Symposium on Hague Convention (in considering the modality of International Family Mediation) and Training

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Reacting to a child abduction to, or from, England and Wales

Once there has been a child abduction to or from England and Wales there are three matters which need to be considered:

(a) the general procedure relating to *incoming* child abduction cases;

(b) the law relating to *incoming* child abduction cases; and

(c) the law relating to *outgoing* child abduction cases.

This paper will discuss the Hague convention in the context of incoming Hague cases (ie children being abducted into England and Wales from other Hague convention countries). While the same may be useful for cases with an outgoing child abduction (and indeed, whilst an autonomous interpretation of the Hague Convention should always be encouraged), the interpretation of certain Articles in this Convention may not always be a reliable guide to how they would be interpreted in other jurisdictions.

Procedure

The initial application: Hague Convention cases

If a child has been abducted and brought to England and Wales, and the Hague Convention is to be invoked, the applicant will usually apply to the Central Authority of his home State who, in turn, will contact the Central Authority for England and Wales, the International Child Abduction and Contact Unit ('ICACU', or, 'the Child Abduction Unit').

It is, however, also possible to apply directly to the Central Authority of England and Wales or to any other Central Authority.

If the ICACU has received the application, it will refer the case to one of the specialist solicitors on its panel.

The application to the Central Authority should as Art 8 of the Hague Convention sets out, contain:

(a) information concerning the identity of the applicant, the child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based; and

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

In addition, the application may be accompanied by:

(a) an authenticated copy of any relevant document, decision or agreement (ie - if the country from which the abduction has taken place has made any decisions regarding the residence of the child);

(b) a certificate or an affidavit from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State; and

(c) any other relevant document.

Public funding

Generally, an applicant in an incoming Hague Convention (or European Custody Convention) case is entitled to non-means and non-merit tested public funding (so long as the letter of instruction from the Child Abduction Unit to the plaintiff's solicitor is provided to the Legal Services Commission).

A respondent to an incoming Hague Convention case must meet the relevant means and merit based criteria that are required by the Legal Services Commission. See Appendix 1 for further details.

In incoming non-Convention cases, both parties must meet the relevant means and merit based criteria.

When a final Hague Convention order is made, the applicant's non-means tested funding will immediately cease.

The commencement of proceedings: The Hague Convention

The relevant procedural rules which apply to proceedings under the Hague Convention (and the European Custody Convention) are those set out in Part 12, Chapter 6, Section 1, r 12.43 – 12.57 of the FPR 2010 which are set out in Appendix 2.

All Hague Convention (and European Custody Convention) cases are commenced by the issuing of an application, (and in respect of the Hague Convention in Form C67, a copy of which is attached at Appendix 3) in the Principal Registry of the Family Division.

By virtue of *Practice Direction* 12F, FPR 2010 the application must contain the following information:

(a) the name and date of birth of the child in respect of whom the application is made;

(b) the names of the child's parents or guardians;

(c) the whereabouts or suspected whereabouts of the child;

(d) the interest of the applicant in the matter(e.g.mother, father, or person with whom the child lives and details of any order placing the child with that person);

(e) the reasons for the application;

(f) details of any proceedings (including proceedings not in England or Wales, and including any legal proceedings which have finished) relating to the children;

(g) Where the application is for the return of a child, the identity of the person alleged to have removed or retained the child and, if different, the identity of the person with whom the child is thought to be;

In European Custody Convention proceedings, the application must also include a copy of the decision relating to custody or access which is sought to be registered or enforced or in relation to which a declaration is sought.

It is important in Hague Convention proceedings, even if the case seeks in the first instance merely to rely on the Hague Convention, or Brussels IIR and the Hague Convention, to include in the application a claim under the inherent jurisdiction so that there is at least the option of pursuing a return (having regard to welfare considerations), if the primary application pursuant to the Hague Convention is unsuccessful.

By virtue of r 12.3(1) of the FPR 2010 , the respondents to an application brought under the CACA 1985 are:

(a) the person who is alleged to have brought the child into the United Kingdom;

(b) the person with whom the child is alleged to be;

(c) any parent or guardian of the child who is within the United Kingdom and is not otherwise a party;

(d) any person in whose favour a decision relating to custody has been made if that person is not otherwise a party;

(e) any other person who appears to the court to have a sufficient interest in the welfare of the child.

Key Convention concepts

There are a number of key *Convention* concepts which are summarized briefly below. A useful resource as to their interpretation is the *Explanatory Report of Professor Elisa Perez-Vera* (April 1981), ('the *Perez-Vera Report*'), available from www.hcch.net.

Articles 3 and 5: 'Wrongful removal' and 'rights of custody'

For the Convention to be relied upon, the removal or retention must be 'wrongful' within the meaning of Art 3. Art 3 provides that the removal or retention is 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'*

Article 3 goes on to state that:

> *'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 5 provides that 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*' and that 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*.'

The judicial or administrative authorities of a requested State may request that the applicant obtains from the authorities of the State of the child's habitual residence a determination of whether the removal or retention was in fact wrongful (see the discussion of Art 15, below).

It is well established that a broad and autonomous interpretation should be attributed to 'rights of custody'. For the purposes of the Hague Convention it is important that 'rights of access' should be properly distinguished from 'rights of custody' (although a person may have both 'rights of access' and 'rights of custody').

It falls to the applicant to prove that he or she had 'rights of custody' under the law of the requesting State and that he or she was exercising those rights at the time of the removal or retention.

This may fall into two distinct questions for the court: the 'domestic law question': what rights, if any, did the applicant have under the law of the State in which the child was habitually resident immediately before the retention or removal?; and, thereafter, the 'Convention question': can those rights properly be categorized as rights of custody? (that is say, did those rights identified equate to rights of custody under the autonomous law of the Hague Convention?)

Or put another way: 'do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not?'

An actual, (as opposed to a potential), right to veto a child's removal to another country will, for the purposes of the Hague Convention, constitute a 'right of custody'.

Ordinarily, in order to be able to determine the position the court would require expert evidence to be given on the issue, or for there to be an Art 15 determination. The court is placed in a highly unsatisfactory position if it simply has, without expert evidence, to come to a judgment as to foreign law. As Sir Mark Potter P stated in *Re F (Abduction: Rights of Custody)*:

> *'evidence is particularly desirable, in a situation where, without it, the court is obliged to form its own conclusion upon the basis of a series of orders translated into English without the assistance of expert evidence as to the nuances of the wording, or guidance as to the nature or extent of the rights of the parties under the relevant law*.'
>
> Sir Mark Potter
>
> *Re F(Abduction: Rights of Custody)*:
>
> [2008] EWHC 272 (Fam), [2008] 2 FLR 1239 at 1244, para [14].

