4pb For Family

INTERNATIONAL CHILDREN LAW UPDATE

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Indu is an experienced barrister specialising in both private children and international children law matters. She has a wealth of experience in international children law and is regularly instructed across a wide range of international children law matters including 1980 Hague convention proceedings, jurisdiction disputes, cases concerning recognition and enforcement of orders, and wardship proceedings. Indu represents clients at all stages of abduction and wardship proceedings in the High Court involving both Hague and non-Hague Convention countries.

Indu won the Jordans Family Law Award for Young Family Barrister of the Year 2017.

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Nadia is developing a busy practice across all of Chambers' specialisms. She has appeared at all levels of the family court, including the Court of Appeal where she has been led by Jacqueline Renton.

Nadia is regularly instructed in complex private law matters involving allegations of domestic abuse and coercive and controlling behaviour. Nadia represents applicants and respondents at all stages, including final hearings. She also represents applicants and respondents in cases with an international element, involving both Hague and non-Hague countries.

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ALEX HALLIDAY

Alex accepts instructions in all areas of family law, having joined Chambers as a tenant in October 2023 following the successful completion of pupillage at 4PB.

Alex appears in the High Court in child abduction matters. She was recently led by Frankie Shama in the matter of A v M & Ors [2024] EWHC 2020 (Fam) in a case which considered the grant of parental responsibility following an application to withdraw 1980 Hague Proceedings.

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Updated Guidance from the President on parallel child abduction and asylum proceedings

Re HR (Parallel Child Abduction and Asylum Proceedings) [2024] EWHC 1626 (Fam)

The Respondent mother in this case was represented by Mark Jarman KC and Indu Kumar, 4PB.

1. Sir McFarlane P. considered an application by the applicant father for the return of two children aged 11 ½ and 9 ½ pursuant to the 1980 Hague Convention to the United States of America. The respondent mother opposed the application relying on the defences of Article 13(b): grave risk of harm and intolerability and also the Child's objections defence in respect of both children.

2. On arrival in the UK the mother immediately made an application for asylum on behalf of herself and the children. An Upper Tribunal Immigration and Asylum Chamber (UTIAC) Judge sat with the President to determine the matter.

3. The facts are set out from paragraphs 5-17 of the judgment. The parents divorced in 2018. In 2019 and 2020 there were issues with contact and a temporary custody order was made in or around July 202. In June 2021 all contact between the father and children stopped following allegations of suspected sexual abuse by the father against one of the children. The mother applied for Sexual Violence Protection Orders. In April 2022 the father applied for an emergency petition for custody. The allegations of sexual abuse were considered by the court in the USA in July 2022. The Judge did not accept the allegations of abuse having questioned the children directly. The former custody order was reinstated. The mother had travelled to England in August 2022, prior to the custody order's implementation.

4. The mother applied for asylum upon arrival. There was some delay before this matter came before the High Court for a final hearing. Prior to the father having made his application pursuant to the 1980 Hague Convention the mother had issued an appeal from the Home Office decision to the First Tier Tribunal (FtT). The FtT ultimately dismissed the mother's asylum case in March 2024 and made findings on "the lower standard of a reasonable degree of likelihood". The FtT did not

accept that the children had been sexually abused by the father. The mother's subsequent application for permission to appeal to the UTIAC was also refused, by the time of the final hearing she had exhausted all rights of appeal in respect of her asylum claim.

Children to be seen by an Independent Solicitor

5. The children were joined as parties to the Hague Convention proceedings in May 2023 pursuant to the guidance in ***G v G*** **[2021] UKSC 9**. At the outset of the final hearing the mother applied for the children to be seen by an independent solicitor to assess their competency and to act on their behalf if competent. The basis of the application was that their Guardian had prepared 2 reports and only conducted one in depth discussion with the children regarding a return over a year ago. Their solicitor had never met with them. The Guardian advocated a return to the USA which directly opposed the children's own strongly expressed views.

6. The court refused the application for the reasons set out at paragraph 20 of the judgment. These included that: the court did not want to cause further delay where the proceedings had been adjourned on 3 previous occasions, the children's objections were clearly expressed in the report before the court, and there was no longer a need for the children's separate representation where the asylum proceedings had concluded.

