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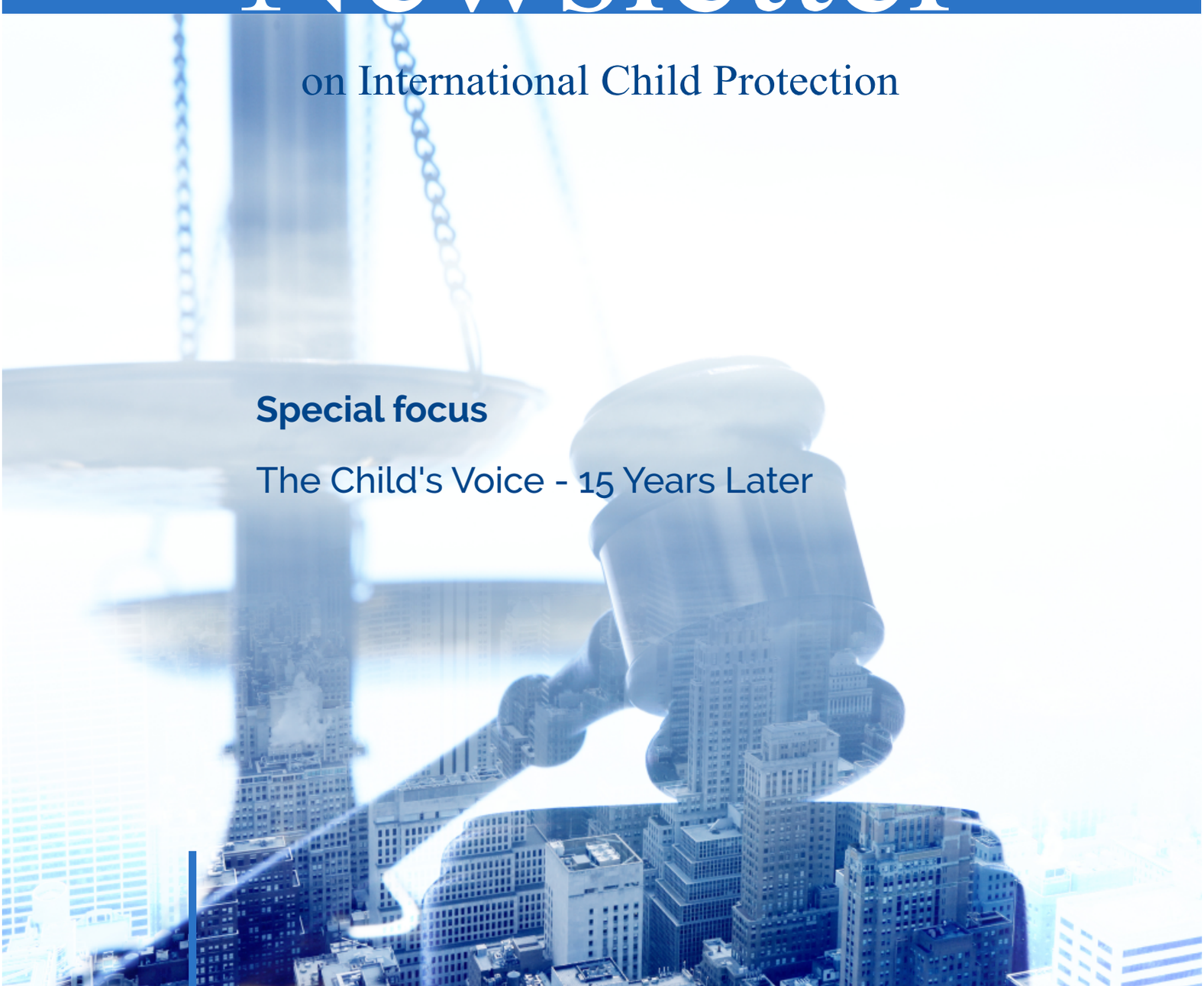

Special focus

The Child's Voice - 15 Years Later

A publication of the Hague Conference on Private International Law

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Foreword

The Child's Voice – 15 Years Later

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) is pleased to publish Volume XXII of the Judges' *Newsletter* with a special focus on "The Child's Voice – 15 Years Later" in co-operation with Professor Marilyn Freeman, University of Westminster, London, England, and Associate Professor Nicola Taylor, University of Otago, Dunedin, New Zealand, in the context of their British Academy research grant on the "objection of the child" exception under Article 13(2) of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the "1980 Convention").

The Permanent Bureau was most supportive when approached by both Professor Marilyn Freeman and Professor Nicola Taylor a little more than a year ago to support their British Academy application for funding. In the light of the very rich and high-quality contributions made by academics, judges, lawyers, mediators, psychologists, social workers and other professionals working in this field during the three workshops held at the end of the project (Auckland (7-8 February 2018), Genoa (7-8 March 2018) and London (22-23 March 2018), it was decided to bring the result of this work to the attention of the international community of experts working in this area through this publication. The objective of this publication is several-fold. It will provide an opportunity to share good practices in an area where the HCCH has not yet published a Guide to Good Practice. Further, it outlines examples of guidelines and normative work developed in relation to the voice of the child. It will also provide an opportunity to raise trust and confidence between the different international actors in an area where there are as many practices on how to hear the voice of the child as there are legal cultures and traditions. This is of the utmost importance, in particular regarding the cross-border recognition and enforcement of measures of protection concerning children under the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the "1996 Convention"). Under the 1996 Convention, recognition of measures of protection may be refused "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State" (Art. 23(2)(b)). Judges and practitioners will need to be familiar with and respect the different ways in which a child can be heard, including in the context of mediation, with a view not to trigger this ground of refusal unnecessarily.

While the United Nations Committee on the Rights of the Child has produced a General Comment on this issue,[1] the HCCH has done very little work on the "objection of the child" with the exception of publishing a Judges' *Newsletter* on the subject in 2003, which explains the title of the present Special Focus "The Child's Voice – 15 Years Later". The Special Focus of the 2003 Judges' *Newsletter* was the "Child's Voice" in international child protection cases, which is a broader subject than the scope of the British Academy project as it covered the hearing of the child in any circumstances including both the 1980 Child Abduction and 1996 Child Protection Conventions. In 2011, the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions adopted a Conclusion and Recommendation on the subject (C&R No 50), to which we will come back later.

In the late 1970s, the HCCH and the Council of Europe developed pioneer provisions regarding the voice of the child respectively in the work that led to the 1980 Hague Convention and the 1980 Child Custody Convention.[2] A lot of the work carried out at the HCCH at the time found inspiration in the work of the Council of Europe and vice versa. Nine years later, the Convention of 20 November 1989 on the Rights of the Child (the "UNCRC") followed with Article 12.

In the late 1970s, there were 27 Members of the Organisation[3] (83 Members today) participating actively in the negotiations of the 1980 Convention. As a result, as for all Hague Conventions, the text developed reflected some of the trends found in the domestic laws of the States sitting around the negotiation table.

Family law was undergoing massive changes at the end of the 1970s. The child, who was previously an object of the law, was becoming a subject of the law. Progressively, the age of majority was changing from 21 years of age to 18 years of age. One could read in Dutch legislation that in child custody cases, children above the age of 14 should be given the opportunity to be heard in relation to custody issues. Furthermore, in the previous version of the United States of America *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA), decisions concerning child custody were to be taken taking into consideration the best interest of the child. However, some legislation in the United States of America provided that children under the age of 14 years old should not be consulted.

This development led to the inclusion of Article 15 in the 1980 Child Custody Convention. In child custody cases, apart from those in the context of removal, recognition and enforcement of custody orders may be refused "if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child".[4] Before reaching a decision, "the authority concerned in the State addressed shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding" in accordance with Article 15.

In this context, when it came to the negotiation of the 1980 Convention, it was only natural to include a provision concerning the views of the child as part of the defence in relation to the return of the child. However, the discussions were very divisive because of concerns that on the sole basis of the views of the child, a judicial authority could, by deciding on the non-return of a child, in fact decide indirectly on custody issues. Article 13(2) of the 1980 Convention reads as follows: "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."

This provision was negotiated against the age limit of application of the Convention being 16 years of age. The reason for this derives from the objects of the Convention themselves; indeed, it was recognised by the negotiators that a person of more than sixteen years of age generally has a mind of his or her own which cannot easily be ignored either by one or both of his or her parents, or by a judicial or administrative authority.[5] Therefore, because some children below sixteen years of age may attain an age and degree of maturity at which it is appropriate to take account of their views, it was important to provide a provision to avoid forcible returns. Article 13(2) was viewed as an escape route for mature adolescents.

In the Explanatory Report on the 1980 Child Abduction Convention, Elisa Pérez-Vera explains that "[s]uch a provision was 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, as regards this particular point, 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."[6] Pérez-Vera goes on and explains that "[i]n general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion — and does not impose upon them a duty — to refuse to return a child in certain circumstances."[7]

Nowadays, most judicial and administrative authorities are also obliged in any proceedings affecting the child to apply Article 12 of the UNCRC, which provides as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Furthermore, the principle of Article 12 of the UNCRC has been incorporated in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. As a result, children should be given the opportunity to be heard in any return proceedings under the 1980 Convention, and not only in proceedings limited to a defence under Article 13(2). It is important to note that in its latest decision on the 1980 Convention, *Office of the Children's Lawyer v. Balev*,[8] the Supreme Court of Canada indicated that there is no conflict between the 1980 Convention and the UNCRC, and in particular between Article 11(2) of the 1980 Convention and Article 12 of the UNCRC.[9] In June 2011, Part I of the Sixth Meeting of the Special on the practical operation of the 1980 and 1996 Conventions adopted on this issue Conclusion and Recommendation No 50 ("C&R No 50"), which reads as follows:

"The Special Commission welcomes the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defence has been raised. The Special Commission notes 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. At the same time the Special Commission emphasises the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognises the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity."

It is reassuring to read in the contributions to this Volume of the Judges' *Newsletter* that seven years after Part I of the Sixth Meeting of the Special Commission and fifteen years after the publication of the Judges' *Newsletter* on "The Child's Voice", many jurisdictions are following and giving effect to C&R No 50 of June 2011. It is hoped that the following contributions will inspire other States and jurisdictions to do same. We hope that you will enjoy as much as we did reading this Volume of the *Judges' Newsletter* with a special focus on "The Child's Voice – 15 Years Later". We wish you a happy reading and a lovely summer (northern hemisphere) or winter (southern hemisphere).

Philippe Lortie
First Secretary

Frédéric Breger
Legal Officer

1 See United Nations Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at < http://www.refworld.org/docid/4ae562c52.html >.
2 Council of Europe, *European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody on Children*.
3 Argentina, Australia, Austria, Belgium, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Suriname, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela.
4 1980 Child Custody Convention, Art. 10 1) b).
5 Almost 40 years later, one could imagine that this age is now 14 years of age.
6 See 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 ("Explanatory Report"), para. 30.
7 Explanatory Report, *ibid.*, para. 113.
8 2018 SCC 16, available at: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do >.
9 See para. 34 of the decision on the conflict with the UNCRC and paras 75-81 more specifically in relation to Art. 13(2) of the 1980 Convention.

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Special Focus

The Child's Voice - 15 Years Later

The articles in this Special Focus are contributions received from several speakers who participated to the various Workshops organised in Auckland, Genoa and London in the context of the British Academy research grant on the "objection of the child" exception under Article 13(2) of the 1980 Convention.

1. Outcomes for Objecting Children under the 1980 Convention

By Associate Professor Nicola Taylor *(University of Otago, Dunedin, New Zealand)* ***& Professor Marilyn Freeman*** *(University of Westminster, London, England)*

Introduction

The issue of children objecting to their return in proceedings under the 1980 Convention particularly vexes the family justice sector internationally as an order for return to a State of habitual residence in such circumstances disregards the child's expressed objection. Given the absence of systematic empirical evidence on use of this exception, we were therefore pleased to receive a research grant from the British Academy to undertake a cross-jurisdictional and interdisciplinary project in England & Wales and New Zealand from 27 March 2017 to 26 March 2018. This mixed-methods project enabled us to investigate, on a global basis, the tensions and challenges inherent in use of the child's objections exception under Article 13(2) of the 1980 Convention. This article outlines the various aspects of the project that were centred around an international literature review, caselaw analyses in New Zealand and England & Wales, a global online survey, interviews with family justice professionals and family members (parents and abducted children/young people), and specialist Workshops in Auckland, Genoa and London. We are particularly delighted that 22 of the experts we invited to make presentations at these three Workshops during February/March 2018 agreed to provide written papers for this issue of the *Judges' Newsletter*. This enables the wider international child abduction community to benefit from the project outcomes and to contribute in the future as we move to extend it, in a new yet-to-be-funded project, beyond the narrower issue of children's objections in 1980 Hague Convention cases, to the wider issue of child participation and hearing the child in Hague Convention cases more generally (*e.g.* the 1980 Child Abduction and 1996 Child Protection Conventions and other relevant Hague Conventions). The establishment of an interdisciplinary International Working Group to progress the issues raised by our project is therefore planned.

The Child's Objections Exception to Return

Article 13(2) of the 1980 Convention states that a court hearing an application may refuse to order return when an abducted 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.

This is a complex provision as there is no minimum age set in the 1980 Convention for when it applies, nor any guidelines for assessing the child's maturity. The objection must be more than a preference and the child must object to returning to the State of habitual residence and not to returning to the left-behind parent - notwithstanding that the place and the person may be the same in the child's mind, especially if the abducting parent (most usually now the primary or joint primary carer mother) refuses to return with the child. There is no guidance in the 1980 Convention on how it is to be found whether children object to return or on the way in which they should be heard. Even if the child is found to object, and to be of an age and degree of maturity at which it is appropriate to take account of their views, the child may, nonetheless, still be returned to the State of habitual residence against their wishes as the fulfilment of these criteria simply creates a discretion for the court which it must then exercise in determining the matter.

This approach is somewhat inconsistent with i) the *United Nations Convention of 1989 on the Rights of the Child* (UNCRC) which includes the child's right to express their views and to be heard under Article 12; and ii) Article 11(2) of the Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003) (inspired by Art. 12 of the UNCRC) which provides guidance on how certain aspects of the 1980 Convention should be interpreted within the Member States of the European Union (other than Denmark). The proposed Recast of Brussels IIa goes further than the current Regulation, and is more consistent with the provisions of the UNCRC, as Article 20 contains the instruction that Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings, and that those views should be given due weight in accordance with his or her age and maturity, and the authority's considerations in the decision should be documented. Therefore, the acknowledged tensions and challenges of the child's objections exception include the need to strike the right balance between

respecting the individual child's rights, in the way in which they are currently understood, and upholding the collective interest in preventing/deterring abductions.

Research Project

Our research project funded by the British Academy comprised the following five aspects:

Literature Review (Taylor, Freeman & Stephens, 2018): This reviewed the international evidence-base on the child's objection exception, including statistical analyses, research and professional publications. The key issues addressed included the genesis and history of the child's objections exception; state practices on hearing the child; interpretation of the exception; age and degree of maturity of the child; undue influence; the exception in the context of children's rights developments, the UNCRC, the Brussels IIa Regulation and the proposed Brussels Recast; the practical operation of the exception; how children should participate in 1980 Hague Convention proceedings, and suggestions for reform.

Caselaw Analyses (Freeman, Taylor & Wright, 2018): Reported court judgments examining use of the child's objections exception to return were analysed in England & Wales from 1985, and New Zealand from 1991, through to 2017. The similarities and differences in approach between these two jurisdictions were also identified.

Online global survey of family justice professionals: An online survey to ascertain global use of, and experience with, the child's objections exception was completed by 97 family justice professionals from 32 countries: Australia (5), Belgium, Brazil, Canada (8), Chile, Croatia, Denmark, Estonia (2), France, Germany (11), Hong Kong, Hungary, Israel (2), Italy, Kenya, Latvia (2). Lebanon, Lithuania, Luxembourg, Malta, Norway, NZ (16), Poland, Portugal (2), Russia, Sweden (2), Switzerland (3), The Netherlands (3), South Africa, UK (16), USA (4) and Venezuela. Just over half the sample were lawyers/solicitors/barristers (50.5%) and 22.7% were judges. Other roles included researchers/academics (9.3%), mediators (8.2%), psychologists, managers and administrators/clerks (4.1% each), social workers (3.1%), and other (16.5%) e.g. caseworker, charity worker, public servant, jurist and mediation officer. Nearly a third of the sample (28.9%) was self-employed, 22.7% worked in law firms/chambers, 24.7% in a court, 22.7% in a Central Authority, 14.4% in a government department/agency, 9.3% in university/tertiary institution, 6.2% in a NGO, and 3.1% in the non-profit sector or IGO. One-third of the sample (33%) spent 0-9% of their current professional work time on international child abduction cases/issues, while 17.5% spent 10-19% and another 17.5% spent 20-29%. Six respondents (6.2%) spent 90-100% of their worktime on abduction matters. The respondents had worked in the international child abduction field for between three months – forty years (mean: 11.7 years; s.d. 9.1 years), with 60% having between five to twenty years' experience.

Research interviews with family justice professionals and family members with experience of the child's objection exception: Research interviews were undertaken with eight family justice professionals from Switzerland (5), Israel (2) and England (1), and with thirteen family members who had been involved in 1980 Hague Convention proceedings. The family member sample involved ten parents (nine taking mothers; one left-behind father) and three abducted children/young people (from two families) aged 19, 15 and 8 years. Five interviews were conducted face-to-face, seven by skype and one by telephone. The family members were recruited through the Child Abduction Lawyers' Association (CALA – UK), GlobalAARK (Global Action on Relocation and Return with Kids) and individual lawyers who agreed to pass details of the research onto their clients who then contacted the researchers directly. The jurisdictions involved in these abductions were: Hungary / England; New Zealand / England (2); France / England; USA / England (2); Spain / Wales; USA / Scotland; Australia / New Zealand; and France / Israel.

Specialist Workshops: We hosted three specialist cross-jurisdictional interdisciplinary Workshops in Auckland (7-8 February 2018), Genoa (7-8 March 2018) and London (22-23 March 2018) with experts from the following 19 jurisdictions: Australia, Belgium, Croatia, Czech Republic, England & Wales, France, Germany, Greece, Italy, Japan, New Zealand, Poland, Russia, Scotland, Singapore, South Africa, Spain, The Netherlands and the United States of America. We had originally planned to hold regional dissemination events in Auckland, Genoa and London to disseminate our preliminary project findings within the Asia Pacific region, the various regions of Europe, and the wider global jurisdictions in which we had specialist contacts who were likely to want to attend. However, the high level of interest generated internationally by our project during 2017 led to us recognising the unique opportunity that collaborative Workshops would offer instead of pure dissemination events. We thus used the three Workshops to invite abduction specialists to come together, to share our preliminary research findings, to gather invaluable additional specialist perspectives on children's objections and child participation in many of the jurisdictions of the State Parties to the 1980 Hague Convention, and to ascertain and discuss other issues of relevance including how best to move forward from this important research. These Workshops thus became integral to the project, contributed to the rich material it produced, and enabled current international thinking on the child's objections exception and the role of children in 1980 Hague Convention proceedings to be shared internationally through this issue of the *Judges' Newsletter*.

The design of the three Workshops was identical in that each began with a lecture delivered by a well-known international specialist in the field to set the scene in a broad context for the Workshop that followed the next day. We also delivered a one-hour presentation on the key

findings from our project on Outcomes for Objecting Children under the 1980 Convention at each Workshop.

i) Auckland, 8-9 February 2018.

This first Workshop was attended by 39 invited delegates from five jurisdictions: New Zealand, Australia, Japan, Singapore and England & Wales. The Workshop was interdisciplinary in nature with judges, solicitors, barristers, academics, Central Authorities, psychologists, government representatives, report writers, mediators and counsellors in attendance. Professor Mark Henaghan, Dean of the Faculty of Law, University of Otago, New Zealand, opened the Workshop with a lecture entitled *The voice of the child in international child abduction cases – Do judges have a hearing problem?* His key message was that we need to act with children, not on them, as this is respectful for the dignity of the person the decision is about. He expressed the view that the 1980 Convention is "totally out of tune with a children's rights framework". This statement was made in the context of the general support he expressed for the Convention's achievements and continued operation. The question was how to make it work better. The programme also included papers by: Dr. Sarah Calvert, clinical psychologist and specialist report writer, who spoke about children and high conflict parenting disputes, estrangement, alienation, relocation, abduction and entrenched conflict; The Hon. Justice Victoria Bennett, Hague Network Judge, Family Court of Australia, and Caroline Smith, Victoria Legal Aid, who together discussed the role of children in international child abduction proceedings; Judge Wong Sheng Kwai, Family Justice Courts, Singapore, and Judge Tomoko Sawamura, Director, First Division, Family Bureau, General Secretariat, Supreme Court of Japan, who both participated in a practitioner and judicial panel on the role of children in 1980 Hague Convention proceedings, together with Judge Lex de Jong from New Zealand, and a barrister from Australia.

ii) Genoa, 8-9 March 2018.

This second Workshop was also highly interdisciplinary, being attended by 31 academics, lawyers, mediators, judges, researchers, psychologists and government representatives from twelve jurisdictions: Italy, Belgium, Croatia, Czech Republic, England & Wales, France, Germany, Greece, New Zealand, Poland, Spain and The Netherlands. Professor Thalia Kruger, University of Antwerp, Belgium, delivered the opening lecture on *The Brussels IIa Recast: Enhancing the best interests of the child?* She highlighted the changes proposed for the Brussels IIa Regulation that has been in operation between all Member States of the European Union, other than Denmark, since 1 March 2005. Although it is uncertain whether the Recast will be finalised by the time the UK is due to leave the European Union in March 2019, the departure, if it takes place, will create challenges for abducted children that must be recognised and met. Children who are subsequently abducted between the UK and countries within the European Union will no longer be subject to the reciprocity currently existing between these jurisdictions through the operation of this Regulation. Notwithstanding the planned retention of the terms of the Regulation through the European Union (Withdrawal) Bill 2017-19, the UK will be recognised only as a third party nation for these purposes. These issues provided important points of consideration for the invited delegates. The Workshop programme also included presentations from: Victoria Stephens on the findings from her and Professor Nigel Lowe's statistical study of all 2015 return and access applications under the 1980 Convention; Sara Lembrechts, University of Antwerp, The Netherlands, who spoke about the Ewell Project case analysis on children's objections; and lawyers from Italy, Greece, England & Wales, Spain and Poland who formed the international practitioner panel discussing children's objections and the role of children in 1980 Convention proceedings in their respective jurisdictions. An Italian roundtable discussion enabled Judge Guiliana Tondina from the Tribunal of Minors in Genoa, a local lawyer and a psychologist from Milan to share their work in the international child abduction field.

iii) London, 22-23 March 2018.

The final Workshop began with a much-anticipated lecture by Baroness Brenda Hale, President of the Supreme Court of The United Kingdom, on *Child abduction from the child's point of view*. Baroness Hale confirmed her support for child participation as set out in the cases of re D [2007] 1 AC 619 and *re M and Another (Children) (Abduction: Rights of Custody)* [2008] AC 1288 and posed the question of how this can best be achieved in Hague Convention proceedings. The 67 invited participants who attended the lecture and/or Workshop came from eleven jurisdictions: England & Wales, France, Germany, Italy, Japan, New Zealand, Russia, Scotland, South Africa, The Netherlands and the USA. The interdisciplinary nature continued with judges, lawyers, mediators, non-governmental organisations, academics, researchers, psychologists, government representatives and policy makers in attendance. The Workshop programme included papers from: Mr. Justice MacDonald, the Deputy Head of International Family Justice for England & Wales and one of their two Liaison Judges, who spoke about the perspective of a judge hearing child abduction cases in England & Wales, recognising the challenges for both the judge and the child involved; Philippe Lortie, First Secretary, The Permanent Bureau, The Hague Conference on Private International Law, The Netherlands, whose paper focused on the voice of the child (including an objection by the child) in child abduction proceedings; Professor Nigel Lowe, University of Cardiff, who presented findings from the 2015 statistical analysis of applications under the 1980 Convention; Professor Helen Stalford, Liverpool Law School, who discussed an analysis of case law regarding the child's objections exception under the 1980 Convention and the Brussels IIa Regulation;

Angela Adams, Practice Supervisor with the Cafcass High Court Team, who spoke about Cafcass Practice in 1980 Hague Convention cases; and Judge Annette Olland, Family Judge of the Bureau Liaison, Judge International Child Protection, District Court of The Hague, and Annelies Hendriks, Guardian ad Litem, who spoke about the pilot scheme in The Netherlands using a guardian ad litem in child abduction cases. The international practitioner panel comprised lawyers from England & Wales, the USA, South Africa and France. Sir Mathew Thorpe provided the concluding remarks to wrap up the highly successful Workshop series.

Key Project Findings

We found a wide divergence in the attitudes of family justice professionals towards the child's objections exception ranging from a minority who thought the exception was overused and abused, to the majority who felt it was appropriate to listen to the child's views in the context of the exception. As the 1980 Convention is premised on the desire to protect children internationally from the harmful effects of their abduction, those in the latter group questioned whether returning a child against their wishes, on the basis of upholding the Convention, can be said to be protecting a child from harm. Concern was also expressed about children's awareness of the exception since families are often unaware an abducted child can get their own lawyer or have their voice heard. Publication of child-friendly information was advocated on how the system works, as well as the availability of specialist advice and support for children to help them cope better. It was noted that, in practice, the restrictive approach to separate representation in England & Wales can result in last-ditch separate representation applications at the appellate or enforcement stage. These cause great anxiety and stress for all involved, and it was suggested that it would be better for children to be more readily separately represented from the outset, as occurs in some other jurisdictions.

We also found that the practices of contracting states relating to the child's objections exception vary considerably depending on domestic laws and procedures. These sometimes involve the use of independent experts/intermediaries between the child and the court; separate legal representation of children; children joined as parties to the proceedings; or judicial interviews with children. One of the most striking of our findings relates to the wide range of specialists involved with the child/family to inform the legal process when a child's objections are raised – 17 different types of specialists were identified within our global survey including psychologists, family consultants, counsellors, social workers, guardians ad litem, children's officers, child protection officials, youth department workers and child protection officials. While social science reports were said to be very helpful in assisting parties to understand, or hear, the view of their child from someone independent, and can be helpful in assisting parents to reach agreement about appropriate arrangements if a child is to return, the variation in their quality in abduction cases was of particular concern to some survey respondents. They emphasised that whoever speaks to the child should be specially trained to assess a child's objections. Specific concerns were also raised about children who are shy and lack confidence, or have learning or other disabilities, and their need for a skilled interviewer. In some jurisdictions judges received no training to hear children, and there was uncertainty regarding whether the purpose of a judicial interview with a child was to provide evidential material for the subsequent hearing. The children may perhaps assume they are seeing the judge to put their views directly to the decision-maker, yet the judge may feel constrained in relation to the use they can make of what they observe and hear from the child.

The abducting mothers we interviewed felt that greater account should be taken of children's views, and that children should have their own lawyer and be made parties to the proceedings, because parents see their cases from their own perspectives. They emphasised the importance of children driving the proceedings as parents cannot be objective in these circumstances. The mothers also suggested that someone should be present when the psychologist or other specialist spoke with the child, or that a transcript should be available, or some other way of knowing what went on, in order to protect the child and ensure that what the child said had been properly understood. The children we interviewed were pleased to be able to talk to the judge without interruption and to use their own voices rather than having someone relay what they had said. They felt that professionals needed to understand that children have their own views and opinions and that it is not right these are given less significance because they are being expressed by children. They articulately explained how courts need to understand that 1980 Convention proceedings are a defining moment in a child's life.

Conclusions and Future Directions

The project, while centred on England & Wales and New Zealand, engaged with a very diverse range of family justice professionals and a smaller number of family members:

- 97 family justice professionals from 32 States completed the online global survey;
- 137 specialists from 19 jurisdictions attended the three specialist Workshops;
- eight family justice professionals from Switzerland, Israel and England took part in a research interview; as did 13 family members (ten parents and three abducted children/young people) who had been involved in 1980 Hague Convention proceedings.

Using a multi-method approach, the project collected key information from research publications and English and New Zealand caselaw on current thinking about, and use of, the child's objections exception to return. In addition, the global online survey and research interviews with family justice professionals and family members provided new findings on the exception that had not been explored in previous studies. The project identified wide variations in child participatory practice across the contracting states, leading to our recommendation that greater consideration be given to how the 1980 Hague Convention can take better account of Article 12 of the UNCRC.

We also recommend that the word 'its' be removed from the wording of Article 13(2) of the 1980 Convention so that children's dignity is properly respected. This would lead to the following rewording:

> 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 **his or her** views. (emphasis added)

There was strong support for meaningful opportunities being afforded to children to be heard in abduction proceedings, with future work needing to focus on how the child is heard, when and by whom? The Workshop participants in Auckland, Genoa and London unanimously agreed that 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). We are now discussing the establishment of the IWG and how best to fund its meetings and work. Its membership will be critical to truly reflect the range of contracting states and the interdisciplinary expertise required. It is likely the first meeting will be held in London on 2 July 2019, immediately prior to the 4th ICFLPP Conference (on 3-5 July) when many of the key international figures will be in England. The IWG will not operate under the auspices of the Permanent Bureau of the Hague Conference on Private International Law although they, of course, have been invited to contribute to its work. To encourage good practice within State Parties the IWG will give consideration to the development of, for example, guidelines, guidance, standards or practice directions.

While there has been a significant movement towards greater recognition of children's right to be involved in decisions affecting their lives, this has been slower to be achieved in practice within the operation of the 1980 Convention globally. Our project has led to an emerging international consensus that the voice and role of children in 1980 Convention proceedings, and the diversity of practice across jurisdictions, is worthy of further consideration. Realising the participation rights of children in this field, whilst safeguarding the canons of the 1980 Convention, will be at the heart of the IWG's future work.

2. A statistical analysis of the child objections exception

By Nigel Lowe QC (Hon) *(Emeritus Professor of Law, Cardiff University)* ***& Victoria Stephens*** *(Freelance Research Consultant, Lyon, France)*

Introduction and background

As reported in the Winter/Spring 2018 edition of the *Judges' Newsletter* ('The 2015 Statistical Survey', Vol. XXI at p. 6), a fourth statistical survey into the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("the 1980 Convention") was conducted by the authors of this article, in consultation with the Permanent Bureau and the International Centre for Missing and Exploited Children (ICMEC). This article focuses on the application of the child objections exception to the obligation (under Art. 12) upon the courts to order the child's return in cases of wrongful removal or retention. It compares the findings of the 2015 Survey with those of the previous surveys of 2008, 2003 and 1999.

By way of background it should be said that the survey concerned Convention applications received by Central Authorities between 1 January 2015 and 31 December 2015. Data was collected from 76 Contracting States and information was obtained about 2270 return applications which were estimated to be 97% of all such applications made via Central Authorities in 2015. Outcomes of applications were recorded up to 18 months after the last possible application could have been received, namely, 30 June 2017. Applications unresolved after that date were classified as 'pending'.

