

IRELAND / JUDGMENT

L -v- C [2008] IESC 19 (11 April 2008)

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[2008] IESC 19 Supreme Court Record Number: 65/08 High Court Record Number : 2007 11HCL
Date of Delivery: 11 April 2008 Court: Supreme Court Composition of Court: Fennelly J.,
Kearns J., Finnegan J. Judgment by: Fennelly J. Status of Judgment: Approved Judgments
by Result Concurring Fennelly J. Appeal dismissed - affirm High Court Order Kearns J.,
Finnegan J. THE SUPREME COURT Appeal No. 065/2008 Fennelly J. Kearns J. Finnegan J.
IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY
ORDERS ACT, 1991 AND IN THE MATTER OF THE HAGUE CONVENTION AND IN THE
MATTER OF C. P. C. BETWEEN P. L. APPLICANT AND E. C. RESPONDENT Judgment
delivered the 11th day of April 2008 by Mr Justice Fennelly.

1. This is a Hague Convention case. The appellant removed the child, C, from Australia to Ireland in October 2005. She appeals from the judgment of the High Court (Dunne J) dated 19th December 2007 and the order dated 15th January 2008, whereby it was ordered that C “be returned to the place of his habitual residence being the jurisdiction of the Commonwealth of Australia.....”
2. Points of defence and reply were exchanged in the High Court. They are set out in the High Court judgment. The issues on the appeal have been narrowed to four:
 - a) whether C had settled in this jurisdiction;
 - b) whether or not C objects to being returned;
 - c) the delay on bringing the proceedings;
 - d) whether there is “grave risk” to the welfare of C, if returned.

3. Dunne J delivered a comprehensive judgment. While there is dispute between the parties on a number of matters, they principally concern interpretation of facts, and the basic outline of the history of the relationship between the parties, the Australian legal proceedings and the circumstances of the removal of C by the appellant to this jurisdiction, as set out in the High Court, are not in doubt. This is not to overlook the fact that the appellant, in the Australian court, made allegations of serious sexual abuse against the respondent who has at all times strenuously denied them. Those allegations form the basis of the appellant's reliance on the "grave risk" defence under the Convention.
4. C was born in Melbourne in the State of Victoria, Australia on 25th August 1999. The appellant is his mother; the respondent is his father. They were never married to each other. The appellant left Australia on 29th October 2005, taking C with her. She came to Ireland.
5. The present proceedings were commenced by Special Summons on 8th March 2007. On 31st July 2007, Finlay Geoghegan J made an order for directions in relation to pleadings and the date of hearing and also, pursuant to section 47 of the Family Law Act, 1995, ordered as follows: "...that Dr. Helen Greally assess C..... and report to the High Court for the purposes of the Court exercising its discretion under Article 12 and 13 of the Hague Convention on the following:
 1. The degree of maturity of the said Minor,
 2. Whether the said minor objects to being returned to Australia,
 3. If the said minor does object to being returned to Australia,
 - (a) the grounds of such objection and in particular whether it relates to an objection to living in Australia and/or a desire to remain in Ireland or whether it relates to an objection to living with or living in the vicinity of a particular parent and/or wish to live with the other parent and
 - (b) Whether any objections expressed have been independently formed or result from the influence of any other person including a parent.
 4. Ascertain the said minor's attitude to the circumstances in which he is now living in Ireland."
 6. The same order directed that the only facts to be disclosed Dr Helen Greally for the purposes of her assessment were: "(a) The age and date of birth of the said minor.
 - (b) That the said minor was removed from Australia to Ireland on 30th October, 2005 during the course of court proceedings in Australia relating to custody and access of the said minor where inter alia the mother, (the respondent in these proceedings) believes that the minor had been sexually abused by the father (the applicant in these proceedings) – the father (the applicant in these proceedings) vehemently denies any such abuse.
 - (c) The said minor whilst in Australia had been assessed as "on the autistic spectrum".

