Undertakings: A Satisfactory Safeguard to Grave Risk?

"Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that the contracting States and Courts will become reluctant to order the return of children."[1]

INTRODUCTION:

In an era that is becoming ever more distinguishable by the prevalence of international marriages, and, in a society where previous constraints on the mobility of peoples are dissipating continuously, the implications for the divisive arena of family disputes is a phenomenon demanding stringent attention. Most notably in debacles of child custody, parents more and more often see fit to unilaterally remove a child from one jurisdiction to another (nearly always in direct conflict with the wishes of the left-behind parent) in an attempt to resolve the situation.

The Hague Convention on Civil Aspects of International Child Abduction (hereafter "the Convention") signed by Ireland on the 25th of October 1980 at the Hague Convention on Private International Law, and incorporated by the Child Abduction and Enforcement of Custody Orders Act (hereafter "the Act") on the 1st of October 1991 strives to ensure that orders made in one jurisdiction, in relation to child abduction, are both recognisable and enforceable in all other signatory jurisdictions.

ARTICLE 13(B): GRAVE RISK

Of the four defences contained in the Convention[2], the most common shield adopted by alleged abductors seeking to thwart attempts to have a child returned to the requesting state lies in Article 13(b). This defence provides that the requested State is not bound by the order to return the child if it can be established that "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".

In the initial years after the Convention's ratification there was a notable reluctance on the part of the judiciary to return a wrongfully removed child where any level of grave risk was established in relation to the abducted child's return. This marked inaction in the formative years of the legislation was not in keeping with the

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[1] As stated by Kay J in the Family Court of Australia decision of *McOwan v McOwan* (1994) FLC 92-451 at 380, in attempting to identify the problem that undertaking seek to overcome.

[2] These are as follows: Art.13(a) - aggrieved person ,institution other body having care of the person of the child was not actually exercising his/her custody rights at the time of the removal or had consented to or subsequently acquiesced in the removal/retention; Art.13(b) - there is a grave risk that child's return would expose him/her to physical or psychological harm or otherwise place the child in an intolerable situation; Art.12 - child is now settled in new environment.

Convention's philosophy of the prompt return of the child (the phrase 'prompt return' is used at least four times in the text of the Convention)[3].

Demonstrative of the Court's reluctance to return a child where any degree of grave risk was alleged, is the case of *MA v PR*[4], where the High Court refused to sanction the return of the child basing their decision upon allegations that the father had previously acted in a violent manner toward the family. Likewise in *RG v BG*[5], an order was refused to a wife who gave evidence that her husband's habitual drinking to excess often culminated in aggressive violent outbursts. Perhaps the most illuminating indication (of how lax the courts had become towards the grave risk issue) was the situation the courts had arrived at in *PF v MF*[6], where a father's application for a return order was refused based on his previous record of financial irresponsibility. The approach taken by the court here would seem to imply that any spurious allegation made by an alleged abductor against her aggrieved partner would result in the refusal to order return[7]. Clearly, these decisions were neither compatible with the use that the creators of the convention intended for it, nor did they encompass the level of grave risk envisaged by the Convention. Accordingly, the Irish judiciary took steps to restrict its use as a defence and in some respects it appears that we are now approaching the other extreme.

The first restrictive step of note occurred in *CK v CK*[8]. A couple and their two children (all Irish citizens) had lived in Australia since February 1989. They had planned to remain there until 1996. Alas, following upon the breakdown of the marriage in 1992, the husband flew back to Ireland in September with the two children in tow, without either the wife's consent or knowledge. Since the time of the breakdown the wife had been involved in an adulterous relationship with another man. The father contended that the children's return to Australia would pose a grave risk under Article 13(b) in that they would, *inter alia*, be subjected to moral corruption due to their mother's adulterous relationship.

