International Child Abduction Update - Summer 2020

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Case Law Update

***G-E (Children: Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] EWCA Civ 283**

Background

M British

F Australian

Met in 2010 (in Australia) and lived there.

2 children born 2012 & 2014

M primary carer. F travels a lot and works long hours.

Parents had moved house 7 times whilst living in Australia. M and the children had spent long periods of time in England.

In **July 2017** M and children travel to England as M's father is terminally ill. Initial agreement to return within 6 months. In **September 2017** M's father dies. M and F agree that the stay should be extended. Don't agree an end date.

In **March 2018** M travels to Australia (without the children) for a week. When she gets back to England, she emails F and makes it clear that she's not returning to Australia.

F issued proceedings under the 1980 Hague Convention in **August 2018**.

First Instance Decision

F said children should be summarily returned to Australia. Argued that M had wrongfully retained the children in England in July 2017, or in the alternative by December 2017/January 2018 at the latest (a 'repudiatory retention').

M accepted the retention had been wrongful, but argued that this had happened in March 2018 (when she emailed F to say she was not returning). By this time, the children were habitually resident in England, therefore the Hague Convention did not apply.

The Judge found that:

a) the wrongful retention had taken place in March 2018; and
b) the children had been habitually resident in England since December 2017/January 2018 when the 'see-saw' had tipped from Australia

Therefore F's application refused

Appeal
F argued that the Judge, whilst she had correctly directed herself as to the law, had erred when she had made both findings as she had "failed to properly analyse the evidence".

Drew the appeal Court's attention to a long list of factors which he said pointed to the fact that the repudiatory retention had taken place prior to March 2018 [8-23].
Argued that the Judge had been wrong to conclude that the children's roots in Australia were 'rather shallow' and said that in fact the children only had "limiting connecting factors" to England

F's appeal dismissed. The conclusions reached by the Judge were open to her on the evidence, which she had analysed sufficiently. Judge had, in her judgment, expressly referred to the matters F relied on in his appeal.

S (A Child - Hague Convention 1980 - Return to Third State) **[2019] EWCA Civ 352**

Background
M and F both Hungarian.
Met in Hungary and lived there until 2016 when F moved to Germany. M and child (A) followed in **January 2017**.
In **March 2018**, M, F and A went back to Hungary for a holiday. A few days later, F went back to Germany and M & A went to London to stay with M's sister.
In **April 2018** F travelled to England.
Parents separated. F tried to take his own life and subsequently assaulted M, as a result of which she dropped A. Pleaded guilty to assault and received a suspended sentence and a restraining order.
Between **April and August 2018** F moved from Germany to Hungary. In **August 2018** he issued proceedings under the 1980 Hague Convention (in Hungary, and subsequently in England).

First Instance Decision

F applied for children's return to Germany. He subsequently said that he would 'prefer' the children to be returned to Hungary, but would let the Court decide whether they should be returned to Germany or Hungary.
He offered "any undertakings" and "all reasonable undertakings" but was not specific about what these should or could entail.

M raised a defence under Art 13(b) of the 1980 Hague Convention - "grave risk". Said that her relationship with F was characterised by domestic abuse.

The Judge was satisfied, unless F offered further undertakings, M would have established her Art 13(b) defence. He outlined what these undertakings should cover and then adjourned to allow F to provide a signed schedule of undertakings that he was prepared to offer and "evidence in support" of them.

He did not accept (as M had argued) that to order a return of a child to a 'third state' was exceptional, but said it was "unusual… but in principle unobjectionable". Noted that M would be more disadvantaged by an order for return to Germany than a return to Hungary.

At the adjourned hearing in January 2019, the Judge ordered that A should be 'returned' to Hungary, subject to the undertakings which had been outlined by F. These included a commitment to pay maintenance to M. He reminded himself that the undertakings were only designed to be short term "pending the engagement of the Hungarian Court". He specifically relied on the fact that:

a) F had notified social services in Hungary of A's likely return;
b) F's Hungarian lawyer had initiated the "child welfare Court process"; and
c) F had not breached the restraining order in England

Appeal

M appealed. She argued;

1) the Judge was wrong to make the 'return' order and had undertaken no analysis as to why it was appropriate to make this "unusual" order in this case,
2) the robustness of the undertakings offered had not been properly analysed by the Judge and did not ameliorate the "grave risk" she had established
   i) because A was habitually resident in Germany, the German Courts retained jurisdiction and therefore the Hungarian Courts could not make orders in respect of A's welfare

ii) no evidence as to whether the undertakings given by F would be enforceable in Hungary.

The day before the appeal, M filed an addendum skeleton argument citing three further grounds of appeal. These were not argued, as the appeal succeeded on the original grounds.

