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The Judges' Newsletter

on International Child Protection

Special focus

Urgent Measures of Protection

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Foreword

Urgent Measures of Protection

The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Child Protection Convention") unlike the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Child Abduction Convention") is not supported through a dedicated case law database such as INCADAT. Hence, it is difficult to research and find cases from other jurisdictions or summaries of such cases and legal analyses of the application of the 1996 Child Protection Convention.

In the light of this shortcoming, it was decided to dedicate the Special Focus of Volume XXIV of The Judges' Newsletter to leading case law under the 1996 Child Protection Convention with a view to raising awareness of the many benefits of the Convention, in particular with regard to its relationship with the 1980 Child Abduction Convention.

One article of the 1996 Child Protection Convention, Article 11, is of particular relevance to the application of the 1980 Child Abduction Convention as it provides a basis of jurisdiction to the authorities of the State where the child is present to take urgent measures of protection. Article 11 of the 1996 Child Protection Convention reads as follows:

Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

The 1996 Child Protection Convention does not define the notion of urgency. Guidance in this regard is found in the Explanatory Report, drawn up by Professor Paul Lagarde, which states that "[i]t might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child". In this respect, the Practical Handbook on the Operation of the 1996 Child Protection Convention (the "Practical Handbook") suggests a pragmatic approach to determine what constitutes a situation of urgency: "A useful approach for authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his / her protection or interests compromised if a measure is not taken to protect the child in the period that is likely to elapse before the authorities with general jurisdiction under Articles 5 to 10 can take the necessary measures of protection." It is important to note that the situation of "urgency" justifies a derogation from the general rules of jurisdiction provided under the 1996 Child Protection Convention (Arts 5-10). The Explanatory Report indicates for this reason that Article 11 ought to be construed "rather strictly".

The Practical Handbook provides examples of cases involving such a situation of "urgency":

(1) the child is outside the State of his / her habitual residence and medical treatment is required to save the child's life (or to prevent irreparable harm occurring to the child or his interests being compromised) and parental consent cannot be obtained for the treatment;

(2) the child is exercising contact with a non-resident parent outside his / her State of habitual residence and makes allegations of physical / sexual abuse against the parent such that contact needs to be suspended immediately and / or alternative temporary care found for the child;

(3) it is necessary to make a rapid sale of perishable goods belonging to the child; or

(4) there has been a wrongful removal or retention of a child and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his / her habitual residence.

Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, which met from 1 to 10 June 2011, adopted the following Conclusion and Recommendation with regard to the latter point:

> "41. It was noted that the 1996 Convention provides jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforce-

ment in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention."

It is interesting to note that the drafters of the 1996 Child Protection Convention did not set out what particular "necessary" measures of protection might be taken under Article 11 on the basis of "urgency". Neither the Explanatory Report nor Conclusion and Recommendation No 41 provide additional information in that respect. The Explanatory Report merely indicates that the urgency should dictate in each case the "necessary" measures. The Practical Handbook explains that "[i]t will therefore be a matter for the judicial or administrative authorities in each Contracting State to determine, based upon the facts of each particular case, what measures (within the scope of the Convention [i.e., Article 3]) are "necessary" to deal with the urgent situation at hand".

The duration of the measures of protection taken under Article 11 is regulated by the said Article. In the case of a child habitually resident in a Contracting State, the measures of protection shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation. In the case of a child who is habitually resident in a non-Contracting State, the measures of protection shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State (including a non-Contracting State) are recognised in the Contracting State in question. It is important to note that Article 11 applies whether the habitual residence of the child is in a Contracting State or a non-Contracting State.

This edition of The Judges' Newsletter intends to draw the attention of judges, lawyers and policy makers to the existence of tools to implement protection measures which may not yet be part of their "tool box". It is hoped that the written contributions found in this volume may encourage States not yet Party to this very important Convention to consider joining the Convention in the near future. For actors involved in child abduction matters in States already Party to the 1996 Child Protection Convention, the written contributions may hopefully bring to their attention some novel applications of the Convention.

In relation to the Special Focus of this issue, readers will find a commentary from Justice Alistair MacDonald, member of the International Hague Network of Judges (IHNJ) for England and Wales, on the leading case law of the Supreme Court of the United Kingdom on Article 11. Also featured are case notes on three important decisions from the Family Court of Australia prepared by the Chambers of the Honourable Justice William Alstergren, member of the IHNJ for Australia. Justice Victoria Bennett, also member of the IHNJ for Australia, in her contribution provides a practical insight on the operation of Article 11 from an Australian point of view. On the other hand, Justice María Lilián Bendahan Silvera, member of the IHNJ for Uruguay, provides her views on the operation of Article 11 in the context of a child abduction case from the perspective of a judge from Uruguay.

Finally, on the subject of Article 11, Judge Myriam De Hemptinne, member of the IHNJ for Belgium, on part-time secondment to the Permanent Bureau (PB) of the Hague Conference on Private International Law (HCCH), provides a summary and commentary of an interesting decision from the High Court of Ireland. The decision deals with a return application between Ireland and Pakistan at a time when the 1980 Child Abduction Convention did not apply between Ireland and Pakistan and where Pakistan is not a Contracting State to the 1996 Child Protection Convention.

Also in this volume of The Judges' Newsletter, is an article by Judge Judith van Ravenstein, member of the IHNJ for the Netherlands, providing an insight on the 2018 activities of the Dutch Office of the Liaison Judge – International Child Protection. Judge António José Fialho, member of the IHNJ for Portugal, writes on the latest reforms in Portugal to implement the 1980 Child Abduction Convention and Judge Graciela Tagle de Ferreyra, member of the IHNJ for Argentina, informs readers about an extraordinary training that took place in Argentina of all national actors involved in child abduction cases. The training, which was organised by the Federal Board of Courts of Justice of the Provinces and the Autonomous City of Buenos Aires, took place online and on site one afternoon a week for two months. It provided 25 hours of training for more than 900 participants from the 22 provinces of Argentina. Finally, Justice Judith L. Kreeger, former member of the IHNJ for the United States of America, informs us in her article of the steps taken in the state of Florida to concentrate jurisdiction with regard to child abduction cases. Hopefully, other states, like California, New York and Texas, will soon follow this leadership.

We hope that you, the reader, will enjoy reading this volume of The Judges' Newsletter as much as we did preparing it, and that it will prompt discussions and inspire initiatives in your respective jurisdictions.

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Special Focus

Urgent Measures of Protection

1. The use of Article 11 of the 1996 Child Protection Convention in the United Kingdom of Great Britain and Northern Ireland

By The Honourable Mr Justice MacDonald, Deputy Head of International Family Justice for England and Wales

This article considers the judicial practice in the jurisdiction of England and Wales in relation to Article 11 of the 1996 Child Protection Convention on urgent measures of protection. Article 11 allows for the taking of "necessary measures of protection" in "all cases of urgency".

Article 11 is designed as a rule of jurisdiction. The jurisdiction of a Contracting State under Article 11 of the 1996 Child Protection Convention, based on urgency and necessity, is concurrent with the general jurisdiction under Articles 5 to 10 of the Convention and is subordinate to that general jurisdiction. Article 13 of the Convention pertaining to the resolution of possible conflicts of jurisdiction does not apply where measures of protection have been taken under Article 11.

As with the HCCH Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, the 1996 Child Protection Convention does not define urgency, however the Practical Handbook to the 1996 Child Protection Convention (the "Practical Handbook") provides as follows at paragraphs 6.2 and 6.4 in this regard:

> "[6.2] The Convention does not provide a definition as to what constitute "cases of urgency". It will therefore be a matter for the judicial / administrative authorities in the Contracting State in question to determine whether a particular situation is "urgent". The Explanatory Report states that a situation of urgency may be said to exist where, if measures of protection were only sought through the normal channels of Articles 5 to 10 (the general bases of jurisdiction), irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised. A useful approach for authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his / her protection or interests compromised if a measure is not taken to protect the child in the period that is likely to elapse before the authorities with general jurisdiction under Articles 5 to 10 can take the necessary measures of protection.
> .../
> [6.4] Examples of cases involving such a situation of "urgency" might include: (1) the child is outside the State of his / her habitual residence and medical treatment is required to save the child's life (or to prevent irreparable harm occurring to the child or his interests being compromised) and parental consent cannot be obtained for the treatment; (2) the child is exercising contact with a non-resident parent outside his / her State of habitual residence and makes allegations of physical / sexual abuse against the parent such that contact needs to be suspended immediately and / or alternative temporary care found for the child; (3) it is necessary to make a rapid sale of perishable goods belonging to the child; or (4) there has been a wrongful removal or retention of a child and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his / her habitual residence."

Within this context, it will be for the judicial or administrative authorities of the Contracting State in question to determine whether a particular situation is one of urgency, with a useful approach being to ask "whether the child is likely to suffer irreparable harm or to have his or her protection or interests compromised if a measure is not taken to protect him/her in the period that is likely to elapse before the authorities with general jurisdiction under Articles 5 to 10 can take the necessary measures of protection".

With respect to the question of whether a measure of protection can be said to be necessary, the Explanatory Report drawn up by Paul Lagarde suggests the concept of necessity is linked to the concept of urgency, describing measures under Article 11 as a "functional concept, the urgency dictating in each situation the necessity of the measures". Paragraph 6.5 of the Practical Handbook provides as follows:

> "[6.5] Whilst there is no settled practice regarding what constitutes a "case of urgency" as yet, in these circumstances it is clearly for the competent authority hearing the return application to determine whether, on the facts of the particular case before it, the case is one of "urgency" such that Article 11 can be relied upon to take measures of protection to ensure the child's safe return."

Once again, in the circumstances, it will be a matter for the judicial or administrative authorities in each Contracting State to determine on the facts of the particular case, including the degree of urgency of the case, what measures within the scope of the Convention are necessary to deal with a situation of urgency.

A further aspect of the protection conferred in cases of urgency by the taking of necessary measures of protection under Article 11 is the fact that, in accordance with Chapter

IV of the 1996 Child Protection Convention, measures of protection taken in cases of urgency under Article 11 are entitled to recognition and enforcement. Pursuant to Article 23, such measures shall be recognised by operation of law. Further, pursuant to Article 23(2)(b) and (c) the grounds for non-recognition of an order are limited in cases of urgency. Thus, in respect of cases in which a return order is made in the context of proceedings under the HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter, the "1980 Child Abduction Convention"), as the Practical Handbook notes at paragraph 13.7:

> "The 1996 Convention adds to the efficacy of any such measures of protection ordered by ensuring that such orders are recognised by operation of law in the Contracting State to which the child is to be returned and are enforceable in that Contracting State upon the request of any interested party (until such time as the authorities in the requesting Contracting State are able to put in place any necessary protective measures)."

Within this context, in England and Wales secondary legislation has been implemented to take account of the provisions of Article 11 of the 1996 Child Protection Convention in the domestic context. In particular, regulation 5 of the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 provides that where a local authority in England and Wales thinks that the conditions in section 31(2)(a) and (b) of the Children Act 1989 (threshold for public law care and supervision orders) apply in relation to a child and Article 11 applies, an interim care or interim supervision order may be made to provide temporary protection, notwithstanding that the English or Welsh court has no international jurisdiction to make a final care or supervision order.

The English and Welsh courts have considered the application of Article 11 in a number of decisions. The key decision however, is that of the United Kingdom Supreme Court in Re J (A child) (1996 Hague Convention: Morocco) [2016] AC 1291 in which the Supreme Court considered comprehensively the operation of Article 11 of the 1996 Child Protection Convention.

The facts of the case can be summarised as follows. The child was born in January 2007. His parents held Moroccan and British citizenship. The parents lived in England when the child was born but then moved first to Saudi Arabia and then to Morocco. The parents' marriage broke down and the child lived with his mother, who was granted residential custody. The father was granted and exercised visiting rights. The mother then moved to England. The child remained in the care of his maternal grandparents but the mother later brought the child to England. Thereafter, the child lived in England with the mother and her new husband. Face to face contact between the father and the child ceased. The father brought proceedings in the English High Court seeking an order that the child be made a ward of court and directions for his summary return to Morocco. The High Court found that the child had been habitually resident in Morocco at the time of his removal and that the father had not consented to his removal from Morocco, which was wrongful. The High Court ordered the mother to return the child to Morocco. The mother appealed to the Court of Appeal, which held that the English courts did not have jurisdiction under the 1996 Child Protection Convention. The Court of Appeal concluded that in cases where a child was habitually resident in another State jurisdiction under the 1996 Child Protection Convention only arose in cases of urgency pursuant to Article 11 and this was not such a case as the father could have made an immediate application to the Moroccan court for a return order.

The Supreme Court allowed the appeal against the decision of the Court of Appeal, holding that it is open to the English courts to exercise the Article 11 jurisdiction in cases of wrongful removal under the 1996 Convention. In the course of its judgment, the Supreme Court considered in detail the operation of Article 11 in the jurisdiction of England and Wales.

The Supreme Court described Article 11 as supplying "an additional jurisdiction in limited circumstances". Within that context, the Supreme Court compared Article 11 with Article 20 of the Brussels IIa Regulation as follows:

> "There are several things to note about this provision. First, it bears a striking resemblance to article 20 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, otherwise known as the Brussels II revised Regulation ("the Regulation"). Article 20, however, merely allows one member state to "take provisional, including protective measures in respect of persons or assets in that State as may be available under the law of that member state", even if, under the Regulation, the court of another member state has jurisdiction. Article 11, in contrast, confers an additional jurisdiction upon the State where the child or the property is. An order made under article 20 is not enforceable in another member state: Purrucker v. Valles Perez (No 1) (Case C-256/09) [2011] Fam 254. In contrast, an order made under article 11 is enforceable in the other Contracting States in accordance with Chapter IV of the 1996 Convention. The order can thus have extra-territorial effect, although it will lapse in accordance with article 11(2) once the authorities in the State of primary jurisdiction have taken the measures required by the situation."

