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Welcome to Volume 1 issue 3 of the Centre's new online journal.

This is the second of three issues which we have now planned to collect the key papers from our 2010 Conference on the three linked topics of International Child Abduction, Forced Marriage and Relocation. For this issue we have chosen to collate most of the International Child Abduction papers from the conference and to present them as a specialised collection of the latest thought on this difficult area of Family Law. Lord Justice Thorpe has also contributed to this theme with his two articles for us on Relocation in issues 1 and 2 of the present Volume of the Journal, as of course Relocation and Child Abduction are often intimately connected with, and indeed often spring directly from the race, nationality and cultural issues which frequently assume a suddenly enhanced profile when a child's parents' relationship breaks up. Lord Justice Thorpe also gave us considerable help and support when it came to drafting the published Conclusions of the breakout discussion groups at the conference which may be found in full on our website, and their themes also here in the articles written by some of the experts who contributed to those discussions..

Our next issue, Number 4 in the next (2011) Volume 2, will take a similar approach to the Forced Marriage strand of our 2010 conference.

Meanwhile we continue with our mission to bring together the perspectives of both academics and practitioners in all sections of the profession, and remain delighted to consider articles for future issues from interdisciplinery specialist experts, researchers and practitioners from around the world who can contribute to our mission to gather together the available corpus of international work on contemporary specialist topics and are now seeking articles for the journal's second issue of 2011, to be published in the summer of 2011, which will focus on our two 2011 seminars (the first of which is on the currently hot topic of Marital Agreements and foreshadows our 2012 conference which will continue our move on from Child Law to Family Property and Finance and on our first international summer school Submission guidance for authors is to be found at the end of the present issue, after the last article.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

Keeping the 1980 Hague Child Abduction Convention up to Speed. Is it time for a Protocol?

Professor William Duncan*

Introduction

I would like to congratulate the Centre for Family Law and Practice on its establishment and wish it every success for the future. Having followed and admired the work of Marilyn Freeman for many years, I know that the Centre is built on firm foundations. I would also like to thank Lord Justice Thorpe for the invitation to present the International Family Law lecture for 2010.

This paper addresses the challenges which confront the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Child Abduction Convention", or simply "the Convention") as it approaches its thirtieth birthday. It begins by considering a number of areas in which improvements to the Convention may seem to be needed and continues by discussing some techniques for bringing about such improvements. Finally, it considers the possible role that a Protocol may have in this process of renewal.

The nature of the 1980 Hague Child Abduction Convention as a legal instrument

As a legal instrument the 1980 Hague Child Abduction Convention combines clarity in its objectives with flexibility in its language. The Convention is not drafted in the same manner as a statute in a common law system. It contains a strong and simple core – the return procedure – and this has been one of its strengths. But beyond that core the provisions of the Convention are rather flexible. Indeed, its language is not always precise and some of its key concepts lack strict definitions; for example, terms such as "rights of custody"[1] do not have complete definitions in the Convention, and terms such as "habitual residence" have no definition.

This open texture is necessary for an instrument which has to operate in a very wide variety of legal systems and traditions. This flexibility is also needed to enable the Convention to be adapted to meet the changing circumstances in which it must operate. The Hague Children's Conventions have all had to be drafted for the long-term. One of the reasons for this is that the amendment of Hague Conventions is quite a complicated process, as we will see when the possibility of a Protocol is discussed.

One of the consequences of this sometimes open texture is the need for those who interpret and operate the Convention, in particular judges and others responsible for implementation of the Convention at the national level, to approach the Convention in a creative and collegiate manner. This means sometimes being prepared to fill the gaps in a way which respects the basic objectives and purposes of the Convention, and also in a way which recognises the international nature of the instrument and the need for consistency in interpretation and practice under the Convention. The Convention has not fared so well in those jurisdictions where judges and legislators have adopted a static approach and have not taken part in the international endeavours to help the Convention enter the modern era.

According to the Contracting States, the Convention still, after a quarter of a century, broadly meets the purposes for which it was established and serves the needs of children and their families. This would not be the case had the Convention been drafted in a more rigid manner. These considerations are relevant as one considers the issue of a possible Protocol. Like the Convention itself, any Protocol will need to be drafted in language which makes it adaptable to different legal systems, as well as to continuing changes in the environment in which the Protocol operates.

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[1] See Article 5.

The challenges facing the 1980 Hague Child Abduction Convention

It is useful to set out some of the challenges facing the Convention in 2010 before turning to consider whether a Protocol may be a suitable mechanism by which to address those issues.

In my view, the key challenges facing the 1980 Hague Child Abduction Convention today can be summarised as follows:

1. How to ensure that Convention procedures operate expeditiously and that enforcement is both sensitive and effective.
2. How to ensure, particularly in cases where domestic violence is alleged, that Article 13 is applied correctly, and that the return of the child is effected in conditions of safety, both for the child and an accompanying carer.
3. How to maintain international consistency in the interpretation of key Convention concepts.
4. How to ensure that co-operation and communication between Central Authorities is smooth, responsive and swift.
5. How to address issues of effective access to procedures, (a) for the abducting parent, as well as for the left-behind parent, and (b) in the country to which the child is returned, as well as the country to which the child is taken or in which the child is retained.
6. How to bring about the more universal adoption of the Convention and to ensure its effective operation between sometimes very different legal cultures.
7. How to encourage awareness of, and the application of, preventive strategies.
8. How to improve the supports for cross-frontier rights of contact between parents and children.
9. How to ensure that judges in the 82 Contracting States are adequately prepared to deal with Convention cases, and that, through networking and direct judicial communications, they have the opportunities to develop the necessary mutual confidence and trust, as well as to engage in direct co-operation in resolving some individual cases.
10. Lastly, but perhaps most important of all, how to build a culture of negotiation and agreement around issues of relocation and contact and how to develop the use of mediation and similar dispute resolution approaches where abductions have occurred.

How to address the challenges

It is immediately obvious that not all of these challenges are matters which can, or should, be addressed by the use of a Protocol. For example, some of them require improvements in the existing co-operation structures at the administrative and judicial levels. Moreover, the challenge relating to the more universal adoption of the Convention requires the continued promotion of the Convention and further work to increase mutual understanding and trust between different legal systems. Indeed, care should be taken that any work towards a Protocol does not send out negative signals to States considering ratification or accession or provide an occasion for States to delay coming on board the Convention.

The challenge as regards consistent interpretation is of particular importance. A Protocol could be useful in this regard but it would undoubtedly be a challenge to achieve consensus on a definition of core concepts such as "rights of custody" or "habitual residence". Further, there is something to be said for the view that, as the recent decision of the U.S. Supreme Court in *Abbott v. Abbott* 130 S. Ct. 1983 (2010) and similar cases might suggest, judges themselves, with the assistance of recommendations of Special Commission meetings and tools such as INCADAT, are themselves addressing the issue of international consistency in an often effective manner.

Some of the challenges may be at least partially addressed by the adoption of existing instruments. The obvious example is the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which in a number of respects strengthens and supplements the provisions of the 1980 Hague Child Abduction Convention, especially in respect of its objective to ensure that rights of access under the law of one Contracting State are effectively respected in other Contracting States.[2]

In some cases, non-binding recommendations, such as

[2] See Article 1 b) of the 1980 Hague Child Abduction Convention.

those of Special Commission meetings on the operation of the 1980 Hague Child Abduction Convention or those resulting from judicial seminars have played their part.

In other cases, the Guide to Good Practice under the 1980 Hague Child Abduction Convention has proved helpful both to States Parties to the Convention and to States considering ratification or accession. The Guide to Good Practice under the 1980 Hague Child Abduction Convention now consists of four parts:

- Guide to Good Practice: Part I - Central Authority Practice;
- Guide to Good Practice: Part II - Implementing Measures;
- Guide to Good Practice: Part III - Preventive Measures;
- Guide to Good Practice: Part IV – Enforcement.

This last Guide on the subject of the enforcement of return orders was published in October 2010. Part V of the Guide to Good Practice on mediation in the context of Convention proceedings is currently being worked on and a draft version of this Guide will be considered at the Special Commission meeting in 2011. Further, the General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children, published in 2008, and concerning the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, sets down important guidance for international contact cases.[3]

One of the factors which complicate the question of whether binding rules are needed or whether non-binding recommendations or principles of good practice may suffice in the different level of flexibility allowed to judges in different jurisdictions. For example, by and large judges in the common law tradition have considerable flexibility to develop novel approaches to new challenges as they arise in abduction cases. One example has been the use made of "undertakings" as a technique to help secure the safe return of a child, and, where necessary, the accompanying parent. Another example is the way in which common law judges have espoused direct judicial communications in international child abduction cases. If on the other hand, the judicial ethos is opposed to innovation except where there exists an explicit authority, it is less likely that non-binding recommendations will have effect.

It is important not to exaggerate this distinction. The distinction between flexible and rigid systems is not a simple one, and there are some areas in which a flexible approach has been almost universal. The best example is the way in which legal systems in different parts of the world are accommodating themselves to the need to promote agreed solutions, and in particular to incorporate mediation into their procedures. However, what is clear is that the adoption of binding rules, through a Protocol, may be particularly useful for those legal systems in which judicial innovation is more difficult.

Where does the Hague Conference stand on the issue of a Protocol?

The issue of a possible Protocol to the 1980 Hague Child Abduction Convention was first mooted at the Hague Conference on Private International Law in the context of discussions concerning transfrontier access / contact. In May 2000, in response to a proposal by the delegations of Australia, Spain, the United Kingdom and the United States of America[4] , the Special Commission on General Affairs and Policy of the Conference[5] asked the Permanent Bureau to prepare a report on the desirability and usefulness of a Protocol which might improve Article 21 of the Convention.[6] In response to this request, in July 2002, the Report on Transfrontier Access / Contact was published.[7] The Special Commission of October 2002 decided that it would be premature to

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3 For a more detailed discussion by the author of the different means available to adapt the Convention to changing circumstances, see, "The Maintenance of a Hague Convention. Adopting to Change", in *New Instruments of Private International Law. Liber Fausto Pocal*, ed. by G. Venturini and S. Bariatti (2009), pp. 291-308.

4 Working Document No 3, Proposal submitted by the delegations of Australia, Spain, the United Kingdom and the United States of America at the Special Commission on General Affairs and Policy of the conference (8-12 May 2000).

5 Special Commission on general affairs and policy of the Conference (8-12 May 2000).

6 The Special Commission on General Affairs and Policy of the Hague Conference on Private International Law (8-12 May 2000) agreed to request the Permanent Bureau to: "prepare by the Nineteenth Diplomatic Session of the Hague Conference a report on the desirability and potential usefulness of a protocol to the 1980 Hague Convention…that would provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative to return requests."

7 Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Final Report, drawn up by William Duncan, Deputy Secretary General (Preliminary Document No 5 of July 2002 for the attention of the Special Commission of September/October 2002).

begin work on a Protocol, but stated that work should continue on the development of a guide to good practice on the issue of transfrontier contact / access in the context of the 1980 Convention.[8]

At the 2006 Special Commission on the 1980 and 1996 Hague Conventions,[9] Switzerland put forward a more general proposal for a Protocol. This proposal suggested that a Protocol might contain provisions:

- Determining in detail the procedure and measures likely to secure the voluntary return of the child within the meaning of Article 10 (in association with Art. 7, para. c));
- Formulating in detail the procedure and measures to secure the safe return of the child (as per Art. 7, para. h)) and the arrangements for securing rights of access (Art. 21);
- Creating supplementary rules allowing the authorities of the requested State to obtain information on custody rights, on the relationship between the child and its parents and on the well being of the child once returned to his country of habitual residence;
- Reducing the period of one year set out in Article 12; and
- Lastly, amending Article 13(1) b) so as to clarify the relationship between the principle of returning the abducted child and the interests of the child.[10]

Experts present at the Special Commission meeting were divided on the proposal, and whilst the potential value of a protocol was recognised by the Special Commission, it was determined not to be an immediate priority.[11]

After reserving the feasibility of a Protocol for future consideration in 2008, the Council on General Affairs and Policy of the Hague Conference, in April 2009:

> "authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a protocol to the 1980 Child Abduction Convention containing auxiliary rules to improve the operation of the Convention."[12]

The Permanent Bureau was requested to prepare a report on these consultations to be discussed by the Special Commission at its next meeting in 2011.

Further to this mandate, the Permanent Bureau commenced preliminary consultations and, following the authorisation of the Council in April 2010, began work on a questionnaire on the issue of the feasibility and desirability of a Protocol.[13] This questionnaire will be sent to all States Parties to the 1980 Hague Child Abduction Convention in the coming months and, along with the responses to the preliminary consultation, will provide the basis for the report of the Permanent Bureau, which will be presented to the Special Commission in 2011.

What are the potential areas for inclusion in a Protocol?

As discussed above, not all of the challenges facing the Convention today are matters which can be resolved by a Protocol to the Convention. However, among the candidates for inclusion in a Protocol are:

- the provision of a legal basis for direct judicial communications;

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8 Report and Conclusions of the Special Commission concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (27 September – 1 October 2002), drawn up by the Permanent Bureau – see conclusion 2.

9 Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006).

10 See paragraph 251 et seq, of the Report of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006).

11 See Recommendation No 1.8.3 of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006). The Swiss proposal was reiterated in the Hague Conference's Council on General Affairs and Policy in 2006, 2007, 2008 and 2009.

12 Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference of 31 March – 2 April 2009.

13 Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference of 7 – 9 April 2010.

- provisions which facilitate the use of mediation;
- provisions which support and control the use of protective orders to enable the safe return of the child;
- provisions which further define and strengthen the role of Central Authorities in cross-frontier contact cases;
- more explicit provisions concerning swift procedures in Convention proceedings, at first instance, on appeal and at the enforcement stage;
- a provision concerning the right of the child to be heard;
- a provision concerning relocation;
- provisions on enforcement.

It should be emphasised that, at this point and as quoted above, the Membership of the Hague Conference has expressed an interest only in a Protocol which will be auxiliary to the Convention – i.e. one which will supplement, not modify, the Convention.

The process of negotiating and then implementing a Protocol will take time. The negotiations and the adoption of a Protocol will involve all Contracting States and will have to be consensus-based. Once the text of a Protocol has been agreed it will be for each Contracting State to decide individually whether to ratify it. If the process is to reach a successful outcome – i.e. an agreed text which is widely and quickly implemented – careful thought needs to be given, in respect of each possible element, as to whether consensus is achievable.

What about a more radical overhaul?

These words will not have brought much comfort to those who favour a more radical overhaul of the Convention. This applies particularly to those who would like to see changes in relation to Article 13 with the introduction of new defences or the remoulding of those that exist.

However, at this stage, it appears that there is not much appetite among the Member States of the Hague Conference for such an overhaul. It would therefore be extremely difficult to achieve consensus on the text of any such amending Protocol and, even if a text were agreed, it would most likely lead to a 'two-track Convention' (with certain States ratifying or acceding to the amending Protocol, while other States decline to do so).

Conclusion

The challenges surrounding the negotiation and implementation of a Protocol require us to redouble our efforts to make the best use of the instruments that already exist. These efforts may include better use of the Guides to Good Practice, the continued development of programmes of technical assistance and training, and the maintenance and improvement of Convention "tools" such as INCADAT, iChild, INCASTAT and the Judges' Newsletter. There is also the task of persuading more States to join the 1980 Hague Child Abduction Convention and of convincing States which are Parties to the 1980 Hague Child Abduction Convention that the 1996 Hague Child Protection Convention complements and strengthens the 1980 Convention in important ways. It is also time to consider the adequacy of the current mechanisms for the monitoring and review of the 1980 Hague Child Abduction Convention, including in this respect, the role of the Permanent Bureau.

If a Protocol is adopted, it too will need to have some flexibility to make it adaptable to different legal systems and to changing circumstances. While there are persuasive arguments in favour of a Protocol to supplement the 1980 Hague Child Abduction Convention, it will not be a panacea and will not dispense with the need for continued action on many fronts – judicial, administrative and academic – to ensure that the Convention fulfils its objectives of protecting children from the harmful effects of abduction.

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Habitual residence under the Hague Child Abduction Convention in Australia: "coach and four" or chaise?

The Hon. John Faulks*[1]

Introduction

In 1989, Butler-Sloss LJ memorably expressed the opinion[2] that permitting an abducting parent to create a psychological risk to a child and then relying on that "grave risk" to refuse returning the child to the country of habitual residence would drive a "coach and four" through the Hague convention on the Civil Aspects of International Child Abduction ("the Convention").

In 2009, the High Court of Australia[3] ("the High Court") upheld an appeal by a mother against orders returning her four children to Israel. The basis for that decision was that the children were not habitually resident in Israel at the time of their retention in Australia. The High Court preferred recent New Zealand authority[4] to that of the courts of Australia and the United Kingdom in asserting that habitual residence is to be ascertained through a broad factual inquiry, rather than by reference to the settled purpose and intention of the parents.

It has been said that the easier it is for parents to change a child's habitual residence, the more likely they are to try it. This is counter to the primary objective of the Convention to prevent international parental child abduction. In adopting a test that arguably places greater emphasis on children's connexion to the place they have been removed to or retained in, has the High Court effectively driven a "coach and four" through the Convention? Or is the import of the decision more in the form of a chaise: light, ductile and relatively inconsequential?

Opinion is divided[5]. But it seems possible that the adoption of a broad factual inquiry test, where parental intention is still a factor, may have the potential further to protract what were intended to be summary proceedings, as well as to increase the likelihood of applications to adduce fresh evidence being made on appeal. Arguably, therefore, the emphasis placed by the High Court on a broad factual inquiry may militate against the objective of courts moving expeditiously and promptly when the return of abducted children is sought.

Background

Australia has been a signatory to the Convention since 1986[6]. The Honourable Michael Kirby, former Justice of the High Court, recently described the objects of that Convention in the following terms:

> The Child Abduction Convention aims to restore the status quo ante. This approach is founded on the principle that abduction, in itself, is normally disruptive and upsetting to the child who is subject to it; frequently puts the non-abducting parent at a great physical, litigious and emotional disadvantage; and, unless quickly repaired, tends to reward abducting parents, confirming their action in taking the law into their own hands.[7]

To give effect to the treaty obligations created by the Convention in Australia, s 111B was inserted into the Family Law Act 1975 (Cth). This provided for the making of regulations "to enable the performance of the obligations of Australia [and] to obtain for Australia any advantage or benefit under [the Convention]".

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1 I gratefully acknowledge the invaluable assistance of Kristen Murray, Senior Legal Research Adviser to Chief Justice Bryant, Family Court of Australia, in the preparation of this paper.

2 *Re C (A Minor)(Abduction)* [1989] 2 All ER 465, [1989] 1 FLR 403 at 410D-F

3 *LK v Director General, Department of Community Services* (2009) 237 CLR 582 (per French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

4 *SK v KP* [2005] 3 NZLR 590; *P v Secretary for Justice* [2007] 1 NZLR 40.

5 See generally: M. Otlowski, "LK v Director-General, Department of Community Services" Casenote, (2009) 14 CFL 103; and R. Chisholm, "The High Court Rules on Habitual Residence: LK v Director-General, Department of Community Services" (2009) AJFL 71.

6 Australia acceded to the Convention on 29 October 1986.

7 The Hon. Michael Kirby AC CMG, "Children Caught in Conflict – the Child Abduction Convention and Australia" (2010) 24 *International Journal of Law, Policy and the Family* 95.

The Family Law (Child Abduction Convention) Regulations 1986 (Cth) state that they are to be construed having regard to the principles and objections mentioned in the preamble to, and Article 1 of, the Convention and recognising "that the appropriate forum for resolving disputes between parents relating to a child's care, welfare and development is ordinarily the child's country of habitual residence". The text of the Convention appears as Schedule 1 to the Regulations. Regulation 16(1A) states, *inter alia*, that a child's removal to or retention in Australia is wrongful if the child "habitually resided" in a convention country immediately before the child's removal to, or retention in Australia. "Habitual residence" is deliberately not defined in the Convention or Regulations[8].

Since the regulations were enacted, there have been five occasions upon which the High Court has granted special leave to appeal from a decision of the Full Court of the Family Court. *LK* is the first time that the High Court has given specific and detailed consideration to the concept of habitual residence.

The case involved an alleged wrongful retention in Australia, as opposed to a wrongful removal[9]. The mother was an Australian citizen who visited Israel for a holiday in 1995. She met the father, an Israeli citizen, and determined to live in Israel. The parties were married in 1997 and had four children. By mid-2005 the marriage was in serious trouble and in September 2005 the father left the matrimonial home. In May 2006 the mother left Israel with the children with the consent of the father. Prior to and following her departure from Israel the mother undertook various activities including renting and furnishing a home in Australia, enrolling those children of school age in school, ensuring their participation in sporting and musical activities, and registering the children as Australian citizens.

The parties differed on the critical issue of the conditions under which the mother left Israel with the children. The mother's case was that she left Israel on the understanding that if the father advised her that the marriage was over, she would settle permanently in Australia with the children. The father's case was that the mother left for a fixed period only and it had never been the parties' intention that she and the children live permanently in Australia. Thus, his consent to the mother's removing the children was conditional upon their return to Israel at a later date. It was agreed that the mother held return tickets to Israel for August 2006 and that in July 2006, two months after their arrival in Australia, the father informed the mother that he wanted a divorce and the children returned to Israel. The mother did not return to Israel and the Central Authority commenced proceedings for their return on the father's behalf. At trial and upon appeal, the dispositive issue was whether or not the children were habitually resident in Israel at the time they were retained in Australia.

The trial judge, Kay J, in what his Honour described as a "difficult case", found that the children were habitually resident in Israel and made an order for their return. An appeal against this decision to the Full Court of the Family Court was dismissed[10]. The mother then sought special leave to appeal to the High Court and, in a unanimous judgment, the High Court allowed the mother's appeal and dismissed the order for return. The High Court found that the children had ceased to be habitually resident in Israel as early as July 2006, when the father asked that they be returned.

The appeal before the Full Court and the reasoning of the High Court

For what reason did the High Court allow the appeal, in what is one of only five decisions of the High Court on the Convention?[11]

The High Court accepted the arguments advanced on behalf of the mother that the Full Court had erred in not allowing the mother's appeal, the gravamen of which was that the trial judge erred in failing to conduct a broad factual inquiry and placed too much emphasis on the 'settled intention' of the parties. Before the Full Court the mother submitted that the applicable principles governing determination of the question of habitual residence were set out in the decision of the New Zealand Court of Appeal in *SK v KP*[12] and confirmed by all five judges of the New Zealand Court of Appeal in *Punter v Secretary for Justice*[13]. The following statement by the Court of Appeal in Punter was advanced as being particularly apposite (at paragraph 88):

8 E. Perez-Vera, *Explanatory Report,* p. 441.

9 See *Director-General, Department of Community Services Kilah (No. 3)* [2007] FamCA 1099 (29 August 2007).

10 *Kilah &Director-General, Department of Community Services* [2008] FamCAFC 81 (per Bryant CJ, Coleman and Thackray JJ)

11 It is noteworthy that in each of the five decisions of the High Court of Australia, return of the child or children has been refused.

12 *SK v KP* [2005] 3 NZLR 590.

13 *Punter v Secretary for Justice* [2007] 1 NZRL 40.

> In *SK & KP*, the inquiry into habitual residence was held, at para [80], to be a broad factual enquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to that state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive.

The Full Court rejected the mother's argument that it was incumbent upon the trial judge to undertake a broad factual inquiry, including but not limited to the children's schooling, their citizenship status, their possession of Australian passports and the father's attempt to sell the family motor car prior to the mother's departure to Australia. The Full Court stated that the "conduct of a broad factual inquiry to consider 'the objective connection the children have with the different states' on the question of habitual residence is not part of the law of Australia" (at para 73). In reliance on what the Full Court described as the "English approach", the Court had found that a "settled purpose" is both a necessary and integral part of a finding of habitual residence. The Full Court declined the invitation from counsel for the mother to depart from this authority in favour of undertaking a "broad factual inquiry", noting, however, that it was unnecessary for the Court to resolve what it described as "the apparently significant departure" of the New Zealand Court of Appeal from previous Australian and English authority. In so doing, the Full Court noted the observations of Glazebrook J in *SK & KP* (*supra*) that the differences may not in fact be as great as they first appeared.

The High Court in effect held that the Full Court was wrong. The High Court found that there was no disconformity in the authorities. As properly understood the authorities required a "search … for the connection between the child and the particular state" and a settled intention "that the children live in a particular place with a sufficient degree of continuity as to be properly described as settled."

The distinction between the concepts of "domicile" and "habitual residence" were not raised before the trial judge or the Full Court. Nevertheless, they were agitated on appeal before the High Court. It is there that the High Court commenced its analysis[14]. The High Court correctly observed that the term "habitual residence" has long been associated with the work of the Hague Conference on Private International Law and that the phrase "habitual residence" has been used in the text of numerous conventions. The High Court repeatedly observed, as have many commentators before it, that the term "habitual residence" is deliberately not defined because it is considered to be a question of fact and in that respect is different to the concept of domicile. The High Court found that, "most importantly" for the purpose of determining the dispute before it, the use of the term "habitual residence" in preference to that of domicile, involved "discarding the approach of the English law of domicile", in which the subjective intention to reside permanently or indefinitely in a place was given decisive importance. For the High Court, the term habitual residence "identifies the center of a person's personal and family life as disclosed by the facts of the individual activities."[15]

The High Court acknowledged that, particularly with young children, it can be very important to examine where it is that the child's parents live, on the basis that it is often not sensible to speak of the habitual residence of a young child being distinct from the person on whom the child is responsible for its care. Nevertheless, given its emphasis on the factually based nature of the inquiry, the Court cautioned against elevating the observation that a child looks to another to provide its care to a legal principle like the law of dependent domicile of a married woman.

The High Court then turned to consider the role of purpose and intention in undertaking an inquiry into a child's habitual residence. The High Court did not seek to discount the role of parental intent as such. The Court acknowledged that intention can be "very important" in answering the question of where a person resides. However, the High Court emphasised that intention does not have "controlling weight" or decisive effect, and that an inquiry into habitual residence is not necessarily confined to physical presence and intention. The High Court's view was that, as habitual residence is a question to be decided in a very wide range of circumstances, it does

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[14] For further discussion of the distinction between "habitual residence" and "domicile" see, for example, G. Zohar, 'Habitual Residence: An Alternative to the Common Law Concept of Domicile?' (2009) 9 *Whittier Journal of Child and Family Advocacy* 169.