Articles 3 and 4: Age and habitual residence

By virtue of Art 4, the Hague Convention applies only to children under the age of 16 and habitually resident in the requesting State prior to the removal or retention. If a child turns 16 during the course of proceedings, he or she falls immediately outside the confines of the Hague Convention and recourse will have to be had to other remedies, such as powers under the inherent jurisdiction, to secure his return.

The term 'habitual residence' in Arts 3 and 4 is not one that is defined within the *Hague Convention*. It has been held that *where* a child is habitually resident is to be determined according to the law of the requested State. The burden is generally on the applicant to prove 'habitual residence'.

In England and Wales, the meaning of 'habitual residence' and its application has been the subject of exhaustive examination in numerous authorities. Its interpretation however, remains, controversial, principally because of the difficult interrelationship of various international instruments and because of certain rulings of the European Court of Justice.

<u>Habitual Residence: an interpretation</u>

Speaking generally, a number of propositions, in respect of 'habitual residence', might be regarded as a proper summary of the current position (at least in relation to domestic law) :

- The term 'habitual residence'

  > '*is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains … the question whether a person is or is not habitually resident in a specified country is a question of fact to be*

decided by reference to all the circumstances of any particular case'.

In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562 at 578G.

- Habitual residence:

  '*refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration'.*

  R v Barnet London Borough Council Ex p Shah [1983] 2 AC 309

  '…[T]here must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled'.

  R v Barnet London Borough Council Ex p Shah [1983] 2 AC 309

- Along with a settled purpose and/or intention, there must be the elapse of 'an appreciable period of time'.

- There is a significant difference between losing habitual residence and acquiring it:

  'A person may cease to be habitually resident in a single day if he or she leaves [country A] with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to come so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B'.

  In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562 at 578H–579A

- Habitual residence may be acquired even though the move was only supposed to be on a short term or trial basis.
- (Generally speaking and probably outside the confines of the Hague Convention) there may be occasions when a person may be found to not be habitually resident in either of the jurisdictions for which claims are made. Alternatively, it is arguable (though not in respect of the Hague Convention or Brussels IIR) that a person may have more than one habitual residence at any time.
- The habitual residence of a child remains a question of fact; indeed, '[it] is not always

determinable by reference to the combined intention of the parties'.

- As a general rule, however, a young child in the sole lawful custody of his or her mother will have the same habitual residence as her.
- Where both parents shared equal rights of custody under the law of the country of their habitual residence, no unilateral action by one of them can change the child's habitual residence save by agreement or acquiescence over time or a court order determining rights of residence and custody.
- A party's consent to send a child abroad for a short term purpose is unlikely to change that child's habitual residence.

An authoritative summary of the proper approach to 'habitual residence' in Hague Convention cases is to be found in the judgment of Ward LJ in *Re P-J (Abduction: Habitual Residence: Consent).*

The interpretation of 'habitual residence' in relation to children covered by Article 8 in Brussels IIR was determined by the European Court of Justice in *Re A (Area of Freedom, Security and Justice) (C-523/07).* The court said as follows:

'*The concept of "habitual residence" under Art 8(1) of regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the 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 in State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.*'

Re A (Area of Freedom, Security and Justice) (C-523/07)

Articles 9 and 11: Minimising delay and the obligation to act within a limited timescale

Central to the good working of the Hague Convention is the obligation to avoid delay.

Article 9 obliges a Central Authority which has received an application and which has reason to believe the child is in another Contracting State, to:

> '*directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be*.'

Article 11 further provides that the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority has not reached a decision within six weeks from the date of the commencement of the proceedings, either the applicant or the Central Authority of the requested State, either by itself or if asked by the Central Authority of the requesting State, shall have a right to request the reasons why there has been a delay.

<u>Brussels IIR and delay</u>

In addition, Brussels IIR, however, positively *requires* Member States to complete the first instance proceedings) within six weeks unless exceptional circumstances make this impossible. This obligation is reinforced by Arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In both *In re D (A Child) (Abduction: Rights of Custody)* and *Re M (Abduction: Zimbabwe)* the House of Lords emphasised that the further away the court was from being able to secure a prompt return the less potent a factor the policy of the Hague Convention was.

Indeed, where an application for a return order was not made promptly and not prosecuted thereafter promptly, very exceptionally, it could be struck out as an abuse of process.

Article 12: Settlement: the 'gateway' stage

As has been noted, Art 12 provides that:

> '*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.'*

<u>'Settled': meaning</u>

It has traditionally been held that 'settled' should be given its ordinary and natural meaning.

For the purposes of the Convention it has two constituents: first, it involves a physical element of relating to and being established in a community and an environment; and second, it has an emotional and psychological constituent denoting security and stability (it being required to be shown that the present situation imports stability when looking into the future).

The new environment includes a child's '*place, home, school, people, friends, activities and opportunities but not, per se, the relationship with … [the parent] which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings*'.

Re N (Minors) Abduction [1991] 1 FLR 413

In cases where there has been concealment and subterfuge, the Court of Appeal has held that 'the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased'.

It has now been authoritatively decided that even if a child has been in the requested State for more than a year and is settled in its new environment a discretion still exists for the court to order the child's return to the requesting State (see below for detailed discussion of the 'discretion' stage once an exception under the Hague Convention has been made out).

Article 13: Consent, acquiescence, grave risk of physical and psychological harm or other intolerability and child's objections: the 'gateway' stage

Introduction

Article 13 provides that:

> *'Notwithstanding the provisions of the preceding Article [12], 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.'*

Art 13 (a): Consent and acquiescence

Consent and acquiescence are separate from each other although they are often raised together. Any consent takes place before the wrongful removal or retention; any acquiescence takes place after it.

Consent

Consent must (usually) be to the child's permanent removal or retention and should be real, informed, positive and unequivocal. It does not necessarily have to be provided in writing. Once given, and acted upon, it cannot thereafter be withdrawn. Consent, however, is not valid if it has been obtained through 'a calculated and deliberate fraud on the part of the absconding parent' or if it is based on a mistake, misunderstanding or non disclosure.

The position where a party has given advance or future consent to a removal or retention at some future (perhaps unspecified) date was considered in *Re L (Abduction: Future Consent)*. In that case, Bodey J stated that he could:

> *'see no reason in principle why a consent should not be valid if tied to some future event even of uncertain timing, provided that the happening of the event is of reasonable acertainability. It cannot be something too vague, too uncertain or too subjective. The following should for example be capable of forming the basis*

of the consent defence: "…if my job application succeeds…" or (as per the example given in Zenel) "…when the child comes out of hospital".