In the High Court, Denham J. adopted the test articulated by Nourse LJ in *re A (a minor)(Abduction)*[9] in the English Court of Appeal as applicable to Article 13(b) in which it was stated "that not only must the risk be a weighty one, but that it must be one of substantial and not trivial psychological harm"[10]. Upon an application of this test, the father's claim was duly rejected. This test is still applicable to date and has recently been reiterated with approval in the case of *RK v JK* [11].

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[3] The Supreme Court emphasised the convention's requirement for speed in *P v B* [1994] 3 IR 507 where the Court stated that the Court of First Instance must not lose "sight of the need to act expeditiously" (per Denham J.).
[4] (1993) 2 FLJ 52
[5] (1993) 2 FLJ 55
[6] Unreported, S.C. 13 January 1993
[7] The pronoun 'her' is used based on a finding by Lowe and Perry that 70 per cent of abductors were mothers, as compared to 27 per cent fathers (Lowe and Perry *International Child Abduction – The English Experience,* Report of research sponsored by the Nuffield Foundation (undated but presumed to be 1997)).
[8] [1994] 1 IR 260; [1993] ILRM 534; [1994] 1 IR 268; [1993] 2 *Fam.L.J.* 59
[9] [1988] 1 FLR 365 (CA)
[10] *Ibid* at p260
[11] [2000] 2 IR 416

Building on this restrictive approach O'Sullivan J, in *MD V ATD*[12], makes reference to the dicta of Donaldson M.R. in *Re C (a minor)(Abduction)*[13] where it is asserted that, in the case of child abduction, it was inherent that the child would suffer some psychological harm, whether or not it was returned. This finding has been upheld many times in both the English and Irish Courts. It was recently re-emphasised by Ward J. in the English Court of Appeal in *Re C (Abduction: Grave Risk of Psychological Harm)*[14] who whilst acknowledging that a child may suffer worry, uncertainty and anxiety, insisted that this fell short of what was required to reach the requisite level of severe harm.

In summation of the above, it would appear that the appropriate test for grave risk under article 13(b) of the Convention, in both England and Ireland, requires clear and compelling evidence of harm, which must be substantial and not trivial, and eminently more severe than the inevitable disruption, uncertainty and anxiety that may occur.

Today, in line with the Convention's philosophy of prompt return, and, with the newly assumed imperative role of undertakings, the court's emphasis is to return the wrongfully removed/retained child. However some commentators believe the Court's willingness has gone to far and that children are now returned "even in what appears to be genuine cases of grave risk"[15].

UNDERTAKINGS:

In Ireland, the first judicial approval of undertakings occurred in *CK v CK*[16], where a mother undertook not to reside with her lover. While many undertakings accepted by the court are negative like the former, many are also drafted in positive terms such as a duty to pay maintenance or to provide accommodation[17].

The first case to involve undertakings in the context of the 1991 Act was that of *P v B*[18]. The Supreme Court noted that undertakings are entirely consistent with both the 1991 Act and the Hague Convention. Furthermore, undertakings were applauded, by Denham J, for their capacity to ensure the welfare of the child during the transition from one jurisdiction to another. She further held that in assessing whether undertakings are 'appropriate and reasonable', the court must determine whether, in the circumstances of the case, they protect the child on its departure from this jurisdiction to a foreign jurisdiction. In the case at hand, undertakings relating to accommodation and maintenance were found to be appropriate and reasonable. The Supreme Court justice added that the function of undertakings was, in effect, to cover the transitional period until the question of the child's welfare, custody, access, and maintenance comes before the court of the requesting State.

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[12] D. (M.) v. D. (A.T.) [1998] IEHC 43 (6th March, 1998)
[13] 1 FLR (1989) 403
[14] [1999] 1 FLR 1145
[15] Ward, P. *Child Abduction: A Rare Refusal to Return,* January (2000) Fam LJ, at p50
[16] *Supra n.6.* However, this case was decided under Part II of the Convention and so is not directly applicable to the topic at hand.
[17] See for example the judgement of Sullivan J in *P v B*, cited below.
[18] [1994] 3 IR 507

P v B was a clear endorsement of the use of undertakings in this jurisdiction. Their use is now predominant in child abduction cases where they are seen as a method of offsetting any possibility of grave risk to a child who is being returned to his/her habitual residence.