[15] *LK v Director General, Department of Community Services* (2009) 237 CLR 582, 593.

not require identification of what the Court described as a "closed" set of criteria, or the attribution of particular weight to individual factors like intent.

The principal discontinuity in the authorities, as identified by the High Court, was that as between Waite J in *Re B (Minors) (Abduction) No. 2*[16] and Rattee J in *A & A (Child Abduction)*.[17] In the former case, Waite J used the language of "settled purpose" and said that all the law requires for "settled purpose" is that the parents' intention have a "sufficient degree of continuity about them to be properly described as settled." In the latter, Rattee J said that reference to "settled intention" should be understood as "a settled intention to take up long-term residence in the country concerned." The High Court disapproved of Rattee J's formulation as attempting to import the common law of domicile in requiring an intention to live in a place permanently or indefinitely. That, in the High Court's view, was not what a habitual residence inquiry is directed to. Their comments on this point are somewhat oblique but the High Court appears to be critical of the Full Court to the extent that the Full Court could be perceived as favouring Rattee J's interpretation.

Applying what it found to be the law to the facts in the case, the High Court found that the absence of an agreed and singular purpose to settle in Australia at the time the mother departed Israel with the children was not to be treated as determinative in deciding the question of habitual residence. The Court found that, where (as in this case) the mother's intentions were expressed conditionally and where the mother set about establishing a new and permanent home for the children in Australia, which she was found to have done prior to and following departure, the trial judge should have found that the children were not habitually resident in Israel in July 2006; the time at which the father asked that the children be returned. The decisive factor, in the High Court's view, was that "the children left Israel with both parents agreed that unless there were a reconciliation they would stay in Australia, and their mother, both before and after departure, set about effecting that shared intention."

Observations about the High Court's decision

First, it needs to be acknowledged that the issue of domicile versus habitual residence was not in issue at first instance or on appeal. Thus, neither the trial judge nor the Full Court had the opportunity to make pronouncements on the distinction between the two in so far as they pertain to proceedings under the Convention Regulations.

Secondly, the Full Court's reliance on the well established principle that courts should be slow to infer a change in habitual residence in the absence of shared parental attempt to bring it about is an entirely orthodox statement of the law. As McGrath J in *SK v PK* observed, to hold otherwise creates disincentives to parents consenting to children travelling to stay with family members in other states and provides an incentive for parents to take precipitate actions where stays are extended or sought to be extended.

Thirdly, it is difficult to disagree with the High Court that the Full Court placed considerable emphasis on the settled intent of the parties and rejected a broad factual inquiry test as not being part of the law of Australia. That does not mean that the Full Court was necessarily seeking to apply a test comparable to that of domicile. The Full Court quoted, presumably favourably (or at least not disapprovingly) from earlier Full Court decisions in which it had variously been held that:

- Habitual residence is not to be treated as a term of art but is to be understood according to its ordinary meaning;
- The question of habitual residence is a question of fact, to be determined by reference to all the circumstances of the case;
- Habitual residence can be for a short or long duration;
- Habitual residence can be lost in one day but acquiring habitual residence requires a settled intention and an "appreciable time".[18]

Fourthly, the trial judge's decision was not arrived at solely on the basis of parental intention. Amongst the evidence considered by Kay J at the trial was the fact that

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16 *Re B (Minors) (Abduction) No. 2* [1993] 1 FLR 993.

17 *A & A (Child Abduction) [1993]* 2 FLR 225.

18 (See *Cooper & Casey* (1995) FLC 92-575; *HBH & Director-General, Department of Child Safety (Qld)* (2007) 36 Fam LR 333; *Panayotides & Panayotides*).

the mother had arranged for the children to become Australian citizens and to be furnished with Australian passports and the corroborative evidence of a witness who was unaligned to either party. Although ultimately considered in the context of conditions to be imposed upon return, the trial judge also had regard to a variety of other factors, including that the former matrimonial home in Israel had been leased, the mother's employment prospects and sources of income in Israel, the mother's housing arrangements for her and the children in Australia, the children's schooling in Australia and her income and employment while in Australia. Further, a welfare report was in evidence before the Court. Thus, it would appear that parental intention was not the sole focus of the trial judge's inquiry at first instance, although a matter that was accorded considerable weight in the factual matrix.

To repeat, it was not a decision the trial judge arrived at lightly. Kay J said "I do not find the resolution of this case particularly easy. There are strong competing claims by both parents as to the outcome that they each seek." Kay J further expressed himself as having "no certain confidence" that ordering the children's return to Israel on conditions was the right outcome. In a finely balanced case such as this, when the authorities ultimately approved by the High Court were not placed before the trial judge, it is interesting that the High Court was unanimous that the case was wrongly decided. To that extent, the High Court is making a clear and unambiguous statement about the approach that should be taken towards determining the issue of habitual residence in future cases.

Possible implications of the High Court's decision

Professor Richard Chisholm AM has asked the following salient question: "Does the High Court's decision mean that if the moving parent intends to stay in Australia, and has made appropriate arrangements for the children before the consent is withdrawn, the court will say that the children were no longer habitually resident in the other country, and therefore the Hague proceedings must fail?" He answers that question in the negative, on the basis that the High Court's general comments about a "broad factual inquiry" seem orthodox and the decision is one that must be seen in the light of its facts. Another commentator, Professor Margaret Otlowski, is not so sanguine. She maintains the decision will have "clear implications for future Family Court decisions on this issue." So which is it to be: chaise, or coach and four?

At this early stage, the answer has to be "wait and see." There is some small guidance in the few first instance decisions following *LK* (discussed below) but the significance accorded to the "broad factual inquiry" test, and the weight accorded to the various factors potentially considered through such an approach, will ultimately be a matter for appellate consideration. It may be that Glazebrook J is correct and the differences between the approaches in New Zealand, Australia and the United Kingdom are more imagined than real[19]. Time will tell.

A matter which I apprehend may be of no small significance is the potential for increased delay in the determination of applications under the Convention in jurisdictions where the "broad factual inquiry" test applies.

The High Court has confirmed that habitual residence is a question to be decided in a very wide range of circumstances. That can include, but is not confined to, the parents' settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to that state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration.

In order for these issues to be squarely before the Court when habitual residence is in dispute, there would presumably need to be extensive affidavit evidence from the parties and corroborative evidence where that is available. Cross-examination of deponents of affidavits may well be required: the High Court in *LK* noted that there were disputed questions of fact at first instance but no cross-examination followed. The High Court in *LK* repeated comments made by it in *MW v Director-General, Department of Community Services*[20] that the requirement

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[19] See, however, the two recent decisions of the Court of Appeal: *Re: P-J (Abduction: Habitual Residence: Consent)* [2009] 2 LFR 1051 and *Re S (Habitual Residence)* [2009] EWCA Civ 1021 where the Court of Appeal affirmed that the test for habitual residence under the Convention is a) physical presence/residence in a new country; b) for a reasonable period of time; c) for a settled purpose and with a settled intention. Although emphasised as a factual inquiry, it would appear on its face that the relevant test in the United Kingdom places greater emphasis on intention than that which is now the common law in Australia, where settled intention is merely one factor to be considered.

[20] *MW v Director-General, Department of Community Services* (2008) 82 ALJR 431, 452.

in the Regulations to deal with applications for return expeditiously does not yield any rule prohibiting cross-examination of deponents. Presumably, therefore, if the High Court formed the view that cross-examination would have been beneficial in resolving disputed questions of fact going to parental intention, it would be similarly inclined in the context of a broader factual inquiry.

It is also difficult to conceive of the various matters alluded to by the High Court as potentially arising in a broad factual inquiry being adequately explored without the assistance of a family report. Further, if the ambit of the Court's inquiry is to extend to an assessment of a child's connexions and the relevance of their participation in the place in which they are currently living, as compared to the place they have left[21], trial judges may well form the view that the assistance of an Independent Children's Lawyer is required[22]. In those circumstances there will need to be sufficient time for reports to be prepared, interviews to be undertaken, evidence to be gathered and submissions and recommendations formulated, all of which derogates from Convention proceedings as an expeditious, summary process.

A broad factual inquiry approach further lends itself to applications upon appeal to adduce further evidence as to the "reality" of the children's lives, which may add to the time taken to hear and decide appeals. Such an application was made in *LK*, and the "prolonged consideration" the Full Court gave to the appeal was the subject of unfavourable comment by the High Court.

There is a clear risk that if proceedings become increasingly protracted, the substantive and procedural objectives of the Convention could be compromised.

It also seems to follow logically that the longer children are resident in a jurisdiction pending the outcome of Convention proceedings, the greater the likelihood of older children in particular raising an objection to return pursuant to Article 13[23].

The Shakespearean adage "[i]n delay there lies no plenty"[24] seems to me to have particular resonance in Convention proceedings. To the extent that the adoption of a broad factual inquiry test may militate against urgency in hearing and determining such proceedings, I believe that is an unfortunate development.

Post *LK* jurisprudence

LK has been "applied", using that lexicon, in three decisions at trial in the Family Court of Australia. In two (both decided by the same judge), the Central Authority's application for orders for return of the child was dismissed. The decisions in *Department of Communities (Child Safety Services) & Rolfston*[25] and *Department of Communities (Child Safety Services) & Fraser* [26] are apposite, as they, like *LK*, involves a wrongful retention and the construction and weight to be attributed to an agreement between the parents.

Professor Chisholm had proposed that in circumstances in which a mother goes on holiday, to which the father agrees, and once on holiday changes her mind and decides to stay, the decision in *LK* does not indicate that the children would have lost their habitual residence. Professor Chisholm maintains *LK* is unusual in that it was decided on the basis of the parties' agreement to the children staying to live in Australia and the mother's arrangements for the children.

In *Department of Communities (Child Safety Services) & Rolfston* the evidence is far more equivocal. The trial judge seems to have emphasised those passages from LK at paragraphs 32 to 34, which the trial judge described as having "real resonance" for the case. Those passages concern the possibility that a person may abandon a place of habitual residence without acquiring a new one. The trial judge found that the mother had formed an intention

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21 For further discussion of the importance of a comparative assessment of children's connections with the countries in which they are and have resided see R. Schuz, 'Habitual Residence of Children Under the Hague Child Abduction Convention – Theory and Practice' [2001] CFLQ 1, p. 10 (citing in particular *Mozes v Mozes* 19 F Supp 2d 1108).

22 Note, however, that section 68L(3)(a) of the Family Law Act 1975 (Cth) states that in proceedings that arise under regulations made for the purpose of the Convention on the Civil Aspects of International Child Abduction, the court may order that a child's interests in proceedings be independently represented by a lawyer only if the court considers that there are exceptional circumstances that justify it doing so. See State *Central Authority & Quang* [2009] FamCA 1038 and *State Central Authority & Truman* [2009] FamCA 1175 for examples of cases in which exceptional circumstances were found, permitting the appointment of an Independent Children's Lawyer.

23 See further *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640.

24 William Shakespeare, *Twelfth Night*, Act II, Scene III.

25 *Department of Communities (Child Safety Services) & Rolfston* [2010] FamCA 264 (per Murphy J).

26 *Department of Communities (Child Safety Services) & Fraser* [2010] FamCA 340 (Per Murphy J).

to establish the child's residence in Australia prior to informing the father that the marriage was over and had taken various actions to give effect to that, including enrolling the child at school, arriving at a position with respect to child support and insisting upon the execution of a parenting agreement prior to any travel to the United States. The trial judge considered these to be "important connections" with Australia within the meaning of the term used by the High Court in *LK*. Accordingly, the Central Authority's return application was dismissed.

The decision in this case, in circumstances that differ in important respects to the "unusual" facts of *LK*, may on one view, suggest that the Family Court of Australia is adopting a more expansive view of what constitutes habitual residence.

A different outcome was arrived at in *State Central Authority & Brume (No. 2)*[27] where the trial judge held that a one-year old child was habitually resident in the Netherlands at the time of what was found to be a wrongful retention in Australia. In her consideration of the High Court's decision in *LK*, the trial judge noted that the High Court made two preliminary observations: that there is a wide variety of circumstances that bear upon where a child resides and whether that residence is habitual; and the past and present intentions of a child's parents will affect the significance to be attached to particular circumstances. Applying the principles espoused in *LK* to the facts, the trial judge found that there was unchallenged evidence that the mother and father had a shared intention to live in the Netherlands together when the mother left Australia in 2005. The trial judge further found that it was not the joint intention of the parties that the child live in Australia, a matter described by the trial judge as "a very important aspect of the court's determination of habitual residence."

The trial judge went on to consider the connections the mother and child had established with Australia. The trial judge found that the child was born and registered in the Netherlands, where she lived with both parents and her half-sister as a family unit. She travelled with the mother and sister on a tourist visa and had no present residence entitlement in Australia. The trial judge found that upon travelling to Australia, the mother was unsure as to whether she herself was entitled to permanent residency and took no steps to deregister the child in the Netherlands until after advising the father that she and the child would not return. The trial judge said that "having regard to the nature of habitual residence", the mother's contention that the child was habitually resident in Australia was implausible." In so doing, the trial judge agreed with the submissions of the State Central Authority that an intention to acquire a place of habitual residence does not travel unconditionally with the primary caregiver and that no parent can unilaterally change a child's place of habitual residence.

This decision indicates that shared parental intention, as one of many factors to be taken account, can still be accorded considerable (although not determinative) significance in decisions as to where children are habitually resident.

Conclusion

I will conclude with the words of the Honourable Michael Kirby AC KMG, which speak for themselves:

> If, having regard to steps taken to establish a new and permanent home for the children in a new country becomes the focus of convention proceedings, there is an obvious risk that this strategy too may conflict with the substantive and procedural objects of the convention. The notion that decisions of foreign courts on "habitual residence" questions will ordinarily be unhelpful as confined to a purely factual inquiry runs a risk that Australia's contribution to the development of an international jurisprudence around the concept of habitual residence will likewise be sidelined as avowedly factual[28].

It is hoped that history does not judge the latest pronouncement on the operation of the Convention by the High Court of Australia as realising both Michael Kirby and Baroness Butler-Sloss's fears.

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[27] *State Central Authority & Brume (No. 2)* [2010] FamCA 458 (per Bennett J). This was also a case where the trial judge found that there were exceptional circumstances justifying the appointment of an independent children's lawyer.

[28] The Hon. Michael Kirby AC KMG, 'Children Caught in Conflict – the Child Abduction Convention and Australia' (2010) 24 *International Journal of Law, Policy and the Family* 95, 105.

International Disorder and the Child Abduction Convention

Frank Bates*

Article 13(b) states that courts may refuse to make an order for the return of a child under The Hague Convention on Civil Aspects of International Child Abduction if there was a grave risk that such a return would expose the child, "…to physical or psychological harm or otherwise place the child in an intolerable situation". In an earlier article, I commented on[1] the decision of the High Court of Australia in DP v Commonwealth Central Authority; *JLM v Director-General, NSW Department of Community Services*.[2] In that article, I concluded[3] that the decision in that case tended to demonstrate a more liberal interpretation of Art 13(b) than had some prior Australian decisions,[4] even though I was at pains to emphasise that each case on the article's operation must necessarily turn on its own facts. It is also a feature of the DP and JLM case that there was a judgment in dissent by Kirby J who emphasised that Art 13(b) represented, not a *departure*, but a *fulfilment*[5] of the scheme of the law at large. This meant that the exceptions contained in Art 13(b) must, self-evidently.remain exceptions – any other approach, he stated,[6] would effectively reward the abducting parent "… with the fruits of conduct which domestic and international law is designed to prevent and, where it occurs, to remedy promptly."

It is necessary, because of the manner of its exposition, to contextualise Kirby J's remarks. First, the objects of the convention are set out in Art. 1 which specifies that, "The objects of the present Convention are:

> (a) to secure the prompt return of children wrongfully removed or retained in any Contracting State, and
>
> (b) insure that rights of custody and access under the law of one contracting State are effectively respected in the other Contracting States."[7]

It will be instantly apparent that the concept of the *welfare/best interests* of the children is not mentioned as being an instant object. In terms of Australian law, that was emphasised by Nygh J, in the seminal decision of *Director, Family and Community Services v Davis*,[8] who stated, in like terms, that the convention was directed to two main issues: "firstly, to discourage, if not eliminate the harmful practice of unilateral removal or retention of children unilaterally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal." It may be that Australian courts have sought to undermine this apparently inflexible view of the aims of the Convention,[9] or, perhaps, to confuse their application.[10]

However, it is necessary, for the purposes of this paper, to apply those initial observations to the more specific situation which is described in its title. *Prima facie*, at least, there can immediately be few situations where children may exposed to a grave risk of physical or psychological harm or an intolerable situation than a situation when international disorder affects those children's country of actual or potential habitual residence. In this context, I unashamedly use the phrase *international disorder* in a broad sense – it can, I would suggest, be used in three

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1 F, Bates, "Grave Risk, Physical or Psychological Harm or Intolerable Situation : The High Court of Australia's View". *Asia Pacific LR* 43

2 (2001) FLC 93-081

3 Above n1 at 56

4 Notably *Laing v Central Authority* (1999) FLC 92-849. For comment, see F Bates, "Undermining the Hague Child Abduction Convention : The Australian Way…?" (2001) 9 *Asia Pacific LR* 45 at 56*ff*. That case left open the possibility of a child's being returned to an abusive environment in the country of habitual residence.

5 (2001) FLC 93-081 at 88, 405. Kirby J's emphasis.

6 *Ibid* at 88.384.

7 For general comment on the aims and purposes of the Convention, see, for example, P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction* (1999) at 28 *ff*; A.E. Anton, "The Hague Convention on International Child Abduction" (1981) 30 *ICLQ* 537; J.M. Eckelaar "International Child Abduction by Parents" (1982) 32 *U. Toronto LJ* 281.

8 (1990) *FLC* 92-182 at 78, 226.

9 See F. Bates, "Undermining the Hague Child Abduction Convention : The Australian Way…?" (2001) 9 *Asia Pacific LR* 45.

10 F Bates, "*Cave Jurisdictionem* – Recent Cases on Family Law and Conflicts in Australia" (2006) 27 *Liverpool LR* 233

major contexts. The first is represented by a situation involving conflict between the child's country of habitual residence and another country. The most obvious situation, of course, being a war, whether formally declared or not.[11] The second, which perhaps is coincidentally so, and more germane to the instant discussion, is the situation which the child's country of actual or potential habitual residence is under threat from forces (with or without extraneous aid or encouragement)[12] or, third, where the population is subjected to a destabilising or oppressive administration, which, in turn, may have led to a breakdown in law related matters, which are frequently taken for granted. These are all situations with which the contemporary world is only too familiar and it would be surprising had the Hague Convention on Civil Aspects of International Child Abduction not become embroiled with international disorders.

The impact of the second of the situations earlier described[13] is graphically illustrated, in fact, by *Genish-Grant v Director General, Department of Community Services*,[14] a decision of the Full Court of the Family Court of Australia which involved an appeal by the mother of two children, aged nine and five years, against an order made at first instance directing the return of the children to Israel. The mother had been born in Australia in 1961 and the father in Israel in 1965. they had begun living together in about April 1990 and married some seven years later, the children being born in 1993 and 1997. They lived in Australia from 1990 until 1995, when they moved to Israel.[15]

In early December 2000, the mother returned to Australia with the children, having obtained the father's agreement that they could remain there for three months. She did not return to Israel. An application for the return of the children there was filed by the relevant Central Authority in August 2001 and was heard in November. At that hearing, the judge found that, though the wife had promised to return the children to Israel, in fact, she had no intention of so doing. The trial judge also found the children to have been habitually resident in Israel, prior to their retention in Australia and that the father had rights of custody under the relevant law of Israel[16] and, finally, that the mother had wrongfully retained the children in Australia as the father had neither consented not acquiesced in that retention.[17] For the purposes of this commentary, though, the most important finding made by the trial judge was that any return of the children to Israel would not fulfil the conditions of Art 13(b). The mother appealed : given the form that the appellate response took, it is important to note that the core of the appeal involved an application to adduce fresh evidence. Although such applications are not uncommon in appellate cases of this kind, in *Genish-Grant*, it was of central importance especially in relation to the trial judge's finding regarding Art 13(b). A particular item, which was to prove crucial in the appeal was a travel advice issued by the Australian Department of Foreign Affairs and Trade (DFAT), which was correct at the time of the appellate hearing[18] and which urged Australians to defer all travel to Israel on the grounds that all population centres in that country were liable to terrorist attack.

Although there were various additional issues raised on appeal by the mother which related to various aspects of the convention's operation, the Full Court[19] found that none were meritorious. This meant that the only remaining issue was the adduction of fresh evidence. By a majority, with Holden JJ dissenting, the Full Court allowed the appeal solely on the fresh evidence issue. In so doing, an order was consequently made dismissing the application by the Central Authority for the return of the children to Israel.

In reaching their conclusion regarding the application of Art 13(b), the majority, Finn and Barlow JJ, sought to apply the High Court's decision in *DP and JLM*.[20] In that case, Gaudron, Gummow and Hayne JJ had said[21] that the

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[11] Many international disputes, although clearly regarded by objective observers as being wars, have never formally been declared. A particularly noxious instance was the dispute between Britain and Argentina over the Falkland Islands/Malvinas. For comment on that issue generally, see I.A. Shearer, *Starke's International Law* 11th ed 1994) at 483 *ff*.

[12] For a general and useful commentary from a variety of standpoints see J.N. Maogoto, *Battling Terrorism : Legal Perspectives on the Use of Force and the War on Terror* (2005)

[13] Above n12.

[14] [2002] Fam LR 51. For more detailed comment, see F. Bates, *International Disorder and the Child Abduction Convention : A Discursive Commentary* (2009) at 21 *ff*.

[15] Whilst in Israel, they lived in a hotel complex near the village of Amirim for some five years prior to their separation. Kamiel, the nearest city, is about 150 kilometres from the extreme edge of the Gaza Strip.

[16] *Capacity and Guardianship Law* 1962.

[17] See Hague Convention on Civil Aspects of International Child Abduction Art 13(a).

[18] It had been issued in April 2002.

[19] Finn, Barlow and Holden JJ.

[20] Above at 8.

[21] (2001) FLC 93-081 at 88, 390.

application of Art 13(b) required. "… some prediction, based on the evidence of what may happen if the child is returned. In a case where the person opposing the return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make that kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child."

That last dictum cannot be allowed to pass without comment : first, it will readily be apparent that the view therein expressed is immediately contrary to that of Nygh J in the *Davis*[22] case and represents a different policy direction from the earlier view. Further, as I have elsewhere sought to point out,[23] it is notorious that prediction in the whole general area of child law is a fraught process – both in personal and institutional terms. In the former, we simply did not know what is likely to happen and, in the latter the reaction of institutions may change in relation to particular issues (the subject of this very paper itself suggests that). In respect of the former, the issue, even in more mundane situations is clouded by subjectivity, uncertain relativisms and the quality of unpredictability itself. This, in 1995, Barton and Douglas noted[24] the results of a survey where people where required to list up to five qualities which parents should teach their children. These qualities appeared to be as follows : "[G]ood manners, cleanness and neatness, independence, hard work, honesty, to act responsibly, patience, imagination, respect for other people, leadership, self-control, being careful with money, determination and perseverance, religious faith and unselfishness."[25] Given the various pressures of the 21st century, regardless of actual parental teaching, it will be a hazardous task to predict the personal development of children in terms of the survey's results. This is quite apart from any extraneous interventions through, say, abduction or retention of a child by one parent!

The institutional aspect appeared to have been recognised by Gaudron, Gummow and Hayne JJ when they went on to comment[26] that, necessarily, there would, "… seldom be any certainty about the prediction. It is essential to observe that certainty is not required : what is required is persuasion that there is a risk which warrants the qualitative description "grave". Leaving aside the reference to "intolerable situation", and confusing attention to harm, the risk that is relevant is not limited to harm which will actually occur, it extends to risk that the return will expose the child to harm." As I pointed out in an earlier commentary on *DP and JLM*[27], that comment, once again,[28] represents a significant departure from earlier views of the application of Art 13(b) : thus, in the *Davis* case,[29] Nygh J seemed to have been at pains to point out the Article had been drafted in such a way as to suggest that it was insufficient merely to establish some degree of harm, but also to establish that that degree must be substantial and, indeed, *comparable to an intolerable situation*.[30] A like view had been expressed by Lord Donaldson in the English case of *C v C (Abduction : Rights of Custody)*[31] who had said that, "… in a situation where it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind."

In the context of that disagreement, the majority in *Genish-Grant* turned their attention to the relevance of the DFAT advice and, in particular, noted[32] that it had referred, in its comment that the whole population were in danger of terrorist attack, to, "…hotels, places of entertainment and bus stations." Finn and Barlow JJ regarded that matter as being of especial importance in the case at hand.[33] Therefore, a return to Israel clearly involved, and that had been conceded by counsel for the Central Authority, the children's returning through danger

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22 Above text at 8.
23 Above n14 at 23.
24 C. Barton and G. Douglas, *Law and Parenthood* (1995) at 129.
25 Of these estimable qualities, honesty was first (85%), followed by good manners (74%) and respect for other people (67%).
26 (2001) FLC 93-081 at 88, 390.
27 Above n1 at 49.
28 See above text at n22.
29 (1990) FLC 92-182 at 78, 277.
30 Author's emphasis.
31 [1989] 1 WLR 654 at 664.
32 [2002] Fam LR 51 at 515.
33 They noted that the father's information relating to his residence in Israel (above n15) referred to the situation as it existed in 1995. Nonetheless, he was still living there and conditions did not seen to have changed significantly.,

and death. In the totality of those circumstances, Finn and Barlow JJ were prepared to accept the passages in the DFAT advice as disclosing clear and compelling evidence of a grave risk that the return of the children to Israel would do them harm.

In his dissent, Holden J disagreed with the approach of Finn and Barlow JJ to the DFAT advice, In the view of the dissentient,[34] caution was urged to be exercised, "… in placing undue reliance upon the DFAT warning. The notice advises Australian nationals that they ought not to travel to Israel. It does not state that residents of Israel ought not to travel home." Although, he stated, it was clearly appropriate for the Australian Government to warn casual visitors as to the risks which they might face, whatever the purpose to that visit, it was quite another to assume that residents of Israel would face the same risks. "There has been", he stated, "turmoil and violence in Israel during the whole period which at times has escalated significantly. This may well be one of those times. Even under the particular circumstances Israel is experiencing, the evidence does not establish that its inhabitants are doing other than carrying on their ordinary business." With respect, as I have elsewhere pointed out,[35] that approach is surely misconceived : first, although those people who might be described as *ordinary residents* might be so doing, the children involved in the *Genish-Grant* case would not be in the same position – they had been once already removed from Israel and, hence, their situation would have been likely to have been still more precarious than that of the people to whom Holden JJ was referring. Second, and this should effectively go without saying, terrorists' bombs and bullets are no respecters of national boundaries nor of the passports of their victims, whatever their countries of *habitual residence*[36] may be.

