HCCH

Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893
Conectando Protegiendo Cooperando Desde 1893

The Judges' Newsletter

on International Child Protection

Special Focus

Experts' Meeting on Nurturing the 1980 Hague Convention

University of Westminster, London

19-20 October 2023

www.hcch.net

Volume XXVI | Fall-Winter 2024

Special Focus

Experts' Meeting on Nurturing the 1980 Hague Convention

University of Westminster, London

19-20 October 2023

Volume XXVI | Fall – Winter 2024

A publication of the Hague Conference on Private International Law

Hague Conference on Private International Law (HCCH)
Permanent Bureau
Churchillplein 6b
2517 JW The Hague, Netherlands

Attribution should be as follows: HCCH, "Special Focus – Experts' Meeting on Nurturing the 1980 Hague Convention, University of Westminster (London), 19-20 October 2023", *The Judges' Newsletter on International Child Protection*, Volume XXVI, The Hague, 2025.

Photo credits (cover): iStock

Published in The Hague, the Netherlands

Foreword

This edition of the Judges' Newsletter on International Child Protection covers the Experts' Meeting on Nurturing the 1980 Hague Convention, convened by Professor Marilyn Freeman and held at the University of Westminster in London from 19 - 20 October 2023. Issues of asylum, domestic violence and child participation, as they relate to international child abduction, were examined during the course of the Experts' Meeting.

This Newsletter aims to serve as a useful repository for the remarks and contributions of the organisers, chairpersons, as well as the panellists, most of whom have submitted their contributions in writing for the purpose of this Newsletter. In so doing, some panellists have chosen to share their verbal presentations in verbatim text while others have opted to transform their presentations into articles. The Permanent Bureau, as well as the organisers Professor Marilyn Freeman (University of Westminster, United Kingdom) and Professor Nicola Taylor (University of Otago, New Zealand), are extremely grateful to all panellists who participated in the Experts' Meeting and those who have prepared and shared their contributions in writing for this Newsletter.

It is hoped that those who were not able to attend the Experts' Meeting, and those who have an interest in the subject matter, will find this Newsletter interesting and helpful.

Given that this Newsletter serves as a repository of the remarks and contributions of the organisers, chairpersons, and panellists of the Experts' Meeting, it is to be understood that the views expressed by the authors are their own and may not reflect those of the HCCH.

Contributions by

Professor Marilyn Freeman

Professor Nicola Taylor

Philippe Lortie

Ewa Kopacz

Nuala Mole

Julia Zelvenska*

Henry Setright KC and **James Turner KC****

Professor Merle Weiner

Lord Justice Andrew Moylan

Professor Katarina Trimmings

Ischtar Khalaf-Newsome***

Professor Rhona Schuz

Stephen Cullen

Professor Yuko Nishitani

The Honourable Justice Victoria Bennett AO

Edited by

Nietta Keane (English version)

Philippe Lortie (English and French version)

Lydie De Loof (French version)

Prior to the publication of this Newsletter, the sad passing of **James Turner KC** in January 2025 was announced by his Chambers, 1 King's Bench Walk. James was a prominent specialist in the area of family law and international child abduction. The HCCH and the organisers of the Experts' Meeting remember him with great fondness and would like to extend their deepest condolences to his family and colleagues.

* Regrettably, the contribution of Mrs Julia Zelvenska could not be provided for the purpose of this Newsletter.

** A paper is not available for this informal discussion and presentation.

*** Contribution forthcoming.

Table of Contents

Welcome and opening remarks **7**

Professor Marilyn Freeman, Co-Director, International Centre for Family Law, Policy and Practice, and Principal Research Fellow, Westminster Law School, University of Westminster, London, England 7

Mr Philippe Lortie**,** First Secretary at the Hague Conference on Private International Law 8

Mrs Ewa Kopacz**,** Vice-President of The European Parliament and The European Parliament Coordinator on Children's Rights 12

Session 1 – Abduction and Asylum Issues **15**

Introduction by Session Chairperson Nuala Mole, The Aire Centre 15

Child Abduction and Asylum, Julia Zelvenska, Head of Legal Support and Litigation (European Council on Refugees and Exiles) 23

Reflections on the relationship between asylum and international child abduction, Henry Setright KC and James Turner KC 24

Session 2 - Abduction and Domestic Violence Issues **25**

Introduction by Session Chairperson Professor Merle Weiner, Philip H. Knight Professor, School of Law, University of Oregon, USA 25

Abduction and Domestic Abuse: A Judicial Perspective from England and Wales, Lord Justice Andrew Moylan, Court of Appeal, Head of International Family Justice and Hague Network Judge for England and Wales 29

The Interface Between Domestic Violence and International Parental Child Abduction: Focus on the Protection of Abducting Mothers in Return Proceedings, Professor Katarina Trimmings 35

Mediation in Child Abduction Cases with Domestic Violence, Ischtar Khalaf-Newsome 40

Project to investigate the effects and outcomes of abduction where the abduction is alleged to have occurred against a background of violence or abuse to the taking parent and/or the abducted child: Initial Observations, Professor Marilyn Freeman, Co-Director, International Centre for Family Law, Policy and Practice, and Principal Research Fellow, Westminster Law School, University of Westminster, London, England 41

Session 3 - Abduction and Child Participation Issues **46**

Introduction by Session Chairperson Professor Rhona Schuz, Centre for the Rights of the Child and the Family, Sha'arei Mishpat Law School, Israel 46

Hearing the Child in the Context of the 1980 Hague Convention, Professor Nicola Taylor, Faculty of Law, University of Otago, New Zealand 49

Child Participation in Abduction Cases, Stephen Cullen 55

'Child Participation' in Japan, Professor Yuko Nishitani* 57

Return proceedings in Australia under the 1980 Convention and Child Participation Issues, The Honourable Justice Victoria Bennett AO 64

Conclusions by the Meeting Chairman, Mr Philippe Lortie 70

Experts' Meeting on Nurturing the 1980 Hague Convention

University of Westminster, London

19 - 20 October 2023

Welcome and opening remarks

Professor Marilyn Freeman, Co-Director, International Centre for Family Law, Policy and Practice, and Principal Research Fellow, Westminster Law School, University of Westminster, London, England

A very warm welcome to this Experts' Meeting and thank you for making the time in your very busy lives to contribute your expertise, thoughts and ideas on the three topics we will be working on together as they relate to international child abduction and the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

We have three specialist session chairs - Nuala Mole, The Aire Centre, London; Professor Merle Weiner, University of Oregon, USA; and Professor Rhona Schuz, Sha'arei Mishpat Law School, Israel. Rhona is sadly unable to be here in-person due to the very worrying situation in Israel and will therefore be participating online.

We are delighted that Philippe Lortie, First Secretary of the HCCH, kindly agreed to chair the Experts' Meeting and are especially indebted to him having only completed work on the Eighth Special Commission in The Hague just two days' earlier, from where he travelled to Aberdeen for a project meeting yesterday, and then rushed here to be with us today. It is a testament, if one is needed, to his commitment to this subject and his willingness to help find solutions to the problems which arise within it - and we thank him sincerely for both.

Professor Nicola Taylor, University of Otago, New Zealand, very kindly offered to act as Rapporteur for the Experts' Meeting, for which we are of course extremely grateful. She has also been an immense help to me in the organisation of this meeting for which I offer her my heartfelt thanks.

I also thank Dominika Opyrchal for her patient good humour and efficiency in helping with the preparations for the Experts' Meeting, which many of you will also have experienced, and from which I have benefitted greatly. Also, Professor Luke Mason, Head of the Westminster Law School, for his enthusiastic and much-appreciated support of me, my projects, and this gathering.

We also thank Ischtar Khalaf-Newsome and the team at MiKK for their wonderful collegiality and willingness to help with tasks outside of their own sphere of operation, and to just roll up their sleeves to assist with our requests for help. Such collaboration is truly valued.

One final expression of thanks is essential before I hand over to Philippe, and that is to Stephen Cullen and Kelly Powers of Miles & Stockbridge, a US firm of lawyers specialising in international child abduction. Stephen and Kelly do so much valuable work in this area, helping as many parents as possible on a pro bono basis who would otherwise be without legal assistance in circumstances where the stakes are so incredibly high. They do that because they care. And they care enough to want to support the search for solutions to the issues which they encounter in their daily practice. I want to express my personal appreciation to them, and to Miles & Stockbridge, for their long-term support and encouragement, and for helping to make this Experts' Meeting possible.

Mr Philippe Lortie, First Secretary at the Hague Conference on Private International Law

I would like to thank Professor Marilyn Freeman and Professor Nicola Taylor for organising this Experts' Meeting and for inviting me to Chair the event alongside the three Session Chairs, with whom I have had the pleasure to collaborate over the years. Each one of them will be chairing a specific session, the theme of which we will explore all together:

- **Abduction and Asylum Issues**, chaired by Nuala Mole, Founder and Senior Lawyer, The AIRE Centre, London England
- **Abduction and Domestic Violence Issues**, chaired by Professor Merle Weiner, University of Oregon, United States of America
- **Abduction and Child Participation Issues**, chaired by Professor Rhona Schuz, Centre for the Rights of the Child and the Family at the Academic College of Law and Science, Israel

Having just completed the Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, held in The Hague from 10 to 17 October 2023 (hereinafter the 2023 Special Commission), one could have not chosen a better title for the Experts' Meeting: "Nurturing the 1980 Hague Convention". International treaties, or Conventions, as we refer to them at the Hague Conference on Private International Law (hereinafter HCCH), contrary to domestic law or even European Regulations, are rarely amended. First, finding a consensus for such amendments is extremely challenging, especially with more than 100 Contracting States, as is the case with the 1980 Child Abduction Convention. Second, if amended, it is challenging to ensure that all States will join the amended version of the Convention in a timely manner. Until all States join the amended version, we risk having the old version of the Convention operating in some States and the amended version operating in others, leading to the Convention operating "at different speeds". Instead, the HCCH "nurtures" its Conventions.

The HCCH provides post-Convention services to facilitate the implementation of its Conventions. Such services include, but are not limited to, organising meetings to review their practical operation (i.e., Special Commission meetings), developing and adopting Guides to Good Practice and Practical Handbooks, maintaining Country Profiles and case law databases, and providing training. Over a little more than 40 years, the Special Commission on the 1980 and 1996 Conventions has met, on average, every five years. But it takes more than the work of the HCCH to "nurture" a Convention. The dedication and hard work of a multitude of actors, many of whom are in attendance today, is also required: Judges, members of Central Authorities, lawyers, barristers, mediators, enforcement officers, academics, researchers, social workers, psychologists, and representatives from non-governmental organisations (NGOs), just to name a few. Many thanks to all of them for making the 1980 Child Abduction Convention what it is today. I would like to take this opportunity to extend a special thank you to Justice Victoria Bennett from Australia, who is in attendance, for co-chairing the 2023 Special Commission alongside Mr Daniel Trecca from the Central Authority of Uruguay.

The three themes we will be discussing during the next two days of the Experts' Meeting were the subject of Conclusions and Recommendations at the 2023 Special Commission. I will now offer a brief summary as to where the 1980 Child Abduction Convention stands in relation to these three themes. From the outset, it is clear to me that these three themes will require further nurturing in the years to come.

While return applications where the taking parent has lodged a parallel asylum claim have been observed in Canada since the early 2000s, they seem to be relatively recent in other Contracting Parties to the 1980 Child Abduction Convention. In Canada, the observed trend is to the effect that parallel asylum claims are most often introduced after a return application has been made, thus giving an indication as to their possible dilatory purpose. Parallel return applications and asylum claims were discussed for the first time at the 2023 Special Commission. With the understanding that return applications should be decided swiftly, in accordance with Articles 1, 2 and 11 of the 1980 Child Abduction Convention, the 2023 Special Commission emphasised the importance of deciding return applications and any parallel asylum claims expeditiously. Where appropriate and where domestic law permits, the 2023 Special Commission invited Contracting Parties to the 1980 Child Abduction Convention to consider taking steps to achieve this result.

Issues concerning abduction and domestic violence were discussed at the 2023 Special Commission in the context of the operation of Article 13(1)(b) of the 1980 Child Abduction Convention (the "grave risk" exception to return). One important development in this area is the holding of a Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention, to take place in Sandton, South Africa, from 18 to 21 June 2024. The idea of the Forum was put to the 2023 Special Commission, and later to the Council on General Affairs and Policy (CGAP) in 2024, by the Secretary General of the HCCH, Christophe Bernasconi, in the light of the correspondence he and I received from advocates

for victims of domestic violence prior to the Special Commission, as well as discussions on these issues that took place during the Special Commission. The importance of ensuring a balanced representation of all interested parties and relevant actors at the Forum was emphasised by the 2023 Special Commission from the outset. While it was, and continues to be, extremely important to give a voice to national NGOs advocating for victims of domestic violence at events such as the Forum (particularly because only international NGOs can attend meetings of the Special Commission), the Forum was not the only development welcomed by the 2023 Special Commission.

The 2023 Special Commission also welcomed the publication of the Guide to Good Practice on Article 13(1)(b) (hereinafter GGP on Article 13(1)(b)) and encouraged its dissemination. Underlining that the Guide must be read as a whole, the Special Commission noted that, as set out in paragraph 33 of the GGP on Article 13(1)(b):

"… harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Article 13(1)(b) exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child".

We all agree that harm to a parent is harm to a child, but this may not always imply a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In some cases, this harm can be addressed through protective measures, thus allowing for the return of the child.

In the context of domestic violence, the 2023 Special Commission also discussed the safe return of a child, including urgent measures of protection. The 2023 Special Commission encouraged Contracting Parties, where they have not already done so, to complete and/or update the section of the Country Profile under the 1980 Convention on "Provisions for safe return" (Section 11.2). Doing so should enhance the understanding of the measures of protection available to ensure the safe return of a child and the mechanisms by which to ensure compliance with such protective measures. In that regard, the 2023 Special Commission also encouraged Contracting Parties to provide publicly available information, through means such as specialised websites, which outlines services that can assist families where a child may be exposed to family and domestic violence, which may relevantly include police and legal services, financial assistance schemes, housing assistance and shelters, and health services. Having robust domestic systems to combat family violence is an important way to prevent child abduction in the first place, as it is well understood that child abduction is also a violent act towards a child.

Furthermore, the 2023 Special Commission welcomed the Australian factsheet "International Hague Network of Judges – Assistance with protective measures through the International Hague Network of Judges for children orders to be returned to Australia", developed thanks to the initiative of Justice Victoria Bennett, and noted that the information contained therein would be helpful in cases where the availability, necessity and appropriateness of protective measures needs to be addressed. The 2023 Special Commission also recognised that, when necessary and appropriate, a court may order protective measures to protect the accompanying parent in order to address the grave risk to the child. In that respect, the 2023 Special Commission recognised that measures to protect the accompanying parent may cover, as set out in paragraph 43 of the GGP on Article 13(1)(b), "a broad range of existing services, assistance and support, including access to legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence, as well as responses by police and through the criminal justice system." Finally, the 2023 Special Commission underlined that measures of protection should be considered and/or ordered only where necessary and appropriate. As set out in paragraph 45 of the GGP on Article 13(1)(b), "[i]deally, given that any delays could frustrate the objectives of the Convention, potential protective measures should be raised early in proceedings so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures."

The participation of the child in child abduction proceedings was also discussed at the 2023 Special Commission. This topic has been the subject of discussions at multiple meetings of the Special Commission in the past. It has also been the subject of two focused editions of the HCCH Judges' Newsletter on International Child Protection (Vol. Nos VI (2003) and XXII (2018)). As underlined at previous meetings of the Special Commission, the 2023 Special Commission recognised that "States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings". When hearing the child for the purposes of Article 13(2) of the 1980 Child Abduction Convention, the 2023 Special Commission emphasised that it is only for that purpose and not in respect of broader questions concerning the welfare of the child, which is the responsibility of the court of the child's habitual residence. In that regard, the 2023 Special Commission noted the following good practices:

a) the person who hears the child, be it the judge, an independent expert or any other person, should have appropriate training to carry out this task in a child-friendly manner and training on international child abduction and the operation of the 1980 Child Abduction Convention;

b) if the person hearing the child speaks to one parent, they should speak to the other;

c) the person hearing the child should not express any view on questions of custody and access as the child abduction application deals only with return.

The 2023 Special Commission noted that the "child objection" exception under Article 13(2) of the 1980 Child Abduction Convention is separate from Article 13(1)(b) and does not depend on there being a grave risk of physical or psychological harm to the child or on the child being placed in an intolerable situation if their views are not respected. Finally, the 2023 Special Commission indicated that if the child is heard for purposes other than Article 13(2) of the 1980 Child Abduction Convention, including for interim access / contact, in conformity with Article 12 of the United Nations Convention on the Rights of the Child, the good practices listed above apply as appropriate.

I would like to wish you all an excellent Experts' Meeting and I look forward to our discussions.

Mrs Ewa Kopacz, Vice-President of The European Parliament and The European Parliament Coordinator on Children's Rights

Ladies and Gentlemen

Dear Speakers and invited guests

I would like to thank the organisers, and in particular, Professor Marilyn Freeman, for the opportunity to address you at the meeting devoted to the Hague Convention on the Civil Aspects of International Child Abduction.

As academics and practitioners, you are well aware of both the legal and social consequences of parental child abduction. Therefore, I have no doubt that your contributions to the discussions during this meeting, which will focus on the relationship between the provisions of the Convention and asylum law, domestic violence and the child's right to be heard will be extremely valuable.

