4pb For Family

INTERNATIONAL CHILDREN LAW UPDATE

WINTER/EARLY SPRING

2024

Table of Contents

CONTENTS

Welcome to the first edition of the 4PB International Update: Winter/Early Spring Edition. This edition is authored by Indu Kumar, Lucy Logan Green, Harry Langford and Nadia Campbell-Brunton.

This update will consider a range of key areas within International Children Law including 1980 Hague Convention abduction proceedings, jurisdiction under the 1996 Hague Convention and summary returns under the Inherent Jurisdiction. The key areas covered within this update are as follows:

EDITOR

INDU KUMAR

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.

Read more

AUTHORS

LUCY LOGAN GREEN

Lucy specialises in cases concerning children. She acts in both public, private and international children law cases. Lucy appears in the High Court representing both applicants and respondents to cases brought under the Hague Convention alongside cases involving child abduction to non-Hague countries. Lucy was named a rising star in the 2024 Legal 500.

Read more

HARRY LANGFORD

He now accepts instructions in all of Chambers' core practice areas and has appeared at all levels of the family courts up to and including the Court of Appeal.

Harry appears in the High Court in child abduction matters pursuant to both the 1980 Hague Convention and the Inherent Jurisdiction. He also regularly appears for parents in cases before the Family Court concerning the international relocation of families.

He recently appeared in the Court of Appeal (Moylan, Baker and Phillips LJJ) in the case of Re B [2020] EWCA Civ 1187, [2020] 4 WLR 149 concerning third state returns under the 1980 Hague Convention.

Read more

NADIA CAMPBELL-BRUNTON

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.

Read more

SOLICITOR-GUARDIANS IN 1980 HAGUE CONVENTION PROCEEDINGS

Re D (A Child) (Abduction: Child's Objections: Representation of Child Party) (Rev1) [2023] EWCA Civ 1047 (14 September 2023)

C v M (A Child) (Abduction: Representation of Child Party) [2023] EWCA Civ 1449 (01 December 2023)

1. These two appeals, which were heard together in the Court of Appeal, concern the scope and role of solicitors who are appointed as the Guardian for children who are subject to child abduction proceedings. This hybrid form of representation is referred to as the "solicitor-guardian". They featured 12 members of 4PB: Ruth Kirby KC, Adele Cameron-Douglas, Miriam Best, Mark Jarman KC, Mani Singh Basi, Chris Hames KC, Charlotte Baker, Indu Kumar, Henry Setright KC, Harry Langford, Michael Gration KC, and Michael Edwards.

Re D

2. In Re D (A Child) (Abduction: Child's Objections: Representation of Child Party) **(Rev1) [2023] EWCA Civ 1047** the appellant was the child (D, aged 13) appealed against a return order that he return to care of the first respondent mother in Singapore on her application under the 1980 Hague Convention.

3. D was joined as a party to the proceedings and D's solicitor was appointed as D's guardian. A Cafcass officer provided a report which stated that the father's behaviour had resulted in D's decision. The judge at first instance (Mr Dias KC, sitting as a Deputy High Court Judge) expressed concern about the appropriateness of the solicitor-guardian giving opinion evidence. He held that he could not give weight to the solicitor-guardian's evidence as he was not qualified to give opinion evidence. The judge found that D objected to being returned to Singapore but concluded that he had been unduly influenced by the father. He therefore exercised his discretion to make a return order, notwithstanding the objection.

4. D submitted on appeal that the judge's decision was flawed as he had not analysed the strength of D's objections because of: (i) his concerns about his qualifications to give opinion evidence; (ii) that the judge had erred in attaching limited weight to the views of a child who was Gillick competent on the basis that he had been exposed to the father's undue influence; and (iii)that the judge had been wrong in the approach he took to D's welfare when exercising his discretion.

5. The court held that the judge's determination that the solicitor-guardian should not have given expert evidence tainted his decision on the question of the weight as to render his decision "unsustainable" [75]. The matter was therefore remitted for a re-hearing.

