna said that she had felt sad at the previous appointment and had not wanted to separate from her mum. At the second interview, through the interpreter, she demonstrated age-appropriate communication skills, but she found the interview process stressful and did not want to recall several aspects of her life in Ukraine.

11.4 Daryna indicated a limited awareness of the situation in Ukraine, saying that there is a war, because Russia attacked Ukraine. She spoke of having to go to the bomb shelter and not being able to go to school. She told the assessor that she is not currently attending full time education in Ireland.

11.5 Daryna, in the words of the assessor, engaged in easy conversation about emotionally neutral topics, for example, about animals she likes. The assessor concluded that Daryna was capable of forming her own views and her unequivocal opinion was that she wants to be with her family. The assessor concluded that her views and feelings were authentic and noted no evidence of influence on her. The assessor noted Daryna's description of living in Ukraine with her parents and siblings. This referred to the Applicant and his wife, not to the Respondent. She told the Assessor: "*I go to the Ukrainian school in Ireland but I have no friends there. Friends are important. I see my friends in Ukraine on Facetime*." Daryna does not speak to her siblings often and said "*I don't know if our house is still there, I think they … live where we used to live*."

11.6 The assessor commented that Daryna showed no preference about which parent she wanted to live with or near, so she clearly has a strong bond with both parents, although of course she has lived entirely in the care of her mother for the past year.

11.7 In particular, Daryna spoke about missing her family and her father. Given that she is currently with her mother, and given her use of terminology in the earlier, 2022 report exhibited by her father, this can only refer to the Applicant and his wife, and her siblings, all of whom are in Ukraine. Although aware of the war, Daryna did not present as having an awareness of the dangers arising from that situation indicating that she was protected from it to the best of her parents' ability. Again, this refers to the Applicant and his wife rather than to the Respondent.

11.8 Daryna drew a picture of the war for the assessor but said she couldn't describe it and explained "*I didn't really see much war. I heard the siren, it was loud so everyone could hear it. We were going straight from our flat to the bomb*

shelter because Ukraine was under attack by Russia. In the bomb shelter we were sitting and drawing and doing crosswords. Mummy and daddy and my [siblings] and neighbours came with me to the shelter."

11.9 When asked what feelings she had going to the shelter, Daryna said she felt nothing. Asked about her journey to Ireland, she described the trip and then the assessor noted that she became tearful and said "*dad stayed in Ukraine. I was sitting in the car and it just moved. I didn't say goodbye*." When asked about returning to Ukraine, she replied, "*there is my family there and I want to go them*." Again, she became tearful. Daryna said that she only has two wishes: "*that I will return to my family and that the war will end of course.*" When asked if she had any last thing she wanted to tell the assessor, Daryna said "*I want to see my dad that is the most important thing*."

11.10 I have repeated many of the child's answers verbatim as it is clear from her replies and her emotions during that assessment that she has been deeply affected by this separation from her father and from her family. She is in a country where she does not yet speak the language, after one year, and despite the war in her home, she wants to return there. Having analysed the real risk to her, which arises from missile strikes near to her home and in the very city where she lives, I am nonetheless persuaded that, for her mental health and considering the statistical likelihood of her safety, given the overall number of civilian casualties and the large population of Ukraine, Daryna's best interests will be served if she returns to her home. Her views align with these interests and there is insufficient evidence of grave risk to her such that the Court should not act to vindicate her interests.

12. <u>Conclusions</u>

12.1 Daryna has been wrongfully removed from Ukraine and brought here. While there is a real risk of serious harm to the Respondent and to Daryna in Ukraine as there is a war ongoing, the evidence does not establish a grave risk of harm if she is returned to her home city given the current statistics and even taking into account the probability of greater civilian casualties in the immediate future. Her psychological health is better served by returning Daryna forthwith to her home in Ukraine. This decision is required by the Convention, as it is in the best interests of this child so that she is no longer separated from her father, his wife and her siblings.

12.2 The Applicant has offered to travel to Ireland to accompany his daughter home and he has also averred that he had plans to move his family to safety which it may now be appropriate to share with the Respondent and the Court.

12.3 I will hear the parties in respect of any further undertakings that may be required, including undertakings in respect of his plans for the family in the event of a missile warning or siren and the prospects of the family moving to a more secure location should the situation in their city worsen.