The Court of Appeal made some 'general observations' [49-56]:

1) "protective measures" which can be put in place to ameliorate risks, are wider than "protective undertakings" (which can be 'offered' by the applicant) which a great deal of the original hearing focused on;
2) although there was no consideration of the scope of the 1996 Hague Convention, the Court noted that even when the Convention did apply, some measures were specifically outwith the scope, such as "maintenance obligations";
3) emphasis on the "need for caution when relying on undertakings" - reiterated the importance of the "efficacy of protective measures" which will vary from case to case and country to country

The Court of Appeal agreed with M that the order which had been made was not a return order but a relocation order, which was a welfare order which had been made with no welfare assessment.

Also agreed that there had been insufficient consideration as to whether the undertakings did, in fact, ameliorate the grave risk established by M - did the Judge believe they were effective in Hungary, or that F would abide by them regardless? They noted that maintenance does not appear to be covered by the 1996 Hague Convention, and therefore those undertaking at least were not enforceable (which would include F's commitment to pay for housing). During the hearing, the Judge had reminded himself that the undertakings were "to provide short-term protection to the Mother and to A only pending the engagement of the Hungarian Court" - the Court of Appeal agreed that there was a significant question mark as to what jurisdiction the Hungarian Courts would have. In particular, once additional documents had been translated it did not, in fact, appear that "child welfare" proceedings had been initiated in Hungary.

<u>M's appeal succeeded and F's application dismissed.</u>

***Re H (Abduction: Retention in Non-Contracting State)* [2019] EWCA Civ 672**

Background

M Ugandan (with British citizenship)

F Australian

Parents met and lived in Australia from 2014. Child born in 2016.

In **November 2017**, both parents (and C) travelled to Uganda for a 2 month trip. Whilst there, the parent's separated and M said that she was 'never going back to Australia'. F persuaded M to go with him to England.

Once in England, F issued application under the 1980 Hague Convention for summary return of C to Australia.

First Instance Decision

M argued that the 1980 Hague Convention did not apply, as the alleged wrongful retention of C had taken place in Uganda (non-Convention), not England. M relied on established case law to the effect that wrongful removal and retention are "events occurring on a specific occasion". She also raised various other defences (none of which succeeded).

The Judge determined that the retention had taken place in Uganda on 23 January 2018 (when the family were due to return to Australia). C was habitually resident in Australia at the time. Rejected M's argument that the 1980 Hague Convention did not apply as the retention had happened in Uganda, decided that a retention that *"started"* outside a contracting State but which was *"continuing"* on a later date in a contracting State **is** justiciable in that contracting State.

Appeal

M appealed and argued that the Judge was wrong in deciding that the 1980 Hague Convention applied, as the wrongful removal took place in Uganda. She submitted that this was effectively applying the Convention to a non-Convention state. She pointed to his use of the words 'started' and 'continuing' and said this demonstrated that he was not following the established law re: the events occurring on a specific occasion.

The Court of Appeal considered a number of provisions in the 1980 Hague Convention, including parts which hadn't been incorporated in English law, but were relevant to context and to understand the purpose.

Held that the Judge had been correct to conclude that earlier retentions in a non-Convention state become justiciable in a Convention state;

> *"I consider that such a conclusion is consistent with… "the two fundamental purposes of the Convention, to protect children from the harmful effects of international abduction and to secure that disputes about their future are determined in the state where they were habitually resident before the abduction"…*
>
> *I do not consider that the fact that both removal and retention "are events occurring on a specific occasion" mean that they cannot continue to be wrongful and with the scope of the Convention if they occurred in a non-Convention state"*

The Court rejected the argument that this was tantamount to applying the Hague Convention to a non-Convention state - a distinction was drawn between an abduction <u>from</u> a non-Convention state and the current case, which involved two Convention states. The Court noted that accepting M's argument would provide a "technical" obstacle to the operation and application of the Convention, and an easy route for abducting parents to evade it.

The only basic requirements for the application of the Convention are [52]:

a) the child must have been habitually resident in a Contracting State at the date of the alleged removal or retention; b) the removal or retention must be wrongful; c) the application must be determined in the Contracting State where the child is; d) the Convention must be in force between both States.

<u>M's appeal dismissed.</u>

In the matter of NY (A Child) [2019] UKSC 49

<u>Background</u>

M and F Israeli

Married in 2013 and lived in Israel until **November 2018** when both parties and the child (NY) moved to London. F got a job, NY attended nursery.

In **January 2019** the marriage broke down. F told M he intended on moving back to Israel and tried to insist that M should return with him. M refused. M called the Police and alleged that F intended to abduct NY. F left for Israel and issued proceedings there and also in England under the 1980 Hague Convention.

First Instance Decision

F applied for summary return, arguing that M had wrongfully retained NY in England on 10 January 2019.

M argued;

a) child was habitually residence in England by that date
b) retention had not been wrongful, as F had given consent "for the purposes of Art 13"
c) return of the child would expose the child to harm, as per Art 13(b) Hague Convention

The Judge decided that:

a) the child remained habitually residence in Israel as at 10 January 2019;
b) F had consented to the NY's removal in November 2018. At that time both parents regarded it as 'possible' that if the marriage broken down then they would return to Israel, but there was no agreement that this would necessarily be the case. The Judge considered that this provided the necessary consent pursuant to Art 13 Hague Convention and therefore he had discretion as to whether to order the NY's return;
c) the high threshold required for Art 13(b) defence had not been reached

The Judge then turned to the exercise of his discretion. He considered the purpose of the 1980 Hague Convention and the significant features connecting the child to Israel and the relatively short time she had been present in England. He made an order for her return to Israel.

