

Child Abduction after *In Re D (A Child)*

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On 16 November 2006 the House of Lords delivered judgment in a Hague Convention ("the Convention") case known as [*In re D \(a child\)*](#) [2006] UKHL 51. It is an important decision, not least because the speeches address a number of aspects of the Convention. This article considers the implications of the decision for the conduct of child abduction cases brought under the Convention in future.

The central issue in *Re D* was whether the mother's removal of the child from Romania was a wrongful removal for the purposes of the Convention. Unless it could be shown that the removal was wrongful, the Convention would not apply at all. In order to demonstrate that the removal was wrongful, it was necessary for the father to prove that at the date of the removal he held "rights of custody" in the relation to the child. The main arguments in the case were all about the extent of the father's rights and whether those rights could properly be classified as "rights of custody".

The facts

The child was a Romanian national born on 17 July 1998. He was eight years old at the date of the decision by the House of Lords (seven and a half years at the date of the first instance decision).

The child's parents were Romanian nationals, although the mother had also acquired British nationality. In January 1998 the parents married in Romania. In November 2000, they divorced in Romania.

In December 2002, when the child was four years old, the mother removed him from Romania and brought him to England without the knowledge or consent of the father. On 14 February 2003 the father issued an application for the summary return of the child to Romania under the Convention.

The father's application was not determined until 28 March 2006, more than three years after it had been issued. By this time the child was less than four months away from his eighth birthday. He had started attending a well-known prep school in England, where he was thriving. He had little memory of his former life in Romania. In a subsequent interview with a CAFCASS Officer, he expressed strong objections to returning to Romania, views described by the CAFCASS Officer as being "authentically his own".

On 28 March 2006 Hogg J found that the child had been wrongfully removed from Romania. She rejected arguments raised by the mother that the return of the child would place him in an intolerable situation. Accordingly, upon various undertakings given by the father, she ordered that the child should be returned to Romania forthwith.

The mother appealed the decision, but her appeal was dismissed by the Court of Appeal (Thorpe LJ, Moses LJ and Hedley J) on 25 May 2006.

On 5 July 2006 the mother was granted permission to appeal to the House of Lords. Her appeal was allowed on 16 November 2006.

It is unprecedented for a Hague Convention case to take more than three years to be determined. The Court of Appeal has, for a number of years, emphasised the need for such cases to be dealt with swiftly and summarily. These days, cases falling within the ambit of Council Regulation (EC) 2201/2003 ("Brussels IIR") must be dealt with within six weeks, unless the circumstances are exceptional. The Court of Appeal has held that courts should strive to conclude all Convention cases within six weeks, whether or not they come within Brussels IIR.

The reason for the delay in this case stems from Johnson J's decision on 8 May 2003 to seek a declaration from the Romanian Courts pursuant to article 15 of the Convention as to whether the mother's removal of the child was "wrongful". Johnson J was faced with a conflict of evidence from Romanian lawyers as to the proper interpretation of Romanian law, which he felt unable to resolve.

The Romanian courts then took more than two years to provide the declaration. On 5 January 2004 a first instance court held that it did not have jurisdiction to make an article 15 declaration. On 25 May 2004 an appellate court ruled that the first instance court was wrong in its conclusion that it lacked jurisdiction, but went on to hold that the rights of the father under Romanian law did not amount to "rights of custody" and that the removal was therefore not wrongful. On 9 June 2005 the highest appellate court in Romania affirmed the decision that, as a matter of Romanian law, the father did not hold rights which could be classified as rights of custody and, therefore, that the mother's removal of the child from Romania was not wrongful.

The proceedings were restored for directions before the English court on 1 August 2005. On this occasion, the court was persuaded on behalf of the father to direct that an expert in Romanian law should prepare a report dealing with the very issue that the Romanian court had just determined.

In due course the Romanian expert prepared a report in which he forcefully expressed the view that the Romanian courts had come to the wrong conclusion. According to the expert, the majority of Romanian "legal doctrine" supported the conclusion that the father did hold rights which should be classified as "rights of custody" and that, in his opinion, the removal of the child was therefore "wrongful".

In her judgment of 28 March 2006 Hogg J preferred the opinion of the expert to the determination of the Romanian court. The Court of Appeal concluded that she had been justified in doing so.

