



CONFLICTS OF EU COURTS ON CHILD ABDUCTION

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Country Reports May 2016

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The Project

Professor Paul Beaumont of the University of Aberdeen, in collaboration with Dr Lara Walker of the University of Sussex, received funding from the Nuffield Foundation to carry out empirical research on Child Abduction in the European Union. The project started on 1st April 2014 for a period of 20 months.

This project aimed to look at cases where a non-return had been ordered by the state of refuge under Article 13 of the Hague Child Abduction Convention 1980. In particular, it aimed to assess how Brussels IIa Regulation no 2201/2003 was being interpreted in cases in the EU where the courts of the habitual residence of an abducted child override the non-return order of the courts in the State where the child was abducted by making an Article 11(8) return order. The research also sought to determine whether the parties and the child had been heard in the courts of the habitual residence of the child, in accordance with a right to a fair trial, and whether those courts had taken adequate account of the reasons given for non-return by the court of refuge. In addition, the distinction between a return order and a custody order in the State of the habitual residence of the child was addressed, through examination of the relevant case-law.

In light of the impending review of the Brussels IIa Regulation, the objective of the project was to determine how the Regulation was being applied in these particular cases, whether there was a uniform approach in the differing jurisdictions and whether the recommendations in the Commission's Practice Guide were being adhered to. We also considered what changes to recommend to the Brussels IIa Regulation and/or the Commission's Practice Guide.

The overall findings from the research are found at "Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" (2016) 12 *Journal of Private International Law* (forthcoming).

Summary of findings

Methodology

A pilot questionnaire was sent to the German Central Authority and to ICACU. A detailed response was received from Dr Andrea Schulz at the German Central Authority for which we are grateful. The revised questionnaire was distributed to all Central Authorities in May 2014 requesting data in relation to Article 11(6)-(8) Brussels IIa proceedings following on from a non-return order under Article 13 of the Hague Child Abduction Convention in the period between the entry into force of Brussels IIa and 28 February 2014. Most Central Authorities provided some information, whether it was a full response to the questionnaire, a partial response to the questionnaire or general statistical data. No information was provided by the Central Authorities of Greece, Slovenia, Spain, Sweden and England and Wales.

The information gathered from Central Authorities was supplemented by data, case files and case summaries provided by native researchers who kindly volunteered to work for the project in each Member State. We are also grateful to the Hague Conference for distributing a questionnaire for judges to European Hague Network judges and to Reunite for distributing a questionnaire for solicitors to all their contacts. A final questionnaire was distributed to relevant NGO's.

The second stage of the project involved carrying out interviews with judges and practitioners in selected Member States. A pilot interview was carried out in the Netherlands, followed by further interviews in Belgium, Latvia, Portugal and the UK and a re-interview in the Netherlands.

Identifying and recording cases for the purpose of the Country Reports.

Where it was possible to identify the case we have used the reported case name and where the case has not been reported we have either used the Central Authority (CA) Reference Number or labelled it 'Unknown Case' where this is unavailable.

Acknowledgement

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General Findings

The combined information provided by each of the sources suggests that at least 66 applications, concerning 70 children, which involved Article 11(6)-(8) proceedings from the date of entry into force of Brussels IIa until June 2015.¹ There may be more cases than this; however these findings are based on the extensive efforts that were made as outlined above in order to identify all the cases where these proceedings occurred.

Member State	Number of Article 11(8) proceedings
Austria	1
Belgium	7
Bulgaria	0
Croatia	0
Cyprus	0
Czech Republic	1
Estonia	0
Finland	0
France	2
Germany	6
Greece	1
Hungary	1
Ireland	5
Italy	17
Latvia	1
Lithuania	0
Luxembourg	1
Malta	0
Netherlands	0
Poland	0
Portugal	3
Romania	5
Slovakia	0
Slovenia	1
Spain	3
Sweden	0
UK	11
Total	66

Figure 1: Number of Article 11(8) proceedings

¹ The information included in the tables outlines information provided to us up until 30 September 2015.

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In 32 of the cases identified the sole reason for non-return was Article 13(1)(b) grave risk of harm. Grave risk of harm was also combined with other factors and therefore was given as a reason for non-return in the majority of cases.

State of Refuge	Reason for Article 13 non-return order								Total
	Consent 13(1)(a)	Acquiescence 13(1)(a))	Grave risk 13(1)(b)	Child's objection 13(2)	Grave risk and child's objection 13(1)(b) and 13(2)	Grave risk and 13(1)(a))	No exercise of custody 13(1)(a)	Unknown	
Austria	0	0	2	1	0	0	0	0	3
Belgium	0	0	1	0	0	0	1	0	2
Bulgaria	0	0	0	0	1	0	0	1	2
France	1	0	2	1	1	1	0	0	6
Germany	1	0	1	2	0	0	0	0	4
Hungary	0	0	1	0	0	0	0	0	1
Ireland	0	0	1	0	0	0	0	0	1
Italy	0	0	1	0	0	0	0	0	1
Latvia	1	0	4	0	1	0	0	0	6
Lithuania	0	0	2	1	0	0	0	0	3
Malta	0	0	1	0	0	0	0	0	1
Poland	0	0	4	0	1	0	0	3	8
Portugal	0	0	2	0	1	0	0	1	4
Romania	1	0	0	1	0	0	0	0	2
Slovenia	0	1	0	1	0	0	0	2	4
Spain	0	0	2	0	0	0	1	1	4
Sweden	0	0	0	1	0	0	0	0	1
UK-England & Wales	1	0	1	0	0	0	0	0	2
UK-Northern Ireland	0	0	0	0	1	0	0	0	1
Unknown	0	0	7	1	1	1	0	0	10
Total	5	1	32	9	7	2	2	8	66

Figure 2: reason for Hague non-return order by Member State

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Outcome

The court reached a decision requiring the return of the child, and issued an Article 42 certificate, in 28 cases.

Member State	Decision of Court of Origin			Total
	Child to be returned	Child should not return	unknown	
Austria	0	0	1	1
Belgium	4	3	0	7
Czech Republic	1	0	0	1
France	1	1	0	2
Germany	2	3	1	6
Greece	1	0	0	1
Hungary	0	1	0	1
Ireland	3	0	2	2
Italy	6	9	2	17
Latvia	0	1	0	1
Luxembourg	1	0	0	1
Portugal	2	0	1	3
Romania	0	4	1	5
Slovenia	1	0	0	1
Spain	2	1	0	3
UK-England & Wales	4	5	2	11
Total	28	28	10	66

Figure 3: Article 11(8) decision

However, the child was only returned to the state of their original habitual residence in seven of these 28 cases.

Member State	Has the child been returned?				Total
	Yes	No	Unknown	Re-abducted	
Belgium	0	2	1	1	4
Czech Republic	1	0	0	0	1
France	0	1	0	0	1
Germany	0	1	0	1	2
Greece	0	0	1	0	1
Italy	1	4	1	0	6
Ireland	1	0	2	0	3
Luxembourg	1	0	0	0	1
Portugal	0	1	1	0	2
Slovenia	0	1	0	0	1
Spain	0	2	0	0	2
UK-England & Wales	1	2	1	0	4
Total	5	14	7	2	28

Figure 4: Enforcement by issuing State

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Hearing the Child

Member State	Was the child heard?				Total
	Indirectly	No	Unknown	'Opportunity' given	
Austria	0	0	1	0	1
Belgium	1	7	0	0	8
Czech Republic	0	1	0	0	1
France	0	2	0	0	2
Germany	1	1	4	0	6
Greece	0	1	0	0	1
Hungary	0	1	0	0	1
Ireland	3	1	1	1	6
Italy	0	14	5	0	19
Latvia	1	0	0	0	1
Luxembourg	0	1	0	0	1
Portugal	1	2	0	0	3
Romania	2	2	1	0	5
Slovenia	0	1	0	0	1
Spain	0	1	1	1	3
UK-England & Wales	5	3	1	2	11
Total	14	38	14	4	70

Figure 5: Hearing the child

There is limited correlation between the age of the child and the decision to hear the child.

Child's age	Child heard				Total
	Yes – 'indirectly'	No	Unknown	'Opportunity' given	
6 months	0	1	0	0	1
18 months	0	1	0	0	1
2.0	2	3	0	0	5
2.5	1	0	0	0	1
3.0	0	5	0	0	5
3.3	0	1	0	0	1
3.5	0	1	0	0	1
4.0	0	3	0	1	4
5.0	1	4	0	0	3
6.0	1	3	0	0	4
7.0	2	1	1	0	4
8.0	2	4	1	0	6
9.0	0	2	1	1	4
11.0	2	1	0	0	2
12.0	0	1	0	1	2
13.0	1	2	1	1	5
14.0	1	2	0	0	3
15.0	0	1	0	0	1
Total	13	36	4	4	57

Figure 6: Age of the child

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The other requirements in Article 42

Member State	Was the abducting parent heard?						Total
	In person in court	Indirectly	Yes-Method Unknown	'Opportunity' given	No	Unknown	
Austria	0	0	0	0	0	1	1
Belgium	1	1	1	1	2	1	7
Czech Republic	0	0	0	0	1	0	1
France	0	0	0	2	0	0	2
Germany	2	2	0	0	0	2	6
Greece	0	0	0	0	0	1	1
Hungary	1	0	0	0	0	0	1
Ireland	0	2	0	1	0	2	5
Italy	1	0	0	2	10	4	17
Latvia	0	1	0	0	0	0	1
Luxembourg	1	0	0	0	0	0	1
Portugal	0	1	0	0	1	1	3
Romania	0	3	0	0	0	2	5
Slovenia	0	0	0	0	1	0	1
Spain	0	0	0	1	0	2	3
UK-England & Wales	1	3	0	4	2	1	11
Total	7	13	1	11	17	17	66

Figure 7: Hearing the abducting parent

Member State	Was the left-behind parent heard?			Total
	Yes	No	Unknown	
Austria	0	0	1	1
Belgium	6	0	1	7
Czech Republic	1	0	0	1
France	2	0	0	2
Germany	4	0	2	6
Greece	1	0	0	1
Hungary	1	0	0	1
Ireland	4	0	1	2
Italy	4	6	7	17
Latvia	1	0	0	1
Luxembourg	0	1	0	1
Portugal	0	2	1	3
Romania	3	0	2	5
Slovenia	1	0	0	1
Spain	1	0	2	3
UK-England & Wales	10	0	1	11
Total	39	10	17	66

Figure 8: Hearing the left-behind parent

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Member State	Approach of the court of origin				Total
	Yes	No	Mixture	Unknown	
Austria	0	0	0	1	1
Belgium	6	1	0	0	7
Czech Republic	0	0	0	1	1
France	2	0	0	0	2
Germany	2	0	0	4	6
Greece	1	0	0	0	1
Hungary	1	0	0	0	1
Ireland	3	0	0	2	5
Italy	14	0	0	3	17
Latvia	1	0	0	0	1
Luxembourg	1	0	0	0	1
Portugal	2	0	1	0	3
Romania	2	1	0	2	5
Slovenia	0	0	0	1	1
Spain	2	0	0	1	3
UK-England & Wales	7	2	0	2	11
Total	44	4	1	17	66

Figure 9: Did the court of origin take account of the reasons for and evidence underlying the non-return order

Conclusion

Our findings indicate that in the vast majority of cases the abducting parent is the mother in these types of proceeding. It is also clear that although orders requiring the return of the child, accompanied by Article 42 certificates, are issued these orders are rarely ever enforced. The findings also indicate that children are generally not heard during Article 11(8) proceedings and this is often not because the child is too young to be heard. In many cases abducting parents are not heard, but this is often linked to their refusal to cooperate with proceedings.

Contact Information

If you have information about any of the cases that we have identified or additional cases which you think would be useful for this research topic please send details to Jayne Holliday at jayne.holliday@abdn.ac.uk

Austria

Background

The Austrian Central Authority in its response to the questionnaire was unable to indicate the number of outgoing or incoming intra-EU Hague Child Abduction Convention (Hague) cases that had resulted in a non-return order based on Article 13 Hague as they do not record the outcome of Hague proceedings in their electronic database and would have had to perform a manual search of each file which was not viable.²

In Austria the Central Authority's involvement in Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) cases is limited to informing the relevant Austrian court of the outcome of Hague proceedings in another Member State and the potential for Article 11(6)-(8) Brussels IIa proceedings.³ The decision as to whether to file for Brussels IIa proceedings lies with the left-behind parent and for the court to decide how to proceed.⁴ The Austrian courts are under no legal obligation to inform the Central Authority about Article 11(6)-(8) proceedings and do not need to record them on the court database.⁵

Notwithstanding the lack of available data, the Central Authority was able to identify two incoming cases where Article 11(6)-(8) Brussels IIa return orders had been granted in the country of origin, although it acknowledged that the number of cases could be higher.⁶ In relation to the Article 11(6)-(8) proceedings, the Central Authority receives the Article 11(8) decision and Article 42 Brussels IIa certificate from the court of origin and therefore the details of the cases they were able to give are limited.⁷

Through cross-referencing our findings we were able to identify one outgoing case and an additional incoming case.

Outgoing Case where Article 11(8) proceedings took place in Austria

Outcome of the following case is unknown

Latvian CA No. 25-1.28/13

² Austria, Central Authority Questionnaire, 4. The lack of available data in a format that enables an assessment of the functioning of Brussels IIa Regulation was apparent in all Member States.

³ Austria, Central Authority Questionnaire, 4.

⁴ Austria, Central Authority Questionnaire, 4.

⁵ Austria, Central Authority Questionnaire, 4. The separation of interests between the Hague proceedings and the Brussels IIa proceedings is not conducive to what is essentially a continuation of the same child abduction case.

⁶ Austria, Central Authority Questionnaire, 5.

⁷ Where possible additional information has been added to create a more complete picture.

This application concerns an abduction by the mother, from Austria to Latvia. The Latvian court ordered the non-return of the child, on 6 May 2014, on the basis of Article 13(1)(b) and 13(2) Hague.⁸ It is unclear how old the child was at this time. The Latvian Central Authority indicated that custody proceedings were ongoing in Austria at the time of the removal, and the father later initiated proceedings under Article 11(6)-(8) Brussels IIa. It is unclear what the outcome of these proceedings is. The Latvian Central Authority told us that: ‘Our office has information that after the Latvian Court ordered the non-return, after our office transmitted all documentation to the Austrian Central Authority in accordance with the Article 11(6), documents were forwarded to the respective Court in Austria for the purposes of the Article 11(7). Unfortunately, we have no further information about these proceedings, nor have we received the return certificate, yet.’

Incoming Hague Convention Cases

Cases where an Article 42 Certificate was issued by the court in the State of Origin

Povse v Alpagó [2010] ECR I-6673

The first incoming case concerns a well-documented case involving an Article 11(8) return order from Italy, *Povse v Alpagó*.⁹

Facts

Ms Povse and Mr Alpagó lived together as an unmarried couple in Italy.¹⁰ Their daughter Sofia was born on 6 December 2006.¹¹ The couple’s relationship broke down at the end of January 2008.¹² The parents had joint custody.¹³ Despite the father obtaining a decision from the Tribunale per i Minorenni di Venezia (Italy) on the 8 February 2008 prohibiting the mother from taking Sofia out of the country, the mother took Sofia from Italy to live in Austria.¹⁴

On 16 April 2008 the father began Hague proceedings before the Bezirksgericht Leoben (Austria) for the return of the child to Italy.¹⁵ Hague proceedings began on 19 June 2008.

⁸ This case technically falls outside our original specified period – which sought to cover cases where the Hague non-return was ordered prior to 28 February 2014.

⁹ Case C-211/10 PPU *Povse v Alpagó* [2010] ECR I-6673. For an analysis of the recognition and enforcement of Article 11(8) Brussels IIa return orders; *Povse v Austria* and the ECtHR see Paul Beaumont, Katarina Trimmings, Lara Walker and Jayne Holliday, ‘Child Abduction: Recent Jurisprudence Of The European Court Of Human Rights’ (2015) *International and Comparative Law Quarterly* 39-63.

¹⁰ Case C-211/10 PPU [2010] ECR I-6673[21].

¹¹ *ibid*, [21].

¹² *ibid*, [21].

¹³ *ibid*, [21].

¹⁴ *ibid*, [21].

¹⁵ *ibid*, [22].

On 23 May 2008 the Tribunale per i Minorenni di Venezia (Italy) revoked its decision prohibiting the mother from leaving Italy with Sofia and awarded provisional custody to both parents and stated that Sofia could reside with her mother in Austria pending a final judgment.¹⁶ The court ordered the father to share the costs of supporting Sofia, gave the mother authority to make the day to day decisions concerning Sofia, established access arrangements for the father and instructed social work reports to be carried out.¹⁷

On 3 July 2008 the Bezirksgericht Leoben (Austria) dismissed the Hague application for the return of the child.¹⁸ However that decision was set aside on 1 September 2008 at the Landesgericht Leoben (Austria) on the ground that the father had not been heard in accordance with Article 11(5) of Brussels IIa.¹⁹

On 21 November 2008 the Bezirksgericht Leoben ordered the non-return of the child on the basis that the Tribunale per i Minorenni di Venezia had provided that the child could reside with her mother pending the final custody decision.²⁰

This decision was upheld on 7 January 2009 at second instance in the Landesgericht Leoben (Austria) on the ground of Article 13(1)(b) Hague.²¹

The mother applied to Bezirksgericht Judenburg (Austria) for sole custody.²² On 26 May 2009 Bezirksgericht Judenburg (Austria) declared it had jurisdiction under Article 15(5) Brussels IIa and asked the Tribunale per i Minorenni di Venezia (Italy) to decline its jurisdiction.²³ The father was not heard at this point.²⁴

On 9 April 2009 the father applied to the Tribunale per i Minorenni di Venezia (Italy) as part of the pending return proceedings for an order for the return of the child under Article 11(8) Brussels IIa.²⁵

On 10 July 2009 the Tribunale per i Minorenni di Venezia (Italy) declared that it retained jurisdiction and ordered the immediate return of the child to Italy, instructing the social services department to make accommodation available if the mother returned with the child and to arrange an access schedule for the father and his daughter. The court issued a certificate under Article 42 Brussels IIa.²⁶

¹⁶ *ibid*, [23].

¹⁷ *ibid*, [23].

¹⁸ *ibid*, [25].

¹⁹ *ibid*, [25].

²⁰ *ibid*, [26].

²¹ *ibid*, [27].

²² *ibid*, [28].

²³ *ibid*, [28].

²⁴ *ibid*, [28].

²⁵ *ibid*, [29].

²⁶ At this point the child is 2 years and 7 months old. The Austrian Central Authority stated that they had no information as to whether the Italian Court heard the child.

Provisional custody was awarded to the mother by the Bezirksgericht Judenburg (Austria) on 25 August 2009 which became final and enforceable under Austrian law on 23 September 2009.²⁷

On 22 September the father submitted an application to the Bezirksgericht Judenburg (Austria) for the enforcement of the judgment of 10 July 2009 ordering the return of the child to Italy.²⁸ The Bezirksgericht Judenburg (Austria) dismissed this on the grounds of Article 13(1)(b) Hague.²⁹ The father appealed and the Landesgericht Leoben (Austria) quashed the decision and ordered the return of the child.³⁰

The mother appealed this decision in the Austrian Supreme Court who stayed proceedings and referred several questions to the CJEU for a preliminary ruling; the outcome of which was delivered on 1 July 2010 which stated that the Italian courts had jurisdiction and that the Article 11(8) Brussels IIa return order should be enforced.³¹ The Austrian Supreme Court followed the preliminary ruling and the mother's appeal was dismissed. The mother was advised to apply to the Italian court if the child's circumstances had changed in order to ask for the return order to be suspended.

Indeed Sofia's circumstances had changed. In 2009, Sofia's mother had entered into a relationship with a new partner and her mother had given birth to a son in March 2011.³² The mother, her new partner and the two children lived in a common household.³³ Sofia did not speak Italian and had not seen her father since mid-2009.³⁴

However, the Tribunale per i minorenni di Venezia refused to withdraw the return order and awarded sole custody of Sofia to her father. Her father continued to seek enforcement in Austria of the Italian Article 11(8) Brussels IIa return order.³⁵

This case went back to an Austrian court where the judge was at pains to point out that the behaviour by the parents, to use their child in their own personal conflict, would lead to the child being traumatised, especially if coercive measures had to be used to return the child.³⁶

²⁷ *ibid*, [32].

²⁸ *ibid*, [33].

²⁹ *ibid*, [33].

³⁰ *ibid*, [33].

³¹ *ibid*, [84(4)] "Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment."

³² *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [51].

³³ *ibid*.

³⁴ *ibid*.

³⁵ *ibid*, [35].

³⁶ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [49].

On 20 May 2013 the Austrian court ordered the child to be returned to her father by 7 July 2013.³⁷

Complaints were brought before the European Court of Human Rights by both the mother and the father in separate cases. The complaint before that Court by the mother and Sofia was that “under Article 8 of the Convention ... the Austrian court’s decisions had violated their right to respect for their family life.”³⁸ The ECtHR decided by majority that the application for breach of Article 8 ECHR was inadmissible as “manifestly ill-founded”.³⁹

So by 18 June 2013 the harsh reality of this case was that the situation for Sofia was no further forward. The Italian Article 11(8) Brussels IIa return order was still in place. Sofia was almost 7 years old at this point. She had been taken by her mother from Italy when she was 14 months old and denied a meaningful relationship with her father. She did not speak Italian and had not seen her father since 2009.

The complaint lodged by the father before the European Court of Human Rights on 14 January 2013 alleged that the Austrian authorities had failed to ensure his daughter’s return to Italy, thus violating his right to respect for family life. On 15 January 2015, two years later, the ECHR held that there had been a violation of Article 8 of the Convention.⁴⁰ The Court ‘considered that the Austrian authorities failed to act swiftly in particular in the first set of proceedings. Moreover, that the available procedural framework did not facilitate the expeditious and efficient conduct of the return proceedings.’⁴¹

Recognition and enforcement of Article 11(8) Brussels IIa return orders.

The outcome of this case demonstrates that even though a return order made under Article 11(8) and certified under Article 42 Brussels IIa was issued on 10 July 2009, theoretically ‘trumping’ an Article 13(1)(b) Hague non-return order, the child was not returned to Italy. This happened even though the Italian court satisfied the Article 42 Brussels IIa certificate requirements, the CJEU had declared that the certified judgment could not be refused recognition and enforcement in Austria and the ECtHR had declared that a complaint against Italy that Article 8 ECHR was breached by the Italian Article 11(8) Brussels IIa return order was manifestly ill-founded.⁴² Yet to keep pushing for the return of the child to Italy at this stage would seem to be contrary to the best interests of the child. At the very least the return

³⁷ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [50]

³⁸ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [57]

³⁹ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [89].

⁴⁰ *Case of MA v Austria* (App no. 4097/13) ECHR 15 January 2015, [138].

⁴¹ *Ibid*, [137].

⁴² In accordance with Annex IV, Brussels IIa the Italian court heard the abducting parent in the court of origin. The Italian court did take into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 Hague. The Italian court also put into place arrangements with the Italian social services to make accommodation available for the mother and child if they returned.

would have to be handled and supervised extremely carefully, to avoid causing the child serious psychological harm.

The length of time this case remained unresolved is extremely concerning. The mother took the child from Italy in February 2008. The Brussels IIa Article 11(8) return order and Article 42 certificate were issued in July 2009. The time taken was undoubtedly exacerbated by going to the CJEU and the ECtHR. To what extent this delay can be attributed to the manipulation of the courts by the parents is difficult to assess but it was a contributory factor.⁴³

Six years after the mother took her 14 month old daughter to Austria the mother and father finally came to an agreement, before an Italian court,⁴⁴ as to where Sofia should reside in 2014. Sofia has not been returned to Italy.⁴⁵ The mother as the abducting parent continues to face criminal proceedings in Italy, the State of origin.⁴⁶

Austrian Central Authority (CA) Case II

The second incoming case concerned a child that was abducted to Austria from Spain by her mother.

Facts

Ana-Maria was born in Austria on 27 July 2000.⁴⁷ Her parents married three months later on 20 October 2000.⁴⁸ The day after the marriage the family returned to live in Spain.⁴⁹ The father subsequently developed religious delusions.⁵⁰ He thought he heard voices, expected a miracle and considered himself to be a messenger of God.⁵¹ He insisted that the mother and daughter wore unattractive clothing so that they were not attractive to other men.⁵² He started to beat the mother, always in front of the child, at one point damaging the mother's eardrum.⁵³ He did not hit the child.⁵⁴ He did however refuse to allow the daughter to go to school.⁵⁵ The mother confided in a priest who informed the police.⁵⁶ The mother and daughter were moved to a women's shelter where they lived from October 2006 until July

⁴³ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, [49].

⁴⁴ Austria, Central Authority Questionnaire, 5. The Central Authority did not state which Court.

⁴⁵ Austria, Central Authority Questionnaire, 5.

⁴⁶ Austria, Central Authority Questionnaire, 5.

⁴⁷ 1Ob163/09s, Oberster Gerichtshof, 2.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

2007.⁵⁷ They then moved to an apartment (which was not available at the time of the Austrian Supreme Court hearing) and received psychological therapy.⁵⁸

The mother began divorce proceedings in 2006, with the divorce pronounced in the Spanish District Court on 25 June 2008.⁵⁹ The mother was given custody of the child but both parents had parental authority.⁶⁰

The Spanish District Court set out the contact arrangements between the child and her father if the mother and father were unable to agree matters between themselves.⁶¹ As part of that arrangement the father was to look after the child from 20 June 2008 until 1 August 2008 at which point the child would stay with the mother for the second half of the summer school holiday.⁶² The parents appeared to have followed the recommendations of the court and on 1 August 2008 the mother collected the child and took her to Austria to live with the maternal grandparents.⁶³ The child settled in well and attended school in Austria.⁶⁴

The father applied for the return of the child under the Hague Convention stating that the mother had violated the divorce agreement, denied the father contact with the child and that the child had missed the start of school year in Spain.⁶⁵ The mother opposed the return of the child under Art 13(1)(b)Hague, arguing that the father's behaviour had traumatised the child and that the child was now settled in Austria.⁶⁶

The father's application for the return of the child was accepted by the District Court of St Pölten, Austria on 11 March 2009.⁶⁷ On 10 June 2009⁶⁸ the Regional Court of Appeal of St Pölten, Austria, allowed the mother's appeal for non-return of the child and sent the case back to the first court in order for the application to be ruled on again once the child had been heard and after having established whether the Spanish Authorities were able to protect the child on her return.⁶⁹ The decision from 10 June 2009 was appealed by both parents in the Austrian Supreme Court.⁷⁰ The appeal was declared inadmissible.⁷¹ The non-return order was confirmed on 7 October 2009.⁷²

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid* 3.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid* 4.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid* 5.

⁶⁷ Austria, Central Authority Questionnaire, 18. 1Ob163/09s, Oberster Gerichtshof, 1.

⁶⁸ Austria, Central Authority Questionnaire, 18. Oberster Gerichtshof, 1.

⁶⁹ Oberster Gerichtshof, 6.

⁷⁰ Oberster Gerichtshof, 1.

⁷¹ *ibid.*

⁷² *ibid.*

On 11 September 2009 the father initiated proceedings at the Court in San Vicente de la Barquera, Spain for the return of the child under Article 11(8) and for a certificate under Article 42 Brussels IIa.⁷³ The Court in San Vicente de la Barquera decided that the child should be returned but did not hear the child.⁷⁴ The child at this point was 9 years and two months of age.

The Austrian Central Authority has no information as to whether the Spanish Court in San Vicente de la Barquera attempted to hear the abducting parent or the left-behind parent,⁷⁵ although it acknowledges that the court did take into account in issuing its judgment the reasons for and evidence underlying the Austrian non-return order issued under Article 13 Hague.⁷⁶

The Central Authority noted that the child has not been returned to Spain and that the mother faces criminal proceedings there.⁷⁷

Juvenile Court Florence, May 2014
(Italian CA No 149/12)

This case concerned two children. The father was an Italian national and the mother was an Austrian national, they were married and lived in Italy with their children. Separation proceedings took place in May 2011. During these proceedings the court awarded joint custody of the children to the parents but held that the children should live with their mother. The court also held that the children should remain in Italy. In June 2012 the mother relocated to Austria, without the father's consent and in violation of the court order. The mother also hindered contact between the children and their father.

The father initiated Hague child abduction proceedings in Austria for the return of the children to Italy. In November 2012 the Innsbruck Court ordered the children's return, however this decision was not enforceable.⁷⁸ The case was appealed to the Appeal Court, which confirmed the decision of the lower court, and then to the Austrian Supreme Court. In March 2013 the Supreme Court refused to order the return of the children.⁷⁹

Meanwhile custody proceedings were ongoing in Italy. In February 2013 the Italian court found that the mother was hindering contact between the children and their father, which was prejudicial to the children. The Italian court confirmed that the parents had joint custody, but

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid* [19].

⁷⁷ *ibid.*

⁷⁸ It is unclear from the summary provided why the decision was not enforceable.

⁷⁹ The summary provided indicates that the reasoning behind the decisions is unreported, however the information provided by the Central Authority suggests the non-return order was made on the basis of Article 13(2) Hague.

modified the parental agreement and awarded residence to the father. The court ordered the return of the children, but not under Article 11(8) Brussels IIa so no certificate was issued and the decision was not automatically enforceable. Following this the father sought enforcement of the Italian order in Austria in September 2013, but the Austrian judge refused *exequatur*, claiming that the children refused to go to Italy, their residence was in Austria and the Austrian authorities had competence.⁸⁰

The father then asked the Italian court to make an Article 11(8) Brussels IIa order. By this time the children were 15 and 13.⁸¹ The Juvenile Court Florence ordered the return of the children, pursuant to Article 11(8) Brussels IIa, and issued an Article 42 Brussels IIa certificate. In reaching its decision the court stated that the children have been repeatedly invited to give their views and be heard by the court, but they have never appeared in court. It was impossible to hear the children because the mother had failed to cooperate. The judge, somewhat controversially stated that, under the current case law the child's opposition to return is not an autonomous ground for return and therefore it is insufficient to make a non-return order on that basis, as long as the judge is convinced that there is no risk of exposure to grave harm or an intolerable situation.⁸² The judge also considered that it had not been argued, and there was no proof, that the father was not fit for parental responsibility nor a risk for the children if they were returned to Italy. The judge further noted that the court only heard the children on one occasion (during the divorce proceedings) where one of the children expressed the view that they wanted to remain in Italy with the father. The judge held that there was no grave risk of harm and issued an Article 11(8) Brussels IIa order.⁸³ The return is still pending.

The information from the Central Authority indicates that the reason for the Hague non-return was Article 13(2), the views of the child. At the time of the Austrian Supreme Court's decision in March 2013, just over a year before the Italian decision, the children were around 12 and 14. Therefore it is good practice that the Austrian court heard the children and gave due weight to their opinions. The Central Authority indicates that the Italian court did not hear any of the parties. It is clear from the summary that the children were invited to attend the hearing but the mother was uncooperative. However it appears that the Italian court only attempted to hear the parties in person and did not try and hear the children through an alternative mechanism such as video link. It is unclear why the father was not heard. There is a suggestion that when the children were heard during divorce/separation proceedings one (or both) of the children expressed a view to remain in Italy. Given that the proceedings referred to were three years earlier, the children's views may have changed in light of the significant change of circumstances.

⁸⁰ Possibly suggesting that they had jurisdiction. However this does not seem to meet the standards for refusal of recognition and enforcement under Article 23 Brussels IIa.

⁸¹ It is unclear when this order was made.

⁸² The summary indicates that this point is not really compatible with current case law.

⁸³ It would be preferable if the judge had reached a conclusion on the basis of the best interests of the children, rather than simply a lack of harm. A lack of harm does not necessarily mean that the order is in the children's best interests.

The conclusion of the judge is particularly concerning. He concludes that because the children should not be placed in a grave risk of harm as a result of returning to Italy then the children should return to Italy. This implies a misunderstanding of the system. Although States of refuge can only refuse to return the child on the basis of the very strict Hague exceptions, grave risk of harm being one of them, the judge in the State of origin is not restricted to these exceptions in Article 11(6)-(8) Brussels IIa proceedings. In Article 11(8) Brussels IIa proceedings the judge is supposed to reach a decision based on the broader welfare of the child, they are not supposed to restrict themselves to Article 13 Hague exceptions. Even more concerning is this particular judge's interpretation of the Article 13 Hague exceptions, which seems to suggest that the only one which really applies is Article 13(1)(b) because Article 13(2) does not constitute a stand-alone exception. In short the correct test in Brussels IIa proceedings is not whether the children will be at a 'grave risk' of harm if returned to the State of origin, what matters is if the return to that State is in their best interests. The children do not need to be at risk of harm for the move not to be in their best interests. These should be two different tests: one is for Article 13 Hague and the other is for Article 11(8) Brussels IIa proceedings. Further, as the children were clearly of an age where they could give their views any best interests assessment must include an evaluation of their views, and these views must be given due weight.

Central Authority view of Article 11(8) of Brussels IIa

In relation to the functioning of Article 11(8) Brussels IIa, the Austrian Central Authority wished to stress that;

(...) the possibility for the Courts of origin to 'overrule' a non-return order should be reconsidered. It does not encourage mutual trust between the Courts of the member states at all but leads to unmanageable proceedings in different member states that are extremely hard to coordinate. We should trust in the discretion of the Hague Convention Courts in the member states that they will only issue non-return orders in exceptional cases since the enforcement of certified decisions under Article 11(8) Brussels IIbis by the Court that has decided on the non-return before requires sheer superhuman degree of objectivity and is often doomed to fail from the beginning. Direct communication among the Courts involved in such cases should be used more often.⁸⁴

Conclusion

What is noticeable in the incoming cases is that the abducting parent was the mother and in neither case was the child returned to the child's habitual residence prior to the abduction, the

⁸⁴ Covering letter with the Austrian Central Authority Questionnaire signed on behalf of Mag. Angelika Muller dated 1 August 2014.

requesting State of origin. Austria has a history of non-enforcement of Hague return orders, for example to the United States.⁸⁵ Whether this behaviour can be transferred to non-enforcement of Article 11(8) Brussels IIa return orders is questionable given the small sample of three incoming cases. However it is clear that there are problems recognising and enforcing Article 11(8) Brussels IIa return orders in Austria. Even if in the first incoming case the parents reached a mutually acceptable agreement in 2014, this was still six years after the issuing of the Article 11(8) return order. This seems to be non-compliance by Austria.⁸⁶ With regard to the second incoming case the Central Authority could not provide the reason for the non-return of the child.

⁸⁵ Although not relevant to Brussels IIa return orders, in the past the United States of America has found Austria to be non-compliant in its implementation of the Hague Abduction Convention, particularly in the area of enforcement of return orders and access including violation of rights to family life as evidenced in the US Reports on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction of 2005, 2006 and 2011 but were encouraged by Austria's willingness to improve in this area, which is notable by Austria's absence from the US reports from 2012. These reports can be accessed <http://travel.state.gov/content/childabduction/english/legal/compliance.html> (accessed 7th March 2015)

⁸⁶ Austria, Central Authority Questionnaire, 17.

Belgium

Background

Information was successfully collected from four different sources. The Belgian Central Authority was only able to provide data from files that were opened between 1 January 2011 and 31 December 2013 and closed on 31 December 2013 at the latest. This was due to lack of a fully digitalised database and time constraints. Nevertheless the Belgium Central Authority identified two relevant outgoing cases that were heard in Belgium, and one incoming case (involving two children).

Further information was received from a very helpful Hague Network judge,⁸⁷ who sent us four decisions, in French, and one in Dutch. Our researcher in Belgium⁸⁸ was also very helpful and sent us English summaries of five decisions. We are very grateful to the Belgian Central Authority, judges and academics for their input. Finally we were provided with information by a parent involved in Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings in Belgium and we have conducted a case study on these proceedings.⁸⁹

In relation to duplication of cases we found that one of the cases identified by the Central Authority was also identified by the judge - *Cooper*,⁹⁰ and one of the cases identified by the academic was also identified by the judge – *Gomirato*.⁹¹ Otherwise there was no cross over in the information we obtained. Therefore we have information on seven Article 11(6)-(8) Brussels IIa proceedings in Belgium. The variation of data received is considered as both positive and negative. The number of sources have enabled us to identify more cases, however the lack of consistency means that it is difficult to build a clear picture on individual cases from the beginning to the enforcement (or non-enforcement) of the order, and instead we have snapshots of information. The inconsistency in the information highlights how difficult it is to track these cases, and it is excellent that a number of people in Belgium took an interest in the project so we could identify a greater number of cases. However this further indicates that there are probably more cases than we could identify, particularly in Member States where we only managed to collect data from one source.

Legal Process in Belgium

Hearing the child

The relevant Belgian law provides that children of 12 years and older must be informed that they have a right to be heard. It is then up to the child to decide whether they want to be

⁸⁷ Myriam de Hemptinne.

⁸⁸ Thalia Kruger.

⁸⁹ McLean: *J.J and L.McL* [2013 No. 10 HLC]; *Jörgenson v McLean* ARK no. 14/476/C.

⁹⁰ CA ref no: WL16/LH/2011/1213, *Cooper v Cooper* R.G.No 11/3804/A.

⁹¹ Gomirato 17.06.2010, on appeal from 20.10.2009 ref No. 09/9117/A.

heard. Children under 12 are only heard if this is requested either by the child, the public ministry or the parents. This seems to conflict with Article 11(2) Brussels IIa and Article 12 of the Convention on the Rights of the Child (CRC),⁹² however if the child asks to be heard the judge cannot refuse to hear them. The judge hears the child in private, in their room in the court building. Some judges also ask their clerk to sit in and take notes but this is not a legal requirement, the judge can hear the child alone. The court building in Brussels is large and imposing and does not seem to be a welcoming place for children. The Committee on the Rights of the Child has indicated that children ‘cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age.’⁹³ Therefore the Belgian authorities should consider providing an appropriate space for judges to hear children. When speaking to the child the judge will normally be looking for a sense of the child’s family situation and how they feel generally.

The judge recognised that the Belgian law is not directly in line with Article 11(2) Brussels IIa, which requires that all children are heard unless this is inappropriate. However all new judges (in Belgium) must participate in mandatory training for family judges which lasts 8 days. Three of these days are devoted to civil proceedings which covers the international documents. Judges are informed that they have to be careful when applying Brussels IIa and make sure they are aware of the requirement to hear children, so they can deal with this appropriately. Qualified judges can participate in training but this is not mandatory. Other judges are informed of this requirement when dealing with Brussels IIa cases through informal discussions and meetings.

During the interview process it was indicated that the requirement to hear the child (under Article 11(2) Brussels IIa) in intra-EU Hague Child Abduction Convention (Hague) cases was not necessarily suitable. This is because the child might have been manipulated and it can be difficult to determine what their real opinion is. Further it can be difficult to explain the Hague Convention process to younger children in the sense that although the child might have relevant opinions for full welfare hearings, they are generally not strong enough to justify a Hague non-return order. Therefore the judge then has to tell the child thank you for your thoughts they are very useful. I will send you back to country X but there is a good chance that there will then be proceedings there, where you will be heard again, and as a result of those proceedings you will be allowed to move back here. In contrast it was argued that the requirement to hear children in custody and Article 11(8) Brussels IIa cases is useful and beneficial. This is because the judge has much more flexibility when making an order and therefore the discussion with the child has more chance to influence the outcome than it does under Article 13(2) Hague, views of the child).

⁹² United Nations Convention on the Rights of the Child 1990 and see Committee on the Rights of the Child, General Comment No 12 (2009): ‘The Right of the Child to be Heard’, CRC/C/GC/12, 2009, (General Comment No. 12). Available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>, accessed 17 March 2016.

⁹³ General Comment No. 12, para 34.

It was also pointed out that in Belgium, in addition to mediation, there is a special process where judges can lead a chamber for an amicable solution.⁹⁴ If an agreement is reached, between the parents, then the child will not be heard because there is no trial or proceedings. Amicable solutions are generally better than court proceedings as everything is resolved more quickly and the judge does not want to create additional problems unnecessarily, however the judge recognised that when parents reach these agreements they are not necessarily thinking about it from the perspective of the child so the agreement might not actually be in the child's 'best interests'. Further the judge cannot determine what the child's perspective is. Despite these potential downsides parties are generally more likely to comply with agreements they have reached, therefore this is preferable to getting lost in endless court proceedings and disagreements.

Article 11(6)-(8) Brussels IIa

The judge considered that the process is a great idea in theory however it doesn't really work in practice. This is because there is a gap between the reality of court proceedings and people's needs. The principle or idea is good, but it is too complicated. People should be encouraged to stop fighting rather than participate in further proceedings. It is also difficult to hear the parties and encourage everyone to cooperate in these cases. This is problematic as Article 11(8) Brussels IIa proceedings require a lot: taking account of the reasons for the Hague non-return order, a wider decision on custody, where the child should live, and possibly also a decision on access.

Video-link in Belgium – practicalities.

Although the Court of Appeal in Brussels is housed in a very impressive building, judges do not necessarily have access to everything they need in practical terms. The judges are aware of the EU Taking of Evidence Regulation and there is support for this in Belgium. Video-conference equipment is available in the building across from the Court of Appeal. However it is very rarely used, because the judges are unsure of what the exact process is. The judge interviewed had not used it, but has considered using it. Because the procedure is complicated the equipment will only be accessed and made available where prior communication with the abducting parent indicates that the parent will utilise it, rather than spending a great deal of time going through the relevant procedures and setting it up for no reason if the parent still refuses to cooperate.

⁹⁴ If an agreement is not reached then the case is sent to a different judge for the trial.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in Belgium

Cases where an Article 42 Brussels IIa Certificate was issued

Cooper v Cooper R.G. No 11/3804/A, 14 March 2012

In this case the child was 8 at the time of proceedings and she was taken to England by her mother. The Hague non-return order was given by the English High Court on 25 November 2011,⁹⁵ on the basis of Article 13(1)(a) Hague, consent. The Article 11(6)-(8) Brussels IIa proceedings took place shortly afterwards in Belgium on 22 February 2012. Mrs Cooper, the defendant, was not present at the proceedings. It appears that she was not heard via any other mechanism and the Belgian Central Authority response also indicates that the mother was not heard.

It is indicated that Mrs Cooper took her daughter to the United Kingdom on 3 March 2011 after a manifest abuse of the authorities in the town of Lessines. It appears that she presented earlier documentation from Paul Cooper (not the child's father) to the authorities which granted permission on behalf of another child.⁹⁶ The authorities accepted the documentation and allowed her to leave with the child. It appears that the UK authorities accepted the evidence put forward as valid consent. On 5 November 2011 the Mayor of Lessines acknowledged the abuse of process and admitted that Mrs Cooper had not provided written certification, from Nigel Cooper, allowing the removal of the child.⁹⁷

The Belgian court held that the child should return to Belgium, and issued a certificate in accordance with Article 42 Brussels IIa.⁹⁸ It was also held that the mother would be fined 500 euros per day, until she returned to Belgium with the child.⁹⁹ In addition to the fact that there was no genuine consent, the mother abused alcohol and other substances whilst living in Belgium and again after she moved to England. It is unclear from the transcript of the Belgian decision whether or not the child was heard.¹⁰⁰ However there is reference to the fact that the child indicated that she wanted to return to Belgium when speaking with her father via skype.¹⁰¹

Later, during communications with the English judge, the Belgian judge clarified 'that he considered the child had been given an opportunity to be heard in that the report of the

⁹⁵ This decision, of Hedley J is unreported.

⁹⁶ *Cooper v Cooper* R.G. No 11/3804/A, p 4.

⁹⁷ Ibid.

⁹⁸ Ibid, 7.

⁹⁹ Ibid.

¹⁰⁰ Although the English decision indicates that the child was not heard and no reason was given. The Article 42 certificate simply states 'no'. (*Re C (Jurisdiction and Enforcement of Orders relating to a child)* [2012] EWHC 907 (Fam), para 34)

¹⁰¹ *Cooper v Cooper* R.G. No 11/3804/A, p 5.

Cafcass officer from November 2011 made the child's position and wishes sufficiently clear.¹⁰²

The Belgian Central Authority indicated in their response that as of August 2014, almost two years after the order, the child had not been returned to Belgium. This is because the English judge refused to enforce the order on 22 March 2012, as he considered that the Belgian court did not have jurisdiction.¹⁰³ As the mother was not caring for the child appropriately care proceedings were commenced in England, at which the father appeared (and the father issued proceedings for a s8 order),¹⁰⁴ after a referral to social services by the court.¹⁰⁵ Several interim measures were directed and the child moved to live with her maternal grandparents on 24 January 2012.¹⁰⁶ On 3 February 2012 Hedley J made an interim care order in favour of the local authority.¹⁰⁷ The local authority, the father, the mother and the child were all represented at the hearing. Hedley J dismissed the application made by the father for permission to withdraw his applications for a residence order and for contact.¹⁰⁸

The father appeared before the English courts in these proceedings. Consequently the judge considered that he had accepted the jurisdiction of the English courts and therefore the jurisdiction of the Belgian court was lost. The father tried to revoke his application for residence and contact, after realising his mistake, but this was denied by the English court. As the English court was seised first of the welfare proceedings it was considered that the court was not obliged to recognise the order of the court second seised. The English decision also indicates that the father had both psychiatric and physical health issues but this is not discussed in the Belgian decision.¹⁰⁹

The Belgian return order accompanied by the Article 42 Brussels IIa certificate was never enforced.¹¹⁰

Mr X v Mrs Y (01/09/2009)¹¹¹

Mr X and Mrs Y have four children. Mr X sought the return of the two eldest children from Poland to Belgium under Article 11(8) Brussels IIa. The children were living with their grandparents in Poland. However the grandparents kept them hidden, there was no phone contact and it was unclear whether they went to school. For these reasons it took a while for

¹⁰² *Re C (Jurisdiction and Enforcement of Orders relating to a child)* [2012] EWHC 907 (Fam), para 77.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para 12. Under the Children Act 1989.

¹⁰⁵ *Ibid.*, para 13.

¹⁰⁶ *Ibid.*, para 17.

¹⁰⁷ *Ibid.*, para 23.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, para 27.

¹¹⁰ For further information see the English report.

¹¹¹ A summary was provided by the researcher and some clarification was given by a solicitor who worked on the case. Unfortunately the case report is no longer available.

the Hague proceedings to be commenced in Poland as initially the children could not be found.

The Polish courts refused to return two of the children on the basis of Article 13(1)(b) Hague, they refused to return the other children on the basis of Article 12(2) Hague, settlement because the children had been in Poland for a long time. Before ordering the non-return on the basis of Article 13(1)(b) Hague the Polish authorities failed to meet the requirement in Article 11(4) Brussels IIa. Once the Polish district court found that the children would be exposed to harm if they were returned to Belgium, it failed to take any steps to discover whether the Belgian authorities could indeed manage the risk of harm if the children were returned there. Therefore the Belgian judge considered that the Hague decision on non-return was taken against the spirit of the Brussels IIa Regulation.

The judge in Brussels then took account of the evidence presented before the Polish courts in order to reach his own decision on the allegations of harm. The Belgian judge considered that the allegations of abuse by Mr X towards his children were not corroborated by any evidence and in fact the accusations were made for the first time in October 2006, when Mr X had not seen his eldest child since April 2002. The judge in Brussels issued a certificate under Article 42 Brussels IIa requiring the return of the two children. The certificate indicated that the children were not mature enough to be heard as they had not reached a sufficient age and because they have been subject to the manipulation of the mother's family. It is unclear how old the children were at the time of the proceedings, so it is unclear whether the decision not to hear the children at all was correct. However the oldest child must have been at least five, if not older.

The judge considered that a return to Belgium, and their father, would be in the best interests of the children even though they would be separated from their siblings (and their grandparents) and they would have to learn a new language. This is because it was not clear whether the children's upbringing in Poland was in their best interests and it was unclear whether they were receiving any education. The judge was not splitting the children up purposely, but the proceedings could not apply in relation to the other two children because of the system set up by Brussels IIa. Further the judge indicated that child protection proceedings should begin on the child's return to Belgium, so it is clear that there were concerns about these children and it looked like the situation was not being managed in Poland by the Polish authorities. It is unclear whether the children were returned to Belgium.

Bradbrooke v Aleksandrowicz (20/02/2015)

The child in these proceedings was conceived as a result of an affair between Ms A and Mr B. The child was born in Poland in 2011. Around July 2012, when the child was around 7 months old, Ms A moved back to Brussels with the child. The child was enrolled in nursery

in Belgium and there was regular contact with Mr B, apparently one evening per week.¹¹² However this seems to have been obstructed in March 2013.¹¹³ In August and September 2013 the parties undertook mediation in Belgium to agree a framework for caring for the child.¹¹⁴ On 16 October 2013 Ms A told Mr B that she was taking the child on holiday and on 18 October Mr B initiated proceedings for parental responsibility in Brussels.¹¹⁵ In a decision of 26 March 2014 the Belgian judge held that Mr B and Ms A had joint parental responsibility for the child. The primary residence was to be with the mother, and Mr B was to have contact every second weekend in Poland (as the child was now located there).¹¹⁶ A further hearing was set for June 2014. The decision was confirmed on 30 July 2014 (no access had taken place by then).¹¹⁷

In the meantime, Ms A had left Belgium for Poland, retained the child there, and contested the jurisdiction of the Belgian court. Mr B initiated proceedings under the Hague Convention and the Belgian Central Authority requested the return of the child from Poland on 20 November 2013.¹¹⁸ On 3 February 2014 the Polish court refused to return the child on the basis of Article 13(1)(b) Hague. There have since been several proceedings in Belgium, including the hearing set for June 2014, but generally Ms A did not attend and was not represented. Proceedings under Article 11(6)-(8) Brussels IIa were initiated on 9 July 2014 and a trial was set for 9 September 2014. On the day of the trial Ms A was neither present nor represented.¹¹⁹

As a result of a hearing on 8 October 2014 a preliminary reference was made by a Belgian court to the CJEU under the PPU procedure. Essentially because there were so many proceedings going on, some of which had been initiated before the Hague non-return order the court wanted to know exactly what jurisdiction it had, and whether it could make an order (had jurisdiction) under Article 11(8) Brussels IIa. The referring Belgian court wanted to know whether it was acceptable to give special jurisdiction to certain courts within a Member State, even where another court in that Member State had already been seised, and whether the court seised could give a decision on the substance of the matter, or whether this jurisdiction was removed by seising the specialised court.¹²⁰

“48 While the Belgian Government argues that, under national procedural law, the specialised court seised of the question of return of the child under Article 11(6) to (8) of the Regulation could, at the request of one of the parties, refer the case to the cour d’appel seised of the substantive dispute relating to parental responsibility, so that the latter court could rule on both the question of return and the question of custody with

¹¹² Ibid, p 4.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid, p 5.

¹¹⁷ C-498/14 PPU, *David Bradbrooke v Anna Aleksandrowicz*, (9 January 2015) ECLI:EU:C:2015:3, para 37.

¹¹⁸ R.G. N°: 2014/JR/73 et N°: 2014/FA/113, p 5.

¹¹⁹ Ibid, p 6-7.

¹²⁰ C-498/14 PPU, *David Bradbrooke v Anna Aleksandrowicz*, (9 January 2015) ECLI:EU:C:2015:3, para 34.

respect to the child, that point concerns the interpretation of national law and is outside the jurisdiction of the Court of Justice. Consequently that point must be decided by the Belgian courts.

- 49 It follows from the foregoing that the determination of the national court which has jurisdiction to examine questions of return or custody with respect to the child in the context of the procedure set out in Article 11(6) to (8) of the Regulation is a matter of choice by the Member States, even in the situation where, at the time when a decision on the non-return of a child is notified, a court or a tribunal has already been seised of substantive proceedings relating to parental responsibility over that child.
- 50 However, as stated in paragraph 41 of this judgment, that choice must not impair the effectiveness of the Regulation.
- 51 The fact that a Member State allocates to a specialised court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in Article 11(7) and (8) of the Regulation, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal, cannot, as such, impair the effectiveness of the Regulation.”

Therefore, the Belgian courts and authorities could do as they wished and national law could require specialised jurisdiction as long as this did not impede the effectiveness of the Regulation. The hearing before the Court of Appeal recommenced and the judgment was delivered on 20 February 2015. Once again Ms A was not present and was not represented at the hearing. The judge did not meet with the child, who was only three, as it was considered inappropriate due to his age and maturity.¹²¹ The case concerned two procedures the one on parental responsibility and the one on welfare under Article 11(6)-(7) Brussels IIa.¹²² Although Ms A was not present, this was because she chose not to appear, as she had been served with all the relevant documents and the earlier decisions had been translated into Polish and transmitted to Ms A through the Belgian and Polish Central Authorities.¹²³

The Belgian court took into account the reasons behind the Hague non-return order issued by the Polish court. The Polish court considered that the child’s main reference point was his mother and in the circumstances transferring the child to Belgium would place him at grave risk of psychological harm and place him in an intolerable situation. The court did not take account of Article 11(4) Brussels IIa.¹²⁴ In reaching its decision the Polish court took into account the fact that the child had a half-brother in Poland and that the child had begun to speak Polish.¹²⁵ It was considered that the child was unfamiliar with Mr B’s house and that he did not know Mr B’s wife nor his other half siblings. The court felt it was unlikely that Mrs B

¹²¹ R.G. N°: 2014/JR/73 et N°: 2014/FA/113, p 10.

¹²² Ibid, p 10.

¹²³ Ibid, p 13

¹²⁴ Ibid, p 14.

¹²⁵ Ibid, p 14.

would want the child in her house given that he was a result of an affair. Finally it was felt that the working patterns of Mr and Mrs B indicated that the child would spend a lot of time in childcare.¹²⁶ Although these are interesting considerations, and some may well be true, they are matters more akin to a welfare test than summary return proceedings. These findings do not support the threshold required to make a Hague non-return order under Article 13(1)(b) Hague, in the sense that the child would not be put at a grave risk of harm in the context of his psychological health. Further there was no consideration that the child could return with his mother. The Belgian court considered that it was not demonstrated that Ms A could not return to Belgium with the child for the purpose of the parental responsibility proceedings.¹²⁷ In the opinion of the Belgian court, the conditions for a non-return under Article 13(1)(b) Hague were not met.¹²⁸

The Belgian Court of Appeal then went on to decide whether to take a decision on custody that would require the return of the child. In doing so it recognised that it could make a provisional order for the return of the child, in order to then make a final decision on custody later.¹²⁹ The court indicated that any decision must be in the best interests of the child as guaranteed by human rights law, and should be one that enables the child to maintain a relationship with each of his parents.¹³⁰ The judgment of 30 July 2014 suggests that the child's principal residence should be with his mother and the father should have secondary residence which he was to exercise in Poland.¹³¹ However since then Ms A had displayed a negative attitude and alienated the child from his father.¹³² This behaviour did not demonstrate that she would guarantee the right of the child to have a relationship with his father. In relation to the then current arrangements, which were not being enforced, there was a risk of an irreparable deterioration in the relationship between the child and the father.¹³³ The court considered that if the child was in the care of Mr B, Mr B would ensure that he had contact with his mother and would ensure that the child was enrolled in a bilingual school.¹³⁴ The court considered that it was urgent, and in the child's best interests to entrust custody to the parent who would be able to respect the child's right to maintain contact with both his parents.¹³⁵ The only way to save the paternal relationship was by, temporarily, granting exclusive custody to the father.¹³⁶ This step was to be taken urgently in order to rectify the situation created by Ms A.¹³⁷ This was not a final decision on the residence of the child, but was instead granted on a provisional basis pending further investigation. Although this

¹²⁶ Ibid, p 15.