'But commonsense is everything in this sphere. If the consent was given when the facts were wholly and manifestly different from those prevailing at the time of the removal; or if the consent was given so long ago that it must clearly have lapsed; or if the consenting party had withdrawn that consent before it were acted on by a removal of the child, then in those various circumstances the defence would not be made out. It is all a question of degree.'

Furthermore, as Bodey J went on to say:

'Where a removing party knows or assumes that the formerly consenting party would not continue that consent at the time of the actual removal and/or if he or she knew the full facts, it is my view that the consent defence fails even though the original consent may never have been expressly withdrawn.'

Bodey J

Re L (Abduction: Future Consent) [2007] EWHC 2181 (Fam), [2008] 1 FLR 914

The issue of consent should be examined as part of a consideration of Art 13(a) and not Art 3.

In the leading case of *Re P-J (Abduction: Habitual Residence: Consent)* Ward LJ summarized the applicable principles in relation to the defense of consent as follows:

(a) Consent to the removal of the child must be clear and unequivocal;

(b) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event;

(c) Such advance consent must, however, still be operative and in force at the time of the actual removal;

(d) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague for both parties to know whether the condition will be fulfilled. Fulfillment of the condition must not depend on the subjective determination of one party; the event must be objectively verifiable;

(e) Consent or the lack of it, must be viewed in the context of the of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract;

(f) Consent can be withdrawn at any time before actual removal. If it is, the proper course if for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed;

(g) The burden of proving the consent rests on him or her who asserts it;

(h) The inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case;

(i) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?

Acquiescence

The proper approach of the court to the question of acquiescence has been set out in *In re H (Minors) (Abduction: Acquiescence)* as summarised by Lord Browne-Wilkinson:

> *'(1) For the purposes of Article 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) (Abduction: Acquiescence) [1994] 1 FLR 819 at 838: "... 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 the 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.'*
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> *Re H (Minors) (Abduction: Acquiescence) [1998] AC 72 at 90E–G.*

Sometimes a left behind parent will not know of his or her Convention remedies or will have been provided with wrong legal advice. Each case will depend on its facts but in *Re S (Abduction: Acquiescence)* Butler-Sloss LJ provided the following guidance:

> *'Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case.*'
>
> *Butler-Sloss LJ*
>
> *Re S (Abduction: Acquiescence) [1998] 2 FLR 115 at 122C–D*

Once acquiescence is given, it cannot be withdrawn. Such a withdrawal will, however, be taken into account when the court comes to consider the 'discretion' stage.

Article 13(b): Grave risk of harm

The Article 13 (b) exception, 'grave risk of harm', is one of the more child-centric exceptions to the obligation to return (along with the child's objections, and settlement, exceptions). It is often invoked but difficult to make out. It has now been considered in detail by two decisions of the Supreme Court: *In re E (Children) (Abduction: Custody Appeal)* and *Re S (A Child) (Abduction: Rights of Custody).* Thus any guidance in the older authorities has been superseded by the reasoning in these important decisions: as the the Supreme Court said in Re S (A Child) (Abduction: Rights of Custody), the decision in *In Re E (Children) (Abduction: Custody Appeal)* 'was primarily an exercise in the removal from [Article 13(b)] of disfiguring excrescence'.

In *re E (Children) (Abduction: Custody Appeal)*, the Supreme Court, after considering the impact of recent jurisprudence from the European Court of Human Rights, set out how a court should direct itself when the Article 13(b) exception was invoked:

'*We share the view expressed in the High Court of Australia in DP v Commonwealth Central Authority (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration of "gloss".*

First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

Second, the risk to the child must be "grave". It is not enough, as it is in other contexts sushc as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterized as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

Third, the words "physical or psychological harm" are not qualified. However, they do gain from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in In re D [2007] 1 AC 619, para 52, " 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and teumplem, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these also, we not understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of

her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

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

re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144

In *Re S (A Child) (Abduction: Rights of Custody)*, the Supreme Court considered the proper approach when a respondent relied upon her subjective perceptions to make out an Article 13(b) approach. In overturning the decision of the Court of Appeal, and in confirming the position, the Supreme Court said:

'The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.'

Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 FLR 442

Many different factual situations have given rise to attempts to make out an Art 13(b) exception to return. A summary of some of the leading cases is found at the end of this paper.

Art 13(2): Child's objections

The child's objections exception was considered in *In re M (Children) (Abduction: Rights of Custody)* where Baroness Hale made it clear that for the exception to be made out at the 'gateway' stage only *two* conditions needed to be met:

(a) that the child himself objects to being returned; and

(b) that he has attained an age and degree of maturity at which it is appropriate to take account of her views.

A useful starting point as to the accumulated learning on the issue of child's objections is the decision of Baker J in *WF v FJ, BF and RF (Abduction: Child's Objections)*.

As to whether a particular child objects to a summary return, in *Re K (Abduction: Case Management)* Thorpe LJ said:

'The Hague Convention is clear in its terminology. There must be a very clear distinction between the child's objections and the child's wishes and feelings. The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, conviction and a rationality that satisfies the proper interpretation of the Article.'

Re K (Abduction: Case Management) [2010] EWCA Civ 1546, [2011] 1 FLR 1268

Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically his own or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to his welfare, as well as general Hague Convention considerations. The older the child, the greater the weight that his objections are likely to carry.

The English courts, in accordance with views expressed in the *Perez-Vera Report,* and for understandable reasons, have declined to determine a particular chronological age at which the second limb of the exception should be regarded as having been made out (if it is found that the particular child objects). Each case must turn on its own facts.

In *Re W (Abduction: Acquiescence: Children's Objections)* Black J held that two children aged 8 and 6 years old were at an age and level of maturity at which it was appropriate to take account of their views. In so concluding, Black J determined that the decision of *In re D (Child) (Abduction: Rights of Custody)* essentially meant that threshold to be crossed (at this stage) was lower than had previously been thought. However, as Black J said:

'*In any given case, one can only determine whether a child has the requisite age and degree of maturity by looking at the attributes of the particular child, the circumstances in which he finds himself, and the nature of the objections*.'

