HAGUE AND NON-HAGUE CONVENTION ABDUCTIONS

NOTES FOR REUNITE WEBSITE ON HAGUE CONVENTION LAW AS AT 20TH OCTOBER 2009

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A. THE LEGAL FRAMEWORK

Essential Reading

- Child Abduction and Custody Act 1985 (Part I and Schedule 1)
- Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ("BIIr"), Articles 10 and 11)

1. Definition

In this context, "*abduction*" means the removal or retention of a child by a parent, guardian or family member without the consent of the other person or people who are entitled to participate in decisions about that child's future and upbringing. The paradigm abduction has shifted radically over the past twenty years.

2. The Hague Convention

The Hague Conference on Private International Law was formed in 1893 to "*work for the progressive unification of the rules of private international law*". This it does by creating and assisting in the implementation of multilateral treaties promoting the harmonisation of conflict of laws principles in diverse subject matters within private international law.

One such treaty is the 1980 Hague Convention in the Civil Aspects of International Child Abduction ("the Abduction Convention").

The Abduction Convention is perhaps the best known treaty emanating from the Hague Conference, and world-wide is the best known of the various arrangements regulating the cross-border movement of children.

As at 26 August 2009, eighty-one Contracting States had signed, ratified or acceded to the Hague Convention.

The United Kingdom of Great Britain and Northern Ireland signed the Hague Convention in November 1984. It was incorporated into our domestic law by the Child Abduction and Custody Act 1985 (Schedule 1). The Convention entered into force on 1 August 1986.

Article 3 of the Hague Convention identifies what an applicant must demonstrate to launch an application:

> ***"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."*

Article 3 must be read in conjunction with Articles 4 and 5. The former identifies to whom the Hague Convention applies. The latter assists in defining rights of custody for the purposes of the Convention's operation:

> ***"Article 4***
>
> *The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.*
>
> ***Article 5***
>
> *For the purposes of this Convention –*

(a) *"rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;*

(b) *"rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.*

3. <u>The European Custody Convention</u>

Prior to the entry into force of Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("BII"), another treaty operated intra-Europe in respect of custody and abduction issues.

This was the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children signed in Luxembourg on 20 May 1980 ("the European Custody Convention").

The European Custody Convention sought to address "*improper removals"* between Contracting States, as well as providing a mechanism by which access and custody decisions could be recognised transnationally.

The Convention is obsolete within the BIIr Membership. It still has application, however, in relation to jurisdictions that are not part of that Membership, namely the following: Bosnia and Herzegovina, Denmark, Iceland, Liechtenstein, Macedonia, Moldova, Norway, Serbia/Montenegro, Switzerland and Turkey.

The United Kingdom of Great Britain and Northern Ireland was one of the original six signatories to the European Custody Convention in May 1980. It was incorporated into our domestic law by the Child Abduction and Custody Act 1985 (Schedule 2).

The European Custody Convention was never an especially well-used instrument, and the number of applications made under it (even prior to BII) was small. The introduction of BII and subsequently BIIr makes it of less relevance still.

4. **BIIr**

BIIr is not directly concerned with questions of child abduction, but some Articles supplement (as opposed to supplant) provisions of the Hague Convention in abduction cases involving two EU Member States.

Article 10 is concerned with attributing jurisdiction to Member States following a wrongful removal or retention, and will be considered in the context of examining the concept of "*habitual residence"*.

Article 11 introduces some modification of procedure and substance where a child who is habitually resident in one Member State is wrongfully removed to or retained in another Member State. We will return to Article 11 below, when looking at defences to Hague Convention applications.

5. **The Supreme Court Act 1981**

The Supreme Court Act is usually invoked in abduction cases that are not covered by any other treaty or convention. This would be the case, for example, if there were no treaty in existence between the two jurisdictions concerned. It also arises where there is a treaty, but where the left-behind parent is unable to bring him or herself within its terms.

The relevant sections of the Supreme Court Act are sections 19 and 41, the former because it preserves the High Court's inherent jurisdiction as a superior court of law and the latter because it makes specific reference to the procedure for making children Wards of court.

Wardship is a status imposed by the High Court in the exercise of its inherent jurisdiction relating to children and incapacitated adults. It is based upon the concept of allegiance to the Crown, and the corresponding duty of the Crown to ensure that the vulnerable are protected. For practical purposes, it involves reposing in the court rights of custody/parental responsibility in respect of the child who is a Ward. No significant decisions may then be taken in respect of that child without the court's approval.

6. The Child Abduction Act 1984

The Child Abduction Act 1984 criminalised certain removals of a child from the United Kingdom.

A "*child*" for these purposes is under sixteen.

Section 1 makes it a criminal offence for a person "connected" with a child to take or send him out of the United Kingdom without the appropriate consents.

Section 2 criminalises the taking or detaining of a child by a person, without lawful authority or reasonable excuse, so as to remove him from or keep him from the lawful control of any person having lawful control of the child.

B. Wrongful Removals and Retentions

Essential Reading

- Child Abduction and Custody Act 1985 (Schedule 1, Article 3 and 15)
- *Re H; Re S (Abduction: Custody Rights)*[1991] 2 AC 476; [1991] 3 All ER 230

1. Wrongful Removal versus Wrongful Retention

As we have seen already, Article 3 of the Abduction Convention confirms that either a removal or a retention may, if wrongful, be actionable under the Convention.

A removal or retention is wrongful if it is in breach of the rights of custody that some person or institution has in respect of the particular child. More on rights of custody later….

Additionally, the authorities tells us that a removal or retention may be wrongful if it is in breach of a court order (*Re E (Abduction: Rights of Custody)* [2005] 2 FLR 759 or of an implicit prohibition on removal established by case law (*C –v- C (Minors)(Child Abduction)* [1992] 1 FLR 163).

Re H; Re S (Abduction: Custody Rights) [1991] 2 AC 476; [1991] 2 FLR 262 is the seminal case on the distinction for Abduction Convention purposes between a wrongful removal and a wrongful retention. The speech of Lord Brandon is authority for the following propositions in relation to these concepts:

(a) to be actionable under the Convention, the wrongful removal or retention must involve and be across an international border - a wrongful removal or retention within the country in which the child is habitually resident is not capable of being remedied by reference to the Abduction Convention;

(b) a wrongful retention occurs on a specific occasion – it is not an ongoing state of affairs;

(c) wrongful removal and wrongful retention are mutually exclusive concepts. One cannot have both wrongfully removed and be wrongfully retaining the same subject child at the same time.