The issues before the House of Lords

Although the central issue in the case was whether the removal of the child was

"wrongful", the speeches of their Lordships touch upon a range of issues and will have an impact upon how future cases under the Convention are conducted.

The issues addressed by the House of Lords included:

- (1) The meaning of the term "rights of custody";
- (2) Whether a right to veto the removal of a child from the jurisdiction is a right of custody;
- (3) Whether a potential right of veto qualifies as a right of custody;
- (4) When it is appropriate to seek an article 15 declaration;
- (5) The weight to be attached to an article 15 declaration;
- (6) The meaning of "intolerable" in the context of Article 13(b) of the Convention;
- (7) The child objections defence;
- (8) The representation of children.

The meaning of the term "rights of custody"

Article 3 of the Hague Convention provides as follows:

"Art. 3. The removal or retention of a child is to be considered wrongful where-

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 5 of the Convention provides a partial definition of "rights of custody" and also of the separate concept of "rights of access":

"Art. 5. For the purposes of this Convention:

- (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.
- (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Thus it can be seen that the Convention draws a clear distinction between "rights of custody" and "rights of access". A mere breach of "rights of access" does not entitle a parent to seek the summary return of a child, although article 21 of the Convention imposes obligations upon Central Authorities to assist parents whose "rights of access" have been breached.

In Re D, Baroness Hale emphasised that "rights of custody" and "rights of access" are not mutually exclusive concepts: there is a degree of overlap between them. She went on to say:

"The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with a different package of rights which that entails ... Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them."

Their Lordships in *Re D* did not attempt to provide a definition of what a right of custody is. Instead, they reviewed some of the authorities and gave specific consideration to whether certain types of rights fall within or outside the concept.

Rights of veto

The House of Lords addressed at some length the issue of whether "a right of veto" – the right to object to a child being removed from the jurisdiction – amounts to a right of custody, even though the issue did not need to be decided in *Re D*. This is a topic which has proved controversial internationally with different states arriving at different conclusions. The conclusion of the majority of House of Lords was clear: such a right does amount to a "right of custody".

The English courts, and indeed the majority of courts in other jurisdictions, have previously held that a parent who has the right to veto a child's removal from the jurisdiction is to be regarded as having "the right to determine the child's place of residence" within the meaning of Article 5 of the Hague Convention and therefore "rights of custody": see *C v C (Abduction: Rights of Custody)* [1989] 1 FLR 403, CA.

The contrary view has been expressed in a number of American and Canadian decisions, most notably the majority decision of the United States Court of Appeal for the Second Circuit in *Croll v Croll* 229 F 3d 133.

In *Re D*, Baroness Hale confirmed that, so far as the English courts are concerned, a right of veto does indeed amount to a right of custody. Lord Hope expressed the same view. Lord Brown agreed with both Baroness Hale and Lord Hope. As this point did not fall for decision in this case, it might be said that this aspect of the speeches was obiter dicta. Indeed, Lord Carswell said that he would prefer to reserve his position on this issue until such time as the point arose directly for decision. For now, however, it can safely be assumed that the opinions of the majority of their Lordships on this issue will be followed by the lower courts (not least because the earlier Court of Appeal decision in *C v C* is in any event binding on all courts other than the House of Lords).

As a matter of English law, a holder of parental responsibility has the right to veto a child's removal from the jurisdiction. Where an order has been made prohibiting a child's removal from the jurisdiction without the consent of some person, that

person will also have a right of veto. Such persons therefore have rights of custody for the purposes of the Convention.

Potential rights of veto

At paragraph 38 of her speech, Baroness Hale made it clear that a parent's potential right of veto could not amount to a right of custody:

"...if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to "rights of custody". To hold otherwise would be to remove the distinction between "rights of custody" and "rights of access" altogether."

This confirms previous decisions such as *Re V.- B. (Abduction: Custody Rights)* [1999] 2 F.L.R. 192, CA, in which it was held that a father's right to be "consulted" about a removal from the jurisdiction, but not, without returning to court, to veto the removal, did not amount to a "right of custody".

Additionally, Baroness Hale's remarks are likely to lead to argument about whether previous cases in which it has been held that a person can have "inchoate rights of custody" were correctly decided.