Article 13(b)

7. The key focus of the mother's Article 13(b) defence was that a return would amount to an intolerable situation for the children. At paragraph 29 of the judgment, the various components of this were set and included the following:
    a. The mother had been charged with two counts of interference with the custody of children and two counts of endangering the welfare of children, following a complaint by the father. The expert evidence showed that she would probably be arrested on arrival in the US and would face a period of imprisonment.
    b. The children would be separated from her and either be placed in the father's sole custody or into foster care. The father had taken no steps to discharge a sole custody order made in his favour some 2 years ago.

c. Dr Ratnam had completed a report for these proceedings. The mother has a history of depression and PTSD. A return would likely further exacerbate these symptoms.

8. Further, the protective measures offered by the father were deficient, in that:
    a. He made no attempts to contact the police and prosecution agencies until very recently with no effect.
    b. He took no steps to discharge or modify the custody order in his favour.
    c. The father refused to provide the mother with any support/accommodation should she be returned.

9. The court accepted that the experience for the children in returning will be "traumatic to a significant degree" and also accepted that the mother is likely to be kept in custody for some time. The fact that the mother would be arrested and the children may be placed into foster care on arrival was described by the court as not without precedent. The court therefore did not find the intolerability aspect of the defence under Article 13(b) to be made out.

Interplay between 1980 Hague Convention proceedings and asylum claims: guidance

10. The general proposition that the High Court should be slow to stay an application under the 1980 Hague Convention prior to any determination is consistent with the aims of the Convention. The court reiterated the 6 practical steps identified by Lord Stephens in ***G v G* [2021] UKSC 9** at paragraph 73.

11. The court referred to **3 particular documents** which practitioners should be aware of to ensure Hague Convention proceedings are carried out expeditiously (with reference to the 6 week timetable) notwithstanding a parallel asylum claim. They provide for the efficient despatch of both asylum and Hague procedures where there are parallel claims. Sir McFarlane P. reiterated that it is important that these guides, and the detailed requirements that they impose, are well known to each and every lawyer who may be engaged in such a case, whether in the immigration process or in the Family Division.:

    a. First, in ***G v G*** Lord Stephens endorsed the steps which the Home Office had taken towards establishing a specialist asylum

team to which this small group of cases would be assigned. ***Guidance*** has been issued by the Home Office setting out the procedure that is to be followed by staff dealing with asylum casework when processing asylum claims involving children where there are concurrent 1980 Hague Convention proceedings in the High Court. The aim is to outline a clear procedure to be proactive and expedite the processing of straightforward asylum claims within 30 days of the Home Office being notified of the relevant case. Where cases are more complex, the intention is that there are clear lines of communication between the Home Office and the Family Division.

b. Second, ***Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings*** was issued on 1 March 2023 by the President of the Family Division concerning cases involving both child abduction proceedings and protection claims and appeals. The aim of the guidance is to ensure that the case management of child abduction proceedings is conducted in a manner that will enhance decision making in both jurisdictions where there are related applications.
c. Third, the Senior President of Tribunals has also issued ***guidance*** specific to appeals where an application under the CACA 1985 has been made in respect of a child who is an appellant or family member of an appellant in a protection appeal brought under the NIAA 2002. The guidance highlights the duty of the parties under the Tribunal Procedure Rules before the First-tier Tribunal and Upper Tribunal to help the Tribunal to further the overriding objective and to cooperate with the Tribunal generally.

Court grants parental responsibility to a Step Father living in New Zealand

A v M & Ors [2024] EWHC 2020 (Fam) (31 July 2024)

This case featured 8 members of 4PB: Christopher Hames KC and Ralph Marnham for the applicant step father, Mark Jarman KC and Mani Singh Basi for the first respondent mother, Teertha Gupta KC and Indu Kumar for the second respondent aunt, Frankie Shama and Alex Halliday for the third respondent father.

1. The court was concerned with two children, D aged 14 and K, aged 10 who are half siblings. The applicant is a New Zealand national and the children's step father. Their mother is a British national presently living in New Zealand.