7. C had been habitually resident in Australia from the date of his birth to the date of his wrongful removal from that jurisdiction on 30th October 2005. In the High Court, the appellant disputed that the respondent had “rights of custody” over C, for the purposes of Article 5 of the Hague Convention. Dunne J, having considered evidence of Australian law and the case-law on that subject, held in favour of the respondent; she held that he had rights of custody. The appellant has not appealed that decision. The Facts
8. The following history is necessary for an appraisal of each of the four specific grounds of appeal upon which the appellant relies. Ms Dervla Brown, Senior Counsel, represented the appellant; Ms Maire Whelan, Senior Counsel, represented the respondent.
9. The appellant was born in England, but has Irish citizenship and a number of Irish relatives. The respondent is Australian. The relationship between the parties commenced in Australia in 1993. For a period of more than a year between 1993 and 1995, the parties travelled overseas. During a substantial part of that time, they resided with relatives of the appellant in County Kilkenny. They returned to Australia in 1995. They bought a house jointly. In 1998, the appellant informed the respondent that she was pregnant. C was born in 1999. In 2002, the relationship between the parties broke down and they separated. The appellant left the home which the parties owned, to live with her mother in Melbourne. I will refer later to the subsequent family law proceedings in the Australian Family Court.
10. After the parties had separated in Australia in 2002, the respondent had access to C every week-end from Saturday morning until Sunday night and every Tuesday overnight to take him to his crèche in the morning. The parties were at first able to cooperate in the care and upbringing of C. In early 2004, difficulties arose between the parties. The respondent says this was when he formed a new relationship. In May 2004, the appellant commenced to make allegations of sexual misbehaviour by the respondent in respect of C. She complained to the police.
11. The appellant filed an application with the Family Court of Australia. From 28th May 2004, that court heard a number of applications concerning C. The appellant strenuously contested any continued exercise of access or contact by the respondent. The court made a number of orders dealing with this issue. On 3rd March 2005, the court made an order suspending all contact between the respondent and C until further order. It also made orders providing for expert examination and reports on C. These were principally concerned with the allegations of sexual abuse.
12. On 17th October, the case was listed before the Family Court of Australia (The Honourable Justice Mushin) for final hearing. It was adjourned to 19th October. The case was heard for eight days in October 2005. Both parties, as well as C, were represented by solicitors and counsel. The greatest controversy in the present application surrounds what happened on the last day of hearing, 28th October. According to the respondent, it became clear that the case would take further time and was adjourned, on a part-heard basis, to be continued on 7th to 9th November. The judge invited counsel to meet him in chambers “to discuss his

tentative views as to what he may order with regard to C's future contact with [the respondent] ." He also stated in open court that "his tentative view was for [the respondent's] contact to resume with C... albeit on a strictly supervised basis for an initial period of time." This is the respondent's account of the matter. In response to an inquiry about these proposals in open court, the appellant said that she believed that the respondent should never see C again.

13. The appellant fundamentally disputes the respondent's account of the proceedings. She says that the judge's views were not tentative but final and that there was to be no further hearing. She has sworn on affidavit that on 28th October, the judge made his proposed order known to her lawyers, that there was no question of resuming for a full hearing on 7th November. She says that the judge indicated that he intended resuming supervised contact for a period of six months and unsupervised contact after that time. She says that she was distraught and shocked by the attitude of the judge and that, since her only concern was the safety of C, she had no other course of action open to her except to flee Australia.
14. The dispute regarding the statements of the judge on 28th October 2005 is central to resolution of the appellant's reliance on "grave risk."
15. On 30th October, the appellant delivered a handwritten letter to her family in Australia. She referred to the court proceedings, saying: "the writing is on the wall." She said that she had not discussed what she was going to do, as she did not wish to have any of the family implicated. She said: "C... and I are going somewhere safe." On 31st October, the appellant wrote to her solicitors in Australia, saying, among other things, that she was withdrawing her application before the Family Law Court. She said that she had understood from her barrister that the judge was "in favour of reinstating contact."
16. On 31st October 2005, the appellant took a flight with C from Melbourne to Dubai and thence to Manchester. She did not tell anyone in advance. Nor did she disclose to the respondent, his lawyers, her own lawyers, the court or even her own family that she was doing this or where she was going. On 3rd November, her Australian lawyers wrote to the respondent's lawyers conveying a without-prejudice offer to consent to an order that the respondent not have contact with C until he attained the age of twelve years at which time the question could be reviewed. This letter did not disclose the fact that the appellant had already left Australia. The lawyers were not aware of this fact.
17. It did not emerge until the resumed hearing in the Australian Family Court on 7th November that the appellant was no longer participating in the proceedings. The appellant's counsel informed the court that they had tried without success to contact her and considered that they no longer had instructions.
18. The judge made inquiries and announced that the Australian Federal Police had discovered the fact of the appellant's flight eight days earlier to Dubai. The judge caused several members of the appellant's close family, her sister, brother and father to be summoned. One sister told the court of her shock at the sudden departure of the appellant. She produced to