Indeed, in *Re W (Abduction: Child's Objections)* (which was the appeal from *Re W (Abduction: Acquiescence: Children's Objections)* (see above) Wilson LJ firmly rejected any criticism of Black J's approach and said:

'…over the last thirty years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold: see Art 12 of the United Nations Convention on the Rights of the Child 1989 and note, for EU states, the subtle shift of emphasis given to Art 13 of the Hague Convention by Art 11(2) of Council Regulation (EC) No 2201/2003 (Brussels II Revised). Fortunately Art 13 was drawn in terms sufficiently flexible to accommodate this development in international thinking; and, although her comment was obiter, I am clear that, in context, the observation of Baroness Hale of Richmond in Re D (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, at [59], that "children should be heard far more frequently in Hague Convention cases than has been the practice hitherto" related to the defence of a child's objections.

…There is however a concern, which I share, that the lowering of the age at which a child's objections may be taken into account might gradually erode the high level of achievement of the Convention's objective, namely – in the vast majority of cases – to secure a swift restoration of children to the states from which they have been abducted. Such is consideration of policy which should always carry significant weight in exercise of the discretion whether to refuse to order the return of an objecting child, but particularly so if that child is young…A considerable safeguard against such erosion is to be found in the well-recognised expectation that in the discretionary exercise the objections of an older child will deserve greater weight than those of a younger child…'

Re W (Abduction: Child's Objections) [2010] EWCA Civ 520, [2010] 2 FLR 1165.

Prior to the decision in *In re M (Children) (Abduction: Rights of Custody)*, there was some debate as to whether it should be at the 'gateway' or 'discretion' stage that various different considerations should be scrutinised – such as the extent to which the child's reasons for objection are rooted in reality and have been shaped or coloured by parental pressure – and how the court's discretion should be exercised once the 'gateway' had been made out. The proper approach appears to have been settled by the reasoning given by the House of Lords in *In re M (Children) (Abduction: Rights of Custody)* and earlier authorities in respect of the child's objections exception should be read in the light of the reasoning therein and only relied upon insofar as they are not inconsistent with the approach of the House of Lords.

Article 15

Article 15 provides that:

> *'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 Art 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.*'

This provision allows the State to which the child has been removed or retained in to request that the State of the child's habitual residence determine whether the removal or retention was 'wrongful' within the meaning of Art 3 of the Hague Convention. Resort to this mechanism, however, because of the inevitable delay that will result from its invocation, should be kept to an absolute minimum.

In cases involving cases subject to Brussels IIR, it has been remarked that advocates ought to consider the use of liaison through the European Judicial Network to consider what would be the best possible route to follow in a particular case.

Once the court of the requesting State has made the determination and the court of the requested State has received that determination there is no real room for the instruction of further evidence in the latter court as to the same issue. The determination, in almost all cases, will be conclusive. Only in exceptional circumstances, where the determination, for example, 'has been obtained by fraud or in breach of the rules of natural justice' or 'is clearly out of line with the international understanding of the Convention's terms' … should the court in the requested state decline to follow it'.

Article 18

Article 18 provides that:

> *'The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.'*

The meaning of Art 18 has been regarded, at least in respect of its consideration in England and Wales, as being somewhat obscure. In *Cannon v Cannon* Thorpe LJ held that Art 18 specifically conferred a general discretion so that even if a child was found to be 'settled' for the purposes of Art 12 the court could still exercise its discretion to return the child to its country of habitual residence. When that issue was reconsidered in *In re M (Children) (Abduction: Rights of Custody)* the House of Lords took a contrary view, the majority implying such a discretion into Art 12 without reliance on Art 18. Article 18 accordingly merely allows a party to rely on other domestic powers outside the confines of the Hague Convention to seek the return of an abducted child.

Article 20

Article 20 provides that:

> *'The return of the child under the provisions of 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.'*

In the *Perez-Vera Report* it was explained that this Article was:

> *'... not directed at developments which have occurred on the international level, but is concerned only with principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.'*

Article 20 was not incorporated into the CACA 1985 but because of the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms by virtue of the Human Rights Act 1998, it has been held that 'Article 20 has been given domestic effect by a different route'.

Although a respondent may therefore, in theory, rely on Art 20 it is difficult to conceive of particular circumstances where Art 20 would add anything to reliance upon Art 13(b). Indeed, internationally, Art 20 has been very rarely invoked.

<u>The proper approach of the court to the 'discretion' stage</u>

Until recently, the courts in this jurisdiction have found it difficult to determine how they should approach the 'discretion' stage, once the 'gateway' stage has been passed, and specifically what factors were relevant and what weight should be given to each of them. Over time a considerable difference in approach had grown up.

In *In re M (Children) (Abduction: Rights of Custody)*, however, the House of Lords gave detailed and authoritative guidance on how the court should approach the 'discretion' stage.

Baroness Hale held that:

> *'... it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which the return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention ...'*

re M (Children) (Abduction: Rights of Custody), [2007] UKHL 55, [2008] 1 AC 1288,, [2008] 1 FLR 251

As to what factors would be relevant in relation to each of the different exceptions, Baroness Hale said:

'In [Hague] Convention cases … there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.

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.

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.

By way of illustration only, as this House pointed out in Re D (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619, [2007] 1 FLR 961, para [55], "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

In child's objections cases, the range of considerations may be even wider than those in the other exceptions … Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to

earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer 'hot pursuit' cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors which may well, as here, include the child's objections as well as her integration in her new community.

All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child …'

Undertakings

A vital weapon of an applicant, and a shield for the respondent, is the ability to offer, or to request, undertakings or other protective measures. On behalf of an applicant it might be hoped that such protective measures might neutralize or ameliorate any potential harm under Art 13(b), or might seek to meet any concerns that might be relevant to the 'discretion' stage, or might be offered so as to reassure the respondent and the court as to the applicant's goodwill, so as to assist in a return. Generally, they will be offered in order to regulate the position only until the court in the requesting State is properly seised of the matter and both parties appear before it. It is appropriate, early in the proceedings, for both parties to set out in detail which undertakings are offered and which are required.

In In re E (Children) (Abduction: Custody Appeal) the Supreme Court urged the Hague Conference to consider whether machinery could be put in place whereby, when the courts of the requested State identify specific protective measures as necessary if the Art 13(b) exception is to be rejected, then those measures can become enforceable in the requesting State, for a temporary period at least, before the child is returned.

The following undertakings might be considered:

<u>Contemplated applicant's undertakings</u>

- Not to support or to initiate any criminal prosecution or other civil proceedings against the respondent relating to the abduction.
- Not to molest, harass or pester the respondent.
- Not to remove the child from the care and custody of the respondent until further order in the requesting State.
- To meet the reasonable travel costs of the return to the requesting State of the respondent and the child.
- To provide certain maintenance and/or accommodation for the respondent and the child

for a specific time period.