He then added a 'postscript' - had M's argument regarding habitual residence been successful, he would still have ordered the return of the child under the inherent jurisdiction.

> *"no doubt many Judges (at any rate I speak for myself) have occasionally been guilty of including in judgments ill-considered, off-the-cuff, remarks which later prove highly unfortunate" [17]*

Court of Appeal

M appealed and raised the following:

a) whether what occurred amounted to a retention under the scope of the Hague Convention;
b) whether whether the Judge's approach to the issue of protective measures (Art 13(b)) was wrong; and

c) whether the Judge was wrong to order NY's summary return to Israel either under the Hague Convention, or the inherent jurisdiction

Permission to appeal was principally justified on the basis of a) and c). M sought permission to appeal the decision that NY was habitually resident in Israel. This was refused.

The Court of Appeal set aside the summary return order under the Hague Convention. Because F had consented to NY's removal from Israel, and the Judge had found that this was not conditional or time-limited, there had been no wrongful retention and therefore the Hague Convention did not apply.

However, the Court then went on to substitute the order with an order for return under the inherent jurisdiction. Referred to the Judge's 'determination' and/or 'decision' to invoke the inherent jurisdiction. Concluded that *"the Judge was entitled to make an order for [the child's] return under the court's inherent jurisdiction and his summary welfare decision to do so is fully supported by the reasons he gave"* [73]

<u>Supreme Court</u>

M appealed to the Supreme Court. Appeal raised two questions;

1) was the inherent jurisdiction available to the CofA in principle?
2) if so, was the exercising of it flawed?

Question 1;

M argued that the inherent jurisdiction cannot be used to make an order for summary return, that it could only have been an order made under the Children Act 1989 (a SIO).

This is important because, she argued, a SIO could only have been made after a more in-depth enquiry into the child's welfare that one conducted under the inherent jurisdiction. In particular the welfare checklist at s.1(3) CA 1989 and PD12J in relation to allegations of domestic abuse.

The 'high point' of M's case was a focus on PD12D 2010 Family Procedure Rules [para 1.1];

> *"such proceedings* [under the inherent jurisdiction] *should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989"*

The Supreme Court did not agree. There is no law which precludes an application under the inherent jurisdiction unless the issue cannot be resolved under the CA. There are policy reasons to restrict the use of the inherent jurisdiction and to confine applications to the lowest suitable level of Judge. A Judge would have to be persuaded that "exceptionally, it was reasonable… to invoke… the inherent jurisdiction… for example, for reasons of urgency, of complexity, or of the need for particular judicial expertise" [44]

However, "where an application for the same order can be made in two different proceedings and falls to be determined by reference to the same overarching principle of the child's welfare, it would be wrong for the substantive enquiry to be conducted in a significantly different way in each of the proceedings" [47]

Therefore, when determining an application under the inherent jurisdiction, a Court is "likely to find it appropriate" to consider the first 6 elements of the welfare checklist and also PD12J. If it is considering whether to make a summary order, it should consider (in light of PD12J) whether the child's welfare requires an inquiry into the allegations of domestic abuse and how extensive the inquiry should be.

Question 2;

The Court of Appeal did not conduct its own inquiry as to whether it was in NY's interests to be the subject of an order for summary return. They considered that the first instance Judge had already done this. The Supreme Court disagreed - the Judge's decision was made under the Hague Convention, not the inherent jurisdiction. There are general policy considerations involved in Convention cases which are sometimes weighed against the interests of the child, which is not the case under the inherent jurisdiction. Therefore the Judge's welfare analysis (such as it was) was not sufficient.

Before making an order, the Court of Appeal should have considered 8 further questions [55-63];

1) whether the evidence before it was sufficiently up to date to enable them to make the summary order
2) whether the Judge had made (or it could make) findings sufficient to justify the summary order
3) whether, in order to sufficiently identify what the child's welfare required for the purposes of a summary order, a welfare inquiry should be undertaken and, if so, how

extensive that inquiry should be - of particular relevance is "the likely effect on the child of any change in circumstances"

4) whether, in light of PD12J, a more extensive inquiry as to the allegations of domestic abuse was required
5) whether, without any information about the arrangements for the child in Israel, it would be appropriate to conclude that her welfare required her to return there
6) whether, in light of the above, any oral evidence should be heard
7) whether a CAFCASS report should be prepared
8) whether it needed to compare the relative abilities of the Court in Israel and the Court in London to reach a swift resolution of the substantive issues between the parents, and to satisfy itself that the Israeli Court had the power to authorise M's return to England (in the event that the English Courts required her to return to Israel)

M's appeal upheld.