Yet it must be still further be borne in mind that the Convention is international, both in its actual application and in its juristic operation. Thus, in *Genish-Grant*, Finn and Barlow JJ found support[37] from the opinion of Boggs J of the United States Court of Appeals for the Sixth Circuit in *Friedrich v Friedrich.*[38] Initially, Boggs J's comments did not seem much to support the mother's case and were redolent of those made by Nygh J in *Davis*,[39] when he stated[40] that, ".... the Hague Convention is generally intended to restore the pre-abduction *status quo* and to deter parents from crossing borders in search of a more sympathetic court." On the other hand, though, from the point of view of the abducting parent, Boggs J stated[41] that grave risk of harm could only exist in two situations – the first of these being where there was a grave risk of harm when return puts the child in imminent danger prior to the resolution of the custody dispute. For example, by returning the child to a *zone of war*[42] to famine or disease.[43]

There are various matters which arise out of Boggs J's dictum : first, as was noted[44] by Finn and Barlow JJ in *Genish-Grant*, Boggs J did not define what was meant by *zone of war*. However, they were equally emphatic that the situation as described in the DFAT advice, even though it particularly described the situation which pertained in the West Bank and the Gaza Strip, might well be regarded as being within the notion of a *zone of war*. In addition, they were of the view that it was not necessary for the mother to show that a return to Israel would expose the children to, " … grave risk of direct harm over and above the risk of harm which any individual in Israel is exposed." The judges were of that view because they thought that it was neither desirable nor possible, when the nature of the harm was the product of *warfare or civil unrest*,[45] to draw any distinction between risk to a particular individual and the risk to which the population at large was exposed. This must not, of course, be taken as saying that there are not circumstances in which particular individuals might not be at especial risk. Thus, for instance, a person who, for whatever reason, returned to a theocracy having, in the meantime, converted to some other religion could well be in such a situation. Similarly, known political affiliations

[34] [2002] Fam LR 51 at 73.
[35] Above n14 at 27.
[36] Or whatever the test for fulfilling that status may be, Below text at n57*ff*.
[37] [2002] FAM LR 51 at 56.
[38] 778 F 3d 1060 (6th Cir 1996)
[39] Above text at n8.
[40] 78 F 3d 1060 (6th Cir 1996) at 1064.
[41] *Ibid* at 1062.
[42] Author's emphasis.
[43] The second situation to which Boggs J referred was where there was a grave risk of harm through serious abuse or neglect or though extraordinary emotional dependence and where the court in the country of habitual residence, for whatever reason, was in capable or unwilling to give the child adequate protection.
[44] [2002] Fam LR 51 at 56.
[45] Author's emphasis.

may be so productive.

The second matter which arises from the adoption of Boggs J's description in *Friedrich* by the majority in *Genish-Grant* is that there is nowhere any *imprimatur* in the Convention for its interpolation. Thus, as there is no mention in the Convention of any exception to the general principles based around *zone of war per se*, the question arises as to how Boggs J came to devise it or arrive at it. A consideration of the Convention at large suggests two way in which Boggs J reached his conclusion : the first and most likely, *fons et origo* of the *Friedrich* exception was to assume that the *grave risk* of "… physical or psychological harm or … intolerable situation" as found in Art 13(b) need not necessarily emanate from another parent, or specified person, but, rather, from a state of affairs, including a state of affairs involving unspecified people. That view does seem to be implicit in some of the prior United States decisions on the area.[46] There is no logical reason why that course of action cannot, or should not, be adopted and the absence of any other background to much of the discussion seems to suggest that Art 13(b) has been utilised and expanded in that way.

One alternative, and, *prima facie*, far from unreasonable manner of invoking the section is by tying it to Art 20 of the Convention. Art 20 states that. "the return of the child under Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Thus, a serious conflict situation would, in all probability, infringe Art 20 and justify its application in the instant situation. However, case law cannot be immediately found to support such a view and, indeed, there seems to have been a noticeable failure to mention the Article. Beaumont and McEleavy have suggested[47] that there may be good reasons for that being the case. In particular, they comment[48] that, "As with many issues of public international law, [the question] is likely to remain theoretical because there is no international court with jurisdiction to adjudicate on the issue even if a contracting State were to regard it as being in its interest to bring such an action."

There are views expressed, though, in even stronger terms. Thus, for example, in *Re K Abduction : Psychological Harm)*[49] Leggatt LJ had stated that, " … there is obvious objection to adopting such a construction of Art 20 as would have the effect of overriding, or materially altering, the scope of any of the other Articles and in particular Article 13(b). It may well be that the court, should and will "have regard to Art 20" in the sense of seeking to construe other Articles, such Art 13(b), in such a way as not to infringe human rights. Further than that, however, it does not go." Commentators such as Eekelaar[50] and Davis[51] have been critical of the clarity of the terms in which Art 20 is expressed. Indeed, Beaumont and McEleavy are consequently uncertain of the situation which the Article is intended to cover.

Ultimately, Beaumont and McEleavy appear to approach Art 20 in an appropriate way, when they write[52] that, "The specific reference to human rights and fundamental freedoms may at present be of little more than token value, but it does provide the Convention with a certain moral authority, which may prove invaluable in the face of a challenge to its constitutionality. But it may be of greater importance if the Convention succeeds in gaining further ratifications among countries which enforce laws or traditions found unacceptable in modern Western democracies."[53] Yet, as I have elsewhere pointed out,[54] the particular issue with which this paper is concerned and the relevance of Art 20 has received scant consideration. In other words, despite the obvious fact that international disorder will, inevitably, affect human rights and fundamental freedoms. This must be regarded, both from a curial and an academic standpoint, as disappointing.

It is, as I have earlier noted,[55] it is more for issues relating to zones of war, to take up the phrase used by Boggs J in *Friedrich*,[56] to stand alone. An obvious situation

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46 See those noted above at n14 at 45*ff*.
47 Above n7 at 172*ff*..
48 *Ibid* n7 at 173.
49 [1995] 2 FLR 550 at 557.
50 J.M. Eekelaar, "International Child Abduction by Parents" (1982) 32 *U. Toronto L*J 281 at 314.
51 B. Davis, "New Rules on International Child Abduction : Looking Forward to the Past" (1990) 4 *Aust. J. Fam. L* 31 at 56.
52 Above n7 at 176.
53 In that context, Beaumont and McEleavy, *ibid,* refer to countries where children are precluded from receiving a full education, but, rather, are forced into poorly paid or dangerous work or countries where female genital mutilation is carried out.
54 Above n14 at 66.
55 *Ibid* at 67.
56 Above text at n41.

relates to the notion of *habitual residence*. This is, as the editors of the most recent edition of Australia's leading text[57] on Conflict of Laws point out, no easy matter even at a basic level. "Unlike domicile, however,", they write, "there is no single concept of residence : some statutes have used residence *simpliciter* or coupled with a time qualification, other statutes use the term "habitual residence", which is often found in international conventions, and, yet others use the words "ordinarily resident". The meaning of these terms and the differences, if any, between them is not altogether clear." These authors go on to comment that a further difficulty is that *residence*, again unlike domicile, is not a term of art, but is normally a question of fact, which, in turn, is often coloured by the purposes for which it was relevant. That is, *residence* may bear one meaning for the purpose of founding *in personam* jurisdiction, another for taxation purposes and yet another in, say, family law matters. "In essence," Davies, Bell and Brereton state, " the court must, when it has to consider whether a person is resident in a particular country for the purposes of a particular rule … enquire as to what of degree of connection was envisaged by the legislature when enacting that rule."

At least some of the situations which arose out of *Genish-Grant*[58] also came to the fore in the decision of the High Court of Australia in *L.K. and Director-General Department of Community Service*.[59] That case involved appeals by a mother against orders that the children of the marriage return to Israel. The parents had married, and were living, in Israel where all of the four children in question had been born. The children, though, were entitled to Australian citizenship by reason of descent from their mother. Following the parents' separation, the children continued to live with their mother in the matrimonial home. In May 2006, the mother and children travelled from Israel to Australia, though they held return tickets for August of that year. Before they left Israel, the father knew, and accepted, that it was their intention to travel to Australia and that the mother would return if the parties were reconciled. Prior to leaving Israel and immediately after arriving in Australia, the mother took steps to establish a home for herself and the children there. Something over two months after the mother and children had arrived in Australia, the father told the mother that he wanted the children returned to Israel, but also that he wanted a divorce. The primary issue in the appeal was whether the children were habitually resident in Israel. The High Court of Australia[60] allowed the mother's appeal.

The first point made by the High Court[61] was that to approach the term habitual residence, as had been done in the past,[62] as presenting a question of fact had, "… evident limitations." The High Court were totally unimpressed, indeed, by any such approach and emphasised that identification of what may be relevant to an inquiry into the matter was, "… not to be masked by stopping at the point of inquiry as one of fact." If, they said, the term *habitual residence* was to be given meaning, " … some criteria must be engaged at some point in the inquiry and they are to be found in the ordinary meaning of the composite expression. The search must be for where a person resides and whether residence at that place can be described as habitual."

That seems, at the outset at least, to be reasonable, but that did not mean, the Court said, that it would not be wrong to attempt some further definition which would be of universal application. "First," the Court stated, application of the expression "habitual residence" permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and the present intentions of the person under consideration will often bear upon the significance that is to be attached to particular circumstances like the duration of a person's connections with a particular place of residence."

The High Court, having made a variety of general observations, then turned their attention[63] to the *habitual residence* of children. First, they stated that it was important to consider the context in which that inquiry was required – in the instant case, the purpose, as represented by the Convention, was the facilitation of

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57 M. Davies, A.S. Bell, P. L. G. Brereton, *Nygh's Conflict of Laws in Australia* (8th ed, 2010) at 288.
58 Above text at 14*ff*.
59 (2009) FLC 93-397.
60 Fench CJ, Gummow, Hayne, Heydon and Kiefel JJ.
61 (2009) FLC 93-397 at 83, 338.
62 See, for example, J. D. McClean, *Recognition of Family Law Judgments in the Commonwealth* (1983) at 28 who wrote that it had, "…repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts."
63 (2009) FLC 93-397 at 83, 339.

resolution of disputes between parents relating to a child's care, welfare and development in one forum (that is, the child's country of *habitual residence*), rather than any other. However, when speaking of the habitual residence of the child, it would be important to examine where the people who are caring for the child live. "The younger the child," the High Court stated, "the less sensible it is to speak of the place of habitual residence of the child as distinct from the place of habitual residence of the person or persons upon whom the child is immediately dependent for care and housing." At the same time, though, the Court was at pains to point out that, if the issue of the child's place of *habitual residence* was one of fact, it was important not to elevate the factual issue that the child necessarily looks to others for care and housing to any principle of law.[64]

At that point, the High Court of Australia turned their attention to an issue which had been central to the Full Court of the Family Court's decision from which the appeal had been launched,[65] that being the question of *purpose and intention*. During the course of their wide ranging discussion, the Full Court of the Family Court of Australia referred[66] to a *dictum* of Glazebrook J of the New Zealand Court of Appeal in *SK v KP*[67] that, "Even among those who doubt the emphasis on settled purpose, however, there has been almost universal approval for the proposition that the unilateral purpose of one of the parents cannot change the habitual residence of the child. To hold otherwise would not accord with the policy of the convention and would provide an encouragement to abduction and retention."

In the High Court of Australia, the judges initially commented on the issue[68] that, unlike domicile, considerations relevant to deciding where a person is habitually resident were not necessarily confined to physical presence and intention was not to be given controlling weight. There were three reasons why that was the case : first, the High Court considered that individuals did not always act with a clearly formed and singular view of what is intended (or hoped) that the future will hold. In other words, their intentions might be ambiguous. The High Court were of the view that the mother's conduct in the instant case exemplified that situation : she had left Israel on the understanding that if the marriage was reconciled she would return; if not, then not. Although she had taken steps, before she had left Israel, to establish herself and the children in Australia, the Court stated[69] that, "Because the possibility of reconciliation and return was not excluded when the mother left Israel, it may be said that her intentions, when she left, were ambiguous. Even accepting that to be so, because the notion of habitual residence does not require that it be possible to say of a person at any and every time that he or she has a place of habitual residence, it is important to recognise that a person may cease to reside habitually in one place without acquiring a new place of habitual residence."

Second, because, the High Court continued, a person's intentions might be ambiguous, it was necessary in asking whether a person has *abandoned*[70] residence in a place, it was, the Court continued, necessary to, "… recognise the possibility that the person may not have formed a singular and irrevocable intention not to return, yet properly be described as no longer habitually resident in that place." This meant that absence of a final decision positively rejecting the possibility of returning to Israel in the foreseeable future is not necessarily inconsistent with ceasing to reside there habitually.

Third, the High Court went on, when the habitual residence of a child is being considered, attention must not be confined to the intentions of the parent who has the actual and daily care of the child, it would usually be necessary to consider what *each*[71] parent intends for the child. However, if it does become necessary to examine, "… the intentions of the parties, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged."

One matter which comes through clearly in *LK* is the disinclination, or inability, of the High Court of Australia to specify the nature of *habitual residence* as it is relevant to the Convention. This was re-emphasised in their conclusion to that part of their judgment when it was said[72] that, "It follows from each of the three

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64 Rather like the former law of dependent domicile of a married woman. For comment, see E. Scoles, P. Hay, P.J. Borchers and S.C. Symeonides, Conflict of Laws (4th ed, 2004) at 247. For the High Court of Australia's views on domicile, see (2009) FLC 93-397 at 83, 338.

65 *Kilah and Director-General, Department of Community Services* (2008) FLC 93-373 at 82, 594*ff per* Bryant CJ, Coleman and Thackray JJ.

66 *Ibid* at 82, 601.

67 [2005] 3 NZLR 590 at [76].

68 (2009) FLC 93-397 at 83, 339.

69 *Ibid* at 83, 340.

70 Court's emphasis.

71 Author's emphasis.

72 (2009) FLC 93-397 at 83, 340.

considerations just mentioned that to seek to identify a set list that bear upon where a child is habitually resident, or to attempt to organise the list of possible matters that might bear upon the question according to some predetermined hierarchy of importance would deny the simple observation that the question of habitual residence will fall for decision in a very wide range of circumstances". The High Court then emphasised that an examination of decided cases in the area did not require the identification of a closed set of criteria, or the attribution of predetermined weighting between them.

Having made that point, which is clearly borne out by the case law and the literature which discusses it, the High Court were at pains to point out that, unless there were good reasons for so doing, it was undesirable for the term to be given a meaning different in Australia from that in other contracting States. It is, though, equally clear from various studies[73] that some different approaches are apparent in judicial attitudes towards the Convention in Australia. Indeed, that seemed to be accepted, at least, when the High Court stated[74] that, "… conclusions reached in the courts of other jurisdictions are not lightly to be treated as establishing principles of law. Rather, they are to be read and understood as resolving the particular controversy tendered for decision."

The Court then sought to move on to the derivation of the *settled purposes* test, as it had arisen in various contexts over the years. In beginning so to do, the High Court remarked[75] that the Full Court had concluded in their own decision in the instant matter that, in its own decisions, *settled purpose* was, in that Court's *ipsissimma verba*,[76] "According to the English and Australian approach, settled purpose is not merely one factor to be considered. It is an integral part of a finding of habitual residence."

The High Court of Australia were at great pains, in that context, to point out[77] that the Full Court's view might have been a little simplistic, mainly, because of the contextual matters which surrounded the House of Lords decision in *R v Barnet London Borough Council ; Ex parte Shah*[78] there, Lord Scarman had said[79] the, "… significance of the adverb "habitually" is that it recalls two necessary features …, namely residence adopted voluntarily and for settled purposes."

As regards that *dictum*, the High Court in *LK*, emphasised that *Shah*, and *Inland Revenue Commissioners v Lysaght*,[80] on which Lord Scarman had relied, were factually very different from the instant case – *Shah* being concerned with the making of grants for educational purposes to students who were *ordinarily resident* in the United Kingdom and *Lysaght* with liability to pay income tax. Further, the reference to *settled purposes* was, as the High Court pointed out, not amplified in either case.

The High Court then continued by examining case law from England,[81] Australia[82] and, most particularly, New Zealand[83] ; that last, is of especial importance because of the reliance placed[84] on one decision by the High Court but also because of extensive discussion of New Zealand authority in the Full Court of the Family Court of Australia.[85] In *Punter v Secretary for Justice*, the majority of the New Zealand Court of Appeal had stated[86] that the inquiry into *habitual residence* should be of a broad, factual nature. They then went on to state that, "Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration." However, no other purpose, including *settled purpose*, of both the children and parents, should overcome what McGrath J, of the same court in the earlier case of *SK v KP*, had called,[87] "…the underlying reality of the connection between the

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73 See above nn2, 10.
74 (2009) FLC 93-397 at 83, 340.
75 *Ibid* at 83, 341.-
76 *Kihal and Director-General, Department of Community Services* (2008) FLC 93-373 at 82, 603 *per* Bryant CJ, Coleman and Thackray JJ.
77 (2009) FLC 93-397 at 83, 341.
78 [1983] 2 AC 309.
79 *Ibid* at 342.
80 [1928] AC 234.
81 *Re J (A Minor) (Abduction)* [1990] 2 AC 563; *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993.
82 *DW v Director-General, Department of Child Welfare* (2006) FLC 83-255;*Cooper v Casey* (1995) FLC 92-575; *Paneyotides v Paneyotides* (1997) FLC 92-733.
83 *Punter v Secretary for Justice* [2007] 1 NZLR 40 ; *SK v KP* [2005] 2 NZLE 590.
84 (2009) FLC 93-397 at 83, 342.
85 (2008) FLC 93-373 at 82, 603*ff*.
86 (2007) 1 NZLR 40 at 61 *per* Anderson P, Glazebrook, William Young and O'Reagan JJ.
87 [2005] 3 NZLR 590 at [22].

child and the particular state."

The High Court of Australia in *LK* endorsed[88] that statement and stated that, since the search in relation to *habitual residence* was for the connection between the child and the particular state, the search that was noted in *Punter*,[89] the relevant criterion was a shared intention that the children live in a particular place with a sufficient degree of continuity to be properly described as settled. If the nature of the search was so regarded, then no lack of congruence between the approach of the New Zealand Court of Appeal in *Punter*[90] and the view expressed by Lord Brandon in the House of Lords decision in *Re J A Minor) (Abduction)*[91] who had stated that the issue of habitual residence was "… a question of fact to be decided by reference to *all* the circumstances of any particular case." There are two points which emerge from that part of the discussion : the first is whether there is innately any lack of congruence between the two comments. The New Zealand judges seem to me, at least, to be exemplary whereas Lord Brandon was seeking rather to articulate a more broadly based principle. Despite that, it seems that they have come out with something not notably dissimilar, however one regards the nature of the search.

The second point which arises is the unfortunate, it is suggested, use of the word *settled* in the instant context. The reason why I regard that usage as being unfortunate is that the word is used in Art 12(2) of the Convention which speaks of the judicial or administrative authority's being required to order the return of the child, "… unless it is demonstrated that the child is now settled in its new environment." In the context of the Article's operation, a comment by Hale J, as she then was, in *Re HB (Abduction : Children's Objections) (No 2)*[92] should be borne in mind. "Once the time", she stated, "for a speedy return has passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after very limited inquiry into the merits which is involved on the cases." There should, of course, be no reasonable possibility of any confusion, but some of the language used by the Full Court suggested to me that two necessarily different concepts were being confused. Thus, the Full Court stated, when,[93] that "The father communicated to the mother in June that he did not agree to the children remaining in Australia, the introduction of fresh evidence as to the "acclimatisation of the children in Australia" which all occurred following the June conversation, could not in our view support a finding of "settlement" in Australia. In this case it was the mother, not the father, who was seeking to bring about what she described as the "acclimatisation of the children..." In the event, the Full Court rejected[94] the application for the admission of fresh evidence on the grounds that it neither supported nor contradicted the mother's position.

This presents a more than somewhat confused picture – the fact that the mother was seeking to retain the children ought to surprise no one.[95] To take up the point made earlier in relation to *Punter* and *J*,[96] all of the items of evidence which the mother had sought to introduce would have fitted in with both the New Zealand judges' specificity and with Lord Brandon's more general description. In the end, the High Court of Australia took the view[97] that it ought not to have been found that the children were habitually resident in Israel; the possibility that they might again take up residence there were their parents reconciled did not mean that they had ceased to be habitually in Israel. "What is decisive," the High Court emphasised. "is that the children left Israel with both parents agreed that unless there was a reconciliation they would stay in Australia, and their mother, both before and after departure set about effecting that intention." One is, I fear, left with an impression that the High Court of Australia were not conducting the kind of inquiry which prior authority had urged upon them.

In that context, the Court had said that the approach to be found in *Punter* was in accord with the general terms of decisions in the United States.[98] Thus, for example, in

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88 (20009) FLC 93-397 at 83, 342.
89 Above n86. there, it was stated that the *settled purpose* of the parents was necessarily included in the case of young children.
90 Above text at n86.
91 [1990] 2 AC 562 at 578.
92 [1998] 1 FLR 564 at 568.
93 *Kilah and Director-General, Department of Community Services* (2008) FLC 93-373 at 82, 603.
94 *Ibid* at 82, 604.
95 The balance of parents who abduct or retain children has altered : it is now not so much fathers seeking to evade unfavourable (or possibly unfavourable) court orders, it is, now, more frequently mothers who are seeking to evade perceived dangers. For comment, see F. Bates, " "Escaping Mothers" and the Hague Convention – the Australian Experience." (2008) 41 *Comp and Int LJ of S. Africa* 245.
96 Above text at n90.
97 (2009) FLC 93-397 at 83, 343.
98 *Feder v Evans-Feder* 63 F 3d 217 (3rd Cir. 1995); *Mozes v Mozes* 239 F 3d 1067 (9th Cir. 2001); *Karkainnen v Kovalchuk* 445 F 3d 280 (3rd Cir. 2006).

Feder v Evans-Feder, one of the cases cited[99] by the High Court, Hansmann J had stated[100] that the Court believed that, "...a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for an acclimatization and which has a 'degree of settled purpose' from the child's perspective." The judge also said that the court further believed that, "… a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that regarding their child's presence there." Despite clear similarities in phraseology between *Feder v Evans-Feder* and *LK*, and the cases relied on there, there is one obvious omission from those cases – that being the emphasis on the child's perspective.

That very point was later taken up in the case of *Robert v Tresson*,[101] where Clay J quoted the Explanatory Report on the Convention which had stated[102] that the Convention should be interpreted in light of the general principle that, "… children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs." The judge expressed the view that that general principle was best given effect by a decision which honours the, "… child's perception of where the home is, rather than on which subordinates the child's experience to their parents' subjective desires." In *LK*, that view, although it received a passing reference,[103] seems to have been avoided as a part of the processes involved.

Since, the case was decided effectively entirely on the issue of *habitual residence*¸ the High Court of Australia considered[104] the issues which it regarded as not being necessary to canvass. In particular, the Court mentioned the issue of the husband's possible acquiescence in the retention, the delay between the hearing of the appeal by the Full Court and the delivery of judgment and the refusal by the Full Court to admit additional evidence.[105] Matters which the High Court neither considered, nor admitted to not having considered, were the matters of *grave risk* and *intolerable situation* as found in Art 13(b) of the Convention. These matters were, though, considered by the Full Court.

The Full Court noted,[106] first in the regard, that the mother had argued at first instance that. "...the return of the children to Israel would expose them to physical harm on the basis that to order their return would be effectively to return them to a war zone." The only evidence to support any such contention, the Full Court of the Family Court of Australia stated, was a travel advisory notice issued by the Australian government to persons travelling to Israel.[107] The trial judge found that such a notice did not support the contention that there was a *grave risk* to the children that they would be exposed to physical harm if they returned to Israel. It appeared that the trial judge had observed that there were five levels of travel advice and that the present was at the third, and not the highest, level.[108]

The Full Court commented[109] that there was no evidence before the judge at first instance that the children would suffer psychological damage of any kind if they were returned to Israel. At the same time, however, they referred to the mother's evidence which, in part, was couched in the following terms : "In order to travel to these suburbs [on the outskirts of Jerusalem] from the city, where the boys would attend school, I would be required top travel on public transport through areas with the boys that are occupied by Palestinian Arabs. These areas are often target of bombings, riots and shootings. There is a high rate of crime. It is very dangerous. I would be terrified to live alone with the boys in an area like this." Given that evidence, which is too unhappily redolent of *Freier v Freier,*[110] a United States decision which was readily followed.[111] There, the court had determined[112] that the fighting, which had seriously troubled the mother, was, fifteen to ninety minutes away from the children's home, too distant to provide a *grave risk*. In neither case, as I pointed out elsewhere in relation to *Freier*,[113] would that

[99] (2009) FLC 93-397 at 83, 346.
[100] 63 F 3d 217 (3rd Cir. 1995) at 224.
[101] 507 F 3d 981 (6th Cir. 2007) at 992.
[102] E. Perez-Vera, *Explanatory Report of the 1980 Hague Child Abduction Convention* (1981) at para 24.
[103] (2009) FLC 93-397 at 83, 342.
[104] *Ibid* at 83, 343.
[105] Above text at n93.
[106] *Kilah and Director-General, Department of Community Services (*2008) FLC 93-373 at 82, 590.
[107] See above text at n18.
[108] The trial judge has also noted that similar advice was given in respect of other Hague Convention countries, including Brazil, Mexico, Panama, South Africa, Turkey and Venezuela.
[109] (2008) FLC 93-373 at 82. 605.
[110] 969 F Supp 436 (ED Mich 1996)
[111] See above n14 at 61.
[112] 969 F Supp 436 (ED Mich. 1996) at 443.
[113] Above n 14 at 61.

be regarded as an ideal situation in which to bring up a child! Or, to use the approach to be found in *Robert v Tresson*,[114] an ideal situation in which a child might be brought up!