2. There were previously 1980 Hague Convention proceedings whereby the applicant was seeking the children's return to New Zealand. The children travelled to England without notice to the applicant and came to England where they have been living with their maternal aunt and continue to do so. In March 2024 the applicant withdrew his application for a summary return of the children to New Zealand. Instead he sought for his parental responsibility in respect of both children to be recognised which was refused by the court. The judgment of this decision is ***R v M (Hague Convention; Withdrawal of Application and Art. 16 (Parental Responsibility))* [2024] EWHC 720 (Fam).**

Basic facts

3. The biological fathers of D and K live in England and were the third and fourth respondents in this matter. Both children currently spend time with their biological fathers regularly whilst living with their maternal aunt.

4. The mother took D and K to live in New Zealand in 2016. The parties were married in New Zealand in 2017 and had a child in 2018 and in 2018 the applicant and mother made a joint application to the family court in New Zealand so that the step father could be a Guardian for

D. In 2023 the relationship broke down and the mother left the family home in New Zealand.

5. The applicant applied in August 2023 to the family court in New Zealand and sought to care for the children. An interim shared care order was made dividing the children's time between the mother and the applicant step father. The judgment of the family court in New Zealand noted that K, in particular, views the applicant as her "dad". Within a month of this order being made, D and K were removed to England. The mother remained in New Zealand.

Legal framework

6. This is a useful judgment for practitioners in that it summarises the law relating to the granting of a parental responsibility order to a step parent. It is set out from §13 -§23 in detail within the judgment but the key principles are outlined below:

> *"The applicable law is settled but requires to be stated. The application is made pursuant to section 4A(1)(b) of the Children Act 1989:*
> *4A Acquisition of parental responsibility by step-parent.*
> *"(1) Where a child's parent ("parent A") who has parental responsibility for the child is married to, or a civil partner of, a person who is not the child's parent ("the step-parent")—*
> *(a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or*
> *(b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.*
>
> *Applications for a Parental Responsibility Order are determined in accordance with the paramountcy principle at section 1(1) of the Children Act 1989. The Court of Appeal in Re H (Parental Responsibility) [1998] 1 FLR 855, at para. 94 identified the following three factors to consider, emphasising that they are a "starting point and non-exhaustive":*
> *i. The degree of commitment the applicant has shown towards the child;*
> *ii. The degree of attachment to the child;*
> *iii. The reasons for their application."*

Application to the facts

7. The children had been joined as parties and their Guardian had prepared two reports relating to the issue of parental responsibility by the time of the final hearing.

8. The Guardian did not support the application noting that to grant parental responsibility in this matter would add a further layer of complication to an already complex matter where there are already several adults with parental responsibility and where some of the adult relationships are strained. It was noted that D, now aged 14, wished to have some autonomy over his life in order to absorb the changes that had taken place.

9. The Guardian noted that the application was born out of the applicant's love and concern for the children but did not agree that the orders should be granted for either child. However, the Guardian supported the applicant being key informed of the children's progress and wellbeing.

10. In respect of K, her relationship with her biological father had only just commenced relatively recently and whilst it was going well, the court noted it was at its earlier stages. The court was clear that K had regarded the applicant as her father and that he should be a significant feature in her history and part of her evolving identity.

11. Having considered the legal principles and the facts of this particular case, the court did not grant a parental responsibility in respect of D, noting the need to respect his autonomy and wishes at the age of 14, but did grant parental responsibility to the applicant in respect of K. The judge noted that there was a great deal of evidence of the applicant's real understanding of and focus upon K's welfare needs and it was in her best interests for the order to be made.

Jurisdiction arguments when a child was removed to Poland during care proceedings

London Borough of Haringey v T (1996 Hague Convention Art 7) [2024] EWFC 151

This case involved five members of 4PB: Christopher Hames KC and Clarissa Wigoder for the Local Authority; Henry Setright KC for the first respondent; and Mark Jarman KC and Charlotte Georges for the third respondent.

This case concerned the issue of jurisdiction in care proceedings under Part IV of the Children Act 1989 following the removal of the child from the jurisdiction to Poland during the course of care proceedings in which an Interim Supervision Order had been granted.