***Re I-L (Children) (1996 Hague Convention: Inherent Jurisdiction)* [2019] EWCA Civ 1956**

The facts

- M is a Russian national. F is British. They married in 2013 and initially lived in England. They had two children in early 2015 and late 2016.
- Following the birth of the younger child, both children lived with M in Russia, with F visiting frequently and the children also visiting England.
- In 2017, M issued divorce proceedings in Russia. Arrangements for the children were agreed and formalised in accordance with the provisions of the Russian Civil Code. It provided the children would live with M and have extensive contact with F both in England and Russia. In 2018 the children spent 73 days with F in England.
- At the end of 2018 M informed F (via lawyers) that she wanted to spend 3 months with the children in the USA. F did not agree, so in January 2019 M travelled to USA by herself and gave birth to a child there. She retuned to Russia in March 2019. In April 2019 the children went with M to the USA on an agreed holiday.
- In May 2019 the parents were exploring options for living arrangements for the children. It was clear that living in Russia was not an option. M wanted to move to the USA with the children but conceded that this would not be convenient for the children to spend time with F.
- Discussions about future arrangements for the children came to an end when F issued proceedings in England.

The proceedings in Russia and England

- The procedural background in this case was considerable:
    a. 17 January 2019 M filed an application in Russia seeking to amend the 2017 agreement.
    b. February 2019 F filed his own application in Russia, unaware of M's application.
    c. 31st May 2019 F commenced proceedings in England under the Children Act 1989 and made a without notice application to a family court. The Court refused to make any orders without notice and adjourned proceedings to 12 June 2019.
    d. 4 June 2019 Russian court allowed F to withdraw his application.
    e. 10 June 2019 M commenced proceedings in England under 1980 Convention. It was M's case that there had been a repudiatory retention by F when he commenced proceedings in England.
    f. On 12 June 2019 both applications came before Newton J. The matter was listed for a 2-day hearing and proceedings under the Children Act were stayed until the conclusion of the 1980 Convention proceedings.
    g. 24 June 2019 the Russian court made an order requiring F to return the children to M. On 25th June 2019 F appealed against this order.
    h. 2 July 2019 DJ Gibson registered the Russian court order dated 24 June 2019 and gave permission for it to be enforced although the time for appealing had not expired.
    i. 3 July 2019 M's English solicitor informed F's solicitor that if no order was made under 1980 Convention, an order for summary return would be sought alternatively under the inherent jurisdiction.
    j. Following the hearing on 8 and 9 July, the court dismissed the application under the 1980 Convention and made an order dated 16 July 2019 for return to Russia by 19 August 2019. The order also provided for the dismissal of F's Children Act proceedings upon the return of the children to Russia.
    k. On 2 August 2019 F appealed from DJ Gibson's order of 2 July 2019.
    l. Cohen J stayed that order until the determination of the respective appeals in Russia and England.
    m. 6 August 2019 F lodged application for permission to appeal the order of 16 July 2019. Moylan LJ granted stay of that order on 9 August 2019 and gave permission to appeal on 19 August.
    n. 13 August 2019 the Russian first instance court determined M's application and made an order for contact. The order included other provisions.

o. 4 September 2019 F's appeal from order of 24 June 2019 was dismissed by Russian court.

p. 16 September 2019 M appealed out of time from an aspect of the Russian court's order of 13 August 2019.

q. 30 September 2019 M applied for stay effected by Cohen J's order of 5 August 2019 to be lifted. 7 October 2019, Cohen J refused to list this application prior to Court of Appeal determining F's application from the order of 16 July.

r. M's application for permission to appeal was withdrawn after this court informed the parties of its decision at the hearing of this appeal on 15 October 2019.

First instance decision

- The Court dismissed M's application under the 1980 Hague Convention but made an order under the inherent jurisdiction for the parties' two children to be returned to Russia.
- In doing so, the Court decided that the children were habitually resident in Russia at the relevant date but that F had not acted in a way, which amounted to repudiatory and wrongful retention as asserted by M. Therefore, there had been no effective breach of M's rights of custody.

The appeal

- On appeal F's contended that the court's determination in respect of habitual residence was flawed and the decision to make an order under the inherent jurisdiction was insufficiently welfare based.
- M cross-appealed the decision in respect of wrongful retention.
- Neither of these arguments succeeded on appeal.

1996 Convention and the inherent jurisdiction

- Prior to the hearing, the parties were informed they would need to address the relationship between 1996 Hague Child Protection Convention and the inherent jurisdiction having regard to the decision in *Re J (A child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291.
- Simply expressed: was the judge was right to make a return order under the inherent jurisdiction?
- Both parties accepted that the court had not been referred to the relevant provision under 1996 Convention.
- At [83] the Court stated;

"It is clear from the Court of Appeal's decision in Re J that, when the 1996 Convention applies, "recourse can only be had to the inherent jurisdiction if that is permitted by the jurisdictional code that (1996 Convention) establishes", at [34]. Further, if the 1996 Convention does not give jurisdiction to make the order sought, "the whole purpose of the 1996 Convention (which) is to determine, as between contracting States, the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child … would be defeated if, notwithstanding an absence of jurisdiction under the Convention, a Contracting State were able to assume jurisdiction by virtue of a domestic rule".