From the decision of the Supreme Court in Re J can be drawn the following key observations made by the Court with regard to the manner in which Article 11 operates:

(a) Article 11 applies where there is (i) a case of "urgency", (ii) the child or his or her property is present in the jurisdiction, and (iii) measures of protection are necessary. Within this context, Article 11 demands a holistic approach. It may be helpful for the court to ask itself three questions. Is the child here? Are measures of protection necessary? Are they urgent? This is not to suggest that these questions must always be asked in that order. The Article should be applied according to its terms.

(b) The concept of "measures of protection" goes far wider than the public law measures of child care and protection to which an English lawyer might otherwise think that they referred (although those are also included).

(c) Article 11 confers jurisdiction on the presence country in all situations to which its terms apply. It is not limited to cases of wrongful removal or retention. A child may be habitually resident in one country but present in another in a whole host of situations which do not involve an unlawful removal or retention. It cannot be the case that the courts of the presence country are prohibited from taking steps under Article 11 because it has not been shown to be impossible for the courts of the home country to do so.

(d) An order made under Article 11 can have extra-territorial effect and jurisdiction and extends to safeguarding children who are lawfully present in another country. As such, it can secure a valuable 'soft landing' for children whose return to their home country is ordered under the 1980 Hague Convention.

(e) If the courts of the home country take action, the measures they take will "trump" those taken in the presence country. But if no action is taken, the measures taken in the presence country will continue to operate throughout the Convention space.

(f) Article 11 should not however be used to interfere in issues that are more properly dealt with by the authorities in the home country. It is a secondary not a primary jurisdiction. In the circumstances, the jurisdiction is not one that is entirely 'at large'.

Within this context, the Supreme Court in Re J, whilst noting that "it would be unfortunate if words in the Explanatory Report were treated as if they were words in the Convention itself", observed as follows with respect to situations in which Article 11 is likely to be of application:

> "[37] The Practical Handbook suggests that "A useful approach for Authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his/her protection or interests compromised if a measure is not taken to protect him/her in the period that is likely to elapse before the authorities with general jurisdiction under articles 5 to 10 can take the necessary measures of protection" (para 6.2). The examples given cover (1) medical treatment to save the child's life or prevent irreparable harm occurring to the child or his interests being compromised; (3) a rapid sale of perishable goods; but also (2) the child is having contact with a non-resident parent outside his home State and makes an allegation of abuse against that parent such that contact needs to be suspended immediately and alternative care arranged; (4) there has been a wrongful removal or retention of the child and, in the context of 1980 Hague Convention proceedings, measures need to be put in place to ensure the safe return of the child" (para 6.4)."

With respect to the area of child abduction, in Re J the Supreme Court further observed that whilst a case of abduction governed solely by the 1996 Child Protection Convention is not invariably one 'of urgency', it is difficult to envisage a case in which the court should not consider it to be so and go on to consider whether it is appropriate to exercise the Article 11 jurisdiction. With respect to child abduction matters under the 1980 Child Abduction Convention, it is noteworthy in this context that in the Practical Handbook in a footnote to paragraph 6.4 the Handbook states as follows:

> "In relation to example (4), it was suggested at the 2011 Special Commission (Part I) that whilst measures which facilitate the safe return of a child in the context of a return application under the 1980 Convention are extremely valuable, they may not always suggest a "case of urgency" (such that Article 11 can be relied upon for a basis for jurisdiction to take these measures). This would particularly be the case in light of the strict interpretation of "urgency" called for in the Explanatory Report. In contrast, it was pointed out that the use of Article 11 in such circumstances was an important addition to the "toolbox" which authorities have at their disposal to ensure the "safe return" of a child following a wrongful removal or retention. It was further suggested that a case involving the need for measures to be taken to ensure a child's safe return to the State of his / her habitual residence would usually be a "case of urgency" such that Article 11 can be relied upon. In the Conclusions and Recommendations of the 2011 Special Commission (Part I) the following was noted (at para. 41): "[T]he 1996 Convention provides

a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention."

2. Recent cases from Australia on the operation of Article 11 of the 1996 Child Protection Convention

By the Honourable Justice William Alstergren, Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia

There have been at least three recent cases before the Family Court of Australia concerning the operation of Article 11 of the 1996 Child Protection Convention.

a) The first decision concerned Australian children who had been placed in the care of German Social Services following the mother wrongfully retaining the children in Germany. The second decision had to confront the practical reality of a Contracting State not having established the "simple and rapid" procedure to render protective measures enforceable between States. The third decision demonstrated the regulation of the care of a returned child in the short period after the child re-entered the State of habitual residence up until the time when the competent authorities of that jurisdiction were seized of the matter and took the measures required by the situation.

In November 2018, Justice Berman delivered a decision in Ryland & Ryland. In that case, both parents were German citizens by birth and held dual Australian citizenship. The parents separated in April 2016 after a relationship of 26 years. There were five children of the marriage, of whom only two were the subject of Hague proceedings. The other three children resided with the father.

Proceedings commenced in 2016, and at the final hearing in September 2018, the father sought, inter alia, that the two youngest children, Rosalind who was 12 years old and Margaret who was 15 years old reside with him in Australia. The mother did not participate in the hearing.

Relevantly, the mother had taken Rosalind and Margaret to Germany for a holiday with the father's consent and on the understanding that they would return to South Australia on 13 January 2017 to recommence spending time with the father. However, the father received a report from a psychologist in Germany who, having seen the girls, reported that the girls were fearful of him and that the mother would not return to Australia as planned.

The father instituted proceedings for the girls' return under the 1980 Child Abduction Convention. On 4 September 2017, the District Court of Cologne ordered that Margaret and Rosalind be returned to Australia. The mother unsuccessfully appealed and on 19 October 2017, the Higher Regional Court of Cologne ordered that the girls be returned to Australia by 3 November 2017.

On 17 November 2017, Margaret was admitted to the University Hospital of Cologne under the diagnosis of "high emotional stress… anxiety symptoms with depressive tendencies, sleeplessness, lack of appetite, recurrent abdominal pain, self-mutilating impulses and suicidal thoughts." It appeared that the ongoing litigation and consequential uncertainty as to whether she and her sister would be returned to Australia was a catalyst for Margaret's psychological distress. As a result of Margaret's deteriorating mental health, the return order was stayed on 7 December 2017.

The International Social Services of the German Association for Public and Private Welfare in Berlin made inquiries as to whether provisional accommodation for Margaret and Rosalind would be available in Australia, but outside the father's care. Apparently, the German authorities were advised by the Department for Child Protection in South Australia that it had no capacity to place the children in secure care as opposed to with the father.

It is emblematic of the stressors faced by abducted children that a year earlier, unbeknownst to the father, the mother and the girls had flown from Germany to Australia on 12 January 2017, stayed for about three days and then returned to Germany. The mother subsequently produced boarding passes for herself and the girls in support of her contention that she had complied with the arrangement to return the children on 13 January 2017.

On 10 January 2018, the Family Senate of the Higher Regional Court of Cologne temporarily stayed enforcement of the return order by reference to Article 11 of the 1996 Child Protection Convention, stating that it was necessary to do so for the protection of Margaret.

On 20 March 2018, the father received a request via the mother's German lawyer to consent to Margaret undergoing a serious operation on her genitals in Germany. The father was not told why the operation was needed. He sought further information but no further information was provided.

On 10 April 2018, Margaret and Rosalind were removed from the mother's care and placed in secure care accommodation by German Social Services. It was alleged by German Social Services that the mother may have been suffering from Munchausen by Proxy. On 13 April 2018, the District

Court—the Family Court of Cologne—found that Margaret and Rosalind were at risk of physical and psychological harm in the mother's care. There was evidence that the mother had sought that Margaret undergo the surgical procedure to obtain evidence that the father had sexually assaulted her.

The court received medical evidence that Margaret had an enlarged labia majora, but that any surgical intervention was premature. Justice Berman referred to the findings of the Family Court of Cologne, which included a concern that the mother appeared fixated upon Margaret having been sexually abused by the father which, in turn, the mother relied upon to justify her retention of the children in Germany and her resistance to all efforts by the father to make any contact with the children. Justice Berman recorded that "the court [in Cologne] found that the mother had damaged, perhaps irreparably, the relationship between the children and the father and it was likely to abate unless the children were removed from the mother's damaging influence".

Before Justice Berman, the father relied upon a report dated 16 May 2018 which had been prepared by the Office for Children Youth and Family Support for the Local Court of Cologne and provided the status of the children one month after they had been placed in secure care. It was reported that Margaret and Rosalind adjusted quickly to the group setting and accommodation. They were not unhappy at being separated from the mother, however, following any communication with the mother, Margaret's demeanour regressed, and she presented as sad and depressed.

An independent medical examination of Margaret took place on 2 May 2018, and the expert concluded that Margaret did not require surgery. It was further reported that the children did not appear to have any clear understanding about why they were taken from the mother's care and that they were apparently bewildered as to why the father wanted to have contact with them. Margaret was particularly resistant to having any relationship with the father. It was reported: "Margaret tried with all her strength and effort to convince the signatory that she would be depressed and ill and needed antidepressants." The children expressed a strong view that they did not wish to return to Australia and despite the best endeavours of those assisting the children, it was reported that the children did not display any willingness to resume a relationship with the father. The report writer concluded:

"… Margaret and Rosalind were already massively exploited by [their] mother in Australia as part of the custody dispute and consequently suffer from an extreme form of loyalty conflict.

This is reinforced by the fact that [the mother] has been actively involving her daughters in the custody dispute since the entry into Germany, burdening them with it and requiring the girls to take responsibility for their mother, which has led to a massive autonomy conflict between the two girls."

Justice Berman declined to make any orders in relation to Margaret and Rosalind. His Honour discussed the Article 11 jurisdiction which, he was satisfied, had been exercised in circumstances where irreparable harm might be caused to a child or where her interests might be compromised. His Honour discussed urgent measures both generally and specifically in this case and opined that the German Social Services taking urgent measures "seem[ed] reasonable in circumstances where the child was experiencing extreme psychological distress with a genuine fear of self-harm and suicidal ideation." Whilst his Honour considered the urgent measures of protection taken in Germany to have been "of a temporary nature", he did not disturb them.

His Honour reflected that:

> 83. Whilst it is conceded that Australia is not an inappropriate forum, in circumstances where the children are resident in an overseas jurisdiction, the evidence necessary to make a determination as to what is in the best interests of the children is available only in that jurisdiction and the court system that is involved in protecting the children's interests is clearly competent to do so, I consider that it would not be in the children's best interests to make orders as sought by the father and that the appropriate forum lies in the Republic of [Germany] and not in Australia at this time.
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> 85. I do not consider it appropriate that this Court should assume jurisdiction in respect of [Rosalind] and [Margaret] who remain outside of the jurisdiction. That determination brings to account either the paramount consideration being the welfare of the child, or it is in any event a significant consideration.

The effect of Justice Berman declining to take measures under Australian law is that the urgent measures taken in Germany have not lapsed and are still in full force and effect.

An interesting side note is that in April 2018, there was direct judicial communication about this case between the other Network Judge for Australia and Judge Martina Erb-Klünemann of the District Court Hamm, Network Judge for Germany. The German authorities sought information without notice to, or consent of, the parties to the family law proceedings in Australia. No information could be provided by our Network Judge because, in Australia, direct judicial communication cannot occur without the consent of the parties to the proceedings, and then it can only be conducted with transparency. Article 34 of the 1996 Child Protection Convention provides, however, that where a measure of protection is contemplated, the competent authorities under the 1996 Child Protection Convention (if the situation of the child so requires) may request information relevant to the protection of the child from any authority of another Contracting State.

b) In the second case, State Central Authority v. Shanli, a return order was made in relation to a child who had been born in Australia in 2007 but had subsequently acquired habitual residence in Turkey.

The mother wrongfully retained the child in September 2017. On 22 January 2018, the father made a request to the Central Authority in Turkey that the child be returned to Turkey, and proceedings to that effect were filed in Australia on 15 March 2018. An independent children's lawyer was appointed for the child, and the child was assessed by a Family Consultant. The task of the Family Consultant included assessing what communication the child should have with the father pending the determination of the return application. Notably, the mother was facilitating frequent audio-visual communication between the father and child. The Family Consultant was also directed to ask the child:

i. if the court ordered that the child be returned to Turkey, whether there was anything that would make the return easier for the child; and
ii. if the court refused the application for return, whether there was anything that would make staying in Australia easier for the child.

The Family Consultant's report was published on 12 April 2018. The Family Consultant reported, inter alia:

Habib presents as a prepubescent child, of slender build. He was reserved, polite and cooperative and able to express his views and feelings clearly. …

… Habib said: "I feel much happier here. Here we have peace. In Turkey my father was screaming and shouting at my mum every day and my mum was frightened. It made me feel bad and I was always worried that something would happen to my mum." When invited to comment further on his experience, Habib described arguments between his parents with "much yelling, shouting and screaming" and which he perceived were always initiated by his father, "for no reason at all." He described his father locking his mother in the bedroom on occasions and sometimes for several hours, "to get her to admit to her fault, but she was not at fault… I was not able to unlock the door for my mum. My father would not let me. I felt like crying when this happened."

Habib described verbal altercations between his parents occurring on a daily basis, "but not when visitors were present". He also said that there were many times when "I had to wake up early in the morning, like at three am, because I could hear them arguing, even though I was in my bedroom… One time when they were arguing at breakfast time, I just went downstairs to outside to play, but I could still hear them even though we lived on the fifth floor."
In response to direct questions, Habib said: "it made me feel bad. Sometimes I would say to my father to stop, don't do it, but he didn't listen to me. I could not stop him." It would appear that Habib may have experienced strong feelings of helplessness at these times.

… [H]e described one occasion when in the midst of an argument his father left his mother "out in the cold, with no coat or anything" and drove away with Habib in the car. Habib said that he had wanted to get out of the car and stay with his mother but his father had locked the doors and he could not get out. …

Habib spontaneously said: "the arguments are continuing, even now. My father is shouting: "if you do not come back you will see what I will do to you". My mum got frightened of this and so we decided to stay here… He, my dad, says that the people here [in Melbourne] are tricking us and forcing us to stay here but that is not true. We want to stay here. …If my dad is shouting to my mum I will try to grab the phone and say stop, don't shout at my mum."