As the Coordinator for Children's Rights, I am responsible for promoting and protecting children's rights within the work of the European Parliament. At the same time, my Office acts as an information point for parents who seek help and support with cross-border child abduction cases or other cross-border family law disputes. I also work to promote child-friendly justice. In practice, this means working closely with experts to promote best practices, including in cross-border family mediation and in the child participation in family law proceedings.

It is clear from available research, as well as from my work, that parental child abduction has a devastating impact on all family members, especially the child concerned. I am convinced that the founding principles of the 1980 Hague Convention remain as relevant today as they were over 40 years ago. However, I see a need to discuss the many societal changes that have taken place in recent decades, which also affect the provisions contained in the Convention.

In my opinion, one of the most difficult issues is the relationship between the provisions of the Convention and domestic violence and the application of Article 13(1)(b) of the Convention in this context. Currently, those are mostly

mothers who are abducting parents, as many of them claim that it is the only way to escape from a violent partner. Therefore, the unique circumstances and evidence of each abduction case together with the appropriate interim protection measures must be taken into account by the judge when deciding in such a case. This means of course that timely coordination, exchange of information and cooperation between courts, state services and central authorities are extremely crucial.

Regarding a child's participation in the Hague proceedings, every child has the right to age-appropriate information about the proceedings and every child has the right to be heard on matters that concern them and affect his or her future life. In this regard, I believe that training judicial staff and relevant stakeholders together with the exchange of best practices are necessary to implement these rights effectively.

In the face of multiple global crises, including war, climate change and growing threats to democracy, human rights and judicial independence, your work to ensure that children's rights and the best interests of the child are at the heart of family proceedings is crucial. Therefore, I am very grateful for your passion and commitment and for working every day to improve the situation of children and parents involved in family proceedings.

Finally, I would like to thank Professor Marilyn Freeman for her tireless work on behalf of children affected by parental abduction and for creating this forum where experts from around the world can meet.

I wish you a fruitful discussion and look forward to its results.

Session 1 – Abduction and Asylum Issues

Introduction by Session Chairperson Nuala Mole, Founder and Senior Lawyer, *The Aire Centre*, London England

This short note looks at the relationship between asylum and the 1980 Child Abduction Convention and the approach needed to taking decisions when both legal orders are involved in the situation of a child whose return is sought but who has ongoing international protection needs.

Decisions on returns under Article 12 of the 1980 Child Abduction Convention are normally made by civil family administrative bodies or courts. Decisions on asylum are made by public law bodies and, where necessary, endorsed by public law judicial instances. Sometimes both legal orders are involved. This short note attempts to provide the necessary background to what can sometimes be a dilemma created by this interplay. The best interests of the child must – as noted in the preamble to the 1980 Convention – always be paramount in matters relating to their custody (and not just primary as in Art 3(1) of the UNCRC).

In international law, torture, inhuman or degrading treatment or punishment[1] are all absolutely prohibited - for example under the ECHR,[2] UNCAT[3] or the ICCPR.[4] Equally absolutely prohibited are *returns* to face ill-treatment of the kind that is absolutely prohibited. Under European law, such returns cannot be justified in any circumstances, even for national security concerns (see e.g. ECtHR cases *Saadi v. Italy*,[5] *Othman v. UK*[6] and many others).

International and European law relating to asylum and refugees

The 1951 Geneva Convention[7] (GC) is the *lex specialis* of "asylum"- a concept that implies protection from harm. The word refugee is often used colloquially to describe anyone fleeing an intolerable situation who is entitled to international protection from return to that situation. But, legally, "refugees" are only those at risk of ***persecution*** under Article 1A of the 1951 GC[8]

---

1 For brevity the acronym TIDTP will be used.

2 European Convention on Human Rights and Fundamental Freedoms 1950.

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

4 International Covenant on Civil and Political Rights 1966.

5 37201/06 2008.

6 8139/09 2012.

7 Geneva Convention on the Status of Refugees 1951.

8 Art 1A GC: "A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section; (2) As a result of events occurring before

for one of the reasons set out in that article, or under other comparable regional instruments such the European Union (EU) recast Qualification Directive (QD).[9]

Persecution is a much wider concept than exposure to absolutely prohibited harm. It can include infringements of the right to freedom of conscience, or socio-economic, education or health related rights.[10] If sufficiently severe, such infringements *may* amount to absolutely prohibited harm, in which case they fall within the absolute prohibition noted above. In the US case of *Kholyavskiy v. Mukasey,*[11] for example, harassment and ostracism at school of a child aged between 8-13 was recognised as constituting persecutory harm from which protection was required.[12]

Refugees (those at risk of persecution) are protected from "refoulement" (return) according to Article 32 of the GC.[13] The GC nevertheless permits the return of those recognised as refugees – but *only* in very narrowly specified circumstances. The *only* exceptions to the prohibition on the return of refugees are set out clearly in Article 33 of the GC which says:

> *"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

In the EU, Article 15 of the QD[14] also extends protection to those who are not at risk of GC persecution but in need of "subsidiary protection" from serious harm. Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or

---

1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

9 DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

10 See The Refugee Definition in International law, Hugo Storey, Oxford University press 2023 p.328 *et seq*

11 540F3d555 (7th Circuit).

12 See generally Hathaway and Pobjoy "Queer cases Make bad Law (2012) 44 NYU Journal of international Law and Politics, p. 315.

13 Art 32 GC: The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

14 Recast Qualification Directive *supra* fn9.

internal armed conflict. Article 21 of the QD provides for protection from refoulement in the same manner as the 1951 Convention and with the same exceptions.

There is no specific mention of child refugees in the 1951 GC, but children can be recognised as refugees - as victims of persecution either in their own right or as the dependents of adult victims of persecution. Normally an accompanied child will be granted status in line with the parent, but the UNHCR has noted that "Each child has a right to make an independent refugee claim regardless of whether s/he is accompanied or unaccompanied"[15] and Article 22 of the UNCRC makes a similar provision. UNHCR Executive Committee (ExCom)[16] conclusions also make clear that the need for international protection of such persons (children) is identified and that refugees are not subject to refoulement. Normally protection given as a dependant will suffice but, in order for this right to be effective, care must be taken to ensure that the child's international protection needs are met.

The UN Committee on the Rights of the Child's General Comment No. 6[17] and No. 12 (GC12)[18] are particularly clear on this point. GC12 notes specifically the child's right to express their views on **all aspects** of immigration and asylum proceedings.[19] "All aspects" clearly includes not only the decision-making process leading to the grant or refusal of asylum but also any decision which attempts to override the protection from refoulement and the grant of asylum. This is a separate and independent right from the general UNCRC right to be heard,[20] which applies for example in 1980 Convention proceedings.

Articles 37, 38 and 39 of the UNCRC and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) have a particular role to play in determining the protection needs of children, including those seeking or granted asylum supplemented by several General Comments. Space does not permit a full coverage of all these matters in this note.

As noted above, international human rights law also protects people from return to face prohibited harm and in particular absolutely prohibited harm. The ECtHR has built up an extensive body of jurisprudence on this prohibition.[21]

However, one thing is clear. Overall, the threshold for securing international protection ("asylum") is set high in both refugee law and international human rights law. The status of refugee is not easily accorded and thus demands particular recognition and respect.

---

15 Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/06/07.

16 General No 71 (1993)

17 General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 2005, para. 25.

18 GENERAL COMMENT NO. 12 (2009) The right of the child to be heard, CRC/C/GC/12, 2009, para. 123.

19 *Ibid*.

20 Either heard expressly or, if still too young to express a view, to have their own perspective put forward. This is a separate matter from the weight to be given to the child's views, see GC 12 para. 20.

21 There is also considerable caselaw on returns that would breach the right to "moral and physical integrity" protected under the private life rubric of Art 8 ECHR or under the right to respect for family life also protected under that article but this paper focusses on the more serious situations commonly falling within the definition of "asylum".

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ("1980 Convention")

The preamble to the 1980 Convention states that the child's interests in matters relating to their custody are of "paramount importance".[22] Article 12 of the 1980 Convention mandates the prompt return of children who have been wrongfully removed or retained by an abducting parent, or other person. The judicial or administrative authority concerned "shall order the return of the child forthwith" (Article 12). Even where the one-year period for commencing proceedings has elapsed, the authority "shall also order the return of the child, **unless it is demonstrated that the child is now settled in its new environment**" (emphasis added). This exception limits the mandatory nature of Article 12 and by implication imposes a general restriction on the ordering of the child's return if the child is settled in their new environment.

A separate provision, Article 13 does not ***prohibit*** returns, but states that the authority "**is not bound to order the return** (as it would be under Art 12) if it is established that (*inter alia*):

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

A considerable body of jurisprudence – worldwide – exists on Article 13(b), on the child's objections and (to a lesser extent) on the concepts of age and maturity. In addition, the HCCH has published a volume of its Guide to Good Practice dedicated to Article 13(b).

But the 1980 Convention includes an important additional provision in Article 20 which permits – but does not mandate - a refusal to return under Article 12:

> *"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."* (emphasis added).

This provision would *prima facie* be applicable to cases where an apparent conflict has arisen between the principles of asylum law, binding principles of international human rights law and those of the 1980 Convention. However, the caselaw on Article 20 is not as voluminous as that on Article 13(b). Where the applicable national and international jurisprudence recognises that refoulement is absolutely prohibited this absolute prohibition must prevail.

---

[22] Note the contrast with Art 3 UNCRC where the child's best interests are generally "a primary consideration" not paramount.

Case law and considerations on the interaction between asylum law and the 1980 Child Abduction Convention

This brief comment looks at some current issues concerning how the standards of asylum law interact with returns sought under Article 12 of the 1980 Convention.

The Permanent Bureau of the HCCH has issued a discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim.[23] It notes that there is inconsistency in domestic jurisprudence on whether courts can order a child's return when their refugee status has been granted.[24]

Most of what little case law there is on the inter-relationship between asylum and child abduction deals with how the courts should approach situations where a **request for asylum is being considered** by public/administrative law bodies/courts at the same time as a request for a return under the 1980 Convention is being considered by private law courts/bodies.

The best-known European case is *G v G*, a 2021 case from the UK.[25] The parties are the parents of an eight-year-old girl ("G"). G was born in South Africa, where she has been habitually resident all her life. In March 2020, G's mother, the appellant, wrongfully removed G from South Africa to England, in breach of G's father's rights of custody. G's father, the respondent, applied for an order under the 1980 Convention for G's return to South Africa. The mother opposed his application on the ground, in particular, that there was a grave risk that return would expose G to physical or psychological harm or otherwise place her in an intolerable situation.

The Supreme Court determined *inter alia* that:

i. A child named as a dependant on the parent's asylum application and but who has not made a separate request for international protection generally can and should be understood to be seeking such protection and therefore treated as an applicant.

ii. A dependant has protection from refoulement pending the determination of the asylum application, so that until the request for international protection is determined by the Secretary of State a return order in the 1980 Convention proceedings cannot be implemented. However, it does not preclude 1980 Convention proceedings from being heard and determined prior to a decision on the asylum proceedings.

iii. An application for asylum was pending and would not have been determined until the conclusion of the appeal process.

In the summer of 2024**,** the President of the Family Division of England and Wales delivered a further thoughtful judgement Re HR[26] setting out the approach to be taken in cases under the 1980 Convention when a parallel asylum claim was under consideration. Re HR was a

---

23 Permanent Bureau of the HCCH, 2023, Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim, Prel. Doc. No. 16.

24 *Ibid*. para. 27.

25 G v G, 2021 UKSC 9.

26 Re HR (Parallel Child Abduction and Asylum Proceedings) [2024] EWHC 1626 (Fam)

case in which, by the time of the judgment, the claim for asylum had been determined - and refused - and all appeal rights exhausted.

These are very different situations from one where the decision required is whether a return under the 1980 Convention can be ordered (or, if ordered, implemented) once the need for international protection from return has been **recognised in public law proceedings** and refugee status (or subsidiary protection) has consequently been granted. This is also a different – and novel – situation for an international court, though national courts have examined this issue but arrived at different conclusions.

The US case *Sanchez v. R.G.L.*[1] concerns three children habitually resident in Mexico who were wrongfully retained in the US by their aunt and uncle. Their mother applied for their return to Mexico under the 1980 Convention, and the children were ordered to return even though they had an asylum application pending. The decision was appealed, and the children were granted asylum in the US in the meantime. The Court of Appeal noted that, according to the Immigration and Nationality Act, the "discretionary" grant of asylum is binding on the Attorney General or Secretary of Homeland Security. It considered that, as a return order does not affect the responsibilities of these two authorities, an "asylum grant does not supersede the enforceability of a district court's order that the children should be returned". As such, it decided that an asylum grant does not in itself constitute a substitute for or control of an Article 13(b) finding. However, it acknowledged that an asylum grant is relevant to the analysis of exceptions under Article 13(b) and 20 of the 1980 Convention, and that all evidence from the asylum proceedings should thus be considered to determine whether these exceptions to return apply. The Circuit Court vacated the return order and remanded the case. According to this decision, a child's asylum status does not automatically prevent the **making** of a return under the 1980 Convention. Whether it prevents its implementation is another question.

On the other hand, in Canada, the Court of Appeal of Ontario considered in *A.M.R.I. v. K.E.R.*[27] that "[a] finding of refugee status accorded by the IRB [Immigration Refugee Board] to a child affected by a Hague Convention application gives rise to a **rebuttable presumption** that the removal of the child from Canada **will expose the child to a risk of persecution, that is, to a risk of harm**" (para. 87, emphasis added). It considered that Articles 13(b) and 20 must be construed in a manner that takes into account the principle of non-refoulement (para. 68).

In a case against Finland[28] (currently pending), the ECtHR has to decide whether the proposed return of children to Russia under the 1980 Convention is compatible with the ECHR. A father with joint custody with the mother took his two children to Finland without her consent. Shortly after arriving in Finland the applicant father applied for asylum for himself and the children. Before the request for asylum had been determined the left behind mother initiated return proceedings under the 1980 Convention for the return of the children to Russia. The proceedings were conducted at several instances from January 2023 to January 2024. In October 2023, the father and the children were granted asylum in Finland – that is to say that they were recognised by the requested state, Finland, as requiring international protection from return to Russia. Arguments were raised in the 1980 Convention proceedings in relation to Article 13(b). No arguments seem to have been raised under Article 20. But Article 20 was

---

27 A.M.R.I. v. K.E.R., 2011 ONCA 417; see also Borisovs v. Kubiles, 2013 ONCJ 85 and Sabeahat v. Sabihat, 2020 ONSC 2784.

28 Z and others v. Finland 42758/23 communicated 25/06/2024

apparently not amongst the provisions of the 1980 Convention included in the Act on Child Custody and Right of Access (*Laki lapsen huollosta ja tapaamisoikeudesta, Lag angående vårdnad om barn och umgängesrätt*, Law no. 361/1983) which governs returns under the 1980 Convention in Finland. In its final decision, the Finnish Supreme Court held that the granting of asylum to the children did not in itself exempt the State from its obligations under the 1980 Convention and that the asylum decision in the applicants' case was not "a new fact" which would have led to a different outcome of the proceedings for the return of the children.

In this case, it is noteworthy that the children's international protection was granted to them as dependents of their father, rather than through an individual application. Considering that "the removal of a child […], without an individual assessment of the child's eligibility for refugee status, **may give rise to a risk of a violation of the duty of non-refoulement and will almost certainly constitute a violation of art 12 of the CRC**"[29] (emphasis added), this raises the question as to whether the children's individual claims for refugee status should be considered before their return can be ordered and/or implemented if there is a recognised risk that they may face persecution upon return.

The applicants (father and children) complain at the ECtHR *inter alia* that the Finnish Supreme Court's order for the return of the children to Russia was in breach of the three applicants' right to respect for family life and, if carried out, would expose the child applicants to a risk of ill-treatment contrary to Article 3 ECHR. In response to Q39 of the questionnaire sent out by the HCCH prior to the 2023 meeting of the Special Commission "*Has your State faced any challenges, or have questions arisen, in processing international child abduction cases where there was a parallel refugee claim lodged by the taking parent?"* Finland replied "yes" but did not provide any further information.

The role of the ECtHR is limited to determining the compatibility with Finland's obligations under the ECHR of the Finnish Supreme Court's return decision of January 2024 (and its eventual implementation were this to occur).[30] It is ***not*** to determine the compatibility of the Finnish Supreme Court's decision with international refugee law or with 1980 Convention law.[31] The case has been "communicated" to the Finnish Government and further developments are awaited.

K.O., M.O. and V.O.,[32] also ongoing ECtHR cases, concern the return of a child from Poland to Ukraine under the 1980 Convention. Each application was lodged by a parent (the mother, K.O. – the first applicant; and unusually also by the father, M.O. – the second applicant) on their own behalf and in the name of their minor child (V.O. - the third applicant, born on 8 November 2009). The case was brought to the ECtHR before the Russian invasion of Ukraine in March 2022 but after there had been disturbances in the Donetsk region of Ukraine.

---

29 Pobjoy, J. (2017) *The Child in International Refugee Law*, Cambridge University Press, p. 62.

30 Art 19 ECHR

31 Although Art 53 ECHR requires the ECHR to be construed so as not to diminish the protection given by those legal orders "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

32 Applications nos. 46748/21 and 46958/21K.O. and V.O. against Poland and M.O.and V.O. against Poland communicated on 6 February 2023.

The complaint was that *ordering* the return of the child by the mother to Ukraine was a violation of the ECHR by the Polish courts, but also that there would be a violation of the ECHR were the return to be carried out.