- The Court determined that the 1996 Convention applied in this case because the Court found that the children were habitually resident in Russia at the relevant date. This meant Russia had substantive jurisdiction when F commenced proceedings under the Children Act. In addition, at the date of the hearing, there were proceedings in Russia, which were "still under consideration," within Article 13. Further, an order had been made by the Russian court, which the mother was seeking to enforce in England.
- In those circumstances, following the dismissal of M's application under the 1980 Convention, the structure of 1996 Convention meant that the English court only had a "secondary" jurisdiction as provided by Article 11.
- When deciding whether to make such an order, the court, had to apply the express provisions of Article 11 (urgent and necessary) and decide whether the circumstances were such as to justify an order being made.
- Accordingly, it was not open to the court to make an order under the inherent jurisdiction and that order was set aside.
- The court also considered whether, if the judge had been asked to make an order under Article 11, would he have done so? The Court concluded the clear answer was no for the following reasons:
  i. Russian Court was actively engaged and had made an order requiring F to return the children to M; and
  ii. M had already obtained a return order from the Russian courts and was taken steps to enforce it in England.
- The court stated, in the circumstances of this case, there was no prospect of the court making an order under Article 11 of the 1996 Convention. The right course was for M to enforce the Russian court's order in this jurisdiction.

***Re S (Children)* [2020] EWHC 834**

The facts

- M was English and F was Libyan. Parties met in 2007 and married under Islamic law.
- They lived in England for most of their married life, save for a period of about 5 months between 2013-2014 when they lived in Libya.
- All three children were born in England and F was granted British citizenship in 2016.
- In December 2017 the family travelled, on one way tickets booked by M, to Turkey for a holiday and from there to Libya.
- The circumstances in which they travelled to Libya were in dispute; M asserted that this was for a holiday and F asserted they had relocated.
- In January 2018, M returned to England to attend an appointment with DWP. The youngest child was supposed to travel with her but F had not been able to secure an exit visa for him.
- During 2018 M travelled to Libya and back five times and spent approximately four months there. The children and F remained in Libya throughout this period.

The proceedings

- On 3 December 2018, M issued proceedings in the High Court seeking a summary return of the parties' three children from Libya to England.
- M alleged that the children had been "forcibly retained" in Libya whilst there on holiday.
- M's application was listed for a fact-finding hearing to determine the issue of habitual residence and thereafter whether or not the court had jurisdiction to proceed to make orders in respect of the children.

First instance decision

- Having heard oral evidence on the relevant issues, the Court found both parents were unsatisfactory witnesses. However, in her judgment (running to over 40 pages) HHJ Hillier found that M had participated and planned a permanent move to Libya in 2017.
- The judge concluded that the children had not been wrongfully removed from England to Libya.
- Further, the judge found that in early 2018, M herself was very unclear about the future. F facilitated M's wish to return to the UK and then return to Libya. When it became clear that M wanted a divorce and return to the UK late in 2018 there was a divergence of opinion as to future arrangements but that this did not constitute an

interference with M's right of custody, and therefore did not amount to wrongful retention.

- The Court concluded that the English Court had no jurisdiction to make an order and that at the time the Court was seised of M's application the children were habitually resident in Libya.

The appeal

- The Court noted at [17] the *"main interest in this appeal is focused on the 'assessment' section of the judge's judgment".*
- M argued that the Judge's conclusions in respect of jurisdiction did not accord with the weight of the evidence, and the factual findings she had made were "flawed", "inconsistent", "contradictory" and "perverse".
- On the issue of habitual residence, in particular it was submitted that the Judge had failed to undertake a 'child centric' view of the facts for very young children who were in a country they had not previously visited and were separated from their former primary carer.
- M also argued that the way the case had been conducted was unfair with M there in person and F via video link.
- M sought permission at a late stage to rely on an additional ground of appeal, namely, whether the judge should have considered whether to exercise *parens patriae* jurisdiction. The Court of Appeal did not give M permission to rely on this ground of appeal, and said that in any event (given the outcome) it would not have made a difference.

The decision of the Court of Appeal

- The Court did not accept that the way the hearing was conducted was unfair and noted that the judge had been alert to the potential advantages and disadvantages in both parents' situations.
- The Court did not consider that M had been able to demonstrate that the judge's assessment of the parent's credibility was wrong. F's dishonesty had been in relation to his UK immigration status and was not directly relevant to the central issue in the case.
- Finally in relation to the findings in in respect of wrongful retention and habitual residence M pointed to some documentary evidence she said the Judge had not considered and which had resulted in "perverse" findings;
  i. M had relied on text messages sent between Nov 2018 and late Spring 2019 - this was after the alleged unlawful retention in January 2018

ii. M said that Judge had selected extracts from an email from M to her Libyan lawyer and thus altered the nature of the email, the Court did not agree that it provided evidence of wrongful retention but showed that M wanted to continue living in Libya “in a different way”.