Note that it is possible for a wrongful removal and a wrongful retention to occur on the facts in relation to the same child at different times (see *Re S (Custody: Habitual Residence]* [1998] AC 750 per Lord Slynn at 767).

It is not a Convention requirement that the removal or retention be unlawful to be actionable. Thus, it is possible for a removal or retention that is entirely lawful from the perspective of the domestic law of the child's habitual residence to still be wrongful for Convention purposes. For examples of cases where this occurred, see *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31 and *Re D (Abduction: Custody Rights)* [1999] 2 FLR 626.

Obtaining an order from an English court seeking to restrain the removal of a child who is habitually resident in another Contracting State can constitute a wrongful retention (see *Re B (Minors)(Abduction)(No. 2)* [1993] 1 FLR 993).

2. <u>Burden of Proof</u>

The party who is seeking the return order under the Convention bears the evidential burden of showing that the removal or retention was wrongful. If he or she cannot, then the application must fail (see *Re M (Abduction: Acquiescence)* [1996] 1 FLR 315).

3. <u>Timing considerations</u>

A wrongful removal occurs on the date that the child is taken from the Contracting State in which he is habitually resident across an international boundary. There are seldom evidential difficulties about establishing the date of a removal, which can often be corroborated by access to third-party material (for example, travel tickets, passport stamps and similar).

The position vis-à-vis a wrongful retention is often less clear. The general position is that a wrongful retention occurs when the child is not returned at the end of the period of time which it has been agreed he will spend abroad.

What happens where a parent who is abroad with a child for an agreed period of time declares prior to the expiration of that period that she does not intend to return the child? This was the situation the court faced in *Re S (Abduction: Wrongful Retention)* [1994] 1 FLR 82. There, parents had agreed that they would come to England from Israel for a year with their children. Prior to the expiration of that year, the mother announced she did not intend to return. Convention proceedings followed, asserting a wrongful retention. The mother's defence was that the retention was not wrongful, as the agreed period abroad had not yet expired. The court rejected that argument. The mother's announced intention not to return effectively voided the original agreement. The mother could no longer rely upon the father's agreement to the limited period of removal.

See also *Re AZ (Abduction: Acquiescence)* [1993] 1 FLR 682, where the Court of Appeal expressed doubt about whether an uncommunicated decision not to return a child in the future could constitute a wrongful retention.

4. <u>Article 15 Declarations</u>

Uncertainty sometimes arises about whether a removal or retention is wrongful. In such cases, reference might be made to Article 15 of the Abduction Convention.

> ***"Article 15***
>
> *The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."*

Section 8 of the Child Abduction and Custody Act 1985 provides as follows:

> ***"Section 8***
>
> *The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or*

his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention."

Section 8 has been afforded a wide interpretation, in terms of the declaratory relief that left behind parents might seek from the English court (see *Re J (Abduction: Ward of Court)* [1990] 1 FLR 276 and *Re P (Abduction: Declaration)* [1995] 1 FLR 831).

The Article 15 procedure is not without its drawbacks in terms of delay and potential expense, and this must be borne in mind before deciding whether to embark upon an application.

C. Rights of Custody

Essential Reading

- Child Abduction and Custody Act 1985 (Schedule 1, Article 5)
- *Re H (A Minor)(Abduction: Rights of Custody)* [2000] 1 FLR 374
- *Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961

1. Whose Rights?

Article 3 confirms that a breach of rights of custody attributed to a person, an institution or any other body, whether jointly or alone, is actionable under the Convention.

Accordingly, whereas most applications are brought by left-behind parents claiming a breach of their own rights of custody, the Abduction Convention can be invoked by relying on someone else's rights or rights vested in a court or other authority.

In *Re H (Abduction)* [1990] 2 FLR 439, reliance was successfully placed on the rights of custody of the abducting parent to secure her return to Canada. She was found to be in breach of her own rights of custody, given that her rights of custody included a prohibition on removing the child from that country.

Article 3(a) of the Abduction Convention confirms that rights of custody for these purposes are attributed under the law of the country of the child's habitual residence immediately before the removal or retention. It does not matter whether the bundles of rights enjoyed are described domestically as a right of custody. Rather, what matters is whether those rights fall within the Convention definition found at Article 5.

Accordingly, what rights someone has in relation to a child is a matter for the law of the child's habitual residence. Whether those rights amount to a right of custody for Convention purposes is a question for the courts of the requested State.

2. What Rights Qualify?

A right to contact or access alone will not entitle a party to bring Convention proceedings; the Convention distinguishes rights of access from rights of custody (Article 5). The former alone cannot found an application (see *Re V-B (Abduction: Rights of Custody)* [1999] 2 FLR 192.

The early Convention jurisprudence in this country supported a view that only an established legal right could amount to a right of custody – see *Re J (Abduction: Custody Rights)* [1990] 2 AC 562, sub nom *C –v- S (A Minor)(Abduction)* [1990] 2 FLR 442. There has since been a movement away from this rigid stance, and a preference to apply a more purposive definition of rights of custody.

Thus, the right to insist that a parent did not remove the child from the country of his habitual residence without consent (a "right of veto") has been held by the House of Lords to be a recognised right of custody - *Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961. It mattered not whether the right of veto reposed in the other parent or in the court. Likewise, it mattered not whether the right of veto came about by court order, agreement or by operation of law.

However, a potential right of veto would not qualify as a right of custody. Accordingly, if a parent had to go to court and ask for an order about some feature of the child's upbringing (to include international relocation), the right to invoke the court's assistance was not of itself sufficient to come within the Convention definition.

The English Court has sought to extend the concept of rights of custody for Convention purposes via the artifice of what are described as "inchoate rights of custody". The concept of such bundles of rights was identified in *Re B (A Minor)(Abduction)* [1994] 2 FLR 249, where it was suggested that rights of custody might arise if a child was effectively abandoned into the care of a person who was then responsible for day-to-day care, but who otherwise had no recognised legal custodial right.