The issues that fell to the court to determine were:

a. Whether T was now habitually resident in Poland;
b. Whether the court retained jurisdiction in respect of T by operation of Article 7 of the 1996 Hague Convention.
c. If the court did retain jurisdiction, whether the court should request that Poland assume jurisdiction, pursuant to Article 8 of 1996 Hague Convention.
d. If the court did not retain jurisdiction, what steps the court should take upon losing jurisdiction.

Habitual residence

The court was clear that the first question which falls to be determined is whether the child has acquired habitual residence in another state. The court did not accept the Guardian's submission that the issue of acquiescence should be addressed first, with questions of habitual residence being rendered irrelevant in the event the court is satisfied the relevant person has acquiesced. On the contrary, Article 7 is clear that the inverse is correct: habitual residence should first be established. If habitual residence in another state has not been acquired, then the question of acquiescence under Art 7(1)(a) is never reached. This was in line with Moylan LJ's view in *Hackney v P & Ors (Jurisdiction: 1996 Hague Child Protection Convention)*.

The court concluded on the particular facts of the case that T was now habitually resident in Poland. Accordingly, the position was that court had lost jurisdiction in respect of T unless Article 7 of the Convention had operated to retain jurisdiction.

Article 7

For Article 7 to operate and retain jurisdiction, the removal of T must have been wrongful, his habitual residence must have changed, and a person, institution or any other body holding rights of custody must have acquiesced to his removal.

Pursuant to Article 7(2), for removal of T to have been wrongful, it must have been in breach of rights of custody attributed to a person, institution or other body and those rights must have been being actually exercised or would have been so exercised but for the wrongful removal. The father's rights of custody had been breached, but he had acquiesced, so the question was whether rights of custody had been attributed to the court by virtue of them being seized with care proceedings under Part IV Children Act 1989.

The court decided they did. In reaching that conclusion the court drew on cases concerning rights of custody for the purposes of Art 3 of the 1980 Hague Convention, and concluded that the same conclusion followed with Article 7 of 1996 Hague Convention. This is right from a policy perspective to prevent one parent pre-empting the final decision of the court by removing the child from the jurisdiction unilaterally, and that removal being determinative. The court was further satisfied that, by virtue of the court actively case managing the care proceedings at the time of the removal, the court was actively exercising its rights of custody.

The court did not consider that they had, to date, acquiesced to the wrongful removal of T from the jurisdiction. Once again, most of the case law which considers the test for acquiescence arises in the operation of the 1980 Hague Convention (in particular, Art 13), the seminal authority remaining *Re H* [1998] AC 72. That case could be readily distinguished as the question in the present case was whether the court, not a parent, had acquiesced.

In those circumstances, the court considered that an objective test based on actions taken or not taken by the court was more attractive than a requirement to search for the subjective intention of the court. The actions,

and often the reasons for those actions, are formally recorded in contemporaneous orders, and that should be taken at face value. Whilst the court had not made an order of its own motion requiring T to return to the jurisdiction, the court had continued to actively case manage and give anticipatory directions in respect of placement orders. The court was therefore satisfied that by operation of Art 7 of 1996 Hague Convention, the court retained jurisdiction conferred by Art 5 when T was habitually resident in this jurisdiction.

Art 8 request or declaration of acquiescence

The final question for the court was what should be done with respect to that retained jurisdiction and whether that is done by operation of Art 8 or Art 7.

The 1996 Hague Convention expressly provides in Arts 8 and 9, a mechanism by which jurisdiction can be transferred from one Contracting State to another where one retains substantive jurisdiction but it may be more appropriate for the other State to exercise that jurisdiction. The test in Art 8 centres around the extent to which the Contracting State to whom the request is made is best placed to assess the child's best interests and the nature and extent of the links between the child and that State.

By contrast, Art 7 considers the question of whether jurisdiction *has* moved, not whether it *should* move, and is not itself a transfer provision. It follows that Art 7 does not contain a test for whether a body or other institution holding rights of custody *should* acquiesce to wrongful removal, and the court declined to construe an autonomous test. The court did not consider that simply by declaring acquiescence the court would confer jurisdiction on Poland. The court was satisfied that was not the intended use of Art 7(1)(a), and that rather, the question of jurisdiction in respect of protective measures is properly asked and answered under Art 8 and 9 of the 1996 Hague Convention.