The ECtHR looks, prospectively, at whether there *would be* a violation if the return were now to be implemented and, in order to determine this, at whether the situation in Ukraine had worsened since the final decision of the Polish Court and also since the application was originally lodged. The K.O. case followed on a previous case concerning a return to Ukraine this time from Russia, *Y.S. and O.S. v Russia*.[33] Unlike in the case of *Z. v Finland* described above, in neither *K.O.* or *YS and O.S* did it appear that any application for asylum was made. Reliance was only placed on Article 13 of the 1980 Convention.

Further international guidance can also be used to consider how to address these issues. In relation to family reunification, the CRC Committee has stated that "granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein".[34] It can thus be inferred, *mutantis mutandis*, that refugee status is also a legally binding obstacle to ordering the return of a child to the state they have been granted asylum from under the 1980 Convention. Moreover, the HCCH 2024 updated guide on the Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children, affirms that nothing in the Convention affects the non-refoulement principle.[35] As a consequence, it seems that the 1980 Convention does not affect the non-refoulement principle, and that children who have been granted international protection should not be returned under the 1980 Convention to States in respect of which they have been granted asylum. The decisions of the ECtHR in the above cases are eagerly awaited.[36]

This note was written by Nuala Mole Founder and Senior lawyer at the AIRE Centre with assistance from Clara Paul, Markella Papadouli and Jess Philips lawyers at the AIRE Centre.

---

33 Y.S. and O.S. v. Russia *(Application no. 17665/17)*

34 CRC GC6, para. 81, supra fn17.

35 Para. 13.

36 The AIRE centre is a third-party intervenor at the ECtHR in the KO. MO and VO v Poland case and has applied to intervene in Z and others v Finland. Third party intervenors at the ECtHR are not permitted to comment on the facts or merits of the cases in which they intervene but are only permitted to submit general remarks and materials relevant to the Court's consideration of the case.

Child Abduction and Asylum, Julia Zelvenska, Head of Legal Support and Litigation (European Council on Refugees and Exiles)

Regrettably, the contribution of Mrs Julia Zelvenska could not be provided for the purpose of this Newsletter.

Reflections on the relationship between asylum and international child abduction, Henry Setright KC and James Turner KC, Barristers, London, England

A paper is not available for this informal discussion and presentation.

Prior to the publication of this Newsletter, the sad passing of James Turner KC in January 2025 was announced by his Chambers, 1 King's Bench Walk. James was a prominent specialist in the area of family law and international child abduction. The HCCH and the organisers of the Experts' Meeting remember him with great fondness and would like to extend their deepest condolences to his family and colleagues.

Session 2 - Abduction and Domestic Violence Issues

Introduction by Session Chairperson Professor Merle Weiner, Philip H. Knight Professor, School of Law, University of Oregon, USA

Let me start by extending my thanks to Marilyn Freeman for hosting this Experts' Meeting. The timing is brilliant because this gathering directly follows the 8th Special Commission Meeting on the 1980 Child Abduction and 1996 Child Protection Conventions. We can take stock of what happened while it is fresh in our minds. The location is brilliant. As one who does not live here, thank you. And, of course, Marilyn's selection of panellists was brilliant too, and so I am very excited to be moderating. I have the pleasure of briefly introducing them, and I will do that before each panellist speaks.

Marilyn informed me that I should share my own thoughts on this topic in the time remaining. I am happy to do so. To cut to the chase, after the 8th Special Commission, I am 'cautiously optimistic' about the 1980 Abduction Convention and its operation in cases of domestic violence.

As you may have heard, the Secretary General reported that he had received an unprecedented number of testimonials from domestic violence survivors who had been negatively affected by the Convention, and he expressed empathy for their plight. Then, the Special Commission supported the Secretary General's idea of holding a forum that would allow discussions between NGOs representing parents and children and those applying the Convention. This initiative is a tacit acknowledgment that the Convention is not working quite right in this context. The initiative is not supposed to be just a politically expedient listening session, but rather, as the Conclusions and Recommendations say, the forum may inform further work of the HCCH in this area. While the forum will focus on the application of Article 13(1)(b) when the taking parent has alleged domestic violence, the discussion may raise some of the many other issues domestic violence survivors face in return proceedings, and therefore may inform a larger work agenda.

This initiative bodes well for the future. It builds on important work that has been done, including by judges in the United Kingdom (UK). Cases here recognise that domestic violence against a parent can harm children, that domestic violence is more than episodic battery, and that any measures of protection must be assessed both for enforceability and effectiveness.

So, at the risk of sounding corny, let me say that these developments remind me of the famous statement by Dr Martin Luther King Jr., the civil rights leader who championed the cause of racial justice: "The arc of the moral universe is long, but it bends toward justice."

Dr King's speech contains not only that famous quote, but also an anecdote that captures my caution. Dr King started his speech, which was entitled, *Remaining Awake Through a Great Revolution*, by reminding everyone of the story of *Rip Van Winkle*. I do not know if this children's story is well known outside the US, but most school children in the US know that Rip Van Winkle slept for twenty years. Dr King observed that the sign on an inn where Rip Van Winkle slept had a picture of King George the Third of England when Rip went to sleep and a picture of George Washington, the first president of the US, when Rip awoke twenty years later. Simply, Rip Van Winkle had slept through a revolution.

According to Dr King, people also sleep through a revolution when they "find themselves living amid a great period of social change, and yet they fail to develop the new attitudes, the new mental responses, that the new situation demands".

In recent years, we have gone through a period of great social change with respect to domestic violence. That change is reflected in the petition to the Permanent Bureau, signed by 37,000 people, saying the 1980 Convention is unjust as applied to domestic violence victims and their children. It is reflected in the fact that States now recognise that domestic violence is a human rights issue, both for survivors and their children. In fact, at the Special Commission Meeting, Contracting Parties mentioned the Istanbul Convention, which entered into force in 2014 and was just ratified by the EU in June of this year, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, which entered into force in 1995. I mentioned Article 19 of the United Nations Convention on the Rights of the Child and General Comment No. 13 (adopted in 2011); they recognize a child's right to be protected from all forms of physical or mental violence while in the care of their parent(s), including exposure to domestic violence. Since 1994, there has been a United Nations Special Rapporteur on violence against women and girls, its causes and consequences, and Reem Alsalem, the current Special Rapporteur, asked for an invitation to observe the Special Commission. One of the invitees to this Experts' Meeting, Dr. Onyoja Momoh, who is a barrister and lecturer in private international law at the University of Aberdeen, took the floor during an earlier session today and referenced the mother's human rights in the context of the return proceedings. Simply, there has been great social change in this area since 1980 when the Child Abduction Convention was adopted.

Despite this great social change, there were many unfortunate examples of old attitudes and old mental responses at the 8th Special Commission meeting. My time is short, so I will focus on only a few.

One was the failure to invite Reem Alsalem to the Special Commission meeting. While other United Nations officials were there, including representatives of the UNHCR, UNCRC, UNICEF and the IOM, their focus and expertise is not gender-based violence. There is still a failure to acknowledge that the misapplication of the 1980 Convention facilitates gender-based violence and punishes victims of gender-based violence for their attempts to escape it. The application of the 1980 Convention has profound implications for survivors' human rights and that fact is rarely acknowledged.

Another old response was the silence by the vast majority of States after the Secretary General announced the proposed forum. There was consensus that it should occur, yes, but there was not enthusiasm.

In terms of substance, there was a clear adherence to the *Guide to Good Practice on Article 13(1)(b)*. In my view, this *Guide* is misnamed and should be called the *Guide to Good and Bad Practice on Article 13(1)(b)*. While this *Guide* commendably acknowledges that violence against the respondent can qualify for the Article 13(1)(b) exception, it then, in a cruel and ironic way, puts up huge barriers to successful invocation of the exception.

The Conclusions and Recommendations that came out of the 8th meeting of the Special Commission repeated and reinforced the *Guide's* problematic language. For example, citing paragraph 33 of the *Guide to Good and Bad Practice*, the Conclusions and Recommendations say that "harm to a parent, whether physical or psychological, *could, in some exceptional circumstances,* create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". But there is nothing exceptional about the risk. As Mr Justice Cobb said in *M and L,* a case mentioned at

the Special Commission, "No one can now be in any doubt about the deeply damaging impact of domestic abuse on children who are exposed to it".

There was also the continued mantra that Article 13(1)(b) must be applied "restrictively". That sentiment is inconsistent with case law from the UK Supreme Court and the High Court of Australia that the exception by its very terms is of restricted application and needs no further elaboration or "gloss". In fact, the language in the *Explanatory Report*, that the exceptions "must be applied only so far as they go and no further," suggests that its language about interpreting them in a "restrictive fashion" simply means that judges should not expand the exceptions, *not* that judges should narrow them.

Another problematic position in the *Guide* and the Conclusions and Recommendations is that the risk to the child should be addressed with protective measures instead of simply granting the Article 13(1)(b) defence outright**.** Of course, this approach is not mentioned in the Convention. While the Special Commission admirably tried to ensure that any protective measures include protection for the taking parent (because neither the *Guide to Good and Bad Practice* nor Article 11 in the 1996 Convention on urgent matters specifically mentions the taking parent), the Special Commission continued to adhere to this substandard approach, perhaps blinded by idealism and political considerations related to the approach in the 2019 Brussels II Regulation.

Protective measures are not realistic in cases of domestic violence. The problems with undertakings are well known. Other types of measures are not necessarily enforceable, or easily so, as revealed by the discussion at the Special Commission of Articles 23 and 26 in the 1996 Convention. Moreover, enforcement occurs only *after* the fact of a violation, and research reveals that restraining orders are regularly violated. About 65 per cent of victims report to researchers that their protective orders have been violated. In addition, determining adequacy involves assessing the dangerousness of the perpetrator. But, troublingly, the *Guide to Good and Bad Practice* says protective measures *may* be insufficient if the petitioner has "*repeatedly* violated protective orders," as if disregarding the criminal law and a judicial order once is not enough.

Even if protective measures might protect the survivor's physical safety and she could return to the child's habitual residence (sometimes an impossibility because of her immigration status), she will often experience considerable hardship on return. Among other things, survivors often experience the following: lingering fears about her and her child's safety; isolation; financial stress (including because of the return case); difficulty obtaining custody, or even visitation, because she is an 'abductor'; potential criminal prosecution; and the hardships associated with being an immigrant.

In short, the reliance on protective measures represents the total subjugation of the domestic violence victim and her child to the almighty goal of return, even when she has done nothing morally wrong, the abuser has, and even though a custody trial could be held in the place where she is safe.

Dr King said it is cruel jest to tell a bootless man to lift himself up by his bootstraps. So, too, it is cruel jest for a judge to tell a domestic violence victim that the law will protect her and the child while simultaneously invoking the law to send her child back to the place of harm.

The commitment to the *Guide* at the Special Commission meeting was palpable. In fact, the Special Commission refused to change even one word in a sentence that everyone agreed could be taken out of context, though the *Guide* is an online electronic document that would be easy to fix. Instead, the Commission adopted a Conclusion and Recommendation

reminding people to read the sentence in context. Frankly, that solution is much less effective than fixing the *Guide*. If a lawyer or a respondent never reads the *Guide* to see that the opponent is using the sentence out of context, then they are highly unlikely ever to read the Conclusions and Recommendations either.

Finally, the Special Commission did not acknowledge the US Supreme Court's very important language about protective measures found in the recent case, *Golan v. Saada*. The Court emphasised that because a judge *must* prioritise the child's physical and psychological safety, the judge need not consider protective measures at all in some instances, including cases of domestic violence or when the judge reasonably expects that they will not be followed. And judges should not consider them if doing so would tread into the merits of the custody dispute or impede an expeditious outcome.

I can only hope that the Forum will foster new attitudes and new mental responses so that the 1980 Convention is applied justly.

Abduction and Domestic Abuse: A Judicial Perspective from England and Wales, Lord Justice Andrew Moylan, Court of Appeal, Head of International Family Justice and Hague Network Judge for England and Wales

Introduction

The title of this article is Abduction and Domestic Abuse with the focus being on the application of Article 13(1)(b) of the 1980 Hague Child Abduction Convention ("the 1980 Convention") in that context.[1]

I have sought to convey the approach taken by the courts in England and Wales when the taking parent relies on allegations of domestic abuse to oppose the making of a return order. I have not and do not propose to go outside the structure of the 1980 Convention both because this is the legal structure within which the courts have to operate and because I consider that the issue can be properly and appropriately addressed within that structure.

It is relevant, in this introduction, also to mention the well-established understanding of the harm caused to children by domestic abuse. For example, as Lady Hale repeated in 2013:

> *We now know that serious harm may be done to the development of children who see or hear domestic violence between their parents.*[2]

In addition, in one of the case examples given below (see *M v L*), the judge said: "no one can now be in any doubt about the deeply damaging impact of domestic abuse on children who are exposed to it".

Setting the Scene

I propose, first, to set the scene by reflecting on the position when the 1980 Convention does not apply and when it does not operate effectively.

When I first started practising as a family law barrister in the late 1970s, there were few international family law instruments and none of real relevance to cross-border wrongful or improper removals or retentions. This issue was not directly addressed in England and Wales until the 1980 Convention and the 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (The Luxembourg Convention) were implemented through the Child Abduction and Custody Act 1985.

The absence of any applicable cross-border legal structure meant that there were no easily available effective remedies with the result that parents could, and frequently did, encounter considerable difficulties in seeking to procure their child's return. At worst, the outcome could be a complete severing of the left behind parent's relationship with their child or children.

---

1 This article is based on and reflects a presentation I gave to the Experts' Meeting on the 1980 Hague Convention at the University of Westminster, London on 19-20 October 2023.

2 Supreme Court of United Kingdom, *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at [36], [INCADAT Ref: HC/E/UKe 1068].

The dilemma faced by parents meant that some would resort to self-help. A documentary was made about one such case in, if I recall correctly, the early 1980s. In that particular case, the child was restored to the left-behind parent's care, but this was achieved by what can only be termed a re-abduction. This is obviously an option which, to put it mildly, is fraught with difficulties but it serves to demonstrate the lengths to which a parent might consider they have to go to seek to be reunited with their child.

A more recent example of this can be seen when an Australian mother unsuccessfully sought to recover her children from Lebanon in 2016. Her two children, then aged 5 and 2, had been retained in Lebanon in 2015 where they had gone on holiday with their father. What has been called in the press, a "botched child recovery" attempt, led to the mother, the television crew accompanying her and others being arrested and held in prison. The former were released and allowed to leave Lebanon but without the children. According to news reports, the mother has not seen the children since then.

We have many cases in England and Wales in which children have been wrongfully removed to or retained in non-Contracting States (to the 1980 Convention). The situation will, of course, vary but in a significant number of these cases the left-behind parent will be unable to either bring proceedings in the other State or enforce any order made by the courts of England and Wales. The practical and legal obstacles are just too great.

I have spent some time on this because, critically, the 1980 Convention provides a structure through which a left behind parent can *access* a court which is tasked with determining whether to make a return order. This is to the benefit of children who find themselves in this situation. It is, or should be, a practical, effective framework for courts to determine whether to make a return order when a child has been wrongly removed or retained.

In summary, the 1980 Convention provides:

(i) A structure which provides an accessible legal route for the left-behind parent;

(ii) A practical, effective framework for courts to determine whether or not to make a return order when a child has been wrongfully removed or retained;

(iii) A framework which operates to facilitate expeditious justice.

This is not to say that the 1980 Convention always operates in a manner which achieves these outcomes. History shows that, in practice, it is not always practical and effective. It can be undermined if justice is partial in the sense of, at least, appearing to favour a particular outcome (see Baroness Meyer's evidence in 1999 to a US Senate Judiciary Sub-Committee). It can also be undermined if there are significant delays in the process. However, I would suggest that the way to address these issues is not to challenge the structure of the 1980 Convention but to consider how it can be better operated in practice.

In summary, therefore, I would like to emphasise the undoubted benefits of the 1980 Convention and ask that these be taken into account when consideration is given to how its operation can be improved so that such improvements adhere to, and remain within, the structure it provides.

Application of Article 13(1)(b) in England and Wales

The process of reasoning which the courts here apply when allegations, *including* but not confined to allegations of domestic abuse, are relied upon for the purposes of Article 13(1)(b) has been described in a judgment given by two of our most eminent family lawyers, Baroness Hale and Lord Wilson, at [36]:

> The court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful.[3]

They went on to say, at [52]: "the clearer the need for protection, the more effective the measures will have to be".

The court doesn't embark on a factual determination partly because of the need for expedition and partly because of the evidential difficulty of seeking to determine allegations about what happened in the other country when nearly all the relevant evidence will be grounded in that country.

Case Examples

VI v VM[4]: 2021, Frances Judd J

The Portuguese father was seeking the return of his child (aged 9) to Portugal. The Portuguese mother relied on Article 13(1)(b) and child's objections. She alleged "that the father has been threatening, abusive and controlling to her". The judge concluded:

> [30] In my view, the allegations of domestic abuse by the mother are of a nature and of sufficient detail and substance to warrant careful analysis. The threats that the father is alleged to have made are extremely serious and intimidating, and they are coupled with frightening and controlling 'stalking' type behaviours that have included drawing L in; and
>
> [31] I therefore consider (taking the risk of harm at its highest) that there is a grave risk that L would be exposed to psychological harm and/or placed in an intolerable situation if a return is ordered. L has demonstrated real fear and distress at the prospect of a return and has told her teachers about a fear that her father would kill her mother. Being sent back to Portugal without sufficient protective measures would be likely to exacerbate this.

