

## The EU: Protecting Children's Rights in Child Abduction

Ruth Lamont Liverpool Law School

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The development of an international family law by the EU means that its policies have an ever more obvious impact upon children. This is illustrated by Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (2003) OJ L 338/1 (Brussels II Revised) Children's rights – and particularly the child's right to be heard in proceedings affecting them – are central to its provisions. Brussels II Revised addresses intra-EU child abductions and the provisions guarantee the child's right to be heard in these proceedings. This article will consider whether, despite demonstrating an awareness of children's rights, the EU incorporated them in a meaningful manner in relation to international child abduction in Brussels II Revised.

### International child abduction and the protection of children's rights

The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention 1980) defines international child abduction as the wrongful removal or retention of a child from the state of their habitual residence (Art 3). The Convention created a remedy of returning the child (Art 12(1)) from the state they were abducted to as fast as possible. The return remedy is subject to limited exceptions whereby the courts have a discretion to refuse the return of the child. The Hague Convention 1980 does not aim to protect the welfare of the individual child. The Convention is designed in part as a deterrent to parental child abduction by preventing the abductor from gaining an advantage from their actions. The return remedy therefore acts in the interests of *all* children, not the individual child, except in the circumstances where an exception to return is fulfilled. The welfare of the individual child is not the paramount consideration in Hague applications and, even where the Art 12 or Art 13 defences are engaged, the courts still have a discretion to return the child. In these circumstances, the child's welfare is still not the paramount consideration (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, at 730. See N Lowe, M Everall and M Nicholls, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing Ltd, 2004), at p 368). Even where a child has expressed views objecting to returning to their habitual residence, their objections will be

balanced against the return policy of the Convention. (Lowe et al argue at p 368 that in these circumstances return is less likely to be ordered unless countervailing reasons in favour of return can be established, citing *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 and *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716.)

Despite the existence of this widely ratified instrument with international scope, the EU has intervened in the area of international child abduction in Brussels II Revised. The inclusion of international child abduction within the scope of that regulation was the most controversial aspect of its drafting. This resulted in a political compromise restricting the EU's action in this area to 'adjusting' the application of the Hague Convention 1980. Instead of creating new rules for intra-EU abductions, the provisions of Brussels II Revised build on the Hague Convention 1980, with the intention of reinforcing the application of the return remedy in intra-EU abductions. The Hague Convention 1980 remains in force between EU Member States (Art 62). The regulation takes precedence over the Hague Convention 1980 where its rules alter those contained in the Convention (Art 60).

Where a child has been removed or retained, Art 2(11) of Brussels II Revised now determines whether this is wrongfully in breach of custody rights. If a child is deemed to have been abducted under Art 2(11), the return remedy will operate under Art 12 of the Hague Convention 1980 (Art 11(1)). Apart from Art 13(b), all the exceptions to return under the Hague Convention 1980 are left unchanged. However, if the return of the child is refused under Art 13 of the Hague Convention 1980, Brussels II Revised puts a mechanism in place under Art 11(6), (7) and (8) whereby the state of the child's habitual residence retains control over issues relating to the custody of the child and their ultimate return to the state of habitual residence. The principle of returning children following an abduction is also reinforced by Art 10 of Brussels II Revised, which provides jurisdictional rules protecting the right of the court of the child's habitual residence to hear any custody dispute except in specified circumstances.

Against this legislative context encouraging the application of the return remedy, Art 11(2) of Brussels II Revised requires a child of an appropriate age and maturity to be heard in return proceedings following an abduction (this practice has been extended to return applications under the Hague Convention 1980 in England and Wales by *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619). Securing this right in national courts is left to national law, so the procedures for hearing the child will vary between Member States. Although there was an exception to return based on a child's objections

under Art 13(2) of the Hague Convention 1980, the Convention contained no specific provision for the child to be heard in the proceedings. However, the Court of Appeal in *Re F (Abduction: Child's Wishes)* [2007] EWCA Civ 468, [2007] 2 FLR 697 has made it clear that the child must be heard in return proceedings under Brussels II Revised.

## Hearing the child in Brussels II Revised abduction cases

Article 11(2) of Brussels II Revised acknowledges the right of children to be heard in decisions affecting them. Since the drafting of the Hague Convention 1980, the law has increasingly adopted the position that the rights and needs of children are distinct from their parents. The traditional construct of the family has the effect of 'hiding' children under the parental moral and economic umbrella. This characterisation of children has increasingly been challenged and children are coming to be regarded as independent agents and rights holders. The development of children's rights and the legal individualisation of their rights from their parents is significant because it recognises their distinct needs. It also acknowledges their autonomy and their procedural right to be heard in decisions affecting them. It is a trend that has been in evidence across Europe as the interests and needs of family members are increasingly individualised. The EU has arguably adopted this approach, which is reflected in the provisions and drafting of Brussels II Revised.