Art 8

Having applied the proper test in Art 8, the court was satisfied that the test for requesting that Poland assume jurisdiction in respect of T was made out and the mother's application should be granted. There was clearly a connection between the child and the requested state, Poland were, in the court's view, better placed to assess the child's best interests, and indeed

the Polish authorities had already engaged with T and undertaken a welfare visit.

Forced Marriage: clarification of the guidance and the role of agencies

MAS v ZK & Ors [2024] EWHC 1939 (Fam)

Teertha Gupta KC, Mani Singh Basi and James Nottage appeared *pro bono* for Karma Nirvana

This case concerned a young person who asserted she was at risk of harm and forced marriage at the hands of her parents. Whilst on a trip abroad in "Country X", the young person escaped from her parents. She had no connection to Country X. She was taken to a children's home where she remained for 5 months until she returned to this jurisdiction.

There were concurrent proceedings in Country X (issued by the young person's parents) and in this jurisdiction. The High Court of England and Wales made a Forced Marriage Protection Order, and Wardship and Tipstaff orders. Several requests were made to various authorities to assist with the young person's repatriation pursuant to the 1996 Hague Convention.

After some months, the parties were informed by the relevant authorities in Country X that the young person had to be collected by a UK state official. They were able to return because the designated local authority agreed to send a social worker to collect the young person. Notwithstanding the young person was safely returned, this case highlighted the lack of clarity as to which public body should have taken the lead in securing the child's return to this jurisdiction in circumstances where Country X would only agree to her return if officials collected her.

This judgment was guidance on that issue.

The court recognised that there is already an abundance of substantive guidance by way of guidance documents, and the court was clear it did not intend to amend that guidance, rather to draw together the various conclusions of the agencies. The judgment contains a helpful summary of several key documents and is particularly useful reading for cases involving the Foreign, Commonwealth and Development Office (FCDO) and the Forced Marriage Unit (FMU).

The key guidance documents to assist practitioners are:

1. “Liaison between Courts in England and Wales and British Embassies and High Commissions Abroad” signed by Sir Andrew McFarlane, dated 14 March 2022.
2. Multi-agency Statutory Guidance for Dealing with Forced Marriage (Updated 13 April 2023) issued under s63Q(1) of the Family Law Act 1996.
3. Multi-agency Practice Guidelines: Handling cases of Forced Marriage’ issued under s63Q(1) of the Family Law Act 1996.
4. “Consular assistance: how the Foreign, Commonwealth & Development Office provides support”, dated 31 August 2022

The following are the key takeaways from those guidance documents:

1. The court cannot order the FCDO to exercise consular assistance, and there is no general duty for the FCDO to provide consular assistance to British nationals.
2. The FCDO provides a facilitative role in relation to the return of the child but is not able to care for, take control of, or assist in procuring the return of the child.
3. FCDO can issue Emergency Travel Documents to British citizens if they meet eligibility criteria.
4. FCDO can provide advice on repatriation. Financial assistance can be considered in exceptional circumstances.
5. Where a child is stuck in a country to which they have no connected and sought protection from their parents and the Hague Convention does not apply, the actions permitted on the part of UK parties will depend on the law, procedure and practice of the other country, the individual situation of the young person, and what the UK court envisages will happen to the young person on their return.
6. The FMU and, where appropriate, the FCDO including its Child Policy Unit is best placed to advise where country-specific advice is required.
7. Where an application for a Forced Marriage Protection Order is required or made by a child, it is usually appropriate (as understood to have happened in this case) for the Local Authority to be made a party to the proceedings, and to take responsibility for any steps required to progress the case, seeking external assistance or advice as necessary.
8. Police officers are not generally able to exercise their powers as police constables outside this jurisdiction.

