

The Hague Convention and the UNCRC

The text of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”) does not refer to any of the familiar concepts of “best interests” or “welfare of the child”. One explanation for this is that the Hague Convention is not a custody determination and therefore the best interests of the child are not an issue in the case. What is at issue is whether a child has been wrongfully removed or retained in violation of the “left-behind” parent’s custody rights and a consideration of the specific claims and available defences under the Convention. At first glance it could therefore be perceived that there may be a tension between the Hague Convention and the United Nations Convention on the Rights of the Child (UNCRC). In this article I want to discuss some recent Northern Ireland case law along with two leading judgements of the Supreme Court and the European Court of Human Rights which details the relationship between the two Conventions and clarifies the position regarding the consideration of the best interests of children in such cases.

Two recent Northern Ireland judgements deal with the issue of the Child Abduction and Custody Act 1985, which is the legislation that provides at Section 1(2) that the Hague Convention shall have the force of law in the United Kingdom. The first case is J v G (In the matter of Q, a child) [2014] NIFam15 and the second is W v C (In the matter of L, a child) [2014] NIFam 16. Both cases were determined by Mr Justice O’Hara and involved children who were born to Northern Irish mothers who wrongfully removed their children from their country of origin to Northern Ireland.

The facts of the first case are as follows: The father of the child is Canadian and was married to the mother. The child of the relationship is three years old. The mother returned to Northern Ireland with the child in February 2014 and the father issued proceedings seeking an order that the child’s removal and retention in Northern Ireland were unlawful and in breach of his custody rights. He further sought a return of the child to Canada.

The judge in this case succinctly sets out the leading authority in this area from the Supreme Court namely Re E (Children) (Abduction: Custody Appeal) [2012] 1AC 144. He states:

“..Lady Hale and Lord Wilson (in Re E) analysed the way in which the Convention operates and how the nature of cases has changed as society has changed in the last 30 years. One of the central themes is to prevent parents taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. Accordingly, if an abduction does take place the aim is to return the children as soon as possible to their home country so any dispute can be determined there. This is on the basis that the “left behind parent” should not be put to the trouble or expense of coming to the State to which the children have been taken in order for factual disputes to be resolved there. The point is also made that if the Convention is applied properly there should be no violation of the Article 8 rights of the child or parents.”

The reference to a violation of the Article 8 rights of the parents or child is in recognition of the 2010 judgement of the Grand Chamber of the Strasbourg Court in Neulinger and Shuruk v Switzerland (Application Number 41615/07) which will be discussed later in this article.

In the Northern Ireland case of J v G, the mother sought to mount one of the defences which are available under Article 13 of the Hague Convention namely that the father had consented or acquiesced to the removal or retention of the child or that there is a degree of risk that the child’s return would expose him to physical or psychological harm or otherwise place him in an intolerable situation within Article 13(b). Notwithstanding the availability of these defences, the Judge retains a discretion as to whether the child’s return should be ordered.

The mother argued that the grave risk and/or intolerable situation related to the fundamental reason for the problems in the marriage namely the father’s excessive use and/or addiction to drugs and alcohol. The mother produced police records to verify the incidents between them, where alcohol and drugs were an issue on the part of the father. The Judge concluded that the defence of consent or subsequent acquiescence was not made out but he found that the child was at grave risk of physical or psychological harm or of being placed in an intolerable situation if his return to Canada were ordered. The Judge based this on the fathers extended use of drugs and alcohol and there being no evidence before him that this use of drugs and alcohol had stopped, save for the father’s own assertions which the Judge felt were extremely unreliable.

Notwithstanding the father's offer of undertakings as to his future conduct if the child were returned the Judge felt that the father could not be relied upon to keep them due to his addictions. The Judge therefore did not exercise his discretion to return the child to Canada.

While there is certainly a flavour of the UNCRC in this judgement there is no overt consideration of the best interest of the child, as the Hague Convention does not specifically require the Judge to do so.