Habib said that his father has told him: "I have a heart condition. I will die if you don't come back." In this regard, Habib commented to the report writer: "but I don't think this is true." Habib also said "I have seen he has a gun in his hand and [says] he will kill himself." Habib said: "but I think this is maybe a fake gun."

The mother and father undertook specialised Hague mediation, similar to the 'Dutch pressure cooker model mediation', arranged by the independent children's lawyer representing the child in the proceedings. The parents agreed that the mother and child would return to Turkey and that the child would continue to live with the mother and would spend time and communicate with the father. These arrangements would continue unless or until a court of competent jurisdiction in Turkey ordered otherwise. The judge was asked to make orders implementing the agreement to return and, following discussion, to make urgent measures under Article 11 reflecting the parents' agreement about care of the child following return.

As her Honour observed, the 1996 Child Protection Convention had entered into force between Australia and Turkey on 1 February 2017. Unfortunately, although Article 26(2) requires each Hague country to apply to the declaration of enforceability or registration in a "simple and rapid procedure", it was ascertained through judicial communication that Turkey had no such procedure.

Ultimately, the judge was satisfied that the parents' agreement should be implemented and made orders which would be recognised (but not enforceable) in Turkey as urgent measures. Her Honour commented that "if there was any means of [the parents'] arrangement being made enforceable prior to [the child] leaving Australia within a timely way", she would have considered delaying the child's departure from Australia until that was done.

c) The third case, State Central Authority v. Rilling, involved an eight-year-old child habitually resident in the United Kingdom. The father had access to the child by agreement in the United Kingdom and in Australia but wrongfully retained the child in Australia from 1 September 2018. The father sought unsuccessfully to oppose the return

application on the basis of Article 13(1)b) of the 1980 Child Abduction Convention. In anticipation of the trial, a social science report had been prepared by the court, and an independent children's lawyer had been appointed to represent the child. Although the judge did not find that the grave risk of harm had been made out, she noted that "this family may well benefit from the scrutiny of domestic parenting proceedings from the perspective of the best interests of the child as soon as possible."

Initially, the respondent father had informed the court that his employment commitments precluded him from being able to return the child to the United Kingdom. However, on the morning of the hearing, the father said that he intended to go to the United Kingdom and stay for some weeks so that he could spend time with the child. The Family Consultant gave evidence that it would be in the child's best interests for the child to have an uninterrupted settling-in period with his mother of approximately seven days. The father then said that his employment might still require him to leave the United Kingdom within the first seven days, and that he therefore sought a shorter settling-in period.

The judge ordered, inter alia, that the child spend the first seven days following his return to the United Kingdom solely with his mother, unless the father showed the mother an airline ticket indicating that he was returning to Australia during that period, in which case the father would be permitted to bid farewell to the child. The raft of interim orders were referred to as being made under Article 11 jurisdiction.

These cases highlight the practical problems that confront judges and authorities in applying Article 11 of the 1996 Child Protection Convention. Some of those problems cannot be overcome, as is seen in the Turkish case. The last case illustrates how judges with experience in the practical operation of the Convention can make nuanced and practical orders to achieve the objectives of the 1980 Child Abduction Convention through the 1996 Child Protection Convention. It is in this difficult space between theory and practical application of the HCCH Children's Conventions that judicial experience and the exchange of information between judges of different jurisdictions is of the utmost importance.

3. The need for robust judicial management for the effective use of Article 11 of the 1996 Child Protection Convention in return applications under the 1980 Child Abduction Convention

By The Honourable Justice Victoria Bennett AO, Family Court of Australia and member of the International Hague Network of Judges

Introduction

I recently made an order returning a child to the United Kingdom under the 1980 Child Abduction Convention . The 5-year-old boy had been wrongfully retained by his father in Australia since September last year. Up until the final hearing the father maintained that, if a return order was made, he would not accompany the child back to the United Kingdom. However, at the hearing, his evidence was that he would fly back with the child and remain in the United Kingdom for a few weeks to be able to see the child continually. The expert social science evidence was that, once the child was returned, the child should have an uninterrupted period of at least 7 days with the mother before commencing any access to the father. I made an urgent order under Article 11 jurisdiction to facilitate collection by the mother of the child from the father upon them arriving in the United Kingdom, made provision for the uninterrupted time between the child with the left-behind parent, specified the father's access, and provided how handovers would be effected and what school the child would go to immediately upon return.

The prompt return remedy is the backbone of the 1980 Child Abduction Convention, but it is very much an adult-driven remedy in which the legitimate needs of the child may be overlooked.

The desires of the signatory states to the 1980 Child Abduction Convention are recorded in the preamble as including "to protect children internationally from the harmful effects of their wrongful removal or retention". The preamble to the 1996 Child Protection Convention records, inter alia, that signatory states joined in: "Considering the need to improve the protection of children in international situations, [and] Recalling the importance of international cooperation for the protection of children."

For those of us who are fortunate to have both children's conventions at our disposal, there is an opportunity and an obligation to ensure that the return of the child to the country of habitual residence is carried out in the least harmful and least traumatic way possible for the child. The 1980 Child Abduction Convention is implemented into Australian law allowing the court to make any order or condition which "it considers is appropriate to give effect to the Convention" . Otherwise, the Article 13(1)(b) grave risk exception requires consideration of what protective measures can be imposed to ameliorate the alleged grave risk of harm or intolerable

situation for the child. As observed by Baroness Hale and Lord Wilson in Re E (Children) (FC) [2011] UKSC 27 [35], "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."

The temporary nature, extra-territorial effect and broad reach of urgent measures of protection under Article 11 make them ideally suited to providing a stable and predictable environment for the child for the short time after the child re-enters the home state and before the courts of that state can put in place interim parenting arrangements. Where necessary, urgent measures can safeguard the child from being placed in the centre of a free-for-all.

I will provide a basic overview of the jurisdictional context within which Article 11 measures of protection in cases of urgency work and then discuss what case management tools a judge seized of a return application under Article 12 of the 1980 Child Abduction Convention may use to maximise the effect of Article 11.

The nature of the Article 11 jurisdiction

Article 11 of the 1996 Child Protection Convention confers concurrent subordinate jurisdiction on the authorities of any Contracting State, in which the child or property belonging to the child is present, to take necessary measures of protection in relation to the child or the child's property in cases of urgency. Authorities are judicial and administrative authorities. In the language of the 1996 Child Protection Convention a court is an authority.

This subordinate jurisdiction operates for Contracting States between which the 1996 Child Protection Convention has entered into force, as well as between a Contracting State and a non-Contracting State.

A measure of protection is inclusively defined in Article 3 of the 1996 Child Protection Convention as a measure (or order) about parental responsibility, rights of custody and guardianship under private law as well as a public law measures to protect a child and the administration, conservation or disposal of a child's property. Measures of protection do not include the matters described in Article 4 of the 1996 Child Protection Convention. In Australia, a parenting order made under our domestic legislation may be a measure of protection in relation to the child.

Jurisdiction conferred by Article 11 is based on the presence of the child in the jurisdiction. It is subordinate to the general jurisdiction under Articles 5 to 10 of the 1996 Child Protection Convention which is variously based on the habitual residence, refugee status, wrongful removal or retention, transfer of jurisdiction or the convenience of parents who seek that a consensual parenting arrangement be given force in divorce proceedings.

Jurisdiction under Article 11 is temporally limited. As between Contracting States, an urgent measure will have effect, including extraterritorial effect, until an authority in the Contracting State which has jurisdiction under Articles 5 to 10 of the 1996 Child Protection Convention takes measures required by the situation. In relation to children who are habitually resident in a non-Contracting State, an urgent measure will cease to have effect when measures required by the situation have been taken by the authorities of the State of habitual residence and have been recognised in the Contracting State in which the child is present.

Urgency and necessary are undefined terms. Interpretation may vary from country to country. For instance, the HCCH Practical Handbook on the operation of the 1996 Child Protection Convention (2014) at [6.3] suggests that the concept of urgency should be conservatively or strictly construed. However, In the matter of Re J (a child) [2015] UKSC 70, is authority from the United Kingdom Supreme Court for a more expansive and generous interpretation of urgency, where necessary appears to be analogous to necessitous. A Contracting State may refuse to recognise or enforce a measure taken in another country because it interprets the qualifying factors of urgency and necessary differently to the Contracting State in which the measure was first taken. It is, therefore, desirable to remove any uncertainty about recognition and enforceability of a measure before reliance needs to be placed on the measure.

Chapter IV of the 1996 Child Protection Convention provides for recognition by one Contracting State of a measure taken in another Contracting State by operation of law, which means without the need for legal proceedings. Recognition may be refused on the procedural fairness and public policy grounds for refusal set out in Article 23(2) although lack of procedural fairness is not a ground of refusal for urgent measures.

Recognition is adequate for parents who abide by their obligations voluntarily and without opposition. However, in the highly conflictual nature of the parental relationships, which are at the core of most cases of international parental child abduction, mere recognition of an urgent protective measure for a returning child is unlikely to suffice. Urgent and other measures should be made enforceable.

Enforceability is generally understood to mean that failure to comply with the protective measure will have consequences, including penalties, for the parent who has contravened the measure. Article 28 provides that measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State will be enforced in the latter State as if they were measures taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested state to the extent provided by such law "taking into consideration the best interests of the child".

Enforceability of an urgent measure does not occur by operation of law. The procedure for rendering an urgent protective measure enforceable, including by declaration or registration, is a matter for each Contracting State. Article 26 of the 1996 Child Protection Convention requires Contracting States to have "a simple and rapid procedure" for applications for declarations of enforceability or registration.

In 2012 I collected information from most Contracting States about their relevant procedure and shared the results with the respondents. In preparation for the Seventh Special Commission (October 2017), the Permanent Bureau delivered, in December 2016 and January 2017, two extensive questionnaires on the practical operation of the 1996 Child Protection Convention. Questions 8, 9, 13 and 15 to 17 (inclusive) of the December 2016 questionnaire are directed to the experience of Contracting States with urgent measures under Article 11 and how such measures are rendered enforceable. Countries were asked questions including, or to the effect of:

i. Which authority in your jurisdiction is responsible for declaring as enforceable or registering a measure of protection taken in another Contracting State?
ii. What time frame applies to ensure that the procedure is rapid?
iii. Must the parties be legally represented for the process?

The responses from Contracting States and a number of non-Contracting States are available online. The country responses are easily accessible and provide valuable insight into how each responding country purports to operate. This country-specific information is not binding but is a worthy source of information to which a judge seized of the return case can direct the parties, to enable a more nuanced consideration of how conditions to return might be implemented in the country of habitual residence. Beware that at least one Contracting State has not established an Article 26 mechanism.

The grounds for refusing enforceability are the same as those which apply for refusing recognition.

Article 24 1996 Child Protection Convention provides that, without prejudice to measures being recognised by operation of law in all other Contracting States, any interested person may request a decision from a competent authority in a contracting state, between which the 1996 Child Protection Convention has entered into force, on the recognition or non-recognition of a measure taken in another Contracting State. For example, a party to an application before me to return a child to Brazil pursuant to the 1980 Child Abduction Convention can obtain a ruling from a competent court in Brazil about whether a condition to return which I have imposed will be recognised in Brazil. This brings forward the consideration of any exceptions to return and should facilitate easier access to a binding declaration of enforceability or registration under Article 26.

Article 24 is frequently referred to as an "advance recognition" provision but that is somewhat of a misnomer. Article 24 operates on "a measure taken in another Contracting State". Accordingly, the measure (order) has to be made and then considered by an authority in the other Contracting State. Accordingly, it is advisable to reserve the court's power to revoke the measure and re-consider the substantive case, if recognition of the urgent measure is refused or it is found not to be enforceable.

Safe harbour orders as urgent measures

Safe harbour orders come in all shapes and sizes. They are frequently conditions to return. An example is the important, but often overlooked, urgent measure whereby both parents are restrained from causing, permitting or suffering the child who has been returned to the State of habitual residence under the 1980 Child Abduction Convention to be further removed from the home State until a court of competent jurisdiction in that State makes orders enabling the parents (or one of them) to travel internationally with the child.

Having regard for the procedure to render an urgent measure enforceable in another Contracting State, the subject matter and enforceability of urgent measures cannot be an afterthought for the judge or the parties. The potential necessity for urgent measures should be considered from the outset.

Observations on case management

My principal case management strategy is to require the parties to prepare for outcomes at the same time as they are preparing to prosecute or oppose the return application. This is a judicial initiative because the parties and their representatives will be loath to contemplate any outcome contrary to their primary position.

There are only two outcomes for which to prepare: the child will either be ordered to return or not be returned. Litigants are usually able to cope with the outcome they want. So, each should be directed to prepare for their unfavourable outcome so that they can deal with those vicissitudes in a manner consistent with their child's best interest.

Where return is refused, the child's ability to connect with the left-behind parent again, as well as their relatives, pets and friends, should not be in limbo.

Where a return is ordered, it is unacceptable to have a child snatched from a returning parent immediately upon disembarkation of their flight home. We want to avoid the child being part of a free-for-all.