The judge went on to consider protective measures based on an expert report which set out what measures would be available to the mother and the child in Portugal (court proceedings and shelters) and what orders or undertakings would be enforceable there. The judge concluded that there were measures which meant "that the risk to L would be sufficiently ameliorated, so that she would not be at grave risk of physical or psychological harm, or placed in an intolerable situation if a return order is made".

---

3 Supreme Court of United Kingdom, *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at [36], [INCADAT Ref: HC/E/UKe 1068].

4 England and Wales, High Court, [2021] EWHC 2451 (Fam): NB: after receiving the draft judgment and following further discussions between the parents, they agreed that L would remain in England with contact with the father including holidays in Portugal.

M v L[5]: 2023, Stephen Cobb J

The Australian father was seeking the return of his child (aged 3) to Australia. The British mother relied on habitual residence and Article 13(1)(b). In respect of the latter, the mother relied on domestic abuse and the impact on her mental health if she was required to return to Australia.

The judge repeated what is well understood and recognised by courts and other professionals in England and Wales that: "no one can now be in any doubt about the deeply damaging impact of domestic abuse on children who are exposed to it".

The judge, first, considered the allegations of domestic abuse, applying the structured approach referred to above:

> … if the allegations are indeed all true, and if A was to be returned to a situation in which he was unavoidably drawn into an abusive parental relationship, I am satisfied that this would be likely to present a 'grave risk' to his psychological wellbeing.

He then considered protective measures:

> Accordingly, I must consider whether the protective measures offered by the father, coupled with the protections of which the mother may be able to avail herself through the Australian courts, and the supports which may be available from her friends in Australia, can mitigate that risk.

He concluded:

> In my judgment, the protective measures offered by the father, together with the protective orders which would be available to the mother, diminish the risk sufficiently – providing the mother with adequate independence from the father – as to reduce to a sufficient extent the grave risk of harm to A of exposure to any ongoing domestic abuse.

The judge next considered the issue of the mother's mental health. There was evidence from a consultant psychiatrist. The judge was "persuaded on the evidence that [the mother] is so unwell that were I to order a return of A to Australia, this would have a significantly debilitating effect on" the mother. He undertook an analysis of the mental health services available in Australia and, in particular, of whether the mother would be able effectively to access those services. The judge considered the mother's situation if she were to return and decided that the available protective measures would not ameliorate the grave risk of harm. In summary, he concluded that a return "would be likely to have a significant deleterious impact on the mental health of this mother, which would be likely in my judgment to impact on her ability to parent him. In turn, this gives rise to the grave risk that A would be caused psychological harm".

---

5 England and Wales, High Court, [2023] EWHC 2082 (Fam).

JC v SS[6]: 2023, Jennifer Roberts J

The Irish father was seeking the return of his four children to Ireland. The British mother relied on consent; acquiescence; Article 13(1)(b); and children's objections.

There were significant allegations by the mother against the father of coercive control and domestic abuse: they were "serious and involve physical harm … sexual abuse, psychological and emotional abuse". The focus of the mother's case was "principally upon the adverse impact on her mental health, were she forced to return to the Republic of Ireland". There was evidence from a consultant psychiatrist.

After a detailed and careful analysis of a wide range of factors, the judge decided that Article 13(1)(b) was established principally because of the likely effect on the mother's mental health if she had to return to Ireland and the impact this would have on her ability to care for the children. The mother was "a vulnerable mother who has suffered in the past with various mental health issues". The judge was "not persuaded that the protective measures which the father offers are sufficient to address the grave risk which exists for these children in the event of an order for return". The judge took into account that "the mother has no social or family support system" in Ireland and that "the professional support available in Ireland 'will not replace the existing raft of support she has relied on to sustain the improvement she appears to have made whilst living, as I have found, with the father's consent, in this jurisdiction'". I should add that the judge was also satisfied that the children objected to returning.

NM v SM[7]: 2023, Alistair MacDonald J

The Romanian mother was seeking the return of her child (aged 4) to Romania. The Lebanese father opposed the application, relying on habitual residence; settlement; consent; and Article 13(1)(b).

In respect of Article 13(1)(b), the father relied on a number of matters including that he "has been subjected to domestic abuse by the mother".

The judge concluded that "there is *no cogent evidence* before the court that he is the victim of domestic abuse" (emphasis added). He made a return order.

Conclusions

I have given a brief overview of the approach taken by the courts in England and Wales to the determination of applications under the 1980 Convention when Article 13(1)(b) is relied upon, with a particular focus on domestic abuse.

I have provided summaries of several decisions selected at random to show the varying circumstances in which allegations of domestic abuse can be raised. They do not follow a simple pattern. They can be integrated with other factors, such as mental health. I would suggest that such cases require careful analysis without any presumed outcome. The last decision referred to above shows that domestic abuse *can* be raised by a taking parent without any "cogent evidence" supporting it.

---

6 England and Wales, High Court, [2023] EWHC 2063 (Fam).

7 England and Wales, High Court, [2023] EWHC 2209.

Finally, I consider it important that the manner in which the 1980 Convention is applied in practice needs to reflect the very varied factual circumstances which can arise in order to ensure that it remains an effective civil law response to child abduction.

The Interface Between Domestic Violence and International Parental Child Abduction: Focus on the Protection of Abducting Mothers in Return Proceedings, Professor Katarina Trimmings, School of Law, University of Aberdeen, Scotland

Over the past few decades, there has been an increased acknowledgment and understanding of domestic violence as a social problem. The complexities of domestic violence have also become clearer. Past legal and cultural understanding of domestic violence was too narrowly focused on single physically violent incidents rather than complex and controlling patterns of behaviour. Nowadays, we acknowledge that domestic violence can manifest itself also through so called 'coercive' and 'controlling' behaviour, with coercive behaviour being defined as a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim. On the other hand, 'controlling behaviour' is a range of acts designed to make a person subordinate and/ or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Domestic violence as intimate-partner violence includes physical, psychological, sexual or economic violence between current or former spouses, as well as current or former partners. Although it may affect both men and women, domestic violence is distinctly gendered as it affects women disproportionately. Incidents are rarely isolated, and usually escalate in frequency and severity. Domestic violence may culminate in serious physical injury or death.

Although the term 'domestic' may appear to limit the context of where such violence can occur, a joint residence of the victim and perpetrator is not required, in particular as the violence often continues after a relationship has ended. Indeed, for a large number of women, ending an abusive relationship does not necessarily mean physical safety.

Where children are concerned, there is a strong, evidence-based link between domestic abuse and child abuse. There is also increasing recognition of the damaging psychological impact that witnessing domestic abuse has on children, and it is acknowledged that children do not need to be directly affected by the violence to be considered victims.

International human rights law has acknowledged that violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights. Addressing this issue, numerous human rights instruments have been adopted both at the international and regional level. These include:

1. The 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women;
2. The 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women;
3. The 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
4. The 2011 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (so called 'Istanbul Convention'), which is the most comprehensive in nature, while also reinforcing action to prevent and combat violence against women and domestic violence.

Last but not least, European Court of Human Rights in its case law on domestic violence has adopted the obligation of due diligence (see the judgment of *Opuz v. Turkey*, Application No. 33401/02, 2009). It has established that the positive obligation to protect the right to life (Article 2 ECHR) requires State authorities to display due diligence, for example by taking preventive operational measures, in protecting an individual whose life is at risk.

I believe that all of us would consider such legislative and judicial endeavours aimed at tackling domestic violence as a positive step forward – a step towards a more equal and just society. I also believe that we would unanimously agree that domestic abuse is an abhorrent act perpetrated on victims and their children by those who should love and care for them.

However, when domestic violence is mentioned in the context of the 1980 Hague Convention, we may feel a bit uneasy.

Some say that the 1980 Convention is designed purely to address the problem of parental child abduction by securing the return of the child to the country of habitual residence (unless one of the limited exceptions apply), and therefore, the circumstances of the abducting parent should bear no relevance in the return proceedings. These experts could be called 'the purists' and I do understand where they are coming from, in particular given the widely held suspicion that, in many Article 13(1)(b) cases, allegations of domestic violence are either fabricated or at least exaggerated so as to strengthen the grave risk of harm defence.

Others, however, believe that the Convention cannot operate in isolation from wider social and legal developments, including the progress made over the past few decades in the field of human rights. They argue that, with the increased understanding of the harm stemming from intimate partner violence and its consequences for the victim's children, domestic violence when raised in the context of Article 13(1)(b) (and sometimes even Art 20) should be taken seriously. I share this view, although it leads to a conundrum:

"How can the Convention protect the children against the negative effects of abduction and, at the same time, protect the mothers from the violence they seek to protect themselves and their children against?"

PROTECTIVE MEASURES

First, through employing effective protective measures to facilitate the safety of the child and the abducting parent upon their return. Here I would direct you to the findings of a collaborative research project titled 'Protection of Abducting Mothers in Return Proceedings' (POAM), which was funded by the European Commission (2019-2022). It is an in-depth study into the topic. However, here I will only extract a few key points:

- The court dealing with the return application should consider protective measures *ex officio*, bearing in mind the particular vulnerabilities of returning mothers in child abductions committed against the background of domestic violence, such as the risk of re-victimisation upon their return to the State of habitual residence, the lack of financial and emotional support in the State of habitual residence plus probable financial dependence on the left-behind father. It seems to me that this will require a complete change of mindset of judges in some Contracting States – States where the Convention continues being applied in a very mechanical manner. Judicial training coupled with measures aimed at concentrating jurisdiction is a key here.
- The term 'protective measures' should be given a broad interpretation, and include, for example, access to courts and other legal services in the requesting State, State assistance and support, including financial assistance, housing assistance, health

services, women's shelters and other means of support for victims of domestic violence; responses by police and the criminal justice system more generally; and availability of protective measures to victims of domestic violence in the requesting State, such as non-molestation injunctions. Direct judicial and administrative cooperation should be widely utilised here to ensure that support mechanisms available in the requesting States exist not only on the theoretical level, but will be accessible to the accompanying parent on the practical level.

- Before ordering a return on the basis of protective measures, the court must satisfy itself that the protective measures will be enforceable in the State of habitual residence, for example by virtue of the 1996 Hague Convention, the Brussels IIt*er* Regulation, the EU Protection Measures Regulation or a mirror order. Voluntary undertakings should not be employed in cases involving allegations of domestic violence. In *Re E (Children)* [2011] UKSC 27, the UK Supreme Court rightly expressed concerns about the 'too ready' acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting State.

The 1996 Hague Convention; safe harbour/mirror orders; and pertinent developments at the HCCH

Although some may question the appropriateness of utilising the 1996 Convention in relation to protective measures related exclusively to the abducting mother, the rationale for employing the 1996 Convention for this purpose is based on the premise that protecting the mother will, by extension, also protect the child as the 'indirect victim' of domestic violence. Nevertheless, the 1996 Convention was not designed and is, therefore, not uniquely suited as a means of facilitating cross-border protection of abducting mothers who have been victims of domestic violence. The main shortcoming is the intermediate step of the declaration of enforceability/registration for enforcement of the protective measures (Article 26), which does not sit well with the need for the abducting mother to be protected immediately upon the return. In order to alleviate this inadequacy, an application to declare the protective measures enforceable/register them for enforcement could perhaps be made at an earlier stage, so that they become enforceable before the return order comes into force. However, where the court system of the requesting State lacks efficiency, the return of the child may be unduly delayed as a result. Also, continued assistance by the Central Authorities here would be very useful.

Where the requesting State is neither an EU Member State nor a Contracting Party to the 1996 Convention, the court dealing with the return application should explore the availability of so called 'mirror orders' or 'safe harbour orders'. The problem with such orders, however, is that they are not common in civil law jurisdictions, as civil law judges do not generally believe that they are authorised to make such an order. Safe harbour orders and mirror orders have been 'invented' by common law judges as the practice has developed mainly in the United States. Another limitation concerns the length of the proceedings, as the case must be dealt with by the courts of both the requested and the requesting State before the child is returned. For example, in *TAAS v FMS* [2017] EWHC 3797 (Fam) the English High Court referred to its past experience with the US State of Florida, where procedure resulted in a 6-month delay which in turn led to an application for the return order to be set aside. Against this background, the use of safe harbour/mirror orders is not recommended as a means to protect abducting mothers in return proceedings.

To conclude, globally, the current legal framework for facilitating cross-border portability of measures for the protection of the abducting parent in return proceedings is not entirely satisfactory. The HCCH worked on a legislative project on the 'Recognition and Enforcement of Foreign Civil Protection Orders', which was a promising development. However, the project was removed from the HCCH agenda by CGAP in 2018, with the understanding that this issue may be revisited at a later stage (see C&R No 14 of CGAP 2018). It is hoped that, if revisited in the future, any resulting instrument will give special consideration to the situation of abducting mothers returning with their child(ren) to their State of habitual residence.

Need for caution

My final comment pertaining to protective measures is that, regardless of what has been said, even where protective measures are enforceable in the State of habitual residence, caution is needed when determining whether ordering a return order with protective measures is the appropriate course of action. This is because protection measures may be breached and satisfactory follow-up measures by relevant authorities in the State of habitual residence may be lacking. In the light of concerns over their effectiveness, protective measures should not be employed where credible allegations of severe violence have been made and there is a risk of future violence of such severity, perhaps coupled with evidence of previous disregard for the law, including breaches of previous protection orders.

EVIDENCE

This takes us to the problem of evidence of domestic violence in return proceedings.

As domestic violence, by its very nature, usually occurs behind closed doors, supporting or corroborative documentary evidence can be scarce. Indeed, the absence of police or other authority intervention is not untypical of a disempowered victim of domestic violence, demonstrated by psychological conditions such as battered woman syndrome, and, if so, we need to think about how such evidence could be obtained within the limited timeframe of return proceedings (see POAM Best Practice Guide, pp 31-35).

Notwithstanding this, there are cases where the alleged victim is equipped with documentary evidence, usually relating to previous proceedings in the State of habitual residence, seeking protection from domestic violence. Such evidence may take the form of police and/or medical reports, previous non-molestation orders, ouster orders, non-harassment orders, child arrangements orders, or even criminal proceedings relating to specific acts of violence. Nevertheless, in the context of return proceedings, obtaining such documentary evidence in a cross-border setting, even with the support of Central Authorities, may prove challenging, and at times unsuccessful, within the strict timescales afforded to Hague Convention cases. These dilemmas may tempt the court to avoid undertaking an evaluation of the merits of the allegations of domestic violence, and to simply proceed to considering protective measures without first assessing the nature and the gravity of the risk involved. The POAM Best Practice Guide analyses this problem in detail and offers a number of recommendations (pp. 29-35).

ADDITIONAL REFLECTIONS

Finally, I would like to share a few additional (more general) thoughts that are pertinent to the topic.

Relocation as a lawful movement of children across borders, and child abduction as unlawful movement of children across borders can be regarded as two sides of the same coin. Given

this correlation, I believe that developing a sensible, transparent, and harmonised global approach to relocation that would give due consideration to the reality of domestic violence, is the way forward to reduce the occurrence of child abduction, including child abductions committed against the background of domestic violence. Unfortunately, currently, many relocation systems are indirectly dismissive of the problem of domestic violence, with anecdotal evidence suggesting that mothers seeking to relocate are commonly advised by their lawyers to refrain from disclosing domestic violence for fear that it would ultimately be held against them as they would be suspected of being likely to hinder contact between the child and the father if permitted to relocate.

Another point, which I have already touched on, is the need to further enhance and invest into developing judicial cooperation.

Last but not least, even more generally, national legal frameworks to tackle domestic violence need to be improved. If women who are victims of domestic violence feel that they are protected in the State of habitual residence, they (or at least some of them) may not resort to unlawfully removing/retaining their children abroad.

Mediation in Child Abduction Cases with Domestic Violence, Ischtar Khalaf-Newsome, Co-CEO and Head of Advisory Services, MiKK International Mediation Centre for Family Conflict and Child Abduction, Mediator and Family Lawyer, Berlin, Germany

Forthcoming

Project to investigate the effects and outcomes of abduction where the abduction is alleged to have occurred against a background of violence or abuse to the taking parent and/or the abducted child: Initial Observations, Professor Marilyn Freeman, Co-Director, International Centre for Family Law, Policy and Practice, and Principal Research Fellow, Westminster Law School, University of Westminster, London, England

Introduction and Purpose of the Research

The often serious, long-term effects of abduction on children are well documented.[1] However, an unanswered question to date is whether abductions undertaken for protective reasons, *i.e.,* to protect the taking parent (usually the mother) and/or the abducted child from violence or abuse at the hands of the left-behind parent, result in the same effects as those abductions which occur for other reasons, or whether the effects and outcomes are different in these circumstances. As Baroness Hale observed in 2014:

> *It would be interesting to know whether the effects of an abduction which the child perceived to be for their own or their carer's protection are different from those in other cases.*[2]

The aim of this empirical research[3] is to probe that question, and to throw some light on the situation experienced by domestic violence victims and their children when facing proceedings for return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The reason this issue is so important is that there are no specific provisions in the Convention directly addressing these circumstances, so those parents who wish to raise domestic violence or abuse in Convention return proceedings must try to do so within the ambit of Article 13(1)(b). This provision allows for the non-return of a child if there is a grave risk that their return would expose the child to physical or psychological harm or otherwise place

---

1 G.L. Greif. 'A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent' (2000) *Child Psychiatry and Human Development* 31(1), 59–78; G.L. Greif, 'The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy' (2009) *The American Journal of Family Therapy* 37(4), 273–86; M. Freeman, 'The Effects and Consequences of International Child Abduction' (1998) *Family Law Quarterly* 32(3), 603–21; M. Freeman, *International Child Abduction: The Effects* (reunite International Child Abduction Centre, London, 2006); M. Freeman, *Parental Child Abduction: The Long-Term Effects* (International Centre for Family Law, Policy and Practice, London, 2014); M.J.L. Gibbs, W.P. Jones, S.D. Smith, P.A. Staples and G.R. Weeks, 'The Consequences of Parental Abduction: A Pilot Study with a Retrospective View from the Victim' (2013) *The Family Journal* 21(3), 313–317; K. Van Hoorde, M. Putters, G. Buser, S. Lembrechts, T. Ponnet, T. Kruger, W. Vandenhole, H. Demarré, N. Broodhaerts, C. Coruz, A. Larcher, D. Moralis, C. Hilpert and N. Chretiennot, *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases* (EWELL, with the support of the European Union, 2017).