The second Northern Ireland case of W v C related to a child who is now 2 years old and whose father is Australian. Both the parents and the child returned to Northern Ireland in December 2013 for a holiday but the mother and child did not subsequently return to Australia. The father applied to the Court seeking an order that the child's retention in Northern Ireland was wrongful, in breach of his custody rights and further seeking an order for the child's return.

As with the previous case the mother sought to mount a defence based on Article 13 of the Hague Convention. She was therefore required to show either that the father consented or subsequently acquiesced to the retention of the child in Northern Ireland or that there is a degree of risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

The mother sought to rely on allegations that the father had handled the child inappropriately and had smacked the child. Further she alleged that the father had pushed her down a set of stairs, while she was in Northern Ireland, causing her to sustain a foot injury and that he had previously tried to punch her when she was pregnant. The father made certain concessions but contended that the level of risk from him did not amount to placing the child at grave risk of physical or psychological harm. The Judge did not find the physical abuse allegations to have been proven and further concluded that the defence of grave risk was not made out by the mother. The Judge therefore directed the return of the child to Australia and acknowledged that it would be up to the Australian Courts to handle any application that the mother would make for relocation, primary residence or contact.

Again, while there was an underlying flavour of the UNCRC and the issue of best interests of the child it was never formally considered, as it was not required to be.

The case of Neulinger (citation above) was greeted with a mixture of excitement and concern by commentators with some believing that the door has been opened to a formal consideration of the best interests of the child in every Hague Convention case. Others, were more cautious in their approach to the judgement fearing that it would have a detrimental impact upon the application of the Hague Convention and that state courts would limit the precedential value of the specific case to its facts and, in particular, to circumstances in which extreme delay in state court proceedings triggered the ECHR's decision.

The Neulinger case involved a mother who was a Swiss national who relocated to Israel and married an Israeli national. They had a son together who had joint Israeli and Swiss nationality. The mother removed the child to Switzerland without the consent or indeed knowledge of the father after her attempts to gain consent from an Israeli Court to the relocation failed. The Swiss domestic Court rejected the mothers claim under Article 13(b) that there was a grave risk that returning the child to Israel would lead to physical or psychological harm or otherwise place him in an intolerable situation. However, when the case came to be considered by the Grand Chamber of the European Court they found that to enforce the order would be an unjustifiable interference with the right to respect for the private and family lives of both the mother and the child, as enshrined in Article 8 of the European Convention on Human Rights. It was thought that this, as set out above, might open the door to the consideration of human rights and the UNCRC in all Hague Convention cases.

In the judgement of Re E (citation above) the Supreme Court expressly looked at the relationship between the UNCRC and the Hague Convention at paragraphs 12-18 of their judgement. The Supreme Court acknowledged that there is no provision expressly requiring the Court hearing a Hague Convention case to make the best interests of the child its primary consideration. They also acknowledge that the fact that the best interests of the child are not made a primary consideration does not mean that they are not at the forefront of such cases. The rightly point out that the preamble of the Hague Convention states that the signatories are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody". The Supreme Court also rightly makes the observation that the Hague Convention does not expressly state that its objective is to serve the best interests of adults. The implied assumption in the provisions of the Hague Convention are that if there is a dispute about any aspect of the future upbringing of the child, the interests of the child should be of paramount importance in

resolving that dispute.

The Supreme Court then went on to consider the relationship between the Hague Convention, best interests under the UNCRC and article 11 of the Council Regulation (EC) No 2201/2003 (“Brussels II revised”) which strengthens and takes precedence over the Hague Convention in cases between member states of the European Union. They point in particular to certain provisions of Brussels II Revised such as Article 11.2 which requires that the subject children be given an opportunity to be heard (unless this is inappropriate) and Article 11.4 which provides that a Court cannot refuse to return a child on the basis of Article 13(b) of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”.

In summary, the Supreme Court are of the view that both the Hague Convention and the Brussels II Revised Regulation have been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration. They go further to state that if a Court faithfully applies the provisions of the Conventions and Regulations then the Supreme Court is satisfied that they will be compliant with Article 3.1 of the UNCRC regarding best interests.

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