Overall, 12% of applications ended in a judicial refusal (less than the 15% in 2008 and 13% in 2003, but higher than the 11% in 1999). Of the cases decided in court, 28% were refused (reversing an upward trend compared with 34% in 2008, 29% in 2003 and 26% in 1999). In terms of numbers, the survey recorded a total of 243 refusals and in 185 of these, information was provided on the grounds relied upon. Analysis of refusals is complicated by the fact that applications for return can be refused on more than one ground. In 2015, 16% of refusals were based upon more than one ground and in all 222 reasons were relied upon in the 185 cases. When this is factored in, as Table 1 below shows, the number and proportion of refusals were as follows:

Table 1 Judicial Refusals in 2015

	Number	Percentage
Child not habitually resident in Requesting State	46	25%
Applicant had no rights of custody	13	7%
Art. 12	32	17%
Art. 13(1)(a) not exercising rights of custody	11	6%
Art. 13(1)(a) consent	28	15%
Art. 13(1)(a) acquiescence	16	9%
Art. 13(1)(b)	47	25%
Child's objections	27	15%
Art. 20	2	1%
Other	0	0%
Number of reasons	**222**	**120%**
Number of applications	**185**	

The findings regarding the child objections exception

We now concentrate on the child objections exception. At 15% of all refusals, the 2015 finding is proportionally the lowest yet recorded for this exception. In 2008, 22% (58 cases) of refusals were based upon the child's objections exception, 18% (26 cases) in 2003 and 21% (21 cases) in 1999. Another difference between the 2015 findings and those of previous surveys is that whereas in 2015 67% of the refusals were solely based upon the child's objections, in 2008, only 46% were, with 50% in 2003 and 62% in 1999.

There were some interesting regional differences inasmuch as 31% of all refusals in Latin American and Caribbean States were based upon the child's objections as against 13% in States governed by the revised Brussels II Regulation, though in each case the actual number of refusals, nine, was the same. So far as individual States were concerned, Mexico had the highest proportion (45%, 5 out 11 refusals) of refusals based solely or in part upon the child's objections ground. Germany had the second highest number (4) but this amounted to 19% of all refusals. Many States had no refusals based either solely or in part on this ground.

Examining other variations, it was found that in 2015 proportionally more applications were refused based on the child's objections (19%) when the taking person was the father of the children compared with applications involving taking mothers (15%). However, this trend is less pronounced than in past Surveys with figures of 31%:13%, respectively, in 2008, 24%:16% in 2003 and 27%:4% in 1999.

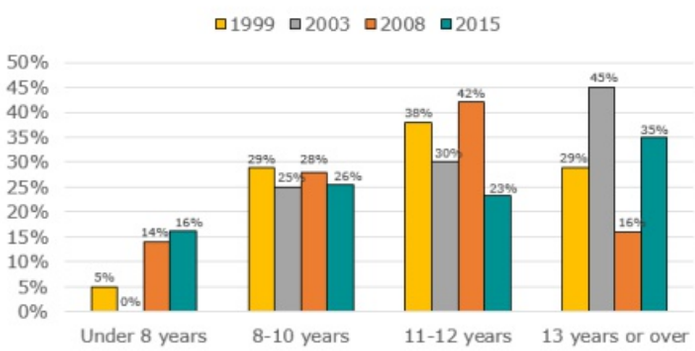
Proportionally more applications were refused based on the child's objections (30%) when the taking person was the non-primary carer compared with applications involving primary or joint-primary carers (15%). There was not a dissimilar finding in 2008 where the respective proportions were 31% and 12%.

The age of the child

So far as the age of the child is concerned, the 2015 Survey found that the average age of an "objecting child" was 11 years with the lowest age being 4 years (one application which also involved siblings aged 10 and 12). In 2008 the average age was found to be 10.7 years. In 2003 it was 11.3 years.

As Graph 1 below shows, in 2015 there was an increase in objecting children under the age of 8, though each of the cases also involved older siblings. On the other hand, there was a large increase in the proportion of objecting children aged over 13 compared with 2008, though still lower than that recorded in 2003.

Graph 1: The age of 'objecting children' compared with previous surveys



Some concluding remarks

The collective findings of the four surveys clearly dispel the fear (expressed when the 1980 Convention was being drafted) that the child's objection exception would provide a serious escape mechanism to the obligation to return. As with all the refusals the number of those based in whole or part upon a child's objection is small (27 in 2015) and, as already noted, the 2015 finding of 15% is proportionally the lowest yet recorded. However, the findings only refer to applications in which a return order was actually refused. They do not include the number of applications in which the child objections exception was pleaded, where the child objections exception was established but a return order was nevertheless made, nor was there any information on the number of applications in which the child was heard at all.

It should be remembered that, even though the number of refusals is small, *all* abductions are likely to be traumatic for the child.

Auckland Workshop (8-9 February 2018)

3. The voice of the child in international child abduction cases – Do judges have a hearing problem?

***By Professor Mark Henaghan**, Professor of Law, University of Otago*[1]

Introduction

Article 13 of the 1980 Convention enables an authority to uphold a child's objection to being returned. It is incorporated into New Zealand's law in section 106(1)(d) of the Care of Children Act 2004. The 'child objection' defence should give the child a voice in international abduction cases. We need to listen to children. They understand their lives better than anyone else, and their input will inevitably lead to better outcomes. Listening to children also advances their autonomy and provides them with dignity and respect.

Unfortunately, the child objection defence does not appropriately recognise the child's views. In particular, it does not enable children to express their wider views, it gives judges too much discretion to discount children's views, and it does not require that lawyers be appointed to represent children.

The Child Objection Defence

The child objection defence is found in Article 13 of the 1980 Convention. It states:

> 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*.[2]

European Union countries are required to give the child an opportunity to be heard unless this is considered "inappropriate". The relevant Regulation states:

> When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.[3]

This is a small step forward in recognising that children should be heard in Hague Convention cases. However, there is still much room for improvement.

The Current Impact of the Defence and the Convention

The percentage of judicial refusals to return based solely on the child's objections was 13% in 1999,[4] 9% in 2003,[5] 10% in 2008,[6] and 10% in 2015.[7] In 1999, 74% of Hague Abduction Convention decisions resulted in return orders,[8] and in 2015, 65% of the applications decided in court resulted in return orders.[9]

How the Defence Applies in New Zealand

New Zealand legislation does not follow the exact wording of the Convention. Section 106(1)(d) of the Care of Children Act 2004 is worded as follows:

> […] the child objects to being returned and has attained an age and degree of maturity at *which it is appropriate*, in addition to taking them into account in accordance with section 6(2)(b), also, to give weight to the child's views.[10]

The leading New Zealand case is *White v. Northumberland*, which was decided in the Court of Appeal.[11] The Court held that the child objection defence does not give rise to a presumption against return. The Court renounced Millet LJ's "in or out" approach in *Re R (Child Abduction: Acquiescence)*,[12] which provides that once a child is mature enough, they will not be returned unless there are countervailing factors.[13] The Court in *White v. Northumberland* preferred to follow Balcombe LJ's "shades of grey" approach instead, namely that the weight to be given to the child's views is balanced against the objectives of the Convention.[14] John Caldwell, a leading New Zealand family law academic says that the "shades of grey approach" means that "there remains a very real prospect that Convention considerations will outweigh the child-centric considerations underpinning the finding of the defence".[15]

Why Listen to Children?

It is essential that we listen to children. Children understand their own world better than anyone else. Each child is unique and sees their world in their own particular way. Giving the child an opportunity to express their views therefore leads to more workable arrangements about their care.

In addition, listening to children advances their autonomy. In the words of Michael Freeman:

> If children's rights are to be more than a political slogan, then children must demand them and must be

> encouraged and educated to do so. Access to people, lawyers and others, with an expertise and commitment will enable the young to develop the sort of claims consciousness which is a part of a rational autonomy.[16]

Further, it is important to have respect for the dignity of the person the decision is about. Allowing the child to express their views is democratic and inclusive. Most children want to have a say. Research carried out with Nicola Taylor and Megan Gollop in our relocation study shows that children want to be heard.[17] Adam, aged 11, said that professionals should "[l]isten to kids, not make their own decisions. They have to listen."[18] Louise, aged 13, said, "I think that [the children] deserve to have a voice".[19] Brett, aged 13, said, "Make sure [children] have their say."[20]

Children expressing their views also helps the court to see them as people. Lady Brenda Hale has said that when a child is given the opportunity to be heard in court proceedings, "the court will then see the child as a real person, rather than as the object of other people's disputes or concerns".[21] In *Hollins v. Crozier*, Judge Jan Doogue spoke of the importance of seeing the child this way in the context of the child objection defence:

> The Court has a duty not to pay just lip service to this requirement. The Court has a duty to listen to Joshua, to take into account his emphatic objection to being returned. The Court has a duty to see him as a person in his own right […] To do other than respect his ardently expressed views at this time would be draconian in the extreme. To do so would be to elevate the remedial and normative objectives of the Hague Convention unduly ahead of the defence contained in s. 13(1)(d) and the obligations this Court has in administering the principles and articles of the United Nations Convention on the Rights of the Child. It would result in treating Joshua as an 'object of concern' and not the person he is in his own right.[22]

This is a brilliant example of the application of the defence from a children's rights perspective.

We Need to Act with Children in Ascertaining Their Views

Adults should provide the scaffolding for children to build their own words. They should act *with* children, not *on* them. Laura Lundy's work on how to listen to and understand children sets out four pillars for children's participation:[23]

- Space;
- Voice;
- Audience; and
- Influence.

Space requires children being in an environment where they feel comfortable to put things in their own terms.[24] Voice focuses on the need to listen to children and put questions to them in a way that they can respond to them in their own voice.[25] The third pillar is audience. The listener must be able to be an appropriate audience for the particular child. Children will respond to an audience which they feel understands them and which they feel will fully listen to them.[26] Finally, influence is important. Children must know that what they say will have influence and will be used in a respectful way.[27]

Limitations on the Child's Views Under the Child Objection Defence

The child objection defence needs to be revised. It is unfortunate that children cannot express their wider views. As Claire Fenton-Glynn explains:

> Restricting the child's participation to only objections concerning returns, rather than recognizing the wider right to express his or her views, undermines [the objectives of ensuring that the child's views have been solicited and adequately considered] and limits participation to a very narrow issue.[28]

This undermines the potential strength of having a child objection defence in the first place. It also limits the information that a court may need to make the best possible decision about the nature and surrounding context of an objection.

In addition, the age and degree of maturity limitation leaves a great deal of discretion for many children not to be heard. Moreover, this limitation is especially problematic because, as Rhona Schuz notes, case law "shows that the way in which the child objection exception is interpreted depends on how the particular judge constructs age, maturity and capability".[29]

Further, there are also no requirements to appoint a lawyer to represent the child. To illustrate, *RCB v. Forrest* concerned four children (aged eight, nine, 12, and 14 years) who were not represented by a lawyer and were given no opportunity to express their views in court or directly participate in the proceedings.[30] The High Court of Australia held that "resolution of questions about a child's objection to return does not in every case require that the child or children concerned be separately represented by a lawyer".[31]

Conclusion:

The child objection defence is totally out of tune with a children's rights framework. It shows a lack of understanding of children's viewpoints and how important it is to incorporate a child's general point of view, rather than narrowly focusing on whether they want to stay or leave. It also fails to put the child's perspective into the context of the child's everyday life. What is at stake here is ensuring

that courts are fully informed as to what is happening to the child, how they are experiencing it, and what is really important to them in terms of their everyday life. Judges have a hearing problem when it comes to younger children and, given the narrow scope of the child objection defence, that further exasperates their ability to hear what is going on for the particular child. The time for reform is now.

1 I would like to thank Jonathon Yeldon for his assistance with this paper.
2 Convention on the Civil Aspects of International Child Abduction 1342 UNTS 89 (opened for signature 25 December 1980, entered into force 1 December 1983), Art 13 (emphasis added).
3 Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1, art 11(2).
4 See "A statistical analysis of applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 3, Part I, prepared for the attention of the Fifth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (October 2006) (available on the Hague Conference website at < www.hcch.net > under "Child Abduction"), at p. 37.
5 *Ibid.*, at p. 37.
6 See "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: Part I — Global report", Prel. Doc. No 8A (revised), prepared for the attention of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (November 2011) (available on the Hague Conference website at < www.hcch.net > under "Child Abduction"), at p. 28.
7 See "Part I – A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* — Global report", Prel. Doc. No 11A of February 2018 (revised), prepared for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (October 2017) (available on the Hague Conference website at < www.hcch.net > under "Child Abduction"), at [84].
8 *Ibid.*, at [67].
9 *Ibid.*, at [66].
10 Care of Children Act 2004, s 106(1)(d) (emphasis added).
11 *White v. Northumberland* [2006] NZFLR 1105 (CA) [INCADAT Ref: HC/E/NZ 902].
12 The Court of Appeal of the United Kingdom (England and Wales), *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 (CA) [INCADAT Ref: HC/E/UKe 60].
13 *Re R (Child Abduction: Acquiescence)*, *ibid.*, at p. 734, as cited in *White v. Northumberland*, *op.cit.* note 10, at [27].
14 *White v. Northumberland*, *op.cit.* note 10, at [44] and [47].
15 J. Caldwell, "The Hague Convention and the 'Child Objection' Defence", *New Zealand Family Journal*, vol. 6, 2008, at p. 90.
16 M.D.A. Freeman, *The Rights and Wrongs of Children*, London, Frances Pinter, 1983, at p. 281.
17 N. Taylor, M. Gollop and M. Henaghan, *Relocation Following Parental Separation: The Welfare and Best Interests of Children*, Centre for Research on Children and Families and Faculty of Law, University of Otago, June 2010.
18 *Ibid.*, at p. 140.
19 *Ibid.*, at p. 133.
20 *Ibid.*, at p. 138.
21 Lady B. Hale, "Children's Participation in Family Law Decision-Making: Lessons From Abroad", *Australian Journal of Family Law*, vol. 20, 2006, at p. 124.
22 District Court of New Zealand, *Hollins v. Crozier* [2000] NZFLR 775 (DC) at 797.
23 L. Lundy, "'Voice' is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child", *British Educational Research Journal*, vol. 33 no. 6, 2013, at p. 932. Although Lundy is discussing Article 12, her methodology can easily be adapted to other contexts.
24 *Ibid.*, at pp. 933–935.
25 *Ibid.*, at pp. 935–936.
26 *Ibid.*, at pp. 936–937.
27 *Ibid.*, at pp. 937–938.
28 C. Fenton-Glynn, "Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings", *Journal of Comparative Law*, vol. 9 no. 1, 2014, at p. 134.
29 R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, Oxford, Hart Publishing, 2013, at p. 349.
30 *RCB v. Forrest* [2012] HCA 47, (2012) 247 CLR 304 [INCADAT Ref: HC/E/AU 1181].
31 *RCB v. Forrest*, *ibid.*, at [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [53] and [60] per Heydon J.

4. What happens to children in high conflict parenting disputes. How should we think of their "voice"?

By Dr Sarah Calvert. PhD. *(Family Court Specialist Report Writer, New Zealand)*

As research progresses our understanding of the impact of Family/Domestic Court processes on children and young people and we think more consistently about the 'voice' of the child,[1] the impact on children and young people of all forms of high conflict cases coming before the courts is becoming clear. It is evident that whatever the legal process involved (Hague proceedings, cases of alienation, cases involving domestic violence, cases of abuse against the child or young person themselves), the experiences of the children and young people are often remarkably similar and their self-reports as adults even more so.

This has led to a discussion about whether these kinds of cases, involving high conflict between parents which appears intractable, are, in fact, cases which should be viewed as 'child welfare' matters, and not just as a dispute between parents (or between parents and family). These are all situations in which children's lives, their day-to-day existence, is disrupted, compromised and sometimes changed beyond a child's understanding because of adult perspectives and decisions. Such cases involve an incapa-

city by parents to set aside their own feelings (however justified) and beliefs and focus on some of the most basic needs of human beings; to know and to be able to engage with our parents, siblings and close relatives

Research in many areas consistently demonstrates that our relationships with our biological parents is more than a social nicety, they play a significant role in our overall healthy development. They can be partially replaced by other relationships (especially if a parent dies), but not entirely. Some of the processes at work here are operating at bio-physiological levels of human development. Parent-child relationships can be very long lasting over the life span. Equally, our relationships with siblings are often the longest lasting of all human relationships.

Relationships need a 'glue' to maintain themselves. They exist in the day-to-day interactions that change our behaviours and indeed our brains, to attune to each other and to others. When that is not possible, the basic building blocks of being human - being a social animal - can be disrupted. This may not always be immediately apparent, and it can also be assumed that relationships can be picked up again in the future.

It is important therefore to consider carefully both the likely (and demonstrated) consequences of disruption to or the cessation of those relationships on children's long-term developmental outcomes. Some choices made by one parent, as in cases of international child abduction, can have the effect of ending, or effectively ending, a child's relationship with a parent and that parent's family.

State authorities intervene in children's lives when the state believes that a child's welfare is in some way at risk. Such intervention occurs when a child has been sexually or physically abused or where parents are unable (for whatever reasons) to provide adequately for their child or children. Clinicians and researchers are beginning to ask why we do not apply the same perspective about high conflict cases in the Family Court jurisdictions, including those involving international child abduction.[2] Research (and clinical experience) is beginning to provide us with data that suggests that children involved in high conflict cases have even more adverse outcomes that many children referred to state welfare authorities, including those children who are eventually removed from the care of their parents due to concerns about their welfare and wellbeing.

Fortunately, we have a body of research that is beginning to provide us with information which should be informing our decision-making in the Family Court.

What do we know about these children, both as children and, more importantly, as adults?

There is literature that can help us understand the outcomes for children whose lives are constrained by their parent's conflict. There are a number of major research papers (roughly 700), two narrative data sets and some commentaries that help us to form a view about this. In particular the work of Professor Marilyn Freeman[3] on the impact of international child abduction and the body of work developed by Dr Amy Baker and her collaborators[4] on parental alienation have produced data sets rich in narrative accounts from these children as adults. Similarly, the work of Kelly,[5] Kelly and Lamb[6] and Fiddler, Bala and Saini[7] has provided an overview of outcomes from a more research-based perspective.

This research is especially important for allowing us to hear the voices of those who experience international child abduction and alienation and to consider what differences each type of high conflict experience produce (or not). Hearing the voices of those who experience abduction, for example, enables us to see that the parental conflict and the loss of a relationship with a parent and family can and often does create significant trauma which the child, and then the adult they become, experience as an aspect of the parental conflict similar to that reflected by children alienated from a parent.

These are often small samples and usually not representative, although the consistency of the findings is significant. However, the data is also important because in the work of Baker et al. as well as Freeman, we have two data sets gathered in different parts of the world and analysing slightly different effects in each case. Reviewing the research, we can see that the outcomes for children (reviewing their experience as the adults they have become) are very similar.

In addition, the outcomes are reflective of the views of clinicians working both with children currently involved in these processes and with adults seeking help later on in life. They are consistent with what psychological and sociological theories elucidate about the impacts on aspects of human functioning and development given the issues which operate in such situations. The findings of the work by both Freeman[8] and Baker[9] is supported by research on adults estranged from parents, even where there is not high conflict and court involvement, where there are family difficulties or sometimes simply some form of mismatch or unhappy circumstance.[10]

Baker and her collaborators undertook research with adults who experienced an alienation process as a child or young person. Their samples come from a number of countries and include adults whose situations did not necessarily involve apparent high conflict post-separation difficulties. Nonetheless, Baker and her collaborators have

consistently found that alienation by a parent may have the following negative outcomes for children as they become adults:

- Poor self-esteem;
- Depression;
- Issues with adult attachment and intimacy;
- Alcohol abuse;
- Issues with self-direction (or self-agency or efficacy in life);
- Difficulties with social engagement, being able to identify and engage with others;
- Fears of abandonment; or
- Difficulties becoming independent, what is termed instrumentally competent.[11]

Baker *et al.* note that such children may ultimately feel that their only worth is in meeting the needs of another. They note that alienation requires the child to give up aspects of their own autonomy in order to accept the parental perspective they become aligned with. Therefore, the impact for the children and young people, no matter what they felt at the time, is likely to have long-lasting, negative impacts. It is very important to think about what a child or young person might voice in the midst of this conflict and what they might say many years later.

Freeman's sample of children abducted by a parent provides us with a tragically similar outcome with a very different population. What is important here is that her sample comprised those who felt the abduction was never warranted and those who considered it was (*i.e.* children who may have been 'realistically estranged' in some way from the left behind parent). Again, these children, now adults, reported pervasive and very major mental health issues arising from their experiences, including:

- Numbness, and blocking out;
- Issues with self-worth;
- Issues with their sense of personal identity;
- Mental health issues such as depression and suicidal ideation;
- Difficulties in personal relationships such as a difficulty letting people into relationships and difficulties with intimacy; and
- Changes in core perceptions of the world such as a difficulty believing anything can last or sustain- that is a pervading sense of insecurity and difficulties with trust.[12]

In Freeman's sample very significant effects were reported by 25 interviewees (73.53%), including those who even while reporting these effects said they felt the abduction was warranted or that they still supported their abducting parent.

Fiddler, Bala and Saini,[13] who have also researched and written about the outcomes for children who become alienated, estranged or simply separated from a parent, point out that children's responses in these situations often involve the development of psychological mal-adaptations caused by anxiety and by intolerable psychological conflicts between experience, knowledge, understanding and desire. They talk about an escalating cycle of fear and anxiety developing in the child, and later the adult, in these situations.

In their work, Fiddler and Bala list the following as potential negative outcomes for these children:

- Poor reality testing;
- Illogical cognitive operations;
- Simplistic and rigid information processing;
- Inaccurate or distorted interpersonal perceptions;
- Compromised interpersonal functioning;
- Distorted self-perceptions (often very negative self-hatred);
- Low self-esteem;
- Pseudo-maturity;
- Gender identity issues;
- Difficulty developing an independent identity of 'self';
- Aggression and conduct disorder type behaviour;
- Poor impulse control;
- Emotional constriction; and
- Frank psychopathology.[14]

So from different data sets, gathered in different parts of the world but all involving entrenched parental conflict in which the child or children have become enmeshed, it is evident that children do not escape the terrible impact of high conflict parental separation, alienation and abduction. The consequences are likely to be life-long. Tragically, the most significant impacts are in terms of development into adulthood, the loss of resilience and capacity, the inability to form a secure adult sense of identity and a loss of trust in adults and in a belief that they themselves lack the capacity for sustaining adult relationships.

Developmental literature and everything we know about the human species as a social animal, arguably one of evolution's most successful experiments, tells us that relationships with parents are hard and soft wired into that success. We are a species for whom our social engagement is tied to all aspects of our success as an individual; we do not survive well alone. Denying children a relationship with a parent and/or involving them in a distress of the end of the adult relationship will compromise their future.

and the parents...

Parental separation involves managing anger, disappointment, loss and the giving up of dreams. Added to this already toxic mix is the complex process that each adult (and the children) are managing the breaking of attachment bonds. None of us do this well. Attachment is so fun-

damental to our core sense of self and every aspect of our development that loss of those bonds creates deep anger and distress and sometimes psycho-pathology. Smyth and Moloney term the adult engagement in such conflicted situations as 'Loving Hate',[15] where the intensity of the adult distress contains extreme emotional states which powerfully drive both adult behaviour and impact on the children involved.

Children's voices?

Children cannot of course know the likely impact on them of the situation they find themselves in. We cannot foresee the future, their wishes are about the 'now'; the now of a parent who has treated them badly, the now of meeting the psychological and emotional needs of a loved parent perceived to have been hurt, the now of the psychological pressure from a mentally unwell parent.

Children's voices and the notion of their wishes/views are used by adults and parents (and indeed professionals, advocates and courts) to avoid our responsibility to children and to childhood. If we honestly thought children could make appropriate and responsible choices, we would not have an age of consent for sexual intimacy, we would not object to child labour (if it was by consent) or children as soldiers. However, we do, as adults, have views about such things and we, not children, have the power to enact our views not theirs.

We owe it to children to acknowledge the complexity of human relationships and of life. That life does not have easy answers or solutions. What children need is to be listened to and treated with respect, to know that we will think about what they say and give it genuine weight. This is what we want as adults, knowing that our own views do not always prevail. Children need accurate information and often they need time, time to think for themselves and not be patronised. We can be most respectful to children by recognising that like all the other people who our interventions and decisions touch, only they (not us) live their life.

A welfare issue?

If we began to see these situations as about children and their welfare, we might begin to make a genuine difference to a significant (if small) group of children and young people who have experienced international child abduction. The difficulty and complexity of these cases requires us to weigh many issues and consider how to craft a way forward which acknowledges the past, protects children and provides for the re-formulation of family ties both in the now of the child's life and later as they become the adults of our future. If we focus on the harm done to children in these cases, then we will focus on their welfare and understand that high conflict between parents which leads to alienation, abduction and gatekeeping is actually an abuse issue.

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1 See in particular G.C. Calloway and S.M. Lee, "Using research to assess children and 'hear' their voices in Court proceedings", *American Journal of Family Law*, vol. 31 no. 3,. 2017, pp. 140 – 157.

2 See C. Houston, N. Bala and M. Saini, "Crossover Cases of High Conflict Families Involving Child Protection Services: Ontario Research and Suggestions for Good Practice", *Family Court Review*, vol. 55 no. 3, 2017, pp. 362-374.

3 M. Freeman, *Parental Child Abductions: The Long-Term Effects*, London, International Centre for Family Law, Policy, and Practice, 2014.

4 See A.J.L. Baker, "Patterns of Parental Alienation Syndrome: a qualitative study of adults alienated as children", *American Journal of Family Therapy*, vol. 34, 2006, pp. 63-78; A.J.L. Baker and J. Chambers, "Adult Recall of Childhood Exposure to Parental Conflict: Unpacking the Black Box of Parental Alienation", *Journal of Divorce and Remarriage*, vol. 52, 2011, pp. 55-76 (DOI: 10.1080/10502556.2011.534396); A.J.L. Baker and M.C. Verrocchio,"Italian College Student-Reported Childhood Exposure to Parental Alienation: Correlates with Well-Being", *Journal of Divorce and Re-Marriage*, vol. 54, 2013, pp. 609-628 (https://doi.org/10.1080/10502556.2013.837714); A.J.L. Baker and N. Ben-Ami, "To Turn a Child Against a Parent Is to Turn a Child Against Himself: The Direct and Indirect Effects of Exposure to Parental Alienation Strategies on Self-Esteem and Well-Being", *Journal of Divorce & Remarriage*, vol. 52 no. 7, 2011, pp. 472-489 (DOI:10.1080/10502556.2011.609424).

5 J.B. Kelly, "Relocation of Children Following Separation and Divorce: Challenges for Children and Considerations for Judicial Decision Making", Paper presented at the 5th World Congress on Family law and Children's Rights, Halifax, Canada, 23-26 August 2009.

6 J.B. Kelly and M.E. Lamb, "Developmental Issues In Relocation Cases Involving Young Children: When, Whether, & How?", *Journal of Family Psychology*, vol. 17 no. 2, 2003, pp. 193-205.

7 B. Fiddler and N. Bala, "Children resisting post-separation contact with a parent: Concepts, controversies and conundrums", *Family Court Review*, vol. 48, 2010, pp. 10-47.

8 *Op. cit.*, note 3.

9 A.J.L. Baker, "Patterns of Parental Alienation Syndrome: a qualitative study of adults alienated as children", *op. cit.*, note 4.

10 L. Blake, "Parents and Children Who Are Estranged in Adulthood: a review and discussion of the literature", *Journal of Family Theory and Review*, vol. 9, 2017, pp. 521-36.

11 *Op. cit.*, note 4.

12 *Op.cit.*, note 3.

13 B.J. Fiddler, N. Bala and M.A. Saini, *Children who Resist Post Separation Parental Contact*, New York, Oxford University Press, 2013.

14 *Ibid.*

15 B. Smyth and L. Moloney, "Entrenched Post Separation Parenting Disputes: The role of interparental hatred?", *Family Court Review*, vol. 55, 2017, pp. 404-417.

5. A better place for the child in return proceedings under the 1980 Convention – A perspective from Australia

By the Honourable Justice Bennett AO *(International Hague Network Judge, Family Court of Australia, Melbourne, Australia)[1] – June 2018*

I INTRODUCTION

Families in international parenting cases are immeasurably better off with the 1980 Convention than they would be without it. However, as may be expected with an instrument created more than 35 years ago, tensions emerge in modern day application, particularly from the stand point of the child whose perspective was not broadly considered when the 1980 Convention was negotiated.

It is not feasible to alter the 1980 Convention, but the immediate needs of children impacted by international parental child abduction can be accommodated without undermining the integrity of the 1980 Convention as a forum selection treaty or the prompt return mechanism. This can be done by incorporating the child's voice in Hague return proceedings through representation of the child's interests, specialised Hague mediation and, where warranted, the imposition of conditions of return.[2] Parents must also be encouraged from the earliest stage of proceedings to prepare for outcomes, that is, what will happen if the child is returned or not returned.

II THE CHILD'S PLACE

The parents and child will experience the return or non-return differently. The left behind parent may expect that the return of the child will rectify the gross injustice which they have suffered and permit them to be reunited with the child as if the removal or retention had not occurred. The taking parent may feel disadvantaged, as if they have lost everything and fear being dealt with punitively within a legal system which they have come to think of, and refer to, as hostile and alien. The child could feel guilty for not having fought to maintain a relationship with the left behind parent as well as being worried about what will happen to the taking parent. Recent research identifies that 70% of abductions involved a single child and that 78% of children were under 10 years old (average age of 6.8 years).[3] Therefore, to the extent that the child experiences both parents as distracted, inattentive, self-focussed, self-justified, angry and aggrieved, many will do so without sibling support and with limited ability to decode and self-protect against the conduct of their parents.

The juridical imperative of a prompt return in an unexceptional case is clear. However, a prompt return places the taking parent and child back into the environment in which the taking parent considered he or she could not continue to live and from which they may well have burnt their bridges. A discretionary non-return will be no better if the child and left behind parent are in limbo as to when they will see one another again or if the child will be able to return to their previous home country during their minority. The prospect of the left behind parent in the home State trying to secure appropriate parenting arrangements in the country in which the child is present is, at best, problematic.

The child's experience of a return or non-return belies the fact that, jurisprudentially, most requested courts would consider that the case has been solved because the child is returned to where they belong or that it has responded appropriately to the exceptional circumstances which justified non-return. Whilst, the prompt return mechanism is appropriate and valuable, it is not a solution in itself.

III WHAT IS A SAFE RETURN?

