

CHILD ABDUCTION IN THE EU

a presentation by

peter beaton

for

for

Era and the Judicial Academy of Slovakia

Omšenie, Slovakia APRIL 29 and 30 2013

petermurdochbeaton@yahoo.co.uk

background and history

- ▶ Before the coming into force of the Brussels II bis Regulation on 1st May 2005 international Child Abduction cases in the EC were dealt with only under the Hague Convention of 1980
- ▶ Original Brussels II had minor impact re children
- ▶ Tampere conclusions required reduction of the intermediate measures for recognition and enforcement of orders for contact
- ▶ French proposal for the fast-tracking of contact stimulus for further EC activity

1980 Hague Convention

- Is in force in 89 countries world-wide (at the latest count) including **ALL** EU MS
- Is intended to deter child abductions across borders by ensuring that children are returned quickly to their HR State
- Limited exceptions to duty to order return
- Remains the foundation for intra-EU rules
- Many decisions of the courts of the States party to the Convention and of the ECtHR assist in the interpretation of the Convention
- CJEU is building up a portfolio of case law

Basic structure and mechanism – shared by Convention and Regulation –

- ▶ Child abduction is not in the interests of children generally and should be deterred
- ▶ Remedy is to return abducted children immediately to the State of their HR
- ▶ Court making the return decision does not have jurisdiction in matters of substance as regards parental responsibility
- ▶ Emphasis on primacy of the HR courts to take decisions on the long term interests of and arrangements for the child
- ▶ Limited exceptions to the duty to return

What is meant by Child Abduction?

- ▶ Wrongful removal – and retention – in breach of custody rights actually being exercised
- ▶ What is wrongful is determined under the law of the State of Habitual Residence – so
- ▶ Custody is NOT determined under the law of the State of the return proceedings
- ▶ Convention does not deal with criminal law issues at all
- ▶ Definitions in the Convention and Regulation are very similar – except
- ▶ In the Regulation there is a definition of ‘joint custody’
- ▶ This is exercised when one holder of parental responsibility cannot decide on the place of residence of the child without the consent of another

Basic principles and objectives of the Child Abduction Convention

- It is against the interests of children in general that they be removed wrongfully or retained – see the preamble to the Convention
- Securing the prompt return to the State of their habitual residence of children wrongfully removed to or retained in any Contracting State is the best way of restoring the status quo ante – see Article 1a
- It is in the interests of children that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States – see Article 1b

United Nations Convention on the Rights of the Child 1989 (UNCRC)

- ▶ See UNCRC Art 10(2)
- ▶ A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.
- ▶ The Hague Child Abduction Convention supports this principle as well as other articles in the UNCRC

Realisation of the aims of the Convention

- ▶ In order to realise its objectives the Convention seeks to strike a delicate balance between the interests of children generally and the interests of the individual, abducted child.
- ▶ In principle the Convention principle that it is against the interests of children generally to be removed unlawfully from the place where they have been living is because this is disruptive of their lives and also – and often – of the relationship with the parent left behind
- ▶ Thus the instrument seeks to deter abductions, protect the custody rights of left behind parents and to make sure that children can return to their home environment as quickly as possible.

Principle of summary return of the child – policy

- Protects the child's right to continuing contact with both parents
- Supports continuity in the child's life
- Helps to ensure that decisions concerning custody and access are made by the *appropriate court*
- Deprives the wrongful parent of procedural advantages that might otherwise result from the abduction or retention
- Effectively serves as a deterrent to abductions and wrongful retentions

Duty to return the child

- ▶ Policy of Convention and Regulation:
- ▶ Where the 1980 HCCA applies, an abduction leads to a return order – Art 12.
- ▶ Where **wrongfulness** of removal or retention is established, and less than **12 months** have elapsed before the legal proceedings commence, abducted children to be returned **forthwith** – Art 12.