- To provide moneys towards a litigation fund for the respondent.
- Not to make, sooner than 28 days after the respondent's return, any 'without notice' applications relating to the respondent and the child.
- Not to attend at the airport on the date of arrival of the respondent and the child.
- To arrange for the lodging of the return order and any undertakings with the relevant court which is, or will be seised, of the matter upon the respondent's return.

Contemplated respondent's undertakings

- To lodge passports upon the respondent's return with his or her solicitors or an independent third party.
- To provide reasonable contact or agreed contact with the applicant until further order of the court in the requesting State.
- To live at particular accommodation for a specific time period.
- Not to leave the jurisdiction of the requesting State until further order of that court.
- To consent to the applicant using undertakings as evidence in any proceedings in the courts of the requesting State.

Leading English cases

Child abduction:Hague convention:general principles

M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] 1 FLR 251
H (Minors) (Abduction: Acquiescence), Re [1998] AC 72
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619

The Hague Convention 1980: general principles

- *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72

  The principles and policy of the Hague Convention as considered by the House of Lords.

- *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

  An important discussion by the House of Lords of the principles and policy of the Hague Convention; 'rights of custody' and 'rights of access'; the nature and use of Art 15 declarations; the exceptions to the obligation to return; how the 'voice of the child' should be heard; and the role of human rights considerations in child abduction proceedings.

- *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288

  An important appraisal by the House of Lords of the principles and policy of the Hague Convention and the authoritative direction as to how the court should exercise its discretion once any 'gateway' stage has been made out. Also important for determining: (a) that there was a residual discretion for the court to exercise in Art 12 'settlement' cases; (b) that there was no room for importing an 'exceptionality' test into the 'discretion' stage; and (c) the test for separate representation of children in Hague Convention cases.

  In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 143

  A recent and very important consideration by the Supreme Court of the policy and the principles of the Hague Convention, particularly in the light of jurisprudence from the European Court of Human Rights, along with the proper approach when Article 13(b) is raised.

  is raised.

Child abduction:Hague convention:Brussels II, relationship between

A (Custody Decision after Maltese Non-Return Order), Re [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923
A, Re; HA v MB (Brussels II Revised: Article 11(7) Application) [2007] EWHC 2016 (Fam), [2008] 1 FLR 289
T and J (Abduction: Recognition of Foreign Judgment), Re [2006] EWHC 1472 (Fam), [2006] 2 FLR 1290
Vigreux v Michel [2006] EWCA Civ 630, [2006] 2 FLR 1180

The Hague Convention and Brussels IIR

- *Vigreux v Michel* [2006] EWCA Civ 630, [2006] 2 FLR 1180

  Discussion of Brussels IIR and its impact on the Hague Convention by the Court of Appeal. Reinforcement of the mandatory requirement to hear Hague Convention and Brussels IIR cases within 6 weeks.

- *Re A (Custody Decision after Maltese Non-return Order)* [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923

  The first reported decision where Art 11 (7) of Brussels IIR was invoked.

- *Re A; HA v MB (Brussels II Revised: Article 11 (7) Application)* [2007] EWHC 2016 (Fam), [2008] 1 FLR 289

  Extensive and important consideration of the provisions of, in particular, Art 11 (7) and, generally, Arts 10 and 11 of Brussels IIR. Construction of what constitutes a 'judgment' for the purposes of Brussels IIR. Guidance on the appropriate procedure to be followed in such cases.

  D v N and D (By her Guardian Ad Litem) [2011] EWHC 471 (Fam), [2011] 2 FLR 464

  Important guidance on the approach of the court in respect of applications pursuant to Art 11(7) of Brussels IIR.

Child abduction: custody rights

C (A Child) (Unmarried Father: Custody Rights), Re [2002] EWHC 2219 (Fam), [2003] 1 WLR 493; sub nom C (Child Abduction) (Unmarried Father: Rights of Custody), Re [2003] 1 FLR 252, [2003] Fam Law 78, FD
Hunter v Morrow (Abduction: Rights of Custody) [2005] EWCA Civ 976, [2005] 2 FLR 1119
P (Abduction: Consent), Re [2004] EWCA Civ 971, [2004] 2 FLR 1057
H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 AC 291
V-B (Abduction: Custody Rights), Re [1999] 2 FLR 192
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619

Rights of Custody

- *In re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291

  Discussion by the House of Lords of 'rights of custody' in the context of a whether a court could be an 'other body' holding 'rights of custody'.

- *Hunter v Morrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119

  Reinforcement of the autonomous nature of the Hague Convention and discussion by the Court of Appeal of Art 15 determinations.

- *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

  The leading House of Lords case on 'rights of custody' and Art 15 determinations. A 'right of custody' would include any right arising by court order, agreement or operation of law to insist that the other parent did not remove the child from the home

country. A potential right of veto was not a right of custody. Art 15 determinations should in normal circumstances be determinative.

Kennedy v Kennedy [2009] EWCA Civ 2009, [2010] 1 FLR 782

The court's approach to the determination of whether or not a parent exercised 'rights of custody' involved a two stage process: (1) an investigation of the law of the State of habitual residence; (2) whether the particular parent's rights equate to 'rights of custody' under the autonomous law of the Hague Convention.

Child abduction: habitual residence

A (Wardship: Habitual Residence), Re [2006] EWHC 3338 (Fam), [2007] 1 FLR 1589
Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951
Ikimi v Ikimi [2001] EWCA Civ 873, [2001] 2 FLR 1288
Marinos v Marinos [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018
D (Abduction: Habitual Residence) [2005] 2 FLR 403
P (Abduction: Declaration), Re [1995] 1 FLR 831
R v Barnet London Borough Council ex p Shah [1983] 2 AC 309
J (A Minor) (Abduction: Custody Rights), Re [1990] 2 AC 562

Habitual residence

- *R v Barnet London Borough Council Ex p Shah* [1983] 2 AC 309

  An important discussion by the House of Lords of the concept of 'ordinary residence'.

- *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562

  A consideration by the House of Lords of the required component parts of 'habitual residence'.

- *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951

  An important consideration of the authorities relating to 'habitual residence' by the Court of Appeal.

- *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018

  The construction of 'habitual residence' for the purposes of Brussels IIR. 'Habitually resident' meant 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence.'

