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WHY DO INTERNATIONAL COURTS AND APPEAL COURTS GET IT WRONG IN HAGUE CONVENTION AND RELOCATION CASES?

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Introduction

It is now recognized that courts having international jurisdiction have difficulty in understanding the fundamental principles of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Hague Convention), and that the question posed by Professor Linda Silberstein in her Paper "The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: Has the European Court of Human Rights Overstepped its Bounds?" has to be answered in the affirmative[1].

But it appears that appeal courts in many countries also have difficulty with two of the main foundations of the Hague Convention: that the courts of the child's ordinary residence are the appropriate forum for considering the welfare of the child, and not the courts of the country to which the child has been taken; and the need, under Articles 1(a) and 11, to act promptly. Despite the fact that in all jurisdictions courts have stated clearly that the exceptions in Article 12 and Article 13 (b) – that the child

[1] I have been assisted in preparing this paper also by an article by Jeremy D. Morley, *The Hague Abduction Convention and Human Rights: A Critique of the Neulinger Case*, including the update.

has settled, or that return of the child will place the child in an intolerable situation – must be interpreted narrowly[2], some courts have regarded the exceptions to the rule as the rule.

In many of these cases there is also a wilful (or maybe inadvertent, but no more excusable) breach of Article 16 of the Hague Convention, which states explicitly that the courts of the country to which the child has been abducted shall not determine the issue of custody[3] until a decision has been made not to return the child. By allowing issues of the welfare of the child to play a part in the decision whether to order the return of a child, the issue of custody is *de facto* decided, since a decision not to return the child places the applicant parent in an impossible position – in order to conduct the custody proceedings he must hire a lawyer and attend the court in a country which may be entirely foreign to him, and contend with the passage of time which will usually favour the parent with whom the child lives.

In addition, when ordering the return of an abducted child, or when permitting transnational relocation of the child[4], some appeal courts have failed to take steps necessary for ensuring continuing contact between the child and one of the parents.

[2] See Elisa Perez-Vera, Explanatory Report on Hague International Child Abduction Convention, Hague Conference on Private International Law, at pp. 428-29 , 430, 435.

[3] The present paper is of course based on the terminology in current use. But see section on "Inappropriate Concepts", *infra*, p. 16*ff*.

[4] In this paper, I do not deal with the relocation of non-custodial parents, since I am not aware of leading cases which have discussed these issues, or of legislation which restricts the freedom of a non-custodial parent. However, the effects on the child of a move by his parent to a distant location may be extremely serious. The move may preclude direct physical contact, or reduce it to infrequent and expensive visits which may require long journeys. The child may perceive the move as a rejection, or at least a diminution of his importance in the eyes of such a parent. It seems that the "right" of the non-custodial parent to change his place of residence is regarded as absolute, while that of the custodial parent is more limited. But the responsibilities of each parent include having appropriate contact with the child and allowing the other parent to have such contact, so there should be no difference in the approach which courts should be taking, whether a parent wants to move the child to a location distant from the other parent or a parent wants to move to a location more distant from the child.

This paper will attempt, by reviewing selected judgments of courts having international jurisdiction, and appeal courts in various countries, to understand why these errors have become widespread, and to suggest ways to remedy the situation.

The Errors and Why They Happen

Misunderstanding the Hague Convention - Non-Specialist Judges

While in many countries family cases are dealt with at first instance by specialist judges, although not always in Family Courts, appeals against decisions and judgments by trial courts are dealt with by appeal courts of general jurisdiction. The judges who hear the appeals may have little or no familiarity with the highly specialized field of family law, and the subspecialty of abduction and relocation.

Anon v. Anon – Israel

An unfortunate example of this phenomenon is to be found in the judgment of Israel's Supreme Court: FLA (Family, Leave to Appeal Application) 741/11 Anon. v. Anon. The court consisted of three justices, none of whom had dealt, at the Bar or on the Bench, with family cases at first instance, and had little or no exposure to relocation or abduction cases. The principal opinion was given by a justice whose entire career at the Bar and as a judge prior to her appointment to the Supreme Court was in criminal cases.