There are a number of authorities in which it has been held that a person who does not have formal custody rights nevertheless can be said to have "inchoate rights" which any court would be bound to recognise in the event of an application being made to it and which should therefore be regarded as "rights of custody". Such rights have only been held to exist in circumstances where a child has been abandoned into the care of a person by its mother (the sole holder of formal custody rights) who has thereafter ceased to play any active role in the child's life. The doctrine of inchoate rights has its origins in a majority decision of the Court of Appeal in *Re B. (A Minor) (Abduction)* [1994] 2 F.L.R. 249, CA, in which Waite LJ said:

"The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?"

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be

regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian."

Since *Re B* was decided, various judges at first instance have had to grapple with the apparent inconsistency between that decision and the earlier decision of the House of Lords in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, HL.

Re J is a case in which an unmarried father without parental responsibility was held not to have rights of custody even though at the date of the child's removal from Australia he was living with the mother and playing a full role in caring for the child.

It will no doubt be argued in future cases that Baroness Hale's remarks about parents who only have the right to go to court to seek orders about a child's upbringing should be interpreted as marking the end of the "inchoate rights" doctrine. On the other hand, her comments were plainly obiter dicta. Moreover she made no specific reference to "inchoate rights" or to the authorities in which it has been held that such rights can amount to "rights of custody". Had she intended to overrule those authorities she could have said so in clear terms. Furthermore in referring to "the other parent" she clearly means the parent who does not have the care of the child. At paragraph 29 of her speech, as part of her exploration as to the meaning of rights of custody, she said:

"There is no problem when the return is requested by the parent with the right to the day-to-day care of the child - or in English terms the parent with whom it has been determined that the child is to live."

It is not clear whether Baroness Hale intended to include in the category of persons about whom "there is no problem" parents who lack formal rights of custody, but with whom it has nevertheless been determined that the child should live by the other parent.

This topic will surely prove to be a fertile area for argument on a future occasion.

Article 15 declarations

Article 15 of the Convention provides a mechanism whereby the courts of the requested state can ask that the courts of the requesting state to provide a declaration as to whether the removal of a particular child was "wrongful". It provides:

"The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or detention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

In *Re D*, Johnson J utilised this procedure (correctly, it was said in the House of Lords) to seek a determination from the Romanian courts as to whether the mother's removal of the child from Romania had been wrongful. The eventual conclusion of the Romanian courts was that the removal was not wrongful.

The central issue before the House of Lords was whether the English courts had been entitled to reject the decision of the Romanian courts in favour of the contrary opinion of an expert. Hogg J had treated the Article 15 declaration as "deserving of respect", but not binding upon her, in view of the Court of Appeal decision in a case called [*Hunter v Murrow \(Abduction: Rights of Custody\)*](#) [2005] 2 F.L.R. 1119.

In *Hunter v Murrow*, the Court of Appeal held that it was a matter for the courts of the requested state – ie the country considering the Hague Convention application – to determine whether or not a plaintiff held rights of custody. Accordingly an article 15 declaration that a removal was or was not wrongfully made by the courts of the requesting state was not binding. The Court of Appeal went so far as to hold that it was inappropriate for a court making a declaration pursuant to article 15 to do more than describe the nature of the rights held by a person, on the basis that the ultimate decision as to whether those rights were to be characterised as rights of custody was a decision for the requested state alone.

In *Re D*, the House of Lords decided that the *Hunter v Murrow* approach to article 15 declarations was wrong. Their Lordships held that where a foreign court has provided a declaration pursuant to article 15 such a decision will be binding in most circumstances. A party cannot challenge the foreign court's decision about the content of a person's rights save in exceptional circumstances such as where the ruling has been obtained by fraud or in breach of the rules of natural justice. Moreover (and contrary to what was suggested in *Hunter v Murrow*) the courts of the requested state must attach considerable weight to the decision of a foreign court as to how a party's rights are to be characterised (i.e. whether they are rights of custody or not). Only where its characterisation is clearly out of line with the international understanding of the Convention's terms should the courts of the requested state decline to follow it. Baroness Hale did accept that one such case may have been *Hunter v Murrow*, where the New Zealand courts had held that a father's rights of access were sufficient to confer upon him rights of custody for the purposes of the Convention.