¹²⁷ Ibid, p 17.

¹²⁸ Ibid.

¹²⁹ Ibid, referring to *Povse*.

¹³⁰ Ibid, 19.

¹³¹ Ibid, 20.

¹³² Ibid.

¹³³ Ibid, p 21.

¹³⁴ Ibid, 21.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

measure would cause substantial upheaval for the child, the judge considered that this was preferable to the current deadlock and should allow a rapid normalisation of the situation.¹³⁸

The court also made reference to the EU Taking of Evidence Regulation in the case of the mother's refusal to appear. The Regulation aims to increase the use of modern technology, and video-conferencing is the most effective method for collecting the necessary information in order to protect the child's interests in the long term.¹³⁹ In conclusion the court granted exclusive custody to Mr B, on a temporary basis, therefore requiring the immediate return of the child to Belgium, and issued a certificate under Article 42 Brussels IIa.¹⁴⁰ Another hearing was set for 26 March 2015 in which Ms A was to appear by video-conference.

Bradbrooke v Aleksandrowicz (03/04/2015)¹⁴¹

Ms A again failed to appear at the hearing on 26 March 2015 and was not represented. She refused to participate as she considered that the Belgian court did not have jurisdiction and she believed that the Belgian authorities were conspiring against her. Since the last hearing Mr B made an arrangement with Ms A to collect A from a hotel in Poland on 28 February 2015, for the purpose of access. Ms A arrived at the hotel and gave the child to Mr B and Mr B returned to Belgium with the child. This was in effect a re-abduction (albeit with the permission of the Belgian court). In relation to the earlier proceedings in Belgium where the father was awarded secondary access, in July 2014, the father had to get the decision executed (recognised and enforced) in Poland. This had been ongoing in the interim. There was a hearing in Poland in January 2015, where the mother appeared and spoke. The judge got tired and did not have time to hear the father so set another hearing for the end of February 2015 (just after the order of the Belgian Court of Appeal). When the father was in Poland for the hearing the mother agreed to let him see the child in the hotel, while she was still unaware of the Belgian decision requiring the return of the child. The mother left the child with the father, on the assumption that she would collect the child later. After the father spent a couple of hours with the child he considered that the child knew him and was comfortable in his presence and decided to take the child back to Belgium, on the basis of the Belgian return order.

In May 2015 the child had been living with his father in Belgium for a month and speaking to his mother via skype. The child had been observed by a Belgian social worker and a report was submitted on 20 March 2015. It indicated that the father had taken steps to help the child overcome the shock of being separated from his mother. The report stated that the living accommodation is adequate, the child seemed to be happy, he was smiling and playing and there were no problems with the relationship with his dad.

¹³⁸ Ibid.

¹³⁹ Ibid, p 23.

¹⁴⁰ Ibid, p 24

¹⁴¹ R.G. N°: 2014/JR/73 et N°: 2014/FA/113

Ms A sent a letter to the court indicating that she refused to take part in the video-conference. She thought the decision was very bad for the child and that he should be permitted to return to Poland without delay. The Belgian court recommended that the child and the mother meet in a centre, starting with 2 hours contact. Mr B is to take the lead and the parties have to agree times that suit. A further hearing was set for June 2015. The mother did not appear so no judgment was issued. The case was then dismissed until March 2016. So the issuing of the Article 11(8) return order and the Article 42 certificate under Brussels IIa, did not rectify the situation created by the mother as the judge intended. On the contrary it simply reversed the situation, so the child now spends all of his time with his father in Belgium and no time with his mother (apart from limited contact via skype if this is still ongoing).

McLean

The case concerned the removal of a child from Belgium to Ireland by his mother. The child was born in Belgium on 11 September 2012 and retained in Ireland between 28 December 2012 and 6 January 2013 when he was 4 months old. The child's mother and father were never married and have had a turbulent on and off relationship since 2006.

J.J and L.Mc.L [2013] No.10 HLC – Hague proceedings in Ireland

The father sought the return of the child from Ireland to Belgium in Hague proceedings in Ireland. The mother alleged that the child was not habitually resident in Belgium at the time of the retention in Ireland. She also said that if this argument failed then a Hague non-return should be ordered on the basis of Article 13(1)(b), grave risk of physical or psychological harm or an otherwise intolerable situation. The court found that the child was habitually resident in Belgium at the relevant time. Although the mother alleged that she had only moved to Belgium for the duration of her maternity leave which was a year (she was due to return to work, but in the Netherlands rather than England, in July 2013), it was clear that she intended the child to be born in Belgium and spend the first year of his life there, with the support of his father. Therefore the child was habitually resident in Belgium at the time of the retention, so the retention was wrongful.¹⁴²

The analysis of habitual residence is clear and there is reference to relevant Hague proceedings. The analysis of Article 13(1)(b) Hague Convention on the other hand is questionable. It is clear from the facts that Mr J has previously had difficulties maintaining employment, financial difficulties and struggled with depression. There have also been incidents where the police were involved in the parties' disputes. However all these incidents surround events prior to Ms M's move to Belgium and the birth of the child. However none

¹⁴² *J.J and L.Mc.L* [2013] No.10 HLC, see paras 21-9. There was no consideration of whether the father had custody rights at the time of the removal, so presumably it was clear that the father had rights of custody under Belgian law.

of the incidents were considered when the analysis of the Hague exceptions to the requirement to return a wrongfully retained child were made. The court made an in-depth analysis of the ECHR case law on the best interests of the child, *Neulinger* and the Chamber decision in *X v Latvia*.¹⁴³ The Irish court also referred to *Sneerson*¹⁴⁴ and the decision of the UK Supreme Court in *Re E*,¹⁴⁵ which they considered was difficult to reconcile with the approach of the ECtHR.

There is then a brief reference to a case on Article 13(1)(b) Hague, where there were allegations of sexual abuse,¹⁴⁶ and one reference to another case.¹⁴⁷ There was no clear analysis of the threshold that is required by Article 13(1)(b) Hague and whether the facts of the case indicated that the child actually is at a grave risk of harm if returned to Belgium. The court then held that a return to Belgium would mean a separation from the mother (although it is unclear why this conclusion is reached)¹⁴⁸ and this would not be in the best interests of the child.¹⁴⁹ The court considers this to be the case even though no psychiatric or psychological reports were submitted to it,¹⁵⁰ and held that ‘the best interests of the child require he remain with his mother in Ireland and not be returned to Belgium.’¹⁵¹ Such a statement is inconsistent with Hague return proceedings and instead is consistent with welfare proceedings, which are supposed to take place in Belgium as that is where the child was habitually resident.¹⁵² The Irish court then tried to reconcile its determination with the Hague Convention suggesting that the final question is whether the child will be exposed to a grave risk of harm or otherwise placed in an intolerable situation.¹⁵³ The court considered that ‘where a newly born child or infant is concerned... it is well established that a stable relationship between the infant and its mother is critical to its early development. Any interference with this relationship could constitute a grave risk to the child’s psychological development and thereby cause the child psychological harm.’¹⁵⁴ Consequently the Irish court concluded that Article 13(1)(b) Hague applied and the child should not have to return to Belgium.¹⁵⁵

This decision is controversial, and Article 11(4) Brussels IIa was not expressly considered by the Irish court in its judgment. The court makes a substantial analysis of the ECtHR case law including the requirement to carry out an ‘in-depth examination of the entire family situation’

¹⁴³ *J.J and L.Mc.L* [2013] No.10 HLC see paras 30-49. However the Grand Chamber decision in *X v Latvia*, suggests a change in approach from *Neulinger*. See also P Beaumont et al, ‘Child abduction: recent jurisprudence of the European Court of Human Rights’ (2015) 64 *International and Comparative Law Quarterly* 39-63.

¹⁴⁴ *J.J and L.Mc.L* [2013] No.10 HLC, para 44

¹⁴⁵ *Ibid*, paras 45-29

¹⁴⁶ *Ibid*, para 51.

¹⁴⁷ *Ibid*, para 52

¹⁴⁸ The parties were still in Ireland and the mother had not yet returned to work in Cambridge (see para 53).

¹⁴⁹ *J.J and L.Mc.L* [2013] No.10 HLC, para 53.

¹⁵⁰ In contrast to *X v Latvia*.

¹⁵¹ *J.J and L.Mc.L* [2013] No.10 HLC, para 54.

¹⁵² Art 10 Brussels IIa.

¹⁵³ *Jorgenson v McLean* ARK no. 14/476/C, para 55.

¹⁵⁴ *Ibid*, para 56.

¹⁵⁵ *Ibid*, para 57.

given in *Neulinger*. The court then purports to rely on this case law but then reaches its decision without making an in-depth analysis of the family situation. The court seems to presume that the mother will not return with the child, and as such concludes that the child should not return at all, even though there seems to be no suggestion that the father poses a risk to the child. Given that there seem to be suggestions that the mother might face imprisonment in Belgium then it might have been correct not to return the child. However the court did not consider this at all nor the risk that the child would really face in Belgium, if any.

Jorgenson v McLean ARK no. 14/476/C - Article 11(6)-(8) Brussels IIa proceedings in Belgium

The petition was submitted on 7 October 2013. The parties were informed in writing on 9 October 2013. Ms McLean did not appear at the hearing on 10 February 2014.¹⁵⁶ On 18 January 2013 during interim proceedings, exclusive parental custody was assigned to the father.¹⁵⁷ On 17 June joint parental custody was assigned by the court in Antwerp. The mother was prohibited from taking the child abroad without the father's permission.¹⁵⁸ The Irish Hague non-return decision was given on 26 July 2013.

Unsurprisingly the Belgian judge did not hear the child,¹⁵⁹ who was only around 18 months old at the time of these proceedings. The judge noted that the child had only met his father once since December 2012. The court considered that the child needed to spend time with each of his parents in order to develop a relationship with both of them. In order to meet the psychological needs of children less than two or three years old, the judge considered that contact arrangements should contain more transitions between the parents to ensure the continuity of both relationships and the necessary support and security to comfort the child.¹⁶⁰

The judge believed that the mother did not acknowledge or respect the right of the child to have contact [and a relationship] with his father.¹⁶¹ As the child needed quality contact with both his parents, for his balanced development, this would be best supported by frequent stays with both his parents.¹⁶² The decision of 17 June 2013 sought to achieve this, but after that the mother continued to prevent regular contact between the child and his father.¹⁶³ In light of the mother's behaviour the court assigned exclusive custody to the father and ordered the immediate return of the child to Belgium.¹⁶⁴

¹⁵⁶ Ibid, p 3.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid, p 4.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, p 6.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid, p 7.

Like the other decisions neither the child nor the abducting parent were heard. The child was too young and the mother did not participate in the proceedings, possibly because she was concerned she would be imprisoned if she returned to Belgium.¹⁶⁵ Unlike the other cases the Belgian judge did not take into account the reasons for the non-return order issued by the Irish courts. It appears that the child still lives with the mother and the parents have reached an agreement about the care of their child through mediation. The mediation was at the request of the Family court in Antwerp. The parties mediated via Skype through a Belgian mediator, with the result that the father moved to Dublin and has access to see his son at the weekends and is able to Skype with his child during the week.¹⁶⁶

Cases where an Article 42 Brussels IIa Certificate was not issued

Chamoun v Chachan (2011) R.G.No: 2011/AR/1040

This dispute concerned a child who was born in Belgium in February 2004.¹⁶⁷ Her parents separated in June 2004 not long after she was born.¹⁶⁸ Following this the court allocated joint parental responsibility but indicated that the child's primary residence was with her mother.¹⁶⁹ Following this there were various orders for contact with the father, but it appears contact hardly ever occurred apart from a weekend in November 2006.¹⁷⁰ In August or September 2008 the mother took the child, who was then 4 and a half years old, with her to Portugal.¹⁷¹ The father filed Hague return proceedings in Portugal in November 2008.¹⁷² The Portuguese courts recognised that the removal was wrongful, but ordered a non-return on the basis of Article 13(1)(b) Hague taking into account Article 11(4) Brussels IIa.¹⁷³

The decision was transmitted to the Belgian Central Authority, and communicated to the parties in August 2010.¹⁷⁴ Proceedings were filed before the court of first instance under the procedure in Article 11(6)-(8) Brussels IIa in November 2010.¹⁷⁵ On 28 March 2011 the court of first instance declared the father's application unfounded.¹⁷⁶ The father made an application to appeal the decision on 29 April 2011.¹⁷⁷

¹⁶⁵ Ibid, see p 4.

¹⁶⁶ Email received 13 November 2014 from Linda McLean.

¹⁶⁷ *Chamoun v Chachan* (2011) R.G.No: 2011/AR/1040, p 2

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, p 3.

¹⁷⁰ Ibid, p 5.

¹⁷¹ Ibid, p 6.

¹⁷² Ibid

¹⁷³ P 9.

¹⁷⁴ P 10.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ P 11.

The appeal judge took account of all the previous proceedings in Belgium, including the civil claim against the father where the mother alleged that he had indecently assaulted and raped their child. The judge also took into account the reasons for the Portuguese Hague non-return order. However the Belgian judge considered that the Hague non-return order did not take into account the behaviour of the mother who prevented contact even before the abduction. Further all the allegations against the father had been dismissed by the Belgian courts. It is also clear that the child had not spent any time alone with her father since a weekend in November 2006.

The Belgian judge recognised that the child had always lived with her mother. The child last saw her father in March 2010, during a meeting that went very badly where she screamed and cried and refused to make contact with him. Although this was partly the fault of the mother it was clear that the child was scared of her father and psychologists had attested to her anxiety in relation to contact with her father. As such it was not suitable to disrupt the life of the child, by removing her from her mother, and placing her with her father whom she was scared of and had never lived with. The circumstances in the case did not justify a different outcome. Therefore, the Belgian court refused to grant custody to the father, indicating that custody would be granted to the mother, although this had not been specifically requested.

The Belgian judge then indicated that he could rule on access rights, however he considered that this was an option and not a requirement (unlike the requirement to decide on custody). He concluded that he would not make a decision on access and instead any further decisions should be made in the courts of the new habitual residence of the child, Portugal, as he had taken a decision on custody that did not require the return of the child (Article 10(b)(iv) Brussels IIa). However he acknowledged that the relationship between the child and her father would need to be reconstructed before any contact could be made, and this could only be done with the help of psychologists.

Belgian CA No. WL16/LH/2011/1182¹⁷⁸

No information is available on this case outside that provided by the Belgian Central Authority, and there is no information on the Hague non-return order on INCADAT. The abducting parent was female and a non-return was ordered on the basis of Article 13(1)(b) Hague on 13 September 2011.¹⁷⁹ The Belgian first instance court reached its decision on Article 11(8) Brussels IIa on 3 May 2012. The court decided that the child should not be returned to Belgium. The child was 3 and a half at the time of the decision, so unsurprisingly the child was not heard. The Belgian Central Authority did not have any information on whether the abducting parent was heard, but the Central Authority considered that the Belgian court took account of the reasons behind and the evidence underlying the non-return

¹⁷⁸ Case identified solely by the Central Authority.

¹⁷⁹ It is unclear from the information available which Member State the child was abducted to.

order in the State of refuge when reaching its decision. The Central Authority indicated that the abducting parent is not facing criminal proceedings in Belgium.

Gomirato 17.06.2010, on appeal from 20.10.2009 ref No. 09/9117/A.

Mr G and Ms BB met while they were both working for the European Commission in Brussels. They have one child, L, a girl born on 3 April 2007 in Spain. The couple never married and never lived together, although Mr G spent several nights a week at Ms BB's apartment in Brussels, where L also lived. When Ms BB lost her job at the European Union Commission, she went back to Spain with L over the Christmas holidays in December 2008. On 19 January 2009, Ms BB returned to Belgium for a few days without L, and requested L be struck from the population register in Belgium. On 22 January 2009, Mr G issued a complaint against Ms BB for wrongful retention of L, and shortly after commenced proceedings in Spain for the return of the child under the Hague Convention. On 20 April 2009, the Court of First Instance no. 10 of La Corogne, Spain dismissed Mr G's claim, on the basis of Article 13(1)(a) Hague, non-exercise of custody rights. The Spanish appeal court also refused to return the child, but it is unclear why. On 8 May 2009, the Belgian Central Authority requested a copy of the court order on non-return. The order was sent through the Central Authorities of Spain and Belgium to the Registrar of the Court of First Instance of Brussels on 22 June 2009.

First instance

Ms BB argued that Article 11(6)-(8) Brussels IIa was not applicable in the case, because the Spanish judge founded its decision on Article 3 of the Hague Convention and not on Article 13. The president of the Court of First Instance of Brussels did not agree with Ms BB's argument, and suggested that Article 13 defines Article 3 not the other way around. This is because, according to the judge, Article 3 merely defines the scope of the Hague Convention,¹⁸⁰ while Article 13 is concerned with the "return of children". Further the Spanish court explicitly referred to Article 13(1)(a) and the lack of (exercise of) custody rights of the father when reaching its decision.

The Belgian judge considered that there has to be an autonomous definition of custody rights for the purposes of the Hague Convention and held that the father did have those rights.¹⁸¹

¹⁸⁰ However, it must be pointed out that Article 3 of the Hague Convention is not a scope provision but rather the provision defining what constitutes a "wrongful" removal or retention. For a thorough analysis see, Rhona Schuz, *The Hague Child Abduction Convention* (Hart, 2013) 141-174.

¹⁸¹ The idea of an autonomous definition of custody rights under the Hague Convention is supported, see Schuz, *ibid* at 147-148, but even advocates of that approach acknowledge that it does involve taking account of the rights given to the applicant by the law of the habitual residence of the child immediately before the wrongful removal or retention (Article 3). This is why the definition has been described as "semi-autonomous", see Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) 74. Clearly the Hague Convention does not create a uniform view of who is entitled to "custody rights" under the Convention. Therefore if the law of the habitual residence of the child immediately before the wrongful removal of the child does not recognise the right of unmarried fathers to have custody rights (or give

The judge considered that it was in the best interests of the child to return with her father to Belgium. The child was only 2 at the time of the first instance decision so she was not heard.

Appeal

Ms BB appealed primarily because she maintained that Article 11(6)-(8) Brussels IIa was not applicable because the Spanish court based its decision on Article 3 and not Article 13 Hague. The Brussels Court of Appeal disagreed with her argument. The Belgian court found that the Spanish court clearly reached its decision by referring to the first ground listed in Article 13(1)(a) of the Hague Convention, that the father was not actually exercising his custody rights at the time of the wrongful removal or retention.

Finally, the Court of Appeal held that “custody rights” within the meaning of Article 3 of the Hague Convention must be interpreted according to Belgian law, and not according to Spanish law. Article 5 of the Hague Convention defines “rights of custody” as including “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”. Under Belgian law, the right to determine the child’s place of residence is part of the rights of parental authority. Article 35 of the Belgian Code of Private International Law designates the law of the habitual residence of the child at the time of the fact which gave rise to the determination of the parental authority, in this case the birth of the child. The residence of the mother, where the child resided as well, was established in Belgium, since this is where she bought a flat and carried out a professional activity. Article 374 of the Belgian Civil Code attributes joint parental authority to both parents.

The Court of Appeal confirmed that the Belgian courts had jurisdiction on the basis of Article 11(6)-(8) Brussels IIa.

Although the Brussels Court of Appeal held the trial judge was correct in deciding that the Article 11(6)-(8) Brussels IIa procedure could apply, the Court of Appeal reached a different outcome. Since the trial decision in October 2009 (nine months earlier) the mother had married and had a second child with her new husband. Therefore the court considered that the mother could no longer return to Belgium as she had a new life in Spain. As such it would not be in the child’s best interests to require her to return as this would entail a separation from her mother and her new sibling. Further she had never been in the sole care of her

the particular unmarried father rights, however they are defined under the national law, which fall within the non-exhaustive definition of custody rights under Article 5 of the Convention) then those types of fathers will not have custody rights under the Convention, see the acceptance of this by the European Court of Human Rights noted by Paul Beaumont, “the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction” (2008) 335 *Hague Recueil des Cours* 9, 51-54. It is, however, consistent with a literal and contextual construction of the Convention to argue that anything which is defined as a custody right by the law of the habitual residence of the child immediately before the wrongful removal or retention of the child is a custody right under the Convention (see Article 3) even if it does not fall within the definition of a “custody right” provided by Article 5 of the Hague Convention because that definition is explicitly non-exhaustive (“shall include”).

father. Therefore the child was to remain in Spain with her mother and the Spanish courts were to decide the visitation rights of the father.

The court emphasised that the behaviour of the mother was wrong, and disgraceful, but they felt that they could not punish the mother at the expense of the child. The mother participated in the court proceedings in Belgium and she was heard by the Belgian courts.

The passage of time, particularly changes in circumstances, alters everything, but it is acknowledged that this case was dealt with quicker than many others. Although it is unfortunate that the Brussels Court of Appeal did not have any other option, it tried to promote a real solution which should result in contact between the child and the father, rather than prolonging proceedings by ordering a return of the child to Belgium (as any action to enforce such an order in Spain may not have been successful) and delaying contact further. Regrettably, however, the information provided to us suggests that the father has had little contact with the child in Spain since the decision by the Brussels Court of Appeal and the transfer of the case to Spain.

Incoming Hague Convention cases

Case where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

Court of First Instance of Kos, decision 443, 11 August 2014

The father took the Child from Greece to Belgium for a holiday in December 2011. He did not return to Greece in January 2012. There was some delay in the mother issuing the Hague proceedings and it is unclear from the summary, why the Belgian court issued a Hague non-return order. Article 11(6)-(8) Brussels IIa proceedings were issued in Greece by the mother. The court in Kos held that the child should be returned to Greece and granted sole custody to the mother.

Cases where a certificate was not issued

Belgian CA No. WL16/LH/2011/1136¹⁸²

This was an incoming child abduction case, where the Belgian court in a Hague case refused to order the return of the child to the UK. The non-return was ordered under Article 13(1)(a) Hague on the basis that the father was not actually exercising custody rights at the time of the

¹⁸² Incoming case provided by Central Authority.

removal.¹⁸³ The order was given on 9 November 2011 when the child was around 5 years old. Article 11(6)-(8) Brussels Ila proceedings were held in the High Court in London. The English judge did not order the return of the child to England. It appears that the child was not heard, but the abducting parent was heard as she appeared in court (this case is unreported).

Other cases of interest

FB v KF (05/06/2012)¹⁸⁴

This is a case where a Hague Convention return order was sought in Belgium asking for the return of the children to the Netherlands. It appears that a non-return order was given at first instance but a return was ordered on appeal. The significance of this case is that the appeal court stated that it is not possible in Belgium to appeal a Hague decision on non-return where the documents have been transmitted in accordance with Article 11(6) Brussels Ila to the other EU Member State, and this is confirmed by Art 1322 of the Belgian Judicial Code. It was then stated that because the Hague order on non-return had not yet been transmitted to the Netherlands Central Authority, then in such circumstances there could be an internal appeal in Belgium.

T v P (15/06/2006)¹⁸⁵

In this case the mother took the children from Belgium to France. However the father did not initiate child abduction proceedings in France under the Hague Convention. Instead he seised the Belgian courts in relation to provisional measures for the custody of the child, but not the return of the child. He then launched an additional urgent procedure in Brussels for the return of the child. The children were aged three and four at the time. The court granted primary custody to the mother and broad secondary custody to the father, amounting to ten days per month.

Sebastiani v Atieno 2012/AR/2739 – Antwerp (April 2014)¹⁸⁶

In this case the child was born in June 2007 and the father took the child to Italy in August 2010. The Italian court held that the child did not have to return because there was not a wrongful removal as the child was not habitually resident in Belgium at the time of the removal. The Belgian court confirmed the decision of the Italian court, held that the child's main place of residence was Italy, the parents shared parental responsibility and the child

¹⁸³ See the comments on p 25 of the questionnaire.

¹⁸⁴ Translation provided by Thalia Kruger.

¹⁸⁵ Summary provided by Thalia Kruger.

¹⁸⁶ Transcript provided by a Belgian Judge, translation provided by Anja Eleveld.

should visit his mother in Belgium during the school holidays. The child was not heard because he was too young. It is unclear whether the abducting parent was heard.

Conclusion

The decisions of the Belgian courts under Articles 11(6)-(8) Brussels IIa appear to be well thought out. The judges seem to conduct a full welfare check and reach a decision based on the best interests of the child, taking the entire family situation into account. Regardless of this good practice, however, there are still cases with terrible results notably *Bradbrooke* and *Cooper*. The ongoing saga in *Bradbrooke* resulted in a re-abduction, with the mother losing all belief and trust in the system, having little or no contact with her child, and the father becoming estranged from his wife and their children. In *Cooper* there were conflicts of jurisdiction resulting from the system under the Regulation and (possibly) bad legal advice given to the father. In general though Belgian practice and understanding of the procedure in Article 11(6)-(8) Brussels IIa appears positive compared to the treatment in some other Member States.

There are two major causes for concern. One is the process for hearing the child. The fact that children under 12 do not have to be informed of their right to be heard under Belgian law, conflicts with Article 11(2) Brussels IIa and Article 12 CRC. Further the children in proceedings in Brussels are heard in a court building which is inappropriate, so a more suitable place should be found so children can be heard in a friendly environment.¹⁸⁷ The second is the availability of video-conferencing equipment. Although the facilities are there, it is difficult for the judges to access these, therefore they are rarely utilised. These issues indicate that the proper application of Brussels IIa in its current form, which relies on national procedures and law, is not always viable. Another problem is the lack of clarity about whether Article 11(6)-(8) proceedings are the subject of concentration of jurisdiction in Belgium and, as a related matter, whether there is any system to ensure that these types of cases are dealt with expeditiously.

¹⁸⁷ Compare with the procedure in Latvia and the UK.

Bulgaria

Background

The Bulgarian Central Authority in its response to the questionnaire stated that although it was aware of four outgoing Hague Child Abduction Convention (Hague) cases involving another EU Member State where the decision not to return the child was based on Article 13 Hague, to their knowledge none of the cases had resulted in an Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) hearing.¹⁸⁸

The Bulgarian Central Authority also noted that with regards to incoming cases, there had been 33 non-return orders made by the Bulgarian courts under Article 13 Hague in cases coming from another EU Member State.¹⁸⁹

From the information provided by the Central Authority it was noted that of the 33 incoming cases only one case involved a left-behind parent initiating Article 11(6)-(8) Brussels IIa proceedings in the State of origin, in this case Spain.¹⁹⁰ However this case was transferred to Bulgarian jurisdiction by Article 15 of Brussels IIa and therefore the Article 11(6)-(8) proceedings ceased at that point.

Our local expert¹⁹¹ contacted both the Director of the Bulgarian Central Authority and family judges in Sofia City Court, who confirmed that there had been no concluded proceedings under Article 11(6)-(8) BIIa Regulation. This was also the outcome of their database search.¹⁹²

However, when cross-referencing our findings we were able to identify an incoming case where a mother abducted her 6-month old daughter to Bulgaria from Slovenia.¹⁹³

Incoming Hague Convention cases.

Case where an Article 42 certificate was issued by the court in the State of origin

Unknown Case I¹⁹⁴

¹⁸⁸ Bulgaria, Central Authority Questionnaire, 4.

¹⁸⁹ Bulgaria, Central Authority Questionnaire, 4.

¹⁹⁰ Bulgaria, Central Authority Questionnaire, 19.

¹⁹¹ Boriana Musseva. Email received 28/1/2015.

¹⁹² *ibid.*

¹⁹³ Suzana Kraljić, Questionnaire Response, 6.

¹⁹⁴ This information was provided by the local researcher. No identifying information was provided.

The Bulgarian court refused to return the child on 8 February 2013.¹⁹⁵ (The ground for refusal is not given) At the time of the Hague proceedings custody proceedings were current in Slovenia.¹⁹⁶ The father initiated proceedings in the Slovenian courts for the return of his daughter under Articles 11(6)-(8) and 42 of Brussels IIa.¹⁹⁷ The Slovenian District Court decided that the child should be returned to Slovenia.¹⁹⁸

Understandably the Slovenian District Court did not attempt to hear the child due to the child's age, but it also did not attempt to hear the mother.¹⁹⁹ The Slovenian judge did hear the evidence from the left-behind parent, the father, in person.²⁰⁰

The enforcement of the Slovenian return order under Article 11(8) Brussels IIa was not contested in the Bulgarian courts but the child has not been returned to Slovenia and the mother is not facing criminal charges in Slovenia.²⁰¹

Case where a certificate was not issued

Bulgarian CA No.16-02-13/11

Facts

This case concerned child/ren²⁰² who were abducted by their father from Spain to Bulgaria. The Bulgarian court issued a Hague non-return order on the basis of Article 13(1)(b), the grave risk of harm exception, and also Article 13(2), the child's objection exception.

The Spanish court upheld the Bulgarian court's decision not to return the child to Spain and arranged to transfer the case to Bulgarian jurisdiction.²⁰³ The Spanish court sent documents to the Bulgarian court under Article 15 of Brussels IIa in order to transfer the case to a court that was better placed to hear the case.²⁰⁴

The Bulgarian Central Authority pointed out that all 33 non-return orders had been sent to the States of origin under Article 11(6) Brussels IIa demonstrating appropriate knowledge of the Regulation.²⁰⁵ In the case where Article 11(8) Brussels IIa proceedings were initiated, the

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*, 7.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² Limited information available.

²⁰³ Bulgaria, Central Authority Questionnaire, 19.

²⁰⁴ Bulgaria, Central Authority Questionnaire, 19.

²⁰⁵ Bulgaria became part of the EU in 2007 therefore the figures that the Central Authority were able to give were from that point.

Bulgarian Central Authority also helped the Spanish court to send the necessary documents under Article 15 of Brussels IIa to a relevant Bulgarian court.²⁰⁶

Conclusion

Bulgaria does not appear to have any outgoing cases involving proceedings initiated under Article 11(6)-(8) Brussels IIa, two incoming cases where in one case proceedings were initiated but then transferred to Bulgaria under Article 15 Brussels IIa and one case where a return order was made by a Slovenian court under Article 11(8) and certified under Article 42 Brussels IIa in a custody case that had already been pending in Bulgaria at the time of the abduction but the child has not been returned.

The fact that there had been a case where the child had been ordered to return from Bulgaria to Slovenia which could not be identified by the Central Authority or our researcher would suggest that a central database is needed to record cases of this kind or at the very least the Central Authority should be informed.

²⁰⁶ Bulgaria, Central Authority Questionnaire, 25.

Croatia

Background

Information was received from the Croatian Central Authority and the researcher. Both sources indicated that there had been no Article 11(6)-(8) Brussels IIa proceedings in Croatia. This result is unsurprising given that Croatia did not join the EU until 1 July 2013.

Cyprus

Background

The Cypriot Central Authority completed the questionnaire. It noted that it had dealt with 11 outgoing Hague Child Abduction Convention (Hague) cases involving another EU Member State that had resulted in a non-return order based on Article 13 Hague and one incoming case where the Cypriot courts had issued a non-return order under Article 13 Hague.²⁰⁷

The Central Authority was unaware of any Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) cases as they had not received any feedback from parents whose applications had resulted in an Article 13 Hague non-return order even though in all cases the Central Authority had given them advice as how to initiate proceedings under Article 11(6)-(8) Brussels IIa.²⁰⁸

However, information gathered by the local researcher indicated that there were two cases pending that involved both Article 13 Hague and Article 11(6)-(8) Brussels IIa, but that these decisions were interim orders, not final decisions.²⁰⁹ No further information has been available.

²⁰⁷ Cyprus Central Authority Questionnaire 4.

²⁰⁸ Cyprus Central Authority Questionnaire 20.

²⁰⁹ Aspasia Efstathiou.

Czech Republic

Background

The Czech Central Authority completed the questionnaire but they only provided information from 2010-2014. The Central Authority personnel were unable to provide data from the years before this as the cases had already been closed. The Central Authority only completed section A, i.e. the summary, as they were unaware of any Article 11(6)-(8) Brussels IIa Regulation cases in the Czech Republic whether successful or unsuccessful.

The information provided indicates that a Hague non-return was ordered in two outgoing cases in the period 2010-14. So there were only two intra-EU cases where the state of refuge refused to return the child to the Czech Republic under the Hague Child Abduction Convention 1980 (Hague) in the designated time period. The response also indicates that the Czech courts only made one Hague non-return order in the period 2010-14.²¹⁰

The researcher confirmed the response of the Central Authority and informed us that there have been no Article 11(6)-(8) Brussels IIa proceedings in the Czech Republic.

However, from cross-referencing our findings we came across the following case.

Outgoing Case where Article 11(6)-(8) proceedings took place in Czech Republic

Slovenian CA Unknown Case IV²¹¹

A mother abducted her eight-year-old child from the Czech Republic to Slovenia. The Circuit Court of Piran in Slovenia issued a Hague non-return order on 31 January 2014. At that time custody proceedings were taking place in the Czech Republic. The father initiated proceedings under Articles 11(6)-(8) and 42 of Brussels IIa in the Czech Republic. The District Court of Olomuc in the Czech Republic decided that the child should be returned. The court in the Czech Republic did not attempt to hear the mother or the child but the judge did hear the left- behind parent, the father. In this case the child was returned to the Czech Republic and the mother is not facing criminal proceedings in the Czech Republic.

Conclusion

²¹⁰ Unpublished data provided by the European Commission indicates that the Czech Republic dealt with 8 intra-EU Hague cases in 2014, 13 in 2013 and 17 in 2012.

²¹¹ This is the number on the questionnaire and allows direct comparison with the Slovenian country report.

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It is possible that the Brussels IIa proceedings fell outside of the time frame of the research project which would explain why the researcher and the Central Authority were unaware of this case.

Estonia

Background

The Estonian Central Authority completed the questionnaire. They reported that they had only had one relevant Hague case: an incoming case where their courts had issued a return order under Article 13 of the Hague Child Abduction Convention. They were unaware of any Article 11(6)–(8) Brussels IIa Regulation cases but also pointed out that they have no way of knowing for sure as there is no obligation to inform the Central Authority.²¹²

The researcher confirmed the view of the Central Authority and informed us that there have been no Article 11(6)–(8) Brussels IIa proceedings in Estonia.²¹³

This is reaffirmed by our Finnish researcher who identified two Hague cases, one incoming and one outgoing, relating to Estonia. The incoming case to Finland concerned a request from Estonia for the return of the child under the Hague Convention. However, Finland ordered a non-return order under Article 13 Hague. The outgoing case concerned an abduction from Finland to Estonia and the Estonian courts refused to return the child on the basis of Article 13 Hague. Although Article 11(6)–(8) Brussels IIa proceedings were contemplated/initiated in both cases the proceedings under Article 11(6)–(8) were not brought to a conclusion with a court decision. Thus, in the end there were no proceedings under Article 11(6)–(8) Brussels IIa to record.²¹⁴

Comment

To have a situation where the Central Authority is aware of the Hague stage of the case but then is unaware of the Brussels IIa aspect and whether or not the child has been returned seems illogical as ultimately the two elements form part of the overall aim which is the return of the child to its habitual residence prior to the abduction.

²¹² Estonian Central Authority Questionnaire 4. Email received from Estonian Central Authority 2nd June 2014.

²¹³ Researcher – Maarja Torga.

²¹⁴ Information provided by Outi Kemppainen on 27 June 2014.

Finland

Background

Information collected from the Finnish Central Authority and a local researcher indicates that there have been no Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings in Finland. The Finnish Central Authority did not identify any cases at all. The Finnish researcher identified two cases – one incoming and one outgoing. The incoming case concerned a request from Estonia and a non-return order was made under Article 13 of the Hague Child Abduction Convention (Hague). The outgoing case concerned an abduction from Finland to Estonia and the Estonian courts refused to return the child on the basis of Article 13 Hague. Although Article 11(6)-(8) Brussels IIa proceedings were contemplated/initiated in both cases the proceedings under Article 11(6)-(8) were not brought to a conclusion with a court decision. Thus, in the end there were no proceedings under Article 11(6)-(8) Brussels IIa to record.²¹⁵

We have no further information.

²¹⁵ Information provided by Outi Kemppainen on 27 June 2014.

France

Background

The French Central Authority returned the questionnaire. They were able to provide information for 2 outgoing cases involving Article 13 Hague Child Abduction Convention (Hague) and Articles 11(8) and 42 Brussels IIa Regulation (Brussels IIa) and 5 incoming cases. They noted that in many of the cases they had found the proceedings were still pending and therefore they were unable to provide all of the requested information.

Unfortunately, we were unable to identify these cases from other sources. This may be in part due to the fact that first instance cases are not usually reported. The databases LegiFrance, Dalloz.fr JurisClasseur and Lamyline were checked but no Article 11(6)-(8) Brussels IIa cases were identified. Additional cases came to light when cross-referencing the findings.

Although a French Hague network judge kindly responded to our questionnaire no relevant cases were identified. Again this is put down to a lack of reporting.

Outgoing Cases where Article 11(6)-(8) proceedings took place in France

Case where an Article 42 certificate was issued

French CA no. 2DE2011

In this case the mother abducted her five year old daughter.²¹⁶ At the time of the abduction, custody proceedings were taking place in France.²¹⁷ The father applied for a Hague return order in another EU Member State but on 25 May 2012 the court in that State ordered a non-return on the basis of Article 13(1)(b) Hague.²¹⁸

The father initiated proceedings under Article 11(6)-(8) Brussels IIa and the French court at first instance decided that the child should be returned to France and ordered the return on 11 April 2013 almost a year after the Hague non-return order.²¹⁹

The Article 11(8) Brussels IIa return order was not appealed by the mother.²²⁰ The French court did not attempt to hear the child, but did hear both the left-behind parent and the

²¹⁶ French Central Authority Questionnaire, 7.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid, 8.

abducting parent.²²¹ The left-behind parent was heard in person by the judge.²²² There is no information as to how the abducting parent was heard.²²³

The French Central Authority note that the court did take into account in issuing its judgment the reasons and evidence underlying the Article 13 Hague non-return order. However, the child has not been returned and the mother is facing criminal charges in France.²²⁴ The French Central Authority pointed out that in this case the mother had gone into hiding in the other Member State and that the local authorities were looking for her and that the father has no access to the child.²²⁵

Case where a certificate was not issued

French CA no. 237DE2011

In this case a mother abducted her three year old female child from France.²²⁶ At the time of the abduction custody proceedings were not taking place in France.²²⁷ The father applied for a Hague return order in another EU Member State.²²⁸ On 7 March 2012 the courts in that State ordered a non-return on the basis of Article 13(1)(b) Hague .²²⁹ The left-behind parent initiated proceedings for the return of the child under Article 11(6)-(8) Brussels IIa.²³⁰ However, the French court at first instance on 23 July 2013, sixteen months after the Hague non-return order, decided that the child should not be returned to France.²³¹ This decision was appealed.²³² The French court did not attempt to hear the child, but as the child was three years old at the time this is not in question.²³³ The court did attempt to hear the abducting parent although information has not been supplied as to how this was done.²³⁴ The left-behind parent was heard in person by the judge.²³⁵

The French Central Authority noted that the court had taken into account in issuing its judgment the reasons and evidence underlying the Article 13 Hague non-return order.²³⁶

The child has not been returned to France and the mother is not facing criminal charges.²³⁷

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid, 9.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid, 10.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

Incoming Hague Convention cases

Cases where an Article 42 certificate was issued by the court in the State of origin.

Portuguese Case: 773/08.2TBLNHL1-7

Judge Luis Espitito Santo²³⁸

Date of Judgment 06.06.2012.

This case concerned the abduction, by the father, of a male child born on the 26th June 2004, from Portugal to Grenoble in France.²³⁹ The parents had divorced on 10 November 2005 and it was agreed that the child would be placed in the custody and care of the mother.²⁴⁰ The child subsequently lived with his mother in Portugal but in 2008 moved to France to live with his father with the mother's consent.²⁴¹ In November 2008 both parents signed an amendment to the parental responsibility agreement to transfer custody to the father but both failed to supply the necessary documents to fulfil the changes to the amendment. The child at this point was living with his father and attending preschool.²⁴²

The child went to stay with his mother during August 2009 but failed to be returned to the father on 1 September as previously agreed.²⁴³ The father applied to the court for the parental responsibility agreement to be modified. The Portuguese court dismissed the case due to a lack of legal basis. The father did not appeal and the child remained with the mother who continued to have custody.²⁴⁴

In August 2010, the child stayed with his father in Portugal to comply with contact arrangements. However the father took the child to France and resumed living with the child there. On 3 September 2010 the mother applied in France for a Hague order for the return of the child to Portugal.

On 23 November 2010 the French court decided not to return the child to Portugal. Both parties were notified of Article 11(6)-(8) Brussels IIa proceedings in Portugal and submitted their written observations.

Taking into account the reasoning by the French court for the Hague non-return order, the Portuguese court ordered the immediate return of the child under Article 11(8) Brussels IIa, taking into account that there were no protection proceedings and no reason to change the

²³⁸ Grateful thanks to Raquel Ferreira Correia for translating the cases.

²³⁹ Case: 773/08.2TBLNHL1-7 Proven Facts [1].

²⁴⁰ Ibid, [3], [4].

²⁴¹ Ibid, [7].

²⁴² Ibid, [5].

²⁴³ Case: 773/08.2TBLNHL1-7.

²⁴⁴ Ibid.

custody arrangements for the child. We have no information on whether this Portuguese return order has led to the child being returned to Portugal.

French CA no. 207DE2010

In this case the father abducted his 14 year old daughter from Portugal to France.²⁴⁵ On 22 March 2011 the French court decided not to return the child based on Articles 13(1)(b) and 13(2) Hague.²⁴⁶ Custody proceedings were not taking place at the time of the abduction.²⁴⁷ The mother initiated proceedings in Portugal for the return of the child under Article 11(6)-(8) Brussels IIa.²⁴⁸ The Portuguese court at first instance decided that the child should be returned.²⁴⁹ The Portuguese court did not attempt to hear the child nor the abducting parent or left-behind parent.²⁵⁰

The French Central Authority noted that the Portuguese judge on the one hand took into account that the French court had refused to return the child due to the grave risk of harm and that there was no evidence of protective measures having been taken in Portugal in that he stated that the mother had seized the youth protection service in Portugal.²⁵¹ However, it was noted that the Portuguese judge did not attempt to hear the child, even though the child was 14 years of age and had during the French Hague proceedings expressed her objection and her fears at returning to Portugal.²⁵²

The French Central Authority had no information as to whether the child had returned to Portugal but the father is not facing criminal proceedings in Portugal.²⁵³

French CA no. 255DE2009

A mother abducted her child from Romania to France.²⁵⁴ The father applied in France for a Hague order returning the child to Romania.²⁵⁵ On 6 July 2010 the French court ordered the non-return of the child on the basis of Article 13(1)(b)Hague.²⁵⁶ The father initiated

²⁴⁵ French Central Authority Questionnaire, 16.

²⁴⁶ Ibid, 15.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid, 16.

²⁵¹ Ibid, 25.

²⁵² Ibid.

²⁵³ Ibid, 16.

²⁵⁴ Ibid, 19.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

proceedings in Italy for the return of the child under Article 11(6)-(8) Brussels IIa.²⁵⁷ The Italian court decided that the child should be returned to Italy.²⁵⁸

The French Central Authority were unable to provide information on whether the Italian court heard the child or the parents, but they noted that the Italian judge had taken into account in issuing their judgment the reasons for and evidence underlying the order pursuant to Article 13Hague.²⁵⁹

In this case the child has been returned to Italy and the mother faces criminal charges in Italy.²⁶⁰

Cases where a certificate was not issued

HA v MB, A (a child, by his guardian) [2007] EWHC 2016 (Fam)

The mother, taking the child from the UK, wrongfully retained the child in France in August 2005 after several visits there. The child was in hospital at the time. The child was only one month old when he first visited France in June 2005.²⁶¹

On 14 October 2005 Hague return proceedings were commenced in France.²⁶² The father, a Palestinian, was not able to participate in person in the French proceedings as he was denied a visa in both December 2005 and July 2006. He was asked to produce financial evidence as well as evidence that he was allowed to remain in the UK.²⁶³ The French court heard the father on 12 July 2006.²⁶⁴ The French court refused to order the return of the child on the basis of Article 13(1)(b) Hague.²⁶⁵ It is unclear from the English judgment why the French court reached this decision but this was probably linked to the age of the child, the father's financial sustainability and the lack of clarity surrounding the father's right to remain in the UK following his divorce.

The documents sent by the French Central Authority 'did not in fact include' a transcript of proceedings before the [French] court, but it appears that the Hague non-return decision was made on the basis of written and oral submissions without direct evidence from the parents.²⁶⁶ The father tried to appeal but the French Central Authority did not take the necessary steps within the time period so the attempt failed.²⁶⁷

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid, 20.

²⁶⁰ Ibid.

²⁶¹ *HA v MB, A (a child, by his guardian)* [2007] EWHC 2016 (Fam), paras 12-14.

²⁶² Ibid, para 16.

²⁶³ Ibid, paras 18-19.

²⁶⁴ Ibid, para 23.

²⁶⁵ Ibid.

²⁶⁶ Ibid, para 27.

²⁶⁷ Ibid, para 23.

From around the middle of June 2006, whilst the Hague proceedings were still ongoing the child was living in England with his grandmother while his mother was working in France during the week. Neither the father nor the French court were aware of this.²⁶⁸ When the Hague non-return was ordered they all moved back to France.²⁶⁹

The decision in the current case was given 22 months after the father requested the return of the child. Proceedings were ongoing before the English court for 10 months.²⁷⁰ Some of the delay relates to the fact that the court sought evidence of the father's right to remain in the UK.²⁷¹ The evidence provided by the Home Office created a circular argument where the father's appeal to remain, was dependent upon the outcome of the Article 11(6)-(8) Brussels IIa proceedings.²⁷²

The mother gave 'oral evidence clearly and in a composed and careful manner.'²⁷³ The Guardian had also observed her and indicated that she is both confident and capable of looking after the child.²⁷⁴ The judge indicated that all parties would like him to make orders regulating future contact. The judge considered there were several advantages of him making these orders (rather than the French authorities).

'I have seen both parties in person, an advantage which a French juge aux affaires familiales is unlikely to have in the case of F given his (now no doubt reduced if not eliminated) likelihood of obtaining a French visa. I have heard detailed representations from the guardian whose duty on behalf of the child is to make submissions as to what is in his best interests. The contact in question will be in England rather in France, and future review and fine-tuning of it would more easily be achieved by an English court... Moreover the expense and delay of re-arguing contact issues in France would thus be avoided. Another factor is that any security arrangements necessary or desirable to safeguard A's return to M after meetings with F... could more realistically be policed by and with the wider powers of the English court.'²⁷⁵

In this case the Article 11(6)-(8) Brussels IIa proceedings were carried out properly. All the parties were heard and the child, who is too young to be heard directly, was observed by the guardian in the company of both his parents. The judge took account of the French decision, however it appears that the judgment was not detailed enough to be analysed fully. The judge also sought more evidence on the immigration status of the father and his financial stability, the two important concerns in this case. The judge concluded that the child should remain in

²⁶⁸ Ibid, para 24.

²⁶⁹ Ibid.

²⁷⁰ Ibid, para 40.

²⁷¹ Ibid, paras 41-48.

²⁷² Ibid.

²⁷³ Ibid, para 50.

²⁷⁴ Ibid.

²⁷⁵ Ibid, para 65.

France with his mother and contact between the father and the child should take place in England.

Insufficient information as to whether an Article 42 certificate was issued.

French CA no. 77DE2011

A mother abducted her child from Italy to France.²⁷⁶ The father, the left-behind parent, applied in France for a Hague order returning the child to Portugal. On 6 February 2012 the French court decided not to return the child based on Article 13(1)(b) Hague. Custody proceedings were not current at the time of the abduction.²⁷⁷

The father initiated proceedings in Italy for the return of the child under Article 11(6)-(8) Brussels IIa.

There is no further information on this case.

French CA no. 265DE2012

In this case the mother allegedly abducted her child from Ireland to France.²⁷⁸ On 18 July 2013 the French court ordered a Hague non-return on the basis of Article 13(1)(a), consent.²⁷⁹ At the time of the alleged abduction custody proceedings were not taking place.²⁸⁰ The father initiated proceedings in Ireland for the return of the child under Article 11(6)-(8) Brussels IIa.²⁸¹

The French Central Authority at the time of writing noted that the left-behind parent had appealed the Hague non-return order and the French Court of Appeal ordered the Hague return of the child,²⁸² the enforcement of the Hague order had not yet been put in place in France and the Brussels IIa proceedings were still ongoing in Ireland.²⁸³

²⁷⁶ Ibid, 28.

²⁷⁷ Ibid.

²⁷⁸ Ibid, 21.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid, 25.

²⁸³ Ibid.

French CA no. 41DE2013

In this case a mother abducted/retained her child in France from England.²⁸⁴ The father applied in France for a Hague return order. On 18 March 2014 the French court ordered the non-return of the child on the basis of Article 13(1)(b) Hague.²⁸⁵ At the time of the abduction custody proceedings were not taking place in England.²⁸⁶ The father initiated proceedings in England under Article 11(6)-(8) Brussels IIa.²⁸⁷

The French Central Authority have no further information for this case.

Other cases of interest

T v P (15/06/2006)

In this case the mother took the children from Belgium to France. However the father did not initiate child abduction proceedings in France under the Hague Convention. Instead he seised the Belgian courts in relation to provisional measures for the custody of the child, but not the return of the child. He then launched an additional urgent procedure in Brussels for the return of the children. The children were aged three and four at the time. The court granted primary custody to the mother and broad secondary custody to the father, amounting to ten days per month.²⁸⁸

Paulino v Carmela 506/2007

In this case the mother took the child from Spain to France. The child was born in Spain on 24 April 2005 and taken to France in August 2005. Shortly after this the mother filed proceedings in France for parental responsibility on 7 September 2005. The father initiated proceedings in Spain for parental responsibility on 21 February 2006, the present judgment being an appeal of that decision. As the available transcript is an appeal decision the facts are not detailed but it is clear that there were a number of proceedings initiated in France and Spain. The judgment does however indicate that in March 2006 the court of Pau France, stated that removal of the child to France was not wrongful. It is unclear whether this statement followed an application for return under the Hague Convention, but the general context of the judgment suggests that it did. The fact that the decision states that the removal was not wrongful indicates that the Hague Convention did not apply by virtue of Articles 3-5, rather than a non-return order being given on the basis of Article 13. Nevertheless in the proceedings before the Spanish court the father appears to be arguing that the removal was wrongful, the Spanish courts have jurisdiction and Article 11(6)-(8) Brussels IIa applies. It is

²⁸⁴ Ibid, 23.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Information taken from Belgian Report.

unclear why Article 11(6)-(8) Brussels IIa applies, if the Hague non-return decision was not given on the basis of Article 13. The Spanish court held that the French court had jurisdiction, all parties having acquiesced in the jurisdiction of the French courts by participating in proceedings there.²⁸⁹

Additional information

The following case although not directly in point for this project, clearly identifies the problems surrounding enforcement of valid Hague return orders intra-EU.

Raw and Other v France App No 10131/11

Judgment 7.3.2013

This case concerned a complaint that the failure by the French authorities to ensure the return of the children to the UK was a violation of Article 8 of the ECHR.

In this case a mother (the applicant) had three children, D, A and C.²⁹⁰ Her two eldest, D born 1995 and A born 1997 were born from her relationship with a French national.²⁹¹ C was born in 2000 to another man after the mother had separated from her first relationship.²⁹² The mother had returned to the UK with the children with the consent of the father of D and A in March 2001.²⁹³ The father of D and A remained in France. Their divorce was finalised in June 2001.²⁹⁴ In January 2002 the French court stated that the parents would have joint parental responsibility but that D and A would reside with their mother and granted the father access.²⁹⁵

In December 2008 the father of D and A retained his children in France at the end of a planned visit.²⁹⁶ On 28 December 2008, he approached the French police to say that the children were upset and feared returning to England.²⁹⁷ On 2 January 2009 the French court granted interim custody to the father.²⁹⁸ The French court requested a report on the family. The report was found to support the claims made by the father concerning the fact that

²⁸⁹ Translation provided by Carmen Otero.

²⁹⁰ [5]

²⁹¹ [5]

²⁹² [5]

²⁹³ [6]

²⁹⁴ [7]

²⁹⁵ [7]

²⁹⁶ [12]. The father had attempted to obtain a transfer of residence for the children in 2006 but this had failed.

The mother had failed to honour several arrangements allowing the children to visit their father during the holidays. In 2007 the children stayed with their father in Spring, Summer and Autumn. After the Christmas trip in 2007 the father only agreed to return the children after intervention by the French police. He also retained them after the summer break in 2008 but complied with a court request for the return. *Raw and Others v France* [7]-[9].

²⁹⁷ [12].

²⁹⁸ [13].

returning the children would cause them psychological harm and stated that D's and A's evidence was credible.²⁹⁹

On 5 January 2009 the mother applied to the English courts for the return of the children under the Child Abduction and Custody Act 1985 and Brussels IIa.³⁰⁰ The English courts ruled that the retention of the children by their father was unlawful on 9 January 2009, placing the children as wards of court.³⁰¹ On 13 January 2009 the English Central Authority forwarded the mother's request for the return of the children to the French Central Authority. On 23 January 2009 a hearing in the French court ordered the return of the children to the mother.³⁰²

The father appealed.³⁰³ On 16 April 2009, the French courts upheld the decision to return the children to the UK, stating that the return of the child could not be refused where adequate protection had been put in place.³⁰⁴ The French authorities attempted to encourage cooperation between the parents. On 4 June 2009 a meeting had been arranged between the children, the mother, father, educator, psychologist and a social worker with the aim that the children would return to the UK with their mother the same day.³⁰⁵ This attempt to re-establish the relationship failed due to the children's negative reaction, in that the eldest child physically attacked his mother and the younger child refused to see her.³⁰⁶ Their reaction to being confronted with their mother was sufficiently shocking to the children to trigger panic attacks resulting in them both being hospitalised for two days.³⁰⁷

The French public prosecutor decided they would not enforce the decision to return the children at that time on the basis of their behaviour at the 'neutral' meeting.³⁰⁸ On 16 June 2009 the English Central Authority continued to communicate with the French Central Authority in attempts to arrange for the return of the children.³⁰⁹ The French CA requested that the English CA organise a child psychiatrist to examine the children and attempted to arrange a video conference between the father, guardian and British social worker to prepare for the return.³¹⁰ Delays followed and the video conference was finally arranged for 10th December 2009.³¹¹ Further delays took place in 2010.³¹² On 28 July 2010 the English CA wrote to the French CA asking them to enforce the judgment of 16 April 2009 and that the mother was willing to travel to France to collect them.³¹³

²⁹⁹ [13].

³⁰⁰ [15].

³⁰¹ [15].

³⁰² [17].

³⁰³ [21].

³⁰⁴ [23].

³⁰⁵ [29].

³⁰⁶ [29].

³⁰⁷ [29].

³⁰⁸ [32].

³⁰⁹ [34].

³¹⁰ [35].

³¹¹ [39].

