

The Judges' Newsletter

on International Child Protection

Special focus

The 20th Anniversary of the International
Hague Network of Judges (IHNJ)

A publication of the Hague Conference on Private International Law

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Foreword

The 20th Anniversary of the International Hague Network of Judges (IHNJ)



The Permanent Bureau is pleased to publish Volume XXIII of *The Judges' Newsletter* with a Special Focus on the Third Global Meeting of the International Hague Network of Judges (IHNJ) on the occasion of which the 20th Anniversary of the IHNJ was celebrated.

From 22 to 25 June 1998, the HCCH, with the financial assistance of the European Union Grotius Programme, organised at "De Ruwenberg" in the Netherlands, a Seminar for Judges on the International Protection of Children. The reactions to the Seminar were very positive. The Seminar not only provided an opportunity for judges to reflect on and discuss the current developments in international child protection, it also provided a unique opportunity for the participants to bridge some of the differences in legal cultures and to promote the mutual understanding and confidence between judges which is necessary for the effective operation of any international instrument.

The following Conclusions and Recommendations were reached at the Seminar during the discussion on the subject "Towards International Judicial Co-operation":

"1. The recommendation was made that, following the example of Australia, judges attending the seminar should raise with the relevant authorities in their jurisdictions (e.g., court presidents or other officials, as appropriate within the different legal cultures) the potential use-

fulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other states, in respect, at least initially, of issues relevant to the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

2. In accordance with the objectives of the Grotius programme of the European Union, a number of judges outlined their plans for passing on the information and experience gained during the seminar to judicial colleagues in their several jurisdictions.

3. As short newsletter would be circulated on a regular basis (perhaps twice yearly) by the Permanent Bureau of the Hague Conference on Private International Law to judges attending the Seminar, with a view to the exchange of information concerning judicial co-operation in matters of international child protection. The information would include any changes in personal contact details, notes on developments concerning relevant international instruments (e.g., new ratifications and accessions), reference to significant national developments (e.g., case law, procedural or organisational changes, judicial conferences / seminars, etc.), and examples of successful practice in international judicial co-operation. The network would be made available to other interested judges.

4. There was broad support for the view that efforts should be made to ensure greater judicial participation in the work of the Hague Conference on Private International Law, both in the development of new international instruments and in the periodic reviews of their practical operation.

5. There was agreement that the seminar had been of practical value in promoting mutual understanding and in forwarding the objective of more effective international judicial co-operation in matters of international child protection. It was recommended that further seminars of this kind be organised periodically (every three or four years)."

In attendance at the 1998 "De Ruwenberg" Seminar were the four founding members of the IHNJ: Justices James Garbolino (United States of America), Michael J. Hartmann (China, Hong Kong, SAR), George A. Serghides (Cyprus) and Mathew Thorpe (United Kingdom). Anno 2019, the IHNJ includes more than 130 judges from more than 80 States representing all regions of the world.

Since the 1998 "De Ruwenberg" Seminar, important tools have been put in place in support of the IHNJ: *The Judges' Newsletter* saw the light of day in the spring of 1999; on 9 May 2000, the International Child Abduction Database (INCADAT) was launched; and, finally, in June 2011, at the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction and the 1996 Child Protection Conventions the "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, within the context of the International Hague Network of Judges" were endorsed. In the near future, as announced later in this Volume, a Secure Platform dedicated to members of the IHNJ to foster dialogue and communication among members of the Network will be launched on the HCCH website.

Twenty years after the 1998 "De Ruwenberg" Seminar, this Volume of *The Judges' Newsletter* also marks the Third Global Meeting of the IHNJ which took place in Miami, Florida, United States of America, from 24 to 26 October 2018 and features contributions from judges and other experts who intervened at the meeting on subjects of interest to judges specialised in international child protection such as: judicial co-operation (Judge Martina Erb-Klünemann (Germany) and Judge Graciela Tagle de Ferreyra (Argentina)); case management and mediation in child abduction cases (Judge Alistair MacDonald (United Kingdom, England and Wales), Judge Martina Erb-Klünemann (Germany) and Ms Melissa Kucinski (United States of America)); the voice of the child (Judge Francisco Javier Forcada Miranda (Spain) and Judge Alistair MacDonald (United Kingdom, England and Wales)); conditions to return in child abduction cases (Judge Victoria Bennett (Australia)); and

the Article 13(1)(b) "Grave Risk" exception to return in child abduction cases (Judge Alistair MacDonald (United Kingdom, England and Wales)). Also reproduced in this Volume are the Conclusions and Recommendations adopted by the Third Global Meeting of the IHNJ showing the evolution of the work of the IHNJ 20 years on. Finally, we are delighted that this Volume of *The Judges' Newsletter* celebrating the 20th Anniversary of the IHNJ also includes a contribution from one of its founding members: Sir Mathew Thorpe.

The publication of this Volume would not have been possible without the assistance of current and former interns of the HCCH, Lindy Christine and Renáta Radócz, respectively, to which we are most grateful, as well as to members of the HCCH Family Law Team. Most importantly, this publication would not have been possible without the very generous contributions of the authors listed above.

We hope you will enjoy reading this latest Volume of *The Judges' Newsletter* and we look forward to receiving your comments and suggestions.

The editors,

Philippe Lortie
First Secretary

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Special Focus

The 20th Anniversary of the International Hague Network of Judges (IHNJ)

1. Judicial activism - the IHNJ & the Judges' Newsletter: a 20 year evolution

By Sir Mathew Thorpe

The development of international family law, initiated by the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1980 Child Abduction Convention) and progressed by a number of other European and global instruments, led to the rapid rise of litigation in the many domestic courts of transnational jurisdiction. In the 1990's the younger judges felt the urge to communicate directly with a judge in the other court seized, and a matching sense of frustration arose if they were prevented from doing so.

This natural development was not restricted to cross border family proceedings. This was an equally prominent feature of international insolvency practice. Mr Justice Baragwanath of the New Zealand High Court drew attention to this developing trend, which he labelled "Judicial Activism". His paper: "Who now is my Neighbour? The Cross Border Cooperation of Judges in the Globalised Society" was published in the Inner Temple Yearbook 2004-2005 London. I learned from him and was able to repay him with my experience in international family proceedings, which were not his sphere.

This activism had I think three manifestations: direct judicial communication in specific cases in progress, participation in the evolutionary reform of law and procedure in the domestic arena and, in the available forums, engaging in debate on the present performance of the international justice system and its evolution. The forums for the Hague Family Conventions were the Meetings of the Special Commission on the practical operation of the 1980 Child Abduction and 1996 Child Protection Conventions and international conferences convened or attended by the Permanent Bureau (the Secretariat of Hague Conference on Private International Law (HCCH)) and, for European Regulations, the regular meetings of the European Judicial Network (EJN) and occasional judicial conferences convened or funded by the European Commission.

Of these three manifestations by far the most significant was the promotion of direct judicial communication by the creation and development of international judicial networks, principally the International Hague Network of Judges (IHNJ) and, in so far as it operates independently, the EJN of Judges. The primacy of the IHNJ derives from the fact that it was first born and that it has provided the model that guided the emergence of the regional EJN. In a real sense it has empowered the specialist judiciary by

giving them confidence in their potential to contribute to a beneficial development of law and practice, and the motivation to strive for it. Therefore, I will principally endeavour to chronicle the creation and development of the IHNJ and in so doing to note activity in the other manifestations.

It has been said that the earliest reported case recording direct judicial collaboration was the Canadian case of *D v B* decided on the 17 May 1996 in the Superior Court of Quebec. In our law reports direct judicial communication seems to make its first appearance in the case of *Re HB (Abduction: children's objections)*.¹ I was in the court together with Lady Justice Butler Sloss and Sir John Vinelott. At first instance Wall J. had endeavoured to establish direct communication, an endeavour which we supported. Another strong supporter of direct judicial communication in the Family Division was Singer J. who tackled the topic head on in his Judgment in *Re MJ (Abduction: international judicial collaboration)*.²

But these judicial pronouncements must be set in a much broader context. The 1980 Child Abduction Convention depended for its function on the creation and operation of Central Authorities, one in each State party to the Convention. This was mandated. However, the text of the Convention more or less took for granted the effective operation of judicial authority. That this was not a safe given was subsequently to be demonstrated in enumerable return applications malfunctioning in the courts of many States party to the Convention. As the mesh of countries operating the Convention steadily advanced and enlarged, it became increasingly evident that the successful operation of the Convention depended not only upon the effective work of the Central Authorities, but also upon the effective work of the judges. It was vital for the judges to understand and correctly apply the law, a goal they were unlikely to achieve without specialist skills. Not only must the judges be specialists in the law, but they must also be past masters in its practice and procedures. No doubt these realities persuaded the HCCH to host the first residential conference for judges of the States party to the 1980 Child Abduction Convention.

The conference was convened in the summer of 1998 at De Ruwenberg, the Netherlands. At that date there were some 50 States party to the Convention and approximately half sent judges to contribute. Expertly guided by the Deputy Secretary General, the much esteemed Professor William Duncan, very valuable work was done. From this gathering stems the INCADAT website and the Judges' Newsletter, but its greatest achievement was the tentative creation of the IHNJ. I say tentative because the proposal came from me on behalf of the United Kingdom. My proposal was both tentative and speculative as I had then no

idea how it might materialise. It has been my experience of innovation that what really counts is the launch. The proposer needs only sufficient ideas of need and purpose to achieve approval for the launch. Once the innovation is born, it will to some extent create its own evolution and develop its own future. So it was with this.

The proposal was fiercely opposed by France. Thus it might have been stillborn. But I believe it survived thanks to strong support from Australia, Hong Kong (SAR, China) and New Zealand and the fact that France's opposition attracted no ally.

In preparing this paper I have found gold in the Judges' Newsletters. I find in the Judges' Newsletters a record of events which were at the time at the centre of my life but which I have long since erased. So the Judges' Newsletters are most valuable not as purveyors of news but as a record of historic fact and have proved invaluable source material for this paper.

For instance in Volume 1 published in Spring 1999 I find:

"Judges are reminded of the following conclusion reached during the final session of the De Ruwenberg Seminar on the subject 'Towards International Co-operation':

'the recommendation was made that, following the example of Australia, judges attending the Seminar should raise with the relevant authorities in their jurisdictions (e.g., court presidents or other officials, as appropriate within the different cultures) the potential usefulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their National Central Authorities, with other judges within their own jurisdictions and with judges in other States, in respect, at least initially, of issues relevant to the operation of the 1980 Convention'

The Permanent Bureau would welcome news of any developments following on this recommendation."

Interestingly the Judges' Newsletter also announces another seminal development relevant to the third manifestation identified above. Having noted the first three Meetings of the Special Commission held respectively in 1989, 1993 and 1997, comes:

"The Permanent Bureau has been considering how the next Special Commission should be organised, and in particular how it may best contribute to the development of improved procedures and practices surrounding the judicial process itself. It will be essential to involve the judiciary more centrally in the process."

Volume 2 appeared in Autumn 2000 and reflected in its considerable expansion how much judicial activism was burgeoning. A second De Ruwenberg Conference earlier in the year had supported the creation of an international judicial network. That resolution had been repeated at the Washington Common Law Conference in September 2000. However these recommendations remained aspirational as later the Judges' Newsletter reported that the tally of nominated Network judges stood at only four and all from Common Law jurisdictions (Australia, Cyprus, New Zealand and UK).

The 4th Meeting of the Special Commission convened in March 2001 and was the special focus of Volume 3 published in March 2001. The report included:

"Judicial attendance and participation contributed greatly to the success of the Special Commission, and will add additional weight to its conclusions and recommendation."

Recommendations 5.5-5.7 are fundamentally important as they elevated mere De Ruwenberg conference proposals to the HCCH work in progress, subject to endorsement by the Council on General Affairs and Policy (the governing body of HCCH) at its next meeting. Effectively they set the agenda for the following decade. The effect of Resolution 5.5 was to encourage States to identify a network Judge. Resolution 5.6 required Contracting States to actively encourage International judicial cooperation by the attendance of judges at judicial conferences, and by exchanging ideas with foreign judges and by explaining the possibilities of direct judicial communication on specific cases. Importantly this resolution also recorded the safeguards commonly accepted in Contracting States in which direct judicial communications are practiced. Resolution 5.7 committed the Permanent Bureau to continue to explore practical mechanisms for facilitating direct judicial communication.

Despite these positive sign posts the Judges' Newsletter later tallies only a modest increase in the number of designated Network judges to eight.

Each Judges' Newsletter addressed a chosen topic, as well as covering current events and news. Volume 4 addressed Direct Judicial Communication, devoting some thirty pages to the topic. The advantages and the pitfalls were set out in a debate between the believers and the non believers. The need for safeguards was acknowledged.

Through these two Judges' Newsletters and the Meetings of the Special Commission in 2001 and 2002 a clear path of progress emerges:

1. The 2001 Special Commission agrees Resolutions 5.5- 5.7.
2. Pursuant to Resolution 5.7 in January 2002 the Permanent Bureau circulates a questionnaire directed to practical mechanisms. 16 responses result.
3. In August 2002 the Permanent Bureau circulates its preliminary report on practical mechanisms.
4. In October 2002 the Special Commission approves the preliminary report and recommends the finalisation of the report within 18 months.

This is a critical point in the evolution. In the four years since the first De Ruwenberg Conference the initial proposal has been developed to general acceptance and the formulation of practical mechanisms. The journey has travelled beyond the point of return. There are now thirteen declared participants, including the first appearance of the USA with the informal designation of Jim Garbolino.

Significant too is the number and diversity of judicial conferences. In this period of rapid growth in judicial activism conferences were the essential evolutionary tool. We needed to discuss our aspirations and the ways and means of achieving them. In London we had launched an International Family Law Committee in 1993 and it was the medium for a bilateral conference with Germany in 1997. The Permanent Bureau had launched the multilateral model at De Ruwenberg in 1998 after which a host of multilateral conferences had followed, some initiated by judges.

This early development of judicial activism within the Hague community coincided with developments in Europe. 2001 saw the arrival of the Regulation creating the EJN for Civil and Commercial Law. In the same year came the short-lived Brussels II Regulation. In 2003 this matured into the Brussels II Revised Regulation which with its commencement in March 2005 brought Family law into the heart of the work of the EJN. In preparation for this arrival the European Commission convened a major conference for specialists in conjunction with the Italian Presidency at Lecco, which was the home town of the then Italian Justice Minister. The minute of the conference prepared by the Commission contained the following conclusion:

"Judges must receive adequate training before entry into force of the new Regulation. The EJTN should be used in this context. The EJN will also play a key role in this respect. The liaison judges specialised in Law should be effectively integrated into the Network and will disseminate information about the new Regulation at a national level"

To coincide with the commencement of the Regulation the Commission issued a Good Practice Guide which in Chapter X stated:

"To arrange and facilitate cooperation discussions between judges should be encouraged. The experience of the informal 'liaison Judge arrangement' organised in the context of the 1980 Child Abduction Convention may prove instructive in this context."

Later in guiding judges considering an Art. 15 transfer the advice becomes very direct:

"If the two judges speak and/or understand a common language, they should not hesitate to contact each other directly by telephone or email. Other forms of modern technology may be useful, e.g., conference calls. If there are language problems, the judges may rely on interpreters."

So at Lecco in 2004 the European Commission, faced with the problem of bedding in a major innovation with only months before commencement, saw the opportunity to appeal to the specialist judiciary to play a major role, a role that had already been tested and established on the global stage of the 1980 Child Abduction Convention.

So gradually, almost inevitably, what emerged were two parallel networks, one global, one European. Obviously the individual judge generally served both functions. It would have made little sense to have had one judge on the IHNJ and a different judge on the EJN.

I return to my primary theme, the evolution of the IHNJ. As we have seen the 2002 Meeting of the Special Commission had recommended the finalisation of the report on practical mechanisms. That report, compiled by Philippe Lortie from 45 responses to a second questionnaire, was circulated as Preliminary Document No 8 in preparation for the 2006 Meeting of the Special Commission. The conclusions of the Commission in identifying future work included:

- (b) to continue to explore practical mechanisms; and
- (f) to explore principles concerning direct judicial communication which could serve as a model for the development of good practice with the advice of experts drawn principally from the judiciary.

Volume 13 of our excellent Judges' Newsletter for the first time included not a list of individual liaison judges but a Directory of Jurisdictions signed up to direct judicial communication - 13 judges as at Autumn 2008. This expansion was largely thanks to the support of Latin American jurisdictions. The Judges' Newsletter also announced that in Brussels on 15-16 January 2009 the HCCH and the European Community would hold a joint conference on direct judicial communication. This long promised conference was to fulfil all our expectations.

The first meeting of experts, principally judges on the IHNJ, took place in The Hague on 3-4 July 2008. We began our task of surveying the practicalities to facilitate direct judicial communication and necessary safeguards to protect the integrity of the proceedings that had given rise to the contact. As an agenda we had the draft general principles settled by the Permanent Bureau in fulfilment of the conclusions of the 2002 and 2006 Meetings of the Special Commission. The plan was that our enhancement of the Permanent Bureau's draft would then form an important item on the agenda of the Brussels conference in the following January.

In the development of judicial activism and direct judicial communication the then forthcoming January 2009 Brussels Conference stood as an Everest above the plain of our work lives. I had mooted it and then badgered for it in frequent meetings with Olivier Tell, the senior official at the European Commission. I was hopeful that it might come to pass but never confident. When finally confirmed and announced I held very high hopes of the outcome. It seemed such a powerful partnership. The Permanent Bureau had the experience and the expertise whilst the European Commission had the funds to cover the considerable cost of such a global gathering. Never before had there been such an assembly of such committed specialist judges from all over the globe. The conference gave equal voice to proponents and opponents, or more precisely those who held misgivings and reservations as to where these innovations might lead. In the civil law world there were respected judges who believed that the role of a judge should be confined to the proper proceedings in the court room. In the common law world there were respected judges who feared that extra camera communication would or might breach the rules of natural justice. The expression of such doubts and anxiety was a necessary stage in the evolution of these innovations.

The conference is very well recorded. In recognition of its significance the papers given at the conference and its conclusions were effectively published as a special edition of the Judges' Newsletter, Volume 15 extending to 200 pages. They still make interesting reading not only for the insight as to how things then were, but also for the prophetic views as to how things would be in 2018! As to how things were, the Hague Directory had grown to record 34 jurisdictions. Many specialist judges wrote of their experience of and support for direct judicial communication. Both England and the Netherlands offered the latest annual reports from their international family justice offices. Amongst the many positive conclusions the most important for my narrative is Conclusion 16 which endorsed the general direction taken by the Experts at the Hague meeting the previous July, noted that the conference had made a significant contribution and awaited the finalisation of the Experts' report. The prophets foreseeing how things might stand in 2018 were Diana Bryant and myself. Our optimism has certainly been borne out but it is disappointing that the

resources then available to the London International Office were much reduced in 2013 with an inevitable reduction in its capabilities. By way of foot note the Association of International Family Judges was launched on the second day of the conference and on the evening of the first we celebrated the tenth birthday of the IHNJ.