In 2015 the International Social Service asked me to speak on the deceptively simple topic of how returns could be made safer for children under the 1980 Convention. I considered that, from the child's perspective, the *return* could be quite harrowing. Parents are preoccupied with feelings of persecution or retribution and it is misleading to speak of the *return* of the child if the child is heading towards a situation which is radically different to that in which they lived prior to the removal or retention. The concept of a "return" implies a status quo to which the child is restored. It is an adult construct. Therefore, the return which we facilitate under the 1980 Convention may be experienced by the child as a geographical rather than a psychological phenomenon, a return which is more apparent than real.

The most prevalent danger from which the child should be kept *safe* is high parental conflict. Advanced legal systems routinely understand how to protect children from physical and psychological harm, but we do not cope well with endemic high parental conflict of which, I believe, international parental child abduction is an extreme example. Indeed, the typical nuclear family structure, parental authority, and the concept of privacy of the individual have allowed high parental conflict to be disguised as family unhappiness rather than being revealed as a corrosive and harmful dynamic from which children deserve to be protected.

IV WHAT IS TO BE DONE TO MAKE RETURNS SAFER?

Hague returns would be emotionally safer for children by incorporating the child's voice in the return proceedings consistently with the child's right to be informed of the progress of proceedings affecting them. It is not always an easy task. I am reminded of a message from the child who had been living with his brother and father in England for 18 months. During this time the mother was recovering from serious health problems including addiction to

painkillers and alcoholism (she was considered to be a functioning alcoholic).[4] The mother sought the return of the children to Australia under the 1980 Convention. It was comprehensively argued by the father that the children had ceased to be habitually resident in Australia, the mother had consented or alternatively acquiesced to their retention in England, the return would expose the children to a grave risk of harm and that both children objected to return in the relevant sense and had reached a degree of maturity at which it was appropriate to take their views into account. The court extracted a message sent by the 12-year-old boy in England to his mother in Australia in response to a message from his mother asking if she could call him. He wrote:

> "Can't call anymore the signal is too bad. Don't tell Dad but no matter what anyone says (including me) get me back to Australia. Don't tell any of this to Dad. He wants me to talk in front of a judge. And most importantly don't tell him this. He wants to apply for full custody. Don't tell Dad that I told you any of that act like you don't know."

Obviously, the child's view is not going to be determinative but that does not mean that it should not be ascertained. It should be obtained respectfully and conveyed to the court within the confines of considerations appropriate for a Hague return case. In my jurisdiction, I do this in a five-step process.

A. ***Representation of the child's interests***

First, secure representation of the child's interests at the earliest opportunity by an appropriately trained legal practitioner who is independent of both parents. This is to be contrasted with direct representation of a child by a lawyer who is bound by the child's instructions. As Black LJ said recently in *Re M (Republic of Ireland) (Child's Objection) (Joinder of Children to Appeal)*[5]:

> "Children need to know that their views are being listened to and that their particular concerns are not being lost in the argument between their parents, but it must be recognised that direct participation in proceedings can be harmful for children."

An independent children's lawyer is also markedly different from an advocate trained in the social sciences who instructs a lawyer for the child.

In Australia, a child's interests are represented by an independent children's lawyer[6] who must inform the court of what the child wants, but nonetheless conduct the case based on what is in the best interests of the child. An independent children's lawyer is appointed, usually free of cost, by a legal aid authority in response to the court's request. They have all of the rights and responsibilities of a party to the proceedings. Their task is to ensure that the proceedings are conducted as expediently and thoroughly as possible including ensuring that all relevant information is before the court, as well as to act as an honest broker between the left behind parent and the taking parent.[7] In 2006 our legislation was amended to provide that an independent children's lawyer may only be requested for Hague proceedings in "exceptional circumstances".[8] Whilst a well-intentioned reform at the time, it is at odds with Australia's obligations under UNCRC and incompatible with according the child appropriate respect. I am optimistic that the executive government will consider removing the requirement of exceptional circumstances.

B. ***A Hague Convention Report by an independent social scientist***

Second, to arrange an early assessment of the child by a family consultant employed by the court. A family consultant is a psychologist and / or social worker with considerable experience in childhood development who is employed directly and exclusively by the court to specialise in child and family issues after separation and divorce. The family consultant's report is called a Hague Convention Report in Australia.

Of course, the child's voice can be heard through the evidence of parents, other witnesses, a private counsellor/ report writer funded by the parties and through the independent children's lawyer. However, a report by a family consultant is independent and provides expert opinion: it is, therefore, the optimal way to get the child's views before the court. In Australia, it is rare for a judge to interview a child, but it is not prohibited.

When a Hague return application is first returnable in court, I request that a Hague Convention Report be prepared by a family consultant. The family consultant then has the following tasks:

(i) depending on the child's age and maturity, to explain to the child the nature of the Hague proceedings and, in particular, that it is not a final decision about with whom the child will live;
(ii) to assess the child's apparent psychological functioning and report acute distress or indictors that the child requires treatment in the immediate to short term;
(iii) to assess the appropriateness of, and the child's preparedness to, engage in electronic communication with the left-behind parent including making specific recommendations about how this may be achieved, and be prepared to facilitate the first session;
(iv) depending on the child's age and maturity, ask the child what (if anything) would make a return to the home State — if that is what is decided — easier for him or her;
(v) depending on the child's age and maturity, ask the child what (if anything) would make staying in

Australia — if that is what is decided — easier for him; and

(vi) to investigate the availability of child-focussed programs or social science support for the child from the home State.

The above assessment provides the independent children's lawyer with an early opportunity to meet the child in the presence of the family consultant. A written report of the assessment is published to the court, the parties and the left behind parent within about two weeks. In assessing the above, the report provides the parents with the child's view and assists them (and those advising them) to gain some perspective around preparing for outcomes. This early intervention by a family consultant is also an excellent time at which a child's objection to return can be assessed for the purpose of Article 13. Recording the child's objection and analysing the child's reasons therefore may truncate debate about the nature of the child's objection and the child's degree of maturity and relieve the child from the invidious situation of having to preference one parent and country over another. If a further report is required, say, on the issue of grave risk or settlement of the child after a year, an addendum report can be prepared by the same family consultant.

I recall a Hague return case in which a child was assessed by a very experienced family consultant (psychologist) and, on her recommendation, assessed subsequently by a child psychiatrist. The child expressed a well thought out plan to kill his younger brother and then himself in preference to them being separated from their mother. The expert evidence was that the deterioration in the boy's mental health was not the result of his removal but a developmentally inappropriate parenting arrangement which had been implemented by the parents in the home State prior to the removal. With coordination between mental health professionals in Australia and the United States and a commendable degree of insight on the part of the parents, the child received therapy in Australia and was eventually returned to the United States with his brother. Notably, the severity of the child's mental health condition was identified by a family consultant rather than by either parent. Following this intervention, the child's return to his State of habitual residence was delayed until he was in an emotionally fit state to return.

C. ***Re-establishing communication between the child and the left behind parent***

Third, facilitating immediate communication between the child and the left behind parent providing, always, that such communication is consistent with the child's interests. Interestingly, the last Hague Convention Report put into evidence before me contained the following description by a 10-year-old boy of recent Skype communication with his father, the left behind parent:

> Harry said that his father had told him; "I have a heart condition. I will die if you don't come back." In this regard Harry commented to the report writer: "but I don't think this is true." Harry also said, "I have seen a gun in his hand and [says] he will kill himself." Harry said: "but I think this is maybe a fake gun."

The taking parent had been very encouraging of electronic communication but ceased it when the left behind parent started to converse inappropriately. The return application was said to be brought partially in response to the breakdown in electronic communication.

D. ***Specialised Hague Mediations***

Fourth, requiring a specialised Hague mediation. These mediations run parallel to the proceedings, do not delay the final determination, are free of charge to the parents, and comprise up to three sessions (electronic or face to face) which are held in quick succession and necessarily close to the final hearing. They are convened by two mediators and share features of the international parental child abduction mediation service provided by Reunite International (United Kingdom), MiKK (Germany) and the Mediation Bureau of the International Child Abduction Centre (Netherlands).

The benefit of mediation is not in trying to achieve a resolution of the return application, which will be fast tracked in any event, but in encouraging the parents to prepare for outcomes. In particular, to negotiate around what immediate parenting arrangements should pertain until the court in the home State is properly seized of the matter. Also, to consider what parenting arrangements should be put in place if the return is refused. Of course, mediation resolves a number of cases but the major benefit of mediation, vis-a-vis the child, lies in making Hague returns and non-returns more child focussed and safer by:

i. providing the opportunity for trained mediators to direct the parents' attentions away from the dispute and onto the child;
ii. encouraging the parents to think past the return application to the next set of parenting arrangements which will provide the child with certainty for the few weeks after a return or non-return decision is made;
iii. to formulate conditions to return in the nature of safe harbour orders;
iv. to ensure that such conditions to return as can be agreed upon can be made enforceable in all relevant jurisdictions prior to the child's return; and
v. to look forward to what parenting arrangements are in the best interest of the child in the long term and, if agreed, to stop further deterioration of relationships between the parents and the child.

In my experience, taking parents and left behind parents will agree and commit to nearly anything in order to achieve the outcome they seek but, if given a chance to do so, will readily change their mind after the event. This is destabilising for children and does not lead to constructive parenting into the future. Adequate protection for the child is not conferred by undertakings to a court in another jurisdiction, mere promises, or arrangements which necessitate the person for whose benefit the promise is made having to go to court for enforcement.

E. Condition on return

Fifth, consider making the return conditional. Our legislation allows the court to impose conditions on return regardless of whether an exception to return (defence) is raised or made out. As return proceedings are prosecuted by the Central Authority (or State Central Authority), it is necessary for the Central Authority to inform our court to what conditions (if any) the left-behind parent will agree to abide and to then make submissions about the reasonableness or practicability of the balance of the conditions sought.

It is worth reminding oneself that a Hague return case does not provide an accurate appreciation of a family's dynamics particularly when, as in Australia, the left behind parent does not prosecute the return application and usually does not attend court in person. Evidence tends to be heavily focused on the respondent's grounds for opposing return to an extent that invites misunderstanding and can give rise to misplaced sympathies. Conditions should be directed to providing for the reasonable needs of the returning parent and child in the immediate to short term and only until a court of competent jurisdiction in the home State is properly seized of the matter and can deliver a reasoned interim judgment.

I suggest that conditions:

- must be simple;
- should be met (complied with) prior to the child's return but, if that is not possible, compliance should be the subject to some security;
- must be practicable and capable of being met. If a condition is impracticable and cannot be fulfilled, noncompliance may defeat the return order;
- generally, should not reward the taking parent by putting them in a more advantageous position than they had prior to the abduction unless the improvement is integral to addressing a perceived grave risk of harm or an intolerable situation which could, otherwise, defeat a return application.

It is essential that conditions not usurp the regular functions of the courts or authorities in the child's State of habitual residence. This is usually observed by making any conditions apply for a short time only and certainly no longer than would be necessary for a court in the home State to be engaged and to render a reasoned interim judgment.

As part of preparing for outcomes, the taking parent should be encouraged to put forward the conditions they seek and the left behind parent asked to respond, in writing, prior to the Hague mediation. This permits the parties to direct negotiations, and ultimately evidence, to the appropriateness and feasibility of the proposed conditions of return.

V CONCLUSION

We need to allow children to be involved in Hague proceedings, to give them a voice, not a choice. We should provide information to children who have the capacity to understand so that they can make sense of the outcome imposed upon them.

We can provide support and scaffolding around the return and non-return of children so that a child's experience of the 1980 Convention is psychologically safe as well as physically safe without alteration to the substantive law or major changes to expedited Hague trial procedure. We can identify and accommodate the child's perspective whilst maintaining the integrity of and prompt return remedy provided by the 1980 Convention which has served us so well in the area of international parental child abduction.

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1 The views of this paper are my own views; they do not represent the views of the Family Court of Australia or other judges. These views do not indicate how I would decide a case after having the benefit of the argument. I acknowledge that all cases and families are different. I have made generalised statements in the interests of brevity and to promote debate but also consistently with themes and personality traits that I have observed, and evidence about childhood development received, during 25 years of Hague return litigation.

2 A "condition of return" is a condition which if not met will defeat the return order. For example, if the return is conditional upon orders being made enforceable in the home State prior to the return, the child will not be returned unless the orders are rendered enforceable.

3 See "Part I – A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global report*", Prel. Doc. No 11A of February 2018 (revised) prepared for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (October 2017) (available on the Hague Conference website at < www.hcch.net > under "Abduction"), p. 9.

4 Court of Appeal of the United Kingdom (England and Wales), *BP and DP (Children: Habitual Residence)* [2016] EWCA 633 (Fam) at [155].

5 House of Lords of the United Kingdom (England and Wales), [2015] EWCA Civ 26 [INCADAT Ref: HC/E/UKe 937].
6 *Family Law Act 1975* (Cth), section 68LA.
7 In Australia, Hague return proceedings are prosecuted by the Central Authority or its nominated State Central Authority for whom the left behind parent is a witness. The proceedings are free of charge to the left-behind parent. A resolution negotiated between the parents is likely to be respected by the prosecuting Central. Authority.
8 *Family Law Act 1975* (Cth), section 68L(3)(a).

6. Child's view in return proceedings – Practice of Japanese courts

By Tomoko Sawamura *(Director, First Division, Family Bureau, General Secretariat, Supreme Court of Japan. Japanese Network Judge)*

The 1980 Convention entered into force in Japan on 1 April 2014. During its operation, Japanese courts have made concerted efforts to implement the Convention effectively and to contribute to the well-being of children. This article provides a brief explanation on the efforts made by Japanese courts to consider the child's views in Hague return proceedings.

Importance of the child's views in child return proceedings

It is important for the court to take the child's views into consideration in Hague return proceedings, because these proceedings and their outcome have a significant influence on the child's welfare. The child's views are particularly essential to the court in cases where exception clauses such as Article 13(2) (child objection) and Article 12(2) (settlement of the child) are raised, because these clauses focus on the situation of the child and how he / she feels in that context.

Japan's Implementing Act

Based on the considerations above, Article 88 of Japan's Implementing Act of the Convention stipulates that "during child return proceedings, the family court shall endeavour to understand the views of the child by hearing statements from the child, through the family court investigating officer's examinations, or through other appropriate means, and shall take into account the views of the child in accordance with the child's age and degree of development, when making a final order".[1] To conform with this Article, the court is required to obtain necessary information of the child's view. While the Implementing Act does not determine how information should be gathered, the court usually mandates the family court investigating officer to interview the child, gather the relevant information and submit a report on the child's views to the court.

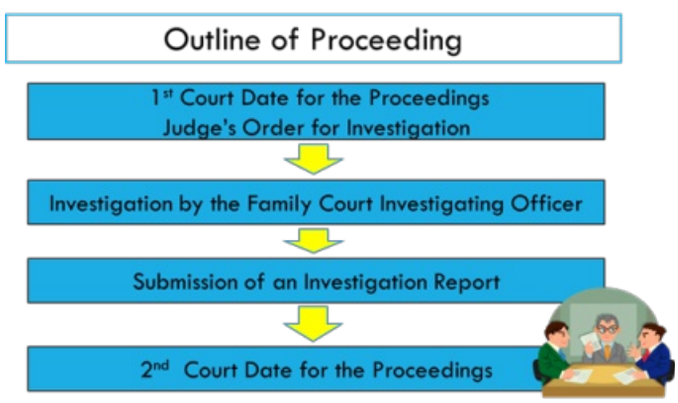
Family court investigating officers

Family court investigating officers are court officials assigned to family courts, and perform functions unique to these courts. Family courts are the first instance courts for family cases and juvenile delinquency cases. Child return cases are classified as family cases and fall under the jurisdiction of the family courts.[2]

Family court investigating officers are experts in the field of behavioural sciences, such as psychology, sociology, pedagogy and social work. Using their expertise, they investigate the relevant facts by, for example, interviewing the parties and the children and drafting reports for judges. In child return proceedings, investigating officers also investigate facts and matters alleged as pertain to the child/ren.

Outline of the child return proceedings

The chart below provides an overview of Hague return proceedings in Japan. Upon receipt of a written application, the court designates the first court date for proceedings as soon as possible.



At the first court date, the court clarifies arguments and evidence submitted by the parties and establishes a timetable for the proceedings. The court considers whether it is necessary to conduct an investigation on the child's views and, if so, issues an investigation order to the family court investigating officers.

Between the first and second court date, the designated investigating officers conduct an examination of facts and issue a report to the court based on the findings of the investigation. The parties are able to read the report on request and they may, if necessary, submit written arguments on the report.

At the second court date, the court conducts a hearing of the parties. The court then subsequently issues a final decision without delay.

Activities of family court investigating officers in investigation

1. Preparations for Interviews

In order to obtain information about the child's views, the investigating officers usually conduct an interview of the child. The interview is carefully prepared to ensure that it will properly elicit the child's views.

They usually request parties to submit in writing information about the child which is necessary to plan an interview with the child. Based on that information, investigating officers consider how to conduct the interview, what questions to ask, etc. They pay attention even to the type of room in which the interview should take place[3] and what clothes they wear during the interview, for example, a business suit or a more casual suit.

2. Interview of the child

After these preparations, investigating officers conduct the interview with the child. Firstly, they explain their role, the proceedings conducted by the court and the matter to which the proceedings concern in child-friendly language. They then ask questions to the child and collect their answers.

To encourage the child to talk, investigating officers use a sympathetic tone and speak in a warm voice. They also ensure that they show respect and attention to the child. They make use of both of closed and open questions, taking into account the child's age and maturity. Rephrasing what the child says and using supportive words are also important interview techniques.

In addition, investigating officers during the interview do not only limit themselves to collecting the child's answers. Attention is also paid to non-verbal expressions such as the tone of the child's voice, the look in the child's eyes or facial expressions. Furthermore, they analyse what the child's words mean in a larger context including the child's degree of development, family background and non-verbal expressions.

3. Submission of investigation reports

After the interview, investigating officers produce a written report which they submit to the judge. The report not only concerns what the child said, but also the investigating officers' analysis of the child's views based on the information gathered before and during the interview.

Parties have an opportunity to read the report before the second court date, and may submit written arguments on the report where necessary. Submissions can be made because judges consider the investigation report to be part of the evidence when making a final decision.

Advantages of the Japan's practice

From the judge's perspective, the family court investigating officers are more neutral than private persons or institutes, since they are court officials. Their neutrality enhances the credibility of their investigations, as well as the judge's decisions which are based on its findings. Furthermore, rather than having a judge hear directly from the child, the practice employed in Japan is beneficial because investigating officers can obtain more information from the child because of their specialised training on interacting with children. The officials also not only report information but provide an analysis based on their behavioural science expertise. This analysis is particularly useful for judges to make a final and accurate decision. These advantages contribute to the appropriate and effective implementation of the 1980 Convention in Japan.

1 *Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction*, Act No. 48 of June 19, 2013. An English translation of the Implementing Act is available at < http://www.japaneselawtranslation.go.jp/ >.

2 Japan's Implementing Act concentrates jurisdiction over child return cases in two family courts of all 50 family courts in Japan, *i.e.*, the Tokyo Family Court and the Osaka Family Court.

3 In family courts, there are particular rooms for investigations, *e.g.*, a normal office room which is used for investigations of teenagers or one like a playing room for younger children.

7. Role of Children in 1980 Hague Proceedings - The Singapore Experience

By District Judge Wong Sheng Kwai[1] *(Family Justice Courts, Singapore. University of Otago, New Zealand February 2018)*

Singapore's approach to cross border family disputes involving children

Singapore has two procedures for managing cross-border child abduction cases. Where the country to which the child has been taken has acceded to the 1980 Convention, we apply the International Child Abduction Act, which conforms with the framework of the Convention. Non-Hague cases are addressed under the Guardianship of Infants Act, which establishes conflict of laws rules designed to determine the appropriate forum to deal with the dispute.

Our 1980 Hague Convention journey

Singapore acceded to the 1980 Convention on 28 December 2010 and it entered into force on 1 March 2011. Of the 98 Contracting States to the Convention, 61 have accepted Singapore's accession. The courts in Singapore have heard 10 Hague cases so far, with one reaching the Court of Appeal and another the High Court before three judges.

A challenge for the court in Hague cases is ensuring that the interests of the child are best served within the framework of the Convention. So far, the exception in Article 13(2), a child's objection to return, has not been raised in Singaporean proceedings. However, we have put in place principles and procedures to ensure that the voice of the child in all family proceedings involving them is heard. I will set out in brief the recent reform of our family justice system which seeks to better address the needs of distressed families, and in particular the needs of children caught in the dispute.

A new approach to family justice

In 2013, the Committee for Family Justice was created to review the family justice system in Singapore.[2] The Committee recommended a national end-to-end integrated support system to meet the needs of youths and families in distress, including the development of a specialist court structure. The Committee's recommendations were accepted and the Family Justice Courts (FJC) were established on 1 October 2014 under the 2014 Family Justice Act.

The Honourable Chief Justice Sundaresh Menon observed at the Opening of the Family Justice Courts on 1 October 2014:

> "Family Justice is a unique field in the administration of justice. In some respects, the judicial task can be likened to that of a doctor with a focus on diagnosing the problem, having the appropriate bedside manner to engender trust and convey empathy and the wisdom to choose the right course of treatment so as to bring a measure of healing."[3]

Embracing this idea, the FJC in collaboration with community partners has put in place multi-disciplinary interventions to support troubled families and youths throughout the life-cycle of a dispute.[4] These include a mandatory parenting programme,[5] collaborative law practice,[6] counselling, mediation, judge-led adjudication processes,[7] child representation,[8] custody and access evaluation reports, supervised visitation facilities[9] and parenting co-ordination.[10] In all these programmes, the key tenets are to reduce acrimony between the parties, focus the parents' attention on the future and the centrality of their children's interests, and to build resilience in the family.

In the context of cross border cases involving children, these programmes can be readily deployed. The appointment of a child representative to elicit the voice of the child as well as the use of mediation to reduce acrimony are particularly relevant to Hague cases. They have the potential to resolve the matter completely, or at a minimum prepare the parties for the eventual decision by the court.

Child representatives are trained professionals appointed by the court to present a child's best interests to the court. The child representative provides an independent view of the child issues and collates relevant information and / or documents necessary for the court to make a decision. In view of the compressed timeline for a Hague case, a child representative must be appointed as soon as possible to give enough time for the required preparatory work.

Singapore has been working with the German non-profit organisation MiKK e.V. to train our accredited family mediators to meet the demands and particular sensitivities of cross-border mediation. On 7 November 2017, a protocol was developed for a pilot project between MiKK e.V. and the Singapore Mediation Centre (SMC) on international family co-mediation for cross-border disputes involving children. The nationalities and places of residence of the parties are not limited to Germany or Singapore. To date, we have yet to activate this protocol.

To conclude, we have not yet had the occasion to deal with the full spectrum of issues that could arise in relation to the role of children in Hague proceedings. However, with our new family justice system, emphasis is placed on problem solving and child centrality. There are specific avenues to determine the voice of the child as well as counselling and mediation processes to help parties conciliate and arrive at practical solutions regardless of the court's eventual decision on a return application. Therefore, we are well poised to meet the needs of cross-border disputes involving children.

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1 This paper is based on the author's presentation at the Workshop on the Role of Children in 1980 Hague Abduction Convention Proceedings on 8-9 February 2018 in Auckland, New Zealand. The author wished to express gratitude to Professor Nicola Taylor and Professor Marilyn Freeman for providing the opportunity to participate in the Workshop.

2 The Committee for Family Justice is helmed by the then Senior Minister of State for Law and Education, Ms Indranee Rajah, SC, Attorney-General V K Rajah (till 24 June 2014), and Justice Andrew Phang (from 25 June 2014), with representation from the legal fraternity, social service agencies, academia, Ministry of Law, Ministry of Social and Family Development, Supreme Court and State Courts.

3 A copy of the speech can be found at Singapore Family Justice Courts website at < www.familyjusticecourts.gov.sg > under "News and Events".

4 At the FJC, our interventions include the use of counselling to address the emotional and relationship issues and mediation to find consensus and a practical way forward for the family. The multidisciplinary team comprises professionals from both the legal and social science sectors.

5 The Mandatory Parenting Programme is a pre-court process administered by the Ministry of Social and Family Development for divorcing couples with children below 21. Parties will require a certificate of attendance before they can commence divorce proceedings.

6 Collaborative Law Practice is a pre-court arrangement where parties who are willing to negotiate in good faith work with their lawyers to resolve the dispute holistically. Lawyers who engage in this process cannot continue to represent their respective clients in the event that the negotiations break down and court proceedings are initiated.

7 The adoption of the judge-led approach through the Family Justice Rules, which came into operation on 1 January 2015 empower the judge to make a wide range of orders to facilitate the just, expeditious and economical disposal of family proceedings. These orders include directing parties to attend mediation, counselling or family support programmes. Further orders relating to the conduct of proceedings such as calling of witnesses, experts, admission of evidence and length of submissions are also at the judge's disposal.

8 The child representation scheme is inspired by the Australian's experience on the appointment of independent child counsel.

9 For Singapore citizens and permanent residents, the court may make up to three court orders of eight free sessions of access for each parent, to be supervised by a Divorce Specialist Support Agency. Thereafter, the services include a fee. The DSSA provides a safe and neutral environment for children to spend time with the visiting parent to strengthen their relationship. A counsellor is on hand to guide parents and the children to sort out any difficulties on the ground. A report will be furnished by the counsellor for the court to review with the parties after the completion of each order so as to determine the next step forward.

10 The parenting co-ordination scheme is currently in pilot phase. Trained co-ordinators are appointed in suitable cases by the court to help parents implement the access orders. Pending legislation that would define the powers of the parenting co-ordinator, they currently act like mediators on the ground to help parties sort out difficulties in relation to the access.

8. Hearing abducted children in Court – A comparative point of view from three countries (Belgium, France & the Netherlands)

By Sara Lembrechts *(University of Antwerp (Belgium))*[1]

Introduction

This paper summarises the findings of a legal study conducted within the framework of the multidisciplinary research project "EWELL – Enhancing the Well-being of Children in Cases of International Child Abduction".[2] The legal study comprised two elements; a "quick scan" of national legislation on the child's right to be heard in 28 European Union (EU) countries, and an in-depth analysis of case law from Belgium, France and the Netherlands focussing on the hearing of children in child abduction cases under the Hague Child Abduction Convention and the Brussels IIa Regulation. The case law analysis is the predominant focus of this paper. Where relevant, examples from the "quick scan" will be provided to situate the findings within a wider European context.

After a brief overview of the research methodology, the paper addresses some of the key findings on how children are heard in abduction proceedings. The second part of the paper takes a closer look at two issues that particularly stroke our attention; the courts' assessment of objections to return and elements of the child's maturity. The paper concludes with a brief critical reflection.

Research methodology for the case law analysis

In the case law analysis, we examined court rulings on hearing children during legal proceedings following an international child abduction (as defined under the Hague Convention and the Brussels IIa Regulation). All cases were decided by family courts at first instance, regional or national Appeal courts and Supreme courts in Belgium, France and The Netherlands. The project was limited to the study of cases that had been decided between March 2005, when the Brussels IIa Regulation entered into force, and March 2016, the starting date of the EWELL-project. The study focussed on those cases where judicial officers explicitly referred to or made a determination on whether a child should be heard in return proceedings, irrespective of whether or not the hearing actually took place

The sample consisted of a total of 176 cases, subjected to various research questions in order to assess the way in which judges approach the hearing of abducted children and its implications, namely:

- What reasons form the basis of the judges' decision as to whether the child will be heard or not?
- Does the court provide any information on how the hearing took place?
- Does the court decision offer any insight into the personality and / or the behaviour of the child?
- Was the child's opinion decisive for the court's decision, and why?
- Is there a difference in approach between Hague cases and the Brussels II a Regulation cases when determining if a child should be heard?
- Are there any other matters relevant to understand a court's procedure on hearing children in cases of parental abduction?

The databases used to find the cases differed for each country. INCADAT was systematically consulted for all three jurisdictions. In the Netherlands, most cases were published on the website "*www.rechtspraak.nl*". Accessing Belgian and French case law however was more challenging, as many judgments are not published online or made publicly available elsewhere. As a consequence, the study also includes non-full-text references. In some cases, child abduction lawyers and judges were particularly helpful in providing anonymised, unpublished decisions. All the cases retrieved were analysed using Excel or NVivo, a software for qualitative data analysis.

The child's age and maturity in Belgium, France and the Netherlands

The number of cases in the sample where the judge referred to the hearing of the child, irrespective of whether the hearing actually took place, varied considerably between the three jurisdictions. For the Netherlands, there were 98 cases, for Belgium 25 and for France 53. For the Netherlands, children were allowed to be heard in 81 cases, or approximately 82% of cases where reference to the hearing of the child was made; children were heard in only 6 Belgian cases (24%) and in 24 of the French cases (45%). However, the number of cases in which the objections of the child were decisive in the order not to return the child (*i.e.*, application of Art. 13(2) of the 1980 Hague Child Abduction Convention) is relatively similar amongst the three jurisdictions, varying between 16% in the Netherlands (16 cases), 12% in Belgium (3 cases) and 11% in France (6 cases).

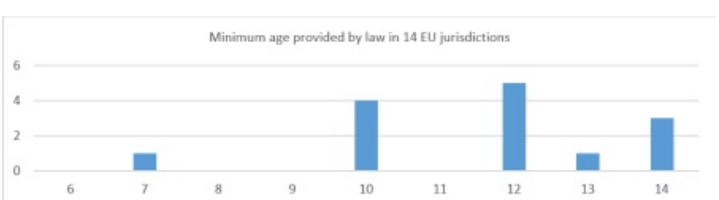
The main reason for the great disparity between the three jurisdictions in the number of cases where children are heard is the minimum age at which judges consider children capable of being heard in such proceedings. In the

Netherlands, children from 6 years onwards are given an opportunity to express their views. In Belgium, courts generally permit children 10 years or older to be heard. In France, our analysis found that children younger than 9 were not heard, with the exception of 6-8 year olds who had older siblings. As most children are abducted when they are young, the Dutch courts have a significantly higher number of cases where the child was heard.

The three jurisdictions are further distinguished by how their respective courts assess a child's maturity. Even though the assessment of maturity should be analysed on a case-by-case basis for every child, Belgian and French courts do not elaborate on the concept of maturity or "*discernement*" in their case law. Both jurisdictions generally refrain from a detailed assessment of the child's maturity and use biological age as a criterion to decide whether or not the child should be heard. Dutch judges, on the other hand, extensively discuss their views on the child's maturity in individual cases. The Dutch case law differentiates between several age categories: children below the age of 9 are usually considered immature. Although they are heard, their views are not decisive. Children who are 11 and beyond are considered mature enough and due weight can be given to their views. However, this does not necessarily imply that the court will follow the child's views. For example, when the child suffers from a loyalty conflict, he or she can be mature enough to be heard (in the sense of his / her 'capacity' to be heard), but his / her views will not be decisive for the outcome of the case.

Minimum ages at which children are heard in the rest of Europe

The results from the "quick scan" demonstrate that there is an obligation to hear children in all EU jurisdictions, subject to a variable minimum age. A total of 14 jurisdictions specify a minimum age for the possibility to hear a child in any legal proceedings (see the graph below), whereas the law of 15 jurisdictions does not stipulate a minimum age.