³¹² [40]-[42].

³¹³ [43].

On 9 December 2010, A contacted his mother in secret via a social network site and arranged to go back to England.³¹⁴ A now lives in England. D is now 18 and lives with his father in France.³¹⁵

The ECtHR declared by five votes to two that in this case the failure to execute a judgment confirming an order to return underage children to their mother in the United Kingdom was a violation of Article 8 ECHR.

In a dissenting opinion by Judge Lemmens he felt that there had been no violation of Article 8 ECHR,³¹⁶ because the French courts had acted quickly and had agreed to return the children in April 2009.³¹⁷ The authorities had used a variety of methods in an attempt to convince the father to comply.³¹⁸ The meeting with the mother in June 2009 had been ‘catastrophic’ resulting in the hospitalisation of the children.³¹⁹ At that point the French public prosecutor made the decision not to return the children.³²⁰ Lemmens notes that the father could have been coerced in order to facilitate the return of the children to their mother but the French authorities did not want to cause the children further harm by taking this approach.³²¹ Lemmens argues that the State has sufficient discretion in relation to the Convention to have behaved in this way.³²²

Comment

The purpose of the 1980 Convention is to restore the situation prior to the abduction/retention as quickly as possible, i.e. to secure the prompt return of the children to their habitual residence before they were abducted/retained, so that decisions regarding their future can be made there.³²³ The French courts were clear in April 2009 that the children had been made wards of court in England and Wales, that sufficient protection was in place for the return of the children with their father, that they took into account the views of the children but that there was a conflict of loyalty and that the children had not seen their mother for three months and had been under the sole influence of their father.³²⁴

There was no legitimate reason at this point not to enforce the return order. Although as seen under Article 7(c) 1980 Convention the Central Authorities have a duty to take appropriate measures to secure the voluntary return of the child or an amicable solution, coercion at the point when the father initially refused to comply may have prevented the emotional trauma

³¹⁴ [44].

³¹⁵ [45].

³¹⁶ Dissenting Opinion Judge Lemmens[3].

³¹⁷ [3].

³¹⁸ [3].

³¹⁹ [3].

³²⁰ [3].

³²¹ [3].

³²² [3].

³²³ Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction, Article 1(a).

³²⁴ *Raw and Others v France* [23].

the children experienced in June 2009. It could therefore be argued that by not being firm with the adult from the outset, the French authorities contributed towards the psychological harm these children experienced, ultimately rewarding the father's unlawful behaviour.

Conclusion

In the two outgoing cases the French courts made an Article 11(8) Brussels IIa return order in one case and it has not resulted in the return of the children to France. Both cases show evidence of considerable delays in the Brussels IIa proceedings. In the incoming cases we have evidence that in one of them a child has returned to the other Member State after an Article 11(8) Brussels IIa return order whereas the position as to the actual return of the child is unclear or pending in others.

Germany

Background

Information from the German Central Authority indicated that between the dates of 1 March 2005 and 31 December 2013 they recorded 73 outgoing Hague Child Abduction Convention (Hague) cases which had resulted in a non-return order based on Article 13 Hague.³²⁵ Of these 73 cases only two resulted in an Article 11(8) Brussels IIa Regulation (Brussels IIa) hearing in the German courts, and only one Article 11(8) return order was granted.³²⁶ The Central Authority noted that the only case where the child had ‘returned’ to Germany was in the well documented C-195/08 *Rinau* case where the father collected the child from Lithuania and brought his daughter back to Germany without waiting for enforcement measures.³²⁷

From 1 March 2005 until 28 February 2014 the German Central Authority recorded a total of 45 incoming Hague cases which resulted in a non-return order based on Article 13 Hague. It noted that this figure may not reflect the full picture as not all Hague non-return orders are available online nor is the Central Authority involved in all return applications due to Article 29 Hague.³²⁸ Of the 45 incoming cases only one case led to an Article 11(8) Brussels IIa hearing in the EU Member State of origin. This case is the well documented C-491/10 PPU *Zarraga* case.³²⁹ In this case the Article 11(8) Brussels IIa return order was granted in Spain but it did not result in the return of the child.

However, as a result of cross-referencing the cases from other Member States, it was possible to identify a further seven cases; 3 incoming and 4 outgoing.

General information

Under Section 235 of the German Criminal Code, a person who removes a child from the custody of one or both of his parents or his guardian in order to take him abroad or who denies access to him abroad after having removed him there or the child having gone there, shall be liable to imprisonment not exceeding five years or a fine. The abduction may only be prosecuted upon request unless the prosecuting authority considered *proprio motu* that prosecution is required because of special public interest.³³⁰ The Central Authority noted that they have no information on whether the individual cases have resulted in criminal proceedings against the abducting parent in Germany.³³¹

³²⁵ Germany Questionnaire, 4.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ C-491/10 PPU *Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247.

³³⁰ Germany Questionnaire, 8.

³³¹ Ibid.

Outgoing cases where Article 11(6)-(8) proceedings took place in Germany

German CA No. SR1c-A-208/06

This is the well documented *Rinau* case.³³² In this case, the mother, a Lithuanian national, separated from her German husband in 2005.³³³ In July 2006, the mother, with the father's consent, took their daughter to Lithuania for a two week holiday but did not return.³³⁴ The father applied for a Hague return order in Lithuania based on the mother's wrongful retention of the child.³³⁵ The Lithuanian first instance court refused to order the return of the child on 22 December 2006.³³⁶ On appeal lodged by the father, the second instance Lithuanian court ordered the return of the child on 15 March 2007.³³⁷ The first instance Lithuanian court suspended the enforcement of the return order on several occasions.³³⁸ At the time of the Hague proceedings, custody proceedings were taking place in Germany.³³⁹ On 20 June 2007 the German court granted the divorce and awarded custody of the daughter to the father.³⁴⁰ In accordance with Article 11(8) Brussels IIa it also issued an Article 42 Brussels IIa certificate to render the return decision enforceable and allowing for automatic recognition in another Member State.³⁴¹ During these proceedings in the German court, the mother was represented by a lawyer in the first instance court and she appeared in person during the appeal. The child was not heard as she was only two years old, but she was represented by a child's guardian who was in charge of representing the child's interests in custody proceedings according to German national procedural law. The father was heard in person by the German judge. In issuing its judgment the reasons and evidence underlying the order pursuant to Article 13 Hague were taken into account. This judgment was upheld in the German appeal court on 20 February 2008. The order for the Article 11(8) Brussels IIa return was appealed.³⁴² The mother applied to the Lithuanian courts for non-recognition of the return decision.³⁴³ The Lithuanian Supreme Court referred preliminary questions to the CJEU where it asked whether a successful appeal against an Article 13 Hague non-return order overrules an Article 11(8) Brussels IIa return order.³⁴⁴ The CJEU ruled that where the Article 42 Brussels IIa certificate had been issued correctly then the enforceability could not be opposed.³⁴⁵ The

³³² C-195/08 PPU *Rinau* [2008] ECR I-05271; [2009] Fam 51.

³³³ *Ibid.*, para 28.

³³⁴ *Ibid.* para 29.

³³⁵ *Ibid.*, para 31.

³³⁶ German Central Authority Questionnaire, 9.

³³⁷ German Central Authority Questionnaire, 9.

³³⁸ C-195/08 PPU *Rinau*, para 31.

³³⁹ German Central Authority Questionnaire, 9.

³⁴⁰ C-195/08 PPU *Rinau* para 37.

³⁴¹ C-195/08 *Rinau* para 37. German Central Authority Questionnaire, 9.

³⁴² German Central Authority Questionnaire, 9.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ C-195/08 PPU *Rinau* para 111. 'Once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, that that decision has been suspended, overturned, set aside or, in any event,

outcome of this case was that the father collected the child from Lithuania and brought her back to Germany without waiting for enforcement measures in Lithuania.

Portugal – Case - 2254/09.8TMPRT-B.P1JTRP000

Judge Freitas Vieira

31 March 2011

This case concerned a family who were all Portuguese nationals. The parents had married on 5 March 1999. The couple with their son had lived in Portugal until the end of 2008 and had then migrated to Germany. The child lived in Germany with his parents and stayed with his mother after the separation. In mid-September 2009 the father abducted his son, born on 25 June 2001, from Germany to Portugal. The mother, the left-behind parent, applied for a Hague return order in Portugal. On 11 January 2010 the Portuguese first instance court refused to return the child under Article 13(2) Hague, child's objection to being returned, a decision that was upheld by the Oporto Appeal Court on 10 May 2010. The child stated the he did not want to return to Germany, that he disliked the school and living in Germany but that he did miss his mother. The child had settled well in the Portuguese school on his return.

On 27 May 2010 the German court confirmed the decision it had given on 10 March 2010 that residence was given to the mother and that the child should be returned to the mother in Germany. On 3 September 2010 documents were submitted to the Portuguese court asking it to declare it did not have jurisdiction to decide the merits and for the immediate return of the child to Germany.

On 20 September 2010 the Portuguese court dismissed the argument that they lacked jurisdiction and dismissed the order by the German court in Dortmund for the return of the child to the mother.

The Public Prosecutor and the mother appealed this decision. The public prosecutor found that the Portuguese court had erred in its understanding of the child's habitual residence. The child had not reacquired its habitual residence in Portugal.

has not become *res judicata* or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place. Since no doubt has been expressed as regards the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. Except where the procedure concerns a decision certified pursuant to Articles 11(8) and 40 to 42 of Regulation No 2201/2003, any interested party can apply for non-recognition of a judicial decision, even if no application for recognition of the decision has been submitted beforehand. Article 31(1) of Regulation No 2201/2003, in so far as it provides that neither the person against whom enforcement is sought, nor the child is, at this stage of the proceedings, entitled to make any submissions on the application, is not applicable to proceedings initiated for non-recognition of a judicial decision if no application for recognition has been lodged beforehand in respect of that decision. In such a situation, the defendant, who is seeking recognition, is entitled to make such submissions.'

The Portuguese Appeal Court noted that the request for the return of the child was based on the enforceability of the German return order made under Article 11(8) Brussels IIa. The Court noted that the decision is only enforceable if the correct certificate is issued by the court of origin. In this case the Article 42 certificate had not been enclosed and therefore the enforceability of the decision did not have to be recognised and therefore this element of the appeal was rejected. The judge also noted that the father had presented a decision from the Court of Appeal in Hamm Germany that changed the German decision regarding the return of the child to the mother.

Outgoing Case where an Article 42 certificate was not issued

German CA No. SR1a-A-116/09

In this case the mother abducted the child from Germany to Poland. The father applied for a Hague return order. The Polish Court refused to return the child on the basis of Article 13(1)(b) Hague on 9 June 2009. At the time of the Hague proceedings custody proceedings were current in Germany. The father then initiated proceedings for the return of the child under Article 11(8) Brussels IIa but the German court decided that the child should not be returned. This decision was made on 18 March 2010.

Although in this case the German court did not order the return of the child, it did hear all relevant persons. The child and the mother were heard using the Taking of Evidence Regulation 1206/2001 and the left-behind parent was heard in Germany. The German Family Court requested that the Polish court hear the child. At the time of the hearing by the Polish court the child was 6 years old. The German court took into account the reasons for and evidence underlying the Polish non-return order made pursuant to Article 13 Hague. The child has not returned to Germany.

Romanian CA No. 90550/2011

A mother abducted her 9 year old child from Germany to Romania.³⁴⁶ Custody proceedings were not ongoing at the time of the removal.³⁴⁷ The father applied for a Hague return order in Romania.³⁴⁸ The Romanian court ordered the non-return of the child on 17 May 2012 on the basis of the child's objections (Article 13(2) Hague).³⁴⁹ The father initiated proceedings under Article 11(6)-(8) Brussels IIa in a German court.³⁵⁰ The German court decided that the child should not be returned to Germany.³⁵¹ In this case the both parents were heard in person

³⁴⁶ Romanian Central Authority Questionnaire, 17.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

by the judge in the German court.³⁵² The parents came to an agreement before the appellate court.³⁵³ Custody was awarded to the mother, together with residence in Romania.³⁵⁴ The child has not been returned to Germany and the mother is not facing criminal charges in Germany.³⁵⁵

Slovenia CA Unknown Case III

The facts for this case are sparse. A mother abducted her child from Germany to Slovenia.³⁵⁶ It would appear that the Slovenian courts refused to return the child under Article 13 Hague. The father initiated proceedings in Germany under Article 11(8) Brussels IIa.³⁵⁷ The parents settled before the German court, but the child was not returned to Germany.³⁵⁸

Italian CA No 212/09P

This application concerned the abduction of a child from Germany to Italy. The abducting parent was female. The Italian court refused to order the return of the child on the basis of Article 13(1)(b) Hague, on 18 May 2010. Following this the left-behind parent initiated Article 11(6)-(8) Brussels IIa proceedings in Germany. The German court did not reach a decision which required the return of the child. The Italian Central Authority (which informed us about this case) did not provide information on whether the parties were heard by the German courts (most likely because it does not have this information). It is unclear how old the child was in this case. The German Central Authority did not provide any information on this case.

Incoming Hague Convention Cases

Cases where an Article 42 Certificate was issued by the court in the State of origin

Aguirre Zarraga v Pelz [2010] ECR I-1427

This case concerned an abduction from Spain to Germany by the mother, by way of a wrongful retention. Custody proceedings were ongoing in Spain prior to the retention in Germany. On 12 May 2008 a first instance court in Bilbao, Spain held that the father should be provisionally awarded rights of custody including residence and the mother rights of

³⁵² Ibid, 18.

³⁵³ Ibid, 17.

³⁵⁴ Ibid, 17.

³⁵⁵ Ibid, 18.

³⁵⁶ Slovenian Central Authority Questionnaire, 20.

³⁵⁷ *ibid*.

³⁵⁸ *ibid*, 21.

access.³⁵⁹ In June 2008 the mother relocated to Germany. In August 2008 the mother retained the child in Germany, at the end of the summer holidays.³⁶⁰ The father then initiated Hague proceedings in Germany for the return of the child to Spain. On 30 January 2009 the German court held that the child should be returned.³⁶¹ The mother appealed this decision and on 1 July 2009 the appeal court held that the child should not be returned on the basis of Article 13(2) Hague, child's objections.³⁶² The court stated that the child categorically refused to return to Spain, and the expert considered that her opinion should be taken into account in the light of her age and maturity.³⁶³ Custody proceedings were then continued before the Spanish court in July 2009.³⁶⁴ The court considered it was necessary to obtain a fresh expert report and hear the child in person. The mother requested that the child be heard via video link, but the request was refused and the parties were not heard.³⁶⁵

On 16 December 2009 the Spanish court awarded the father sole rights of custody,³⁶⁶ and required that the child be returned to Spain. The mother appealed this decision requesting that the child was heard. This appeal was dismissed on 10 April 2010 on the basis of procedure.³⁶⁷ On 5 February 2010 an Article 42 Brussels IIa certificate was issued by the Spanish court. Ms Pelz objected to the enforcement of the certificate in Germany, despite the fact it is automatically enforceable under the Regulation. On 28 April 2010 the first instance court held that the judgment was not to be enforced because the Spanish court had not heard the child.³⁶⁸ On 18 June 2010, the father appealed this decision.³⁶⁹ Although the appeal court recognised that there is no power to review Article 42 Brussels IIa certificates, it considered that exceptions should be made where there is a serious infringement of fundamental rights.³⁷⁰ Further the appeal court considered that the certificate declared that the child was heard when she was not.³⁷¹ Therefore the court made a reference to the Court of Justice of the European Union (CJEU) asking what the procedure should be where the decision violates Article 24 of the EU Charter of Fundamental Rights (the Charter), and the certificate makes a declaration that is 'manifestly false'.³⁷²

³⁵⁹ C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247, para 18. See Lara Walker and Paul Beaumont "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) 7 *Journal of Private International Law* 231-249.

³⁶⁰ Ibid, para 20.

³⁶¹ Ibid, para 26.

³⁶² Ibid, para 27.

³⁶³ Ibid, para 28.

³⁶⁴ Ibid, para 22.

³⁶⁵ Ibid.

³⁶⁶ Ibid, para 23.

³⁶⁷ Ibid, para 24.

³⁶⁸ Ibid, para 32.

³⁶⁹ Ibid, para 33.

³⁷⁰ Ibid, para 34.

³⁷¹ Ibid, para 36.

³⁷² Ibid paras 35-37. However it is noted that the declaration only need indicate that the child was given an opportunity to be heard (see Article 42 and Annex IV).

The CJEU held that the Member State where enforcement is sought cannot review the certificate or the enforcement of the judgment,³⁷³ unless there are questions regarding the authenticity of the judgment/certificate.³⁷⁴ If there are any other issues with the judgment, such as the protection of fundamental rights, (specifically the child's right to be heard under Article 24 of the Charter) the decision should be appealed in the Member State of origin.³⁷⁵ The CJEU pointed out that the requirement to hear the child is not absolute and this is subject to the child's age and maturity.³⁷⁶ The decision on whether to hear the child should also take into account the best interests of the child.³⁷⁷ However the CJEU stressed that where the court in the State of origin had taken a decision that the child should be heard, then every effort should be made to hear that child. The court should 'use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001',³⁷⁸ in order for the child to have 'a genuine and effective opportunity to express his or her views'.³⁷⁹

In this case the CJEU tried to take a balanced view, giving full effect to the automatic enforcement of the Article 42 certificate as required by the Regulation. However this case highlights some problems with the Regulation, particularly its lack of clarity in relation to the term 'opportunity', the inability to review the judgment on which the Article 42 certificate is based on any ground and the lack of detail that judges need to provide in the Article 42 certificate. Our research indicates that on many occasions in Article 11(6)-(8) Brussels IIa proceedings throughout the EU the child is not heard and often authorities do not make any real effort to hear the child, taking account of the child's position. However it is noted that in *Aguirre Zarraga* the order was never enforced and the child has remained in Germany with her mother.

Cases where an Article 42 Brussels IIa certificate was not issued

Italy - Juvenile Court Catania, order 19 June 2014

(Italian CA No 157/12)

This case concerned an abduction from Italy to Germany, in September 2013, carried out by the mother. In June 2013 the German court ordered the non-return on the basis of Article 13(1)(a) Hague, consent.³⁸⁰ The father then initiated proceedings under Article 11(7) Brussels IIa in Italy requesting an Article 11(8) decision. However the father did not lodge this request until February 2014, which was 8 months after the Hague non-return decision and 18 months after the abduction. The father claimed that this delay was due to the fact that he was never 'notified' of the receipt of the German decision by the Italian Central Authority. The Italian

³⁷³ Ibid, para 49.

³⁷⁴ Ibid, para 50.

³⁷⁵ Ibid, para 73.

³⁷⁶ Article 42(2)(a) and Article 24(1) Charter.

³⁷⁷ *Aguirre Zarraga*, paras 63-4 and Article 24(2) Charter.

³⁷⁸ Ibid, para 67. EC Regulation 1206/2001 is the Taking of Evidence Regulation.

³⁷⁹ Ibid, para 66.

³⁸⁰ OGH Hamm.

court indicated that Article 11(7) Brussels IIa does not compel the Central Authority to follow special formalities, and the applicant had been informed, albeit not by proper notification, but through a ‘note’ received by the father in June 2013.³⁸¹ The judge indicated that the rationale underlying the three month period for submission, is to set a time limit in relation to the competence of the court in accordance with the principle of proximity to the minor. Since the minor had lived in Germany since August 2012, the connection with Italy had now ceased so jurisdiction of the Italian court had to be denied and the return was refused.

The child was only three at the time of the Italian proceedings so was not heard. The Italian Central Authority indicates that the judge attempted to hear the abducting parent, the mother. However, it is not clear from the information provided by the Central Authority nor the researcher what mechanisms were used and whether the mother was actually heard. The Central Authority and the researcher both indicate that the left behind parent was heard. The Central Authority indicates that the court took account of the reasons for non-return. The researcher suggests the previous decision is mentioned, but it is unclear how much attention the Italian court gave to the German decision. The Italian decision that the child should remain in Germany, appears to be based on the fact that the father did not initiate Article 11(6)-(8) Brussels IIa proceedings, under Article 11(7), within 3 months and the judge considered that the child was now habitually resident in Germany, which meant the Italian court no longer had jurisdiction to make decisions in relation to the child.³⁸²

AF (Father), T (Mother) v A (a child, by his Children's Guardian) [2011] EWHC 1315 (Fam)

A was born in 2004. He was abducted from England to Germany by his mother in 2008. From then until this case was decided in England in 2011 he had not seen his father. The court made a detailed analysis of the German decision to refuse to return the child.³⁸³

The refusal was based on Article 13(1)(a) Hague, lack of exercise of custody rights, and Article 13(1)(b) Hague.³⁸⁴ On appeal the German courts relied solely on Article 13(1)(b) and did not consider the Article 13(1)(a) arguments.³⁸⁵ The main reason behind the Article 13(1)(b) non-return order was that the German courts considered that A had no attachment to his father, and in fact he did not even recognise him. In such circumstances ‘A’s return without his mother does not come into consideration.’³⁸⁶ Therefore the judge considered that the return of the child to England without his mother would be contrary to the child’s ‘well-being’. The court then stated that this issue could not be counteracted by the mother

³⁸¹ Article 11(7) Brussels IIa requires that either the court or the Central Authority (whichever was notified of the Art 13 Hague non-return order under Art 11(6) Brussels IIa) must notify the parties and invite them to make submissions to the court.

³⁸² Compare with the decision of the Belgian court in *X v Y*.

³⁸³ *AF (Father), T (Mother) v A (a child, by his Children's Guardian)* [2011] EWHC 1315 (Fam), paras, 37-44.

³⁸⁴ *Ibid* paras 37-42.

³⁸⁵ *Ibid*, para 43-44.

³⁸⁶ *Ibid*, para 43.

accompanying the child to England.³⁸⁷ This is because the mother was considerably traumatised and in the presence of the father she was not able to ‘articulate’ herself even with public support. The judge believed that she had an ‘immense fear’³⁸⁸ of the applicant.

‘The extraordinary psychological state of the Respondent can be explained, ..., by the physical abuse she has had to suffer, which has not been substantially disputed by the Applicant and the core truth of which he has even expressly admitted... The Respondent’s considerable and sustained traumatising, which ... can be definitely traced back to the Applicant’s behaviour, does not allow her to accompany A in the event of an order that he return to England. Indeed, this is also the case even if... the English authorities take all the necessary protective measures conceivable for the benefit of the Respondent.’³⁸⁹

The German appeal court took account of the general approach under Article 13(1)(b) Hague and the additional requirement under Article 11(4) Brussels IIa. However the English judge was critical of the approach of the German court, as the decision did not take account of earlier proceedings in England where the mother was capable of participating and did not appear distressed.³⁹⁰ Further, the German authorities did not carry out a psychological assessment of the mother,³⁹¹ nor did there appear to be any expert medical evidence submitted.³⁹² The approach of the lower court in Germany was also criticised by the English judge. The refusal to return the child under Article 13(1)(a) Hague was considered inappropriate. Contact was taking place between A and his father at the time of the removal and there were also proceedings ongoing before the English courts.³⁹³ Therefore the father must have been exercising his custody rights (if it was deemed that he had custody rights under Articles 3 and 5)³⁹⁴ as he did have contact with his child and was party to further proceedings concerning A.

Although the English court was critical of the way the German court assessed the mother’s psychological fitness the English court did not hear the mother in the Article 11(6)-(8) Brussels IIa proceedings, so was unaware of whether the mother’s psychological state had altered since the proceedings in 2006/07.³⁹⁵ Despite this the English court was satisfied that a certificate could be issued under Article 42 Brussels IIa because the parties were given an opportunity to be heard. The judge indicated that sustained efforts had been made to engage the mother since July 2009 (just under two years) but these were all ignored by the mother.³⁹⁶ It is unclear whether these efforts simply required the mother to appear before the court, so she chose to ignore them, or whether the mother had the choice to join the proceedings via

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Ibid, para 44.

³⁹¹ Ibid, para 37.

³⁹² See the synopsis of the German judgment at para 43.

³⁹³ Ibid, paras 3-4.

³⁹⁴ Oddly when assessing the Art 13(1)(a) Hague point the lower court then seems to suggest that the father only had access rights. If this is true then the Convention would not have been applicable as the removal would not have been wrongful, this should not be a consideration under Art 13(1)(a) (ibid, para 41).

³⁹⁵ Ibid see paras, 11 and 44.

³⁹⁶ Ibid para 11.

video link, or give evidence under the EU Taking of Evidence Regulation. The English court did not hear the child, who was then 7. In ‘these limited and particular circumstances hearing from A can be described as inappropriate. For reasons beyond his control, his father is now a stranger to him and he is not of an age or degree of maturity to understand the position.’³⁹⁷ However the English court did have access to a Youth Welfare Report prepared by the German Authorities that was transmitted to the Children’s Guardian via the German Central Authority.³⁹⁸ This report contained information on the mother and the child. There was a report from the Children’s Guardian that contained information on the father, and there were some further Cafcass reports which predated the abduction. Therefore the court was able to carry out a welfare assessment and was made aware of the views of the parties, albeit indirectly.

A major problem with this case is the lapse of time. The English proceedings took place three years after the child was wrongfully removed and two years after return was refused.³⁹⁹ As such the judge considered whether it was appropriate to make an order at all. However it was considered that the father would be faced with further delay and difficulty if he was now required to bring fresh proceedings in Germany. As such the judge considered that it was appropriate for the English court to make an order, if this was justified on welfare grounds.⁴⁰⁰ ‘Making no order would almost inevitably lead to the irretrievable loss of the relationship between A and his father. If this court allowed that to happen it would not in my view be meeting its obligations under Article 8 ECHR.’⁴⁰¹ The court went on to consider the welfare issues in light of the information available at that time.⁴⁰² The judge held that the child should remain in Germany but considered that a contact order might bring about some beneficial progress, although that is in the hands of the German authorities.⁴⁰³ The order indicated that the father should have contact with the child 6 times per year, in Germany, under the supervision of the German Youth Welfare Authority.⁴⁰⁴ The contact should commence as soon as possible.⁴⁰⁵

The English judgment takes into account the decision of the German court and appears to make a fair assessment of the current situation. Although the mother was not heard directly, the judgment indicates that several attempts were made by the authorities to encourage her to participate in proceedings. The outcome that the child should remain in Germany and currently have supervised contact with his father, seems to promote the welfare of the child but takes into account the fact that the child has a right to know both his parents and that both parents have rights in relation to their child.

³⁹⁷ Ibid, para 12.

³⁹⁸ Ibid, para 50.

³⁹⁹ Ibid para 64.

⁴⁰⁰ Ibid, para 66.

⁴⁰¹ Ibid.

⁴⁰² Ibid, para 67.

⁴⁰³ Ibid, para 73.

⁴⁰⁴ Ibid, para 7(3).

⁴⁰⁵ Ibid.

Conclusion

As noted at the beginning of this report according to the statistics of the German Central Authority there have only been two German Article 11(6)-(8) Brussels IIa cases that went to judgment and in only one (*Rinau*) was a return ordered. The child was returned to Germany in that case but through unilateral action by the left-behind parent. Our additional research indicates that there was another case where the German court was invited to make an Article 11(8) return order but did not do so because the case settled (Slovenia), one where the German court declined to make a return order and then the parties settled during the appeal in the Hague return proceedings (Romania) and finally one case where the German first instance court did order a return but did not issue an Article 42 certificate to accompany it (Portugal) so the order was not enforced.

In relation to the enforcement in Germany of Article 11(8) Brussels IIa return orders from other Member States the German Central Authority was only aware of the notorious *Zaragga* case in which the child was not returned to Spain. This was confirmed by our additional researches. There is one English case where an Article 11(8) Brussels IIa return order was refused by the English court after a decision of a German court not to return the child to England that had ultimately been given on the basis of Article 13(1)(b) Hague and one Italian case where an Article 11(8) return order was denied in Italy because the proceedings had been brought in Italy too long after the Hague non-return order by the German court.

Given the large volume of Hague cases between Germany and other EU Member States the remarkably small number of Article 11(8) Brussels IIa return orders (2 out of 118) of which only one led to a return of the child (and even that not by lawful means) shows that the Article 11(8) system serves little or no purpose in cases concerning Germany.

Greece

Background

The Greek Central Authority did not return the questionnaire. Their explanation for not returning the questionnaire was twofold.⁴⁰⁶ The fact that the Central Authority did not have a computerised database at all and that there was only one member of staff meant that they would have to search for the information manually and understandably they did not have time to do this.

The local researcher also pointed to difficulties in obtaining relevant information but made a thorough examination of both a private legal database and a restricted user database. He noted that there had been no reported cases involving Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings.⁴⁰⁷

However, since then we have been made aware of one case from a court of first instance concerning Article 11(6-8) Brussels IIa.⁴⁰⁸

Outgoing case where Article 11(6-8) proceedings took place in Greece

Case where an Article 42 certificate was issued

Court of First Instance of Kos, decision 443, 11 August 2014

This application concerned retention of the child by the father in Belgium.

Facts

The parents married in Belgium in 2004. The parents subsequently separated and lived apart. Care of the child was decided in 2008 by a settlement agreement of the Court of First Instance of Kos, Greece. The parents had joint custody rights.

⁴⁰⁶ Research Assistant - Jayne Holliday met and spoke to the representative for the Greek Central Authority at the Conference in Rome October 2014.

⁴⁰⁷ Aimilios Koronaïos "In Greece, our first and second instance courts do not have electronic databases and it is not possible to access the hard copies of the judgments without having authorisation from the parties involved. The only exception is our Supreme Court where there is an electronic database and you can have access to the hard copies of the judgments by declaring that you have an interest for the related legal issues, due to the importance of these judgments. (...) two electronic databases that include all the judgments of the Supreme Court, all the judgments published in legal journals and selected judgments from the first and second instance courts. These databases are NOMOS (<https://lawdb.intrasoftnet.com/>) and ISOCRATES (<http://www.dsanet.gr/>) (...)” Email received 10th November 2014.

⁴⁰⁸ Maria Psarra – Attorney at Law – kindly provided the information for this case.

In 2011, the father, exercising his custody rights, took the child to Belgium for the Christmas holidays. However, in January 2012 he did not return the child to Greece. The mother filed a Hague application to the Belgian courts requesting the return of the child to Greece. The first instance court decision ordered the return of the child. This decision was reversed on appeal. In 2012, the Court of First Instance of Kos granted the mother exclusive custody rights of the child. Finally, in May 2013, the mother petitioned the Court of First Instance of Kos:

1. for a declaratory judgment that she had exclusive custody rights of the child (as assigned by the - previous - no. 593/2012 judgment of the same court), and
2. for a judgment ordering the return of the child to Greece.

At the time of the filing of the petition the child was 8 years old.

The court held that there was no legal interest for a declaratory judgment and they ordered the return of the child. The Court held that at the time of the retention the parents held joint custody of the child in accordance with the 2008 settlement agreement of the Court of First Instance of Kos. The mother exercised that right until the Christmas holidays of 2011. At that time, the child had its habitual residence in Kos, Greece.

The Court noted that the child had been taken to Belgium by the father for the Christmas holidays with the consent of the mother. Nevertheless, it noted that the child remained in Belgium after the Christmas holidays without the mother's consent. In the light of these findings the Court held that the child had been wrongfully retained in Belgium, in violation of the mother's custody rights.

More than a year had elapsed from the wrongful retention on 8th January 2012 until the return application was filed 20th May 2013. It was noted that the mother had not omitted to file a request for return, since she did so to the Belgian courts and therefore the Court was obliged to order the return of the child.

The father's claim that the return would expose the child to a grave risk of psychological harm or otherwise place the child in an intolerable situation was dismissed as unfounded. It was not proven to the requisite standard that the child was exposed to a physical or psychological harm due to the mother's behaviour. In that regard, the court noted that the fact that the father exercised joint custody of the child for a long time, without claiming, until recently, exclusive custody, demonstrates that he believed the mother was suitable to exercise custody of the child.

The Court noted that the assertions by the child of negligence on the part of the mother, if not a product of the father's psychological influence, were not proven.

Although the child was 8 years old the judge held that the child did not have the requisite age or maturity to be interviewed. In the judge's opinion, the child's prolonged time away

from its mother and its emotional dependence on its father meant that it could not be determined with certainty whether the child actually objected to being returned to Greece.

On 11 August 2014 the Court of First Instance of Kos ordered the return of the child to Greece under Article 11(8) Brussels IIa. There is no further information as to whether this was successful or not.

Conclusion

A period of over two and a half years passed between the retention of the child in Belgium and the Greek court finally ordering a return under Article 11(8) of Brussels IIa. There is no further information as to whether this decision was enforced and whether the child has been returned. It also appears to have taken the Greek court over a year from the mother petitioning the court of first instance in May 2013 for the return of the child to the court making a decision to order the return of the child in August 2014. Two and a half years in the life of a young child, without contact with the left-behind parent, and increased dependence on the abducting parent is unacceptable. Also worrying is the fact that the Greek court did not seem to undertake a full welfare inquiry before deciding to order the return of the child to Greece under Article 11(8) Brussels IIa but rather reviewed whether the Article 13 Hague refusal to return by the Belgian court was justified.

Hungary

Background

The information provided by the Hungarian Central Authority and researcher⁴⁰⁹ indicates that there have been no Article 11(6)-(8) Brussels IIa Regulation proceedings (Brussels IIa) in Hungary. However the Central Authority only provided information on applications between 2010 and 2012.

The Central Authority indicated that within this period, 19 applications made by the Hungarian Central Authority for the return of the child had resulted in an Article 13 Hague Child Abduction Convention (Hague) non-return order in the state of refuge (2010: 7, 2011: 4, 2012: 8). Information provided indicates that none of these orders resulted in Article 11(6)-(8) Brussels IIa proceedings in Hungary, which seems odd as it is not an insignificant number.⁴¹⁰ Perhaps the parents did not initiate further proceedings because they were unaware of this procedure or they did not have sufficient means to seek adequate legal advice and initiate proceedings.

The Hungarian courts issued 18 Hague non-return orders, over the same period (2010: 9, 2011: 3, 2012: 6). The Central Authority indicates that none of these orders resulted in Article 11(6)-(8) Brussels IIa proceedings in the state of refuge.⁴¹¹

Legal Process in Hungary⁴¹²

A paper by Király,⁴¹³ indicates that Hungary did not make a reservation under Article 26 or 42 when it ratified the Hague Convention so legal aid is provided for procedural costs. There is also concentrated jurisdiction in Hungary for 1980 Convention proceedings and the Central District Court Pest, has exclusive jurisdiction.⁴¹⁴ The media department for the Ministry of Justice has indicated a continued increase in child abduction cases. In 2004 there were only 28 applications, but more recently the Central Authority has been dealing with around 90 applications per year.⁴¹⁵ The parents are usually taking their children to other EU Member States, and in recent years there has been a significant increase in the number of children taken to the UK.⁴¹⁶ The paper indicates that in a number of cases the child was returned

⁴⁰⁹ Csongor Nagy.

⁴¹⁰ We are aware of a Latvian non return order (CA ref no 25-1.47/12) from February 2013 that resulted in Article 11(8) proceedings in Hungary.

⁴¹¹ We are aware of a non-return order (issued in 2012) which resulted in Article 11(8) proceedings in Italy.

⁴¹² Under the 1980 Hague Convention.

⁴¹³ L Király, 'The Hungarian Court Practice to Brussels II.bis Regulation', provided by Mirela Župan (our colleague in Croatia).

⁴¹⁴ Ibid, p 15.

⁴¹⁵ Ibid, p 24.

⁴¹⁶ Ibid.

voluntarily, or the parents reached an agreement before the court made an order.⁴¹⁷ Unfortunately where there is an order requiring the return of the child, the Hungarian authorities often have difficulty enforcing the order.⁴¹⁸

The paper also indicates that the abducting parent argues that the Article 13(1)(b) Hague exception applies in most cases that are heard before the Hungarian court. It is suggested that Hungarian practice recognises that the refusal to return should be ‘exceptional’ and Article 13(1)(b) Hague is interpreted ‘rather restrictively’. Therefore non-return orders, on the basis of Article 13(1)(b) Hague, are issued rarely and only in well-founded cases.⁴¹⁹ However there are cases where the court found that the information provided by the Central Authority, in relation to Article 11(4) Brussels IIa, was insufficient and the return of the child was refused.⁴²⁰ The Hungarian court does not refuse to return the child on the basis of Article 13(2) Hague, the views of the child.⁴²¹ This is very strange, however the paper suggests that this exception is completely ignored because the Hungarian court considers this to be a question for custody only,⁴²² and not summary return proceedings, despite the fact there is an exception allowing for this (and Article 11(2) Brussels IIa requires that the child is heard). Unfortunately, there is nothing in the paper which refers to any Article 11(6)-(8) Brussels IIa proceedings or Hungarian practice in these proceedings.

A UK based solicitor has suggested that it is very difficult to get children back from Hungary when they are taken there.⁴²³ It was also indicated that abduction proceedings with Hungary are very difficult due to Hungarian national law. For example parents are permitted to take their child out of Hungary for a period of up to twelve months without the permission of the other parent. This seems to defeat the objective of the 1980 Hague Convention which attempts to secure the prompt return of children.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in Hungary

Cases where an Article 42 Brussels IIa certificate was not issued

Latvian CA no.25-1.47/25⁴²⁴

This application concerned an abduction by the mother from Hungary to Latvia. The Latvian judge refused to return the child to Hungary on the basis of Article 13(1)(a) Hague, consent and acquiescence by the father on 12 February 2013. There were no proceedings ongoing at

⁴¹⁷ Ibid.

⁴¹⁸ Ibid, pp 24-26.

⁴¹⁹ Ibid, p 17 – referring to Case law of the Central District Court of Pest Pk. 500.062/2010, Municipal Court of Budapest No. Pkfv. 637.192/2010; BH 1998/86., Curia Pfv.II.20.018/2012.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Interview 6 October 2015.

⁴²⁴ Latvian CA ref.no.

the time of the removal, but the father initiated proceedings under Article 11(8) Brussels IIa in Hungary following the non-return order. The Hungarian judge decided that the child should remain in Latvia. The child, who was 3 years and 4 months at the time, was not heard in these proceedings. The information provided by the Latvian Central Authority indicates that both the abducting parent and the left behind parent were heard in person in court in the Hungarian proceedings. The Central Authority also indicates that the Hungarian judge took account of the reasons for and evidence underlying the non-return order.

Incoming Hague Convention cases

Case where a certificate was not issued

Juvenile Court Sassari, 5 August 2013⁴²⁵

The mother took the child from Italy to Hungary. The father made an application under the 1980 Convention for the return of the child, but the Hungarian Court refused to order the return of the child, on the basis of Article 12(2) Hague, because the application was lodged 12 months after the abduction and the child had settled. The father asked the Italian court to review the foreign decision and make a return order pursuant to Article 11(8) Brussels IIa.

The Court considered that the time-limit of 12 months had not elapsed because the father had made an application to the Central Authority in time. The application was however dismissed because, as a result of the Hungarian proceedings, the Italian Court found that the child had properly settled in Hungary and it was in her best interests to stay there. The judge considered that the Hungarian proceedings were fair, both parents and the minor have been heard and there was no need to gather further evidence to find that the mother is overall a good caregiver. The child was well cared for, goes to school and has learned Hungarian. She lives in proper conditions, and has improved both in school and emotionally (while in Italy she was restless and misbehaved). The judge also considered that the mother managed to keep good relations with the father and with the wider Italian family. The father on the contrary was aggressive and had taken steps to have the child returned to Italy only after a long delay (although still within the 12 month time limit before Article 12 comes into operation). Overall, after a complete family examination, the Italian court found that an order for return to Italy would place the child at a grave risk of psychological harm, as she would be separated from her mother who is her main person of reference.⁴²⁶

Conclusion

To our knowledge there has only been one set of Article 11(6)-(8) Brussels IIa proceedings in Hungary, so it is impossible to determine how these cases are treated by the judiciary in

⁴²⁵ Italian CA Ref no 1/10.

⁴²⁶ For further information see the Italian Report.

Hungary. However our research has highlighted that there are some causes for concern in relation to Hague abduction proceedings.

Ireland

Background

No information was received from the Central Authority. We are obliged to Dr Maebh Harding for supplying information on the *O.K. v K* [2011] IEHC 360 case that the child had been returned.

The following cases were found using the British and Irish Legal Information Institute database.

Outgoing cases where Article 11(6)-(8) proceedings took place in Ireland

Cases where an Article 42 Certificate was issued

O.K v K [2011] IEHC 360

This case concerned the retention of the child (daughter) by the father in Poland.⁴²⁷ The child was born in Poland in 2000.⁴²⁸ The mother and father are both Polish nationals.⁴²⁹ The parents were married. The father came to Ireland to work in 2005.⁴³⁰ The mother and children (mother had a second child from a previous relationship) joined him in 2006.⁴³¹ In 2008 the father began work in Poland.⁴³² By summer of 2009 the relationship between the father and mother had broken down.⁴³³ In June 2009 the father came to Ireland to take the child to Poland for a pre-arranged holiday in Poland.⁴³⁴ The mother, concerned that he would not return the child after the holiday, brought an application under the Guardianship of Infants Act 1964. A settlement was reached by both parties on 2 July 2009 that the child was considered to be habitually resident in Ireland and that the child was permitted to travel to Poland on 7 July 2009 but was to return to Ireland with the mother on 15 August 2009.⁴³⁵

The child went to Poland as agreed on 7 July 2009 but did not return to Ireland. The child lived with the father in Poland. The mother had limited access via telephone and in Poland.⁴³⁶ Access by arrangement between the parties took place in 2011 and the child was brought to

⁴²⁷ *O.K v K* [2011] IEHC 360 [7].

⁴²⁸ *Ibid.*, [3].

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*, [4].

⁴³² *Ibid.*, [5].

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*, [6].

⁴³⁶ *Ibid.*, [8].

Ireland for two weeks pursuant to an interim return order made by the Irish court on 23 June 2011 and returned to Poland in accordance with the terms of that order.⁴³⁷

In September 2009 an order was made in the District Court in Ireland for the mother to have sole custody of the child. The father appealed but the appeal was struck out and the order by the District court affirmed.⁴³⁸ The order has not been enforced in Poland.⁴³⁹

The mother sought the return of the child in Hague proceedings before a district court in Poland on 6th October 2009. The application was dismissed on 18 December 2009. The mother appealed but it was rejected on 18 May 2010.⁴⁴⁰ The reasoning for the Hague non-return order is not clear from the case.

The Polish Central Authority notified the Irish Central Authority of the Hague decision not to return the child to Ireland on 5 July 2010.⁴⁴¹

At this point a dispute arose as to how the custody application was to proceed. This was the first application for custody in Ireland of a child following notification pursuant to Article 11(6) of Brussels IIa after the making of a Hague non-return order in another EU Member State.⁴⁴²

Justice Finlay Geoghegan in the interim ruling had encouraged mediation between the parties to the end that the father improved contact between the mother and the child, the mother agreed not to pursue interim or interlocutory applications for the return of the child and the father would not pursue an application under Article 15 Brussels IIa for transfer of the case to Poland.⁴⁴³

The outcome of the interim ruling is interesting in that the parents cooperated and the father brought the child to Ireland so that the child could stay with the mother for two weeks, at the end of that stay the child returned with the father to Poland. However, by making this decision the judge prolonged the time the child was in the State of refuge with the abducting parent and ultimately had the potential to make the child more settled in that environment.

The child who by this stage was 11 years old was interviewed by an independent expert in both Ireland and Poland and a comprehensive report is provided. This case is unusual in that the Article 11(8) return order is used to facilitate the relationship between the child and her mother in that the child is to return to Ireland to complete the fifth year of primary school, but she is to return to Poland for the sixth year of primary school so that she can sit the State exams with the aim to continue her education in Poland, residing with her father, and spending holidays in Ireland with the mother.

⁴³⁷ Ibid.

⁴³⁸ Ibid, [10].

⁴³⁹ Ibid, [11].

⁴⁴⁰ Ibid, [12].

⁴⁴¹ Ibid, [14].

⁴⁴² Ibid, [16].

⁴⁴³ Ibid, [20].

Comment

In essence this case, although the child is returned to Ireland under Articles 11(8) and 42,⁴⁴⁴ upholds the Hague non-return decision in the Polish court in that the child will return to Poland to live with her father and to continue her education there. The judge upheld the views of the child who wanted to continue her education in Poland, whilst protecting the relationship between the mother and child allowing them a year together before the child is returned to the father in Poland. This could have been achieved by focussing on forging access arrangements for the mother under Brussels IIa rather than resorting to the Article 11(8) and 42 process with an interim return order and then a final return order (which did not intend that the child should stay in Ireland in the long term).

In this case the judge states that the view of the Polish court has been taken into consideration⁴⁴⁵ however there is little to demonstrate this in the ruling which does not clarify what the reasons were under Article 13 Hague for the non-return. The court is clearly extremely sensitive to the requirements for the Article 42 certificate as well as the needs of the child to have a relationship with both parents. Yet the fact that the case took a year to deal with from 30 July 2010 when the Article 11(8) proceedings began to this final decision in September 2011 is unduly long.

Minister for Justice and Equality acting as Central Authority v M.F. Anor [2015] IEHC 538

This case concerned the removal of children by their mother from Ireland to Latvia.⁴⁴⁶ The eldest child was born in Latvia in 2007 and had sole Latvian citizenship, the youngest child was born in Ireland in 2009 and had dual Latvian and Irish citizenship.⁴⁴⁷ Hague proceedings took place in Latvia with the final non-return order issued on 15 February 2013.⁴⁴⁸ The Latvian court refused to return the children to Ireland under Article 13 (1)(b) Hague because there was not appropriate housing for the children, that the mother was ineligible for social welfare payments and that she lacked protection from alleged domestic violence in Ireland.⁴⁴⁹ Article 11(6)-(8) Brussels IIa proceedings were brought before the Irish court on 15 May 2013.⁴⁵⁰ The applicant (the father) issued his motion on 19 July 2013.⁴⁵¹ The mother issued her motion on 7 January 2015.⁴⁵² The father requested that the mother return to Ireland with the children on a temporary basis so that custody/access could be determined. The father was

⁴⁴⁴ Information supplied by Dr Maebh Harding email dated 1 July 2014.

⁴⁴⁵ [2011] IEHC 360, [27].

⁴⁴⁶ *Minister for Justice and Equality acting as Central Authority v M.F. Anor* [2015] IEHC 538

⁴⁴⁷ *Ibid*, [1].

⁴⁴⁸ *Ibid*, [1].

⁴⁴⁹ *Ibid*, [17].

⁴⁵⁰ *Ibid*, [3].

⁴⁵¹ *Ibid*, [3].

⁴⁵² *Ibid*, [3].

clear that he was not seeking full custody in Ireland if the mother came back with the children to live in Ireland.⁴⁵³

The Irish court noted that it has jurisdiction to determine questions of custody and to make interim orders for the return of the children for the purpose of effecting a welfare assessment and report. The Irish court also noted that the children were heard in Latvia at their behest on 11 March 2015, but that the purpose of the children being heard at that point was only to satisfy the requirements of the Article 42 Brussels IIa certificate and not intended to form part of a welfare assessment.⁴⁵⁴ (In this case the youngest child is heard in Latvia in contrast to the child of the same age in the *OK v K* case was not heard in Poland where the Irish court regarded the child as too young.)

The Irish court took account of the right of the children to maintain on a regular basis a personal relationship with both parents unless contrary to their interests and ordered the mother to arrange for the return of the children to Ireland for a period of 7 weeks so that the father could access the children. He was to see them between 10am and 6 pm every day for the duration of the visit.⁴⁵⁵ An assessment was to be conducted not before the end of the first two weeks of the visit in preparation for the final custody hearing.

Comment

The Irish court is keen to protect the relationship between the children and both parents and is seen to make access arrangements so that the assessor will be able to obtain a holistic view of the relationship between the father and his children. However, the approach can be criticised. The court clearly takes the reasoning of the Hague non-return order into account where the Latvian courts regard Ireland as not being a suitable place to return the children due to there not being appropriate housing available and the lack of protection for alleged domestic violence. However, even though the judge responds defensively to these points, the court fails to put measures in place to protect the child and arrange supervised access. The time it took between the original notice for the Article 11(6)-(8) proceedings in May 2013 to the decision to make an interim order for the children to return to Ireland on 21 May 2015, 2 years, is too long. The Irish court should have used a different approach to obtain access for the father (all he wanted if the mother would return to Ireland with the children) in order to avoid using Article 11(8) for a 'Povse' temporary return order.

Case where a certificate was not issued

M.H.A v A.P [2013] IEHC 611

⁴⁵³ Ibid, [5]

⁴⁵⁴ Ibid, [14].

⁴⁵⁵ Ibid, [24].

This case concerned the wrongful retention of a child by his mother in Poland.⁴⁵⁶ The mother is a Polish national. The father is a Kurdish Iraqi with a right to reside and work in Ireland but unable to travel outside of Ireland.⁴⁵⁷ The mother and father married in August 2007. They are not divorced. The child was born on 28 January 2008 in Ireland.⁴⁵⁸ In January 2011 the mother took the child to Poland on the basis of seeing her own mother who was ill. The father consented to the trip.⁴⁵⁹ The mother failed to return to Ireland with the child at the end of the visit and informed the father of this. The father commenced Hague proceedings in Poland in February 2011.⁴⁶⁰ A decision not to return the child was not taken until August 2012. The delay was in part due to the taking of evidence from the father in Ireland.⁴⁶¹ The case does not say why this was an issue.

The Irish courts were notified of that decision in August 2012.⁴⁶² The father appealed the Polish decision.⁴⁶³ In December the Irish Central Authority was notified that the appeal had been dismissed.⁴⁶⁴ In February 2013 the Irish Central Authority received the documents which declared that the decision to dismiss the appeal had been taken on 16 November 2012. The reason why the State of refuge issued a non- return is not clarified. Article 11(7) Brussels IIa proceedings began on 22 March 2013 in Ireland.⁴⁶⁵ The father issued a notice of motion on 27 June 2013 and asked for the return of the child under Article 11(8) of Brussels IIa.⁴⁶⁶

The Irish court considered its responsibility to hear the child under Article 42 of Brussels IIa and concluded that it would not hear the child as it was inappropriate due to the child's age as he was not yet six years old. However they also state that “ The Court does not have at its disposal the means of arranging for a child under six years, resident in Poland in the care of his mother (who has not appeared or been represented before the court) to be given an opportunity to be heard in a manner appropriate to his age.”⁴⁶⁷ The lack of means to hear the child seems more accurate as to why this child was not heard, especially as in the next breath the court states that they will interview the child on his return along with both parents which is contradictory.⁴⁶⁸ This statement highlights the need for an improved use of cross-border taking of evidence in order to protect the rights of the child.

⁴⁵⁶ *M.H.A v A.P* [2013] IEHC 611 [8].

⁴⁵⁷ *Ibid*, [2].

⁴⁵⁸ *Ibid*, [5].

⁴⁵⁹ *Ibid*, [8].

⁴⁶⁰ *Ibid*, [10].

⁴⁶¹ *Ibid*, [10].

⁴⁶² *Ibid*, [11].

⁴⁶³ *Ibid*, [11].

⁴⁶⁴ *Ibid*, [11].

⁴⁶⁵ *Ibid*, [12].

⁴⁶⁶ *Ibid*, [13].

⁴⁶⁷ *Ibid*, [40].

⁴⁶⁸ *Ibid*, [38(iv)]

Again the court states that it has taken into account the evidence underlying the Article 13 Hague non-return order, yet there is nothing to support this in the text.⁴⁶⁹

The Article 11(8) Brussels IIa decision was taken on 16 December 2013, almost three years after the child had been retained in Poland. The court granted the Article 11(8) return order but stayed the decision in order to allow the mother to proceed with arranging to return the child on a voluntary basis.⁴⁷⁰ The judge gave her one month to make the arrangements to return with the child after which the Article 11(8) return order would come into effect.⁴⁷¹ The full custody hearing was arranged for 31 March 2014.⁴⁷²

We are not aware of how this case developed.

Unknown outcome

French CA no. 265DE2012

In this case the mother allegedly abducted her child from Ireland to France.⁴⁷³ On 18 July 2013 the French court ordered a Hague non-return on the basis of Article 13(1)(a), consent.⁴⁷⁴ At the time of the alleged abduction custody proceedings were not taking place.⁴⁷⁵ The father initiated proceedings in Ireland for the return of the child under Article 11(6)-(8) Brussels IIa.⁴⁷⁶

The French Central Authority at the time of writing noted that the left-behind parent had appealed the Hague non-return order and the French Court of Appeal ordered the Hague return of the child,⁴⁷⁷ the enforcement of the Hague order had not yet been put in place in France and the Brussels IIa proceedings were still ongoing in Ireland.⁴⁷⁸

EE v O'Donnell [2013] IEHC 418

This case concerns a judicial review seeking to quash an order made by Judge O'Donnell on 19th June 2013.⁴⁷⁹

This case concerned a Swedish mother and an Irish father to three children born in 1995, 1996 and 2000. The elder two children were born in Ireland and the youngest was born in

⁴⁶⁹ Ibid, [42].

⁴⁷⁰ Ibid, [56], [64].

⁴⁷¹ Ibid, [56].

⁴⁷² Ibid, [64(3)(d)].

⁴⁷³ French Central Authority Questionnaire, 21.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid, 25.

⁴⁷⁸ Ibid.

⁴⁷⁹ *EE v O'Donnell* [2013] IEHC 418

Sweden. The parents spent time in both countries until 2010 when they separated. The mother resides in Sweden and the father resides in Ireland. The children lived with the father in Ireland and visited their mother in Sweden.⁴⁸⁰

In summer 2012, the children travelled to Sweden to stay with their mother in accordance with the access arrangement. At the end of the visit the two eldest children returned to Ireland but the mother retained the youngest child. The child is still living in Sweden with his mother.⁴⁸¹

On 6th September 2012 the father was granted sole custody of the children as part of existing proceedings. The mother was refused a stay of that order. The mother lodged an appeal.⁴⁸²

The father sought the return of the child in Hague proceedings in Sweden and under Article 11 Brussels IIa on the basis of wrongful retention. The Swedish court refused to return the child on the basis of Article 13(2) Hague, the child's objection to return to Ireland.⁴⁸³ The Swedish Authority notified the Irish Central Authority of the decision pursuant to Article 11(6) Brussels IIa on 9 November 2012 and 29 January 2013.⁴⁸⁴ The Irish Central Authority notified the Irish High Court and it was confirmed that a dispute concerning custody/access of the children was due to be heard in the E Circuit Court.⁴⁸⁵

A request was made by the Irish court to interview the child and to get an assessment by a child psychologist in preparation of the custody hearing. The mother was not willing for the child to travel to Ireland but was willing for the interview and assessment to take place in Sweden.⁴⁸⁶

At this point the Circuit Court affirmed the District Court's orders and struck out the mother's appeal. It then returned all documents to the High Court. This decision was based on a misunderstanding that there were ongoing Hague proceedings in the High Court. The mother sought judicial review of the decision of the Circuit Court and the High Court held that the Circuit Court should have heard the mother's appeal as the High Court did not have jurisdiction to hear any issue relating to the child in question when relevant proceedings were already pending in the Circuit Court.⁴⁸⁷

Comment

This case highlights that where custody proceedings are already ongoing in a court in Ireland at the time when an Article 13 Hague non-return order is notified to Ireland by another EU Member State under Article 11(6) Brussels IIa, it is that court which must hear the arguments for a return order under Article 11(8) Brussels IIa.