Some general considerations

- Contracting States are to use the most expeditious procedures available since the issues are limited to the sole question as to whether the child should be returned – (Art. 2 & 11(1))
- Objective: to reach a decision within 6 weeks from the date of commencement of the proceedings – (Art. 11.2)
- No decision on the merits of rights of custody to be taken in the State to which the child was removed or in which she or he is retained until the return order application proceedings have concluded – (Art. 16)
- A return order is not a determination on the merits of any custody issue – (Art. 19)

NB It is no justification for unlawful removal/retention of a child that this results in the child moving to the State of her/his nationality of the child from the State of the child's habitual residence

Key Concepts – Rights of custody

- ▶ For the purposes of the Convention and the Regulation the concept 'rights of custody' has an autonomous definition.
- ▶ The core issue is – did the left behind parent have to give his / her consent before the removal / retention of the child from her/his State of habitual residence
- ▶ Custody can be held by a court where interim order has been made for custody or prohibiting removal of the child

Habitual Residence

- ▶ Considered to be a question of fact
- ▶ Centre of gravity of the interests/life of the child
- ▶ However, should centre of gravity be interpreted on a short-term, medium-term or long-term basis?
- ▶ Should this depend on the context in which HR is being used – jurisdiction or choice of law?
- ▶ Should this depend on whether it is the HR of an adult or of a child which is at issue?
- ▶ What about very young children?

Elements in establishing a Habitual Residence

- ▶ As a purely factual concept reference would only be made to a child's actual connections to a place in order to determine their HR:
- ▶ How much time has been spent in that place?
- ▶ What is the nature / quality of the residence there? To be appraised on the facts of the case.
- ▶ However should HR be a factual or a legal concept or an amalgamation of fact and law?
- ▶ International organisations and legislators have always avoided a formal definition in order to preserve the flexibility of the concept.

Intention? How far relevant in establishing Habitual Residence?

- ▶ To what extent should weight be placed on an individual's intention when assessing HR?
- ▶ Must an individual intend to abandon an existing HR before a new one might be acquired?
- ▶ Must an individual intend to stay in a place for a long period of time before a HR can be acquired?
- ▶ Can a child establish the intention to acquire or abandon a Habitual Residence?

Factual Elements in change of HR

- ▶ Actions in former HR State indicating intention to change HR:
 - ▶ selling home/giving up lease, car, other possessions; shipping possessions to other State;
- ▶ Actions in new State indicating intention to change HR:
 - ▶ Buying / renting home (length of lease); length of employment contact; child being enrolled in school? Registering with local authorities? Using local doctor etc? Opening bank account?

Successful functioning of Convention and Regulation provisions – courts and the judiciary

- Courts need to use their powers to **manage cases** so that they proceed as expeditiously as possible
- **Priority** should be given to Convention cases in court programmes at first instance and appeal
- Courts need to be prepared to make provision in the Return order for the **practical details of the return of the child and for its enforcement**
- All contracting States need to ensure that they have in place systems and procedures for the efficient and effective **enforcement** of return orders
- It has been shown that **concentrating jurisdiction** in a limited number of judges enhances expertise and greater understanding of the Convention is built up
- Appoint and support of a Hague Convention or European Family Judicial network judge is shown to be beneficial in solving problems

Successful functioning of Convention and Regulation provisions – agreed return

- ▶ It should be borne in mind that one of the key aims of the Convention is to secure the agreed return of children who have been unlawfully removed or retained –
- ▶ This means that Central Authorities, Courts and other agencies should explore methods of securing parental agreement about the voluntary or agreed return of the child –
- ▶ See also the duets of Central authorities under the Regulation to assist agreed solutions –
- ▶ Agreed return can be assisted where all involved are familiar with the aims of Convention and Regulation and apply the provisions of each

Child abduction under the Brussels II bis Regulation

- Provisions in Br II bis on child abduction are to complement those of the 1980 Hague Convention
- That Convention remains in full force between the MS except only as concerns matters governed by the Regulation – arts 60/62
- The policy behind the Regulation provisions supports and strengthens that of the Convention by favouring the court of the HR of the child **even after** a non-return order is made
- Also seeks to prevent shift of jurisdictional competence by the use of child abduction
- Plus fast tracking of enforcement of decisions to help parent/child relations

co-operation of the authorities

- The Regulation follows the Hague Conventions in requiring MS to set up central authorities – at least one per MS – Art 53
- Their functions include giving information about law/procedure and improving the functioning of the Regulation – Art 54
- For parental responsibility cases they are to collect/disseminate info about children, provide info to parents assist communication between the courts for Arts 11.6/7 and 15 and to facilitate agreement using e.g. mediation:- Art 55

Jurisdictional effects of the Regulation on the 1980 Convention – art 10

- ▶ Habitual residence remains with the State of the Habitual Residence of the Child unless certain conditions are met –
- ▶ Holders of parental responsibility have to agree actively or tacitly
- ▶ Tacit agreement determined by the failure to raise a return application or once raised that a return application is not pursued