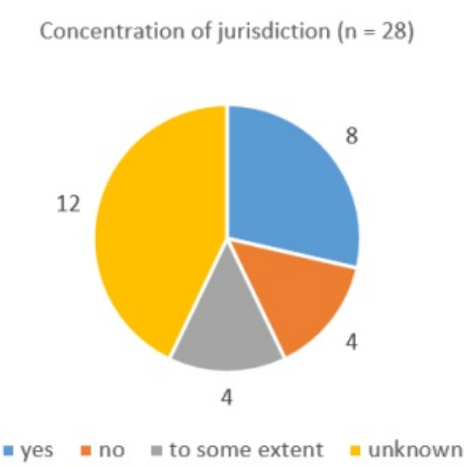
Note that the total number of jurisdictions is 29 instead of 28 – this is because England & Wales do not have minimum ages whereas Scotland does.

These figures relate to the hearing of children generally in legal proceedings. In abduction proceedings, the minimum age a child can be heard is sometimes lower. In the Netherlands, where children are in principle heard in legal proceedings from the age of 12, judges have allowed children to be heard at the age of 6 in abduction cases. In Belgium, children from 12 onwards are invited to be heard, but children aged 10 and 11 can be heard occasionally in abduction proceedings. French law, on the contrary, does not provide for a minimum age at which a child can be heard.

Concentration of jurisdiction

Another structural reason that may explain why Dutch courts are more familiar with hearing children is its concentration of jurisdiction. In the Netherlands, there is only one first instance court dealing with child abduction cases, which is based in The Hague. Accordingly, fewer judges deal with abduction cases, implying that they have gained experience and expertise on the subject matter. In Belgium, whilst there exists specialised family courts at first instance, there are 6 courts dealing with abduction cases in Antwerp, Brussels, Ghent, Liège and Eupen. In France, there is no concentration of jurisdiction at first instance level; any first instance courts can deal with child abduction cases. Whilst the data shows that concentration of jurisdiction might not have an influence on the number of cases where return is actually refused on the grounds of Art. 13(2) of the Hague Child Abduction Convention, judges in concentrated jurisdictions may feel less insecure or hesitant towards hearing children, because they do it much more often.

In the rest of Europe, of the 16 countries where this information was available, 8 countries concentrate jurisdiction, like in the Netherlands. 4 countries have found a middle ground (*e.g.*, Belgium), and in another 4 countries there is no concentration of jurisdiction at first instance level (*e.g.*, France).



A strict interpretation of the child's objections to return

Children's objection to return have been interpreted strictly in all three jurisdictions analysed in the study. The quantitative data also illustrates this; only between 11% and 16% of cases where children are heard was Article 13(2) of the Hague Child Abduction Convention applied. Such an assessment poses a huge dilemma for the judge. Whereas the views of the child is one of a variety of factors considered by the court in return proceedings, there are a number of instances in the case law where more weight was given to the child's objection.

For example, when an objection is explicit ("firm and consistent", conscious, sustained) (*Netherlands, Belgium, France*), it is more likely that judges will treat it as a serious ground for non-return. Objection has also justified non-return where the reasons for the objection are not limited to a preference for living in one country or the personality of one parent, but rather take into account the circumstances, the context and likely impact of return (*Netherlands, Belgium, France*). If the objection is confirmed in other sources at the court's disposal (*Netherlands, Belgium, France*), such as materials from the hearing of other parties, or documents from child welfare authorities, the child's views are also given more weight. Other reasons include when the objections relate to the child's healthy development (*Netherlands*); when the objection goes beyond a mere preference to keep the status quo (*Netherlands*); when the child takes initiative to stay in contact with the other parent (*Netherlands*); when the objection is not merely based on factual circumstances that make the country 'safer' or 'nicer' (like traffic, comfortable school etc.) (*Netherlands*); and when the child does not suffer from a loyalty conflict (*France*).

Whilst determining if a child should be heard and what weight should be given to the child's views is an extremely difficult and challenging task for judges, the case law has demonstrated that judges attempt to move beyond superficial or inconsistent objections and try to capture, as good as they can, what the long-term implications of a decision are for the child concerned.

Assessing children's maturity

The views of a child can be decisive to determine the outcome of the case when the court finds the child has reached sufficient age *and* maturity. Where determining at what age a child should be heard already poses considerable challenges to the courts, the assessment of maturity is even more controversial. Unlike Belgian and French courts, who do not elaborate on maturity or *discernement* in the case law at our disposal (with the exception of an occasional reference to authenticity), Dutch courts have made a concerted effort to elaborate their assessment of abducted children's maturity in their jurisprudence.

Analysing the available cases, we could compile an overview of the various conditions that Dutch courts take into account when assessing the child's maturity. Not all conditions must be satisfied for the child's views to be influential in the outcome of the proceedings, but the more a child's manner of speech and behaviour corresponded to the factors listed below, the more likely their views impacted the outcome of the case. The factors included:

- Ability to sufficiently oversee and understand the current situation as well as future consequences of a decision or preference on where to live (referenced in 16 cases);
- Ability to express one's wishes verbally (if needed assisted by an interpreter) and voice one's thoughts, feelings and emotions in a clear and comprehensive way (referenced in 10 cases);
- Ability to convey a certain degree of consistency in the story (referenced in 10 cases);
- Authenticity, self-reflexivity and independence corresponding to the child's age (referenced in 9 cases); or the ability to make independent decisions (referenced in 4 cases);
- Ability to speak in age-appropriate language (referenced in 4 cases), in his or her own words (referenced in 1 case) and with words through which the child can understand the implications (referenced in 1 case: the child spoke in terms of 'running away' or 'committing suicide', where the judge was of the impression that the child did not understand the implications of these actions);
- Ability to convey a sense of reality, thoroughness and/or detail in expressing his or her views (referenced in 4 cases);
- Ability to speak freely, openly and spontaneously (referenced in 3 cases);
- Ability to give reasons for a certain choice or preference (referenced in 3 cases);
- Ability to speak in a way that is not overly emotional (reference in 1 case where a strong expression of anger was considered a sign of insufficient maturity);
- Give an impression of maturity, *e.g.* seeming more mature than other children of the same age (referenced in 3 cases). It is worth noting the court explicitly states that maturity is *not* related to the extent to which a child feels responsible or 'pretends' to be older than he or she is (referenced in 1 case).

Whereas most elements to assess maturity are related to speaking abilities, behaviour is also considered (referenced in 5 cases), especially in cases involving younger children (5 to 7 years old) or children with a specific medical background (mental or behavioural problems). In one case, for example, the court pointed out that a 6-year-old child was uncomfortable when people spoke Spanish around him.

Intelligence (in the sense of schooling level) is rarely used to assess maturity (referenced in 1 case). Children who are shy, not particularly confident or persuasive in their speech and behaviour face more difficulty in convincing the court that they are sufficiently mature (referenced in 4 cases).

In one case involving a 13.5-year-old boy who made a significantly mature impression, the court explicitly stated that it is irrelevant whether the child speaks the full truth when reporting about the situation in his country of habitual residence if it is clear to the court that the way in which he *experiences* the situation is authentic and consistent. It follows that truth or objectivity are important only in cases of younger children, of a loyalty conflict, of undue influence by the parent or for any other reason that may raise doubts concerning the authenticity of the child's opinion, but are not so relevant when there is no doubt about the child's maturity.

Loyalty-conflicts or undue influence by one of the parents (usually the current caregiver, i.e. taking or retaining parent) are generally indications for the court not to follow the child's views (referenced in 5 cases). A loyalty-conflict is sometimes considered a sign of insufficient maturity (referenced in 8 cases). However, exceptions apply when the court can identify the child's independent ability to form an authentic opinion. Children who are under obvious social and emotional pressure can still be considered mature, even if their opinion is not decisive due to a loyalty-conflict. For example, a 15-year-old girl who had insisted she wanted to return to her other parent ever since she had been abducted, but changed her mind a few days before the hearing, was considered not insufficiently mature but subject to a loyalty-conflict. Further, the more the child portrays a situation in extreme terms, the less likely it is that a court will take his or her views into account.

Critical reflection

Elements of maturity are mainly linked to rational and verbal abilities, to speaking, to words and language. However, considering Article 12 of the UNCRC, capacity to form one's own views is not limited to rational competences, but also involves moral, emotional and social capacity. Policy makers, practitioners and academics have argued that as a minimum, children should not be assessed on the basis of indicators or conditions in which even most adults would fail to show sufficient understanding. This should make us particularly aware of the fact that children who are shy, lack self-confidence or are not as persuasive in their speech and behaviour, face more difficulty in convincing the court that they are sufficiently mature. Does that necessarily mean they are less able to assess their own lives and understand consequences of a decision? To that end, one may consider that assistance or guidance from other professionals could be required to explore and develop one's views, in accordance with the child's evolving capacities and context, always putting the burden of proof to assess maturity with the State, not with the child.

1 With the cooperation and support of Prof. Thalia Kruger, Prof. Wouter Vandenhole, Mrs. Hilde Demarré and Ms. Kim Van Hoorde.

2 Disclaimer: The findings in this paper are part of the EWELL research project on Enhancing the Well-being of Children in Cases of International Child Abduction. EWELL ran between January 2016 and December 2017, co-funded by the European Commission, with partners in Belgium, The Netherlands and France. The complete research report can be downloaded here, a summary is available here.

9. The hearing of the child in civil proceedings in Italy - Rules and practice

By Marzia Ghigliazza *(avocat, secretary ICALI (Italian Child Abduction Lawyers in Italy))* ***& Sara Luzzati*** *(avocat)*

The hearing of the child in civil proceedings in Italy has been effectively addressed through precise practical guidelines, beginning with the Protocol prepared by the Observatory on Civil Justice of Milano in 2006. The Protocol supplements Law n. 54 of 8.02.2006, which first introduced the possibility for the Judge to hear the child in separation and divorce procedures (Article 155 *sexies* of the Italian Civil Code).[1] Nonetheless, Art. 155 *sexies* did not provide any specific rule regarding the hearing.

Following amendments in 2012 and 2013,[2] the Italian Civil Code today expressly recognises the compulsory right of the child to be heard in any matter or procedure concerning him or her (Article 315 *bis*, comma 3). A series of rules are incorporated in the Code for the judicial hearing of the child in any proceeding where decisions affecting him or her are to be taken.[3] The rules contained in Law n. 54 since 2013 have been adopted and transposed following the Court's Protocols drawn throughout the country, starting with the first one in Milano.

The "Milano Protocol" was drafted between February and June 2016 by a working group of members of family law specialised associations, namely *Camera Minorile* and *AIAF (Associazione Italiana degli Avvocati per la famiglia e per i minori)*, with support from psychological and pedagogical experts. The Protocol was subsequently agreed to by the Family, Minor and Appeal Court.

Following the adoption of the Protocol in 2006, other local judicial institutions and authorities drafted similar rules,[4] contributing to the development of good practices throughout Italy. The trend created a set of practical and procedural rules for judges, for parties and their lawyers to be followed throughout the hearing which serve the child's best interests.

I. GENERAL RULES ON THE HEARING OF THE CHILD

a. At what age and in which proceedings should the child be heard

Generally, the hearing of the child of at least 12 years of age shall be conducted by the judge only in contentious proceeding, except decisions concerning purely economic matters. In non-contentious proceedings, the judge may hear the child only where the particular circumstances of the case indicate it is the preferable course of action.

It is a duty of the judge to hear the child in contentious proceedings which impact his or her interests, unless the particular circumstances of the case suggest that to do so would not be in the child's best interests. Where this is the case, the judge has a corresponding duty not to demand the hearing of the child.[5]

If the child has already been heard in earlier proceedings, the hearing may be avoided if: *i)* the judge deems it would be unnecessary or harmful for the child (since his or her views have already been expressed); *ii)* the child expressly objects to the hearing; or *iii)* the judge determines it is not in his or her best interests.[6]

Where the child is below the age of 12, the judge may only hear the child if: *i)* sufficiently serious reasons require it; *ii)* the parties agree; or *iii)* in lack of agreement, the judge believes the child has sufficient understanding of the proceedings. The judge must assess whether the child is capable of forming his or her own views and whether he or she could suffer any possible harmful consequence. The judge may request the assistance of an expert for this assessment. Pursuant to Article 68 of the Italian Code of Civil Procedure, the judge may appoint an infant psychologist, infant psychiatrist or social services.[7]

However, our Juvenile Courts, which have a sitting "honorary" or psychologist judge, hear children also at the age of 4-6.

b. By whom should the child be heard

As a general rule, the hearing is a "direct hearing" conducted by the presiding judge together with an "honorary judge", a psychologist judge permanently sitting at the Juvenile Courts and in Family Appeal Courts, if and when present in Court.[8] For courts which do not have an "honorary judge", such as the ordinary Family Courts, it is recommended that the presiding judge appoints an expert psychologist or psychiatric, pursuant to Article 68 of the Italian Code of Civil Procedure, to assist him with the necessary "complementary skills".

c. When and where should the child be heard

The child must be heard promptly, to avoid intensifying the existing conflict between the parents, or a parent and child. A date should be set for the hearing, outside of school hours (possibly in the afternoon) and in an appropriate environment behind closed doors. The judicial authority, the clerk or other competent administrative officer shall give appropriate instructions to the parties regarding the time and place of the hearing. These hearings are given due priority and attention.

The hearing shall be conducted in a quiet and safe environment for the child.[9] The location of the hearing shall ensure due process and safeguard the child's best interests and well-being.[10] The child shall preferably be heard in a private room, where the layout of the room facilitates communication and interaction between the child and the judge. Where possible, it should be equipped for video and audio recording.[11]

II. PROCEDURAL RULES TO BE FOLLOWED *BEFORE* THE HEARING

Before the hearing of the child, the judge shall provide adequate instructions to the parents, their lawyers and the guardian, on how to inform the child of the rules governing his or her attendance at Court and the time and location of the hearing.[12]

Any contact between the parents' lawyers - whose presence during the hearing is, as a general rule, excluded - and the child is prohibited during the whole length of the proceedings.[13] Lawyers are also obligated to advise their clients to act responsibly and to avoid attempting to influence the child, and must expressly invite the parents to refrain from showing the child any document relating to the case.[14]

Before the hearing, lawyers are able to submit to the judge what issues or topics on which they consider appropriate to hear the child.[15]

III. PROCEDURAL RULES TO BE FOLLOWED *DURING* THE HEARING

a. Information to the child

The child shall be properly informed of his or her right to be heard, of the reasons underlying his or her involvement in the proceedings and of its possible outcomes before the hearing commences. The judge must also explain to the child that the final decision will not necessarily comply with

the views expressed by him or her during the hearing, but that his or her opinion taken into account.[16]

b. The presence of the parents, their lawyers, the child's guardian or legal caregiver

The Milano Protocol provides that only the presiding judge, the appointed expert and, where named, the child's guardian or other legal caregiver may attend the hearing. The presence of the other parties and their lawyers is not appropriate, for it could unduly influence the child's opinion. The parties and their lawyers therefore must leave the courtroom before the hearing starts.[17]

Other Protocols contain less stringent rules and allow the parties' lawyers to attend the hearing, provided they respect a set of rules designed to maintain the child's well-being. Lawyers shall: *i)* refrain from any contact with the child prior to, during or after the hearing; *ii)* remain silent during the hearing (they will not directly address the child); and *iii)* refrain from any behaviour that could negatively impact the child's well-being and freedom of speech.[18]

Parents may not personally assist the hearing, unless otherwise indicated by the judge. Where the child requests one or both parents, or someone outside the family, to be present at the hearing, the judge has a duty to consider the child's request, taking into account the age of the child and their probable need of psychological support during the hearing.[19]

Where sibling are the subject of proceedings, children shall preferably be heard separately, unless the judge deems it appropriate to hear them jointly or, alternatively, alone during a first hearing and together in the second hearing.[20]

c. Records of the hearing

The hearing shall be recorded and the child must read and sign the record. While certain Protocols require a summary transcript of the hearing,[21] other require a complete record of the hearing, including a description of the behavior of the child during the hearing.[22]

IV. PROCEDURAL RULES TO FOLLOW *AFTER* THE HEARING

Once the hearing is concluded, the child leaves the courtroom and the parties may, upon request and if strictly necessary, submit to the Court additional issues they believe should be addressed by the child. If the judge deems it necessary, they may call the child back in the room and complete the examination. Lawyers must, in any case, avoid addressing issues regarding litigation in the presence of the child.[23]

V. INDIRECT HEARING OF THE CHILD

In the case of an "indirect hearing", a hearing with the appointed expert and not in Court, it is equally advisable that the parties and their lawyers do not participate. The hearing may, upon request of the parties, be recorded. Before the beginning of the hearing, each expert appointed by the parties, who can participate in the hearing, may submit the issues and topics they wish to be addressed by the judge's appointed expert.[24]

Conclusions

The practice of the courts, derived from the Protocols and provisions of law, ensures that the child is protected and their hearing is child-friendly, even for a tender aged child.

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1 "*Protocollo sull'interpretazione e applicazione legge 8 febbraio 2006, n. 54 in tema di ascolto del minore*"

2 Law n. 219 of December 10th 2012 and Legislative Decree n. 154 of December 28th 2013.

3 Article 336 *bis* Italian Civil Code:

> "The child of at least 12 years of age or even below the age of 12, if capable of forming his or her views, is heard by the President of the Tribunal or by the delegated Judge in proceedings where decisions affecting him or her must be taken. If the hearing is in contrast with the child's best interest, or is clearly unnecessary, the Judge shall motivate his or her decision not the hear the child.
> The hearing is conducted by the Judge, with the assistance of experts. The parents (including when they are parties to the proceedings), the lawyers, the child's guardian (if appointed), and the prosecutor, may participate to the hearing if authorized by the judge, to whom they may submit the issues and the topics they wish to be addressed before the beginning of the hearing.
> Prior to the hearing, the judge shall inform the child of the nature of the proceedings and of the possible consequences of the hearing. A record must be kept of the hearing and it shall include the behaviour kept by the child during the hearing. Alternatively, a video-audio registration is made."

Article 337 *octies* Italian Civil Code:

> " […] the judge, furthermore, shall hear the child of 12 years of age or even below the age of 12 if capable of forming his or her own views. In presence of a custody agreement, the child will not be heard if the judge believes the hearing would be contrary to his or her best interests or clearly unnecessary."

4 Rome Protocol of 7th May 2007; Venice Protocol, 28th November 2008; "*Protocollo sull'interpretazione e applicazione legge 8 febbraio 2006, n. 54 in tema di ascolto del minore (Protocollo per il processo di famiglia, ALL. B)*", Verona Observatory on Family Law, 13th February 2009 and "*Protocollo per i procedimenti in materia minorile e di famiglia*", Salerno Observatory on Justice, 7th May 2009; "*Protocollo del Distretto di Campobasso in tema di ascolto del minore*", Campobasso, 1st June 2010; "*Protocollo per i giudizi di separazione, divorzio e relative modifiche, All. 1 – Ascolto della persona minorenne nei giudizio di famiglia*", Florence, 6th May 2011 and "*Protocollo per l'audizione dei minori nei*

procedimenti giurisdizionali", Varese, 30th April 2011; "*Protocollo per l'ascolto del minore*" Messina, 29th June 2012; and "*Ascolto della persona minorenne nei giudizi di famiglia*", Turin, 13th May 2013; "*Protocollo per i procedimenti in materia di famiglia e persone*", Bologna Observatory on Civil Justice, 27th February 2014; "*Protocollo ascolto minore nei procedimenti di famiglia*", Palermo Observatory on Civil Justice, 20th March 2018.

5 *Cfr.* Milan art. 1, Rome art. 1 and 8, Verona p. 11, Salerno art. 5A, Campobasso art. 1, Florence p. 3, Varese art. 1, Turin art. 1, Palermo para. 2.

6 *Cfr.* Rome art. 8, Campobasso art. 10 and Palermo para. 2.

7 *Cfr.* Milan art. 1, Rome art. 2, Verona p. 11, Salerno art. 5A, Campobasso art. 2, Florence pp. 3-4, Varese art. 2, Turin art. 2 and Palermo para. 1.

8 *Cfr.* Milan art. 3, Rome art. 4, Verona p. 11, Salerno art. 5C, Campobasso art. 3, Florence pp. 5 and 8, Varese art. 5, Turin art. 3. The Florence Protocol expressly states that direct and indirect hearings are not equivalent and preference must be given to hearings conducted personally by the judge, p. 8.

9 *Cfr.* Milan art. 2 and 4, Rome art. 3 and 6.1, Verona p. 11, Salerno art. 5B, Campobasso art. 4 and 5, Florence p. 4, Varese art. 3 and 4, Turin art. 5, Palermo para. 3.

10 *Cfr.* Rome art. 3.

11 The Rome and Florence Protocols further foresee the creation of dedicated courtrooms for the hearing, specifically set up in a manner to facilitate the interaction and the communication between the judge and the children and divided in two parts by a one-way mirror. In this way, the judge can conduct the child's hearing alone on one side of the room, while the other parties may silently assist on the other side (*cfr.* Rome art. 3 and Florence p. 4).

12 *Cfr.* Milan art. 6, Venezia art. 6, Verona p. 12, Salerno art. 5E, Florence p. 5, Messina art. 5.

13 *Cfr.* Venezia art. 6, Campobasso art. 11, Messina art. 6, Turin art. 8.

14 *Cfr.* Milan art. 7, Rome art. 5, Verona p. 12, Salerno art. 5F, Campobasso art. 11, Palermo para. 5.

15 *Cfr.* Milan art. 5, Rome art. 5, Venice art. 6, Campobasso art. 6, Salerno art. 5D, Turin art. 7, Palermo para. 3. The Florence Protocol specifies that the parties may submit their topics during a dedicated hearing. Furthermore, the protocol specifies that where the child voluntarily appears before the Court -without prior warning to his or her parents - the judge must immediately inform the lawyers and set a date for a hearing to discuss whether to proceed with the hearing. The same occurs in any other case of direct communication or contact between the child and the judge.

16 *Cfr.* Milan art. 6, Rome art. 6, Venice art. 6, Verona p. 12, Salerno art. 5E, Florence p. 5, Messina art. 5, Palermo para. 4.

17 *Cfr.* Milan art. 5, Venice art. 6, Salerno art. 5D, Campobasso art. 6, Turin art. 7, Palermo para. 4.

18 *Cfr.* Rome art. 5, Varese art. 3.

19 *Cfr.* Milan art. 5, Verona p. 12, Salerno art. 5D.

20 *Cfr.* Milan art. 5, Verona p. 12, Salerno art. 5D, Campobasso art. 6, Florence p. 6, Turin art. 6, Palermo para. 4.

21 *Cfr.* Milan art. 4, Verona p. 11, Messina art. 3, Palermo para. 4.

22 *Cfr.* Rome art. 7, Venice point 6), Varese art. 6 and 7, Campobasso art. 8, Turin art. 4, Florence pp. 5-6. The Florence Protocol additionally provides for a "*four-handed report*" of the hearing – drafted by the judge together with the child and, possibly, using the child's language – to be read to the parents in the final phase of the hearing and to be attached to the transcripts of the hearing (pp. 7 and 8).

23 The Florence Protocol (p. 8) additionally underline that the final phase of the hearing represents a precious opportunity for the parents to understand their child's needs rather than concentrate on their personal conflict. The judge will represent the child's views by reading the report of the hearing, and will listen to the parent's observations.

24 *Cfr.* Milan art. 8, Salerno art. 5C, Campobasso art. 9, Varese art. 5, Messina art. 7, Palermo para. 6.

10. The Voice of the Child in Hague Convention Proceedings in Greece

By Karolina Zoi Andriakopoulou & Maria Louiza Andriakopoulou *(Attorneys at Law to the Supreme Court. Members of the Bar Association of Athens, Greece)*

The purpose of this article is to highlight how the opinion of the child is heard and taken into consideration in Hague Convention proceedings in Greece, and to assess whether Greek procedural law facilitates ensuring the voice of the child is reflected in the contents of a Court decision regarding the future of this particular child.

Greek procedural law in Hague Convention cases

Firstly, it will be examined how the child can be represented at a court in Greece. In accordance with the Civil Procedure Code of Greece ("CiProCoGr"), the child can be represented in court by his/her parents. Article 62 of the CiProCoGr provides that "any person having the capacity to be a subject of legal rights and obligations has the right to be a party to a dispute" and Article 64 paragraph 1 of the CiProCoGr states that "any person unable to conduct legal acts in his own name is represented in a legal dispute by his/her legal representative". In addition to this, as stated in Article 1510 paragraph 1 of the Civil Code of Greece ("CCGr"), "care for the minor child is a duty and right of the parents (parental care), which is exercised jointly by the parents. Parental care includes custody of the person of the child, management of his/her assets and representation of the child in all his/her affairs or legal acts and Court appearances concerning his/her person or assets".

As the provisions of law above clearly state, the legal representatives of a child in Greece are his/her parents. A special representative is appointed only where the interests of the child conflicts with the interest of the parents exercising parental care, or the parent's spouse or their relatives by blood or by marriage (art. 1517 of the Civil Code). In Greece there is no wardship of the court, guardian ad litem or a similar institution available in Hague proceedings. These mechanisms are only available where the child is represented individually (*i.e.* not through the parents by law) in a court dispute. An application for return under the 1980 Convention is linked to parental care, except in the cases of Article 1517 of the CCGr mentioned previously. Therefore, as a rule there is no special representative of the child appointed by the court, and the child

is not made a ward of the court, as is the case in some other European countries. For a minor child (a child that is below 18 years of age) the only way to be represented in the Greek courts is through his/her parent(s).

In 1980 Convention cases, the application requesting the return of the child is filed by the parent requesting the return of the child (the applicant). The applicant can choose either to appear in his/her own name or be represented by the Minister of Justice, Transparency and Human Rights, which is the designated Central Authority in Greece under the 1980 Convention. The respondent is the parent who has wrongfully removed or retained the child. These are the only two parties of the dispute since, as it has been stated above, the child is not entitled to individual legal representation and does not become a ward of the court during 1980 Convention proceedings.

The involvement of the child in the proceedings is provided for in Article 13(2) of the 1980 Convention: "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 use. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence […]."

1980 Convention proceedings in Greece are heard before the one sitting judge at the Court of the First Instance, and are regulated by Articles 682 – 738 of the CiProCoGr. These Articles regulate the Interim Measures Procedure, which applies in cases of emergency or to avoid imminent danger by allowing the Court to secure or maintain a right or by regulating a situation. The Articles ensure speedier administration of return proceedings than ordinary court procedure, which conforms fully to the requirements of Article 11 of the 1980 Convention, that "the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children".

However, there are two basic differences of the rules of the 1980 Convention procedure and the rules governing interim measures procedure. All facts pertaining to the substantive matters of the case have to be fully, and not provisionally, proven, by using any means of proof available, contrary to the provisions of Article 690 of the CiProCoGr. Furthermore, the decision is subject to appeal and other legal remedies, contrary to the provisions of article 699 of the CiProCoGr, which apply to decisions issued in accordance to the Interim Measure Procedure (no 1980 Convention) cases, wherein it is stated that "decisions that accept or reject applications for interim measures or for revoking or changing these measures are not subject to appeal". Therefore, the procedure might look the same as the Interim Measures Procedure but it is by no means the same in substance, since the provisions of Articles 690 and 699 of the CiProCoGr constitute important parts of the core of the Interim Measures Procedure.

Before a judge determines whether to allow a child to be heard, the legal and factual necessity to do so must be proven by evidence brought by the parties. The evidence taken into consideration includes arguments of the parties brought forth by their legal representatives, the documentation that the parties present, oral testimony of one witness per party during the hearing and written statements under oath of the other witnesses of the parties who have not appeared in court. It is interesting to note that the parties themselves do not give statements. The applicant's petition substitutes the function of his/her statement and the respondent's written briefs (or "proposals" as termed in Greek procedure) substitute the function of the their statement. In both the application as well as the written briefs of the parties, the substantive as well as the legal aspects of the matter are addressed. These documents are not drafted by the parties themselves but by their legal representatives, who also sign them so that they are admissible in court.

If the applicant's request for the child to be heard is to prove that the child wants to be returned or another Article 13 defence, the judge will most likely hear the child if they are of sufficient age and maturity and if they do not suffer from a condition which would not allow the child to communicate freely his/her opinion to the judge. In the decisions that have been examined for the purposes of this Article, children approximately 6–7 years old are considered of suitable age. In some exceptional cases, children below the age of 6 have also been heard.

Interview of the child

The judge first sees the child in their chambers in the court to determine whether the child should be heard in proceedings, at a time which takes into account the child's time commitments, such as schooling. The judge specifies and announces the time and place of the interview before all parties during the hearing.

The interview is conducted by the judge alone. In one case that the authors of this Article conducted, the child was interviewed in the presence of two judges, which is something that has not been encountered before or since this event. The judge interviews the child in his/her chambers in the court building during court official working hours. The child is seen by the judge alone; no other person is permitted to be in the room, except an interpreter if required for the child. No child psychiatrist, child psychologist or social worker is allowed to be present during the interview.

As pointed out before, the child is interviewed in the judge's chambers; there are no special rooms at the court

houses in Greece for this purpose. Although children as young as 6 may be interviewed, judges have no previous training on how to conduct the interview with a child of this age, or with an adolescent. There are also no guidelines issued by the court. Therefore, each judge conducts the interview as he/she sees fit.

During the interview, the judge is left alone in their chambers with an unknown and usually frightened child. It is customary for the judge to first ask the child general questions, such as where he/she goes to school, what football team he/she supports, if he/she has seen any films recently or what is his/her favorite food or color, to make the child more open to dialogue. While the judge is asking such questions, he/she is also observing the general appearance of the child, that is if the child is well-dressed, clean, if the child's hair is combed and the child's face is washed, or if the child appears neglected or malnourished or dirty, or other signs of possible parental neglect. If the judge observes a mark or lesion on the skin of the child, he may ask the child later in the interview how this was made.

The judge will then start asking the child questions relating to his/her present environment. These questions could be:

- Where are you living now?
- With whom are you living?
- Are you having a good time there?
- How do you spend your day?
- Apart from mum/dad, do you see any other relatives? Do you spend time with them?
- How often do you communicate with your dad/mum? In which way? Do you want this type of communication?
- Do you feel lonely? Are you left on your own?
- How do you like your school?
- Is school easy for you?
- How are you dealing with the language? (in the case that the child does not speak the language of the place he/she has been abducted to well).
- Do you have any friends from school? Are other children teasing you?
- Do you participate in any out-of-school activities? With or without other children?
- How does your mother/father behave towards you? Do they punish you? For what reason?
- Do you love your mother/father? Do you feel safe with them?
- How do your grandfather and grandmother behave towards you?
- How do your other relatives behave towards you?