Volume 16 was published in Spring 2010 and records that the number of jurisdictions participating in the IHNJ had grown to 37. The focus was upon the Third Malta Conference. Two other important conferences were reported, the Washington Relocation Conference in March 2010 and the first Commonwealth Conference in August 2009. Indeed the proceedings in Washington were made the subject of a special edition of the Judges' Newsletter, Special Edition No. 1 of 2010.

We on the Expert Group met again on 28 June 2010 to revise our initial text in the light of all the developments at the Brussels Conference. Our product together with comments from other sources merged in Preliminary Document 3A which the Permanent Bureau prepared for the 6th Meeting of the Special Commission, the agenda for which was so extensive that it was divided into two parts, the first held in June 2011 and the second in January 2012.

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The first part was the focus of Volume 18 of the Judges' Newsletter published in Spring 2012. Preliminary Document 3A was extensively debated. The conclusions recorded that its formulated principles and guidance were generally supported. The Permanent Bureau was asked to finalise the text to reflect the discussion at the Commission.

The second part of the 6th Special Commission is the subject of Volume 19 of the Judges' Newsletter. It reports that the meeting endorsed the support which the Emerging Guidance and General Principles on Judicial Communications had received in June 2011. Accordingly, the main Question for debate was the Swiss proposal contained in Preliminary Document No 4 for the creation of an international binding instrument on direct judicial communication. Although that did not achieve consensus there was support for the inclusion of a legal basis in any future relevant Convention. There was also agreement for:

- a) promotion of the use of the Emerging Guidance and General Principles.
- b) the continuation of the strengthening and expansion of the IHNJ.
- c) the maintenance of an inventory of legal bases for direct judicial communication in domestic legal systems.

At this 6th Meeting of the Special Commission, it can be said that the IHNJ achieved the official and unqualified seal of approval. The publication of the Emerging Guidelines and General Principles followed in 2013. The Introduction in its final paragraph admits:

"this Document and the General Principles for Judicial Communications are work in progress, as they could be improved in the future. Comments from States interested organisations or judges, especially members of the IHNJ of Judges, are always welcome."

As far as I know no person or body has taken advantage of this invitation and a second edition of the General Principles seems unlikely. Their production and publication were essential to show, by the definition of do's and don'ts, that the way forward was safe. How often they are now consulted or cited is questionable.

In the same year 2013 Volume 20 of the Judges' Newsletter was published but it does not record the publication of the General Principles. This may be because its focus is on concentration of jurisdiction which is comprehensively covered. It records that by November 2013 there were 63 jurisdictions supporting the IHNJ. It marks the first residential conference of the judges of the IHNJ only by a photograph of the participants. I would like to offer my appreciation of the background and context of that conference which was, I believe, a very significant event in the evolution of judicial activism.

I was able to secure the support of the Ministry of Justice and of the Foreign and Commonwealth Office to host this first residential conference at Cumberland Lodge in July 2013. I was able to structure it round my last sitting day and valedictory in the Lord Chief Justice's Court. That it was to be my swan song helped in the appeal to the Government to meet the considerable costs.

The second IHNJ Conference became possible in Hong Kong in September 2015 in conjunction with the Third Children's Forum there and the immediately following Commonwealth Judicial Conference in Sydney. The 7th Meeting of the Special Commission in October 2017 created the opportunity for the next meeting of the IHNJ. A further residential conference for members of the IHNJ was held in Miami in October 2018.

Returning to my primary theme, Volume 21 of the Judges' Newsletter was not published until winter/spring 2018. This regrettable, but unavoidable four year void was the result of financial and other pressures on the Permanent Bureau. The focus of this volume is the 7th Meeting of the Special Commission held in October 2017. A highlight of the meeting was the celebration of the many achievements of Chief Justice Bryant on the occasion of her retirement. Throughout her years in office as Chief Justice she had been a committed supporter of direct judicial communica-

tion and the development of the IHNJ. The more prominent role of the specialist family judiciary in the affairs of the HCCH is in no small measure due to her example. I was able to be present at this celebration thanks to the grant of NGO status to the Association of International Family Judges by the HCCH. This had enabled members of the Association to attend for the first time at the 2011/2012 meetings and it enabled me to represent the Association in 2017.

In his foreword to this Volume Philippe Lortie drew attention to two products of the Meeting of the Special Commission that have particular relevance for the judges. First this conclusion:

"At a Minimum every volume of the Judges' Newsletter should include recent developments and experiences in relation to direct judicial communication with a view to promoting their use across the IHNJ."

Secondly:

"The Special Commission supports the development of an IHNJ specialised section on the HCCH website. This section would constitute a dedicated platform providing information relevant to the IHNJ."

At this date, early 2018, the Judges' Newsletter records 125 Network judges registered from 81 Jurisdictions. The latest Volume 22 notes further growth of the IHNJ whilst focusing on the Voice of the Child and the important work in this area being done by Professors Freeman and Taylor.

Let me step back from any further consideration of the detail and simply observe that over the last two decades there has been a movement of forces all in the same general direction.

There had been the stream of judicial pronouncements from the bench in reported judgements, increasingly creative and positive.

There had been the contribution of the judges in their quasi diplomatic role, arguing the case for activism at Meetings of the Special Commission and Conferences, as well as creating through the expert group the Emerging Guidance.

There was the parallel and supportive activity of the European Commission through the EJN.

There was the spectacular growth of the IHNJ from single figures at the turn of the century to well over 100 judges representing over 80 jurisdictions in modern times.

This is a history of harmony since, apart from the earliest days, there has been no real dissent and there is not a single case in which miscarriage of justice has resulted

from an abuse of the general principles governing direct judicial communication.

So we have seen the specialist family judges of the world united in their more or less passionate support for direct judicial collaboration. This support is expressed not only by the trial judges, but also by the most influential courts, such as the Court of Justice of the European Union and the Supreme Court of the United Kingdom. We should also note the flexibility of the tool. Although originally and principally for use in child abduction cases it has in this jurisdiction been used in cases involving inter country adoption, maintenance, simultaneous care proceedings in two jurisdictions, the validity of marriage and a divorce forum dispute. There would be no sense or logic in restricting its use. It is a tool of general utility. The only, and perhaps theoretical, argument against its validity is the absence of any legislative reference. Obviously the concept of judicial activism considerably post-dated the 1980 Child Abduction Convention. During the long negotiation of Brussels II revised, culminating in agreement in 2003, the tool was comparatively new to the world. So whereas the Regulation mandated the meetings of the Contact Points and the Central Authorities, there is nothing that requires a member State to send its member of the IHNJ to the meetings of the EJN.

But now at last legislative legitimacy may be in sight. In particular, I draw attention to Recital 44 in the Council's proposals for the text of Brussels II Recast which in detailing channels of communication gives equal status to Central Authorities, Network Judges and contact points. In the articles themselves the role of the EJN is explicit in Article 14 (6) and Article 79 (2).

Of course, these are only proposals and we must wait to see how they emerge from the process of negotiation by 27 Member States. Whatever may result it is a political acknowledgment from the Commission. It is a thoroughly realistic and modern acknowledgement. It is much to be applauded. It would remove the pedantic argument, much advanced in the early days, that in the domestic law of the particular State there was no legal basis for the nomination or function of the Network judge.

I write as a retired judge to record my memory of what was a substantial growth in the responsibility of the specialist international family judges world wide. Without that growth our power and influence would have been steadily eroded.

¹ (1998) 1FLR 422.

² (2000) 1FLR 803.

2. Judicial Co-operation in a "Triangle"

By Judge Martina Erb-Klünemann (German Network Judge to the IHNJ)

This article portrays a successful case of judicial co-operation through effective and innovative judicial communication.

Background – The case

At the end of 2017, as the presiding judge over the first instance court I handled the return proceedings concerning a small girl of 2½ years. The father had applied for return under the 1980 Child Abduction Convention arguing that the mother had removed the child wrongfully from Australia to Germany. During the proceedings, hints of a danger that the mother could once again abduct the child led me to order a border alert and the detention of the passports of both the mother and the child. Subsequently, I ordered the return of the child to Australia. The mother appealed the decision. On April 17, 2018 her appeal was dismissed. Under the German implementing law, section 44(3) of the Act to Implement Certain Legal Instruments in the Field of International Family Law, International Family Law Procedure Act – IFLPA,¹ I now had to carry out enforcement *proprio motu*. On the day the file returned, I asked the mother's lawyer whether the mother was willing to return to Australia with the child within the next ten days. If not, I would enforce the ruling. The lawyer informed me that the mother had already booked flights for both herself and the child to return to Australia on May 1, 2018. At my request, the lawyer sent me scans of the flight tickets.

The problem

A problem arose when I saw that the mother had booked the return flights from Frankfurt to Melbourne via Hong Kong Special Administrative Region (HKSAR). I feared that she could use the flight and especially the stop-over in HKSAR to avoid returning the child to Australia. The question then arose on whether the court had the right to dictate routes of travel. Here, a direct flight to Australia or one with a stop-over in a Schengen State (where the border alert is active) would limit this danger; however, a direct flight could result in more expenses and the flights were already booked. Unfortunately, I was unable to answer that question and had doubts concerning the extent of my authority on this matter. Consequently, I then started to think about an alternative, *i.e.* whether there was a possibility of securing a flight route via HKSAR. This presented two clear issues: (a) the risks associated with returning the passports to enable the mother and child to travel; and (b) the risks associated with the stop-over in HKSAR. It now started to become a Hague case between three States: a triangle was formed.

The route to a solution

On the same day the flight information was received, I informed the German border police that I would transfer the mother and child's passports. Following this, I requested the police to escort both the mother and child through Frankfurt airport. Additionally, the German border police and German Central Authority were asked if they could help with securing the transit of the mother and child through HKSAR airport. Subsequently, I ordered that the passports be removed from the deposit and sent to the border police at Frankfurt airport to hold accordingly. I informed both lawyers of these actions and asked the father to respond within five days on whether he saw a need for these safeguards.

Three days later the German border police informed me that they were unable to secure transit through HKSAR. As a result, I informed the German Central Authority about this limitation and appealed for assistance from the Central Authorities of HKSAR and Australia. I requested Australia's involvement due to their interest in the safe return of the child to Australia. On the same day, I ruled for: (a) the creation of an exclusion of the border alert for the flights booked, (b) the transmission of the passports to the police at Frankfurt airport, and (c) made a reservation concerning safeguards in HKSAR. At that moment, I had no idea whether these requests would be possible.

Additionally, I received notice from the father's lawyer that he indeed saw the need for safeguards. In parallel to my efforts above, the German Central Authority asked the Central Authority of HKSAR for support, providing it with the flight details and informing the Australian Central Authority that it was unable to get in contact with the father.

On April 25, 2018 the German Central Authority was informed by the Central Authority of HKSAR that it may apply to the court for an order facilitating transit of an abducted child and that it accepted a statement by the court instead of a translation of the judgment.

As a result, I issued the requested statement stating:

- (1) The German Court of Hamm decided that the child [...] had been wrongfully removed to the Federal Republic of Germany in the meaning of Article 3 of the 1980 Child Abduction Convention,
- (2) The German Court of Hamm had determined that the child's habitual residence immediately before the removal by the mother [...] was Australia; and
- (3) The German Court of Hamm had made an order providing for the return of the child to Australia, being the child's habitual residence, via HKSAR. The return decision became final on April 14, 2018.

This statement was sent directly to the HKSAR Central Authority via the German Central Authority on the same day. The German Central Authority also informed the HKSAR Central Authority that it was unable to send copies of the passports at that moment as the passports were already on their way to Frankfurt airport. In response, the HKSAR Central Authority asked the German Central Authority for an official letter briefly explaining the background of the case and attaching the original determination of the court. This was provided accordingly. The question of cost allocation would also need to be discussed at a later date. On this note, I was concerned regarding the extent of these costs, as there was no indication on how high they could be. Regardless of this apprehension, I proceeded accordingly as there was a need to ensure the secured transit of the child back to Australia.

The following day I requested the police at Frankfurt airport to send scans of the passports to the court and the Central Authorities of Germany and HKSAR as soon as possible, as well as to inform both the court and the Central Authorities about the boarding status of the mother and child in Frankfurt airport. Upon receiving the scans of the passports from the border police at Frankfurt airport, I issued the following declaration:

- (1) The public authorities in HKSAR are asked to safeguard the transit of child and mother to Australia with flight [...].
- (2) The mother is obliged to follow the safeguarding instructions by the authorities of HKSAR. The Central Authorities of Germany, HKSAR and Australia are informed and asked to ensure that only the flight indicated on the boarding ticket will be used to transport the child back to Australia. HKSAR has indicated that it will ensure that the mother and child will remain in the transit area and only take the flight that is indicated on the boarding pass.
- (3) The passports arrived at Frankfurt airport.

I updated all the parties involved and the Central Authorities to ensure transparency in the process.

On April 27, 2018 the Central Authority of HKSAR filed an application with the court of HK by way of *ex parte* originating summons.² They referred to Section 16 of Child Abduction and Custody Ordinance, Chapter 512 of Laws of HKSAR: "16. Court of First Instance may make order prohibiting removal of child from HKSAR except to habitual residence."

The High Court of HK then ruled:

- (1) The child [...] shall not be removed from the jurisdiction of HK other than to Australia, being the child's habitual residence within the meaning of the 1980 Child Abduction Convention;
- (2) The respondent and the child to remain in the airside area of HKSAR International Airport after landing and before departing on their onward flight No[...] to Melbourne, Australia on 2 May 2018;
- (3) The Director of Immigration and the Commissioner of Police will aid in facilitating the execution of this order in a manner and to the extent as they deem appropriate;
- (4) Penal notice to be endorsed on this order; and
- (5) There be no order as to the costs of this Application.

On receipt of this order, the Central Authority of HKSAR liaised with the Director of Immigration and the Commissioner of Police to ensure the smooth transit of the child.

On April 30, 2018 the Central Authority of HKSAR informed the German Central Authority and myself about the proceedings in HKSAR. I informed the lawyers about the HK ruling and that it would be served to the mother on her arrival in HK.

The return

May 1, 2018 was the scheduled day of the child's return to Australia. It was also the day to find out whether everything would work as planned. At that moment, I felt I had done everything within my power to ensure the safe return of the child and that I was now in a position to accept the booked flights.

In accordance with the plans, the German police duly accompanied both the mother and child through Frankfurt airport and handed out the passports to the mother at the very moment she boarded the plane. The HKSAR Central Authority then informed us that the mother and child had boarded the flight to Melbourne without any untoward events. Finally, the Australian Central Authority confirmed the successful arrival of the mother and child in Australia.

Following these events, I received a letter from the father's lawyer indicating how glad he was that everything had worked out so well. In contrast, the mother's lawyer wrote to me expressing that there had never been a need for such safeguards. I informed the mother's lawyer that I had seen a need for the safeguards and that they had caused no harm to the mother from fulfilling the judgment. I was not surprised about the different reactions.

The conclusion

This case was for me an excellent example of collaboration between different stakeholders, *i.e.*, two courts, three Central Authorities, police in two States and the immigration authorities. In addition, it highlighted the importance of ensuring transparency to the parties resulting in their trust and emphasizing to the mother that a system existed that did not provide a means of escape.

It is also important to note that the process is one of trial and error. Therefore, I hope that more courts in the world have or will have the legal grounds to take action towards judicial co-operation – even if they are a "third" State and not the one which is directly impacted by the return proceedings.

Lastly, this example shows that it is worth thinking about the possibilities that international co-operation offers. I would support a creative approach to expand national co-operation between courts and their own Central Authority, international co-operation and direct judicial communication. These initiatives can help to secure the best interests of the child and, because of that, it is in my view worth trying.

- 1 English version available: http://www.gesetze-im-internet.de/englisch_intfamrvvg/englisch_intfamrvvg.html#p0200
- 2 *Ex parte* originating summons commences civil proceedings on behalf of the interests of another through the issuance of a motion which states the main issues of law (and where the court is not required to investigate the facts in detail).

3. 10 years working as Member of the International Hague Network of Judge

By Graciela Tagle de Ferreyra, Member of the International Hague Network of Judges in the Republic of Argentina



INTRODUCTION

On the occasion of the Conference held in Miami in October 2018, I would like to share with you the work done as a Member of the International Hague Network of Judges (IHNJ) in the Republic of Argentina and my experience in relation to direct judicial communications presented there.

Ten years ago I was appointed as a Member of the IHNJ in Argentina. My role is to act as a channel of communication and a link with the Central Authority, with judges within the jurisdiction and with foreign judges. I am at the disposal of the Central Authority and of the national and foreign judges on a daily basis to advise them on the application of the Conventions in the field of child protection. I also initiate incoming direct judicial communications and initiate and facilitate outgoing communications between the judges involved in specific cases.

BUILDING THE NATIONAL NETWORK OF JUDGES IN THIS AREA

The National Network of family judges for the protection and international abduction of children has been presented to the Supreme Court who approved the initiative and decided to expand it to one judge per province. Nowadays all the provinces have appointed a National Network judge who is an expert on this topic in Argentina. Their contact details are available on the Supreme Court's website.

AGREEMENTS WITH THE SUPREME COURT OF JUSTICE OF THE NATION AND THE HIGH COURT OF JUSTICE OF THE PROVINCE CORDOBA

As part of my work, I implemented the presentation of the conclusions of the different Special Commission meetings and seminars on the matter to the Supreme Court of Justice of the Nation and the High Court of Justice of the Province of Cordoba to have them ratified, recorded and

disseminated. That is how I achieved a legal framework for "direct judicial communications" and its Protocol; to extend the scope of the Liaison Judge to include the "Protection and the International Return of Children", a recommendation that arose in the Seminar at Cumberland Lodge; to concentrate jurisprudence in specialized judges; among other achievements.

PROCEDURAL DRAFT LAW INITIATIVES

The Procedural Law on International Abduction of Children and Visiting Rights of Cordoba was passed in December 2016. The draft law was presented at the Legislature and received unanimous approval. This procedural law only applies to cases that take place in the Province of Cordoba. It provides for concentration of jurisdiction as one of its most outstanding provisions. Some provinces, such as Neuquén, have replicated this legislation. The Protocol for the operation of the Convention on International Abduction of Children provides judges with procedural guidelines to follow in order to speed up cases. The National Procedural Draft Law on International Abduction of Children and Visiting Rights is in the Legislature.