⁴⁸⁰ Ibid, [4].

⁴⁸¹ Ibid, [6].

⁴⁸² Ibid, [7].

⁴⁸³ Ibid, [8].

⁴⁸⁴ Ibid, [9].

⁴⁸⁵ Ibid, [10].

⁴⁸⁶ Ibid, [13].

⁴⁸⁷ Ibid, [32].

Incoming Hague Convention Cases

Cases where an Article 42 Certificate was issued by the court in the State of origin

McLean

The following information concerning this case is taken from the Belgian report.

The case concerned the removal of a child from Belgium to Ireland by his mother. The child was born in Belgium on 11 September 2012 and retained in Ireland between 28 December 2012 and 6 January 2013 when he was 4 months old. The child's mother and father were never married and have had a turbulent on and off relationship since 2006.

J.J and L.Mc.L [2013] No.10 HLC – Hague proceedings in Ireland

The father sought the return of the child from Ireland to Belgium in Hague proceedings in Ireland. The mother alleged that the child was not habitually resident in Belgium at the time of the retention in Ireland. She also said that if this argument failed then a Hague non-return should be ordered on the basis of Article 13(1)(b), grave risk of physical or psychological harm or an otherwise intolerable situation. The court found that the child was habitually resident in Belgium at the relevant time. Although the mother alleged that she had only moved to Belgium for the duration of her maternity leave which was a year (she was due to return to work, but in the Netherlands rather than England, in July 2013), it was clear that she intended the child to be born in Belgium and spend the first year of his life there, with the support of his father. Therefore the child was habitually resident in Belgium at the time of the retention, so the retention was wrongful.⁴⁸⁸

The analysis of habitual residence is clear but the analysis of Article 13(1)(b) Hague on the other hand is questionable. It is clear from the facts that the father had previously had difficulties maintaining employment, financial difficulties and had struggled with depression. There had also been incidents where the police were involved in the parties' disputes. However all these incidents concern events prior to the mother's move to Belgium and the birth of the child. However none of the incidents were considered when the analysis of the Hague exceptions to the requirement to return a wrongfully retained child were made. The court made an in-depth analysis of the ECHR case law on the best interests of the child, *Neulinger* and the Chamber decision in *X v Latvia*.⁴⁸⁹ The Irish court also referred to

⁴⁸⁸ *J.J and L.Mc.L* [2013] No.10 HLC, see paras 21-9. There was no consideration of whether the father had custody rights at the time of the removal, so presumably it was clear that the father had rights of custody under Belgian law. We are grateful to the mother for contacting us in relation to our research project.

⁴⁸⁹ *J.J and L.Mc.L* [2013] No.10 HLC see paras 30-49. However the Grand Chamber decision in *X v Latvia*, suggests a change in approach from *Neulinger*. See also P Beaumont et al, 'Child abduction: recent

*Sneerson*⁴⁹⁰ and the decision of the UK Supreme Court in *Re E*,⁴⁹¹ which it found difficult to reconcile with the approach of the ECtHR.

There is then a brief reference to a case on Article 13(1)(b) Hague, where there were allegations of sexual abuse,⁴⁹² and one reference to another case.⁴⁹³ There was no clear analysis of the threshold that is required by Article 13(1)(b) Hague and whether the facts of the case indicated that the child actually was at a grave risk of harm if returned to Belgium. The court then held that a return to Belgium would mean a separation from the mother (although it is unclear why this conclusion is reached)⁴⁹⁴ and that this would not be in the best interests of the child.⁴⁹⁵ The court considers this to be the case even though no psychiatric or psychological reports were submitted to it,⁴⁹⁶ and held that ‘the best interests of the child require he remain with his mother in Ireland and not be returned to Belgium.’⁴⁹⁷ Such a statement is inconsistent with Hague return proceedings and instead is consistent with welfare proceedings, which are supposed to take place in Belgium as that is where the child was habitually resident.⁴⁹⁸ The Irish court then tried to reconcile its determination with the Hague Convention suggesting that the final question is whether the child will be exposed to a grave risk of harm or otherwise placed in an intolerable situation.⁴⁹⁹ The court considered that ‘where a newly born child or infant is concerned... it is well established that a stable relationship between the infant and its mother is critical to its early development. Any interference with this relationship could constitute a grave risk to the child’s psychological development and thereby cause the child psychological harm.’⁵⁰⁰ Consequently the Irish court concluded that Article 13(1)(b) Hague applied and the child should not have to return to Belgium.⁵⁰¹

This decision is controversial, and Article 11(4) Brussels IIa was not expressly considered by the Irish court in its judgment. The court made a substantial analysis of the ECtHR case law including the requirement to carry out an ‘in-depth examination of the entire family situation’ given in *Neulinger*. The court then purports to rely on this case law but then reaches its decision without making an “in-depth analysis” of the family situation. The court seems to presume that the mother will not return with the child, and as such concludes that the child should not return at all, even though there seems to be no suggestion that the father poses a risk to the child. Given that there were suggestions that the mother might face imprisonment in Belgium it might have been correct not to return the child but only after efforts had been

jurisprudence of the European Court of Human Rights’ (2015) 64 *International and Comparative Law Quarterly* 39-63.

⁴⁹⁰ *J.J and L.Mc.L* [2013] No.10 HLC, para 44

⁴⁹¹ *Ibid*, paras 45-29

⁴⁹² *Ibid*, para 51.

⁴⁹³ *Ibid*, para 52

⁴⁹⁴ The parties were still in Ireland and the mother had not yet returned to work in Cambridge (see para 53).

⁴⁹⁵ *J.J and L.Mc.L* [2013] No.10 HLC, para 53.

⁴⁹⁶ In contrast to *X v Latvia*.

⁴⁹⁷ *J.J and L.Mc.L* [2013] No.10 HLC, para 54.

⁴⁹⁸ Art 10 Brussels IIa.

⁴⁹⁹ *Jorgenson v McLean* ARK no. 14/476/C, para 55.

⁵⁰⁰ *Ibid*, para 56.

⁵⁰¹ *Ibid*, para 57.

made to try to secure the return of the child to Belgium with the mother by getting the Belgian authorities to drop the criminal proceedings relating to the abduction of the child. However the court did not consider this at all nor evaluate the risk that the child would really face in Belgium if the mother did not return with the child.

Jorgenson v McLean ARK no. 14/476/C - Article 11(6)-(8) Brussels IIa proceedings in Belgium

The Article 11(6) petition was submitted on 7 October 2013. The parties were informed in writing on 9 October 2013. Ms McLean did not appear at the hearing on 10 February 2014.⁵⁰² On 18 January 2013 during interim proceedings, exclusive parental custody had been assigned to the father.⁵⁰³ On 17 June 2013 joint parental custody was assigned by the court in Antwerp. The mother was prohibited from taking the child abroad without the father's permission.⁵⁰⁴ The Irish Hague non-return decision was given on 26 July 2013.

Unsurprisingly the Belgian judge did not hear the child,⁵⁰⁵ who was only around 18 months old at the time of these proceedings. The judge noted that the child had only met his father once since December 2012. The court considered that the child needed to spend time with each of his parents in order to develop a relationship with both of them. In order to meet the psychological needs of children less than two or three years old, the judge considered that contact arrangements should contain more transitions between the parents to ensure the continuity of both relationships and the necessary support and security to comfort the child.⁵⁰⁶ The judge believed that the mother did not acknowledge or respect the right of the child to have contact [and a relationship] with his father.⁵⁰⁷ As the child needed quality contact with both his parents, for his balanced development, this would be best supported by frequent stays with both his parents.⁵⁰⁸ The decision of 17 June 2013 sought to achieve this, but after that the mother continued to prevent regular contact between the child and his father.⁵⁰⁹ In light of the mother's behaviour the court assigned exclusive custody to the father and ordered the immediate return of the child to Belgium.⁵¹⁰

Neither the child nor the abducting parent were heard. The child was too young and the mother did not participate in the proceedings, possibly because she was concerned she would be imprisoned if she returned to Belgium.⁵¹¹ It does not appear that any effort was made to

⁵⁰² Ibid, p 3.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid, p 4.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid, p 6.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid, p 7.

⁵¹¹ Ibid, see p 4.

hear the mother in Ireland through the Taking of Evidence Regulation. The Belgian judge did not take into account the reasons for the Hague non-return order issued by the Irish courts.

It appears that the child still lives with the mother and the parents have reached an agreement about the care of their child through mediation. The mediation was at the request of the Family court in Antwerp. The parties mediated via Skype through a Belgian mediator, with the result that the father moved to Dublin and has access to see his son at the weekends and is able to Skype with his child during the week.⁵¹²

Other cases of interest

FL v CL [2006] IEHC 66

This case concerned the retention of four children, born 1996, 1998, 2000 and 2002, by their mother in Ireland from Northern Ireland. The father had consented to the mother taking the children to see their maternal grandparents in Ireland for a weekend trip on 4 November 2004. The mother did not return with the children. The father applied in Ireland for the return of the children under the Hague Convention. On the evidence the Irish judge held that the father had consented to the children remaining in Ireland under Article 13(1)(a) Hague but had applied for their return under the Hague Convention when his access to the children was denied by the mother. Since the start of the Hague proceedings he had successfully obtained an interim order for access and had had the children to stay with him after Christmas, after which he had returned them to Ireland to be with their mother.

This case shows the court considering the relevant provisions of the Brussels IIa Regulation, by giving the eldest child the opportunity to be heard and through the transmission of all documents to the High Court of Justice in Northern Ireland as per Article 11(6) of Brussels IIa Regulation once it decided to deny the return of the child under Article 13(1)(a) Hague.

There is no further information on what subsequently happened in this case.

A.K v A.J [2012] IEHC 234

The children were habitually resident in Poland at the time when the father retained them in Ireland in 2008.⁵¹³ The lapse of time in this case, from the wrongful retention in June 2008 to the time of the Irish Hague return proceedings in March 2012, almost four years⁵¹⁴ was crucial in the decision making for the judge. The judge took into consideration the objections

⁵¹² Email received 13 November 2014 from Linda McLean.

⁵¹³ *A.K v A.J* [2012] IEHC 234

⁵¹⁴ *Ibid*, [6].

by the children to return to Poland, the children were aged 10 and 7 at the time of this hearing.⁵¹⁵

The Irish court refused to return the children to Poland on the basis of Article 13(2) Hague, views of the children, noting that the first instance court in Poland on 16 February 2012 had already placed the children in the parental care of their father in Ireland⁵¹⁶ and ordered the documents to be sent to the Polish Central Authority as per Article 11(6) Brussels IIa. There is no further information on this case.

R.P v A.S [2012] IEHC 267

A Hague return order was refused by the Irish Court on the basis of Article 13(1)(a) Hague, acquiescence by the father.⁵¹⁷ The appropriate documents and transcripts were sent to the Central Authority of the Slovak Republic in accordance with Article 11(6) of Brussels IIa.⁵¹⁸ There is no further information on this case.

P v P [2012] IEHC 31

The child had been abducted to Ireland from Poland by the father. The mother sought the return of the child from Ireland to Poland in Hague proceedings in Ireland. The Irish Court refused to return the child on the basis of Article 13(1)(b) and 13(2) Hague. The Irish court ordered the documents to be sent to the Polish Central Authority as per Article 11(6) of Brussels IIa.⁵¹⁹

The Irish court recognised that the Polish court had jurisdiction to deal with custody and access arrangements and advocated mediation between the parents in an attempt to restore the relationship between the child and her mother and between the mother and father so that they could act in the child's best interests.⁵²⁰

RP v LN [2015 IEHC 475

This case concerned a child born in 2002 in the United Kingdom abducted by the mother to Ireland on 2 May 2015.⁵²¹ This case is interesting due to the fact that the family law court attempted to issue an Article 11(8) and Article 42 Brussels IIa return order/certificate in England even though Hague proceedings had not yet begun in Ireland. This was appealed in

⁵¹⁵ Ibid, [1].

⁵¹⁶ Ibid [58].

⁵¹⁷ *R.P v A.S* [2012] IEHC 267 [24].

⁵¹⁸ [32].

⁵¹⁹ *P v P* [2012] IEHC 31 [57].

⁵²⁰ [54].

⁵²¹ *RP v LN* [2015 IEHC 475 [3],[12].

England and the error corrected by Lady Justice Black granting a stay of the order.⁵²² Hague proceedings were heard in Ireland on 22 July 2015 and the court decided to return the child to England under the Hague Convention.⁵²³

Legal Aid Issues

For an example of a case where the abducting parent was not able to get legal aid in a Hague case in Ireland, see *R v R* [2015] IECA 265 [2] and for an example of where the abducting parent had to represent herself in a Hague case, see *R P v LN* [2015] IEHC 475 [20].

Conclusion

From the Irish case law it is possible to see the courts familiarise themselves with the way Article 11(6)-(8) Brussels IIa operates as the years go by. They are clear in their aim to hear the child and the parties yet have a tendency to regard it as a box ticking exercise. In *M.H.A v A.P* a six year old child was too young to be heard before ordering an interim return order under Article 11(8) when the court had the explicit intention to hear the child on its return for a full welfare hearing.

The Irish courts want to protect the right of the child to have a meaningful relationship with both parents. However, it is not satisfactory for the court to merely state that they have taken into account the evidence underlying the Article 13 Hague non-return orders. The courts must explain how they arrived at the conclusion that it is in the best interests of the child to order the return of the child to the country of habitual residence despite the court in the State of refuge deciding that one of the much narrower grounds found in Article 13 applies to decide that the child should not be returned there. It is always counterintuitive to believe that a return is in the best interests of the child if the left-behind parent consented to or acquiesced in the abduction, or the child is old enough and mature enough and objects to being returned even for the length of time needed to have a hearing on the merits, or the return of the child would create a grave risk of physical or psychological harm for the child or create an otherwise intolerable situation and the court in the State of refuge exercised its discretion that it was still not in the interests of the child to return the child to the State of habitual residence.

To adequately reverse this intuition the court in the State of habitual residence has to fully engage in its judgment with the reasoning in the judgment of the court in the State of refuge. The only case where the court clearly does take the reasoning into account is *Minister for Justice and Equality acting as Central Authority v M.F. Anor*. However, that judgment can be criticised for a degree of complacency in response to the Latvian Article 13(1)(b) refusal to

⁵²² Ibid, [14].

⁵²³ Ibid, [109].

CONFLICTS OF EU COURTS ON CHILD ABDUCTION

return because precautionary measures are not put in place to protect the child eg by arranging for supervised access rather than expressly ordering unsupervised access.

Another criticism would be that these cases are taking too long to deal with and that the length of time that the child is with the abducting parent becomes an issue for the court that ends with decisions that favour unlawful behaviour or are unduly unsettling on the child.

Out of the five outgoing cases, one case uses Article 11(8) and 42 to bring the child back to Ireland for a limited period to restore the relationship with the mother, one case uses Article 11(8) as a means of making the mother comply with giving the father access but is stayed, a third case uses Article 11(8) to create an interim order where an access order would have been sufficient, and in the fourth and fifth cases the outcomes are unknown. It is reasonable to conclude that Article 11(8) is not being used in Ireland as it was initially intended.

It is clear from the incoming cases that the Irish courts are familiar with their duty in Hague Article 13 intra-EU refusals to transfer the documents to the Central Authority of the State of the habitual residence of the child as per Article 11(6) Brussels IIa. However the time it is taking for these Hague cases is always longer than the 6 weeks maximum provided by Article 11(3) of Brussels IIa; *P v P* took less than 4 months, *A.K v A. J* took one year, *R.P v A.S* took 4 months, *R v R* [2015] IECA 25 including an appeal took just over 7 months. The length of time in *A.K v A. J* is particularly unacceptable.

Italy

Background

Detailed information was provided by the Italian Central Authority and a researcher.⁵²⁴ When the Central Authority first provided the information in September 2014 three cases were still pending. On 12 May 2015 we received updated information on each of these cases. Although the Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings happened after 28 February 2014, two of the applications fit within the timeframe originally set because the Hague Child Abduction Convention (Hague) non-return order had been made before 28 February 2014. One case falls outside of the timeframe because the Hague non-return order was not given until 13 June 2014.⁵²⁵ However due to the difficulty tracing Article 11(6)-(8) Brussels IIa proceedings, it is useful to take account of this case as the information has been provided. No information on these three cases was provided by the researcher but the researcher identified two cases which were not identified by the Central Authority. When this is combined with information provided by other Member States, there were 17 sets of Article 11(8) Brussels IIa proceedings in Italy. An Article 42 Brussels IIa certificate was issued in six of these cases, in nine cases the child was permitted to remain in the State of refuge and in two cases the outcome is unknown.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in Italy

The information provided by the Central Authority indicated that there had been 44 Hague non-return orders made in relation to intra-EU requests for return issued by the Italian Central Authority. Seventeen requests for return resulted in Article 11(8) Brussels IIa proceedings in Italy.⁵²⁶

Cases where an Article 42 Brussels IIa Certificate was issued

Trib minorenni dell'Emilia Romagna (Bologna), 7 May 2009

The unmarried mother took the child from Italy to Portugal. The father initiated Hague Convention proceedings in Portugal. The Portuguese courts refused to return the child at first instance and on appeal (it is unclear from the information provided why the Hague non-return was ordered).

⁵²⁴ Professor Costanza Honorati, University of Milan Bicocca. See also C Honorati, 'La prassi italiana sul ritorno del minore sottratto ai sensi dell'art. 11 par. 8 del regolamento Bruxelles II-bis' (Italian Practice on the Return of the Abducted Child Pursuant to Art. 11(8) of the Brussels IIa Regulation) (2015) *Rivista di diritto internazionale privato e processuale* 275.

⁵²⁵ CA Ref No 158/13.

⁵²⁶ The information provided by the Central Authority indicated there were 11 Art 11(8) proceedings in Italy.

The Italian Court considered that the Portuguese decisions were not based on the Hague Convention, and were therefore incorrect. (According to the Portuguese Court the unmarried mother had a right to transfer to Portugal even without the consent of the father and the Italian return decision is not binding and enforceable). The Italian court then examined each ground for refusal in Article 13 of the Hague Convention and found that none of the exceptions were met in the case. Consequently the court ordered the return of the child pursuant to Article 11(8) Brussels IIa.

No information was provided by the Central Authority.

Juvenile Court Rome, decree 21 April 2008 – *Kampanella* (CA No 07/07)

The information provided by the Central Authority indicates that the non-return was ordered on the basis of Article 13(1)(b) Hague, grave risk of harm, and the abducting parent was the mother. The information indicates that the child was five at the time of the proceedings. The Italian courts did not hear the child, the abducting parent, nor the left behind parent. The Hague non-return order was given on 11 April 2007, and the Italian decision was given just over a year later. The Central Authority indicates that the Italian court took account of the reasons for the Hague non-return order when reaching its decision.

Šneersone and Kampanella v Italy (App No 14737/09) ECHR 12 July 2011.

Šneersone and Kampanella, is the only decision so far, where the European Court of Human Rights (ECtHR) has dealt with the procedure under Article 11(6)-(8) Brussels IIa where the application was made against the State of origin.⁵²⁷

The child was born in Italy in 2002 to an Italian father and a Latvian mother. The parents, who were not married, separated in 2003 and the child lived with his mother.⁵²⁸ In September 2004, the Rome Youth Court granted custody of the child to the mother with access rights in favour of the father.⁵²⁹ The fathers appealed but this was rejected by the Rome Court of Appeal.⁵³⁰ In June 2005, the Italian court granted authorisation for the child to be issued with a passport.⁵³¹ In February 2006, the father was ordered to make regular child support payments.⁵³² The father, however, failed to provide financial support for the child which led

⁵²⁷ In contrast, see *Povse* (discussed below) where the mother brought the application against the State of refuge. See also P Beaumont, K Trimmings, L Walker & J Holliday, “Child Abduction: Recent Jurisprudence of the European Court of Human Rights” (2015) 64 *International and Comparative Law Quarterly* 39-63.

⁵²⁸ (App no 14737/09) para 7.

⁵²⁹ *Ibid*, para 8.

⁵³⁰ *Ibid*, para 9.

⁵³¹ *Ibid*, para 10.

⁵³² *Ibid*, para 11.

to the mother lodging a complaint with the Italian police in April 2006.⁵³³ The only income the mother and the child had was money which the maternal grandmother was sending from Latvia.⁵³⁴ This situation was unsustainable so the mother decided to leave Italy for her native Latvia in April 2006, taking the child with her.⁵³⁵ Following the mother's departure, the father successfully requested the Rome Youth Court to grant him sole custody of the child.⁵³⁶ The court also held that the child was to reside with the father.⁵³⁷

The father did not initiate Hague return proceedings in Latvia until January 2007 (nine months after the abduction).⁵³⁸ The District Court in Latvia, considered that the 'child's living conditions were beneficial for his growth and development',⁵³⁹ and that the child's return to Italy 'would not be compatible with his best interests.'⁵⁴⁰ This argument was supported by the findings of a psychologist who expressed the view that severance of contact between the mother and the child could 'negatively affect the child's development and could even create neurotic problems and illnesses.'⁵⁴¹ In response to these concerns, the Italian Central Authority sought to assure the Latvian Central Authority that measures would be taken in Italy to ensure that the child and the father receive the necessary psychological help.⁵⁴² The District Court, nevertheless, refused the father's return application on the grounds of Article 13(1)(b) of the Hague Convention. In a decision dated 11 April 2007, the court noted that due to financial constraints the mother was unable to accompany the child to Italy, and held that the protective measures offered by the Italian Central Authority could not ensure that the child would not suffer psychologically if he were returned to Italy.⁵⁴³

In May 2007, the decision of the District Court was upheld on appeal. The appellate court found that the protective measures proposed by the Italian Central Authority were 'too vague and non-specific.'⁵⁴⁴ The court also highlighted the fact that the father had not made any effort to establish contact with the child since his removal from Italy in April 2006.⁵⁴⁵ Following the rejection of the father's appeal, the mother successfully petitioned the Rīga City Vidzeme District Court for sole custody of the child.⁵⁴⁶

Following this the father initiated Article 11(6)-(8) Brussels IIa proceedings in Italy in August 2007.⁵⁴⁷ The father proposed that upon the return of the child he would stay with him

⁵³³ Ibid.

⁵³⁴ Ibid, para 12.

⁵³⁵ Ibid.

⁵³⁶ Ibid, para 14.

⁵³⁷ Ibid, para 15.

⁵³⁸ Ibid, para 17.

⁵³⁹ Ibid, para 18.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid, para 19.

⁵⁴² Ibid, para 20.

⁵⁴³ Ibid, para 22.

⁵⁴⁴ Ibid, para 23.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid, para 24.

⁵⁴⁷ Ibid, para 25.

and attend a kindergarten where he had been enrolled before his departure from Italy.⁵⁴⁸ The father also undertook to enrol the child for Russian-language classes and to provide him with adequate psychological help.⁵⁴⁹ According to the father's proposal, the mother would be allowed to see the child in Italy for approximately one month a year, during which period she and the child would be authorised to use a house rented by the father (although one half of the rent would have to be covered by the mother).⁵⁵⁰ The Rome Youth Court held that 'the only role left to it'⁵⁵¹ in these proceedings was to make sure that adequate measures were in place to secure the protection of the child upon his return to Italy. The court considered that the arrangement proposed by the father was suitable and met the requirements in the Brussels IIa Regulation.⁵⁵² Consequently, on 21 April 2008 the Italian court held that the child should return to Italy and live with his father.⁵⁵³

The mother appealed against the decision and sought to suspend its execution. She argued that the child had not been given the opportunity to be heard in the proceedings, and that the decision had been issued without the court taking account of the arguments used by the Latvian courts in refusing the return under Article 13(1)(b) of the Hague Convention.⁵⁵⁴ The mother also argued that she had not been heard in person in the proceedings.⁵⁵⁵ The arguments put forward by the mother were rejected by the Italian court and a return certificate was issued in accordance with Articles 40, 42 and 47 of the Brussels IIa Regulation in July 2008.⁵⁵⁶ In August 2008, the Italian Central Authority requested the Latvian Central Authority to act upon the Rome Youth Court's decision from 21 April 2008 and to arrange the child's return to Italy.⁵⁵⁷ The mother unsuccessfully appealed against the decision of the Rome Youth Court to the Rome Court of Appeal which reached its decision in April 2009.⁵⁵⁸ In July 2009, (more than three years after the wrongful removal) the bailiff of the Rīga Regional Court in charge of the return order requested the father to re-establish contact with the child, but the father did not respond to the request.⁵⁵⁹

During this time the Republic of Latvia brought an action against Italy before the European Commission, under Article 259 TFEU, for procedural failings in the handling of the case.⁵⁶⁰ However the Commission dismissed the application.⁵⁶¹

In March 2009, the mother and child lodged an application against Italy, before the ECtHR, relying predominantly on Article 8 of the European Convention on Human Rights

⁵⁴⁸ Ibid, para 28.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid, para 28.

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid, para 30.

⁵⁵⁵ Ibid, para 31.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid, para 32.

⁵⁵⁸ Ibid, para 37.

⁵⁵⁹ Ibid, para 38.

⁵⁶⁰ Ibid, para 39 (ex Art 227).

⁵⁶¹ See paras 41-44.

(ECHR).⁵⁶² The Court had to determine whether the decision of the Italian courts constituted an interference with the applicant's right to family life, and whether this interference was necessary under Article 8(2) of the ECHR. In particular, the Court sought to determine whether 'a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters.'⁵⁶³

The ECtHR considered that the reasoning of the Italian courts was rather "scant", and the decisions failed to address the risks that had been identified by the Latvian authorities.⁵⁶⁴ The court went on to determine whether the arrangements for the child's protection, given by the Italian courts, could be regarded to have taken account of the best interests of the child.⁵⁶⁵ When making the assessment, the Court considered several factors. First, there was a strong tie between the mother and the child, and the separation of the child from his mother would have an adverse effect on his psychological development. Second, it was alleged that the mother could not accompany the child to Italy because she did not have sufficient financial means to live there and since she could not speak Italian she could not gain employment. Third, the child and the father had not seen each other for three years and had no language in common. Fourth, the Court also considered that the father had made no effort to establish contact with Marko in the three year period.⁵⁶⁶

The Court highlighted that the Italian courts did not take account of the dangers to the child's psychological health that had been referred to in the expert psychologist's reports. If the Italian courts had considered the reports unreliable, then they could have obtained reports from a different psychologist.⁵⁶⁷ There was also no effort to establish whether the house the child would live in when he returned to Italy would be suitable for him.⁵⁶⁸ 'Those conditions, taken cumulatively, leave the Court unpersuaded that the Italian courts sufficiently appreciated the seriousness of the difficulties which Marko was likely to encounter in Italy'.⁵⁶⁹ As regards the safeguards established by the Italian courts the Court considered that the arrangements made for the child to spend time with the mother were 'a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between the mother and the child.'⁵⁷⁰ Further it was considered that 'the order to drastically immerse a child in a linguistically and culturally foreign environment cannot in any way be compensated by attending a kindergarten, a swimming pool and Russian-language classes.'⁵⁷¹ Following this the Court concluded that the interference with the applicants' right to respect for their family life could not be regarded as

⁵⁶² Ibid, para 54.

⁵⁶³ (App No 14737/09) ECHR 12 July 2011, para 91.

⁵⁶⁴ Ibid, para 93.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid, para 94.

⁵⁶⁷ Ibid, para 95.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid, para 96.

⁵⁷¹ Ibid.

‘necessary in a democratic society’ within the meaning of Article 8(2) of the ECHR, and there had been a violation of Article 8.⁵⁷²

The judgment indicates that the Italian courts are not taking account of the full family situation and the best interests of the child in Article 11(8) Brussels IIa proceedings. This is reflected in the other cases where the judges also take a narrow approach and appear to restrict their analysis to Article 13 Hague considerations.⁵⁷³ This narrow approach does not appear to be the intention behind Article 11(6)-(8) Brussels IIa, and it is inconsistent with the approach in other jurisdictions. Although the CJEU has held that a decision under Article 11(8) Brussels IIa that requires a return only needs to be an interim order,⁵⁷⁴ it is unlikely that the CJEU intended that those decisions (on whether to make an interim order) be limited to an analysis based on Article 13 Hague considerations. In *Povse* it is indicated that the court must take account of the reasons for the Hague non-return order, to ensure that a decision is based on mutual trust.⁵⁷⁵ It is also suggested that the issue of return is examined twice.⁵⁷⁶ Although it is true that the return is then in effect examined twice, it is doubtful that Article 11(8) Brussels IIa proceedings are limited to this.

Juvenile Court Venice, decree 10 July 2009 – *Povse* (CA No 81/08)

These proceedings relate to the famous *Povse* case, where there were proceedings before the CJEU⁵⁷⁷ and the ECtHR.⁵⁷⁸

The child’s parents lived together as an unmarried couple in Italy.⁵⁷⁹ Their daughter was born on 6th December 2006,⁵⁸⁰ and the parents had joint custody.⁵⁸¹ The couple’s relationship broke down at the end of January 2008.⁵⁸² The father obtained a decision from the Italian courts on 8 February 2008 which prohibited the mother from taking the child out of the country, however the mother took the child from Italy to live in Austria.⁵⁸³ On 16 April 2008 the father initiated Hague Convention proceedings in Austria for the return of the child to Italy,⁵⁸⁴ and the proceedings began on 19 June 2008.

⁵⁷² Ibid, para 98.

⁵⁷³ In particular see (CA No 149/12), discussed below.

⁵⁷⁴ See *Povse*, (Case C-211/10 PPU [2010] ECR I-6673) discussed below.

⁵⁷⁵ Ibid, para 59.

⁵⁷⁶ Ibid, para 60.

⁵⁷⁷ Case C-211/10 PPU [2010] ECR I-6673.

⁵⁷⁸ (App no 3890/11) 18 June 2013

⁵⁷⁹ Case C-211/10 PPU [2010] ECR I-6673, para 21.

⁵⁸⁰ Ibid, para 21.

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid, para 22.

On 23 May 2008 the Italian court revoked their decision prohibiting the mother from leaving Italy with Sofia and awarded provisional custody to both parents and stated that Sofia could reside with her mother in Austria pending a final judgment.⁵⁸⁵ The court ordered the father to share the costs of supporting Sofia, gave the mother authority to make the day to day decisions concerning Sofia, established access arrangements for the father and instructed social work reports to be carried out.⁵⁸⁶

On 3 July 2008 the Austrian court dismissed the application for the return of the child under the Hague Convention.⁵⁸⁷ However that decision was set aside on 1 September 2008 on appeal, on the ground that the father had not been heard in accordance with Article 11(5) Brussels IIa.⁵⁸⁸ On 21 November 2008 the Austrian court ordered the non-return of the child on the basis that the Italian court had provided that the child could reside with her mother pending the final custody decision.⁵⁸⁹ This decision was upheld on 7 January 2009 at second instance in Austria on the basis of Article 13(1)(b) Hague.⁵⁹⁰

The mother then applied for sole custody before the Austrian courts.⁵⁹¹ On 26 May 2009 the court declared it had jurisdiction under Article 15(5) Brussels IIa and asked the Italian court to decline its jurisdiction.⁵⁹² The father was not heard at this point.⁵⁹³ On 9 April 2009 the father applied to the Italian court as part of the pending return proceedings for an order for the return of the child under Article 11(8) Brussels IIa.⁵⁹⁴ On 10 July 2009 that court declared that it retained jurisdiction and ordered the immediate return of the child to Italy, instructing the social services department to make accommodation available if the mother returned with the child and to arrange an access schedule for the father and his daughter. The court issued a certificate under Article 42 Brussels IIa.⁵⁹⁵

Provisional custody was awarded to the mother by the Austrian court on 25 August 2009 which became final and enforceable under Austrian law on 23 September 2009.⁵⁹⁶ On the 22nd September the father submitted an application to the Austrian court for the enforcement of the judgment of 10 July 2009 ordering the return of the child to Italy.⁵⁹⁷ This application was dismissed on the ground of Article 13(1)(b) Hague.⁵⁹⁸ The father appealed and the Landesgericht Leoben Austria quashed the decision and ordered the return of the child.⁵⁹⁹

⁵⁸⁵ Ibid, para 23.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid, para 25.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid, para 26.

⁵⁹⁰ Ibid, para 27.

⁵⁹¹ Ibid, para 28.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid, para 29.

⁵⁹⁵ At this point the child was 2 years and 7 months old. The Italian courts did not hear the child which is unsurprising as she was very young.

⁵⁹⁶ Case C-211/10 PPU [2010] ECR I-6673, para 32.

⁵⁹⁷ Ibid, 33.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid

The mother then appealed this decision in the Austrian Supreme Court who stayed proceedings and referred several questions to the CJEU for a preliminary ruling; the outcome of which was delivered on 1 July 2010 which stated that the Italian courts had jurisdiction and that the Article 11(8) Brussels IIa return order should be enforced.⁶⁰⁰ The Austrian Supreme Court followed the preliminary ruling and the mother's appeal was dismissed. The mother was advised to apply to the Italian court if the child's circumstances had changed in order to ask for the return order to be suspended.

The mother then applied to the Italian court. In 2009, Sofia's mother had entered into a relationship with a new partner, in Austria, and had given birth to a son in March 2011.⁶⁰¹ The mother, her new partner and the two children lived in a common household.⁶⁰² Sofia did not speak Italian and had not seen her father since mid-2009.⁶⁰³ However the Italian court refused to withdraw the return order and awarded sole custody of Sofia to her father. Her father continued to seek enforcement of the Article 11(8) Brussels IIa return order proceedings.⁶⁰⁴ This case went back to the Austrian Courts where the judge was at pains to point out that the behaviour by the parents, to use their child in their own personal conflict would lead to the child being traumatised, especially if coercive measures had to be used to return the child.⁶⁰⁵ On 20 May 2013 the Austrian court ordered the child to be returned to her father by 7 July 2013.⁶⁰⁶

The case also went before the ECtHR. The complaint before the court by the mother and the child was that the decisions of the Austrian court had violated their right to family life under Article 8 of the Convention.⁶⁰⁷ The ECtHR decided by majority that the application for breach of Article 8 ECHR was inadmissible as "manifestly ill-founded".⁶⁰⁸ By 18 June 2013 the harsh reality of this case was that the situation for Sofia was no further forward. The Article 11(8) Brussels IIa return order was still in place. Sofia was almost 7 years old at this point. She had been taken by her mother from Italy when she was 14 months old and denied a meaningful relationship with her father. She did not speak Italian and had not seen her father since 2009. The child had not returned to Italy, and the parties subsequently agreed that she can remain in Austria with her mother.

The information provided by the Italian Central Authority corresponds with this. It indicates that the child was 2 years and seven months at the time of the Italian proceedings so she was

⁶⁰⁰ Ibid, para 84(4) "Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment."

⁶⁰¹ *Povse v Austria* (App no. 3890/11) ECHR 18 June 2011, para 51

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid, para 35.

⁶⁰⁵ Ibid, para 49.

⁶⁰⁶ Ibid, para 50.

⁶⁰⁷ Ibid, para 57.

⁶⁰⁸ Ibid, para 89.

not heard. The Central Authority indicates that the Italian courts attempted to hear the mother but it is not clear whether this happened. The father was heard in person in the Italian court.

Juvenile Court Florence, May 2014

(CA No 149/12)

This case concerned two children. The father was an Italian national and the mother was an Austrian national, they were married and lived in Italy with their children. Separation proceedings took place in May 2011. During these proceedings the court awarded joint custody of the children to the parents but held that the children should live with their mother. The court also held that the children should remain in Italy. In June 2012 the mother relocated to Austria, without the father's consent and in violation of the court order. The mother also hindered contact between the children and their father.

The father initiated Hague child abduction proceedings in Austria for the return of the children to Italy. In November 2012 the Innsbruck Court ordered the children's return, however this decision was not enforceable.⁶⁰⁹ The case was appealed to the Appeal Court, which confirmed the decision of the lower court, and then to the Austrian Supreme Court. In March 2013 the Supreme Court refused to order the return of the children.⁶¹⁰

Meanwhile custody proceedings were ongoing in Italy. In February 2013 the Italian court found that the mother was hindering contact between the children and their father, which was prejudicial to the children. The Italian court confirmed that the parents had joint custody, but modified the parental agreement and awarded residence to the father. The court ordered the return of the children, but not under Article 11(8) Brussels IIa so no certificate was issued and the decision was not automatically enforceable. Following this the father sought enforcement of the Italian order in Austria in September 2013, but the Austrian judge refused *exequatur*, claiming that the children refused to go to Italy, their residence was in Austria and the Austrian authorities had competence.⁶¹¹

The father then asked the Italian court to make an Article 11(8) Brussels IIa order. By this time the children were 15 and 13.⁶¹² The Juvenile Court Florence ordered the return of the children, pursuant to Article 11(8) Brussels IIa, and issued an Article 42 Brussels IIa certificate. In reaching its decision the court stated that the children have been repeatedly invited to give their views and be heard by the court, but they have never appeared in court. It was impossible to hear the children because the mother had failed to cooperate. The judge, somewhat controversially stated that, under the current case law the child's opposition to return is not an autonomous ground for return and therefore it is insufficient to make a non-

⁶⁰⁹ It is unclear from the summary provided why the decision was not enforceable.

⁶¹⁰ The summary provided indicates that the reasoning behind the decisions is unreported, however the information provided by the Central Authority suggests the non-return order was made on the basis of Art 13(2) Hague.

⁶¹¹ Possibly suggesting that they had jurisdiction. However this does not seem to meet the standards for refusal of recognition and enforcement under Art 23 Brussels IIa.

⁶¹² It is unclear when this order was made.

return order on that basis, as long as the judge is convinced that there is no risk of exposure to grave harm or an intolerable situation.⁶¹³ The judge also considered that it had not been argued, and there was no proof, that the father was not fit for parental responsibility nor a risk for the children if they were returned to Italy. The judge further noted that the court only heard the children on one occasion (during the divorce proceedings) where one of the children expressed the view that they wanted to remain in Italy with the father. The judge held that there was no grave risk of harm and issued an Article 11(8) Brussels IIa order.⁶¹⁴ The return is still pending.

The information from the Central Authority indicates that the reason for the Hague non-return was Article 13(2), the views of the child. At the time of the Austrian Supreme Court's decision in March 2013, just over a year before the Italian decision, the children were around 12 and 14. Therefore it is good practice that the Austrian court heard the children and gave due weight to their opinions. The Central Authority indicates that the Italian court did not hear any of the parties. It is clear from the summary that the children were invited to attend the hearing but the mother was uncooperative. However it appears that the Italian court only attempted to hear the parties in person and did not try and hear the children through an alternative mechanism such as video link. It is unclear why the father was not heard. There is a suggestion that when the children were heard during divorce/separation proceedings one (or both) of the children expressed a view to remain in Italy. Given that the proceedings referred to were three years earlier, the children's views may have changed in light of the significant change of circumstances.

The conclusion of the judge is particularly concerning. He concludes that because the children should not be placed in a grave risk of harm as a result of returning to Italy then the children should return to Italy. This implies a misunderstanding of the system. Although States of refuge can only refuse to return the child on the basis of the very strict Hague exceptions, grave risk of harm being one of them, the judge in the State of origin is not restricted to these exceptions in Article 11(6)-(8) Brussels IIa proceedings. In Article 11(8) Brussels IIa proceedings the judge is supposed to reach a decision based on the broader welfare of the child, they are not supposed to restrict themselves to Article 13 Hague exceptions. Even more concerning is this particular judge's interpretation of the Article 13 Hague exceptions, which seems to suggest that the only one which really applies is Article 13(1)(b) because Article 13(2) does not constitute a stand-alone exception. In short the correct test in Brussels IIa proceedings is not whether the children will be at a 'grave risk' of harm if returned to the State of origin, what matters is if the return to that State is in their best interests. The children do not need to be at risk of harm for the move not to be in their best interests. These should be two different tests: one is for Article 13 Hague and the other is for Article 11(8) Brussels IIa proceedings. Further, as the children were clearly of an age where

⁶¹³ The summary indicates that this point is not really compatible with current case law.

⁶¹⁴ It would be preferable if the judge had reached a conclusion on the basis of the best interests of the children, rather than simply a lack of harm. A lack of harm does not necessarily mean that the order is in the children's best interests.

they could give their views any best interests assessment must include an evaluation of their views, and these views must be given due weight.

Italian CA No 68/12

The child was abducted by her mother. The information provided does not indicate which Member State the child was abducted to. The Hague non-return order was given on 18 April 2013 on the basis of Article 13(1)(b) grave risk of harm. The left behind parent initiated proceedings in Italy under Article 11(8) Brussels IIa following the non-return order. On 24 February 2015 the Italian court held that the child should be returned to Italy. The child who was six years old at the time, was not heard by the Italian courts. The Italian Central Authority did not indicate whether the abducting parent or the left behind parent were heard in the Brussels IIa proceedings, presumably because they do not have this information. It is indicated that the Italian court took account of the reasons for and evidence underlying the Article 13 Hague non-return order. As of 12 May 2015 the child had not been returned.

Italian CA No 15818/2008⁶¹⁵

This case concerned an abduction from Italy to Romania by the mother. On 5 February 2009 the Romanian court refused to return the child on the basis of Article 13(1)(a) Hague, consent. There were not any custody proceedings ongoing in Italy at the time of the Abduction, but the father then initiated proceedings under Article 11(7) Brussels IIa following the Article 13 Hague non-return order. The Italian court held that the child should return to Italy. It is unclear whether any of the parties were heard during these proceedings or whether the order was enforced.

Cases where an Article 42 Brussels IIa certificate was not issued

Juvenile Court Catania, order 19 June 2014

(CA No 157/12)

This case concerned an abduction from Italy to Germany, in September 2013, carried out by the mother. In June 2013 the German court ordered the non-return on the basis of Article 13(1)(a) Hague, consent.⁶¹⁶ The father then initiated proceedings under Article 11(7) Brussels IIa in Italy requesting an Article 11(8) decision. However the father did not lodge this request until February 2014, which was 8 months after the Hague non-return decision and 18 months after the abduction. The father claimed that this delay was due to the fact that he was never ‘notified’ of the receipt of the German decision by the Italian Central Authority. The Italian

⁶¹⁵ Romanian Reference number.

⁶¹⁶ OGH Hamm.

court indicated that Article 11(7) Brussels IIa does not compel the Central Authority to follow special formalities, and the applicant had been informed, albeit not by proper notification, but through a ‘note’ received by the father in June 2013.⁶¹⁷ The judge indicated that the rationale underlying the three month period for submission, is to set a time limit in relation to the competence of the court in accordance with the principle of proximity to the minor. Since the minor had lived in Germany since August 2012, the connection with Italy had now ceased so jurisdiction of the Italian court had to be denied and the return was refused.

The child was only three at the time of the Italian proceedings so was not heard. The Italian Central Authority indicates that the judge attempted to hear the abducting parent, the mother. However it is not clear from the information provided by the Central Authority nor the researcher what mechanisms were used and whether the mother was actually heard. The Central Authority and the researcher both indicate that the left behind parent was heard. The Central Authority indicates that the court took account of the reasons for non-return. The researcher suggests the previous decision is mentioned, but it is unclear how much attention the Italian court gave to the German decision. The Italian decision that the child should remain in Germany, appears to be based on the fact that the father did not initiate Article 11(8) Brussels IIa proceedings, under Article 11(7), within 3 months and the judge considered that the child was now habitually resident in Germany, which meant the Italian court no longer had jurisdiction to make decisions in relation to the child.⁶¹⁸

Juvenile Court Sassari, 5 August 2013

(CA No 1/10)⁶¹⁹

This case concerned an abduction from Italy to Hungary by the mother. The child’s parents were not married. The father filed an application in Hungary for the return of the child under the Hague Convention. The Hungarian court refused to return the child on the basis of Article 12(2) Hague because the application was issued 12 months after the abduction,⁶²⁰ and the child had settled in their new environment.⁶²¹ The father initiated proceedings before the Italian court under Article 11(7) Brussels IIa, seeking an order under Article 11(8).

The Italian proceedings were held in August 2013. The Italian judge considered that the 12 month period had not expired because the father had made an application to the Central Authority in time. The judge dismissed the application, however, finding that as a result of

⁶¹⁷ Article 11(7) Brussels IIa requires that either the court or the Central Authority (whichever was notified of the Art 13 Hague non-return order under Art 11(6) Brussels IIa) must notify the parties and invite them to make submissions to the court.

⁶¹⁸ Compare with the decision of the Belgian court in *X v Y*.

⁶¹⁹ Information was provided by the Central Authority and the researcher. The researcher matched the CA number to the case, however there are some disparities and it is not clear whether it is the same case.

⁶²⁰ It is unclear when the abduction took place. The information provided by the Central Authority suggests that the non-return was ordered on 23 January 2013.

⁶²¹ The information provided by the Central Authority suggests that the non-return was ordered on the basis of Art 13(1)(b) Hague.

the Hungarian proceedings the child had settled in Hungary and it was in her best interests to stay there.⁶²² The court indicated that the Hungarian proceedings were fair, all parties were heard and there was no need to gather further evidence to establish whether the mother was capable of caring for the child appropriately. The child is well cared for, goes to school and has learned the language. She is housed in proper conditions, has improved both in school and emotionally (while in Italy she was restless and misbehaved). The court also found that the mother had managed to keep good relations with the father and with the wider Italian family. The father on the other hand was aggressive and made the Hague application after a significant delay (although still within the twelve month timeframe before Article 12(2) Hague should come into play). Overall, on a complete family examination, the Italian court held that an order for return to Italy would place the child at a grave risk of psychological harm, as she would be separated from the mother who was her main person of reference.

The Italian Central Authority indicated that the non-return was ordered on the basis of Article 13(1)(b) Hague, grave risk of harm, and that the proceedings were in relation to two children, aged 14 and 9. The Central Authority indicated that neither the children, the abducting parent nor the left-behind parent were heard during the Article 11(8) Brussels IIa proceedings. However if the non-return was ordered on the basis of Article 12(2) Hague, then the father would not be able to initiate Article 11(8) Brussels IIa proceedings which could explain why the court did not hear any of the parties. Not extending Article 11(6) Brussels IIa to also cover non-returns on the basis of Article 12(2) Hague could be a problem where courts misinterpret Article 12(2) Hague and order a non-return on this basis even though the one year period since the abduction has not in fact elapsed. In cases where the period has elapsed and Article 12(2) Hague is correctly applied, then Article 11(6)-(8) Brussels IIa should not apply anyway by virtue of Art 10(b)(i) Brussels IIa as the court in the State of origin will no longer have jurisdiction.

The summary refers to child not children, and the Italian Central Authority indicated that there was an appeal but the summary suggests that there was not an appeal. It is interesting that the Italian court appears to motivate its decision on the basis of Article 13(1)(b) Hague, rather than looking at broader issues concerning the welfare of the child. However in this case the court does seem to have carried out an examination of the child's current family situation.

Appellate C. Catania, 21 July 2011 (confirming Trib Modica 21 June 2011)

In this case the parents were married, the mother was English the father Italian, and the children lived in Italy with their parents. Following the breakdown of the marital relationship, the mother returned to England with the children and filed divorce proceedings there. The father then petitioned for separation before the Italian courts and initiated Hague return proceedings in England. The English court refused to return the children on the basis of

⁶²² The information from the Central Authority suggest that there were two children aged 14 and 9.

Article 13(1)(b) Hague as the father had behaved violently.⁶²³ During the course of the separation proceedings in Italy the father requested that the Italian court review the English decision and order the return of the children. This claim was rejected and the father appealed the decision.

The appeal court confirmed the decision of the trial judge, noting that the English court had made grave findings of physical, sexual and psychological violence used by the father against the mother, sometimes in the presence of the children.⁶²⁴ Therefore the outcome is unsurprising as it would not be in the children's best interests to live with their father, given his violent behaviour.

No information was provided by the Central Authority.

Juvenile Court Salerno, 30 March 2011

(CA No 162/09)

This case concerned an abduction from Italy to Poland by the mother. The Polish court refused to return the child, on 14 October 2010, on the basis of Article 13(2) Hague, child's objections, Article 12(2) Hague, settlement and no exercise of custody rights by the applicant, Article 13(1)(a) Hague.⁶²⁵ The applicant then initiated proceedings before the Italian courts under Article 11(7) Brussels IIa, seeking an order requiring the return of the child pursuant to Article 11(8).

The Italian court confirmed the Polish non-return order.⁶²⁶ The court confirmed that the application was lodged more than 12 months after the abduction and that the minor was settled in her new environment. The judge also noted that the child opposed the return. He took into account how the Polish authorities heard the child, noting that she was heard indirectly through experts, her level of maturity and understanding was ascertained and her views had been reported to and considered by the Polish court. Consequently the Italian judge was satisfied that the child was heard properly, through an appropriate mechanism for her age, her view was clear and there was no need to hear her again.⁶²⁷ However, the Italian court made it clear that custody rights were actually exercised by the father, even though the father did not participate in the day-to-day care of the child. The father was indeed paying child support and under Italian law joint custody is presumed.

⁶²³ It is unclear from the summary whether the violence was directed at the mother, the children or both. This may be the case *DT v LBT* [2010] EWHC 3177 (Fam), where there were three children aged 7.5, 4 and 2. The non-return was ordered on 7/12/2010.

⁶²⁴ The information provided indicates that the decision is very short.

⁶²⁵ It is unclear whether this is on the basis of Art 3(b) or 13(1)(a) Hague. The response from the Central Authority suggests that the non-return was ordered on the basis of Art 13(1)(b) and (2) Hague.

⁶²⁶ The summary provided indicates that the reasoning was different.

⁶²⁷ The summary indicates that the decision shows a very careful and complete analysis of the Polish decision and proceedings, carefully appreciating all that was done by the foreign Court.

The response of the Italian Central Authority indicates that the child was 6 years old and the Polish court ordered the non-return based on Article 13(1)(b) and 13(2) Hague. Further the Central Authority indicated that the Italian court did not hear the child. Again it is interesting that the Italian decision is motivated on Hague exceptions rather than broader welfare principles. However if the Polish court did order the non-return on the basis of Article 12(2) rather than Article 13 Hague then Article 11(6)-(8) Brussels IIa should not apply anyway.

Slovenian CA No. VSM sklep I Ip 623/2010 / Juvenile Court Turin, 23 March 201 (CA No 113/09) (following Appellate Court Turin, 12 May 2010)

The information from our Slovenian source says:

20 July 2010

A mother abducted her 13 year old child from Italy to Slovenia.⁶²⁸ On 20th November 2010 the Slovenian Court refused to return the child on the basis of Article 13(1)(b) and 13(2) of the Hague Abduction Convention.⁶²⁹ At the time of the Hague proceedings, custody proceedings were taking place in the habitual residence of the child.⁶³⁰ The father initiated proceedings under Articles 11(6)-(8) and 42 Brussels IIa in the Italian District Court and the court decided that the child should be returned.⁶³¹ The Italian District Court did not attempt to hear either the child or the mother, even though the child was 13 years of age and one of the reasons for non-return was due to the child objecting to being returned.⁶³² The local researcher states that the Italian District Court did take into account in issuing its judgment the reasons underlying the Hague non-return order.⁶³³ The child has not been returned to Italy and the mother is not facing criminal charges in Italy.⁶³⁴

The information from our Italian source says;

This case concerned an abduction from Italy to Slovenia by an unmarried mother. Initially the father sought a return before the Italian courts under national law.⁶³⁵ In August 2009, the Turin Juvenile Court found that the abduction by the mother was illegal, awarded custody to the father, ordered the return of the child and ruled on access for the mother. This decision was not enforceable. The mother appealed before the Italian appellate court, and at some point during those proceedings the father initiated Hague return proceedings in Slovenia. On 12 May 2010, the Italian court stayed proceedings, waiting for the Slovenian decision on return to become final, and refused an Article 11(8) Brussels IIa order on the basis that this

⁶²⁸ *ibid*, 16.

⁶²⁹ *ibid*.

⁶³⁰ *ibid*.

⁶³¹ *ibid*, 17.

⁶³² *ibid*.

⁶³³ *ibid*.

⁶³⁴ *ibid*.

⁶³⁵ Article 317 bis civ code.

was a 'new request' which is inadmissible under Italian procedural law. The Slovenian court refused the return of the child in January 2010 on the basis of Article 13(2) Hague, the child's objections. The Slovenian appellate court confirmed the Hague non-return order in April 2010. The father then stayed the appellate proceedings in Italy and filed new proceedings before the first instance court on the basis of Article 11(7) Brussels IIa, in an attempt to get an Article 11(8) order.

The Juvenile Court found that it had already given an order on the return of the child in August 2009. The court considered that because the two Slovenian decisions did not add any new elements the earlier decision was confirmed. The Court also stated that there was no need to declare this order again under Article 11(8) Brussels IIa because the decision would have the same content. A request for an Article 11(8) order can only be granted if the applicant is seeking an order which is enforceable under Article 42 Brussels IIa. However this was not possible in the present case because the first return order was not enforceable, and now that appellate proceedings were pending the return order could not be declared enforceable. Therefore the court considered that the conditions for adopting an Article 11(8) Brussels IIa order were not met. This outcome seems unusual as the earlier decision was on the basis of internal law, not the Regulation, and following the earlier decision there had been two Hague non-return decisions in Slovenia making the provision in Article 11(8) Brussels IIa applicable in Italy.⁶³⁶

It should be noted that there was a long delay in the proceedings. It took the Central Authority two years to inform the Italian judicial authority of the Slovenian final non-return decision of April 2010. It then took more time to resume proceedings, translate the decision and appoint lawyers. The Appellate Court in Turin finally gave its decision on 1 July 2013. The court gave exclusive custody to the mother and allowed the child to remain in Slovenia. The court noted that the removal was unlawful, however, recognised that four years after the removal it was no longer practical to order the return of the child and this would not be in the child's best interests. The court aimed to ensure contact for the father.

The information provided by the Italian Central Authority indicates that the Slovenian Hague non-return order was based on the views of the child. The child was eleven at the time of the Article 11(8) Brussels IIa proceedings. The Italian court did not hear the child, the abducting parent, nor the left behind parent. As the court refused to hold Article 11(6)-(8) Brussels IIa proceedings it is unsurprising that none of the parties were heard. This is a case where the proceedings were not dealt with quickly enough and at the time of the final decision it was highly unlikely that a decision to order the return of the child could be in the best interests of that child as she had already been in the state of refuge for four years.

Additional information

⁶³⁶ Professor Honorati considers that this case was dealt with badly by the Italian Authorities.

The Slovenian local researcher stated that the Italian District Court did take into account in issuing its judgment the reasons underlying the Hague non-return order.⁶³⁷ The child has not been returned to Italy and the mother is not facing criminal charges in Italy.⁶³⁸

Comment

The information supplied from Slovenia and Italy has some discrepancies but we believe that the information relates to the same case and we have classified our data on that basis.