The judge then proceeds to ask the child questions having to do with the substantive matter of the case, such as:

- Do you like it here more than the place you were before you were brought here?
- Do you prefer to go back with your father/mother or to stay here with your mother/father?
- Do you miss your father/mother enough that you would want to be with him/her permanently?
- Would you feel happier if you went back?
- Would you feel safe if you went back? Do you feel that you would be in danger if you went back?
- What is the danger you will avoid if you stayed here?
- What aspects of the behavior of …… (if a certain person is mentioned) scare you?
- What does he/she do to you or to people you love that frightens you?

The judge needs to ask all these questions, because he/she needs to establish the following facts:

- Whether the child has the maturity appropriate for his/her age so that his/her opinion can be considered by the court.
- Whether the child has been unduly influenced or has given a prepared response to the judge.
- Whether the child can understand what is his/her best interests.

The substance of 1980 Convention decisions

The best interests of the child is defined in the preamble of the 1980 Convention. The child should return to the *status quo ante*, or to the situation he/she was living in before he/she was unlawfully removed or retained, and that the child is not exposed to physical or psychological hardship. Such hardship could be caused by the sudden loss of the stability of his/her family situation and the traumatic loss of the parent that was the primary carer of the child up to now. However, it must also be taken into consideration that the child should not be exposed to similar hardship by yet again having to adapt to a new and unfamiliar environment if return is ordered.

In their decision the judge usually gives a short description of the child. The description includes some of the characteristics of the appearance, as well as of the personality, of the child. Children have been described as well-kept, well-dressed, clever, sociable and mature in judgments. If during the proceeding it is determined that a child is not mature enough to be examined by the judge, there will be mention of this in simple and non-derogatory terms. Although the precise content of the conversation of the judge with the child is not reported, the judge needs to specifically mention the findings that he made during the interview with the child in the decision. These are findings pertaining to:

- The overall appearance and condition of the child;
- The intelligence of the child;
- The social skills of the child;
- The character of the child;

- The feelings and relationship of the child towards either of his/her parents and to their behaviour towards the child;
- The feelings and relationship of the child towards his/her relatives and to their behaviour towards the child;
- Which country the child feels more at home;
- Whether the child has adjusted in their new environment;
- What the child aspires to do with their life (and where); or
- The opinion of the child on where he/she wants to live.

In conclusion, it is important to emphasise that this procedure not only meets the full criteria set by law, but it is also beneficial for the child. The child, who is the focus of the procedure since a decision about his/her future will be issued by the court, is provided with a secure private space where he/she can be heard by a sympathetic adult on a one-to-one basis. The child is given a proper opportunity to express an opinion on a situation that affects him/her deeply and has an enormous impact on his/her future. It also ensures that the child does not feel obliged to take sides in a courtroom in front of his/her disputing parents. With this, the Greek procedural law ensures that the voice of the child is heard and given due consideration in Hague proceedings.

11. Listening to the Child's Voice in Spain

By Christopher Lee *(English Solicitor and Spanish Abogado)*

This paper considers hearing or gauging the voice of the child in Spanish court proceedings, with special emphasis on cases involving the 1980 Convention.

Article 13 of the 1980 Convention sets out exceptions where the return of a child wrongfully removed or retained from her country of habitual residence may be refused. One such exception is where the child herself objects to return provided, that is, the child has attained an age and degree of maturity which make it appropriate to take her views into account. However, the 1980 Convention does not specify an age at which a child may generally be taken to have attained, or be likely to have attained, such maturity.

Article 12 of the *United Nations Convention on the Rights of the Child* indicates that, when adults are making decisions affecting a child, that child should be able to express her opinion freely, be listened to and have her views taken into account if she is capable of forming her own opinions in accordance with her age and maturity. In particular, a child should be given the opportunity to be heard in any judicial proceedings that affect her "in a manner consistent with the procedural rules of national law".

Accordingly, we need to consider Spanish domestic law and jurisprudence for guidance as to when and how children's voices are canvassed in court proceedings in Spain:

- Organic Law 1/1996 of 15 January 1996 on Judicial Protection of Minors indicates that, in order to assess the best interests of the child, her wishes and opinions should be taken into account in accordance with the child's age and maturity. Article 9 of that Law recognises the child's right to be heard and listened to without any discrimination based on age. It guarantees that the child, having reached a sufficient degree of maturity, may exercise this right for herself. Maturity must be assessed by specialised personnel. In Spanish judicial proceedings a child is considered to have attained sufficient maturity to have her opinions listened to and taken into account once she has reached 12 years of age, although it is not discounted that a younger child may also have attained the required maturity.

- Article 159 of the Spanish Civil Code states that a child must be heard by a judge where the child is aged 12 or above, or it is determined that she has sufficient good sense.

  Of course, the judge may "hear" a child in different ways. Below, we shall see that, unlike in some jurisdictions, in Spain judges themselves may, and frequently do, interview children. However, in other instances, the child may - instead of, or in addition to, speaking to the judge - be interviewed by the child psychologist service linked to the court. Such services seek to assess conflicts from a non-judicial perspective. Their reports are not in themselves deemed expert evidence but, rather, are a tool at the court's disposal to enable the court to learn more about the circumstances or facts of a case which are relevant to arriving at a decision. So, although either or both the parents' lawyers may propose that such a report be made, whether it is or not is at the judge's discretion. The judge will exercise that discretion in the best interests of the child.

As for Spanish case law, these decisions are notable:

- **Barcelona Provincial Appeal Court, 8 March 2016, EDJ 2016/57417**

This was an appeal against a ruling that a father should return his children to Belgium, where he alleged that their mother mistreated them. The statements of the children - one quite a mature 14-year-old and the other only 9 years old - contradicted each other as to the mother's alleged

mistreatment, although they both clearly expressed a desire to remain living in Spain with their father. The court dismissed the appeal, upholding the return of the children to Belgium. It found that the statement of the 9-year-old was not truly sincere, that the siblings made contradictory statements and that the mother's mistreatment of the children was not proven by their accounts. The court held that a decision not to return the children should not be made solely based on the children's views, however firmly and consistently those views had been expressed, given that one of them was of an age below the minimum established by legislation (*i.e.*, 12 years of age) and the elder sibling contradicted himself, even though he evidently wished to remain living in Spain with his father.

- **Barcelona Provincial Appeal Court, 16 April 2004, 555/2003**

In this case, a mother's appeal against a ruling ordering her to return her children to Chile was dismissed. The court did not take into account the opinions of the children (aged 11 and 9 respectively) because they had not attained the level of maturity foreseen in the 1980 Convention.

- **Lugo Provincial Appeal Court, 18 July 2005, 270/2005**

The court in this case declined to return a boy to Brazil as requested by his foster father, despite the fact that application was made less than a year after the abduction occurred. It based its decision on Article 13 of the 1980 Convention, finding that although it could not determine how severe might be the effect of returning the child to social and familial reintegration in Brazil, the child was emotionally stable in Spain and that his foster mother in Brazil had died. Therefore, the court could not discount that the child might suffer grave psychological harm were he returned to Brazil and removed from his current situation in Spain where he was living again with his biological mother and two siblings. The psychologist examining the child found him to be capable and mature despite his young age and, also, convinced as to his preference to remain living in Spain.

- **San Sebastián Provincial Appeal Court, 31 December 2002, 3333/2002**

Here, the court dismissed an appeal brought by the state lawyer (*abogado del estado*), representing a parent requesting return of two children to Argentina, against a decision of the lower court not to return the children to their country of habitual residence. The lower court had found that, although there had been a wrongful retention, proceedings had been initiated beyond one year from the retention. Therefore, return under Article 12 of the 1980 Convention was not obligatory and the children were demonstrated to be settled in their new environment. Further, the wishes of one of the children (aged 12) needed to be respected given her age and degree of maturity. Her younger brother also expressed a desire to stay in Spain, and in the children's overall best interests as well as to avoid separating the siblings, a return order for both children was denied.

- **Seville Provincial Appeal Court, 12 September 2008, 5400/2008**

In this appeal decision, the views of a very young child (5 years of age) were taken into account, together with other factors, in order to uphold a refusal by the lower court to order a return to Paraguay. The mother, having obtained authorisation from the father and the Paraguayan court to bring the child to Spain, did not return the boy at the end of an agreed three months stay. The boy said he did not wish to return to Paraguay because his father would hit him and because he had settled well in Spain with his mother and Spanish friends. Combined with this was the fact that the mother had reported the father for domestic abuse in Panama, and that the father himself was intending to move to the USA with his new partner.

- **Caceres Provincial Appeal Court, 3 June 2003, 22/2003**

By way of contrast to the previously cited case, this appeal court held that it did not have to listen to the views of a child one year younger – a 4-year-old – despite the father alleging abuse of process because the court had refused to take his son's views into account. The child was ordered to be returned to France, given that the father had not complied with a ruling of the French court, which had held that the child's residence was in France with the mother and prohibited the taking of the child from France without the written consent of the other spouse. In its decision, the court also found that there was no risk of physical or psychological harm in the child being returned to his State of origin.

To supplement the above legislation and case law, note should also be taken of paragraph 4.6.7 of the Spanish state public prosecutor's circular 6/20158 on civil aspects of international child abduction:[1]

- The opinion of the child must be considered taking into account her maturity. That said, a child's opposition does not presuppose an automatic denial of return, but it does generate an obligation to take her opinion into account when arriving at a decision as to return.

- There is no specific age from which the opinion of the child must be taken into account, given that the degree of maturity can vary from child to child, and therefore whether to do so or not must be considered on a case-by-case basis.

- To determine the child's degree of maturity, the judge must hear the child, except where their age implies lack of a minimum level of maturity.

- In any event, the Law on Judicial Protection of Minors indicates that sufficient maturity has been reached at the age of 12.

- The opinions of children shall be taken into account based on two criteria, being their age (the older they are, the more weight their opinions should carry) and their level of maturity.

- The arguments justifying their choice are also fundamental since they may reveal solid rational motives or indicate manipulation or the use of unsatisfactory criteria.

- The Spanish Civil Code establishes a guideline regarding age, setting a minimum of 12 years of age. However, children younger than that may also be heard if they display "sufficient judgement", the Committee on Children's Rights noting that "maturity" refers to the capacity to understand and evaluate the consequences of a specific issue.

- Maturity is understood as the capacity of the child to express her opinions on questions in a reasonable and independent way. This is based on three concepts:

    - The child's capacity should be evaluated to take into account her opinions or to tell her what influence her opinions have had on the results of a court process. A base level of rationality should be verified, being that the desire expressed is in-line with the results expected.

    - The age of the child in itself cannot determine the importance of the opinions she may have. Levels of comprehension are not uniformly linked to biological age. Therefore an examination must be made on a case-by-case basis.

    - The effects of the matter should also be taken into consideration: the greater the potential impact on the child's life, the more important a correct evaluation of her degree of maturity will be.

- Special care must be taken to present these hearings so as not to place the burden of the decision on the child. Placing a child in a "situation of divided loyalties" must be avoided. The child should not be made to feel she may be betraying one or other of her parents, or that she has to choose between them. In some cases, it will be necessary to resort to the opinions of specialists in order to obtain a true understanding of the child's wishes, which can be requested by the judge or public prosecutor.

Regarding Spanish court hearings involving children, one should also take account of the guidelines contained in section 11 of circular 3/2009 of 10 November on the protection of victimised minors and witnesses:

- Although Article 770 of the Spanish Civil Procedure Law (unmodified) continues to state imperatively that a child that has reached the age of 12 should be heard, this is not obligatory; instead the child should be heard when the judge deems it necessary.

- In each case, surrounding circumstances must be considered in order to decide on the necessity or otherwise of hearing the child (whether or not there is a dispute between the parents, the age of the child, the precise nature of measures requested in respect of the child, etc.)

- Interviews of children if deemed necessary should be undertaken in such a way that the child feels as relaxed as possible, and should take place only in the presence of the judge, the court secretary and the public prosecutor. Equally, if circumstances dictate, assistance should be requested from psychologists or members of the specialist team assigned to the court.

- A child should be heard respecting the necessary conditions of discretion and intimacy, giving the child confidence and protecting to the maximum possible her dignity and personality.

- As a general rule, one should avoid asking the child direct questions about which parent she would like to live with or about what sort of contact regime would work best; thus, indirect questions that reveal which parent the child has a stronger relationship with, which takes more responsibility for her or which she gets on better with are preferable.

- No principles are violated in not allowing the parties' lawyers to intervene in the interviewing of a child, given that it is not a formal means of gathering evidence. The child should not be inundated with a torrent of questions and cross-examination. In the child's best interests, she should be isolated from counter-productive interventions other than a personal, one-on-one interview with the judge and, where appropriate, the public prosecutor.

1 The public prosecutor's office is party to Spanish proceedings involving children, considering the case from the child's viewpoint and, in that sense, representing the child.

12. Child Abduction from the Child's Point of View

By Baroness Hale of Richmond *(President of the Supreme Court of the United Kingdom)*

Child abduction law purports to be all about the children. But for far too long it has denied them their voice. It has denied them the opportunity to take part in the process: ostensibly all about them, in practice it has been all about the adults – the presumptively guilty taking parent and the presumptively innocent left behind parent. The courts have made several highly questionable assumptions: first, that the children involved have no independent views of their own, but are bound to mimic the views of the taking parent; second, that their views are unimportant because the extent to which they can influence the court's decision under the 1980 Convention is so limited; and third that it may even be harmful to ask them their views. There will be cases where these assumptions mirror the facts but there will be other cases where they do not. We have to cater for them both.

However, the child's voice will not be heard unless the left behind parent (or some other person, institution or other body claiming that a child has been removed in breach of custody rights) initiates the process to secure his return. Most of them do not – the number of 1980 Convention cases are tiny in comparison with the likely scale of wrongful removal and retention. There may be many reasons – lack of access to resources or advice, a sense that it would be hopeless, a lack of commitment to the child, or even an understanding of why the taking parent felt it so necessary to go.

The child may be desperate to go back home, but have no way of securing this. Rhona Schuz[1] points out that the 1980 Convention does not require that the person whose rights of custody have been breached initiate the process. Why, she asks, should the child not be able to do so? Article 12 of the *United Nation Convention of 1989 on the Rights of the Child* ("UNCRC") requires State Parties "to assure to the child who is capable of forming his or her own view the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Our own Children Act 1989 expressly contemplates that a child may make an application for an order about her upbringing, provided that she has sufficient understanding and obtains the court's permission (s 8(1)(a)(ii), (2)(b), and (8)). Should we be thinking about enabling a child to invoke the 1980 Convention?

Suppose, however, that the 1980 Convention is invoked. The Convention purports to be child-centric in its aims: as the Preamble states, the signatory States are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody", and "desiring to protect children internationally from the harmful effects of their wrongful removal or retention"; but those aspirations have to be accommodated within their other object, "to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access", reflected in the requirement in Article 12 to order the return of a child who has been wrongfully removed or retained in breach of rights of custody "forthwith".

Hence the main object of the 1980 Convention is to secure the return of the child, whether or not this is in her best interests. The welfare evaluation is to take place in the State of the child's habitual residence. But Article 3 of the UNCRC requires that the child's best interests shall be a primary consideration in all official actions concerning her. The child's best interests are not necessarily the same as the child's welfare. Welfare is a paternalistic – or maternalistic – assessment of what will be better for the child. But a best interests evaluation might go further and ask how the child's rights can best be accommodated and advanced.

The UNCRC recognises that children have a wide range of other human rights, analogous to those of adults but adapted to their special position as children. A striking illustration is the *Castle* case.[2] Three teenagers complained that being "kettled" for several hours in Whitehall when taking a peaceful part in a student protest was in breach of the police duty in section 11(2) of the Children Act 2004 to "make arrangements for ensuring that […] their functions are discharged having regard to the need to safeguard and promote the welfare of children". The Divisional Court held that the police were indeed subject to this duty when policing the protest, but that it was reasonable for them not to plan ahead for the possibility that kettling would be necessary and the likelihood that children would among those kettled and not to make any specific arrangements for them. Yet section 11(2) can be read to include the need for children to develop their personalities and experience. Taking part in demonstrations and other political activities is a vital part of this. Promoting children's best interests incudes promoting their rights under the UNCRC, including their political rights, freedom of association and expression, facilitating their development as active democratic citizens, not just protecting their physical safety and welfare in the traditional sense.

Perhaps we could apply the same thinking to the child's objections exception in Article 13 of the 1980 Convention? It seems to have been driven by the pragmatic concern that the forcible repatriation of teenagers against their will would be extremely difficult,[3] rather than by a recognition of a child's right to autonomy. Hence:

> "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."

There are three things to note about this, apart from the terrible fact that the child is referred to as "it" – immediately regarding the child as an object rather than a person. First, the child's objections are not determinative: the court "may" refuse to order the return if such objections exist. Secondly, the "age and degree of maturity" are not set, leaving open the potential for a wide variation in how this is to be judged. Thirdly, there is no requirement that a court ascertain the child's views if they are not offered, nor any guidance as to how the views are to be canvassed. This permissive tone is echoed by Elisa Pérez-Vera when describing the purpose of Article 13 in her Explanatory Report: "In this way, the Convention gives children the *possibility* of interpreting their own interests."[4]

Since then, we have had Article 12 of the UNCRC. Our own law, in the Children Act 1989, imposes several obligations on courts and public authorities to take account of the ascertainable wishes and feelings of the child concerned in relation to a variety of decisions about them. And it has become mandatory for a court to receive a child's views in abduction cases governed by the Brussels IIa Regulation. Article 11(2) of the Regulation states:

> "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

All this is intended to recognise a child's right to participate in and be heard in proceedings which profoundly concern her.

In fact, refusals to return an abducted child to the State of her habitual residence, based on her objections, are relatively rare. In Lowe and Stephens' most recent study, of applications in 2015, child objections accounted for 15% of refusals, a decrease from earlier years. In the courts of England and Wales there were 14 judicial refusals to return, in which child objections were the sole reason in 2 and a joint reason in a further 3 cases. There is no information about how often objections were raised but did not prevail.

One reason for this rarity is that the children are usually so young. The average age of the children involved in 2015 was 6.8 years. Only 23% of children were between 10 and 15, realistically the ages at which the exception might be applied. The average age of an objecting child was in fact 11.

Another reason for rarity is that the obligation to take the child's views into account does not mean that those views are always determinative or even presumptively so. The court is entitled to weigh in the balance the general policy considerations underlying the 1980 Convention against the interests of the child in the individual case. These include not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes, as well as more general considerations of the child's rights and welfare.[5]

But one can reasonably expect that, as the number of return applications continues to rise, and an appreciation of the importance of listening to the child's point of view grows, the number of child objections cases is likely to rise too. And for the reasons suggested in *In re D*,[6] this is a welcome recognition of the role this can play in reaching better outcomes for the child, regardless of whether the objection is acceded to:

> "Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents."

The 1980 Convention gives no guidance as to how children's views are to be elicited. In the courts of England and Wales there are three possible ways of doing it:

1. Joining the child as a party to the proceedings with separate legal representation.
2. A face-to-face interview with the judge.
3. The report of an independent Cafcass Officer or other professional, who is skilled and experienced in interviewing children.

In *In Re D*,[7] I expressed the view that in most cases a report from a Cafcass Officer should be enough and this is now the standard practice. But it does not allow the child to engage in the proceedings herself. The officer cannot advocate the child's views or respond to evidence or submissions. But the involvement of the officer, and the degree of removal from the court process, may protect the child from the risk that the litigation may exacerbate difficult relations at home.

Meetings between children and judges hearing proceedings concerning them used to be commonplace, but the practice dwindled. In our adversarial system, the child cannot be offered confidentiality by the judge: anything which might influence the decision has to be reported to the parties so that they can have a proper opportunity of dealing with it by evidence or argument.[8] Some judges may have been reluctant to undertake a task to which they did not feel well suited. However, the advent of the obligation to hear children in the Brussels IIa Regulation required a fresh look at the question. The then President of the Family Division, Sir Mark Potter, had more frequent meetings with children. These had the dual purpose of giving the young person a chance to say anything she wished to tell the judge and the judge a chance to explain to her the nature of the decision and that an order for return might be made despite her firm objections.

Pressure to increase the number of meetings between judges and children in family proceedings generally led to the Family Justice Council *Guidelines for Judges Meeting Children who are Subject to Family Proceedings*[9] in 2010 ("2010 Guidelines"). This stated firmly what the purpose was:

> "It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence […] the purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her."[10]

It would not be helpful if the children wanted a meeting for one purpose (to tell the judge their views) and the courts offered it for a different one (to tell the child about the court). Since the 2010 Guidance was issued, the conceptual purists have drawn a hard line between (a) evidence of what the judge needs to know in order to answer the question before the court, including evidence of the wishes and feelings of the child and (b) a public relations exercise enabling the child to see the court and meet the judge who will decide her fate, enabling her to understand the decision-making process, but not giving her a real role in it. Pilot projects in the north of England have not drawn such a clear distinction, assuming that the purpose of meeting the judge is to communicate what the child's wishes and feelings are.[11]

The judge's role in abduction proceedings was examined by the Court of Appeal in *In re KP*.[12] A 13-year-old girl objected to a return to Malta (both to the place and to her father's care). The Cafcass Officer was impressed with the strength and articulation of her objection and favoured an order for no return. She recommended that the judge meet the girl who "was feeling unheard". The meeting lasted over an hour, in which the judge probed the reasons for the objections with a series of 87 questions. She concluded that the girl was in reality very confused and did not object to returning to Malta on any cogent or rational grounds. The Court of Appeal stated very firmly that judges should be passive recipients of whatever communication the young person wishes to transmit. If the child volunteered relevant evidence the duty of the judge was to report back to the parties and determine whether, and if so, how that evidence should be adduced. Since the information gleaned in the meeting had achieved a pivotal status in the judge's evaluation, the case was remitted for rehearing before a different judge. Permission to appeal to the Supreme Court was refused, perhaps understandably, but the confusion remains.

It seems to me that the problems of judges meeting children in private apply just as much to professionals' doing so. The only person who can give the child a guarantee of confidentiality is her own lawyer. The other professionals cannot give the child that guarantee any more than the court can. Skill is needed both in eliciting the child's views and in interpreting them. Care is needed in preserving the rules of natural justice while enabling the child to speak freely. We cannot deny the existence of these problems by delegating the task to professionals whose direct work with children we never see.

An alternative is to join the child as a party. *In Re LC (Children)*[13] four children, who were born in England and had lived here all their lives, had moved to Spain with their mother a few months earlier. After spending Christmas here with their father, the children indicated that they did not want to return to Spain and the two of the boys hid their passports to make sure that they missed their flights. The mother issued 1980 Convention proceedings. The 12-year-old, T, applied for separate representation but the judge refused. He relied on the evidence of the Cafcass Officer who had twice interviewed the three older children. She reported that T was confident and intelligent, with a maturity beyond her years. Her 10-year-old brother also seemed thoughtful and mature for his age, her eight-year-old brother equally thoughtful but less confident. The judge ordered the return of all the children. He acknowledged that T objected, but found that her brothers' expressed wishes not to return to Spain were only preferences rather than objections. The Court of Appeal held that he should not have ordered T to return, and remitted the issue of whether it would be therefore intolerable for the younger siblings to be separated from her.

The Supreme Court allowed T's appeal on the joinder question. The threshold criterion is the best interests of the child. If it is in her best interests then the court has a discretion to make the order, although this discretion is more theoretical than real since resolution of the threshold issue will almost invariably drive the exercise of the discretion. Lord Wilson expressed his concern that "the intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely

affects their interests."[14] He stressed that there should not be any routine grant of party status to older children objecting to their return to the requesting State. In this case, however, T had a standpoint which was incapable of being represented by either of the adult parties and she should have been joined. However, this might not have satisfied T given what Lord Wilson said next:

> "A grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which she should play in the proceedings […] it would surely have been inappropriate for [the judge] to receive oral evidence in court from T even if she had been a party to the proceedings. It is conceivable that, had he considered that her evidence might prove determinative yet needed to be further explored, [he] might have invited counsel, particularly counsel for the mother, to ask age-appropriate questions of her otherwise than in court and recorded on videotape. In all probability, however, the reasonable course would have been to confine T's participation in the proceedings to (i) the adduction of a witness statement by her, or of a report by her guardian […] (ii) her advocate's cross-examination of the mother; and (iii) her advocate's closing submissions on her behalf. Whether it would have been reasonable for [the judge] to have allowed T to be present in court during the hearing I cannot tell. It would have been for the guardian to decide which of the documents file in the proceedings should be shown to T."[15]

I have quoted this at length because it illustrates how far short this approach falls of recognising the autonomy of the child, even by definition a child of sufficient age and maturity to be heard. From the child's point of view, joinder as a party will be a woeful disappointment if in fact her strong desire is full participation in proceedings which so closely concern her future. If her views are still mediated by her representatives and she is unable to give instructions on evidence and submissions as they are made in court, a feeling of remaining "unheard" is still a distinct risk.

The question of joinder also arose in *In re M*.[16] Four children, aged 16, 12, 10 and 5, were removed from Ireland by their mother, who alleged a history of domestic abuse. The children were not joined but gave evidence through a Cafcass Officer that they did not want to return and were in fear of their father. The judge ordered their return, and the older two children and the mother appealed. The two children wished to be joined as parties. This was allowed and the appeal succeeded. But Black LJ stressed that consideration should be given at the earliest possible stage to whether the appropriate parties are before the court. By the time the case gets to the Court of Appeal it usually too late.

Where does this leave us? The reluctance to join children as parties goes deeper than concerns about delays and funding constraints. It reflects a longstanding and in many respects natural desire to protect a child from making "mistakes" about where her best interests lie. It represents a big cultural shift for the family courts to move away from their traditional reliance on hearsay and professional evidence in favour of the direct involvement of children. There is still much work to do to ensure that children really do feel at the centre of decision making in relation to their own futures.

The role of the court welfare officer, the guardian, the solicitor acting as a litigation friend or the judge meeting the child includes explaining to her the nature (and limits) of the right of objection in 1980 Convention proceedings. An adult on learning of the threshold test would be likely to present his evidence accordingly. If he did not want return to the State of habitual residence, he would be likely to frame this in terms of an objection. But we want to hear unaffected evidence about a child's wishes and feelings in her own words. Children will not necessarily use the language of objection or preference or mere unhappiness with the precision required by courts interpreting Article 13. But very often a judge's refusal to return a child will be based on a strict analysis of the language used.

The normal approach to the child objections exception in 1980 Convention proceedings is to break it down into the "gateway" stage and the discretion stage. The gateway stage has two parts (1) does the child object; and (2) has the child attained an age and degree of maturity at which it is appropriate to take account of his or her own views? Then the court has a discretion whether or not to return the child. What the child says is of course relevant to the assessment of all three elements. One difficulty for the child is that strongly expressed words, clearly amounting to an objection, may satisfy the first gateway stage and may weigh more heavily in the exercise of the discretion, but the force of the emotion could be taken to indicate a lack of maturity. This is particularly difficult for teenagers, who may well present their opinion very forcefully. But more thoughtfully expressed desires not to return, showing a mature appreciation that the issue is not black and white, run the risk of being discounted as preferences rather than objections, such that the gateway threshold is not even reached.

Equally there has been a tendency to disregard objections which appear to echo those of the abducting parent, or seem designed to serve that parent's interests. There may be cases in which the child's objection is not authentic or independent and the court will need to explore the extent to which it is genuinely held. The inquiry was described by Ward LJ in *Re T*[17] where he said that the strength and validity assessment will consider the following factors:

> "(a) what is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is *her* views which have to be judged appropriate; (b) to what extent, if at all, are the reasons for objection rooted in reality or might reasonably

> appear to the child to be so grounded? (c) to what extent have those views been shaped or even coloured by undue influence and pressure, directly, or indirectly exerted by the abducting parent? (d) to what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

The key word there is "undue". It can be rational for a child to side with the abducting parent, not just as a result of events which have preceded and prompted the abduction, but because a child may very much prefer not to be uprooted again. The aftermath of any abduction, and the delay caused by proceedings including appeals, can last for a significant proportion of a child's life. And the child's view may quite reasonably change, as the process takes its course. *In re M*[18] concerned two girls born in Zimbabwe to Zimbabwean parents, who had lived with their father after their parents separated in 2001. In March 2005 they were abducted and brought to England by their mother. The girls were not happy at first and in September 2005 they asked their father to come home. However, he did not bring 1980 Convention proceedings in England until 2007, by which time the girls were 13 and 10 and settled into their new home. They no longer wished to return. The judge ordered their return, as he thought the case needed to be exceptional in order for their objections to outweigh the general policy of the 1980 Convention. The House of Lords ruled that there was no test of exceptionality once the discretion arose.

Looking at the matter from the child's point of view. The two girls "have had to suffer all the upset of being brought to this State secretly. They were unsettled at first [but there was a long delay before the father started the ball rolling with Convention proceedings]. What were the children to do during all this time? They settled down and got on with making their lives here, where they are happy and have become fully integrated in their local church and schools. They feel fully settled here whatever the courts may think. Their views have changed from wanting to go home to objecting to this further disruption in their short lives [...] In short, having been the victims of one international relocation contrary to their wishes, they stand to be the victims of another should the father's application succeed."[19]

Just as we are becoming more conscious of the child's distinctive point of view in child objection cases, we are also recognising that the child's point of view may have a role to play in deciding where she is habitually resident. Habitual residence is a question of fact. The old test[20] which looked at the parents' intention is no longer applicable. The search is now for "the place which reflects some degree of integration by the child in a social and family environment".[21] Some of the factors which will be important in determining habitual residence will be objective, such as how long a child has lived in the State to which she has been taken, her living conditions, and her enrolment at school for example. But other relevant factors are subjective: what is the reason for her being there and what is her perception of the situation?

I come back to the "bossy older sister", T, in *In re LC*. The Cafcass Officer's evidence was combed through to assess what the children's state of mind had been about the move to Spain and while they were there, in their new schools. The Cafcass Officer's evidence was combed through to assess what the children's state of mind had been about the move to Spain and while they were there, in their new schools. They had been moved very abruptly from their English schools. The officer concluded that T continued to regard England as her home. It had been her home for almost all of her life and she felt that her own roots and those of her immediate family remained in England. These children felt that the decision to move to Spain had been taken by their mother without taking account of their wishes and feelings. This was all highly relevant to the question of whether their State of habitual residence had in fact changed to Spain:

> "The perception of the children is at least as important as the adults in arriving at a correct conclusion as to the stability and degree of their integration. The relevant reality is that of the child, not the parents."

The question now is not whether we should hear from the children involved in child abduction cases. The question is how best to do it, in a way which recognises the centrality of the child in the proceedings, without placing upon the child a burden which she should not be required to bear.