The EU currently has no explicit children's policy or competence in relation to children, and therefore has no explicit mechanism for considering children's interests in policy making. Despite this, the focus of the drafting of Brussels II Revised was on children's rights. The proposals eventually translated into legislation in which children's rights form a significant focus. Recital 33 of the Preamble states that Brussels II Revised: 'seeks to ensure respect for the fundamental rights of the child as set out in Art 24 of the Charter of Fundamental Rights of the European Union'. Article 24 of the Charter states that children should be heard in all decisions affecting them if they are of an appropriate age and maturity; that they have the right to care and protection; and that their best interests will be the primary consideration in all decisions taken that affect them. The legal status of the Charter remains uncertain, but Brussels II Revised provides evidence that it encourages the incorporation of children's rights into European legislation, even though there is currently a lack of analysis and expertise as to how these rights interact and should be interpreted. This focus is notable as it appears to be part of a process of mainstreaming children's rights within the EU; whereby children's rights are being explicitly incorporated into legislation having a clear impact on children. During the passage of Brussels II Revised, the Commission stated that:

'As people increasingly move from one Member State to another, and families break up 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.' (COM(2001) 505 final, 6 September 2001, at 2)

This statement acknowledges the effect of increased intra-EU migration which the EU has encouraged through Art 39EC on the free movement of workers. Migration increases both the incidence of international family breakdown and the diversity of family forms. The EU should arguably address the consequences of its free movement policies on families and the Commission's statement highlights that concern over how children's rights and their relationship with their parents can be secured in these circumstances. This is a theme that was adopted by the various European bodies that considered the proposal. The Economic and Social Committee stated during the passage of Brussels II Revised that:

'The interests of the child are difficult to define but there is no doubt that they should be paramount. The opinion of the (often warring) parents may not always be useful in determining the best interests of a child, as they may be confusing their own emotional needs with those of the child. They may also be using a child as a bargaining counter.' (COM(2002) 222 final, 4 September 2002, at para 5.2.5.1)

Although Brussels II Revised reveals further evidence of an EU policy to protect children's rights, it may also demonstrate a failure adequately to consider the legislative context in which these rights are to be protected. The right of the child to be heard is guaranteed in several provisions of Brussels II Revised. Article 11(2) in particular guarantees the right of the child to be heard in return applications, but how this interacts with the policy of reinforcing the application of the return remedy adopted by the regulation was not considered. Addressing children's rights in this individualised form, without considering the purposes of the return remedy, meant that the practicalities and the effect upon children who have been abducted have not been adequately addressed.

Freeman and Hutchinson have highlighted that children wish to be involved in the legal process and giving the child the right to be heard in return proceedings may be viewed as an important step forward on the Hague Convention 1980 (M Freeman and AM Hutchinson, 'The Voice of the Child in International Child Abduction' [2007] IFL 177, at p 178). Although a child's right to be heard is not the same as being heard, this provision has the potential to considerably increase a child's status in return proceedings. It is also, therefore, potentially a source of greater numbers of refusals to return the child, as more children are heard. However, it could also have the effect of slowing down the conduct of proceedings.

This may cause particular difficulties in the context of Brussels II Revised because of the Art 11(3) requirement that judgment on the return application should be issued within 6 weeks.

Given that Brussels II Revised aims to reinforce the application of the return remedy, the child's opinion may be accorded little weight. For example, in *JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), [2007] 2 FLR 900, a 14-year-old child's cogent objection was not enough to prevent the operation of the return mechanism. This difficulty has led Lowe to question the value of Art 11(2) and its purpose within Brussels II Revised, as:

'Given the summary nature of such proceedings, in which there is a presumption of return save in exceptional circumstances, beyond establishing perhaps wholesale opposition of the child, what is the purpose of hearing the child?' (N Lowe, 'The Current Experiences and Difficulties of Applying Brussels II Revised' [2007] IFL 182, at p 196)

The respect for children's right to be heard may be subsumed by the policy of reinforcing the application of the return remedy in the interests of all children. However, in *Re F (Children: Abduction)* [2008] EWHC 272 (Fam), [2008] 2 FCR 120, two boys aged 11 and 13 strongly objected to returning to Poland. It was stated that:

'the overall nature of the court's task in performing its balancing exercise as between welfare and other Convention considerations remains the same whether or not the Convention case is governed by [Brussels II Revised].' (at para [65])

The allegation that the boys' opinions had been coached was unfounded; the strength and nature of their objections were felt to outweigh any policy considerations and their return to Poland was consequently refused. The nature of their objections was assessed in the same way as a normal Hague Convention application. Even though the children's views were not weighed against the policy of Brussels II Revised in reinforcing the application of the return remedy, the individualised notion of hearing the child's views is still at odds with the purpose of the return remedy. In this context the inclusion of the right of the child to be heard is not constructive, as Brussels II Revised reproduces the return policy of the Hague Convention, making the child's views in most cases ineffective to influence the eventual outcome of the return application.

## Conclusion

The drafting of Brussels II Revised reveals that the EU is increasingly willing to incorporate children's rights into legislation affecting them. However, Art 11(2) demonstrates that, particularly where the EU is adjusting a legal structure already in place, it needs to consider what effect securing those rights will have in practice, instead of pursuing a blanket policy of incorporation. The purpose of Art 11(2) in hearing the child may in practice conflict with Brussels II Revised policy of reinforcing the application of the return remedy in intra-EU abductions. This policy means that in most cases an abducted child will be returned to the state of their habitual residence, whatever their opinion. The incorporation of children's rights in this area of European competence is welcome but, as Art 11(2) demonstrates, greater sensitivity to the legislative context may be required for the EU to understand the purpose of securing those rights.