In fine, there is an obvious connection between what can, broadly, be called *international disorder* and *habitual residence*. A person may be forced to abandon the latter by reason of the former and may be similarly forced to take children, against another parent's wishes, with her. It would, it is submitted, be quite wrong to accept that the relationship is uncomplicated or, even, particularly satisfactory. Much of the problem, it is further submitted, is that the effect of *international disorders* on the operation of the Hague Convention on Civil Aspects of International Child Abduction has not been properly explored.

At the centre of the dispute is the first object of the Convention, to be found in Art 1 which states that it is. "… to secure the prompt return of children wrongfully removed to or retained in any contracting state…" When taken together with cases such as the Australian decision in *Davis*,[115] that provision may provide a notable obstacle to dealing with cases of the kind which have been considered in the course of this paper. As I have elsewhere pointed out,[116] in cases involving international disorder and its ramifications, the summary return of a child to her or his country of habitual residence may not be appropriate, for clearly apparent reasons. That might especially be the case where, as Boggs J suggested in *Friedrich*,[117] because of war or civil disturbance, the courts of the country of habitual residence are unable to make an effective decision relating to the future of the relevant children.

In *Friedrich*, Boggs J was dealing with the operation of Art 13(b) of the Hague Convention on Civil Aspects of International Child Abduction, albeit in a somewhat expanded form.[118] As regards the operation of the article itself, Beaumont and McEleavy regard it[119] as having been managed in a very strict manner. That they applaud on the grounds that, in many instances, the degree of alleged harm is of a relatively minor nature and, hence, can usually be dealt with by domestic courts without the child's being placed in any real danger. With all due respect to these distinguished commentators, it may be that they are being unduly sanguine in that it may be that there are, at least, some cases[120] where serious harm may be done before the courts in the relevant jurisdiction have an opportunity to intervene.

In view of all of these considerations, as I have already suggested[121] that much might be gained were Art 13(b) to be amended so as to include Boggs J's formulation in *Friedrich*, to which the majority of the Full Court of the Family Court of Australia were drawn in *Genish-Grant*.[122] Hence, it is submitted that a revised Art 13(b) should now read : "*...that there is a grave risk that the child would be returned to a zone of war or area of civil disturbance, famine and disease or there is a grave risk that her or his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation and that, in either case, the courts in the country of habitual residence are, for whatever reason, incapable of providing the child with adequate protection*."

Such an amendment could, it is suggested, reduce the uncertainties attaining to mush of what this paper has considered. It is very hard, certainly at this stage, however, for reasons noted by Davies, Bell and Brereton,[123] to be able to particularise qualities of the kind of *habitual residence* which might be germane to the operation of the Convention. However, even at this fairly tentative stage, we can try to ensure that a country of *habitual residence* is not rendered intolerable through disorders of the kind which have been discussed.[124] Quite apart from anything else, the revision of Art 13(b) which has been proposed, might, as Beaumont and McEleavy suggest,[125] assist in ensuring that, "...the public could be assured that the Convention operated as part of a logical and complex remedy, rather than an abstract legal tool which appeared to act to the detriment of vulnerable, if not exactly blameless, people." This may, across the board, be correct, but it is difficult to hold people who are unwittingly caught up in international disorder culpable in any way.

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114 Above text at n102.
115 Above text at n8.
116 Above n 14 at 68.
117 78 F. 3d 1060 (6th Cir. 1996) at 1069.
118 Above text at n 46.
119 Above n7 at 264.
120 See, for example. *Elyashiv v Elyashiv* 353 F Supp 2d (EDNY 2005). For comment see above n14 at 61.
121 Above n14 at 69.
122 Above text at n37*ff*.
123 Above text at n57.
124 See above text at n10*ff*.
125 Above n7 at 265.

'A Paradise for Kidnapping Parents'

Legal, political and media discourses on Parental Child Abduction in the Netherlands (1970-2009)

Betty de Hart*

1. Introduction

In 2008, a Dutch legal scholar commented on a High Court case on parental child abduction:

> 'This decision proves once more the risks for a woman who starts a relationship with a foreigner and starts living in the country of her husband. At least once a year all women's magazines should publish in violent colours the story of a mother who, after the relationship with her foreigner broke down, returns with her children to the country of origin and is subsequently accused of child abduction. Good chance that the children are returned to their father and that the mother has hardly any practical or legal opportunities to be with them'.[1]

This quote draws attention to some important features of legal, political and media discourses on parental child abduction. The quotation presents child abduction as an event that particularly endangers a woman who marry a foreigner and have been living abroad with him. Hence, child abduction is a gendered issue, in which perceptions of men and women, fathers and mothers play an important role.

As mothers, women marrying foreigners are in danger of losing their children when they return to their home country after their marriages break down. In such an event, they are left helpless, without practical or legal means to be reunited with their children. The case in question involved Australia, and is covered by the Hague Convention on the Civil Aspects of Child Abduction (hereafter: the Hague Convention), which came into force in the Netherlands in 1990. Apparently, according to this legal scholar, the Hague Convention did not protect mothers or children. Parental child abduction is an event in which law is powerless; hence, perceptions of the power of law are important in discourses on parental child abduction.

The dangers of mothers losing their children are so great, that all Dutch women should be warned against the dangers of marrying foreigners and living abroad. Consequently, parental child abduction is about more than the incidental abductions, it is about the dangers of globalization of interpersonal relationships and marriage for women. The quotation implies that the best way to prevent child abduction is to refrain from international marriages and moving abroad. As such, parental child abduction is also about the place of the Dutch nation-state and its population in the globalised world.

This paper looks at changes and continuities in public discourses on parental child abduction in the Netherlands. To this end, it will analyse historical and present-day political, legal and media debates since 1970.

These changing discourses of parental child abduction are relevant to analyse, because they are not without consequences. They have had actual effects for the decision-making process, for jurisprudence on child custody and the reorganisation of the implementation of the Hague Convention and non-convention cases in the Netherlands.

2. Theoretical framework: representations of parental child abduction

A limited number of studies has looked into the media representation of parental child abduction in the United States, New Zealand and the Netherlands. These studies demonstrate that parental child abduction may be framed as a social issue in two different ways: as a general family law issue, or as an issue of mixed marriages and multiculturalism. American historian Paula Fass describes how in the United States child abduction came to be seen as a new and rapidly

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1 High Court, 25 April 2008, Nederlandse Jurisprudentie 2008, 539. Translation into English by author.

spreading social phenomenon from the 1970s and 1980s, when divorce was on the rise. It was seen as the result of new mobility and jurisdictional shopping, and a sign of the erosion of contemporary family life, 'family disintegration and gender conflict'.[2] According to Vivienne Elizabeth's analysis of media representations in New Zeland after 2000, stories of abduction in New Zealand were discussed in the context of the father's rights movement.[3]

Marleen Kamminga's study of Dutch media representations in the 1990s, demonstrates the relevance of the frame of mixed marriages and multiculturalism. Parental child abduction was presented as 'typical' for mixed marriages between Dutch women and Islamic men.[4] This fits with my own analysis of representations of international child abduction in life stories written by mothers involved in child abduction.[5] In such books, including the most famous: Betty Mahmoody's *Not Without my Daughter*, parental child abduction is presented as the unavoidable consequence of mixed marriages that failed because of cultural differences.

Images on motherhood and fatherhood, victims and perpetrators are central in discourses on parental child abduction. According to Elizabeth, the mothers in abduction stories, irrespecive of whether they were the abducting or left behind parent, were always portrayed as the 'villains'. The fathers were represented as 'family men', the mothers were portrayed as vengeful mothers who kept the fathers away from their children, and whose misfortunes were entirely to blame on their own doings. Fass comes to the opposite conclusion: the abducting parent was described as a vindictive husband who kidnapped the children to punish the former wife. If women were the abducting parent, they were described as fleeing from abusive situations, deserving public sympathy. Fass notes that reports on international or intercultural abductions changed the way abducting parents were portrayed. Media reports stressed parents' individual righteousness operating outside the law, returning their children with all possible means, including vigilante groups re-abducting children. In kidnapping their own children, parents became heroes. I have noted a similar transformation in my analysis of Mahmoody's and similar books. As 'maternal melodramas', the books represent women as victims of the mixed marriage, who became heroines by going all the way in sacrificing themselves for their children. Although the women fell unknowingly into the trap of the mixed marriage, they withstood many horrors and returned safely home to tell their tale of survival.[6] An important feature of most media representations of parental child abductions is that the mothers are almost always white, western women.

In the struggle for the child, a symbiosis of mother and child takes place, as if they were part of one being. Although it is suggested that the child and the love for the child is central, it merely exists as a function as child for the mother. We learn little about the child, who is the object, the appendix of the mother.[7]

Law is an important theme in representations of parental child abduction. Fass described how legal solutions - coordination between states and returning the child to the state of origin– soon became suspect. State authorities became an object of suspicion, were seen as impersonal, distant and judicially incompetent. In the life stories, Islamic law is presented as ancient and backward, arbitrary, without justice and favouring their own citizens and men. The picture of western law, however, is only slightly better. Western law and visiting rights provided the opportunity for abduction. Judges and lawyers often did not listen to women fearing abduction by their (former) husbands. Ultimately, Western law is as impotent as Islamic law in protecting women and children.[8]

This discussion of these studies led to the following questions to be answered in this paper:

1. How and in what terms is child abductions described and what causes are mentioned?
2. How is child abduction connected to other social issues?
3. How are the involved family members

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2 P. Fass, *Children of a New World. Society, Culture and Globalization* (New York University Press 2007).
3 V. Elizabeth, 'Turning Mothers into Villains' (2010). *Feminist Media Studies* , 51-67.
4 M. Kamminga, *Grensoverschrijders. de beeldvorming van biculturele relaties in Nedelandse dagbladen* (Wetenschapswinkel Universiteit van Amsterdam 1993).
5 B. de Hart, 'Not without my Daughter. On Parental Abduction, Orientalism and Maternal Melodrama' (2001) *The European Journal of Women's Studies*, 51-65.
6 F. Milani, 'On Women's Captivity in the Islamic World' (2008) *Middle East Report*.
7 A. K. Reulecke 'Die Befreiung aus dem Serail". Betty Mahmoody's Roman "Nicht ohne meine Tochter"' *Feministische Studien* (1991), 8-20.
8 De Hart 2001.

(mother, father and child) discussed?
4. What solutions are mentioned and how are they evaluated, and how is the working of the Hague convention evaluated?

3. Methodology

My study includes an analysis of media debates, political debates and legal journals from an almost forty-year period (1970-2009). These discourses are linked in several ways. Fass has noted that personal, individual narratives are an important feature of media representations, but also of political debates, and have instigated the United States Congress to take action.[9] In the Netherlands, politicians often asks questions in parliament in response to media reports on personal narratives of abductions, and sometimes court decisions. The quotation at the beginning of this paper suggests a link between legal and media discourse. Hence, although media, political and legal discourses are separate, they are interrelated and influence each other. Meanings are taken over from one discourse to the other, and enhance and reproduce each other.[10]

Of course, analyzing a period of almost forty years means that the social context in which child abduction was being discussed changed considerably. In these forty years, the Netherlands witnessed important changes in family law, opening up access to divorce in 1971, and the right to contact with the child for the non-custodial parent in 1990. Shared custody after divorce was introduced in 1998 and a compulsory parenting plan in 2009. Furthermore, the Netherlands was transformed into an immigration country, with a considerable so-called 'non-western' immigrant community and recurring discussions on how to deal with the multiethnic composition of society. I will consider these changing contexts as far as relevant for the analysis.

Only those legal articles, newspaper articles and debates with child abduction as the main topic were included in the analysis. Search terms were *kinderontvoering* (child-abduction), *ontvoering kind* (abduction child), kidnapping and *ontvoering* (abduction). Parliamentary debates could be searched digitally for the whole period in two databases: overheid.nl and statengeneraaldigitaal.nl. Newspapers were searched digitally through LexisNexis for the period since 1994. Through references in legal articles and political debates and my personal archive, articles from before 1994 could be found.

4. Child abduction as a non-issue (1970-1980)

Until 1980 parental child abduction was a non-issue in the Netherlands, hardly drawing attention from politics, media and legal scholars. The Dutch parliament did not discuss the issue at all and I did not find any reference to newspaper articles in this period.[11] Dutch legal journals paid no attention to international child abduction at all before 1980, when the Hague Convention was drawn up.[12] It could be that because of the low incidence of divorce, child abduction just did not happen very often, or that it was the drafting of the Hague Convention that drew attention to the issue.

In the period before the Convention came about, the Netherlands did not take any measures to combat or prevent parental child abduction and did not sign a European Convention concerning the return of children of 1971.[13] However, this does not mean that legal scholars did not perceive parental abduction as a problem. Illustrative is the Dutch-American case *Ring/Gould*, that dragged on in the Dutch courts for years. The custodial mother had taken the child to the Netherlands, in spite of visiting rights between the child and father and a court order not to leave the state of California. The Dutch High Court rejected the claim by the American father for the child to be handed over to him. The High Court ordered that the best interests of the child were an issue of Dutch public order, which should prevail above the foreign court order. In his note to the case, Professor of IPL Struycken critically commented that the verdict made the Netherlands into 'a paradise for kidnapping parents' and would reward parents for forum-shopping.[14] It was the most famous case among lawyers and often quoted in later years to argue the seriousness of the issue and the need for international regulations.

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[9] Fass, p. 149.

[10] M. Meijer, *In tekst gevat. Inleiding tot een kritiek van representatie* (Amsterdam University Press 1996).

[11] I did not systematically research this period, due to lack of databases. With Fass, I assume that the newspapers did not discuss child abductions as a social issue, only as individual events. Fass, p.146.

[12] An exception is: A. Shapiro and K. Siehr, 'The Jundeff Affair- Comparative Remarks on International child kidnapping and judicial cooperation' (1978), *Netherlands International Law Review*, 3-23. Because it discusses a case between Germany and Israel, I leave it out of this overview.

[13] This Convention was only signed by Turkey. Europese overeenkomst inzake de teruggeleiding van minderjarigen, The Hague, 1970, Trb. 1971, 22.

[14] HR 14 May 1971, NJ 1971, 369 (*Ring/Gould*). *Ars Aequi* 1971, vol. 10. Nr. 7, p. 361-369.The author lists a number of other Dutch court cases in which foreign parents asked in vain for the return of a child taken to the Netherlands by the other parent.

5. Anticipating the ratification of the Hague Convention (1980-1990)

The Netherlands had witnessed large-scale immigration since the Second World War, first from the former colony Indonesia after its independence in 1947, then labour migration from countries like Turkey and Morocco. These so-called 'guest workers' were thought to stay only temporarily, but after in 1979 the Scientific Council for Government Policy (WRR) advised that most of them would stay, the government decided to design its minority policy to further their integration into Dutch society. Hence, in the 1980s 'guest-workers' were at the centre of political attention. At the beginning of the 1980s, child abduction came to be seen as a growing and urgent problem that required a legal solution largely in this context.

The Dutch parliament discussed child abduction for the first time in the context of an amendment of divorce law, giving the non-custodian parent more rights on visiting arrangement with the child. Women's organizations, groups of men, youth welfare institutions and other NGOs actively lobbied their concerns to parliament. Feminist groups opposed the bill, which they feared would limit women's rights, including those of migrant women.[15]

The position of migrant women was picked up by MPs, even if they rejected other critiques by feminist groups. NGOs feared that a migrant woman who had been married to a Dutch man would not be allowed to return with the child to her country of origin, because the former husband had visiting rights. But politicians soon turned their attention to Dutch women married to foreigners. While the conservative-liberal VVD spoke in general terms about cases in which a father or mother abducted the child from the Netherlands to abroad, the communist CPN asked:

> How does the minister see a safeguard for women who were married to foreigners and are afraid that the man may use the visiting rights to take the child to his country of origin, a collision both between parents as well, as it happens, between cultural patterns?[16]

MPs thought it important to restrict visiting rights in such a case and suggested that the Minister of Justice should ask the countries of origin of guest-workers to ratify the Hague Convention. This was an issue that would turn up repeatedly in later years.

With the drafting of the Hague Convention in 1980, a legal solution for these problems was within reach. The first legal article, published in 1980, announced the signing of the Hague Convention by the Netherlands on the day of its inauguration.[17] It described parental child abduction mainly in legal terms: as taking the child outside the jurisdiction of the court, taking the law in one's own hands, and a form of forum shopping. Another article described the situation as legal powerlessness (*rechts-on-macht*), which meant that in the 'after-marriage-jungle', the boldest, smartest or strongest parent won.[18] The hope was that the Hague Convention would solve this legal disorder, but this would depend on how states would use the refusal grounds and whether they would trust each others' legal systems.

The media also presented the Hague Convention as a reason for hope, because it would have a preventive effect.[19] A report of the first conference in the Netherlands on parental child abduction, organized in 1985, stated that the Hague Convention would not solve all problems, because the countries children were abducted to - Egypt, Morocco and Turkey were mentioned- had shown no interest in signing it. The Ministry of Foreign Affairs said they could do little in case of abductions to these countries, because fathers always retained custody after divorce. The lengthy procedures could mean that the judge decided that it was no longer in the interests of the child to be returned, so that the legal system worked to the advantage of the abducting parent. This was why the reporting journalist expressed understanding for a Ministry of Justice representative, who said: 'purely theoretically one would say: never enter an international marriage'. Under the picture included in the article, was repeated; 'never start an international marriage'. The phrase 'purely theoretical' indicates an awareness that advising against international marriages was not opportune, but at the same time it was given credence as a quotation from a Ministry of Justice-representative, its repetition under

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15 Handelingen Second Chamber, 2 April 1981, *Regeling van werkzaamheden Echtscheidingsrecht*, pp, 4484 a.f.
16 Second Chamber, 1 April 1981, Handelingen, p. 4397- 4399.
17 M.I. Jansen 'Internationale ontvoering van kinderen', *Familie en Jeugdrecht* (1980), 119-125.
18 J. E. Doek 'Internationale Kinderontvoering, the last battle of the marital war?' *Justitiële Verkenningen* (1985), 31-47.
19 *NRC*, 26 September 1985. *NRC* is an nationwide quality newspaper.

the photograph, and because the reporter said it was 'understandable'.

The idea that most abductions were carried out by Mediterranean fathers was proved false in a 1984 study by Defence for Children which demonstrated that most abductions were carried out by non-custodian Western European fathers.[20] Although several legal scholars quoted this study,[21] others still described child abduction as an issue involving Mediterranean countries, and in cultural terms, requiring special measures involving all mixed marriages.[22]

In the meantime, politicians started wondering why ratification of the Hague Convention took so long. Repeatedly, the Minister of Justice answered that ratification was in an advanced state of preparation and was desirable as soon as possible, because other countries had done so, and because of the growing international mobility and growing number of international marriages.[23] In 1988, the government finally sent the ratification bill to parliament.[24] Although the memorandum of clarification to the bill also mentioned the DCI- study, it still connected the issue of child abduction to guest-workers. When marriages to guest-workers failed, sometimes soon, the difficult economic situation made many guest- workers return to the country of origin. Hence, child abduction was seen as abduction from the Netherlands to abroad and involving marriages of guest-workers with Dutch women.[25]

While the Hague Convention was generally welcomed, some were cautious about its possible consequences. The advising State Commission for International Private Law and the Council for the Judiciary warned that the Hague Convention would bring the Netherlands into contact with legal systems that differed significantly from the Dutch system –they did not mention specific countries- so that return of the child to these countries would violate Dutch opinions concerning the interests of the child and the rights of parents. This problem could be addressed by a wide discretion of the judge.[26] This was a preview of the main criticism directed at the Convention in later years.

MPs shared these worries. The Christian Democrats (CDA) were concerned that a child would have to be returned to a Mediterranean country with custody laws that violated fundamental principles of Dutch family law. In this context, the Social Democrat PvdA worried about the limited judicial discretion to refuse the return of the child.[27] The conservative-liberal VVD wondered whether the political situation in a country could be grounds to refuse return, or the better financial situation of the abducting parent. In which cases could decisions be in violation of fundamental principles of Dutch family law?[28]

The government tried to take away these concerns by pointing out that international cooperation was the most important weapon in the combat and prevention of child abduction. Referring to the *Ring/Gould* case, the government stressed that the leading principle was that the child should be returned without discussion and the custody issue had to be decided in the country of origin of the child.[29] Different political regimes, a disadvantaged financial situation of the custodian parent, or different cultural, religious and social circumstances were no grounds for refusal to return the child. In case of non-Convention countries such as Morocco, the possibilities were limited. The Dutch Central Authority (CA) could ask the Moroccan authorities to facilitate the return of the child. There was little chance of success, however, since Moroccan family law started from the assumption that the father had custody by right, so that the Dutch custody order could be ignored.[30]

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[20] J. Oost, *Probleem Kinderontvoering schreeuwt om volwassen aanpak* (Defence for Children 1984).
[21] Doek 1985, p.32-33.
[22] A. Heida, 'Omgangsregeling en international kinderontvoeringen', *Migrantenrecht* (1988), 287-289.
[23] Second Chamber 1986-1987, Appendix to Handelingen, nr. 651, p. 1295. ,
[24] Second Chamber 1987-1988, 20 461, nr. 1, 23 February 1988.
[25] 20 461, nr. 3, p. 1 and 6.
[26] 20 461, nr. 3. p. 2
[27] 20 461, nr. 7, p. 6.
[28] 20 461, nr. 7, p. 7
[29] 20 461, p. 4 and 8.
[30] 20 471, p. 13-14.

6. The forced return of children (1990-2000)

Only four years after its ratification, confronted with Dutch mothers who had to return their children, politicians started wondering about the consequences of the Convention. The Convention was welcomed when it was expected to prevent abduction of Dutch children out of the Netherlands, but was questioned when it turned out that Dutch children had to be returned from the Netherlands, even though it was not to 'strange, foreign cultures', but to western countries such as the USA. MPs asked about the 'problems' of implementation of the Convention, and about its possible amendment, if the consequence was that:

> 'A Dutch woman is forced to hand over her child to her former American husband, without any guarantee about the wellbeing of the child, when this father has received custody without her being there.'[31]

MPs asked questions about once a year, always after media reports on individual cases. In 1995, the VVD, together with PvdA and CDA asked about the 'forced return' of three children to their fathers in the United States, reported in the media.[32] They wanted an evaluation of these forced returns, of the functioning of the CA and the refusal grounds of articles 3 and 13 of the Hague Convention. They inquired whether the Dutch authorities supported the Dutch parent in the court case. The VVD asked whether the CA could reframe the request for return as a request for guarantee of visiting rights.[33]

The government tried to redress these sometimes emotional pleas with formal arguments, stressing time and again the importance of the Convention, which aimed at preventing parents from taking law in their own hands and forum shopping. The Hague Convention was one of the most successful conventions of the Hague Conference, and in the last Hague-conference meeting of 1993 no comments to the Dutch practice were made.

In December 1997, again in reaction to media reports, the VVD wanted more general information about the number of child abductions, the possibility to make the CA coordination and information point for parents of abducted children, about prevention by police signalling and the efforts to include countries in North Africa and the Middle East.[34] The government concluded that the Convention had a preventive effect, since the numbers (34 requests of incoming cases, 29 outgoing cases in 1995, and 53 incoming and 17 outgoing cases in 1996) had stabilized. The CA already functioned as coordination and information point and signalling with the police was not allowed in case of threat.

For the moment, the legal journals did not pick up on the more critical tone in parliament. Legal scholars remained fairly optimistic about the results of the Convention, describing it as a clean break with the old practice, since most children were returned and child abduction no longer paid off.[35] They analysed the first court cases, which were solely cases from western countries.[36] Hence, the fear that the convention would bring the Netherlands into contact with foreign cultures had not become true.

The grounds for refusal to return the child were a central issue in the legal journals. Some legal scholars thought that judges were too reluctant to return a child. One author criticised a case where return was refused because the child did not have a bond with the father, as the father had not been living with the child for some time, ignoring the fact that this was the consequence of the wrongful removal in the first place. A civil servant from the Ministry of Justice pointed out that most abducting parents were mothers, who often appealed to the refusal grounds of article 13.[37] She warned that return should only be refused in case of concrete proof of danger for the child. Generally, the child should be returned and protective measures should be taken in the other country.

Some other legal scholars were more critical of the goal of return of the child, placing the interests of the child at the centre.[38] In specific cases, the child's best

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31 Questions Second Chamber Vos (VVD) 22-12-1994,

32 Second Chamber 195-1996, Appendix, 392, p. 795, 4 December 1995.

33 Second Chamber 1996-1997, Appendix 200, p. 413, 7 October 1996. Al these questions by VVD by Vos.

34 Second Chamber 1997-1998, Appendix 630, p. 1285, 18 December 1997.

35 A. Hollenberg , 'Internationale Kinderontvoering door een van de ouders: een keuze tussen teruggeleiding en het belang van het kind' (1995), Tijdschrift voor de rechten van het kind, 2-5

36 M. Sumampouw, 'Rechtspraakoverzicht IPR; international kinderontvoering' (1995), *Familie en Jeugdrecht* 1995, 156-164.

37 Van Iterson, 'Het functioneren van het Haags Kinderontvoeringsverdrag' (1997), *Familie en Jeugdrecht*, 160-161.

38 Th. M. de Boer and R. Kotting, 'De Kant van het kind', in Th. M. de Boer, M. de Langen and P.H. Bakker Schut (eds) *Liber amicorum prof. Miek de Langen* (Gouda Quint, Arnhem 1992), 801-813.

interests might speak against the return of the child, who might be best served with a change of environment, e.g. better social and economic chances. In many cases the Dutch opinions about the best interests of the child were different from those in the other country. The authors concluded that the interests of the child in specific cases could be damaged by the general interests of the child of immediate return.

With the Convention in place, it turned attention away from non-convention countries and abductions out of the Netherlands. Only the media maintained its attention for abductions out of the Netherlands to foreign cultures, within the frame of mixed marriages and multiculturalism. In a report on a conference on intercultural marriages, organized in 1991, child abduction was the main issue. Most problems occurred with countries such as Morocco that 'could not care less about our legal system'. The organizing director sighed that people did not inform themselves about the culture and legal system of the partner they were marrying and 'sometimes hardly knew where Turkey or Morocco was'[39].

7. The best interests of the child (2000-2009)

The fourth and last period is marked by intensified and critical attention from politicians, academics and the press for parental child abduction and some remarkable changes in discourse. The Convention became heavily criticised for taking away Dutch children from Dutch mothers. Clearly, this critique had to do with the fact that most abducting parents were mothers and primary caretakers, something of which all participants in the debate are well aware. The problems of the Convention were also connected to changing family law, and shared custody.