The development of inchoate rights of custody continued throughout the 1990s and into the new millennium (for those interested in the jurisprudence, see *Re O (Child Abduction: Custody Rights)* [1997] 2 FLR 702, *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2

FLR 146, *Re G (Abduction: Rights of Custody)* [2002] 2 FLR 703, *Re C (Child Abduction)(Unmarried Father: Rights of Custody)* [2003] 1 FLR 252 and *Re F (Abduction: Unmarried Father: Sole Carer)* [2003] 1 FLR 839).

What can be distilled from this line of authority is this proposition: English law recognises that a right of custody for the purposes of the Convention can be held by somebody who has no defined legal right, but who has the care of the child to the exclusion of the holders of parental responsibility. This can be so even if that care was not being exercised immediately before the wrongful removal.

An institution, such as a local authority or adoption agency, can have rights of custody (see *Re JS (Private International Adoption)* [2000] 2 FLR 638).

Similarly, a court might have rights of custody (*Re C (A Minor)(Abduction)* [1989] 1 FLR 403). The seminal case in relation to such rights is *Re H (A Minor)(Abduction: Rights of Custody)* [2000] 1 FLR 374. There, the House of Lords confirmed that the Irish Court had rights of custody in respect of a child, because it was dealing with a guardianship application at the date of the wrongful removal. The House held that:

- a court would have rights of custody in relation to a child if it was seised of a question of custody
- that right of custody would be conferred on the court (at the latest) when the application was served,
- the right of custody would continue until the application was disposed of, and
- questions about the merits of the application could not be deployed as a mechanism to go behind the court's right of custody.

Accordingly, the father was entitled to rely upon the Irish court's custodial rights to invoke the Convention.

3. <u>Actual Exercise of Custody Rights</u>

Article 3 comes in two parts, the net effect of which is to make clear that simply having a right of custody at the relevant time is not the end of the matter; the right of custody must also be actually exercised (Article 3(b)).

For practical purposes in England and Wales, this provision is construed very broadly. It is not necessary to show day-to-day care or even any degree of regular or recent contact with the child. Actual exercise will be presumed if the left-behind parent is maintaining the stance and attitude that is broadly in keeping with his right of custody. See *Re H; Re S (Abduction: Custody Rights)* [1991] 2 FLR 262 per Lord Brandon (at 272-273).

Giving permission to a child travelling or living abroad for a temporary period is the actual exercise of a custody right (*W –v- W (Child Abduction: Acquiescence)* [1993] 2 FLR 211.

4. <u>Burden of Proof</u>

The applicant under the Convention must show on the balance of probabilities that he has a right of custody, and if he cannot then the application will fail.

Where there is an issue as to custodial rights, this can be addressed by the filing of expert evidence and/or by seeking an Article 15 declaration. *Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961 suggests that the latter is to be preferred to the former, and that an Article 15 declaration should be sought from the foreign court at the highest level. A balance must be struck between delay on the one hand and the need for the best information available about the custody rights in issue on the other. An Article 15 declaration would be all but determinative of the question save in exceptional circumstances.

D. Defences

Essential Reading

- Child Abduction and Custody Act 1985 (Schedule 1, Articles 12 and 13)
- BIIr, Article 11

1. Introduction

The following provisions of the Abduction Convention are concerned with "defences":

> ***"Article 12***
>
> *Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.*
>
> *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*
>
> *Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."*

> ***"Article 13***
>
> *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*
>
> *(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or*

retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Also of relevance is Article 11 of BIIr in cases between two Member States, and see in particular the following:

"Article 11 – Return of the child

…

"4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

There are other rules of procedure within Article 11, and provisions concerned with the recognition of orders made in another Member State following a refusal to return under Article 13 of the Abduction Convention.

From the Articles quoted, the following propositions can be extracted:

- Contracting States have a mandatory obligation to return wrongfully removed or retained children, where proceedings are started within the year following the wrongful removal or retention complained of;

- That obligation continues after the expiration of the one year period referred to, but is subject to the child being settled in his new environment;
- In addition to the twelve months/settlement exception, the following defences are available:

    - the left-behind parent was not actually exercising his rights of custody at the time of the wrongful removal or retention;
    - the left-behind parent consented to the removal or retention;
    - the left-behind parent subsequently acquiesced to the removal or retention;
    - the return sought would expose the child to a grave risk of physical or psychological harm or would otherwise place him in an intolerable position, and
    - the child objects to returning and has attained an age and degree of maturity such that it is appropriate to have regard to his views.

These defences will now be considered in turn.

2. Settlement

Essential Reading

- *Cannon –v- Cannon* [2004] 1 FLR 169
- *Re M (Abduction: Zimbabwe*) [2008] 1 FLR 251

We know from Article 12 that settlement of the child concerned is only of relevance if the period of time between the date of the wrongful removal/retention and the date on which proceedings are commenced exceeds twelve months. Settlement right up to the end of that twelve month period cannot be used as the basis of a defence under Article 12 (although it might be relevant elsewhere, such as in the context of a child's wishes, or as part of an intolerability argument).

The date for assessing settlement is the date on which proceedings are started, and not the date on which the application is determined (see *Re N (Abduction)* [1991] 1 FLR 413).

What is meant by settlement? In *Re N*, referred to in the previous paragraph, the Judge gave the term its ordinary meaning, and said it involved two constituent elements: *"a*

physical element of relating to, being established in, a community and an environment" and *"an emotional constituent denoting security and stability"*. The following factors, unsurprisingly, were said to be relevant to an examination of whether a child was settled: *"place, home, school, people, friends, activities and opportunities but not, per se, the relationship with the mother, which has always existed in a close, loving attachment*."

For reasons that are self-evident, settlement cases often give rise to divergent views about timing; an applicant up against the twelve month period will argue for a wrongful removal or retention that would have the effect of his application being within the year following removal/retention, and a respondent will seek to argue the opposing position.

Historically, there was some judicial disagreement about whether settlement, if established, gave rise to an obligation **not** to return a child, or whether it simply gave rise to a discretion not to direct a return. Early English authorities preferred the latter, but at least one line of authority from Australia suggested that a strict application of the Convention required the former conclusion. The House of Lords in *Re M (Abduction: Zimbabwe*) [2008] 1 FLR 251 settled the matter for our purposes: where more than twelve months have expired and the child is settled, the court still has jurisdiction to hear the application and a discretion to direct a return.