Cass. 14 July 2010 n. 16549 (confirming Juvenile Court Palermo 9 March 2009)
CA No 25/08

This case concerned a child abduction from Italy to Spain. The mother was Spanish and the father Italian, when they separated the mother took the child to Spain with her. The Palermo Juvenile Court granted a provisional measure giving custody to the father. The father also issued Hague return proceedings in Spain. The Spanish court refused to return the child on the basis of Article 13(1)(b) Hague, finding that a return to Italy would put the child in an intolerable situation. Following this the father sought a decision under Article 11(8) Brussels IIa from the Palermo Juvenile Court. The Italian court refused to issue a decision accompanied by an Article 42 Brussels IIa certificate, confirmed the non-return order and declared that it no longer had jurisdiction. The facts were not reported in the case, however it is stated that the high level of conflict between the parents would prejudice the well-being of the child and put her in an intolerable situation.

The father then appealed to the Italian Supreme Court, which confirmed the first-instance decision. As this was the first decision by the Supreme Court on Article 11 Brussels IIa, and one of the first in all Italian case law, it gave a general overview of the legal framework:

- a) Article 11(8) allows for a re-examination of the decision given by the state of refuge;
- b) such re-examination is to be made by the ‘natural court’ of the minor, i.e. the court of the child’s (previous) habitual residence;
- c) such re-examination implies an autonomous interpretation of all national and international legal rules and requires a new, full and complete examination of all factual and legal circumstances that were considered by the foreign court in order to refuse the return of the child, as well as of all new circumstances that the court of habitual residence may consider appropriate.
- d) the scope of this re-examination is limited to the review of the decision on non-return as adopted on one of the grounds mentioned by Article 13 Hague Convention. The notion of «the question of custody of the child» as mentioned by Article 11(7) («diritto di affidamento») must be interpreted autonomously, in the light of the system and purposes of the Regulation. On such a construction «the question of custody» must be interpreted as

⁶³⁷ Suzana Kraljić, Questionnaire Response, 17.

⁶³⁸ *ibid.*

meaning (only) “the violation of the right of custody of the holder of parental responsibility with reference to his right to determine the child's place of residence”

e) The proceeding pursuant to Article 11 is *ex parte*. The court's *ex officio* duty is limited to notifying the parties upon arrival of the decision and relevant documents of the foreign court and inviting them to make their submissions within three months of the date of such notification. If the parties do not lodge their request timeously the proceeding is barred.

f) the decision adopted pursuant to Article 11(8) can be appealed to the Supreme Court.

The information provided by the Italian Central Authority indicates that the Spanish courts refused to return the child on the basis of Article 13(1)(b) Hague, grave risk of harm or an otherwise intolerable situation. The Central Authority indicated that the child was three at the time of the Italian proceedings, but it is unclear whether this was the first instance or the appellate proceedings (which were a year and 4 months apart).

The decision of the Italian Supreme Court confirms that the Article 11(6)-(8) Brussels IIa provisions can only be used where a Hague non-return was ordered in another EU Member State on the basis of Article 13 and not Article 12, or another provision. Further it suggests that during Article 11 Brussels IIa proceedings the court should carry out a full and complete examination of the circumstances that were considered by the state of refuge as well as any new circumstances that the court considers appropriate. However the court then suggests that this is limited to a review of the Article 13 Hague grounds and creates a narrow construction of the reference to custody in Article 11(7) Brussels IIa. Neither of these positions seem to be correct.

Italian CA No 159/12

The child was abducted by the mother. It is unclear which Member State the child was abducted to. The decision on non-return was given on 5 August 2013 and was ordered on the basis of Article 13(1)(b) Hague, grave risk of harm. The left behind parent initiated proceedings in Italy under Article 11(8) Brussels IIa following the Hague non-return order. On 9 October 2014 the Italian judge decided that the child should not be returned to Italy. The child, who was eight years old, was not heard. The court did not attempt to hear the abducting parent and the left behind parent was not heard either. However the judge did take account of the reasons for the Hague non-return order. The Italian Central Authority also indicated that the abducting parent was facing criminal proceedings in Italy.

Italian CA No 158/13

The child was abducted by the mother. It is unclear which Member State the child was abducted to. The decision on non-return was given on 13 June 2014 and was ordered on the basis of Article 13(1)(b) Hague, grave risk of harm. Custody proceedings were already ongoing in Italy at the time of the removal or retention, and the left behind parent initiated proceedings under Article 11(8) Brussels IIa following the Hague non-return order. On 17 February 2015 the Italian court decided that the child should not be returned. The child was

four at the time of the proceedings and was not heard. The court did not attempt to hear the abducting parent. It is unclear whether the left behind parent was heard. The Italian Central Authority indicates that the court took account of the reasons for and evidence underlying the Article 13 Hague non-return order.

Latvian CA No.25-1.3/13

In this case the mother took the child from Italy to Latvia. The Latvian court ordered the non-return of the child on 4 June 2013 on the basis of Article 13(1)(b) Hague, grave risk of harm. The judge did not take account of Article 11(4) Brussels IIa,⁶³⁹ however it seems that the Article 13(1)(b) Hague defence was properly made out in this case. The case involved domestic violence which was carried out in front of the child, and this was considered as emotional violence against the child.⁶⁴⁰ The mother had provided the court with medical evidence which indicated that violence had taken place (e.g. medical records evidencing broken ribs). Because the father did not provide any evidence to the contrary, such as evidence suggesting the harm had occurred in a different way, the judge considered that the evidence provided was enough to prove domestic violence, which the mother had run away from. Therefore Article 13(1)(b) Hague was made out, in the judge's opinion, because the return would place the child in an intolerable situation because of the risk that the child would suffer from emotional abuse.

There were also proceedings ongoing in Italy whilst the Hague proceedings were taking place in Latvia. The father also tried to initiate proceedings under Article 11(8) Brussels IIa, after the Hague non-return was ordered. First he attempted to initiate these before the Court of Appeal in Naples. That court decided that it did not have jurisdiction and the father should initiate proceedings before the Naples Juvenile Court instead. However by the time the father initiated proceedings before the Juvenile court, three months had already passed. The judge held that the father was time barred, and could no longer initiate these proceedings in Italy. The child, who was two, was not heard during these proceedings. The Latvian Central Authority indicates that the Italian courts heard the abducting parent and the left behind parent in person in court. It is also suggested that the Italian court took account of the reasons for and evidence underlying the Hague non-return order made in Latvia. However the abducting parent was facing criminal proceedings in Italy.⁶⁴¹

French CA No. 77DE2011⁶⁴²

⁶³⁹ This is because the judge was not aware of the rule until he was writing the judgment – highlighting the importance of training and concentrated jurisdiction.

⁶⁴⁰ Information provided at an interview on 15 June 2015.

⁶⁴¹ Information has not been provided on this case by our Italian contacts – possibly because they do not see it as an Art 11(8) case, because it was time barred.

⁶⁴² Information provided by the French Central Authority.

This case concerned an abduction from Italy to France by the mother. The father, the left behind parent, applied for the return of the child under the Hague Abduction Convention. On 6th February 2012 the French court decided not to return the child based on Article 13(1)(b) Hague. Custody proceedings were not current in Italy at the time of the abduction. The father initiated proceedings in Italy for the return of the child under Articles 11(8) and 42 Brussels IIa.

There is no further information on this case.

Slovenian CA unknown Case II⁶⁴³

A father abducted his seven-year-old child from Italy to Slovenia. The Slovenian Court refused to return the child on the basis that there had been acquiescence under Article 13(1)(a) Hague. Child custody proceedings were taking place in Italy at the time of the Hague proceedings. The mother initiated proceedings in the Italian court for the return of the child under Articles 11(8) and 42 Brussels IIa. The Italian court did not attempt to hear the father (the abducting parent) but the Italian judge did hear the left behind parent, the mother. There is no information regarding whether the Italian court attempted to hear the child.

The Italian court did take into account in issuing its judgment the reasons for and evidence underlying the Hague non-return order. The child has not been returned and the abducting parent is not facing criminal proceedings in Italy.

Incoming Hague Convention cases

The information provided by the Italian Central Authority indicates that there were 34 Article 13 Hague intra- EU non-return decisions given by the Italian courts between 1 March 2005 and 28 February 2014. Of these the Central Authority is only aware of one order that resulted in Article 11(8) Brussels IIa proceedings in the State of origin.

Cases where a certificate was not issued

Italian CA No 212/09P

This application concerned the abduction of a child from Germany to Italy. The abducting parent was female. The Italian court refused to order the return of the child on the basis of Article 13(1)(b) Hague, on 18 May 2010. Following this the left behind parent initiated Article 11(8) Brussels IIa proceedings in Germany. The German court did not reach a decision which required the return of the child. The Italian Central Authority did not provide information on whether the parties were heard by the German courts (most likely because it

⁶⁴³ Information provided by the Slovenian local researcher.

does not have this information). It is unclear how old the child was in this case. The German Central Authority did not provide any information on this case.

Conclusion

The Italian courts have dealt with a number of Article 11(8) Brussels IIa proceedings. It is concerning that the approach in Italy is to review whether the Article 13 Hague exceptions were validly applied by the court in the State of refuge rather than carry out a full welfare examination based on a best interests of the child analysis. It is likely that this is due to the decision of the Italian Supreme Court. However the ECtHR in *Šneerson* made it clear that the review should be broader and it is concerning that the approach has not yet changed. Some cases do indicate that the judge did carry out a wider review although ultimately motivated their decision on the basis of Article 13 Hague. Another cause for concern is that courts have heard Article 11(6)-(8) Brussels IIa proceedings in Italy where the Hague non-return in another EU Member State was issued on the basis of Article 12(2) Hague. It is also clear that there were unnecessary delays in some of the cases.

A positive feature is that the information available indicates that Italian courts apply the deadline in Article 11(7) Brussels IIa strictly, and will not hear cases where the left behind parent has failed to issue proceedings within three months (where this provision is applicable).

Latvia

Background

Information from the Latvian Central Authority indicates that there were five incoming cases which resulted in Article 11(8) Brussels IIa Regulation (Brussels IIa) proceedings, out of 11 cases where the Latvian courts ordered a non-return order under Article 13 of the Hague Child Abduction Convention 1980 (Hague). There was one outgoing case from Latvia which resulted in a Hague non-return order in the state of refuge and this resulted in Article 11(8) Brussels IIa proceedings in Latvia.

Legal Process in Latvia

The majority of child abduction cases both to and from Latvia involve the UK. For example, in 2011 when Latvia had the highest number of outgoing cases, there were 41 in total and 39 involved the UK. The majority of these applications involved England and Wales. Latvia received the highest number of incoming applications in 2014, 15. The majority of these were sent by the UK, 1 by Ireland and 1 or 2 by Lithuania. Most of the incoming applications have resulted in a non-return order in Latvia. All incoming applications are dealt with by one solicitor based in Riga. The government provides legal aid for the left behind parent and instructs the solicitor (who works in private practice).

Concentrated jurisdiction

Since March 2015 Latvia has used concentrated jurisdiction for Hague proceedings. This means that at first instance there will now only be around 7 judges hearing the case,⁶⁴⁴ compared to around 300 previously (across 35 district courts). Therefore given the small number of incoming cases, prior to March 2015 it was unlikely that a district court judge would hear more than 1 Hague case, if any at all. However, if the decision is appealed, there are 30 judges who need to be trained for 2nd instance proceedings, where three judges decide each case. At second instance there is no actual hearing, as such, instead all the evidence is submitted in written form. The judges are also supposed to follow a strict six week timeline. The first instance judge should deal with the case in 15 days. There is then ten days allowed for an appeal, and the second instance judges should then hear the case and reach a decision within 15 days.

The delegates that were interviewed did not think that there was a need for concentrated jurisdiction for Article 11(6)-(8) Brussels IIa cases. This is because they see it as a normal decision on custody which should represent a full welfare examination. Therefore it does not seem necessary to separate general custody cases from custody cases involving the Regulation as the welfare examination should be the same. Lara Walker and Jayne Holliday

⁶⁴⁴ There are 12 judges who sit in the particular court in Riga but some of these judges only deal with criminal proceedings.

pointed out that the judges do need to know how to produce an Article 42 Brussels IIa certificate, which requires knowing how the Hague Article 13 grounds for non-return work, that Article 11(6)-(8) Brussels IIa proceedings had not always been treated like full custody proceedings in every Member State and therefore concentrated jurisdiction involving Hague judges might be needed. The delegates noted the arguments but still considered that concentrated jurisdiction was not necessary in Latvia. Nevertheless, concentrated jurisdiction could still be beneficial, firstly because 300 judges is a large number, and they might not all treat the proceedings as custody proceedings. Second, all 300 judges would also need to be told how to complete the Article 42 Brussels IIa certificate, because if this is not done the decision is not enforceable. It is easier to keep track of these cases if they are only dealt with by a small number of judges. Finally if the same judges deal with Hague and Article 11(6)-(8) Brussels IIa proceedings they will have the expertise and the commitment to ensure that both types of proceedings are dealt with as expeditiously as possible.

Enforcement

Latvia has had an implementing law since 2006. The implementing law contains special rules on enforcement. This is because general rules don't work, so special rules are needed. These rules were strengthened in 2011. The rules allow the enforcement officers (bailiffs) to collect children from school or kindergarten and place them in a protected children's home until the other parent can come and collect the children. They also require the parent seeking enforcement to pay for enforcement. The cost of enforcement includes set fees and then other fees (dependant on the action taken) and a full deposit is required. There are two fixed fees: the state fee which is 2 Euro 80 cent, and the expenses relating to the Bailiffs action which is approximately 120 Euros. All other expenses are dependent on several factors, such as: whether the applicant parent will come to collect the child (in which case they will pay for the air fare), whether the child needs to spend time in the crisis centre, whether the child needs a psychologist. All these expenses depend on whether the enforcement agent or the parent takes action. If the agent has to do these things then they will charge the parent. The Bailiff is an independent legal official who is not government funded. Therefore he charges a deposit based on what he expects the cost to be. Excess funds will be returned.

Hearing the child

In Latvia the children are heard by representatives from the Orphan's court. The Orphan's 'court' is not an actual court but part of social services. However in Latvia representatives of the Orphan's court can decide things that only courts can decide in other jurisdictions: such as foster care, the temporary suspension of custody rights and guardianship. The Orphan's court can make a review on their own initiative. In the context of child abduction the Orphan's court has a variety of roles. The representatives need to check where the child is living. They then have to check that the child is safe, in a suitable environment and not in danger. They then decide whether it is suitable for them to hear that child based on the child's age, maturity and any health conditions. It appears that all children can be heard, if the Orphan's court deems it to be appropriate, and no minimum or maximum age requirement is set. Older children are not heard in court by the judge. The judge interviewed preferred that the Orphan's Court hears children because they are trained to do this and they know how to

approach children – the judge saw no benefit hearing children personally. The children are interviewed by a psychologist from the Orphan's court and this usually takes place over two sessions. The personnel also have to indicate whether they think there is any impact or danger from the father.⁶⁴⁵ They also have to look at whether the child has been manipulated. Sometimes the children come with a list of things to say, and when the list is taken away from them they have nothing to say. In these cases it is unlikely much weight will be given to anything that the child has said.

The Orphan's court also has to discuss the possibility of amicable solutions with the mother, or the abducting parents.

Hearing the parties

In the one outgoing case where Article 11(6)-(8) Brussels IIa proceedings were held in Latvia, the parties were heard under the Taking of Evidence Regulation. During the interviews it emerged that Latvia has the appropriate technology in place for taking evidence via videoconference.⁶⁴⁶ Every court has a video conference system in place, in at least one room in each court. Thus far the system has mainly been used for national criminal cases rather than family cases. Despite this, it is positive that the relevant technology is in place so that evidence can be taken via video link in Article 11(6)-(8) Brussels IIa proceedings. The interviewees did note, however, that it can be difficult to arrange videoconferences with other Member States and the waiting period can be six months, which is too long for proceedings under Article 11(6)-(8) Brussels IIa and parental responsibility proceedings generally.

Other points

In general the delegates had problems with the additional procedure in Article 11(6)-(8) Brussels IIa because they thought it breached the principle of *res judicata*. The procedure was considered to be very confusing because a decision that was thought to be final is no longer final. However the delegates did recognise the positive side in the fact that the courts of the child's habitual residence can make a final decision on custody, which is easier for them as they are closer to the child.

One of the delegates considered that the procedure in Articles 11(6)-(8) Brussels IIa should only apply to refusals made on the basis of Article 13(1)(b). He thought that this is logical because Article 11(4) Brussels IIa requires the state of refuge to determine if protective measures are in place and this should open up a dialogue between the two courts. Where this is not resolved correctly then the review should still be open. This is particularly because abducting mothers often argue that separation will place the child in an intolerable situation and this usually works with the Latvian court. However if Article 13(1)(b) Hague and 11(4) Brussels IIa are applied correctly then this should not be possible. The proper application of Article 11(4) Brussels IIa should allow courts to focus on the use of dialogue between the state of refuge and the state of origin and the utilisation of protective measures where these are necessary. This delegate's view indicates that some professionals involved in child

⁶⁴⁵ It is presumed that this means the left-behind parent who is often the father.

⁶⁴⁶ C.F. Belgian Report.

abduction cases in Latvia consider that Article 13(1)(b) Hague has been misapplied, at least in Latvia. This suggests that there is a more positive feeling in relation to the other Article 13 Hague grounds for non-return and a belief that they will be applied correctly. As argued elsewhere, where there is valid consent the removal or retention should not be regarded as wrongful.⁶⁴⁷ Further, if the left behind parent has consented to the removal then it is unlikely that they want custody of the child. Similarly where a child of sufficient maturity clearly and articulately objects to the return it is unlikely to be in that child's best interests to be forced to move to the other country and live with the other parent. For example in *Re A* (England-Maltese)⁶⁴⁸ the child objected, the English court issued an Article 42 Brussels IIa certificate, the child eventually returned to England only to return to the UK six months later. In *Aguirre Zarraga* where the Hague non-return order was also ordered on the basis of the child's objections,⁶⁴⁹ the Article 42 Brussels IIa certificate insisting on a return was never enforced.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in Latvia

Cases where an Article 42 Brussels IIa certificate was not issued

No.25-1.112

In this case the father took the child from Latvia to Northern Ireland. The Northern Irish court refused to return the child on the basis of the child's objections and grave risk of harm on 28 March 2012.

Custody proceedings were already pending in Latvia at the time of the removal and the mother then also initiated proceedings under Article 11(8) Brussels IIa. On 20 February 2014 (almost a year after the non-return was issued) the Latvian court decided that the child could remain in Northern Ireland. The child, who was 14 years old, was heard under the Taking of Evidence Regulation. The judge also heard the abducting parent under the Taking of Evidence Regulation. The left behind parent was heard in person by the judge and the judge also took account of the reasons for and evidence underlying the non-return order.⁶⁵⁰ As all the parties were heard, it appears that the Latvian judge carried out a welfare hearing and gave a decision based on the best interests of the child.

Incoming Hague Convention cases

⁶⁴⁷ See England and Wales Report and Paul Beaumont, Lara Walker, Jayne Holliday, "Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU" in Centre for Private International Law Working Paper No. 2016/1 http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf.

⁶⁴⁸ *Re A* [2006] EWHC 3397 (Fam).

⁶⁴⁹ Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247.

⁶⁵⁰ Information provided by the Northern Irish Central Authority reflects that provided by the Latvian Central Authority. The only discrepancy is that the information from Northern Ireland suggests the child was 12 at the relevant time. This could be because the Northern Irish information is based on the age of the child at the time the Hague application was initiated, but the Latvian information gives the age of the child at the time of the Art 11(8) Brussels IIa proceedings in Latvia.

Cases where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

No.25-1.15 - *Šneersone and Kampanella*

This is the famous *Šneersone* case, where the mother took the child from Italy to Latvia. The Latvian judge ordered the non-return of the child on 24 May 2007 on the basis of Article 13(1)(b) Hague, grave risk of harm. The father then initiated Article 11(8) Brussels IIa proceedings and the Juvenile Court Rome, held that the child should be returned to Italy and issued a certificate under Article 42 Brussels IIa. The ECtHR later held that this order was in violation of Article 8 ECHR right to family life. The child has not been returned to Italy.⁶⁵¹

No.25-1.25/13

This application concerned an abduction by the mother from the UK (England and Wales) to Latvia. The first instance court in Latvia had held that the child should be returned, however on 11 December 2013 the Latvian appeal court refused to return the child on the basis of Article 13(1)(b) Hague grave risk of harm. Information provided suggests that this case involved domestic violence which had been reported before the mother left the UK and there was a prohibited steps order in place. The mother had been seeking a relocation order but she left just before court proceedings began in England, primarily because she believed that she would not qualify for legal aid.

As explained above custody proceedings were ongoing in England at the time of the removal, and the father also initiated proceedings under Article 11(7) Brussels IIa after the Hague non-return was ordered. The High Court of Justice (Family Division) issued a summary decision requiring that the child be returned to the UK, on 26 June 2014, and issued an Article 42 Brussels IIa certificate (the case is unreported). The decision required that the child must be returned to England by 30th July 2014,⁶⁵² so that the hearing could be relisted for 6 August 2014 when the court would examine the child's welfare under Article 11(7) Brussels IIa and then possibly allow the child to return to Latvia.⁶⁵³ The Article 42 Brussels IIa certificate indicates that the child and both parties were given an opportunity to be heard. The certificate simply states 'YES', to both questions, and does not provide any explanation on how the parties were heard or whether the parties were heard, and if they weren't heard what opportunities were offered. Information provided by the Latvian Central Authority indicates that the child, who was 6 years and 2 months at the time, was not heard. Given that the certificate is supposed to mitigate the effects of the abolition of *exequatur*, if the current procedure is retained, then judges should have to be more specific when completing the certificate which is designed to make the return order automatically enforceable. In relation

⁶⁵¹ For further information see the Italian Report and P Beaumont (et al) 'Child Abduction: recent jurisprudence of the European Court of Human Rights' (2015) 64 *International and Comparative Law Quarterly* 39-63.

⁶⁵² Court order, para 1.

⁶⁵³ Ibid, para 5.

to point 13 of the certificate – whether the court has taken account of the reasons for and evidence underlying the non-return order - again the answer just states ‘YES’. The most concerning issue is the answer to point 14 – details of measures to ensure the protection of the child where applicable. Once again the certificate simply states ‘YES’. It is troubling that a document that does not even answer the questions coherently still has the effect of making the underlying return order enforceable. A simple “yes” does not answer the question in point 14, either no protective measures are needed or if they are they should be listed.

The Brussels IIa return order indicates that service should be carried out by the father’s solicitors. It has been suggested that the mother was not served with the order until after it was due to be enforced. The lawyers want to close the case because the father has not been in contact with them. As enforcement takes place under Latvian law, the bailiff cannot proceed with enforcement until the father has been in contact because he needs to pay for enforcement (this could be an advance payment of around 1000 Euros). Unfortunately the solicitors cannot close the case because the certificate remains enforceable.

At the time the information was provided the child had not been returned to England and the abducting parent was not facing criminal proceedings there.

Minister for Justice and Equality acting as Central Authority v M.F. Anor [2015] IEHC 538

This case concerned the removal of children by their mother from Ireland to Latvia.⁶⁵⁴ The eldest child was born in Latvia in 2007 and had sole Latvian citizenship, the youngest child was born in Ireland in 2009 and had dual Latvian and Irish citizenship.⁶⁵⁵ Hague proceedings took place in Latvia with the final non-return order issued on 15 February 2013.⁶⁵⁶ The Latvian court refused to return the children to Ireland under Article 13 (1)(b) Hague because there was not appropriate housing for the children, that the mother was ineligible for social welfare payments and that she lacked protection from alleged domestic violence in Ireland.⁶⁵⁷ Article 11(6)-(8) Brussels IIa proceedings were brought before the Irish court on 15 May 2013.⁶⁵⁸ The applicant (the father) issued his motion on 19 July 2013.⁶⁵⁹ The mother issued her motion on 7 January 2015.⁶⁶⁰ The father requested that the mother return to Ireland with the children on a temporary basis so that custody/access could be determined. The father was clear that he was not seeking full custody in Ireland if the mother came back with the children to live in Ireland.⁶⁶¹

⁶⁵⁴ *Minister for Justice and Equality acting as Central Authority v M.F. Anor* [2015] IEHC 538

⁶⁵⁵ *Ibid.*, [1].

⁶⁵⁶ *Ibid.*, [1].

⁶⁵⁷ *Ibid.*, [17].

⁶⁵⁸ *Ibid.*, [3].

⁶⁵⁹ *Ibid.*, [3].

⁶⁶⁰ *Ibid.*, [3].

⁶⁶¹ *Ibid.*, [5]

The Irish court noted that it has jurisdiction to determine questions of custody and to make interim orders for the return of the children for the purpose of effecting a welfare assessment and report. The Irish court also noted that the children were heard in Latvia at their behest on 11 March 2015, but that the purpose of the children being heard at that point was only to satisfy the requirements of the Article 42 Brussels IIa certificate and not intended to form part of a welfare assessment.⁶⁶² (In this case the youngest child is heard in Latvia in contrast to the child of the same age in the *OK v K* case was not heard in Poland where the Irish court regarded the child as too young.)

The Irish court took account of the right of the children to maintain on a regular basis a personal relationship with both parents unless contrary to their interests and ordered the mother to arrange for the return of the children to Ireland for a period of 7 weeks so that the father could access the children. He was to see them between 10am and 6 pm every day for the duration of the visit.⁶⁶³ An assessment was to be conducted not before the end of the first two weeks of the visit in preparation for the final custody hearing.

Comment

The Irish court is keen to protect the relationship between the children and both parents and is seen to make access arrangements so that the assessor will be able to obtain a holistic view of the relationship between the father and his children. However, the approach can be criticised.

The court clearly takes the reasoning of the Hague non-return order into account where the Latvian courts regard Ireland as not being a suitable place to return the children due to there not being appropriate housing available and the lack of protection for alleged domestic violence. However, even though the judge responds defensively to these points, the court fails to put measures in place to protect the child and arrange supervised access. The time it took between the original notice for the Article 11(6)-(8) proceedings in May 2013 to the decision to make an interim order for the children to return to Ireland on 21 May 2015, 2 years, is too long. The Irish court should have used a different approach to obtain access for the father (all he wanted if the mother would return to Ireland with the children) in order to avoid using Article 11(8) for a ‘Povse’ temporary return order.

The Latvian court in their decision not to return the child did not appear to consider the protection available for the child under Article 11(4) and Article 20 Brussels IIa.

Cases where an Article 42 Brussels IIa certificate was not issued

⁶⁶² Ibid, [14].

⁶⁶³ Ibid, [24].

Latvian CA No.25-1.47/12

This application concerned an abduction by the mother from Hungary to Latvia. The Latvian judge refused to return the child to Hungary on the basis of Article 13(1)(a) Hague, consent or acquiescence, on 12 February 2013. There were no custody proceedings ongoing at the time of the removal, but the father initiated proceedings under Article 11(8) Brussels IIa in Hungary following the Hague non-return order. The Hungarian judge decided that the child should remain in Latvia. The child, who was 3 years and 4 months at the time, was not heard in these proceedings. The information provided by the Latvian Central Authority indicated that both the abducting parent and the left behind parent were heard in person in court in the Hungarian proceedings. The Latvian Central Authority also indicated that the Hungarian judge took account of the reasons for and evidence underlying the Hague non-return order. Following this the Latvian court requested the Hungarian court to transmit the case to Latvia. The case has since been transmitted and the Latvian courts have jurisdiction.

Latvian CA No.25-1.3/13

In this case the mother took the child from Italy to Latvia. The Latvian court ordered the non-return of the child on 4 June 2013 on the basis of Article 13(1)(b) Hague, grave risk of harm. The judge did not take account of Article 11(4) Brussels IIa.⁶⁶⁴ The case involved allegations of domestic violence by the father against the mother at least some of which was carried out in front of the child and that this should be considered as emotional violence against the child.⁶⁶⁵ The mother had provided the court with medical evidence which indicated that violence had taken place (e.g. medical records evidencing broken ribs). Because the father did not provide any evidence to the contrary, such as evidence suggesting the harm had occurred in a different way, the judge considered that the evidence provided was enough to prove domestic violence, which the mother had ran away from. Therefore the judge decided that the Article 13(1)(b) defence was made out because the return would place the child in an intolerable situation due to the grave risk that the child would suffer from emotional abuse.

There were also proceedings ongoing in Italy whilst the Hague proceedings were taking place in Latvia. The father also tried to initiate proceedings under Article 11(8) Brussels IIa, after the Hague non-return was ordered. First he attempted to initiate these before the Court of Appeal in Naples. That court decided that it did not have jurisdiction and the father should initiate proceedings before the Naples Juvenile Court instead. However by the time the father initiated proceedings before the Juvenile court, three months had already passed. The judge held that the father was time barred, and could no longer initiate the Article 11(6)-(8) Brussels IIa proceedings in Italy. The child, who was two, was not heard during these proceedings. The Latvian Central Authority indicates that the Italian courts heard the

⁶⁶⁴ During the interview, in relation to Article 11(4), the judge spoke candidly about his own need for training in this area.

⁶⁶⁵ Information provided at an interview on 15 June 2015.

abducting parent and the left behind parent in person in court. It is also suggested that the Italian court took account of the reasons for and evidence underlying the Hague non-return order. However the abducting parent was at the time facing criminal proceedings in Italy.⁶⁶⁶

Outcome unknown

Latvian CA No.25-1.28/13

This application concerns an abduction, by the mother, from Austria to Latvia. The Latvian court ordered the non-return of the child, on 6 May 2014, on the basis of Article 13(1)(b) and 13(2) Hague.⁶⁶⁷ It is unclear how old the child was at this time. The Latvian Central Authority indicated that custody proceedings were ongoing in Austria at the time of the removal, and the father later initiated proceedings under Article 11(6)-(8) Brussels IIa. It is unclear what the outcome of these proceedings is. The Latvian Central Authority told us that: ‘Our office has information that after the Latvian Court ordered the non-return, after our office transmitted all documentation to the Austrian Central Authority in accordance with the Article 11(6), documents were forwarded to the respective Court in Austria for the purposes of the Article 11(7). Unfortunately, we have no further information about these proceedings, nor have we received the return certificate, yet.’

Conclusion

Latvia does not receive many incoming cases, however evidence provided indicates that the Latvian courts generally deal with abduction cases badly. Apart from in 2008, when 6 cases went to court and the courts ordered the return of the children in each case (including *X v Latvia*), most incoming Hague applications result in a non-return order. This is partly due to the fact that there are not many cases and there were 300 judges dealing with them so they were unlikely to deal with more than one abduction case, resulting in a lack of expertise. Concentrated jurisdiction was introduced in March 2015 so hopefully the practice will begin to change.

An interesting feature of Latvian law is the requirement to pay for the enforcement of an order. The stringent enforcement law, and wide range of available measures, is designed to increase the effectiveness of enforcement, however if the applicant has limited funds they will not be able to pay the enforcement fees rendering the whole application pointless. An applicant cannot get assistance from the Latvian authorities to help pay for the private bailiff. It is unclear whether the father who received legal aid in England for the proceedings there, can use the English legal aid system to pay for enforcement. If not the money that the state has already provided is effectively wasted.

⁶⁶⁶ Information has not been provided on this case by our Italian contacts – possibly because they do not see it as an Art 11(8) Brussels IIa case, because it was time barred.

⁶⁶⁷ This case technically falls outside our original specified period – which sought to cover cases where the Hague non-return was ordered prior to 28 February 2014.

A positive feature of Latvian practice is the Orphan's court. This allows the Latvian authorities to gain the views of the child through trained specialists in a child friendly environment. Another good feature is the Orphan court's ability to check the living situation of the child and the child's safety, and its ability to take appropriate temporary measures where these are necessary. Finally in relation to hearing the parties more generally, there is a video conference system available in each court, which is fantastic for hearing the abducting parent in Article 11(6)-(8) Brussels IIa proceedings. It would be preferable if each Member State had equivalent technology in place.

There has only been one Article 11(6)-(8) Brussels IIa case in Latvia to date in which the Latvian court heard both parties and the child (making good use of the EU Taking of Evidence Regulation in relation to hearing the abducting parent and the 14 year old child), took account of the reasons for the non-return order under Article 13 Hague by the Northern Irish court and did not order the return of the child from Northern Ireland to Latvia. The only flaw is that the Latvian Brussels IIa case took a year. Given the uncertainty such a long delay causes to all a possible remedy is to introduce strict time limits for completing Article 11(6)-(8) Brussels IIa proceedings. Such time limits would be more easily respected if combined with the specialisation in international cases made possible by concentration of jurisdiction.

Lithuania

Background

The Lithuanian Central Authority sent us a letter dated 11 July 2014, stating that there had been no Article 13 Hague Child Abduction Convention (Hague) non-return orders in other EU Member States in relation to abducted children who were habitually resident in Lithuania that had by that date resulted in proceedings under Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa). The researcher provided us with details of one incoming case,⁶⁶⁸ where there had been a Hague non-return order in Lithuania which resulted in Article 11(6)-(8) Brussels IIa proceedings in England and Wales.⁶⁶⁹

Incoming Hague Convention cases

Cases where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

SR1c-A-208/06 *Rinau*

This is the well documented *Rinau* case.⁶⁷⁰ In this case, the mother, a Lithuanian national, separated from her German husband in 2005.⁶⁷¹ In July 2006, the mother, with the father's consent, took their daughter to Lithuania for a two week holiday but did not return.⁶⁷² After the two week holiday was over and the mother did not return with the child, the father applied for the return of the child under the Hague Abduction Convention⁶⁷³ and the First Instance Court refused to order the return of the child on 22 December 2006.⁶⁷⁴ On appeal lodged by the father, the second instance court ordered the return of the child to Germany on 15th March 2007⁶⁷⁵ but enforcement of this return order was suspended.⁶⁷⁶ At the time of the Hague proceedings, custody proceedings were taking place in Germany.⁶⁷⁷ On 20th June 2007 the German court granted the divorce and awarded custody of the daughter to the father.⁶⁷⁸ In accordance with Article 11(8) Brussels IIa Regulation (Brussels IIa) they also issued an

⁶⁶⁸ Dr. Kristina Pranevičienė.

⁶⁶⁹ *L.A. v. S. A.*, No. FD13P00646 (unreported). This information has since been confirmed by a UK based lawyer and some further information was provided.

⁶⁷⁰ Case C-195/08 PPU *Rinau* EU:C:2008:406; [2009] Fam 51. See the discussion of this case by Paul Beaumont, "The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction" (2009) Vol 335 (2008) *Hague Recueil des cours* 9, 87-96.

⁶⁷¹ *Ibid*, para 28.

⁶⁷² *Ibid* para 29.

⁶⁷³ *Ibid*, para 31.

⁶⁷⁴ German Central Authority Questionnaire, 9.

⁶⁷⁵ *Ibid*, 9.

⁶⁷⁶ Case C-195/08 PPU *Rinau*, para 34.

⁶⁷⁷ German Central Authority Questionnaire, 9.

⁶⁷⁸ Case C-195/08 PPU *Rinau*, para 37.

Article 42 Brussels IIa certificate so the return decision was automatically recognisable and enforceable in another Member State.⁶⁷⁹ During these proceedings in the German court, the mother was represented by a lawyer in the Court of First Instance and she was heard in person during the appeal in the Second Instance Court. The child was not heard as she was only two years old, but she was represented by a child's guardian who was in charge of representing the child's interest in custody proceedings according to German national procedural law. The father was heard in person by the judge. In issuing its judgment the reasons and evidence underlying the Lithuanian non-return order pursuant to Article 13 Hague were taken into account. This German judgment was upheld in the Higher Regional Court (Second Instance Court) in Germany on 20th February 2008. The judgment granting the Article 11(8) Brussels IIa return order was appealed.⁶⁸⁰ The mother applied to the Lithuanian courts for non-recognition of the German return decision.⁶⁸¹

The Lithuanian Supreme Court referred preliminary questions to the Court of Justice of the European Union (CJEU) where it asked whether a successful appeal against an Article 13 Hague non-return order would overrule the return order under the Brussels IIa Regulation.⁶⁸² The CJEU ruled that where the Article 42 Brussels IIa Certificate had been issued correctly then the enforceability of the underlying return order could not be opposed. The outcome of this case was that the father took the child from Lithuania and brought her back to Germany without waiting for enforcement measures.⁶⁸³

L.A. v. S. A.

The case concerns a girl who was taken from England to Lithuania by her father in September 2011, when the child was nine.⁶⁸⁴ The first instance court in Lithuania refused to order the return of the child on the basis of Article 13(2) Hague, the views of the child, in March 2012. The child was ten at the time of these proceedings, and the judge thought it was appropriate to take account of her views. The judge also thought that she would suffer psychological stress if she were returned. She might blame her mother for this, which would seriously harm the fragile relationship between the mother and her daughter. The case was then heard by the court of appeal where it was considered that Article 13(2) Hague had not been made out and there was no grave risk of psychological harm under Article 13(1)(b) Hague. However the court held in January 2013, that the child had now settled in her new environment so should not be returned, and referred to Article 12(2) Hague. Article 12(2) Hague should not have been applied because the original request for a return was made within 12 months of the abduction, but the court referred to Article 11(3) Brussels IIa and the need for expeditious procedures. As the procedures had not been expeditious the court felt

⁶⁷⁹ Ibid, and German Central Authority Questionnaire, 9.

⁶⁸⁰ German Central Authority Questionnaire, 9.

⁶⁸¹ Case C-195/08 PPU *Rinau*.

⁶⁸² Ibid.

⁶⁸³ Information provided by the German Central Authority.

⁶⁸⁴ This information is a combination of the information provided by the two sources.

that the child had become settled in Lithuania and therefore considered that the return would not be in the child's best interests, relying on the ECtHR decision in *Neulinger*.⁶⁸⁵ The court considered that the best interests of the child were of utmost importance and took account of the fact that the child lived with her father, stepmother and half-brother.

Following this the mother issued proceedings in England and Wales under Article 11(6)-(8) Brussels IIa. On 17 September 2013, following a lengthy legal aid application, the High Court considered that the child should be returned to the UK and live with her mother. This order has not been enforced, mainly due to the father's efforts to thwart any attempts at enforcement. He took the child to Italy during enforcement proceedings, he then returned to Lithuania only to then take the child to a non-EU State.

Cases where an Article 42 Brussels IIa Certificate was not issued

M v T (Abduction: Brussels II Revised, Art 11(7)) [2010] EWHC 1479 (Fam) (58)

The child was wrongfully retained in Lithuania by the mother. At the time of the father's initial request for return the child was around 9 months old. The Lithuanian courts refused to return the child on the basis of Article 13(1)(b) Hague. By the time the Hague non-return was ordered the child was around 18 months old. Following that the Article 11(8) Brussels IIa proceedings were ongoing in England for around 1 year. The child was two and a half at the time of the decision.⁶⁸⁶ Although the judge acknowledged that the timescale has not been ideal he indicated that a full welfare enquiry had been undertaken in the time. There 'has essentially been a full welfare inquiry, in which the guardian... has visited Lithuania and has also observed contact in this country. She has also had discussions with Social Services in Lithuania, with the parents, and with members of the mother's family in Lithuania.'⁶⁸⁷ Unfortunately the length of the legal process increased the difficulties between the parties and there was a lot of antagonism between them.⁶⁸⁸

It is unfortunate that the process took so long. However, given that the child's situation was fully examined and all parties were involved in proceedings then these elements can be seen as a positive. There has been contact between the father and the child. However, it is clear that the young child, who only lived in the UK for a short period of his life, is settled in Lithuania. Therefore, given that the result was that the child should remain in Lithuania with his mother, apart from the designated periods of contact with his father in England, the fact that the child's welfare was properly assessed by the English courts is not too problematic.

⁶⁸⁵ Of course *Neulinger* has subsequently been qualified by the Grand Chamber decision in *X v Latvia* and the best interests of the child are established in Hague return cases by an effective examination of whether any of the Hague exceptions apply rather than a freestanding welfare analysis, see P R Beaumont, K Trimmings, L Walker & J Holliday, "Child Abduction: Recent Jurisprudence of the European Court of Human Rights" (2015) 64 *International and Comparative Law Quarterly* 39-63.

⁶⁸⁶ *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam), paras 9-13.

⁶⁸⁷ *Ibid*, para 14.

⁶⁸⁸ *Ibid*, para 15.

However if the outcome had been that the child was to return to the UK and reside with his father for the majority of the time, then this would have been difficult to reconcile with the child's interests given that he has lived in Lithuania with his mother for the majority of his life.

The court did take account of the reasons for the Lithuanian non-return order. One reason for the decision seemed to be that the father refused to guarantee living conditions for the mother if she returned to the United Kingdom.⁶⁸⁹ Therefore because the father refused financial support then this was seen as a significant risk.⁶⁹⁰ The refusal by the father to provide financial assistance does not appear to be consistent with his desire for the child to be returned.

Given the delay to this case, partly down to the full welfare enquiry, the judge concluded that there were two options available in this case. These were ordering a return and making a contact order, or refusing an order for return and making a contact order.⁶⁹¹ The judge held that the child should remain in Lithuania and contact should take place in the UK.

Conclusion

No Article 11(6)-(8) Brussels IIa proceedings took place in Lithuania, so no comment can be made on the treatment of these proceedings in that State. However in two cases out of three where an Article 13 Hague non-return was ordered in Lithuania and Article 11(6)-(8) Brussels IIa proceedings took place elsewhere in the EU, the court in the State of origin ordered the return of the child. This could suggest that the courts in Lithuania are making Hague non-return orders too readily but it is such a small sample that too much should not be made of this suggestion.

⁶⁸⁹ Ibid, para 41.

⁶⁹⁰ Ibid, para 43.

⁶⁹¹ Ibid, para 96.

Luxembourg

Background

The Luxembourg Central Authority returned the questionnaire but were only able to provide statistical data from 2010.⁶⁹² The Central Authority noted that they had had two outgoing cases that had resulted in a non-return order based on Article 13 of the Hague Child Abduction Convention (Hague) and four incoming cases involving non-return orders made in their courts under Article 13 Hague but were unaware of any cases involving Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings.

However the local researcher identified one outgoing case from 2010.⁶⁹³ This case involved a father who abducted his 13-year-old daughter from Luxembourg to Portugal.⁶⁹⁴

Outgoing Case where Article 11(6)-(8) proceedings took place in Luxembourg

Case where an Article 42 Certificate was issued

Unknown Case I

The basis of the non-return order issued by the Portuguese Court on 19 August 2010 is not mentioned, but is referred to within the final judgment as having been made under Article 13(1)(b) and Article 13(2) Hague. The child appears to have objected to returning to Luxembourg as she was a victim of domestic violence.

At the time of the removal, custody proceedings were taking place in Luxembourg. The mother initiated proceedings for the return of her daughter under Article 11(6)-(8) Brussels IIa. The Luxembourg District Court decided that the child should be returned to Luxembourg on 29 October 2010. The father did not appeal the decision.

The District Court in Luxembourg did not attempt to hear the child and attempted to hear the abducting parent. The abducting parent did not turn up to the hearing.⁶⁹⁵ The left behind parent was not heard. The Luxembourg District court did take into account in issuing its judgment the reasons for and evidence underlying the Portuguese order made under Article 13 Hague and the child was returned to Luxembourg. The abducting parent is not facing criminal charges in Luxembourg.

Conclusion

⁶⁹² Email received from Luxembourg Central Authority 9th July 2014.

⁶⁹³ Celine Camara. Email Received 6th November 2014.

⁶⁹⁴ Researcher Completed Questionnaire, 20.

⁶⁹⁵ Ibid, 25.

CONFLICTS OF EU COURTS ON CHILD ABDUCTION

Although this is a rare case where the child was actually returned, it is noted that the court in Luxembourg did not hear the child even though the child was 13 years old and one of the reasons for non-return under the Hague Convention was due to her objections to being returned. However, the reason for the child and abducting parent not being heard is not due to a failing on the part of the courts in Luxembourg but because the abducting parent was not willing to cooperate. The impact of the abducting parent's behaviour on the child's right to be heard is concerning.⁶⁹⁶

⁶⁹⁶ Hague Network Judge Response to Questionnaire – Received 8 October 2014.

Malta

Background

The Maltese Central Authority provided us with information on Hague non-return orders but indicated that there were no Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings. According to the information provided there were four cases where an application for return initiated in Malta by the left behind parent, resulted in a Hague Child Abduction Convention (Hague) non-return order in another EU Member State. There were three applications, within the timeframe, for Hague return orders where the Maltese courts held that the child should not be returned to another EU Member State. We were unable to find a local researcher in Malta who was willing to check for these cases. We are aware of one incoming case, where a Hague non-return order was issued in Malta and there were Article 11(6)-(8) Brussels IIa proceedings in England and Wales.⁶⁹⁷

Incoming Hague Convention cases

Cases where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

Re A [2006] EWHC 3397 (Fam)

The child was 12 at the time of the English proceedings. He went to stay with his father in Malta during the summer holidays and did not return, when he was meant to, on 28th July 2006.⁶⁹⁸ Shaun's two older siblings already resided in Malta. The Hague proceedings were dealt with promptly. The Maltese judge heard evidence from the mother, father and Shaun on 23rd August.⁶⁹⁹ Return was refused on 4th September 2006 on the basis of Article 13(1)(b) Hague. The judge also took into account the fact that the child stated a preference for remaining in Malta.⁷⁰⁰

The main reason for the Article 13(1)(b) Hague non-return order seems to centre around allegations that the mother and her partner either took drugs or allowed drugs to be taken in their house.⁷⁰¹ It was alleged that the mother's sister also took drugs. Apparently Shaun tried drugs at school, and because his older brother Anthony took drugs before he left the UK it was considered that this was a bad environment for Shaun to be in, in case he also acquired a drug habit.⁷⁰² There was also a possibility that Anthony was still taking drugs. Shaun was

⁶⁹⁷ *Re A* [2006] EWHC 3397 (Fam).

⁶⁹⁸ Ibid, paras 1-2.

⁶⁹⁹ Ibid, para 3.

⁷⁰⁰ Ibid, para 4.

⁷⁰¹ Ibid, para 44.

⁷⁰² Ibid, para 40.

living in a flat with his brother 19 and his sister 17,⁷⁰³ at the time of the English proceedings. The father lived elsewhere. The mother and step father denied taking drugs or having drugs in their house, and evidence suggested this was true.⁷⁰⁴ The Aunt indicated that she used to take drugs but has not done so for a long time. This also suggested that the mother did not allow drugs in her house. The English judge took account of the Maltese judgment and went through all the relevant evidence.

The judge then took into account other elements that came to light after the Maltese judgment. When the mother was in Malta, she saw Shaun every day for one hour under supervision.⁷⁰⁵ Shaun was very clear ‘that he wanted to come back to England, and that what he said he had been told to say by his brother.’⁷⁰⁶ There were texts from Shaun suggesting that he wanted to come back and that Anthony made him say he wanted to stay.⁷⁰⁷ After the texts the father removed Shaun’s mobile and the mother was supposed to be able to ring Shaun twice per week.⁷⁰⁸ The phone calls didn’t last long and following that she received three letters, supposedly, from Shaun.⁷⁰⁹ The father was not mentioned in any of the letters which seemed ‘to indicate that his father is not exercising parental authority or control over him but has deputed that to his brother and sister to some extent at least, if not completely.’⁷¹⁰ There were no phone calls after 20th October and the mother only received a few brief texts which indicated that Shaun did not want to speak to her.⁷¹¹

The father was notified several times about the proceedings in England. The mother and father were directed to cooperate with any enquiries or investigations made by the children’s guardian. It was hoped that the guardian would travel to Malta in order to meet the father and Shaun, any other relevant individuals, and investigate Shaun’s living circumstances. Unfortunately this was not possible as the father refused to cooperate. No response was received from his lawyer either.⁷¹² In addition the English authorities received limited response from the Maltese authorities.⁷¹³ On the rare occasion a response was received it was generally critical of the English proceedings. Further the Maltese authorities did not seem to be concerned that Shaun was most likely being cared for by his two siblings who were only 17 and 19, and appeared to be incapable of providing the correct support.

The judge took into account the fact that all the parties have to be given an opportunity to be heard before a certificate can be issued.⁷¹⁴ The judge considered that although the Regulation requires that all the parties have to be given an opportunity to be heard, this does not ‘impose

⁷⁰³ Ibid, para 25.

⁷⁰⁴ Ibid, para 45.

⁷⁰⁵ Ibid, para 52.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid, para 54. These texts contain the code word ‘buster’.

⁷⁰⁸ Ibid, para 55.

⁷⁰⁹ Ibid, paras 55-58. The letters did not contain the code word ‘buster’.

⁷¹⁰ Ibid, para 58.

⁷¹¹ Ibid, para 59. However these texts did not contain the code word ‘buster’.

⁷¹² Ibid, paras 62-66.

⁷¹³ Ibid, see paras 67-71.

⁷¹⁴ Ibid, para 76.

(sic) an obligation to do nothing until the child and/ or in this case the father can in fact be heard if, as in this case, the father and (as a result I readily infer of his activities) the child cannot in fact be heard.⁷¹⁵ The judge considered that the father had been given every opportunity to be heard and participate. The father had also prevented Shaun from having direct communication with the guardian.⁷¹⁶ Therefore the judge decided that he could make a decision despite the fact that he had not heard all the parties.

The judge summarised his findings in relation to the Maltese non-return order. He concluded that ‘on the evidence which I have read and heard, I have some difficulty in finding the situation, as found by the court in Malta, to be so risky and potentially dangerous as to surmount to what certainly is the English view of article 13(b) as a very considerable hurdle indeed.’⁷¹⁷

After giving full attention to the Maltese judgment he had to consider the broader welfare basis under Article 11(7) Brussels IIa and the Children Act.⁷¹⁸ The judge took into account the evidence provided by the family members he was able to meet.⁷¹⁹ After taking all the factors into account,⁷²⁰ the judge concluded that Shaun should be returned to the UK and live with his mother.⁷²¹ This is a very difficult case. Particularly because the child was over 12 years old and capable of forming his own views. However the judge could not ascertain those views as his father did not cooperate with the authorities, and it was unclear what Shaun’s views actually were due to the conflicting evidence provided. A further concern is that it was unclear who was actually caring for Shaun in Malta. The judge attempted to deal with these factors by making Shaun a ward of court subject to further proceedings which would take place after Shaun had returned and spent time with the Guardian.⁷²²

In this case the order was enforced and Shaun came back to the UK. However he returned to Malta six months later.⁷²³

Conclusion

The information provided suggests that no Article 11(6)-(8) Brussels IIa proceedings were heard in Malta. It is clear from the information on the one Article 11(6)-(8) Brussels IIa case from another EU Member State concerning a Maltese Hague non-return order that the Maltese authorities could have been more cooperative.

⁷¹⁵ Ibid, para 76.

⁷¹⁶ Ibid, paras 77-78.

⁷¹⁷ Ibid, para 94.

⁷¹⁸ Ibid, paras 95-96.

⁷¹⁹ Ibid, paras 97-101.

⁷²⁰ Ibid, paras 102-113.

⁷²¹ Ibid, para 116.

⁷²² Ibid, para 117.

⁷²³ Information provided at meeting with English Judges, 20 May 2015.

The Netherlands

Background

The Netherlands was originally chosen as a focus country due to their reputation for efficiency when dealing with Hague Child Abduction cases. A Hague Network Judge agreed to be interviewed twice during the project and a meeting was arranged with members of the Hague Permanent Bureau. The Hague Permanent Bureau was very supportive of this project and sent out a project questionnaire to all the Hague Network judges within the EU on our behalf for which we are grateful. The following information is drawn from the information received during the interviews with the Hague Network Judge.

Legal Process in the Netherlands

Legal Aid

There are no special legal aid provisions for Article 11(6)-(8) Brussels IIa cases. The applicant is able to apply for legal aid which is generally available and is means tested. This is the same situation for Hague cases in the Netherlands.

Videoconferencing

In the court at the Hague there is now a court room for video conferencing. The Judge explained that prior to using that facility she had been apprehensive about using videoconferencing but after using it for a Portuguese case she would highly recommend it as it did make the observer feel as if they were in the Portuguese court room.

Hearing the child

In child abduction cases children are heard from the age of 6. However this only takes place in Hague Convention cases. In domestic cases or other international cases, children will be heard from the age of 12. The reason these ages currently differ is that the Netherlands is aware that in order for its decisions to be respected in other countries it has to hear children from the age of 6 in child abduction cases. In other cases it is usual for the child to receive an invitation to be heard and they can either write to the judge or ask to speak to the judge.

Occasionally the judges will hear a child who is under the age of 6 but this is the exception in that it is usually due to a parental request or the child being sufficiently mature.

Additional benefits to hearing the child were identified in that it provides insight into how the family functions. Hearing the child and relaying the information to the parents can prove to be beneficial to the situation as a whole. The Judge recounted that she had heard 12 year old twins who informed her that they wished to return to their native Ireland. The parents did not know the views of their children and when they were informed arranged for the mother to return with the children to Ireland and arranged for the father to have access.

Where and how is the child heard?

In Hague cases the child is heard in an informal room at the Hague court. The child will be in the room with three judges. One judge will chat to the child and the other two will sit at the back of the room. The conversation is 'one to one'. There will be an interpreter if this is needed. It was identified that the original arrangement for hearing the child, ie by the judge in the court room was an ordeal for the child as the sight of the left-behind parent affected them hence the move to the child being heard in an 'informal room'.

Training

Training to hear the child is not compulsory in the Netherlands. Training is offered after someone is appointed as a judge. However, in the majority of cases the child will be heard twice, the first time if mediation takes place and the second time by the court. In the Netherlands, Hague Abduction Convention cases are dealt with in a centralised way only by the court in The Hague. At present there is no concentration of proceedings for Article 11(6)-(8) Brussels IIa cases. This means that any family judge, of whom there are up to 200 in the Netherlands in the 11 family courts, is able to hear an Article 11(6)-(8) Brussels IIa case. Training takes place in these courts and issues such as child abduction and child protection are covered. Additional assistance is available for these judges if needed.

Mediation

For Hague Convention cases, mediation is offered. When a case comes in to the court in The Hague a hearing will be planned within two weeks of that initial date. This allows the court to check that they have all the information they need and to see if the parties are willing to consider cross-border mediation. A review of this situation is taken two weeks later. During that time a professional will hear the child and write their report. The parents will hear the report. The judges don't see that report. The judges will only hear whether mediation has been successful or otherwise. The success rate for full agreement as a result of mediation is low which can be connected to the fact that the left-behind parent used to be represented by the Central Authority but is now represented by a lawyer. This has reduced the number of full agreements and increased the number of mirror agreements.

Enforcement

Judges in the Netherlands are not involved in the enforcement process. The public prosecutor and the police deal with enforcement. It was suggested that this situation needed to be improved.

Additional Information

The Netherlands has seen a visible increase in the number of refusals under the Hague Child Abduction Convention (Hague), particularly Article 3. Cases that make reference to Article 11(8) of the Brussels IIa Regulation (Brussels IIa) are few and primarily concern procedural issues.

