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Developments in Hague

Child Abduction cases - the English experience

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Introduction

The Child Abduction and Custody Act 1985, came into force in 1986¹, at which date only a relatively small number of states were active parties. From the start, the English approach as seen in the incorporating legislation and rules², and in judge-made law from the decided cases, was that a key to the successful operation of the Hague Convention was to safeguard and promote its (at least ostensible) speed and simplicity of operation. Accordingly it was made the exclusive preserve of specialist High Court Judges, and carefully ring-fenced from the domestic welfare jurisdiction. Its procedure was special, with the aim being to achieve fast summary hearings (no adjournment longer than 21 days, determination within 6 weeks, fast-track appeals), with normally no oral evidence, no expert evidence, and no multiplicity of parties. Its few special concepts – ‘habitual residence’ and ‘rights of custody’ were interpreted broadly and purposively, in a way that consciously promoted world-wide compatibility. In contrast its defences were given a high evidential threshold – ‘clear and cogent’ evidence was required before ‘consent’ could be established³, ‘acquiescence’ was held to be subjective to the left-behind parent⁴ – making it thereby very hard for the abducting parent to demonstrate - and a case in which a child’s

¹ Incidentally, substantially pre-dating the comprehensive re-modelling of English domestic law in the currently applicable *Children Act 1989*

² The *Family Proceedings Rules 1991*

³ See for example *Re C (Abduction: Consent)* [1996] 1 FLR 414; *Re K (Abduction: Consent)* [1997] 2 FLR 212; and *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171

⁴ *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872

objections defence could succeed had to be ‘exceptional’⁵ if it was to succeed. The often attempted defence under Article 13(b) of grave risk of harm or intolerability was mitigated by the use of undertakings⁶ – an English common law concept – to secure practical safeguards on the conditions of returns. This and a very high interpretive threshold⁷ virtually eliminated the successful use of the defence.

The purposive approach to the return of abducted children remains intact in England and Wales in 2008 – Hague Convention cases continue to be heard by specialist High Court judges, continue to be fast-tracked continue to be heard in a summary way, and continue in most cases to culminate in orders for a return. Yet the English approach has been subject to influences and changes which can make the process more complex.

European Convention on Human Rights (‘ECHR’) into English law¹, includes by Article 6 a broadly stated right to a ‘fair hearing’, and by Article 8 a right to ‘respect for private and family life’. The Hague Convention had been ring-fenced from English domestic children’s law, but was not impervious to the newly incorporated ECHR. In **Re: J (Child Returned Abroad: Convention Rights)**⁹ the tendency of English courts to apply Hague Convention policy and practice to cases involving non-signatory countries was emphatically disapproved. Hague policy and practice when applied to Hague cases was in no sense criticised. However, in part of the speech of Baroness Hale came an indication that Hague Convention cases were subject to the ECHR – Article 20 of the Hague Convention, which provides a reason not to return based on incompatibility with fundamental principles in the law of the state addressed had deliberately not been incorporated in the English 1985 Act. But, said Baroness Hale, the effect of the ECHR was to make the same principle applicable.

The voice of the Child

The House of Lords went considerably further. In a Hague Convention case, **Re: D (Abduction: Rights of Custody)**⁹, although the decision itself concerned rights of custody, there was a wide-ranging review in the speeches of many aspects of English Hague procedure and practice. The part of Article 13 which allows a discretionary refusal of a return if a subject child objects, and has reached an age and degree of

⁵ *Zaffino v Zaffino (Abduction: Children’s views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410

⁶ See for example *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349; *Re M (Minors) (Abduction: Undertakings)* [1995] 1 FLR 1021

⁷ See for example *In Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145

⁹ *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

maturity at which it is appropriate to give weight to his or her views, has always aroused controversy. Children are often quite naturally aligned with their primary carers, and abducted children are no exception. A primary carer abductor can be in a powerful position to influence a child against the other parent, and a return. In Hague Convention cases, a full investigation into children's views, as part of the process, has an obvious potential to extend and delay a 'summary' hearing. In the English model, it was for the defending parent to lead evidence of children's alleged objections, which might in some cases then be investigated summarily by a welfare officer, who would then report orally or in a brief report limited to whether the child objected, and the child's maturity. Even if the child did object the discretion not to return would only be exercised in an 'exceptional' case.

By the time **Re: D** was heard in the House of Lords, a European Council Regulation universally known as 'Brussels II revised'⁶ had been introduced across the European Union⁷ as directly applicable law. By Article 11.2 of the revised Regulation, that a child must be heard in a Hague abduction application to which the regulation applies this was irrespective of whether or not a 'child's objections' defence was raised.

In **Re: D** Baroness Hale affirmed that the Brussels II revised practice must be followed, and indicated that it should extend to seeking the views of children in *all* Hague cases – not just those within Europe. The result is that *all* children⁸ in Hague Convention cases are now routinely seen by welfare officers, whether or not a child's objections defence has been raised. The welfare officers report to the Court on the children's wishes, as well as on any objections which they may express to a return. Baroness Hale also observed in **Re: D** that consideration might also be given to direct judicial interviewing of children.

In the subsequent case of **Re: F (A Child) [2007] EWCA Civ 393** the Court of Appeal held in a Spanish abduction case that it had been a fundamental defect at the trial not to hear a 7 year old child (by the usual means of a short welfare interview) notwithstanding the fact that no objections case had been raised, and neither party had made a sustained application for a report. The Court allowed the Mother's appeal against the order for a return – remitting the case for re-hearing. The obvious rationalisation for this approach (beyond a literal adherence to Article 11.2) is that only by being heard does the child have the opportunity to raise an objection which

⁶ *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000*

⁷ Except Denmark

⁸ Except those who are so young as to make the process impracticable

may be unknown to, or not endorsed by, the parents, and which may constitute the basis for an effective defence against a return.