2 See M. Freeman, *Parental Child Abduction: The Long-Term Effects* (International Centre for Family Law, Policy and Practice, London, 2014), Foreword.

3 IACLaR, supported by the national delegations for the UK and New Zealand, submitted a proposal for the consideration of the Eighth Special Commission regarding the need for such evidence-based research to address the gaps remaining in our understanding of the issues involved in the field of international child abduction, which include the outcomes in cases involving domestic violence. The Special Commission approved the proposal which became Conclusion and Recommendation No. 102. See Conclusion and Recommendations of Eighth Special Commission here: https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf

the child in an intolerable situation. As such, it focuses on harm to the child, not to the taking parent, and there have been varied approaches taken by the Contracting States to the Convention as to whether harm to the taking parent on return can be brought within its ambit.[4] Grave concerns have been expressed over many years about how this situation impacts domestic violence victims and their children,[5] including at the Eighth Special Commission held in The Hague from 10-17 October 2023.[6]

Our research team comprises the Principal Investigator, Professor Marilyn Freeman, University of Westminster, London; Co-Investigator, Professor Nicola Taylor, University of Otago, New Zealand;[7] and postgraduate research assistant, Taylor MacDonald Plummer (funded by the Quintin Hogg student internship scheme).[8] The research is funded by The University of Westminster and The International Centre for Family Law Policy and Practice, and was ethically approved by the University of Westminster College of Liberal Arts and Sciences Research Ethics Committee.

---

4 See Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper, Preliminary Document No. 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

5 See M. Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) *Fordham Law Review* 69, 694; M. Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) *International Journal of Law, Policy and the Family* 13, 191; C. Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) *Family Law Quarterly* 38, 529; B. Hale, 'Taking Flight —Domestic Violence and Child Abduction' (2017) *Current Legal Problems* 70, 3; M. Freeman and N. Taylor, 'Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention' (2020) *Journal of Social Welfare and Family Law* 42(2), 154–175; J. Edleson, S. Shetty and M. Fata, Fleeing for Safety; Helping Battered Mothers and Their Children using Article 13(1)(b)' in M. Freeman and N. Taylor (eds), *Research Handbook on International Child Abduction*: *The 1980 Hague Convention* (Edward Elgar Research Handbooks in Family Law Series, 2023); *The 1980 Child Abduction Convention Guide to Good Practice, Part VI, Article 13(1)(b)* (Hague Conference on Private International Law, 2020); R. Schuz and M. Weiner, 'A Mistake Waiting to Happen: The Failure to Correct the Guide to Good Practice on Article 13(1)(b)' (2020) *IFL*, 87; R. Schuz and M. Weiner, 'A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice' Lexis-Nexis, 21 January 2020; D. Bryant, 'Response to Professors Rhona Schuz and Merle H Weiner ("the authors"), A Mistake Waiting to Happen: The Failure to Correct the Guide to Good Practice on Article 13(1)(b)' (2020) *International Family Law Journal* 207–208.

6 Conclusion and Recommendation No. 26 of the Eighth Special Commission held from 10-17 October 2023 records that, in light of the discussion at the Special Commission on the issue of domestic violence and the operation of Article 13(1)(b), and further to correspondence received by the Secretary General from advocates for victims of domestic violence prior to the start of the Special Commission, a proposal made by the Secretary General to the Hague Conference on Private International Law to hold a forum for discussion amongst organisations representing parents and children, and those applying the Convention, was supported by the Eighth Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions.

7 The Principal and Co-Investigator are, respectively, Chairperson and Secretary of The International Association of Child Law Researchers (IACLaR).

8 Gratitude is also expressed to Alan Porter and Anna Cheshire, School of Social Sciences, University of Westminster, for their early collaboration with this project.

Methodology

A short anonymous questionnaire in English (which took approximately 20 minutes to complete) was designed by the Principal Investigator and Co-Investigator, with assistance from the School of Social Science at the University of Westminster. The survey questions enquired into family justice professionals' experiences and observations about the effects and impacts of abduction on taking parents, children and left-behind parents; the differences, if any, between abductions for protective reasons compared to those involving no violence or abuse; the Article 13(1)(b) exception to return; the effectiveness of the Convention in cases where domestic/family violence or abuse had been alleged; what was working well; and the changes or improvements that would be helpful regarding the Convention's operation in these cases. The survey opened online on 22 March 2023 and closed on 2 May 2023. An invitation, together with the survey link, was widely distributed internationally to family justice professionals and organisations and was also available on request.

Survey Sample

The sample comprises 116 family justice professionals from 30 jurisdictions: Albania, Argentina, Australia, Brazil, Canada, Czech Republic, Chile, Costa Rica, Croatia, Denmark, France, Germany, Globally, Greece, Ireland, Italy, Japan, Malta, Netherlands, New Zealand, Norway, Poland, Serbia, Singapore, Slovenia, South Africa, Spain, Switzerland, UK and USA.

Unsurprisingly, lawyers and lawyers acting for the child (69%) were the main group of survey respondents. However, family justice professionals from all the other significant categories of people working in the field of international child abduction also participated: judges, psychologists, mediators, academics/researchers, counsellors, non-government and other organisations, and Central Authorities. They were very experienced in the international child abduction field:

- 76% were working in this field for more than 6 years; 50% for more than 16 years; and 31% for more than 21 years;
- 30% had dealt with up to 10 cases of international child abduction; and 69% with more than 11 cases (of which 31% had dealt with more than 51 such cases);
- 91% said they had knowledge of, and/or experience with, international child abduction where domestic violence and/or abuse to the taking parent, abducting child(ren) or both had been alleged.

Key Findings

At the time of the Experts' Meeting, the data analysis was not yet complete. Nevertheless, our initial observations regarding the survey findings included the following:

- Many thought that cases where domestic violence and/or abuse are alleged are increasing either by 'a little' (11.7%), 'a fair amount' (27.1%), or 'a lot' (25.2%);
- Most respondents thought that Article 13(1)(b) was argued 'often' (37.7%), 'mostly' (27.2%) or always' (18.4%) in cases where domestic violence is alleged;
- Most thought that children were returned 'often' (50.5%) or 'mostly' (25.2%) despite the exception being argued;

- Respondents were almost evenly split between the negative (33.0%) and positive responses (36.7%) regarding how effectively the Convention deals with protective abductions;
- The grave risk exception in circumstances involving domestic violence and/or abuse was said to be working 'very well' (7.1%), 'well' (18.8%), 'poorly' (25.9%) or 'very poorly' (8.9%) in these circumstances.
- There were distinct, but mixed, views in the survey sample, roughly evenly divided, about the genuineness of domestic violence claims and the way in which domestic violence is dealt with by the Convention.

Interesting qualitative data is provided on the following matters where domestic violence is alleged:

- Effects on the taking parent – especially regarding the relief felt on escape, but overwhelmed by the fear of the child's return to the State of habitual residence being ordered;
- Effects on the child of the violence experienced between their parents;
- Impact for the child of the loss of, or change in, the relationship with the left-behind parent who the abducted child will often still love;
- Effects on the left-behind parent which, similar to the impact of the diminution or loss of the parent-child relationship for the child, may result in a profound impact on those left behind;
- Differences where domestic violence is involved in cases compared to those cases where there is no domestic violence and/or abuse involved;
- Comments on the operation of the grave risk exception;
- Protective orders on return and whether they adequately protect the taking parent (usually the mother) on return.

Conclusion

The survey sample is not representative but does include the perspectives of a diverse range of family justice professionals from 30 jurisdictions. It provides an interesting snapshot of the distinctly different schools of thought (roughly evenly divided in this sample) held by family justice professionals globally about domestic violence and the Convention. It also reveals illuminating data in relation to professionals' views regarding Article 13(1)(b) as it impacts on the various parties involved in international child abduction cases under the Convention. The Experts' Meeting provided an early opportunity to consider and discuss the initial observations of the research team in a specialist environment of invited participants with differing standpoints about how those views may best be reconciled so that the Convention may be nurtured and continue to protect children as envisaged. Data analysis was completed following the Experts' Meeting and the Research Report, including the survey findings and conclusions, was published in April 2024.[9]

[9] M. Freeman and N. Taylor, (April 2024). *Research Report - Where international child abduction occurs against a background of violence and/or abuse: A project investigating the effects and outcomes of abduction on children where the abduction occurred against a background of domestic violence and/or abuse towards the taking parent and/or the abducted child*. London: The International Centre for Family Law Policy and Practice. The Research Report can be downloaded from www.icflpp.com/research/

Session 3 - Abduction and Child Participation Issues

Introduction by Session Chairperson Professor Rhona Schuz, Centre for the Rights of the Child and the Family, Sha'arei Mishpat Law School, Israel

The issue of child participation generally, and the objection of the child for the purposes of Article 13(2) specifically, have received relatively little attention in the work of the Permanent Bureau and at Special Commission meetings, with Conclusions and Recommendations simply stating that different Member States take different approaches to the way in which the child's views are obtained and introduced into proceedings.

At the recent Eighth Special Commission, Conclusions and Recommendations 35-39 provide some guidance in relation to hearing children in the context of Article 13(2) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction:

1. They clarify that hearing the child is only for this purpose and should not address wider welfare issues.
2. They note some good practices:
    - The person hearing the child should receive adequate training;
    - If the person hearing the child talks to one parent, they should also talk to the other parent;
    - The person hearing the child should not express a view on substantive custody or access issues.

Whilst this guidance is helpful, it is very limited and does not address the fundamental differences that exist between the approach to hearing children and the weight to be given to their views in different jurisdictions. This has been documented in the literature and will be addressed in the forthcoming presentations.

Some scholars have suggested that a Good Practice Guide be prepared on the objection of the child for the purposes of Article 13(2), with the objective of reducing the significant disparities between the approaches of different Contracting Parties. I think this is a good idea, but it is clearly not going to happen in the near future.

In the meantime, I believe that it is important for those of us who work in this field to consider what practices in relation to child participation should be endorsed and encouraged and how this might be done (in ways other than a Good Practice Guide). The presentations and discussion in this session will promote this aim. The four presenters will be providing us with insights from several States and their own professional perspective. We have a senior judge, two academics and a practitioner. I hope that in the discussion part, participants at this Experts' Meeting will provide additional information about the practices in their own States and their perspectives about these various practices.

In this introduction, I would like to set out a number of issues which I think we should be considering This is, of course, not an exhaustive list.

1. The objective of hearing the child

In the early days of the Convention, the prevailing view seems to have been that the only reason to hear the child was to assess if the Article 13(2) child objection exception was established. However, following the recognition of the child's right to be heard in proceedings concerning in him or her in Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), it is now clear that this right is not purely instrumental, but reflects the recognition that, as human beings, who have a personality, existence and views of their own, independent and distinct from those of their parents, children have the right to have a say in the shaping of their lives.

Moreover, children's views and insights may be relevant in relation to other questions arising in Convention proceedings, such as determination of habitual residence; determination of whether one of the other exceptions is established; exercise of discretion to return in cases where an exception is established; and consideration of whether proposed protective measures will adequately protect the child.

So, any discussion about child participation should not be limited to the context of the Article 13(2) exception.

2. When and how should the child be heard?

The method and timing of hearing the child should surely be designed to maximise the likelihood that the views which children express are their own authentic wishes and that appropriate weight is given to them.

(a) How?

The main issue is by whom the child should be heard: whether directly by meeting with the judge, indirectly by a social worker or mental health professional who reports to the court, or via separate legal representation. Even within these categories there are considerable differences between different Member States. For example, in England and Wales, meetings with judges are not for the purpose of obtaining evidence about the child's views and I understand that in Australia the Independent Children's Lawyer (ICL) is primarily a best interests advocate.

Some scholars, including myself, have questioned whether indirect hearing really satisfies the child's right to be heard, since the child is not given the opportunity to talk directly to the decision maker and there is a risk that the social worker or other expert will not accurately convey the child's views and instead interpret them in the light of their own perceptions in relation to the child's needs. On the other hand, concerns have also been expressed about the dangers of judges relying on their own impressions from a short meeting with the child. Whilst some of these concerns might be addressed to some extent by better training for those who hear children, it can be argued that the only way to ensure that the child's views are effectively presented is via independent separate representation in addition to direct or indirect hearing.

(b) When?

At what stage of the proceedings? And what information should the child be provided with prior to being heard?

3. What weight is given to the child's views?

Whilst, as I stated earlier, the child's views may be relevant to a number of issues, in practice they are most commonly considered in relation to the child objection exception.

Comparative research shows significant variations in the ways in which the Article 13(2) exception is interpreted and applies in different jurisdictions. In many jurisdictions, the exception is interpreted very narrowly. For example, in Australia, legislation added a gloss to the 1980 Hague Convention, requiring that the child's objection has to show a particular strength of feeling. Israeli courts have adopted a similar requirement. In my view, there can be no justification for this restrictive approach to the Convention's exceptions, as Professor Merle Weiner explained yesterday in the context of the Article 13(1)(b) grave risk exception. Accordingly, it is gratifying that shortly after the Experts' Meeting in November 2023, Australian legislation deleted the aforesaid requirement.

Similarly, some judges take a highly paternalistic approach in assessing maturity and independence of the child's views, assuming that most abducted children are not capable of forming views of their own and/or are being manipulated by the abducting parent. Other judges are prepared to recognise that some influence by parents and family members is inevitable and that this does not necessarily vitiate the authenticity of the child's views. The latter approach is more consistent with research evidence suggesting that adults' thoughts and feelings are also influenced by those close to them. Accordingly, the emphasis should be on disentangling the views of the children from family members, which may require more careful examination of the child's views and ensuring that those views are based on objective and complete information.

Even where the gateway conditions are clearly satisfied, some judges treat the policy of the Convention as a reason to exercise their discretion to order return. In my view, this approach is not consistent with Article 12 of the UNCRC (requiring appropriate weight to be given to the views of children in accordance with their age and maturity), nor with the philosophy of the 1980 Hague Convention itself. The Perez-Vera Report expressly states that the child objection exception "gives children the possibility of interpreting their own interests" (paragraph 30). More generally, as we were reminded yesterday by Philippe Lortie, the primary objective of the 1980 Hague Convention is the desire to promote the interests of children and the exceptions reflect situations in which return may actually cause harm to children, rather than protect them from it. It seems to me that judges who order the return of objecting children often take insufficient account of the psychological harm likely to be caused to a mature child by being forced to return against their wishes. I am aware of a number of cases where objecting children were badly affected by being subjected to return orders.

I would like to suggest that one way to promote greater uniformity and a more child-centric approach, consistent with the philosophy of the UNCRC and the 1980 Hague Convention itself, would be to disseminate among judges and other professionals involved in hearing children a summary of contemporary child development research regarding the cognitive, emotional and language abilities of children of different ages and backgrounds and information about potential psychological effects, both of abduction and of returning sufficiently mature children despite their objections. In other words, the Conclusion and Recommendation 37(a) about adequate training for those hearing children should be extended to judges who do not hear children but nevertheless have to decide whether the Article 13(2) exception has been established.

Hearing the Child in the Context of the 1980 Hague Convention, Professor Nicola Taylor, Faculty of Law, University of Otago, New Zealand

Introduction

Article 13(2) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Convention) provides that a "judicial or administrative authority may 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". While the debates surrounding Article 13(2) were "without doubt among the most divisive of the XIVth Session",[1] the Drafting Committee ultimately considered this provision to be:

> "… absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover … all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities."[2]

The final wording "represented a compromise between participants who wanted consideration of children's wishes, and those who were apprehensive about the potential misuse of such a clause".[3] These apprehensions included the risk of Article 13(2) turning what should be summary proceedings into merits assessments, concern that a taking parent might unduly influence their child's views, and abducted children feeling pressured to choose between their parents.[4]

The passage of time has not negated the significance of these issues despite the circumstances surrounding international child abduction now differing in several key ways from those in play when the Convention was first introduced. For example, the profile of the taking parent has changed, as has the way that parents divide childcare responsibilities between them, including the growth in shared parenting.[5] Domestic violence has become much more widely recognised in the context of international child abduction as mothers flee

---

1 P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction,* Oxford University Press, 1999, at p. 177.

2 E. Pérez-Vera, "Explanatory Report on the 1980 Hague Child Abduction Convention", in *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, at para. 30.

3 A.M. Greene, "Seen and not heard? Children's objections under the Hague Convention on International Child Abduction", *University of Miami Law School International and Comparative Law Review*, vol. 13, no. 1, 2005, pp. 105-162, at p. 121.

4 B.M. Bodenheimer, "The Hague Draft Convention on International Child Abduction", *Family Law Quarterly* vol. 14, no. 2, 1980, pp. 99-120; See also, Greene, note 3.