The first meeting was held with the Hague Network judge at the Hague Court in September 2014. At this meeting three incoming Article 11(6)-(8) Brussels IIa cases from Belgium were identified, two from Utrecht (pending) and one from Rotterdam.⁷²⁴

Incoming Hague Convention Cases

Outcome Unknown

C/16/362195⁷²⁵ Decision 17th July 2015

District Court – Utrecht (at the point of the September 2014 meeting this case was still pending)

This case concerned a child born in 1998. The Dutch judge heard the child on 12 June 2015. The case was heard by videoconferencing on 12 June 2015. It is not clear from the text whether there have been Hague proceedings and whether this is an Article 11(8) Brussels IIa case.⁷²⁶

After the meeting in September 2014 three further Article 11(6)-(8) Brussels IIa cases came to the attention of the Hague court. These were brought to our attention at the second meeting on 2 November 2015. Two cases came in from Poland. In both cases the parties were invited

⁷²⁴ It was reported to us that the Rotterdam court dealt with a case where the child had been abducted to Belgium. The first level Belgian appeal court had ordered the return of the child to the Netherlands and at that point the child went back there. The Rotterdam court made a custody decision on the merits that did not require an order to return the child from Belgium to the Netherlands as the child was already in the Netherlands. It was therefore of no consequence that the final appeal court in Belgium had decided that the child should not have been returned to the Netherlands under Article 13 Hague.

⁷²⁵ Grateful thanks to Peter Beaton for translating the case.

⁷²⁶ Ibid.

to make submissions to the Dutch court. No submissions had been made by that date. Another case involved Lithuania, but the Hague court held that it did not have jurisdiction to hear that case. The case concerning Lithuania is as follows: -

C-09-489087 District Court of the Hague⁷²⁷

This case concerned a child that had been abducted by their mother from the Netherlands to Lithuania. The mother died in Lithuania and the child is living with the aunt/foster parent. The father requested the return of the child to the Netherlands under 1980 Hague (after the courts of Lithuania had, at first instance and appeal, decided that the child should not return to the Netherlands.) In this case the Hague court declared that it had no jurisdiction to decide certain craves in a case where a child, presently in Lithuania, had been the subject of return proceedings there resulting in a non-return at first instance, confirmed at appeal. The papers were transmitted under Article 11(6) Brussels IIa to the court in Lelystad which is the competent court in The Netherlands given the habitual residence of the father. The Hague court found that Article 11(8) Brussels IIa does not allow a renewed 1980 Hague Convention case in the jurisdiction of the left-behind parent and therefore the concentration of jurisdiction in Hague Child Abduction Convention cases in the Netherlands in the courts in the Hague does not apply to Article 11(6)-(8) Brussels IIa proceedings in the Netherlands.

The case was sent back to Lelystad for that court to deal with the remaining craves concerning custody and to apply Article 11(6)-(8) Brussels IIa.

When asked whether the child or the parties had been heard in this case it was noted that the foster family were represented by a lawyer. Their lawyer had not asked for the parties to be heard although it would have been possible if it had been requested.

Other case of interest

FB v KF (05/06/2012)⁷²⁸

This is a case where a Hague Convention return order was sought in Belgium asking for the return of the children to the Netherlands. It appears that a non-return order was given at first instance but a return was ordered on appeal. The significance of this case is that the appeal court stated that it is not possible in Belgium to appeal a Hague decision on non-return where the documents have been transmitted in accordance with Article 11(6) Brussels IIa to the other EU Member State, and this is confirmed by Art 1322 of the Belgian Judicial Code. It was then stated that because the Hague order on non-return had not yet been transmitted to the Netherlands Central Authority, then in such circumstances there could be an internal appeal in Belgium.

⁷²⁷ *ibid.*

⁷²⁸ Translation provided by Thalia Kruger.

Comment

In jurisdictions where the decision whether to hear the parties is based on whether it is requested by their legal representative this raises questions as to whether the rights of the child to be given the opportunity to be heard are adequately protected. The solution to this issue would be to give the child independent representation or to require the judge(s) to raise the issue of hearing of the child of their own motion.

Conclusion

The Netherlands does not have much experience dealing with Article 11(6)-(8) Brussels IIa cases. As there is no concentration of jurisdiction for these cases the Hague court is only able to act as a 'postbox' for Article 11(6)-(8) Brussels IIa cases in that it communicates with the parties that they have this option at the end of an Article 13 Hague non-return case. The Hague court is proactive in making certain that all courts/parties are aware of and follow the requirements of Brussels IIa but is conscious that many judges within the family law courts within the Netherlands are not comfortable handling these cases.

It is commended that training and assistance is available for these judges on how to apply Brussels IIa, and that recommendations are being put forward to make training on hearing the child mandatory for judges. As specialists in child welfare are not used to hear the child, compulsory training for the judges would seem to be the minimum standard expected.

The fact that children are heard from the age of 6 in Hague Abduction cases but from the age of 12 in other international and domestic cases would seem to be a point that needs to be addressed in favour of all children being given the opportunity to be heard. It makes no sense for a 6 year old child to be heard in one Member State and their view to be a reason for a non-return under Article 13(2) Hague and for that child not to be heard within a Brussels IIa scenario. One would hope that if a court in the Netherlands was dealing with Article 11(6)-(8) Brussels IIa proceedings in which another EU Member State court had refused to return the child on the basis of Article 13(2) Hague the Dutch court would hear the child even if he or she was less than 12 years old.

Of particular importance is the protection of the right of the child to be given the opportunity to be heard in cases that affect them. Their right is weakened if it relies on the request of a third party. It is suggested that a method of protecting the right of the child to be heard would be through independent representation or the court having a duty of its own motion to give a real opportunity to a child to be heard, at least where the child is 6 years old or older.

Enforcement was also identified as an area where the procedure needed greater consideration for the child. At this point enforcement is treated as if it were a criminal case in that the public prosecutor and police handle the enforcement. It was suggested that social workers or child psychologists being present at the enforcement or handling the enforcement would

lessen the trauma on the child at this point. The model used by the Czech Central Authority was recommended to the Netherlands as the Czech Central Authority does not get to the point of requiring coercive enforcement. They have a very good system of mediators and psychologists who are able to persuade the parents to act in the best interests of the child. They are able to prepare the parent to either return with the child or hand over the child. The preparation that takes place allows the return of the child to take place very soon after the court decision. The parent is aware that coercive measures are possible in that the police have the power to enforce the return but it is seldom used. The child being returned in a calm manner has to be an improvement on the use of coercive measures.

Poland

Background

The Polish Central Authority provided us with information on Hague Child Abduction Convention (Hague) non-return orders in intra-EU cases. They indicated that one Hague non-return order in another EU Member State resulted in Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings in Poland. However they could not provide any information on this case. In regard to incoming applications that resulted in Hague non-return orders in Poland, it was stated that the Polish Central Authority was not in possession of information on custody proceedings and Article 11(8) Brussels IIa orders in the State of origin. Therefore, we have compiled information on incoming cases based on information provided by sources in other Member States. The researcher stated that there were no Article 11(6)-(8) Brussels IIa proceedings in Poland.⁷²⁹

The information provided indicates that there were 6 outgoing applications to another EU Member State for a Hague return order that resulted in a non-return order in the State of refuge (1 resulted in Article 11(6)-(8) Brussels IIa proceedings in Poland). There were at least 5 incoming applications from other EU Member States that resulted in a Hague non-return order in Poland.

Outgoing Hague cases where Article 11(6)-(8) Brussels IIa proceedings took place in Poland

The Polish Central Authority indicated that there may have been one case where Article 11(8) Brussels IIa proceedings took place in Poland, but we have no information on this case.

Incoming Hague Convention cases

Cases where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

Bradbrooke

This case involved a child A, who was taken from Belgium to Poland by his mother (who was a Polish national). The child was born in Poland in 2011. Around July 2012, when the child was around 7 months old, Ms A moved back to Brussels with the child. The child was enrolled in nursery in Belgium and there was regular contact with Mr B, apparently one evening per week.⁷³⁰ However this seems to have been obstructed in March 2013.⁷³¹ In

⁷²⁹ Email dated 15/09/2014.

⁷³⁰ R.G. N°: 2014/JR/73 et N°: 2014/FA/113, p 4.

⁷³¹ Ibid.

August and September 2013 the parties undertook mediation in Belgium to agree a framework for caring for the child.⁷³² On 16 October 2013 Ms A told Mr B that she was taking the child on holiday and on 18 October Mr B initiated proceedings for parental responsibility in Brussels.⁷³³ In a decision of 26 March 2014 the judge held that Mr B and Ms A had joint parental responsibility for the child. The primary residence was to be with the mother, and Mr B was to have contact every second weekend in Poland (as the child was now located there).⁷³⁴ A further hearing was set for June 2014. The decision was confirmed on 30 July 2014 but no access took place in Poland.⁷³⁵

In the meantime, Ms A had left Belgium for Poland and contested the jurisdiction of the Belgian court. Mr B initiated proceedings under the Hague Convention and the Belgian Central Authority requested the return of the child from Poland on 20 November 2013.⁷³⁶ On the 3 of February 2014 the Polish court refused to return the child on the basis of Article 13(1)(b) Hague. There have since been several proceedings in Belgium, but generally Ms A did not attend and was not represented. Proceedings under Article 11 of Brussels IIa were initiated on 9 July 2014 and a trial was set for 9 September 2014. On the day of the trial Ms A was not present nor represented.⁷³⁷ In addition to the proceedings in Belgium, the Belgian court also made a reference to the Court of Justice under the PPU procedure.⁷³⁸

On 20 February 2015 the Belgian Court of Appeal held that the child should return to Belgium and live with his father. This was mainly because the mother had not cooperated and she refused to let the father see his son. This had resulted in a breakdown in the relationship between the child and the father, and the most effective way to repair this would be to let the child live in Belgium with his father for a period.⁷³⁹ On 28 February 2015 the mother let the father see the child at a hotel in Poland while she was still unaware of the Belgian order. The father took the child back to Belgium where he is now living with his father.⁷⁴⁰

Mr X v Mrs Y (01/09/2009)⁷⁴¹

This is the strange case where there were four children and only two of them were subject to Article 11(8) Brussels IIa proceedings. The children had been in Poland for several years at the time of the Article 11(8) proceedings, because it had taken a long time to locate the children, but the Belgian court still ordered a return and issued an Article 42 Brussels IIa certificate.

⁷³² Ibid.

⁷³³ Ibid.

⁷³⁴ Ibid, 5.

⁷³⁵ C-498/14 PPU, *David Bradbrooke v Anna Aleksandrowicz*, (9 January 2015) ECLI:EU:C:2015:3, para 37.

⁷³⁶ R.G. N°: 2014/JR/73 et N°: 2014/FA/113, 5.

⁷³⁷ Ibid, p 6-7.

⁷³⁸ C-498/14 PPU, *David Bradbrooke v Anna Aleksandrowicz*, (9 January 2015) ECLI:EU:C:2015:3.

⁷³⁹ For more information see the Belgian Report.

⁷⁴⁰ Ibid.

⁷⁴¹ Summary provided by Thalia Kruger, see the Belgian Report for more details.

D v N and D (By her Guardian ad Litem,) [2011] EWHC 471 (Fam)

D was 4 and a half years old, at the time of the English proceedings, and she had been living in Poland with her mother since she was wrongfully retained there in April 2010. The Polish court refused to order the return of the child on the basis of Article 13(1)(b) Hague in July 2010. The father issued proceedings in England for the return of the child under Articles 11(6)-(8) Brussels IIa in October 2010.

The English judge assessed the remedies available to her under Article 11(8) Brussels IIa and focussed on whether she could order a summary return, or if she had to make a final decision. The judge concluded that she could order the summary return of the child.⁷⁴² Following this the court made a decision in relation to the child's welfare. The judge started by referring to the decision of the Polish court. The facts that resulted in the refusal to return were:

- a) 'the risks posed by the father's alleged excess consumption of alcohol
- b) an absence of secure provision of the 'necessities' of life in England
- c) a return to the father's care and/ or England would be contrary to the child's wishes.

This appears to be based on the mother indicating she would not return.⁷⁴³

The English judge criticised the fact that the Polish courts did not examine whether adequate arrangements had been made to secure protection for the child after her return, as required by Article 11(4) Brussels IIa.⁷⁴⁴ The father supplied evidence about his alcohol consumption before the English court.⁷⁴⁵ The father also indicated that he would make certain undertakings.⁷⁴⁶

The judge did not hear the child, whom she considered would be closely aligned with her primary carer. The Guardian did attempt to obtain the child's views but the mother did not cooperate.⁷⁴⁷ The judge proposed that the Guardian see the child in Poland first, before the child and the mother return to the UK.⁷⁴⁸ The judge asserted that the mother was aware of the proceedings, and had been contacted on a number of occasions, but she failed to respond. She also failed to comply with the requests that would continue her public funding.⁷⁴⁹ Given that the mother failed to respond at all, it is difficult to assess whether suitable procedures were made available.

The English judge did take account of the reasons for and evidence underlying the Polish Hague non-return order. Given that the Polish authorities failed to assess whether there were adequate arrangements to protect the child on return, it is unlikely that that court complied

⁷⁴² *D v N and D (By her Guardian ad Litem,)* 2011 EWHC 471 (Fam), para 39, and see the decision of the CJEU in *Povse* (Case C-211/10 PPU [2010] ECR I-6673) discussed in the Italian Report.

⁷⁴³ *Ibid.*, para 42.

⁷⁴⁴ *Ibid.*, para 43.

⁷⁴⁵ *Ibid.*, para 47.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*, para 54 (a).

⁷⁴⁸ *Ibid.*

⁷⁴⁹ *Ibid.*, para 54 (b).

with the requirement under Article 11(4) Brussels IIa. Therefore, the Polish Hague non-return order was questionable. The English judge concluded that she should order the summary return of the child to the UK.⁷⁵⁰ A full welfare decision was to be made at a later date once all the parties were present. The hearing was set for the 13 April 2011, to allow the Guardian to assess the child in Poland and in England before the hearing took place.⁷⁵¹

O.K v K [2011] IEHC 360

This case concerned the retention of the child (daughter) by the father in Poland.⁷⁵² The child was born in Poland in 2000.⁷⁵³ The mother and father are both Polish nationals.⁷⁵⁴ The parents were married. The father came to Ireland to work in 2005.⁷⁵⁵ The mother and children (mother had a second child from a previous relationship) joined him in 2006.⁷⁵⁶ In 2008 the father began work in Poland.⁷⁵⁷ By summer of 2009 the relationship between the father and mother had broken down.⁷⁵⁸ In June 2009 the father came to Ireland to take the child to Poland for a pre-arranged holiday in Poland.⁷⁵⁹ The mother, concerned that he would not return the child after the holiday, brought an application under the Guardianship of Infants Act 1964. A settlement was reached by both parties on 2 July 2009 that the child was considered to be habitually resident in Ireland and that the child was permitted to travel to Poland on 7 July 2009 but was to return to Ireland with the mother on 15 August 2009.⁷⁶⁰

The child went to Poland as agreed on 7 July 2009 but did not return to Ireland. The child lived with the father in Poland. The mother had limited access via telephone and in Poland.⁷⁶¹ Access by arrangement between the parties took place in 2011 and the child was brought to Ireland for two weeks pursuant to an interim return order made by the Irish court on 23 June 2011 and returned to Poland in accordance with the terms of that order.⁷⁶² In September 2009 an order was made in the District Court in Ireland for the mother to have sole custody of the child. The father appealed but the appeal was struck out and the order by the District court affirmed.⁷⁶³ The order has not been enforced in Poland.⁷⁶⁴

The mother sought the return of the child in Hague proceedings before a district court in Poland on 6th October 2009. The application was dismissed on 18 December 2009. The

⁷⁵⁰ Ibid, paras 54-55.

⁷⁵¹ Ibid, para 57.

⁷⁵² *O.K v K* [2011] IEHC 360 [7].

⁷⁵³ Ibid, [3].

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid, [4].

⁷⁵⁷ Ibid, [5].

⁷⁵⁸ Ibid.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid, [6].

⁷⁶¹ Ibid, [8].

⁷⁶² Ibid.

⁷⁶³ Ibid, [10].

⁷⁶⁴ Ibid, [11].

mother appealed but it was rejected on 18 May 2010.⁷⁶⁵ The reasoning for the Hague non-return order is not clear from the case.

The Polish Central Authority notified the Irish Central Authority of the Hague decision not to return the child to Ireland on 5 July 2010.⁷⁶⁶

At this point a dispute arose as to how the custody application was to proceed. This was the first application for custody in Ireland of a child following notification pursuant to Article 11(6) of Brussels IIa after the making of a Hague non-return order in another EU Member State.⁷⁶⁷

Justice Finlay Geoghegan in the interim ruling had encouraged mediation between the parties to the end that the father improved contact between the mother and the child, the mother agreed not to pursue interim or interlocutory applications for the return of the child and the father would not pursue an application under Article 15 Brussels IIa for transfer of the case to Poland.⁷⁶⁸

The outcome of the interim ruling is interesting in that the parents cooperated and the father brought the child to Ireland so that the child could stay with the mother for two weeks, at the end of that stay the child returned with the father to Poland. However, by making this decision the judge prolonged the time the child was in the State of refuge with the abducting parent and ultimately had the potential to make the child more settled in that environment.

The child who by this stage was 11 years old was interviewed by an independent expert in both Ireland and Poland and a comprehensive report is provided. This case is unusual in that the Article 11(8) return order is used to facilitate the relationship between the child and her mother in that the child is to return to Ireland to complete the fifth year of primary school, but she is to return to Poland for the sixth year of primary school so that she can sit the State exams with the aim to continue her education in Poland, residing with her father, and spending holidays in Ireland with the mother.

Comment

In essence this case, although the child is returned to Ireland under Articles 11(8) and 42,⁷⁶⁹ upholds the Hague non-return decision in the Polish court in that the child will return to Poland to live with her father and to continue her education there. The judge upheld the views of the child who wanted to continue her education in Poland, whilst protecting the relationship between the mother and child allowing them a year together before the child is returned to the father in Poland. This could have been achieved by focussing on forging access arrangements for the mother under Brussels IIa rather than resorting to the Article

⁷⁶⁵ Ibid, [12].

⁷⁶⁶ Ibid, [14].

⁷⁶⁷ Ibid, [16].

⁷⁶⁸ Ibid, [20].

⁷⁶⁹ Information supplied by Dr Maebh Harding email dated 1 July 2014.

11(8) and 42 process with an interim return order and then a final return order (which did not intend that the child should stay in Ireland in the long term).

In this case the judge states that the view of the Polish court has been taken into consideration⁷⁷⁰ however there is little to demonstrate this in the ruling which does not clarify what the reasons were under Article 13 Hague for the non-return. The court is clearly extremely sensitive to the requirements for the Article 42 certificate as well as the needs of the child to have a relationship with both parents. Yet the fact that the case took a year to deal with from 30 July 2010 when the Article 11(8) proceedings began to this final decision in September 2011 is unduly long.

Cases where an Article 42 Brussels IIa certificate was not issued

M.H.A v A.P [2013] IEHC 611

This case concerned the wrongful retention of a child by his mother in Poland.⁷⁷¹ The mother is a Polish national. The father is a Kurdish Iraqi with a right to reside and work in Ireland but unable to travel outside of Ireland.⁷⁷² The mother and father married in August 2007. They are not divorced. The child was born on 28 January 2008 in Ireland.⁷⁷³ In January 2011 the mother took the child to Poland on the basis of seeing her own mother who was ill. The father consented to the trip.⁷⁷⁴ The mother failed to return to Ireland with the child at the end of the visit and informed the father of this. The father commenced Hague proceedings in Poland in February 2011.⁷⁷⁵ A decision not to return the child was not taken until August 2012. The delay was in part due to the taking of evidence from the father in Ireland.⁷⁷⁶ The case does not say why this was an issue.

The Irish courts were notified of that decision in August 2012.⁷⁷⁷ The father appealed the Polish decision.⁷⁷⁸ In December the Irish Central Authority was notified that the appeal had been dismissed.⁷⁷⁹ In February 2013 the Irish Central Authority received the documents which declared that the decision to dismiss the appeal had been taken on 16 November 2012. The reason why the State of refuge issued a non- return is not clarified. Article 11(7) Brussels IIa proceedings began on 22 March 2013 in Ireland.⁷⁸⁰ The father issued a notice of

⁷⁷⁰ [2011] IEHC 360, [27].

⁷⁷¹ *M.H.A v A.P* [2013] IEHC 611 [8].

⁷⁷² *Ibid*, [2].

⁷⁷³ *Ibid*, [5].

⁷⁷⁴ *Ibid*, [8].

⁷⁷⁵ *Ibid*, [10].

⁷⁷⁶ *Ibid*, [10].

⁷⁷⁷ *Ibid*, [11].

⁷⁷⁸ *Ibid*, [11].

⁷⁷⁹ *Ibid*, [11].

⁷⁸⁰ *Ibid*, [12].

motion on 27 June 2013 and asked for the return of the child under Article 11(8) of Brussels IIa.⁷⁸¹

The Irish court considered its responsibility to hear the child under Article 42 of Brussels IIa and concluded that it would not hear the child as it was inappropriate due to the child's age as he was not yet six years old. However they also state that “ The Court does not have at its disposal the means of arranging for a child under six years, resident in Poland in the care of his mother (who has not appeared or been represented before the court) to be given an opportunity to be heard in a manner appropriate to his age.”⁷⁸² The lack of means to hear the child seems more accurate as to why this child was not heard, especially as in the next breath the court states that they will interview the child on his return along with both parents which is contradictory.⁷⁸³ This statement highlights the need for an improved use of cross-border taking of evidence in order to protect the rights of the child.

Again the court states that it has taken into account the evidence underlying the Article 13 Hague non-return order, yet there is nothing to support this in the text.⁷⁸⁴

The Article 11(8) Brussels IIa decision was taken on 16 December 2013, almost three years after the child had been retained in Poland. The court granted the Article 11(8) return order but stayed the decision in order to allow the mother to proceed with arranging to return the child on a voluntary basis.⁷⁸⁵ The judge gave her one month to make the arrangements to return with the child after which the Article 11(8) return order would come into effect.⁷⁸⁶ The full custody hearing was arranged for 31 March 2014.⁷⁸⁷

We are not aware of how this case developed.

Juvenile Court Salerno, 30 March 2011 (CA No 162/09)

The mother took the child from Italy to Poland. The Polish court refused to return the child on the basis of Article 12(2) Hague as well as the objections of the child and lack of exercise of custody rights by the applicant father under Article 13 Hague.⁷⁸⁸ The Italian court confirmed the Polish Hague non-return decision, but for different reasons. The court confirmed that the application was lodged after 12 months had passed from the abduction, the child is settled in Poland, and the child opposes the return. The child was heard indirectly through experts, and her level of maturity and awareness ascertained. Her views and answers were reported and considered by the Polish court. The Italian judge was therefore satisfied

⁷⁸¹ Ibid, [13].

⁷⁸² Ibid, [40].

⁷⁸³ Ibid, [38(iv)]

⁷⁸⁴ Ibid, [42].

⁷⁸⁵ Ibid, [56], [64].

⁷⁸⁶ Ibid, [56].

⁷⁸⁷ Ibid, [64(3)(d)].

⁷⁸⁸ Information provided by Professor Costanza Honorati.

that the child had been properly heard, her view and will is clear, and there was no need to hear her again. The Italian court indicated that custody rights were actually exercised by the father, even if the father did not participate in the day-to-day care of the child. The father was paying child support and joint custody is presumed under Italian law.⁷⁸⁹

The response of the Italian Central Authority indicated that the child was 6 years old and the Polish court ordered the non-return based on Article 13(1)(b) and 13(2) Hague. The Central Authority indicated that the Italian court did not hear the child. The Italian decision seems to be motivated by Hague exceptions rather than broader welfare principles. However if the Polish court did order the non-return on the basis of Article 12(2) Hague rather than Article 13 Hague then Article 11(8) Brussels IIa should not apply anyway.⁷⁹⁰

SJ v JJ, AJ (by his children's guardian, Robert McGavin) [2011] EWHC 3450 (Fam)

In this case the infant child, born on 24 June 2009,⁷⁹¹ was taken to Poland by his mother on 24 September 2009, for the purpose of a holiday.⁷⁹² On 14 October 2009 the mother informed the father that she intended to remain in Poland.⁷⁹³ In around December 2009 the father initiated Hague proceedings for the return of the child from Poland.⁷⁹⁴ On 24 September 2010 the Polish appellate court refused the father's Hague request for the return of the child.⁷⁹⁵ It is unclear from the English judgment, why the Polish courts refused to return the child to the UK. It is stated that it was on the basis of Article 13 Hague, but the case report does not state which element of Article 13 this is based on, nor the reason behind the non-return. Therefore the English court did not take into account the decision of the Polish courts or the reason for the Hague non-return order. This could be because the Polish decision did not state clearly why the non-return was ordered, which is a common occurrence. 'In Outgoing Cases with Poland, quite often it is not possible to know the basis of the non-return order, as the Polish law provides that the ground of the decision are not written unless one part[y] asks for them. We can understand that the decision is under Article 13 because the Polish authority sends us the acts of the procedure following Article 11 Re. (CE) 2201/2003.'⁷⁹⁶

On 16 September 2011 the English High Court held that it would not be in the child's best interests to order a summary return of the child to England.⁷⁹⁷ However the judge refrained from making a final "judgment on custody" as he was not satisfied that the mother would take all the necessary steps to ensure that the child has contact with his father.⁷⁹⁸ Instead the

⁷⁸⁹ Ibid.

⁷⁹⁰ For more information see the Italian Report.

⁷⁹¹ *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam), para 1.

⁷⁹² Ibid, para 8.

⁷⁹³ Ibid.

⁷⁹⁴ Ibid, para 11.

⁷⁹⁵ Ibid, para 1.

⁷⁹⁶ Comment of the Italian Central Authority.

⁷⁹⁷ Ibid para 43.

⁷⁹⁸ Ibid, para 44.

judge made an interim order for contact between the child and his father, but no final order for residence.⁷⁹⁹ As the judge only made an interim order he considered that the English courts should retain jurisdiction. ‘The order should also include a recital that this is not a judgment on custody under Article 10 of Brussels II Revised and that this court, accordingly, retains jurisdiction in respect of matters concerning parental responsibility for [the child].’⁸⁰⁰

Although technically this appears correct, the English court cannot and should not retain jurisdiction indefinitely. By the time this judgment was given, the child had been in Poland for two years (since September 2009). Given that the child was born on 24 June 2009, the child had lived in Poland for nearly all of his (short) life. Therefore, a later decision on residence that required the return of the child would arguably be worse for the child than a return in 2011. Although the ‘interim’ order may only have been made to scare the mother into ensuring contact between the child and his father, so that a residence order requiring the return of the child to England would not be made at a later date, the ability of the English courts to retain jurisdiction over a child who had been resident in England only for a very short time appears incorrect. Further as the contact was generally to happen in Poland,⁸⁰¹ it would have been more sensible for jurisdiction to be transferred to the Polish courts which would be better placed to ascertain the best interests of the child in any further disputes. The mother and the grandparents were habitually resident in Poland, the whole family are Polish nationals and the child only spent two months of his life in England.

The left behind parent and child were not present at the proceedings. However the child was only two, so it would have been inappropriate to hear the child. Instead the court took account of information contained in a report by the Children’s Guardian.⁸⁰² The report describes the child’s relationship with both parents and took account of a number of relevant factors. The court took account of submissions made for the mother by her counsel. The mother opposed the application for return, saying that she had always been the child’s primary carer and that the child is settled in Poland. She also indicated that if the court did order the return of the child to England she would return with him, although she suggested that this would have negative effects for both herself and the child. The court took all the information available into account when reaching its decision.⁸⁰³

German CA No SR1a-A-116/09

In this case the mother abducted the child from Germany to Poland. The father applied for the return of the child under the Hague Convention and the Polish Court refused to return the child on the basis of Article 13(1)(b) Hague. The Hague non-return order was ordered on 9th June 2009. At the time of the Hague proceedings custody proceedings were current in

⁷⁹⁹ Ibid.

⁸⁰⁰ Ibid, para 52.

⁸⁰¹ Ibid, paras 45-51.

⁸⁰² Ibid, para 37.

⁸⁰³ For further analysis see the English Report.

Germany. The father then initiated proceedings for the return of the child under Article 11(8) Brussels IIa. However, the German court decided, on 18 March 2010, that the child should not be returned.

Although in this case the German court did not order the return of the child, they did hear all the parties. The child and the mother were heard using the Taking of Evidence Regulation 1206/2001. The German Family Court requested that the Polish court hear the child. At the time of the hearing by the Polish court the child was 6 years old. The German court took into account the reasons for and evidence underlying the Hague non-return order pursuant to Article 13 Hague.

Conclusion

There is no evidence of Article 11(8) Brussels IIa proceedings taking place in Poland. There have been suggestions that it is not always clear from the paperwork why Hague non-returns were issued in Poland, therefore it can be difficult for the court in the EU Member State of origin to take account of the reasons for and evidence underlying the Polish Hague non-return order as required by Articles 11(6)-(8) and 42 Brussels IIa.

Portugal

Background

Finding cases involving Article 11(6-8) Brussels IIa Regulation (Brussels IIa) proceedings was a slow process due to the lack of a comprehensive database in Portugal. Initially the Central Authority stated that they did not have any cases involving Article 11(8) Brussels IIa proceedings and therefore did not need to respond to our questionnaire.⁸⁰⁴ However as questionnaires came in from other Member States it was possible to begin to cross-reference the cases and cases involving Portugal began to appear.

One case concerned Portugal and France.⁸⁰⁵ When the Portuguese Central Authority were asked if they could provide further information concerning the case they admitted that they did not have a database which could identify the relevant information and they would only be able to recover the file if we were able to provide them with the child's name or the Portuguese file number, information which is not available to the external researcher.⁸⁰⁶

This situation was confirmed by the Portuguese International Hague Network Judge, who responded to our questionnaire that was forwarded to him by the Hague Permanent Bureau. As a result of this finding he said that he intended to propose to the High Council of Judiciary and to the Ministry of Justice that a database should be created that recorded the judicial decisions concerning the application of the 1980 Hague Child Abduction Convention (Hague), the 1996 Hague Children's Convention and Brussels IIa.⁸⁰⁷

Legal Process in Portugal

Hearing the child

Historically the Portuguese courts have attempted to protect the child from conflict. The right for the child to be heard brings the child into the conflict which requires careful handling. In theory every child is heard from the age of 12 although they may be heard at a younger age if they are considered to be sufficiently mature. In principle the judge is responsible for hearing the child themselves, but does so alongside an expert in hearing the child. At present, children are becoming increasingly more likely to be heard as judges receive training in this area. If a child shows interest in being heard then they will be heard.

Training

⁸⁰⁴ Email received from the Portuguese Central Authority 24th July 2014.

⁸⁰⁵ Questionnaire from French Central Authority

⁸⁰⁶ Email received from the Portuguese Central Authority 4th September 2014.

⁸⁰⁷ Meeting with Portuguese Hague Network Judge.

Asked whether judges receive training on the Brussels IIa Regulation it was highlighted that information as how to deal with a Regulation is always available from the School for Judges. However, the schedule of actual training takes place between September and July. This is the time when aspects of International Family Law may be taught but it was accepted that it did not occur with the frequency that it could be as the training tended to correspond to cases that judges were dealing with at that moment.

Recording of Cases

In relation to the functioning of the Portuguese Central Authority, it was acknowledged that internal changes needed to be made and increased resources whether eg a working database or increased human resources. At present the protection of minors is within the Department of Social Security and may benefit from being transferred to the Ministry of Justice.

Since 2001 everything that is done within the courts is in electronic format. The database was opened to judges in 2007. A judge on the appropriate network is able to see any judgment from the courts in Lisbon. Unfortunately the Central Authority is unable to access it. In principle it would not be difficult to transfer the decisions into a database, however data-protection is an important issue.

The judge is currently working towards a model law to apply the 1980 and 1996 Hague Conventions and Brussels IIa.

Additional information

An opportunity arose to present the progress of this project to the Ministry of Justice. A general discussion followed concerning the implementation of the 1980 Hague Convention and the Brussels IIa Regulation. The Portuguese judges present at the meeting spoke candidly that they did not regard the initial intentions of child abduction as a crime as the abduction was not done for criminal reasons. They advocated dismissal of criminal proceedings if the abducting parent complied with the return order to facilitate custody or relocation orders.

The 6 week requirement under the 1980 Convention was thought to be too unrealistic by the judges present especially when trying to obtain information to support the exception to return. It was noted that in Portugal, even where the case is regarded as urgent it can take two months to acquire the information that is needed and judges just have to be patient. With technology in place there should be no problem, however the system is flawed and there are other commitments on the judge's time.

One judge noted that she was currently waiting to arrange a videoconference with the Netherlands, but that the Netherlands has a two month waiting list for the video conference

facilities. Member States need to have the infrastructure in place to manage taking of evidence.

Comment

The practical issues need to be considered when recommending changes to the legislation. It was suggested that the EU needs to support Member States by providing funding to allow the Member States to put in place the systems, particularly to support taking of evidence that are necessary when dealing with international cases.

Outgoing cases where Article 11(6)-(8) proceedings took place in Portugal

Cases where an Article 42 Certificate was issued

French CA No. 207DE2010

This application concerned the abduction of a female child born May 1997, by the father from Portugal to France.⁸⁰⁸ The French judge refused to return the child on the basis of Hague Article 13(1)(b) grave risk of harm, and Article 13(2) child's objection.⁸⁰⁹ The non-return was ordered by the French Court on 22 March 2011.⁸¹⁰ There were no proceedings ongoing at the time of the removal, but the mother initiated proceedings under Article 11(6)-(8) Brussels IIa in Portugal following the non-return order.⁸¹¹ The Portuguese judge in the court of First Instance decided that the child should be returned to Portugal.⁸¹² At this point the child was 14 years old. The information provided by the French Central Authority indicates that the Portuguese court did not attempt to hear the child or the abducting parent or the left-behind parent.⁸¹³ Further information needs to be gathered as to why the child was not heard by the Portuguese Court in light of the fact that the reason for non-return was in part due to the child's objection and the child was 14 years old.

The Portuguese Central Authority provided an update on this case.⁸¹⁴ The child had been ordered to return to Portugal, but the French Court then ordered a psychological expert report, which caused delays. In May 2015, the child turned 18 years of age.⁸¹⁵

The French Central Authority did indicate that the Portuguese judge had taken account of the reasons for and evidence underlying the non-return order but only in part and had not paid attention to the child's objection. The child has not been returned to Portugal.

⁸⁰⁸ French CA Ref no 207DE2010.

⁸⁰⁹ Questionnaire from French Central Authority, 15.

⁸¹⁰ Ibid.

⁸¹¹ Ibid.

⁸¹² Ibid.

⁸¹³ Ibid, 25.

⁸¹⁴ Response received from Hague Network Judge.

⁸¹⁵ Ibid.

French Case: 773/08.2TBLNHL1-7

This case concerned the abduction, by the father, of a male child born on 26 June 2004, from Portugal to Grenoble in France.⁸¹⁶ The parents had divorced on 10 November 2005 and it was agreed that the child would be placed in the custody and care of the mother.⁸¹⁷ The child subsequently lived with his mother in Portugal but in 2008 moved to France to live with his father with the mother's consent.⁸¹⁸ In November 2008 both parents signed an amendment to the parental responsibility agreement to transfer custody to the father but both failed to supply the necessary documents to fulfil the changes to custody provided for in the amendment. The child at this point was living with his father and attending preschool.⁸¹⁹

The child went to stay with his mother during August 2009 but failed to be returned to the father on 1 September 2009 as previously agreed.⁸²⁰ The father applied to the court for the parental responsibility agreement to be modified. The Portuguese court dismissed the case due to a lack of legal basis. The father did not appeal and the child remained with the mother who continued to have custody.⁸²¹

In August 2010, the child stayed with his father in Portugal to comply with contact arrangements. However the father, believing that the mother was neglecting the child, took the child to France and resumed living with the child there. On 3 September 2010 the mother applied for the return of the child under the Hague Convention.

The child, who was six years old at the time, was heard in the Hague proceedings in France and clearly expressed his desire to remain with his father. At this point the child's family life, housing, education and health were considered favourable in the French residence as opposed to the situation in Portugal.

On 23 November 2010 the French court decided not to return the child to Portugal under Articles 13(1)(a) and (b) and 20 Hague. Both parties were notified of Article 11(6)-(8) Brussels IIa proceedings in Portugal and submitted their written observations.

Dismissing the appeal and taking into account the reasoning by the French court for the non-return of the child under the Hague Convention, the Portuguese court requested the immediate return of the child under Article 11(8) Brussels IIa, taking into account that there were no protection proceedings and no reason to change the custody arrangements for the child. The mother had an indisputable right to the custody of the child due to the parental

⁸¹⁶ Case: 773/08.2TBLNHL1-7 Proven Facts [1].

⁸¹⁷ Ibid, [3], [4].

⁸¹⁸ Ibid, [7].

⁸¹⁹ Ibid, [5].

⁸²⁰ Case: 773/08.2TBLNHL1-7.

⁸²¹ Ibid.

responsibility regime that was established at the time of the divorce. The request to alter the custody arrangements in November 2008 had not been authorised by the court so the original custody arrangements still stood. The child had been habitually resident in Portugal prior to the abduction by the father and should be returned to Portugal.

Incoming Hague Convention cases

Cases where an Article 42 Certificate was issued by the court in the State of origin

Luxembourg Unknown Case I

Our researcher in Luxembourg identified one case from 2010.⁸²² This case involved a father who abducted his 13-year-old daughter from Luxembourg to Portugal.⁸²³ The basis of the Hague non-return order issued by the Portuguese court on 19 August 2010 is not mentioned, but is referred to within the final judgment as having been made under Article 13(1)(b) and (2). The child appears to have objected to returning to Luxembourg as she was a victim of domestic violence.

At the time of the removal, custody proceedings were taking place in Luxembourg. The mother initiated proceedings for the return of her daughter under Article 11(8) and Article 42 Brussels IIa. The Luxembourg District Court decided that the child should be returned to Luxembourg on 29 October 2010. The father did not appeal the decision.

The District Court in Luxembourg did not attempt to hear the child but did hear the abducting parent in the court. The left-behind parent was not heard. The Luxembourg District Court did take into account in issuing its judgment the reasons for and evidence underlying the Portuguese order made under Article 13 Hague and the child was returned to Luxembourg. The abducting parent is not facing criminal charges in Luxembourg.

Comment

Although this is a rare case where the child was actually returned, it is noted that the court in Luxembourg did not hear the child even though the child was 13 years old and one of the reasons for non-return under the Hague Convention was due to her objections to being returned. However, the reason for the child and abducting parent not being heard is not due to a failing on the part of the courts in Luxembourg but because the abducting parent was not willing to cooperate. The impact of the abducting parent's behaviour on the child's right to be heard is concerning.⁸²⁴

⁸²² Celine Camara. Email Received 6th November 2014.

⁸²³ Researcher Completed Questionnaire, 20.

⁸²⁴ Hague Network Judge Response to Questionnaire – Received 8 October 2014.

CONFLICTS OF EU COURTS ON CHILD ABDUCTION

Italy - Trib minorenni dell'Emilia Romagna (Bologna), 7 May 2009

The unmarried mother took the child from Italy to Portugal. The Father initiated Hague proceedings in Portugal. The Portuguese courts refused to return the child at first instance and on appeal (it is unclear from the information provided why the non-return was ordered).

The Italian Court considered that the Portuguese decisions were not based on the Hague Convention, and were therefore incorrect. (According to the Portuguese Court the unmarried mother had a right to transfer to Portugal even without the consent of the father and the Italian return decision is not binding and enforceable). The Italian court then examined each ground for refusal in Article 13 Hague and found that none of the exceptions were met in the case. Consequently the Italian court ordered the return of the child pursuant to Article 11(8) Brussels IIa.

No information was provided by the Central Authority.

Case where a certificate was not issued in error

Portuguese Case - 2254/09.8TMPRT-B.P1JTRP000

Oporto Appeal Court.

This case concerned a family who were all Portuguese nationals. The parents had married on 5 March 1999. The couple with their son had lived in Portugal until the end of 2008 and had then migrated to Germany. The child lived in Germany with his parents and stayed with his mother after the separation. In mid-September 2009 the father abducted his son born 25 June 2001 from Germany to Portugal. The mother, the left-behind parent, applied for the return of the child under the Hague Convention. On 11 January 2010 the Portuguese court refused to return the child under Article 13(2) Hague, the child objected to being returned, a decision that was upheld by the Oporto Appeal court on 10 May 2010. The child stated that he did not want to return to Germany, that he disliked the school and living in Germany but that he did miss his mother. The child had settled well in the Portuguese school on his return.

On 27 May 2010 the German court confirmed the decision that they had given on 10 March 2010 that residence was given to the mother and the decision that the child should be returned to the mother in Germany. On 3 September 2010 documents were submitted to the Portuguese court asking the Portuguese courts to declare lack of jurisdiction and for the immediate return of the child to Germany.

On 20 September 2010 the Portuguese courts dismissed the argument that they lacked absolute jurisdiction and dismissed the application by the German court in Dortmund for the return of the child to the mother.

The Public Prosecutor and the mother appealed this decision. The public prosecutor found that the Portuguese court had erred in their understanding of the child's habitual residence. The child had not reacquired its habitual residence in Portugal.

The Portuguese court noted that the request for the return of the child was on the enforceability of the return under Article 11(8) Brussels IIa. The judge noted that the decision is only enforceable if an Article 42 certificate is issued by the judge of origin. In this case the certificate had not been enclosed and therefore the enforceability of the decision may not be recognised and therefore this element of the appeal was rejected. The judge also noted that the father had presented a decision from the Court of Appeal in Hamm Germany that changed the decision regarding the return of the child to the mother.

Case where a certificate was not issued

Belgium - *Chamoun v Chachan* (2011) R.G.No: 2011/AR/1040

This dispute concerned a child who was born in Belgium in February 2004.⁸²⁵ Her parents separated in June 2004 not long after she was born.⁸²⁶ Following this the court allocated joint parental responsibility but indicated that the child's primary residence was with her mother.⁸²⁷ Following this there were various orders for contact with the father, but it appears contact hardly ever occurred apart from a weekend in November 2006.⁸²⁸ In August or September 2008 the mother took the child, who was then 4 and a half years old, with her to Portugal.⁸²⁹ The father filed Hague return proceedings in Portugal in November 2008.⁸³⁰ The Portuguese courts recognised that the removal was wrongful, but ordered a non-return on the basis of Article 13(1)(b) Hague taking into account Article 11(4) Brussels IIa.⁸³¹

The decision was transmitted to the Belgian Central Authority, and communicated to the parties in August 2010.⁸³² Proceedings were filed before the court of first instance under the procedure in Article 11(6)-(8) Brussels IIa in November 2010.⁸³³ On 28 March 2011 the court of first instance declared the father's application unfounded.⁸³⁴ The father made an application to appeal the decision on 29 April 2011.⁸³⁵

The appeal judge took account of all the previous proceedings in Belgium, including the civil claim against the father where the mother alleged that he had indecently assaulted and raped

⁸²⁵ *Chamoun v Chachan* (2011) R.G.No: 2011/AR/1040, p 2

⁸²⁶ Ibid.

⁸²⁷ Ibid, p 3.

⁸²⁸ Ibid, p 5.

⁸²⁹ Ibid, p 6.

⁸³⁰ Ibid

⁸³¹ Ibid, p 9.

⁸³² Ibid, p 10.

⁸³³ Ibid.

⁸³⁴ Ibid.

⁸³⁵ Ibid, p 11.

their child. The judge also took into account the reasons for the Portuguese Hague non-return order. However the Belgian judge considered that the Hague non-return order did not take into account the behaviour of the mother who prevented contact even before the abduction. Further all the allegations against the father had been dismissed by the Belgian courts. It is also clear that the child had not spent any time alone with her father since a weekend in November 2006.

The Belgian judge recognised that the child had always lived with her mother. The child last saw her father in March 2010, during a meeting that went very badly where she screamed and cried and refused to make contact with him. Although this was partly the fault of the mother it was clear that the child was scared of her father and psychologists had attested to her anxiety in relation to contact with her father. As such it was not suitable to disrupt the life of the child, by removing her from her mother, and placing her with her father whom she was scared of and had never lived with. The circumstances in the case did not justify a different outcome. Therefore, the Belgian court refused to grant custody to the father, indicating that custody would be granted to the mother, although this had not been specifically requested.

The Belgian judge then indicated that he could rule on access rights, however he considered that this was an option and not a requirement (unlike the requirement to decide on custody). He concluded that he would not make a decision on access and instead any further decisions should be made in the courts of the new habitual residence of the child, Portugal, as he had taken a decision on custody that did not require the return of the child (Article 10(b)(iv) Brussels IIa). However, he acknowledged that the relationship between the child and her father would need to be reconstructed before any contact could be made, and this could only be done with the help of psychologists.

Other cases of interest

B v D [2008] EWHC 1246 (Fam)

The children were two and four at the time of the English proceedings. At this point the children lived in Portugal with their father, where they had been since March 2007, apart from one month which they spent in the UK in July 2007. The mother gave consent for the children to begin school in Portugal in 2007, but this was on the premise that she and the father and the children all lived together and tried to save their marriage. When she realised that this was not going to happen and the children were going to remain in Portugal, she commenced proceedings in the English courts on 13 December 2007. The father commenced proceedings in Portugal on 21 December 2007.⁸³⁶ There were no Hague Convention proceedings.

The father's solicitor attempted to argue that the mother should first have initiated Hague proceedings in Portugal. The English judge disagreed and held that because the children

⁸³⁶ *B v D* [2008] EWHC 1246 (Fam), para 33.

were habitually resident in England and Wales, and the mother had not consented to a permanent relocation to Portugal, the English courts still had jurisdiction. The English judge ordered the return of the children to England and held that they should live with their father in his London flat, until a final decision had been issued by the court.⁸³⁷

It is unclear what the correct outcome is in this case, partly due to a lack of clarity in the Brussels IIa Regulation. The general jurisdiction under Article 8 is that the courts of the children's habitual residence shall have jurisdiction, but this is subject to Articles 9, 10 and 12. Article 10 deals with jurisdiction in cases of child abduction. This states:

'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
 - (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
 - (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
 - (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
 - (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.'

The provision that may be problematic in relation to this case is Article 10(b)(i). At the time of the proceedings before the English court the children had resided in the State of refuge for over a year and no request for return had been lodged. Although the current proceedings were commenced within a year of the alleged abduction, by the time a decision was to be taken a year had passed since the "abduction". There is no reference in Article 10(b)(i) to the commencement of custody proceedings in the State of habitual residence only to that of return proceedings in the State of refuge. According to the opening paragraph of Article 10 the children also need to have acquired a new habitual residence before you can look at the other factors. The English judge considered that the children were too young to have Gillick competence,⁸³⁸ therefore they could not decide on their own habitual residence. As both parents did not agree that the children were habitually resident in Portugal then, the judge held that, they were still habitually resident in England and Wales.⁸³⁹ Since the mother

⁸³⁷ Ibid, para 66.

⁸³⁸ Ibid, para 30.

⁸³⁹ Ibid. The judge primarily reached this conclusion because the agreement was that they went to school in Portugal for a short period of time, and attendance at school does not have to amount to a change in habitual residence. The decision was taken before the English courts started to follow a less parental intention approach to determining habitual residence. For the new approach see Centre for Private International Law Working Paper No. 2015/3- '[Recent Developments on the Meaning of "Habitual Residence" in Alleged Child Abduction Cases](#)' by Paul Beaumont and Jayne Holliday, available at

commenced custody proceedings before the 1 year period expired this would fit with the philosophy of the Hague Convention. However, the provision in Brussels IIa is not necessarily clear on what should happen if Hague proceedings are not initiated and the case takes over a year to resolve. In Hague proceedings the one year period stops ticking as soon as proceedings are initiated, thereby effectively freezing the children's habitual residence, it is not clear whether this is also the case where no Hague proceedings are initiated. It is likely that a return would have been ordered if Hague proceedings had been initiated.

Conclusion

We wish to thank Raquel Ferreira Correia for making available to us English translations of some of the Portuguese cases. In the two outgoing cases, both concerning France, the Portuguese courts ordered the return of the children under Article 11(8) Brussels IIa and in one case the child was not returned and in the other the outcome is not known. In the four incoming cases to Portugal that we have information about, one Article 11(8) Brussels IIa order was refused at least partly because it was not accompanied by an Article 42 certificate, one order was enforced, one order we have no information about what happened in Portugal and one order was not granted in the foreign court which instead was happy to let the Portuguese court take future decisions on custody and access as the new habitual residence of the child. Given the small sample and the diversity of results it is difficult to draw any meaningful conclusions in relation to the handling of conflicts in child abduction cases concerning Portugal. It is worrying that there is evidence of an Article 11(8) return order being made in Portugal without the views of a mature child being heard and without the parents being heard.

Romania

Background

The Romanian Central Authority completed the questionnaire and provided information about the Hague non-return cases.⁸⁴⁰ They indicated that they had had five outgoing cases involving another EU Member State that had resulted in a non-return order based on Article 13 of the Hague Child Abduction Convention (Hague).⁸⁴¹ Of those five, all of the cases appear to have resulted in an Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) hearing in Romania.⁸⁴² However the Romanian courts did not grant an Article 11(8) return order in any of these cases and none of the children were returned to Romania.⁸⁴³

Between 1 March 2005 and 28 February 2014 they had 11 intra-EU child abduction incoming cases which resulted in non-return orders being made by the Romanian courts under Article 13 Hague, two of which resulted in Article 11(6)-(8) Brussels IIa proceedings.⁸⁴⁴ In only one case was an Article 11(8) Brussels IIa return order granted, but there is no information on this case as to whether the child was returned.⁸⁴⁵

The local researcher pointed to the difficulty in obtaining information regarding cases in Romania as there was no central database meaning that we were unable to obtain further information on the cases supplied by the Central Authority.⁸⁴⁶

Outgoing cases where Article 11(6)-(8) proceedings took place in Romania

Cases where a certificate was not issued

Romanian CA No 15557/2013

A mother abducted her 13 year old child from Romania.⁸⁴⁷ The father applied for the return of his child under the Hague Abduction Convention. The courts in the State of refuge ordered a non-return based on Article 13(1)(b) and Article 13(2) Hague on 28 October 2013.⁸⁴⁸ Custody proceedings were not current in Romania at the time the child was abducted.⁸⁴⁹

⁸⁴⁰ Romania, Central Authority Questionnaire, 1. The questionnaire was returned 28.07.2014.

⁸⁴¹ Ibid, 4.

⁸⁴² Ibid.

⁸⁴³ Ibid.

⁸⁴⁴ Ibid.

⁸⁴⁵ Ibid.

⁸⁴⁶ Monica Bajan Waloszyk, Email received 23rd September 2014.

⁸⁴⁷ Ibid, 5.

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid.

The Father then initiated proceedings under Article 11(6)-(8) Brussels IIa.⁸⁵⁰ The Romanian courts decided after hearing all parties, the child and the mother were heard under the Taking of Evidence Regulation 1206/2001 and the father was heard in the Romanian court by the judge, not to order the return of the child to Romania and instead ordered joint custody, establishing residence with the abducting parent, the mother.⁸⁵¹

The Romanian court took into account in issuing its judgment of 19 February 2014, the reasons for and evidence underlying the Hague non-return order pursuant to Article 13 Hague and the mother was not at the time facing criminal charges.⁸⁵²

Romanian CA No 105337/2010

A mother abducted her 12 year old child from Romania to the State of refuge.⁸⁵³ The father applied for the return of his child under the Hague Abduction Convention.⁸⁵⁴ The courts of the State of refuge ordered a non-return order on 13 April 2011 on the basis of Article 13(1)(b) Hague.⁸⁵⁵ Custody proceedings were not current in Romania at the time the child was removed.⁸⁵⁶

The father then initiated Article 11(6)-(8) Brussels IIa proceedings in a Romanian court, however he was not successful and the Romanian court decided not to order the return of the child. They did not attempt to hear the child or the mother.⁸⁵⁷ This decision was made by the Romanian First Instance court on 3 April 2012.⁸⁵⁸ The father did not appeal the decision and withdrew his application.⁸⁵⁹ The child has not been returned to Romania and the mother is not facing criminal charges there.⁸⁶⁰

Romanian CA No 122288/2009

A mother abducted her 3 year old child from Romania.⁸⁶¹ Custody proceedings were not taking place at the time of the removal.⁸⁶² The father applied to the Romanian court for the return of the child under the Hague Abduction Convention.⁸⁶³ The Court in the State of refuge ordered the non-return of the child on 18 May 2010 on the basis of Article 13(1)(a)

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

⁸⁵² Ibid, 6.

⁸⁵³ Ibid, 22.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

⁸⁵⁷ Ibid.

⁸⁵⁸ Ibid.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid, 10.

⁸⁶¹ Ibid, 11.

⁸⁶² Ibid.

⁸⁶³ Ibid.

and Article 13(1)(b) Hague.⁸⁶⁴ The father then initiated proceedings under Article 11(6)-(8) Brussels Ia.⁸⁶⁵ However the Romanian court decided on 9 June 2010 not to order the return of the child.⁸⁶⁶ The Romanian court did attempt to hear the abducting parent under the Taking of Evidence Regulation 1206/2001.⁸⁶⁷ It did not hear the child due to the child's age.⁸⁶⁸ The left-behind parent was heard in person by the judge.⁸⁶⁹ This decision was not appealed.⁸⁷⁰ The Romanian court awarded custody to the abducting parent and the child has not been returned to Romania.⁸⁷¹ The mother is not facing criminal charges there.⁸⁷²

Romanian CA No 134749/2009

A mother abducted her 11 year old child from Romania.⁸⁷³ Custody proceedings were not taking place at the time of the abduction. The father applied for the return of the child under the Hague Abduction Convention.⁸⁷⁴ The court in the State of refuge ordered the non-return of the child on 6 July 2010 on the basis of Article 13(1)(b) Hague.⁸⁷⁵ The father then initiated proceedings in the Romanian court for the return of the child under Article 11(6)-(8) Brussels Ia.⁸⁷⁶ However the Romanian court having heard from all parties (the abducting parent and child were heard in the State of refuge under the Taking of Evidence Regulation 1206/2001 and the left-behind parent was heard in person by the judge) decided on 23 October 2012 not to order the return of the child.⁸⁷⁷ The Romanian court took into account in issuing its judgment the reasons for and evidence underlying the order pursuant to Article 13 of the Hague Convention.⁸⁷⁸ The father appealed this decision however the child has not been returned and the mother is not facing criminal charges in Romania.⁸⁷⁹

Outcome Unknown

Romanian CA No 69681/2011

The details of this case are sparse. A mother abducted her child from Romania.⁸⁸⁰ The father applied for the return of the child under the Hague Abduction Convention.⁸⁸¹ The courts of the State of refuge issued a non-return order on 23 April 2012 on the basis of Article 13(2)

⁸⁶⁴ Ibid.

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid.

⁸⁶⁹ Ibid.

⁸⁷⁰ Ibid.

⁸⁷¹ Ibid, 12.

⁸⁷² Ibid.

⁸⁷³ Ibid, 13.

⁸⁷⁴ Ibid.

⁸⁷⁵ Ibid.

⁸⁷⁶ Ibid.

⁸⁷⁷ Ibid, 14.

⁸⁷⁸ Ibid.

⁸⁷⁹ Ibid.

⁸⁸⁰ Ibid, 7.

⁸⁸¹ Ibid.