The case turned on the issue of consent or acquiescence of the father to the child remaining in Israel; the parents, both Israelis, had gone to live in the USA; the mother returned to Israel for a visit and decided to stay; the patents conducted negotiations as to whether the child would stay in Israel or return to the USA, but no signed agreement was reached. Two of the justices found that there was a valid defence to the return of the child under Article 13(a) of the Hague Convention; one of the justices found that the father had consented to the child living in Israel, and another held that although there was no consent, there was acquiescence. The

dissenting justice found neither consent nor acquiescence, and found for the father[5].

The disturbing part of the judgment of the majority is in paragraph 36:

> "For my part, the welfare of the child requires that the proceedings relating to her custody be conducted in Israel and not in the USA. For most of her life, the child, **who is not yet two years old** *(emphasis in the original*) has lived with the applicant *(the mother)* who is the dominant personality in her life, especially considering the extended stay of the father in the USA, apart from the child, which continues to this day. Given the separation between the parents, return of the applicant *(the mother)* and the child to the US for the purpose of determining the issue of custody is liable to place the applicant in an intolerable position, which will, at the end of the day, be contrary to the welfare of the child."

Note the use of the phrase "in an intolerable position" in relation to the mother; in Article 13(b) of the Convention, this phrase refers to the child being placed in an intolerable position, not the parent.

The learned justice goes on to say that it is not to be expected that the parents will continue to live under the same roof; that the mother's status as a tourist will not permit her to work and she will not be able to finance separate accommodation for herself and the child, and if she does work she will be liable to be deported; and although this likelihood is remote, it would be inappropriate to risk separation of the child from her mother, which would be contrary to the welfare of this small child. Alternatively, continues the learned justice:

> "…it may be that the applicant will be forced to return to live with the respondent under the same roof, but in view of the prolonged

[5] The dissent was clearly in line with paragraph 4.4 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 2001: "Efforts to achieve an amicable resolution of the issues should not be construed as giving rise to an acquiescence or consent".

> separation and alienation demonstrated by the parties during these legal proceedings, it is reasonable to assume that cohabitation of the parents, who are not at peace with one another, would be contrary to the interests of the child."

For these reasons, "and in particular the child's **tender years** *(emphasis in the original)* and the applicant's legal status in the USA", the child's welfare requires that the custody proceedings be conducted in Israel, and that the child should not be returned to the USA for this purpose.

The learned justice states earlier in her judgment that the lower courts had conditioned the return of the child upon the father depositing $10,000 for the child's maintenance and on proof that he had commenced custody proceedings in the USA. Thus her assumptions about the living arrangements appear to be largely unfounded. But the critical issue is this: as the learned justice herself points out, she had rejected the father's claim on the ground that the father had consented to the child remaining in Israel and also, in paragraph 34 of her opinion, that the mother's defence of severe damage to the child had been dismissed by the lower courts, and in any case required a very high standard of proof and the opinion of an expert that there were extreme circumstances, which had not been provided. So the learned justice's assumptions, not based on adequate evidence, as to the risks to the mother, have no place in the judgment.

I would suggest that the underlying reason for including this unnecessary material in the judgment is the failure to understand that the issue of the welfare of the child is, in the absence of one of the exceptions in Articles 12 and 13 of the Convention, a matter for the court of the place of the child's habitual residence. Although judges of international and appeal courts are aware that in ordinary matters relating to children, the welfare, or best interests, of the child are the paramount or principal consideration – see, for example, Article 3 of the UN Convention on the Rights of the Child: "In all issues concerning children… the best interests of the child shall be a primary consideration" – they seem to ignore the absence of this wording from the Hague Convention. It seems that they cannot break out of the idea they must, in all cases, without exception, determine the

best interests of the child. Only judges who have knowledge and experience in the field can grasp that that the object of the Hague Convention is to ensure the proper forum for proceedings relating to the child, and that the absence of reference to the general principle of the welfare of the child is no coincidental. The states parties to the Hague Convention agreed in Article 16 that determination of the proper forum serves best the interests of the child, and the desire of the court of the child's present location, to decide what is best for the child at the time the case comes before it, must retreat in favour of the jurisdiction of the courts of the child's habitual residence.[6]