The Minister of Justice had to report about the issue and debate in parliament on a regular basis, and was critically questioned on several points. What brought about this change? First of all, NGOs had started cooperating and addressed politicians, academics, and media with personalized stories illustrating the consequences of child abduction. *Stichting de Ombudsman* was confronted with Dutch mothers who returned from the United States and were then faced with a request for return of the child. Gestolen Kinderen was an informal group of mothers whose children were abducted to non-convention countries. Every month they demonstrated on the square before parliament, holding pictures of their children. In 2002, Defence for Children published a collection of stories of parents whose children were abducted abroad, or feared abduction.[40] The government was forced to consult these NGOs, e.g. in Working Groups, and parliament consulted them in a roundtable. Vigilante groups that abducted children back were incidentally also involved in these consultations. The personalized stories of almost exclusively Dutch mothers, as left behind or abducting parents, were presented in the media, and politicians read these stories and had personal contacts with the mothers.

The following examples illustrate the media discourse in this period. The first article reports a non-convention case, with a heading quoting the Dutch mother: 'They forget the Dutch language quickly'.[41] [Illustration 1] And then: 'Mother tries to get children abducted by her Lebanese husband back'. A large heading in the article says: 'Especially to Egypt many children "disappear" '. The article speaks of a number of 100 children abducted from the Netherlands by the foreign parent, quoting the NGO 'Stolen Children'. This number is higher than the official number of the Ministry of Justice.[42]

It is a very personal account by the mother, who tells how her husband changed after the children were born; he started reading the Koran and praying. Without giving a further indication about how his religiosity explained the abduction, a connection between abduction and Islam was made. During a holiday in Lebanon, the father announced that he wanted to stay. After a few weeks, the mother collapsed and returned to the Netherlands, leaving the children with their father in a small mountain village 'with nothing there', where children played with rocks, and electricity and water did not always work. In trying to get the children back, the mother had started court cases in the Netherlands and Lebanon, but also contacted a vigilante group that was quoted as having to

39 *NRC* 2 December 1991.
40 Ashan Bishesar, Shelia Bodbijl, Sandra van der Zee, Diana Zuljar, *Ontvoering van Kinderen, verhalen van Ouders* (Defence for Children 2002).
41 *Volkskrant* 26 May 2005.
42 The Ministry reported a total of 75 outgoing cases in 2005.

give up the plan to re-abduct the children, because there was only one road into the village. All of them proved impotent in rescuing the children.

The heading of the second article, dealing with a convention case, is 'Mothers without a child' and the subheading: 'Divorced women lose their child to foreign ex because of treaty'.[43] The first sentence in large letters reads: 'Women who followed their foreign husbands and want to return after divorce, almost always lose their children. "When I got into the car, I still heard his screaming" '. [Illustration 2]

Comparing the second with the first article, they share some striking similarities. First, the pictures of both women are similar. They are seated, a picture of the children is included, and they look directly at the reader, as if asking for their help. Moreover, the United States is, although differently then Lebanon in the first article, depicted as a country where a woman cannot live. The woman in the second article was a medical doctor, but had to do uneducated work because her diploma was not recognised. She lived in isolation during her marriage and had no social network that she could turn to. A small New York-apartment would cost her 1000 dollars a month. The American legal system was depicted as unjust, custody cases were decided without hearing the mother. Finally, both articles are about the mothers and the father's stories are not heard. In the second article, the ex-husband is quoted briefly, saying that parents should stay together for the children. He seems very religious, and is already looking for a new wife.

Just to highlight how uncommon it is to hear the stories of the fathers, especially foreign fathers, I want to mention the following exceptional media article, the only one of its kind in the whole period under research [illustration 3]. It is the story of an Iraqi father whose children were abducted by his Iraqi wife. Again, there are striking similarities with the two earlier pictures: the father is holding the picture of his children. However, he is standing up straight and does not look directly at the reader. This father does not seem to ask for anything. The story line is more or less the same: the insecurity, not knowing where the children are, the many institutions that were contacted but did nothing. He was worried about the safety of the children because of the situation in Iraq.

All these stories led the main political parties to question not only the implementation of the Hague Convention, but also the point of the Convention. Initially, the Dutch government denied any problems, repeating that it was one of the most successful conventions that had ever been established, was based on trust between states, and practice demonstrated that this trust was justified. The Minister also denied any problems with the Dutch CA. For years, the government tried to hold off making any significant changes.

But political parties no longer believed in this success story of the Hague Convention. In their eyes it had turned into a failure. They were no longer satisfied with asking questions, and in several debates that took place over the years, they pushed the government for changes on the main issues of concern: the role of the CA, the best interests of the child and the financial costs of the procedure.[44] In all these issues the Dutch mother, abducting or left behind, was presented as the weaker party, so that the principle of equality of arms was violated.

The concerns about the role of the CA had to do with the fact that the CA represented the foreign left behind parent in a Dutch court case against the Dutch abducting parent without costs. Hence, the Dutch abducting parent, a litigation novice, had to defend herself against the Dutch state, an established player, with much more legal experience and financial means.[45] The issue of financial costs related mainly to the lack of legal aid foreign court cases, but also to other financial costs reliant to the abduction. Politicians often suggested establishing a fund, so far, in vain.

The main issue of concern, however, was the best interests of the child. Progressive-liberal D66 described the problem as follows:

> We know from experience from especially women that this can be very problematic, especially when it concerns countries like Australia, Canada or the United States, where one cannot get free legal aid in a good way. Dutch women come into enormous problems. That is not in the interests of the child.[46]

The discussion focussed on the forced return of the

43 *NRC* 26/27 september 2008, Moeder zonder kind.
44 Second Chamber 1999-2000, Appendix 952, 24 Februari 2000, p. 2071.
45 M. Galanter, 'Why the Haves always come out ahead: Speculations in the limits of legal change.' (1974) *Law and Society review*, 95-160.
46 Handelingen Second Chamber, 11 October 2000, p. 11-748.

child to the father, separating it from the mother and primary caretaker who frequently would not or could not return with them. Often the child had been living in the Netherlands for quite a few years, and there was little insight in what happened to the child after it was returned. Hence, politicians wondered, was it really in the best interest of the child to be returned? Was it even child abduction when a Dutch mother returned home with her child from the USA? They pointed out that the 'so-called abducting' mothers were closely connected to their children, but the Convention shoved such considerations aside.

MPs thought that the Netherlands behaved like the best boy in the class and returned children sooner than other countries did.[47] The VVD suggested the Netherlands should be more 'naughty' within Europe, and step on the break. The PvdA wondered whether the reciprocity principle of the Convention (meaning that not only children had to be returned from abroad to the Netherlands, but also the other way around) should be upheld. Did the Netherlands have to cooperate just because otherwise other countries would not do so? Parties also wondered whether the Convention was outdated, since it was designed in the 1980s, when it was clear who had custody, but nowadays in many countries shared custody had become the rule. PvdA, VVD, SP and Greens put forward a motion entailing that the interest of the child should always be taken into account in decisions on return.[48]

For the non-Convention countries, the problem was that children were not returned to the Netherlands. The Ministers of Justice and Foreign Affairs sent a letter to parliament explaining the working procedure in case of non-Convention countries.[49] Although Dutch embassies made a maximum effort, they still depended on the cooperation of local authorities that not only lacked expertise, but often had a different view of child abduction, since fathers always had sole custody according to local law. Egypt was mentioned as a problem country, with 12 cases of abduction. To prevent child abduction to Egypt, parents had to take preventive measures themselves. The problems were caused by the deeply rooted differences in opinion about parental responsibility, different legal traditions, and those countries' limited focus on internationalization of society.

In response to the perceived limited means in case of non-convention countries, the PvdA started searching for other than civil law means and in 2006, submitted a bill for criminalisation with higher sentencing for child abduction.[50] The memorandum of clarification put international child abduction into the frame of mixed marriages and multicultural society.[51] Incorrectly, it was claimed that three quarters of abductions out of the Netherlands took place to non-Convention countries.[52] Because chances of returning a child were smaller in non-Convention cases, the child was harmed and the parent left behind, mostly the mother would never see her child again. The bill did not make a distinction between Convention and non-Convention countries, because even in Convention-cases return was not always guaranteed. The bill extended Dutch jurisdiction to abduction that occurred outside the Netherlands and to countries where abduction was not punishable, as well as to abducting parents without Dutch nationality.

The bill met with a lot of criticism. The Council of State thought that it was superfluous, because child abduction was already punishable with high sentences.[53] The Council also doubted that the interests of the child were served by punishment of one of the parents. Generally, the other political parties questioned the practical use of the bill and doubted it would contribute to prevention of abduction. It was typified as symbolic politics. The bill is still pending.[54]

Over a period of years, the Minister gradually changed his position and attitude. He remained cautious at first, informing the Second Chamber about the improvement of the Ministry's brochure on international child abduction, developed protocols for police departments, and a research on the procedures in abduction cases.[55]

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47 Second Chamber 2000-2001, 27 4000 VI, nr. 14, p. 2.
48 Second Chamber 2008-2009, 30 072, nr. 17
49 Second Chamber 2003-2004, 13 February 2004, nr. 1043, p. 2207. Second Chamber 2004-2005, 30 072, nr. 7. nrs 2-6.
50 Second Chamber 2005-2006, Proposal of MP Timmer to amend the Criminal Act concerning Legal power and sentencing of international child abduction, 30 491, nr. 2.
51 30 491, nr. 3, p. 1.
52 It should have been ¼ of all abductions to non-convention countries, corrected in 30 491, nr. 4, p. 3.
53 Second chamber 2005-2006, 30 491, nr. 4.
54 Second Chamber 2005-2006, 12 September 2006, 30 491, nr. 5.
55 Second Chamber 2004-2005, 30 072, nr. 1.

He announced that the CA would take a better look at the possibilities of the abducting parent to return with the child. The issue of financed legal aid was brought to the attention of the Hague Conference.

But later, the Minister had to take measures that changed the landscape considerably for child abduction cases. The Ministry decided to subsidize the Centre for Child Abduction, founded in 2006. After two studies on the role of the CA, its dual role was abolished. Jurisdiction of Convention cases was concentrated with one court, and a mediation pilot installed in cases handled by this court. Appeal in cassation with the High Court would be abolished. These measures answered many of the concerns expressed by MPs and NGOs. Concerning non-convention countries, the measures were much less concrete. The Minister promised to try to establish a *commission mixte* with Egypt that already existed with Morocco. In the second Malta-conference of 2006, further talks with Mediterranean countries would take place.

The Minister also had to change his earlier formal position, and paid attention to the emotions involved in the issue.[56] In a letter of January 2007, the Minister mentioned the emotions not only of families left behind, but also of the general public, that felt connected to individual cases that were reported in the media. The return of children to foreign countries could lead to painful situations, and to discussion about the way authorities had handled this. He stressed the need to inform the parties to international marriages and relationships about these possible consequences of a breakup.

On the other hand, the Minister tried to point out the dangers of the new attitude towards the Convention, stating that the standpoint that the best judge to decide is the Dutch judge, was untenable. Child abduction could not be considered more reproachable when a child was abducted from the Netherlands than to the Netherlands. He warned that the rules of the Convention could not be put aside without undermining the whole system, and warned against what would happen if every country made the best interests of the child the main consideration. He also pointed out that the problematic individual cases that the MPs heard about were exceptional and that generally, cooperation with other CAs was good. Only one party seemed to share some of these worries: Green Left critically commented on the way some individual cases were depicted in the media and by politicians, with a tendency to equal interests of the child with the mother. Where were the fathers in these stories?

The success-story of the Hague Convention turned into a story of failure in the legal journals also. The journals directed their attention at the situations in which caring Dutch mothers had to return the child to the USA. Nevertheless, a few articles still congratulated the Convention for ending legal disorder.[57] This were especially legal scholars who were involved in general family law issues or who had a mediation background, such as the article by Paul Vlaardingenbroek. He stressed the importance of good visiting arrangements, and prevention of escalation of the relationship between the parents through mediation and parenting courses. He still recounted the discourse of legal disorder, since the Convention only partly worked and in too many cases taking the law in one's own hands still paid off.

The more critical approach was represented by IPL-professor Th. M. de Boer, with whose quotation I started this paper.[58] He claimed that the Convention had turned into a device that took children away from their mothers.[59] De Boer explained the dissatisfaction with the Convention by the changed reality of child abduction. The need for the Convention came up in a time when after divorce the child custody was granted to the mother and the father, dissatisfied with the visiting rights that were not upheld by the mother, abducted the children. Nowadays parents often shared custody and the mother returned to her country of origin, because her life had become socially and economically impossible in the country of her husband. More often than before a decision to return the child would separate the child from its primary caretaker. De Boer then discussed suggestions made by the Commission of International Private Law, of which he was a member. Its proposals tackled the problem of long procedures by taking away cassation with the High Court, the lack of expertise with lawyers and courts by concentrating abduction cases with one court. Furthermore, a pilot for mediation and court decision within 18 weeks would take place. De Boer concluded that a lot was expected from alternative dispute resolution. The question whether the child was

56 Second Chamber 2006-2007, 121 August 2007, 30 072/29 980, nr. 12.

57 The more positive articles include: M.L.C.C. De Bruijn-Lückers, and P. Dorhout, 'Internationale Kinderontvoering'(2000) *Ars Aequi,* 621-628; G. Cardol, 'De positie van het kind in de twee kinderontvoeringsverdagen' (2000), *Familie en Jeugdrecht,* 128-133. P. Vlaardingenbroek, 'Preventie en ongedaanmaking van internationale kinderontvoering. Hoe effectief zijn de kinderontvoeringsverdragen?' (2001), *Echtscheidingsbulletin*, 161-165.

58 Th. M. De Boer, 'Nieuwe ontwikkelingen in de uitvoering van het Haags Kinderontvoeringsverdrag 1980'(2009), *Familie en Jeugdrecht*, 318-323.

59 Note to High Court 25 April, NJ 2008, 539.

better off in the Netherlands with the abducting parent or in the country of origin with the left behind parent was not addressed. Hence, the new Dutch approach was still in line with the Hague Convention.

Two lawyers who used to work for the Centre for Child Abduction and Defence for Children saw more in the Swiss approach that centred the best interests of the child.[60] They suggested that in cases of return of a child, a court had to take into account that the abducting parent was the primary caretaker. If return of the child was ordered, the primary caretaker should be able to go with the child. In practice, this was not always possible, e.g. because there were pending criminal procedures, because there was no residence permit, no house, job and financial means in the other country. Often the left behind parent was granted sole custody. The fact that the child, after lengthy procedures, was rooted in the Netherlands meant that the habitual residence had changed and institutions in the country of residence were best informed about the situation of the child. The Convention on the Rights of the Child obliged states, in case of conflicting interests, to give the interests of the child primary consideration.

One article in this period paid attention to non-convention cases, reporting on the Malta conference with delegations from Arab and western countries.[61] The author, a children's court judge, 'painfully' concluded that there was no balance between European and Arab states, because European countries were guided by the Hague convention, while Arab countries just applied national law and would not cooperate in returning children. He explained child abduction to these countries in cultural terms, focussing on Dutch mothers and Egyptian fathers. Egyptian fathers saw it as their responsibility to raise the child as a good Muslim and decided where the child should be raised. Since Egyptian law was totally patriarchal, European women who wanted to raise their child in a European country would hardly ever meet the requirements. Egyptian husbands saw their patriarchal rights not respected in European law and felt misunderstood. They abducted their children in an effort to regain respect and would even resist hostage and jail.

Here, the report of the Malta conference became a statement of personal opinions on mixed marriages. He concluded that it was impossible to make a realistic estimate of the danger that an Egyptian husband would abduct his child, which is why it was best to deny visiting rights to Egyptians altogether:

> 'Granting visiting rights to an Arabic father for children below the age of twelve is irresponsible in these circumstances. This is a harsh conclusion, because the good ones have to suffer. The justification lies in the fact that the countries of origin refuse to sign the treaties and the best interests of the child.'[62]

8. Conclusions

We are now able to answer the questions posed at the beginning of this article. We have seen that parental child abduction was not defined as a social issue in the Netherlands until 1980, when the Hague convention was drawn up. Before ratification in 1990, the debate focussed on abduction from Netherlands to foreign, mainly Mediterranean countries, since it was guest workers who were assumed to abduct, even after research proved otherwise. After ratification, the attention turned to abductions from abroad to the Netherlands by Dutch mothers.

Child abduction was understood as the consequence of the rising numbers of international marriages. Non-convention cases were understood as the result of cultural differences and patriarchal (Islamic) norms in which mothers had no right to be with their children. Although only a tiny minority of international marriages result in child abduction, sometimes the picture was painted that this was the unavoidable outcome.

Child abduction was understood as a problem of women, of mothers. The individualized media-stories that politicians referred to, were the stories of mothers; 'maternal melodramas'. I have seen no proof of the statement of Elisabeth that the mothers were always depicted as villains. On the contrary, women, mothers, were always the victims, whether they abducted themselves or their children were abducted.

The stories of fathers were not represented, sometimes they were hardly even mentioned and their voices were almost entirely absent. However, fathers from non-Convention countries were hypervisible as a type -as patriarchal Islamic husbands, who abduct because of

60 A.E.H. Van Katwijk and A. Wolthuis, 'Het belang van het kind onbemind in kinderontvoeringszaken Hoge Raad, strike interpretatie van het Haagse Kinderontvoeringsverdrag zorgelijk' (2008), *Familie en Jeugdrecht,* 58-64.

61 F.A. Van der Reijt, 'De eerste Arabisch-Europese rechtersconferentie over kinderontvoering, gehouden op Malta van 14 tot 17 maart 2004' (2004), *Trema*,453-456.

62 Van der Reijdt, p. 456

63 O. Lahoucine, 'Islamic Masculinities: Introduction' (2003) *Men and Masculinities*, 231-235.

cultural reasons- but invisible as individuals.[63] We learn nothing about the experiences of fathers, their motives for abducting or asking for return of the child, their sorrows and worries about their children. This is a remarkable difference with more general debates on family law issues in the Netherlands, where contact between father and child are fore-grounded and mothers sometimes reproached for not making this contact possible.[64] While Elisabeth noticed the framing of child abduction with father's rights issues, in the Netherlands, it seemed to be the disconnection of both issues that allowed for this separate discourse on child abduction that left fathers out of the picture.

What is more, although the best interests of the child were on everyone's lips, we learned little about the child's experiences. The interests of the child were conflated with those of the mother, as if they were always the same.[65] The interests of the child in regular contacts with the father, the bond between father and child before the abduction, were hardly even mentioned. Nor did we learn anything about the child's wider environment: e.g. its relationship with grandparents, language, school, or friends. The child remains an object that is acted upon, not a subject by its own right.[66]

The discourses described here have had actual consequences for the institutional arrangements concerning child abduction, that may actually result in a more successful approach to child abduction, such as the concentration of jurisdiction with one court and mediation. However, these arrangements only apply to Convention-cases and some other results are more worrying. In non-convention cases, parents still depend on the diplomatic negotiations that the government described as highly problematic and unsuccessful. Consequently, stakeholders searched for different means, such a criminal approach, denying visiting rights and vigilante actions. Research has demonstrated that some Dutch judges have taken up on the suggestion to refuse visiting rights and shared custody to Arabic fathers.[67] While parents in convention cases are offered 'soft methods' such as mediation, parents in non-convention cases are left with 'harsh methods' of criminalization, denial of right to family life, preventive measures or taking law into their own hands.

Finally, how can we explain these changes in discourse? First of all, a strong policy network has emerged with shared notions about child abduction and active lobbying, that succeeded in using the discourses described to draw attention to their case.

Furthermore, similar to what Fass described for the USA, legal solutions (the Convention) soon became suspect, public sympathy turned to the abducting parent and authorities were mistrusted. Also similarly to the USA, solutions outside the law, such vigilante groups, have found some legitimacy. This discourse could be explained by a disappointment in the power of law to solve human conflicts. Possibly, these changes in discourse can also be found in other countries; more research is required here.

However, I suggest that there is also a Dutch twist to these changing discourses. The most significant changes took place in the period after 2000. This was a time in which some significant changes in Dutch society occurred. After the murder of populist politician Pim Fortuyn, the idea emerged that 'old, elite' politics had failed, because they did not listen to the concerns and emotions of 'normal citizens'. This critique on old politics focussed largely on the consequences of migration and multiculturalism. The Netherlands has turned from what was said to be an open society looking at the world to more inward-looking, and suspicious of globalization and international law. The discourse on child abduction could be seen as an expression of this suspicion, fear of international marriages, international law and foreign legal systems. As we have seen, it was often implied that a Dutch child is best off in the Netherlands, that the Dutch mother is always in her rights, cannot live in strange, foreign countries (including the USA), and the Dutch legal system is the best.[68]

As has often been argued, ideals of family, womanhood and motherhood are closely related to representation of the nation and nationhood.[69] In this respect the warnings directed at Dutch women –and never men- about the dangers of international marriages, with Egyptian and American men alike, are a warning to all in Dutch society. We could therefore see the public concern over the private stories of child abduction as a way for the Netherlands to position itself in a globalized world that has come to be seen as more and more threatening.

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64 M. Wegelin, 'Omgangsrecht in de landelijke pers. terugblik op een opinieklimaat' (1983) *Tijdschrift voor familie en jeugdrecht,* 189-196. M. Wegelin, *Moeders en vaders, scheiden en delen. Constructies van gelijkheid in de verdeling van het ouderschap na echtscheiding* (University of Amsterdam 1990).

65 Reulecke, p. @

66 P. Albanese, 'The Missing Child in Canadian Sociology: Is it Time for Change?' *Jeunesse/Young People* (2009), 136-146.

67 A. Hoekema, *Rechtspluralisme en interlegaliteit* (Vossiuspers UvA 2004).

68 A. Hoekema and W. Van Rossum. 'Empricial conflict rules in Dutch legal cases of cultural diversity', in M. C. Foblets, J. F. Gaudreault-DesBiens and A. Dundes-Renteln (eds) *Cultural Diverstiy and the Law* (Bruylant 2010), 851-888.

69 N. Yuval-Davis, *Gender and Nation* (Sage Publications 1997).

Linking Child Abduction and the Free Movement of Persons in European Law

Ruth Lamont *

Introduction

Child abduction is an international problem and not one that just affects citizens of the Member States of the European Union. However, despite the global reach of the Hague Convention 1980, the EU has its own approach to regulating international child abduction, based on the return remedy created by the Hague Convention, but applicable only to those abductions between its Member States. The rationale and necessity of the child abduction provisions of Brussels II Revised[2] has of course been questioned before,[3] but it is now in operation and provides additional aspects to the operation of the return remedy with the aim of reinforcing its application across EU Member States. Instead of focusing on the specific rules addressing child abduction within the EU, in this paper I want to demonstrate the underlying influences of the Brussels II Revised Regulation as they affect international child abduction. In particular I want to examine the influence of the free movement of persons, a key fundamental freedom in European law supporting the internal market, and now a central element of European citizenship, on both the conception of Brussels II Revised and on its potential interpretation in the future. It will be argued that the free movement of persons shapes the way the Regulation is intended to operate in cases of international child abduction and has informed the approach of the European Court of Justice in its interpretation of the Regulation.

The free movement of persons policy and its importance within the European policy framework will be considered first to identify where European interest in regulating international family life originated and to demonstrate its current importance and links to European citizenship and the realisation of the Area of Freedom, Security and Justice. It will be argued that the free movement of persons has led to an emphasis on mutual trust between Member States' legal systems and that this informed the approach taken to legislating for the effects of cross-border family life in Brussels II Revised. The influence of the policy on the interpretation of the Regulation by the European Court of Justice will be demonstrated by consideration of Case C-523/07 A [4] which gives an interpretation of the habitual residence of children, and Case C-403/09 PPU Deticek[5] where the Court was asked to consider the interaction of the child abduction provisions with the use of provisional measures to protect children outside their habitual residence. Finally, some of the wider tensions created by this focus will be examined, identifying the inherent conflict between promoting free movement of persons with the desire to maintain stability and contact with both parents for children by preventing international child abduction.

Where did European interest in family life originate? Why is the free movement of persons important?

Regulation of family life within Europe is not an entirely recent phenomenon. The original Treaty of Rome envisaged that workers would move freely between the Member States, and that the free movement of labour in this way would help build the internal market. The free movement of persons was complemented by freedom of movement for goods, capital and services and these form the fundamental principles of the economic union. However, it was recognised that free movement for workers alone would not be sufficient to encourage migration, a worker was unlikely to want to move without their family members.[6] The free movement of workers

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2 Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000. [2003] OJ L 338/1, 27th November 2003.

3 See McEleavy, P. 'The New Child Abduction Regime in the European Community: Symbiotic Relationship or Forced Partnership?' (2007) 3 *Journal of Private International Law* 5

4 Case C-523/07 A [2009] ECR I-2805.

5 Case C-403/09 PPU *Deticek v Sgueglia*, judgment of 13th March 2010.

6 Self-employed people and their families are also covered, but the focus here is on workers.

provisions in Regulation 1612/68, which defined the rights of workers to move and access benefits in their host Member State, therefore also extended the rights to defined family members to allow them to migrate alongside the worker. The EEC, as it then was, had an interest in regulating cross-border family life only as far as it was necessary to regulate the family members of workers, providing them with the same opportunities as citizens of that Member State.

This, broadly speaking, was the extent of European interest in family life until the Treaty of Maastrict. Under Article 18(1) EC, the Treaty of Maastrict created a concept of European citizenship, a status which all citizens of a Member State hold, and one of the major rights attached to that concept was the right of movement of all citizens within the European space, subject to the limitations and conditions laid down in the Treaty and relevant legislation. The significance of Article 18(1) was not initially clear, in particular whether it added any further rights beyond those already provided for by the free movement of workers provisions. The potential implications of this provision were broad: citizens had the right of movement, not just workers, and the right of family members to move around Europe, as long as they were citizens, would no longer necessarily be parasitic on the right of the worker.[7] The concept of citizenship was developed by the European Court of Justice in a series of judgments and in Case C-413/99 Baumbast[8] it was established that Article 18(1) embodies a directly effective right to reside in a host Member State, although this remains subject to the restrictions of secondary legislation made under the Treaty. The provisions on free movement on citizens, defining who can move, have now been consolidated in Directive 2004/38[9] to reflect the developments in the concept of citizenship and the case law of the ECJ. There is not complete free movement of citizens, and family members who do not work must still move with a worker,[10] but the restrictions on free movement must now be developed and interpreted in a proportionate way. Article 18(1), now Article 21(1) under the Treaty on the Functioning of the European Union (Lisbon Treaty) demonstrates the importance of the free movement of persons for the EU. By linking it to the status of citizenship, the free movement principle has been placed at the centre of what the EU hopes it can provide for people within Europe.