- *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2009] 2 FLR 1051

Child abduction: Hague Convention: settlement

C (Abduction: Settlement), Re [2004] EWHC 1245 (Fam), [2005] 1 FLR 127, FD
C (Child Abduction: Settlement), Re [2006] EWHC 1229 (Fam), [2006] 2 FLR 797, FD
Cannon v Cannon [2004] EWCA Civ 1330, [2005] 1 WLR 32, [2005] 1 FLR 169, [2004] All ER (D) 252 (Oct), [2005] Fam Law 8, CA

M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] 1 FLR 251
N (Minors) (Abduction), Re [1991] 1 FLR 413

Article 12: settlement

- *Re N (Minors) (Abduction)* [1991] 1 FLR 413

  Construction of the meaning of 'settled' for the purposes of the Hague Convention. The word 'settled' had two constituents: a physical element relating to, being established in, a community and environment, and an emotional element denoting security, as in permanence, and that the present position imported stability when looking forward into the future.

- *Re C (Abduction: Settlement)* [2004] EWHC 1245 (Fam), [2005] 1 FLR 127

  Extensive review of authorities relating to Art 12 and decision that there was no discretion to be exercised once the 'gateway' stage of Art 12 had been made out.

- *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169

  Reversal of *Re C (Abduction: Settlement)* (above). Discussion by the Court of Appeal of the impact of subterfuge and the concealment of a child in child abduction proceedings. In those situations, the burden of demonstrating the necessary elements of emotional and psychological settlement was much increased.

- *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251

  Authoritative statement by the House of Lords that there was indeed a discretion to be exercised once the Art 12 'settlement' gateway stage had been made out.

  F v M and N (Abduction: Acquiescence: Settlement), [2008] 2 FLR

  An unduly technical approach to the question of settlement should be resisted.

Child abduction: Hague Convention: acquiescence and consent

C (Abduction: Consent), Re [1996] 1 FLR 414
K (Abduction: Consent), Re [1997] 2 FLR 212
M (Abduction) (Consent: Acquiescence), Re [1999] 1 FLR 171
P (Abduction: Consent), Re [2004] EWCA Civ 971, [2004] 2 FLR 1057
T v T (Abduction: Consent), Re [1999] 2 FLR 912

Article 13 (a): consent

- *Re C (Abduction: Consent)* [1996] 1 FLR 414

  Consent does not have to be in writing. Indeed, it was possible in an appropriate case to infer consent from conduct.

- *Re K (Abduction: Consent)* [1997] 2 FLR 212

  A leading case on consent. Consent must be real, positive and unequivocal. It does not have to be in writing. It can be inferred from conduct.

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

  Consent which is based on a misunderstanding or non disclosure would be vitiated.

- *Re P (Abduction: Consent)* [2004] EWCA Civ 971, [2004] 2 FLR 1057

  Consent fell to be considered within the provisions of Art 13(a) not Art 3 of the Hague Convention.

  Re L (Abduction: Future Consent) [2007] EWHC 2181 (Fam), [2008] 1 FLR 914

  Consent could be valid if tied to a future event, even of uncertain timing, provided that the happening of the future event was reasonably ascertainable; it should not be too vague, subjective or uncertain. If the consent was provided based on different facts, or had been withdrawn, then it could no longer be relied upon.

  Re P-J (Abduction: Habitual Residence: Consent) [2009] EWCA Civ 588, [2009] 2 FLR 1051

  The leading case on the proper approach to consent in Hague Convention cases.

Child abduction: Hague Convention: acquiescence and consent

S (Abduction: Acquiescence), Re [1998] 2 FLR 115, [1998] Fam Law 309, CA
H (Minors) (Abduction: Acquiescence), Re [1998] AC 72

Article 13 (a): acquiescence

- *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72

  The leading House of Lords case on acquiescence.

- *Re S (Abduction: Acquiescence)* [1998] 2 FLR 115

  It is not necessary in order for acquiescence to be made out for there to be a specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. To expect knowledge of the rights which can be enforced under the Hague Convention is to set too high a standard. The degree of knowledge as a relevant factor will depend on the facts of each case. Once acquiescence is given, it cannot be withdrawn.

Article 13 (b)

Child abduction:Hague Convention:grave risk of harm
Child abduction:Hague Convention:grave risk of harm:domestic violence

C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, [1999] 2 FCR 507, [1999] Fam Law 371, CA
TB v JB (Abduction: Grave Risk of Harm) [2001] 2 FLR 515
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619

General

- *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

  There was a particular risk that an expansive application of Art 13 (b), which focuses

on the situation of the child, could lead to courts in the requested State carrying out full welfare enquiries. That said, there would be circumstances in which a summary return would be so inimical to the interests of the particular child that it would be contrary to the objection of the Convention to require it. A restrictive application of Art 13 did not mean that it should never be applied at all. For the purposes of Art 13 (b), 'intolerable' meant 'a situation which this particular child in these particular circumstances should not be expected to tolerate.'

In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144

The most important and definitive guidance as to the proper approach to Article 13(b).

Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 FLR 442

An important consideration of subjective perceptions and Article 13(b) by the Supreme Court.

D (Article 13B: Non Return), Re [2006] EWCA Civ 146, [2006] 2 FLR 305
F (Child Abduction: Risk if Returned), Re [1995] 2 FLR 31
W (Abduction: Domestic Violence), Re [2004] EWHC 1247 (Fam), [2004] 2 FLR 499, [2004] Fam Law 785, FD
TB v JB (Abduction: Grave Risk of Harm) [2001] 2 FLR 515

Domestic or other violence

- *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31

  A successful reliance before the Court of Appeal on Art 13 (b), relying on a combination of the child being present whilst violence was being perpetrated; the impact that that had on the child's health; and the lack of available and reliable protective measures in the 'home' state.

- *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515

  A failed attempt to rely on Art 13 (b) relating principally to the behaviour of the mother's second husband and her own fragile mental health. The Court of Appeal held that protective measures that could be relied upon were sufficient to allow the court to return the children.

- *Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam), [2004] 2 FLR 499

  A failed attempt to rely on Art 13 (b) based to some extent on domestic violence. A large number of conditions were placed on the order for return so as to attempt to protect the child in the 'home' state.

- *Re D (Article 13B: Non Return)* [2006] EWCA Civ 146, [2006] 2 FLR 305

  A successful reliance on Art 13 (b). The mother had been shot in Venezuela by an unknown gunman. Having heard expert evidence, the judge concluded that there was a grave risk of harm to the children arising out of the attempted assassination. The Court of Appeal agreed. However, it cautioned that in weighing the evidence of an abductor seeking to justify or explain conduct, a judge needed to subject that evidence to rigorous and perhaps sceptical scrutiny.