the court the handwritten letter mentioned above. All these witnesses informed the court that they did not know where the appellant was. They signed undertakings that they would inform the court of any information about the appellant's whereabouts of which they would become aware. The appellant's mother had left Australia at the same time.

19. The Family Court proceedings were adjourned sine die .
20. On 23rd November 2005, the respondent filed an Application for return of a child with the Australian Commonwealth Central Authority, in accordance with Article 8 of the Hague Convention seeking the return of C. In his supporting affidavit, he stated that the appellant's family originally emigrated from Ireland and that there were numerous family members throughout Ireland and England. He suspected that the appellant and C were staying with relatives in either Ireland or England. He supplied a list of various relatives and friends and, so far as available, their addresses. Most of these addresses were in County Kilkenny. Some were in England. It emerged later that the appellant was not residing at any of these addresses, but at an address in Mullingar, Co Westmeath.
21. On 19th January 2006, the Central Authority wrote to the Irish Central Authority at the Department of Justice Equality and Law Reform, stating that it was concurrently lodging the application with the Authority for England and Wales. It appears that the Australian Authority may have failed to transmit the list of addresses supplied by the respondent, though this scarcely matters, since the appellant was not resident at any of these addresses.
22. The whereabouts of the appellant and C were not known to the respondent, or to the Australian or Irish Central Authorities. It took over a year from January 2006 to March 2007 for the proceedings to be issued. The appellant claimed on affidavit that there was no basis for uncertainty about the location of C and that her own whereabouts were readily ascertainable.
23. The appellant says that, after she had arrived in Ireland in October 2005, an uncle rented a house for her at an address in Mullingar and that she has lived there since early November 2005. In an affidavit filed since the High Court proceedings, she discloses that she has moved from that address. C was enrolled in school in Mullingar in January 2006. The appellant registered with Manpower in Mullingar and was provided with employment by them since 27th November 2006. The appellant says that she was a regular visitor to the Kilkenny address since November 2005. However, an affidavit from her aunt, Patricia C., of that address, paints a somewhat different picture. She says that, when her sister, Kathleen (the mother of the appellant) visited her at Christmas 2005, she was distraught and on medication and that she did not inform her of the appellant's whereabouts, as that was the wish of the latter. She also says that the appellant did not visit that place (in Kilkenny) "during that time." By clear implication, therefore, Patricia C. was aware of the actual whereabouts of the appellant. She also says that she is the divorced wife of the uncle of the appellant (the uncle who provided the house). When she was asked by "a stranger" in March 2007 where the appellant lived, she said that she did not know her address. She then

contacted her former spouse to tell him of this contact.