The following are suggestions and observations in relation to case management.

a. Set the matter down for final hearing on the first day it comes to court, so everyone knows the time frames under which they must operate. Explain to the respondent that the final hearing will not be adjourned by reason of the respondent retaining lawyers too late in the process for the lawyers to be adequately prepared.

b. Require the parties to state their case concisely and promptly. The applicant must provide particulars of the wrongful removal and retention and provide evidence of all jurisdictional facts (habitual residence, rights of custody etc) which have not been immediately conceded. The respondent must then specify their opposition to return by reference to jurisdictional facts and/or one more of the six exceptions return. From this point, the issues are able to be defined and the evidence can be limited to relevant issues.

c. Anticipate any and all possible further grounds on which the respondent may oppose return and address each one. This is to avoid the respondent raising further grounds of opposition late in the proceedings and being entitled to an adjournment to prepare those grounds. For example: if there is more than one child who objects to return, the judge should consider whether the grave risk of harm exception will arise in relation to a sibling (especially a younger sibling) who is returned alone.

d. If the child needs direct or indirect representation, order it as soon as possible. Ordering an independent children's lawyer or child advocate late in the proceedings will inevitably lead to a delay.

e. Direct the parties to relevant country information (as discussed in paragraph 18 above). This serves as an introduction to how they will be able have any urgent measures made enforceable without unnecessary delay.

f. Require all parties (including the child, if represented) to specify their case in writing, so that it can be responded to by other parties:

1. what conditions to return would be sought if a return is ordered;
2. .what parenting arrangements should pertain if a return is refused

A respondent may not volunteer details of the urgent measures they want for fear that to do so will be construed as a form of capitulation. However, the judge can reframe the requirement as specification of urgent measures which would be necessary for the child in the event of return. In my experience, respondents readily respond to a direction from the court to specify conditions to return once it is made clear that this is without prejudice to their primary position.

g. Parties are entitled to be accorded procedural fairness in relation to the subject matter of urgent measures. They must have an opportunity to adduce evidence in relation to the need or practicability of urgent orders and to test the other parent's case in that respect. Procedural fairness around urgent measures is more complicated and time consuming when (as in Australia) the return application is prosecuted by a Central Authority and the requesting parent is not a party to the proceedings.

h. If necessary, seek the parties' consent to direct judicial communication. Direct judicial communication can run parallel to proceedings about enforceability.

i. Arrange for specialised Hague mediation, preferably free to the parties, but most importantly scheduled so that mediation will not delay the proceedings. Encourage the parties to negotiate around the possible outcomes from the child's perspective. I prefer the Dutch "pressure cooker" style of Hague mediation. To the extent possible, rule that anything said or done in mediation is inadmissible in the return proceeding to avoid alleged acquiescence.

Observations in conclusion

Urgent measures cannot be left for consideration until after the return order is made (or refused). The purpose and content of urgent measures should be raised by the judge with the parties as early as possible in return proceedings. Apart from the considerations referred to above, parents are most likely to be reasonable when they do not know the outcome of the return application and still want to create a favourable impression in the judge.

Urgent measures should:

1. be simple;
2. be realistic;
3. be necessary and proportionate (not a consolation or reward for return);
4. usually, not place the respondent in a better position than they were in prior to the wrongful retention or removal of the child;
5. not usurp the regular functions of courts in the state of habitual residence;
6. be enforceable and, preferably, be rendered enforceable.

Requiring the parties to prepare for outcomes is the optimal means by which to achieve a safe and prompt return. Children are to be returned forthwith. Prolonging the time between a return order being made and the actual return is likely to add to the child's trauma and also encourage the taking parent to devise other avenues of opposition (most of which will have an adverse impact on the child).

Finally, it is important to note that most parents are profoundly distracted by return proceedings. They invest a disproportionate amount of emotion and money into these forum selection proceedings, with little or no apparent regard for their position in the substantive parenting proceedings which may follow. Likewise, parents are readily distracted from the legitimate needs of the child who is subject to the proceedings, to the extent that the judge may need to remind the parents of their primary obligations to parent their child or children. The child's advocate is obviously well placed to negotiate with the parents about the content of urgent measures from the child's perspective. If there is no child advocate, then it will fall to the judge to direct the attention of the parents to the return, or non-return, order as a real and daunting prospect for the child rather than a reward or a punishment to be suffered only by the parents. The challenges for an abducted child are considerable at all stages. Urgent measures have the capacity to make the immediate aftermath of the return more tolerable for a child.

4. A case between Ireland and Pakistan, MQ/KJ, [2017] IEHC 342.

By Myriam de Hemptinne, Magistrate of the Court of Appeals of Brussels (Conseiller à la Cour d'appel de Bruxelles), member of the IHNJ for Belgium

Factual background

The parties married in Pakistan in 2001 and resided in Ireland from that same year on. Three children were born in Ireland, a son in 2002 and two daughters, one in 2005 and one in 2008. All the members of the family have both Irish and Pakistani passports and identity cards. The father travelled to the United Kingdom each week to work in various parts of England as an ophthalmic surgeon and returned to Ireland every weekend.

Every year, the family went on holiday to Pakistan for a few weeks and, while the father worked, the children also went with their mother on holiday to Kuwait, the mother's country of origin.

After Easter 2014, the family moved to Pakistan but the circumstances around this relocation are subject to controversy.

In any case, it is undeniable that there were difficulties in the marriage by that time.

In April 2015, a domestic incident occurred in Pakistan, while the family was living with the husband's extended family.

In May 2015, the mother applied to get passports for the children but the father succeeded in tracking and intercepting the package.

On 4 May 2015, an order was given by a Pakistani court that stated that the children must not be removed from Pakistan.

Further to an order made on 29 September 2015, the Dublin District Court allowed for passports of the children to be issued without the consent of the father. However, the father succeeded to have this order revoked on the basis that the particular district court lacked territorial jurisdiction and on the basis that he ought to have been informed of the application.

Emergency travel documents were thereafter obtained by the mother through the Irish Consulate in Karachi.
In early November 2015, the mother arrived in Ireland with the children, in breach of the Pakistani order and without the consent of the father.

The District Court in the area where the family lived in Ireland granted a protection order in favour of the wife on 3 November 2015.

Proceedings before the Irish High Court

On 11 November 2015 the father seized the Irish High Court with an application seeking an order of return of the children to Pakistan pursuant to Article 11 of the 1996 Child Protection Convention or, alternatively, pursuant to the inherent jurisdiction for the return of the children to the jurisdiction of Pakistan.

On 3 December 2015, the court appointed an expert to assess the best interests of the children, initially to restore access between the children and their father.

The expert was further instructed to ascertain the views of the children in relation to access and their potential return to Pakistan.

The report of the expert described the negative feelings and views of the children towards their father and towards their life in Pakistan. They were very frightened of the prospect of going back. The girls were very frightened of their father and the fear to be separated from the mother was immense. The eldest son was said to need mental health support. The expert assessed that the children, especially the two eldest, had formed their own views and did not reflect simply the mother's view. The expert opined that it would not be in favour of the children being separated from their mother.

The father was not willing to engage in building relationships in Ireland unless it was decided definitely that they were going to move to Pakistan.

The court itself heard the children. The views of the three children as ascertained by the court were entirely consistent with those given to the expert.

Position of the parties about the relocation to Pakistan and the circumstances of the wrongful move to Ireland

a) The father submits that the move to Pakistan was a well-planned common decision to permanently relocate. It was arranged to take place in June 2014, at the end of the children's school year, while all the belongings of the family were shipped to Pakistan with the intention of selling the family house in Ireland. He denied putting pressure on or forcing his wife to accept to move to Pakistan. In 2012, he had bought a family home in Pakistan, which the couple had chosen together.

His position is that the habitual residence of the children was Pakistan since they had been living there and attending a private school in Pakistan for approximately 18 months. The children lived with the extended family and were socially fully integrated.

He complained about the mother's attempts to alienate the children from him and alleged that her behaviour was inadequate with the children and unstable, violating the court orders.

He denied that the children had been unhappy in Pakistan, while they had the best education and were doing well in school. The family unit there was operating in a different way than in Ireland. He contested that there would be a risk for his wife to return there.

b) The mother described herself as the primary care giver during their time in Ireland, because the father was regularly working in England. The marriage was an arranged one (she was 18 and he was 32 of age when they married) and she saw her husband as superior to her, never questioning what he told her to do.

A protection order had been issued in 2014 in Ireland which was withdrawn at the mother's request under pressure from her husband with the promise that he would change his behaviour while the son of the parties had also understood that his father was going to improve his behaviour if they moved to Pakistan.

The mother's position was that she felt pressure from her husband to accept the move under threat that he would leave her and stop giving her money if she refused to go. The actual move was not a joint decision and was initiated quite suddenly after the withdrawal of the protection order. She agreed reluctantly to go to Pakistan and saw it as a two- or three-year arrangement, with the intention to see the children returning to Ireland for their higher level education in any event. She would not have agreed to the move if she had been aware of the social welfare assistance available in Ireland had she stayed.

Once they arrived in Pakistan, she described how, although they owned a new house, they had moved in with her mother-in-law and the extended family, which she had not expected. She described a context of oppression and threat by her husband and his brother and different incidents of domestic violence when she showed opposition to the wishes of her husband, including in the presence of the children.

Legal position of the parties

a) The father brings the case before the court as an abduction case concerning the alleged wrongful removal of the children from a non-Hague Convention country.

The recent accession of Pakistan to the 1980 Child Abduction Convention has not yet been accepted by the European Union ("EU").

Pakistan is also not a Contracting Party to the 1996 Child Protection Convention.

Nevertheless, the applicant father asserted that the 1996 Child Protection Convention governs the jurisdiction matter in this case and, in any case, that the court has an inherent jurisdiction to make an order for summary return of the children.

Relying on Article 11 of the 1996 Child Protection Convention, the father founded his case on the main assumption that child abduction is not in the best interests of the child and that it may be in the interests of children to be summarily returned to another jurisdiction. According to him and the case law he cited, this summary return order does not require a "full welfare hearing".

He argued that in abduction cases, the application of Articles 13 and 20 of the 1980 Child Abduction Convention does not require that the court holds an enquiry to the welfare of the child which would mandate a full welfare hearing.

He asserted that the Brussels II*bis* Regulation,[1] like the 1996 Child Protection Convention, fixes the jurisdiction with respect to the habitual residence and that, therefore, while the children in this case had their habitual residence in Pakistan at the time of their wrongful removal, the Irish court only has jurisdiction to take measures of protection in the event a situation of urgency arises.

He argued that the children were more connected to Pakistan than to Ireland and especially that the eldest son did not want to live in Ireland and identified himself solely as

Pakistani. He argued that the issue of the welfare of the children would be better decided in the place of the children's habitual residence.

The applicant requested the court to exercise its inherent jurisdiction to order the return of the children to give effect to and to recognise the Pakistani order. He noted the reciprocity of this mutual recognition between courts of different states as Pakistan and Ireland and submitted that the Pakistani order made the removal of the children wrongful.

b) The mother's case is that her children never settled in Pakistan and that they missed Ireland.

She contended that she was not aware of the order restraining her from going to Ireland and was on the contrary convinced that nothing could stop her because of their Irish citizenship. She denied having ever alienated the children from their father.

She stated that for Article 11 of the 1996 Child Protection Convention to apply, one needs to assess whether this Convention is applicable. According to Article 61 of the Brussels IIbis Regulation, once the child is habitually resident on the territory of an EU Member State, the jurisdiction rules are to be taken in this Regulation and if the children are habitually resident in a non-EU Contracting State to the 1996 Child Protection Convention this latter instrument applies, which is not the case in the circumstances of this case.

As a principal position, the mother submitted that the children had retained their habitual residence in Ireland at all times, throughout their stay in Pakistan, where they never settled and were not socially integrated. They never moved to the intended family home and the father never started working in Pakistan. There was no joint settled intention to move to Pakistan as required for a change of habitual residence and from April 2015 onwards the mother had been trying to leave with the children and return to Ireland, which was a mere ten months after their arrival. The Irish court has therefore jurisdiction in relation to the children under Article 8 of the Brussels II*bis* Regulation.[2]

As a subsidiary position, the mother stated that the Irish court could assume jurisdiction either on Article 12 or 13 of the Brussels II*bis* Regulation or, even more subsidiary, pursuant to Article 14 of the Regulation, on the basis of residual domestic Irish private international law rules which entitle the Irish court to make orders in respect of Irish children.

The mother accepted that the 1996 Child Protection Convention falls under the consideration of domestic Irish law due to the national act that implements the Convention under Irish law.[3] Therefore, Article 11 of the 1996 Child Protection Convention provides a separate and distinct basis for the court to take any necessary measures of protection in all cases of urgency relating to a child present in the State.

The mother stated that, even though one must consider the general public interest in deterring child abduction, the primary concern of the court must be the welfare of the children. According to her, it may, on the contrary, do the children irreparable harm to make an order for their return to Pakistan. She therefore considered that there was no "urgent" reason why the court should make an order returning the children, and further that such an order was not "necessary". She emphasised the children's clear objections and fears, which were mature and inde-pendently formed.

She finally submitted that, even if the court had to apply the standards of the 1980 Child Abduction Convention, to this case, the children's objections would meet that standard.

Position of the parties about the actual well-being of the children in Ireland and in case of their return to Pakistan

a) The mother submits that her children are happy back in Ireland and are well behaved and conscientious students. They have close links with the Islamic community in Ireland and study also the Quran by way of lessons via Skype. English is their primary language but they also speak the Urdu language. They fear to be returned to Pakistan and to be taken away from their mother.

She herself is in fear of her husband and she changed the locks of the house which is a property in their joint names. She undertook courses in order to obtain education and employment. She believes she would be persecuted and even killed in Pakistan for fighting this case and would be helpless there. She would not be able to go with the children if an order was issued to return them. She described how sexual abuse is frequent in Pakistan, even though it is forbidden in Islam and how she was a victim of such abuse and fears that it would also happen to her children.

b) The father submitted that the children would have a much better life in Pakistan and that they are currently living in deprived conditions in Ireland.

He considered also that the only possibility for the children to have a meaningful relationship with both parents is to decide for them to return and live in Pakistan.

Decision of the Irish Court

a) In a first fact-finding paragraph based on the evidence given by the parties, the court assesses the following circumstances:

- there is no alienation attempt by the mother;
- the fact that the father succeeded in his judicial review of the District Court decision to allow to duplicate the passports for the children without his consent is not determinative of the legal issue at play;
- the mother is not unstable and did not attempt to commit suicide;

- the mother acted in breach of the Pakistani order but was not aware of that order at that time;
- the allegations of the mother in respect of violence, sexual abuse and oppression are generally consistent;
- the criticisms made by the father on the expert report are not accepted;
- the mother's version of the circumstances surrounding the family's move to Pakistan is to be accepted;
- the children did not enjoy their time in Pakistan.

b) The court next applied its domestic law in analysing the facts as presented by the expert, and reached the conclusion that the safety and psychological well-being of these children was best served by having them remain in Ireland with their mother with whom they are described as having a close attachment, while the proposals of the father are not acceptable to the children.