CONTACT

As an International Network Judge I am in touch with the other Members of the IHNJ, exchanging information on ongoing cases, interchanging good practices, jurisprudence, doctrine and preparing training sessions or work meetings. This contact is fluid and has resulted in friendships forged over the years during which we have supported each other to provide the sound structure exhibited by the IHNJ.

INTERCONNECTION OF NETWORKS

We have linked the IHNJ with IberRed and with the International Association of Women Judges. This interconnection has helped us to provide training in different provinces, which results in "more training at no extra cost".

TRAINING

Training programmes for judges, attorneys, defenders, mediators, public officials and psychological teams have been a part of my activities. With the Central Authority we have delivered training courses in 17 provinces with the support of the Regional Office for Latin America and the Caribbean of the Permanent Bureau (ROAP) and with the Supreme Court of the Nation.

EXPERIENCES OF THE INTERNATIONAL NETWORK JUDGE AND LOCAL JUDGES IN CASES OF DIRECT JUDICIAL COMMUNICATIONS IN THE ARGENTINE REPUBLIC

These are some of the many experiences we have had with respect to direct judicial communications (DJC). As I have mentioned on other occasions, it is the Network Judge who initiates and facilitates the communication and who contacts the Network Judge in the foreign State. After this communication the Network Judge of the State of habitual residence makes contact with the judge having jurisdiction to inform him or her of the DJC request and the reason therefore. DJC are used to provide the judge having jurisdiction with the legislation on custody in the State of refuge in order to proceed with obtaining informational proof for safe return measures (mirror orders, safe harbour). The important thing is that we aim to comply with the principle of expeditiousness and experience indicates that we are obtaining good results in this regard in our country.

Case between Argentina and the USA

In my capacity as Network Judge and upon the request of the judge having jurisdiction, I have initiated DJC with the Network Judge in the USA in a case involving broad press coverage. In this case the issue concerned the possibility of initiating DJC between a judge in Argentina who had to decide on the return of children in a highly complex case, and his American counterpart to analyse the issuance of a mirror order laying down guidelines for the children's safe return, guidelines that were ordered in this country and had to be replicated in the USA. The Network Judges facilitated this communication and worked on the issues relating to timetables and language so that the communication could be carried out, as well as the terms of the possible agreement as it had to comply with the public order of the State in which it was to be executed. The DJC was held in English as the local judge spoke the language and the communication between the two judges was made setting up guidelines for the girls' safe return. The bad practice in this case consisted in the judges in both States failing to deem it necessary to embody the agreement of the DJC in a mirror order or safe harbour order.

Case between Argentina and Canada

It was the Canadian Network Judge who got in touch with the Central Authority in Argentina as in this case an agreement had been reached to return a child with safe return measures consisting in the payment of alimony for the child and his mother. The Central Authority contacted me to report on this agreement. I immediately contacted the Network Judge for the Province of Ushuaia who knew about the role of the Network Judge, the use of DJC and the possibility to issue mirror orders. He got in touch with the judge from the southern district of Ushuaia who was seized with the case. The latter judge agreed to replicate

the provisions issued by the Canadian judge and thus the child was returned to Ushuaia with the safety measures agreed upon in place.

Proceedings for obtaining evidence in a case between Argentina and Spain

In this case evidence had to be obtained in Spain on whether the mother had been hospitalised in psychiatric institutions there and whether she had a police record. The sitting judge contacted me and we analysed the possibility of obtaining evidence through the Central Authorities and the International Network of Judges. The Spanish Network Judge agreed to go ahead with this way of obtaining evidence once the Central Authority had been informed. Thus evidence was obtained through an official letter sent by the sitting judge to the Central Authority in Argentina, who forwarded it to the Central Authority in Spain, who in turn referred it to the sitting judge there and, approximately a fortnight later, evidence was obtained and added to the file.

Case between Argentina and the USA

This was an extremely complex case. It was received by the US Central Authority shortly after a year had passed since the wrongful removal was known. No information was provided on the address as it was not known at the time and it was only supplied two years after the case had been filed with the court. Two localizations failed because the taking parent was permanently on the run. In July 2018, the International Criminal Police Organization ("INTERPOL") communicated the whereabouts of the mother and child. A hearing was settled and the mother and child were summoned to appear before the judge. Parallel to this, work was carried out with the US Network Judge to find out whether there was an arrest warrant pending against the mother in this case in the USA. The Network Judge reported that "no arrest warrant [was] currently in force" and that "all the arrest warrants which had been issued against the mother in the past had all been cancelled." These warrants had been issued on the grounds of the taking parent's non-appearance at the temporary custody trial requested by the applicant. That is to say that the arrest warrant had been issued by a civil judge. This DJC was crucial for the judge to order the return of the child with the taking parent or, as occurred in this case, the applicant in the USA.

Case between Argentina and Peru

In this case a judge in Entre Rios, Republic of Argentina, requested a DJC with the judge in charge of an alimony case in Lima, Peru, with a view to issuing a mirror order prior to the children's return. I requested the DJC from the Network Judge in Peru but after four months had elapsed with no effective response, the judge decided to return the child with no measures of protection. This constitutes bad

practice which needs to be shared as expedition is essential to DJC.

I have described different cases of DJC. I would like to leave you with a reflection: mirror orders are a tool that can facilitate the safe return of a child but they must be used proportionally and articulated with the applicable law in the State of habitual residence to which the child is to be returned. This involves ensuring that the mirror order will be effective in the receiving country prior to issuing it so that they do not become contradictory or unenforceable decisions. It is in that regard that the importance of the 1996 Convention comes into play, as it provides the judge in the State of refuge with the chance to take provisional measures with limited effects until the judge in the State of habitual residence takes control of the case (article 11).

ACADEMIC ACTIVITIES: INTERNATIONAL CONGRESSES, NATIONAL SEMINARS

I have been actively involved as a moderator in different academic activities. It is my practice in these activities to leave the work material for the assistants and to allow attendees to record them in order to disseminate the content and help to circulate the correct operation of the 1980 Child Abduction Convention as well as the Inter-American Convention of Montevideo of 1989.¹

BILATERAL MEETINGS

I have taken part in bilateral meetings with Brazil, the USA and the Republic of Chile; involved in these meetings were the Brazilian Network Judge and the Central Authority in Brazil; USA Network Judge, Hiram Puig Lugo, the Central Authority and I in Buenos Aires, and the Central Authority of Argentina and Chile and I in Uruguay.

TELEPHONE AND VIDEO CONFERENCES

One kind of training I have taken part in with great enthusiasm is one involving telephone conferences organized by ROAP. I have also lectured judges abroad via videoconference. This means that the training is inexpensive and makes it possible to reach out to States which would otherwise be unable to take part.

INFORMATION POINT IN THE JUDICIAL MAP OF ACCESS TO JUSTICE OF THE SUPREME COURT OF JUSTICE OF THE NATION

The details of the Members of the IHNJ and those corresponding to judges belonging to the National Network of family judges for the international protection and return of children are available on the [Map of Access to Justice of the Supreme Court of Justice of the Nation](#).

WORKSHOP

The workshop was produced by the Central Authority, myself and a team of legal advisors. We presented different cases, analyses on complex issues and proposed good practices. We describe them and display the corresponding file if necessary. Together, we consider different solutions direct judicial communications and speaking to the judge in charge of the case. We also promoted judicial co-operation sending good practice guides, doctrine, case-law and even calling them so that they know about the roles of the Central Authority and the International Hague Network Judge. This has been very successful. We worked on a difficult case we had with Venezuela in a workshop and were able to agree on the terms of DJC with the Venezuelan Network Judge. This Network Judge contacted the Supreme Court of Justice and on the occasion of the celebration of the 125 Anniversary of the HCCH in Buenos Aires we held a meeting with the judicial authorities, the Network Judge in Venezuela, the Central Authority and his team of advisors in Argentina, myself among them and were able to discuss on concrete bases as the topic had been developed during the workshop.

CREATION OF THE OFFICE OF THE INTERNATIONAL JUDICIAL COOPERATION OF THE HIGH COURT OF JUSTICE OF THE PROVINCE OF CORDOBA

The Office of International Judicial Cooperation of the High Court of Justice in the Province of Cordoba carries out the DJC laid down in Article 2612 of the Civil and Commercial Code of the Nation. This Office is within the Judiciary Branch in the Province of Cordoba also prepare training programmes for specialised judges (*i.e.*, where jurisdiction is concentrated), and the instruction sheet which was subsequently submitted to the High Court of Justice to appoint jurisdiction in this matter among the seven jurisdictions of the province of Cordoba, and has expanded its scope to the provinces of Santiago del Estero, Entre Rios and Tucuman.

Lastly, this initiative has been submitted to the Supreme Court of Justice of the Nation so that it can be implemented around the country as it provides judges with the tools required to carry out DJC.

CONCLUSION

The big challenge is the promptness with which child abduction cases are processed and resolved. On account of this, we have focused on supplying tools to reduce delays and we have considerably progressed by making use of new tools, such as Procedural Law 10419 of the Province of Cordoba, of the Procedural Law of the Province of Neuquén, the Protocol, agreements made with the Supreme Court of Justice of the Nation and with the different High Courts of Justice. We have already observed that using these tools makes it possible to reduce delays.

- 1 Publications: A book I have co-authored with the Network Judge in Spain and the Central Authority of Argentina since my appointment is "*La Restitución Internacional de Niños. Enfoque doctrinario y jurisprudencial en Argentina y España*". Another publication to which I have contributed and which was the result of a collaboration between Network judges and academics: "*Restitución Internacional de la niñez – Enfoque Iberoamericana doctrinario y jurisprudencial*" published in Mexico in 2012. I also invited the judges of the National Network of Argentina to join this new challenge. On this occasion I was the director of the work "*Restitución internacional de niños. Visión de los Jueces Nacionales y Autoridades Centrales*", coordinated by Fabio Mastrágelo and published in November 2016. My latest contribution was to the book "*Cuestiones complejas en los procesos de restitución internacional de niños en Latinoamérica*", co-ordinated by Florencia Castro, Lázaro Tenorio and Nieve Rubaja, published in Mexico in January 2018.

4. Article 13 Exceptions – Return and Best Interests of the Child in the Jurisdiction of England and Wales¹

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

1 LEGAL PRINCIPLES FOR ARTICLE 13 EXCEPTIONS IN ENGLAND AND WALES

In applying Article 13 of the 1980 Child Abduction Convention, the courts in England and Wales deploy the following legal principles when determining whether the exceptions provided by Article 13 have been made out.

No Exercise of Custody Rights

The meaning of 'rights of custody' under Article 5 of the 1980 Child Abduction Convention includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. Whether they are being exercised is a question of fact. The term 'rights of custody' is established by the autonomous law of the 1980 Child Abduction Convention. Thus, the question of whether 'rights of custody' as defined by the 1980 Child Abduction Convention *exist* in a given case is to be determined by reference to the position created by the law of the State in which the child was habitually resident immediately before the removal or retention.

The approach of the English and Welsh courts to determining the question of the existence or otherwise of 'rights of custody' is a two-stage process,² namely:

- (i) What is the position created by the law of the State in which the child was habitually resident immediately before the removal or retention?
- (ii) Does the position created by the law of the State in

which the child was habitually resident immediately before the removal or retention equate to 'rights of custody' for the person in question having regard to the meaning of the term 'rights of custody' as established by the autonomous law of the 1980 Child Abduction Convention?

As to whether the position created by the law of the State in which the child was habitually resident immediately before the removal or retention equates to 'rights of custody' having regard to the meaning of the term 'rights of custody' as established by the autonomous law of the 1980 Child Abduction Convention, in *Re D (A Child)*³ Baroness Hale observed that, "[t]he question is, do the rights possessed under the law of the home country by the parent who does not have the day-to-day care of the child amount to rights of custody or do they not?"

Consent or Acquiescence

(i) Consent

Evidence to establish consent must be clear, compelling and unequivocal. It may be in writing or in documentary form. It can be deduced from the words and conduct of the wronged parent. Consent cannot be passive but must be positive consent to the removal of the child. A third party cannot give consent on behalf of the parent even if under the law of the foreign State such consent is permissible. The means of proof will vary according to the circumstances of the case and may include the court receiving oral evidence from the parties.

An effective consent to removal can be given in advance provided it subsisted at the time of removal. Consent to the removal of a child may be valid even if it is dependent on a future event provided it is not too vague, uncertain or subjective and the facts at the time are not wholly or manifestly different to those prevailing at the time of removal and may be conditional. Consent to a removal in the future may be withdrawn but circumstances may result in it being too late to withdraw. A consent obtained by fraud or deception is unlikely to be regarded as valid.

(ii) Acquiescence

The key legal principles underpinning the defence of acquiescence can be derived from the judgment of the House of Lords in *Re H (Minors) (Abduction: Acquiescence)*⁴ as follows:

- i) For the purposes of Article 13(1)(a) of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his or her actual state of mind;
- ii) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent;

- iii) The trial judge, in reaching his decision on that question of fact, will be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law;
- iv) There is only one exception to this approach. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced;
- v) A parent cannot be said to have acquiesced in the unlawful removal or retention of a child unless he or she is aware of the act of removal or retention, is aware that it is unlawful and is aware, at least in general terms, of his or her rights against the other parent;
- vi) It is not a prerequisite for the establishment of the defence of acquiescence that a parent has correct advice or detailed knowledge of his or her Convention rights provided it is shown that he or she knew in general terms that he or she could bring proceedings;
- vii) When considering written evidence of the parties' intentions, the written statements in question must be in clear and unambiguous terms in order to establish acquiescence;
- viii) Merely seeking to compromise matters by permitting the abducting parent to remain in the country to which he or she has taken the children provided that the wronged parent is satisfied as to other matters and issues between them has not been regarded as acquiescence for the purposes of the 1980 Child Abduction Convention;
- ix) Delay, and in particular unexplained delay, in taking action can be indicative of acquiescence.

Harm or Intolerable Situation

The law in respect of the defence of harm or intolerability under Article 13(1)(b) was examined and clarified by the United Kingdom Supreme Court in *Re E (Children)(Abduction: Custody Appeal)*⁵ and *Re S (A Child)*.⁶ The applicable principles may be summarised as follows:

- i) There is no need for Article 13(1)(b) to be narrowly construed. By its very terms it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or gloss.
- ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabi-

lities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

- iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
- iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
- v) Article 13(1)(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
- vi) Where the defence under Article 13(1)(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Article 13(1)(b).

Pursuant to Article 11(4) of the Brussels IIa Regulation, the court cannot refuse to return the children to the jurisdiction of their habitual residence on the grounds set out in Article 13(1)(b) of the 1980 Child Abduction Convention where the court is satisfied that adequate arrangements can be made to secure the protection of the children on their return.

Having regard to the foregoing provisions, the vital consideration is whether the child and the abducting parent will have sufficient protection if they return to the State of the children's habitual residence. The approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Article 13(1)(b). Rather, the court should assume the risk of harm at its highest on the evidence and then, if it meets the test in Article 13(1)(b), consider whether protective measures sufficient to mitigate the harm are identified. This does not amount to a two-stage test. Rather, the question of whether Article 13(b) has been established re-

quires a consideration of all the relevant matters, including protective measures.

Child's Objections

The courts apply a two-stage test.⁷ 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, the court will consider the following key way points:

- i) Does the child object to being returned? This question is 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 second, 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.

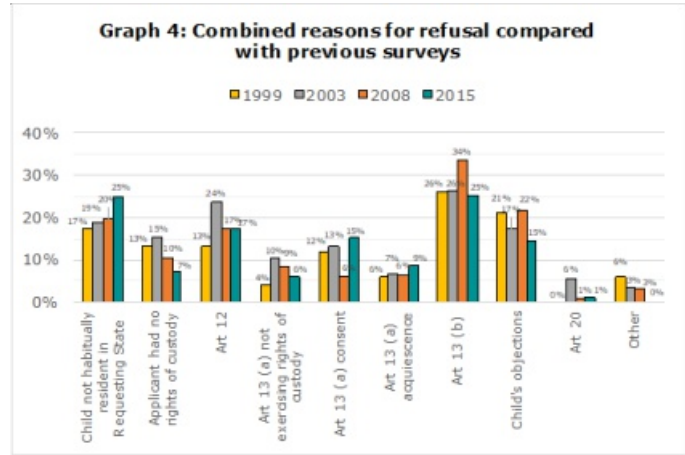
In applying the two-stage test, the judge is enjoined by the Court of Appeal not to adopt an over prescriptive, over intellectualised approach to the 'gateway' stage and not to adopt an over engineered approach to the 'discretion' stage.

2 ARTICLE 13 STATISTICS FOR ENGLAND AND WALES

The following tables show the statistics with respect to the use of Article 13 in England and Wales, placed first in the context of the global figures for Article 13, then in the context of cases engaging the Brussels IIa Regulation and, finally, setting out the figures for England and Wales. I am extremely grateful to Professor Nigel Lowe for providing me with these figures and the accompanying analysis. I begin with the global figures in tabular and graphic formats,

Table 1 The combined reasons for refusal (sole and multiple reasons) in applications received in 2015 and previous Surveys

	1999		2003		2008		2015	
Child not habitually resident in Requesting State	17	17%	27	19%	53	20%	46	25%
Applicant had no rights of custody	13	13%	22	15%	28	10%	13	7%
Art. 12	13	13%	34	24%	46	17%	32	17%
Art. 13(1)(a) not exercising rights of custody	4	4%	15	10%	23	9%	11	6%
Art. 13(1)(a) consent	12	12%	19	13%	16	6%	28	15%
Art. 13(1)(a) acquiescence	6	6%	10	7%	17	6%	16	9%
Art. 13(1)(b)	26	26%	38	26%	91	34%	47	25%
Child's objections	21	21%	26	18%	58	22%	27	15%
Art. 20	0	0%	8	6%	2	1%	2	1%
Other	6	6%	5	3%	8	3%	0	0%
Number of reasons	118		204		342		222	
Number of applications	99		144		269		185	



It is important to note that that information was only sought on the reasons cited in applications that ended in a refusal. These statistics do not reveal how often the exceptions were argued unsuccessfully, nor do they include those cases where an exception was made out but the court

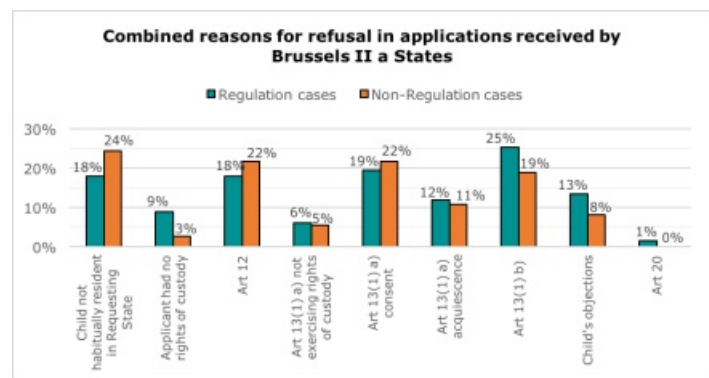
nevertheless exercised its discretion to make a return order. Analysis of refusals is further complicated because some applications are refused for multiple reasons.