Hague, the child's objection to return.⁸⁸² The father initiated proceedings in Romania for the return of the child under Article 11(6)-(8) Brussels Ia.⁸⁸³ The Central Authority were unable to supply any further information.⁸⁸⁴

Incoming Hague Convention Cases

Case where an Article 42 Certificate was issued by the court in the State of origin

Romanian CA No 15818/2008

A mother abducted her child from Italy to Romania.⁸⁸⁵ Custody proceedings were not taking place in Italy at the time the mother removed the child.⁸⁸⁶ The father applied for the return of the child under the Hague Abduction Convention.⁸⁸⁷ On 5 February 2009 a court in Romania ordered the non-return of the child on the basis of Article 13(1)(a) Hague, that there had been consent.⁸⁸⁸ The father initiated proceedings in Italy for the return of the child under Article 11(6)-(8) Brussels Ia.⁸⁸⁹ The Italian Court decided that the child should be returned.⁸⁹⁰ There is no information as to the age of the child or whether the child was returned to Italy.⁸⁹¹

Case where a certificate was not issued

Romanian CA No 90550/2011

A mother abducted her 9 year old child from Germany to Romania.⁸⁹² Custody proceedings were not ongoing at the time of the removal.⁸⁹³ The father applied for the return of his child under the Hague Child Abduction Convention.⁸⁹⁴ A Romanian court ordered the non-return of the child on 17 May 2012 on the basis of the child's objections, Article 13(2) Hague.⁸⁹⁵ The father initiated proceedings under Article 11(6)-(8) Brussels Ia in a German court.⁸⁹⁶ The German court decided that the child should not be returned to Germany.⁸⁹⁷ In this case both parents were heard in person by the judge in the German court.⁸⁹⁸ The parents came to

⁸⁸² Ibid.

⁸⁸³ Ibid.

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid, 28.

⁸⁸⁶ Ibid, 28.

⁸⁸⁷ Ibid.

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

⁸⁹⁰ Ibid.

⁸⁹¹ Ibid.

⁸⁹² Ibid, 17.

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid, 18.

an agreement before the appellate court in Germany.⁸⁹⁹ Custody was awarded to the mother, together with residence in Romania.⁹⁰⁰ The child has not been returned to Germany and the mother is not facing criminal charges in Germany.⁹⁰¹

Observations

In the outgoing cases there appears to be a clear indication from the report by the Central Authority that the Romanian courts do attempt to hear the child and the abducting parent as per the requirements of Article 42 of Brussels IIa and utilise the Taking of Evidence Regulation.⁹⁰² It is also of note that in four of the five outgoing cases where we know the outcome of the case, the Romanian courts, once having heard the evidence and taken the Article 13 Hague decision into account make the decision not to return the child and uphold the original non-return Hague order. This is in keeping with our findings from this project that there is a correlation between the parties being heard and the courts in the State of origin agreeing with the courts in the State of refuge thereby making the Article 11(6)-(8) Brussels IIa proceedings an unnecessary burden on the families and the court system.

⁸⁹⁹ Ibid, 17.

⁹⁰⁰ Ibid, 17.

⁹⁰¹ Ibid, 18.

⁹⁰² Outgoing case I, IV and V heard the abducting parent, and child if appropriate under the Taking of Evidence Regulation 1206/2001.

Slovakia

Background

The Slovakian Central Authority did not complete the questionnaire, and instead provided overall statistical data for the year 2012-2013. During that period there were 87 Hague Child Abduction Convention (Hague) applications pending with other EU Member States. The States were the UK, Czech Republic, Ireland, Austria and Germany. It is unclear how many of these cases resulted in a Hague non-return order. However, the information indicates that the most common outcomes were voluntary return or withdrawal of the application.

As a result of cross-referencing our findings we identified one potential case –

R.P v A.S [2012] IEHC 267

A Hague return order was refused by the Irish Court on the basis of Article 13(1)(a) Hague, acquiescence by the father.⁹⁰³ The appropriate documents and transcripts were sent to the Central Authority of the Slovak Republic in accordance with Article 11(6) of Brussels IIa.⁹⁰⁴ There is no further information on this case.

⁹⁰³ *R.P v A.S* [2012] IEHC 267 [24].

⁹⁰⁴ [32].

Slovenia

Background

Unfortunately, the Slovenian Central Authority did not respond to our questionnaire. However we were able to obtain information about the existence of Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) cases from our local researcher.⁹⁰⁵ The researcher explained that the Slovenian Central Authority had moved from the Ministry of the Interior in 2012 to the Ministry for Family and is still undergoing reorganisation.⁹⁰⁶ The researcher relied primarily on information available in reported court cases and modest statistics available from the Central Authority.⁹⁰⁷ The information indicates that Article 11(6)-(8) Brussels IIa proceedings arose in one outgoing case and four incoming cases.

Outgoing Cases where Article 11(6)-(8) proceedings took place in Slovenia

Cases where an Article 42 certificate was issued

Slovenian CA unknown Case I

A mother abducted her 6-month old daughter to Bulgaria.⁹⁰⁸ The Bulgarian Court refused to return the child on 8 February 2013.⁹⁰⁹ At the time of the Hague proceedings, custody proceedings were current in Slovenia.⁹¹⁰ (The ground for refusal is not given) The father initiated proceedings in the Slovenian courts for the return of his daughter under Articles 11(6)-(8) and 42 Brussels IIa.⁹¹¹ The Slovenian District Court decided that the child should be returned to Slovenia.⁹¹²

Understandably the Slovenian District Court did not attempt to hear the child due to the child's age, but they also did not attempt to hear the mother.⁹¹³ The Slovenian judge did hear the evidence from the left-behind parent, the father, in person.⁹¹⁴

The enforcement of the Slovenian order for the Article 11(8) Brussels IIa return was not contested in the Bulgarian courts but the child has not been returned to Slovenia and the mother is not facing criminal charges in Slovenia.⁹¹⁵

⁹⁰⁵ Suzana Kraljić.

⁹⁰⁶ Suzana Kraljić, Questionnaire Response, 4.

⁹⁰⁷ *ibid.*

⁹⁰⁸ *ibid.*, 6.

⁹⁰⁹ *ibid.*

⁹¹⁰ *ibid.*

⁹¹¹ *ibid.*

⁹¹² *ibid.*

⁹¹³ *ibid.*, 7.

⁹¹⁴ *ibid.*

Incoming Hague Convention Cases

Cases where an Article 42 Certificate was issued in the State of origin

Slovenian CA unknown Case IV

A mother abducted her eight-year-old child from the Czech Republic to Slovenia.⁹¹⁶ The Circuit Court of Piran in Slovenia issued a Hague non-return order on 31 January 2014.⁹¹⁷ At that time custody proceedings were taking place in the Czech Republic.⁹¹⁸ The father initiated proceedings under Articles 11(6)-(8) and 42 of Brussels IIa in the Czech Republic.⁹¹⁹ The District Court of Olomuc in the Czech Republic decided that the child should be returned.⁹²⁰ The court in the Czech Republic did not attempt to hear the mother or the child but the judge did hear the father.⁹²¹ In this case the child was returned to the Czech Republic and the mother is not facing criminal charges proceedings in the Czech Republic.⁹²²

Slovenian CA No. VSM sklep I Ip 623/2010/ Juvenile Court Turin, 23 March 201 (CA No 113/09) (following Appellate Court Turin, 12 May 2010)

The information from our Slovenian source says:

20 July 2010

A mother abducted her 13 year old child from Italy to Slovenia.⁹²³ On 20th November 2010 the Slovenian Court refused to return the child on the basis of Article 13(1)(b) and 13(2) of the Hague Abduction Convention.⁹²⁴ At the time of the Hague proceedings, custody proceedings were taking place in the habitual residence of the child.⁹²⁵ The father initiated proceedings under Articles 11(6)-(8) and 42 Brussels IIa in the Italian District Court and the court decided that the child should be returned.⁹²⁶ The Italian District Court did not attempt to hear either the child or the mother, even though the child was 13 years of age and one of the

⁹¹⁵ *ibid.*

⁹¹⁶ *ibid.*, 22.

⁹¹⁷ *ibid.*

⁹¹⁸ *ibid.*

⁹¹⁹ *ibid.*

⁹²⁰ *ibid.*

⁹²¹ *ibid.*, 23.

⁹²² *ibid.*

⁹²³ *ibid.*, 16.

⁹²⁴ *ibid.*

⁹²⁵ *ibid.*

⁹²⁶ *ibid.*, 17.

reasons for non-return was due to the child objecting to being returned.⁹²⁷ The local researcher states that the Italian District Court did take into account in issuing its judgment the reasons underlying the Hague non-return order.⁹²⁸ The child has not been returned to Italy and the mother is not facing criminal charges in Italy.⁹²⁹

The information from our Italian source says;

This case concerned an abduction from Italy to Slovenia by an unmarried mother. Initially the father sought a return before the Italian courts under national law.⁹³⁰ In August 2009, the Turin Juvenile Court found that the abduction by the mother was illegal, awarded custody to the father, ordered the return of the child and ruled on access for the mother. This decision was not enforceable. The mother appealed before the Italian appellate court, and at some point during those proceedings the father initiated Hague return proceedings in Slovenia. On 12 May 2010, the Italian court stayed proceedings, waiting for the Slovenian decision on return to become final, and refused an Article 11(8) Brussels IIa order on the basis that this was a 'new request' which is inadmissible under Italian procedural law. The Slovenian court refused the return of the child in January 2010 on the basis of Article 13(2) Hague, the child's objections. The Slovenian appellate court confirmed the Hague non-return order in April 2010. The father then stayed the appellate proceedings in Italy and filed new proceedings before the first instance court on the basis of Article 11(7) Brussels IIa, in an attempt to get an Article 11(8) order.

The Juvenile Court found that it had already given an order on the return of the child in August 2009. The court considered that because the two Slovenian decisions did not add any new elements the earlier decision was confirmed. The Court also stated that there was no need to declare this order again under Article 11(8) Brussels IIa because the decision would have the same content. A request for an Article 11(8) order can only be granted if the applicant is seeking an order which is enforceable under Article 42 Brussels IIa. However this was not possible in the present case because the first return order was not enforceable, and now that appellate proceedings were pending the return order could not be declared enforceable. Therefore the court considered that the conditions for adopting an Article 11(8) Brussels IIa order were not met. This outcome seems unusual as the earlier decision was on the basis of internal law, not the Regulation, and following the earlier decision there had been two Hague non-return decisions in Slovenia making the provision in Article 11(8) Brussels IIa applicable in Italy.⁹³¹

It should be noted that there was a long delay in the proceedings. It took the Central Authority two years to inform the Italian judicial authority of the Slovenian final non-return

⁹²⁷ *ibid.*

⁹²⁸ *ibid.*

⁹²⁹ *ibid.*

⁹³⁰ Article 317 bis civ code.

⁹³¹ Professor Honorati considers that this case was dealt with badly by the Italian Authorities.

decision of April 2010. It then took more time to resume proceedings, translate the decision and appoint lawyers. The Appellate Court in Turin finally gave its decision on 1 July 2013. The court gave exclusive custody to the mother and allowed the child to remain in Slovenia. The court noted that the removal was unlawful, however, recognised that four years after the removal it was no longer practical to order the return of the child and this would not be in the child's best interests. The court aimed to ensure contact for the father.

The information provided by the Italian Central Authority indicates that the Slovenian Hague non-return order was based on the views of the child. The child was eleven at the time of the Article 11(8) Brussels IIa proceedings. The Italian court did not hear the child, the abducting parent, nor the left behind parent. As the court refused to hold Article 11(6)-(8) Brussels IIa proceedings it is unsurprising that none of the parties were heard. This is a case where the proceedings were not dealt with quickly enough and at the time of the final decision it was highly unlikely that a decision to order the return of the child could be in the best interests of that child as she had already been in the state of refuge for four years.

Additional information

The Slovenian local researcher stated that the Italian District Court did take into account in issuing its judgment the reasons underlying the Hague non-return order.⁹³² The child has not been returned to Italy and the mother is not facing criminal charges in Italy.⁹³³

Comment

The information supplied from Slovenia and Italy has some discrepancies but we believe that the information relates to the same case and we have classified our data on that basis.

Slovenian CA Unknown Case II

A father abducted his seven-year-old child from Italy to Slovenia.⁹³⁴ The Slovenian court refused to return the child on the basis that there had been acquiescence, Article 13(1)(a) Hague.⁹³⁵ Child custody proceedings were taking place in Italy at the time of the Hague proceedings.⁹³⁶ The mother initiated proceedings in the Italian court for the return of the child under Articles 11(6)-(8) and 42 Brussels IIa.⁹³⁷ The Italian court did not attempt to hear the father (the abducting parent) but the Italian judge did hear the left-behind parent, the mother.⁹³⁸ There is no information regarding whether the Italian court attempted to hear the child.⁹³⁹

⁹³²Suzana Kraljić, Questionnaire Response, 17.

⁹³³ *ibid.*

⁹³⁴ *ibid.*, 18.

⁹³⁵ *ibid.*

⁹³⁶ *ibid.*

⁹³⁷ *ibid.*

⁹³⁸ *ibid.*

⁹³⁹ *ibid.*

The Italian court did take into account in issuing its judgment the reasons for and evidence underlying the Slovenian Hague non-return order.⁹⁴⁰ The Italian court found that the child should return to Italy and issued an Article 42 certificate accompanying the judgment. The child has not been returned and the abducting parent is not facing criminal proceedings in Italy.⁹⁴¹

Case where a certificate was not issued Slovenian CA Unknown Case III

The facts for this case are sparse. A mother abducted her child from Germany to Slovenia.⁹⁴² A Slovenian court refused the return of the child under Article 13 of the Hague Convention. The father initiated proceedings in Germany under Articles 11(6)-(8) and 42 of Brussels IIa.⁹⁴³ The parents settled before the German court, but the child was not returned to Germany.⁹⁴⁴

Conclusion

In all of the cases where information was available, the courts where the Article 11(6)-(8) Brussels IIa proceedings were initiated did not attempt to hear either the child or the abducting parent. The ages of the children in these cases at the time of the proceedings were 6 months, unknown, 7 years, 8 years and 13 years. It is especially surprising to note that the 13-year-old was not heard by the Italian court, especially as one of the justifications in this case for non-return under the Hague Abduction proceedings was due to the child's objection to being returned. It can be assumed from the fact that the Slovenian court put forward this exception to return that they believed that the child not only had sufficient capacity to be heard but also for their objections to being returned to be upheld.

It should also be noted that only one child out of the five children involved in the Article 11(6)-(8) Brussels IIa proceedings was returned to the State of origin.

⁹⁴⁰ *ibid*, 19.

⁹⁴¹ *ibid*.

⁹⁴² *ibid*, 20.

⁹⁴³ *ibid*.

⁹⁴⁴ *ibid*, 21.

Spain

Background

The Spanish Central Authority did not provide a response to the questionnaire. The researcher could not provide us with any information directly on Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) proceedings beyond the *Aguirre Zarraga* case. Some other cases on Article 11 Brussels IIa more generally were provided including a case where the father argued Article 11(6)-(8) Brussels IIa applied, but it was not actually an Article 11(6)-(8) case.⁹⁴⁵ A judge responded to the judge's questionnaire but did not identify any Article 11(6)-(8) Brussels IIa cases. We have identified three sets of Article 11(6)-(8) Brussels IIa proceedings that took place in Spain when combining the responses received in relation to other Member States.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in Spain

Cases where an Article 42 Brussels IIa Certificate was issued

Aguirre Zarraga v Pelz

This case concerned an abduction from Spain to Germany by the mother, by way of a wrongful retention. Custody proceedings were ongoing prior to the retention. On 12 May 2008 a first instance court in Bilbao, Spain held that the father should be provisionally awarded rights of custody including residence and the mother rights of access.⁹⁴⁶ In June 2008 the mother relocated to Germany. In August 2008 the mother retained the child in Germany, at the end of the summer holidays.⁹⁴⁷ The father then initiated proceedings under the Hague Convention for the return of the child to Spain. On 30 January 2009 the German Local court held that the child should be returned.⁹⁴⁸ The mother appealed this decision and on 1 July 2009 the Regional court held that the child should not be returned on the basis of Article 13(2) of the Hague Child Abduction Convention (Hague), child's objections.⁹⁴⁹ The court stated that the child categorically refused to return to Spain, and the expert considered that her opinion should be taken into account in the light of her age and maturity.⁹⁵⁰ Custody proceedings were then continued before the Spanish court in July 2009.⁹⁵¹ The court considered it was necessary to obtain a fresh expert report and hear the child in person. The

⁹⁴⁵ *Paulino v Carmela* 506/2007.

⁹⁴⁶ C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247, para 18. See Lara Walker and Paul Beaumont "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) 7 *Journal of Private International Law* 231-249.

⁹⁴⁷ *Ibid*, para 20.

⁹⁴⁸ *Ibid*, para 26.

⁹⁴⁹ *Ibid*, para 27.

⁹⁵⁰ *Ibid*, para 28.

⁹⁵¹ *Ibid*, para 22.

mother requested that the child be heard via video link, but the request was refused and the parties were not heard.⁹⁵²

On 16 December 2009 the Spanish court awarded the father sole rights of custody,⁹⁵³ and required that the child be returned to Spain. The mother appealed this decision requesting that the child was heard. This appeal was dismissed on 10 April 2010 on the basis of procedure.⁹⁵⁴ On 5 February 2010 an Article 42 Brussels IIa certificate was issued by the Spanish court. Ms Pelz objected to the enforcement of the certificate in Germany, despite the fact it is automatically enforceable. On 28 April 2010 the Local court held that the judgment was not to be enforced because the Spanish court had not heard the child.⁹⁵⁵ On 18 June 2010, the father appealed this decision before the Regional court.⁹⁵⁶ Although the Regional court recognised that there is no power to review Article 42 Brussels IIa certificates, it considered that exceptions should be made where there is a serious infringement of fundamental rights.⁹⁵⁷ Further the Regional court considered that the certificate declared that Andrea was heard when she was not.⁹⁵⁸ Therefore the court made a reference to the Court of Justice of the European Union (CJEU) asking what the procedure should be where the decision violates Article 24 of the EU Charter of Fundamental Rights (the Charter), and the certificate makes a declaration that is ‘manifestly false’.⁹⁵⁹

The CJEU held that the state of refuge cannot review the certificate or enforcement of the certificate,⁹⁶⁰ unless there are questions regarding its authenticity.⁹⁶¹ If there are any other issues with the judgment, such as the protection of fundamental rights, (specifically the child’s right to be heard under Article 24 of the Charter) the decision should be appealed in the state of origin.⁹⁶² The CJEU pointed out that the requirement to hear the child is not absolute and this is subject to the child’s age and maturity.⁹⁶³ The decision on whether to hear the child should also take into account the best interests of the child.⁹⁶⁴ However the Court stressed that where the court in the state of origin had taken a decision to hear the child, then every effort should be made to hear that child. The court should ‘use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001’,⁹⁶⁵ in order for the child to have ‘a genuine and effective opportunity to express his or her views.’⁹⁶⁶

⁹⁵² Ibid.

⁹⁵³ Ibid, para 23.

⁹⁵⁴ Ibid, para 24.

⁹⁵⁵ Ibid, para 32.

⁹⁵⁶ Ibid, para 33.

⁹⁵⁷ Ibid, para 34.

⁹⁵⁸ Ibid, para 36.

⁹⁵⁹ Ibid paras 35-37. However it is noted that the declaration only need indicate that the child was given an opportunity to be heard (see Article 42 and Annex IV).

⁹⁶⁰ Ibid, para 49.

⁹⁶¹ Ibid, para 50.

⁹⁶² Ibid, para 73.

⁹⁶³ Article 42(2)(a) and Article 24(1) Charter.

⁹⁶⁴ *Aguirre Zarraga*, paras 63-4 and Article 24(2) Charter.

⁹⁶⁵ Ibid, para 67. EC Regulation 1206/2001 is the Taking of Evidence Regulation.

⁹⁶⁶ Ibid, para 66.

In this case the CJEU tried to take a balanced view, giving full effect to the automatic enforcement of the certificate as required by the Regulation. However this case highlights some problems with the Regulation, particularly its lack of clarity in relation to the term ‘opportunity’, the inability to review the judgment on which the Article 42 certificate is based on any ground and the lack of detail that judges need to provide in the Article 42 certificate. Our research indicates that on many occasions in Article 11(6)-(8) Brussels IIa proceedings throughout the EU the child is not heard and often authorities do not make any real effort to hear the child, taking account of the child’s position. However it is noted that in *Aguirre Zarraga* the order was never enforced and the child has remained in Germany with her mother.

1Ob163/09s, Oberster Gerichtshof

This case involves a child who was taken from Spain to Austria by her mother.⁹⁶⁷ The child was born in Austria on 27 July 2000.⁹⁶⁸ Her parents married three months later on 20 October 2000.⁹⁶⁹ The day after the marriage the family returned to live in Spain.⁹⁷⁰ The father subsequently developed religious delusions.⁹⁷¹ He thought he heard voices, expected a miracle and considered himself to be a messenger of God.⁹⁷² He insisted that the mother and daughter wore unattractive clothing so that they were not attractive to other men.⁹⁷³ He started to beat the mother, always in front of the child, at one point damaging the mother’s eardrum.⁹⁷⁴ He did not hit the child.⁹⁷⁵ He did however refuse to allow the daughter to go to school.⁹⁷⁶ The mother confided in a priest who informed the police.⁹⁷⁷ The mother and daughter were moved to a women’s shelter where they lived from October 2006 until July 2007.⁹⁷⁸ They then moved to an apartment (which was not available at the time of the Austrian Supreme Court hearing) and received psychological therapy.⁹⁷⁹

The mother began divorce proceedings in 2006, with the divorce pronounced in the Spanish District Court on 25 June 2008.⁹⁸⁰ The mother was given custody of the child but both parents had parental authority.⁹⁸¹ The Spanish District Court set out the contact arrangements between the child and her father if the mother and father were unable to agree matters

⁹⁶⁷ Information provided by the Austrian Central Authority.

⁹⁶⁸ 1Ob163/09s, Oberster Gerichtshof, 2.

⁹⁶⁹ Ibid.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² Ibid.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid.

⁹⁸⁰ Ibid 3.

⁹⁸¹ Ibid.

between themselves.⁹⁸² As part of that arrangement the father was to look after the child from 20 June 2008 until 1 August 2008 at which point the child would stay with the mother for the second half of the school summer holiday.⁹⁸³ The parents followed the recommendations of the court and on the 1st August 2008 the mother collected the child and took her to Austria to live with the maternal grandparents.⁹⁸⁴ The child settled in well and attended school in Austria.⁹⁸⁵

The father applied for the return of the child under the Hague Convention stating that the mother had violated the divorce agreement, denied the father contact with the child and that the child had missed the start of the school year in Spain.⁹⁸⁶ The mother opposed the return of the child under Article 13(1)(b) Hague, arguing that the father's behaviour had traumatised the child and that the child was now settled in Austria.⁹⁸⁷

The father's application for the return of the child was accepted by the District Court of St Pölten, Austria on 11 March 2009.⁹⁸⁸ On 10 June 2009⁹⁸⁹ the Regional Court of Appeal of St Pölten, Austria, repealed that decision and allowed the mother's appeal for non-return of the child and sent the case back to the first court in order for the application to be ruled on again once the child had been heard and after having established whether the Spanish Authorities were able to protect the child on her return.⁹⁹⁰ This decision was appealed by both parents in the Austrian Supreme Court.⁹⁹¹ The appeal was declared inadmissible.⁹⁹² The non-return order was confirmed on 7 October 2009.⁹⁹³

On 11 September 2009 the father initiated proceedings at the Court in San Vicente de la Barquera, Spain for the return of the child under Articles 11(6)-(8) and 42 Brussels IIa.⁹⁹⁴ The Court in San Vicente de la Barquera decided that the child should be returned but did not hear the child,⁹⁹⁵ who was 9 years old. The Austrian Central Authority has no information as to whether the Spanish Court in San Vicente de la Barquera attempted to hear the abducting parent or the left behind parent,⁹⁹⁶ although they acknowledge the court did take into account in issuing its judgment the reasons for and evidence underlying the order issued in Austria

⁹⁸² Ibid.

⁹⁸³ Ibid.

⁹⁸⁴ Ibid 4.

⁹⁸⁵ Ibid.

⁹⁸⁶ Ibid.

⁹⁸⁷ Ibid 5.

⁹⁸⁸ Austria, Central Authority Questionnaire, 18. 1Ob163/09s, Oberster Gerichtshof, 1.

⁹⁸⁹ Austria, Central Authority Questionnaire, 18. Oberster Gerichtshof, 1.

⁹⁹⁰ Oberster Gerichtshof, 6.

⁹⁹¹ Oberster Gerichtshof, 1.

⁹⁹² Ibid.

⁹⁹³ Ibid.

⁹⁹⁴ Ibid.

⁹⁹⁵ Ibid.

⁹⁹⁶ Ibid.

relating to Article 13 Hague.⁹⁹⁷ The Central Authority noted that the child has not returned to Spain and that the mother faces criminal proceedings there.⁹⁹⁸

Cases where an Article 42 Brussels IIa Certificate was not issued

16-02-13/11⁹⁹⁹

This case concerned child/ren who were abducted by their father from Spain to Bulgaria. The Bulgarian court issued a non-return order on the basis of Article 13(1)(b) Hague, the grave risk of harm exception and also Article 13(2) Hague, the child's objections.

The Bulgarian Central Authority indicated that the Spanish court upheld the Bulgarian court's decision not to return the child to Spain and arranged to transfer the case to Bulgaria. The Spanish court sent documents to the Bulgarian court under Article 15 of Brussels IIa in order to transfer the case to a court that was better placed to hear the case.¹⁰⁰⁰

Incoming Hague Convention cases

Cases where an Article 42 Brussels IIa Certificate was not issued

Cass. 14 July 2010 n. 16549 +
confirming Juvenile Court Palermo 9 March 2009¹⁰⁰¹

The mother was Spanish, the father was Italian and the family lived in Sicily. When the parents separated the mother took the child to Spain. The Palermo Juvenile Court granted a provisional measure giving custody and residence to the father. The father sought a return order from the Spanish court under the Hague Convention. The Spanish court, however, refused return on the basis of Article 13(1)(b) Hague, finding that return to Italy would put the child in an intolerable situation. The father then sought an Article 11(8) Brussels IIa decision from the Palermo Juvenile Court. The Italian Court however refused to adopt such an order, confirmed the non-return of the child and subsequently declared its lack of jurisdiction. The factual situation is not reported. It is only stated that the high level of conflict between the parents would prejudice the well-being of the child and put her in an intolerable situation.¹⁰⁰²

The information provided by the Central Authority indicates that the Spanish courts refused to return the child on the basis of Art 13(1)(b) Hague, grave risk of harm, or an otherwise

⁹⁹⁷ Ibid, 19.

⁹⁹⁸ Ibid.

⁹⁹⁹ Bulgarian CA Ref no.

¹⁰⁰⁰ Bulgaria, Central Authority Questionnaire, 19.

¹⁰⁰¹ Italian CA No 25/08.

¹⁰⁰² Information provided by Professor Costanza Honorati.

intolerable situation. The Central Authority indicates that the child was three at the time of the Italian proceedings, but it is unclear whether this was the first instance or the appellate proceedings (which were a year and 4 months apart).¹⁰⁰³

Gomirato 17.06.2010, on appeal from 20.10.2009 ref No. 09/9117/A.

Mr. G and Ms. B. B. met while they were both working for the European Commission in Brussels. They have one child, L., a girl born on 3 April 2007 in Spain. The couple never married and never lived together, although Mr. G. spent several nights a week at Ms. B. B.'s apartment in Brussels, where L. was also present. When Ms. B. B. lost her job at the European Commission, she went back to Spain over the Christmas holidays in December 2008. On 19 January 2009, Ms. B. B., who had come back to Belgium for a few days without L., asked for L. to be struck from the population register. On 22 January 2009, Mr. G. lodged a complaint against Ms. B for wrongful retention of L., and quickly commenced proceedings for the immediate return of the child under the Hague Convention.

On 20 April 2009, the Court of First Instance no. 10 of La Corogne in Spain dismissed Mr. G.'s application for a Hague return order – on the basis that he was not exercising his custody rights – (this is stated in the summary of the first decision but not the appeal). On 8 May 2009, the Belgian central authority requested a copy of the court order on non-return, because it had not, yet, been sent by the Spanish authorities under Article 11(6) Brussels IIa. The order was sent through the central authorities of Spain and Belgium to the Registrar of the Court of First Instance of Brussels on 22 June 2009.

There were two sets of proceedings in Belgium, first instance and appeal. At first instance it was held that the child should return to Belgium. However on appeal the court considered that the trial judge was correct in deciding that the Article 11(6)-(8) Brussels IIa procedure could apply, but reached a different outcome. Since the first instance decision in October 2009 (nine months earlier) the mother had married and has a second child with her new husband. Therefore the court considered that the mother could no longer return to Belgium as she had a new life in Spain. As such it would not be in the child's best interests to require her to return as this would entail a separation from her mother and her sibling. Further she had never been in the sole care of her father. Therefore the child was to remain in Spain with her mother and the Spanish courts were to decide the visitation rights of the father.¹⁰⁰⁴ Information provided indicates that the father has not had any contact with his child, despite pursuing the matter before the Spanish courts.

Unknown

¹⁰⁰³ For further information, see the Italian report.

¹⁰⁰⁴ For further information see the Belgian Report.

H v M, H (a child) (by her Guardian ad litem, Sarah Vivian) [2009] EWHC 2280 (Fam) (60) At the time of the reported decision in the English High Court, Family Division, the child was almost four years old. She was born in Spain in October 2005.¹⁰⁰⁵ The family returned to the UK later that month.¹⁰⁰⁶ She was wrongfully retained by her mother in Spain in August 2006.¹⁰⁰⁷ The father issued Hague return proceedings in Spain in October 2006.¹⁰⁰⁸ The father did not see the child between June 2007¹⁰⁰⁹ and September 2009.

The Spanish court refused to return the child on the basis of Article 13(1)(b) Hague.¹⁰¹⁰ The reason for issuing the non-return seems to be that the child should not be separated from the mother. However, the judgment did not explain why the mother could not return with the child.¹⁰¹¹

The English court criticised the Spanish judgment for being too short, and falling short of what would constitute the Article 13(1)(b) Hague defence in England. It was considered that the Spanish court confused Article 13(1)(b) with settlement.¹⁰¹² The English court also criticised the delay before the Spanish court, of more than 18 months.¹⁰¹³ Given that the father initiated proceedings almost immediately, and there appear to be no allegations of violence or abuse, this case should have been dealt with quickly. From the English case report, it appeared that the English judge took account of the Spanish report and the reason for the non-return order, but this lacked clarity.

The English court did not hear the mother. She refused to cooperate with the proceedings and she often did not respond to requests. It was stated that in August 2007, she telephoned the Father's solicitor and informed her that she would not be coming to court, and that her lawyers in Spain had advised her to ignore the hearing.¹⁰¹⁴ The judge considered that because there was no adverse welfare information the best approach would be 'shared residence arrangements or direct and meaningful contact for the absent parent and the child.'¹⁰¹⁵ The judge decided to adjourn the proceedings to allow the mother to 'engage with the court and provide the usual welfare information to the court and the Guardian. If she chooses not to do so she cannot complain if this court makes an order in her absence.'¹⁰¹⁶ Therefore the judge acknowledged that the mother has not been involved so allowed her more time to engage with the proceedings.

¹⁰⁰⁵ *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam), para 8.

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ *Ibid.*, para 4.

¹⁰⁰⁸ *Ibid.*, para 11.

¹⁰⁰⁹ *Ibid.*, para 4.

¹⁰¹⁰ *Ibid.*, para 26.

¹⁰¹¹ *Ibid.*, para 27. For more information see the English Report.

¹⁰¹² *Ibid.*, para 28.

¹⁰¹³ *Ibid.*, para 28.

¹⁰¹⁴ *Ibid.*, para 21.

¹⁰¹⁵ *Ibid.*, para 58.

¹⁰¹⁶ *Ibid.*, para 59.

He also recognised that the father's relationship with his child had to be established, so if the mother continues to choose not to cooperate he will rule on direct contact absent of any evidence suggesting he should not. Unfortunately there is no further information available on this case.

Re SJ (a child) (Habitual Residence: Application to Set Aside) [2014] EWHC 58 (Fam) (53)

In this case the Spanish court dismissed the father's Hague application for return of his child who was nine. However, it was unclear to the English judge, from the Spanish case report, why the Hague non-return was ordered. The arguments put forward before the English judge relate to consent and habitual residence. The English judge asked the Spanish judge to address a question:

'did the judge refuse to return the child on the basis that she (i) was not wrongfully removed or retained, or (ii) because father had given his consent'.

This is important because if return was refused on point (i) then the English courts no longer have jurisdiction. If it was refused on point (ii) then proceedings pursuant to Article 11(6)-(8) Brussels IIa can take place before the English courts. The English judge gave the Spanish judge 4 weeks to issue a response. It was stated that if no response was received within 4 weeks the English judge would continue on the information available.¹⁰¹⁷ The decision was issued in January 2014 and there appear to have been no proceedings since.¹⁰¹⁸ Therefore it is unclear what the outcome was. If the English judge continued without the response of the Spanish judge then he could not have taken into account fully the reasons for the Hague non-return, as required by the Brussels IIa Regulation, as he was unclear why the non-return was ordered.

Other relevant cases

Paulino v Carmela 506/2007

In this case the mother took the child from Spain to France. The child was born in Spain on 24 April 2005 and taken to France in August 2005. Shortly after this the mother filed proceedings in France for parental responsibility on 7 September 2005. The father initiated proceedings in Spain for parental responsibility on 21 February 2006, the present judgment being an appeal of that decision. As the available transcript is an appeal decision the facts are not detailed but it is clear that there were a number of proceedings initiated in France and Spain. The judgment does however indicate that in March 2006 the court of Pau France, stated that removal of the child to France was not wrongful. It is unclear whether this

¹⁰¹⁷ *Re SJ (a child) (Habitual Residence: Application to Set Aside)* [2014] EWHC 58 (Fam) paras 84-86.

¹⁰¹⁸ There are no reported cases and we were unable to gain any further information from our contacts.

statement followed an application for return under the Hague Convention, but the general context of the judgment suggests that it did. The fact that the decision states that the removal was not wrongful indicates that the Hague Convention did not apply by virtue of Articles 3-5, rather than a non-return order being given on the basis of Article 13. Nevertheless in the proceedings before the Spanish court the father appears to be arguing that the removal was wrongful, the Spanish courts have jurisdiction and Article 11(6)-(8) Brussels IIa applies. It is unclear why Article 11(6)-(8) Brussels IIa applies, if the Hague non-return decision was not given on the basis of Article 13. The Spanish court held that the French court had jurisdiction, all parties having acquiesced in the jurisdiction of the French courts by participating in proceedings there.¹⁰¹⁹

Conclusion

There is some evidence of Article 11(6)-(8) Brussels IIa proceedings taking place in Spain, but we are unlikely to have the full picture. It is considered that the approach of the Spanish courts in *Aguirre Zarraga* was not ideal because, unlike in other cases where the abducting parent refused to cooperate, the mother did try to engage and cooperate with the Spanish authorities but the Spanish authorities refused to comply with her requests, which were perfectly reasonable. The issuing of an Article 42 Brussels IIa certificate in the Austrian case is also slightly concerning, as from the facts, the father did not appear to be in a position to be the primary carer of the child. There is an indication that Spanish non-return orders are not always clearly reasoned, but this would need to be explored further.

¹⁰¹⁹ Translation provided by Carmen Otero.

Sweden

Background

We received no response to our questionnaire from the Swedish Central Authority. However, we were able to confirm from several sources that there had been no cases involving Article 11(6)-(8) Brussels IIa Regulation (Brussels IIa) in Sweden.

Judge Ulrika Beergrehn (Senior Judge, Svea Court of Appeal) and Professor Maarit Jantera-Jareborg (Uppsala University) found that there had been no Article 11(6)-(8) Brussels IIa cases involving Sweden.¹⁰²⁰

Judge Ulrika Beergrehn was able to state that there had been a few Hague cases where Swedish courts had rejected the request to return the child using Article 13 Hague but that these Hague non-return orders had not resulted in Article 11(8) Brussels IIa return orders in the State of origin.¹⁰²¹

Judge Ann-Sofie Bexell (Judge, Stockholm City Court and Hague Network Judge) responded to our request for information sent by the Hague Conference on Private International Law and after checking with her colleagues within the district also confirmed that there had been no Article 11(6)-(8) Brussels IIa cases in Sweden.¹⁰²²

The following case, identified from cross-referencing our findings indicates that there was a possible Article 11(8) Brussels IIa case involving Ireland and Sweden.

Incoming Hague Convention case

Unknown outcome

EE v O'Donnell [2013] IEHC 418

This case concerns a judicial review seeking to quash an order made by Judge O'Donnell on 19th June 2013.¹⁰²³

This case concerned a Swedish mother and an Irish father to three children born in 1995, 1996 and 2000. The elder two children were born in Ireland and the youngest was born in Sweden. The parents spent time in both countries until 2010 when they separated. The

¹⁰²⁰ Email received Ulrika Beergrehn 12 November 2014. Email received Maarit Jantera-Jareborg 11 March 2015.

¹⁰²¹ Email received Ulrika Beergrehn 12 November 2014.

¹⁰²² Email Received from Ann-Sofie Bexell 30 October 2014.

¹⁰²³ *EE v O'Donnell* [2013] IEHC 418

mother resides in Sweden and the father resides in Ireland. The children lived with the father in Ireland and visited their mother in Sweden.¹⁰²⁴

In summer 2012, the children travelled to Sweden to stay with their mother in accordance with the access arrangement. At the end of the visit the two eldest children returned to Ireland but the mother retained the youngest child. The child is still living in Sweden with his mother.¹⁰²⁵

On 6th September 2012 the father was granted sole custody of the children as part of existing proceedings. The mother was refused a stay of that order. The mother lodged an appeal.¹⁰²⁶

The father sought the return of the child in Hague proceedings in Sweden and under Article 11 Brussels IIa on the basis of wrongful retention. The Swedish court refused to return the child on the basis of Article 13(2) Hague, the child's objection to return to Ireland.¹⁰²⁷ The Swedish Authority notified the Irish Central Authority of the decision pursuant to Article 11(6) Brussels IIa on 9 November 2012 and 29 January 2013.¹⁰²⁸ The Irish Central Authority notified the Irish High Court and it was confirmed that a dispute concerning custody/access of the children was due to be heard in the E Circuit Court.¹⁰²⁹

A request was made by the Irish court to interview the child and to get an assessment by a child psychologist in preparation of the custody hearing. The mother was not willing for the child to travel to Ireland but was willing for the interview and assessment to take place in Sweden.¹⁰³⁰

At this point the Circuit Court affirmed the District Court's orders and struck out the mother's appeal. It then returned all documents to the High Court. This decision was based on a misunderstanding that there were ongoing Hague proceedings in the High Court. The mother sought judicial review of the decision of the Circuit Court and the High Court held that the Circuit Court should have heard the mother's appeal as the High Court did not have jurisdiction to hear any issue relating to the child in question when relevant proceedings were already pending in the Circuit Court.¹⁰³¹

Comment

This case highlights that where custody proceedings are already ongoing in a court in Ireland at the time when an Article 13 Hague non-return order is notified to Ireland by another EU Member State under Article 11(6) Brussels IIa, it is that court which must hear the arguments for a return order under Article 11(8) Brussels IIa.

Conclusion

¹⁰²⁴ Ibid, [4].

¹⁰²⁵ Ibid, [6].

¹⁰²⁶ Ibid, [7].

¹⁰²⁷ Ibid, [8].

¹⁰²⁸ Ibid, [9].

¹⁰²⁹ Ibid, [10].

¹⁰³⁰ Ibid, [13].

¹⁰³¹ Ibid, [32].

Once again this potential case highlights the difficulty in finding the information relating to Article 11(6)-(8) Brussels IIa cases.

UK

England and Wales

Background

We did not receive any information from the England and Wales Central Authority and they did not respond to the questionnaire. We did our own research and identified 8 reported cases directly on point, 3 unreported cases, and 2 further cases one concerning enforcement of an Article 42 Brussels IIa Regulation (Brussels IIa) Certificate and another where the parties did not use the Hague Child Abduction Convention 1980 (Hague).

The judges in England and Wales are aware of the procedure under Article 11(6)-(8) of Brussels IIa. This is apparent because they have referred to the possibility of these proceedings taking place in the state of origin when issuing the non-return order. There are four cases where there is a clear mention of the Article 11(6)-(8) procedure.¹⁰³² We are aware of two cases where Article 11(6)-(8) proceedings took place in the state of origin following the non-return order in England. In *Re H*, where return to Spain was refused on the basis of Article 13(1)(b) Hague, the judge suggested that the Spanish court should transfer any further proceedings to the English courts under Article 15.¹⁰³³

In addition to our case law search we interviewed and spoke to judges, solicitors, charities, parents and Cafcass officers in England.

Legal Process in England

Knowledge and experience

Jayne Holliday and Lara Walker had the privilege of discussing Article 11(6)-(8) Brussels IIa with eight High Court judges (7 current and 1 former). It was an excellent experience.¹⁰³⁴ Jayne and Lara also met with Sir Mathew Thorpe on a separate occasion (former Lord Justice in the Court of Appeal).

The High Court judges were aware of the procedure, however although they had plenty of experience with Hague proceedings, unsurprisingly, they had little experience with Article 11(6)-(8) Brussels IIa, at least that they could remember. The judges deal with a number of cases so it is understandable that they cannot remember each case, however it does indicate

¹⁰³² *A v T* [2011] EWHC 3882 (Fam); *WF v RJ, BF (a minor, by her Guardian ad litem, Miss Nina Hansen) v RF (a minor, by his Guardian ad litem, Ms Toni Jolly)* [2010] EWHC 2909 (Fam), *M v B* [2009] EWHC 3477 (Fam), *De L v H* [2009] EWHC 3074 (Fam).

¹⁰³³ [2009] EWHC 1735 (Fam).

¹⁰³⁴ Judges present: Sir Peter Singer, Justice Peter Jackson, Justice David Bodey, Justice Philip Moor, Justice Andrew Moylan, Justice Michael Keeton, Justice Lucy Theis, Justice Stephen Cobb.

that it is difficult to build expertise on Article 11(6)-(8) Brussels IIa compared to Hague return proceedings. Concentrated jurisdiction is employed for the latter but not the former in England and Wales.

Hearing the parties

The children who are the subject of abduction proceedings are spoken to by Cafcass officers in a special room in the High Court, which is child friendly. Children are heard in this room during the course of Hague child abduction proceedings to determine whether they have any relevant objections under Article 13(2) Hague. The officers can also check whether the child might be at risk of harm if there are unproven allegations under Article 13(1)(b) Hague, however this is rare and it does not necessarily help as these are still summary proceedings so a full welfare assessment is not possible. In relation to determining whether the child has any objections under Article 13(2) Hague, Cafcass officers usually see children from 6 years old. They would only see younger children as part of a sibling group. Cafcass officers spend around an hour with children to determine whether they have any objections under Article 13(2) Hague. They are met at the main entrance to the High Court, by their designated Cafcass officer, and taken to the room where the discussion will take place. The officer will try to build a rapport with the child during the walk, pointing out potential areas of interest in the court buildings.

The officer then tells the child what the meeting is about, whilst the abducting parent is present, explains that what they tell the officer is not confidential and makes it clear that they do not have to say anything if they don't want to. This is very important because the child might be very aware of what is resting on their answer and feel under a lot of pressure to respond in a particular way. The parent then leaves the room and the officer spends the rest of the time talking to the child and ascertaining whether they have any objections to return that would stand up to the criteria established in the English case law. If the child wants to speak to the judge then this is also possible. This usually only applies to older children.

We also discussed the possibility of Cafcass officers travelling to the state of refuge to carry out fact finding missions and gather evidence. We were told however that this was very unlikely, as it was expensive and some other Member States do not like government workers/civil servants from other Member States intruding in their country. In some countries it can even be illegal for non-local social workers to be in a particular Member State. Therefore Cafcass abroad is unlikely. Despite this it has happened on certain occasions, and this is documented in the case reports. Since Article 11(6)-(8) Brussels IIa proceedings are full welfare proceedings Cafcass officers will try and observe the child in a variety of settings before writing their report. They will usually spend around two days in the Member State where the child is present in order to gather evidence.

The English judges rely heavily on Cafcass and there is a big move towards hearing the child. Cafcass reports are generally very effective, particularly in the area of child abduction, and it is a good method of determining the child's wishes and feelings. Should children be heard

directly by judges (as in Germany) or through Cafcass officers? Historically English judges hardly ever hear children in person, although children can make applications to be heard in person.

Outgoing cases where Article 11(6)-(8) Brussels IIa proceedings took place in England

There are eight reported cases, and 3 unreported cases in England and Wales that relate to outgoing proceedings under Articles 11(6)-(8). These will be dealt with in turn.

Cases where an Article 42 Brussels IIa Certificate was issued

Re A [2006] EWHC 3397 (Fam)

This case concerned a wrongful retention in Malta. The child, Shaun, went to stay with his father in Malta during the summer holidays and did not return, when he was meant to, on 28 July 2006.¹⁰³⁵ Shaun's two older siblings already resided in Malta. The Hague proceedings were dealt with promptly. The Maltese judge heard evidence from the mother, father and Shaun on 23rd August 2006.¹⁰³⁶ Return was refused on 4 September 2006 on the basis of Article 13(1)(b) Hague. The Maltese judge also took into the account the fact that the child stated a preference for remaining in Malta.¹⁰³⁷

The main reason for the Article 13(1)(b) Hague non-return order seems to centre round allegations that the mother and her partner either took drugs or allowed drugs to be taken in their house.¹⁰³⁸ It was alleged that the mother's sister also took drugs. Apparently Shaun tried drugs at school and because his older brother Anthony took drugs before he left the UK, it was considered that this was a bad environment for Shaun to be in, in case he also acquired a drug habit.¹⁰³⁹ It is possible that Anthony continued to take drugs after moving to Malta, and Shaun was living in a flat with his brother Anthony, 19, and his sister, 17,¹⁰⁴⁰ at the time of the English proceedings. The father lived elsewhere. The mother and step father denied taking drugs or having drugs in their house and the evidence suggested this was true.¹⁰⁴¹ This also suggested that the mother did not allow drugs in her house. The aunt indicated that she used to take drugs but had not done so for a long time. The English judge took account of the Maltese judgment and went through all the relevant evidence.

The English judge then took into account other elements that came to light after the Maltese judgment. When the mother was in Malta, she saw Shaun every day for one hour under supervision.¹⁰⁴² Shaun was very clear 'that he wanted to come back to England, and that what

¹⁰³⁵ *Re A* [2006] EWHC 3397 (Fam), paras 1-2.

¹⁰³⁶ *Ibid*, para 3.

¹⁰³⁷ *Ibid*, para 4.

¹⁰³⁸ *Ibid*, para 44.

¹⁰³⁹ *Ibid*, para 40.

¹⁰⁴⁰ *Ibid*, para 25.

¹⁰⁴¹ *Ibid*, para 45.

¹⁰⁴² *Ibid*, para 52.

he said he had been told to say by his brother.¹⁰⁴³ There were texts from Shaun suggesting he wanted to come back to England and that Anthony made him say he wanted to stay in Malta.¹⁰⁴⁴ After the texts the father removed Shaun's mobile and the mother was supposed to be able to ring Shaun twice per week.¹⁰⁴⁵ The phone calls did not last long and the mother subsequently received three letters, supposedly, from Shaun.¹⁰⁴⁶ The father was not mentioned in any of the letters which seemed 'to indicate that his father is not exercising parental authority or control over him but has deputed that to his brother and sister to some extent at least, if not completely.'¹⁰⁴⁷ After 20 October 2006 there were no further phone calls and the mother only received a few brief texts which indicated that Shaun did not want to speak to her.¹⁰⁴⁸

The father was notified several times about the proceedings in England. The mother and father were directed to cooperate with any enquiries or investigations made by the children's guardian. It was hoped that the guardian would travel to Malta in order to meet the father and Shaun, any other relevant individuals, and investigate Shaun's living circumstances. The child was 12 at the time of the English proceedings. Unfortunately this was not possible as the father refused to cooperate. No response was received from his lawyer either.¹⁰⁴⁹ In addition the English authorities received limited response from the Maltese authorities.¹⁰⁵⁰ On the rare occasion a response was received it was generally critical of the English proceedings. One paragraph in particular stated:

'As to the proceedings in England, we further feel that they going counter the *ne bis in idem* principle, and that at this stage we humbly feel that the English court should be examining the question of changing the applicant's care and custody order in favour of the father and determining the access issue, rather than re-hearing the case on the same merits with the consequence that the mother can adapt the facts in order to suit her means. Please note that Maltese law in the issue is not only regulated by the Convention and the EU Regulation, but also by domestic law which clearly directs the parties to appeal before the Maltese Court of Appeal.'

This paragraph appears to demonstrate a misunderstanding of the Brussels IIa Regulation. For this is exactly what Article 11(6)-(8) Brussels IIa implies. A reanalysis of the decision that resulted in the Hague non-return. The court of the State of origin has to take the reasons for the Hague non-return into account before it can issue a certificate requiring the return of the child under Article 42 Brussels IIa. Why should the parties be required to appeal in Malta when the English court still has jurisdiction? Further the Maltese authorities were not concerned that Shaun was most likely being cared for by his two siblings who were only 17 and 19, and appeared to be incapable of providing the correct support. This issue needed to

¹⁰⁴³ Ibid.

¹⁰⁴⁴ Ibid, para 54. These texts contain the code word 'buster'.

¹⁰⁴⁵ Ibid, para 55.

¹⁰⁴⁶ Ibid, paras 55-58. The letters did not contain the code word 'buster'.

¹⁰⁴⁷ Ibid, para 58.

¹⁰⁴⁸ Ibid, para 59. However these texts do not contain the code word 'buster'.

¹⁰⁴⁹ Ibid, paras 62-66.

¹⁰⁵⁰ Ibid, see paras 67-71.

be assessed and therefore the authorities should have cooperated with the guardian who could have given an opinion on the matter.

The judge then took into account the fact that all the parties have to be given an opportunity to be heard before a certificate could be issued.¹⁰⁵¹ The judge considered that although the Regulation requires that all the parties have to be given an opportunity to be heard, this does not ‘impose (sic) an obligation to do nothing until the child and/ or in this case the father can in fact be heard if, as in this case, the father and (as a result I readily infer of his activities) the child cannot in fact be heard.’¹⁰⁵² The judge considered that the father has been given every opportunity to be heard and participate. The father also prevented Shaun from having direct communication with the guardian.¹⁰⁵³ Therefore the judge decided that he could make a decision despite the fact that he had not heard all the parties.

The judge summarised his findings in relation to the Maltese non-return order. He concluded that ‘on the evidence which I have read and heard, I have some difficulty in finding the situation, as found by the court in Malta, to be so risky and so potentially dangerous as to surmount to what certainly is the English view of article 13(b) as a very considerable hurdle indeed.’¹⁰⁵⁴ After giving full attention to the Maltese judgment he considered the broader welfare basis under Article 11(7) Brussels IIa and the Children Act.¹⁰⁵⁵ The judge took into account the evidence provided by the family members he was able to meet.¹⁰⁵⁶ After taking all the factors into account,¹⁰⁵⁷ the judge concluded that Shaun should be returned to the UK and live with his mother.¹⁰⁵⁸ This is a very difficult case. Particularly because the child was over 12 years old and capable of forming his own views. However the judge could not ascertain those views as his father did not cooperate with the authorities. Further it was unclear what Shaun’s views actually were due to the conflicting evidence provided. A further concern is that it was unclear who was actually caring for Shaun in Malta. The judge attempted to deal with these factors by making Shaun a ward of the court subject to further proceedings which would take place after Shaun had returned and spent time with the Guardian.¹⁰⁵⁹ The Brussels IIa Article 11(8) order and Article 42 certificate were enforced and Shaun returned to the UK. He returned to Malta six months later.¹⁰⁶⁰

LA v SA No FD13P00646 (unreported)

¹⁰⁵¹ Ibid, para 76.

¹⁰⁵² Ibid, para 76.

¹⁰⁵³ Ibid, paras 77-78.

¹⁰⁵⁴ Ibid, para 94.

¹⁰⁵⁵ Ibid, paras 95-96.

¹⁰⁵⁶ Ibid, paras 97-101.

¹⁰⁵⁷ Ibid, paras 102-113.

¹⁰⁵⁸ Ibid, para 116.

¹⁰⁵⁹ Ibid, para 117.

¹⁰⁶⁰ Information provided at meeting with English Judges, 20 May 2015.

The case concerns a girl who was taken from England to Lithuania by her father in September 2011, when the child was nine.¹⁰⁶¹ The first instance court in Lithuania refused to order the return of the child on the basis of Article 13(2) Hague, views of the child in March 2012. The child was ten at the time of these proceedings, and the judge thought it was appropriate to take account of her views. The judge also thought that she would suffer psychological stress if she were returned. She might blame her mother for this, which would seriously harm the fragile relationship between the mother and her daughter. The case was then heard by the court of appeal where it was considered that Article 13(2) Hague had not been made out and there was no grave risk of psychological harm under Article 13(1)(b) Hague. However the court held in January 2013, that the child had now settled in her new environment so should not be returned, and referred to Article 12(2) Hague, although, technically, this provision should not apply because the original request was made within 12 months of the wrongful removal. The court referred to Article 11(3) Brussels IIa and the need for expeditious procedures, because this did not happen the court felt that the child had become settled in Lithuania and therefore considered that the return would not be in the child's best interests, relying on the ECtHR decision in *Neulinger*. The court considered that the best interests of the child were of utmost importance and took account of the fact that the child lived with her father, stepmother and half-brother.

Following this the mother issued proceedings in England under Article 11(6)-(8) Brussels IIa. On 17 September 2013, following a lengthy legal aid application, the High Court considered that the child should be returned to the UK and live with her mother and issued an Article 42 Brussels IIa certificate. Both the father and the child were heard through the EU Taking of Evidence Regulation. This order has not been enforced, mainly due to the father's efforts to thwart any attempts at enforcement. He took the child to Italy during enforcement proceedings, he then returned to Lithuania only to then take the child to a non-EU State.

Latvia CA No.25-1.25/13 (unreported)

This application concerned an abduction by the mother from England to Latvia. The first instance court in Latvia held that the child should be returned, however on 11 December 2013 the Latvian appeal court refused to return the child on the basis of Article 13(1)(b) Hague, grave risk of harm. Information provided suggests that this case involved domestic violence which had been reported before the mother left the UK and there was a prohibited steps order in place. The mother had been seeking a relocation order but she left just before court proceedings began in the UK. She was working, so she was above the threshold for legal aid in England, but she did not have enough money to hire a lawyer so she left England for Latvia with her child without pursuing the relocation proceedings.

As explained above proceedings were ongoing in England at the time of the removal, and the father also initiated proceedings under Article 11(6)-(8) Brussels IIa after the Hague non-

¹⁰⁶¹ This information is a combination of the information provided by the two sources.

return was ordered in Latvia. The High Court of Justice (Family Division) issued a summary decision requiring that the child be returned to the UK, on 26 June 2014, and issued an Article 42 Brussels IIa certificate (unreported). In this case the judge ordered the summary return of the child to England so that full custody proceedings could take place. He did not hear the child, instead requiring that the child would be heard in the full custody proceedings. The certificate simply indicated that the child was given an opportunity to be heard, it does not explain that the child had not yet been heard, but should be heard in the full proceedings. The certificate has other downfalls.