The court expressed doubts about the capacity of the father to properly care for the children and to recognise and respect their needs, while the mother was found to be conscientious, serious-minded and caring, putting the children's needs before her own. The views of the children had been clearly identified and considered as mature and independent and needed to be given due weight.

c) Before concluding, the court stated that it must consider whether the children were habitually resident in Pakistan or in Ireland at the time of their departure from Pakistan. The court considered that while it may be seen that there are numerous factors leaning in favour of Ireland being the place of the habitual residence, it is particularly significant that the mother did acquiesce to the move to Pakistan where the family spent 18 months, the children attending school in Pakistan which indicated a level of social integration, and the fact that the mother engaged the jurisdiction of the Pakistani court. On balance, the court stated that the children did have their habitual residence in Pakistan at the relevant time.

d) The court considered further that Pakistan is a "non-Hague Convention and non-Regulation State", which means that the jurisdiction may be founded on Article 14 of the Brussels II*bis* Regulation whereby the domestic laws of Ireland are to be applied.

With the Protection of Children Act 2000 that implemented the 1996 Child Protection Convention into Irish law, the court is empowered by Article 11 to take a measure of protection.

The court did not agree with the argument of the father that, under this provision, there should be an automatic order of return to enable the Pakistani courts to deal with matters of custody and access arrangements for the children because of the wrongfulness of the removal of the children in the sense of Article 7 of the 1996 Child Protection Convention. The court considered that the term "wrongful removal" is a legalistic term of art that is viewed in the context of the 1980 Child Abduction Convention which did not apply in this case, as Pakistan's accession to the Convention has not been accepted by the EU.

The court considered the existence of a degree of connection of these children to Pakistan but still a more substantial degree of connection with Ireland and concluded that they should be encouraged to maintain a link with their cultural and linguistic heritage in Pakistan, which can happen in Ireland as a multicultural society.

It was the view of the court that it would not cause the children irreparable harm to refuse to make an order returning them to Pakistan.[4]

After this "negative" assessment the court continues in a "positive" statement that it is in the best interests of the children to remain in the care of their mother in Ireland.

As a final hypothesis, the court admitted that, even if it were to apply the standards of the 1980 Child Abduction Convention which cannot apply due to Pakistan not being a Contracting Party, the objections of the children did meet, in this particular case, the requirements of Article 13(2) of the 1980 Child Abduction Convention, in particular because the children had formed their own views and were in a good position to evaluate the two places, and because their objections were targeted towards the return to Pakistan as a State to live in and not merely the expression of a preference for a particular parent and were based on traumatic events that occurred while they were in Pakistan.

As a conclusion, the court refused to make the order returning the children and vacated the interim orders made herein.

Comments

It is interesting to note that the father found support for his procedural strategy in a UK case where the return of a child was ordered to Morocco in the context of return proceedings based on Article 11 of the 1996 Child Protection Convention.

The UK Supreme Court held in *Re J.*[5] that Article 11 of the 1996 Child Protection Convention gives jurisdiction to a court to make an order for the return of a child to the country where he or she is habitually resident, emphasising three conditions: i) the case is one of urgency; ii) the court has jurisdiction based on the presence of the child or of his / her property; and iii) measures of protection are necessary.

Despite the fact that the cases are to be distinguished on the point that, unlike Pakistan, Morocco is a Party to both the 1980 Child Abduction and the 1996 Child Protection Conventions, and not having regard to the factual circumstances

of the cases, this procedural choice of the applicant is theoretically both creative and adequate and could prove efficient to achieve return in abduction cases involving a non-Hague State. As a matter of fact, the Irish High Court admitted the strategy as legally correct.

While, amongst Contracting Parties, the 1980 Child Abduction Convention rests on the principle that return shall be ordered unless one of the exceptions provided under Article 13 has been made out, a return request based on Article 11 of the 1996 Child Protection Convention would only be granted when it is positively assessed that returning the child to his / her State of origin is both a necessary and urgent measure of protection for that child.

The condition of urgency is clearly explained by Paul Lagarde in the Explanatory Report on the 1996 Child Protection Convention: "It might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child. The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly."[6]

Admittedly, as the Irish court observed, the UK Supreme Court rejected this strict approach in the case Re J. and was more willing to make an order for the return of the child to Morocco, considering that possible objections to return analogous to those provided under Article 13 of the 1980 Convention may become relevant as part of that consideration. However, unlike the Moroccan case, for a non-Hague State as Pakistan, it seems obvious that the necessity of a protection measure should be assessed with regard to the Explanatory Report's criterion and guidance that such measure should only be taken to "avoid irreparable harm" to the child.

It is worthwhile to note that an application based on Article 11 of the 1996 Child Protection Convention, unlike an application based on the 1980 Child Abduction Convention, offers the possibility for the defendant (i.e., the taking parent) to make a counterclaim for additional protective measures that he / she deems necessary for an urgent protection of the children. In the Irish-Pakistani case, one may wonder why the mother, who opposed the request of her husband, did not request an urgent custody order which would have secured her parental rights over the children in Ireland and would have prevented the father from taking other steps, such as taking the children from school, to force the return of the children to Pakistan. Given the circumstances of the case, the mother was arguably in a favourable position to request custody rights from the Irish Court, either as an urgent measure on the basis of Article 11 of the 1996 Child Protection Convention, or even on the substantial merits of the case, on the basis of the residual ground of jurisdiction based on the Irish citizenship of the children.

This Irish-Pakistani case is a perfect illustration of the broad possibilities offered by the provision of Article 11 of the 1996 Child Protection Convention, as an alternative to the 1980 Child Abduction Convention return proceedings, especially but not only when non-Hague States are concerned.

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1. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, also known as "Brussels IIbis Regulation"
2. Art. 8.1. states as follows: "The courts of a Member State hall have jurisdiction in matters if parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."
3. Under Irish law, the Protection of Children (Hague Convention) Act 2
4. The court added that it may even be the case that it could cause the children irreparable harm if they were to be returned to Pakistan and separated from their mother.
5. Re J. (A Child) (1996 Child Protection Convention) (Morocco) [2015] UKSC 70.000
6. Explanatory Report, para. 68.

5. Contribution to the safe return of the child in cases of wrongful removal

By Dr. Maria Lilian Bendahan, Justice of the Court of Appeals in Family Matters, Montevideo, Uruguay

The 1996 Child Protection Convention is a "protection" Convention aimed to replace the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*. In its Preamble, the 1996 Child Protection Convention places itself within the framework of the 1989 *United Nations Convention on the Rights of the Child*. Indeed, the Preamble highlights the two main pillars on which the Convention is based: international co-operation and the best interests of the child.

Furthermore, the 1996 Child Protection Convention is undeniably connected to the 1980 Child Abduction Convention, for which, in some cases, it is instrumental (*e.g.*, in international child abduction cases), complementary and essential (cases falling under Arts 7-9). In other cases, the 1996 Child Protection Convention replaces the 1980 Child Abduction Convention, in particular in cases of child abduction to non- Contracting States to the 1980 Child Abduction Convention.

Pursuant to these three Conventions – the 1980 Child Abduction Convention, the *UN Convention on the Rights of the Child* and the 1996 Child Protection Convention – the State ordering the return has the duty to protect the child and to ensure the child's safe return.

The 1996 Child Protection Convention provides that the authorities of the Contracting State in whose territory the child is present (the child can be found in a State other than the State of its habitual residence for various reasons) have jurisdiction to take measures of protection. This constitutes one of the exceptions to the general rule of jurisdiction laid down in Article 5 of the 1996 Child Protection Convention and can be seen as the greatest advantage of the Convention.

Specifically, this provision contributes to legal certainty by expressly resolving the jurisdiction issue arising out of Article 16 of the 1980 Child Abduction Convention.

The 1996 Child Protection Convention confirms the general rule that jurisdiction lies with the Contracting State of the habitual residence of the child (Arts 5-12), and sets out the exceptions to the rule, for specific instances and timeframes (until the Contracting State of habitual residence is in a position to take the necessary measures of protection); these exceptions apply to situations where certain requirements primarily related to the child's best interests (Arts 7-10) are met and, in addition, to cases of urgency (Art. 11).

The latter, *i.e.*, the measures of protection in cases of urgency, are, as any measure of protection under this Convention, meant to be recognised and enforced in the Contracting State of habitual residence (Chapter IV of the 1996 Child Protection Convention, Arts 23 *et seq.*).

These measures will lapse once appropriate measures are taken by the Contracting State of habitual residence, thus ensuring the effective and continuous protection of the child (Art. 11(2)).

The classic example for this is the safe return of the child following a return order in child abduction cases.

This stage proves to be one of the most difficult within the return proceedings. The advantage of Article 11 is that eventually issuing a mirror order becomes unnecessary (mirror orders are often cumbersome given the absence of a "counterpart" judge, a priori, in most of the cases). Instead, the application of this Convention allows the judge dealing with the return (in the requested State) to issue an order of protection. Further to Article 23, this measure will be recognised in any other Contracting State by operation of law. Any interested person may however, pursuant to Article 24, seek advance recognition of the measure. Pursuant to Article 26, an interested party may request that the measure be declared enforceable or registered for the purposes of enforcement in the State of habitual residence (*i.e.*, the requesting State).

In Uruguay's experience – Uruguay signed the 1996 Child Protection Convention in 2009 and approved it with the Law No. 18.535 of 11 August 2009 – this has proven to facilitate the enforcement of return orders for example, in cases where the return is ordered with the condition that the requesting State ensures the safety of the child and the child's mother against domestic violence from the father requesting the return.

In these cases, where both States are Parties to the 1996 Child Protection Convention, a protection order can be issued by the court seised with the return proceedings (requested State) under Article 11 without the need to issue a mirror order or request recognition in the other State Party in the future, for example, a temporary restraining order with supervised contact with the other parent.

This concerns cases where a claim for violence or abuse established *prima facie* would give rise to the exception of Article 13(1)(b) of the 1980 Child Abduction Convention if it were not for the application of Article 11. It also concerns other cases which are not as serious, but where a certain degree of violence is established.

The application of the 1996 Child Protection Convention and its Article 11 will allow, in both cases, to avert the potential risk that the child would suffer upon his / her return to the State of habitual residence (potential risk established during the summary investigation in the requested State). Applying the exception of Article 13(1)(b) of the 1980 Child Abduction Convention becomes unnecessary in the former scenario because, even where there is grave risk but it can be averted, return would not place the child in an intolerable situation in the sense of the 1980 Child Abduction Convention.

And where the risk is not that grave, safe return – which is one of the fundamental objects of the Convention – will still be possible.

In these cases where a certain level of violence has been established by presumption, and where it can be envisaged that the evidence would not be sufficient to establish the grave risk exception, the requested State which will order the child's return is still bound by the legal principle of the best interests of the child.

Interplay between the 1980 Child Abduction Convention and the 1996 Child Protection Convention

The issue discussed in this article is currently considered as one of the most crucial issues regarding the resolution of international child return cases, in both Hague and non-Hague Convention cases.

Particularly in the first scenario, i.e, where the 1996 Child Protection Convention supplements the 1980 Child Abduction Convention, the question arises specifically during the judge's assessment of prima facie evidence on the possible existence of a grave risk – for example, based on a direct violent or abusive situation towards the child, or indirectly exerted towards the taking mother – the court still requires verification before a decision about the child's return is made.

As stated in an earlier essay (see Cuestiones complejas en los Procesos de Restitución Internacional de Niños en Latinoamérica, Ed. Porrúa, Mexico, first edition 2017, collective work co-ordinated by Lázaro Tenorio, Nieve Rubaja, Florencia Castro, pp. 289 et seq), even though the evidence obtained about the actual existence of violence is important, this nonetheless does not represent the most crucial part of the judge's investigation.

Instead, the judge should focus on the real core of the matter: after establishing – on a summary assessment – the existence of some type of violence against the mother, the child, or both, the judge should determine which effective measures of protection are available in the State of habitual residence.

In other words, it is at this point that the judge will exceptionally decide whether the fundamental principle of the 1980 Child Abduction Convention ("the judge of the State of habitual residence is best placed to protect the child") will be subverted or not.

Furthermore, it is at this stage – and in our view, not earlier – and it is on this matter that we must make the best efforts to determine whether or not the child should be returned to his/her natural jurisdiction.

Measures of protection: evaluation criteria

Then we analyse the existing theoretical background dedicated to the overall study of the 1980 Child Abduction Convention and the particular study of the exception under Article 13(1)(b), we come to find that the assessment of availability of adequate and effective measures of protection in a particular case does not appear as a central point at the outset. It is often treated as a duty of the judge which he will perform after having reached a decision. This wrongly places the emphasis on the determination of whether a real situation of violence existed or not.

However, we argue that the summary assessment conducted – if the judge has reasoned correctly – should lead us to that fundamental matter: effective measures of protection. We could say that the assessment actually exists for this very purpose.

We will start by asking ourselves: on what does the concept of protection in the State of habitual residence depend? Is it the availability of protection within the legal system of the State of habitual residence?

In most common law and civil law States, this protection is, in theory at least, available to their citizens. We refer here to an effective justice system, that is not only integrated by the Judicial Branch but also by the administrative authorities (police force) and prosecution services, health and social development services, etc., which provide the possibility to appear before an authority, either administrative (police force) or judicial, to file complaints and receive help and guidance, as well as to obtain measures of protection. It is access to justice considered as a global system.

Therefore, when as judges we conduct this check, we will generally find that, theoretically speaking, protection is indeed available in the State of habitual residence of the child.

If we delve further into this, does access to protection depend on the availability of financial means?

In other words, should the judge dealing with the case verify access to protection from a financial point of view?

Without a doubt the answer is yes because, naturally, if justice is available but only at a cost, and the person who has to return with the child does not have the means to afford it, this will pose some practical – though not insurmountable – difficulties which have to be taken into account.

"Effective" measures of protection

However, we still have to look even deeper.

For what we need is enforced / enforceable and effective measures of protection for each *specific case*.