24. When the Special Summons was issued in March 2007, the address of the appellant was given as being in Kilkenny.
25. I must also refer to the evidence of Dr Helen Greally, the court-appointed expert. The High Court had the benefit of the report and the oral evidence of Dr Greally. It will be most convenient to cite the passage from the High Court judgment which summarises the effect of Dr Greally's evidence: "Dr. Greally had received limited information in accordance with the court order made herein previously in relation to the background of C. She was aware that there had been allegations of sexual abuse made in proceedings in the Australian courts. She was also aware that there was a query as to his developmental progress. She described his presentation at interview as unusual. She also described him as a very detached child and she came to the conclusion that he had not been influenced by anybody in the immediate family background. Her view was that the child's presentation was so unusual that he required further assessment including intellectual assessment and emotional assessment. In her report she noted "a striking aspect of C's interview was that he showed little or no affect during all of the interviews that he had with the writer and did not respond in an animated or an enthusiastic way to any questions that were asked of him. His presentation was consistently flat". Dr. Greally was of the view that there was some degree of fantasising on the part of C in relation to his contacts with his father and that for that reason the interviews were unreliable in respect of the questions posed by the court. In the course of her direct evidence she commented that "I really would be very unhappy to say anything except to say what I think which is that this child merits further investigation and his presentation. It gives me a lot of cause for concern, because he is so flat and detached". She went on to note in the written report that in relation to the level of maturity "C's lack of real involvement in the interview situation makes it a difficult question to answer. However, aspects such as his concept of time suggests that he is somewhat immature". In the course of her evidence she observed that it was not possible to stand over a view that C should be either sent back or kept here having regard to his presentation to her. One of the final comments made by Dr. Greally in her evidence was that C's presentation suggested to her that he would settle anywhere. He did not show enthusiasm about Ireland or about Australia. It is I think obvious from the above that there are difficulties with the presentation of C and that the position in relation to his levels of maturity and his presentation generally is a cause for some concern. There was a query as to his developmental progress. Given the report of Dr. Greally and the evidence given Dr. Greally in court, it seems to me that it is not possible in this case to rely on the provisions of Article 13 of the Hague Convention which provides "the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Firstly it seems to me that there is a question mark over the maturity of C. Secondly, Dr. Greally has expressed serious concerns about the level of intellectual functioning and emotional state of C. That being so she concluded that the interviews were unreliable for the purposes of deciding matters in

relation to whether C should return to Australia or not or remain living in Ireland.”

26. The learned High Court judge made detailed findings of fact and made clear rulings, which are set out in the following four paragraphs, against the appellant in respect of each of the issues which are raised on this appeal. Whether C has “settled” Dunne J concluded as follows: “...having regard to the evidence of Dr. Greally, I could not conclude that C was well settled in his new environment. Her evidence to the court was that he would settle anywhere. The evidence put forward by the respondent as to C’s school reports and general circumstances does not alter this view.” Whether C “objects to being returned”
 27. Again, Dunne J relied on the evidence of Dr Greally. Having referred to Article 13 of the Convention, the learned judge said: “Firstly it seems to me that there is a question mark over the maturity of C. Secondly, Dr. Greally has expressed serious concerns about the level of intellectual functioning and emotional state of C. That being so she concluded that the interviews were unreliable for the purposes of deciding matters in relation to whether C should return to Australia or not or remain living in Ireland.” The delay on bringing the proceedings
 28. The learned judge treated “delay and acquiescence” together. The appellant no longer relies on acquiescence. Having considered all of the affidavits sworn in relation to this issue, the learned judge concluded: “I can only come to the conclusion that the respondent had taken some steps to conceal her whereabouts.” She distinguished the case from that of *P. v. B.* (No.2)
- [1999] 4 IR 185 . She said: “It is correct to say that the proceedings in this case have been issued more than twelve months after the wrongful removal. However, from a consideration of the large number of affidavits before this court as to the steps taken to trace the respondent and the child, it does seem to me that everything was done that could be done by the applicant to locate the respondent and C.” The issue of “grave risk”
29. Dunne J approached the matter “on the basis that there is at the very least a case made out which raises the issue of sexual abuse, but I am very conscious of the fact there has been no determination by the appropriate court to deal with this issue, namely the Family Law Court of Australia.” She referred to the decision of this Court in *A. S v. P. S.* [1998] 2 I. R. 244. In effect, while accepting that a prima facie case of sexual abuse had been made out, it was a matter for decision by the Australian courts. The rights and interests of C could be protected by the Australian courts. She ruled that the views expressed by the judge were tentative. The matter still had to be decided. Consideration of the issues
 30. The Child Abduction and Enforcement of Custody Orders Act, 1991 gives the force of law in the State to the Hague Convention on the Civil Aspects of International Child Abduction. The present appeal is concerned with certain exceptions to the undoubted general obligation to order the return of abducted children to the jurisdiction from which they have been unlawfully removed. The assumption underlying the Convention is that disputed issues regarding custody and access in relation to children should be decided by the courts of the