5 N. Lowe and V. Stephens, "The value and challenges of statistical studies looking at the operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction", in M. Freeman and N.J. Taylor (eds.), *Research Handbook on International Child Abduction*: *The 1980 Hague* Convention, Edward Elgar Research Handbooks in Family Law Series, 2023, pp. 63-77.

abroad, often to return to their homeland, with their children to escape an abusive (ex)partner.[6] The interrelationships between the Convention and other global and regional frameworks have never been more important regarding how they impact the Convention's operation. For example, the United Nations Convention on the Rights of the Child (UNCRC) 1989 has promoted the right of the child to participate in ways not contemplated when the earlier 1980 Hague Convention was developed.[7] Societal understanding of, and attitudes towards, childhood and children's rights have also altered considerably since 1980.

This article draws on research evidence to highlight trends and issues in the use of Article 13(2) over time. This is important because of the lack of guidance in the Convention on how to establish that a child objects to return, or on the way in which children should be heard in such proceedings. These crucial issues are left to the policies and practices of individual Contracting States, which statistical surveys and other research projects aim to discern and then present internationally to help inform further discussion.

Statistical Surveys (1999-2021)

Statistical surveys have been systematically undertaken of all the applications received by Central Authorities in 1999, 2003, 2008, 2015 and 2021 to provide reliable data to inform discussions at the Special Commissions held in 2001, 2006, 2011, 2017 and 2023.[8] The statistical trends over this 22-year period thus provide a longitudinal perspective on the global operation of the Convention, including in relation to the use of Article 13(2).

The average age of children involved in the return applications has remained constant at six years of age: 6.3 years (2003), 6.4 years (2008), 6.8 years (2015), and 6.7 years (2021).[9] The breakdown of children's ages into 0-4, 5-9 and 10-15-year age categories has also been consistent at around 35-38%, 41-43% and 21-23% respectively.[10] As Lowe and Stephens state:

> "These findings are not without significance with regard to listening to children in child abduction proceedings and having regard to children's objections to returning."[11]

---

6 K. Trimmings, A. Dutta, C. Honorati and M. Župan (eds.), *Domestic Violence and Parental Child Abduction*, Cambridge, Intersentia, 2022.

7 R. Schuz, "Child participation and the child objection exception" in M. Freeman and N.J. Taylor (eds.), *Research Handbook on International Child Abduction: The 1980 Hague Convention*, Edward Elgar Publishing Research Handbooks in Family Law Series, 2023, pp. 115-130; A. Skelton, "The CRC perspective in the context of international child abduction and the 1980 Hague Convention" in M. Freeman and N.J. Taylor (eds.), *Research Handbook on International Child Abduction: The 1980 Hague Convention*, Edward Elgar Publishing Research Handbooks in Family Law Series, 2023, pp. 279-297.

8 Lowe and Stephens, note 5.

9 N. Lowe and V. Stephens, *Global Report - Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction* Convention, Preliminary Document No 19A of September 2023, Eighth Special Commission, HCCH, The Hague, 2023, at paras. 52-54.

10 *Ibid*., para. 55.

11 *Ibid*.

The percentage of cases where the child's objection was a sole or partial reason for refusal to return has also remained fairly consistent: 21% (1999), 18% (2003), 22% (2008), 15% (2015), and 22% (2021).[12]

The average age of an objecting child appears to be getting younger: 11.3 years (2003), 10.7 years (2008), 11 years (2015), and 9.8 years (2021).[13] In both 2015 and 2021, there was an increase in the number of objecting children under the age of 8 years, although many of these cases also involved older siblings.

It is important to note that these figures only include the cases in which the child's objections were a sole or partial reason for judicial refusal of the return application. We do not know in how many applications the child's objections were raised unsuccessfully.

Research on the Child's Objections Exception

In 2017–2018, Professor Marilyn Freeman and I undertook a project, funded by the British Academy, on *Outcomes for Objecting Children under the 1980 Hague Convention*. This involved i) a literature review summarising the key findings and specialist commentary on the child's objections exception internationally; ii) a caselaw analysis of reported court judgments examining use of the exception from its introduction in England and Wales in 1985 and in New Zealand from 1991; iii) an online global survey which attracted responses from 97 family justice professionals in 32 countries; and iv) research interviews with family justice professionals, parents and children who had been involved in 1980 Convention proceedings where the exception had been raised. To conclude the project, three cross-jurisdictional interdisciplinary Regional Workshops were held in 2018 in Auckland, Genoa and London with 137 participants from 19 jurisdictions.[14]

The 97 global survey participants came from the UK (16), New Zealand (16), Germany (11), Canada (8), Australia (5) USA (4), Switzerland (3), the Netherlands (3), Estonia (2), Israel (2), Latvia (2), Portugal (2), Sweden (2), and Belgium, Brazil, Chile, Croatia, Denmark, France, Hong Kong, Hungary, Italy, Kenya, Lebanon, Lithuania, Luxembourg, Malta, Norway, Poland, Russia, South Africa, and Venezuela. Their role in international child abduction comprised lawyers/solicitors/barristers (50%), judges (23%), researchers/academics (9%), mediators (8%), psychologists (4%), managers (4%), administrators/clerks (4%), social workers (3%) and others (17%, for example, Central Authorities, consultants, and legal advisers).

Survey respondents were asked "When the court learns of the child's objections, how often do the following occur in your jurisdiction?" Their responses, set out in Table 1, highlight the diversity across the 32 jurisdictions in obtaining a specialist/expert report, referring the family to mediation, appointing a lawyer to represent the child, joining the child as a party to the proceedings, and the judge meeting with the child.

---

12 *Ibid*., see table below para 83 - "The combined reasons for refusal (sole and multiple reasons) in applications received in 2021 and previous Studies".

13 *Ibid*., see table below para 85 – "The age of 'objecting children' compared with previous Studies".

14 N.J. Taylor and M. Freeman, "Outcomes for objecting children under the 1980 Hague Convention on the Civil Aspects of International Child Abduction" *The Judges' Newsletter on International Child Protection,* vol. XXII, Summer-Fall (Special Focus: The Child's Voice – 15 Years Later), The Hague: Permanent Bureau of the HCCH, 2018, pp. 8-12.

Table 1: Use of Child Participatory Processes in 32 Jurisdictions

When the Court Learns of Children's Objections to Return

	Rarely or Never	Sometimes	Often or Always
A specialist/expert report is obtained	24%	25%	51%
The family is referred to mediation	50%	32%	18%
A lawyer is appointed to represent the child	26%	26%	48%
The child is joined as a party to the proceedings	68%	16%	16%
A judge meets with the child	32%	26%	42%

A wide range of specialists were reported as being involved with the child/family to inform the legal process when a child's objections are raised. These included psychologists; CAFCASS; specialist / professional report writers; family consultants; lawyers representing children; guardians ad litem; counsellors; experts; social workers; youth workers; social welfare officers; children's officers; child protection officials; and social service, social science, social Institution and family conciliation personnel. The breadth of professionals' backgrounds and expertise when engaging with abducted children who are objecting to return confirms the need for specialist interdisciplinary training on how best to hear these children.[15]

Thus, we found significant global diversity in the interpretation and implementation of the Article 13(2) exception, and the processes utilised, including how, when and by whom children's objections are heard in Hague Convention proceedings. The 2018 Regional Workshops subsequently reached unanimous agreement that:

[15] M. Freeman and N.J. Taylor, "Nurturing the 1980 Hague Convention" in M. Freeman and N.J. Taylor (eds.), *Research Handbook on International Child Abduction*: *The 1980 Hague* Convention, Edward Elgar Research Handbooks in Family Law Series, 2023, 403-429.

> " … an *International Working Group* (IWG) should be established to extend the current project beyond the narrower issue of children's objections in 1980 Hague Convention cases to the wider issue of the voice of the child and the role of children in Hague Convention cases more generally (*e.g.* the 1980 and 1996 Hague Conventions)."[16]

This call reflects the shift in recognition of children's rights generally and their right to be heard in particular (UNCRC Article 12), as well as recent international developments promoting child participation in child abduction proceedings – such as the Dutch 'pressure cooker' model,[17] and the Brussels Recast Regulation 2019/1111 providing children "with a genuine and effective opportunity" to express their views.[18] Several large-scale European research projects have also addressed children's wellbeing in international child abduction cases (EWELL),[19] examined 2005-2017 case law concerning the child's best interests and hearing the child following a wrongful removal or retention from 17 countries (VOICE),[20] and identified a set of good practices (based on children's perspectives) for legal and other professionals to improve children's wellbeing when dealing with cases of international child abduction (INCLUDE).[21] I very much welcome these policy, practice and research initiatives relating to child participation and international child abduction, which are all centred in Europe, and hope the Common Law world soon follows suit.

Children's Right to Information

Article 13 of the UNCRC affords children the right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds". This right to receive information is currently underplayed internationally, yet children's capacity to meaningfully contribute to abduction, and other legal/judicial, proceedings will be greatly enhanced if they are properly informed of all relevant aspects relating to their family circumstances and engagement with family justice professionals. This information must be age-appropriate and child-centred. To help facilitate children's access to justice and legal literacy, Professor Marilyn Freeman (University of Westminster), Professor Helen Stalford (University of Liverpool) and I launched a website www.findinghome.world in December 2022 to help inform children about international child abduction, the Convention, and how the law and support agencies can assist them. Developed in partnership with a Children and Young

---

16 Taylor and Freeman, note 14, at p. 12. Note that all the presentations from the 2018 Regional Workshops are published in this issue of *The Judges' Newsletter*.

17 A. Olland, "The voice of the child in 1980 Hague return procedures in the Netherlands", *The Judges' Newsletter on International Child Protection,* vol. XXII, Summer-Fall (Special Focus: The Child's Voice – 15 Years Later), The Hague: Permanent Bureau of the HCCH, 2018, pp. 54-55.

18 The Brussels ll bis Regulation and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). Entry into force 1 August 2022.

19 K. Van Hoorde at al., *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases*. EWELL, with the support of the European Union, 2017.

20 L. Carpaneto, T. Kruger and W. Vandenhole, *The Voice of the Child in International Child Abduction Proceedings in Europe – Work Stream Two: Case Law Results*, Universities of Genoa and Antwerp, with the support of the European Union, 2019.

21 S. Lembrechts, T. Kruger and W. Vandenhole, *Guide to Good Practice: INCLUDING Children in International Child Abduction Proceedings*, Missing Children Europe, 2021.

People's Advisory Group, these child-friendly resources are currently available in three languages (English, French and Spanish), and we are now working collaboratively with Missing Children Europe on FindingHome's further development and dissemination.

Conclusion

Hearing the child was a key topic addressed at the recent Eighth Special Commission through a Working Document[22] and discussion by delegates that resulted in five Conclusions and Recommendations.[23] The Special Commission emphasised that:

> "… when hearing the child for the purposes of Article 13(2) … it is only for that purpose and not in respect of broader questions concerning the welfare of the child, which are for the court of the child's habitual residence."[24]

Several good practices were also noted,[25] which signal the attention being given to nurturing the Convention, encouraging best practice within the 103 Contracting Parties, and assisting those tasked with hearing the child. While acknowledging that the modalities of how children should be heard must be left to national law and procedure, there is much that can be learnt, and perhaps adopted or adapted, from the initiatives currently underway. Professor Costanza Honorati explicitly included "the hearing of the child" in her proposal that EU "solutions … may provide an interesting 'laboratory' capable of suggesting and directing the application of the 1980 Hague Convention among non-EU Member States too".[26] Providing opportunities by trained family justice professionals that facilitate the child's right to 'have a say' in decisions that shape their lives - like those related to international child abduction – will shift us closer towards overcoming the gap identified so eloquently by The Honourable Justice Victoria Bennett AO at the 2018 Auckland Regional Forum:

> "A wrongful retention or removal away from one parent and the child's home country probably changes the child's world view permanently and irretrievably. The return which we facilitate is a geographical rather than a psychological phenomenon."[27]

Perhaps the time has arrived for the International Working Group mooted in 2018 to be established.

---

22 HCCH Permanent Bureau, "Article 13(2) - Hearing the Child", Working Document No. 9, 26 Sept 2023.

23 Conclusions and Recommendations (C&R) 35-39, Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and 1996 Child Protection Convention, The Hague, 10-17 October 2023.

24 *Ibid*., C&R 36.

25 *Ibid*., C&R 37.

26 C. Honorati, "The Court of Justice of the European Union and international abduction of children", in M. Freeman and N.J. Taylor (eds.), *Research Handbook on International Child Abduction*: *The 1980 Hague* Convention, Edward Elgar Research Handbooks in Family Law Series, 2023, 163-178, at p. 178.

27 V. Bennett, "What is the role of the child in international parental child abduction proceedings?" Paper presented at the Regional Workshop, Auckland, New Zealand, 8-9 February 2018, at para 62. See also, V. Bennett, "A better place for the child in return proceedings under the 1980 Convention – A perspective from Australia", *The Judges' Newsletter on International Child Protection,* vol. XXII, Summer-Fall (Special Focus: The Child's Voice – 15 Years Later), The Hague: Permanent Bureau of the HCCH, 2018, pp. 20-24, at p. 20.

Child Participation in Abduction Cases, Stephen Cullen, Principal and Head of Family Law & Private Clients, Miles & Stockbridge P.C., USA

I have been lucky enough to spend over 30 years in the United States where my main practice has been in 1980 Convention litigation. I emigrated from Scotland where I had been an English and Italian high school teacher and then a Scottish lawyer. Both the Scottish education system and Scots Law put the voice of the child front and center. The child's voice is paramount. My journey in America has, therefore, been one of trying to find a way for the voice of the child to be heard in American litigation. Suffice it to say that journey is not complete and is still a work in progress in the United States. A child's voice is certainly not paramount under American law.

First a word about state courts and custody cases. The 50 States of the Union do all have factors that are to be considered in custody disputes. Some are established by statute and others by case law. One of the factors is typically that the court *may* hear about the *views* or the *preferences* of the child "where practicable." *See, e.g.,* D.C. Code Ann., Section 16-914(a). But this common factor relating to the views or preference of the child is inevitably permissive and involves the court hearing through third parties what the views of (usually only mature) children may be. Nowhere does one see a requirement that the *voice* of the child *must* be heard. And because the hearsay rules are alive and well in civil litigation in the United States, neither parent is able to testify about what the child has told them about their wishes or what they have seen. Even though almost all family law cases are referred to mediation, I have never participated in a mediation where the mediator has agreed to hear the voice of the child in the mediation.

The federal and state courts have "concurrent original jurisdiction" over Convention cases. 22. U.S.C.A. 9001. This means that a left behind parent can pursue their Convention case either in federal court or in state court. But most 1980 Convention cases are brought in federal court in the United States. This is partly because the left behind parent will believe that they are going to get a fair shot as the "out-of-towner" in federal court; and partly because the federal system is able to expedite 1980 Convention cases much better than state courts.

It has, therefore, fallen to federal courts to develop how the voice of the child is heard in Convention cases. Parties have been permitted to retain their own experts to evaluate the children and present their voices that way; federal courts have appointed a neutral expert to present the voice of the child on the child's behalf; federal courts have appointed attorneys to represent the children directly and advocate on their behalf. Rarely have federal courts met with children directly in chambers to hear evidence on the child objection exception under Article 13(2); but in one case the federal court has met with a very young child directly to hear the child's own testimony regarding his father's abuse of his mother and the grave risk exception.

Two well-known and recent cases in America demonstrate some of the options the federal judges have used to ascertain the voice of the child.

In *Royal Borough of Kensington and Chelsea v. Bafna-Louis*, 2023 WL 6867135 (2nd Cir. 2023), the United States Court of Appeals for the Second Circuit affirmed the return order of one of two children to the United Kingdom. One child was a baby and the other a teenager. The trial court appointed counsel for the teenager to advocate on his behalf and to prepare the teenager for a meeting with the federal trial judge in chambers. Neither party nor their counsel

were present. The trial court did not appoint anyone—psychologist, expert, neutral, attorney, guardian, to represent the baby. The federal court returned the baby to England but did not return his teenage brother to England.

In *Luis Ischiu v. Gomez Garcia*, 274 F. Supp. 3d 339 (D.Md. 2017), the trial judge met with a six-year-old child *in camera* in relation to the mother's grave risk defense that she had asserted at trial. The federal judge's summary, worth repeating in its entirety, is a modern template for how judges should hear from children in 1980 Convention cases:

> "In his *in camera* interview with the Court on July 25, 2017, W.M.L.G., who is six and a half years old, was reserved but displayed sufficient intelligence and maturity to understand the Court's questions and to provide responsive answers candidly, without signs that he had been coached. He did not, however, appear to be able to provide as much detail in his answers as an older child without a language barrier would have been able to provide. W.M.L.G expressed a preference to be with his mother, who treated him well, and stated that he did not miss living in Guatemala and would not want to live with his father. He described his father as bad for causing harm to his mother. He has heard his father verbally abuse his mother, using terms like "piece of shit," and he has witnessed his father physically assault her, on one occasion, when his father "smashed" his mother's face. W.M.L.G. said his parents fought every day in Guatemala such that he did not feel safe living in Guatemala. His uncles, Luis Ischiu's brothers, also argued with and used "bad words" towards Gomez Garcia. W.M.L.G. also stated that he did not like living in the family compound and that his grandmother, Luis Ischiu's mother, treated his cousins better than she treated him, such as when she would go out with the other children but leave him behind. He reported that his cousins would sometimes fight with him. W.M.L.G. told the Court that he would be afraid that his parents would fight and that his mother would get hurt if they were all together again. He also expressed a belief that if he returned to Guatemala with his mother, his father and grandfather would come to get him and make him live with them."