Asvesta v. Petroutsas – USA, Greece

Of course, not all appeal courts suffer from this lack of understanding. In a brave judgment[7], the United States Court of Appeals, Ninth Circuit rightly criticized the refusal of the One-Member Court of First Instance in Piraeus to order the return of a child, under the Hague Convention, from Greece to the USA. After that decision, against which it appears no effective appeal was filed in Greece, the father brought the child to the USA, and the mother filed proceedings under the Convention, for return of the child to Greece. The US District Court granted the mother's petition, saying that comity required it not to interfere with the Greek court's dismissal of the father's Hague Convention petition.

The Court of Appeals found that the Greek court's decision was not worthy of comity, accepting the father's submission that:

[6] The situation is further clarified by the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996. Article 7(1) provides that "In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State…" Article 7(3) provides that where no new habitual residence has been established, "the authorities of the Contracting State to which the child has been removed of in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child". But not all countries signatory to the 1980 Abduction Convention have signed the 1996 Convention.

[7] *Asvesta v. Petroutsas* No. 08-15365 (Judgment of 4 September 2009)

> "The Greek court's ruling… improperly focused on matters relevant to the merits of a custody determination and made findings plainly unsupported or contradicted by the evidence… The Greek court's analysis of the merits of Petroutsas' (*the father's*) Hague petition misapplies the provisions of the Convention, relies on unreasonable factual findings, and contradicts the principles and objectives of the Hague Convention".

The Court of Appeals was aware of the danger that failure to accord comity might damage the mutual trust between states and their courts which is "necessary for the Convention's continued success", but recognized that the success of the Convention "relies on the faithful application of its provisions" by the courts of all contracting nations. Where the Greek court contravened the fundamental premises or objectives of the Convention, there was no basis for mutual trust.

The importance of this decision is that the US Court of Appeals was fully aware of the objectives of the Hague Convention and the crucial importance of uniform interpretation of its provisions. Unfortunately, not all appeal courts are able to do what is necessary to advance the interests of all children, which depend on compliance with the Convention, even when compliance appears to oust the jurisdiction of the court of the place where the child happens to be.

Cantor v. Cohen, Ozaltin v. Ozaltin - USA

However, a court not familiar with family law may be unwilling to tackle cases involving the Hague Convention, or to limit their treatment of such cases to matters within their field of comfort.

The US Court of Appeals, Fourth Circuit, demonstrated in *Cantor v. Cohen*[8] its unwillingness to tackle an access application under the Hague Convention, *inter alia* on the grounds that federal courts "generally

[8] 442 F. 3d 196, 2006

abstain from hearing child custody matters"[9]. The federal court of appeals upheld by a majority the decision of the district court to dismiss the mother's claim for enforcement, under Article 21 of the Hague Convention, of her access rights to her children, which had been granted by the Rabbinical Court in Israel. The district court was of the opinion that only the state courts had jurisdiction, despite the provisions of the enabling statute, the International Child Abduction Remedies Act (ICARA), at s.11603(b), which clearly provide that state and federal courts have concurrent jurisdiction, and that:

> "any person seeking to initiate judicial proceedings under the Convention for return of a child or for arrangements for organizing or securing the effective rights of access to a child may do so by commencing a civil action by filing a petition for relief sought in any court which has jurisdiction of such action…"

The Fourth Circuit Court of Appeals, following the district court, relied on Article 21 of the Hague Convention, which provides that