In *AS v PS*[19] an abducting mother proffered allegations of sexual abuse against the children's father as grounds for her defence of grave risk. Denham J in the Supreme Court accepted that there was a grave risk at issue in the case, but, nevertheless, ordered the return of the child to England on the basis of the husband's undertaking to vacate the family home. This finding differed from that of Geoghan J in the High Court who expressed an apprehension that the alleged abductor might tolerate and even permit breaches of the undertakings by the appellant. Tabitha Woods opines that here "the Supreme Court took too little account of the danger posed to V (the abducted child) in its eagerness to uphold the Convention"[20].

Perhaps Wood's belief holds true for subsequent cases too. In *AS v MH and EH (child Abduction)(Wrongful Removal)*[21], E, the child of an international marriage between an Irish mother and a Moroccan father was 'spirited away' after her mother's funeral (by her maternal grandmother and maternal aunt) from London to Ireland. The defendants contested that the return of E to England would cause her grave psychological harm, and, that therefore, the court should exercise its discretion under Article 13 (b). Geoghan J in the High Court found no evidence that long-term psychological damage would be caused by returning E for custody proceedings. He further stated: "Any danger of even some damage can be largely removed by suitable undertakings. This has consistently been the view of the Supreme Court". On this basis, it was ordered that the child be returned to England.

In *IK v JK*[22], Morris P ordered the return of a child to his/her habitual residence but stated the order "must be hedged around by undertakings". The father undertook not to live in the family home, not to contact his wife and children, to provide weekly maintenance and agreed to limited access arrangements, pending a ruling from the Scottish Family Law Court. On appeal, the Supreme Court upheld Morris P's decision. The Court acknowledged a grave risk could arise in the case before them but was satisfied that such grave risk could be abated by the undertakings given. Wood considers Morris P.'s decision as a perfect example of the willingness of the Irish Courts to accept a number of detailed undertakings from an appellant so as to return abducted children to the courts of their habitual residence[23].

A somewhat rare exception to the above trend of accepting undertakings in ameliorating the grave risk occurred in *TMM v MD*[24]. In the High Court, McGuinness J held that the very real risk of physical and psychological harm caused by the mother's alcoholism and depression, coupled with the complete absence of the father from the children's upbringing could not be met by undertakings given by either

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[19] [1998] 2 IR 244
[20] Wood, T., *Child Abduction – An Irish Perspective* [1999] 1 IJFL 15 at p17
[21] [1999] 4 IR 504
[22] [1998] IEHC 195 (25th February, 1998)
[23] *Supra* n.18 at p18
[24] [2000] 2IR 149

party. The Supreme Court on appeal confirmed the approach of the learned trial judge.

The English Courts have also adopted the practice of requiring an applicant to accept conditions or give undertakings before ordering the return of a child[25]. According to Dicey and Morris, undertakings are viewed in England as encompassing a clear tactical advantage to the parent seeking the return of the child, in their ability to undermine any argument that the return of the child would expose it to grave risk of harm.[26]

The case of *RK v JK* encapsulates the present position adopted by the Irish judiciary. Here it was held that the policy of the Hague Convention to return a child to its habitual residence would be met where undertakings and circumstances could be created to protect the child.

Difficulties with Undertakings:

In essence, an undertaking is merely a voluntary promise, restricted in scope, and for a limited period. Herein lies the problem – enforceability. On a basic level, an undertaking may not be enforced as between the abductor and the aggrieved partner. As already mentioned, Geoghan J in *AS v PS* expressed a fear that the respondent herself might tolerate, and even permit, breaches of the undertakings by the applicant.