6. The court suggested that a committee should be set up to make recommendations as to the process to be adopted for the joinder of a child and the appropriate role of a solicitor appointed as a child's guardian. There was force in the submission that D should not have been joined as a party at the first hearing. It was advisable, absent strong reasons to the contrary, for a child to be seen by Cafcass before a decision was taken as to party status.

7. The court held that on the facts that a judge was entitled to give little weight to a Gillick-competent child's views if he concluded that those views had been influenced by parental pressure.

C v M

8. In C v M (A Child) (Abduction: Representation of Child Party) **[2023] EWCA Civ 1449** the Court of Appeal considered a case in which the older subject child (X, aged 12) was joined to proceedings and represented by her solicitor as a solicitor guardian. The solicitor guardian prepared evidence setting out her opinion as to X's wishes and feelings and her objection to a return to Mauritius. The judge at first instance (Theis J) accepted X's solicitor-guardian's evidence and declined to order a return on the basis of X's objections; and on the basis of an Art. 13(b) risk to both children.

9. The Appellant father appealed in relation to (i)the admissibility of the solicitor-guardian's evidence and (ii) the weight given to it by Theis J.

10. The Court of Appeal noted that, as in Re D, the general issues which have been identified are: (a) the appropriate nature of the role of a solicitor when acting as a solicitor-guardian, in particular, in respect of the scope of the evidence they adduce; and (b) the process which should be adopted in respect of a child being joined as a party to private law proceedings.

11. Moylan LJ held [91] that at present solicitor-guardians "..should not seek to give opinion evidence beyond that necessary to explain why they consider a child competent to instruct them (under r.16.6(3)(b)(i)). I appreciate that the April 2022 Guidance, at paragraph 7, refers to the need for a solicitor to be "alert to the potential influence of the parent or person who has brought the child to see them, both before proceedings have been initiated, and once they have started". But that is for the specific purposes of deciding whether a child "is competent or has sufficient understanding to conduct proceedings". It is not for any wider purpose. At present, solicitor-guardians should confine their evidence to setting out the child's perspective or views as relayed through their instructions. If they seek to go further, the express permission of the court should be sought in advance so that the issue can be properly considered in the context of the individual case."

12. The court noted that it would only be rarely necessary for a child to be joined to proceedings and that "their voice would typically be sufficiently heard and their views sufficiently conveyed through a Cafcass report" [78]

13. The court held that that decision should be considered at the first substantive directions hearing [79] but held that it is clearly preferable, and advisable absent strong reasons to the contrary, for the child to be seen by the Cafcass High Court Team before any decision was taken as to party status.

14. The court held that non-expert opinion is admissible as evidence of perception under s.3 of the Civil Evidence Act 1972 and s.1 of the Civil Evidence Act 1995.

THE DATE FOR DETERMINING HABITUAL RESIDENCE

London Borough of Hackney v P & Ors (Re Jurisdiction: 1996 Hague Child Protection Convention) [2023] EWCA Civ 1213 (19 October 2023)

1. This case featured four members of chambers: Henry Setright KC, Jacqueline Renton, Charlotte Baker and Frankie Shama.

2. The landmark judgment authoritatively determined the relevant date for establishing jurisdiction under Art. 5 of the 1996 Hague Convention, an issue that has troubled the High Court since the UK left the EU.

3. It has also reached important conclusions about the jurisdiction to make public law orders in care proceedings, where a child is habitually resident elsewhere but present in England and Wales. This case is of significance for children's law disputes with an international element.

4. The child, H, born in France in 2009, had moved to Tunisia in 2017 to live with her paternal grandmother. In 2021, the child arrived in England to stay with her paternal uncle but was quickly removed into foster care. Public law orders were made. At the outset of the proceedings, the local authority identified jurisdiction as a live issue requiring determination.

5. The paternal grandmother subsequently issued proceedings for the summary return of H to Tunisia. This application was later dismissed.