With respect to Article 13, it is of note that, in proportional terms, the 2015 findings provide evidence, particularly in comparison with 2008, of a notable shift in the grounds for refusals with increasing reliance being placed on non-habitual residence in the requesting State and a decline in reliance on Article 13(1)(b) (the grave risk of harm exception) and on the child's objections. The 25% of refusals based on Article 13(1)(b), though markedly lower than the 34% in 2008, is more in line with the 26% both in 2003 and 1999. With regard to the child objection exception, at 15%, the 2015 finding is the lowest proportion yet recorded and may be compared with 22% in 2008, 18% in 2003 and 21% in 1999. There was also an increase in the proportion of refusals based upon Article 13(1)(a) due to the consent or acquiescence of the left-behind parent. Overall, the findings bear testimony to courts across the globe observing the spirit of the Convention to refuse return applications only in exceptional circumstances.

With respect to cases engaging the Brussels IIa Regulation, the following table and graph deals with reasons for refusal in cases in applications received by Brussels IIa States.

Table 2 The reasons for refusal and the Regulation

	Regulation cases		Non-Regulation cases	
	Frequency	Percentage	Frequency	Percentage
Child not habitually resident in Requesting State	11	16%	7	19%
Applicant had no rights of custody	5	7%	1	3%
Art. 12	9	13%	5	14%
Art. 13(1)(a) not exercising rights of custody	0	0%	2	5%
Art. 13(1)(a) consent	11	16%	6	16%
Art. 13(1)(a) acquiescence	2	3%	4	11%
Art. 13(1)(b)	11	16%	6	16%
Child's objections	6	9%	1	3%
Art. 20	1	1%	0	0%
Other	11	16%	5	14%
Total	67	~100%	37	~100%



Considering the position in respect of Article 13, whilst some caution should be exercised against reading too much into the comparison between Regulation and non-Regulation cases given the relatively low numbers in the latter case, it can be seen that there is a clear difference in the proportion of refusals based either solely or partially, on Article 13(1)(b) in Regulation and non-Regulation cases. This was also the case in 2008. This repeated finding is pertinent in as much as, in an attempt to limit refusals based upon Article 13(1)(b), Art 11(4) of the Regulation provides that a court 'cannot refuse the return of a child on the basis of Article 13(1)(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.'

On the basis of the above findings, Article 11(4) does not appear to have reduced the proportion of applications refused based on Article 13(1)(b), though reliance on that ground has reduced across the board both within BIIa States and globally. Finally, these findings point up that in Regulation cases a relatively high proportion of refusals are not based upon Article 13 of the Convention.

Finally, turning to the position in respect of the use of Article 13 in the jurisdiction of England and Wales.

Table 3 Reasons for refusal in applications received by England and Wales and globally in 2015

	England and Wales	Global
Child not habitually resident in Requesting State	5 (29%)	46 (25%)
Applicant had no rights of custody	0 (0%)	13 (7%)
Art. 12	0 (0%)	32 (17%)
Art. 13(1)(a) not exercising rights of custody	2 (12%)	28 (15%)
Art. 13(1)(a) consent	4 (24%)	11 (6%)
Art. 13(1)(a) acquiescence	2 (12%)	16 (9%)
Art. 13(1)(b)	3 (18%)	47 (25%)
Child's objections	1 (6%)	27 (15%)
Art. 20	0 (0%)	2 (1%)
Number of reasons	17 (121%)	222 (120%)
Number of applications	14	185

Bearing in mind again that the proportions are based on low numbers, a relatively high proportion of applications received by England and Wales were refused based on Article 13(1)(a), both with respect to the consent of the left-behind parent, their acquiescence or not exercising rights of custody. As is the position globally, a high proportion were refused based on the child not being habitually resident in the Requesting State. By contrast, the figures for England and Wales in respect of Article 13(1)(b), and in particular in respect of the child's objections, are considerably below the proportions seen globally for these exceptions.

3 RETURN AND THE BEST INTERESTS OF THE CHILD

The purpose of the 1980 Child Abduction Convention is to secure the prompt return of children wrongfully removed to, or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. Within this context, the 1980 Child Abduction Convention limits consideration of the welfare merits of the case, in that a decision under the 1980 Child Abduction Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. The 1980 Child Abduction Convention is aimed at restoring the *status quo* prior to any wrongful removal or retention, and at deterring parents from seeking to dictate the forum for determining substantive welfare questions concerning the child. Detailed consideration of the child's best interests by the receiving State is antithetical to these core aims.

However, the requisite rigorous application of the policies enshrined in the 1980 Child Abduction Convention to this end creates a tension with the best interests principle. This tension is perhaps most acutely seen in Article 13(1)(b) cases. The attempt to reconcile the policy and purpose of the Convention with the best interests principle is thus one that continues to present challenges. Within this context, there has been a criticism levelled at the process of deciding whether to return a child to the jurisdiction of their habitual residence. Namely, that it fails to give proper consideration for the child's best interests, a widely recognised international principle ordinarily mandated as a key factor, or the key factor in any decision concerning children, and one which the Convention on the Rights of the Child mandates as a primary consideration for any actions involving children.

The best interests principle is not directly addressed by the Articles of the 1980 Child Abduction Convention, but the Preamble states that the interests of children are of paramount importance. Recital 12 of the Brussels IIa Regulation provides that the grounds of jurisdiction in matters of parental responsibility are shaped in light of the best interests of the child.

Within this context, the most common mechanism by which it is sought to reconcile the paradigm summary approach in child abduction proceedings under the Convention with the best interests principle is the deployment of a presumption, the dominant theme of the Convention, that the child's best interests are best served by a prompt return to the court of habitual residence. That presumption is underpinned by the rational that the jurisdiction of the child's habitual residence is ordinarily the forum best suited to determine the welfare merits of the case and, as a prerequisite to that exercise, the forum best suited to determine any factual disputes that are required to be resolved to that end.

The English and Welsh courts have recognised the tension between the summary nature of the Convention process and the best interests principle. The United Kingdom Supreme Court examined the question in the cases of *Re E (Children)*⁸ and *Re S (A Child)*⁹, after the decision of the ECtHR in *Neulinger & Shuruk v. Switzerland* (Application no. 41615/07).

The Supreme Court recognised that both the 1980 Child Abduction Convention and the Brussels IIa Regulation were devised with "the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration", and that Article 13 recognises that there are circumstances where a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. Within this context, with respect to the exception under Article 13(1)(b) the Supreme Court emphasised the need, in determining whether a return would mean a grave risk of exposure to physical or psychological harm or would otherwise place the child in an intolerable situation, to focus not on disputed matters of fact which can neither be tried nor objectively verified within the context of a summary process, but rather on the often far less contentious factual question of whether adequate protective measures can be put in place to mitigate the alleged risk of harm.

Accordingly, as already noted at Paragraph 1.10 above, in *Re E (Children)*, and again in *Re S (A Child)*¹⁰, the United Kingdom Supreme Court endorsed an approach whereby the court considers the alleged risk at its greatest extent on the evidence available and asks whether protective measures to meet that risk can be put in place. The clearer the need for protection, the more effective the measures will have to be. If the court decides that the protective measures meet the risk, then the terms of Article 13(1)(b) will not be made out, an outcome consistent with the terms of Article 11(4) of the Brussels IIa Regulation. In those cases, likely small in number, where protective measures cannot be put in place, the court may need to enter into a fact-finding exercise to resolve the factual disputes as to the nature and extent of the alleged risk.

The Supreme Court decision in *Re E* represents an attempt to balance the paradigm summary approach to proceedings under the Convention and the demands of the best interests principle in the context of which the Convention was devised, by seeking to resolve the tension between the inability of a court deploying a summary process to determine factual disputes between the parties, and the risks that the child will face if the disputed allegations are in fact true. This balance is achieved by concentrating on the protections available to meet any grave risk of harm, rather than on disputed questions of fact regarding the nature and extent of any such risk. The decision aims to meet the dual intentions of the Contracting States to the Convention and the Members States of BIIa both to ensure a summary process and also to protect the child's best interests. The Supreme Court concluded in *Re E (Children)* that this approach, properly applied, is compatible with the imperatives of Article 8 of the European Convention on Human Rights and Article 3(1) of the United Nations Convention on the Rights of the Child.

Since the Supreme Court decisions in *Re E (Children)* and *Re S (A Child)*, the Courts in England and Wales have deployed this approach as the most appropriate means of drawing the correct balance between the summary nature of the 1980 Child Abduction Convention process and the best interests principle.

1 This paper was originally presented at the Anglo-Germanophone Conference on Family Law held in Vienna from 27 to 29 June 2018. The paper was also made available to the delegates attending the Conference of International Hague Network Judges which took place at Florida International University in Miami from 24 to 26 October 2018 to inform discussion of the conference topic 'Draft Guide to Good Practice on Article 13(b)'.
2 see *Hunter v. Murrow* [2005] 2 FLR 1119 and *Kennedy v. Kennedy* [2010] 1 FLR 728
3 [2007] 1 AC 619 at [26]
4 [1998] AC 72
5 [2011] UKSC 27, [2012] 1 AC 144
6 [2012] UKSC 10
7 see *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children to Appeal)* [2015] EWCA Civ 26
8 [2011] UKSC 27
9 [2012] UKSC 10
10 [2012] UKSC 10

5. Active Case Management and Court Based Mediation in Child Abduction Proceedings in England and Wales¹

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

1 INTRODUCTION

In *Re F (Children)*² Lady Justice Black (now Lady Black of Derwent) observed as follows with respect to the issue of delay in international child abduction proceedings:

"Addressing the problem of delay in this country is challenging, in view of the large numbers of Hague Convention applications filed in our courts and the lack of readily available resources. However, we need to do everything possible to process these applications urgently. The disruption caused by a wrongful removal and an imposed return to the country of habitual residence is minimised if the whole episode is concluded within a matter of weeks. If more time goes by, life in the new country may start to seem to the children like their established pattern of existence, battle lines may become firmly entrenched with the other parent, and the scope for damage is infinitely greater."

In England and Wales rigorous, structured issue identification, case management and timetabling at the earliest opportunity has been demonstrated in the context of the judicial phase of public law children proceedings to be a powerful tool for mitigating delay where resources are finite and under increased pressure.

Within this context, the jurisdiction of England and Wales has developed and introduced Practice Guidance entitled "*Case Management and Mediation of International Child Abduction Proceedings*". The Practice Guidance is aimed at ensuring the use in the judicial phase of child abduction proceedings of rigorous case management and timetabling. In addition, and as an integral element of the effort to avoid delay, the Practice Guidance incorporates a court-based mediation scheme, designed to divert parents from contested proceedings into mediated settlements

2 COMPILATION

Whilst the Practice Guidance concentrates on the judicial phase, the Practice Guidance was compiled in consultation with all of the key organisations and individuals involved in the field of international child abduction as follows:

- (a) Child abduction lawyers;
- (b) The High Court Tipstaff (the court officer charged with enforcing child abduction orders);
- (c) The Child Abduction Lawyers Association;

- (d) The Hague Network Judge for England and Wales;
- (e) The Head of International Family Justice for England and Wales;
- (f) The Director of Reunite International;
- (g) The Central Authority for England and Wales (ICACU);
- (h) The Ministry of Justice.

The Practice Guidance was introduced in February 2018 in the Family Division of the High Court (the division of the court responsible for hearing and determination cases of alleged child abduction in England and Wales). The Practice Guidance has therefore been in force for some eight months.

3 THE NEW PRACTICE GUIDANCE

Key aims

A copy of the President's Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings can be found online at:

www.judiciary.uk/publications

The Practice Guidance and accompanying documentation has the following four key aims:

- (a) To make clear the very limited circumstances in which international child abduction proceedings may be commenced without notice;
- (b) To minimise delay in the making of case management directions in those applications which are commenced on notice;
- (c) To ensure that the parties have access to a scheme of court-based mediation running in parallel with the proceedings;
- (d) To codify the key case management principles applicable to international child abduction proceedings.

Without Notice Applications

From Paragraphs 2.1 to 2.7 the Practice Guidance deal with the principles applicable to the making of a without notice application. The Practice Guidance seeks to emphasise firmly the *narrow* circumstances in which it is permissible to make a without notice application in child abduction proceedings. Paragraph 2.5 sets out the court directions that will ordinarily be given at the first without notice hearing. A without notice application will always be followed by an on notice hearing very shortly after the without notice order is granted.

"2.4. Passport orders, location orders and collection orders constitute an interference with the child's and the respondent's fundamental rights. On a without notice application, parties should only seek, and the court can only

be expected to grant, such orders as are necessary and proportionate having regard to the risks assessed to exist on the evidence."

On Notice Applications

From Paragraphs 2.8 to 2.11 the Practice Guidance seeks to ensure that delay is avoided by way of standard directions being given on paper by the applications judge (the judge who will deal with the first hearing of the application in a list of short first directions hearings). Where an application is issued on notice the court file is provided to the applications judge as part of his or her box work, together with a pro-forma form with a menu of directions (see Appendix B). The Clerk of the Rules (the court officer in charge of listing) has implemented a system to ensure that the resulting orders and notice of the first on notice hearing are drawn and served expeditiously.

"2.9. Where the application is made on notice (and, accordingly, there is no without notice hearing immediately following the issuing of the application) there is a risk that valuable time will be lost between issue and the first on notice hearing. To minimise this risk, upon the court issuing an on notice application the court will, of its own motion, make standard directions upon issue pursuant to FPR r 12.5(1)(b) [...]"

Respondent parents often begin proceedings as 'litigants in person' without legal representation. In respect of both without notice applications and on notice applications, the resulting order is served on the respondent with an 'Information Sheet' summarising how the respondent can obtain legal advice, public funding from the Legal Aid Agency and, if necessary, *pro bono* assistance, and a copy of the Child Abduction Mediation Scheme.

"2.6. It is important that any without notice application is prepared in a manner that maximises the chances of the on notice hearing being effective. To this end, the without notice application and the evidence in support must contain all the information in the possession of the applicant that will or may assist in the prompt execution of any orders made. To further assist in achieving an effective on notice hearing, the directions order resulting from the without notice hearing will be served together with an information sheet, detailing how the respondent can obtain legal advice, public funding from the Legal Aid Agency and, if necessary, *pro bono* assistance, and a copy of the Child Abduction Mediation Scheme."

Mediation

The Practice Guidance incorporates a Child Abduction Mediation Scheme. The aim of the scheme is to ensure that parties engaged in child abduction proceedings are able, in an appropriate case, to access a mediation service as an integral part of the court process and in parallel with the proceedings.

The basis of the mediation scheme is an agreement by Reunite to make available at court two mediators each day to whom the applications judge can refer parties who express an interest in entering into mediation of their dispute. The application of the mediation scheme is dealt with at Paragraphs 2.5(a) and 2.9(a) and 3.1 to 3.3 of the Practice Guidance. The Child Abduction Mediation Scheme itself is set out at Appendix 1 to the Practice Guidance.

The operation of the scheme will be reviewed after 12 months to evaluate the success of the scheme. Reunite will be responsible for keeping the records necessary to conduct these evaluations. As a part of the evaluation process, Reunite will keep a record of those cases where one or both parents do not wish to speak with the mediator at court, or where cases do not progress to mediation, and the reasons that lie behind the parents' decisions or indeed the mediators' decisions in order to identify any specific trends or barriers to mediation.

"3.3. The Child Abduction Mediation Scheme will operate in parallel with, but independent from, the proceedings. Where parties agree to enter into mediation, the court will give any directions required to facilitate the mediation. The parties or the parties' representatives must be in a position to address the court on the question of mediation at the relevant hearing to enable the court to consider the appropriateness of such directions. The mediation will proceed with the aim of completing that mediation within the applicable timescales. Where the mediation is successful, the resulting Memorandum of Understanding will be drawn up into a consent order for approval by the court. If the mediation is not successful, the court will proceed to determine the application."

Key Case Management Principles

Finally, Section 3 of the Practice Guidance collates and sets out the key case management principles for international child abduction proceedings to be applied by the Judge at the case management stage in order to ensure that the case is disposed of both expeditiously and fairly.

"3.4. Key to ensuring that the final hearing is dealt with in a manner commensurate with the summary nature of most international child abduction hearings is the identification at the case management stage of what matters are truly in issue between the parties. It is particularly important that the directions hearing(s) preceding the final hearing be used to identify the real issues in the case, so that the judge can give firm and focused case management directions, including as to the form that the hearing will take. Parties can expect the court to be rigorous and robust at the case management stage in requiring parties to consider and identify the issues that the court is required to determine and to make concessions in respect of issues that are capable of agreement."

Section 3 of the Practice Guidance summaries good practice in respect of deals with the following case management themes commonly arise in international child abduction proceedings:

- (a) Issue identification;
- (b) Participation of the child;
- (c) Witness statements;
- (d) Oral evidence;
- (e) Bundles;
- (f) Time estimates;
- (g) International judicial liaison;
- (h) Final hearing;
- (i) Orders;
- (j) Appeals and applications for stay.

4 APPEALS

The Practice Guidance applies to first instance decision. From a decision of the High Court, an appeal lies to the Court of Appeal and, from there, to the Supreme Court (although there are provisions for rare 'leap frog' appeals from the High Court to the Supreme Court).

Permission to appeal is required in every appeal from a Hague decision. Permission can be given by the trial judge but, invariably, permission is refused and an application for permission is made to the Court of Appeal.

The Court of Appeal operates a system, administratively, under which every application for permission to appeal is referred to a judge in the Court of Appeal (Lord Justice Moylan, if available, or one of the family Lord or Lady Justices of Appeal) on the same day that the papers are filed with the Court of Appeal. A decision on permission will usually be made within a week with an expectation that, if permission is granted, the appeal will then be heard within approximately three to four weeks. This target is not always achieved.

Within this context, appeals have the potential to be a source of significant delay in proceedings designed to proceed summarily and with expedition. The Practice Guidance provides for any application for a stay pending an application for permission to appeal and the application for permission to appeal to be made expeditiously. The court can shorten the procedural time limit for lodging an appeal (currently 21 days from the date of the decision).

"3.17. Any application for a stay pending an application for permission to appeal and the application for permission to appeal should be made expeditiously. Any application for permission to appeal and any stay should be made to the judge if possible and, if not possible or if refused, to the Court of Appeal. The filing of the notice of appeal should not be delayed until the appellant has received a copy of the approved transcript of the judgment under appeal."