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4 *Ibid*.
5 House of Lords, *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2018] 1 AC 1288, paras 42-43, 46 [INCADAT Ref: HC/E/Uke 936].
6 House of Lords, *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [INCADAT Ref: HC/E/Uke 262].
7 *Ibid.*, para 60.
8 United Kingdom Supreme Court of Appeal (England and Wales), *Mabon v. Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011.
9 [2010] 2 FLR 1872.
10 Para 5.
11 H. Barrett, H.H.J. Hillier and A. Johal, *Children and Young People Meeting Judges and Magistrates, Evaluation Report of the West Yorkshire Project*; H.H.J. Finnerty, M. Gittims and P. Scatcherd, *Children and Young People Meeting Judges and*

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12 United Kingdom Court of Appeal (England and Wales), *In re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554, [2014] 1 WLR 4326 [INCADAT Ref: HC/E/Uke 1258].

13 United Kingdom Supreme Court of Appeal (England and Wales, [2014] UKSC 1, [2014] AC 1038, [INCADAT Ref: HC/E/ES 1256].

14 Para 48.

15 Para. 55.

16 *Op. cit.*, note 4.

17 United Kingdom Court of Appeal (England and Wales), *In re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 [INCADAT Ref: HC/E/UKe 270].

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19 Para 52.

20 House of Lords, *R v. Barnet London Borough Council, ex p Nilish Shah* [1983] 2 AC 309.

21 United Kingdom Supreme Court (England and Wales), *A v. A (Children: Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2014] AC 1 [INCADAT Ref: HC/E/PK 1233].

13. Hearing the Children's Objections[1]
Some perspectives from a judge hearing cases in England and Wales

By the Honourable Mr Justice MacDonald *(Deputy Head of International Family Justice for England and Wales)*

Introduction

In *Re D*,[2] Baroness Hale provided the following, seminal, articulation of the importance of listening to children in the context of litigation that touches and concerns their lives:

> "There is a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

In *Re M and Another (Children)(Abduction: Rights of Custody)*,[3] Baroness Hale stressed that the aims of Article 12 of the *United Nations Convention of 1989 on the Rights of the Child* ("UNCRC") should be given greater emphasis in cases concerning a child's objection under Article 13 of the 1980 Convention. Article 12 of the UNCRC requires States Parties to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child.

It is undoubtedly the case that we, as judges, can learn a lot from listening to children. I learnt recently from a child at court that I may be working too hard. In public law proceedings a young boy had decided, at the last minute, that he did not want to meet me after all. He had however, as I had earlier seen from my vantage point in court, peeked through the window in the court door during earlier submissions. When later explaining the boy's decision not to see me, I asked his solicitor whether the boy nonetheless had anything else he wanted conveyed to me. Well, came the reply, "he is a bit worried that Your Lordship looks absolutely exhausted".

That story of course belies the more serious task I have in delivering this talk. That task is to offer you some reflections on the experience of a judge who deals on a regular basis with children's objections in cases of alleged child abduction under the 1980 Convention. Before coming to some of those experiences, and because I am the first speaker of the day, it is perhaps useful to consider briefly the legal framework within which a judge operates in England and Wales.

The legal framework

What does the law in this jurisdiction say about how the judge must deal with children's objections in a child abduction case? The clearest statement of the law is the judgment of Black LJ, as she then was, in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children to Appeal)*.[4]

Black LJ articulated clearly a two-stage test. First, a "gateway" stage. Namely, an examination of whether, as a matter of fact, the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Second, a 'discretion' stage, wherein the court must consider not only the nature and strength of the objections but a much wider range of considerations, including whether they are authentic as opposed to the product of influence by the parent who has allegedly abducted the child, and the extent to which the objections coincide with, or are at odds with the child's welfare. Within this context, in *Re M* Black LJ laid down the following key way points:

i) Does the child object to being returned? The exercise of answering this question should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.

ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

There is, of course, an interrelationship between the two stages from the perspective of the voice of the child. In applying the two-stage test, the judge is enjoined by the Court of Appeal *not* to adopt an over prescriptive, over intellectualised approach to the "gateway" stage and *not* to adopt an over engineered approach to the "discretion" stage.

Of course, to be in a position to adopt this two-stage approach, the judge has to have a mechanism for hearing the child's objections. How do we, as judges, do that in the jurisdiction of England and Wales?

In *Re F (Abduction: Child's Wishes)*[5] the Court of Appeal made clear that, in every case of alleged child abduction, at the first directions hearing, there must be an enquiry into how the child's wishes and feelings will be placed before the Court. The new *Practice Guidance on Case Management and Mediation in International Child Abduction Proceedings* issued by the President in April of this year, for the drafting of which I was responsible, reinforces that approach as follows:

> "Where directions have not already been given [at a without notice hearing], the question of whether the child is to be given an opportunity to be heard in proceedings having regard to his or her age and degree of maturity, and if so how, must be considered and determined at the first on notice hearing. The methods by which a child may be heard during the proceedings comprise a report from an officer of the Cafcass High Court Team or party status with legal representation."

I would just like you to remember that last sentence as we move forward, as it points up one of the issues that I wish to highlight today. That sentence being, "The methods by which a child may be heard during the proceedings comprise a report from an officer of the Cafcass High Court Team or party status with legal representation." By contrast, in *Re D* at [60] Baroness Hale expressed the following view regarding the appropriate methodologies for ascertaining the views of the child in Convention proceedings:

> "There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge."

Going back to the sentence I asked you to bear in mind from the Practice Guidance, you will see that there is an additional methodology in this passage from *Re D*, namely a "face to face interview with the judge". It did not escape my notice that last night, Lady Hale reiterated this as a valid methodology.[6]

Within the latter context, it is important also to examine one more legal instrument, namely the *Guidelines for Judges Meeting Children who are Subject to Family Proceedings*,[7] issued in 2010. In that Guidance, paragraph 5 concludes with the following injunction:

> "It cannot be stressed too often that the child's meeting with the judge is *not* for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her."

A judicial perspective

What then are the challenges presented by applying the foregoing legal framework, and the methodologies for its implementation when one is a judge dealing with these cases in a busy court list?

In the same way that, as Alan Bennett has observed, a tribute often becomes more about the person delivering it than the recipient of the honour, when a judge cites his own cases he can open himself up to a legitimate charge of being rather too self-referential. However, as this talk is about *my* perspective, I feel slightly less guilty about using one my own decisions to illuminate some of the challenges judge's face in hearing a child's objections. In giving you my perspective, I would like in particular to concentrate on what I think is the most challenging part of the judge's job in the context of child objections cases, and that is the task of conducting a face to face meeting with the child in the context of a case in which the Article 13 child objections exception is raised.

It is increasingly common to receive a request to meet the child who is the subject of child abduction proceedings. Within this context, there are two areas I would like to highlight in this brief presentation on the judicial perspective. First, the question, and one that I think remains to be resolved, of how we treat the information that judge's inevitably gather when meeting children face to face. Second, and briefly, the question of the extent to which judges are in fact properly equipped to meet children.

With respect to these two issues, my decision in *B v. P (Children's Objections)*[8] provides a good example of these issues and the challenges that they can present in the day to day business of determining proceedings concerning the alleged abduction of children across national frontiers. In discussing the case, I make clear that I am confining my statements only to information that is contained in the publicly available judgment.

B v. P concerned an application pursuant to the Child Abduction and Custody Act 1985 and the 1980 Convention for an order for the summary return of two children to the jurisdiction of Hungary. The children were aged 11 and 12. Each child had a diagnosis of autism in Hungary. In resisting an order for their summary return, the mother relied on the exceptions of harm and child's objections under Article 13 of the 1980 Convention.

The children had been seen by a Cafcass Officer from the High Court Team, who had ascertained their wishes and feelings in respect of a return to Hungary. At the request of the children, on the recommendation of the Cafcass Officer and with the agreement of the parties, I met the children in the presence of the Cafcass Officer. That meeting occurred prior to the commencement of the final hearing and in accordance with the provisions set out in the 2010 *Guidelines for Judges Meeting Children who are subject to Family Proceedings*.

As the complete minute of the meeting, set out in full in my judgment, shows, the children made clear repeatedly, and in emotional terms their visceral objection to returning to Hungary. The elder child wanted to explain the entire case to me and had to be repeatedly diverted from doing so. Each child made statements that were forensically significant not only to the Article 13 child objections exception, but also to the Article 13(b) harm exception. Each of the children also behaved in a manner that was forensically significant in the context of the harm exception. As the meeting proceeded it got to the stage where both children were pleading with me not to send them back to Hungary. At that point, Cafcass Officer intervened as she did not think they would leave otherwise.

Following the meeting, the minute prepared by the Cafcass Officer was circulated to the parties to enable them to know what had been said and to make submissions on what had transpired if they wished. The minute did not, and could not however, convey the shear level of upset the children displayed nor the nuances of behaviour that was forensically significant in the context of the diagnosis of autism, the eldest child displaying a high level of persistent and repetitive behaviours that appeared to be a pre-condition to him being able to articulate what he wished to say.

Information from Meeting with Children

The first question that I wish to highlight as arising out this difficult case, and leave you thinking about, is what can the judge do with the information gathered during the course of such a meeting?

For those of you who heard Baroness Hale speak last night, you may be forgiven if you feel a sense of *deja vu* from this point forward. It is always a difficult moment at a conference when you realise that you are going to touch on, if not squat on, the thesis of the speaker that came before you. Especially one so august. It causes in me, at the very least, to feel an overwhelming compulsion to promise you that I did not copy my homework. More seriously, there is perhaps, when seeking to assess the reality and significance of the difficulties under discussion, some significance in two speakers having identified, independently, the self-same issues.

As we have seen, the 2010 *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* contain a clear and specific injunction against using a meeting with a child as a venue for gathering evidence. To repeat that injunction, "it cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence". By contrast however, and as I have already noted, in *Re D*, the Supreme Court has posited a "face to face meeting between the judge and the child" as a valid means of conveying to the court the child's wishes and feelings. Thus, on the face of the Guidelines, a face to face meeting should not be used to gather evidence that will go on to be considered in the forensic analysis underpinning the court's ultimate determination in child abduction proceedings. However, against this, the Supreme Court has suggested that a face to face meeting is a legitimate means of achieving that end.

What then is permissible? There is certainly at least one example in the authorities of the latter approach being taken, that authority being a decision of a former President of the Family Division, Sir Mark Potter in the case of *De L v. H*.[9] The President, in his judgment, confined the stated purpose of the meeting with the child to (a) assuring the child that evidence as to the nature and force of his objections had been received; (b) explaining to the child the law and (c) seeking to dissuade the child from his expressed distrust of the Portuguese Court. It is however, quite clear from the judgment, to me at least, that the then President also went on to take into account information he had gathered when meeting the child in reaching his substant-

ive decision on the merits.

The contrary position is put in *Re KP*[10] (which cited *Re D*, including the passage that contains the reference to a face to face interview), in which Moore-Bick LJ stated that there is a firm line to be drawn between a process in which the judge and a young person simply encounter each other and communicate in a manner which is not for the purpose of evidence gathering, and a process in which one of the aims of the meeting is to gather evidence. The Court of Appeal concluded that, notwithstanding what was said in *Re D* that:

> "None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge."

The approach set out in *Re KP* was endorsed in the *Report of the Vulnerable Witnesses & Children Working Group* in February 2015. One of the tasks of the Working Group was "to review the Family Justice Council's April 2010 Guidelines for Judges Meeting Children who are Subject to Family Proceedings [2010] 2 FLR 1872, particularly in the light of the Court of Appeal's recent decision in *Re KP*." Whilst, as I have noted, the Working Group endorsed the strict injunction against using meetings with children for the purpose of gathering evidence, stating that "it is not part of the judicial function to evidence gather so the wishes and feelings expressed at the meeting cannot properly be taken into account when decision making", Russell J and Hayden J, who authored the report of the Working Group, acknowledged at [24] that:

> "This is a difficult concept for any young person to grasp at best; and is misleading as it amounts to saying the judge is here to listen to you but cannot take any notice of what you say. It would seem from the Fortin research that the paternalistic and interpretive approach to the "evidence" or expressed views of children in the past has left them feeling that they were effectively excluded from adult decision making which directly concerned them and would affect them for the rest of their lives."

Within the foregoing context, and as I observed in *B v. P*, if the injunction against taking evidence from such a meeting stands in such circumstances then, whilst that injunction may be said to have an entirely legitimate procedural and forensic foundation in the need to ensure fairness between the parties and to maintain the fundamental precepts of natural justice, it places the judge who meets a child in child abduction proceedings where the child's objections exception, or indeed the harm exception, is raised, in some difficulty.

This is so because it is *inevitable* that, upon meeting a child, a judge begins to form an impression of the child, to see how the presentation of the child compares to that contended for by the parties and, as in the case of *B v. P*, to hear from the child "that she may wish to volunteer to the judge". What is heard by the judge may, in turn, be relevant to the 1980 Convention exceptions on which the court is tasked with adjudicating. This is a predictable, and unavoidable consequence of meeting and talking to children. Indeed, it is a predictable and unavoidable consequence of all human interaction. In *B v. P*, meeting the children resulted in them telling me directly that they objected to returning to Hungary, relevant to the Article 13 child's objections exception, and their emotional presentation when articulating their objections gave me a clear sense of the foundation of those objections and some impression of the potential impact of such a return on their emotional wellbeing, relevant to the Article 13(1)(b) harm exception.

So how is a judge to treat information gathered from meeting a child in an objection case? On the basis of the 2010 *Guidelines for Judges Meeting Children who are subject to Family Proceedings* and subsequent authority, the judge may not rely on that information at all as being evidence in the proceedings. Against this however, where the judge, as I did, considers that what he or she has seen in the meeting with the children may, or does, have some relevance to the issues to be determined in the proceedings, it is surely artificial, and potentially unjust, simply to banish those matters from one's mind without more. Within this context, it may be said that the injunction against using a meeting with the child as a means of gathering evidence contained in the *Guidelines for Judges Meeting Children who are subject to Family Proceedings* is far easier to articulate in theory than it is to apply in practice.

Whether it follows that there should, accordingly, now be a simple acceptance that, as suggested by Baroness Hale in *Re D*, a face to face meeting between judge and child is a valid means of securing evidence of the child's wishes and feelings is merited is a much more complex question. However, what is clear is that the continuing lack of clarity in this area is certainly something that needs to be addressed for children involved in the proceedings.

My experience in *B v. P* was that the *children* considered that they were coming to see me to provide me with information that would inform my decision, whatever the lawyerly characterisation of the meeting may have been. They were coming, in short, to persuade me. As recognised in *Report of the Vulnerable Witnesses & Children Working Group*, one might seek to explain to a child that this is not the purpose of the meeting. However, in reality, I suspect that this will often be *entirely* unsuccessful in dissuading a child from his or her settled and tenacious view of why *they* are coming to see the judge. I doubt that a desperately worried child will understand a judge who seeks to explain that, although he or she has agreed to

meet the child, that judge will not be taking any account of what they say when reaching the decision about which the child is so deeply concerned.

That this is likely to be the position is also clear from Sir Mark Potter's account in *De L v. H* of the subject child's stated rational for wanting to see the judge (emphasis added):

> "If a Judge says I have to go back to Portugal, I simply won't go. I would try to make the Judge see how bad it would be for me if he forced me to go back to Portugal. I suppose I would listen if there was a very good reason why I had to go back, but I cannot think of any good reason. If the reason is simply that this is simply what that the law says because of what happens to other people, this is not a good enough reason for me. The Judge needs to *understand* that it is not just the law but it is what is happening to my life. The Judge has to understand how bad everything would be with me if I went back to live with my mum."

In this context, I wonder how the children in *B v. P* would have felt had I told them at the end of the meeting that, whilst I was very glad they had come to see me, with respect to their deeply held and passionately expressed wishes and feelings, I was not able to take account of a word that they had said to me. Or whether, had known beforehand that this was the position, they would have bothered coming to see me. It is at least difficult, in my view, to square this stark consequence of the current Guidelines with the imperative of Article 12 of the UNCRC. Against that bench mark, at present it might be said that we are at risk in this area of implementing children's rights in name but not in substance.

Judicial Training

The second and related issue I wish to touch on very briefly is the extent that Judges are properly equipped to meet children. In *Re KP* Moore-Bick LJ emphasised that the manner in which the task of hearing the child at a meeting between the child and the judge is discharged, will depend on the developing skill and understanding of the judge and the other professionals involved. This raises the question of where such skill and understanding is to come from for judges who are meeting children in the context of complex and acrimonious international child abduction cases. We do not, at present, receive any training for the purposes of meeting children.

Within this context, I do not mind conceding before this audience that, in its contemplation, the task that faced me in *B v. P* was a daunting one. You might ask how does a judge go about preparing to meet with two children who are on the autistic spectrum, in the always emotive context of child abduction proceedings and in circumstances where the purpose of the meeting is to hear what the children say but also ensure that what is heard is not taken into account in any way in the subsequent forensic decision-making process notwithstanding the clear expectations of the children standing before you. The answer at present, I am afraid, may be said to be less than satisfactory.

Some, but by no means all, judges may be able to draw on their own experiences of raising children. Otherwise, we are reliant largely on our instincts and a good measure of common sense. Whether this is, in fact, the proper way to approach such a potentially sensitive and significant task is one, I think, that requires much further thought. At the very least it would seem appropriate to consider whether Judges could be provided with training or appropriate resources to ensure that children are gaining from the experience of meeting the judge all that they are entitled to expect. This is particularly so in the context of the very fine line the judge has to tread in the context of the way in which the purpose of such meetings is currently circumscribed.

Conclusion

I hope these brief reflections have been of some use. As is very often the case, systems are more difficult than principles to get right. Lady Hale demonstrated eloquently in her lecture last night that the principles are clear. What remains to be secured is a fully effective system for implementing those principles. There remains scope to do so. As Moore Bick LJ made clear in *Re KP* "It is not our aim to say anything that may set current practice in concrete or otherwise prevent discussion, thought and the further development of good practice." It is reassuring in that context, that events such as this are working hard towards that end.

1 This article comprises a talk given by the author on 23 March 2018 at the conference on the *Role of Children in 1980 Hague Child Abduction Convention Proceedings*, held at Westminster University, London from 22 to 23 March 2018. The views expressed in this article are the personal views of the author and do not necessarily reflect those of the judiciary as a whole.
2 [2007] 1 AC 619.
3 [2008] AC 1288.
4 [2015] EWCA Civ 26.
5 [2007] 2 FLR 697.
6 Baroness Hale delivered the keynote lecture at the conference on the *Role of Children in 1980 Hague Child Abduction Convention Proceedings* on 22 March 2018, entitled "Child Abduction from The Child's Point of View".
7 [2010] 2 FLR 1872.
8 [2017] EWHC 3577 (Fam).
9 [2010] 1 FLR 1229.
10 [2014] EWCA 554.

14. Towards a Children's Rights-Based Approach to Judging Child's Objections Cases[1]

By Helen Stalford *(Professor of Law, European Children's Rights Unit, University of Liverpool)** **&** ***Kathryn Hollingsworth*** *(Professor of Law, Newcastle University)*

What do we mean by a Children's Rights-Based Approach to Judging?

This short paper examines the extent to which judicial assessments of child objections under Article 13(2) of the 1980 Convention and Article 11(2) of the Brussels IIa Regulation are conducted in a way that corresponds with a children's rights based approach. Articulating precisely what is a children's rights based approach to judging was the object of a two-year project that we led, entitled *Children's Rights Judgments: From Academic Vision to New Practice*.[2] This project involved over 50 children's rights scholars and practitioners who revisited 28 existing judgments involving children, from a range of different jurisdictions and legal contexts, and re-wrote them from a children's rights perspective. The collection included two cross-border family cases.[3]

In the course of re-working these judgments, we conducted an extensive review of the literature on children's rights and the courts and identified five strategies for administering a judgment that is more faithful to a children's rights-based approach. **First**, judges can more effectively utilise the formal legal tools which give effect to children's rights, including (but not confined to) the *United Nations Convention of 1989 on the Rights of the Child* ("UNCRC").[4] **Second**, a children's rights judgment draws on appropriate, reliable evidence. This can include scholarly insights to help judges address theoretical tensions, conceptual challenges, and prevailing presumptions which stymie the resolution of cases in ways that best protect children's rights. **Third**, the extent to which the legal processes leading up to the judgment endorse and conform with appropriate, child-friendly, participatory procedures is a central feature of a children's rights based approach to judging. The **fourth** element concerns *how* judgments are written - the 'art and craft' of judgment writing.[5] All judgments are narrative; they tell a story through facts, structure, and language and it is through this storytelling method that judges seek to convince their audience that they have made the right decision. Given that cases concerning children - particularly abduction cases - can be amongst the most contentious, emotionally-charged, value-ridden and life-changing of cases to be dealt with by the courts, the imperative to persuade through narrative is strong. The narrative employed - whether intentional on the part of the individual judge or not - also conveys messages about the cultural and social backdrop to children's rights, and the extent to which adult "fears and fantasies" about childhood are reflected in and potentially magnified by the law. The **fifth** and final marker of a children's rights judgment is one that acknowledges children as one of the audiences for legal judgments, by using child-appropriate language, structure and style, either in the primary judgment itself or in an additional "child-friendly" version.

The following discussion tests these strategies on a sample of 30 recent abduction cases (first instance and appellate decisions in England and Wales) involving children's objections to return under both the 1980 Convention and the Brussels IIa Regulation. We deliberately chose cases decided since the Supreme Court decision of *Re E (Children) (Abduction: Custody Appeal)*[6] and focus specifically on strategies 3, 4 and 5: the quality and currency of children's participation in decision-making; and on the form and narrative used in child objection judgments.

Children's voice

We argue, as have others,[7] that there is much more scope within the abduction framework to respond to such cases in a way that is more closely informed by children's rights principles and processes. Child's objection cases, which are fundamentally concerned with the voiced wishes and feelings of the child (reflecting Art. 12 of the UNCRC), offer a fertile testing ground for this. Indeed, there is established jurisprudence pointing to the importance of child participation in 1980 Convention proceedings, which is cited recurrently in the cases we analysed.[8]

The most notable, perhaps, is Lady Hale's guidance in *Re D (A Child) (Abduction: Rights of Custody)*, a case concerning an eight-year-old boy who had been in England for nearly four years following removal by his mother from Romania:

> "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity … the principle is in my view of universal application and consistent with our international obligations under Article 12 of the United Nations Convention on the Rights of the Child […] **It erects a presumption that the child will be heard unless this appears inappropriate**."[9]

In the same vein, Thorpe LJ in *Re G (Abduction: Children's Objections)* emphasised that hearing from children in international family proceedings should extend to direct meetings with the trial judge "in carefully arranged conditions".[10]

Our analysis of the objection cases reveals a range of different approaches to judicial engagement with the child - some more meaningful and direct than others - but only in a minority of cases (8 out of the 30) did they make any difference to the outcome for the child. Rather than dwell too much on *how* children's views are elicited and presented to the court in such cases, it is worth considering evidence of

the *impact* of children's views on the judge's ultimate decision.

Do children's objections really count?

Given the high premium placed on expediting the swift return of abducted children to their place of habitual residence, it is perhaps not surprising that objection cases impose a high threshold of persuasiveness and clarity for children's objections to be weighted in favour of non-return. Specifically, since the Court of Appeal judgment in *Re M (Abduction: Child's Objections)*,[11] it has been standard practice to deal with such cases in a series of interrogatory stages, with each stage placing the child on the evidential back foot.

The first stage considers whether the child's expressed views really do amount to an objection to being returned, rather than a mere preference. The case law we analysed was conflicting in terms of the threshold that had to be reached to establish a persuasive objection. Cobb J, in *F v. M, B (by his Litigation Friend)*,[12] suggested that the threshold is fairly low, whereas judges in other, factually similar, cases required an unequivocal expression of dissent.[13]

Significantly, some judges in the sample recognised that the propensity of children to express their objections in persuasive terms depends heavily on the manner in which those views are elicited; namely how the child is questioned by intermediaries, and the circumstances surrounding those meetings. Indeed, CAFCASS officers in four of the cases analysed were heavily criticised for failing to probe whether the child was objecting or simply expressing a preference, or to inform the child of the importance of expressing their views in the unequivocal terms required for an objection.[14]

A second evidential obstacle that children have to overcome is the requirement that they demonstrate a high degree of independence from the views of parents. In *Re F*, for instance, the judge declined to set any store by the child's views, suggesting that they had been "coloured" by those of the father.[15] In *RB v. DB*[16] the judge confidently rejected the authenticity of the children's views on the basis that they were simply too mature.

Of course, judges have to be alert to situations in which the child forms an opinion only on the basis of partial "facts", conveyed by only one parent, which deliberately and unfairly vilifies the other parent or indulges either parent's own selfish needs. Equally, the courts want to avoid situations in which the child is unable to express his / her own (differing) views for fear of reprisals from the parent/s or, more likely, for fear of hurting a parent that they love. But concerns of parental influence should be treated with some caution; rather than aspiring to an artificial expression of independent thought, courts should point to ways of disentangling the wishes of the various parties and interrogating further the views of the child, if necessary through appropriate expert intervention and assessment. Some of the other judgments achieved this through critical interrogation of the CAFCASS officer's conclusions and experience, and a more nuanced perspective on what responses and behaviour might be reasonable to expect of a child in such circumstances.[17]

Once it is established that there is an independent and unequivocal objection, the judge then has to be satisfied that the child is of sufficient age and maturity for their views to be taken into account. Whilst the sample of cases analysed presented a relatively liberal attitude towards hearing the views of children of a range of ages[18] and abilities,[19] the perennial reminder that such views have to meet a high threshold to render them determinative undermines the significance of this otherwise promising feature of abduction case law. A children's rights-based approach at this stage might resemble that of Peter Jackson J in *CB v. CB*,[20] to the effect that a child who expresses a mature and insightful opinion "deserves respect", and that sound reasons should be given to dissent from what they say. And yet, it is telling that so many others dwell on Lady Hale's assertion that "hearing the child is not to be confused with giving effect to his views,"[21] virtually conceding that their consideration of the views of the child is a tokenistic nod to the perceived need to make the child merely *feel* part of (rather than genuinely influence) the process.

Crafting a Children's Rights Judgment: The Importance of Form

We turn now to a related, yet under-explored, aspect of a children's rights judgment: the *way* in which judges craft their opinions, specifically the style, tone, structure, choice of facts and language employed.

The cases we analysed exposed wide differences in approach, suggesting that, even in summary proceedings which characterise abduction cases, a more child-sensitive approach to crafting judgments is possible.

A first and simple children's rights technique is for judges to use a pseudonym for the child rather than simply an initial. Conferring a name on the child recognises their status as a moral actor rather than a "thing" or proprietary interest about which others are making decisions, and the effect is to remind us that at the heart of the case is an individual, very real, child.[22] It is especially important in abduction cases not to lose sight of the individual child, given that the overall policy is one based on presumptions about what is in the best interests of children in general. That said, only five of our 30 sample cases used a name for the child/ren concerned.

A second stylistic aspect, is the extent to which the child's experiences are centralised in the narrative, ensuring that it is the child's perspective and not that of adult others (not-

ably parents) that informs the reasoning and outcome. How this is done can be subtle yet powerful. For example, consistent with her approach in other cases, Black LJ opens her account of the facts in *Re U-B* by acknowledging the child as the primary subject ("[t]his appeal concerns E […] E's parents separated when he was about 18 months old").[23] Contrast this with Davis LJ in the same case who mentions the child only three times in eight paragraphs and, consistent with the majority of the judges in our other cases,[24] it is the parental perspective that is foregrounded. This emerges most starkly when he asks us to "*[i]magine* her [the mother's] feelings" when the English court refuses the child's return; no plea is made to empathise with the child.[25]

Structure and fact-selection are yet other ways in which children can be brought to the forefront or, indeed, sidelined in a judgment. In *Re F*, Black LJ presents the children's letters to the court before the Cafcass report, thus ensuring that it is their unfiltered voices that are heard first.[26] She also implicitly criticises the first instance judge for failing to include some of the "stronger comments" of objection made by the children. In the Supreme Court decision in *Re LC*,[27] Baroness Hale avoids such pitfalls by quoting the children verbatim, using their exact language and thus allowing their authentic voice to be heard to a greater degree than had occurred in the lower courts.

The value and challenges of writing "child-friendly" judgments

The second aspect of the "art and craft" of a children's rights judgment is a consideration of whom the judgment is written *for*. Different courts write for different audiences (an appeal court, a lower court, the public, the legislature, etc.). In family court proceedings, in particular, where the personal relationships at the heart of the dispute are likely to be on-going and highly emotive, there is a strong imperative that those involved in the proceedings – not only the (adult) parties but the affected child/ren as well – understand the outcome and (hopefully) the reasoning so that the decision can be accepted as fair and can be subsequently enforced.

Examples of "child-friendly" judgments are starting to emerge in England and Scotland,[28] but are still rare. In parental child abduction cases, the legal framework and the practical and emotional issues they involve can be complex and confounding for the parties involved; yet for the judiciary, especially in first instance decisions, the law is relatively settled and thus the need for intricate legal reasoning is reduced. Both of these factors provide a strong imperative for judges to write *for* the parties and, moreover, to write child-friendly judgments for the children affected (whether they have party status or not). This imperative is further heightened in objections cases where, in most instances, the child is regarded as of sufficient age and maturity to make objections and to have those objections taken into account. These children should, therefore, be regarded as also having sufficient capacity to understand an appropriately drafted judgment that clearly explains the decision-making process and the outcome.

It is perhaps surprising then that none of the cases we reviewed were obviously written for the child concerned. Some of the judgments were written in a simpler, clearer and more accessible way (Black LJ's judgments stand out); and there is evidence that some of the judges direct some of their comments to the child, with a view to ensuring the child understands their reasoning, including Cobb J, in *LCG v. RL* ("I wish T to know that I understand and respect her views. She is plainly a bright and determined young person").[29]

But there were an equal if not greater number of examples of cases being actively child *un*friendly. There are many examples of abstruse phrases and language unlikely to be understood by children (or, indeed, by most adults), perhaps best exemplified by the idioms and similes used by the judge in *SP v. EB* ("without wishing to pile Ossa upon Pelion" and "as plain as a pikestaff"!).[30] Other judgments are cold, detached, legalistic and thus unlikely to be accessible to a child.

Conclusion

International child abduction cases present an important opportunity and, indeed, a need to reflect on how a children's rights-based approach to judgment-writing can be achieved. Our relatively modest analysis of 30 recent child objections cases in England and Wales suggests there is a great deal of variation in the extent to which judges are able and willing to engage with the factors that we have identified as characteristic of such an approach. The extent of this variation is matched, however, by the range of opportunities available to judges to reason, decide and compose judgments in a way that responds more powerfully to their children's rights obligations. Despite the constraints imposed by the summary nature of abduction proceedings and the presumption in favour of return, our findings suggest that a children's rights-based approach would lead to greater levels of understanding and compliance in this most fraught and painful of legal contexts.

1 This article is an abridged version of a more detailed children's rights-based analysis of the child objections case law, published in K. Hollingsworth and H. Stalford, "Judging parental child abduction: What does it mean to adopt a children's rights-based approach?" in G. Douglas and V. Stephens (eds.), *Essays in honour of Nigel Lowe*, Netherlands, Brill, 2018, Chapter 9.