On a more fundamental level an undertaking may never be enforced by the court of the child's habitual residence. A court may in some cases be liable to or be thought to usurp the functions of the court of habitual residence. Particular difficulty is associated with contracting states whose civil codes of law render undertakings ineffective.

Denham J, in *P v B*, was of the view that undertakings do not in any way arrogate the jurisdiction of the Spanish Courts to determine questions of custody and access. The High Court had ordered the return of R to Spain, satisfied that whatever risk there was to R would be eliminated by undertakings given by the father. However, R's father breached these undertakings and was subsequently convicted of sexually abusing R upon her return to Spain, a clear demonstration of their uselessness where their enforceability can't be ensured.

Again in *LP v MNP*[27], the appellant father failed to abide by the undertakings he gave to the High Court when the child was returned to the civil law jurisdiction of Italy. In her judgment, delivered in October 1998, McGuinness J states that from time to time during the month's following the mother and child's return, counsel for the defendant had been obliged to make a number of applications to the Court "concerning the virtually complete failure of the husband to abide by the various

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[25] For examples see *Re O (Child Abduction: Undertakings)*[1994] 2 FLR 349, , [1994] Fam Law 482, [1995] 1 FCR 721; M (Abduction: Undertakings), Re [1995] 1 FLR 1021**,** CA

[26] *Dicey and Morris on the Conflict of Laws*, London: Sweet & Maxwell, 2000. 13th ed. /under the general editorship of Lawrence Collins with specialist editors. At p842.

[27] [1998] IEHC 151 (14th October, 1998)

undertakings given by him"[28]. Additionally, the Italian courts removed the child from her mother's custody within two weeks of her return and placed her in an institution. When questioned by McGuinness J., as to the non-enforcement of the undertakings order made by her, the Italian Central Authority gave unsatisfactory replies. McGuinness J stated that it was not clear form the replies "whether the common law concept that a party may give undertakings to the Court and that the failure to abide by such undertakings constitutes a contempt of Court is a normal part of the Italian legal code"[29].

The dominant theme to be gleaned from the above cases is that of the reluctance of civil law countries to recognise undertakings. Moreover, ancillary to the view that undertakings are little more than a camouflaged technique for usurping their function as courts of the child's habitual residence, it would seem that civil law countries perceive them to be an incentive and motivation for abduction in that they allow the abducting parent to gain significant advantages. Perhaps they have a point.

Conversely, common law jurisdictions would appear to have few qualms in the enforcement of each other's undertakings. Curiously, the issue of whether undertakings would be enforceable in Scotland arose before the Irish courts, and Denham J. in particular, in the case of *RK v JK*. In supporting her finding that they would be enforceable, she cited the Canadian Supreme Court case of *Thomson v Thomson*[30] where La Forest J. stated at p599:

> "Given the preamble's statement that 'the interests of children are of paramount importance', courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention…Through the use of undertakings, the requirement in Article 12 of the Convention that " the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short term harm to the child is ameliorated".

She advocated, that, the Scottish courts, both through the implementation of the Hague Convention, and, through the exercise of the comity of nations, would take the same view of undertakings as do other Convention countries.

To ensure certainty in relation to compliance with undertakings, several members of the judiciary charge themselves with supervisory roles to ensure their stringent adherence. In the *CK* case, Denham J directed that the undertakings given be brought to the attention of the Central Authority in New South Wales. In a similar fashion, as mentioned above, McGuinness J (in relation to the case of *LP v* MNP) questioned the Italian Central Authority about the failure to uphold undertaking given before her in Court.

Most common law countries, which choose to recognise and abide by the comity of courts principle, frequently use undertakings and support their enforcement vociferously. Indeed, Ireland and England seem to be a shining example of co-operation between contracting states. The English and Irish Central Authorities are in

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[28] *Ibid.* at p78
[29] *Ibid.* at p83
[30] [1994] 3 RCS 551

constant contact effectuating a monitoring role over undertakings. The success of this dual system has permitted the English Central Authority (invested in the Office of the Lord Chancellor) to commend Ireland's observance of, and support for, the enforcement of undertakings in the U.K.[31].