The judgment required that the child be returned to England by 30 July 2014,¹⁰⁶² so that the hearing could be relisted for 6 August 2014 when the court would examine the child's welfare and possibly allow the child to return to Latvia.¹⁰⁶³ The certificate indicated that the child and both parties were given an opportunity to be heard. The certificate stated 'YES', to both questions, and did not provide any explanation as to how the parties were heard or whether the parties were heard, and if they were not heard what opportunities were offered. Information provided by the Latvian Central Authority indicated that the child, who was 6 years and 2 months at the time, was not heard. It was indicated that both the father and mother were heard in person, in court. None of this is clear from the order itself which is very short and just outlines the next steps. Given that the certificate is supposed to mitigate the effects of the abolition of *exequatur*, if the current procedure is retained, then judges should have to be more specific when completing the certificate which has the effect of making the return order in the judgment automatically enforceable. In relation to point 13 – whether the court has taken account of the reasons for and evidence underlying the Hague non-return order - the certificate just states 'YES'. Point 14 – details of measures to ensure the protection of the child where applicable - the certificate simply states 'YES'. It is troubling that a document that does not even answer the questions coherently still renders the underlying return order enforceable automatically. "Yes" does not answer the question, either no protective measures are needed, or if they are these should be listed.

The order indicated that service should be carried out by the father's solicitors. It was suggested that the mother was not served with the order until after it was due to be enforced. The lawyers want to close the case because the father has not been in contact with them. As enforcement takes place under Latvian law, the bailiff cannot proceed with enforcement until the father has been in contact because the father needs to pay for enforcement (this could be an advance payment of around 1000 Euros). Unfortunately the Latvian solicitors cannot close the case because the English Brussels IIa return order covered by the certificate remains enforceable.

At the time the information was provided the child had not been returned to the UK and the abducting parent was not facing criminal proceedings there.

¹⁰⁶² Court order, para 1.

¹⁰⁶³ Ibid, para 5.

D v N and D (By her Guardian ad Litem,) [2011] EWHC 471 (Fam)

This case involves a wrongful retention in Poland. D was 4 and a half years old, at the time of the English proceedings, and she had been living in Poland with her mother since she was wrongfully retained there in April 2010. The Polish court refused to order the return of the child on the basis of Article 13(1)(b) Hague in July 2010. The father issued proceedings in England for the return of the child under Articles 11(6)-(8) Brussels IIa in October 2010.

The judge assessed what remedies were available to her under Articles 11(6)-(8) Brussels IIa. In particular she investigated whether she could order a summary return or she had to make a final decision. The judge concluded that she could order the summary return of the child.¹⁰⁶⁴ Following this the judge made a decision in relation to the child's welfare. The judge started by referring to the decision of the Polish court. The facts that resulted in the refusal to return were:

- a) 'the risks posed by the father's alleged excess consumption of alcohol
- b) an absence of secure provision of the 'necessities' of life in England
- c) a return to the father's care and/ or England would be contrary to the child's wishes.

This appears to be based on the mother indicating she would not return.¹⁰⁶⁵

The judge criticised the fact that the Polish courts did not examine whether adequate arrangements had been made to secure protection for the child after her return, as required by Article 11(4) Brussels IIa.¹⁰⁶⁶ The father supplied evidence about his alcohol consumption before the English court.¹⁰⁶⁷ The father also indicated that he would make certain undertakings.¹⁰⁶⁸

The judge did not hear the child, whom she considered would be closely aligned with her primary carer. The Guardian did attempt to obtain the child's views but the mother did not cooperate.¹⁰⁶⁹ The judge proposed that The Guardian had the opportunity to see the child in Poland first, before the child and the mother returned to the UK.¹⁰⁷⁰ The judge asserted that the mother was aware of the proceedings, and had been contacted on a number of occasions, but she failed to respond. She also failed to comply with the requests that would continue her public funding.¹⁰⁷¹ Given that the mother failed to respond at all it is difficult to assess whether suitable procedures were made available under the Taking of Evidence Regulation for the mother to be heard.

The judge did take account of the reasons for and evidence underlying the Polish non-return order. Given that the Polish authorities failed to assess whether there were adequate

¹⁰⁶⁴ *D v N and D (By her Guardian ad Litem,)* 2011 EWHC 471 (Fam), para 39.

¹⁰⁶⁵ *Ibid*, para 42.

¹⁰⁶⁶ *Ibid*, para 43.

¹⁰⁶⁷ *Ibid*, para 47.

¹⁰⁶⁸ *Ibid*.

¹⁰⁶⁹ *Ibid*, para 54 (a).

¹⁰⁷⁰ *Ibid*.

¹⁰⁷¹ *Ibid*, para 54 (b).

arrangements to protect the child on return, it is unlikely that that court complied with the requirement under Article 11(4) Brussels IIa. Therefore the Hague non-return order was questionable. The English judge concluded that she should order the summary return of the child to the UK.¹⁰⁷² A full welfare decision was to be made at a later date once all the parties were present. The hearing was set for 13 April 2011, to allow the Guardian to assess the child in Poland and in England before the hearing.¹⁰⁷³ It is our understanding that the child never returned and the parents managed to reach an agreement.¹⁰⁷⁴

Cases where an Article 42 Brussels IIa certificate was not issued

SJ v JJ, AJ (by his children's guardian, Robert McGavin) [2011] EWHC 3450 (Fam)

In this case the infant child was wrongfully retained in Poland by his mother. The child, born on 24 June 2009,¹⁰⁷⁵ was taken to Poland by his mother on 24 September 2009, for the purpose of a holiday.¹⁰⁷⁶ On 14 October 2009 the mother informed the father that she intended to remain in Poland.¹⁰⁷⁷ Around December 2009 the father initiated Hague proceedings for the return of the child from Poland.¹⁰⁷⁸ On 24 September 2010 the Polish appellate court refused the father's request for the return of the child.¹⁰⁷⁹ It is unclear from the English judgment, why the Polish courts refused to return the child to the UK. It is stated that it was on the basis of Article 13 Hague, but the case report does not state which element of Article 13 this was based on, nor the reason behind the non-return.¹⁰⁸⁰ Therefore the English court did not take into account the decision of the Polish courts nor the reason for the non-return order as this was not discussed at any point. However, what this judgment does include is an in-depth analysis of the Article 11(6)-(8) Brussels IIa procedure and an analysis of earlier judgments involving the procedure. Importantly the court did not make a judgment that requires the return of the child to the UK, so the lack of analysis of the Polish judgment is possibly not too problematic in this case.

The court spent a lot of time analysing what the purpose of an Article 11 order is. In the analysis the court referred to the earlier decision in *N v T (Abduction: Brussels II Revised Article 11(7))*.¹⁰⁸¹ In that decision the court differentiated between Article 13 Hague orders and the later decision of the court of habitual residence. In the case of the latter, the judge considered that the court was exercising jurisdiction in regards to welfare and therefore a

¹⁰⁷² Ibid, paras 54-55.

¹⁰⁷³ Ibid, para 57.

¹⁰⁷⁴ Information provided on 1 December 2015.

¹⁰⁷⁵ *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam), para 1.

¹⁰⁷⁶ Ibid, para 8.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid, para 11.

¹⁰⁷⁹ Ibid, para 1.

¹⁰⁸⁰ The Italian Central Authority indicated in their response that it is sometimes difficult to identify the reason for the non-return order in Polish judgments (see the Polish report for more information).

¹⁰⁸¹ [2010] EWHC 1479 (Fam).

welfare approach was to be applied.¹⁰⁸² ‘Within that approach applying English law, there is the ability of the court to order a summary return of a child to another jurisdiction. So it seems to me that the court in exercising its welfare jurisdiction has the power to make a summary return order under Art 11(7) in an appropriate case.’¹⁰⁸³ Essentially the judge considered that it is not necessary to reach a final custody decision that either required or did not require the return of the child. It was also possible to order a summary so that a final decision on custody could be reached at a later date.¹⁰⁸⁴ The judge followed this approach in *SJ* and concluded:

“Whatever basis on which the court of the Member State from which the child has been abducted exercises jurisdiction – either because it was seised before the non-return order in the other jurisdiction or because one of the parties has made submissions under the Article 11(7) procedure – the court’s powers are the same... The judge should be in the position he or she would have been in if the child had not been abducted. The whole range of orders under the Children Act is available. In deciding what order should be made, the child’s welfare is the paramount consideration and the court must apply the welfare checklist. In appropriate circumstances the court may exercise its welfare jurisdiction by ordering a summary return.”¹⁰⁸⁵

When applying these principles to the case in question the court held that it would not be in the child’s best interests to order a summary return to England.¹⁰⁸⁶ However the judge refrained from making a final “judgment on custody” as he was not satisfied that the mother would take all the necessary steps to ensure that the child had contact with his father.¹⁰⁸⁷ Instead the judge made an interim order for contact between A and his father, but no final order for residence.¹⁰⁸⁸ As the judge only made an interim order he considered that the English courts should retain jurisdiction. ‘The order should also include a recital that this is not a judgment on custody under Article 10 of Brussels II Revised and that this court, accordingly, retains jurisdiction in respect of matters concerning parental responsibility for A.’¹⁰⁸⁹ Although technically this appears correct, the English court cannot and should not retain jurisdiction indefinitely. By the time this judgment was given, the child had been in Poland for two years (since September 2009). Given that the child was born on 24 June 2009, the child had lived in Poland for nearly all of his (short) life. Therefore, a later decision on residence that required the return of the child would arguably be worse for the child than a return now. Although the ‘interim’ order may only have been made to scare the mother into

¹⁰⁸² *N v T (Abduction: Brussels II Revised Article 11(7))* [2010] EWHC 1479 (Fam), para 17, cited in *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam) at para 25.

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ The CJEU also takes this broad approach in *Povse* (Case C-211/10 PPU *Povse* [2010] ECR I-6669).

However this can be distinguished from the approach of the English judge. The English judge suggested that this is the case because this approach is possible under English law in the Children Act. In contrast the CJEU suggests this approach is always possible, no matter whether the national law allows for this or not. For an analysis of *Povse* see A Dutta and A Schulz, ‘First cornerstones of the EU rules on cross border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive (2014) 10 *Journal of Private International Law* 1.

¹⁰⁸⁵ *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam) para 34.

¹⁰⁸⁶ *Ibid* para 43.

¹⁰⁸⁷ *Ibid*, para 44.

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ *Ibid*, para 52.

ensuring contact between the child and his father, so that a residence order requiring the return of the child to England wasn't made at a later date, the ability of the English courts to retain jurisdiction over a child who can hardly be said to have been habitually resident in England appears incorrect. Further as the contact is generally to happen in Poland,¹⁰⁹⁰ it would be more sensible for jurisdiction to be transferred to the Polish courts which are capable of dealing with any further disputes. The child, the mother and all his grandparents are habitually resident in Poland, the whole family are Polish nationals and A only spent two months of his life in England.

The left behind parent and child were not present at the proceedings. Instead the court took account of information contained in a report provided by the Children's Guardian.¹⁰⁹¹ The report described A's relationship with both parents and took account of a number of relevant factors. The court also took account of submissions made for the mother by her counsel. The mother opposed the application for return, saying that she had always been A's primary carer and that A is settled in Poland. She also indicated that if the court did order the return of A to England she would return with him, although she suggested that this would have negative effects for both herself and A. The court took all the information available into account when reaching its decision.

The judgment gave a detailed analysis of the law under Brussels IIa, and adequately assesses the welfare principle. The 'interim judgment' appears to reach the correct outcome for the child and the judge sought to ensure a continuing relationship between the child and the left behind parent. However the judgment failed to take account of the decision of the Polish court, to the extent that it is unclear why the non-return was ordered in the first place. Further the English court's desire to retain jurisdiction is questionable, particularly when no indication of when a 'final' order will be made is given.

AF (Father), T (Mother) v A (a child, by his Children's Guardian) [2011] EWHC 1315 (Fam)
A was born in 2004. He was abducted from England to Germany by his mother in 2008. He has not seen his father since. The court made a detailed analysis of the German decision to refuse to return the child.¹⁰⁹²

The refusal was based on Article 13(1)(a) Hague, lack of exercise of custody rights, and Article 13(1)(b) Hague.¹⁰⁹³ On appeal the German courts relied solely on Article 13(1)(b) and did not consider the Article 13(1)(a) arguments.¹⁰⁹⁴ The main reason behind the Article 13(1)(b) non-return order was that the German courts considered that A had no attachment to his father, and in fact he did not even recognise him. In such circumstances 'A's return

¹⁰⁹⁰ Ibid, paras 45-51.

¹⁰⁹¹ Ibid, para 37.

¹⁰⁹² *AF (Father), T (Mother) v A (a child, by his Children's Guardian)* [2011] EWHC 1315 (Fam), paras, 37-44.

¹⁰⁹³ Ibid paras 37-42.

¹⁰⁹⁴ Ibid, para 43-44.

without his mother does not come into consideration.’¹⁰⁹⁵ Therefore the judge considered that the return of the child to England without his mother would be contrary to the child’s ‘well-being’. The court then stated that this issue could not be counteracted by the mother accompanying the child to England.¹⁰⁹⁶ This is because the mother was considerably traumatised and in the presence of the father she was not able to ‘articulate’ herself even with public support. The judge believed that she had an ‘immense fear’¹⁰⁹⁷ of the applicant.

‘The extraordinary psychological state of the Respondent can be explained, ..., by the physical abuse she has had to suffer, which has not been substantially disputed by the Applicant and the core truth of which he has even expressly admitted... The Respondent’s considerable and sustained traumatising, which ... can be definitely traced back to the Applicant’s behaviour, does not allow her to accompany A in the event of an order that he return to England. Indeed, this is also the case even if... the English authorities take all the necessary protective measures conceivable for the benefit of the Respondent.’¹⁰⁹⁸

The German appeal court took account of the general approach under Article 13(1)(b) Hague and the additional requirement under Article 11(4) Brussels IIa. However the English judge was critical of the approach of the German court, as the decision did not take account of earlier proceedings in England where the mother was capable of participating and did not appear distressed.¹⁰⁹⁹ Further, the German authorities did not carry out a psychological assessment of the mother,¹¹⁰⁰ nor did there appear to be any expert medical evidence submitted.¹¹⁰¹ The approach of the lower court was also criticised by the English judge. The refusal to return the child under Article 13(1)(a) Hague was considered inappropriate. Contact was taking place between A and his father at the time of the removal and there were also proceedings ongoing before the English courts.¹¹⁰² Therefore the father must have been exercising his custody rights (if it was deemed that he had custody rights under Articles 3 and 5)¹¹⁰³ as he did have contact with his child and was party to further proceedings concerning A.

Although the English court was critical of the way the German court assessed the mother’s psychological fitness the English court did not hear the mother in the Article 11(6)-(8) Brussels IIa proceedings, so was unaware of whether the mother’s psychological state had altered since the proceedings in 2006/07.¹¹⁰⁴ Despite this the English court was satisfied that a certificate could be issued under Article 42 because the parties were given an opportunity to be heard. The judge indicated that sustained efforts had been made to engage the mother

¹⁰⁹⁵ Ibid, para 43.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Ibid, para 44.

¹¹⁰⁰ Ibid, para 37.

¹¹⁰¹ See the synopsis of the German judgment at para 43.

¹¹⁰² Ibid, paras 3-4.

¹¹⁰³ Oddly when assessing the Art 13(1)(a) Hague point the lower court then seems to suggest that the father only had access rights. If this is true then the Convention would not have been applicable as the removal would not have been wrongful, this should not be a consideration under Art 13(1)(a) (Ibid, para 41).

¹¹⁰⁴ Ibid see paras, 11 and 44.

since July 2009 (just under two years) but these were all ignored by the mother.¹¹⁰⁵ It is unclear whether these efforts simply required the mother to appear before the court, so she chose to ignore them, or whether the mother had the choice to join the proceedings via video link, or give evidence under the EU Taking of Evidence Regulation. The English court did not hear the child, who is now 7. In ‘these limited and particular circumstances hearing from A can be described as inappropriate. For reasons beyond his control, his father is now a stranger to him and he is not of an age or degree of maturity to understand the position.’¹¹⁰⁶ However the English court did have access to a Youth Welfare Report prepared by the German Authorities that was transmitted to the Children’s Guardian via the German Central Authority.¹¹⁰⁷ This report contained information on the mother and the child. There was a report from the Children’s Guardian that contained information on the father, and there were some further Cafcass reports which predated the abduction. Therefore, the court was able to carry out a welfare assessment and was made aware of the views of the parties, albeit indirectly.

A major problem with this case is the lapse of time. The English proceedings took place three years after the child was wrongfully removed and two years after return was refused.¹¹⁰⁸ As such the judge considered whether it was appropriate to make an order at all. However it was considered that the father would be faced with further delay and difficulty if he was now required to bring fresh proceedings in Germany. As such the judge considered that it was appropriate for the English court to make an order, if this was justified on welfare grounds.¹¹⁰⁹ ‘Making no order would almost inevitably lead to the irretrievable loss of the relationship between A and his father. If this court allowed that to happen it would not in my view be meeting its obligations under Article 8 ECHR.’¹¹¹⁰ The court went on to consider the welfare issues in light of the information available at that time.¹¹¹¹ The judge held that the child should remain in Germany but considered that a contact order might bring about some beneficial progress, although that is in the hands of the German authorities.¹¹¹² The order indicated that the father should have contact with the child 6 times per year, in Germany, under the supervision of the German Youth Welfare Authority.¹¹¹³ The contact should commence as soon as possible.¹¹¹⁴

The English judgment takes into account the decision of the German court and appears to make a fair assessment of the current situation. Although the mother was not heard directly, the judgment indicates that several attempts were made by the authorities to encourage her to participate in proceedings. The outcome that the child should remain in Germany and

¹¹⁰⁵ Ibid para 11.

¹¹⁰⁶ Ibid, para 12.

¹¹⁰⁷ Ibid, para 50.

¹¹⁰⁸ Ibid para 64.

¹¹⁰⁹ Ibid, para 66.

¹¹¹⁰ Ibid.

¹¹¹¹ Ibid, para 67.

¹¹¹² Ibid, para 73.

¹¹¹³ Ibid, para 7(3).

¹¹¹⁴ Ibid.

currently have supervised contact with his father, seems to promote the welfare of the child but takes into account the fact that the child has a right to know both his parents and that both parents have rights in relation to their child.

M v T (Abduction: Brussels II Revised, Art 11(7)) [2010] EWHC 1479 (Fam)

This case concerned a wrongful retention in Lithuania by the mother.¹¹¹⁵ At the time of the father's initial request for return on 21 July 2008,¹¹¹⁶ the child was around 9 months old. The Lithuanian courts refused to return the child on the basis of Article 13(1)(b) Hague.¹¹¹⁷ By the time the non-return was ordered the child was around 18 months old. Following that Article 11(6)-(8) Brussels IIa proceedings were ongoing in England for around 1 year, and the child was two and a half years old at the time of the decision.¹¹¹⁸ The judge acknowledged that although the timescale had not been ideal a full welfare enquiry had been undertaken during that time. There 'has essentially been a full welfare inquiry, in which the guardian... has visited Lithuania and has also observed contact in this country. She has also had discussions with Social Services in Lithuania, with the parents, and with members of the mother's family in Lithuania.'¹¹¹⁹ Unfortunately, however, the length of the legal process had increased the difficulties between the parties and there was a lot of antagonism between them.¹¹²⁰

It is unfortunate that the process took so long. However, the child's situation was fully examined, all parties were involved in the proceedings and there had been contact between the father and the child in the interim. However it was clear that the young child, who only lived in the UK for a short period of his life, was settled in Lithuania. Therefore given that the result was that the child should remain in Lithuania with his mother, apart from the designated periods of contact with his father in England, this was not too problematic. However if the outcome had been that the child was to return to the UK and reside with his father for the majority of the time, then this would have been difficult to reconcile with the child's interests given that he had lived in Lithuania with his mother for the majority of his life.

The court did take account of the reasons for the Lithuanian non-return order. One reason was that the father had refused to guarantee living conditions for the mother if she returned to the United Kingdom.¹¹²¹ Therefore because the father refused to give financial support then this was seen as a significant risk.¹¹²² The refusal by the father to provide financial assistance was not consistent with his desire for the child to be returned.

¹¹¹⁵ *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam) para 9.

¹¹¹⁶ *Ibid.*

¹¹¹⁷ *Ibid.*

¹¹¹⁸ *Ibid.*, paras 10-13.

¹¹¹⁹ *Ibid.*, para 14.

¹¹²⁰ *Ibid.*, para 15.

¹¹²¹ *Ibid.*, para 41.

¹¹²² *Ibid.*, para 43.

Given the delay to this case, partly down to the full welfare enquiry, the judge considered that there were two options available in this case. These were ordering a return and making a contact order, or refusing an order for return and making a contact order.¹¹²³ The judge chose the latter option and concluded that the child should remain in Lithuania with contact in the UK.

HA v MB, A (a child, by his guardian) [2007] EWHC 2016 (Fam)

The mother wrongfully retained the child to France in August 2005 after several visits there. The child was in hospital at the time. The child was only one month old when he first visited France in June 2005.¹¹²⁴

On 14 October 2005 Hague proceedings commenced in France.¹¹²⁵ The father a Palestinian, was not able to participate in person in the French proceedings as he was denied a visa in both December 2005 and July 2006. He was asked to produce financial evidence as well as evidence that he was allowed to remain in the UK.¹¹²⁶ The French court heard the father on 12 July 2006.¹¹²⁷ The French court refused to order the return of the child on the basis of Article 13(1)(b) Hague.¹¹²⁸ It is unclear from the English judgment why the French court reached this decision but this was probably linked to the age of the child, the father's financial sustainability and the lack of clarity surrounding the father's right to remain in the UK following his divorce. The documents sent by the French Central Authority 'did not in fact include' a transcript of proceedings before the [French] court, but it appears that the non-return decision was made on the basis of written and oral submissions without direct evidence from the parents.¹¹²⁹ The father tried to appeal but the French Central Authority did not take the necessary steps within the time period so the attempt failed.¹¹³⁰

From around the middle of June 2006, whilst the Hague proceedings were still ongoing the child was living in England with his grandmother while his mother was working in France during the week. Neither the father nor the French court were aware of this.¹¹³¹ When the non-return was ordered they all moved back to France.¹¹³²

The decision in the current case was given 22 months after the father requested the return of the child. Proceedings were ongoing before the English court for 10 months.¹¹³³ Some of the

¹¹²³ Ibid, para 96.

¹¹²⁴ *HA v MB, A (a child, by his guardian)* [2007] EWHC 2016 (Fam), paras 12-14.

¹¹²⁵ Ibid, para 16.

¹¹²⁶ Ibid, paras 18-19.

¹¹²⁷ Ibid, para 23.

¹¹²⁸ Ibid.

¹¹²⁹ Ibid, para 27.

¹¹³⁰ Ibid, para 23.

¹¹³¹ Ibid, para 24.

¹¹³² Ibid.

¹¹³³ Ibid, para 40.

delay relates to the fact that the court sought evidence of the father's right to remain in the UK.¹¹³⁴ The evidence provided by the Home Office created a circular argument where the father's appeal to remain, was dependent upon the outcome of the Article 11(6)-(8) Brussels IIa proceedings.¹¹³⁵

The mother gave 'oral evidence clearly and in a composed and careful manner.'¹¹³⁶ The Guardian had also observed her and indicated that she is both confident and capable of looking after the child.¹¹³⁷ The judge indicated that all parties would like him to make orders regulating future contact. The judge considered there were several advantages of him making these orders (rather than the French authorities).

'I have seen both parties in person, an advantage which a French juge aux affaires familiales is unlikely to have in the case of F given his (now no doubt reduced if not eliminated) likelihood of obtaining a French visa. I have heard detailed representations from the guardian whose duty on behalf of the child is to make submissions as to what is in his best interests. The contact in question will be in England rather in France, and future review and fine-tuning of it would more easily be achieved by an English court... Moreover the expense and delay of re-arguing contact issues in France would thus be avoided. Another factor is that any security arrangements necessary or desirable to safeguard A's return to M after meetings with F... could more realistically be policed by and with the wider powers of the English court.'¹¹³⁸

In this case the Article 11(6)-(8) Brussels IIa proceedings were carried out properly. All the parties were heard and the child, who is too young to be heard directly, was observed by the guardian in the company of both his parents. The judge took account of the French decision, however it appears that the judgment was not detailed enough to be analysed fully. The judge also sought more evidence on the immigration status of the father and his financial stability, the two important concerns in this case. The judge concluded that the child should remain in France with his mother and contact between the father and the child should take place in England.

Belgian CA No. WL16/LH/2011/1136¹¹³⁹

This is an incoming child abduction case, where the Belgian court refused to order the return of the child to England. The non-return was ordered under Article 13(1)(a) Hague on the basis that the father was not actually exercising custody rights at the time of the removal.¹¹⁴⁰ The order was given on 9 November 2011 when the child was around 5 years old. Article 11(6)-(8) Brussels IIa proceedings were held in the High Court in London. The judge did not order the return of the child. The information provided by the Central Authority suggests that

¹¹³⁴ Ibid, pars 41-48.

¹¹³⁵ Ibid.

¹¹³⁶ Ibid, para 50.

¹¹³⁷ Ibid.

¹¹³⁸ Ibid, para 65.

¹¹³⁹ Information provided by the Belgian Central Authority.

¹¹⁴⁰ See the comments on p 25 of the questionnaire.

the child was not heard, but the abducting parent was heard as she appeared in court (this case is unreported).

Unknown outcome

Re SJ (a child) (Habitual Residence: Application to Set Aside) [2014] EWHC 58 (Fam)

In this case the Spanish court dismissed the father's application for return. The child was nine. However, it was unclear to the English judge, from the Spanish case report, why the non-return was ordered. The arguments put forward before the English judge relate to consent and habitual residence. The English judge asked the Spanish judge to confirm if 'the judge refused to return the child on the basis that she (i) was not wrongfully removed or retained, or (ii) because father had given his consent'.¹¹⁴¹

This is important because if return was refused on point (i) then the English courts no longer had jurisdiction. If it was refused on point (ii) then proceedings pursuant to Article 11(6)-(8) Brussels IIa could take place before the English courts. The English judge gave the Spanish judge 4 weeks to issue a response. It was stated that if no response was received within 4 weeks the English judge would continue on the information available.¹¹⁴² The decision was issued in January 2014 and there appear to have been no proceedings since.¹¹⁴³ Therefore it is unclear what the outcome was. If the English judge continued without the response of the Spanish judge then he could not have taken into account fully the reasons for the non-return, as required by the Regulation, as he was unclear why the non-return was ordered.

H v M, H (a child) (by her Guardian ad litem, Sarah Vivian) [2009] EWHC 2280 (Fam)

The child was born in Spain in October 2005, and was almost 4 years old at the time of the English proceedings.¹¹⁴⁴ The family returned to the UK later on in October 2005.¹¹⁴⁵ The child was wrongfully retained by her mother in Spain in August 2006.¹¹⁴⁶ The father issued Hague Convention proceedings in October 2006.¹¹⁴⁷ The father had not seen the child between June 2007¹¹⁴⁸ and the court's decision in the English proceedings in September 2009.

¹¹⁴¹ *Re SJ (a child) (Habitual Residence: Application to Set Aside)* [2014] EWHC 58 (Fam) para 84.

¹¹⁴² *Ibid*, paras 84-86.

¹¹⁴³ No further proceedings have been reported and no further information on the case has been provided.

¹¹⁴⁴ *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam), para 8.

¹¹⁴⁵ *Ibid*.

¹¹⁴⁶ *Ibid*, para 4.

¹¹⁴⁷ *Ibid*, para 11.

¹¹⁴⁸ *Ibid*, para 4.

The Spanish court refused to return the child on the basis of Article 13(1)(b) Hague.¹¹⁴⁹ The reason for issuing the non-return order was that the child should not be separated from the mother. However, in the quote below there is no reference as to why the mother could not return with the child.

“From the documentation in the dossier...there is inference of the excellent situation of Minor and her settling in and adaptation to the new environment in Spain, along with the positive and gratifying relationship which she has with her mother, a relationship necessary for her appropriate and proper development in all aspects, especially at this time given her age and the stage of formation of her personality; due to all of the aforesaid, given the current situation of the little girl and her parents, living in different countries, who do not have plans to continue the lifestyle and place of residence (Seville and London) that they currently have, along with the support of the extended maternal family, it can be understood that the return to Father, depriving the girl of her relationship with her mother, a reference attachment figure, and a normalised and stable family situation, entails a physical risk for H and consequently, the hypothesis upheld in the aforementioned articles of the quoted Convention being met, it is appropriate to refuse [a return]”.¹¹⁵⁰

The English court criticised the Spanish judgment for being too short, and falling short of what would constitute the Article 13(1)(b) defence in England. It was considered that the Spanish court confused Article 13(1)(b) with settlement.¹¹⁵¹ The English court also criticised the delay before the Spanish court, which was more than 18 months.¹¹⁵² Given that the father initiated proceedings almost immediately, and there appears not to have been any allegations of violence or abuse, this case should have been dealt with quickly. From the English case report, it appeared that the English judge took account of the Spanish report and the reason behind the Hague non-return order as far as possible, but the Spanish decision lacked clarity. The English court did not hear the mother. She refused to cooperate with the proceedings and she often did not respond to requests. It was stated that in August 2007, she telephoned the father’s solicitor and informed her that she would not be coming to court, and that her lawyers in Spain had advised her to ignore the hearing.¹¹⁵³ The judge considered that because there was no adverse welfare information the best approach would be ‘shared residence arrangements or direct and meaningful contact for the absent parent and the child.’¹¹⁵⁴ The judge decided to adjourn the proceedings to allow the mother to ‘engage with the court and provide the usual welfare information to the court and the Guardian. If she chooses not to do so she cannot complain if this court makes an order in her absence.’¹¹⁵⁵ Therefore the judge acknowledged that the mother has not been involved so allowed her more time to engage with the proceedings. He also recognised that the father’s relationship with his child had to be established, so if the mother continued to choose not to cooperate he would rule on direct contact absent of any evidence suggesting he should not.

¹¹⁴⁹ Ibid, para 26.

¹¹⁵⁰ Ibid, para 27.

¹¹⁵¹ Ibid, para 28.

¹¹⁵² Ibid, para 28.

¹¹⁵³ Ibid, para 21.

¹¹⁵⁴ Ibid, para 58.

¹¹⁵⁵ Ibid, para 59.

We have no further information on this case.

Incoming Hague Convention cases

Cases where an Article 42 Brussels IIa Certificate was issued by the court in the State of origin

Re C (Jurisdiction and Enforcement of Orders relating to a child) [2012] EWHC 907 (Fam)

In this case the child was 8 at the time of the English enforcement proceedings. She was taken to England by her mother on 18 March 2011.¹¹⁵⁶ The Hague non-return order was given by the High Court on 25 November 2011,¹¹⁵⁷ on the basis of Article 13(1)(a) Hague, consent. The proceedings in Belgium took place shortly afterwards on 22 February 2012. Mrs Cooper, the defendant, was not present at the proceedings. It appears that she was not heard via any other mechanism; the Belgian Central Authority response and the Article 42 Brussels IIa certificate both indicate that the mother was not heard.

The decision of the Belgian court was based on a finding of fact that Mrs Cooper took her daughter to the United Kingdom on 3 March 2011 after a manifest abuse of the authorities in the town of Lessines. It appears that she presented earlier documentation from Paul Cooper to the authorities which granted permission on behalf of another child.¹¹⁵⁸ The authorities accepted the documentation and allowed her to leave with the child. It appears that the UK authorities accepted the evidence put forward as valid consent. On 5 November 2011 the Mayor of Lessines acknowledged the abuse of process and admitted that Mrs Cooper had not provided written certification, from Nigel Cooper, allowing the removal of the child.¹¹⁵⁹

The Belgian court held that the child should return to Belgium, and issued a certificate in accordance with Article 42 Brussels IIa.¹¹⁶⁰ It was also held that the mother would be fined 500 euros per day, until she returned to Belgium with the child.¹¹⁶¹ In addition to the fact that there was no genuine consent, the court found that the mother abused alcohol and other substances whilst living in Belgium and again after she moved to England. It is unclear from the transcript of the Belgian decision whether or not the child was heard.¹¹⁶² However there is reference to the fact that the child indicated that she wanted to return to Belgium when speaking with her father via skype.¹¹⁶³ Later during communications with the English judge

¹¹⁵⁶ *Re C (Jurisdiction and Enforcement of Orders relating to a child)* [2012] EWHC 907 (Fam), para 5.

¹¹⁵⁷ This decision, of Hedley J is unreported.

¹¹⁵⁸ *Cooper v Cooper* R.G.No 11/3804/A, p 4.

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ P 7.

¹¹⁶¹ P7.

¹¹⁶² Although the English decision indicates that the child was not heard and no reason was given. The Article 42 certificate simply states 'no'. (*Re C (Jurisdiction and Enforcement of Orders relating to a child)* [2012] EWHC 907 (Fam), para 34)

¹¹⁶³ P 5.

the Belgian judge clarified ‘that he considered the child had been given an opportunity to be heard in that the report of the Cafcass officer from November 2011 made the child’s position and wishes sufficiently clear.’¹¹⁶⁴

The Belgian Central Authority indicated in their response that as of August 2014, almost two years after the Brussels IIa return order, the child had not been returned to Belgium. This is because the English judge on 22 March 2012 refused to enforce the return order, as he considered that the Belgian court did not have jurisdiction.¹¹⁶⁵ As the mother was not caring for the child appropriately care proceedings were commenced in England by the father,¹¹⁶⁶ after a referral to social services by the court.¹¹⁶⁷ Several interim measures were directed and the child moved to live with her maternal grandparents on 24 January 2012.¹¹⁶⁸ On 3 February 2012 Hedley J made an interim care order in favour of the local authority.¹¹⁶⁹ The local authority, the father, the mother and the child were all represented at the hearing. Hedley J dismissed the application made by the father for permission to withdraw his applications for a residence order and for contact.¹¹⁷⁰

The father appeared before the English courts in these proceedings. Consequently the judge considered that he had accepted the jurisdiction of the English courts and therefore the jurisdiction of the Belgian court was absolved. He tried to revoke his application for residence and contact, after realising his mistake, but this was denied by the English court. As the English court was seised first it is considered that they are not obliged to recognise the order of the court second seised. The English decision also indicates that the father had both psychiatric and physical health issues but this is not discussed in the Belgian decision.¹¹⁷¹

The English High Court judge refused to enforce the Belgian order because: the father did not appeal the decision of 25 November 2011, the father submitted to the English jurisdiction, therefore the English court was first seised for parental responsibility questions, and the Belgian judge did not communicate and respond to his queries in regard to jurisdiction and lis pendens. However under the Brussels IIa Regulation, in its current form, there is no requirement to appeal the Hague decision on non-return in the State of refuge. The left behind parent can proceed immediately with Article 11(6)-(8) Brussels IIa proceedings. This is potentially another problem with the Regulation as it is open to the party to appeal the decision in the State of refuge or begin alternative proceedings in the State of origin or to do both. Further the over-reliance in this case on the rather tenuous habitual residence of the child in England and Wales is unhelpful. Technically Article 8 Brussels IIa does not apply in abduction proceedings but Article 10 does. Jurisdiction can only shift, under the Regulation, when it is clear that one of the provisions in Article 10 is applicable. Article 10(a) which

¹¹⁶⁴ *Re C*, para 77.

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ *Ibid*, para 12.

¹¹⁶⁷ *Ibid*, para 13.

¹¹⁶⁸ *Ibid*, para 17.

¹¹⁶⁹ *Re C*, para 23.

¹¹⁷⁰ *Ibid.*

¹¹⁷¹ *Ibid*, para 27.

requires that each person, institution or body having rights of custody has acquiesced in the removal or retention, could be applicable as the return of the child was refused on the basis of consent.¹¹⁷²

The discussion in relation to jurisdiction under Article 12(3) Brussels IIa is more relevant. This requires that the jurisdiction has been accepted either expressly or in an otherwise unequivocal manner by all the parties to the proceedings at the time the court is seised. Given that the father initially participated in the parental responsibility proceedings in England and Wales in a manner that looked like he accepted the jurisdiction, at the relevant time, then Article 12(3) is applicable. Although the father tried to withdraw from the proceedings at a later stage, it is the time that the court is seised which is relevant for assessing jurisdiction. The misleading statements in the judgment are unhelpful. In particular the fact that ‘Hedley J made an order that the mother make B available for contact with the father. He also gave the father permission to apply for a contact order and dispensed with all formalities in respect of any such application.’¹¹⁷³ Unfortunately the decision is unreported so it is impossible to get an idea of the full ruling. However the guidance that he should apply directly for a contact order seems inconsistent with other reported cases where the UK judges have made reference to Article 11(6)-(8) Brussels IIa and indicated that even though they have ordered a Hague non-return that is not the end of the story. It appears that Mr Cooper was not given any direction in regard to Article 11(6)-(8) Brussels IIa. Therefore, it would appear that Brussels IIa is a minefield for applicants and sets out a ‘complicated landscape’.

Mr Cooper may have accepted the jurisdiction of the English court, but this case highlights the difficulties that are faced by litigants in this complicated system. Many applicants are not informed of the Article 11(6)-(8) Brussels IIa procedure, they might not be given the correct legal advice and they might not necessarily qualify for legal aid (as it is no longer automatic) so they are in a difficult position. This is particularly the case where one wrong move, such as participating in proceedings, immediately removes one of their remedies. It is also problematic that all the English decisions focus on the fact that Mr Cooper consented to the removal when it is clear from the Belgian decisions that this consent was deliberately forged by the mother. The English decision does not refer to this at any point, however given that the father appears to have submitted to the jurisdiction for the parental responsibility proceedings, the analysis of Article 12 Brussels IIa and the *lis pendens* provision is correct. It is noted that the judge did try to communicate with the Belgian judge, possibly with the hope of reaching a better outcome, but this was not possible.¹¹⁷⁴

Cases where an Article 42 Brussels IIa certificate was not issued

Appellate Court. Catania, 21 July 2011

¹¹⁷² However the judge only relies on Art 8 and 12(3) Brussels IIa, see *Re C* paras 68-9 and 78.

¹¹⁷³ *Re C*, para 11.

¹¹⁷⁴ This has been described as a cultural difference and Belgian judges are not used to discussing their decisions particularly when proceedings are pending, as this is a private matter.

The English mother and Italian father had lived in Italy with their children. After the couple's break down, the mother returned to England with the children and filed divorce proceedings. The father lodged a claim before the Italian court for separation and before the English court for abduction. The English court refused to return the children on the basis of Article 13(1)(b) Hague, on the basis that the father had behaved in a violent manner.¹¹⁷⁵ In the course of the parallel separation proceedings before Trib Modica, the father asked the court, among other things, to review the English decision and to order the return of the children. The President of the Tribunal rejected the claim. The decision was appealed.

The Italian Appellate Court in Catania found that the divorce proceedings, although filed previously, had not been continued so there was no *lis pendens* with the English proceedings. In relation to the children's return under Article 11(8) Brussels IIa, the appeal court confirmed the Presidential order, because the Italian judge agreed with the grave findings of the English court in relation to physical, sexual and psychological violence used by the father against the mother, sometimes in the presence of children.

The Appellate Court found that in the current summary proceedings, it did not have enough information to transfer jurisdiction to the English courts pursuant to Article 15 Brussels IIa.¹¹⁷⁶

Other cases of interest

B v D [2008] EWHC 1246 (Fam)

The children were two and four at the time of the English proceedings. At this point the children lived in Portugal with their father, where they had been since March 2007, apart from one month which they spent in the UK in July 2007. The mother gave consent for the children to begin school in Portugal in 2007, but this was on the premise that she and the father and the children all lived together and tried to save their marriage. When she realised that this was not going to happen and the children were going to remain in Portugal, she commenced proceedings in the English courts on 13 December 2007. The father commenced proceedings in Portugal on 21 December 2007.¹¹⁷⁷ There were no Hague Convention proceedings.

The father's solicitor attempted to argue that the mother should first have initiated Hague proceedings in Portugal. The English judge disagreed and held that because the children were habitually resident in England and Wales, and the mother had not consented to a permanent relocation to Portugal, the English courts still had jurisdiction. The English judge

¹¹⁷⁵ It could be that the non-return decision is *DT v LTB (Abduction: Domestic Abuse)* [2010] EWHC 3177 (Fam), the decision was given in December 2010.

¹¹⁷⁶ The information provided indicates that the decision was very short and does not go into detail.

¹¹⁷⁷ *B v D* [2008] EWHC 1246 (Fam), para 33.

ordered the return of the children to England and held that they should live with their father in his London flat, until a final decision had been issued by the court.¹¹⁷⁸

It is unclear what the correct outcome is in this case, partly due to a lack of clarity in the Brussels IIa Regulation. The general jurisdiction under Article 8 is that the courts of the children's habitual residence shall have jurisdiction, but this is subject to Articles 9, 10 and 12. Article 10 deals with jurisdiction in cases of child abduction. This states:

'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;
- or
- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
 - (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
 - (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
 - (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
 - (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.'

The provision that may be problematic in relation to this case is Article 10(b)(i). At the time of the proceedings before the English court the children had resided in the State of refuge for over a year and no request for return had been lodged. Although the current proceedings were commenced within a year of the alleged abduction, by the time a decision was to be taken a year had passed since the "abduction". There is no reference in Article 10(b)(i) to the commencement of custody proceedings in the State of habitual residence only to that of return proceedings in the State of refuge. According to the opening paragraph of Article 10 the children also need to have acquired a new habitual residence before you can look at the other factors. The English judge considered that the children were too young to have Gillick competence,¹¹⁷⁹ therefore they could not decide on their own habitual residence. As both parents did not agree that the children were habitually resident in Portugal then, the judge held that, they were still habitually resident in England and Wales.¹¹⁸⁰ Since the mother

¹¹⁷⁸ Ibid, para 66.

¹¹⁷⁹ Ibid, para 30.

¹¹⁸⁰ Ibid. The judge primarily reached this conclusion because the agreement was that they went to school in Portugal for a short period of time, and attendance at school does not have to amount to a change in habitual residence. The decision was taken before the English courts started to follow a less parental intention approach to determining habitual residence. For the new approach see Centre for Private International Law Working Paper No. 2015/3- '[Recent Developments on the Meaning of "Habitual Residence" in Alleged Child Abduction Cases](http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases.pdf)' by Paul Beaumont and Jayne Holliday, available at http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf.

commenced custody proceedings before the 1 year period expired this would fit with the philosophy of the Hague Convention. However, the provision in Brussels IIa is not necessarily clear on what should happen if Hague proceedings are not initiated and the case takes over a year to resolve. In Hague proceedings the one year period stops ticking as soon as proceedings are initiated, thereby effectively freezing the children's habitual residence, it is not clear whether this is also the case where no Hague proceedings are initiated. It is likely that a return would have been ordered if Hague proceedings had been initiated.

Conclusion

The majority of Article 11(6)-(8) Brussels IIa proceedings in England and Wales involve infants or very young children.¹¹⁸¹ In these cases the children have often been removed from the UK at a very young age. For example in *HA*,¹¹⁸² *H v M*,¹¹⁸³ *SJ*¹¹⁸⁴ and *M v T*¹¹⁸⁵ the children were only months old at the time they were taken from the UK. This is relevant, as the fact that the child had spent the majority of their life living in the State of refuge with the abducting parent seemed to play a factor in the court of refuge's decision to issue a Hague non-return order.

Another factor that is prevalent is that the abducting parent often refused to cooperate with the proceedings.¹¹⁸⁶ From the information available this appears to be more than a general refusal to return to the court of origin in order to attend court, which would be understandable. It is a complete refusal to even respond or cooperate with the authorities, so the abductor often does not even attempt to participate in proceedings in a suitable way. In fact in *A*,¹¹⁸⁷ the father's refusal to cooperate resulted in an inability to even consult the child who was 12 and was therefore old enough to be heard. In *D v N*¹¹⁸⁸ the abducting parent's failure to cooperate also meant that the Guardian could not observe the child in the state of refuge prior to the judge making the order. This is extremely unhelpful. Even if the parent does not want to cooperate they should at least allow the Guardian to visit the child. In a number of cases arrangements were made for the Guardian to visit the child in the State of refuge so they could write a report. Therefore the abducting parent was required to do nothing but cooperate. Where the parent did not cooperate the Guardian could not write a report, and it was very difficult for the judge to reach a decision based on the welfare of the child.

¹¹⁸¹ *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam), *D v N and D (By her Guardian ad Litem,)* [2011] EWHC 471 (Fam), *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam), *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam), *B v D* [2008] EWHC 1246 (Fam) and *HA v MB, A (a child, by his guardian)* [2007] EWHC 2016 (Fam).

¹¹⁸² *HA v MB, A (a child, by his guardian)* [2007] EWHC 2016 (Fam) (one month).

¹¹⁸³ *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam) (9 months, and the child was abducted to the state where she was born).

¹¹⁸⁴ *SJ v JJ, AJ (by his children's guardian, Robert McGavin)* [2011] EWHC 3450 (Fam) (2 months).

¹¹⁸⁵ *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam) (8 months).

¹¹⁸⁶ *Re A* [2006] EWHC 3397 (Fam), *D v N and D (By her Guardian ad Litem,)* [2011] EWHC 471 (Fam), *AF (Father), T (Mother) v A (a child, by his Children's Guardian)* [2011] EWHC 1315 (Fam) and *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam).

¹¹⁸⁷ *Re A* [2006] EWHC 3397 (Fam).

¹¹⁸⁸ *D v N and D (By her Guardian ad Litem,)* [2011] EWHC 471 (Fam).

The English cases also indicate that the English judges have been reluctant to order the return of the child to the UK in Article 11(6)-(8) Brussels IIa proceedings. This has partly been due to the passage of time, whereby the child was now settled in their new environment.¹¹⁸⁹ The English court has only made a final return order in two Article 11(6)-(8) Brussels IIa cases. In the first *Re A*, the Hague proceedings were dealt with very quickly in Malta and the Article 11(6)-(8) Brussels IIa proceedings were initiated shortly after the Hague non-return was ordered.¹¹⁹⁰ In the second case *LA*, the report is not available so it is unclear how long the proceedings took.¹¹⁹¹ The English court ordered a summary or preliminary return in two cases.¹¹⁹² In both these cases the child/ren were to return to the UK so that all the parties could be properly heard and/or observed before a final order was made. In all other cases the judge made contact orders. In these cases this seemed like the correct approach due to the circumstances of the case and the prolonged period spent in the State of refuge with the abducting parent.

In most cases the abducting parent was the mother, but there are three cases where the abducting parent was the father.¹¹⁹³ It is worth noting that three of the four cases where the English court ordered the return of the child are the three cases where the father was the abducting parent. Most of the cases were a wrongful retention rather than a wrongful removal, and in all cases the State of refuge was the State where the abducting parent was a national.

¹¹⁸⁹ See for example, *AF (Father), T (Mother) v A (a child, by his Children's Guardian)* [2011] EWHC 1315 (Fam), *M v T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479 (Fam) and *H v M, H (a child) (by her Guardian ad litem, Sarah Vivian)* [2009] EWHC 2280 (Fam).

¹¹⁹⁰ *Re A* [2006] EWHC 3397 (Fam).

¹¹⁹¹ *LA v SA* No FD13P00646 .

¹¹⁹² *D v N and D (By her Guardian ad Litem.)* [2011] EWHC 471 (Fam) and *Latvia – No.25-1.25/13 (unreported)*.

¹¹⁹³ *Re A* [2006] EWHC 3397 (Fam), *LA v SA* No FD13P00646 and *B v D* [2008] EWHC 1246 (Fam).

Northern Ireland

Background

The Central Authority in Northern Ireland completed the questionnaire. It noted that it had not had any outgoing intra-EU Hague Convention/Brussels IIa cases in 2013 and 2014 but that they had had two incoming cases since 2011 where the courts in Northern Ireland had issued a non-return order under Article 13 of the Hague Convention. The Central Authority provided information concerning one case involving Latvia but did not provide information for the second case and we have been unable to identify it from other sources.

Incoming Hague Convention cases

Case where a certificate was not issued

Latvian CA No.25-1.112

In this case the father took the child from Latvia to Northern Ireland. The Northern Irish court refused to return the child on the basis of the child's objections and grave risk of harm on 28 March 2012. (This was first heard on 18 November 2011. The Hague decision was appealed and the appeal was dismissed on 28 March 2012)

Custody proceedings were already pending in Latvia at the time of the removal and the mother then also initiated proceedings under Article 11(8) Brussels IIa. (The Central Authority in Northern Ireland were unaware of these proceedings) On 20 February 2014 (almost a year after the non-return was issued) the Latvian court decided that the child could remain in Northern Ireland. The child, who was 14 years old, was heard under the Taking of Evidence Regulation. The judge also heard the abducting parent under the Taking of Evidence Regulation. The left behind parent was heard in person by the judge and the judge also took account of the reasons for and evidence underlying the non-return order.¹¹⁹⁴ As all the parties were heard, it appears that the Latvian judge carried out a welfare hearing and gave a decision based on the best interests of the child.

From cross-referencing our results, we were able to find an additional outgoing case relating to an abduction from Northern Ireland to Ireland.

Other case of interest

FL v CL [2006] IEHC 66

¹¹⁹⁴ Information provided by the Northern Irish Central Authority reflects that provided by the Latvian Central Authority. The only discrepancy is that the information from Northern Ireland suggests the child was 12 at the relevant time. This could be because the Northern Irish information is based on the age of the child at the time the Hague application was initiated, but the Latvian information gives the age of the child at the time of the Art 11(8) Brussels IIa proceedings in Latvia.

This case concerned the retention of four children, born 1996, 1998, 2000 and 2002, by their mother in Ireland from Northern Ireland. The father had consented to the mother taking the children to see their maternal grandparents in Ireland for a weekend trip on 4 November 2004. The mother did not return with the children. The father applied in Ireland for the return of the children under the Hague Convention. On the evidence the Irish judge held that the father had consented to the children remaining in Ireland under Article 13(1)(a) Hague but had applied for their return under the Hague Convention when his access to the children was denied by the mother. Since the start of the Hague proceedings he had successfully obtained an interim order for access and had had the children to stay with him after Christmas, after which he had returned them to Ireland to be with their mother.

This case shows the court taking time to consider the relevant provisions of the Brussels IIa Regulation, by giving the eldest child the opportunity to be heard and through the transmission of all documents to the High Court of Justice in Northern Ireland as per Article 11(6) of Brussels IIa Regulation once it decided to deny the return of the child under Article 13(1)(a) Hague.

There is no further information on what subsequently happened in this case.

Conclusion

The cases highlight the need for a central database that connects the Hague cases to the Brussels IIa cases. It is not unusual for the Central Authority, having been so involved in the Hague proceedings to then hear nothing further with regards to the Brussels IIa proceedings.

Scotland

Background

In September 2014 we interviewed the head of the Scottish Central Authority¹¹⁹⁵ Due to its busy workload the Central Authority only managed to check the data for the previous few years. We were informed that the number of parental child abduction cases involving Scotland had increased. In 2013 there had been 42 cases whereas by September 2014 there had been over 50. None of the cases had led to an Article 11(8) Brussels IIa return order and therefore this was an additional reason why the Scottish Central Authority had not completed the questionnaire.

When asked if it was possible to identify reasons why parents were not using the Brussels IIa return procedure it was suggested that parents were accepting the Hague decision.¹¹⁹⁶ It was thought that the lack of legal aid and the high costs associated with cases of this kind (high costs of translation requirements were mentioned) were in part responsible for this.

For the Hague proceedings there is automatic legal aid in Scotland for the left-behind parent. However, the issue for the Scottish Central Authority is that other Member States do not have legal aid or have complicated legal systems which can make trying to get the child back difficult. In one Slovakian case the Central Authority appeared to be completely disinterested in helping the Scottish Central Authority with the case. It was also noted that it is not easy to get legal aid in France or Poland and it was suggested that there is a need for a level playing field in relation to legal aid in these cases.

The most trying aspect for the Scottish Central authority was the issue of enforcement of the Hague return order. An incoming case from Sweden highlights some of the difficulties that can be faced by a Central Authority. This case concerned an abduction of a child by its mother to Scotland from Sweden. The mother hid the child in Scotland and as a consequence spent time in prison for contempt of court for refusing to say where the child was. Sweden issued a warrant for her arrest. The mother returned voluntarily to Sweden. The left-behind parent, the father, employed a private investigator to find the child. The child was found to be with its maternal grandmother. The Sheriff Court ordered the child to be taken from the grandmother and to be placed in social services. This was done, but then the grandmother retook the child. The child was then taken by the authorities from the grandmother the next day. The father was then able to take the child back to Sweden. The mother went back to Sweden but was immediately apprehended at the airport – highlighting the fact that the threat of prison is a real threat in child abduction cases.

¹¹⁹⁵ We are grateful to Bill Galbraith for giving his time to discuss the issues surrounding the return of the child in child abduction cases. The interview took place on 26 September 2014. (BAILLI checked as of 18/5/2016 and no new BIIa cases).

¹¹⁹⁶ A telephone interview with a Scottish practitioner also indicated that there was a lack of awareness of the Brussels IIa procedure amongst practitioners advising clients in these cases.

In a Dutch case the child was taken by the mother to the Netherlands. It took the Scottish Central Authority 4 years to get the child back. The child was only successfully returned because the father had sufficient funds to support the process. At first the Central Authority were told the child was in Belgium. Then it was told that the child was in the Netherlands. The return of the child was requested from the Netherlands but then the mother took the child to Spain. Spanish Interpol were not helpful in that they asked the Spanish Police to check for the child but the police will only make one visit to a property and if the child is not there at that point in time then they do not follow it up.

The mother then returned with the child to the Netherlands. At this point the father had not seen the child for a long time. The father went over to the Netherlands and arranged access. The social services in the Netherlands kept the father and child apart due to the time they had spent apart but eventually an order was made for access with the advice that the child needed time to get to know the father.

A particular frustration for the Scottish Central Authority in this case was the lack of ability to transfer the case from one Member State to another. Spain treated the case as if it was a first application. The Hague return order was not enforceable in another Member State.

It could have been possible to use the criminal procedure but this only ensures the return of the mother and not the child which would be detrimental to the child. It was thought that the child was now living with the father but the Central Authority was not informed officially of the final outcome.

It was also highlighted that in these cases there is difficulty obtaining affidavits from other Member States as there was a lack of knowledge about how they should be attested. This supports the information provided by CAFCASS in England and Wales that sending people out to the Member State to obtain evidence is better than relying on evidence provided by that Member State as the former provides evidence that is likely to stand up in a British court.

Comment

Hague cases face many difficulties, including lack of availability of legal aid in some Member States, the negative impact on the rights of the child as a result of the behaviour of the abducting parent and criminal proceedings relating to the abducting parent, variable standards between Central Authorities and the difficulties in obtaining evidence in other Member States and the difficulties in enforcing returns. Apart from the inability to transfer the Hague return to another Member State the problems identified by the Scottish Central Authority are not related to the 1980 Hague Convention, but to the lack of necessary infrastructure and manpower to deal with these cases in some Member States.