2 The findings of this project are published in H. Stalford, K. Hollingsworth S. and Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice*, Oxford, Hart Publishing, 2017, with a Foreword by Lady Hale.

3 *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest* [2012] HCA 47, rewritten for the project by Brian Simpson, with a commentary by Rhona Schuz; *Povse v. Austria* (Application no 3890/11) ECtHR 18 June 2013, rewritten for the project by Lara Walker, with a commentary by Ruth Lamont.

4 It also involves maximising regional and domestic rights protection, including the *EU Charter of Fundamental Rights* (CFR), the *European Convention on Human Rights of 1950* (ECHR), the Human Rights Act 1998 (HRA), and the common law, as well as other relevant international treaties.

5 E. Rackley, "The Art and Craft of Writing Judgments: Notes on the Feminist Judgment Project", in R. Hunter, C. McGlynn and E. Rackley (eds), *Feminist Judgments: From Theory to Practice*, Oxford, Hart Publishing, 2010.

6 [2011] UKSC 27.

7 R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, Hart Publishing, Oxford 2014; H. Stalford, *Children and the European Union: Rights, Welfare and Accountability*, Hart Publishing, Oxford 2012, ch. 4; R. Lamont, "Free Movement of Persons, Child Abduction and Relocation within the European Union", *Journal of Social Welfare and Family Law*, vol. 34, 2012, p. 231.

8 See most notably *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51 [INCADAT Ref: HC/E/UKe 880]. See further the House of Lords *Re M (Children)* [2007] UKHL 55 [INCADAT Ref: HC/E/UKe 937]; and the Supreme Court of the United Kingdom (England and Wales) *Re LC (Children) (International Abduction: Child's Objections to Return)* [2014] UKSC 1 [INCADAT Ref: HC/E/ES 1256].

9 *Re D (A Child)(Abduction: Custody Rights)*, *op. cit.*, note 8, para. 58.

10 The Court of Appeal of the United Kingdom (England and Wales), *Re G (Abduction: Children's Objections)* [2011] 1 FLR 1645 [INCADAT Ref: HC/E/UKe 1173].

11 *Re M (Abduction: Child's Objections)* [2007] 2 FLR 72 [INCADAT Ref: HC/E/UKe 901].

12 The High Court of Justice (Family Division) of the United Kingdom (England and Wales), *F v. M, B (by his Litigation Friend)* [2015] EWHC 3300 (Fam).

13 The High Court of Justice (Family Division) of the United Kingdom (England and Wales), *Re F (Abduction: Acquiescence: Child's Objections)* [2015] EWHC 2045 (Fam), supported by the Court of Appeal of the United Kingdom (England and Wales) in *Re M (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26, at para. 41.

14 For examples see HHJ Bellamy in *Re F*, *ibid.*, para. 59; Theis J in the High Court of Justice of the United Kingdom (England and Wales), *MR v. HS* [2015] EWHC 234 (Fam); Thorpe LJ in the High Court of Justice of the United Kingdom (England and Wales), *Re D (Children)* [2011] EWCA Civ 1294; and Cobb J in *F v. M, B* (by his Litigation Friend), *op.cit.* note 10, para. 41.

15 *Op.cit.*, note 11, para. 120

16 The High Court of Justice of the United Kingdom (England and Wales), *RB v. DB* [2015] EWHC 1817 (Fam), para. 22.

17 See, *e.g.*, the High Court of Justice of the United Kingdom (England and Wales), *X v. Y, Z Police Force, A, B and C (by their Children's Guardian)* [2012] EWHC 2838 [INCADAT Ref: HC/E/UKe 1180].

18 See, *e.g.*, *F v. M, B (by his Litigation Friend)* [2015] EWHC 3300 (Fam), *op.cit.*, note 10, in which Cobb J goes to some effort to consider the 'actual words' of a child of seven in reaching his decision.

19 The High Court of Justice (Family Division) of the United Kingdom (England and Wales), *B v. B (Abduction: Child with Learning Difficulties)* [2011] EWHC 2300 (Fam) concerned the objections of a 14-year-old boy with Asperger's syndrome.

20 The High Court of Justice (Family Division) of the United Kingdom (England and Wales), *CB v. CB* [2013] EWHC 2092 (Fam), para. 25.

21 *Re M and another (Children) (Abduction: Rights of Custody)*, *op.cit.*, note 7, para. 46.

22 See M. Freeman, "Re T (A Minor)" in H. Stalford, K. Hollingsworth and S. Gillmore (eds.), *op.cit.*, note 2, Chapter 13; and Lady Hale's plenary lecture at the 7th World Congress on Family Law and Children's Rights, Dublin, 5 June 2017.

23 Court of Appeal of the United Kingdom (England and Wales), *Re U-B (A Child)* [2015] EWCA Civ 60.

24 Of the 30 judgments, we identify 10 as adopting the child's perspective to some degree, and the rest are told from the adult point of view or a mixed perspective.

25 *Re U-B (A Child)*, *op.cit.*, note 21, para. 49.

26 *Re F (Abduction: Acquiescence: Child's Objections)*, *op.cit.*, note 11.

27 *Re LC (Children) (Reunite International Child Abduction Centre Intervening)*, *op.cit.*, note 7.

28 Court of Appeal of the United Kingdom (England and Wales) *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185; Family Court of the United Kingdom (England and Wales), *Re A: Letter to a Young Person*, [2017] EWFC 48; Family Court of the United Kingdom (England and Wales), *Lancashire County Council v. M and Others* [2016] EWFC 9 (Peter Jackson J); Sheriffdom of Glasgow, *Mr Patrick (a pseudonym) Pursuer against Mrs Patrick (a pseudonym)* [2017] SC GLA 46 (Sheriff Aisha y Anwar). See also the fictive examples in H. Stalford, K. Hollingsworth and S. Gillmore (eds.), *op.cit.*, note 2, Chapters 13, 17 and 18.

29 The High Court of Justice (Family Division) of United Kingdom (England and Wales), *LCG v. RL* [2013] EWHC 1383 (Fam), para. 108.

30 The High Court of Justice (Family Division) of United Kingdom (England and Wales), *SP v. EB* [2014] EWHC 3964 (Fam), [23] and [29].

15. The voice of the child in 1980 Hague return procedures in the Netherlands

By Judge Annette Olland *(Family Judge of the Bureau Liaison, International Child Protection Division, District Court of The Hague)*

The 1980 Hague return procedures in the Netherlands in short

The Hague District Court Family Law Division is competent in all incoming international child abduction cases. In these cases, the Dutch judges hear children from the age of six years. This Court has developed the so-called "pressure cooker model", also known as "The Dutch Model", implementing the swift handling of these cases by the Court (six weeks from the filing of the request for return and the order of the Court), including cross-border mediation for the parents within this strict time frame of six weeks.

In summary, the return procedure in the Netherlands under the 1980 Convention is as follows.

A return application must be filed by a lawyer. Prior to that, the Dutch Central Authority for international child cases may also assist the left-behind parent. The Central Authority may, among other roles, offer free translations of legal documents (up to a certain amount).

The Ministry of Justice and Security encourages mediation in these cases and does so by partly funding the costs of mediation. The Dutch Child Abduction Centre, an independent NGO, has established a specialised Mediation Bureau that offers practical assistance to the specialised cross-border mediation which Hague abduction cases require.

The District Court of the Hague organises a "pre-trial hearing" within two weeks of the return application being filed. The judge at this pre-trial review will, together with the parties and their lawyers, explore the possibility of cross-border mediation. At this stage, the Mediation Bureau of the Child Abduction Centre also offers any necessary assistance.

The mediation is conducted by two specialised cross-border mediators, preferably a lawyer and a psychologist. On the first day of the cross-border mediation, especially designed for 1980 Hague abduction cases, the child or children involved will be interviewed by a specialised children's psychologist. They prepare a written report of this interview with the child(ren), which is read to the parents at the very start of the mediation session between the parents.

If the parents fail to reach a settlement in the cross-border mediation, the District Court of the Hague will organise a full court hearing within two weeks. The District Court will also invite children from the age of six years upwards for an interview with one of the judges of the full court. The full court will render a decision on the return application within two weeks.

The time limit for lodging an appeal with the Court of Appeal in The Hague is two weeks. A hearing will take place within two weeks of lodging the appeal, and the Court of Appeal decision will follow two weeks later. Again, children from the age of six years upwards will be invited for an interview with one of the judges of the Court of Appeal. No further appeal is possible.

The guardian ad litem in international child abduction cases

Children who are involved in 1980 Hague abduction cases find themselves in a very complicated and stressful situation, even more so than other children whose parents have separated or divorced. No matter how hard the judges of the District Court and of the Court of Appeal try to put children at ease during their interviews, the context in which these interviews take place, right before a court hearing in the Court House and within in a relatively limited time frame, makes it difficult for the child to "express his or her views freely" (Art. 12 of the *United Nations Convention of 1989 on the Rights of the Child* ("UNCRC"). Also, the concept of "Child-friendly justice" requires "justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings […]". Participation of the child in these proceedings and ensuring the child understands the proceedings demands specific support for the child. Imagine: all information about the case (what is the case about, what is the decision of the court, what is going to happen after the decision of the court?) is mostly provided to the child(ren) by the taking parent. While both parents are informed and assisted by their own legal counsels, who is there to stand up for the child? The child's right to participate and to be informed so he or she can understand the proceedings necessitates the intervention of a neutral person whose only focus is the child, who listens to him/her and provides information to him/her from a neutral perspective.

This is why the District Court of The Hague decided to appoint a guardian *ad litem* for each child involved in a 1980 Hague return cases. The guardian *ad litem* is on the one hand a child's confidante and on the other hand acts as an "interpreter" of the voice of the child *vis-à-vis* the judges who have to decide on the child's return. The guardian *ad litem* is a behavioural expert who belongs to

the circle of specialist cross-border mediators working in cross-border mediation cases.

Above all, it should be noted that the child is neither a witness nor a decision maker. In these cases there is no room for weighing up the interests, in the sense that the judge can or must decide in which State or with whom of the parents the child would be better off. In deciding whether or not the child's return should be ordered, the court, to the extent that this has been argued by one of the parties, may only assess whether the child "objects to being returned" and whether he/she "has attained an age and degree of maturity at which it is appropriate to take account of his/her views" (Art. 13(2) of the 1980 Convention). The introduction of a guardian *ad litem* into the proceedings may ensure that the child's voice is interpreted and understood as adequately as possible.

The questions to be answered by the guardian *ad litem* are:

1. What is the minor's own opinion on potentially residing in State X and potentially residing in the Netherlands?
2. To what extent does the minor feel free to express him/herself?
3. To what extent does the minor seem to be aware of the consequences of residing in State X or in the Netherlands?
4. Have any details emerged that are relevant to the decisions to be made?

The intention is for the guardian *ad litem* to have two meetings with the child, outside the court building, in his or her own office. Practice shows that children feel more at ease during a second meeting. Also, it gives them an opportunity to discuss any further questions, thoughts or feelings that come up after the first meeting.

After these meetings the guardian *ad litem* writes a report for the full court hearing, providing a report of the interviews and extended answers the aforementioned questions, as well as other possibly relevant findings. The report is submitted to the Court, and to the parties and their legal counsel, at least two days before the full court hearing.

If the child wishes so, the guardian *ad litem* can accompany the child to the interview with the judges. The guardian *ad litem* will in all cases be present at the full court hearing in order to provide – if necessary – additional information and answer questions of the parents and/or their lawyer(s).

After the Court decision, the guardian *ad litem* will, depending on the child's age and degree of maturity, contact the child to inform them on the content of the Court decision. Depending on the child's age and degree of maturity, the guardian *ad litem* may also inform the child of the possibility and consequences of an appeal.

In the event of an appeal being lodged against the District Court's decision, the appointment of the guardian *ad litem* lasts during the appeal proceedings. The Court of Appeal may have additional questions to the guardian *ad litem*. In that event, the guardian *ad litem* may need to invite the child for another interview and draw up a supplementary report. The guardian *ad litem* may also accompany the child to the child interview with the Appeal judge(s) and be present at the hearing before the Court of Appeal.

Does this practice perfectly meet the requirements of Article 12 UNCRC and the concept of "Child friendly justice": "accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings […]"? I would leave the answer to this question to the children involved. I suspect that if we would interview them another time after the proceedings, they could point out many aspects that could and should be done in a much better, and (even) more child-friendly way. I can only say that we will continue to be open to better ways to meet the needs and rights of the child. I am therefore curious to hear and read about best practices in other jurisdictions. Let's continue to learn from one another.

16. The Role of Children in 1980 Hague Child Abduction Convention Proceedings - A perspective from Scotland and the USA

By Stephen J. Cullen *(LL. B.)* ***& Kelly A. Powers*** *(J.D.)*

Two unique jurisdictions, Scotland and the United States of America, take very different legal approaches to the role of children in Hague proceedings. This paper sets forth the straightforward approach under Scots Law, and the complex and sometimes convoluted approach under federal law in the United States.

Scotland

In *Urness v. Minto*,[1] the Court of Session explained that Article 13 of the 1980 Convention should not be construed narrowly, and that it is a valid enquiry for the court to consider a child's preference for wanting to stay in Scotland. Although the court did not require to consider child's welfare as paramount, that did not mean that the court should ignore issues that might be raised later in the competent court considering custody and access. In this early case, there might appear to be some blurring of the treaty issues with traditional notions of what is in a child's best interests, but this approach has the benefit of allowing the child's voice to be heard in all areas of enquiry in a return case.

The approach in *Urness* was modestly curtailed ten years later in *W v. W*.[2] The Court of Session held that the proper approach is to see first whether the child objects and why the child objects to return. Second, assess whether the child knows what has happened and the range of choices available to the child. Only then is it appropriate to take account of the child's views. Although there is some tightening of the belt in *W v. W*, it is clear that Scots law continues to insist that the whole range of child's views are probative in an exception case, including the child's preferences.

United States of America

The position in the federal circuits of America is more complex than in Scotland. The American approach is rather technical—somewhat like the current competing tests to habitual residence across the country.

First, the implementing statute for the 1980 Convention, the International Child Abduction Remedies Act, establishes the burden of proof in relation to the child's Article 13(2) exception as the preponderance of the evidence standard.[3] The statute imposes different burdens of proof for different exceptions. It is fortunate that the lowest burden was set for this exception and not the "clear and convincing evidence" standard, as applied to Article 13(1)(b), that may have resulted in the child's voice being extinguished completely in treaty cases in the USA.

Nevertheless, courts in the USA have regularly asserted that the child's objection exception is to be narrowly construed.[4] This approach can be seen as a safeguard against the concern of American courts of the alleged taking parent's undue influence on the child.[5] The exception remains a two-stage test in America. First, has the child reached an age and degree of maturity where it is appropriate to take the child's views into account. Second, does the child have a clearly articulated objection to return—a preference not being sufficient.[6] This approach runs the risk of the court fixating on applying a technical test, rather than trying to hear exactly what the child is trying to articulate.

Courts in the USA still rarely appoint an independent expert. Both sides can still designate their own experts, leading to multiple competing experts and rebuttal experts. In a child's voice case, the child may therefore have to undergo what will be competing evaluations. Further, the lack of an expert can be used against a party, despite the fact that there is no legal aid in the USA for Hague cases.[7] In rare cases a federal judge has appointed a child's attorney.[8] Such an approach is consistent with other Hague jurisdictions but still considered a novel approach in America. And there are of course 2,700 federal judges who can hear a Hague case in the United States.

Three broad approaches may nonetheless be drawn from a review of the federal Hague jurisprudence. First, the child's voice is heard as evidence of some other aspect of the Hague case. Examples include hearing from a child in relation to abuse evidence, asylum evidence or of course the well-settled exception. In *Ischiu v. Gomez Garcia*,[9] the federal court heard extensive evidence from a five-year-old in chambers, without the parties or counsel, in relation to the child's exposure to his mother's abuse in Guatemala. In *Blondin v. Dubois*,[10] the court found highly probative the voice of an eight-year-old child in relation to her father's abuse of her mother in France.

Second, the child's voice may be heard through the medium of a guardian *ad litem*. There are inherent dangers in this approach both with respect to cultural understanding, language, and the desire of the Guardian *ad litem* to advance what he or she thinks is best for the child, thereby smothering the child's voice.[11]

Third, the child's voice is sometimes heard as part of the court's consideration of conditions or undertakings the judge wants to impose before entering a return order. The court may want to review court records from the requesting State, medical records, school records and even therapy records. The child's voice is therefore only being heard through the statements of third-party adults.

There has then been little progress in the USA over the last 20 years with respect to the child's voice in Hague proceedings. In many ways the following findings of Judge T.S. Ellis in *Hazbun Escaf v. Rodriquez*,[12] continue to be mirrored in the vast majority of Hague cases involving the voice of the child, despite the fact that such an approach is not followed in the rest of the Hague world and can be seen now to be a very narrow and outdated approach to listening to children:

> Isidoro is a normal child of thirteen who seems to be coping well with an exceptionally difficult situation. Yet, he is certainly not mature or sophisticated beyond his years and, like all adolescents, he is susceptible to suggestion and manipulation. […] Isidoro does not have a strong objection to returning to Colombia, […] His stated preference is to remain in the United States for now to spend more time with his father, but then to spend equal time in the United States and Colombia. To accommodate Isidoro's preference would be a custody determination. […] Because Isidoro is not exceptionally mature and does not object strongly to returning to Colombia, the Article 13(2) exception has not been established.

There follows a chart of the federal circuit current approaches to the child's voice in Hague litigation.

First Circuit	*Felder v. Wetzel*, 696 F.3d 92 (2012)	Return proceedings for a 14-year-old with psychiatric issues dismissed on the basis of Art. 13(2). On appeal, the court remanded the trial judge for considering Art. 13(2) but upheld the decision on the basis it was within their discretion to allow the child to testify or credit her views.
Second Circuit	*Blondin v. Dubois*, 238 F.3d 153 (2001) [INCADAT Ref: HC/E/USf 585]	On appeal, the 8-year-old child was considered sufficiently mature for her views to be considered in the context of an Art. 13(1)(b) claim of abuse suffered by the taking-parent.
Third Circuit **No appellate decision**	*Castillo v. Castillo*, 597 F. Supp. 2d 432 (2009)	An 11-year-old's strong and unequivocal desire to remain in the USA, expressed through her guardian *ad litem* and with particularised objections, was sufficient to sustain the exception. The Court held there was no evidence of undue influence by taking parent.
Fourth Circuit **No appellate decision**	*Hirst v. Tiberghien*, 947 F. Supp. 2d 578 (2013) Note 4 and 11 of article	The trial judge appointed a guardian *ad litem* for brothers aged 9 and 10 years old, and met with the children alone in chambers. No expert evidence was led on the children's maturity. The judge held that neither boy was particularly sophisticated nor reached a maturity beyond their years, and their mere preference to live in South Carolina over Manchester, England was not sufficient for Art. 13(2).
Fifth Circuit	*England v. England*, 234 F.3d 268 (2000) [INCADAT Ref: HC/E/USf 393]	A 13-year-old girl's testimony that she had established friendships and enjoyed a stable life in the USA following her removal from Australia did not establish the mature child exception.
Sixth Circuit **No appellate decision**	*Aranda v. Serna*, 911 F. Supp. 2d 601 (2013)	Siblings, aged 10 and 11 years old, testified at trial through an interpreter under oath. Undue influence was asserted but there were no objections to their competency, and Art. 13(2) was applied.
Seventh Circuit	*Garcia v. Pinelo*, 808 F.3d 1158 (2015)	Despite the 13-year-old's clear objection to return over the course of litigation, the trial court ordered return to Mexico on the basis that abduction cannot be rewarded. The appellate court found nothing powerful enough to reject trial court's exercise of its discretion.

Eighth Circuit	No cases	
Ninth Circuit	No cases	
Tenth Circuit	*de Silva v. Pitts*, 481 F.3d 1279 (2007)	The trial judge after interviewing the 13-year-old in chambers commented that the child was bright, expressive and had a well-developed understanding of the situation, but that a stricter standard must applied to the maturity exception when the exception is the only reason underlying a repatriation decision and not part of some broader analysis. Since the child was fully involved with school sports and had spoken at length to his father about his desire to stay in USA and to not return to Canada, return was denied.
Eleventh Circuit **No appellate decision**	*Angulo Garcia v. Fernandez Angarita*, 440 F. Supp. 2d 1364 (2006)	Siblings, aged 6, 9 and 11 years old, underwent psychological evaluations to determine whether to allow the children to be heard in proceedings, on the premise that permitting a child to testify is potentially very damaging psychologically. Return to Colombia was ordered.

1 1994 SC 249 [INCADAT Ref: HC/E/UKs 79].
2 2004 SC 63 [INCADAT Ref: HC/E/Uks 508].
3 22 USC 9003(e)(2)(B) (2016).
4 See, *e.g.*, *Hirst v. Tibergian*, 947 F.Supp.2d 578 (D.S.C. 2013).
5 *Von Meer v. Hoselton*, 44 FLR 1157 (2018).
6 *Rodriguez v. Yanez*, 817 F.3d 466 (5th Cir. 2016).
7 See, *e.g.*, *Hazbun Escaf v. Rodriquez*, 200 F.Supp.2d 603 (E.D.Va. 2002).
8 See, *e.g.*, *Bocquet v. Ouzid*, 22 F.Supp.2d (S.D.Fl. 2002).
9 43 FLR 1347 (2017).
10 238 F.3d 153 (2d Cir. 2001).
11 *Hirst v. Tibergian*, *op.cit.*, note 4.
12 *Op.cit.*, note 7.

17. Child Exceptions / Representation of the Child in South Africa

By Zenobia Du Toit

The 1980 Convention was incorporated into South African law by Section 275 of the Children's Act 38 of 2005 ("the Children's Act"), as amended, as schedule 2 to Chapter 17. The South African courts are the upper guardian of children in terms of the common law and have extremely wide powers in establishing what is in the interests of the child.

The court in consideration of an application for the return of the child must in terms of Section 278 (3) afford that child an opportunity to raise an objection to be returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child. These objections may be voiced in a number of ways.

Section 278(1) of the Children's Act gives the court the power to request the Central Authority to provide a report on the domestic circumstances of a child prior to the alleged abduction in order to ascertain whether there has been a wrongful removal or retention within the meaning of Article 3 of the 1980 Convention.

Section 279 of the Children's Act determines that a legal representative must represent the child (subject to Section 55) in all applications in terms of the 1980 Convention. Section 55 obliges the court, where the court is of the opinion that it would be in the best interests of the child to have legal representation, to refer the matter to the Legal Aid Board who must deal with it in terms of Section 3 (B) of the Legal Aid Act 22 of 1969.

Section 10 of the Children's Act prescribes that every child that is of such an age, maturity and stage of development has to be able to participate in any matter concerning that child and the views expressed by the child must be given due consideration.

Section 8(1) of the Children's Act provides that the rights which a child has by virtue of the Act supplement the rights which the child has by virtue of the Bill of Rights of South Africa. In all matters concerning the wellbeing of the child, the child's best interests are of paramount importance. This right has been entrenched in Section 28(2) of the Constitution of South Africa and in Section 9 of the Children's Act.

Article 12 of the *United Nations Convention of 1989 on the Rights of the Child* ("UNCRC") entrenches the child's right to participate in matters affecting the child. In terms of the *African Charter on the Rights and Welfare of the Child 1990* ("ACRWC"), as set out in Article 4 (2), in proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the applicable law. Section 28 (1) (h) of Constitution provides that every child has the right to have a legal practitioner assigned to the child by the State, at the State's expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

Section 14 the Children's Act provides that every child has the right to bring and to be assisted in bringing a matter to court, provided that that matter falls within the jurisdiction of that court. This section broadens a child's right to legal representation beyond cases in which substantial injustice would otherwise occur.

There are many cases in which children have litigated independently of parental or guardian assistance where the interests of the parent or guardian are adversarial to or out of kilter with that of the children.

There are different mechanisms to hear children's voices in South Africa in 1980 Convention matters.

1. A Family Advocate or Central Authority report may be submitted and is usually compiled by a social worker in conjunction with one of the Family Advocates. As the institution of the Family Advocate is the same as the Central Authority, in principle this may constitute a conflictual role as the Central Authority not only has to manage the return application but also has to investigate the best interests of the child within the parameters of the 1980 Convention.

2. A court may in terms of Section 29 (5) of the Children's Act for the purposes of any hearing in relation to parental responsibilities and the rights of a child, order that a report incorporating the recommendations of a suitably qualified person be submitted after an investigation by such a person and, if necessary, such a person must give or produce evidence.

3. An expert report may be submitted by a social worker or a psychiatrist, which report will be privately funded by a party to the proceedings.

   Either parent may employ an expert to investigate the best interests of the child in appropriate circumstances. The expert provides an independent report and the report may reflect the wishes or views of the child as perceived by the expert but furthermore as assessed by the expert.

4. In cases where mediation is appropriate, the child's views would be reflected in the course of the mediation process.

5. A child might have a direct meeting with a judge. This, however, does not happen very often.

6. A curator ad litem may be appointed to act on behalf of the child, but is not there to act as a legal representative for the child. The curator *ad litem*'s report will therefore be tempered by the curator's independent view of the best interests of the child and would not just reflect the views of the child.

7. The child's guardian (in terms of Section 18 (3) of the Children's Act) may present the child's views.

8. A legal representative may be appointed to act on behalf of the child.

   The Supreme Court of Appeal of South Africa in *Soller NO v. G and Another*[1] examined the role of a legal practitioner, and in particular how the role differs from that of the role of the Family Advocate, a curator *ad litem* or a psychologist expert.

   The legal practitioner:

   a. In representing the child argues the standpoint of the child;

   b. Takes the side of the child and acts as the child's agent or ambassador;

   c. Is not neutral but stands squarely in the corner of the child and has the task of presenting and arguing the wishes of that child;

   d. Provides adult insight into those wishes and desires which have been confided and entrusted to him or her and applies legal knowledge and expertise to the child's perspective;

   e. Provides the child with a voice but is not merely the child's mouth piece;

9. Children are also in certain circumstances represented *pro bono* by the Centre for Child Law, a South African non-governmental organisation, who does valuable work to protect the interests of children. This occurs as a result of the lack of resources in South Africa.

Case law in regard to children's objections in terms of Article 13 of the 1980 Convention unfortunately is quite sparse in South Africa.

Questions have been raised internationally and in South Africa as to whether the right of the child to object allows too much deference to the wishes of the child who may, *inter alia*, be confused, influenced by the parents, suffering from psychological harm, forced to choose between the parents, who may be manipulated by the parents and may feel guilty or compromised by the choices he or she has to make. Further concerns arising are:

1. The lack of consistent objective criteria for deciding Article 13 defences. Arbitrary decision making may potentially occur.

2. The tension between the inability of the court to get to the bottom of factual disputes and the risks a child will face if grave harm is a reality.

3. Establishing the protective measures available in the State of return and the effectiveness of or the ability to implement such measures.

4. Undertakings are not always enforceable and may not achieve the purpose of protection. Liaison between judges are important in this regard.

5. There is no minimum age in regard to taking into account the views of a child and no guidance for assessing a child's maturity.

6. There are opposing judgments in regard to short term interests of a child versus the long-term interest of a child and the impact the conflict between the parents will have on the interests of a child.

7. There is no consistent training in regard to these issues.

8. We have no specialised justice system in South Africa although each High Court has liaison judges who have been appointed to specifically assist and act in 1980 Convention matters.

The North Gauteng High Court in *Central Authority v. MV (LS Intervening)*[2] stated that although it was "not sitting in custody proceedings […] it is abundantly clear both from Article 13 of the 1980 Convention, Section 278 of the Children's Act and Section 28 (2) of the Constitution that it is by law required to take those considerations into account over and above the relevant Articles of the Convention and the Convention itself is subservient to those provisions". The court mentioned that Article 13 and 20 exemptions cater for those cases where specific circumstances might dictate that the child should not be returned and exceptions were there to protect the welfare of a child. The nature and extent of the exemptions were to be mitigated both taking into account Section 28 (2) of the Constitution in applying Article 13. The court found that the child's own views, which largely referred to short term views and interests were worth taking into account and confirmed that the child's objection to a return was a separate defence from the grave harm defence.

The South Gauteng High Court in the matter of *Central Authority of the Republic of South Africa and Another v. B*[3] confirmed that the child's objection was a separate defence from the grave harm objection.

The court was of the view that it has an obligation to treat as paramount in every decision affecting the child the well-being or best interests of that child. This must inform the understanding of the exceptions without undermining the integrity of the 1980 Convention. Where there is an objection to return by a child of sufficient age and maturity for his views to be taken into account, these particular factors of objection and maturity do not merely open the doors to an exercise of the court's discretion, but are themselves factors to be taken into account in the exercise of discretion. Thus, the court must put in the balance not merely the fact that an objection has been raised, but the nature and basis of the objection as well as taking into account the views of the court. The court will give greater or lesser weight to these views in accordance with the child's actual age and degree and level of maturity which the court considers it to have (*Singh v. Singh* 1998 SLT 1084 [INCADAT Ref: HC/E/UKs 196]).

In addition, the court in exercising the discretion must bear in mind the general policy of the 1980 Convention which is designed to achieve the return forthwith of children wrongfully removed or retained. Orders for return are not intended to be determinative of questions of custody or access.

The court also referred to the decision of the Scottish Outer House of the Course of Session in *M., Petitioner*[4] and the questions that were raised to be asked of the child:

1. Is the child of an age or maturity where it is appropriate to take into account the child's views?

2. Is the objection independent of the views of the parent?

3. Does the child appreciate that the purpose of the order of return to which the child objects would enable the court in his country of habitual residence to decide on his future, his welfare and so on?

A South African court is obliged to place into balance on the one hand the desirability in the interests of the child of the appropriate court retaining its jurisdiction and on the other hand, the likelihood of undermining the best interests of the child by ordering the return to the jurisdiction of that court.

In *Family Advocate v. Chirume*[5] Zondi J in the High Court of South Africa (Cape of Good Hope Provincial Division) said that grave risks should arise from the return of the child, none from the mother's refusal to return. Intolerability should be looked at from the view of the child. Mere allegation of domestic violence is not sufficient but an established pattern must be showed.

It is important for the child to be given an opportunity to be heard: not only to hear and evaluate the child's views, but also to consider how the child can be effectively protected upon return.

The person interviewing the child or reflecting the child's views should be trained, have experience with children, have specific knowledge of the 1980 Convention, the case law and the elements required to be presented to the court in order to make a decision regarding the child.

The child's views should be obtained and presented in a child friendly manner.

There should be case management to expedite the hearing and have the child represented in a manner which does not expose the child to further harm. Information should be requested, provided, exchanged and commented on. The order of evidence should be decided, and the periods of time within which information should be gathered should be set. Strict time frames should be set for the filing of affidavits, disclosure, filing of reports and the conduct of the matter.

The particulars of the exception and the child's objection should be identified and adversarial approaches should be avoided.

