

Richard Harrison of 1 KBW examines the extent to which the views of children can affect the outcome in Hague Convention proceedings by analysing the "Child's Objections" defence.

The Views of Children in Child Abduction Cases under the Hague Convention

Richard Harrison, Barrister, 1 Kings Bench Walk

The views of children considered in the light of their age and understanding are a fundamental element of welfare-based decisions concerning their upbringing (see section 1 (3) of the Children Act 1989). However, the position of children who are the subject of proceedings under the Child Abduction and Custody Act 1985, which incorporates into domestic law The Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention") is very different. This article examines the extent to which the views of children can affect the outcome in Hague Convention proceedings by analysing the "Child's Objections" defence, including the impact which Brussels II Revised will have upon that defence.

The object of the Hague Convention is to ensure that children who have been wrongfully removed or retained away from the country of their habitual residence, in breach of the rights of custody of (usually) another parent, are returned immediately to that country for the Courts there to make substantive decisions concerning their welfare. Under Article 12 of the Convention, where a wrongful removal or retention is established in relation to a child, the Courts are bound to order that child's immediate return to the country of his habitual residence, unless the Defendant to the application is able to establish one of several limited defences under Article 13.

When the Hague Convention was first drafted it was envisaged that the paradigm abductor would be a non-custodial father deciding to take unilateral action by abducting his child. In fact, the reality has proved to be very different. The majority of Defendants to Hague Convention applications are custodial mothers who have decided to leave a foreign country following the break-up of their relationship with the child's father. In some cases their decision to leave is motivated by domestic violence. Others leave (or refuse to return) simply because after the collapse of their relationship they feel the need to be back at home where they have a support network.

In many cases, the children, who are caught up in an international dispute between their parents, have views - often strong views - about what the outcome of the case that concerns them should be.

However, such views are not automatically considered in proceedings under the Hague Convention, but can only be taken into account within the relatively narrow ambit of Article 13. This provides that a Court is not bound to order the return of a child if, amongst other things, '[the Court] 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'.

This is known colloquially as 'the Child's Objections Defence'. It has been considered in a number of reported authorities. The leading authority is now probably *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 in which Ward LJ summarised the principles to be extracted from past cases at pages 202-204. There are several aspects to the defence, which are discussed individually below.

Does the child object to being returned?

The first question that needs to be addressed is whether a child "objects" to being returned.

The phrase 'the child objects' is to be construed by reference to its literal meaning without adding a gloss to the language. In *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 the Court of Appeal disapproved an earlier statement of Bracewell J in *In Re R (A Minor: Abduction)* [1992] 1 FLR 105 in which she had said

'The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute.'

The objection must be to returning to the country of habitual residence as opposed to a particular carer. However, there are cases in which the two factors are so inevitably and inextricably linked that they cannot be separated. Examples include *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390, *Re R (Abduction: Acquiescence)* [1995] 1 FLR 716 and *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192.

Has the child attained an age and degree of maturity at which it is appropriate for the court to take account of his views?

Take Account of

The expression "take account of" means that the child's views should be considered by the court. It does not mean that they will necessarily be upheld (*Re J & K (Abduction: Objections of Child)* [2005] 1 FLR 273). That only falls to be considered in the exercise of the court's discretion once the Article 13 defence has been established.

Age

The Hague Convention does not lay down any minimum age before a child's objections can be taken into account. In *Re R (Abduction: Acquiescence)* [1995] 1 FLR 716 the majority of the Court of Appeal (Millet LJ dissenting on this point) held that it was appropriate to "take account of" the views of two children aged 7 ½ and 6, although they went on to override those views and order their return. In *B v K* [1993] 1 FCR 382 Johnson J took account of (and upheld) the objections of two boys aged 9 and 7. In *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242, the views of a 9 year old child were taken into account and prevailed. In *Re J & K (Abduction: Objections of Child)* [2005] 1 FLR 273 Wilson J held in respect of a 9 year old child of normal intelligence that he had "only just" attained an age and degree of maturity at which it was appropriate for the court to take account of his views (although they did not prevail).

Degree of Maturity

In *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819, Waite LJ said at 827:

'When Art 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalised appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question "Do you object to a return to your home country?" he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and short term.'

This passage was cited with approval by Ward LJ in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 at 203. Ward LJ explained that the court should seek to establish

whether the child is more mature or less mature than (or as mature as) his chronological age. He went on to say that a child 'may be mature enough for it to be appropriate for his views to be taken into account even though he may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making'.

