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Return of a child under the 1980 Hague child abduction convention to a ‘third state’?


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The 1980 Hague Convention on the Civil Aspects of International Child Abduction seeks *inter alia* to protect children internationally from the harmful effects of parental child abductions and ‘to establish procedures to ensure their prompt return *to the State of their habitual residence*’ (Preamble) [emphasis added]. Accordingly, save in exceptional circumstances (see Arts. 12(2), 13 and 20), an abducted child shall be returned ‘forthwith’ (Art. 12(1)). The return order is intended to reinstate the status quo that existed before the abduction (Explanatory Report to the 1980 Convention, para. 18 (hereafter: ‘Explanatory Report’)) and enable any determination of the merits of the custody rights to take place ‘before the competent authorities in *the State where the child had its habitual residence prior to its removal*’ (Perez-Vera, 1981, para. 19). In *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187, the Court of Appeal (consisting of Moylan, Baker and Phillips LJ) was faced with the question whether, on the facts of the case, the trial judge interpreted the concept of habitual residence appropriately and arrived at a correct finding as to where the child was habitually resident prior to the abduction. Importantly, Moylan LJ also expressed an obiter view on whether there is power under the Convention to order the ‘return’ of the child to a Contracting State other than the one where the child was habitually resident immediately before the abduction (“‘return’ to a third state”). The focus of this case comment is on the obiter point.

The case concerned a two-year old child, B, born in Australia. Her mother and father were born in England and France respectively. They met in Australia in 2015, after having moved to live there in 2007 and 2014 respectively. The parents married in 2017. In 2019, the family relocated to France, arriving in that country on 2 December. On 20 December, they travelled to England to spend the Christmas holidays with the mother’s family. The father returned to France on 27 December due to work commitments. In early January 2020, the mother informed the father that she and the child would not be coming back to France. The father applied for the return of the child to France under the 1980 Hague Convention. At the first instance, his application was dismissed as the judge (Judd J) decided that, at the date of the retention of the child by the mother in England, the child was habitually resident in Australia rather than France. Consequently, the 1980 Convention did not apply as the court did not have power to

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order the return of the child to a third state. The father appealed. On appeal, the decision of Judd J was reversed as the child was found to be habitually resident in France.

Examining the question of whether a return order can only require a child to be returned to the state of their habitual residence at the date of the abduction or whether the 1980 Convention permits a court to order that a child be ‘returned’ to a third state, Moylan LJ engaged with a number of considerations. These led him to conclude that there was power under the Convention to order that a child be ‘returned’ to a third state (para. 104).

In particular, His Lordship considered that the Convention was to be interpreted purposively (para. 105). On this point, he cited Lady Hale in the case of *In re K (A Child) (Reunite International Child Abduction Centre Intervening)* [2014] UKSC 29 (which concerned the matter of ‘inchoate custody rights’). Paradoxically, he quoted *inter alia* her words that one of the purposes of the 1980 Convention that she considered relevant was to ‘enable the courts of the child’s habitual residence to determine where his long term future should lie’ (para. 105). Given His Lordship’s findings on the matter of a ‘return’ to a third state, this quote is rather inconsistent.

Moylan LJ also compared the wording of the Preamble to the 1980 Convention and the Explanatory Report to the Convention and found a discrepancy between the two. In particular, the Preamble refers to the prompt return of abducted children *to the State of their habitual residence* as one of the key objectives of the Convention [emphasis added]. In contrast, para. 110 of the Explanatory Report explains that the matter of a ‘return’ to a third state was expressly considered by the drafters of the Convention and that ‘[t]he Convention’s silence on this matter must [...] be understood as allowing the authorities of the state of refuge to return the child directly to the applicant, regardless of the latter’s present place of residence’. His Lordship was persuaded by this passage as he concluded, *inter alia*, that the Explanatory Report ‘makes clear that an express decision was made to leave scope for return to a return state’ (para. 111) and that ‘to interpret the Convention otherwise would be inconsistent with the objective of protecting children from the harmful effects of international child abduction’ (para. 116).

Baker and Phillips LJJ refrained from expressing a view on the matter as it would have been ‘entirely obiter’ (para. 136). Rather, their Lordships preferred to wait ‘until the issue falls for substantive determination’ (para. 136).

With respect, the conclusion reached by Moylan LJ is at odds not only with the wording of the Convention itself (Preamble, see above), which, it is submitted here, should be accorded greater weight than the Explanatory Report, but also with another provision of the Explanatory Report itself. Namely, paragraph 19 of the Explanatory Report states: ‘[t]he Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities *in the State where the child had its habitual residence prior to its removal*’ [emphasis added]. This provision also supports the argument that the 1980 Convention has to be applied as part of a broader regulatory framework applicable in the area of international family law, in particular instruments that set out rules on jurisdiction for substantive custody proceedings. Such relevant instruments are the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter: ‘the 1996 Convention’), and the Council Regulation (EC) No

2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereafter: 'the Brussels IIA Regulation'). Both the 1996 Convention and the Brussels IIA Regulation state that, in matters of parental responsibility, jurisdiction to deal with the substance of a matter is vested with the courts of the state of the child's habitual residence (Arts. 5 and 8 respectively). The state of the child's habitual residence is regarded as the most appropriate forum given its proximity to the child and, consequently, likely availability of relevant evidence. The 1996 Convention and the Brussels IIA Regulation also provide that the state of habitual residence retains jurisdiction after an abduction until specific requirements have been met (Arts. 7 and 10 respectively). Consequently, 'returning' a child to a third state could mean that 'that state had no substantive jurisdiction to make welfare decisions' (para. 45). Not less importantly, such 'return' order could be seen as effectively amounting to a relocation decision reached without attendant welfare inquiry (cf para. 117). Such orders need to be avoided. Indeed, as was submitted on behalf of the mother, 'the word "return" means return and not relocation to a third state' (para. 41).

Disclosure statement

No potential conflict of interest was reported by the author.

Reference

Pérez-Vera, E. (1981) Explanatory Report on the 1980 HCCH child abduction convention. Available from: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2779>.