6. Macdonald J at first instance dealt with three substantive issues:

    i. The jurisdictional scheme under Chapter II of the 1996 Convention does apply to care proceedings under Part IV Children Act 1989 and applies to proceedings even where the rival jurisdiction is a non-convention state.

ii. Even if the jurisdictional scheme did not apply, the common law jurisdiction based on the presence of the child would subsist, notwithstanding that it is not expressly addressed within the 1996 Convention.

iii. The relevant date to determine habitual residence for the purposes of establishing the court's jurisdiction pursuant to Article 5 of the 1996 Convention "is the date of the hearing".

7. On appeal, the Court of Appeal determined the following:

   a. That the 1996 Convention "clearly" applies to public law children proceedings [92].
   b. That the 1996 Convention is the "first port of call" even where the rival jurisdiction is a non-convention state albeit that there are significant differences in the manner in which the Convention is applied depending on whether the rival jurisdiction is or is not a Contracting State [93].
   c. If the child is habitually resident in another Contracting State to the Convention, that State has substantive jurisdiction under Article 5 and it is open to the English court to request a transfer of jurisdiction pursuant to Article 9 [95]. If the child is habitually resident in a **non**-Contracting State, Article 5 does not apply. In such a case, the court may have jurisdiction under Article 11 or alternatively, jurisdiction can be established based on presence under our domestic law [96-97/109].
   d. In order to provide clarity and certainty as to the relevant date, this should be determined by reference to the date on which proceedings were commenced [113].
   e. Finally, that in relation to the issue of the **loss or acquisition of jurisdiction** during the course of proceedings:
      i. a Contracting State can lose jurisdiction under Article 5 during the course of proceedings if the child ceases to be habitually resident. Article 5 jurisdiction would have be acquired in a non-Contracting State, however the court acknowledged that this was unlikely to cause difficulties given that if a child moved to a non-Contracting State during the course of proceedings, it would likely be a move sanctioned by the court. If it was as a result of removal then clearly this assumption does not apply.
      ii. a court can gain jurisdiction during the course of proceedings either pursuant to Article 5 (for Contracting States) or by reason of the child's presence (for non-Contracting States). The acquisition of habitual residence in England and Wales will depend on the circumstances of the individual case, including whether the child was previously habitually resident in a Contracting or a non-Contracting State and whether there are or are not extant proceedings in that State [124].

TRANSFER OF WELFARE PROCEEDINGS UNDER ARTICLE 7 OF THE 1996 HAGUE CONVENTION

B v N (No. 2) (Article 7 and Transfer of Jurisdiction) [2024] EWHC 17 (Fam)

1. This case featured four members of chambers: Cliona Papazian and Lucy Logan Green for the Applicant and Teertha Gupta KC and Harry Langford for the Respondent.

2. MacDonald J disagreed with the decision in A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention) **[2021] EWHC 581** and allowed the transfer of private children proceedings to Germany under the 1996 Hague Convention, after the wrongful removal of the child from England.

3. The case concerned X, a nine-year old boy, who at the time of the hearing was living with his father (the applicant) in Germany. The mother, who was Ugandan, remained in England, where she had travelled in 2020 from Germany with X and two younger children.

4. The father sought permission to withdraw his application under the 1980 Hague Convention for the return of X to Germany (this having been achieved by the father unlawfully removing X from England and Wales to Germany without the mother's consent during the course of proceedings). The mother sought X's return to England and orders under Part II of the Children Act 1989. The mother had previously applied for X's summary return in Germany, which was refused by the German courts on the basis that X objected to being returned to England & Wales.

5. At the outset of the final hearing, the father conceded that the English court retained jurisdiction under Article 7 of the 1996 Convention. The question for the court to determine therefore was what was the proper forum for the determination of the welfare dispute between the parents: Germany of England & Wales?

6. The father sought for jurisdiction to be transferred to Germany pursuant to Article 8(1). The mother argued that this case fell outside the scope of Article 8(1) because the English court retained jurisdiction under Article7(1). The mother, in making this submission, relied upon the decision of Arbuthnot J in A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention).