9. Where there hasn't been an opportunity for all potentially involved agencies to meet prior to the first hearing, the role of the agencies should be considered at the first hearing when directions are being sought.
10. The FCDO should be notified in advance of any application in which their involvement may be sought so that their ongoing input can be discussed, and if not agreed, considered by the court. There should not be an assumption that FCDO should take the lead role unless circumstances clearly warrant it or they have agreed or been directed to take it on.
11. In the majority of cases which concern repatriation of a child/young person in circumstances where the country in question will only release the child/young person to a State official, the local authority will have a crucial part to play in leading and managing the process.
12. Local authorities should engage as appropriate and identified in the guidance documents with the FCDO and FMU and identify as quickly as possible what information is required and which agency is best placed to liaise and engage with the overseas country involved. If there is an opportunity to do that in advance of the matter coming before a court, then that should be taken.

Overall, this court concluded that each case will have to be tailored to the individual facts and circumstances to ensure that matters are acted upon swiftly and effectively. All agencies will need to be aware of their responsibilities and powers and be willing to engage, without reluctance, once the circumstances requiring intervention have been established.

Mental Health and Article 13b

Re A and R (1980 Hague Convention: Return to Australia) [2024] EWHC 2190 (Fam)

The respondent mother was represented by Mani Singh Basi.

Mr Justice Cobb considered an application by the applicant rather for the return of two children aged 5 and 3 to Australia. The respondent mother opposed the application, relying on the following arguments:

a. That immediately before the alleged retention, the children had become habitually resident in England;

   Or alternatively

b. That a return of to Australia would expose them to a grave risk of physical or psychological harm, or otherwise pace them in an intolerable situation (article 13(b)) as a consequence (relying on allegations of domestic abuse against the father and her own mental ill-health and the risk to A and R if she were to return, or if they were to return without her).

Cobb J sets out the background at paragraphs 7 – 28. The father is an Australian citizen farm manager, working 40 to 50 days a year in England at an international event. The mother is a British national with Australian citizenship. She has worked at the same international event as the father in an operational role. The parents met at this event 20 years ago and then married in 2017. The children have dual British and Australian citizenship. The mother's case is that this relationship was characterised by controlling and coercive behaviour by the father towards her. The alleged abuse included physical, emotional and sexual abuse of her.

The mother travelled to England with the children in April 2023 for an agreed extended trip. The father joined them between June and July. In September, the mother saw her GP in England and reported feelings of not wanting to go back. It was during this time that the parties' relationship ended and they entered discussions about the children's future. The mother

was prescribed anti-depressant medication. On 3 November 2023, the mother confirmed she would return to Australia by email. On 18 November 2023, the mother emailed the father advising him she would no longer return to Australia with the children. The agreed date of retention is 19 November 2023.

The father applied to the Australian Central Authority in December, but delays to ICACU meant his application was not submitted until 1 July 2024.

At the first hearing, before Pool J, the mother was given permission to instruct a consultant psychiatrist to undertake an assessment of her. Dr McClintock's report suggests that the mother has developed "*an "adjustment disorder", sometimes known as reactive depression ("the psychological symptoms which arise out of a marked reaction to a life event which is perceived as unpleasant" – i.e., the prospect of a return to Australia)*"

Outcome

Habitual residence – Cobb J concluded that although the children had spend time with their maternal family, the evidence did not support a conclusion that their lives in England had acquired such a degree of stability, or had become so integrated into English life, as to change their habitual residence.

The court then considered Article 13(b). Cobb J concluded there was little independent evidence in relation to the mother's case of domestic abuse and if anything, there was significant email correspondence of a different tone. The evidence of Dr McClintock did not support the mother's case. The parties had agreed a suite of possible protective measures should they be relevant. Cobb J was satisfied that the undertakings offered by the father would be capable of ready enforcement in Australia and offer "*immediate protection from the father's alleged conduct*". With reference to the mother's fears of a deterioration of her mental health in the event of a return, the court was satisfied that this could be managed sufficiently though access to medical and therapeutic services in Australia.

Cobb J concluded that "*a return of the children would not create a grave risk to them of exposure to physical or psychological harm; I do not find that a return would otherwise place them in an intolerable situation. The mother's case in this regard has been more than adequately addressed and answered by the father in the ways I have set out above*". The court ordered the summary return of the children to Australia.

Unsuccessful Article 9 application to transfer proceedings from Malta

***Re E v D (Child: Transfer of Proceedings Art. 9 of Hague Convention 1996)* [2024] EWHC 2422**

Chris Barnes appeared on behalf of the applicant father. Harry Langford appeared on behalf of the respondent mother.