The Court of Appeal in *Cannon –v- Cannon* [2005] 1 FLR 169 looked at the question of concealment – could a child be considered settled if living with an abducting parent in such a way as to prevent detection? The answer was possibly. In cases of concealment, the burden of demonstrating the necessary elements of emotional and psychological settlement was much increased. Although it was not the case that a period of concealment should be disregarded and therefore subtracted from the total period of delay in order to calculate whether the twelve-month mark (which is an approach that has some currency in the USA, called "*equitable tolling*") had been exceeded, judges should look critically at any alleged settlement that has concealment or deceit as its foundation.

Settlement cases will almost always now involve consideration of the separate representation of the subject child – see below under child's objections.

3. Non-exercise of custody rights

Essential Reading

- *W –v- W (Child Abduction: Acquiescence)* [1993] 2 FLR 211
- *Re W (Abduction: Procedure)* [1995] 1 FLR 878

This sub-provision of Article 13 has attracted very little judicial attention in this jurisdiction. There are two or three reported decisions where this issue is considered, but even then it is in passing.

Perhaps most usefully, *Re W (Abduction: Procedure)* [1995] 1 FLR 878 examined the distinction between Articles 3 and 13(a). The court observed that the former refers to rights of custody generally, whereas the latter is concerned with rights of custody which are not being exercised by the person who has the care of the person of the child. This is a much narrower situation, therefore, than that contemplated by Article 3.

As this is the (only) English authority directly on point, this defence could likely only arise if it could be shown that an applicant had abandoned for all intents and purposes his role as the child's residential parent.

Note that imprisonment of the left-behind parent will not necessarily deprive him of his rights of custody, either for the purposes of Article 3 or 13(a). It does not follow that, by virtue of circumstances, including imprisonment or hospitalisation, whereby a parent is unable to exercise some component of his rights of custody (for example, physical care), he is also unable to consent or refuse to the removal of the child from the jurisdiction. There are several cases where the court has confirmed that a prisoner can still exercise a right of custody for the purposes of being consulted about a removal from the jurisdiction – see *Re A (Abduction: Rights of Custody: Imprisonment)* [2004] 1 FLR 1 and *Re L (A Child)* [2006] 1 FLR 843.

4. Consent

Essential Reading

- *Re P (Abduction: Consent)* [2004] 2 FLR 1057

- *T –v- T (Abduction: Consent)* [1999] 2 FLR 912

It is a defence to a Convention application that the left-behind parent agreed to the child's permanent removal from or retention away from the country in which he was habitually resident. It follows from this that consent to a holiday does not equate with consent to a permanent relocation (to the extent that any judicial confirmation of this principle is required, see *Re B (A Minor)(Abduction)* [1994] 2 FLR 249).

There was some dispute arising from several first instance decisions about whether consent was relevant to the "wrongful" stage (that is, could a removal or retention to which the left-behind parent agreed in advance be wrongful?) or to the defence stage. This was settled definitively by the Court of Appeal *Re P (Abduction: Consent)* [2004] 2 FLR 1057; issues concerning consent should be dealt with under Article 13(a), which has the effect of putting the evidential burden on the alleged abductor.

What is the practical distinction between consent and acquiescence? The authorities tell us it is one of timing: consent pre-dates the removal or retention and acquiescence comes after the event (see Lord Donaldson MR in *Re A (Minors)(Abduction: Acquiescence)* [1992] 1 FLR 14 at 29).

Consent must be clear and unequivocal to constitute a valid defence. It must not be based upon a fraud, or on misunderstanding (*Re B (A Minor)(Abduction)* [1994] 2 FLR 249 and *T –v- T (Abduction: Consent)* [1999] 2 FLR 912).

Whilst it needs to be unequivocal and clear, consent need not be in writing and can be inferred from a parent's words and actions as a whole. It is not necessary for particular magic words to be uttered: a consent defence can still succeed even if "*I consent*" has never been said. See in this regard *Re C (Abduction: Consent)* [1996] 1 FLR 414 and *Re M (Abduction)(Consent: Acquiescence)* [1999] 1 FLR 171.

The relevance of timing to the giving of consent was considered in *Re K (Abduction: Consent)* [1997] 2 FLR 212. There, the court was concerned with the question of whether consent given and acted upon could be subsequently rescinded if the left-behind parent thought better of it. *Re K* supports the view that consent given and acted upon cannot then be withdrawn.

5. Acquiescence

Essential Reading

- *Re H (Abduction: Acquiescence)* [1997] 1 FLR 872

As we have seen, acquiescence is considered to be the after-the-event corollary to consent.

The development of English jurisprudence in this area initially focussed on concepts of "active" and "passive" acquiescence, applying different approaches depending upon which type was in issue. This errant line of authority was swept away by the House of Lords in *Re H (Abduction: Acquiescence)* [1997] 1 FLR 872, which remains the seminal authority on acquiescence cases.

The following approach emerges from the speeches in *Re H* (per Lord Browne-Wilson @ 884)*:*

> *"(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact'.*
>
> *(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.*
>
> *(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.*

(4) *There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."*

In practice, therefore, the alleged abductor must prove to the court's satisfaction that the left-behind parent acquiesced. If he or she cannot, the defence fails, unless the exception at paragraph (4) is engaged.

Recent examples of the judicial approach in operation can be found in *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2008] 2 FLR 351 and *D –v- S* [2008] 2 FLR 393.

There are competing lines of authority regarding whether delay brought about because of a lack of knowledge of the Convention remedy can amount to acquiescence. These are expressed in *D –v- S* [2008] 2 FLR 393 on the one hand, and in *B-G –v- B-G* [2008] 2 FLR 965 on the other.

Pending guidance from an appellate court, perhaps the clearest guidance that can be given about this concept is that the degree of knowledge of the remedies available on the part of the left-behind parent will be a relevant factor in each case. The weight to be attached to it will be case-specific. Once an applicant is aware of a Convention remedy, he **might** be considered to have acquiesced if it is not engaged promptly.

Attempts to achieve a reconciliation or agreement for the child's voluntary return should not be inferred as an intention to acquiesce – see *Re H*.

6. Grave Risk/Intolerability

Essential Reading

- *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145
- *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478
- *C –v- B (Abduction: Grave Risk)* [2006] 1 FLR 1095

This is by far and away the most commonly-pleaded defence to Convention applications, and accordingly has been the subject of the most judicial consideration of any of the Convention's articles.