7. On behalf of the father it was submitted that the Arbuthnot J decision is incorrect. There are numerous recent High Court decisions in which the question of transfer of jurisdiction was addressed under Article 8(1) notwithstanding that in each case the English court retained jurisdiction pursuant to Article 7 [28]. The court should prefer this approach to that taken in A (A Child) as being as being consistent with the need to interpret and apply the 1996 Convention purposively in a manner which supports the protection of children and their welfare interests. A strict approach cannot be applied.

8. The court determined that the case did come within the scope of Article 8(1) and that the appropriate course was for the German courts to assume jurisdiction due to being in a better position to assess X's best interests. The court reiterated in its closing paragraph that its decision should not be seen as a vindication of the father's actions, which it described as "a blatant and cynical child abduction" [75].

RESILING FROM AGREEMENTS IN ABDUCTION PROCEEDINGS

Re T (Abduction: Protective Measures: Agreement to Return) [2023] EWCA Civ 1415

1. This case featured five members of chambers: Teertha Gupta KC, Paul Hepher and Emma Spruce for the respondent father and Jacqueline Renton and Mani Singh Basi intervening for Reunite.

2. The Court of Appeal addressed the applicability of Rose v Rose and Xhydias v Xhydias, both decisions taken in the financial remedies sphere, concluding that they are of limited application in relation to contested 1980 Hague Convention proceedings. In so concluding, the court cited the following reasons:

    a. There is a fundamental difference in stake between parties' marital assets and the future of a child/children;
    b. Both Rose and Xhydias related to agreements which had been extensively negotiated prior to the agreement being reached and each lawyers' activity prior to the agreement had been focussed upon trying to achieve settlement;
    c. The approach to compromise e.g. setting out details of offers and responses prior to court in financial remedy proceedings is unlikely to be transposable to a determination governed by the best interests of a child;
    d. The FDR process which led to the agreement in Rose is specifically designed for the purposes of discussion and negotiation. This stands in direct contrast to negotiations at the door of court prior to a contested final hearing.

3. In any event, the Court of Appeal determined that both Rose and Xhydias were materially distinguishable from the facts of this case in which:
    a. There was a materially incomplete agreement about the mother's return to the USA;
    b. The essential building blocks of an agreement were missing (unlike in Xhydias). In this case, the agreement was absent details about the manner in which protective measures would be implemented/rendered enforceable in the USA.
    c. There was no early judicial-led early neutral evaluation which stimulated the so-called agreement and the judge herself acknowledged that she had not "analysed" the evidence before her (unlike Rose).

4. The matter was accordingly remitted for case management directions and final hearing.

5. Further, the judgment helpfully reinforces the proper practice and approach to protective measures designed to ameliorate the risk when a respondent is relying upon the defence under Article 13(b). In the judgment at [45] onwards the summary will be of assistance to practitioners. Specifically it summarises the need to deal with the issue of protective measures early and to consider from the outset whether they will actually be effective. The court will need to consider "in concrete terms" the situation which a child will face upon a return. In deciding what weight can be placed on undertakings as a protective measure, the court will take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance [47].

COMMITTAL AND ABDUCTION PROCEEDINGS

Re XZR (Abduction: Hague Convention (Lithuania)) [2024] EWHC 64 (Fam) (17 January 2024)

1. This case featured Harry Langford (for the mother) and Olivia Gaunt (for the father).

2. The mother sought the summary return of her five-year-old child to Lithuania from the UK. The child, born in the UK in 2018, had moved to Lithuania with the mother in 2019. In 2022, the Lithuanian court refused the father's own Hague application for the child's return to the UK, finding that the father had consented to the child's relocation to Lithuania, and that the child faced grave risk of harm if returned to the UK due to the father's history of violence against the mother and child. Subsequently, in 2023, the Lithuanian court ordered supervised contact between the father and child. The father went on to abduct the child to the UK during a scheduled supervised contact.

3. The father at the outset of the hearing indicated to the court (Mr Bowen KC sitting as a Deputy High Court Judge) through counsel that he would refuse to comply with court orders and threatened to frustrate the process by hiding the child in the event that a collection order was made. The father was notified that his expressed refusal to comply with any court order, and his stated intention to frustrate any order if made, might constitute a contempt of court and that he was under arrest. He was ordered to surrender his phone to the tipstaff so that he could not contact anyone who might frustrate the court's order (see [48]). The judge made a collection order prior to hearing submissions on the making of a return order in order to secure the physical safety of the child.