Procedural effects of the Regulation on the Convention – art 11

- ▶ Child to be heard in all cases where Arts 12/13 of the Convention are being applied – art 11.2
- ▶ Courts in EU cases under the Convention must take no longer than 6 weeks from application to deliver the judgment – Art 11.3
- ▶ Court not to refuse return on ground of grave risk if protection can be arranged after return
- ▶ Applicant has to be heard before refusal to return can be ordered – Art 11.5

non-return – transfer to court in the HR state – Art 11.6–8, Br II bis

- Where a court refuses to order return on a ground in Art 13 of the Convention – the court must transfer the case to the court in the MS of the child's Habitual Residence
- The court in the HR state must inform parties and invite them to make submissions
- If no case arises or submissions within three months the non return order stands
- If the court in the HR state orders return this order is enforceable in the other MS by fast track
- Communication between courts for purposes of Art 11.6/7 to be facilitated by the central Authorities – Art 55(c)
- See case *in re Attard* (2006)– judgment of Mr Justice Singer in English High Court – BUT see *Aguirre Zarraga v Pelz* C-491 /10 PPU
- as regards problems where the child was not heard in the MS of HR

Brussels II bis – recognition and enforcement

- Orders for contact and, where Art 11.8 applies, return of the child to the MS of Habitual Residence are enforceable directly – no intermediate measures required – Arts 40 to 45
- Certificate is issued showing that all parties **and the child** given opportunity to be heard
- Where Art 11.8 applies court (in HR State) takes into account reasons for and evidence underlying the refusal to return – Art 42.2(c)
- Any measures of protection ordered after return to be shown in certificate – Art 42.2

Nature of the Exercise of the discretion not to return the child

- ▶ However, the presumption in favour of return is not absolute
 - ▶ A number of exceptions apply to create some limited discretion not to order return.
 - ▶ Where an exception to the duty to return the child is upheld, the judge must consider whether or not to make a return order.
 - ▶ Onus of proving factual basis for an exception is **always** with the person opposing return
- NB 1** Under the Regulation if return is refused on any Art 13 ground the referral mechanism under Art 11.6 to 8 comes into operation to second guess the decision
- NB 2** – Nationality is **never** a ground of non-return where a child is abducted to the country of her/his nationality

Failure to exercise custody

- ▶ Return may be refused if, at time of abduction/retention, the left behind parent was not actually exercising his/her right of custody
- ▶ To establish that custody was not being exercised is in practice not easy
- ▶ Tendency in case law : a positive act of abandonment by the ‘left-behind parent’ – almost – required

Custody – by whom exercised?

- ▶ Necessary to bear in mind that apart from parents with custody rights there are some situations where non natural persons are held to exercise custody
- ▶ So a court as ‘an institution or any other body’ which is seised with an application for parental responsibility can have custody
- ▶ Custody can be exercised vicariously where – say – a person in hospital entrusts care of a child to another such as a grand-parent
- ▶ Can be exercised passively where consent to remove a child is in issue –see Art 5.a of the Convention and the meaning of Joint custody under the Regulation

13 (1) (a) : consent

- ▶ Return may be refused if the left behind parent had consented to removal/retention
- ▶ NB some jurisdictions (a minority) consider that consent is an element to appreciate the wrongfulness of a removal/retention so consider it in the context of Art 3
- ▶ Consent is always a question of proof
- ▶ Consent must be shown to have been given actively especially in those States where cross border movement of children requires written agreement of both parents

Acquiescence

- ▶ The majority of courts consider that acquiescence is established from the subjective intention of the left behind parent –
- ▶ but some courts do consider that acquiescence should not be deduced from remarks made by a parent in the heat of the moment
- ▶ Courts are reluctant to find acquiescence in cases in which the left behind parent tries to secure a voluntary return, tries to use other procedures (eg religious proceedings) to obtain return or tries to reconcile with the other parent or tries to mediate a solution
- ▶ Failure to raise an application for return is rarely enough to establish acquiescence