5 CONCLUSIONS

International child abduction proceedings dealt with under the 1980 Child Abduction Convention must be completed within six weeks of the date of the application. The court rules in England and Wales apply the same time limit to non-Convention cases under the inherent jurisdiction, save where exceptional circumstances make this impossible.

By applying the principles of rigorous, structured issue identification, case management and timetabling at the earliest opportunity in child abduction proceedings, the Practice Guidance now in use in the jurisdiction of England and Wales aims to reduce unnecessary delay in the resolution of child abduction proceedings and, where possible, divert parents into mediation with a view to achieving an agreed outcome.

- 1 This article is based on a paper that was presented on the topic of 'Avoiding Delays: Revision of Internal Procedures Applicable to Child Abduction Cases, in Administrative, Judicial and Enforcement Phases' at the Conference of International Hague Network Judges, held at Florida International University in Miami from 24 to 26 October 2018'.
- 2 [2016] EWCA Civ 1253

6. The voice of the child from a continental-Spanish perspective

By Francisco Javier Forcada Miranda (Spanish representative to the International Hague Network of Judges)

During the recent IHNJ Miami Conference,¹ I had the opportunity to restate that the voice of the child is one more piece of a complex judicial mechanism in which the child should be the focus of attention when involved in judicial proceedings.

Only in a legal framework of an adapted and accessible justice for children, are children able, for example, to have access to legal aid, to initiate proceedings, directly or through a representative, or to be exempt from having to pay judicial fees. These legal frameworks also prevent children from being conditioned by parental leave and circumvent obstacles blocking the child from initiating a legal procedure.

In the same way, only within a child-friendly judicial environment, can the voice of the child be obtained and developed in a proper way, with the child being the objective of the proceedings and the person in need of primary attention and care.

Countries lacking a family / specialised jurisdiction cannot provide an adequate framework for children to be heard, and the best interests of the child, as an undetermined legal concept, is more difficult to establish. In such environments, there are inadequate safeguards to protect the voice of the child.

I completely agree with the words of one of the most renowned specialists in international family law, when he said that: "Specialization 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."²

Based on the described premises or foundations, these lines intend to provide a personal vision of the child's voice in an environment of continental legal tradition and in the current Spanish legal framework after a relevant legal reform in 2015, adding the particular point of view of one who has been a family judge for more than 12 years in which I was able to interview hundreds of children.

As mentioned above, children must be the focus of attention of any judicial process that affects them. This appropriate trend to consider the child as the focus of whatever approach to family issues can be observed, for instance, in the recent case law of the European Court of Justice in Luxembourg when approaching the habitual residence autonomous concept under the Brussels II a Regulation.³

In two recent judgments, the child has been considered the centre of the matter when it comes to determining their habitual residence. It has been determined that their physical presence is absolutely necessary to establish the habitual residence whatever the purpose of the parties.⁴

But theory is one thing and the very different harsh reality another. In this way, one of the most recent empirical surveys in this field⁵ has proven that practices of Contracting States to the 1980 Child Abduction Convention relating to the child's objections exception vary depending on domestic laws and procedures, that there are a 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), and that in some jurisdictions judges receive no training to hear children.

Quite relevant are also the outcomes and results of a three-part research project conducted in the framework of the project "Enhancing the Well-being of Children in Cases of

International Child Abduction (EWELL)", in particular in relation to age and maturity attainment and assessment in the context of judicial decisions on international child abduction and the application of Article 13(2) of the 1980 Child Abduction Convention in Belgium, France and the Netherlands.⁶

Aside from empirical studies, it is also worthwhile reviewing the most recent legislative trends in this field. For instance, the recent developments in Spain with respect to the voice of the child and those in the European Union with the ongoing Brussels II a Recast.

In the European Union, Articles 11, 23, 41, 42 and the Preamble (19, 20) of the Brussels II a Regulation are devoted to this topic. In that legal instrument, the relevance of the voice of the child was enshrined only for restitution proceedings. Consequently, it was not emphasised in all cases of parental responsibility, although this is not something to necessarily object to. In Article 11(2), when applying Articles 12 and 13 of the 1980 Child Abduction Convention, it was established that *"it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regarded his or her age or degree of maturity"*.

There are also non-recognition grounds in parental responsibility cases linked to children's hearings and third parties in an unappropriated way, the child's voice also being considered as a pre-requirement to abolish exequatur in decisions ordering return (Art. 42(2)(a) of the Brussels II a Regulation).

The Brussels II a Regulation did not modify national legal rules governing the voice of the child. However, during the last 13 years, where the Regulation has been applied, a clear trend can be found. Here, countries with restrictive national rules on the voice of the child have been in some way encouraged to refuse exequatur if the hearing performed in another country (the country of origin in return proceedings in cases of Article 11.8 of the Brussels II a Regulation) was not accomplished or was not according to their national rules over the child's voice.⁷

In the recent proposal for a new Brussels II a Regulation launched by the European Commission on 30 June 2016,⁸ Article 20 devoted to the right of the child to express his or her views, established that *"when exercising their jurisdiction under Section 2 of this Chapter, the authorities of the 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. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision"*.

Under this 2016 Proposal, the European Commission did not intend to modify national rules harmonising the regu-

lation of the child's voice, but rather to establish a new regulation of greater depth, beyond cases of international child abduction. Under the Proposal, for example, the recognition or enforcement of a judgment cannot be refused on the basis that the child's voice has been obtained in a different way according to whatever national rule. On top of that, and according to the aforementioned Article 20.2, it should be compulsory to give due weight and consideration to the child's voice according to his or her age and degree of maturity, documenting his / her considerations in the decision to be adopted.

Be that as it may, and throughout more than two years of intensive negotiations in which the Proposal for a new Brussels II a Regulation has been involved, at this moment under the Austrian Presidency, it is not clear what the final solution will be. We may end up facing a certain tendency of the European legislator towards a maximum harmonising process considering national rules, for example describing situations in which a court may decide not to provide the child with the opportunity to express his or her views.

This is a problematic approach which does not meet the minimum standards over the voice of the child enshrined under the UN Convention on the Rights of the Child or the Charter of Fundamental Rights of the European Union.

In many countries there is even a discussion regarding the procedural nature of the voice of the child. It is clear that children are performing a right, not an obligation, and that they are not witnesses, but it remains uncertain if we tackle a mere judicial proceeding to exercise a right or actual evidence. If it is regarded as evidence, it will be connected to contradictory procedural principles and if not, the judicial proceedings will be aimed at satisfying a child's right.

Regarding what has recently been developed in Spain relating to the voice of the child we can take a look at a very recent legal reform that took place in 2015.⁹

The way to perform hearings in Spain after the 2015 national legal reform (new Art. 9 Organic Law 1/1996 after Organic Law 8/2015 amendments) can be described as follows: hearings of the child will have a preferential character, and they will be carried out in a manner appropriate to their situation and evolutionary development, with the assistance, if necessary, of qualified professionals or experts, taking care to preserve their privacy and using language that is understandable to her or him, in an accessible format and adapted to his or her circumstances, informing him or her of both what is asked and the consequences of his / her opinion, and with full respect for all the guarantees of the procedure. However, when this is not possible or does not suit the interests of the child, the child's opinion may be made known through their legal representatives, provided they do not have conflicting interests, or through other persons who, by profession or re-

lationship of special trust with him / her, can transmit it objectively. When the hearing of children is denied directly or through a person representing them, the decision will be motivated in the best interests of the child and communicated to the Public Prosecutor, the child and, where appropriate, to his / her representative, indicating explicitly the existing appeals against such a decision.¹⁰

More to the point and for specific child abduction cases, a new Article 778.quinquies.8, Civil Procedure Rule, established in 2015 to the effect that in children's hearings the Public Prosecutor always ought to be present, that hearings are performed in a separate way, regarding other evidence, and with the possibility, where necessary, of using a video-conference. In case a hearing should not be admitted for child maturity reasons, a specific motivation is always needed. Even Public Prosecutors Circular No 6/2015 encourages prosecutors in these cases to promote recording or transcription in the most extensive and exact way, to avoid a further new exploration in the second instance that could potentially re-victimise children.

Within this new Spanish legal framework, maturity and expert evidences have reached a considerable importance or relevance. Concerning the voice of the child, maturity will be evaluated by specialised personnel, considering both the evolutionary development of the child and their ability to understand and evaluate the specific issue to be dealt with in each case, considering that, in any case, the child is sufficient of maturity when he or she is 12 years old.

In this way, under the recent Spanish legal framework, expert evidence seems to have reached an almost mandatory status when it comes to the adoption of a judicial decision that is relevant and affects children. According to Article 2.5.b Organic Law 1/1996 after being amended by Organic Law 8/2015, in the especially relevant decisions that affect the child, a collegiate report of a technical and multidisciplinary group specialised in the appropriate areas is needed. Even under Article 92.9 Spanish Civil Code there exists the possibility of seeking an expert opinion.

In Spain, expert evidences in cases connected to Article 13(1)(b) of the 1980 Child Abduction Convention should be preferential, urgent and concise, it being possible for the judge to, exceptionally, collect the assistance of specialists when it is necessary under Article 778.quinquies.8 Spanish Civil Procedure Rule. The judge may seek, *ex officio*, at the request of a party or the public prosecutor, the reports that it deems pertinent (Art. 778.quinquies.7 Spanish Civil Procedure Rule) and it must be considered that in international child abduction cases there are only six days to carry out any means of evidence ordered during the main hearing inside the national internal restitution process.

The issue of maturity is always connected to the assumption that, after a certain age (for example, the age of 12), a child must always be considered mature. This raises the

question of whether such presumptions are or are not *iuris tantum* and if a child under the age of 12 can be deprived of his / her right to be heard solely for not having reached that age. Under these premises, we could end up undermining points of view expressed through games, drawings, body language, gestures, etc.

We should not forget that under the UN Convention on the Rights of the Child the key is the ability to understand and evaluate consequences and the ability to express opinions on issues in a reasonable and independent manner. That is to say, any opinion of a child that is autonomous, firm and decisive should be relevant if it is in accordance with the best interests of the child. That is why the appropriate assessment of the voice of the child is of great relevance.

Within Article 13(2) of the 1980 Child Abduction Convention, relevance to mature children's points of view should be granted balancing maturity and external influences while in the same circumstances an uncertain relevance to non-mature children's points of view should be granted.

Under Article 13(1)(b) of the 1980 Child Abduction Convention less relevance to mature children's points of view should be granted when discussing grave risk and factual violent situations due to the fact that other evidences are requested in the vast majority of cases. In situations involving sexual abuse / domestic violence in family contexts, the possibilities of communication, of expressing opinions and of being interviewed, may be very limited for children who may not be able to report on the experiences they have suffered, although this does not mean that children should not be listened to, but always under specific guarantees.

In the future, the child's voice will continue to be the object of preferential attention if we want to safeguard the rights of children in national and international cross-border family proceedings, in a way that brings us closer and closer to the standards already developed in 2010 by the so-called Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

To this end, the European Parliament Coordinator on Children's Rights, formerly known as the Mediator on International Parental Child Abduction, convened on 19 November 2018 in Brussels a conference on "*safeguarding the rights of the child in cross-border family conflicts*". In addition, we all expect that the Working Group to develop a Guide to Good Practice on Article 13(1)(b) of the 1980 Child Abduction Convention, after its successful sixth meeting (18-21 September 2018), will provide us with useful practical guidance on this topic. Furthermore, such development may lead to the evolution of discussions addressing "child maturity", so that this topic too shall one day hold its own set of guidelines.

- 1 Conference of Hague Convention Network Judges, Miami, Florida, 24-26 October 2018, FIU Modesto Maidique Campus, celebrating the 20th Anniversary of the International Hague Network of Judges (IHNJ).
- 2 Wrap-up speech by the Rt. Hon. Sir Mathew Thorpe at the London Workshop on 23 March 2018, *The Judges' Newsletter* (Vol. XXII – Summer – Fall 2018, Special Focus, The Child's Voice-15 Years Later), p. 65.
- 3 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, Official Journal L 338, 23/12/2003 P. 0001 – 0029.
- 4 C-111/17, judgment 8 June 2017, ECLI:EU:C:2017:436 and C-393/18 PPU, judgment 17 October 2018, ECLI:EU:C:2018:835.
- 5 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") and workshops held at the end of the project (Auckland (7-8 February 2018), Genoa (7-8 March 2018) and London (22-23 March 2018)), according to *The Judges' Newsletter* (Vol. XXII – Summer – Fall 2018, Special Focus, The Child's Voice-15 Years Later), p. 11.
- 6 EWELL research project on Enhancing the Well-being of Children in Cases of International Child Abduction, 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 is available on the Internet, at < http://missingchildren-europe.eu/Portals/1/Docs/Compiled_research_report_final.pdf >.
- 7 C-491/10 PPU, judgment 22 December 2010 (Joseba Andoni Aguirre Zarraga *versus* Simone Pelz), ECLI:EU:C:2010:828.
- 8 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Brussels, XXX COM (2016) 411/2, 2016/0190 (CNS).
- 9 The core of the 2015 legal reform is a new Art. 9 Organic Law 1/1996 after being amended by Organic Law 8/2015, plus a specific regulation of the voice of the child that can be found in Arts 92.2 92.6 Spanish Civil Code and in Arts 700.4, 777.5 and 778 *quinquies* 8 Civil Procedure Rule. The connection between the age of 12 and the age of maturity appears, for example, in Arts 156, 159, 161, 172, 172ter, 176bis, 177, 178, 231 and 273 Spanish Civil Code, and practical guidance to perform children's hearings can also be encountered under Public Prosecutors Circulars No 6/2015 on the civil aspects of international child abduction and No 3/2009 on the protection of victimised minors and witnesses.
- 10 A quick look at this topic was recently provided in "Listening to the Child's Voice in Spain", by Christopher Lee (English Solicitor and Spanish Abogado), *The Judges' Newsletter* (Vol. XXII Summer – Fall 2018, Special Focus, The Child's Voice-15 Years Later), pp. 37-39.

7. What is the Evidential Status of the Child's Voice?¹

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

Introduction

The Judge's Newsletter Volume XXII for Summer-Fall 2018 concentrated on the 'voice of the child'. The Judges' Newsletter provided an opportunity to share good practice in an area where the HCCH has not yet published a Guide to Good Practice. The Foreword to the Newsletter, authored by Philippe Lortie and Frédéric Breger, noted that the voice of the child is "an area in which there are as many practices on how to hear the voice of the child as there are legal cultures and traditions".

Perhaps one common thread that can be discerned amidst the variety of approaches is the importance of ensuring that children have a voice in proceedings that will determine their future. Within our jurisdiction, 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."

The provisions of the United Nations Convention on the Rights of the Child illuminate and reinforce this position. 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 on the Rights of the Child 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.

One of the great virtues of Marilyn's work, and of Volume XXII of the Judges' Newsletter, is that these efforts allow different jurisdictions to examine their own practices in

light of the experience of colleagues, and to identify areas for potential change or evolution. To demonstrate the operation of this particular virtue, you will forgive me if I take as a starting point the legal framework within which I operate, namely that applicable in the jurisdiction of 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."

As I will come to, that last sentence points up one of the specific issues that I wish to highlight in this paper. 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 from the Practice Guidance, it can be seen 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 in her keynote lecture to the conference on the *Role of Children in 1980 Hague Child Abduction Convention Proceedings* on 22 March 2018, 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."

Meeting children

Within the foregoing context, one of the most challenging parts of the judge's job in the context of child objections cases 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 for Judges in England and Wales to receive a request to meet the child who is the subject of child abduction proceedings. Within this context, the question I would like to highlight, and one that I think remains to be resolved, is that of how we treat *evidentially* the information that judge's inevitably gather when meeting children face to face. In some jurisdictions the answer may well be simple: it is evidence. That is not the current position in our jurisdiction.

My decision in *B v P (Children's Objections)*⁸ illustrates the point. *B v P* concerned an application pursuant to the Child Abduction and Custody Act 1985 and the 1980 Child Abduction 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 Child Abduction 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 *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(1)(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 sheer 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.

The evidential status of the child's voice

Into this already challenging context is then introduced the issue that inevitably follows on from meeting the child. Namely, what can the judge *do* with the information gathered during the course of such a meeting?

In England and Wales, 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 in England and Wales? There is certainly at least one example in the English and Welsh 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 dis-

trust 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 substantive 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,"¹¹ particularly in the light of the Court of Appeal's recent decision in *Re KP*.¹² 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 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 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 which she may wish to volunteer to the judge". What is heard by the judge may, in turn, be relevant to the 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 objection 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 well-being, relevant to the Article 13(1)(b) harm exception.

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

The approach in other jurisdictions

To return to the Volume XXII of the Judges' Newsletter, the information contained in that publication permits the jurisdiction of England and Wales to examine such complex questions by reference to the procedure adopted in other jurisdictions in the Hague community. There are of course a wide variety of methods by which the child's views can be brought before the court. Within this context, judicial meetings or interviews with children are not inevitable. It is however clear that they are utilised in a number of jurisdictions.

In Italy, it is apparent that the children are heard, as a general rule, in a "direct hearing" conducted by the presiding judge, together with an "honorary" psychologist judge or expert psychologist or psychiatrist, at which, subject to certain conditions, evidence is taken directly from the child. Likewise, in Greece the judge conducts a meeting to determine whether the child should be heard in proceedings, interviewing the child alone in chambers. Whilst the precise content of the meeting is not reported to the parties, the judge will give a decision setting out his or her findings, including the child's own opinion as to where he or she wants to live. In Spain, a judge may, and frequently does, interview a child directly to ascertain his or her position, although this is not considered to be a "formal" means of gathering evidence. In the United States, there have been examples of courts hearing extensive evidence in chambers without the presence of the parties or counsel on

issues that went to other aspects of the case,¹² of children giving testimony under oath in court¹³ and of judges interviewing children in chambers.¹⁴ In South Africa, children do meet judges directly, although this does not occur very often. Whilst not covered in Volume XXII of the Judges' Newsletter, I am aware that there is a longstanding practice of judges meeting children in Germany.

However, what is notable with respect to the accounts provided by those jurisdictions who do adopt meetings with children as part of the process of listening to the voice of the child is a relative paucity of information from a number of the jurisdictions in which judges meet children on what formal *evidential* status, if any, is accorded to the information gathered from those judicial meetings. For example, how, in each jurisdiction, does the information gleaned in a judicial meeting with children fit into the formal rules of evidence in force in that jurisdiction? By what means, if any, are parents permitted to challenge that information, in the way they might in respect of evidence admitted in accordance with applicable procedural rules, if they seek to do so? Such information from other jurisdictions would be very valuable in informing and refining the development in each jurisdiction, including the jurisdiction of England and Wales, of processes of listening to the voice of the child within the paradigm of ensuring a fair trial.