The Child as a Party

Re: H (Abduction) [2006] EWCA Civ 1247 [2007] 1 FLR 242, a 15-year old child (who was therefore at the Hague Convention's upper age limit) was refused permission to be separately represented in an application for his return to South Africa. The Court of Appeal dismissed the appeal, holding that age alone was not an exceptional circumstance justifying separate representation, and that the child's views could be adequately expressed through a welfare report. The Court went on to observe that with the demands on the Family Division to hear abduction cases within the 6-week limit, a more, rather than a less-restrictive view should be taken of separate representation.

In **Re: D** (above) the House of Lords itself allowed the separate representation of an 8 year old child, and criticised (in the speech of Baroness Hale) the suggestion of a more restrictive approach. In the case of **Re: C (Abduction: Separate Representation of Children)** [2008] EWHC 517 (Fam) [2008] 2 FLR 6 the proper test for the joinder of children as parties in a Hague Convention case was held to be

'whether the separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result'.

This test plainly requires consideration on a case-by-case basis, goes far wider than hearing a child on a consideration of that child's objections alone, and is formulated in language compliant with the ECHR. It should be said that instances of a represented child in an English Hague Convention case are still relatively rare.

Article 13(b)

In **Re M (Abduction: Zimbabwe)** [2007] UKHL 55, [2008] 1 FLR 251 the House of Lords turned its attention to Article 13(b) defences – although this defence was not pivotal to its decision to overturn the affirmation of a return by the Court of Appeal in both cases. Baroness Hale in **Re: D** confirmed the basic correctness – in accordance with Hague Convention policy – of a restrictive approach to Article 13(b). She said that

'It is obvious, as Professor Perez-Vera points out, that these limitations on the duty to return must be restrictively applied if the objection of the Convention is not to be

defeated. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result.'

However, Baroness Hale went on to say that

'Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all.'

Article 13(b) defences remain very hard indeed to substantiate in English courts. To the established principle that undertakings will be used to mitigate the effect of a return pending an inter-partes hearing in the court of the country of habitual residence has been added the principle, established in case-law in **Re: H (Abduction: Grave Risk)** [2003] EWCA Civ 355, [2003] 2 FLR 141, and reinforced in intra European Union Hague Convention cases by Article 11.4 of Brussels II revised, that the English court will look to see if safeguards are available in the state to which the return is proposed, and will refuse a return only if effective protection from Article 13(b) risks or intolerability is not possible. However, a landmark decision (albeit on the extreme factual basis of the abducting Mother having been shot in the head and left psychologically weakened following an unsuccessful but serious assassination attempt in Venezuela) refusing a return on a pure Article 13(b) defence was affirmed by the Court of Appeal in the case of **Re: D (Article 13B: Non-return)** [2006] EWCA Civ 146, [2006] 2 FLR 305.

The Discretion

The key to many Hague Convention cases in which defences under Articles 12 (settlement) and 13(a) (consent and acquiescence) 13(b), and children's objections are advanced is the exercise by the court of its discretion to return, or not to return. Part of the 'rigorous' English approach was to emphasise that 'welfare' was only one of the considerations that the court had to bear in mind, and it was not paramount. Emphasis had to be given to the policy and purpose of the Hague Convention. Thus even in a case in which the child objected strongly to a return or (theoretically) if an Article 13(b) defence was established showing a grave risk to the child on a return, a court could still say that a return must take place. In the case of **Vigreux v Michel** [2006] EWCA Civ 630, [2006] 2 FLR 1180 the Court of Appeal returned the subject child notwithstanding his objections, holding that the policy of the Convention and the need for comity must prevail, in what, the Court considered, was not an 'exceptional' case.

In the House of Lords, in the case of **Re M (Abduction: Zimbabwe) [2007] UKHL 55, [2008] 1 FLR 251**, Baroness Hale took a diametrically different view. She said that

'...I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention'

So, what was the approach to be? Baroness Hale, consistently with the general approach to the interpretation of Conventions, and with the ECHR, was reluctant to establish overarching principles. Discretion was at large, but courts were entitled to take into account Convention policy, the circumstances that gave the court the discretion, and

'wider considerations of the child's rights and welfare'.

However, guidance was at hand on the interpretation of the policy of the Convention. Was it always to insist upon a return in every case? Baroness Hale observed that

'...the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'

This not surprisingly means that it is hard to see how a discretion can easily be exercised to return a child who is 'settled' within the meaning of Article 12 – although the House of Lords did determine by a majority that a discretion does attach to a finding of settlement. Delay will also be highly relevant. In settlement cases, Baroness Hale said that

'...it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer 'hot pursuit' cases. By definition, for whatever reason the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors,

which may well, as here, include the child's objections as well as her integration in her new community.'

In a true Article 13(b) case, the exercise of a discretion in favour of a return was to be considered a virtual impossibility. In Baroness Hale's words,

'...as was pointed out in Re D (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619]...it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate...'

In child's objections cases (of which **Re: M** was an example, and one in which the discretion had been exercised against the child's wishes) Baroness Hale said that

'the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views...Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.'

In contrast, in cases of consent or acquiescence, Baroness Hale said that

'general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her (sic) future can be decided in her home country.'

Thus a new, mature and ECHR-compliant approach to the discretion, which is also faithful to the principles of the Hague Convention itself, illustrates that, in Baroness Hale's words,

'the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child...'

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