> "an application for organizing or securing the effective rights of access may be presented to the Central Authorities in the same way as an application for the return of a child",

as precluding a direct application to the court. This interpretation, as pointed out in the dissenting opinion, and recently also by the US Court of Appeals for the Second Circuit in *Ozaltin v. Ozaltin*[10], interprets the phrase "may be presented" as meaning "may only be presented". The court ignored the words "in the same way as an application for the return of a child", which clearly refer back to Article 12, which provides for the initiation of judicial proceedings in the case of wrongful removal and retention, without recourse to the Central Authorities. There is a similar provision in Article 29, specifically providing for direct applications to

[9] Quoting *Cole v. Cole*, 633 F. 2d 1083, 1087 (4th Cir. 1980)

[10] Case 12-2371, judgment delivered 11 February 2013

courts for enforcement of access rights "whether or not under the provisions of this Convention".

It seems that the Fourth Circuit Court of Appeals in *Cantor*, following five previous federal district court decisions which decided that they had no jurisdiction to deal with access, erred as to the intention and objectives of the Hague Convention, and it is hard to escape the conclusion the they feared being put in the position of having to deal with issues beyond their area of experience. They were apparently of the opinion that, by dealing with enforcement of a foreign access order, they would have to deal with issues of custody – which is plainly not the case.

It remains to be seen whether the US Supreme Court will be asked to decide between the contradictory judgments, that in *Cantor* by the Fourth Circuit, and that in *Ozaltin* by the Second Circuit.

Neulinger v. Switzerland - European Court of Human Rights

This defective understanding of the objects of the Hague Convention is one of the reasons for the decision of the Grand Chamber of the European Court of Human Rights (hereinafter ECtHR) in the case of *Neulinger*[11]. Relying on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the European Convention), the ECtHR determined the case contrary to the principles of the Hague Convention[12].

Professor Silberman has referred in her article at p. 13 to the criticisms of *Neulinger* by the Supreme Court in England, particularly as to the arrogation of the investigation of the "entire family situation" to the courts of the country to which the child has been abducted. And Jeremy Morley points out at p. 19 that the Supreme Court in England in *Re E*

[11] *Neulinger and Shuruk v. Switzerland,* 41615/07 [2010] ECHR 1053

[12] Article 8 of the European Convention is entitled "Right to respect for private and family life", and Article 8(1) provides :"Ëveryone has the right to respect for his private and family life, his home and his correspondence". It is not clear why the ECtHR preferred the mother's right to family life over the father's right, especially since the mother was responsible for the disruption in the child's family life.

(Children) [2011] UKSC 27 made it clear that a proper interpretation of Article 8 of the European Convention requires reunification of families, so that if a child is not reunited with the left-behind parent, the state to which he has been abducted will be in breach of Article 8.

If it should be suggested that the provisions of the Hague Convention conflict with those of the European Convention, the rule of interpretation, that *Lex specialis derogat legi generali,* a law of specific application prevails over a general law, is entirely appropriate to this issue. The European Convention is of general application, and is designed to protect families from interference by state or other authorities; the Hague Convention deals with a very specific set of circumstances, where the family has already been disrupted by separation of the parents and removal of the child to a location which prevents or obstructs the proper contact of the child with one of the parents. In such a case, the courts, as representing the state, are obliged, under the European Convention itself, to interfere so as to ensure family life for the child.

X v. Latvia - European Court of Human Rights

The judgment of the majority of the Chamber of the ECtHR in the case of *X v. Latvia*[13], now pending in the Grand Chamber, is based on the same faulty reasoning as *Neulinger*. The Latvian courts had rightly decided that the mother's Article 13 defence, of psychological harm if the child were returned to Australia, was without merit, but the ECtHR, by a 7-2 majority, held that those courts should have conducted an "in-depth examination of the entire family situation". It is to be noted that the dissenting opinion in *X v. Latvia* states unequivocally that "…the majority has assumed a function going beyond the competence of this Court" where the Latvian courts had assessed all the relevant material.