Issues about article 15 declarations are only likely to arise in a few cases in future, given the need for Convention cases to be conducted speedily. Lord Hope suggested that in view of the delay which will of necessity arise from using the procedure, great care should be taken to keep this to the absolute minimum.

Article 13 (b) – grave risk

In *Re D*, the mother sought to resist the return of the child to Romania relying upon Article 13(b) of the Hague Convention. This provides as follows:

"Art 13. Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

.....

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The mother's case was that in circumstances where the child had been in this country for more than three years, was now completely anglicised, and had little memory of Romania, it would be intolerable for the child to order his return.

The major obstacle for the mother in running that argument was a long line of Court of Appeal cases in which it has been held that a high hurdle needs to be surmounted before Article 13(b) can be relied upon by a Defendant. In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 F.L.R. 1145, CA, in a much-quoted passage, Ward LJ summarised the law in this way:

"There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

As a result of this and other dicta to similar effect, it is only in very rare cases that the English courts have been prepared to accept that an Article 13(b) defence is made out. In *Re M (Abduction: Intolerable Situation)* [2000] 1 F.L.R. 930 Charles J ordered the return of the children to Norway in circumstances where the father had been convicted of murdering the mother's boyfriend and was due shortly to be released from prison, on the basis that the Norwegian authorities would be able to offer adequate protection to the mother such as accommodation in an anonymous safe-house. A recent example of a case in which the courts have been prepared to find Article 13(b) made out is [*Re D \(Article 13B: Non-return\)*](#) [2006] 2 F.L.R. 305, CA. In that case the mother had been targeted by a gunman in Venezuela who had identified her by name before shooting her in the face. In those extreme circumstances the Court of Appeal declined to order the children's return.

In the present *Re D*, the House of Lords held that the removal of the child was not wrongful, and therefore the mother's Article 13(b) case did not arise for decision.

However, Baroness Hale (with the agreement of the majority) had some things to say on the subject which tend to suggest that in past cases the English courts may have set the bar too high:

"...these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated. The authorities of the requested state are not to conduct their own investigation and evaluation of what is best for the child.

There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interest of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all."

Whilst not ruling on the issue one way or the other, Baroness Hale also made it clear the factors relied upon by the mother such as the long delay, the child's objections to returning, and the uncertainties which the child would face upon a return were capable of amounting to an intolerable situation. She gave some guidance to how judges should interpret the phrase "intolerable situation", when she said:

"... 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'."

On the face of it this would seem to be an easier test to satisfy than the high hurdle which has been set in previous authorities. Baroness Hale emphasised that in evaluating an article 13 defence it was inappropriate for courts to refer to the morality of an abductor's actions, something which courts previously have done when rejecting article 13 (b) defences in the past. As Baroness Hale said, "By definition one does not get to article 13 unless the other party has acted in wrongful breach of the other party's rights of custody. Further moral condemnation is both unnecessary and superfluous." These remarks also offer some hope to future defendants running article 13(b) defences whose arguments previously would have received little sympathy from the courts.

Baroness Hale also made the point that although in theory the court has a discretion about whether to order a return after finding that this would place a child at grave risk, in practice it is inconceivable that a return would be ordered in such circumstances.

The objections of the child to returning

When the case was decided at first instance by Hogg J, there was no independent material before her communicating the views of the child. The mother had applied for a CAFCASS report to be prepared at an earlier directions hearing, but her application had been refused.

The child's views came to light after Hogg J had ordered that he should be returned to Romania. The child himself had spoken to Ms Anne-Marie Hutchinson O.B.E., a highly experienced solicitor in this field, who swore an affidavit making it plain that he held strong and reasoned objections to returning to Romania. The child applied to intervene in the appellate proceedings on the basis that his views needed to be communicated to the court and that his interests could not adequately be represented by the mother, who had not raised his objections as a potential defence before Hogg J. The Court of Appeal refused the child's application to intervene, instead directing that he should be seen by a CAFCASS

officer. An experienced officer of CAFCASS prepared a report in which he confirmed the opinion of the child's solicitor that he had strong objections to returning to Romania for reasons which appeared to be well-founded.