- In all the circumstances, the judge’s finding that there was no wrongful retention on 9 January 2019 could not be dislodged. M’s return had been discussed between the parties, there was no suggestion that her elder children should return with her and no challenge to the evidence that an exit visa had genuinely not been granted for the youngest, F “genuinely facilitated” M’s travel but did not want her to leave Libya and M asked members of the paternal family to look after the children while she was away.
- In terms of habitual residence, M had relied on the judge saying that the children had “some degree of integration” in England up to 2017. The phraseology adopted by the judge was challenged as failing to reflect the true extent of the children’s complete integration in England. The Court of Appeal pointed out that this phrase “some degree” was borrowed from case law. The judge had rightly noted that the children’s integration in Libya would have been slowed by the fact that their primary carer was not there for long periods of time, but found that since they had been there they had come to rely on the paternal family and it was permissible to take that into consideration, as well as the reason for moving being mutual agreed.
- The judge went on to refer to the ‘see-saw’ analogy and found that the children had achieved the required “some degree of integration” and that in fact this was “substantial”.
- The Judge may not have referred to all of the evidence, but this did not make her decision wrong.

Impact of COVID-19

Following the issuance of the President's Guidance entitled COVID-19: National Guidance for the Family Court, the operation of the Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings has been temporarily amended.

https://www.judiciary.uk/wp-content/uploads/2020/03/COVID19-Draft-Temporary-Amendments-to-Child-Abduction-Practice-Guidance-Final-26.03.2020.pdf

Toolkit for the HCCH 1980 Child Abduction Convention in times of COVID-19

https://www.hcch.net/en/news-archive/details/?varevent=741

***Re N (A Child)* [2020] EWFC 35**

Introduction

- The child was unilaterally removed by M to the maternal grandmother's home in Greece due to COVID-19.
- F applied in Greece for a return order under the 1980 Convention.
- F also applied for a range of orders under the Children Act 1989, including an inward return order from Greece to England.

The facts

- The parties are Greek. They married in 2008 and the child was born on 2 January 2009.
- The parties' relationship broke down in 2017. Divorce proceedings were commenced but never completed in Greece. Within those uncompleted proceedings the parties agreed child arrangements.
- F came to London in 2017. M and the child followed in January 2018.
- M and F lived under same roof but did not resume a relationship.
- The child became fully integrated into London life, attending school here and otherwise becoming fully socially assimilated. The Court found that by 20 March 20, the child had established his habitual residence in London.
- By 20 March 2020 Coronavirus pandemic had taken grip here.
- Three days before the Prime Minister announced lock down M unilaterally removed the child to the Island of Paros. She did so in belief that she and the child would be much safer from the virus there.

- F approached ICACU and instructed solicitors. He instructed a lawyer in Greece. An application under the 1980 Convention was made.
- During Easter vacation, F made emergency application, without notice, in the High Court seeking a range of orders under section 8 of the Children Act 1989 including an immediate inward return order. The court ruled that the application should be heard on notice to M.
- M sent email to F's solicitor confirming that she intended to return to England but was not sure when due to COVID-19

The hearing

- At a one hour directions hearing F sought the following substantive orders:
  i. a declaration that the child is habitually resident in England and Wales and was on 21 March 2020.
  ii. A specific issue order for M to return child to England forthwith.
  iii. PSO prevent M from removing the child from England once he returned until conclusion of proceedings.
  iv. SIO requiring M to lodge child's passport and travel documents with F's solicitor, until conclusion of proceedings.
  v. PSO to prevent M from applying for a travel document or passport with Greek embassy in England and Wales.
  vi. A Child Arrangements Order for the child to live with F until conclusion of proceedings.

Applicable law in relation to outward and inward return orders

- The Court confirmed that the same principles apply to outward and inward return orders. They are subject to the same substantive law and to the same procedural law.
- The Court considered the principles for an outward return order in *Re NY (A Child).*
- The Court also considered the guidance in *In Re S (Abduction: Hague convention or BIIa)* [2018] EWCA Civ 1226 and set out the following statements by Moylan LJ in relation to inward return orders, where the child has been taken to an EU member state:

  "47. Apart from this being the expected route, it has certain real advantages. First a higher degree of assistance is likely to be provided by the authorities in the requested state to a party bringing an application under the 1980 Convention than in respect of an application for the enforcement of an order. Secondly, there is a specific obligation on states to determine applications under the 1980 Convention within 6 weeks. There is no such specific requirement in respect of parental responsibility orders. Thirdly,

Article 11 provides what is to happen if a non-return order is made. There is, therefore, a tailor-made procedure through which the courts of the respective Member States engage with the case and engage with each other. Additionally, any subsequent return order has an expedited enforcement procedure under Chapter III, section 4 and, to repeat, "without any possibility of opposing its recognition of the judgment has been certified in the Member State of origin in accordance with" Article 42(2). The making of a summary return order does not necessarily lead to the expedition return of a child.