Here we see a thoughtful and sensitive interview with a young child (through an interpreter) whose evidence was compelling and crucial to the grave risk defense. This approach is rare in the United States. It is to be hoped that the voices of children will be heard in more 1980 Convention proceedings, not just with respect to the child objection exception under Article 13(2) but regarding all aspects of a 1980 Convention case. My experience has been that children's voices, when they are heard, are oftentimes accurate as to what led to the 1980 Convention litigation in the first place.

'Child Participation' in Japan, Professor Yuko Nishitani, Kyoto University, Japan*

I. Introduction

Japan joined the 1980 Child Abduction Convention ('1980 Convention') in 2014. Installing the return mechanism was challenging because Japanese family law does not clearly define the 'rights' and 'obligations' of the parties, as in other Asian jurisdictions. In Japan, 87.7% of all divorces are carried out as extrajudicial consensual divorce by submitting a divorce form at the municipal office.[1] Divorce and its consequences, including parental responsibility, custody, access, and child support, are left to the spouses' autonomous decision unless one party disagrees and goes to court.[2] Furthermore, after the breakdown of a marital relationship, it is common for a caregiving parent to take the child and move out of the house without the other parent's consent. As a matter of domestic law, it is still considered lawful in view of the continuity of custody and respect for the primary caregiver.[3] Only for cross-border cases, such an act is now qualified as 'wrongful', in breach of the other parent's rights of custody under the 1980 Convention.[4]

Notably, Japan used to exclude joint parental responsibility for divorced or unmarried parents. Following a divorce, the mother regularly obtained sole parental responsibility, and the non-custodial father was hindered from having access to the child. In May 2024, Japan's legislature ultimately granted the option of joint parental responsibility for divorced and unmarried parents and took substantive and procedural law measures to enhance access and child support recovery.[5] It is a notable development that responds to the concerns expressed by the UN Committee on the Rights of the Child and the European Parliament[6] and respects the child's right to be raised by both parents and maintain personal relations with both parents in their best interests.[7]

While Japan has duly implemented the 1980 Convention, ensuring child participation remains a challenge. After briefly explaining the implementation of the 1980 Convention in Japan (II),

---

* Japanese cases are mainly cited from INCADAT (https://www.incadat.com/en).

1 For statistics, see https://www.e- stat.go.jp/stat- search/files?page=1&toukei=00450011&tstat=000001028897

2 See Yuko Nishitani, "Identité culturelle en droit international privé de la famille", *Recueil des cours* 401 (2019), pp. 171 ff.

3 Supreme Court, 19 October 1993, *Minshû* 47-8, 5099.

4 For further details, see Yuko Nishitani, "International Child Abduction in Asia", in: Marilyn Freeman and Nicola Taylor (eds.), *Research Handbook on International Child Abduction* (Elgar, 2023), pp. 200 ff.

5 Act amending the Civil Code, etc. (Act No. 33 of 24 May 2024).

6 UN Committee on the Rights of the Child, "Concluding observations on the combined fourth and fifth periodic reports of Japan" of 5 March 2019 (CRC/C/JPN/CO/4-5); European Parliament resolution of 8 July 2020 on the international and domestic parental abduction of EU children in Japan (2020/2621(RSP)), *O.J.* 15.9.2021, C 371/2.

7 Art. 9(3), 10(2), 11(1) and 18(1) CRC.

this paper discusses issues on hearing the child based on two recent Supreme Court decisions (III). This study then envisages further improvements in Japan's practice (IV), before delivering some final remarks (V).

II. Implementation of the Hague Convention in Japan

Upon joining the 1980 Convention,[8] Japan established the Central Authority at the Ministry of Foreign Affairs ('JCA'). The JCA has about 20 members, including a Family Court judge, a Family Court investigator, an attorney, a social worker, and experts in domestic violence and child psychology. For return proceedings, the subject-matter and local jurisdiction is concentrated on the Tokyo and Osaka Family Courts. This has enhanced expertise and effective administration of justice. The judges strictly follow the '6-week model' and render a decision expeditiously after holding two court hearings for parents. The *ex officio* investigation is conducted by Family Court investigators, who also hear the child and report to the judge. The characteristic of the practice in Japan is that 63% of all cases are resolved by agreement between the parties. In-court conciliation and out-of-court mediation play an important role. The seemingly low return rate is attributable to the parents' non-return agreements[9] and the dismissal of a return petition for lack of the child's habitual residence in the alleged State of origin.[10]

The overall implementation of the 1980 Convention in Japan is satisfactory. The JCA plays an important role in assisting the parties, seeking amicable solutions, facilitating access, and cooperating with foreign and domestic authorities. Case law has developed and duly follows international standards for a uniform and autonomous interpretation of the Convention (*e.g.,* the 'hybrid approach' for the child's habitual residence and a strict interpretation of the grave risk exception). The practice has significantly improved. Judges, investigators, lawyers, officers, and NGOs are well-informed and seek various methods to achieve a reasonable solution for the case at hand. The judges now immediately order access for the left-behind parent to deter alienation, alleviate parental conflicts, and encourage amicable solutions. While the compulsory execution measures adopted in 2014 were toothless by requiring two-step sanctions (first monetary sanction, then execution by substitute) and the simultaneous presence of the child and taking parent, the 2019 amendment remedied them and enabled effective enforcement with a high success rate.[11] This prompted the United States to take down Japan from the list of non-compliant countries in 2019.[12] Arguably, the remaining area where Japan should further seek improvements is in hearing the child and child participation.

---

8 For further details, see Nishitani, *supra* note 4, pp. 203 ff.

9 For statistics, see https://www.mofa.go.jp/mofaj/ca/ha/page25_000833.html#section1.

10 See, *e.g.,* Osaka High Court, 24 February 2017 (HC/E/JP 1526); Tokyo High Court, 15 May 2020 (HC/E/JP 1559).

11 See *supra* note 9.

12 For annual reports of the US State Department, see https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html.

III. Child Participation and Two Supreme Court Decisions

(1) Introduction

It is challenging to ascertain the child's views and their objection to being returned within the limited timeframe of return proceedings. In Japan, Family Court investigators take over the task. They are knowledgeable in law, psychology, social welfare, and pedagogy and are considered more suited to hear the child than the judge, who is a purely legal expert.

Family Court investigators always meticulously prepare the child's hearing and carefully choose the environment, questions, and other considerations to make the child relax and feel at ease to speak. They also use child-friendly language and speak in a sympathetic tone.[13] Due to the "6-week" framework, they only meet with the child once for a couple of hours to have a conversation on the possible return to the State of habitual residence. The judge renders a decision based on the investigators' report without hearing the child directly. The child's counsel, who can be appointed for children with sufficient age and maturity, is not yet frequently used. The following two Supreme Court decisions will illustrate the challenges inherent in child participation in Japan.

(2) 2018 Supreme Court Decision and Habeas Corpus

The Supreme Court decision of 15 March 2018[14] underlies the following facts. The Japanese Father X and Mother Y resided in the United States since 2002. In January 2016, Y took the youngest son (then aged 11), Z, to Japan without X's consent. In July 2016, X filed a petition for the return of Z to the United States with the Tokyo Family Court. A return order was rendered in September 2016. In May 2017, the enforcement officer attempted execution by substitute by climbing up a ladder and entering the house through the window on the 2nd floor. Yet, Y and Z clung together in bed and vigorously opposed being returned to the United States. The officer had to declare the enforcement failed.

In July 2017, X further sought *habeas corpus* at the Nagoya High Court, which dismissed the application, but the Supreme Court reversed and remanded the case to the lower court on 15 March 2018. The Justices opined that, first, Y's care of Z constituted a "restraint". Although Z was then age 13, he was isolated and depended on Y without objectively obtaining information on his current situation, the return mechanism, and future life. Thus, Z was not living with Y of his own free will. Second, the Justices qualified Z's retention as "conspicuously illegal", given that Y violated the return order and thwarted the execution by substitute to continue caring for Z. Upon being remanded the case, the Nagoya High Court ordered *habeas corpus* on 17 July 2018. After a while, Y eventually agreed to return to the United States with Z.

This decision is not treated as a precedent due to the specificities of the case. The Japanese courts usually deny a "restraint" in *habeas corpus* for children over 10, like 13-year-old Z, as they have a high enough degree of maturity to decide whether to stay with the parent. The Supreme Court deviated from this framework and backed *habeas corpus,* presumably to penalize Y for continuously breaching court orders. Yet, it is doubtful that Z's views were duly

---

13 Tomoko Sawamura, "Child's View in Return Proceedings – Practice of Japanese Courts", *The HCCH Judges' Newsletter on International Child Protection* 22 (2018), p. 25 (https://www.hcch.net/en/instruments/conventions/publications2/judges-newsletter).

14 Supreme Court, 15 March 2018 (HC/E/JP 1388).

respected. The Supreme Court noted Z's refusal to return, as expressed to his attorney in September and October 2017, but did not give due weight to his views. In this case, an extensive hearing of Z in return proceedings (then aged 11) may have led to a dismissal of the return application from the outset. It would have also been desirable to enforce the return order expeditiously. While the execution measures have subsequently been strengthened in 2019, the compulsory execution still takes some time due to the requirements of the party's separate applications, as opposed to an *ex officio* implementation. This case indicates the need to carry out the entire procedure expeditiously and closely follow the child's views at various stages of the process since their abduction to Japan.

(3) 2020 Supreme Court Decision and Modification of Conciliation Agreement

In the Supreme Court decision of 16 April 2020,[15] Russian Father X and Japanese Mother Y married and had a daughter Z in 2006. They resided in Moscow from 2007. In May 2016, Z (then aged 9) came to Japan. Y followed and started to retain Z in Japan in August 2016.

X petitioned Z's return to Russia to the Tokyo Family Court in November 2016. At the hearing, Z told the Family Court investigator that she could not live in Russia and preferred living in Japan. The evening before the parents settled in an in-court conciliation in January 2017, Y had phoned Z to ask them to return to Russia, and Z briefly said "Yes". The parents agreed and the Court authorized that Y and Z would return to Russia by 12 February 2017, and X would have access to Z and pay child support. Nevertheless, on 10 February 2017, Z took refuge in a church on her way home from school and refused to return to Russia. X sought enforcement of the return agreement from 15 February 2017 in vain.

In February 2018, X sought *habeas corpus* at the Sapporo District Court and later settled with Y on non-return on 30 July 2018. Y sought to modify the 2017 conciliation agreement on return to Russia, which contradicted this 2018 judicial settlement on non-return. The Supreme Court acquiesced to the claim on 16 April 2020, which was confirmed by the lower court.

The issue in this case was again the child's views. While the Family Court investigator had noted Z's reluctance to return to Russia, Z agreed to the parents' return agreement in conciliation but then escaped from the execution by substitute. As a 10-year-old child, Z may have been unsure and unstable, changed her views, felt loyalty conflicts, or had not understood the consequences of agreeing to return once. It is not clear whether extensively hearing the child in return proceedings or in-court conciliation may have yielded a different result in this case.

Notably, opinion is divided in Japan on whether and to what extent the judge should modify a return order or return agreement in conciliation on grounds of the changed circumstances in the child's best interests (Art. 117 of the Implementation Act).[16] The legislator adopted a narrow interpretation, holding that only special circumstances would justify a modification of

15 Supreme Court, 16 April 2020 (HC/E/JP 1558).

16 For an English translation, see https://www.japaneselawtranslation.go.jp/en/laws/view/4008

a return order or return agreement, to the exclusion of a change in the child's views (*e.g.,* the left-behind parent is imprisoned and nobody can care for the child in the state of origin, or the child becomes severely ill and must be hospitalized in the state of refuge, etc.).[17]

On the other hand, many authors opine that a change in the child's views could be grounds for modification under limited circumstances. The prognosis that the child's return to the State of habitual residence would be in their best interests may turn out differently later. The timeframe and the subject matter of examination are limited in return proceedings. It is unavoidable that the child's views change as they grow and become acclimatized to the new environment. Thus, a modification is admissible when, *e.g.,* facts of child abuse are revealed subsequently, or the child's opposition to being returned becomes clear at the stage of enforcement. This may, of course, not unduly give the taking parent a second chance to refute the child's return but presupposes a strict examination of the changed circumstances and the child's age, maturity, and long-term interests.[18] Ultimately, accelerating the entire process of filing a return application, rendering a return order or agreeing to return, and enforcing it would be the key to returning the child to the State of habitual residence successfully.

IV. Further Developments

The two Supreme Court decisions indicate that improvements ought to be envisaged in the context of hearing the child. First, to date, the Family Court investigators only meet with the child once for a couple of hours in return proceedings to have a conversation on the return to the State of habitual residence. This arguably does not suffice to ascertain the child's true intent, understand the background of their statements, and trace a change in their views. An interview focusing on return or non-return may overlook essential factors, such as the child's loyalty conflicts, fear or distress of losing one parent and siblings, cultural and social background, relationship with the parents, and possible experience of abuse. The investigators should hear all mature children in return proceedings, including in conciliation, without limiting hearing the child to cases where the child's objection to being returned is an issue. Ideally, the child should be heard several times to duly grasp the state and development of the child's views and circumstances.

Second, the interview of Family Court investigators always takes place in court in a formal way due to the time constraint of return proceedings. It is different from domestic cases, where the investigators may visit the child's home, kindergarten, or school, talk to the parents, and even interview the child at home. To complement the role of investigators, it is beneficial to appoint the "child's counsel", as enabled by the 2011 Domestic Relations Case Procedure Act (DRCPA).[19] A child's counsel must be a qualified lawyer and can only be appointed for children of a certain age and maturity (from around age 8 or 9). No social worker or child psychologist can be appointed, nor for younger children or infants, unlike the "guardian ad litem" in foreign legal systems. Despite these limitations, the use of the child's counsel is essential. While the

---

17 Osamu Kaneko (ed), *Ichimon Ittô: Kokusaiteki na Ko no Tsuresari heno Seidoteki Taiô — Hague Jôyaku oyobi Kanren Hôki no Kaisetsu* [Q&A on Institutional Settings to Tackle Cross-border Child Abduction — Commentary on the Hague Convention and Other Relevant Statutes and Rules] (Shôji Hômu, 2015), p. 248.

18 See Yuko Nishitani, "Hague Jôyaku ni yoru Ko no Henkan to Jijô Henkô" [Return of the Child under the Hague Convention and Changed Circumstances], in: Kazuhiko Yamamoto (ed.), *Ko no Hikiwatashi Tetsuzuki no Riron to Jitsumu* [Theory and Practice on the Return of the Child] (Yûhikaku, 2021), pp. 187 ff.

19 Domestic Relations Case Procedure Act (DRCPA) (Act No. 52 of 25 May 2011).

child's counsel has scarcely been appointed for return proceedings so far, their role in domestic cases has been acknowledged.

To conduct procedural acts on the child's behalf, the counsel can ascertain the child's views by arranging several informal meetings outside the court (at home, in a park, etc.) and establishing a personal relationship with the child. They also explain, inform, and advise the child on the procedure by providing a prognosis on its possible outcome. In addition, the counsel can talk to the parents, let them know the child's intent where appropriate, and suggest future custody and access to possibly induce an amicable resolution of the parental disputes. Moreover, the child's counsel may collaborate and report to judges, investigators, and (sometimes) the conciliation committee on the child's views, background, character, and mental and physical state.[20] As in domestic cases, the child's counsel should be used to accompany the child in return proceedings.

Third, it would be crucial to seek the assistance of an independent child psychologist at any stage of the procedure, which is not yet practiced in Japan. Child psychologists can duly analyze the child's reaction and mental state, understand their true intention, and find out the background of their statements, such as the relationship with their parents, loyalty conflicts, and fear or distress of losing one parent or siblings. They can also consider the child's long-term interests that go beyond the issue of return or non-return. A child psychologist's hearing of the child could be conducted right after the abduction, then on several occasions continuously. This will help clarify the development of the child's views and circumstances. In the future, effective collaboration between a child psychologist, a child's counsel, and a Family Court investigator and judge would be desirable to take a child-centered approach in handling child abduction cases.

While the task of ensuring adequate child participation is not easy to fulfill, there are different clues on how to improve the practice in Japan. The mobilization of a child's counsel and a child psychologist can be materialized as an *ex officio* appointment or investigation under the current law. It is hoped that the practice will advance gradually to achieve a child-centered approach. This will raise the quality of Japanese court decisions and allow a successful implementation of the 1980 Convention.

V. Final Remarks

The 1980 Child Abduction Convention brought about various positive developments in Japan. Cross-border child abduction has widely attracted attention in society and raised awareness of its unlawfulness. This may be one of the reasons why incoming abduction cases are decreasing and are now outnumbered by outgoing cases, where children are often taken by Asian mothers to their home country.[21] The recent introduction of joint parental responsibility after divorce and enhanced performance of visitation and access to the child are also attributable to Japan accepting the 1980 Convention. Improving child participation and taking a child-centered approach in return proceedings are the next challenges we should meet.

---

[20] See Japan Federation of Bar Associations, "Kodomo no Tetsuzuki Dairinin no Yakuwari to Dôseido no Riyô ga Yûyô na Jian no Ruikei" (2015) [The Role of the Child's Counsel and the Categories of Cases where their Appointment is beneficial] (available at: https://www.nichibenren.or.jp/library/pdf/activity/human/child_rights/dairinin_yakuwari.pdf).

[21] See *supra* note 9.

Becoming a Contracting Party to the 1980 Convention is certainly not an easy task for Asian countries. They do not clearly set forth 'rights' and 'obligations' in their family law or still adhere to a patriarchal family system, entitling fathers to have sole parental responsibility. However, we could also contemplate that Japan's experience and gradual progress may encourage and inspire other Asian countries to join the 1980 Convention. Further developments are anxiously awaited.