The aspirational nature of the notion of citizenship led the European institutions to seek policies beyond the focus on goods and the internal market, aimed at securing the principle of free movement. This goal was supplemented by the additional competences provided by the transfer of Title IV into the EC Treaty by the Treaty of Amsterdam, covering 'the incidences of the free movement of persons': asylum and immigration policy and judicial cooperation over civil matters. Together with cooperation over criminal law matters with cross-border implications, these policy areas became the basis of the policy portfolio developing an 'Area of Freedom, Security and Justice' within Europe following the Tampere European Council. Free movement within the European space is a central theme of this policy portfolio and is closely linked to the concept of European citizenship. In the most recent Programme for action, the Stockholm Programme, the European Council reaffirmed its commitment to developing an Area of Freedom, Security and Justice '...responding to a central concern of the peoples of the States brought together in the Union.'[11] Developing legislation within this framework is clearly linked to adding value to European citizens and inherently linked to the consequences of free movement within Europe.

It is this aspect of European competence of which Brussels II Revised formed part, having been adopted under Article 65 EC. It was recognised by the Commission that Brussels II Revised responds to some of the problems arising due to the free movement policy. Free movement of persons encourages the formation of international families, and when international families breakdown the legal processes will vary between Member States. In trying to address the consequences like international child abduction, the EU is trying to manage the negative outcomes of the policy of free movement of persons. In the proposals for Brussels II Revised, the Commission stated that the proposal responded to the difficulties

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7 Legislation was put in place to cover students, retired people and those with sufficient resources to maintain themselves without becoming a burden upon the social security of the host State.

8 Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091

9 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77, 29th April 2004.

10 Article 7, Directive 2004/38.

11 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens' 2nd December 2009, 1.

created, stating that:

'As people increasingly move from one Member State to another, and families breakup and are recomposed, children need a secure legal environment for maintaining relations with persons who have parental responsibility over them and who may now live in different Member States.' [12]

However, it is important to bear in mind that although Brussels II Revised aims to address the consequences of free movement it was also developed within the wider policy of the Area of Freedom, Security and Justice, which aims to encourage movement. The link between the internal market and migration is used to justify intervention in private international family law and has meant that the form and tools adopted have been modelled to these political purposes.[13] I want to now consider what approach the EU has taken to regulating cross-border family conflicts and then focus on how that has affected international child abduction under Brussels II Revised.

The Approach of Mutual Trust and Child Abduction in Brussels II Revised

The basis for European intervention in the policy areas covered by the portfolio of the Area of Freedom, Security and Justice has been the principle of mutual trust between States. The Stockholm Programme outlines the importance of this principle, arguing that 'Mutual trust between authorities and services in the different Member States as well as decision-makers is the basis for efficient cooperation in this area.' [14]

Mutual trust requires that all legal systems within Europe must trust all other legal systems and the decisions emanating from that system without looking behind to consider the substance of the decisions. Mutual trust encourages focus on automatic mutual recognition of judgments[15] by all Member States and limits on disputes over jurisdiction. The principle of mutual trust supports the policy of free movement of persons because it encourages speed and limited formality, reducing the potential complexity of processes. The mutual trust principle forms the basis of European regulation of cross-border family disputes and is linked both to ease of circulation of judgments within the European space and thus the ease of movement of people. The principle of mutual trust and the free movement of persons formed the context for the development of Brussels II Revised.[16]

The approach based on the principle of mutual trust has particular implications for cross-border family law disputes. Family law disputes and substantive family law more generally is often informed by the culture and society and its perception of family life. When we ask all Member States to trust every other, we are asking them to trust the content and interpretation of their domestic family law. For example, establishing where a child's best interests lie, or at what point a child is old and mature enough to be heard in proceedings, may vary significantly between States. Mutual trust requires significant respect to be accorded to these decisions, despite the differences, and makes it important that decisions are taken where there is a true link between the individual and the jurisdiction, particularly where children are concerned.

The provisions of Brussels II Revised relating to international child abduction are an endorsement and reinforcement of the return remedy in the Hague Convention 1980. The decision to return the child is intended to be taken quickly and is not a hearing over the custody of the child. The child's habitual residence is deemed to be the appropriate forum for such a hearing and as such is facilitated by the return of the child. The Hague Convention itself therefore relies upon trust between States as an important element of its operation and comity between jurisdictions using the Convention has been a significant aspect of the reasoning in English decisions on the Hague Convention. In addressing child abduction within the European framework the EU was engaging with an area of law already successfully regulated using similar principles. Arguably the free movement of persons within Europe both exacerbated the problem of child abduction and potentially made it easier to achieve, particularly within the Schengen area, but it was questionable the extent to which the EU could add to the already existing approach.

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12 Commission COM(3002) 505 final, 2

13 Meeusen, J. 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 European Journal of Migration and Law 287, 305.

14 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens' 2nd December 2009, 5.

15 This is reflected in the policy of reducing the processes involved for the enforcement of judgments and the abolition of exequatur.

16 These principles are reflected in Recitals 1, 2 and 21, Brussels II Revised.

Brussels II Revised is clearly aimed at reinforcing the return remedy, responding to the ease of movement and also acts to try and encourage trust between Member States. This is evident in the provisions of the Regulation, particularly Article 11(4) which affects cases where Article 13(b), Hague Convention 1980 is returned and requires the court to consider whether there are mechanisms in place which can adequately protect the child on return. This process encourages trust in other Member State's legal and social systems to secure the welfare of children on return. Although there are practical difficulties and potentially allows judges to assess the suitability of arrangements, the primary focus of Article 11(4) is on the aim of returning children and trying to reduce the circumstances in which this cannot be achieved.

Secondly, the Article 11 mechanism which permits the courts in the child's habitual residence to be seised to consider the custody of the child once return has been refused under the Hague Convention 1980. This seems to significantly undermine the principle of mutual trust because it potentially allows one Member State court to replace the decision of the court refusing the child's return.[17] Rather than trusting that decision, the issue is reopened for further consideration. Although there is potential for this to occur, the hearing in the child's habitual residence, if it takes place, is a custody hearing and should consider a wider range of issues than the return hearing. As such, the decision of this court may have a wider knowledge base to act on and methods at its disposal to ensure the safety and welfare of the child in the future. The mechanism then acts as a strong reinforcement of the child's habitual residence as the appropriate jurisdiction for the hearing of a dispute over the child, and requires the court hearing the return proceedings to accept this, despite its own decision. Effectively the court hearing the return application is required to trust the decision of the court of the child's habitual residence.

The actual legal provisions of Brussels II Revised are only one half of the story however. The interpretation and use of the Regulation will obviously affect its use in practice and, although national practice is an important aspect of this analysis, I want to focus on the European Court of Justice and its approach to these family law disputes. In particular I want to highlight the underlying influence of the free movement and mutual trust principles in defining its interpretation of Brussels II Revised.

Interpretation by the European Court of Justice and the Potential for Conflict

The European Court of Justice has the exclusive right to define the interpretation of European legislation for the purposes of certainty and consistency in the application of European law throughout the Union.[18] The ECJ is generally regarded as an active agent in the protection and enforcement of European principles which contribute to the realisation of the aims of the Treaties. The type of case the ECJ is generally presented with are more commonly commercial or contractual in nature and it is not well known for its family law jurisprudence. It is having to develop its expertise at speed, but there is evidence that it is using its tried an tested approach to the internal market and fundamental freedoms in its decisions on Brussels II Revised. In particular, policies of mutual trust and free movement of persons have the potential to shape the reasoning about child abduction, and to create tensions with national courts over subsequent relocation.

I first want to consider two decisions of the ECJ on Brussels II Revised. The first is A, a decision about habitual residence under Article 8, Brussels II Revised and habitual residence and protective measures under Article 20. The children had been taken into care in Finland but it was not clear where they were habitually resident and the Finnish court sought a preliminary reference on when a child is habitually resident in a State and what measures can be taken if they are not for their protection. Case A is not therefore a decision on child abduction, but the decision on the interpretation of a child's habitual residence is important as this potentially influences the interpretation of the child's habitual residence prior to an alleged unlawful removal or retention. Other aspects of European law use the concept of habitual residence, which has been interpreted as being established very quickly by the ECJ to ensure coverage by European law.[19] In the context of the free movement of persons, it may be regarded as

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[17] McEleavy, P. 'The New Child Abduction Regime in the European Community: Symbiotic Relationship or Forced Partnership?' (2007) 3 *Journal of Private International Law* 5.

[18] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199

[19] E.g. Case C-90/97 *Swaddling v Adjudication Officer* [1999] ECR I-1075. See Lamont, R. 'Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law' (2007) 3 *Journal of Private International Law* 261.

necessary to establish habitual residence very quickly to ensure the protection of the child from abduction. The ECJ derived a fact sensitive interpretation of the concept, requiring national courts to consider '...the duration, regularity, conditions and reasons for the stay on a territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child...'.[20] Although the ECJ refrains from transposing the interpretation of adult habitual residence from elsewhere in EU law onto the position of children, the focus does remain on the reasons for the migration and why the family is in that State. The position of the child within the family is viewed through the reasons for the move and its conditions. The actual decision on where a child is habitually resident will remain with national courts, and the ECJ has pointed to several important factors, but it is firmly grounded in the context of European law more widely where the stability of the residence is a less important factor, the reasons for the presence in the jurisdiction may assume more importance.

Secondly, the decision in Deticek indicates that the ECJ may use human rights principles to reinforce its decisions on Brussels II Revised and its emphasis on mutual trust and the return remedy. In Deticek the mother had removed the child from Italy to Slovenia following divorce proceedings in which custody had provisionally been granted to the father, although the court had ordered that the child be placed temporarily in a children's home. The Maribor Regional Court in Slovenia enforced the Italian custody order in Slovenia and proceedings began for the return of the child to Italy. However, the mother applied to the Slovenian court for a provisional and protective measure giving her custody of the child under Article 20, Brussels II Revised. The child had expressed a wish to remain with her mother during the proceedings and the Slovenian court granted custody to the mother on the grounds that the child had settled in Slovenia and return to a children's home in Italy would be cause her both physical and psychological trauma. [21]

The ECJ found that to use Article 20 to defeat the return of the child to Italy was inappropriate because, as an exception to the jurisdictional principles in Brussels II Revised, it must be interpreted strictly.[22] There was no urgency in this case and to permit a change in the child's circumstances to undermine their return to their habitual residence would 'run counter to the principle of mutual recognition of judgments'[23] and would encourage courts to block the enforcement of foreign judgments. The mother should not be able to take advantage of her wrongdoing in removing the child from Italy and, in supporting these arguments, the ECJ refers explicitly to Article 24 of the Charter of Fundamental Rights of the European Union, which protects children's rights, particularly the right for children to have decisions taken in their best interests.[24] However, the Court refers only to the right under Article 24(3), the right of the child to maintain a personal relationship, and have contact with, both parents, which in the ECJ's words is 'undeniably merging into the best interests of any child.'[25] This right is seen within the wider context of European integration and the resulting structure of Brussels II Revised, with its emphasis on mutual trust. The use of Article 24(3) is selective and there is no examination of the internal contradictions of Article 24, with its emphasis on both the welfare and autonomy of children.[26] Impliedly, in this case the child's welfare lies with having contact with both parents, despite the other factors identified by the Slovenian court. Most notably perhaps the ECJ effectively ignores the views of the child which had been expressed to the Slovenian court, also guaranteed by Article 24 of the Charter, but only mentioned briefly by the ECJ. The Court does not consider the role of the child's right to be heard under Article 24 and the impact of her views on the domestic court's decision. The outcome, and the reasoning, in Deticek are defensible, although the result

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20 Case C-523/07 A [2009] ECR I-2805, para 39

21 Article 13b, Hague Convention 1980.

22 Case C-403/09 PPU Deticek v Sgueglia, judgment of 13th March 2010, para 38.

23 Ibid, para 45.

24 Ibid, para 53.

25 Ibid, para 54.

26 Stalford, H. 'Brussels II and Beyond: A Better Deal for Children in the European Union?' in Boele-Woelki, K. (ed) Perspectives for the Unification and Harmonisation of Family Law in Europe (2003, Intersentia, Antwerp), 476.

for the child concerned in being returned to an Italian children's home might be regarded as problematic.[27] However, the reasoning of the ECJ was strongly informed by the underlying principles of the Regulation, and particularly the principles of mutual trust and recognition of judgments, and children's rights were used to reinforce that reasoning process.

Finally, the principle of free movement of persons as a European law principle and a directly enforceable right of citizenship, could potentially cause tensions in domestic law. National law has struggled to a certain extent with application for a parent to relocate from the jurisdiction with the child following the breakup of the relationship with the child's other parent.[28] The situation of primary carer mothers has been of particular concern. The way in which national jurisdictions have approached this problem has varied but the court has an understandable desire to maintain the relationship between the child and both their parents, and relocation abroad is likely to significantly affect the child's relationship with the parent who remains. Refusing relocation however will highlight the inherent tension between this approach and the free movement rights of the parent. If the relationship between the parent wishing to relocate and their child is recognised, the refusal to allow the child to relocate abroad affects the parent's European right of free movement if they cannot relocate with their child. Some parents may wish to relocate for defensible reasons, to facilitate care and access job markets in their home State for example, but they will be tied to the host State through the continuation of their former relationship. There is evidence that some women in these circumstances view this as a restriction on their right of free movement[29] and this raises the risk of the abduction of the child. Although the parent's right is not directly affected by the restriction of the relocation of the child, there is an inherent tension here with the wider principle of the free movement of persons, potentially affecting an individuals access to a right of European citizenship. Although the law of relocation is a domestic issue, the scope of European law is such that if domestic law affects an individuals right of free movement, broadly interpreted, this falls within the scope of European law.[30] This right can be restricted where it is necessary and proportionate to do so, and relocation law may in fall within those guidelines, but the tension demonstrates the wider impact the European approach to cross-border family disputes may have the potential to create.

Conclusions

The European intervention in regulating international child abduction was not without controversy but arguably Brussels II Revised was an attempt to address a problem that the EU itself has a role in creating. The legislative response is however strongly informed by the legal context in which it developed and the effect of the free movement of persons on family life remains an influence on the use and interpretation of Brussels II Revised. In particular, the approach of the ECJ, grounded in its European role as enforcer of the Treaties, is shaped to a large degree by the importance of the fundamental freedoms. This is perhaps an inevitable aspect of regulation by a supranational body with its own aims and policies, but there is potential for wider tension. Although there are limits on the principle, it is clear that applying this policy in a family law context does not have straightforward outcomes. Free movement of persons is obviously not the only concern, but the link drawn in the European context should be acknowledged as an influence on Brussels II Revised.

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[27] Returning a child to a State where they will enter the care system has a precedent in English law see Re S (Abduction: Return into Care) [1999] 1 FLR 843.

[28] In the English context see Payne v Payne [2001] 1 FLR 1051.

[29] Ackers, L. 'Citizenship, Migration and the Value of Care in the European Union' (2004) 30 Journal of Ethnic and Migration Studies 373, 393.

[30] Case C-60/00 Carpenter where domestic immigration law was held to constitute a potential restriction on free movement of persons.

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The Influence of the CRC on the implementation of the the Hague Child Abduction Convention

Rhona Schuz *

1. Introduction

The United Nations Convention on the Rights of the Child (hereinafter: the CRC) constitutes international, almost universal, recognition of the status of minors as right-holders independent of their parents and provides a relatively comprehensive list of the rights which they are recognized as holding. It can be convincingly argued that the two most influential provisions of the CRC are Article 3, which provides that the best interests of the child shall be a primary consideration in all decisions affecting minors, and Article 12, which entrenches the child's right to participate in decisions concerning him.[1] These two provisions together with a number of other rights recognized by the Convention, such as the right of the child to continued contact with both parents[2] and his right to identity, have direct relevance to international abduction cases.

When I started writing about the relevance of the CRC to the Hague convention on the Civil Aspects of International Child Abduction (hereinafter: the Abduction Convention) at the beginning of the century,[3] the CRC was very rarely mentioned in Hague cases and even in academic writing was not given prominence.

I am pleased to say that my review of case law in a number of jurisdictions shows that this situation is changing and, in particular, Article 12 is mentioned quite frequently. Last summer I was privileged to participate in a judicial conference of around 50 Commonwealth judges, organized by Lord Justice Thorpe, in which one of the main topics of discussion was the Abduction Convention and all the papers on this topic referred to the CRC.[4]

In the short time available to me, I want to concentrate on the ways in which I believe that my views go further than the mainstream view in relation to the influence of the CRC on the implementation of the Abduction Convention.

2. The Right to be Heard

There is no doubt that children are being given more opportunity to have their voices heard in Hague cases in some jurisdictions, partly as a result of Article 11(2) of Brussels II Revised. I would remind you that under this provision the obligation to hear children is not limited to cases where the Article 13(2) child objection defence is pleaded.

However, Brussells II Revised does not specify how children should be heard and my research shows that in most countries children are heard by an expert or welfare officer, who then reports to the Court. In my view, such indirect hearing does not go far enough. The main rationales behind the child's right to participate in proceedings concerning him[5] require that a child be given

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[1] For convenience, children will be referred to in the masculine form rather than using the clumsier his/her notation or alternating randomly between masculine or feminine forms.

[2] Entrenched in Art.7 of the CRC. Whilst clearly the Abduction Convention can be seen as promoting this right, it should be remembered that if the abducting parent does not return with the child, then the return will damage the child's right to continuing contact with that parent. Whilst considerations of justice between the parents and law enforcement might favour giving preference to the left-behind parent, this outcome cannot be based purely on the child's right to continuing contact with both parents.
Similarly, it is difficult to accept the claim that returning a child under the Abduction Convention violates the child's right to family life under Art. 8 of the European Convention on Human Rights
since the purpose of return is to restore the family life with the left-behind parent. But see the recent decision of Grand Chamber of the European Court of Human Rights (ECHR) (*Neulinger and Shuruk v Switzerland (Application no. 41615/07*, 6th July 2010) holding *inter alia* that enforcement of the Swiss return order after so long would violate the right to family life. Ironically, the long delay was caused by the ECHR proceedings themselves and thus the interference of the ECHR undermined the Abduction Convention).

[3] R. Schuz, "The Hague Child Abduction Convention and Children's Rights", *Transnational Law & Contemporary Problems Vol. 12*, No. 2, 396 , (2002) (hereinafter "Schuz (2002)") at 401)

[4] The current paper is an abridged and updated version of my paper at that conference.

[5] Recognition that the child is a separate personality independent from his parents; the child's constitutional right to put forward his views before the judge who is making the decision about his life; respect for the child; recognition of the child as a social and moral actor at the centre of the process; benefit to the child. See, for example, F. Raitt, "Hearing Child in Family Law Proceedings", *Child and Family Law Quarterly Vol 19* 204 (2007); A.L. James, A. James and S. McNamee, "Turn Down the Volume? Not Hearing Children in Family Proceedings", 16 *Child and Family Law Quarterly*, 189 (2007). See also words of Israeli Justice Rotlevi in *FamA 90/97 Moran v Feldman-Moran Tak-mechozi 98(3) 34571 (*1998), , "it is expected that family courts will develop the approach of giving respect to the child by hearing him, not from a paternalistic stance that there is no point in hearing, because they with the help of experts know what is good for him and can interpret his views, but from an opposite approach that usually children have the ability to express their views and to make preferences and that they should be allowed to have their views heard" (author's translation – R.S.)

the opportunity to be heard directly by the judge hearing his case. I would add that the Israeli Supreme Court held three years ago that sufficiently mature children should be given the opportunity to meet with the judge in all Hague cases unless there was clear indication from a welfare professional that this would cause them harm.[6] Justice Arbel added that where the child wished to talk to the judge, it was unlikely that this would cause harm.

Of course, many children will not want to talk to the judge directly and they should certainly not be forced to do so, but their right to be heard is only properly realized if they are given the opportunity to do so. In a two-year pilot project in Israel, children aged over six involved in certain types of family proceedings were given the opportunity to talk to judge in private, if they wished to do so.[7] Only 26% took advantage of this opportunity and the rest were content to be heard by a special court social worker appointed for this purpose, who passed on to the judge a protocol of the discussion with the child, which was treated as confidential and not available to the parties. This method of indirect hearing is also a considerable improvement on the traditional welfare report in which the child's views are reported through the eyes of the welfare officer. Research accompanying the pilot reported high rates of satisfaction among the children and their parents and the project is being continued and expanded.

I am aware of the argument that the hearing of children by judges or even social workers in the absence of the parties is inconsistent with the adversarial system and prejudices the procedural rights of the parents. However, I believe that we have to give precedence to the rights of the child and to remember that the decision primarily concerns his future. If it is felt that there is a need for a welfare professional to report on the maturity or mental state of the child, this can be in addition to the meeting with the judge.

3. The right to have appropriate weight attached to his views

Consideration of case law from a number of countries[8], convinces me that many judges still take the view that only in exceptional cases will the child's views outweigh the so-called policy of the Convention. Baroness Hale rejected this approach in *Re M (Abduction: Zimbabwe)*.[9] I would go further and argue that that the exceptions are part of the policy of the Convention.

I am far from suggesting that children's views should be followed in every case, but I think that judges are often too paternalistic in deciding whether a child is sufficiently old and mature that his views be taken into account and whether his views are independent. We should remember that adults too sometimes have difficulty in taking into account long term considerations when making decisions and that adults are also often influenced by the views of those around them.

In particular, more weight should be given to the child's objections, where the child has become settled in the country of refuge. In these cases, as Baroness Hale points out,[10] the child is a victim twice : first when he is abducted and has to acclimatize and secondly when after having settled in the country of refuge he is uprooted a second time against his will in order to satisfy the Convention policy of returning children. Isn't this treating the child as a chattel to be shuttled around at the will of adults?

4. The right to independent representation

Article 12(2) of the CRC recognises the possibility that a child may be separately represented, but does not confer on him any right to such representation. However, acknowledgment that children are independent individuals who are separate from their parents inevitably involves recognition of the right of children to have their interests represented in proceedings affecting them distinct from the interests of their parents. Where the parents are not able to represent the interests of their child properly, usually because there is a conflict between their own interests and that of the child, there exists a risk that the child's rights, needs or other interests will suffer real damage. Thus, in such cases the child has a right to separate representation[11] and the State has an obligation

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6 FamA 5579/07 *Plonit v Ploni tak-al 07(3) 2054* (2007)

7 For more detailed explanation of the project see Rhona Schuz, "The Voice of the Child in the Israeli Family Court," B. Atkin (ed) *The International Survey of Family Law, 2008 Edition* (Family Law) 185-205.

8 For detailed analysis of the interpretation of article 13(2), see Rhona Schuz , "Protection Versus Autonomy: The Child Abduction Experience" in Ya'ir. Ronen and Charles W. Greenbaum (eds), *The Case for the Child: Towards a New Agenda* (Intersentia, 2008) 269

9 *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at para. 42 - 46.. See also decision of the Supreme Court of New Zealand in Secretary for *Justice v HJ* [2007] NZFLR 195.

10 *Re M ibid* at para. 52-53.

11 It is important to point out that the right to separate representation is wider than the right of the child to participate. Thus, separate representation is not only a method of enabling the child's voice to be heard, but is a method of ensuring that the child's case is presented to the court in a persuasive and professional manner.

to provide representation for the children, in the same way that it has an obligation to meet other needs of the child that are not met by their parents.

However, whilst there has been a growing recognition in a number of countries, including England[12], that there will be cases involving children where separate legal representation is required, separate representation is still only ordered in a small percentage of private law cases in most common law countries.

I would suggest that certain characteristics of abduction cases increase the need for separate representation. In particular, the fact that the abducting parent is perceived to be the guilty party is liable to affect the way in which the court treats the abductor's arguments in relation to the child's interests. For example, in the UK case of *Re M (Abduction: Zimbabwe* at first instance and in the Court of Appeal,[13]) where the child was not separately represented, the settlement and child objection exceptions pleaded by the abducting mother were analyzed more from the parents' perspective than from that of the children and thus return was ordered, even though the article 12(2) settlement defence was established. In contrast, in the House of Lords[14], where the children were separately represented, counsel for the children emphasized child-centric considerations, and in particular the impact that the return order would have on the children. Baroness Hale, with whom all the other Lords agreed on this point, accepted these arguments and so return was refused.

In my view, all Contracting States should follow the example of the Swiss Federal Act on International Child Abduction of December 2007, which mandates appointing a separate representative for the child in Hague cases[15]. At the very least, the need for separate representation should be considered automatically in all cases where there is a risk that the child's interests will not be fully and objectively represented, including all cases where the child objection or grave risk of harm or settlement defences are raised.

5. The right to have his best interests treated as a primary consideration

I maintain that there is a potential clash between the Abduction Convention and the CRC. The fact that the CRC entreats states to take measures to combat the illicit transfer and non-return of children abroad[16] does not mean that any means of doing so will be consistent with the CRC, even if other rights in the CRC are violated.

Thus, whilst clearly the child's welfare is not the sole or even paramount consideration as in domestic custody cases and it is inappropriate to carry out a detailed welfare investigation, weight is still given to the child's interests through the exceptions to mandatory return.[17]

Much has been said in recent years about the need to improve measures to protect returned children, by techniques such as mirror orders and judicial co-operation and some progress has been made[18]. However, at the end of the day, we have to remember that there will be some cases where even mirror orders and judicial co-operation cannot effectively neutralize the grave risk of harm or the intolerable situation[19] and that the drafters enacted article 13(1)(b) because they saw a need for it. The fact that most abductions are by primary caretakers means that the exception is likely to apply more often than intended by the drafters, who did not envisage this scenario. But this does not mean that the courts should be afraid to use the exception where necessary. In particular, there would seem to be room for more use of the intolerable situation exception, as shown by the Swiss reform[20]. I believe that judges need to be mindful of Baroness Hale's clear warning that the Abduction Convention, which was designed to protect children from harm, should not become an instrument for causing them harm[21].