Conclusion

My own 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 with what they considered to be their evidence. That this is likely to be the position in most, if not all cases 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."

As recognised in *Report of the Vulnerable Witnesses & Children Working Group*, one might seek to explain to a child that gathering evidence 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 because what they say is not evidence. 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, evidentially, of a word that they had said to me. Or whether, had they known beforehand that this was the position, they would have bothered coming to see me.

Further, where the judge, as I did in *B v P*, 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 because the rules do not permit us to rely those matters evidentially, even though, as judges, we are trained to, and can, perform such mental gymnastics where necessary.

If we are to ensure that the 'voice of the child' is heard in child abduction proceedings, the 'voice of the child' must be more than an intangible, conceptual or abstract notion. Whilst great strides have been taken in achieving this end, it is arguable that, in seeking to consolidate this progress, *parity* of evidential status (as distinct, I make clear, from parity of evidential weight) between the 'voice' of the adult and the 'voice' of the child is necessary. We at the very least owe it to children and their parents to attain *clarity* regarding the evidential status of what children are telling judges when they meet them, as in many of our systems they do, in order to ensure what are already summary proceedings maintain fidelity to the principles of fairness and natural justice and continue to satisfy the requirements of global and regional human rights instruments that enshrine the right to a fair trial for those coming before our courts.

As I noted at the outset, the Foreword to the Newsletter, authored by Philippe Lortie and Frederic Breger, noted that the voice of the child is "an area in which there are as many practices on how to hear the voice of the child as there are legal cultures and traditions". The Volume XXII of the Newsletter demonstrates that we have much to learn from each other with respect to the question of how we ensure that children are properly heard in decisions that can and do affect them for the rest of their lives. I venture to suggest that one of the areas in which this is so is how our respective jurisdictions treat the evidential status of the 'voice of the child'.

- 1 This paper is based in part on a presentation 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 and later published in Volume XXII of The Judges' Newsletter.
- 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" and published in Volume XXII of The Judges' Newsletter.
- 7 [2010] 2 FLR 1872
- 8 [2017] EWHC 3577 (Fam)
- 9 [2010] 1 FLR 1229
- 10 2014] EWCA 554
- 11 [2010] 2 FLR 1872
- 12 *Ischiu v. Gomez Garcia* 43 FLR 1347 (2017)
- 13 *England v. England* 234 F.3d 268 (2000) and *Aranda v. Serna* 911 F.Supp 2d 601 (2013)
- 14 *De Silva v. Pitts* 481 F.3d 1279 (2007)

8. Use by German courts of mediation in child abduction return proceedings

By Judge Martina Erb-Klünemann (*German Network Judge to the IHNJ*)

In Germany, the use of mediation arose as a means to address parental conflicts caused by child abduction. Although this concept sprouted about ten to fifteen years ago, it only started to develop years later, emerging into a fully-fledged alternative avenue to address child abduction only more recently. Despite its evolution, there continues to be room for improvement in its application in child abduction return proceedings.

Advantages of implementing mediation

Why should a judge engage in mediation? The sphere of action of the judge is limited to the proceedings, whilst mediation takes place outside these proceedings. However, those who deal with Hague cases on a regular basis realise that return proceedings are often not always the best forum to protect the interests of the family involved. The ultimate task of a judge is to try to achieve a peaceful outcome which is in the best interests of the child. Consequently, this also includes the integration of alternative methods of conflict resolution that may parallel the return proceedings.

One of the key advantages of addressing child abduction disputes through mediation is its effect on the time and length of the proceedings. Courts must take swift action to meet the six-week target stipulated by Article 11 of the

1980 Child Abduction Convention. Consequently, the German courts attempt to conclude the proceedings after one oral hearing lasting a few hours, which takes place approximately four weeks after the start of the proceedings. During mediation, however, time pressure is not as critical, allowing several meetings to be arranged. The mediation process takes place throughout a two to three-day period, with the possibility to reconsider the results achieved at each stage of the process. This contrasts with the specific nature of Hague cases, where judges have limited time and information at their disposal to help them reach a decision. Additionally, mediation offers parties the chance for an in-depth identification of the individual interests and needs of the family. Conversely, the court's discretion as to whether it can order or refuse return of a child is narrow and a judicial decision on return or non-return often does not cater to the best interests of the family involved. This is distinct from mediation which provides parties with the possibility to agree on an individual and tailor-made solution. Moreover, return proceedings bear the danger of further escalating the conflict with both parents at times wishing to stand their ground. Alternatively, mediation offers the parents a chance to find an agreed permanent solution, or at least to de-escalate the conflict.

Growing use of mediation as a reliable forum

In October 1999, a German-French group of parliamentarians began mediating difficult return cases. From February 2003 to March 2006 a bi-professional and bi-national co-mediation project, including accompanying research, was undertaken. It was subsequently followed by various projects on mediation: German-British (2003), German-US-American (2006), German-Polish (2007), German-Spanish (2012), German-Japanese (2015).

In parallel, in 1999, the German applicable law changed leading to the appointment of specialised courts for child return proceedings. Only 22 out of more than 660 German family courts have jurisdiction to deal with return proceedings as a first instance court.¹ Moreover, since 2003 the German Central Authority ("Bundesamt für Justiz"²) offers biannual training sessions for the specialised judges³ where the topic of integrating mediation into court proceedings is always addressed.

Since 2004 a special advanced training on cross-border mediation is offered to mediators. In 2006, a national working group was established to implement mediation in child return proceedings.⁴ It included a specialised judge as well as representatives from the Ministry of Justice, the Central Authority, and a mediator. In 2008, the NGO "MiKK e.V."⁵ was founded by the "BAFM"⁶ and "BM",⁷ two associations dealing with mediation. Subsequently, in 2009, a book on mediation in cross-border family conflicts was first published in German,⁸ followed by the English language publication, "Cross-Border Family Mediation" by Paul/Kiesewetter in 2011. In addition, several articles from different authors have been written on this topic.

In parallel, the recognition of mediation as an alternative avenue for the resolution of child return proceedings continued to develop. The European Judicial Network Working Group on International Family Mediation was established in 2010.⁹ The Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters from 2011 required European Union Member States to develop implementing measures for mediation, including family disputes. In the same year, an EU-training project for international family mediation entitled "TIM" started up as a result of co-operation between MiKK e.V. and Child Focus, an NGO from Belgium, with the support of the Dutch Centre for International Child Abduction ("IKO"), co-financed by the European Commission. The project consisted of an analysis of the international mediation framework in Europe, the development of a training programme for family mediators and training sessions for future instructors.¹⁰ In 2012, the German Law on Mediation came into force. At the international level, the Hague Conference's Guide to Good Practice on Mediation was also published in 2012.¹¹

The International Mediation Centre for Family Conflict and Child Abduction (MiKK e.V.)

MiKK e.V. is a non-profit organisation providing multi-lingual and free support, advice and referrals to mediation for parents in cases of cross-border family conflicts. Its additional activities include research, public relations, trainings and workshops on cross-border family mediation. Although located in Berlin, the mandate of MiKK e.V. covers Germany and countries abroad. MiKK e.V. offers help to parents and others concerned, for example, lawyers, judges, members of the Central Authorities and youth authorities. Brochures informing about the work of MiKK e.V. are available in different languages.¹²

The MiKK-model of mediation

Drawing on the experience and working methods of the German-French mediation project as well as other mediation projects, MiKK e.V. offers, where appropriate, co-mediation according to the so-called "MiKK-model". Mediation is organised by two mediators who are bilingual, bi-cultural, bi-professional and representing both genders ("the 4 Bs"). This means that the mediators should be from the same countries of origin as the two parents; one mediator should be a man, the other a woman; one should have a professional background or education in psychology and the other should have a legal profession. When organising mediation, MiKK e.V. refers parents to more than 150 specially trained MiKK-mediators based in Germany and in 29 other countries covering more than 30 languages. In addition, MiKK e.V. has access to an informal network of over 350 mediators worldwide. This allows MiKK e.V. to offer co-mediation within a very short time period, mostly within a few days.

Costs of mediation

The cost of cross-border mediation is high, causing a hinderance to its accessibility. A cross-border co-mediation, taking place over two days, can often cost as much as 4,000 euros. For most parents involved in cross-border family conflicts, this is a substantial amount of money. The question then raised is who will cover these costs. In Germany, costs for mediation are not part of the costs for the proceedings and as a result cannot be covered by legal aid. In general, the parties have to pay for their own costs. This runs the risk that the parties refuse mediation initially, due to its financial burden. It is thus the task of all professionals involved, especially the court, to inform the parties about the possibilities and the means to overcome the issue of costs. The parties in cross-border family conflicts can apply to the Central Authorities who are sometimes in a position to provide funding.¹³ Embassies or other institutions might also be able to assist. It is always important to ensure that parents understand that mediation is worth considering to help ensure the best interests of the child, but also from an economic point of view. Return proceedings in several instances, followed by proceedings on custody and access in several instances, cost far more than return proceedings concluded via a mediated agreement.

Integrating mediation in return proceedings

The German working group dealing with the question of integrating mediation in proceedings recommends that mediation should take place as early as possible. Mediation should ideally commence before the start of proceedings, otherwise before the oral hearing, after the oral hearing, between the instances or before enforcement. Additionally, parents have to be made aware that they can agree to the continuation of mediation.

The guidelines of the working group are to assess possibilities for a mutually acceptable solution between the parties while also proceeding with the greatest possible care not to put the child or either parent at a disadvantage. Potential disadvantages include prolonging the length of time to resolve the issue and unduly delaying the court proceedings.

On the other hand, courts are able to provide an court information guide to both the parties. These guides have been developed by the working group and have already been translated into 11 languages.¹⁴ The procedure is standardised and established resources are provided to the courts. Additionally, the working group looks for means to address the financial burden described above.

Under the German governing law the applicant may apply to be represented by the Central Authority, a lawyer or even request to be self-represented. If the Central Authority is involved it will inform the parties about mediation under Article 10 of the Child Abduction Convention and

Article 55(2)(e) of the Brussels II bis Regulation.¹⁵ Once an application is lodged with the court, the court will schedule the oral hearing within approximately four weeks of its submission, as well as order the immediate service of documents.

Judges have two possibilities to suggest the use of mediation to the parties: (a) a judge may propose mediation in a written form when informing the parties about the scheduled oral hearing; or (b) a judge can request a preliminary hearing. The judge may, when informing the parties about the date of the oral hearing, suggest the course of mediation to the parties by referencing to the court information guides for parties and lawyers developed by the working group.¹⁶ Past judicial experience also suggests that it is helpful if a judge calls the lawyer ten days after the date of lodging the case to ask whether the parties have discussed the topic of mediation. This often encourages the lawyers and parties to engage in mediation. This traditional model of mediation prior to the oral hearing offers the advantage that the results of the mediation can directly be incorporated into the oral hearing and the discussion in a court agreement.

The other, more modern means to recommend mediation was inspired from the Dutch process of pre-trials. Pre-trials under German law in principle do not exist. However, the German framework has incorporated the Netherlands' practise to inform parties about mediation at a pre-trial stage. Sabine Brieger, former German judge appointed to the International Hague Network of Judges, was the first to develop this idea. When a case is lodged, the judge directly schedules two dates: (a) one for the oral hearing within four weeks, but also (b) a date for the preliminary hearing scheduled roughly ten days before the regular oral hearing. In this preliminary hearing only the topics of mediation and access to the child through the proceedings are discussed. Together with the judge, a mediator, appointed by MiKK e.V. and free of charge, informs the parties about mediation. This in-person informational session is found to be more effective than a written guide, despite the content being the same in both.

Requirements

Mediation can only take place with the consent of both parties. The lawyers' support plays an important role in this process. The child welfare authorities and the appointed guardian ensure the child's interests through informed decisions regarding the peculiarities of return proceedings and the advantages of mediation.

Additionally, it is important that all steps taken by the court regarding mediation are transparent. Mediation takes place in parallel to the proceedings; it does not influence the proceedings themselves. The court is only informed about the results of mediation providing both parties agree. Judicial actions concerning mediation are limited to its initiation

and support. Courts and mediators do not exchange information regarding the content of mediation. Mediation does not delay the proceedings.

Integrating results of mediation into court proceedings

If the parties conclude a mediated agreement they will inform the court. Following this, an oral hearing takes place where the court reviews whether the agreement is comprehensive and sufficiently concrete. The court and lawyers subsequently evaluate the need and the possibilities for the court to issue a writ of execution. As a result, an oral hearing that can last up to three hours and focuses on these aspects takes place. Here, the court has to consider whether: (a) it has international jurisdiction to rule on the matter; (b) such a ruling is even required; and (c) the court's ruling has validity and enforceability in the other jurisdiction. In certain situations, a recognition or a mirror order might be required. The assistance obtained through the International Hague Network of Judges is often essential to gather relevant information from other countries in this regard.

The future

Those involved in cross-border family mediation in Germany are working on convincing more parents to resolve their conflicts through mediation. However, obstacles caused by high costs associated with the process should continue to be addressed. Another obstacle is the lack of experience of lawyers in mediation for these types of cases which can result in lawyers dissuading parents from mediation as a means to conflict resolution. Additionally, further efforts on informing and persuading professionals of the benefits of mediation as an alternative avenue for conciliation is needed. One possible means of achieving this is by encouraging the new system of MiKK-mediators to attend a first oral hearing, a practice that should continue to be endorsed. Moreover, where face-to-face mediation is not possible the possibility of online mediation should be explored, as mediation using modern technology is better than no mediation at all. Lastly, there continues to be the need to develop mediation as a means to conflict resolution in cases where a non-Contracting State is involved.

In short, it is hoped that the use of mediation in child abduction return proceedings can be promoted. The overcoming of the aforementioned obstacles would facilitate the courts' ability to issue writ of executions, which reflect the parties resolution through mediation and ensure the best interests of the child throughout the process.

- 1 §§ 11, 12 International Family Law Procedure Act; English version available: <http://www.gesetze-im-internet.de/englisch_intfamrvg/index.html>.
- 2 For more information in English: <https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/HKUE_node.html>.
- 3 For many years the author has chaired these conferences.
- 4 The author was the chair.
- 5 International Family Centre for Family Conflicts and Child Abduction; for information in English see the website at <<https://www.mikk-ev.de/en/>>.
- 6 Bundes Arbeitsgemeinschaft für Familien-Mediation e.V.; for more information, see the website (in German) at <<https://www.bafm-mediation.de>>.
- 7 Bundesverband Mediation e.V.; for information in German, see the website at <<https://www.bmev.de>>.
- 8 Paul/Kiesewetter, Mediation bei internat. Kindschaftskonflikten
- 9 <https://e-justice.europa.eu/fileDownload.do?id=6f759ddf-e78c-49d1-b918-g2e2d930764b>
- 10 For more information in English: <<https://www.mikk-ev.de/en/project/tim-uebersetzung-englisch/>>.
- 11 See "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction- Mediation", available on the Hague Conference website at <www.hcch.net> under "Publications" then "Guides to Good Practice".
- 12 <<https://www.mikk-ev.de/en/informations/flyer/>>.
- 13 This is, for example, possible for the German Central Authority.
- 14 <<https://www.mikk-ev.de/informationen/informationen-fuer-richter/>>.
- 15 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; <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>>.
- 16 <<https://www.mikk-ev.de/en/informations/court-information-about-mediation/>>.

9. Lessons from the United States to Make Mediation More Available to Global Families

By Melissa Kucisnik¹

In 2001, the U.S. Uniform Law Commission (ULC) finalized its Uniform Mediation Act (UMA), defining mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."² This definition summarizes the consensus among U.S. mediators, and while different models have emerged over the years, the predominant mediation practice in the United States continues to revolve around a neutral person³ who acts as facilitator between disputing parties through a truly voluntary process.⁴ The UMA also solidly confirms that mediation communications are privileged and not to be used in any formal proceeding,⁵ with only few exception,⁶ and that mediators are prohibited from making any report,

assessment, evaluation, or recommendation regarding the mediation.⁷

Proximate in time to the ULC codifying certain fundamental mediation principles in the United States, the Association for Family and Conciliation Courts (AFCC) and the American Bar Association (ABA) were jointly developing standards for family mediators. These model rules for family mediators focus on the need for educated mediators and an educated public.⁸ Not only should mediators be qualified by education and training to undertake their role, but the mediator has an obligation to ensure that the parties to the mediation are equally educated, so that they can voluntarily choose mediation, end the mediation whenever it no longer addresses their needs, and understand what happens throughout the mediation so they can make appropriate and informed decisions.

At the end of 2018, eleven U.S. territories have adopted the UMA.⁹ Other U.S. states may already have existing laws regulating the practice of mediation, making the UMA duplicative for those states. While the AFCC and ABA's model standards are only instructional, most U.S. family mediators abide by its basic principles. Mediation itself is practiced as a fluid skill, and each mediator has his or her own style and way of engaging with the parties. Without any mediator credentialing in the United States, each mediator has a different background and is free to show his or her unique inherent personality traits. In the United States, therefore, mediation may be practiced differently depending on the selection of the mediator, giving options for families to seek out a mediator whose style and personality fits their needs. U.S. family mediators also have different training and education. The ABA and AFCC model standards urge mediators to ensure they are competent to handle each case the mediator undertakes, but there is no definition of what makes a family mediator "competent." Any individual can practice mediation in the United States, and consumers are left to select a mediator based on their own research and needs. In the U.S., the only restriction for holding oneself out as a mediator involve those mediators who accept cases from a roster, typically associated with court-referred cases or referrals through nonprofit or mediation organizations. This lack of defining a mediator's background has perpetuated the view that mediation is a skill, not a profession. Accordingly, most "mediators" in the United States are in dispute resolution professions, such as lawyers or counselors, each bringing their unique professional style to the mediation process.

Challenges with Ensuring Widespread Access to Cross-Border Family Mediation in the United States

When it comes to defining consistent standards for cross-border mediation and a creating a trained pool of cross-border mediators in the United States, there are some significant obstacles. First, with no consistent nationwide definition of the ideal background for family me-

diators, it is difficult to define the optimal background for a *cross-border* family mediator. In fact, some within the United States are concerned about rigid mediator credentialing, fearing that by creating training requirements and a performance assessment, then some highly qualified and competent mediators could be excluded from practice. Nonetheless, cross-border family cases have distinct and complex issues that most mediators rarely find the opportunity to address in their routine practice, so advanced training or experience should be encouraged, and mediators who are not competent to handle a case should decline to accept the case. Designing a training curriculum comes with difficulties as well. Since there is a lack of nationwide mediator credentialing in the United States, each family mediator will come to the topic of cross-border family mediation from a different starting point, therefore making it difficult to design a one-size-fits-all advanced training. Cross-border family mediator training may need to be designed on a case-by-case basis, depending on the audience being trained.