Grave risk of Harm

- ▶ This exception is the most popular to be invoked and mostly by mothers returning to the state of their nationality
- ▶ In general courts have taken the view that this exception ought to be used in very restricted circumstances since otherwise the summary return mechanism, which is the basis of the Convention, would be undermined seriously
- ▶ As a result in many States a very restrictive approach has been adopted consistently rendering the application of the exception truly exceptional.
- ▶ Examples include Austria, Canada, the UK jurisdictions, Germany, Switzerland, NZ, USA and this exception is very unlikely to be allowed in these States;
- ▶ In some States this is a change from earlier approaches as the Convention and its application has become more widely know and understood

discretion under Art 13.1.b

- ▶ Establishing 'grave risk' does not mean that the court must reject the application for return – it must consider the whole circumstances in the light of the objectives of the Convention
- ▶ The court ought not to treat the test as one where the best interests of the child are to be determined since this should be left to the court with jurisdiction to determine the substance – see Art 16
- ▶ Under the Regulation court not entitled to refuse return if measures of protection in the HR State

The effect of Br II bis on Art 13.1.b

- ▶ In the EU there are two breaks on the use of Art 13.1.b to refuse to order the return of a child on the ground of grave risk
- ▶ First – it must be shown that measures of protection are not, or are not likely to be, taken on the MS of the HR of the child – Art 11.4
- ▶ Second – the general procedural provision that if there is a non return order in exercise of the discretion under Art 13, the court has to transfer the matter to the HR court which will then consider whether the child should be returned

Child's objections

- ▶ Most courts require that a distinction be made between the objection of the child to an immediate return and the objection to living with the left behind parent:
- ▶ There is a need to distinguish between custody and return matters – only opposition to the immediate return under the 1980 Convention should be considered as relevant to the Convention/Regulation.

Child's Views

- ▶ Procedure is by and large left to the Contracting States – various modalities are possible and some judges hear the child themselves – Art 12 UNCRC
- ▶ Where older children in a family express a view which points one way and others to another courts are sometimes reluctant to split younger and older siblings
- ▶ Note – Art 13.3 – information about the social background of the child in the HR State has to be taken into consideration

The importance of the ECtHR

- The ECHR has issued many judgments in cases involving the 1980 Convention hence important also for the Regulation
- The ECtHR has emphasised its support for the Convention and has in a number of cases made it clear that it is a breach of the ECHR where States fail to fulfil their obligations under the 1980 Convention particularly to enforce return orders within a reasonable time so returning the child
- So States have to have systems in place to fulfil the aims of the Convention and these must also work
- ECtHR now inclined recently to look more carefully at the interests of the child

Some Case Law – themes

- ▶ The wider interests of the child – how far to go?
- ▶ Review of the certificate under Art 42 – can this be done in the MS of enforcement
- ▶ Enforcement

How far to go in considering the wider interests of the child

- ▶ Case law of the ECtHR now tending to declare that the court in considering return or execution of a return order should take into account the interests of the child
- ▶ This potentially can have the effect of converting the return proceedings into a decision on the long term future of the child
- ▶ This is contrary to the policy of the Convention and Brussels II bis – will likely be taken into account in the review of Br II bis
- ▶ Cases include *Neullinger*, *Raban*, *Sneerson*, and *X v Latvia*; many courts are not following the ECtHR
- ▶ Hopefully *X v Latvia* will clarify the position once the Grande Chambre has issued its judgment in that case

Review of the Certificate under Art 42

- ▶ Court in the Member State addressed cannot review the certificate issued in the State of origin – no appeal is competent under Art 31 – *Inga Rinau* C-195/08 PPU
- ▶ Even where a statement in the certificate that a child had been heard when that was incorrect – *Aguirre Zarraga v Pelz* C-491/10 PPU
- ▶ In that case CJEU made clear the primacy of the article 40 to 42 mechanism to preserve the jurisdiction of the HR MS
- ▶ It appears that the two European courts are diverging as to their policies

Finally – problem areas – Enforcement

- ▶ Continues to be a difficulty despite many cases before the ECtHR
- ▶ Not dealt with in the Regulation or the Convention but States are required to have systems in place for effective as well as speedy return
- ▶ Most recent case *Raw v France* 7th March 2013 – opposition of children to return does not mean that a return order should in all cases not be executed – French authorities held to be in breach of Article 8 ECHR for not taking all necessary action

Conclusion – The future

- ▶ The 1980 Convention is a bit under threat but is still the best means available to seek to deter international child abduction and is being adopted by more and more States
- ▶ In the EU BR II bis supports the policy of the Convention and this is unlikely to change
- ▶ The ECtHR has thrown doubt in what was a clear area of understanding about Art 13.1.b
- ▶ So far there is no formal reaction to this
- ▶ Time for a relocation Convention maybe???