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12 See, for example, discussion in J. Fortin, *Children's Rights and the Developing Law* (3rd edition, 2009) at 256-264. and Marilyn Freeman and Anne-Marie Hutchinson, *Abduction and The Voice of the Child:* Re M *and thereafter* [2008] IFL 163

13 [2007] All ER (D)(69)

14 *Supra* note 9

15 See Merle Weiner, "Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases" 58 Am. U.L. Rev. 335 (2008) and Andreas. Bucher, "The New Swiss Federal Act on International Child Abduction" J. Priv. Int. Law Vol 4 139 (2008) (to which an English translation of the Swiss Act is appended)

16 See articles 11 and 35.

17 For detailed consideration of the arguments see Schuz (2002) supra note 1 at pp. 436-440

18 See for example Conclusions and Recommendations of the 5th Special Commission (November 2006) Parts VI and VIII , available at http://www.hcch.net/upload/concl28sc5_e.pdf and Lord Justice Thorpe, "Judicial Activism in International Child Abduction", [2010] INT. FAM. L. 113

19 See per Baroness Hale in *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51at para 52

20 See Weiner *supra* note 15 at and Bucher *supra* note 15

21 *Re D (a child) (abduction: foreign custody rights) supra* note 19 at para 52

6. Child-Centric Interpretation

I would argue that the influence of the CRC is wider than the specific rights enacted therein. The Convention's recognition of the concept that children have rights contains a fundamental message about the centrality of children in matters affecting them. The doctrine of the rights of the child emphasizes that the child is a subject and that issues affecting him have to be viewed through his eyes and not paternalistically from the viewpoint of adults. The implications of this perception go further than giving mature children the right to be heard and have weight accorded to their views. In addition, findings concerning children of all ages have to take into account the situation from the viewpoint of the child. In the context of the Abduction Convention, this conclusion is particularly pertinent in relation to the crucial finding as to the place of the child's habitual residence, whether there has been a breach of custody rights and in relation to the finding as to whether the child has become settled in his new environment under article 12(2) , in cases where one year has passed between the date of wrongful removal or retention and that of submission of the application. Since caselaw evidences differing approaches among the judiciary in different countries on these three issues, I think that it is important to discuss them, if only briefly.

Habitual Residence

As most of you will know, some courts, such as those in England, determine a child's habitual residence in the light of the parental intention ; whereas other courts use an objective or independent test which examines the degree of connection between the child and the country involved. When I wrote about these different approaches in 2001[22], US courts were the pioneers of the independent approach, but since then the positions has changed rather dramatically and some circuits have adopted an even more stringent version of the parental intention approach, under which habitual residence cannot usually change unless both parents intend to abandon the previous habitual residence[23].

This emphasis on the intentions of the parents ignores the fact that the objective of the Convention is to prevent harm to a child by wrongfully removing him from a country which he regards as his home and which is the forum conveniens for the trial of the merits of the dispute concerning his future.

I would argue that it is essential to view the question of habitual residence from the child's perspective[24]. Whilst the child's point of view is undoubtedly heavily influenced by his parents' intentions, it is important to assess those intentions via the eyes of a child[25]. If the child is unaware that the stay in a particular place is for a limited time and this fact is not clear from day to day living arrangements, then the temporary nature of the visit cannot influence the child's perception of his connection with the place. Even where he is so aware, the significance of the intended duration of the stay needs to be judged in the light of a child's sense of time. To a child, two or three years is like a lifetime and so he may form significant connections with the local environment, despite the temporary nature of the stay.

Rights of Custody

The term rights of custody needs to be interpreted widely in order to give effect to the child's right to have continuing contact with both parents, which is entrenched in arts 7 and 9 of the CRC.

Two recent decisions are consistent with this approach: the US Supreme Court decision in *Abbot*[26], in relation to ne exeat rights, and the UK Court of Appeal decision in *Re K*[27] holding that the unmarried father had custody rights.

I have suggested in the past that the using breach of parental custody rights as the trigger for the mandatory return mechanism is inconsistent with the concept of the rights of the child because it treats the left-behind parent as the real victim of the abduction and gives him a remedy similar to that given to a person whose property has been taken from him unlawfully[28]. Indeed, case-law concerning

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22 R. Schuz, Habitual residence of children under the Hague Child Abduction Convention – theory and practice , CFLQ Vol. 13 No. 1 , 1 (2001)

23 See, for example, *Gitter v Gitter 396 F.3d 124* (2005)

24 See per Israeli Justice Hendel in FamA 130/08 *Plonit v Almonit* (District Court, 31.8.08) ,"It seems to me that the language of the Convention requires us to focus on the child and not on his parents – "habitual residence of the child… The examination requires pure, comprehensive and in-depth fact-finding. The inclusive fact finding requires hearing the voice of the child – not in the sense that the court asks him where is his habitual residence, because we are not dealing with a subjective issue……It is important to examine the life of the child as it is, but the conclusion is likely to include the parents' intention, which is also relevant as a fact." (author's translation)

25 A rare example of giving weight to the child's perceptions and wishes in determining his habitual residence can be found in the New Zealand case of *LJG v RTP (Child abduction)* [2006] NZFLR 589

26 *Abbott v Abbott 130 S.Ct* 1983 (2010)

27 *Re K (Children)(Rights of Custody: Spain)* 2009 EWCA Civ 986.

28 Schuz (2002) *supra* note 3 at 407-8.

the interpretation of custody rights, such as *Abbott,* focuses entirely on the rights of the parents and not on the implications for the child. Thus, I argue that the breach of the child's right to contact with his parents should be the trigger. However, I realize that such a reform is unrealistic and so the best that can be done is to interpret custody rights widely. But there is nothing to stop the courts referring to the child's right to contact with his parents in support of such wide interpretation.

Settlement

The defence in article 12(2) of the Abduction Convention, which applies where twelve months have passed since the date of wrongful removal or retention and the child has become settled in his new environment, gives effect to the child's need for stability and continuity and in some cases also to his right to identity. A child-centric approach to interpretation of the Convention requires that the question of whether the child has become settled should be considered from the perspective of the child[29].

For example, the impact of concealment must be considered from the child's point of view as evidenced by the child's way of life. Accordingly, where the child has been living in the same place for a reasonable period of time, has a perfectly normal everyday life and participates fully in educational and social activities, the fact that his carer is a fugitive from justice is not relevant to the question of the child's settlement[30]. Furthermore, the question of settlement must be considered in the light of the child's sense of time, which does not usually include long term future planning. Thus, it is inappropriate to require proof of a long term settled position

It should be pointed out that a child-centric approach to interpretation of settlement in art. 12(2) is consistent with a purposive interpretation of this provision. In the words of Singer J,

> "If .. too high a threshold is set for establishing settlement, the consequence is not so much that the Hague Convention's aims of speedy return will be frustrated, but rather that a child who has in his or her past already suffered the disadvantages of unilateral removal across a frontier will be exposed to the disruption inherent in what for that child would be a second dislocation, potentially inflicting cumulative trauma."[31]

Thus, where the required 12 months has passed, if a child feels settled in the country of refuge, he should not be returned without a careful welfare investigation. However, where the child does not yet feel settled, then the mere fact that a lengthy period of time has passed does not per se rebut the normal presumption that return will best promote his welfare. Furthermore, the adoption of a child-centric approach conveys the message that promotion of the child's interests should override the policy of not allowing guilty parents to benefit from their wrongdoing, which is often taken into account in such cases[32].

7. Conclusion

We have seen that the provisions of the CRC are of considerable relevance to decision making under the Abduction Convention. Whilst the drafters of the Abduction Convention may not have thought in terms of children's rights, the inclusion of the exceptions shows that they were concerned to protect children from harm that would be caused by immediate mandatory return. In interpreting these exceptions today, account has to be taken of developments which have occurred in the approach of the international community to the interests of children and in particular the almost universal ratification of the CRC.

Thus, children's rights to participate and to have their welfare treated as a primary consideration should be respected. Furthermore, a child-centric approach should be taken to interpreting concepts in the Abduction Convention, such as habitual residence, custody rights and settlement. Such an approach does not contradict the policy of the Abduction Convention, which was designed primarily to promote the interests of children and not adults.

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29 For more detailed analysis, see R. Schuz, In Search of a Settled Interpretation of Art 12(2) of the Hague Child Abduction Convention, *Child and Family Law Quarterly Vol 20*, No. 1 (2008) 64.

30 Cf. per Thorpe LJ in *Canon v Canon* [2004] EWCA CIV 1330 at para 52-6.

31 *Re C (Abduction: Settlement)* [2004] EWHC FAM 1245

32 See, for example, per Lord Justice Thorpe in *Canon v Canon supra* note at para. 58-59 But compare , *M v M (Abduction)(Settlement)* [2008] EWHC 2049 , where Black J said that he had been careful not to fall into the trap of allowing himself to be inappropriately influenced by the father's behaviour..

To Return or Not to Return: Hague Convention *versus* Non-Convention Countries

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1. Introduction

Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents who are not a part of this global conglomerate of like-minded nations who honour each other's laws? No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems.

The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos have all the positive traits but are fraught with a new set of risks for children caught up in cross border situations. Caught in cross fire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.1 billion Indians, about 30 million are non-resident Indians living in 130 countries overseas, who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

1.1 Definition of child removal

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or international child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives.

A broader definition encompasses the removal of a child from his / her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 with 80 contracting countries today as parties from all regions of the globe, however defines removal or detention wrongful in the following words:

> "Article 3
>
> The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Child removal does not find any specific definition in the Indian statute books and since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and / or foreign origin.

1.2 Global solutions and remedies

The Hague Convention on Civil Aspects of International Child Abduction came into force on 1 December 1983 and now has 80 nations signed up to it. The objects of the Convention were:

a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

It operates as an effective deterrent providing real and practical means of restoring the status quo prior to the abduction, prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of The Hague Conference on Private International Law at The Hague, Netherlands, renders a superb service by monitoring and helping the development of services to support effective implementation and consistent operation of The Hague Conventions and review their operations. Since, there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of The Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

1.3 Why should India be interested in joining the Convention?

The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems on the family law front are largely unresolved.

Times have changed but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a makeover. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

Firstly, India is no longer impervious to international international child removal. In the absence of the Convention principles, the Indian Courts determine the child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The most powerful parent succeeds in establishing his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

Secondly, such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of the Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's origin and so would be the Court of that country. In India, determination of rights as per Indian law of a foreign child removed to India by an offending parent may often be clouded and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

Thirdly, the fact that India is not a party to the Hague Convention may have a negative influence on a foreign judge who is deciding whether a child living with his / her parent in a foreign country should be permitted to spend time in India to enjoy contact with his / her Indian parent and extended family. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle; membership of the Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 80 States that are parties to the Convention.

Fourthly, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries which are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above.

1.4 The UK judicial initiative

In January 2005, the Right Honorable Lord Justice Thorpe at the Royal Courts of Justice, London was appointed Head of International Family Law for England and Wales. For the first time such a position has been created within the UK Judicial system. The appointment confirms the increasing importance attached to the development of international instruments and Conventions in a field of family law and to the value of international judicial collaboration, particularly in the extension of the Global network of liaison Judges specialising in family law. This may prompt some other jurisdictions in the world, whether or not they are signatories to The Hague Convention on Civil Aspects of International Child Abduction 1980, to make similar appointments. In relation to wrongful removal or retention of children, as between UK and Pakistan, a protocol has been agreed between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between the judicial authorities of the two countries and providing agreed procedures for dealing with such cases. India, however has not taken any steps in such regard.

2. Relevant legislation and forum for custody proceedings

As far as the forum for securing the return of the children is concerned, it is important to take into account that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a Habeas Corpus Petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

In so far as relating to the relevant legislation, the aggrieved parent could well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act 1890 (GWA). The HMGA 1956, like the Hindu Marriage Act 1955 (HMA), has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years and a 'guardian' in s 4(b) is defined as a person having the care of the person of the minor or of his property or both and includes a natural guardian, a guardian appointed by Will of his natural parents and a guardian appointed or declared by the court and a person empowered to act as such under any enactment.

2.1 India and the Hague Convention on Civil Aspects of International Child Abduction 1980

As of now, India is not a party to the Hague Convention on Civil Aspects of international Child

Abduction 1980. Other than the statutory provisions of law quoted above in which matters of child custody are agitated in different courts in different proceedings, the principles of the Hague Convention cannot be enforced in Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case basis and there is no uniform precedent which can be quoted or cited as a universal rule.

India not being a signatory to the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

2.2 The position of Indian law on child abduction

Under Article 214 of the Constitution of India, there shall be a High Court for each State in India and under Article 124 there shall be a Supreme Court of India. Under Article 141, the law declared by the Supreme Court shall be binding on all Courts within India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions. Part III of the Constitution secures "Fundamental Rights" to citizens, which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under Articles 226 & 32 respectively of the Constitution of India.

The High Courts and the Supreme Court in India entertain petitions for issuance of a writ of Habeas Corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution.

Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent, seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past three decades. A quick summary of Indian law laying down this position is as hereunder:

i) In *Marggarate Vs. Chacko* AIR 1970 Kerala 1, in deciding if custody and care of a child could be entrusted to a parent who was living outside the country and outside the Court's jurisdiction, it was held that where the welfare of the child so demands, the Court can also permit the child to be taken out of the country by one of the parents, with proper safeguards laid down by the court.

ii) In *Marilynn Anita Dhillon Gilmore Vs. Margaret Nijjar and Others*, 1984 (1), Indian Law Reports (Punjab and Haryana) 1, in a Habeas Corpus Petition, it was held that, respecting the order of the foreign court, the custody of the children who were US nationals and who were brought to India from USA, should be returned to the mother as per the US court order, subject to the safeguards of this Court.

iii) In *Surinder Kaur Vs. Harbax Singh Sandhu*, 1984 Hindu Law Reporter 780 Supreme Court, it was held that the provisions of the Hindu Minority and Guardianship Act, 1956 cannot supercede the paramount consideration as what is conducive to the welfare of the child while exercising summary jurisdiction in returning the minor children to the foreign country of their origin.

iv) In *Elizabeth Dinshaw Vs. Arvand M. Dinshaw*, All India Reporter 1987 Supreme Court 3, the Court again exercising summary return of

a removed child upheld the right of a foreigner mother to directly invoke the jurisdiction of the Supreme Court to seek the custody of a minor child from his father on the principle that the matter is to be decided not on the considerations of the legal rights of the parties but on the sole and predominant criterion of the best interest of the minor child.

v) In *Kuldeep Sidhu Vs. Chanan Singh*, All India Reporter 1989 Punjab & Haryana 103, in a criminal writ petition exercising summary return, it was held that the welfare of the children who were Canadian citizens would override any consented custody arrangement and the children have a right to be brought up in the culture and environment of the country of their birth.

vi) In *Amita Gautam Vs. Ramesh Gautam*, 1989 (2) Hindu Law Reporter Punjab & Haryana 385, following the above decisions, it was held that the orders of the Canadian Court granting interim custody to the mother must be honoured by restoring forthwith the custody of the minor to the mother who had been removed from Canada to India by the father in an unauthorized manner not warranted by law.

vii) In *Sarvajeet Kaur Mehmi Vs. State of Rajasthan*, 1987(2) Hindu Law Reporter Rajasthan 607, the custody of the minor child was given to the mother without hearing the father in view of the orders passed by the High Court of Justice (Family Division), UK requesting Courts in India to pass necessary orders and issue directions seeking the return of the minor back to UK from India.

viii) In *Kala Aggarwal Vs. Suraj Prakash Aggarwal*, 1993(1) Hindu Law Reporter Delhi 145, despite the children having been brought to India from the USA in violation of US Court custody orders, the Court upholding the maintainability of the petition only granted access but declined to grant the custody to the mother by concluding that the children's welfare is with the father till they attain majority.

ix) In *Jacqueline Kapoor Vs. Surinder Pal Kapoor*, 1994(2) Hindu Law Reporter Punjab & Haryana 97, following earlier precedents, the High Court upheld the mother's petition seeking custody of her minor female child in accordance with the orders of the Court of competent jurisdiction in Germany and directed that the child be handed over to the mother as the judgment of the German Court was binding on the father who had removed the child to India by deceitful means.

x) In *Atya Shamim Vs. Deputy Commissioner / Collector* Delhi All India Reporter 1999 Jammu & Kashmir 140, in a Habeas Corpus Petition by a person who was not a citizen of India, it was held to be maintainable to secure the custody of a minor.

xi) In *Dhanwanti Joshi Vs. Madhav Unde*, 1998 (1) Supreme Court Cases 112, the Supreme Court observed that the order of the foreign Court will only be one of the facts which must be taken into consideration while dealing with child custody matters, and India being a country which is not a signatory to the Hague Convention, the law is that the Court within whose jurisdiction the child is removed will consider the question on the merits, the welfare of the child being of paramount importance. It is in this case that the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning removed children to their parent country by observing that the welfare and best interest of the child should be of paramount consideration.

xii) The above observations by the Supreme Court of India was followed in its later decision in *Sarita Sharma Vs. Sushil Sharma*, Judgements Today 2000 (2) Supreme Court 258. Thereafter, in *Sahiba Ali v. State of Maharashtra*, 2004(1) Hindu Law Reporter 212, the Supreme Court declined to grant the custody of her children to the mother but at the same time issued directions for grant of visitation rights in the interest and welfare of the minor children.

xiii) In *Paul Mohinder Gahum Vs. State of NCT of Delhi,* 2005 (1) Hindu Law Reporter 428, upholding the maintainability of a Habeas

Corpus Petition, the High Court held that the orders passed by foreign Courts granting custody take a back seat in preference to what lies in the best interest of the minor rather than what a foreign court has directed.

xiv) In *Eugenia Archetti Abdullah Vs. State of Kerala*, Hindu Law Reporter 2005 (1) (Kerala) 34 upholding the right of the US citizen i.e. the petitioner mother before the Court in a Habeas Corpus Petition, the custody of the children was handed over to the mother after holding that the High Court can exercise such jurisdiction under Article 226 of the Constitution of India.

xv) In *Leeladhar Kachroo Vs. Umang Bhat Kachroo*, 2005 (2) Hindu Law Reporter, Delhi 449, upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court upheld the contention and that it has the jurisdiction to order the minor child's leaving the country with one of the parents, and that the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with that parent if it is in the interests of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

xvi) In *Paul Mohinder Gahun Vs. Selina Gahun*, 2007(1) Recent Civil Reports (Civil), 129, it was held that where the wife, husband and the minor female child were all Canadian citizens, and where the wife had stealthily come to India with the minor daughter, the Indian Guardian Court at Delhi had no jurisdiction to try and decide the petition of the mother for a guardianship order as their matrimonial home was in Canada where the child was ordinarily resident.

xvii) In a judgment dated March 3, 2006 of the High Court of Bombay at Goa, reported as *Mandy Jane Collins Vs James Michael Collins*, 2006(2) Hindu Law Reporter Bombay 446, between a 62-year-old American father and 39-year-old British mother resident in Ireland who were litigating over the custody of their 8-year-old minor daughter said to be illegally detained in Goa by the father, the Court declined the issue of a writ of Habeas Corpus and held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court, dismissing the mother's plea for custody, concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa was not possible, and directed that the status quo be observed. This in effect means that the 8 year old minor female must continue to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on 21 August 2006, leaving it open to the parties to move the appropriate forum for the custody of the child, which if done, was directed by the Supreme Court to be decided within a period of three months, with earlier visitation rights continuing to the mother.

xviii) In another matter reported as *Ranbir Singh Vs Satinder Kaur Mann,* 2006 (3), Punjab Law Reporter 571, the Punjab and Haryana High Court declined to issue a Writ of Habeas Corpus to the petitioner father residing in Malaysia who was seeking release of his five year old son and three year old daughter from their mother's custody in India. The High Court of Malaya at Kuala Lumpur had held that the petitioner was entitled to the legal guardianship of the minor children. However, The High Court in India, declining to enforce the foreign judgment of the Malaysian High Court, held that the matter could be re-activated before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by the parties. The Habeas Corpus Petition was dismissed with the observation that it would be open to either party to move for custody of the minor children under appropriate law before an appropriate forum.

xix) In *Kulwinder Dhaliwal Vs. State of Punjab and Others*, reported as The Indian Law Reports 2008 (2) Punjab and Haryana 730, decided by the Punjab and Haryana High Court on 21 July 2008, on a writ of Habeas Corpus, it was held that the orders of the Foreign Court giving custody of the minors to the petitioner deserved to be respected, and the children were directed to be handed over to the petitioner with liberty to take them to Canada. The children were citizens of Canada and by an order passed by the Ontario Superior Court of Justice, the custody of the minors had been given to the petitioner.

xx) In Criminal Writ Petition no. 1076 of 2008, *Paramjeet Kaur Toor Vs. Santosh Kaur and Others*, decided by the Punjab and Haryana High Court on 19 November 2008, on a writ of Habeas Corpus it was directed that the custody of the minor children, who were British nationals and who were detained by the grandparents in India, be handed over to the mother along with their passports to enable them to return to England, and that any contentions sought to be made can be thereafter agitated before the High Court of Justice, Family Division, London, which was at that point of time was already hearing the matter and had passed orders for the return of the children.

xxi) In Criminal Writ Petition no. 608 of 2008, *Manjit Kaur Vs. State of Punjab*, decided by the Punjab and Haryana High Court on 14 August 2008, where a minor child of 9 months was taken away by his grandparents when their non-resident Indian daughter-in-law had come from abroad for a short period, the High Court held that the Habeas Corpus Petition filed by her was maintainable as the child had been illegally snatched away from the mother. The custody of the minor child was given to the mother leaving the parties to avail other remedies in accordance with law.

xxii) In Criminal Writ Petition no. 543 of 2008, *Gippy Arora Vs. State of Punjab and Others*, decided by the Punjab and Haryana High Court on 25 November 2008, the court, after examining the entire law on the subject, held in a case of domestic child abduction that a writ of Habeas Corpus should not be dismissed merely because it is for the Court of the Guardian Judge to determine the question of welfare of the minor child in custody of another person. Consequently, the minor child was directed to be handed over to the mother till the matter was finally decided by the Family Court or the Court of the Guardian Judge.

xxiii) In *Gurmeet Kaur Batth Vs. State of Punjab and Others* reported as 2009 (2) Punjab Law Reporter 250 (Punjab and Haryana) the High Court held that it can exercise jurisdiction vested in it under Article 226 of the Constitution of India by issue of the writ of Habeas Corpus when the custody of the child had been taken away by one of the natural guardians playing a trick upon the other. Relying on the Canadian Court Order in favour of the petitioner mother, the Court held that since the court of competent jurisdiction in Canada had held that the mother was entitled to the custody of the child, she would be permitted to take the child to Canada.

xxiv) In *Shilpa Aggarwal Vs. Aviral Mittal*, decided on 9 December 2009 and reported as 2010 (1) Supreme Court Cases 591, a three-and-a-half-year-old female child, who was a British citizen born in UK to Indian parents, was removed to India from UK by the mother in contravention of British Court orders. The mother was directed by the Supreme Court of India to return with the child to UK.

xxv) In *Dr. V. Ravi Chandaran Vs. Union of India and Others* decided on 17 November 2009 and reported as 2010 (1) Supreme Court Cases 174, a seven-year-old boy, who was a US citizen and was born in USA to Indian parents (who had become US citizens), was removed to India from the USA by the mother, contrary to US Court orders. The mother was directed by the Supreme Court of India to return to USA with the child failing which the father would be entitled to do so.

xxvi) In *Vikramvir Vohra Vs. Shalini Bhalla*,

decided on 25 March 2010 and reported as 2010 (3) Judgments Today 213, it was held by the Supreme Court of India that child custody orders are interlocutory in nature and can be altered for the welfare of the child. Consequently, the Supreme Court permitted the mother to take her minor son, aged about ten years old, to Australia in accordance with the wishes of the child to stay with the mother, upholding the welfare of the child as a paramount consideration.

The above is the consolidated case law summary on the proposition of inter-parental child removal with regard to cases of removal of children from foreign jurisdiction to India and their decisions in different Courts in India as a non-convention country.

Conclusion of case law analysis

An analysis of the Indian case law reveals that until 1997, Indian Courts whenever approached by an aggrieved parent invariably exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights. However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court should be only one consideration while determining the matters on merits, in which the welfare of the child will be of paramount importance. Thereafter, child removal and custody matters now get decided on the merits in India, and every individual decision is based on the facts of the case and there is no set pattern of decisions consistently being followed. However, a different trend set by some of the recent decisions above indicates that aggrieved parents who invoke the jurisdiction of the High Court in a writ of Habeas Corpus are not non-suited simply for the reason that the determination of the best interest of the child can be done only by an adjudicatory process in the Family Court or before the Guardian Judge. The Habeas Corpus remedy to enforce the child custody order of a foreign court is proving to be effective and result oriented. These recent decisions also indicate a trend in respecting foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of such foreign court decisions. The position however varies on the facts and circumstances of each case.

2.3 Position of foreign court orders in India

The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in section 13 CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments

It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the children being of paramount importance.

Section 14 of the CPC relates to presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, but that such presumption may be displaced by proving want of jurisdiction.

2.4 No provision for mirror orders in India

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English, but not to the Indian, legal system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, a letter of request be obtained from the foreign court in which litigation is pending for incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be specifically mentioned that the passports of both the parent and the child should be deposited with the Registrar General of

the State High Court to ensure that the child is not taken away from the jurisdiction of the court where he or she is confined.

3. A possible solution

With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. While India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in the Hague Convention. Divergent views emerging at different times may not be able to cope with the rising number of such cases, which come up from time to time for interpretation. We in India are thus hoping for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in the Hague Convention. Let us not delay the path to resolution of these disputes.

3.1 Law in the making: an aftermath

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has with the passage of time generated a new crop of legal issues in the realm of private international law comprising rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make sincere efforts for resolving such complications.

A fugitive Non Resident Indian (NRI) parent declared a proclaimed offender in matrimonial proceedings in India cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court orders directing return of NRI children. These occurrences find daily mention but no straightforward resolution for the NRI in any Indian law. International parental child abduction, defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent, is sadly an increasing phenomenon which causes acute emotional distress to the abducted child.

Happily, now this acute problem of the 30 million Indian Diaspora (which is still growing) has precipitated the process of the Government acceding to the Hague Convention on Civil Aspects of International Child Abduction. However, before that is done, and India becomes a member of the group of 80 or so contracting convention nations, appropriate Indian legislation will have to be enacted for its implementation. In this way children removed to and from India will be reunited with their aggrieved parent and India will no longer be a sought after destination for parking removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The draft of the Indian Civil Aspects of International Child Abduction Bill 2007, meant to secure the prompt return of children wrongfully retained or removed to India, proposes to ensure that the rights of custody and access under laws of contracting states are respected by providing for prompt removal of wrongfully removed children. The salient and salutary features of this proposed law are as follows.