The meaning of "grave risk" was considered very early on in the Convention's lifespan in this jurisdiction. The risk must be weighty, and not trivial. The harm must be more than the disruption inherent in an unwelcome return to the child's country of habitual residence. The grave risk is **not** to be compared to the paramount consideration of the child's welfare, and the tests are wholly different.

It must be shown that the risk arises by reason of the return to the requesting state rather than by returning to the applicant. It is up to the Courts in the State of the child's habitual residence to decide questions of custody and to rule on the parties' merits as parents.

An alleged abductor cannot rely on his own refusal to return to the requesting state for the psychological harm upon the child as resulting in an intolerable situation for the child *(*see *Re C (A Minor) (Abduction)* [1989] 1 FLR 403).

Our courts have been very slow to allow this defence to succeed in situations where the abduction itself has given rise to the problems that are then prayed in aid of the defence - see *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 and *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478. In the former case, the issues pleaded in support of the defence were immigration matters that would result in the abducting mother being separated from her new husband if she accompanied her child back to the USA. The latter concerned a splitting of half-siblings if a return to Cyprus was enforced, with the older (and non-subject) child refusing to cooperate with a return. In both cases, the court took the view that the issues raised flowed directly from the wrongdoing of the abducting parent, and that accordingly it should be slow in allowing those factors to sustain an Article 13(b) defence.

The fact that an abducting parent might face prosecution if she returns with the child is not of itself an Article 13(b) defence (see *Re L (Abduction: Pending Criminal Proceedings)* [1991] 1 FLR 433).

Abuse, whether by way of domestic violence or some other form of physical or emotional abuse, will not of itself be sufficient to establish this defence. See, for example, *W –v- W* [2004] 2 FLR 499 and *TB –v- JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515. An English court will take into account measures which the alleged abductor could reasonably be expected to take prior to or upon her return to protect herself. Further, it is to be presumed that the courts in the country of habitual residence are ready, willing and able to assist those who are the victims of abuse. This includes, where appropriate, punishing the perpetrator for breach of orders. If it is submitted that that is not the case, good and cogent evidence will be required.

See also *Re H (Children)(Abduction: Grave Risk)* [2003] 2 FLR 141, where a return order was made despite compelling evidence that the abductor had endured brutalisation, violence and threats. It was held that the Belgian court could protect the mother and the children, albeit the return order was not to be enforced until a structure of protection and support was put in place.

The high-water marks in relation to this defence came in *Re S (A Child)* [2002] 2 FLR 815 and *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930. The former involved a decision to return a child to Israel notwithstanding a recent escalation of sectarian violence, which had in turn impacted upon the mother's ability to function and the parent. The court accepted that a state of civil unrest or war in the requesting State could give rise to a defence, but not on the circumstances as they stood at the time in that particular case. The latter related to the return of a child to Norway, notwithstanding his mother's fear of physical harm from her husband who, having been imprisoned for murdering someone whom he believed was having an affair with the mother, was due to be released.

For an example of a case where the defence has succeeded, see *Re D (Article 13(b): Non-Return)* [2006] 2 FLR 305. There, the court was asked to direct the return of a child to Venezuela in circumstances where there had already been an earlier direct attempt on the mother's life. The Court of Appeal found that the specific and targeted risk of physical harm to the children and extremely strong evidence of a risk of justified refusing to return the children. See also *Klentzeris –v- Klentzeris* [2007] 2 FLR 996 and *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550.

The difficulty in making out this defence is compounded by the willingness of English Judges, consistent with Convention's obligations, to accept undertakings from the left-behind parent designed to address and to ameliorate any short-term harm or intolerability that is pleaded. For example, there are now "standard" undertakings offered and sought in these cases relating to short-term financial provision and accommodation, concerned with non-harassment (usually without admission), and confirming the non-removal of the child from the care of the abductor pending a hearing on notice in the courts of the State of habitual residence.

In addition, it is not uncommon now for quite inventive arrangements to be put in place whereby a return order is made, but not implemented immediately pending steps or hearings to be undertaken in the other Contracting State. See *Re H (Children)(Abduction: Grave Risk)* [2003] 2 FLR 141, *JPC –v- SLW and SMW (Abduction)* [2007] 2 FLR 900 and *Re R (Abduction: Immigration Concerns)* [2005] 1 FLR 33. In the last case, enforcement of a return to Germany was deferred pending resolution of immigration difficulties that might otherwise have resulted in the separation of the mother and the child.

Another difficulty facing parties seeking to argue this defence is the trend towards international judicial collaboration. English Judges are showing an increasing willingness to engage directly with the judiciary in other Contracting States to secure the Convention's objectives (see *Re M and J (Abduction and International Judicial Collaboration)* [2000] 1 FLR 803, where Singer J spoke to several Judges in California and a warrant for the mother's arrest was recalled quashed).

A final difficulty is peculiar to EU Member States, and arises by virtue of Article 11(4). An English court cannot decline to order a return under Article 13(b) if adequate arrangements can be made to secure the child's protection in the other Member State. Given the other initiatives (deferred returns, undertakings, judicial collaboration), it will be very rare indeed for an intra-EU case to arise where it is not possible to put in place adequate protection to address the particular Article 13(b) defence that is asserted. English courts will operate on the basis that other Member States are in a position to provide that protection, absent proof to the contrary (a recent distillation of this principle appears in *F –v- M (Abduction: Grave Risk of Harm)* [2008] 2 FLR 1263).

7. Child's Objections

Essential Reading

- *Re D (A Child)(Abduction: Rights of Custody)* [2007] 1 FLR 961
- *Re M (Abduction: Child's Objections)* [2007] 2 FLR 72
- *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251
- *Re C (Abduction: Separate Representation of Children)* [2008] 2 FLR 6

This is by far and away one of the "hot" abduction topics of recent years. In conjunction with general considerations of the separate representation of children in abduction proceedings, it has yielded two House of Lords' decisions, several from the Court of Appeal and more still at first instance.

Before looking at those decisions, it is useful to deconstruct the defence. It arises where a child, who has attained an "*age and degree of maturity*" where his views ought to be taken into account, "*objects to being returned*". Each pleading of this defence therefore requires two enquiries: does the child object and is he of the requisite age and maturity? The defence is not made out unless the answer to both questions is yes.

The verb "objects" in this context is to be interpreted literally; earlier attempts to import a particular strength of feeling were said to be improper (see *S –v- S (Child Abduction)(Child's Views)* [1992] 2 FLR 492.