Ward comments that the cohesiveness of the common law approach "is to be welcomed in adopting a single universal approach to child abduction and is ultimately beneficial in securing the objectives of the Hague Convention"[32].

CONCLUSION:

In all but the most exceptional cases, Irish Courts will order that it is in the best interests of a child to be returned to its habitual residence where the court of that jurisdiction can properly decide matters of custody and assess arrangements. In this context, undertakings given to a court are seen to redress the possibility of grave risk that the return of an abducted child may pose.

Although a simple point, it must be remembered that an undertaking is only useful if an enforcement mechanism exists in the requesting country. Many of the 69 signatory states completely ignore undertakings and refuse to recognise them, rendering them useless and ineffective in these jurisdictions. There has been much discussion (judicial and academic) to how best resolve the matter. Singer J of the Family Division of the High Court of Justice, Australia holds the following view:

> "…..there may be some scope for developing probably on a bi-lateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic Courts take to issues which commonly arise in Convention cases. Such an issue may well be these Courts use of undertakings…..By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country wishes to cause offence to the Courts of the other, nor to seek to interfere with or to influence what that Court then does."[33]

Closer to home, a somewhat similar suggestion is proposed by Martin and Corrigan, who call for the Hague Convention parties to initiate bilateral agreements on the issue of enforceability of undertakings in order to ensure the prompt and safe return of children wrongfully removed from their habitual residence[34].

In the interim, the best short-term solution may lie elsewhere. Professor Duncan William, First Secretary at the Hague Conference on Private International Law believes the use of "safe harbour" or "mirror" orders, obtained from a court in a state where the enforcement of undertakings is not feasible, may offer the best solution for the time being[35].

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[31] Source: Editorial by Corrigan, C and Martin, F, [1998] 2 IJFL 1

[32] *Supra* n.13 at p51

[33] *Re O (Child Abduction: Undertakings)* [1994] 2FLR 349. , [1994] Fam Law 482, [1995] 1 FCR 721 (exact page number of quote unknown)

[34] *Supra n.*27 at p2

[35] Duncan, W., "Hague Conference on Private International Law and the Children's Conventions", 2 I.J.F.L. [1998] 3-4 at p3. For a detailed examination of the effectiveness of these orders, see

A concluding digression relates to whether undertakings, which are a manifestation of extreme judicial activism, should be encouraged and enforced in the first place? Is their use authorised by the Convention (the text of the Hague Convention is entirely bereft of any mention of undertakings)? One may argue in favour of their use, that the Preamble and objects of the Convention are sufficiently general to allow signatories to utilise whatever legal or administrative mechanisms necessary to achieve the objects of the Convention. Presumably this is the justification for their use in Ireland, as certainly the Irish Judiciary has not proved shy of their use. The Learned Justice McGuinness, speaking recently at a meeting of the Law Society, University College Cork[36], saw no such problems with undertakings. It was the honourable justice's view that they served as "useful tools" in the Convention process and that their use was suitable where the legal regime of the requesting country will uphold the undertakings given.

It is this author's opinion that if the use of undertakings in Hague Convention cases is to continue, some formal arrangement for their operation will have to be implemented. While applauding the purpose undertakings seek to serve, i.e. the Convention's philosophy of the prompt and safe return of a child, it is entirely unsatisfactory that they can be cast aside at the whim of a requesting court. The time has come to give these creatures of judicial activism a statutory basis, if not for the sake of certainty and cohesiveness, then at the very least for the sake of the children whose welfare and well-being may very well depend on their enforcement.

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[36] As a guest of the 72nd session of the Law Society, UCC, 13th March, 2002

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