Discretion: should the court uphold the objections of a child?

The court's discretion to refuse to order the return of a child on the basis of his objections only arises once it is established both (a) that the child objects to being returned and (b) that he has attained an age and degree of maturity for the court to take account of his views. If these matters are not established then, in the absence of any other "defence", the court must order the child's immediate return.

There is some divergence on the authorities about the ambit of the Court's discretion. In *Re R (Abduction: Acquiescence)* [1995] 1 FLR 716 Millett LJ suggested that once the court was satisfied that it was appropriate to take account of the child's views the Convention envisaged that the child would not be returned in the absence of countervailing considerations. On the other hand, in the same case Balcombe LJ (with whom Sir Ralph Gibson agreed on this point) held that the ambit of the discretion would include consideration of the age of the child and his degree of maturity: the older and more mature the child, the more likely it is that his objection would be upheld.

Balcombe LJ made it clear that in every case the objections of the child need to be weighed against the policy of the Convention which is that children should be returned to the country of their habitual residence so that long-term welfare-based decisions can be made about them. In *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392 Hale J, ordering the return of two children aged 13 and 11, held at page 399 that the policy of the Convention is particularly important in cases where children come to another country for visits so as not to deter custodial parents from sending children aboard for contact.

In *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 Ward LJ at 213, without expressing a concluded view, said that he was inclined to agree with the view expressed by Millett LJ in *Re R*, albeit he seems to have formed the (mistaken) view that Sir Ralph Gibson had been in agreement with him, when in fact the opposite was the case. This tentative statement by Ward LJ is difficult to reconcile with a passage earlier in his judgment (at page 204) where he identified a number of considerations to which the court should have regard to before it "takes account of" a child's views. It is clear from the context of this part of his judgment that he is referring to the discretionary exercise and equating the expression 'take account of' with 'uphold'.

The considerations Ward LJ identified as being of relevance to the discretionary exercise were later cited with approval by a different constitution of the Court of Appeal in *Re J (Abduction: Child's Objections to Return)* [2004] EWCA Civ 428, [2004] 2 FLR 64. They are:

- (a) The child's own perspective of what is in the interests, short, medium and long term.
- (b) The extent to which the reasons for objection are rooted in reality or might reasonably appear to the child to be so grounded.
- (c) The extent to which the views have been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent.
- (d) The extent to which the objections will be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?

In *Re J & K (Abduction: Objections of Child)* [2005] 1 FLR 273 Wilson J considered the apparent difference of view expressed in the Court of Appeal and described as being in reality a difference of emphasis. His conclusion was that the approach of Balcombe LJ in *Re R* to the question of discretion was correct and that the court at the discretionary stage was entitled to

weigh in the balance the age and degree of maturity of the child and the nature of his objections.

The position of younger siblings where only the older one has valid objections

One of the more difficult aspects of the defence of child objections that occasionally arises is the situation where only one out of two or more children raises objections to returning or is old / mature enough for his view to be taken into account.

In *Re HB* (above) Hale J had to consider the objections of two children aged 13 and 11 to returning to Denmark. She found that the objections of the younger child were insufficient to justify refusing to make an order for her return. The objections of the older child were more compelling. Nevertheless, the Judge made an order for his return in the exercise of her discretion so as to avoid splitting the siblings. The case returned to the Court of Appeal one year later (see [1998] 1 FLR 422), in circumstances where (ironically) the older child had returned to Denmark, but the younger child had refused to board the aeroplane. The Court of Appeal allowed the appeal on the basis that one year had elapsed in which the Plaintiff mother had done nothing to enforce the order. They commented, however, that Hale J had been correct in her approach (albeit without considering the basis of her decision in any detail).

In *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, the Court of Appeal adopted a different approach in dealing with two children aged 11 and 6, the older of whom objected to returning to Spain. They considered first the objections of the older child and decided that she should not be returned. In relation to the younger child, they held that in view of his exceptionally close relationship to his sister, it would create an 'intolerable situation' if he were to be returned without her. On that basis they allowed an appeal against an order for the return of both children.

TB v JB (Abduction: Grave Risk of Harm) [2001] 2 FLR 515, was a case in which the Court had to consider the objections of a 14 year old girl to returning to New Zealand. She had three siblings: a 12 year old boy who had expressed a positive wish to return, and two younger children who were too young for their views to be considered by the court. The majority of the Court of Appeal decided that the 14 year old girl should be ordered to return, citing with approval the approach adopted by Hale J in *Re HB*. However, the decision in *Re T* was not considered.