The objection must be to the particular return that is under contemplation. It is a return to the country rather than to the applicant parent. A mere preference as to wishing to live with the abducting parent is not an objection for these purposes. A willingness by the child to return to the Contracting State in question with the abducting parent would vitiate the defence.

However, courts are alert to the reality that, in some circumstances, it is not easy to distinguish a return to the country from a return to the left-behind parent, and it would be artificial to try – see *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192.

There is no particular age at which the defence becomes available. In *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, the court was concerned with objections from children aged seven and a half and six, who were held to be mature enough for their objections to be considered (albeit they did not carry the day). Children aged eight and seven were found to be sufficiently mature in *B –v- K (Child Abduction)* [1993] 1 FCR 382. As Balcombe LJ said in *Re R*, the younger the child the less likely it is that he will have the maturity at which it is appropriate to take his objections into account.

In the normal course of events, the enquiry about whether or not a child objects and has attained the necessary age and degree of maturity is undertaken by a CAFCASS Officer. Until relatively recently, that was the end of the matter, save for an exceptional handful of cases where the child participated in the proceedings in a more active capacity. These tended to be cases where there was some unusual feature, for example, a child who had been in local authority (or equivalent) care prior to the removal, or who faced the prospect of a return into such care.

As recently as 2007, the Court of Appeal was refusing to allow clearly capacitated children to engage in the litigation process and to file direct evidence about their objections and the reasons for those (see *Re H (Abduction)* [2007] 1 FLR 242). In that case, the "child" concerned was fifteen. The Court of Appeal nevertheless confirmed the line of authority that a child should only be made a party in Abduction Convention proceedings in "*exceptional circumstances*". In all other cases, those objections could be adequately expressed through a CAFCASS Officer, hence there would be no need for separate representation to ensure that the child's voice properly was heard.

The House of Lords took a different view in *Re D (A Child)(Abduction: Rights of Custody)* [2007] 1 FLR 961. It said that children should be heard in Abduction Convention applications more frequently than had hitherto been the practice. There was a range of approaches available to ascertaining a child's view. In most cases an interview with a CAFCASS officer would be sufficient, but in other cases it might also be necessary for the judge to hear the child, especially if the child had requested this. Only in a few cases would full scale legal representation be necessary, but whenever it seemed likely that the child's views and interests might not be properly presented to the court, in particular if there were legal arguments which the adult parties were not putting forward, the child should be separately represented. BIIr required the court to address at the outset whether and how the child was

to be given the opportunity of being heard and there was no reason why this should not happen in non-European cases as well; the more uniform the practice the better, and the earlier the issue of the child's views was addressed the less likely that the issue would cause delay.

The House of Lords returned to separate representation in *Re M (Abduction: Zimbabwe*) [2008] 1 FLR 251. Baroness Hale had this to say about the issue (@ 269):

> *"[57] I would finally comment that, 'exceptional' or not, this is a highly unusual case. Cases under the second paragraph of Art 12 are, in any event, very few and far between. They are the most 'child-centric' of all child abduction cases and very likely to be combined with the child's objections. As pointed out in Re D, it is for the court to consider at the outset how best to give effect to the obligation to hear the child's views. We are told that this is now routinely done through the specialist CAFCASS officers at the Royal Courts of Justice. I accept entirely that children must not be given an exaggerated impression of the relevance and importance of their views in child abduction cases. To order separate representation in all cases, even in all child's objections cases, might be to send them the wrong messages. But it would not send the wrong messages in the very small number of cases where settlement is argued under the second paragraph of Art 12. These are the cases in which the separate point of view of the children is particularly important and should not be lost in the competing claims of the adults. If this were to become routine, there would be no additional delay. In all other cases, the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, the expense and the delay that may result. I have no difficulty in predicting that in the general run of cases it will not. But I would hesitate to use the word 'exceptional'. The substance is what counts, not the label."*

The Judge at first instance in *Re C (Abduction: Separate Representation of Children)* [2008] 2 FLR 6 adopted this distillation of the proper enquiry to be undertaken, namely: *"whether the separate representation of the child will add enough to the court's understanding of the*

issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result".

8. <u>Burdens of Proof</u>

The burden of establishing on the balance of probabilities that a particular defence is made out lies with the alleged abductor. If he or she cannot satisfy that evidential burden, the defence fails and the mandatory obligation to direct a return prevails.

E. Judicial Discretion (and how to use it)

Essential Reading

- Child Abduction and Custody Act 1985 (Schedule 1, Articles 12 and 13)
- *H –v- H (Abduction: Acquiescence)* [1996] 2 FLR 570
- *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251

1. Introduction

As we have seen from the text of Articles 12 and 13, establishing settlement or a defence is not an absolute answer to a Convention application. It is instead a "*gateway*" finding. It opens up judicial discretion. It relieves the court of the otherwise mandatory obligation to direct a return. That is not to say that it drives the court to refuse a return.

Whether a return is directed after a defence is made out depends on how the Judge hearing the case considers he or she ought to exercise the discretion now available.

To an extent, the manner in which judicial discretion falls to be exercised will depend upon the particular case and the circumstances of the defence that has been made out. There are, however, some principles of general application relevant to the exercise of the discretion.

2. General Principles

There hitherto was a two-stage approach of exceptionality applied to Convention defences in this country. First, the abductor had to make out an exception to the general rule of return (that is, to successfully plead a defence). Second, she had to then show that the case justified an exceptional exercise of the judicial discretion, so that the Judge could depart from Convention principles and the spirit of the treaty and decline a return.

The House of Lords said in *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251 that that approach was erroneous. There was no additional test of exceptionality built-in at the discretion

stage. The circumstances in which a return might be refused were sufficiently exceptional. It was unnecessary and undesirable to add a layer of complexity to the Convention. Therefore, once the defence is made out, the discretion was at large.