country of habitual residence of the child. Australia is the country of habitual residence of C. The respondent has rights of custody, pursuant to Australian law, for the purposes of the Convention.

31. I now consider the four particular issues raised on the appeal. Whether C has settled
32. Article 12 of the convention provides:
 1. Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
 2. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”
33. In this case, paragraph 2 of the Article may apply. The Court has discretion to refuse to order the return of the child, if it is demonstrated that he has “ settled ” in his new environment.
34. Ms Brown, on behalf of the appellant accepts that whether C has settled should be determined as of the date of commencement of the proceedings, March 2007. She relies on the evidence of the appellant herself and of some school reports from the school in Mullingar. She criticises the learned judge’s reliance on Dr Greally’s report and says that, in view of the concerns expressed by Dr Greally, the court should have adjourned the hearing in order to enable that expert to conduct further assessment.
35. In *P. v B.*, cited above, Denham J, speaking for the Court, at page 219, cited with approval the following passage from the judgment of Bracewell J. in *Re N. (Minors) (Abduction)* [1991] 1 F. L. R. 413 at pp. 417 and 418:- "The second question which has arisen is: what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the defendant can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas L. J. in *Re S.* did advert to art. 12 at p. 35 of the judgment and he said:- 'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.' He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in *M. v. M.* and at first instance in *Re S.* The phrase

'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the defendant, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings."

36. When applying those principles to the facts of the particular case before the Court Denham J, continued as follows at page 221: "The relevant facts commence with the length of time which the child has lived in this environment - without any application for her removal. This has several elements; (a) the physical presence of the child in the town and all its consequences, and (b) the absence of contact from the plaintiff requesting her return; (c) the emotional element. The reasonable and logical inference to be drawn from this length of time is that to a child of the tender age of R. it would be a most significant length of time and one in which roots would have been put down in the community. In light of the special circumstances of this case strong inferences may be drawn from the delay. These arise because the defendant had returned to her family home with R., there was no contact from the plaintiff, who had every reason and opportunity to make contact with the defendant's family home, for twenty months. However, the burden of proof is higher than that which arise solely by inferences from the delay in this case."
37. The foregoing comments relate to the specific facts of that case, notably the fact that the plaintiff father had failed without excuse to make contact for twenty months. This element featured again at the conclusion of the judgment (page 222), where Denham J emphasised the continuing discretion of the Court to order return of the child, but deplored the "the special circumstances of this case, which arise largely because of the inappropriate delay in commencing the proceedings....."
38. Denham J also held, in *P. v B.* that the burden of establishing "settlement" lies on the person alleging it.
39. The respondent in his written submissions also makes reference to a dictum of Thorp LJ in *Cannon v Cannon*

[2005] 1 WLR 32, as follows: "There must be at least three categories of case in which the passage of more than 12 months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction short of acquiescence on the part of the left behind parent. In that category of case the Court must weigh whether or not the child is settled and whether nevertheless to Order a return, having regard to all the circumstances including the extent of the Plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the Defendant besides the wrongful removal or

retention itself. In other cases concealment or other subterfuge on the part of the Abductor may have caused or contributed to the period of delay that triggers Article 12 (2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and, therefore, subtracted from the total period of delay in order to ascertain whether or not the 12 month mark has been exceeded. This seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.”