Return proceedings in Australia under the 1980 Convention and Child Participation Issues, The Honourable Justice Victoria Bennett AO, Federal Circuit and Family Court of Australia (Division 1), Melbourne, Australia[1]

Introduction

The 1980 Convention is implemented in Australia by the *Family Law (Child Abduction Convention) Regulations 1986* (as amended) ("the Regulations"). Australia is a signatory to the Convention on the Rights of the Child 20 November 1989 and has implemented it as an object of the *Family Law Act 1975* (s 60B(b)) but no further.

Return proceedings are prosecuted by the Australian Central Authority ("ACA"). The left behind parent is a witness for the ACA rather than a party. In the interests of brevity, I will adopt the stereotype of the mother as the taking parent and the father as the left behind parent. Evidence is adduced by affidavit, and it is not unusual for the Court to permit cross examination on contentious issues. Even after the cessation of COVID-19 lockdowns, the Federal Circuit and Family Court of Australia ("FCFCOA") retained functional videoconferencing which is used to obtain evidence and conduct cross-examination remotely. It also enables a left behind parent to observe the proceedings if they wish to do so.

Proceedings in Australia

The first hearing of a return application may be without notice to the Respondent taking parent. Orders may be made *ex-parte,* for example requiring the Respondent to attend Court for a hearing and to bring the child with them; and/or ensuring the child's location and safety pending the determination of the application. Australia is a highly concentrated jurisdiction for the purpose of the 1980 Convention. The Chief Justice of the FCFCoA, Justice Williams and myself are designated to the International Hague Network of Judges ("IHNJ"). I have taken the liberty of referring to developments in, and amendments to, relevant Australian law which have come into operation since the Experts' Meeting in October 2023.[2] Australia now has a financial assistance scheme for taking parents in matters that have commenced since January 2024.

Scenarios where the child's perspective is particularly relevant

The participation of children is a focus in a return case in at least three respects.

First, where a return application is filed more than one year after the wrongful removal or retention and the person opposing return seeks to establish that the child has settled in their new environment. In Australia, a finding that a child is settled is dispositive and the application is at an end.

---

1 The views expressed in this paper are my own views; they do not represent the views of the Federal Circuit and Family Court of Australia (Division 1) or other judges of Division 1 or of Division 2 of the Court.

2 *Family Law Amendment Act 2023* (Cth).

Second, the child's objection to return under reg 16(3)(c), which gives expression to Article 13(2). This gives the Court a discretion to refuse return 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 their views into account. The Court is required to consider how a child constructs and expresses the objection. There has been an amendment to our Regulations to remove a requirement that the child's objection must be more than an expression of an ordinary wish. Once it is proved that the child does object in the relevant sense, the Court's discretion to refuse return may informed by a number of considerations including what is in the child's best interests in the traditional sense. My impression is that this exception is least likely to attract the exercise of the Court's discretion to refuse return in no small part because it is dependent upon the trial judge's regard for the views of a child, which are frequently not adequately advocated for and, therefore, easy to displace when put against other considerations, such as the policy of the Convention and the behaviour of the taking parent.

The third focus of a child's participation in return proceedings is reg 16(3)(b), which gives expression to Article 13(1)(b). These are circumstances where it is alleged that the return will expose the child to a grave risk of physical and psychological harm or otherwise place the child in an intolerable situation. This exception brings the child's perspective into focus, particularly as it is now uncontroversial that family violence perpetrated within a household or against a taking parent is more likely than not to impact adversely on a child. Another manifestation of an intolerable situation under Article 13(1)(b) now frequently encountered is where, by virtue of mental illness, incapacity of the taking parent or a concluded legal process in the State of habitual residence, the taking parent (who was historically the primary carer) will have little or no prospect of caring for the child on return. This may include a situation where the taking parent has been convicted *in absentia* for criminal offences associated with the wrongful removal or retention of the child and faces a period of incarceration.

It is immediately apparent from the above examples that the interests of an abducted child do not necessarily coincide with the interests of the taking parent or the left behind parent and, where that is the case, effective participation by children in the return proceedings is essential lest the child's independent needs get lost in the mire of high parental conflict.

Dr Sarah Calvert, psychologist, in her article 'Ghosts in our genes – psychological issues in child abduction and high conflict cases' puts it well when she says:

> Convention proceedings and other high conflict Family Court matters involve situations in which children's lives are disrupted, compromised and sometimes changed beyond a child's understanding. Legal processes, like Convention proceedings, also recognise that the impact is primarily imposed on the children by adults pursuing their own interests and outcomes.
>
> Convention matters are, by definition, high conflict disputes and they add the complexities of abduction and relocation to a child's experience of conflicted parental separation. This may mean a child experiences a move to a place which is totally unfamiliar. It is possible the language is not one they speak, and the schooling is very different. The continuity of their life is disrupted and they risk losing significant relationships, not just with their left-behind parent. There is often limited support for them as the 'taking' parent becomes pre-occupied with managing both the ensuing legal proceedings and their evolving new life.

Given that the intention of the 1980 Convention, as expressed in its preamble, is the protection of children from the harmful effects of wrongful removal and retention across international borders, the participation of children in return proceedings should be broader than the narrow

perspective of exceptions to return. Unfortunately, and in common with domestic parenting proceedings, parents in return proceedings are keen to press the child's interests when the child's interests coincide with their own interests but pay little more than lip service to a child's views and perspective when they diverge from their own.

Preparing for outcomes

Parents in return proceedings must be facilitated to "prepare for outcomes" because, more so than domestic family law litigants, they are absolutely polarised. Each is convinced that they will win. The fact that the child has been removed or retained in another country means that the parents do not have the moderating influence of wanting to at least appear to cooperate with one another under the scrutiny of relations, friends, school parents and teachers - let alone a Court. They are in an environment which is devoid of objectivity, with each parent convinced that their position will prevail. This has serious consequences for a child. It can lead to communication between the child and the left behind parent being terminated as soon as the allegation of a wrongful removal is made. Further into proceedings, when a parent whose position does not prevail does not have a backup plan, it is the child who suffers most. A parent who has not considered what will happen if they lose the case will be bewildered and unprepared for the loss - but the child is in a much worse situation that is not of their making. The child is in a position of having to go back to the requesting State with a bereft, unprepared, and under-resourced mother, or, alternatively, the child has no idea when they will see their father, relatives, friends, pets, school, or house again. One of the most beneficial tasks an Independent Children's Lawyer can perform is to facilitate the taking parent and the left behind parent to prepare for outcomes.

Preparing for outcomes is facilitated by the exchange of information, ensuring the articulation at an early stage of any conditions to return that will be sought so that the taking parent will be able to respond and the necessity, practicability, desirability and enforceability of the proposed conditions can be the subject of evidence and submissions at the final hearing of the return application. A specialised mediation is an important component of preparing for outcomes. The mediation is conducted in the same "pressure cooker" style in which judges in the Netherlands conduct their mediations. In my home state, Victoria Legal Aid provide a specialised service consistent with the model taught by Reunite (UK). The specialised mediations have two mediators of different gender and discipline. They are considerably more advanced and of longer duration than mediations for domestic family law matters. The purpose and amenity of specialised mediation deserves its own discussion paper.

How the voice of child is heard

In return proceedings in Australia, the voice of the child is heard through:

- a Family Consultant who is a psychologist or social worker employed by the Court who conducts interviews and prepares an assessment for the court, free of cost to the parties; and/or
- an Independent Children's Lawyer, who is a legal practitioner appointed to represent the child's interests in the proceedings, free of cost to the parties.

With these opportunities to obtain the child's perspective, it is rare to have an Australian judge speak directly to a child, though not impossible. When they do, the process is procedurally fraught. The experience, recruitment and training of family law judges in Australia is not conducive to having judges speak with children. However, in my trip to attend this Experts'

Meeting, I was delighted to visit Courts in Germany, to be hosted by colleagues Judge Martina Erb-Klünemann and Dr Joanna Guttzeitand, and to observe Judge Erb-Klünemann interview a child in two cases.

Independent Children's Lawyers

The Court may make an order requesting that the legal aid authority in that State or territory to appoint an Independent Children's Lawyer to represent the child's interests at any time in the proceedings. However, the earlier the appointment is made, the more useful an Independent Children's Lawyer can be to the Court and the child. In return proceedings, the Independent Children's Lawyer does not represent the child's interests at large. It is the child's interests in the context of the 1980 Convention. Typically, that involves arranging communication with the left behind parent, organising a specialised mediation, formulating conditions to return and, importantly, filling gaps in evidence. An Independent Children's Lawyer does not take instructions from the child. An Independent Children's Lawyer is not bound by the child's views but should inform the Court if the child's views are at variance with a submission made by the Independent Children's Lawyer or an order sought by them.

The representation of children's interests in return proceedings has had a chequered history in Australia. In the early days, the Independent Children's Lawyers seemed not to understand the very significant differences between a case under the 1980 Convention and a domestic parenting case. In sum, that the return of a child is not pre-conditioned on the return being in the child's best interests. In those days, a misguided Independent Children's Lawyer would be a barracker for the responding parent with the result that they were more of a hindrance than a help. In 2006, the *Family Law Act* 1975 was amended to require the Court to be satisfied of exceptional circumstances before an Independent Children's Lawyer could be requested.[3] This resulted in fewer Independent Children's Lawyers being appointed in return cases. The requirement to demonstrate special circumstances has only very recently been removed from our legislation as part of the current Australian government's raft of legislative reforms directed at making returns under the 1980 Convention safer for taking parents and children. The next challenge is to identify legal practitioners who have good Independent Children's Lawyer skills and to provide them with training on the differences and nuances of return proceedings so that they can be effective in that role.

Early Social Science Intervention

Part of the Australian government funding for its platform to make returns safer has been earmarked for early intervention by Family Consultants. On the first day that the taking parent is in Court, the judge can order that the child be seen by a Family Consultant (a psychologist or social worker) for a preliminary assessment. The parents are not assessed or interviewed. The Family Consultant has specific tasks, namely:

- At some convenient time in the assessment interview, to introduce the child to the Independent Children's Lawyer, who has been appointed to represent the child's best interests. It is important not to burden the child with too many appointments.

---

3 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) - Schedule 5.

- Check that the child is not in acute psychological distress.
- Subject to the age of the child, to explain to the child the purpose of the proceedings (invariably, this has not been accurately explained to the child)
- Ask the child what would make life easier if the Judge orders that the child return to their home State;
- Ask the child what would make life easier if the judge orders that the child can stay in Australia;
- The Family Consultant must find out what communication the child has had with the left behind parent since being removed or retained in Australia, and to be in a position to recommend to the Court when electronic communication should commence and how it should be structured;
- The family consultant also needs to be in a position to recommend to the Court: any counselling or support services from which the child may benefit (like Marilyn Freeman's program for children – FindingHome) in the home State or somewhere other than the State of refuge.

If the return application relates to more than one child, the children are seen separately and together.

The Family Consultant comes to Court on the same day and delivers an oral report of their assessment of the child and the matters on which they have been directed to report. There can be limited cross-examination. The Family Consultant's evidence usually provides a clear indication of whether and what electronic / virtual contact there should be between the child and the left behind parent. It is easy to gauge from the Family Consultant's observations and record of what the child said whether it will be an 'object to return' case given the age of the child or that a grave risk exception will be alleged. The Family Consultant's evidence is transcribed, and a copy is provided to the taking parent, the left behind parent and the mediator. There may be a further reportable assessment directed to any exception relied upon by the taking parent as and when the response to the application is filed. The taking parent and the left behind parent are both interviewed for any subsequent assessment.

This early intervention is not compulsory. Whether or not it is ordered will depend on how interested the judge is in hearing the child's views. There may be limited amenity to interviewing a child who is under 5 years of age. My view, subject to hearing argument, is that most children of school age and over have something to say and should be heard. I recall one case in which a child was asked whether video time with his father was enjoyable. He responded words to the effect of "…yes but last time Dad showed me a gun and said he would use it to kill himself if I do not come home. I think maybe it was a not a real gun." A seven-year-old child in another case revealed a detailed plan to kill his younger brother and then himself if the Court ordered his return and he was separated from his mother.

Early intervention by a Family Consultant may be to provide expert evidence of childhood development and the implications for a child where the taking parent's care of the child will be disrupted because they face, say, a period of incarceration in the State of habitual residence. I ordered such a report early this year where a father had obtained an order that he have full custody of a baby, and the mother have only brief supervised access, in circumstances where the couple had never lived together, and he had spent only a few hours with the child prior to the wrongful removal. The purpose of the evidence was to inform the Court of the implications of a baby being removed from her sole carer.

At the 8th Special Commission, there were discussions led by the United Kingdom on the standard which should be applied to social science assessments in cases under the 1980 Convention. The point was that the limited social science assessments done for return proceedings must not be contaminated by best interests' considerations. If this occurs, the parents, their lawyers and any inexperienced Judge can be led astray.

Conclusion

The participation of children in return cases must be transparent, principled and not result in the child feeling responsible for the outcome. The aim of appointing an Independent Children's Lawyer or ordering a Preliminary Hague Report is to accord respect to a child who is the subject of a return application, to give them some age-appropriate insight into the situation in which they unwittingly find themselves, and to provide them with a voice, not a choice.

Conclusions by the Meeting Chairperson, Mr Philippe Lortie

It is clear from our discussions that the three issues examined during the Experts' Meeting, held in London on 19 and 20 October 2023, all require more "nurturing". All of them require that we keep a close eye on future developments. In all cases, we will need to continue hearing from judges and Central Authorities. It will also be important to collect case law for INCADAT on those three important issues, which implies that the HCCH will need to work more on obtaining voluntary contributions to maintain INCADAT.

Of the three issues, I am the least worried about the parallel return applications and asylum claims, as they are limited to cases where the taking parent seeks refuge in a State other than that of their nationality. These cases are relatively rare and should remain relatively rare as the taking parent is more likely to remove or retain the child in their State of nationality.

Regarding domestic violence and the Article 13(1)(b) "grave risk" exception to return, we heard from NGOs that there are "two camps". If there are indeed two camps, I would say that one camp is pessimistic, while the other one is optimistic. The great majority of experts attending the Experts' Meeting fall within the latter category. We have no choice but to make the 1980 Child Abduction Convention work. One thing is certain: we are all working towards the best interests of the child. It is agreed by all that child abduction also constitutes violence towards the child, as does family violence. Both should be prevented at all costs. Domestic violence should be addressed in the State where it is taking place. If properly addressed in the State where it is taking place, this should go some way in preventing international child abduction. A child has the right to maintain personal relations and direct contact with both their parents on a regular basis, except in circumstances where doing so is not in their best interests. It is understood that a parent cannot unilaterally change the child's right to have contact with the other parent. Most importantly, it is fundamental to offer a child the possibility to live in a peaceful environment, with parents who can effectively work together in raising the child, whatever form the family ultimately takes and regardless of whether the parents are married, separated or divorced. Hopefully, the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention will provide an opportunity for all the parties and actors involved to discuss these issues, and to understand each other better, while keeping the best interests of the child as the main focus of the discussion. It appears that recent case law that follows the GGP on Article 13(1)(b) is going in the right direction, but long-term positive results cannot happen overnight. Lots of work is still required before we can celebrate success. It is important that everyone recognises that the 1980 Child Abduction Convention, when applied correctly, is a solution and not a problem.

Regarding the participation of the child in abduction proceedings, it appears that the 2023 Special Commission has gone as far as possible. Now, it is a question of raising awareness to make certain that actors follow the good practices recognised by the Special Commission.

As I mentioned at the beginning, it will be important to continue hearing from judges and Central Authorities on these three issues. It will also be important that we collect case law for INCADAT on these three important issues to make a better assessment of actions to take in the future.

I would also like to underline the value of evidence-based research to strengthen the effective operation of the 1980 Child Abduction Convention. The detrimental impact of abduction on children and family members is well-known to many experts working in the area but, in my view, all actors involved in cases of child abduction could benefit from more awareness

raising. In addition, general information directed to the public on the impact of international child abduction could also go some way in preventing child abductions. Important gaps remain in evidence-based research. For instance, more research could be undertaken on the prevalence of voluntary agreements reached in the context of international child abduction and the extent to which positive outcomes are reached through such agreements. Additional research could also be conducted on any subsequent legal proceedings following the resolution of the 1980 Convention case and on the provision of aftercare support and post-return or non-return monitoring. As recommended and concluded by the 2023 Special Commission, further research to address these gaps, among others, would be welcome especially research of a collaborative or cross-jurisdictional nature. The Special Commission did, however, acknowledged that this is not part of the work programme of the Permanent Bureau, and that it places no burden on individual States.

Again, I would like to thank the multitude of actors, many of whom are in attendance today: Judges, members of Central Authorities, lawyers, barristers, mediators, enforcement officers, academics, researchers, social workers, psychologists, and representatives from non-governmental organisations (NGOs), just to name a few, for their dedication and hard work in nurturing the 1980 Child Abduction Convention. Many thanks again to all of them for making the 1980 Child Abduction Convention what it is today. Many thanks for keeping-up the good work!

Hague Conference on Private International Law - HCCH
Permanent Bureau

Churchillplein 6b
2517 JW The Hague
The Netherlands

Tel.: +31 70 363 3303
Fax: +31 70 360 4867
secretariat@hcch.net
www.hcch.net

HCCH

Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893
Conectando Protegiendo Cooperando Desde 1893

Hague Conference on Private International Law
Conférence de La Haye de droit internationa privé
Conferencia de La Haya de Derecho Internacional Privado