48. The advantages of an application being made under the 1980 Convention as against a summary return order are evident from the circumstances of this case. Having obtained a summary return order, the mother found herself unable effectively to apply for its enforcement. It is not, therefore, known whether she might have encountered other difficulties under Article 23, for example, on the issue of whether the voice of the child had been heard. Although there were some delays in the mother's application under the 1980 Convention being progressed, once she engaged with the process required in the Netherlands to progress an application under the 1980 Convention, the court there dealt with the application with expedition. That such applications are dealt with expeditiously can be seen from the information provided in its Annual Report for 2017 by the Dutch Office of the Liaison Judge for International Child Protection. This is not to say that a return order would be made but that the process was more likely to be expedited by making an application under the 1980 Convention than seeking to enforce a summary return order by means of BIIa".

- The Court stated that in addition to the practical reasons, there were powerful reasons of principle why the left behind parent should be expected to make an election as to which form of relief, and in which forum, he or she wishes to litigate. An unfettered freedom to litigate gives rise to the risk of tensions between, and inconsistent judgments from, the two jurisdictions. Under the 1980 Hague Convention the best interests of the child are not the court's paramount consideration, although they are highly relevant. If the removal or retention has been wrongful there will be an order for return unless the guilty parent can establish one of the specified defences. In contrast, an application for a summary return order will be judged from first to last by reference to the paramount consideration of the best interests of the child. It is a markedly different forensic process.
- Whether the application is for an inward return order or an outward return order it is almost invariably going to be framed as an application for a specific issue order

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pursuant to section 8 of the Children Act 1989. Such applications are the subject of procedural requirements under the Family Procedure Rules, namely:

i. An application for a section 8 order cannot be made until there has been a MIAM – FPR 3.6; this requirement can be dispensed with in certain circumstances pursuant to rule 3.8. These include delay, risk of harm to the child, risk of unlawful removal to, or retention of a child in, another place. In many cross-border cases where a return order is sought such an exception would apply; but this should not be regarded as automatic or invariable.

ii. The application once issued will be regulated by PD12B – application will first be considered at FHDRA about 5 weeks after issue of application. Respondent should normally be given 14 days' notice of the hearing. At that hearing the court will have the C100, respondent's response, and importantly, a safeguarding document from Cafcass. The parties would be guided by the Cafcass officer and the court to see if they can reach agreement. If an agreement is reached the court will make orders by consent.

iii. The urgency attending an application for a return order, whether inward or outward, may well dictate that the timescales in the CAP should be abridged, and the FHDRA dispensed with. However, again, this should not be regarded as an automatic or invariable step.

The decision

- The Court stated that it would be surprised in light of M's email to F's solicitor, if Greek court did not readily conclude M should return the child to England. However, Greek court would want to be satisfied it was safe for M and the child to travel and that they would be safe on arrival.
- The Court decided that the proceedings in England and Wales should wait for the conclusion of proceedings in Greece under the 1980 Convention in line with the Court of Appeal guidance in *Re S (Abduction: Hague Convention or BIIA).*
- The Court granted a declaration that the child was habitually resident in England on 21 March 2020 and had remained so ever since.
- Regarding F's application for the other substantive orders the Court stated that determination of those would be grossly unfair in procedural terms; M had the right to a fair trial of F's application and for the court to make such orders without her having filed any formal evidence at a 1 hour directions hearing would have been a travesty of justice.

***Re PT (a child) (summary return)* [2020] EWHC 834 (Fam)**

Introduction

- F's application for summary return of child to Spain.

The facts

- The child and both parents are Spanish nationals.
- Following parties' separation, legal proceedings were brought in Spain by M concerning the child's welfare.
- Spanish court determined that M would have custody and both parties would share parental responsibility.
- The order provided for F to have fairly extensive contact with the child.
- In February 2019 M travelled to England with the child. M's new partner lived in England and they moved in with him.
- F asserted that the child was removed from Spain without his knowledge and/or consent.
- F travelled to England and asked M to return the child to Spain, but she refused. She did however permit the child to spend a night with F at his hotel in England.
- M was pregnant and was due to give birth around 3 weeks after the final hearing.

The proceedings

- The case first came before Lieven J on 10 March on a without notice basis. A location order was made and the matter was adjourned to a with notice hearing.
- M attended in person and produced a letter from a law firm seeking an adjournment for her legal aid options to be explored and indicated that she would be seeking to defend the application on the basis of (1) F's consent and/or acquiescence and (2) Article 13(b) of the 1980 Convention.
- The child was, as directed by Lieven J, present in the court vicinity and was interviewed by a CAFCASS Officer. The child's clear wish, as expressed to CAFCASS, was that she wanted to return to Spain with F rather than stay in England.
- The matter was listed for a final hearing and consequential directions were made, including a direction for M to file an answer indicating the Convention grounds upon which a return was being opposed and a witness statement in support by March 23. The order also provided for interim contact.