40. That distinguished judge continued as follows at paragraph 53 of the judgment: “A broad and purposive construction of what amounts to “settled in his new environment” will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasize. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.”
41. Settlement must be assessed according to all the circumstances. It is ultimately a matter of appreciation of all the facts. The court must make a careful and balanced judgment. There is a physical and an emotional element. Family, home and school come into it, as does the absence, to the extent that it is relevant, of contact with the applicant parent. It is the emotional element in particular which calls attention to the evidence of Dr Greally. Dunne J referred to Dr Greally’s evidence that C’s presentation suggested that “he would settle anywhere.” She was entitled to do so. It was consistent with the general tenor of Dr Greally’s evidence in which she described C as a detached child. Furthermore, Dr Greally’s strictures on reliance on what she called the “verbalisations” of an eight-year old point firmly against the usefulness of an adjournment for the purpose of further inquiry into the question of whether C had settled. Finally, anticipating to some extent my judgment on the question of delay, I agree with Dunne J that “there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts.” This must also be put in the balance when considering the issue of settlement.
42. I have no hesitation in concluding that the appellant has not discharged the burden of establishing that C had settled in his new environment as at the date of commencement of the proceedings.
43. I should not leave this topic without referring to the affidavit placed before this Court on appeal pursuant to Order 58, rule 8 of the Rules of the Superior Courts. It discloses that the appellant, at the time of the High Court hearing was in a new relationship. It is clear that she was pregnant at the date of the High Court hearing. She has now married the father of the child who was born to her in January and has moved with C from Mullingar to live in Kilkenny. Insofar as these facts existed at the date of the High Court hearing, it is surprising that they were not disclosed to the High Court. In view of the conclusion I have arrived at in relation to the issue of settlement, it is unnecessary to refer to it further, or to rule on the respondent’s argument that it undermines the appellant’s reliance on settlement in Mullingar. Whether C “objects to being returned”

44. Article 13 of the Convention contains the following: “The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”
45. The burden of proving this allegation clearly rests on the appellant. The Article discloses a very wise policy of not permitting reliance on this exception without having due regard to the degree of maturity of the child. The younger the child, the more likely he or she is to be suggestible. Family courts are cautious about acting on the expressions of opinion of children of tender years when they are concerned in disputes as to custody or access between parents. In the present case, it is unnecessary to look further than the evidence of Dr Greally. At different points of the interview C expressed quite contrary and inconsistent views about whether he wished to stay in Ireland or to return to Australia. Her report does not suggest that C objects to return. In any event, Dr Greally’s report casts doubt on his ability to express a mature considered decision. Again, the appellant submits that the court should facilitate the expert appointed by the court to ensure that C’s wishes are ascertained. I cannot agree. Once more, I would draw attention to the reservations of Dr Greally with regard to the “verbalisations” of an eight-year old.
46. I would dismiss this ground of appeal. The delay in bringing the proceedings
47. The Hague Convention contains no provision permitting refusal of return on the ground of delay simpliciter. Article 13(a) recognises such a possibility where a person has “consented to or subsequently acquiesced in the removal or retention” of the child. Dunne J rejected acquiescence as a ground. The appellant has now rightly abandoned that ground. However, Ms Brown claimed at the hearing that the appellant could rely on simple delay. She relied on the judgment of Denham J in *P. v B.*, which I have already fully discussed. She did not claim to be able to rely on any other authority, still less any provision of the Convention. The following is the crucial passage from the judgment in *P. v B.* at page 217: “Delay is contrary to the Hague Convention. Significant culpable delay by a requesting party is contrary to the fundamental policy of the Convention. Sometimes culpable delay may be a form of acquiescence. However, there may well be circumstances where there is culpable delay and yet no acquiescence. It may well be reasonable to determine in certain circumstances that delay by an applicant is such that the Convention procedures are not applicable.”
48. Read in isolation from its context, that passage might convey the impression that delay alone, without acquiescence is a ground for refusal. However, it must be read in context. The decisive passage in the judgment appears at page 222 and I have cited it above. It was the link of delay with the settlement of the child that formed the actual reason for the court’s decision. At most, the cited passage is an obiter dictum. I do not believe it can have been intended to introduce a novel and free-standing provision into the Convention. On the contrary, Denham J has regularly emphasised the mandatory terms of the Convention.