The court was entitled to take into account the various aspects of the Convention policy, but alongside the issue or issues that had given the court its discretion in the first place. The wider consideration of the child's rights had its place, as did welfare. It was not the case that the spirit of the Convention should always carry the day, and the weight to be given to Convention considerations would vary from case to case. The further away a particular case was from a speedy return, the less weight would be given to the spirit of the Convention. Per Baroness Hale @ 266:

> *"[43] My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para [32] above, save for the word 'overriding' if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.*
>
> *[44] That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be."*

Pre-dating the decision in *Re M* by many years, the decision in *H –v- H (Abduction: Acquiescence)* [1996] 2 FLR 570 still provides a useful checklist of factors that a court might consider weigh in the balance when deciding how to exercise the judicial discretion that arises (per Waite LJ @ 574-575):

> *"(1) the comparative suitability of the forum in the competing jurisdictions to determine the child's future in the substantive proceedings;*
>
> *(2) the likely outcome (in whichever forum they be heard) of the substantive proceedings;*
>
> *the consequences of the acquiescence, with particular reference to the extent to which the child may have become settled in the requested State [*this case concerned acquiescence – read the consequences of the defence that has been found to be made out in this case];
>
> *the situation which would await the absconding parent and the child if compelled to return to the requesting jurisdiction;*
>
> *(5) the anticipated emotional effect upon the child of an immediate return order (a factor which is to be treated as significant but not as paramount);*
>
> *the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused."*

Re D (A Child)(Abduction: Rights of Custody) [2007] 1 FLR 961 is authority for the proposition that the exercise of discretion ought not to take account of the court's view of the "morality" of the abductor's actions, and see Baroness Hale @ 981:

It was said by Waite J in *W –v- W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 that these factors should not be applied rigidly and mathematically, but instead use to inform an overall impression gained from the evidence. This statement was made in the context of a defence of acquiescence, but it a proposition that is true generally of the manner in which the court should exercise its discretion.

3. <u>Discretion and Settlement</u>

It is difficult to envisage, given the Judgment in *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, that judicial discretion would be exercised in favour of directing the return of a child found to be settled here. See in particular what Baroness Hale had to say about the less

weight to be given to Convention concepts where what one sought was not a speedy return (referred to above). See also in particular the following paragraph from Baroness Hale's speech (@ 267):

4. Discretion and Consent

See *Re K (Abduction: Consent)* [1997] 2 FLR 212 and *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24. Both support the proposition that, if a defence of consent is made out, then in effect there is no abduction and the result is that the spirit of the Convention is a less potent factor. *Re K* is a decision of Hale J and *Re D* of Wilson J, which gives some insight into how the House of Lords and the Court of Appeal, respectively, might treat the question.

In *Re D*, however, return to France was directed despite the fact that a defence of consent was established. This was on account of the connection of the family to France, and the relative ease with which the courts there could deal with the family dispute.

It will accordingly not always be the case that discretion will be exercised in favour of directing a return if consent is made out.

5. Discretion and Acquiescence

H –v- H (Abduction: Acquiescence) [1996] 2 FLR 570 was an acquiescence case, and the factors listed there remain good law as to which issues are relevant.

6. Discretion and Grave Risk/Intolerability

In light of *Re D (A Child)(Abduction: Rights of Custody)* [2007] 1 FLR 961, a finding that Article 13(b) is made out will also almost invariably resolve that the discretion ought to be exercised to decline the return. Per Baroness Hale @ 981:

7. Discretion and Child's Objections

The balance to be struck is between the child's objections and enforcing the spirit of the Convention despite those objections. The court in *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 expressed the view that it was more likely for a return to be refused in a child's objections case, as opposed to cases where defences of consent or acquiescence had been made out.

The current thinking on how discretion falls to be exercised in these cases is also found in *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251 and again in the speech of Baroness Hale @ 266-267:

F. Non-Abduction Convention Cases

Essential Reading

- *Re J (Child Returned Abroad: Convention Rights)* [2005] 2 FLR 802

1. Introduction

The late 1990s and early 2000s saw two divergent lines of authority arise concerning this species of abduction. The first, favoured by Ward LJ, was that the welfare of the particular child concerned was the court's paramount consideration in non-Convention abduction cases. A court had a duty to decline to order a return if to do so would not be in that child's paramount welfare interests. See *Re JA (Child Abduction: Non-Convention Country)* [1998] 1 FLR 231).

The competing line of authority, preferred by Thorpe LJ, was to apply the Convention machinery analogously to non-Convention cases. There was a starting principle that it would be in a child's interests for the courts in the country of his habitual residence to decide on his future, and exceptional circumstances were required to depart from that starting point – see *Re E (Abduction: Non-Convention Country)* [1999] 2 FLR 642*, Re M (Abduction: Peremptory Return Order) [1996]* 1 FLR 478 and *Re Z (Abduction: Non Convention Country* [1999] 1 FLR 1270.

The latter approach gained currency and was the preferred approach until the question reached the House of Lords in 2005 in *Re J (Child Returned Abroad: Convention Rights)* [2005] 2 FLR 802.

2. Re J

Re J concerned a Saudi father and a mother who was a dual national of Saudi Arabia and the UK. They had a child. Their marriage fell into disrepair. The mother obtained the father's consent to come to England with the child to study. She later resolved not to return to Saudi Arabia. The father started proceedings in England for the child's peremptory return to Saudi Arabia under the court's inherent jurisdiction. That application failed at first instance, but

succeeded on appeal. The mother took the case to the House of Lords given the conflicting Court of Appeal authorities. Her case was that she would be prevented a fair hearing in Saudi Arabia, and that she would not be able to move a court there to grant her permission to relocate to England with the child.

Baroness Hale (for it was she) gave the speech on behalf of the House. The court nipped in the bud the competing line of authority that saw a quasi-Abduction Convention approach applying to these cases. The court could order an immediate return in appropriate cases, but that should not be the automatic reaction in the absence of a treaty obligation. Likewise, a convenient starting proposition might be that it would be better for a child to have his future decided in his home country. There could be no "strong presumption" in favour of a return. The court must focus on the particular child in the particular circumstances. What was in **this child's** interests?

Baroness Hale went on to suggest factors that might be relevant in such cases to determining applications for summary return (see paragraphs [33], [34], [37], [39] and [40]. The following epitome of those factors is taken from the headnote in Family Law Reports:

3. Post-*Re J* Decisions

Re H (Abduction: Non-Convention Application) [2006] 2 FLR 314 and *Re H (Abduction: Dominica: Corporal Punishment)* [2007] 1 FLR 72 both warrant reading if time permits.

4. Bilateral Arrangements

The UK has a bilateral arrangement with one other State, namely Pakistan, which is of relevance to issues of the cross-border movement of children. Additionally, there is a bilateral arrangement in place between Egypt and England and Wales.