- M did not file a statement in line with the order and refused F direct and indirect contact with the child.
- Due to COVID-19 the in-person final hearing was converted to a remote hearing.
- F argued that the child was habitually resident in Spain; her parents share parental responsibility; she was brought to England without F's knowledge or consent; and none of the grounds for refusing a return under Article 13 of the Convention applied. F also offered a number of undertakings.
- M did not provide a witness statement but made an affirmation and so the court treated her submissions as forming her evidence (with caution as they were not subject to cross-examination). M asserted that F was aware M intended to move to England with the child; F behaviour towards the child is a cause for concern and a reason why the child should not be permitted to live with him; a separation of the child from her mother would be harmful to her; a return to Spain would be to different circumstances to those which existed before the removal; and finally, the health risks posed by the current coronavirus pandemic.

<u>COVID-19</u>

- The Court was asked to consider the risk of physical harm presented by COVID-19. The Court noted that the risk presented itself in two ways:
  i. the pandemic is more advanced in Spain than in UK;
  ii. increased risk of infection that is posed by international travel;

- The Court stated at [47(3)]:

  "Although the course of the pandemic is clearly more advanced in Spain than in the UK, I do not have any evidence from which I can draw a conclusion that either country is any more or less safe than the other. It is clear that the pandemic is a serious public health emergency in both nations and that the number of cases in the UK is expected to continue to rise in the coming weeks. Both countries have imposed significant restrictions on their citizens in an effort to contain the pandemic. I am simply not in a position to make any findings as to the relative likelihood of contracting the virus in each country. On the material before me, all that I can conclude is that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.

  …

Taking all these matters into account, whilst I accept that travel associated with a return is likely to increase the risk that PT could contract coronavirus, I do not consider that such a risk, when considered in the context of the likely harm that would be suffered by PT should she contract the virus, is sufficient to amount to the "grave risk" of physical harm required by Art. 13(b)."

- The Court determined that the child had been wrongfully removed from Spain within the terms of Article 3 of the Convention and none of the Article 13 defences were made out.
- An order was therefore made for summary return of the child to Spain.
- In determining when the child should return the Court considered M's pregnancy and the fact that an immediate return would prevent the child from having the opportunity to meet her new sibling. However, due to restrictions placed on movement by COVID-19, the rapidly changing international situation, the need to restore some stability in the child's life and the undertakings provided by F in relation to direct and indirect contact, the Court did not delay the implementation of the order.

_VB v TR_ [2020] EWHC 877

Introduction

- Application made by F for summary return of child to Bermuda for an order pursuant to the Court's inherent jurisdiction.

The facts

- In December 2019 M removed the child from Bermuda to the UK without F's agreement.
- In doing so M breached an order of the court in Bermuda, which provides that F should have access to the child on alternate weekends.

Applicable law

- It was not possible to invoke the provisions of the 1980 Hague Convention for technical reasons;
  i. just as the Convention does not operate between England and Wales, on the one hand, and Scotland on the other, it does not operate between the United Kingdom, on the one hand, and British Overseas Territories on the other.
  ii. Mutual recognition of orders under section 25 of the Family Law Act 1986 only applies to orders made in England and Wales, Scotland and Northern Ireland.
  iii. There is no automatic statutory recognition of orders between the United Kingdom and its Overseas Territories. Nor does the mutual recognition of orders regime under the 1996 Hague Convention apply to orders made in British Overseas Territories.

- The Court stated, *"It would seem that the only way in which a return order made in a British Overseas Territory could be recognised would pursuant to the common law".* The Court considered the recent judgment of Privy Council in *C v C* (Jersey) [2019] UKPC 40 on the common law on recognition of foreign orders about children. The Court found that *"a foreign order should be recognised unless it would be contrary to public policy to do so. The Privy Council's analysis demonstrates that in determining the question of public policy the court does not embark on a full welfare-based enquiry".*
- However, F did not apply for such an order and made an application for summary return under the court's inherent jurisdiction. The Court noted that whilst such a path is permissible, as confirmed in the recent Supreme Court judgment in *Re NY (a child)* [2019] UKSC 49, this course required the paramountcy principle in section 1(1) of the Children Act 1989 to be applied; for the first six specific matters in section 1(3) to be specifically addressed; and for eight matters listed in the judgment in Re *NY (a child)* to be worked through.
- Unsurprisingly, the Court opined *"it is bizarre that the 1980 Hague Convention should not apply between the United Kingdom and its Overseas Territories"* and the law needs to be changed as between the UK and its overseas territories to provide that the 1980 Convention operates between then. Alternatively, the law needs to be changed *"so that the automatic recognition of orders within the United Kingdom under the Family Law Act 1986 is extended to orders made in Overseas Territories and the Crown Dependencies".*

The decision

- The court granted F’s application under the inherent jurisdiction for the return of the child to Bermuda.

COVID-19

- Although the Court ordered a summary return to Bermuda, it had to consider whether it was safe for M and the child to travel due to Covid-19. M suffered from Crohn’s disease so the Court determined it was not reasonable to expect her to travel to Bermuda until UK Government decided it was safe for people in vulnerable conditions to travel.