When the mother's appeal was heard by the Court of Appeal, the case based upon his objections was not properly considered as the child was not separately represented and his objections did not form part of the mother's grounds of appeal.

After the mother was granted permission to appeal by the House of Lords, the child petitioned for leave to intervene in the appeal before the House and was permitted to do so. The House of Lords was therefore faced with the unusual situation of hearing arguments on an issue which had not featured either at first instance or in the Court of Appeal.

It was argued on behalf of the mother and on behalf of the child that even if the House of Lords upheld the decision that the removal of the child had been wrongful, they should decline to order his return on the basis of his objections. This argument relied upon the second paragraph of Article 13 of the Convention, which provides:

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

In the event, in the light of their Lordships' ruling that the removal of the child had not been wrongful, it was unnecessary for them to rule one way or the other on the child objection arguments. The speeches contain no analysis of the authorities in this area, although, as she did with article 13(b), Baroness Hale, with the concurrence of the majority, had a number of important things to say on the subject.

First, she made it clear that there was a difference between "taking account of" a child's views and acting in accordance with those views, thereby resolving a previous debate in the authorities about the meaning of the words "take account of".

She also made it clear that it would have been appropriate to have taken account of this child's views at the date of the first instance hearing, when he was aged seven and a half. Baroness Hale indicated that had the proceedings been completed in August 2005 (when the child was only just aged seven) it may well have been inappropriate to have canvassed his views. Once the proceedings went on beyond that date, however, the child:

"had reached an age where it could no longer be taken for granted that it was inappropriate for him to be given the opportunity of being heard."

By expressing herself in this way, Baroness Hale was suggesting that in borderline cases courts should err on the side of giving the child a voice. It would also appear that the age of seven is likely to be the youngest age at which a court will regard it as appropriate to take account of a child's views, although this is of course subject to the degree of maturity of the particular child. Importantly, Baroness Hale also stated that consideration should be given to canvassing children's views in all Convention cases, not just those in which a child objections defence is raised.

Baroness Hale made it clear that the views of children should be heard far more often than had previously been the practice. In most cases this should be done through an interview with a CAFCASS officer. She said that in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to see the child. It is only in a few cases that full scale representation is likely to be necessary, although this will be so whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting it forward.

Baroness Hale's suggestion that in some cases it is appropriate for a judge to hear directly from a child, is likely to be greeted with some surprise by the legal profession and the judiciary, as it runs entirely contrary to the practice in this jurisdiction of children not addressing the judge directly. Until now, the assumption has been that it is potentially damaging for a child to have to articulate his views to a judge. Moreover, judges do not have the specific training in interviewing children which CAFCASS officers possess. One assumes that a child would be invited to address the judge in the privacy of the judge's room and in the absence of the parties, as opposed to in the intimidating atmosphere of the court room. One difficulty with this is that the parties would then be reliant upon the judge to communicate what was said to him and would be unable to cross-examine the judge about what was said. The profession should be prepared to deal with these difficulties, as a case in which a child asks to speak directly to the judge may well soon arise.

Human Rights

Article 20 of the Convention permits member states to refuse to return a child "if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." However, this article was not incorporated into the Child Abduction and Custody Act 1985 and has not previously been used by the English courts as a basis for refusing to return a child. However, Baroness Hale pointed that since the Human Rights Act 1998 came into force in October 2000 it has been unlawful for a court to act in a way which is incompatible with a person's rights under the European Convention on Human Rights ("ECHR"). She therefore held that article 20 had been given effect by a different route. It is not clear whether Baroness Hale intended that article 20 should now be used as a separate ground of defence for defendants or whether she was simply emphasising that the other provisions of the Hague Convention need to be interpreted so as to be compatible with the ECHR rights.

Conclusion

Re D has clarified the law relating to rights of custody and article 15 declarations. There is now relatively little scope for argument about those aspects of the Convention (apart from in relation to inchoate rights). The same cannot be said for the potential defences under the Convention. In this respect *Re D* represents a significant shift in the Convention landscape in favour of defendants, whose pleas for clemency in the past were only rarely acceded to by the courts.

Richard Harrison was junior counsel for the appellant in *Re D*.
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