In *Re J (Abduction: Child's Objections to Return)* [2004] EWCA Civ 428, [2004] 2 FLR 64 the Court of Appeal allowed an appeal against an order for the return to Croatia of two children aged (at the date of the judgments) 12 and 9. Their decision was based entirely upon the objections of the older child. The position of the younger child was not considered separately, as it appears to have been accepted that he should not be returned without his brother. The approach of the Court of Appeal was consistent with the *Re T* approach of considering the objections of the older child first, as opposed to the *Re HB* and *TB v JB* approach (albeit the latter two cases were not cited).

The *Re T* approach of considering first the objections of an older sibling is consistent with two decisions at first instance: *B v K (Child Abduction)* [1993] 1 FCR 382 and *Ontario Court, The v M and M (Abduction: Children's Objections)* [1997] 1 FLR 475.

Re HB and *Re T* are not easy to reconcile. It should be remembered however that if a child holds valid objections under Article 13, that merely opens the door to the Court's discretion. The overall trend of the authorities is that the Courts are reluctant to make orders which fly in the face of strongly held and rational objections expressed by children who are old enough and mature enough to consider the consequences of their decision. Such views would probably prevail, even in circumstances where there was a younger sibling too young to express any meaningful objection. If *Re HB* were being decided today at first instance, it is questionable

whether the same conclusion would be reached.

Position of step-children

The position of step-siblings who are not the subject of the Hague Convention application is more clear cut on the authorities. As they fall outside the ambit of the proceedings, their views do not fall to be considered under Article 13. Unless a defence can be established in relation to the child who is the subject of the Convention, that child will be returned regardless of the consequences of that decision for the step-child: see *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478 and *S v B and Y* [2005] EWHC 733 (Fam).

Separate Representation

In most cases, the objections of a child should be ascertained through a Cafcass Officer, whose report should include an appraisal of the child's degree of maturity and the reasons underlying the objections.

In exceptional cases, it is possible for a child to obtain separate representation and be joined as a party to the proceedings, although these cases have been described a 'highly unusual': see *Re J (Abduction: Child's Objections to Return)* [2004] 2 FLR 64 at para 64. There should normally only be separate representation when the child's position cannot be properly represented by the Defendant: see *M (A Minor) (Abduction: Child's Objections)* [1994] 2FLR 126, *Re S (Abduction: Children: Separate Representation)* [1997] 1FLR 486 and *S v B and Y* [2005] EWHC 733 (Fam).

Impact of Council Regulation 2201/2003 ("Brussels II Revised")

Brussels II Revised came into force on 1 March 2005. It applies to all EU member states except Denmark. It contains a number of provisions relevant to Hague Convention applications which take precedence over the Convention as between States to which the Regulation applies.

Article 11(2) of the Regulation provides that it shall be ensured that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age and degree of maturity. This creates an effective presumption in favour of at least ascertaining the views of the child. Chapter IX of the Practice Guide which accompanies the Regulation provides that the exception to the presumption is to be interpreted restrictively. The Regulation does not require the child to be separately represented. His or her views may be communicated to the Court by a social worker (or in this jurisdiction a Cafcass Officer).

Where a court refuses to order the return of a child under Article 13, the Courts in the country of the child's habitual residence are able to reconsider and, if appropriate, override that decision: see Article 11(6). A decision to override a 'non-return' order under Article 13 of the Convention is enforceable under Article 42 (without any defence being available), provided that (a) the child was given the opportunity to be heard, (b) the parties were given an opportunity to be heard, and (c) the court having the final say has taken into account the reasons given by the original court in refusing to order the return of the child under Article 13.

There may well arise cases in which the English courts have no option but to order the return of a child under Article 42, however strongly and cogently that child objects to returning. It is difficult to see how in practice such an order would be implemented, bearing in mind the difficulties that have been encountered in past cases.

In one case a child caused such a scene on board a 747 bound for Australia that the pilot felt he had no option but to turn the plane around and leave the child back at Heathrow. The Court of Appeal upheld the child's objections and allowed an appeal against an earlier order for his

return.

In another case, the tipstaff was directed to implement an order by collecting the children and placing them aboard a flight to New Zealand. When he arrived at the children's home, he found that one child was locked in a bedroom brandishing a knife while the other children were locked in the bathroom ready to defend themselves with cricket stumps. The Court of Appeal concluded that its own order was unenforceable and stayed its earlier decision.