We should remember that we face a scenario where we have, at the very least, some evidence that we were able to collect, that is convincing (sufficiently convincing – as "full conviction" is not required) indicating that the violence alleged to object to the return is real. This will be a problem that will have to be faced if the mother (most frequently) returns with her child to the State of habitual residence.

At this point in the analysis, the judge will decide on and implement the measure of protection that is best suited to the specific case.

If both the requesting and the requested States are Parties to the 1996 Child Protection Convention, we would apply Article 11 to take measures of protection in cases of urgency to assist the mother and the child (we are looking at one of the most complex scenarios, which is where the mother who is the taking parent is also the primary carer) until the authorities in the State of habitual residence have taken adequate measures of protection once the return has taken place.

Naturally, the application of this mechanism, or a similar one – such as "mirror orders" in cases where the 1996 Child Protection Convention is not in force in both States – will require a series of arrangements as complex as taking the decision itself.

At this point, depending on the case, we still have to conduct another check.

It is possible, and as can be shown in practice, that even if we managed to make all these mechanisms work perfectly, we would possibly still not be able to provide adequate protection to the child in question for a number of reasons.

In a nutshell, we see that in certain cases what has come to be known as "safe return" is simply not possible.

If we become aware of this circumstance because it arises from the investigation during the return proceedings, then that will prevent return; that is to say that we will be facing one of the scenarios where the exception applies.

In some cases, the application of the exception will be clear from the start, such as in cases where the child has been abducted from his / her State of habitual residence which is affected by war or a natural disaster.

However, establishing whether the exception applies can be especially complex in cases such as the one inspiring this chapter: cases of alleged direct or indirect violence or abuse against the child.

In some cases — not of the most frequent kind but without a doubt some of the most critical — the mother herself may be the one that is unable to afford the measures of protection obtained.

In this type of situation, without prejudice to the faith and trust placed in the other State Party to the Convention, its institutions, the judges having natural jurisdiction, which stem from belonging to the same legal community, protected by common principles and precepts, there are some complex cases where the exception should be applied. It should be understood that being part of the community also implies the duty to protect its most vulnerable members where one of the exceptional situations provided in the Convention is established.

Case "S" versus "U", the joint application of the 1980 and 1996 Conventions

On the contrary, in a recent case entitled "S" versus "U" (ruling from the Court of Appeals of which I am a member, dated 22 December 2016, unpublished) the mother took her four-year-old daughter "N" from Spain, State of her habitual residence. The child was a Spanish national like her father, and her mother was Uruguayan. The mother took her daughter on holiday to Uruguay with the permission of the father, supposedly to return at the end of the holiday period, as they had done in previous years.

When it was time to return, the couple was going through separation, and the mother remained in Uruguay with the child. Mrs "U" stated that from a drawing that her daughter made on the flight to Montevideo, she was advised to take her to a psychologist and started therapy. The mother argued that from what her daughter had expressed – mainly to the psychologist – it could be established that she had been sexually abused by her father. She presented a substantial amount of evidence, expert reports and testimony from family members, all of which were obtained in Uruguay (requested State), and raised the exception under Article 13(1)(b) of the 1980 Child Abduction Convention.

The father had initiated custody proceedings in Spain as well as criminal proceedings on the grounds of abduction against the mother.

The first instance ruling ordered the return after not having found grounds to rule otherwise, stating that the abuse had not been established.

In the second instance, the Court examined the evidence, and even though the independent experts, especially the Forensic Psychologist and Medical Examiner, found no evidence of abuse, it did not dismiss the possibility of it having happened either (as is very common in these cases), because the Social Report coincided with the evidence provided by the mother on the existence of abuse.

The Court affirmed the return decision, but ordered certain measures of protection as a condition to the effective return.

The Second Instance Court found that some elements were lacking in order to decide if it was a case of abuse. However, it did not find it necessary to investigate any further on the matter.

The evidence did not suggest a safe return was impossible, but quite the opposite. Despite well-founded assessments pointing in that direction, the situation until arrival in Uruguay had been quite amicable between the parties, and from their exchanges they seemed to be overcoming a crisis that was not exempt of a certain degree of violence between them, which led to their separation.
There was evidence that the criminal case against the mother in this second instance had been dismissed. This arose from the fact that the parties had entered into a conditional return agreement at the First Instance, which was not confirmed on time in Spain and therefore expired. However, there was no record of the dismissal of the case being final.

Given all the evidence, the Court of Appeal found, on the whole, that measures of protection were applicable. It stated that even if the abuse allegations were proven to be true, if the measures of protection were made effective, the mother would be able to commence legal proceedings for custody and even present the case on abuse before the competent jurisdiction.

The mother's personality, mental state, economic resources, among others, were taken into account to assess if she would be capable of sustaining the measures of protection ordered under the 1996 Child Protection Convention.

Since there had been criminal proceedings in the State of origin, it was important to protect the child from the vicissitudes of the case – a case allegedly dismissed but there was no full certainty of this – due to her young age (her mother was the primary carer). Furthermore, and even when the evidence was incomplete, the duty was to protect the child against every instance of violence and / or abuse, on which the Court was silent.

A measure of protection was therefore ordered: provisional custody of the child was given to the mother, and a restraining order of 500 meters was issued against the father. Most importantly, the child's return was ordered subject to two cumulative conditions: a) that the requesting party prove before the requesting State (Uruguay) the judicial recognition of the protection order issued by the competent judge in the Spanish jurisdiction under Article 11 of the 1996 Child Protection Convention; and b) that the requesting party prove that the dismissal of the criminal proceedings against the mother was final and therefore unappealable.

Given that judicial recognition under Article 24 of the 1996 Child Protection Convention is governed by the internal law of each State Party (procedure and duration mainly, which are very important), in order to ensure the safe return of the child, return was actually delayed until a ruling on the recognition of the protective measures was effectively obtained.

As for the criminal proceedings, one of the factual circumstances that present an essentially insurmountable obstacle is when the mother is the primary carer of the child and, due to certain circumstances, as in this case, custody cannot be awarded to the father. That is the reason why, as a condition to the effective return of the child, the finality of the dismissal of the criminal proceedings, which in principle appeared from the case file, had to be formally demonstrated.

In this case, it was only when the measures were ordered that the Second Instance Court decided to partially confirm the ruling of the First Instance to add the aforementioned condition before proceeding with the return.

Carrying out all the material and intellectual work described in this case(?), in the brief timeframes that Uruguay's special procedural law No 18.895/2012 provides in order to fulfill the obligation provided for in the treaty, poses a real challenge.

In the case at hand, the timeframes were met in the First and Second Instances.

Spain recognised the protective measures. The mother, in order to delay enforcement of the return order (admissibility of this challenge was questionable as the procedural law admits precisely only two instances), filed an extraordinary appeal before the Supreme Court of Uruguay, arguing that the child had not had a fair and impartial defense by the Public Defendant assigned by the Judicial Branch in both previous instances. However, the Supreme Court did not find any merit in those allegations and finally the child returned to Spain with her mother.

According to subsequent press reports, the abuse accusation was dismissed in the State of habitual residence and the court ordered that the child resume contact with her father.

News from the IHNJ - National developments

1. Contribution to a procedural regime for return cases in Portugal under the 1980 Child Abduction Convention

By António José Fialho – Judge, member of the IHNJ for Portugal

Freedom of movement, establishment of residence or better working conditions in a rapidly globalising world could only lead to an increase in unions between persons of different nationalities. Such situations are not immune to the dissolution of the *status familiae* that marks contemporary societies and make cross-border family relations more complex as they require the intervention of two or more legal systems to resolve the various issues that arise.

These many changes in international society – increased transnational mobility of people and families as a result of the development of technology and transportation, the relaxation of border restrictions in some regions, socio-political and economic imbalances, and even the globalization of professional activities – have prompted the global community to explore mechanisms for handling the challenges associated with an expanding world.

The breakdown of a family unit often involves conflict as to the fate of the children or the preservation of family coexistence. Such conflict is marked by intense emotions, resulting in behaviors that disrupt or threaten bonds with one of the branches of the child's family.

The international community, aware of this reality and paying close attention to the complexities and difficulties introduced by cross-border family relations, established the right to family reunion in cases of parental separation as one of the fundamental rights of the child. They requested that States join or accede to bilateral or multilateral instruments designed to prevent the unlawful removal or retention of children (Article 11 of the 1989 United Nations Convention on the Rights of the Child).

This international desire to protect families and children has led to the creation of numerous mechanisms designed to safeguard such rights, aiming to overcome the obstacles of conflicting legal systems and unify rules in one central international regime.

The 1980 Child Abduction Convention protects the best interest of the child by striving to secure the prompt return of children wrongfully removed to or retained in any Contracting State and, in addition, ensures that the rights of custody and of access under the law of one Contracting State are respected in other Contracting States. This Convention also limits consideration of the welfare merits of the case, in that a decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

The 1980 Child Abduction Convention seeks to restore the *status quo* prior to any wrongful removal or retention and deter parents from attempting to dictate the forum for determining substantive welfare questions concerning the child. Detailed consideration of the child's best interests by the requested State would be antithetical to these core aims.

However, none of these instruments[1] define the procedural rules that should regulate the return of the child, and national procedural law likewise does not provide for a specific procedure in this area.

Thus, it is necessary for internal legal procedure to provide, in particular, for:

(a) A simplified procedure, since the purpose of this action is not to discuss custody rights but only the positive and negative conditions for deciding or refusing to return the child wrongfully removed or retained;
(b) A procedure that asserts the adversarial principle;
(c) An urgent and expeditious procedure, taking as a reference the six-week period for decision-making;
(d) A procedure ensuring that a child of sufficient age and maturity is able to be heard and to express freely and adequately his/her opinion.

Issues related to parental responsibilities are regulated by the Portuguese General Regime of the Civil Guardian Procedure, which establishes the procedure applicable to custody issues.

In the absence of a specific procedure applicable to return applications, a common procedure has typically been used in judicial practice, which only provides that **"the judge may order the steps it deems necessary before issuing a final decision"**.

However, the application of the 1980 Child Protection Convention offers complexities of its own: first, the need to combine numerous indeterminate legal concepts not addressed by domestic law; second, the fact that these cases do not frequently occur; and third, that the urgency of the cases that *do* occur requires that the judge make quick decisions without the opportunity to properly assess all the questions presented.[2]

Other States have adopted internal procedural mechanisms for the implementation of the 1980 Child Abduction Convention, which resulted in increased efficiency in rendering

decisions, the development of uniform procedures, improvements in the establishment of mechanisms of communication and mutual trust between the authorities involved, increased certainty and security, and other advantages that can only prompt Portugal to follow a smilar path.

An internal procedural regime should therefore take into account, *inter alia*, this set of benefits gained in other legal systems, as well as other procedural instruments which could facilitate or simplify the tasks of the courts, Central Authorities and judicial networks.

This contribution does not attempt to suggest a final proposal for a procedural system, but only to outline some aspects which, in our opinion, call for appropriate reflection by the legislature, keeping in mind the recast of the Brussels IIa Regulation.

In domestic law, jurisdiction to take measures directed at the protection of the child´s person or property or to decide parental responsibilities is assumed by the courts in the State of habitual residence of the child.

Therefore, cases where Portugal is the requested State in the context of a wrongful removal of children are now handled by about 112 different courts with different levels of specialisation.

The interpretation and application of the legal rules relating to cases involving a decision to return a child under the 1980 Child Abduction Convention may give rise to difficulties for the judge, and thus only an appropriate model concentration of jurisdiction would be able to overcome these difficulties.[3]

Child return proceedings have their own complexities not only because of the need to combine international normative instruments, but also because of the many legal concepts not addressed by domestic law, as well as the existence of antagonistic interests, and the need for a swift response in order to obviate the risk of weakening the affective relationship between the child and the left-behind parent.

A procedural model for the application of the conventions should also specifically define the scope of the administrative support provided by the Portuguese Central Authority in the context of the return of the child, as well as the intervention of other authorities that may be called upon to enforce a return decision issued by courts.

A court to which an application for return of a child is made shall act expeditiously, using the most expeditious procedures available under national law.[4]

In Portugal, this requirement has been met by granting urgency to the procedure for civil protection; however, this procedure has rarely been allowed to observe the six-week period, even more so when there is an appeal pending against the decision.[5]

Thus, the adoption of instruments guaranteeing an expeditious procedure, setting maximum deadlines for decisions, and including the necessary legal certainty and compliance with basic procedural rights, is also imperative.
A fair and equitable procedure must provide each party with the opportunity to present its factual and legal grounds before the court prior to a decision; that is to say, the opportunity to be heard.[6]

The principle of adversarial proceedings is meant to ensure the effective participation of the parties during the whole procedure by allowing them, in full equality, to bring all relevant elements into the discussion (principle of influence), by stating their facts, contradicting the facts alleged by the other party, and proposing the relevant evidence to establish those facts.

The right of the child to be heard implies that all children with a capacity for discernment, have the right to freely express their opinions on matters which concern them, and according to their age and maturity, to participate in all decisions concerning them.[7]

Neither the 1980 Child Abduction Convention nor the Brussels IIa Regulation set out procedures to be observed for the hearing of wrongfully removed or retained children, since approaches on this issue sometimes widely differ from one State to another.[8]

Not only is the hearing of the child in a court case an extremely intense moment for the child, but also a particularly demanding one for professionals involved. They need to be qualified with appropriate training and experience to perform the hearing; they need to be able to interprete nonverbal behaviors and have a reasonable knowledge of the various elements that may need to be considered during the hearing (the environment, the conduct of the interview, the level of development of the child and, finally, those related to the adults performing this hearing).

Each process has a name and to this corresponds a face and a voice or any other form of expression. Although it concerns the child, the process is part of the world of adults and the child's hearing, even if it is a right of the child, with rules that are unknown, must not contribute to its fragility and exposure or become traumatic experience.[9]

The overarching goal of the 1980 Child Abduction Convention is to ensure the restoration of the *status quo ante*, and the return of the child is the essential measure to be resolved by the courts of the requested State. The proceedings should not be distracted with any discussion on the residence of the child or on the exercise of parental responsibility, which is exclusively reserved for the courts of the State of habitual residence.[10]

In a case of wrongful removal or retention, the opportunity or the need to safeguard an access right between the child and the left-behind parent can be justified not only by the need to implement acess rights that may have been granted in another,[11] but also by the need to preserve the affective bonds between the child and the left-behind parent.