In addition to mediator training, there should be separate education for the gatekeepers (those who first interact with a family and ultimately refer the family to mediation) about what comprises a cross-border family case. Both the gatekeepers (such as government offices, courts, judges, lawyers, or counselors) and the mediator need to be able to determine whether a specific family has unique cross-border issues, so that the family can be referred to the proper mediator. Unfortunately, many people overlook issues that require advanced skills for a variety of reason, at times because the family is all one nationality, religion, or culture. Many mediators expect that if a family does not have a clear overt international child abduction issue, then the case can be handled like “any other” family case. This is misleading and dangerous. This excludes cases where there may need to be discussion about abduction prevention, international travel, child relocation, multi-jurisdictional custody, and the costs associated with this cross-border lifestyle. Without being able to determine, at the outset, what complex issues are present in a family's life, the case may be referred to a mediator who lacks sufficient training or experience. This creates the need for a comprehensive screening and intake protocol. Case screening and intake needs to be consistent, comprehensive, and culturally sensitive, factoring in many variables not necessarily addressed in a typical domestic case intake process. U.S. jurisdictions that already have domestic intake procedures for their cases need to re-assess these processes, because it is otherwise easy to have complex cross-border cases shuffled into basic family mediation programs in courts and organizations that may be mis-handling the cases and wrongly assigning them to mediators who lack the required background to meet their professional and ethical duties to the family.

With more comprehensive case screening, mediators can also assess whether the family may benefit from conduct-

ing the mediation, entirely or partially, at a distance. Distance mediation can include use of video conferencing, telephonic mediation, or other electronic communication, to counter-act the difficulties families in the United States may encounter in these cross-border cases. With a large country, expensive travel, difficulty in obtaining travel visas to attend mediation in person, and the potential for criminal arrest warrants related to a child abduction, mediators need to focus on being flexible and creative in structuring processes that will make mediation more widely available, and less exclusive. Distance mediation can also work towards addressing the power imbalances that may exist between disputants who are otherwise afraid of in-person contact. With this flexibility, however, come additional ethical considerations. It may be easy to define a mediator's obligations if the family is meeting in one jurisdiction. It is not as easy to assess what obligations exist when a mediator and the parents are each in different cities, causing confusion as to what law may apply to the mediation process.

Above all, perhaps the most important addition to any successful mediation in the United States is highly trained attorneys. There is a lack of legal training in international family law cases in the United States, including understanding the legal and practical outcomes for these families. With a highly educated lawyer guiding a parent through the mediation process, the mediator can typically get through certain roadblocks much more easily. Because a mediator is not able to advise a parent when that parent may be pursuing an approach that is counter to the law, a lawyer can play a key role in the mediation process, providing the necessary reality checks for the parties, and helping brainstorm creative solutions in complex legal structures, including helping any agreements achieve enforceability in multiple jurisdictions. Some U.S. mediation programs run through courts have begun implementing rosters of attorneys who will represent parties in a limited scope for the mediation alone, which may be much more cost effective and manageable for some attorneys.

Envisioning European Models in the United States

Europe has several successful cross-border family mediation programs.¹⁰ There are some key similarities in the European programs. Mediation sessions tend to be condensed into a short timeframe (two to three full days), and held in person in the city where the child is now located. The case tends to be mediated by two mediators in a co-mediation model. There may be some cost to the mediation, but the cost is kept fairly minimal to facilitate the mediations occurring in person. For some programs, the parents may even be granted reimbursement for the cost of their travel to conduct the mediation in person.

Unfortunately, these mediation structures tend to be unworkable in the United States. The United States has no unified court, and a Hague child abduction return petition

can be filed in any court in the entire United States. With a country that requires a six-hour flight to get from one side to the other, even parents who have domestic cross-border cases, have insurmountable costs, with time out of work, away from their home, and on airfare, hotel, and other transportation costs. The caseload in the United States also includes a high number of indigent families who cannot afford to pay for mediation services, and the case itself is typically costly enough that there are insufficient funds to offer compensation or reimbursement for one mediator, making a co-mediation model difficult to employ. Most judges and lawyers will see relatively few, if any, international family law cases in his or her career. The same holds true for mediators. Most U.S. family mediators do not see the utility in attending expensive trainings, often out of town, for a skillset that they are not likely to use in other parts of their career. Therefore, there needs to be economical web-based trainings available to family mediators, and better understanding that international families have many more complex issues than just child abductions under the 1980 Child Abduction Convention. This also calls for flexibility in designing the mediation process, including the use of online dispute resolution or distance mediation.

There are existing structures within the United States. Nearly every single family court in each state in the United States has a mediation program. The programs differ, at times dramatically, from paid private mediator referral services to free in-house mediation sessions. There may be limitations on the number of sessions or hours that parents can use through a court program. But, the court programs tend to require their family mediators to have certain basic background requirements, including certain basic training. It may be prudent to explore whether a national organization within the United States, like the National Center for State Courts,¹¹ would consider working with the U.S. family courts to ensure that at least one family mediator per court program or county has advanced cross-border training, and that the courts are properly screening cases to ensure the cross-border family mediator is referred those cases. In addition, court annexed programs may consider using technology to facilitate mediation sessions, particularly when low budget court programs previously refused mediation to families where one parent is overseas, unless that parent travels at his or her own cost.

The United States is also a mixing bowl of cultures, heritages, religions, and backgrounds. You can find nearly every single cultural group in the world within the United States. It is difficult to ensure you have an experienced cross-border family mediator who is sufficiently skilled in all cultures and all languages. It may be beneficial to ensure mediators, instead, are adequately trained to screen cases, educate themselves about their specific cases, and decline cases for which they are not competent, which often takes some preliminary pre-mediation work on the part of the mediator, and the need to have cases referred

early in the family's dispute, so the mediator can structure the process with multiple sessions over a period of time, and not condensed into short stretches, making it possible to consult other experts or mediators throughout the mediation process, as necessary.

Current Resources for International Families Who Seek Out Mediation in the United States

Despite the somewhat significant challenges in the United States, there are advancements towards making high quality mediation services available for international families.

The U.S. Department of State, which serves as the U.S. Central Authority under the 1980 Child Abduction and the 1993 Inter-country Adoption Conventions, is able to facilitate access to no-cost mediation with one of three U.S. law schools if an international family expresses an interest, and has an open case with the Central Authority. The law schools typically accept access cases, although one law school has agreed to accept some cases where a left-behind parent is seeking the return of their child. The cases are mediated through the law school's clinical education programs, where law students, who are learning mediation skills, serve as the mediator, alongside a law professor. While this program has some limitations, including the skillset of the student mediator, the limited screening, and the restrictions in caseload, it does offer no-cost services to families where a Hague Abduction case is opened with the U.S. Central Authority.

Likewise, the Office of the Attorney General in California is also working on designing a pilot mediation program for Hague Abduction cases it handles between California and Mexico. The pilot program is still at its infancy, with the Office of the Attorney General assessing the background criteria for its pilot program mediators, along with determining how to make training, background requirements, and process consistent between California and Mexico so that cases can be co-mediated with one California mediator and one Mexican mediator.

As stated above, nearly every family court in the United States has an established family mediation program. The mediators in these programs already meet basic background requirements and are experienced family mediators. If a more robust screening and intake protocol were designed for these court-annexed programs, along with a widely accessible low-cost training program, these courts could more readily funnel appropriate cases to mediators within their own programs who have an appropriate background to handle the issues common among international families.

Most mediation in the United States, however, remains in the hands of private family mediators. These private family mediators set their own fee structures, with many agreeing

to use a sliding scale (*i.e.*, accepting different fees based on the family's ability to pay) or accepting *pro bono* referrals. The ABA, the largest organization of lawyers in the United States, explored the issue of international family mediation through a task force in the years of 2010 to 2015. The task force created internal background standards for international family mediators, and, based on those standards, designed a 40-hour advanced family mediation training, held in November 2013 and again in November 2015, attended by approximately thirty private family mediators across the United States between the two offerings. These mediators were trained in skills ranging from the law, cultural competencies, criminal and immigration issues, online dispute resolution, ethics, and drafting cross-border agreements, among other things. Some mediators who attended the training have begun creating a consortium of their individual private practices, so they could harness their own experiences, and create a U.S. network of skilled cross-border family mediators in different regions across the country.¹²

Finally, International Social Service, with its U.S. branch in Baltimore, Maryland, hosted a conference in June 2018 at the George Washington University School of Law, bringing together a variety of professionals, ranging from lawyers to social workers to the government, to discuss structures that might work within the United States, and plant the seed of building these structures within regions and communities in the country.

Conclusion: Ensuring the United States is Part of the Global Discussion

Above all, the U.S. variety of mediation offerings teaches us that mediation is a flexible process. No two mediations look the same. In fact, each family may require different mediators with different skills and backgrounds, and differently structured processes. With the United States' challenges in designing a nationwide cross-border family mediation structure, we can learn a lot about new and creative avenues for providing mediation as an option to international families. Whether we incorporate distance mediation, technology, or existing structures, such as court-annexed mediation programs, into the broader discussion about what future international family mediation processes look like, a lot can be learned by examining the United States' challenges, and how it has creatively addressed these challenges, making mediation widely available to families within its vast geography. With additional research into comprehensive screening and intake protocols, more cases can be directed to fewer mediators, and processes can be better structured to meet the needs of cross-border families. It may be that any country only needs a small number of highly trained cross-border family mediators, but with the technology and innovation seen in different places within the United States, that may be more than sufficient to serve the number of families. With earlier identification of these international families by courts, law-

yers, and the government, mediators will have the flexibility to design a mediation process that incorporates distance mediation, over multiple time zones, and uses different methods of communication that might be more appropriate for the family. The many challenges within the United States may ultimately prove to be fertile ground for more creative processes to help more families than ever before.

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2 UMA, Section 2(1), <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act>, last accessed 11/22/18

3 Id. at Section 9

4 Id. at Section 10

5 Id. at Section 5

6 Id. at Section 6

7 Id. at Section 7

8 <https://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.pdf> last accessed 11/22/18

9 Ibid. at FN 2

10 Among the most successful programs are mediation structures through Reunite in the UK (www.reunite.org), MiKK in Germany (www.mikk-ev.de), and IKO in the Netherlands (<http://www.kinderontvoering.org>).

11 <https://www.ncsc.org> (last accessed 11/22/18)

12 www.globalfamilymediation.com (last accessed 11/22/18)

10. Conditions to Return

By the Honourable Justice Victoria Bennett AO¹

The imposition of conditions to return can facilitate a safe and appropriate transition for a child back to his / her place of habitual residence but, if used extravagantly or without an evidential and reasoned foundation, conditions can defeat the very purpose of the 1980 Child Abduction Convention in relation to wrongfully removed or retained children. This article discusses general principles about the imposition of conditions on the return of children from Australia to other Convention countries.

A condition to return is an obligation which must be fulfilled prior to the return of the child. Non-compliance with the condition may result in the child not being returned. Conditions to return are different to undertakings which, in common law jurisdictions, are promises made by a party to

the court which may, or may not, be in a position to impose sanctions for non-compliance. The 1980 Child Abduction Convention is implemented into Australian law so that conditions to return can be imposed where it is considered necessary for the appropriate operation of the 1980 Child Abduction Convention and regardless of whether one of the five exceptions to return (defences) is raised. The preamble to the 1980 Child Abduction Convention makes clear that one purpose of the 1980 Child Abduction Convention is to remove the harmful effects of the wrongful removal or retention of a child, so the potential scope of conditions is quite broad providing always that the discretion to impose conditions is exercised judicially and in a principled manner.

There are a number of features which impact upon the imposition of conditions to return in Australian² cases. First, Australia has a highly concentrated jurisdiction for international child abduction and international relocation cases. These cases are heard by the Family Court of Australia (not Western Australia)³ which comprises 18 judges⁴ who sit predominantly in the trial division and seven judges who sit predominantly as our intermediate appeal court. One of those 25 judges will determine the application at first instance and, if appealed, another three judges will determine the appeal.⁵ All judges of the Family Court are well versed in international parental child abduction law. The concentration of jurisdiction facilitates a coherent approach to jurisprudence.

Second, the family courts have specialist social scientists employed within each Registry to assess and write reports on families. These are psychologists or social workers who specialise in the assessment of families after the breakdown of a relationship. However, they understand the difference between the limited scope of a report in a Hague case as opposed to the general assessment of a child's best interests in a domestic parenting dispute. In a Hague return case, a family consultant may be required to report on one or more of the following matters to assist the judge to make a decision:

- habitual residence from the child's perspective;⁶
- where the application is filed more than 12 months after the wrongful retention or removal, whether the child is settled;⁷
- whether the child objects to return in the relevant sense and whether the child is of sufficient maturity to take that objection into account;⁸
- an element of grave risk posed to the child by return;⁹ and
- an aspect of the child's welfare for the purpose of informing the exercise of any discretion to refuse return which arises upon an exception to return being made out.

We also have a preliminary assessment of the child by the family consultant for the purpose of assessing various

matters including whether the child is safe and if the child would be amenable to having some electronic communication with the left-behind parent. All of the family consultant's evidence can be tested by cross-examination. Accordingly, conditions to return will be imposed against a background of expert evidence.

Third, reflecting Australia's federal system of government, return applications are usually prosecuted by the Central Authority through its delegated State Central Authority which is located in the State in which the child is present. The left behind parent is merely a witness in the State Central Authority's case. The Central Authority pays all litigation expenses. It does not pay airfares or accommodation expenses for the requesting parent or for the child. In Australia left behind parents rarely attend Hague return hearings in person due to the geographic remoteness from most Convention countries. Their actual involvement may be restricted to being cross-examined by means of video-link or electronic communication.

Fourth, 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* (hereinafter, "the 1996 Child Protection Convention") entered into force for Australia in 2003.

Finally, because Hague return proceedings are prosecuted by the Central Authority (or more usually through a State Central Authority) in Australia, it is necessary for the pertinent Central Authority to inform our court as to what conditions (if any) the requesting parent will agree to abide, and to then make submissions about the reasonableness or practicability of the balance of conditions sought. In the majority of cases, information and instructions during the running of the case must pass through the State Central Authority to the Australian Central Authority, to the Central Authority of the requesting State and then to the left behind parent and back again. The multiple central authority dynamic or chain of communication can contribute to the left behind parent feeling remote from the proceedings. A source of disquiet for the court is that the left behind parent may not have been adequately consulted about the proposed conditions in the course of the Australian proceedings or, even if consulted, might have agreed to the conditions in the belief that to withhold their agreement to the conditions would mean that the child would not be returned. Even if the requesting parent gives oral evidence or is cross-examined in person or by video-link, they will not be legally represented or entitled to make submissions on the reasonableness of the conditions sought to be imposed. It is the responsibility of the prosecuting State Central Authority to adduce relevant evidence in opposition to, or furtherance of, the conditions sought.

Leaving to one side the intervening authorities in Australian return proceedings, in my experience, parents readily agree to propositions in the course of litigation but sub-

sequently want to wind back that agreement. In short, they agree to anything and then change their minds. Two prime examples are the parent who is seeking to relocate a child's residence internationally and the parent who is seeking the return of their child under the 1980 Child Abduction Convention. Both seemingly view the relief they seek as conclusive and the conditions as voluntary, with the prospect of enforcement of the conditions upon which the relief may have been granted as less than certain, hence the imperative to ensure that conditions to return are enforceable.

I recently presented on the Hague Children's Conventions in Jamaica and there heard the local saying: "When elephants fight, it is the grass that suffers". Likewise, when parents do not act in accordance with promises or expectations, it will usually be the child who suffers first and most. This is why judges who determine Hague return applications must craft the conditions carefully, conservatively and in a way that they will be enforceable.

Conditions to return are most successfully imposed where parents have been required to prepare for the outcomes of the Hague application. The outcomes are limited to the child being returned or return being refused. Preparation for outcomes is facilitated by:

- early articulation by the taking parent of what conditions are sought by that parent if the child is returned,
- specialised Hague mediation.

Whilst the State Central Authority prosecutes the return application, it will facilitate the left behind parent engaging in specialised mediation with the taking parent concurrently with the return application and will not stand in the way of a resolution reached between the parents and the lawyer who represents the child's interests.

Co-ordination between the courts of both countries through direct judicial communications is of enormous assistance in securing the enforceability of conditions around parenting arrangements immediately on the child's return. Of course, parenting matters are to be resolved in the country of habitual residence but the child is likely to be most vulnerable in the days or few weeks after return and before the court of the home State is appropriately seized of the case and the taking parent has had an opportunity to adequately prepare their case. The most common condition of return relates to the payment of airfares for the child and the taking parent to return. The next most common raft of conditions is directed to the child not being removed from the taking parent at the airport, where the child will live and go to school, and how frequently the child will have access with the left behind parent in the time leading up to the first court case in the home country. These arrangements require forbearance on the part of parents, particularly the left behind parent, but ensuring predictable and stable arrangements for the child immediately

after return will usually be in the best interests of the child.

Imposition of conditions to return can obviate the need for the requested State to delve into the allegations and counter allegations by implementing preventative measures which ameliorate the alleged harm to the child. Baroness Hale and Lord Wilson, delivering the judgment of the Supreme Court in *Re E (Children) (FC)*,¹⁰ made the following observation pertinent to conditions to return in grave risk (Article 13(b)) cases:

There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true [however] there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

In the above sense, I interpret "protective measures" as including, but not being limited to, measures of protection under the 1996 Child Protection Convention. Accordingly, a protective measure may be an urgent order under Article 11 of the 1996 Child Protection Convention but could also include steps which do not involve orders such as payment of money (airfares or rent) before the child is returned or a commitment to a course of specialist treatment to be undertaken by the child after return.

As far as the imposition of conditions are concerned, it is recognised that:

- Conditions to return must be simple.
- Conditions should be complied with prior to the child's return and, absent further order of the court, the child should not be returned if the conditions are not met.
- We should be vigilant to ensure that the returning parent does not obtain conditions which cannot be met with the consequence that a return order will be frustrated. If a condition is impracticable or cannot be fulfilled, it should not be imposed. If the subject matter of the condition is considered to be imperative but cannot be achieved, whatever circumstance is sought to be addressed by the condition may give rise to one of the five exceptions to return.
- Conditions to return which are too onerous to meet must never be used as a back door means of defea-

ting an application for return. To do so is an unprincipled use of judicial discretion which will lead to uncertainty for the child as well as adults. It will preclude the child from reconnecting with the left behind parent and other elements in the home country. Accordingly, the court should satisfy itself that the conditions are feasible before making them or provide some means of review for the parties if conditions turn out not to be feasible. If conditions are sought to be varied, it will be necessary for the court to decide whether the condition was mechanical (and therefore able to be varied) or substantive (not able to be varied).