4. The court held that the father had failed to demonstrate a grave risk of harm to the child's safety under Article 13(b) of the Convention. Despite restrictions on the father's contact being in placed on him in Lithuania due to his previous violent behaviour, there was no absolute bar on contact (which was restricted to indirect contact only after the removal of the child), and that Lithuanian court order was subject to variation in Lithuania. As the Lithuanian court had jurisdiction and the father had been afforded procedural fairness in Lithuanian, the child's return was ordered.

5. The court held that the father's position as communicated to the court at the outset of the hearing constituted potential contempt. Given the urgency, and to prevent the father from disrupting the child's return, the court initiated proceedings against the father for contempt of its own motion. This power exists pursuant to Rule 37.6(1) of the Family Procedure Rules 2010. And pursuant to Rule 37.6(4) the ordinary procedure to be followed can be dispensed with if the Court directs otherwise. Where there is an emergency situation as described in this matter, the court plainly has the power to commit where there has been evidence of contempt in the face of the court. At [50] of the judgment it is noted that the relevant factors were considered in EBK v DLO **[2023] 4 WLR 51**, [72], namely: the strength of the case; the public interest; the proportionality of proceedings; and the overriding objective. The court noted that the best interests of the child concerned should also be considered a relevant factor.

6. Bail was denied due to concerns for the safety of the mother and child and the father was imprisoned at the conclusion of the hearing to allow the mother's return with the child to Lithuania: the court held that the father's behaviour warranted immediate action to safeguard the child's welfare and ensure compliance with its orders.

7. This decision reiterates to practitioners that the High Court will be prepared to utilise a whole host of orders, including committal, where a party makes plain that they will wilfully frustrate orders of the court.

PARENTAL STATUS AND JURISDICTION

Re S (Children: Parentage and Jurisdiction) [2023] EWCA Civ 897

1. This case featured three members of chambers: Jacqueline Renton and Nadia Campbell-Brunton for the respondent and Michael Gration KC for the intervener (Reunite).

2. The children, born in the UK between 2008 and 2013, were conceived by fertility treatment and are now habitually resident in a Gulf State. The applicant (later appellant) was the civil partner of the respondent at the time the children were born. She was not on the birth certificates. The civil partnership was dissolved in 2016 with a limited financial order made by consent.

3. In 2022, the appellant applied for a child arrangements order under s.8 of the Children Act 1989 seeking to spend time with the children. She sought to argue that her status as a same-sex parent prevented her from applying to the court in the Gulf State and that English courts had jurisdiction under the Family Law Act 1986 ("FLA 1986"). She also applied for permission to invoke the court's inherent jurisdiction stating she would have no other means of having her parental rights determined and of exercising them. The

appellant contented that she is and was always a legal parent, which the respondent disputed.

4. Sitting as a deputy High Court Judge, Christopher Hames KC heard the matter at first instance. He determined that the appellant was not the legal parent of the younger children but they were "children of the family". He concluded that no jurisdiction existed in respect of the younger children as there was not sufficient connection between the dissolution proceedings and the current child arrangements proceedings under ss2(1)(b)(i) and 2A(1)(a) FLA 1986 and dismissed proceedings regarding them. He found that the court had jurisdiction only in respect of the oldest child due to his presence in England at the time the application was made. The appellant appealed the decision.

5. Lord Justice Peter Jackson, Lord Justice Moylan and Lady Justice King considered the following two issues:

    a. Is the appellant the legal parent of the children who are subject of applications that she has made to the court? This point turns on the interpretation and application of s42 of the Human Fertilisation and Embryology Act 2008 ("HFEA 2008").
    b. Does the Family Court have jurisdiction to entertain the appellant's applications? This question depends on ss2(1)(b)(i) and 2A (1) of the FLA 1986 and shall be the focus of this summary.