[13] App. No. 27853/09 ECHR 13 Dec 1011

Raban v. Romania-- European Court of Human Rights

In the ECtHR case *Raban v. Romania*[14] the trial court in Romania had ordered the return of the children to Israel at the father's request, but the Bucharest Court of Appeal found in favour of the mother, finding (on the basis of highly suspect evidence) that life in Israel was dangerous, that the father had consented, and that the children were well settled in Romania. The ECtHR dismissed the father's application, holding that in a Hague case the courts in the state where the child is located must determine what is best for the child.

To say that the ECtHR has driven a coach and horses through the Hague Convention does not overstate the case[15].

Failure to Consider the Ramifications of Relocation or Abduction – Non Specialist Judges

Where a child is removed from one country to another, and for this purpose it matters not whether the removal is lawful (by agreement, by order of the court allowing relocation or compelling return after abduction) or unlawful (abduction), there is always a need to ensure continuing contact between the child and both parents. This is the case even where after the removal, the child and both parents live under the same jurisdiction.

Courts ordering or permitting relocation or return of a child often make orders relating to contact, including by telephone or other electronic means, and also for vacations and trips so that the child can meet with the

[14] [2010] ECHR 1625

[15] The ECtHR is used to conducting detailed investigations in cases involving removal of individuals from one state to another, since a substantial part of its jurisprudence deals with applications relating to deportation, extradition and removal of aliens. These applications often allege that in the courts of the destination state the applicant will not receive a fair trial against Article 6 of the European Convention, or will be subjected to torture against Article 3. Such applications are not usually time-sensitive. It may not be inappropriate to speculate that the court feels that such an investigation is justified in all cases, including abduction cases.

parent. However, the courts of one country are powerless to enforce these orders in another jurisdiction, so arrangements must be made for orders to be given by the court having jurisdiction in the country to which the child is to be removed[16].

These orders, sometimes called mirror orders, are essential, especially in cases where the parent, with whom the child is moving to another country, did not comply with contact arrangements when the parents lived in the same jurisdiction[17].

The courts have a clear interest in preventing unnecessary litigation. Awareness of the availability of mirror orders, and willingness to hold off on giving final judgment for removal until mirror orders are in place, put the court in a better position to bring the parties to agreement; a parent may be more inclined to agree to removal if there are in place enforceable arrangements for contact.

Likewise, a parent taking the child to another country may be more likely to agree to enforceable orders for contact with the other parent, if there are also enforceable orders for payment of child maintenance.

Courts may also order the giving of guarantees for payment of maintenance, such as deposit of a sum in advance with a trustee, or signature of guarantors in the country to which the child will be taken.

Both parents should have an interest in agreeing about the child's home arrangements, education and health care provisions, and if they do not do so, the court ordering the relocation will often make interim orders which

[16] At the International Judicial Conference on Cross-Border Family Relocation, held in Washington D.C. in March 2010, representatives from several countries and experts from the Hague Conference on Private International Law issued the so-called Washington Declaration. Clause 4 contains a list of factors relevant to decisions on international relocation, which include practical arrangements, such as provision for accommodation and schooling for the child, and: "(xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination".

[17] There are indeed conventions on reciprocal enforcements of judgments, but the procedures are often cumbersome, and the respondent to such an application can defend the action and bog the applicant down in expensive and time consuming litigation. Mirror orders, by definition, require no further litigation and are immediately enforceable.

are to be in force until the courts having jurisdiction in the place to which the child will be taken have determined these matters.

Such arrangements will be useless if there are no means of enforcement. In particular mirror orders will be essential where a child is ordered to be returned after abduction, on the application of a parent who has abused the child or the other parent, or at least the court ordering return has before it satisfactory *prima facie* evidence to this effect. In such a case, return should only be ordered after satisfactory protection orders or injunctions have been provided in the jurisdiction to which the child is to be taken[18].