- Specifically, it is preferable to dispatch a child promptly after a return order has been made rather than to permit the parties, in the requested country, to quibble about matters which can be adjusted by the courts and authorities in the home country after the return. This would include payment of a return airfare for the abducting parent as well as the child, or the provision of a modest amount of money to cover immediate needs for accommodation and food on return. It also includes personal protection orders or domestic violence measures which can be imposed but then reviewed, on a testing of evidence in the home country, after the return.
- Conditions should not operate to put the returning parent in a more advantageous position than that parent enjoyed prior to the abduction unless that improvement is integral in addressing a perceived grave risk of harm or an intolerable situation which, if left unaltered, could defeat a return application.
- Very importantly, the conditions should not usurp the regular functions of the courts or authorities in the child's country of habitual residence. This is usually observed by making any conditions apply for a short time only.

I cannot recommend highly enough the benefits of specialised mediation in Hague matters. It will not delay or undermine the return proceedings. It will provide parents with an opportunity to consider the child's perspective and prepare for outcomes. Some Contracting States eschew mediation as inconsistent with 'pure Hague' principles. However, the Permanent Bureau of the Hague Conference supports, and has published a guide to, mediation and experienced States such as the United Kingdom, the Netherlands and Germany consider specialised Hague mediation to be entirely appropriate.

The court should make clear to each party that his or her primary position in a return case is not weakened by formulating contingency plans for what arrangements he or she would want if his or her primary position on the Hague return application fails and what conditions should be imposed. For instance, a requesting parent should consider what access he or she would seek going into the future if the return is refused and the respondent taking parent should consider how the return could be made easier for a

child notwithstanding that is not what the parent wants.

It is essential for the respondent taking parent or the child's lawyer to articulate the conditions he or she seeks and for the requesting parent to respond, in writing, early in the proceedings and prior to any mediation. Relevant evidence may then be adduced and tested by the parties in the running of the case. The formulation of conditions should not be left until after evidence is closed or a decision to return has been made.

International parental child abduction is a dynamic process which has an enormous impact on a child. It will usually be naïve for a judge to assume that the child can simply return to the life they had prior to being removed or retained from the country in which they belong. Well considered and enforceable conditions can afford the child much needed protection against the harmful effects of their wrongful removal or retention from the country of their habitual residence and their eventual return to that country under the 1980 Child Abduction Convention.

- 1 Chief Justice William Alstergren and I are designated to the International Hague Network of Judges for Australia. These views are my personal views and do not necessarily coincide with the views of other judges of the Family Court of Australia and nor do they represent how I would decide a case after hearing evidence and with the benefit of legal argument.
- 2 Cases in Western Australia are determined by the Family Court of Western Australia.
- 3 The Family Court of Australia is a superior court of record. The lower court is the Federal Circuit Court of Australia which is at district or county court level and determines approximately 85% of family law matters in Australia.
- 4 The number of commissioned judges may vary depending on when retiring judges are replaced.
- 5 Our apex court is the High Court of Australia to which a final right of appeal lies only with leave.
- 6 See *LK & Director-General, Department of Community Services* (2009) 237 CLR 582; *P v. Secretary for Justice* [2007] NZLR 40; *A v. A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60; *Re B (A Child)* [2016] UKSC 4.
- 7 See *Director-General, Department of Community Services & M & C & Child Representative* (1998) FLC 92-829
- 8 See *De L v. Director General Department of Community Services NSW* [1996] HCA 5; *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children to Appeal)* [2015] EWCA Civ 26; *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192.
- 9 See *DP v. Commonwealth Central Authority; JLM v. Director-General NZW Department of Community Services* (2001) 180 ALR 402; [2001] HCA 39; *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; *Re E (Children) (FC)* [2011] UKSC 27.
- 10 [2011] UKSC 27

**11. Conference of Hague Convention Network Judges.
Celebrating the 20th anniversary of the
International Hague Network of Judges.
(Miami, Florida, United States of America,
24-26 October 2018)
Conclusions and Recommendations**

From 24 to 26 October 2018, judges from Argentina, Australia, Bahamas, Belgium, Brazil, Canada, Cayman Islands, Colombia, Dominican Republic, Ecuador, El Salvador, Germany, Guatemala, Guyana, Japan, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Portugal, Romania, Singapore, South Africa, Spain, Switzerland, United Kingdom (England and Wales and Scotland), United States of America and Venezuela and experts from the Central Authority of the United States of America, Reunite, private practice, and the Permanent Bureau of the Hague Conference on Private International Law (HCCH), met at Florida International University, Miami, to discuss the International Hague Network of Judges ("IHNJ"), direct judicial communications ("DJC") in international family law matters and the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Child Abduction Convention) from a judicial perspective.

The discussions also touched upon other Hague Children's Conventions, *i.e.*, 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 Child Protection Convention") and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the "2007 Child Support Convention").

WHEREAS the meeting of the IHNJ recognises the extraordinary contribution of the late Madam Justice Robyn Moglove Diamond to the IHNJ as well as her tireless efforts in the service of international family justice.

The conference reached the following Conclusions and Recommendations:

The IHNJ and the use of DJC

1. The conference welcomes the growth of the IHNJ which now includes 133 judges from 84 States. Notably, in the Americas, every jurisdiction is now covered by the IHNJ, with the exception of Bolivia, Cuba, Haiti and Turks and Caicos.

2. The conference emphasises the proven value of the IHNJ and DJC in international child abduction cases.

3. The conference encourages all States which have not yet designated judges to the IHNJ, whether or not Parties to the 1980 Child Abduction Convention or to the 1996 Child Protection Convention, to do so forthwith.

4. The conference recognises the need for current members of the IHNJ and the Permanent Bureau of the Hague Conference to work together to encourage and bring about new designations to the IHNJ.

5. The conference encourages members of the IHNJ from States Parties to the 1980 Child Abduction Convention to partner with a judge from a State Party which has not yet designated a judge to the IHNJ (in particular, those with which they may have special ties) in order to work with the judge in the latter State to bring about a designation to the IHNJ.

6. The conference reiterates that judges designated to the IHNJ should be sitting judges with appropriate authority and experience in international family law matters.

7. The conference recognises the accomplishments of the Latin American and Caribbean Regional Office and the Asia Pacific Regional Office of the Permanent Bureau in facilitating the expansion of the IHNJ.

Overview of how the 1980 Child Abduction Convention is working globally and regionally (Topic 1)

8. Since the last meeting of the IHNJ, held from 11 to 13 November 2015, in Hong Kong (Special Administrative Region, China), the 1980 Child Abduction Convention has attracted six Contracting Parties (*i.e.*, Philippines (2016), Bolivia (2016), Pakistan (2017), Jamaica (2017), Tunisia (2017) and Cuba (2018)). In addition, since its last meeting, the IHNJ has welcomed 33 additional members and nine new Member States.

9. The conference noted the results of the 2015 Nigel Lowe and Victoria Stephens Statistical Survey which shows that applications are generally resolved more quickly, compared with the 2008 Survey. The average time taken to reach a decision of judicial return was 158 days (compared with 166 days in 2008) and a judicial refusal took an average of 245 days (compared with 286 days in 2008). For applications resulting in a voluntary return the average time taken was 108 days, compared with 121 days in 2008. As there is still a severe problem of delays, the conference recognises that improvements are still required (see C&Rs No 16-18 below).

Promoting direct judicial communications and sharing experiences to ascertain foreign law (Art. 14), make determinations of wrongful removal (Art. 15) and organise safe return of the child (Topic 2)

10. The conference acknowledges that the scope of DJC may be broad, and not necessarily restricted to the 1980 Child Abduction Convention.

11. Based on the experience of several Network Judges, the conference recognises the advantages of using DJC to ascertain foreign law in order to make swift determinations on the wrongful removal or retention, as well as for exploring the possible implementation of arrangements or protective measures that might be needed to secure the safe return of the child.

12. Where possible, in order to avoid delays in the procedure, the conference suggests to judges having recourse to Article 14 instead of Article 15 for a determination of whether the removal or retention was wrongful.

13. The conference emphasises the importance for members of the IHNJ to use their best efforts to swiftly respond to DJC requests. When the requested judge anticipates a delay in providing a response, he / she should at a minimum acknowledge receipt of the request and provide an indication as to when a response will be provided.

14. The conference recognises the potential for judicial education bodies and other bodies in every State to promote the use of DJC and to raise awareness and educate judges, practitioners and other system actors concerning the Hague Children's Conventions and the IHNJ, with a view to developing expertise and building mutual trust and confidence.

15. The conference recognises the benefit of:

- reporting case law on DJC for inclusion in INCADAT (the International Child Abduction Database < www.incadat.com >); and
- reporting experiences of DJC on the future specialised section of the HCCH website on the IHNJ and in *The Judges' Newsletter on International Child Protection*.

Avoiding delays: Revision of internal procedures applicable to child abduction cases, in administrative, judicial and enforcement phases (Topic 3)

16. The conference notes that several jurisdictions have developed special guidelines and / or procedures which provide for strict timeframes both at first instance and appeal levels, and which have allowed to shorten considerably the timeframes to decide 1980 Child Abduction Convention cases.

17. The conference encourages judges to review internal judicial procedures applicable to child abduction cases (including, where applicable, at the enforcement phases) in order to identify possible sources of delay and implement the adjustments needed to secure shorter timeframes consistent with Articles 2 and 11 of the 1980 Child Abduction Convention. In particular, judges should give consideration as to whether concentration of jurisdiction, if possible, will assist in resolving child abduction cases in their jurisdiction, and if so, promote it as appropriate.

18. The conference recognises the importance of being creative and flexible in order to facilitate access to the proceedings by parents such as being flexible when scheduling hearings and accepting the use of appropriate audio-video secure means of communication when a parent cannot appear in person before the court.

Co-operation between Hague Network Judges and between Hague Network Judges and Central Authorities – Sharing of experiences (Topic 4)

19. The conference welcomes the increasing co-operation within States between the member(s) of the IHNJ and the relevant Central Authorities resulting in the enhanced operation of the 1980 and 1996 Conventions.

20. The conference takes note that many members of the IHNJ have developed excellent working relationships with their Central Authorities. Some have regular meetings to discuss the operation of the Convention, trainings and implementation of good practices.

Mediating Hague Convention cases (Topic 5)

21. The conference welcomes the appropriate use of mediation in international child abduction cases. Guidance with respect to the appropriate use of mediation may be found in particular in the Guide to Good Practice on Mediation.

22. The conference notes that some jurisdictions have reported successful results in including mediation within the judicial procedure (court-based mediation). Parties are referred to mediation at the start of the proceedings in a way that does not generate delays to such proceedings. In such context, mediation also facilitates the preparation of parents for the outcomes of return proceedings.

23. Subject to limitations under domestic law, the conference encourages the use of modern means of technology to allow at distance mediation, if appropriate, where in-person mediation is not practicable.

Report on Professors Marilyn Freeman and Nicola Taylor's latest research project on "The Voice of the Child" – Volume XXII of *The Judges Newsletter* (Topic 6)

24. The conference welcomes the latest research project by Professors Marilyn Freeman and Nicola Taylor on the voice of the child in relation to Article 13(2) of the 1980 Child Abduction Convention and welcomes the possible expansion of the research project to cover the voice of the child in general under both the 1980 Child Abduction and the 1996 Child Protection Conventions including mediation under these Conventions.

25. The conference acknowledges that there exists across jurisdictions a wide range of approaches and methods to ascertain the views of the child. Some jurisdictions have developed guidelines to hear children.

26. The conference takes note that in some jurisdictions the voice of the child is considered evidence where it is not the case in other jurisdictions.

27. The conference further emphasises that the person hearing the child, whether a judge or other professional, in a Hague case should have received adequate training. Psychologists or other professionals hearing the child should receive training on the 1980 Child Abduction Convention.

Draft Guide to Good Practice on Article 13(1)(b) (Topic 7)

28. The conference welcomes the progress made on the development of a Draft Guide to Good Practice on Article 13(1)(b).

Practical strategies for implementing the Convention and enforcing judicial orders (Topic 8)

29. The conference acknowledges the importance for return orders to be crafted such that they may be enforced quickly and effectively. In particular, return orders should, in so far as possible and appropriate, include details with respect to the persons and steps involved to help facilitate the safe return of the child to his / her country of habitual residence. Central Authorities in both States should also coordinate as appropriate to help facilitate the safe return of the child.

30. As appropriate, the conference encourages judges to re-establish contact between the left-behind parent and the child as soon as possible in the proceedings.

31. The conference takes note that many members of the IHNJ have been instrumental in implementing changes of practices or procedures in their jurisdictions, with a view to securing an effective operation of the 1980 Child Abduc-

tion Convention, and encourages all Hague Network Judges to consider the possible need for adjustments, in consultation with their Central Authority, as appropriate, in their respective jurisdictions.

The role of the Hague Network Judge within the framework of the 1996 Convention, and its interplay with the 1980 Child Abduction Convention in dealing with return, relocation and access cases (including urgent measures of protection and advance recognition) (Topic 9)

32. The conference notes the many benefits and use of the 1996 Child Protection Convention in relation to the use of the 1980 Child Abduction Convention, including the primary role played by the authorities of the State of habitual residence of the child, rules on jurisdiction, applicable law, recognition and enforcement and co-operation with respect to the organisation and enforcement of rights of custody, access / contact, urgent measures of protection, possible post-return assistance and relocation.

33. When taking measures of protection in accordance with the 1996 Child Protection Convention in a child abduction case (for example, to facilitate interim access or ensure safe return), judges are invited, preferably through Central Authorities or members of the IHNJ by way of DJC to obtain information on available measures of protection in the other State with a view to ensuring the effective implementation of such measures.

The Judges Newsletter and development of IT communications tools by the Permanent Bureau (Topic 10)

34. The conference highlights the usefulness of *The Judges' Newsletter*, in particular when published with a thematic approach. Taking into account Conclusions and Recommendations Nos 71 and 72 of the Seventh Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, the conference supports the continued publication of *The Judges' Newsletter*, subject to available resources.

35. The conference recommends that the next volume of *The Judges' Newsletter* (Vol. XXIII) be a Special Issue on the 20th Anniversary of the IHNJ and *The Judges' Newsletter*.

36. The conference invites judges to share with the Permanent Bureau any special topic relevant to international child protection that they would like to see addressed in a future volume of *The Judges' Newsletter*.

37. The conference welcomes the future development of a secured IHNJ Platform of the HCCH website, funded by a voluntary contribution of the Federal Ministry of Justice and Consumer Protection of Germany.

38. The conference invites interested judges who would like to be involved in the development of the secured IHNJ Platform to reach out to the Permanent Bureau.

39. The conference recommends that members of the IHNJ post on the future secured IHNJ Platform of the HCCH website information relevant to international family law, such as upcoming significant international and regional conferences on international family law and the subsequent "Conclusions and Recommendations" and other materials. As much as possible, these resources should be shared with Central Authorities to ensure that the State Parties to the 1980 Child Abduction and 1996 Child Protection Conventions are aware of the latest developments and events.

Possible criminal prosecution of abducting parent and facilitators; effects on child abduction cases and safe return (Topic 11)

40. The conference noted Conclusion and Recommendation No 1.8.4 of the 2006 Special Commission meeting to review the operation of the 1980 and 1996 Hague Conventions:

"The Special Commission reaffirms Recommendation 5.2 of the 2001 meeting of the Special Commission: 'The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges.' The Special Commission underlines that Central Authorities should inform left-behind parents of the implications of instituting criminal proceedings including their possible adverse effects on achieving the return of the child. In cases of voluntary return of the child to the country of habitual residence, Central Authorities should co-operate, in so far as national law allows, to cause all charges against the parent to be abandoned. The Central Authorities should also inform the left-behind parent of the alternative means available to resolve the dispute amicably."

Future meetings of members of the IHNJ

41. The conference acknowledges the value of this meeting and its successful outcome and notes the desirability of convening meetings of members of the IHNJ and officials from Central Authorities.

Acknowledgements

42. The conference expresses its sincere gratitude to:

- Florida International University (FIU), the Florida Conference of Circuit Judges, The Mertz Law Group, Kluger Kaplan Silverman Katzen & Levine, P.L., Alan and Jayusia Bernstein, Deborah S. Chames, Esq., Miles & Stockbridge, Alan and Vivian Dimond, Peter Messitte, and Judith and Julian Kreeger for funding this conference;
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- and
- Judith Kreeger and the four members of the IHNJ for the United States of America for organising this conference.

News from the Permanent Bureau

1. Change of Portfolio Responsibility

The Permanent Bureau announces that, as of November 2018, First Secretary Dr Gérardine Goh Escolar takes over primary responsibility for, among others, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*.

First Secretary Philippe Lortie retains primary responsibility over the *Convention of 13 January 2000 on the International Protection of Adults*, the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, as well as the International Hague Network of Judges, including direct judicial communications, and the Judges' Newsletter.

2. Ongoing development of a Secure Platform for the IHNJ

Thanks to a voluntary contribution of the Federal Ministry of Justice and Consumer Protection of Germany, the Permanent Bureau has been able to follow up on Conclusion and Recommendation No 74 of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction and 1996 Child Protection Conventions concerning the establishment of a Secure Platform to allow protected dialogue and communication among the members of the International Hague Network of Judges (IHNJ).

The development of a dedicated Secure Platform fulfils a longstanding request of the IHNJ. As early as 2006, on the occasion of the Fifth Meeting of the Special Commission to review the operation of the 1980 Child Abduction and the 1996 Child Protection Conventions, the Permanent Bureau was invited to explore the possibility of establishing a secure system of communication for the members of the IHNJ (see Conclusion and Recommendation No 1.6.7(f)). Additionally, at the 2015 IHNJ Global meeting in Hong Kong, the IHNJ welcomed, in Conclusion and Recommendation No 24, the development of a secure electronic communication tool by the Permanent Bureau.

The project comprises two phases, aiming respectively at developing a "public" and a "private" part of the Secure Platform. The creation of the "public" section, which is currently being undertaken, takes a "forum-like" approach, allowing only members of the IHNJ to post general

information relevant to the work of the Network, discuss on specific topics, subscribe to threads of discussion and receive notifications. It will also feature a directory with the names, contact details and a photograph of the members of the Network. Access to the Secure Platform will be secured with an individual login and a password. The Platform is "public" in the sense that anything posted there is accessible to all members of the IHNJ but to them only.

The second phase, the development of the "private" section, will allow secured bilateral communications to take place between members to allow them to discuss confidential information, e.g., on a specific international child abduction case. The content of a bilateral communication will be accessible only to the two judges concerned with this communication. The development of this phase of the project is still subject to additional funding being found.