49. Ms Brown made it clear that she was relying on culpable delay by the respondent. I have already referred to and approved the finding of the learned High Court judge, with which I agree, that “there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts.” This needs to be taken into account and balanced against any allegation of delay by the respondent. In *P. v B.*, the delay by the father was during a period when he was fully aware of the whereabouts of the child.
50. The facts also need to be looked at as a whole. I am utterly unpersuaded by the suggestion that the appellant lived “openly” in Mullingar from November 2005 and that there was no reason for the respondent not to discover her whereabouts. The evidence is that the respondent knew that appellant’s family were widely scattered over Ireland and England. Where inquiries were made of close members of her family, no information could be obtained. This was either because those people (the witnesses heard by the Australian court) were unaware of her whereabouts or because they would not disclose. It makes no difference. It suggests that attempts by the respondent to inquire among the Kilkenny relatives would have been fruitless. The affidavit of Patricia C. confirms a tendency to concealment. The appellant unconvincingly suggests that the respondent should have known she was living in Mullingar, because he had once visited her uncle in that area. She asserts, without proof that the respondent could have traced her. She does not suggest how he, living in Australia, could have done so. She certainly gave no disposition to assist anybody to do so.
51. Thus, even if it be a good ground in law, I am satisfied that delay is not made out on the facts. The issue of “grave risk”
52. This is the main point of the appellant’s case. She has demonstrated that she is absolutely determined, based on her allegations of sexual abuse, to prevent the respondent from having access to C, whether or not under a court order or under supervision. It was her fear that the judge would order such access, even on a supervised basis, that prompted her precipitate departure from Australia.
53. The relevant provision of the Convention is Article 13, which, so far as relevant, provides: “Notwithstanding the provisions of the preceding articles, 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.”
54. As articulated by Ms Brown, the appellant’s case is as follows. She believes that the respondent has, when exercising rights of access, sexually abused C and that, C will be at risk of repetition of such behaviour if access takes place. Counsel accepts that such an allegation, in itself, would not justify this Court in refusing to order the return of C to Australia. Such disputed allegations form the normal material for ruling by the family courts in the jurisdiction of habitual residence. However, the appellant says that the Australian

court has clearly already ruled on the issue, that it has prejudged the question of access. That was the reason for her leaving Australia. Put shortly, her submission amounts to saying that this Court should not trust the Australian courts to protect the interests of C.

55. The correct approach to the treatment of this issue is very well established in the case-law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country.
56. In her judgment in *A. S. v P. S.* [1998] 1 I. R. 244, Denham J, cited from a judgment of Hale J, as she then was. She said at page 261: "The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in *Re HB (Abduction: Children's Objections)* [1997] 1 F. L. R. 392. Hale J. held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned."
57. Denham J also cited with approval from the judgment of Wall J in *Re. K. (Abduction: Child's Objections)* [1995] 1 F. L. R. 977, where the relationship between courts of the two jurisdictions was explained as follows: "The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction."
58. In *R. K. v J. K.* [2000] 2 I. R. 416, Barron cited with approval the following passage from the judgment of the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrich* (1996) 78F 3d 1060: "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of

war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

59. This principle was further developed in the judgment of Denham J in *Minister for Justice, Equality and Law Reform as the Central Authority for Ireland (E. M.) v J. M.*

[2003] I. R. That case concerned an abduction of children by the mother from England to Ireland, without the consent of the father. There had been evidence before the High Court that one of the children suffered from autism and that the programme of treatment that he was receiving in this jurisdiction would be disrupted if he were to be returned to England. On this ground the High Court made a finding of "grave risk" and refused to make the order for return. Denham J, delivering the unanimous judgment of this Court, held that the High Court had fallen into error. She cited with approval the passage from the judgment of Barron J, cited above and stated: "This is a classic issue, a classic balance to be achieved, in cases of custody and access, matters for hearing in custody cases, not appropriate to the summary hearing envisaged by the Hague Convention. I am satisfied that the High Court Judge fell into error in this case in his application of the grave risk exception under the Hague Convention."