This solution not only combats the harmful effects of the child's separation from the left-behind parent but also allows the court opportunity to see if any exceptions should be made regarding return or access rights.

It is important to ensure that the internationalisation of legal issues and the search for effective mechanisms for international legal and judicial cooperation is not overcome by the complexity of cross-border family relations. It is well known how fast and easy it is to travel between countries, to obtain work or residence in a different country, to complete studies or training, to marry or to have children, but judicial cooperation, in some cases, still remains dependent on old instruments, almost medieval or post-Westphalian.

Judicial cooperation based on judicial networks and **direct judicial communications**[12] has proved to be an essential element in establishing mutual trust in the legal systems involved, in accordance with the decisions issued by the competent authorities of Contracting States, harmonising legal solutions guided by common principles and good practice.[13]

Despite the complexity and diversity of legal systems, it is always through the courts that the areas of freedom and administration of justice must be affirmed. This is due to a shared sense of cooperation between the judges of the States involved, encouraging the exchange of experiences and the crossing of concepts and practices. It is important that this cooperation is shaped by the same values of openness, sharing, compatibility, cooperation, mutual trust and, above all, making use of the most recent, effective and informal means of communication.

In this way, the procedural regime should also provide for legal procedures to be observed in direct judicial com-munications and in the intervention of judicial networks, respecting the international guidelines.[14]

Legal representation by a lawyer[15] is an essential element in the administration of justice, required in any proceeding and necessary before any jurisdiction, authority or any public or private.[16]

In return cases, legal issues may involve complexities which parents are not able to overcome without the neces-sary specialised advice that only the lawyer can provide.[17]

The economic implications must also be considered, since some parents may not have the resources to appoint a lawyer qualified to represent them in such a case, thus requiring the assistance of legal aid.[18]

Conclusions

The guidelines and recommendations that were adopted[19] concerning the procedural regimes and our contribution[20] refers to a set of principles which can be summarized as follows:

1. Any model adopted shall respect the objectives of the 1980 Child Abduction Convention and other international instruments relating to the best interests of the child and the fundamental rights of the child and the parents, as enshrined in the provisions binding each of the States;

2. Return procedures must be carried out before specialised courts, at the first instance and at the appeal stage, and the concentration of jurisdiction at any stage is recommended;

3. The procedure shall guarantee the child's right to a hearing, subject to his or her age and maturity, ensuring that it is performed in an appropriate environment by specialized professionals and, if justified, assistance is provided;

4. Any procedural model must guarantee the adequate fulfillment of the obligations of Central Authorities, including the duty of cooperation.

5. The chosen model should guarantee that a fast and expeditious procedure is available, allowing for a decision to be reached within a reasonable time (preferably within a six-week period);

6. Where it is possible, the conditions necessary for a voluntary return of the child at any stage of the return process, including through mediation, should be encouraged and guaranteed;

7. Exceptions to return must be given a restrictive interpretation and such return should not be refused if the requesting State can provide for a safe return of the child and, where necessary, for the establishment of protective measures;

8. The appeal against a decision ordering the return must be examined within a very short timeframe and, preferably, there must be only one stage of appeal;

9. During the return proceedings, the child's access rights with the left-behind parent must be guaranteed; this right may be restricted only if it is justified by the child's own best interest;

10. Judges involved in procedures for the return should have direct judicial communication mechanisms through judicial networks and their liaison judges or national contact points; such mechanisms should be known to the parties.

It is true that the complexity of this areahas not prevented the application or enforcement of these instruments of international law, but at the same time the development of these instruments has not been immune to the difficulties we have attempted to state in this work. There has also been difficulty complying with certain assumed obli-gations, especially within the European Union.

These obligations and requirements arise from the need to ensure fair and equitable processes that allow decisions within a reasonable time but, above all, allow better consideration of the best interest of the child who is wrongfully removed or retained.

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1. In Portugal, the 1980 Child Abduction Convention should also be combined with the application of other instruments whose standards are important for completing the framework for the protection of children in the event of unlawful removal or retention:
   (a) Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels IIa);
   (b) 1996 Child Protection Hague Convention.
2. Return proceedings concern the return of a child who has been wrongfully removed or retained in another State, without regard to the aspects relating to the exercise of parental responsibility.
3. The judicial practice of other States has shown that, although the parents (and their lawyers) are obliged to travel long distances to go to court, they often say that such a move is not a problem in that they are assured that they present their case before a more specialised and empowered court; as a result, specialisation of courts improves the degree of satisfaction of the parties.
   Concentration of jurisdiction consists of giving jurisdiction to a limited number of courts on a specific issues; it is regarded as an effective and essential instrument for speeding up the handling of child abduction cases in several States, since judges tasked with assessing a large number of such cases develop specific skills.
   Depending on the structure of the legal system, jurisdiction to hear and decide on cases involving the wrongful removal or retention of children may be concentrated in a single court for the whole country or in a limited number of courts.
4. Articles 11 (1) of the 1980 Child Abduction Convention and 11 (3) of the Brussels IIa Regulation provide that the judicial or administrative authorities of the States must adopt emergency procedures for the return of the child by setting a time limit of six weeks for a decision to be taken, unless exceptional circumstances make this impossible.
5. In a more realistic approach, Brusselas IIa (proposal) provides for a period of six weeks for the Central Authority to examine the request (including assistance in determining the whereabouts of the child), to promote mediation or, in certain cases, to provide the applicant with a lawyer qualified to take the case to court.
   The court will have a period of six weeks to decide whether to return or refuse to return, using the most expeditious procedure available under national law.
   Finally, if an appeal is lodged, the decision ordering the return of the child must also be decided within six weeks after the appeal has been lodged in a single grade, in all cases safeguarding the existence of exceptional circumstances which may make it impossible to comply with those decisions.
   To prevent dilatory remedies, the Court may provisionally enforce a decision ordering the return of the child, even if an appeal has been lodged against that decision, despite if national law does not provide for such provisional enforceability.
6. The court cannot refuse to return the child unless the person who requested the return has been given an opportunity to be heard (Article 11 (5) Brussels IIa).
7. At the international level, the hearing and participation of the child is expressly enshrined in Article 12 of the United Nations Convention on the Rights of the Child, Articles 3 and 6 of the European Convention on the Exercise of the Rights of the Child, Recommendation 1864 (2009) of the Parliamentary Assembly of the Council of Europe, Recommendation CM/Rec (2012) of the Committee of Ministers of the Council of Europe, the Guidelines of the Committee of Ministers of the Council of Europe on Adapted Justice for Children, Article 24 (1) of the Charter of Fundamental Rights of the European Union and the Recommendation of the European Commission of 20 February 2013 (2013/112/EU).
   The complex nature of the issues raised in the international instruments on the removal and wrongful retention of children require that the hearing and participation of the child in proceedings concerning him take into account the reasons which may justify a refusal to return the child when the latter expresses its opposition and the applicant is of an age and degree of maturity which would justify taking account of their views on the subject (Articles 13 of the 1980 Child Abduction Convention and 11 (2), 12 and 13 of the Brussels IIa Regulation) or as an essential condition for the enforceability of decisions relating to the custody or cohabitation rights of the child with his or her parents (Articles 23 (2) (b)) of the 1996 Child Protection Convention and 23 (b), 41 (3) (c) and 42 (2) (a) of the Brussels IIa Regulation).
   In the national legal system, the right to hear the child is expressly provided for in Articles 4 and 5 of the General Regime of the Civil Guardianship Process and these normative provisions are the reference for articles 84 of the Law of Protection of Children and Young People, 47 and 96 of the Law on Young Offenders and 3 and 54, paragraph 1, c) and 2 of the Legal Framework of the Adoption Process.
8. It is important that the person performing the hearing has adequate training, knowing how to communicate with the child and being aware of the risk of the influence and pressures that the parents may have on the child. The child must also be given all the necessary information on how to effectively exercise his or her right, and it must be explained that his hearing will not necessarily condition the final decision that will be taken,
   and the means used will be adapted to the child's capacity, to the rhythm and attention span of the child, using plain and simple language, appropriate to the child's age and his or her level of understanding.
9. The hearing should take place in an informal and reserved, non-intimidating environment, enhancing the spontaneity and sincerity of the child, if necessary with the support of specialized advice.
10. Underlying the objectives of the 1980 Child Abduction Convention is the idea that the main victim of international abduction is the child who is "withdrawn" from the social and familiar milieu he/she knows and from his/her routines and friends, deprived of contact with one of the parents or a branch of the family, instrumentalised by the one parent as a way to reach the other, and taken to a country he or she does not know, sometimes without speaking the language.
11. Some procedural rules expressly provide for a preliminary hearing between the parents, subject to the principle of immediacy and orality, to be carried out within a very short period of time, in which the court seeks a consensual solution, directs parents to mediation or, if it is not possible, identifieseach of the issues that prevent a voluntary return, and may also refer the situation to child protection services.
    At this preliminary hearing, the judge may also propose or determine the child's right to live with the parent of that contact because of the wrongful removal or retention, in particular during the pending process or taking advantage of the parent's presence for the hearing.
12. In order to facilitate the implementation and enforcement of child protection conventions as well as the provision of communication tools between judges, International Hague Judges Network (IHNJ) was created to establish a link between the judges involved, support, assist or cooperate with the CA, provide direct judicial communications to obtain information on the status of proceedings, exchange views or information on

applicable law or jurisdiction of Courts, custody or acess rights, avoid situations of *lis pendens* and harmonize preventive or protective decisions justified by the best interests of the child.

13. Mutual trust is an essential factor in this type of communication, encouraging pragmatic and imaginative solutions which are usually accepted by personal knowledge, contacts and mutual assistance between the network's judges and national judges.
14. See (in several languages) https://www.hcch.net/en/publications-and-studies/details4/?pid=6024.
15. In Portugal, the qualification of civil protection measures involving the return of children illegally displaced or detained as a voluntary jurisdiction procedure implies that legal representation by a lawyer is not mandatory, except at the appeal stage.
16. The lawyer is the professional whose activity is deployed in "three aspects: support and legal information, an instance of amicable settlement of conflicts and procedural agent of the parties'".
17. Therefore, specialization should also be required in the technical-legal assistance plan and this is only possible with intervention in the process of lawyers prepared to deal with the specificity of these legal issues, aware of the procedural instruments within their reach and, above all, qualified to know the legal systems that may be involved and thus provide legal and technical support to parents to enable them to make more informed choices about the options that may be placed in these processes.
18. An obligation under Article 26 1980 Child Abduction Convention and to which Portugal has not made any reservation or objection.
19. Model Law on Procedure for the application of the Conventions on International Child Abduction developed by a Latin American Expert Group Gathered by th Hague Conference on Private International Law and the Inter-American Children´s Institute and Presented at the 2nd Meeting of Government Experts "Inter-American Program of Co-Operation for the Prevention and Remedy of cases of International Abduction of Children by one of the parents" (Buenos Aires, Argentina, 19-21 September 2007) (Doc. Info. No 6, May 2011), available in https://assets.hcch.net/upload/wop/abduct2011info06e.pdf
20. This contribution has intentionally left out other issues equally lacking in adjective densification, in particular the procedures for recognition of decisions in matrimonial matters and parental responsibilities in the Brussels IIa, the enforcement of the right of access (Article 21 1980 Child Abduction Convention), the request for assuming jurisdiction (Articles 8 and 9 1996 Child Protection Convention and 15 Brussels IIa) and cross-border placement of children (Article 33 1996 Child Protection Convention and 56 Brussels IIa).

2. 1980 Child Abduction Convention Concentration of Jurisdiction in Florida

By The Honourable Judith L. Kreeger, Circuit Judge, Eleventh Judicial Circuit of Florida, Miami, former member of the IHNJ for the United States of America

By his recent administrative order, the Chief Justice of the Florida Supreme Court created a concentration of jurisdiction for the state of Florida trial courts to determine cases filed by left behind parents of children located in Florida who seek relief concerning their children pursuant to the 1980 Child Abduction Convention. This milestone should help Florida to achieve the Convention's goal of having these cases decided within six weeks of their filing date by judges who have specialised knowledge about the Convention

Background information: In Florida's state court system, Hague cases may be filed in any Circuit Court, which is the statewide trial court of general jurisdiction. There are more than 500 judges who sit in Florida's 20 judicial circuits who have the legal authority to determine these cases. Florida is one of the top four U.S. states receiving the greatest number of Hague filings (New York, California and Texas being the other three), and receives approximately 45 incoming cases annually. Obviously, most Florida circuit judges who preside over family law cases will never have to determine a Hague case. As a result, Florida judicial education concentrates on their continuing judicial education on day-to-day issues such as child support, creating a parenting plan, alimony, division of property, and domestic violence. The result of such a judicial education system is the likelihood that the Hague cases will not receive the expedited attention and knowledgeable treatment that they should have.

In late October, 2018, Justice Alan Lawson of the Florida Supreme Court agreed to give welcoming remarks at the Third Global Meeting of members of the International Hague Network of Judges (IHNJ), hosted by Florida International University in Miami, Florida. Justice Lawson spent two days at the meeting, and took advantage of the opportunity to speak with Philippe Lortie, First Secretary, Permanent Bureau (Secretariat), Hague Conference on Private International Law (HCCH), under the auspices of which the 1980 Child Abduction Convention was adopted. He also talked with Justice Alistair MacDonald from London, and became aware of the merits of the UK system of concentration of judges who are assigned to determine Hague matters. Justice Lawson also had the opportunity to talk to various other judges members of the IHNJ who participated in the Miami meeting.