6. The Court of Appeal allowed the appeal in relation to jurisdiction, making the following determinations:
    a. There was jurisdiction under the FLA 1986, applying Re T (Jurisdiction: Matrimonial Proceedings) **[2023] EWCA Civ 285**;
    b. The FLA is not confined to intra-UK cases and therefore applies to international cases involving a non-UK jurisdiction [102];
    c. The words "the Hague Convention does not apply" meant that when the 1996 Convention "does not apply to give jurisdiction to England and Wales or to any other Contracting State" the domestic provisions, in this case ss2(1)(b)(i) and (ii) of the FLA 1986 apply to determine jurisdiction in respect of a s(1)(1)(a) order [104].
    d. The words "in or in connection with matrimonial proceedings" does not require there to be a factual or temporal overlap between the dissolution proceedings and the children proceedings. When incorporating and amalgamating s42 MCA 1973 and s4 FLA 1986 into ss 2 and 2A, there is nothing to suggest an intention to make any substantive change to the effect of the former in respect of jurisdiction [106].

7. Lord Justice Moylan set out the elements required to bring a case within s. 2(1)(b)(i) as those set out in the FLA 1986 itself:
    a. That the parties in the matrimonial or civil partnership proceedings are or were "the parents of the child concerned" (including a child of the family);
    b. That the matrimonial or civil partnership proceedings are taking place or did take place in England and Wales (and concluded other than by dismissal); and that one or other or both of the parents seek a section 1(1)(a) order.

PD12J AND RETURN UNDER THE INHERENT JURISDICTION

R & Y (Children) [2024] EWCA Civ 131 (28 February 2024)

1. This case featured Mark Jarman KC who appeared on behalf of the Respondent.

2. The appellant mother appealed against an order for the return of 2 children to the United Arab Emirates in the care of the father.

3. Lord Justice Baker giving the lead judgment allowed the appeal, noting that this case raised a number of difficult issues but specifically referring to 2 critical issues where the trial judge went "astray", namely: treating this as an application for a "summary return" and secondly the trial judge's treatment of serious findings of abuse which were made against the father.

4. This decision is a helpful reminder of the principles to be applied when considering a return under the inherent jurisdiction to a non-Hague Convention country where the court is required to consider PD12J and allegations of domestic abuse.

5. The father sought the return of the children to the UAE under the Inherent Jurisdiction. The mother relied on allegations of domestic abuse including rape, sexual assault and controlling and coercive behaviour. Following the advice of Cafcass within the proceedings, a fact finding hearing was listed to consider the allegations. The trial judge made some, but not all, of the findings sought by the mother.

6. A final hearing was listed together with a supplemental report from Cafcass. The report had recommended a return of the children to the UAE. The judge made an order for the children to return. Within the judgment the trial judge also referred to the findings made against the father, set out at [25-33] of the Court of Appeal's judgment. These included findings of physical abuse of the children, financial abuse and psychological abuse.

7. The Court of Appeal noted that the trial judge had not expressly considered the extent to which the children had suffered, or were likely to suffer harm as a result of the

domestic abuse which he had previously found had occurred. Another interesting feature of this case is that the mother (who had been the primary carer of the children) made plain she would not return to the UAE if the children were returned.

8. At the appeal hearing the key ground relied upon was the trial judge's failure to have adequate regard to all the facts found in the fact finding judgment when making the final welfare decision [62]. The focus of the trial judge was noted to be flawed as it primarily focused on a "summary return" rather than focusing on the long term welfare decision [67]. Baker LJ notes that the point for a summary return had already passed by the time that the court had ordered a fact finding hearing.

9. PD12J was not properly applied or considered in the manner that it should be. At [76-78] the court set out the proper approach to PD12J in this context as specifically referred to by the Supreme Court in Re NY (A Child) **[2019] UKSC 49** at [50].

10. The judgment provides a useful summary of the correct approach to be applied when considering allegations of abuse within the context of a return under the Inherent Jurisdiction. Such a decision is a welfare based one and must place the welfare of the child concerned at the forefront.

CONTACT

4PB

6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200

www.4pb.com
clerks@4pb.com
@4PBFamilyLaw