The availability of adequate and effective measures of protection and interim protective measures in regard to the child must be considered. There should be an investigation of how the protective measures will be applied and how effective these will be.

The child should be informed of the proceedings taking into account the child's age, maturity and stage of development.

There should be a report back to the child after the matter has been heard on the finding of the judge to prepare the child for the way forward. This is sometimes done in South Africa by way of the offices of the Central Authority or an expert witness or the representative of the child.

The mediator, if mediation is used as a tool, should be a trained person fully aware of how to deal with children, experienced and knowledgeable in the 1980 Convention, the case law and the application of the best interests of children.

The child should feel secure, not be endangered nor fearful that there will be repercussions because of the expression of the child's views. The child should be protected at all times.

When assessing the child's views, the court should take care of the imbalance of the forces, potential intimidation, harassment and control by a parent, drawn out proceedings, uneven resources, and the lack of support for the child.

If the child has witnessed domestic abuse between the parents or the child was subject to domestic abuse, these allegations should be heard and evaluated by persons with extensive training in regard to domestic violence. The abuse can take various forms, *e.g.* harassment, control, intimidation, physical harm, psychological harm, an intolerable situation which the child cannot be reasonably expected to tolerate, imminent danger, coercive control, sexual or other abuse and economic abuse. Cases are fact specific and where issues of domestic violence are raised.

If the child is to be returned what measures should be taken to safeguard the child's concerns? In this regard the Liaison Judges and Central Authorities can exchange information in a valuable manner:

1. An investigation of the availability of protective measures and the efficacy of its implementation;

2. The obtaining of enforcement orders or mirror orders;

3. The provision of undertakings which may relate to financial issues, non-prosecution, care, custody and contact, protection of the parent who abducted the child, protection of the child upon return, and expedited court proceedings in the country of return;

4. Whether the parties will have access to justice;

5. Whether supervision of contact is viable and can be implemented;

6. Whether interdicts can be granted;

7. Whether separate and safe housing can be provided;

8. Whether counselling, treatment and monitoring (*e.g.* follow up by the Central Authority, the Family Advocate or social services) of a child is available;

9. Whether expedited proceedings will take place upon the return;

10. A litigation kitty may be established for the returning parent in order to have a more equal playing field to litigate regarding care, contact, and the best interests of the child upon return;

11. Provision for the payment for the costs of the return, maintenance in the interim pending the proceedings in the country of return and a home;

12. The child's expectations should also be managed so that the child understands the process.

Case law for further reference:

- *Central Authority v. MV* (LS Intervening) 2011 (2) SA 428 (GNP)
- *Central Authority of the RSA and Another v. B* 2012 (2) SA 296 (GSJ) [INCADAT Ref: HC/E/ZA 726]
- *Sonderup v. Tondelli and Another* 2001 (1) SA 1171 (CC) [INCADAT Ref: HC/E/ZA 309]
- *Singh v. Singh* 1998 SLT 1084 [INCADAT Ref: HC/E/UKs 196]
- *Central Authority of RSA and JW and HW, C du Toit intervening*, 34008/2012 (6/5/13)
- *Family Advocate v. Remy* 2013 JDR 0252 (ECP)
- *Central Authority v. LG* 2011 (2) SA 386 (GNP) [INCADAT Ref: HC/E/ZA 722]
- *Family Advocate v. Chirume* 2006 JDK0277 (C) [INCADAT Ref: HC/E/ZA 1054]
- *Family Advocate v. Bailie* 2009 JDR 0681 (SE)
- *Central Authority v. Seale* 2011 JDR 0609 (T)

1 2003 (5) SA 430 (W).
2 2011 (2) SA 428 (GNP).
3 2012 (2) SA 296 (GSJ) [INCADAT Ref: HC/E/ZA 726].
4 2005 SLT 2 [INCADAT Ref: HC/E/UKs 804].
5 2006 (JDK0277) (C) [INCADAT Ref: HC/E/ZA 1054].

18. Hearing the Children's Objections – Some perspectives from a French lawyer

By Véronique Chauveau *(Véronique Chauveau & Partners - Paris)*

"*Children are not the people of tomorrow, but people today…*"
Janus KORCZAK

As early as 1924, the League of Nations in the Geneva Declaration advocated that the voice of the child should be heard. However, France has been slow to embrace this idea, becoming a party to the *1996 European Convention on the Exercise of Children's Rights* only in September 2007. France signed the *United Nations Convention of 1989 on the Rights of the Child* in 1990, and consequently introduced Article 388-1 in the Civil Code, granting children the right to be heard in any procedure where (a) he/she has capacity of discernment and (b) it is in his/her best interest. Children are now commonly heard with the assistance, if they wish, of an independent lawyer paid by legal aid. Most large bars have a body of specially trained "children lawyers".

While some Appellate courts have firmly ruled that nine years old is too young an age for a child to be heard, the appreciation of the "age of maturity" can still vary from one court to another. Once the question of sufficient maturity has been determined, most courts in France will examine the objection of the child in its context, demonstrating the court's fear of undue influence by the abducting parent. The risk of undue influence is often aggravated by the fact that the maximum six-week delay for adjudicating on return is very rarely respected, and that most children do not have access to the left-behind parent during the Hague proceedings.

Moreover, when heard, children are often assisted by lawyers who have no experience with the 1980 Convention. The lawyers are very often unable to explain to the child that a return order is *not* an order on the merits of custody. The child sees the return order as forcing him / her to cohabitate with a parent from whom he / she has been separated for a long time.

Relevant parties in a return proceeding may need to consider if the objection of the child is an objection:

(a) to being separated from the parent he is living with?
(b) or a real objection to being returned to his country of habitual residence?

How can a child properly express her or his views without being duly informed on the matter, on his / her options and the possible decision to be made and the consequences thereof? Such children experience fear, sadness, powerlessness, guilt and a sense of divided loyalty. One should remember that Professor Perez Vera clearly stated that hearing children, although needed, may prove dangerous. When heard, without full information, this is indeed true.

In an order dated February 14 2006, the French "*Cour de Cassation*" approved an appellate court order in which "the sole objection of the child cannot justify the refusal to return". One may interpret the decision as not espousing a general principle that the child's objection in itself cannot be an obstacle to return, but rather confirming that the Appellate Court was correct to order return despite the child's objection. Four years later, the "*Cour de Cassation*" clarified that "because of the conflict of loyalty to which the children were subjected [...] the sole objection of the children cannot be an obstacle to their return".[1] The European Court of Human Rights has subsequently ruled in *Blaga v. Romania* that the objection of the child may constitute an autonomous cause for refusal.

The careful study of French jurisprudence shows that there is a strong tendency not to refuse return on the sole objection of the child; while this may be regarded as a very orthodox analysis of the 1980 Convention, it also demonstrates that the courts' treatment of an objection of the child is most of the time "contextualised". As a topical example, the Appellate Court of Paris ruled on 2 April 2013 that "this position is the result of children having been subjected during many months to the influence of the father's family, in the context of a very violent conflict between the mother and the father, and, hence, cannot be retained as decisive". In another order made in 2012, the same court considered that the child had lived in acute conflict that had deleterious consequences on the expression of her free will. It is clear that French courts require a "non-ambiguous" objection of the child.

In some decisions, the objection of the child was relevant where the children were older and very firm in their position, and where elements of an Article 13(1)(b) defense were found. In an order dated 2007 the French "*Cour de Cassation*" approved an appellate court in a case where the child was 10 and had spent two years in France with her biological parents. The child objected to being returned to her foster family in Spain and the Court ruled that after two years, return would place the child in an "intolerable situation".

It is rare that the objection of the child is deemed by the court to justify refusing to order return when expressing a choice between two countries or two parents, but as said before, we fear that the child seldom understands.

1 See Cour de Cassation, 1st Civil Chamber, 8 July 2010, Jurisdata 2010-011380.

Wrap-up speech by the Rt. Hon. Sir Matthew Thorpe at the London Workshop on 23 March 2018

Let us pay tribute to this wonderful partnership! Marilyn Freeman and Nicola Taylor have brought together academic innovation from two great Commonwealth jurisdictions, geographically so far apart but having so much common scholarship.

Over the course of the last 24 hours we have discussed the development of the child's objection defence and beyond that modern concerns surrounding the rights of the child and the participation of the child in proceedings brought under the 1980 and 1996 Conventions. These are evolutionary fields. Those who attended the First Special Commission would have been astounded by the existing modern concerns and their impact on the operation of the Conventions. But it is fundamentally important that in interpreting and applying the Conventions we innovate and react to developments in law and social norms.

At this London Workshop we are a diverse audience, but we cannot claim to be representative of the 98 States Party to the 1980 Convention. Latin America is very significant in its support for the Conventions and administratively now extends to the Caribbean, a region of great potential for Convention growth. Those regions must have a contribution to make. To me this initiative, so successfully developed by Marilyn and Nicola, must progress to the formation of a truly international group that would create a global guide generally accepted by the growing community of States which are Party to these great Conventions. We today have the opportunity to express our strong support for the proposal for future work that is put before us. Are we united in affirmation? Yes we are!

The speakers who we have heard today are of the highest level of expertise, but even they cannot speak with certainty. For they, in developing the law, are in a mist created by diversity of view and dissenting voices. Once the focus is narrowed to a single issue such as the participation of the child, engaging human rights issues, diversity, dissent and doubt follow. But we must never lose sight of the vital importance of these Conventions. They are truly global instruments resolving many cases each year swiftly and justly. The average case does not give rise to complexity or legal uncertainty. Whether by agreement or order, children are returned home thanks to the availability of the Convention remedy. That is the important reality. We must not over indulge ourselves in the discussion of difficult issues lest we lose sight of the simplicity and efficacy of this 'hot pursuit' remedy.

Today's workshop has not been dominated by judges. We have had valuable words from Alistair MacDonald and Annette Olland. But judges have an important contribution to make to the future growth of International Family Justice, not just by dedication to high professional standards but also by their extra judicial activism. The Network judges have a record of fruitful participation in development and there is the potential for a greater part as the Network grows. It is essential that they meet regularly in residential conferences, and there is the possibility of such a meeting in the United States of America later this year. The education and development of judges and the encouragement of specialisation is

vitally important. To what extent is international family law being taught in our universities? Nigel Lowe's answer to that question is depressing. We need to invest resources to improve the performance of all the major actors and contributors. The specialist associations for practising lawyers are a welcome development. Specialisation amongst trial and appellate judges has been fostered by the growth and development of the "Hague Network". The Judges' Newsletter *occasionally sinks only, like the sun, to rise again and it is very good news that on this latest rising it will publish the papers given at our Workshop. The support of the Hague Conference for this work, not just in that respect but generally, is so valuable.*

Specialisation elevates professional standards. Families caught up in cross-border litigation deserve access to justice, representation and a standard of justice second to none. Governments have a considerable responsibility to allocate funds to achieve these standards. It is a complete fallacy to say "look at the numbers, there are not that many cases". It is not a question of numbers; few children are more vulnerable than those caught up in cross-border, often cross-continent, movement and turmoil. They deserve high quality performance by lawyers, court administrators and judges to ensure priority, no delay and justice.

In the context of the work on which Nicola Taylor and Marilyn Freeman are embarking, and the support we are giving them, we must always remember the bigger picture: the efficacy of the Conventions and the importance of the work of the Permanent Bureau. Without them there would be even less justice in this already troubled world.

International Child Protection Conference

1. HCCH-UNICEF Workshop on the "Role of the Hague Conventions in Cross-Border Child Protection in South Asia", Kathmandu (Nepal) (29–31 May 2018)

From 29 to 31 May 2018, 31 governmental experts from Afghanistan, Bangladesh, India, Maldives, Nepal and Sri Lanka, UNICEF representatives from these countries as well as from the Regional Office for South Asia (ROSA), representatives from the Permanent Bureau of the Hague Conference on Private International Law (HCCH), the International Social Services (ISS) and three independent consultants met in Kathmandu, Nepal, for a Workshop entitled "Role of the Hague Conventions in Cross-Border Child Protection in South Asia", co-organised by UNICEF ROSA and the HCCH.

The aim of the Workshop was to discuss the cross-border movement of children from South Asia and mechanisms to support safe migration. During the Workshop, the country teams presented existing mechanisms children use to migrate and to return; the HCCH presented the benefits of becoming a Member of the organisation; the role and value of the Hague Children's Conventions for addressing cross-border child protection issues in South Asia was examined, in particular in the context of irregular migration (*e.g.*, trafficking, unaccompanied children); and some of the practicalities surrounding implementation of these Conventions were discussed. Significant time was devoted to discussion of case studies.

During the Workshop, the government experts shared their experiences in relation to existing mechanisms and initiatives addressing and assisting cross-border protection of children. They highlighted their good practices and identified possible gaps in their current system, which consist mainly of a lack of adequate cross-border co-operation mechanisms.

Participants were informed about the global situation of children on the move, including the Global Compacts on Migration and on Refugees. In addition, a background paper was drafted by UNICEF ROSA on the situation in the region. Participants were also provided with good practices of migration programmes collected over the years by ISS.

Participants were trained on the following Hague Conventions, projects and Protocols which implement key provisions of the United Nations Convention on the Rights of the Child for the purposes of establishing proper cross-border child protection systems:

1) the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the 1996 Convention);

2) the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the 1993 Convention);

3) the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Convention);

4) the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the 2007 Convention) and the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (the 2007 Protocol);

5) the United Nations Protocol to Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;

6) the International Labour Organisation 1973 Convention concerning Minimum Age for Admission to Employment and 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;

7) the Malta Process on Cross-Frontier Child Protection and Family Law;

8) the HCCH Parentage/Surrogacy Project and the draft ISS Principles on Surrogacy.

During the Workshop, participants spent significant time working on case studies, which provided an opportunity to

apply the best interest determination procedures as devised by UNICEF and UNHCR. The case studies dealt specifically with the application of the 1996 Convention to the cross-border trafficking of children, the cross-border movement of children due to regional conflict and political unrest, child labour across borders and the implementation of the 1993 Convention in general as well as in relation to financial issues and illicit practices in intercountry adoption.

The value of all countries in the region becoming Contracting States to the 1996 Convention was recognised, especially regarding the cross-border co-operation mechanisms based on a Central Authority system provided therein. This could fill an important gap in the region with regard to the cross-border movement of children.

The values of the 1993 Convention to protect adopted children, and to prevent and address illicit practices and other abuses, were also recognised. Countries permitting adoption in their system were encouraged to become a Party to this Convention and properly apply its rules and standards.

The values of the 1980 Convention to combat the wrongful removal or retention of children in a civil context and of the 2007 Convention for the cross-border recovery of child support, based on procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair were also recognised.

The Workshop also provided an opportunity to develop a better understanding of the issues surrounding surrogacy and the need to protect all vulnerable parties in this area, prevent problems and address them when they occur.

Participants acknowledged the unique value of HCCH post-Convention services which include, for example, periodic meetings of Contracting States to review the practical operation of specific Conventions, Guides to Good Practice and Practical Handbooks on the operation of specific Conventions, implementation checklists, Country Profiles, case law databases, electronic case management and secure communication systems, the Judges' *Newsletter* on International Child Protection, the International Hague Network of Judges and the Intercountry Adoption Technical Assistance Programme (ICATAP).

Participants agreed on the following next steps:

1) Participants committed to raise awareness about the Hague Conventions with their respective governments with the objective, if found suitable, to become Members of the HCCH and Contracting States to the Hague Children's Conventions.

2) Participants of some countries committed to assess the cross-border migration situation that may be addressed by the 1996 Convention; reflect on the extent of migration to which the 1996 Convention could apply; assess the existing systems and structures which address these cases; and examine previous discussions on the 1996 Convention in their countries to determine if the 1996 Convention is useful and what would be required to become a Party to the Convention. Some countries have existing legislation in this area that they propose could be reviewed to determine alignment with the 1996 Convention.

3) Participants of some countries permitting adoptions offered to share their good practices implementing the 1993 Convention, in particular the principle of subsidiarity. Some countries permitting adoptions that are not Party to the 1993 Convention expressed their intention to further promote the 1993 Convention and to undertake the necessary work with a view to becoming a Party.

4) Countries are encouraged to continue sharing information and experiences at the regional level on, *inter alia*, good practices, challenges in relation to cross-border child protection issues that they face, and means of addressing those challenges. In particular, countries with more experience implementing the Hague Conventions are encouraged to provide assistance to new State Parties or those interested in joining the Hague Conventions.

2. Expatriate Law International Family Law Conference (Dubai, United Arab Emirates)

By Alexandra Tribe *(Expatriate Law)*

On 3-4 May 2018, Expatriate Law[1] were delighted to welcome 70 delegates from around the world to Dubai for its International Family Law Conference. Lawyers attended from 18 different jurisdictions including England, Australia, South Africa, the United States of America ("USA"), Oman, Bahrain and India. The conference attracted family lawyers

who regularly advise expatriate clients in the Middle East.

Over the course of two days, speakers and delegates discussed a range of topical family law issues, with a particular focus on issues relating to the United Arab Emirates (UAE). One of the key themes of the conference was the notable absence of the UAE from the signatories to the 1980 Convention, and the impact that this has on cases involving the region, especially considering the vast numbers of expatriates residing there.

The conference began with a presentation by the English barrister and Shari'a law expert, Mr Ian Edge.[2] Mr Edge discussed the practical implications of Shari'a law and how the main family law statute in the UAE, the Personal Status Law 28 of 2005, has been derived from it. He considered the framework that is applied to domestic cases in the UAE and highlighted the need for appropriate expert advice at an early stage in matters with a cross-border component.

Continuing the theme of domestic UAE principles, Stephanie Allerton[3] and Hassan Elhais[4] addressed the delegates on the methods which can be employed to enforce foreign orders in UAE courts.

Clare Renton[5] and Alexandra Tribe[6] then spoke on the relocation of children both to and from the Middle East, and the difficulties which arise in these cases as a result of the UAE's non-accession to the 1980 Convention. In particular, Ms Tribe addressed the safeguards that could be put in place through the Family Guidance Committee of the UAE courts, or the UAE courts themselves, to ensure the return of children following contact with a parent in the UAE.

Day 1 culminated with a series of talks from regional speakers on the family law in their own jurisdictions, including:

- Mert Yalcin (Turkey);
- Elham Hassan (Bahrain);
- Djoulene Boukedroune (Algeria);
- Amna Abbas (Pakistan); and
- Sumaiya al Balushi (Oman)

These speakers also conducted a panel discussion, explaining how their country would respond to a scenario involving both the international relocation of children and financial remedies within an expatriate divorce. It was helpful for delegates to compare and contrast the applicable laws in the region.

Day two commenced with a lively discussion conducted by:

- Will Tyler QC (England);
- Patricia Apy (USA);
- Max Meyer (Australia);
- Beverley Clark (South Africa);
- Malavika Rajkotia (India);
- Byron James (Expatriate Law, England); and
- Lucia Clark (Scotland).

Though the focus of this panel was issues which have arisen in these practitioners' cases involving the Middle East, it also served as a helpful reminder of the differences between the English and Scottish jurisdictions within the United Kingdom. The speakers also engaged in an animated debate on the question of whether India should accede to the 1980 Convention.

A key theme of the discussion was domestic violence and the strategies which are currently employed in the UAE to address this issue. It culminated in a discussion of a recent case involving an abduction from the UAE, where coincidentally both advocates and the Judge for the matter were attending as speakers at the conference (Will Tyler QC, Clare Renton and Sir Peter Singer). The panel also reviewed a case in which Facebook had been used to locate a parent who had abducted a child. The English High Court granted a *Norwich Pharmacal* order,[7] providing the IP addresses used to access the parent's Facebook account, which were then used to pinpoint their location.

Following on from this discussion, Jeremy Morley addressed the delegates on how the USA has responded to family law matters in Middle Eastern jurisdictions. In doing so, he highlighted the importance of the 1980 Conven-

tion to US domestic law, making reference to the automatic prohibition on travel to non-Hague countries in the state of Michigan's parenting time orders, unless the parents can themselves agree otherwise.

Moving on from the focus on litigation, David Hodson OBE took to the stage to address the question of alternative dispute resolution and its importance for international families. The increasing availability of technological resources and the possibility for international ADR to be conducted outside the limitations of any one national legal system were particularly emphasised. Mr Hodson also discussed the success of mediation in resolving cases of international child abduction, noting that a left-behind parent will often want to avoid a situation in which the primary carer of the children is trapped in a State in which he or she is unhappy.

This theme of collaboration was continued by the next speaker, Margaret Heathcote,[8] who introduced the "Resolution Code of Practice" to the international audience, highlighting the opportunities for international family law professionals involved in joining the organisation.

The penultimate speaker, Jemma Dally,[9] spoke on the immigration consequences of adoption for the expatriate family. Ms Dally highlighted the need to acquire advice prior to returning to the UK with an adopted child as well as the approach which has been taken to Kefalah orders by the UK Home Office.

The conference was concluded by Sir Peter Singer. Adopting the theme of the 1980 Convention, Sir Peter Singer discussed the challenges of judging international cases and reflected on the need for more countries within the Middle East to accede to the Convention.

The International Family Law Conference was of great benefit to practitioners, allowing for much-needed dissemination of information and practices in cross-border family law matters in Middle Eastern jurisdictions.

1 For further information about Expatriate Law, please visit our website.
2 From "3 Paper Buildings and SOAS" (UK).
3 From "Expatriate Law" (UK).
4 From "Al Rowaad Advocates" (UAE).
5 From "29 Bedford Row" (UK).
6 From "Expatriate Law" (UK).
7 Under UK law, a *Norwich Pharmacal* order is an order for the disclosure of documents or information relating to unlawful conduct held by an innocent third party. The order was first granted by the House of Lords in *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133 and has been subsequently incorporated into the United Kingdom Civil Procedural Rules.
8 Margaret Heathcote is the Chair of England's family law association, Resolution.
9 From "Goodman Ray" (UK).

News

1. Third meeting of the Experts' Group on the Parentage / Surrogacy Project

From 6 to 9 February 2018, the Experts' Group on Parentage / Surrogacy (the "Group") met at the Permanent Bureau in The Hague for a third occasion. The meeting was attended by 23 experts, 3 observers, and members of the Permanent Bureau under the chairmanship of Joëlle Schickel-Küng, co-Head of the Private International Law Unit, Federal Office of Justice for Switzerland.

The Council on General Affairs and Policy of the Hague Conference (the "Council") in 2015 decided that an Experts' Group should be convened to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from International Surrogacy Arrangements (ISAs). The Group primarily focuses on legal parentage with a view to provide its predictability, certainty and continuity in international situations. The Group also noted that the issue of legal parentage is relevant to all persons and not only to children under the age of majority.

The Group met for the first time in February 2016 and determined that although definitive conclusions could not be reached as to the feasibility of a possible work product in this area, they considered that the work should focus primarily on recognition of judicial decisions and public documents which establish or record legal parentage.

At its second meeting in January – February 2017, the Group agreed on the possibility, in principle, of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage. The Group also considered the recognition of legal parentage status where there is no judicial decision but which is usually recorded in a public document. It was agreed to further explore both a recognition approach of such public documents and an applicable law approach to the establishment of legal parentage. Concerning ISAs specifically, the group discussed both the prospect of applying future general private international law rules on legal parentage to ISAs and the need for additional rules and safeguards in cases of ISAs and Assisted Reproductive Technology (ART), but could not reach a definitive conclusion.

At its third meeting, the Group deepened the discussions which took place at the second meeting.

Regarding recognition by operation of law of judicial decisions on legal parentage, it was agreed that the possible future instrument would focus on indirect grounds of jurisdiction with the place of habitual residence of the respondent, if any, or the person whose parentage is the subject of the proceedings as possible connecting factors. There were also discussions on the application of the public policy exception and some experts queried whether public policy should be applied where it would render the child parentless. In addition, the Group discussed whether the recognition of a judicial decision on legal parentage should extend to the recognition of its effects and agreed that it should not address areas outside the possible future instrument's scope (for example, nationality, maintenance, parental responsibility).

Regarding legal parentage recorded in public documents, the Group mainly focused on birth certificates. It was acknowledged that although in the vast majority of cases individuals only have a birth certificate and a judicial decision is not required to prove their legal parentage, most States only give evidential weight to such documents and they are not constitutive of legal parentage. The Group discussed three approaches:

- the recognition of birth certificates by operation of law, which might only be possible if such documents are constitutive of legal parentage. It was noted that such birth certificates would thus need to be specifically identified as such, through a Country Profile, an international birth certificate, or an international certificate of parentage;

- the acceptance of foreign birth certificates as rebuttable evidence of legal parentage, which would not be very different from the actual practice; and

- the determination of uniform applicable law rules to determine the child's legal parentage, which would not require reliance on public documents.

At this stage however, no agreement could be made on which approach would appear the most feasible.

Regarding legal parentage in the context of ISAs, the Group was not able to reach a definitive conclusion as to

whether the general private international law rules on legal parentage should apply to the particular context of ISAs or whether additional rules and safeguards should be followed. If a differentiated approach would be deemed more appropriate, the Group discussed the possibility of an Optional Protocol specifically for ISAs, or an opt-in or opt-out mechanism, so that ISAs would only apply in States which consented to their application. The Group agreed that the scope of the general instrument would first need to be established before it could be decided which option would be most appropriate in the particular context of ISAs. Concerning cases of ART, whether involving a third-party donor or not, the Group considered that, at this stage, a differentiated approach was not necessary.

Following the third meeting, the Council agreed in March 2018 that the Experts' Group should hold two further meetings. The fourth meeting (September 2018) should focus on general private international law rules on legal parentage, namely: a) deepening the discussion regarding uniform applicable law rules for parentage; b) further analysing the possibility of recognising or accepting foreign public documents which record legal parentage; and c) refining possible provisions on the recognition of foreign judicial decisions. The fifth meeting (January 2019) should focus specifically on ISAs and consider both the feasibility of applying the general private international law rules on legal parentage that will be discussed at the fourth meeting to ISAs and the possible need for additional rules and safeguards for ISA cases.

2. New Brochure – 25 Years of Protecting Children in Intercountry Adoption

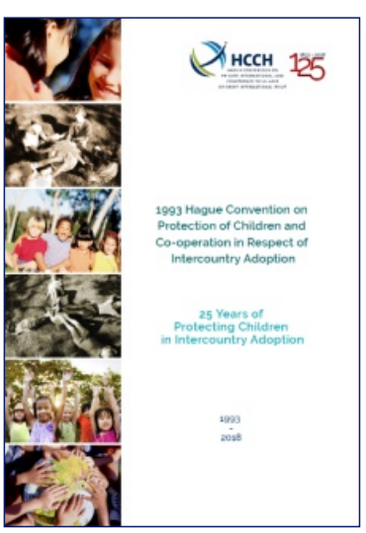
The Permanent Bureau of the Hague Conference on Private International Law (HCCH) is celebrating the 25th Anniversary of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("1993 Convention") in 2018 and recently published a brochure to commemorate this anniversary.

The 1993 Convention was concluded on 29 May 1993 and signed on that day by Brazil, Costa Rica, Mexico and Romania. The Convention entered into force 1 May 1995, with Mexico, Romania and Sri Lanka as the first three Contracting States. Since then, a total of 98 States have joined the Convention and an additional three States have signed the Convention but not yet ratified it.

The 1993 Convention is one of the most important international instruments in force for the protection of the interests of children in intercountry adoptions. The Convention gives effect to, and furthers, the guarantees established by the *1989 United Nations Convention on the Rights of the Child*, in particular Articles 3 and 21. It establishes minimum standards to be guaranteed and requires a specific procedure for adoption be followed by both the State of origin and the receiving States, both of which enable the automatic recognition of the intercountry adoption between all Contracting States.

25 years since its conclusion, the Convention has established itself as the international benchmark, providing for an orderly, rules-based and State-supervised global intercountry adoption system. It has promoted a new division of responsibilities, clear roles for each actor in the adoption process, a system of co-operation between States and within States, and a more safe, clear, ethical, transparent and smooth adoption procedure. All of these features have helped to reduce the incidence of illicit practices in intercountry adoption.

The brochure presents the fundamentals of the 1993 Convention in an easily accessible form, analyses the main achievements in its 25-year history, identifies remaining challenges and outlines the different missions of the HCCH in helping States implement the 1993 Convention. Finally, the brochure includes the main tools which have been developed over the years by the HCCH and the International Social Service to assist with the implementation of the Convention. These tools are intended for all actors involved in intercountry adoptions, including adoptees and their families. The brochure is available on the website of the HCCH at < www.hcch.net > under "Adoption Section".



News from the International Hague Network of Judges

A tribute to the Honourable Madam Justice Robyn M. Diamond (1952-2018)

The Hague Conference on Private International Law and more specifically the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* had a special place in the heart and life of Madam Justice Robyn Moglove Diamond. She was the first Central Authority designated under the 1980 Child Abduction Convention for the province of Manitoba, that, in part through her efforts, was one of the first four provinces in which the Convention came into force in Canada in 1983. At the forefront of work relating to the Convention in Canada, Madam Justice Diamond first came to the Hague Conference for a meeting of Contracting States to the 1980 Child Abduction Convention in March 2001. She was appointed to the Family Division of the Court of Queen's Bench of Manitoba in 1989 and to the International Hague Network of Judges in September 2006. In that capacity, Madam Justice Diamond played a leadership role in the development and promotion of direct judicial communications both at the inter-provincial level in Canada and at the international level. She was instrumental in the development of the Canadian Recommended Practices for Court-to-Court Judicial Communications and the establishment of a Canadian provincial / territorial network of judges specialised in child abduction and judicial communication matters. Between 2008 and 2010, Madam Justice Diamond was part of the Experts' Group that developed the Hague Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases. She participated in the Malta Process in 2006 and 2009 and contributed on many occasions to the *Judges' Newsletter* and to Canadian and international legal and judicial conferences. Madam Justice Diamond retired in September of 2017 after 28 years on the Bench and sadly passed away on May 29, 2018 after a brave battle with cancer. She will be dearly missed by all her friends around the world as well as by present and past members of the International Hague Network of Judges and Central Authorities designated under the 1980 Child Abduction Convention.

Members of the IHNJ

The IHNJ Network has undergone further changes in membership since the last issue of the Judges' Newsletter in April 2018.

We firstly would like to express our sincere appreciation to the following judges who have recently left the Network. Their knowledge and meaningful contribution to the Network will be missed. We convey our warm wishes to them and their current and future endeavours.

JAPAN
Judge Yoshiaki ISHII (17/04/2018)

SINGAPORE
Judicial Commissioner FOO Tuat Yien (24/05/2018)

SLOVENIA
Judge Tadeja JELOVSEK (03/05/2018)

Further, we are delighted to announce that we have received the following designations since April 2018. We look forward to the future growth of the Network as a result of these new members' unique insight and experience in international child protection.

JAMAICA
The Honorable Mrs Justice Lorna SHELLY-WILLIAMS (12/06/2018)

JAPAN
Judge Kousuke UDAGAWA (17/04/2018)

SINGAPORE
Judicial Commissioner TAN Puay Boon (24/5/2018)