60. The court must apply these principles to the facts of this case. It is indisputable that a risk of sexual abuse is a grave risk. The learned High Court judge has said that there was *prima facie* evidence of sexual abuse before the Australian court. It is undoubtedly the case that the appellant has made such allegations before the Australian court. However, as the learned judge correctly said, that court has not yet ruled on the allegations. The High Court did not hear any direct evidence on the issue, but was informed of the nature of the evidence before the Australian court. I am not sure that it is right to rule on the quality, even at a *prima facie* level, of the evidence before the court of the other country. It is clear that there was a great deal of oral evidence before the Australian court, but this court has seen none of that. Nonetheless, this court must take note of the fact that such an allegation has been made and that it awaits adjudication before the Australian court. It is also clear that the allegation is strenuously denied. It is not possible to go further.
61. The real issue concerns the position that this court should adopt in relation to the fact that the identical allegations are the subject of proceedings before the Australian court. The appellant submits that she has produced evidence to satisfy the test that the Australian court is unable or unwilling to protect the interests of C.
62. In order to meet the test laid down in the cases, the appellant must persuade the Court that the Australian court has decided, in advance of argument from counsel, to make orders exposing C to a risk of sexual abuse and that, for that reason, that court is unable or unwilling to protect the welfare of C.

63. The appellant does not accept that the judge expressed a tentative view in proposing for consideration by counsel an order providing for supervised access for a time and unsupervised access thereafter. The respondent, in his application to support his application to the Australian Central Authority in November 2005 three times said that the judge had described his views as tentative. At the time he swore that affidavit, he had not yet heard the appellant allege the contrary. He would have had to be remarkably prescient to predict that the appellant would deny that the judge's views were tentative. The appellant's written submissions, in an attempt to discredit the respondent, allege that the respondent first alleged that the judge's views were tentative in his affidavit in these proceedings on 24th June 2007. This is patently incorrect. I assume that counsel in making this statement simply overlooked the fact that the respondent had made this statement in his 2005 affidavit. More importantly, the judge, at the hearing of 9th November 2005 explained in explicit terms that the views he had expressed were tentative: "...on one or two occasions during the running of the trial I expressed – what I made clear was a tentative view about my thinking with regard to the case, and that was strictly supervised contact."
64. He explained this and reiterated it in clear terms. The appellant nonetheless says, in an affidavit of 17th July 2007: "I say that it was only when challenged about making his decision prior to hearing all the evidence that the judge stated his views were tentative." This, of course, amounts to an attack on the integrity of the judge. The appellant does not state when the judge is alleged to have been "challenged." There is no evidence of such a challenge at the hearing on 9th November. This type of unsupported attack on the Australian court is quite unacceptable. It is made in disregard of the facts. The appellant was represented by solicitor and counsel throughout the lengthy hearing in the Australian Family Court. None of her legal representatives have been asked to swear an affidavit to support her attacks on the judge. I conclude that the appellant has produced no credible evidence to suggest that the Australian courts are unable or unwilling to protect the interests and welfare of C.
65. It is for the Australian court, not this court, to test the strength and veracity of the allegations of sexual abuse. It has heard oral evidence from both parties, tested by cross-examination, over a period of eight days. It has also heard expert witnesses and received their reports. The Australian courts conduct adversarial proceedings in a manner remarkably similar to our own. They are capable of protecting the interests of C. If the appellant is dissatisfied with a decision of the Family court, she will have a right of appeal. For these reasons, I am satisfied that the appellant has not made out the case of grave risk.
66. The appeal having failed on all grounds, I would dismiss the appeal and affirm the order of the High Court. In doing so, however, I would amend that order to provide that it will take effect on receipt of the undertaking of the respondent that he will not exercise rights of access to or contact with C, other than in accordance with the order of the Australian Family Court. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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