Child abduction: Hague Convention: grave risk of harm
Child abduction: Hague Convention: grave risk of harm: potential abuse of child

N v N (Abduction: Article 13 Defence) [1995] 1 FLR 107
D (Article 13B: Non Return), Re [2006] EWCA Civ 146, [2006] 2 FLR 305
F (Child Abduction: Risk if Returned), Re [1995] 2 FLR 31
M (Abduction: Acquiescence), Re [1996] 1 FLR 315
S (Abduction: Return into Care), Re [1999] 1 FLR 843

Potential abuse of child

- *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31

  A successful reliance before the Court of Appeal on Art 13 (b), relying on a combination of the child being present whilst violence was being perpetrated; the impact that that had on the child's health; and the lack of available and reliable protective measures in the 'home' state.

- *N v N (Abduction: Article 13 Defence)* [1995] 1 FLR 107

  A failed attempt to rely on Art 13 (b), relying on the risk of physical harm (potential sexual abuse of the child) and psychological harm.

- *Re S (Abduction: Return into Care)* [1999] 1 FLR 843

  A failed attempt to rely on Art 13 (b), relying on the potential sexual abuse of the child. Protective arrangements, those being the return of the child into an investigatory care home in the requesting State, were such as to negate any Art 13 (b) defence.

- *Re D (Article 13B: Non Return)* [2006] EWCA Civ 146, [2006] 2 FLR 305

  A successful reliance on Art 13 (b). The mother had been shot in Venezuela by an unknown gunman. Having heard expert evidence, the judge concluded that there was a grave risk of harm to the children arising out of the attempted assassination. The Court of Appeal agreed. However, it cautioned that in weighing the evidence of an abductor seeking to justify or explain conduct, a judge needed to subject that evidence to rigorous and perhaps sceptical scrutiny.

Child abduction:Hague Convention:grave risk of harm
Child abduction:Hague Convention:grave risk of harm:primary carer, separation from

C v C (Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 645 sub nom Re C (A Minor) (Abduction) [1989] 1 FLR 403
D v D (Child Abduction: Non-Convention Country) [1994] 1 FLR 137
S v B (Abduction: Human Rights), Re [2005] EWHC 733 (Fam), [2005] 2 FLR 878, [2005] Fam Law 610, FD

Separation from primary carer

- *C v C (Minor: Abduction: Rights of Custody)* [1989] 1 WLR 654 sub nom *Re C (A Minor) (Abduction)* [1989] 1 FLR 403

  The classic consideration of reliance on the non return of a primary carer as raising an Art 13 (b) defence. To allow a primary carer to create the psychological situation, that

being that parent's non return, and then rely on it would be to 'drive a coach and four through the Convention'.

- *S v B (Abduction: Human Rights)* [2005], EWHC 733 (Fam), [2005] 2 FLR 878

  The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which they have created by their own conduct was born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Art 13 (b) of the Convention. However it was not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which was in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent.

Child abduction:Hague Convention:grave risk of harm
Child abduction:Hague Convention:grave risk of harm:siblings, separation from

B v K (Child Abduction) [1993] 1 FCR 382, [1993] Fam Law 17, FD
T (Abduction: Child's Objections to Return), Re [2000] 2 FLR 192

Separation from siblings

- *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192

  Two children aged 11 and 6 were sought to be returned to the requesting State. Given that a child objection's defence in respect of the elder child was made out, it would create an Art 13 (b) situation if the younger child were to be returned to their State of habitual residence and therefore such a return would be refused.

- *S v B (Abduction: Human Rights)* [2005] 2 FLR 878

  A mother raised an Art 13 (b) defence based on the unwillingness of her elder 13 child to return to the requesting State and its consequent impact on her other child, the elder child's step sibling. The position as to the elder child's reluctance to return was to some extent the result of the mother's conduct. The reality of the situation was that when faced with an order for return both the mother and the elder child would return to the requesting State with the younger child. A return order would accordingly be ordered.

Child abduction:Hague Convention:grave risk of harm
Child abduction:Hague Convention:grave risk of harm:conditions in requesting state

M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] 1 FLR 251
S (Abduction: Custody Rights), Re [2002] EWCA Civ 908, [2002] 2 FLR 815
S (Abduction: Intolerable Situation: Beth Din), Re [2000] 1 FLR 454

Conditions in the requesting State

- *Re S (Abduction: Intolerable Situation: Beth Din)* [2000] 1 FLR 454

  A failed attempt to rely on Art 13 (b), relying on the potential injustice that would derive from the judicial system in the requesting State. It was not appropriate to consider in detail the law and principle applied in the courts of the requesting State, which was, in any event, a signatory to the Hague Convention.

- *Re S (Abduction: Custody Rights)* [2002] EWCA Civ 908, [2002] 2 FLR 815

A failed attempt to rely on Art 13 (b), relying on the conditions in Israel, which was suggested to be in a state of war.

- In re *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288

  The moral and political climate in Zimbabwe was not such as to place a child at a grave risk of psychological harm or intolerability.

Child abduction: Hague Convention: grave risk of harm
Child abduction: Hague convention: grave risk of harm: prospective criminal proceedings

C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, [1999] 2 FCR 507, [1999] Fam Law 371, CA
L (Abduction: Pending Criminal Proceedings), Re [1999] 1 FLR 433

Prospective criminal proceedings

- *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433

  Prospective criminal proceedings awaiting in the courts of the requesting State was not enough to justify the making out of a Art 13 (b) defence.

- *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145

  A risk of prosecution in the courts of the requesting State was not sufficient to make out an Art 13 (b) defence.

Child abduction: child's objections

S (A Minor) (Abduction: Custody Rights), Re [1993] Fam 242 sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492
M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] 1 FLR 251
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619
T (Abduction: Child's Objections to Return), Re [2000] 2 FLR 192

Child's objections

- *In re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492

  The classic early consideration of the child's objection's defence.

- *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192

  A comprehensive consideration by the Court of Appeal of the child's objections defence, containing an approach which would appear to be superseded by *Re M (Abduction: Zimbabwe).*

- *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288

  The authoritative guide to the child's objections defence. The child's objections exception was brought into play when only two conditions are met: (a) that the child objected to being returned; and (b) that he had attained an age and degree of maturity at

which it was appropriate to take account of his views. Once the discretion came into play, the court might have to consider the nature and strength of the child's objections, the extent to which they were authentically their own or the product of the influence of the abducting parent, the extent to which they coincided or were at odds with other considerations which were relevant to his welfare, as well as general Convention considerations. The older the child, the greater the weight that his objections were likely to carry.