The arrangement with Pakistan is in the form of a Protocol. The text of the original Protocol, concluded on 17 January 2003, appears in *Family Court Practice* (in Part IV). It can also be found (amongst other places) on the website of the Foreign and Commonwealth Office, at the following address:

http://www.fco.gov.uk/resources/en/word/uk-pakistan-protocol

The Protocol has been revisited twice since, in September 2003 and February 2006, and see the following links for the documents emerging from those sessions:

http://www.fco.gov.uk/resources/en/word/UK-Pakistan-protocol-guidelines

http://www.fco.gov.uk/resources/en/word/uk-pakistan-points

The Protocol is primarily concerned with child abduction cases, but cases that involve the cross-border recognition of orders as to custody and access also fall within the "spirit", if not the letter, of the agreement.

In terms of practical operation, the Protocol looks to appoint liaison judges in the two jurisdictions; in England and Wales, the liaison judge is Lord Justice Thorpe. The liaison judges are intended to work together to advance the objects of the Protocol.

The arrangement with Egypt is styled as an agreement known as the Cairo Declaration, which was concluded on 17 January 2005. A copy of the Declaration is reproduced in *Family Court Practice* (in Part IV). It comprises a series of agreed principles to be applied to cross-

border cases, whether relating to abduction or recognition/enforcement of orders, as between the two jurisdictions.

Far less has been written about the Cairo Declaration than the Anglo-Pakistan Protocol. However, the spirit of the agreements is sufficiently similar to enable the guidance issued in relation to the latter to be applied analogously to the former.

Neither the Protocol nor the declaration is a binding arrangement. Further, both concluded prior to the House of Lords' decision in *Re J*. Accordingly, anything said in either document must be read as subject to the principles found in that case about the task and approach of the English court.

G. Sequestration

Essential Reading

- *Richardson –v- Richardson* [1990] 1 FLR 186
- *Re S (Abduction: Sequestration)* [1995] 1 FLR 858

1. Introduction

A Writ of Sequestration is a Writ of Execution in the High Court. Traditionally, it was a form of punishment that the court would consider applying when dealing with a contemnor who has failed to perform an act within a specified time, or else who has disobeyed an injunction.

Sequestration has been used in abduction proceedings as a fulcrum to move an abductor, especially in non-Convention proceedings, to obey orders relating to the return of a child to England and Wales.

A Writ of Sequestration orders third parties to take possession of the property or assets of the contemnor, and to manage them or otherwise apply them in a particular way.

2. When is it appropriate?

Given that it is designed to address contempt, there must be an order to be enforced, which must have been served personally on the contemnor. Alternatively, the court must be persuaded that it can dispense with the requirement for personal service, on the basis that the order has been brought to the attention of the contemnor in some other way.

The order must also be endorsed with a penal notice.

There must be property within the jurisdiction that is susceptible to the Writ of Sequestration. This can include real and personal property, freehold or leasehold interests, choses in action, pensions and stocks. Sequestration cannot be deployed against property owned by the contemnor as trustee.

3. Procedure

Sequestration is only available in the High Court, and cases proceeding at other levels will need to be transferred up to enable sequestration to be deployed.

The leave of the court is required to issue the Writ. The application for leave is by Notice of Motion stating the grounds of the application. This must be supported by an affidavit. Consents to act on the part of the would-be sequestrators must also be filed.

The Notice of Motion must be served personally on the contemnor (although the court can provide for substituted service or dispense with it altogether if satisfied that the Notice of Motion has come to the contemnor's attention through some other means). Whether leave should be granted is a matter of judicial discretion.

If leave is granted to issue a Writ, four sequestrators take possession of the contemnor's property. The court may authorise payments out for particular purposes, may sanction the sale, mortgage or letting of property, etc.

The sequestration lasts until the contemnor has cleared his contempt, when it will be discharged. The court may discharge it sooner on application.

RSC Order 45, rules 5 to 7 apply.

4. In action

In *Richardson -v- Richardson* [1990] 1 FLR 186, the court was asked whether sequestrators should be permitted to raise money against the security of a property left behind in England by an abducting mother, and to provide that money to the father to use to fund litigation abroad. The court had no difficulty in concluding that it was appropriate to sanction that course of action; to do otherwise would render the sequestration nugatory. This had the desired effect; the children were promptly returned to England.

In *Mir –v- Mir* [1992] 1 FLR 624, the court permitted the sale of a property in England belonging to a father who had abducted a Ward of court to Pakistan, for the purpose of ensuring that the mother could finance litigation in Pakistan.

The contemnor in *Re S (Abduction: Sequestration)* [1995] 1 FLR 858 was a third party, a friend of the abducting mother. The court was satisfied that the mother's friend knew of the orders made by the court, and was complicit in their deliberate frustration of those orders. Permission was granted to issue a Writ of Sequestration against the property of the mother's friend.

5. Disadvantages

Sequestration is notoriously expensive, involving as it does four professionals in the management of the contemnor's assets and properties. It is not uncommon for the sequestrators' costs quickly to run into figures measured in tens, or even hundreds of thousands of pounds.

The skill set required to act as a sequestrator is a specialist one, which restricts the pool of individuals to whom one might turn. This specialisation adds to the cost issue referred to above.

The court will be unlikely to sanction a course of action that will not enrich anybody but the sequestrators – that is, there will need to be enough available in terms of the contemnor's assets to make the exercise commercially viable (see *Clark –v- Clark* [1989] 1 FLR 174).

As a general rule, I would not consider sequestration as being sensible unless there were unencumbered assets belonging to the contemnor within the jurisdiction in the region of £100,000.

6. Alternatives to Sequestration

If one hopes to cut off financial supply to an abductor, for example, by preventing him accessing bank accounts that are enabling him to operate abroad and continue to stay beyond the reach of court orders, this can readily be achieved by way of a freezing injunction, without the added complication and cost of sequestration.

Where a fighting-fund is sought to enable a left-behind parent to take part in litigation abroad, this might be alternatively obtained under the Matrimonial Causes Act 1973 (see *Al Khatib –v- Masry* [2002] 1 FLR 1053, where a fighting fund of £2.5 million was awarded in ancillary relief proceedings to enable a wife to engage in litigation abroad to recover her

abducted children) and/or under section 15 of, Schedule 1 to, the Children Act 1989 *(Re S (A Child: Financial Provision)* [2005] 2 FLR 94).