- The proposed law seeks to create a Central Authority for performance of duties under the Hague Convention for securing the return of removed children by instituting judicial proceedings in the High Court concerned .
- The appropriate authority of a contracting country may apply to the Central Authority for return of a removed child to the country of habitual residence.
- The High Court may order return of a removed child to the country of habitual residence but may refuse to make such an order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence

may also lead to refusal for return of a child by the court.

- The High Court may refuse to return a child if the child objects to being returned upon the court being satisfied that the child has attained an age and degree of maturity to take into account his views.
- The High Court, before making an order of return, may request the Central Authority to obtain from the relevant authorities of the country of habitual residence, a decision or determination as to whether the removal or retention of the child in India is wrongful.
- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs incurred in returning the child to the country of habitual residence.

The sacrosanct feature, in recognizing and retaining the jurisdiction of the High Court to protect the paramount consideration i.e. the best interest and the welfare of the child, by carving out exceptions for grounds of refusal, has upheld the majesty of law vested in the Indian courts. But at the same time, this welcome law will be a great relief to distraught children who have been removed from their parents. The temptation to remove wrongfully will also be deterred. The cruel abduction of NRI children for the purposes of forced marriages will also be checked.

3.2 Plugging the holes: suggestions for amendments

Though the efforts to make the Civil Aspects of International Child Abduction Bill 2007 are salutary, in view of certain beneficial provisions of The Hague Convention on Civil Aspects of International Child Abduction, the following suggestions could be advanced to improve the proposed Indian law which is based on the domestic Sri Lankan legislation. These suggestions are as follows:

a) The preamble the proposed bill must open with the words ''That the interests of children are of paramount importance in matters relating to their custody" as is stated in the Hague Convention.

b) Section 1 or any other introductory section must clarify about the applicability of the Act to state that it would be applicable to every child removed or retained in India within the meaning of the Act from his or her country of habitual residence irrespective of religion, nationality, residence, domicile or status in India. This is necessary because of children of foreign nationals and professing different religions are often brought to India in violation of foreign court orders. Lest, any objection arise, the Act must clarify that it would be applicable to children of all religions or nationality who are removed to India. The terms High court, appropriate authority and specify country will require to be defined in section 2 of the proposed Act.

c) Section 4 of the proposed law, while considering the qualification for appointment of the chairperson and members of the Central Authority, should bear in mind that they will need to have adequate knowledge and experience in ''International Child Abduction, access, custody and related issues. An effective Central Authority can be a solitary legally qualified Director assisted by case workers rather than ex-officio/ non official members. The composition of the Central Authority should be as minimal as possible and all such appointments should be left to the exclusive discretion of the Supreme Court.

d) Article 11 of the Convention enjoins a period of six weeks for an expeditious disposal of the proceedings before the judicial or administrative authority of the Contracting State. Sections 9 and 10 of the proposed law do not contain any time frame for such expeditious disposal. This time period to be specified in proceedings before the Central Authority/ High Court is very essential, since these proceedings are intended to be of a summary and expedient nature and delay is inimical to a child's best interest.

e) The exclusive use of specialist or designated judges in every High Court of every state may be necessary since unlike U.K which has 18 specialist judges of the Family Division to hear the Convention proceedings, India with neither a Family Division nor a specialist family law judiciary may find it difficult to cope with

Convention proceedings. Likewise specialist practitioners in the field of International Child Abduction will be required for assistance. Similarly, training of judges by specialists in the field of International Child Abduction will be essential for an understanding of The Hague Convention and the new proposed Indian law.

f) For effective operation, the Central Authority must be able to communicate with at least two liaison judges, as is the statutory precedent in the Netherlands. The UK has the benefit of a Judge in the Court of Appeal acting as Head of International Family Law, who assists in liaising with the judges abroad. In India too, such an office will need to be created. Even the Chairperson of the Central Authority should ideally be a Judge who can communicate effectively with the High Courts, to secure a smooth resolution of overseas child abduction disputes.

g) A provision should be added for providing interim powers to move the High Court concerned to give such interim directions as necessary for the purpose of securing the welfare of the child or for preventing changes in the circumstances relevant to the determination of the case. This is suggested because there is no provision for interim directions in this new law.

h) Another effective provision that needs to be added relates to the power to order disclosure of a child's whereabouts. Owing to the size of India, which is spread over an area of 3.28 million sq. kms. in 28 States and 7 Union Territories, it may be necessary to secure information about the child's whereabouts, or removal and harm to the child can result. Disclosure orders may be necessary to elicit information about the child's location. Thus, a penal provision to effect this may be necessary, otherwise the proceedings may be frustrated. Further, to provide territorial limits, section 9 ought to specify that the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present after being removed from a foreign jurisdiction.

i) A deterrent of providing an effective mode of recovering costs for the aggrieved spouse is necessary. Hence, a section needs to be incorporated in the proposed law to ensure the true spirit of the rule that "costs must follow the event." This will deter future child removals and provide actual monetary recompense.

j) The necessity of a section to permit making of procedural rules is of extreme importance as they lend great assistance. Hence, rules of procedure regarding making of applications before the Central Authority and / or other requirements must be made a part of the new proposed Indian law.

Hopefully the law is still in the making and has not yet been codified. The discussion is still pending and the Bill has not achieved finality. May be with the passage of time, more suggestions and views may mature it fully.

4. Some experiences with Hague Convention countries

There are two instances of removal of children from India to a Hague Convention country. Experience of these cases indicate that in such matters when children are removed from India to a convention country, either against parental consent or by violating Indian court custody orders, the convention country has sought not to send them back summarily. Rather, the convention country courts have chosen to determine the best interest of the child, thereby abandoning the summary return principle of sending the child back to the country of habitual residence. Since these two matters are still in the process of final adjudication, they are being referred to in hypothetical terms.

In the first instance a minor child was removed from India by a relative to a convention country in violation of an Indian Court custody order and against the consent of both the parents. Upon the writer's assistance to the court as an amicus curiae, it transpired that the travel documents used by the relative to travel to the convention country violated Indian laws, and there was a clear case of overstaying in the convention country in violation of visa regulations. Regardless of this, the courts of the convention country initially continued to determine the child's best interests in an environment and conditions which are alien to the child. Initially, the orders of the Indian court seeking return of the child to determine its welfare went unheeded. Ultimately, when the Court of the Convention Country directed the return of the removed child back to India, the child was

mysteriously abducted again whilst at school in the convention country. As a result, the indulgence granted to a fugitive of Indian laws by a convention country, which was totally inconsistent with the principles of The Hague Convention, led the small child to be used as a pawn for asylum being claimed by the abducting relative. Ultimately, whenever the child returns to India, a long lapse of time may create new problems for the removed child. The untold suffering and the misery of the parents and the child is distressing.

In the second instance of the writer's assisting the court of a convention country as a joint expert on behalf of the parties, the minor children were taken by one of the parents from India to a convention country purportedly for a holiday, but did not return to India. In response to the other parent's claim for return of the children to India, alleged domestic violence and safety issues were voiced. The matter is currently under examination before the convention country's court to decide whether or not the children and the parent should go back to the country of habitual residence. The larger issue again would be as to which country's court is the best forum to decide or adjudicate upon the welfare of the minors. Is it the country where the children are now resident or is it the country where the children were habitually resident? Does the Hague Convention Country make a departure in dealing with non convention countries in such a situation? This is a poser which needs to be elaborated and dwelt upon at a forum looking at the practical issues and lessons learnt in the implementation of The Hague Convention. Non-convention countries could adapt the answers for their own guidance.

Furthermore, what should be the procedure in dealing with child removal matters when children are removed from Non-Convention countries to Convention countries? Does the convention provide a side window for dealing on separate principles? How would the Courts of Convention countries make departures in this regard? What is the message that a non-convention country's Court gets in the adjudication of such disputes in a convention country's Court? Is the principle of reciprocity disturbed? Should it not revert to the best interest principle in totality? Can it be said that a child in a foreign country, uprooted from his or her habitual residence, is in a position to judge his welfare and best interest? Could a temporary residence in a convention country be apt for determination of the child's best interests? Would it be appropriate to determine the child's best interest in the country of habitual residence? Can the abducting parent or relative be given the advantage of his or her own wrong by providing residence in a convention country when clearly the laws of a non-convention country or parental rights have been violated? Is it fair to expect an aggrieved parent to travel to the convention country to contest legal proceedings at considerable expense, costs and time, to press his or her rightful claim over protracted legal proceedings in the convention country? What law will apply in such circumstances to the removed child i.e. the law of the Convention country which is the temporary residence or the law of the non-convention country which is the country of habitual residence? Will such precedents retard the process of having more signatory countries to the Hague Convention? These are some issues which may arise for determination and different viewpoints may emerge on these perspectives.

5. Conclusion

With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter-parental child removal to and from India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. While India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in the Hague Convention. Divergent views emerging at different times may not be able to cope with the rising number of such cases. We in India are thus hoping for an expeditious acceptance and implementation of the international principles of inter-parental child removal which are couched in the Hague Convention. Let us not delay the path to resolution of these disputes. Removed children cannot be allowed to live in a no man's island.

International Child Abduction:
Australian Law, Practice and Procedure

Michael Nicholls QC*

In 2009 there were 83 children wrongfully removed to Australia from other Contracting States to the 1980 Hague Abduction Convention ("the Convention")[2] , some of those from the United Kingdom. As we shall see, the significant difference in the form (rather than the substance) of the law, practice and procedure in international child abduction cases between England & Wales and Australia is that, at least in Convention cases, a great deal more is written down in Australia.

When an application is being made to the High Court Applications Judge for a passport order or a location order at the start of a Hague case in England, no-one asks whether the power to make the order is to be found in s 5 of the Child Abduction and Custody Act 1985 or the inherent jurisdiction of the High Court with respect to children. Even if the question were to be asked, either answer would do. But in Australia, regulations provide rather precisely for the relief that can be sought if a child is wrongfully removed from a contracting state to, or wrongfully retained in, Australia. The responsible Central Authority or person, institution or other body that has rights of custody can apply *"..in Form 2, for any of the following orders.."*, which include a return order, an order for the delivery of the child's passport, an order directing the child not to be removed from a specified place, and an order requiring arrangements to be made to place the child with an appropriate person, institution other body until the request for return is determined. A responsible Central Authority can also apply for *"any other order [it] considers appropriate to give effect to the Convention".*[3]

Australian Legislation About International Child Abduction

Australia has three significant legislative provisions to deal with international child abduction, all enacted by the Commonwealth Parliament.[4] The return of children under the Convention is provided for in Part XIIIAA, Div 2, s 111B of the Family Law Act 1975 (Cth) and the Family Law (Child Abduction Convention) Regulations 1986. Recognition of overseas orders relating to children made in prescribed overseas jurisdictions[5] is provided for in Part VII, Division 13, Subdivision C of the Family Law Act 1975 (Cth) ("Registration of overseas orders") and jurisdiction, recognition and enforcement of orders is provided for in Part XIIIAA, Div 4, s 111CA of the Family Law Act 1975 (Cth) and the Family Law (Child Protection Convention) Regulations 2003, which together bring the 1996 Hague Protection Convention[6] into effect in Australia.[7]

Preventing Abduction, Finding and Recovering Children

Regulation 14(2) of the Family Law (Child Abduction Convention) Regulations 1986 enables an application to be made for a warrant to find and recover a child, if necessary by stopping, entering and searching a vessel, vehicle or aircraft or for the delivery of the child's passport or the passport of any other relevant person to the Central Authority or the police or the person specified in the order.

There are also statutory provisions for locating and

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2 The 1980 Hague Convention on the Civil Aspects of International Child Abduction

3 Family Law (Child Abduction Convention) Regulations 1986, reg 14.

4 The Commonwealth Parliament has the power to make laws with respect to international child abduction under s. 51 (xxix) of the Constitution ("external affairs") – see *Mc Call and McCall; State Central Authority (Applicant); Attorney-General (Cth)(Intervener) (1995) ¶FLC 92-551 at 81, 506 and 81,514 "The constitutional source of power for the passage of s 111B and the Regulations is, as the Solicitor General pointed out, the external affairs power."* (judgment delivered on 3 November 1994).

5 See Family Law Regulations 1984, reg 14 and Sch 1A. The prescribed jurisdictions are Austria, New Zealand, Papua New Guinea, Switzerland and most, but not all, of the United States of America.

6 The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measure for the Protection of Children, signed at the Hague on 19 October 1996.

7 See reg 21 of the Family Law (Child Protection Convention) Regulations 2003.

recovering children in the Family Law Act 1975.[8] Those statutory provisions include a location order, which can require a government department to provide the court with information contained in, or coming into, departmental records [9], and a recovery order requiring the return of a child. A recovery order can authorize or direct a person to stop and search any vehicle, vessel or vehicle or to enter and search premises to find a child, by force if necessary. Section 67V makes it clear that in deciding whether to make a recovery order, the best interests of the child is the court's paramount consideration.

Returning Abducted Children

If the Convention applies, then it is the obvious route to the recovery of an abducted child. If it does not apply, an application for return can be made under the Family Law Act 1975 (Cth) to which the ordinary principles applicable to the determination of children's cases will apply (see below). However, if there is an issue about who has parental rights, that might be determined by registering an overseas order.

Cases Under the 1980 Hague Abduction Convention

The Commonwealth of Australia has been a State party to the Convention since 1986[10] . The Secretary of the Commonwealth Attorney-General's Department is the Commonwealth Central Authority ('the CCA")[11] . The International Family Law Section of the Commonwealth Attorney-General's Department is responsible for coordinating the implementation of the Convention and carries out the functions of the Central Authority for Australia.

The Legislation

The Convention is imported into Australian domestic law in a rather unusual way. Section 111B(1) of the Family Law Act 1975 (Cth) provided that regulations may make such provision as necessary or convenient to enable Australia to perform its obligations under the Convention:

111B(1) The regulations may make such provision as is necessary or convenientto enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the Convention) but any such regulations shall not come into operationuntil the day on which that Convention enters into force for Australia. [12]

The regulations made under that provision are the Family Law (Child Abduction Convention) Regulations 1986 [13], schedule 2 of which contains the Convention. So the Convention itself is not part of Australian law; only the Regulations are. [14]

There are one or two unusual features about the Regulations. First, the Family Law Act 1975 (Cth) has quite a bit to say about what they should contain – or not contain. Section 111B(1A) says that that:

> In relation to proceedings under regulations made for the purposes of subsection (1), the regulations may make provision:
>
> (a) relating to the onus of establishing that a child should not be returned under the Convention; and
>
> (b) establishing rebuttable presumptions in favour of returning a child under the Convention; and
>
> (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.

Regulation 111B(1B) goes on to be quite specific about what the approach to a child's objections to being returned should be:

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8 Section 67J to 67Y.

9 A location order which requires a government department to disclose information is known as a "Commonwealth Information Order" (s67J(2)).

10 Ratifed by Australia on 29 October 1986, in force in Australia since 1 January 1987.

11 Family Law (Child Abduction Convention) Regulations 1986, reg 2(1)

12 *"The reason why this method of applying the Convention was chosen is not clear and it is difficult to understand why Australia did not adopt the same method as that adopted by the United Kingdom. It is also apparent that there is, in some cases, no direct correspondence between the words of the Regulation and those of the Convention." Mc Call and McCall; State Central Authority (Applicant); Attorney-General (Cth)(Intervener) (supra.)* at 81,509

13 SR 1986 No.85

14 *Mc Call and McCall; State Central Authority (Applicant); Attorney-General (Cth)(Intervener) (supra.)*

111B(1B) The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.

And s 111B(1C) deals with how a child might be protected after returning to Australia pending a decision about his or her future:

111B(1C) A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.

Because the Regulations embrace more than just the Convention (reg 4, for example, defines "rights of custody")[15] they have been amended many times to accommodate legislative changes, such as those made by the Family Law Reform Act 1995 (Cth) and the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), so great care needs to be taken when looking at the case-law to make sure that the principles expressed are still consistent with the most recent version of the Regulations.

The Regulations are not exclusive, in the sense of precluding other forms of relief. This is made clear by reg 6, which makes it clear that they are not intended to prevent a "*…person, an institution or another body that has rights of custody in relation to a child ..*" from applying to a court if the child is removed to, or retained in, Australia in breach of those rights, or to be taken as preventing a court from making an order for the return of the child.

However, consistently with Art 16 of the Convention, if an application has been made for the return of child under the Regulations, only an interim order providing for custody can be made until the determination of the application. "Custody" in this context does not include a contact order.

Interpretation – General

That the terms used in the Convention have what might be described as a "Convention meaning" has been recognized in Australia for some time, and in November 1994 the Full Court of the Family Court of Australia in *Mc Call and McCall; State Central Authority (Applicant); Attorney-General (Cth)(Intervener)*[16] made it clear that the concept of "rights of custody" within the meaning of the Regulations is sui generis and has no necessary connection with rights of custody under Australian domestic law.[17] "Habitually resident" has similarly a wider meaning. It is permissible to look at the French text and the Explanatory Report for assistance in interpreting the Regulations.

In December 2004 the Regulations were amended to make it clear that their purpose is to give effect to s. 111B of the Family Law Act 1975 (Cth) and that they are intended to be construed having regard to the objects and principles of the Convention:

1A(1) The purpose of these Regulations is to give effect to section 111B of the Act.

(2) These Regulations are intended to be construed:

(a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention and

(b) recognising, in accordance with the Convention that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and

(c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries. [18]

Rights of Custody

In November 1994, when *Mc Call and McCall; State Central Authority (Applicant); Attorney-General (Cth)(Intervener)*[19] was decided, Australian domestic law

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15 That seems to be an attempt to determine the characterisation issue, usually regarded as being a matter for the requested state. And see s 111B(4) (*infra.*).

16 *supra.*

17 At 81,515

18 Inserted by Schedule 2 of the Family Law Amendment Regulations 2004 (No.3) (SR 2004 no. 371)

19 supra.

recognized two classes of powers and responsibilities, guardianship and custody. [20]

In 1996 the Family Law Reform Act of 1995 (Cth) made significant changes to the law relating to children. In particular, it replaced the concepts of custody and guardianship with that of parental responsibility.[21] As a consequence, it was felt necessary to make some rather complicated statutory provisions about the effect of these amendments on the Regulations and the operation of the Convention:

> 111B(2) Because of amendments of this Act made by the Family Law
> Reform Act 1995:
> (a) a parent or guardian of a child is no longer expressly stated to have custody of the child; and
> (b) a court can no longer make an order under this Act expressed in terms of granting a person custody of, or access to, a child.
>
> 111B(3) The purpose of subsection (4) is to resolve doubts about the implications of these changes for the Convention. That is the only purpose of the subsection.
>
> 111B(4) For the purposes of the Convention:
> (a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
> (b) subject to any order of a court for the time being in force, a person:
> (i) with whom a child is to live under a parenting order; or
> (ii) who has parental responsibility for a child under a parenting order;
> should be regarded as having rights of custody in respect of the child; and
> (c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and
> (d) subject to any order of a court for the time being in force, a person:
> (i) with whom a child is to spend time under a parenting order; or
> (ii) with whom a child is to communicate under a parenting order;
> should be regarded as having a right of access to the child.
>
> Note: The references in paragraphs (b) and (d) to parenting orders also cover
> provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).
>
> 111B(5) Subsection (4) is not intended to be a complete statement of the circumstances in which, under the laws of the Commonwealth, the States and the Territories, a person has, for the purposes of the Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child.

It seems to me that the intention of s 111B(3) is to ensure that the attempt to clarify Convention rights does not somehow confer domestic rights.

The Characterisation Issue [22]

I am puzzled by s 111B(4). In the jurisprudence of the Convention, whether or not a person has "rights of custody" is generally regarded as being a matter for the requested state. This seems to be accepted in Australia. As "Australian Family Law and Practice"[23] puts it under the heading "Rights of Custody and their breach to be determined by the law of the forum": "*Whether a person enjoys rights of custody in relation to a child, and whether*

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[20] See "Family Law" Dr Anthony Dickey QC, 5th. ed., chap. 15 (Lawbook Co., 2007)

[21] See Family Law Act 1975, s 61A, substituted by s 31 of the Family Law Reform Act 1975 on 11 June 1996

[22] "Characterisation" is the process by which a meaning or identity is ascribed to rights or obligations. *See Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 FLR 961 at para. [43] "*The Court of Appeal declined to accept that ruling. But their reasoning is important. They did not challenge the ruling as to the content of the father's rights in New Zealand law. They merely challenged the characterisation of those rights as rights of custody for Convention purposes.*"

[23] CCH Australia Ltd, Vol. 1, para. 24-108

his or her rights of custody have been breached, is a matter for the courts of the jurisdiction which has to determine this issue, and not or the courts of the child's home country.".

The Principles Applied to International Child Abduction Cases

There is no difference in the general principles applied in Australia and the United Kingdom; it is considered desirable to secure the prompt return of an abducted child to his or her home country to ensure that the courts there can determine any issue of who should have parental responsibility in respect of the child.

Current Issues in Hague Convention Cases in Australia

In common states in which the Convention has been in force for some time, the early questions about its constitutional propriety, interpretation and relationship with other domestic legislation have been resolved, and the current issues seem to be whether the applicant has got "rights of custody",[24] whether the child was habitually resident in requesting state immediately before their removal or retention and whether he or she is settled in the new environment and if so, whether any discretionary power remains to order his or her return[25].

Procedure - The Central Authority

Australia has a federal system. If the CAA decides to accept an application for a child's return under the Convention, it will send it to the appropriate State Central Authority for action.

Procedure - Who Can Apply?

Following a change in the Regulations in December 2004[26], it is now possible for an individual to make an application for the return of a child. So applications can now be made by a responsible Central Authority or a person, institution or another body that has rights of custody.

Hearing the Children

There seems to be something of a move towards children being more involved in Convention cases than in the past. In *State Central Authority v Quang*[27] it was noted that under s 68L(3)(a) of the Family Law Act 1975 (Cth) the court may order a child's interests in Convention proceedings to be independently represented by a lawyer only if itconsiders that there are exceptional circumstances that justify it doing so, but that in determining whether exceptional circumstances exist in this context, it is helpful to construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. *"To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."*[28]

Non-Convention Cases

There is nothing particularly unusual in the Australian approach to non-Convention cases. The sole principle which governs the determination of an application for the return of a child from Australia to a non-Convention country is the best interests of the child, and the principles of *forum non conveniens* are not relevant.[29]

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[24] See *MW v Director-General of the Department of Community Services* (2008) 39 Fam LR 1. This involved a question of whether a father had guardianship rights under the law of New Zealand (and therefore "rights of custody" for the purposes of the Convention) as a result of being in a de facto relationship with the mother, and whether the Regulations could accommodate the concept of a court having rights of custody (see "The High Court indicates a problem in the Hague child abduction regulations", Richard Chisholm, (2008) 22 AJFL 161).

[25] Yes, there is, and it remains "at large" – see *Director-General of Communities (Child Safety Services) v Kells* (2009) 41 Fam LR 525

[26] by Schedule 2 of the Family Law Amendment Regulations 2004 (No.3) (SR 2004 no. 371)

[27] (2009) 42 Fam LR 288

[28] at paras. [12]-[13]

[29] *Karim v Khalid* (2007) 38 Fam LR 300

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Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention)

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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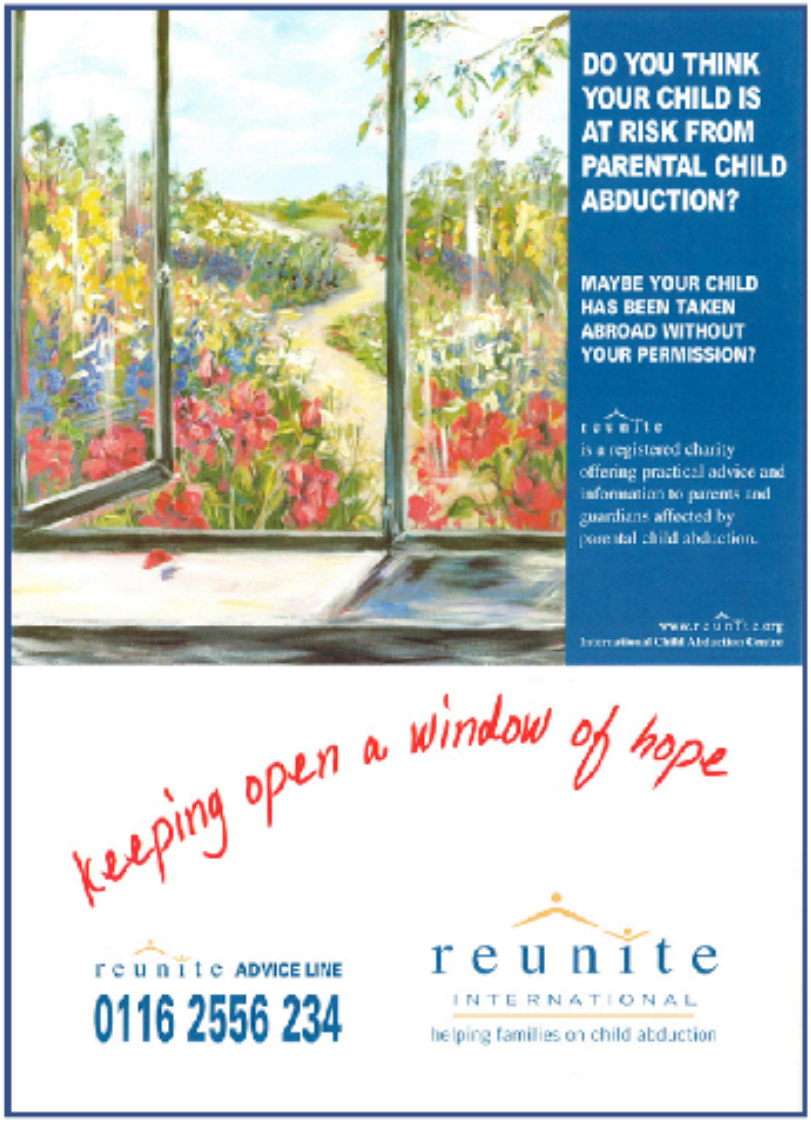

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