Re W (Abduction: Child's Objections) [2010] EWCA Civ 520, [2010] 2 FLR 1165

Important decision as to the 'gateway' stage in relation to a child's objections. The 'gateway' stage was a fairly low threshold to be passed.

Child abduction: Hague convention: jurisdiction

J (A Child) (Custody Rights: Jurisdiction), Re [2005] UKHL 40, [2006] 1 AC 80
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619

Article 20

- *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

  Article 20 had been given domestic effect by virtue of the Human Rights Act 1998. Human Rights considerations may well be relevant in child abduction cases.

  Re E (Children) (Abduction: Custody Appeal) [2011] EWCA Civ 361, [2011] 2 FLR 724

  Consideration by the Court of Appeal of the Article 20 defence.

  In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144

  Consideration by the Supreme Court of (*inter alia*) the Article 20 defence.

Child abduction: Hague convention: court's discretion

M (Abduction: Zimbabwe), Re[2007] UKHL 55, [2008] 1 FLR 251

The exercise of the court's discretion

- *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288

  The leading case on the exercise of the court's discretion in Hague Convention cases. There was no room for an 'exceptionality' test at the discretion stage. Where a discretion arose, the discretion was at large: the court was entitled to take into account the various aspects of the Hague 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.

  F v M and N (Abduction: Acquiescence: Settlement) [2008] EWHC 1525 (Fam), [2008] 2 FLR 1270

  It was within the powers of the Hague Convention for an order for return to be suspended on terms.

Child abduction: Hague convention: undertakings

M (Abduction: Undertakings), Re [1995] 1 FLR 1021
O (Child Abduction: Undertakings), Re [1994] 2 FLR 349

Undertakings

- *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349

  The use of undertakings to alleviate what otherwise would be an intolerable situation was permissible in Hague Convention proceedings.

- *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021

  Undertakings or conditions attached to an order for return were to make the return of the child easier and to provide for necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence could become seized of the proceedings brought in that jurisdiction. The court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations. Undertakings have their place in the arrangements designed to smooth the return of and to protect the child for the limited period before the foreign court took over, but they must not be used to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child.

Child abduction: procedure

W (Abduction: Domestic Violence), Re [2004] EWHC 1247 (Fam), [2004] 2 FLR 499, [2004] Fam Law 785, FD
W (Abduction: Procedure), Re [1995] 1 FLR 878

Contempt

Re A (Abduction: Contempt) [2008] EWCA Civ 1138, [2009] 1 FLR 1

In a case where contempt to an order was raised, the contempt that must be established lay in disobedience to the order to return, rather than the original abduction. Contempt of court must be proved to the criminal standard; it involves a contumelious, that is to say, a deliberate disobedience to the order. If it is that the father cannot cause the return of the child, he is not in contempt of court however disgraceful his conduct is.

Practice and procedure

- *Re W (Abduction: Procedure)* [1995] 1 FLR 878

  Skeleton arguments were required in Hague Convention proceedings.

  Re M (Abduction: Appeals) [2007] EWCA Civ 1059, [2008] 1 2 FLR 699

In applications for a return under Brussels IIR the obligation was to complete proceedings at first instance within 6 weeks. An order following a judgment ought to drafted and agreed speedily.

Re A (Abduction: Interim Directions: Accommodation by Local Authority) [2010] EWCA CIv 586, [2011] 1 FLR 1

There was a wide power under section 5 of the Child Abduction and Custody Act 1985 to give directions on an interim basis to safeguard the position of the child. This included a power to direct the provision of accommodation.

Child abduction: separate representation of child

C (Abduction: Separate Representation of Children), Re [2008] EWHC 517 (Fam), [2008] 2 FLR 6
D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619
M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] 1 FLR 251

Separate representation

- *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011

  Useful guidance and discussion by the Court of Appeal as to the test for separate representation in Children Act 1989 proceedings (which can be applied to such applications in Non Convention cases).

- *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619

  Only in a few cases would separate representation be necessary. But whenever it seemed likely that the child's views and interests may not be properly presented to the court, and in particular where there were legal arguments which the adult parties were not putting forward, then the child should be separately represented.

- *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288

  To order separate representation in all cases, even in all child's objections cases, might be to send the wrong messages. But it would not send the wrong messages in the very small number of cases where settlement was argued under the second paragraph of Art 12. These are the cases in which the separate point of view of the children was 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 was whether separate representation of the child would 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. One should hesitate to use the word 'exceptional'. The substance is what counts, not the label.

Child abduction: oral evidence

F (A Minor) (Child Abduction), Re [1992] 1 FLR 548
F (Child Abduction: Risk if Returned), Re [1995] 2 FLR 31
W (Abduction: Domestic Violence), Re [2004] EWHC 1247 (Fam), [2004] 2 FLR 499, [2004] Fam Law 785, FD

Oral evidence

- *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548

  The classic early statement by the Court of Appeal of the use of oral evidence in Hague Convention proceedings. There was no right to call oral evidence but a discretion to admit it. Such a discretion should be used sparingly. There was a real danger if oral evidence was generally admitted in Hague Convention cases, it would become impossible for them to be dealt with expeditiously and the purpose of the Convention might be frustrated.

- *Re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366, [2005] 1 FLR 727

  Oral evidence should only be admitted in exceptional cases. In Art 13 (b) cases, to warrant oral exploration of written evidence, the judge must be satisfied that there was a realistic possibility that oral evidence would establish an Art 13 (b) case that was only embryonic on the written material.

EC-L v DM (Child Abduction: Costs) [2005] EWHC 588 (Fam), [2005] 2 FLR 772, [2005] All ER (D) 187 (Apr), FD

Costs

- *EC-L v DM (Child Abduction: Costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772

  There was a power to make costs orders in child abduction proceedings. It should, however, be the expectation in child abduction cases that the usual orders would be no order as to costs, but where a party's conduct had been unreasonable or where there was a disparity of means, then the court could consider whether to exercise its discretion in accordance with the normal civil principles.

Child abduction: costs

Child abduction: non-Convention cases

J (A Child) (Custody Rights: Jurisdiction), Re [2005] UKHL 40, [2006] 1 AC 80

Other (non-Convention) cases

- *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80

  The leading case on how the court should adjudicate upon a child abduction from a Non Convention country. The House of Lords held that the welfare of the child was the court's paramount consideration; the court did have a power to order an immediate return without a full investigation; and the decision whether to order an immediate return or whether to conduct a full investigation was a matter to be determined by considering the individual child and the particular circumstances of the case.