I also had the opportunity to talk to Justice Lawson and described to him an experience I had a few years ago, when a left behind British father filed a Hague case in a central Florida community, and he experienced a long delay in the Florida judicial treatment of his case. The father had a re-

lated custody case in the UK court system, and a representative of that court had communicated with me, acting in my capacity as a U.S. Network Judge, seeking to ascertain the status of the Florida case. When I attempted to communicate with our Florida judicial colleague to obtain that information, my telephone calls were ignored. The UK judge in his ultimate decision in the custody case included a paragraph in which he described his frustration that the Florida court had not acted in a timely fashion concerning the Hague case, and had ignored the proper attempts to communicate. When Justice Lawson returned to Tallahassee, the capital of Florida, he reported to the Chief Justice regarding the meeting and his impressions. Several months later, on April 12, 2019, the Chief Justice signed Administrative Order AOSC19-19 which creates the concentration of jurisdiction for Hague matters in Florida state's trial court system. In that Order, he said: "It is the intent of the Florida State Courts System to better protect children from the effects of their wrongful removal through the establishment of a network of Florida judges who develop expertise in this important area of law." AOSC19-19 requires that the chief judge of each of Florida's 20 judicial circuits must designate one judge with primary responsibility for handling all Hague cases filed within that jurisdiction. It further requires that these 20 judges participate in educational opportunities to learn the substantive law and procedural requirements for Hague cases.

The Florida judges' first educational opportunity, offered in Florida and which they are required to attend, is a one-day programme to be held on August 6, 2019. The faculty will include Ignacio Goicoechea, Principal Legal Officer and HCCH Representative for Latin America and the Caribbean; Scott Renner, Director of the Office of Children's Issues of the United States Department of State, which is the United States' Central Authority under the 1980 Convention; Judge James Garbolino, author of the outstanding treatise "International Child Custody: Handling Hague Convention cases in U.S. courts", copies of which will be given to each of the 20 Florida circuit judges; and Stephen Cullen, a distinguished Washington, D.C. attorney who has represen-ted numerous parents in Hague cases.

The chief judge of my judicial circuit, which encompasses Miami-Dade County, designated my colleague, Judge Scott Bernstein, to handle these cases, and he recently was assigned his first two incoming cases. The clerk of our Court is developing an intake system to identify Hague cases when they are filed, so that they will be specifically assigned to the designated Hague judge. Judge Bernstein will conduct a case management conference in each of these cases, and will schedule the final hearings for the parties shortly thereafter. All clerks of Florida's circuit courts are developing intake processes to expedite assignment of these cases to the appropriate specialist judges.

I, as a former Network judge, consider the concentration of knowledgeable judges to be a major milestone for our court system to improve the administration of justice for international families whose children suffer the impact caused by delayed court processes.

3. An experience to share

By Graciela Tagle de Ferreyra, member of the IHNJ for Argentina

As the representative of the International Hague Network of Judges in the Argentine Republic I would like to share with my colleagues a very novel experience carried out in the context of the training activities in the area of the international return of children and international access arrangements which we proposed for this year. I refer to the online and on-site training sessions organized by the *Junta Federal de Cortes y Tribunales de Justicia de las Provincias y Ciudad Autónoma de Buenos Aires* (The Federal Board of Courts of Justice of the Provinces and the Autonomous City of Buenos Aires) which I had the honour to direct and program. A total of 900 attendees from twenty-two provinces of the Argentine Republic were present. The training sessions were addressed to judges, district attorneys, child protection advisers, officials, technical teams for families and children, the judicial police and mediators from all over the country. They lasted two months, were held on Fridays and had a total class load of 25 hours. The course was designed to cover eighteen units, comprising both the theoretical and practical aspects. For this I selected the most distinguished lecturers and the most updated practical workshops on the subject.

The general and special objectives are incorporated into the programme and a careful reading of its subject matter clarifies its initial proposal: to recognize the impact of international legal cooperation, the necessary starting point in a global world in which people and goods are continually moving from one place to another, in order to ensure legal certainty, access to justice and the effective safeguarding of essential rights wherever an individual might be.

The fact is that, persuaded by the realisation that the human rights granted under different international instruments depend largely on the effectiveness of international legal cooperation, the study of the tools of such cooperation has intensified. The work developed using the network, direct judicial communications in the context of the International Hague Network of Judges and videoconferences, an indispensable technological tool recently available to judges around the country.

Another proposal was to learn the key concepts of the 1980 Child Abduction Convention and the Inter-American

Convention of Montevideo of 1989, to study the norms that govern these processes, and drawing from the practice, to develop a "critical judgment of the current situation", analysing its causes in order to be able to overcome them.

The issue of delays in proceedings was addressed thoroughly and we presented the procedural laws in force in the different provinces as well as the procedural draft bill at the federal level, which has recently been approved by the National Senate. We were pleased to see that, as of this seminar, the provinces of La Rioja and Salta respectively began to develop a draft procedural law.

The structure was new in that the National Network Judges were appointed as "tutors" of each of their provinces with the purpose of guiding their assistants. They helped with updating the program units, answering questions, holding consultations and supervising the practical tasks as well as sending the required theoretical and practical material to participants in advance of the study units.

There were also coordinators who assisted the lecturers and the National Network Judges from each province and the programme director.

The methodology was very dynamic as every lecture was followed by practical workshops, questionnaires, discussion forums, TED Talks, open discussions, practical sessions of direct judicial communications, case-law analysis, and a mock trial on a case of international child abduction.

The theoretical aspect addressed the international protection of children, an analysis of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, the role of the Central Authority, the public defence, the child protection advisers, the best interest of the child, the exceptions, the judicial procedure, the enforcement of the judgment, and mediation, among others. It ended with a recount of experiences in relation to the American system of justice presented by those who had taken part in the "International Visitors Leadership Program" (IVLP), the main professional exchange program held by the US Department of State, as well as information about the practice of direct judicial communications in the Kingdom of Spain and the European Union delivered by International Hague Network Judge Javier Forcada, a distinguished specialist in the topic who gave us a global view of this tool.

The practical part concluded with a mock trial on a case of international child abduction from the moment the application reaches the court until the decision is issued. Magistrates and officials acted in this mock trial, with the participation of the judge, the District Attorney, the child protection adviser, the technical team and each party's attorney. All of these individuals offered their own insight and experience throughout the process, leading up to the resolution of the case.

In order to complete the course, attendees were required to attend 80 percent of events and fulfil all the practical tasks of each of the units. These tasks were corrected by the tutors, followed by global feedback for each of the attendees. The technical team deserves a special mention for the excellent connectivity maintained throughout the course, and for making available recordings of each of the units and the material delivered so that it could be compiled and sent to the attendees.

We have already seen positive results: the course has been declared of judicial interest by a large number of provinces, and the first course on Family Mediation was held during the development of the programme.

We have been able to carry out this training programme thanks to the Federal Board of Courts and the work we have developed over the years in training network judges with the help of the Regional Office of the HCCH for Latin America and the Caribbean.

The greatest recognition is echoed in the words of a participating judge: "This training program marks a before and an after in the history of our province in these matters".

4. The annual report of the Office of the liaison judge on international child protection ('BLIK')

By Judith van Ravenstein, family law judge in the District Court of The Hague and president of the Netherlands Office of the liaison judge on international child protection (BLIK), member of the IHNJ for the Netherlands

Some background information

In July 2005, the Netherlands Council for the Judiciary[1] appointed the President and Vice-President of the Family Division of the District Court of The Hague as liaison judges for the Netherlands. These liaison judges are the primary points of contact for judges in the Netherlands and liaison judges abroad who are handling cases concerning international child protection.

Also, since the Netherlands has established concentration of jurisdiction for 1980 HCCH Child Abduction Convention cases, the liaison judges – together with six to eight other youth/family law judges working at the District Court of The Hague – handle all 1980 Child Abduction Convention cases concerning children who have been (wrongfully) removed to or are being retained in the Netherlands.

In order to perform the liaison duties properly, the Family Division of the District Court of The Hague has set up a bureau: the Office of the liaison judge on international child protection. This office is commonly referred to by its Dutch acronym 'BLIK'. A number of judges and (senior) legal officers who work in the Family Division of the District Court of The Hague devote part of their work-week to performing liaison duties and activities for BLIK.

The BLIK annual report

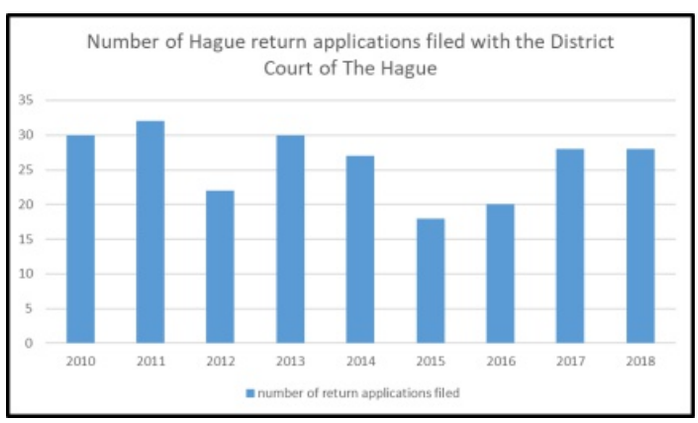
BLIK started its activities on 1 January 2006. As BLIK is co-funded by the Council of the Judiciary and the District Court of The Hague, the annual report is one of the means by which BLIK (in relation to its sponsors) can be held accountable for its activities. The annual report also serves as a way of informing practitioners and academics about BLIK's activities in the dynamic field of international child protection. Judging from the feedback BLIK receives on its annual report, the report is not only read (and used) by judges, lawyers, mediators and government employees in the Netherlands and judges from BLIK's international networks (the International Hague Network of Judges, "IHNJ" and the European Judicial Network, "EJN"), but it is also seen as a valuable source of information by bachelor, master and PhD students and other academics in the Netherlands and abroad. Furthermore, the annual report serves as an important source of information for the (appeal) judges themselves. If, for instance, the report shows that there is an increase in the delays, this might be a reason to investigate the cause of the hold ups and to address this issue with colleagues or third parties.

BLIK's first report was a bi-annual report and looked back on all the activities in the start-up years 2006 to 2007. From 2010 onwards, the report became an annual publication.

The annual report is written in Dutch and then translated by a professional translator into English. For some years, the report was also translated into French and Arabic, but for reasons of cost control, this practice was abandoned after some years. The annual report is available digitally and (upon request: blik@rechtspraak.nl) also in hardcopy. It is also published on (semi) open sources such as the intranet and internet.

The 2015 annual report in Arabic and the 2017 annual report in French

The annual report is published around March-April of each year and aims to offer a comprehensive insight into all of BLIK's activities. These activities can be broken down into four main categories: (1) expediting liaison requests from abroad; (2) handling helpdesk enquiries from Dutch family law / juvenile judges and, if necessary, passing them on to liaison judges abroad; (3) dealing with 1980 HCCH Child Abduction Convention return cases; and (4) attending (international) conferences and giving presentations on (sub)topics of international child protection. In the annual report, graphs and statistics are increasingly used to visualise information and to show trends over time:



A graph showing the fluctuation in the number of Hague return applications filed in the Netherlands

Each year, the members of BLIK who work on the annual report – usually: one of the liaison judges and three (senior) legal officers – try to critically assess the information that is included in the report. Thus, over the years, information on return cases, for example, has been expanded. Whereas previously this information was broken down into five categories (number of cases, subject, country of origin, date of the decision and return/non-return decision), the report now also includes precise information about lead times, cross-border mediation (did the parties accept the offer of cross-border mediation; was it fully successful or did it result in a mirror agreement?), involvement of the Central Authority, involvement of a pro bono lawyer, etc. As of 2019, two new categories will be introduced: (1) the age of the child/children involved in the 1980 Hague return cases; and (2) whether the preliminary and/or full-court hearing was done via teleconferencing. Also, hyperlinks to the full text (in Dutch) of the court's judgments might be included.

The annual report is a 'work in progress' in the truest sense of the word. This means that the tables and statistics appearing therein are updated every week: whenever a new helpdesk enquiry or liaison request is received or a new return case is filed, the case/enquiry is registered with a number. After the ruling in a specific case is given or the enquiry or request has been appropriately addressed, the outcomes are immediately added to the tables. Also, immediately after one of the members of BLIK has attended an (international) conference, details of the conference are added in one of the tables and a short synopsis is written. By approaching the annual report as a 'living document' and by ensuring that data is regularly added over the year, a lot of time is saved at the end of the year. In January, only the introductory and general paragraphs remain to be written and no time is wasted on gathering the data. In addition, the chances that activities get forgotten or omitted as the year passes, are limited.

The creation of a central office like BLIK and the concentration of jurisdiction that the Netherlands enjoys, make it relatively easy to work together on this 'living document' throughout the year. And if one stumbles on 'information gaps' whilst working on the annual report, it is of course convenient that the person who can help you fill in this gap, is working just down the hallway. However, given the modern means of communication, it might also be possible in jurisdictions that do not have a central office similar to BLIK and/or that do not have concentration of jurisdiction, to appoint (a group of) lawyers/judges to centrally collect information on international child prote-ction cases in an efficient manner.

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1. The Netherlands Council for the Judiciary ('*Raad voor de rechtspraak*'), while forming part of the Judiciary, does not actually adjudicate itself. Instead, the Council is dedicated to ensuring that the courts of law can perform their (adjudication) duties effectively. The Council represents the interests of the courts in the political arena and in (national) administration and government, notably the Minister of Security and Justice.

News from the International Hague Network of Judges

Passing away of Judge Irma Rumilda Alfonso de Bogarín
(1948-2019)

This year, the international child protection community has suffered a great loss with the death of Irma Rumilda Alfonso de Bogarín, member of the International Hague Network of Judges ("IHNJ") for Paraguay.

Ms Alfonso de Bogarín fought tirelessly for the protection of children and played an active role in the field of juvenile justice in Latin America – a field to which she contributed her writings and her vocation for teaching. She was president of the Mercosur Association of Children and Youth Judges.

In 2010, she was appointed as a member of the IHNJ, and participated in numerous international and regional meetings on international child abduction. On this topic, she participated in the drafting of the Annex on International Child Abduction to the Ibero-American Protocol on International Judicial Cooperation, an instrument of significant importance for the region.

The Permanent Bureau would like to thank her for her work and continued efforts to contribute to the cross-border protection of children.