HHJ Moradifar, sitting as a judge of the High Court, considered an application by a father of an 8 year old child to transfer proceedings to this country. The central issue for the court to decide was whether the courts of England and Wales are better placed to assess the welfare of the subject child within the meaning of Article 9 of 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*.

As applications under Article 9 are uncommon, the judge provided a helpful summary of the applicable principles of the law that were relevant to this case:

a. The 1996 Hague Convention embodies the principle of cooperation between the authorities of its Contracting State to achieve the purposes of this Convention that includes determination by the State that is to have jurisdiction to take measures for the protection of the child and his/her property. (Article 1).
b. Such measures include the rights and custody, determination of the child's residence and access (Article 3).
c. Protective measures may be taken by a contracting State where the child is habitually resident (Article 5).
d. The Contracting State with jurisdiction under Article 5 (and 6) can request that another Contracting State to exercise jurisdiction by taking protective measures in some circumstances that includes the child being a national of the Contracting State that is receiving the request or with which the child has a substantial connection (Article 8).
e. The proposed receiving State can also request a transfer of jurisdiction from a contracting State in which the child is

habitually resident and may exercise such jurisdiction if the latter authority has accepted the request (Article 9).

f. The test to be satisfied before such a request is made under Article 9 is whether the contracting State considers that it is better placed to 'assess the child's best interests". In other words, applying the Article 15 BIIA ratio in *Child and Family Agency v D (R intervening) (ECJ)* [2017] 2 WLR 949 any proposed transfer will provide a genuine added value on the specific facts of the case.
g. Requests under both Articles 8 and 9 may be made directly with assistance of Central Authority of each State or by invitation to the parties to introduce the request.
h. The authorities (courts) of the Contracting State proceed on the principle of comity, mutual respect and acceptance that the authorities (courts) of each jurisdiction are competent and able to hear the case.
i. The approach is similar to Article 15 of BIIA. [*Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam)].
j. When hearing an application for transfer, the court is not questioning the *"competence, diligence, resources or efficacy of either the child protection services or the courts"*[per Baroness Hale in *N (Children)* [2016] UKSC 15].
k. The draft of the text of Articles 8 and 9 are written in the supposition that the authorities of the State of the child's habitual residence have not had their jurisdiction invoked. However this does not exclude an application under Article 9 when there are proceedings before the courts of the Contracting State with primary jurisdiction (*Rapport explicatif de Paul Lagarde*).

The background to this case had been set out previously by McDonald J in *E v D* [2022] EWHC 1216 (Fam). These were long running proceedings, with proceedings also ongoing in Malta. The child was born in this country, with Canadian and British nationality. The family lived in England until the child was 17 months old, when they moved to Canada in 2017. The family then moved to Malta in May 2019. The father travelled to London with V in December 2021 and wrongfully retained him, before McDonald J ordered his summary return until the provisions of the 1980 Hague Convention.

The child was retuned in April 2022, with the Maltese courts engaged by June 2022. There has been litigation in Malta since, with various

applications. The father had sought for the child to be ordered to lvie with him in the UK. The father made his application for the transfer of proceedings to this country.

The father relied, inter alia, on arguments that the unfortunate delay in the Maltese courts meant it would be unconscionable and manifestly contrary to the child's welfare to allow those proceedings to continue for another two or three years. The father argued that the child had expressed a wish to move back to the UK and was suffering emotional harm by trying to integrate into a school where he does not speak the language.

The mother agrued that the question is not one of the competence of the Maltese courts and that the father's application hides his real motivation. She argued she may not receive legal aid in England and would not be able to fund proceedings privately. Further, she argued that the claims of delay in Malta were not accurate, and that there are concerning delays in this jurisdiction in any event.

The judge stated it was not the function of the High Court to undertake a welfare analysis of the child, but rather to assess if the courts of this jurisdiction can "*add real value or in Convention terms are better placed to hear the application*". The judge was not satisfied that it would be better placed and dismissed the the father's application, strongly encouraging the parties to reflect on the conclusions of a psychological report which stated the child was suffering trying to protect both parents.

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