Finally, the party who has abducted the child may be liable to arrest and incarceration on return to the state of habitual residence, because of the illegal abduction or for other associated offences; and sometimes that parent, or the left-behind parent, may not be able to enter that country without a visa or residence permit, or because of pending legal actions against him. In most cases, the child will need to be accompanied to the state of habitual residence by the abducting parent, and the order of return will be irrelevant if no arrangements are made prior to the return to avoid these consequences[19].

[18] In Civ. App 4391/96 *Rowe v. Rowe* [1997] 50(5) P.D.338, the Israeli Supreme Court was satisfied that the father, whose return application to England, was granted, was a danger to the child, and conditioned the return upon obtaining orders from the court in England that the child would be in the exclusive custody of the mother, who herself would be at risk of violence by the father; that the father would not be permitted to have any contact with the child except by order of the court, which would decide after considering the opinions of experts; that the father should have no contact whatsoever with the mother, unless the court in England should decide otherwise; that the father would pay all living expenses of the child and the mother who was free to choose the place of residence; and that he should deposit the sum of 5,000 pounds sterling with the mother's lawyer to guarantee maintenance payments.

[19] As an example of comprehensive undertakings made by a father, who was successful in his application for return of his children under the Hague Convention, and which were to be translated into mirror orders in the court of competent jurisdiction in South Africa, see *Director- General, Department of Families, Youth and Community Care v. Hobbs* [1999] FamCA 2059. In that case, before the Family Court of Australia, the father undertook: to refrain from instituting or supporting any criminal or civil charges arising from the abduction by the mother; to withdraw any charges pending against the mother; to pay the costs of the child's air fare to South Africa; that the child would remain in the care of the mother if the mother accompanied the child, until the South African court should decide otherwise; but that if the mother would not accompany the child, then the father would accompany the child, who would remain in his care; that he would initiate proceedings for custody, access and maintenance of the child within 48 hours of the child's arrival in South Africa; that until decided otherwise, the agreement

In all of these circumstances, the order for transfer of the child is only part of the judgment which needs to be given by the court ordering return. Unfortunately, too often the appeal court, when ordering that a child should be transferred abroad, thereby overturning a decision by the trial court to refuse a return order under the Hague Convention, or refUSal of an application for relocation, simply allows the appeal, without ensuring that proper safeguards, which are intended to serve the interests of the child, are in place.

In a case which came before me at first instance in the Family Court, I refused the application of a mother to relocate with two small children. The mother had, while in Israel, done everything within her power to stymie contact between the father and the children. The country to which she wanted to take the children is over 24 hours away from Israel by air. In addition, there was evidence before me that if the father were to travel to that country, he might be arrested for tax or other offences.

The mother's appeal to the District Court succeeded, and the case came before the Supreme Court on the father's application for leave to appeal. The Supreme Court preferred the "right" of the mother, who was very unhappy in Israel, to decide where she wanted to live, over the children's interest in maintaining contact with the father. The Supreme Court did make orders as to contact and visits, but made no attempt to find out how such orders were to be enforced, nor did it remit the case to the trial court to complete the arrangements for contact, and discharged the *ne exeat* order that had been in force. The father applied to the Family Court for clarification of the arrangements, but the mother had left Israel with the children immediately after the Supreme Court gave its judgment. The children were deprived of enforceable arrangements for contact with the father; the mother had no assets in Israel which could have been distrained, and of course an order of imprisonment for contempt of court would be useless.

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between the parents relating to custody with the mother and access to the father, which was in force before the abduction, would continue in force until otherwise decided; and that he would finance private tuition for the child.

In this case the *ne exeat* order should have remained in force, and the removal of the children should have been stayed, until the courts in the destination country had made a mirror order about contact and visits, and until the authorities in that country confirmed that the father would not be arrested and detained if he visited, and would be allowed to leave after seeing the children.

The framing and giving of legal force to mirror orders can be accomplished speedily and efficiently by direct communication between judges of the international Hague Network of Judges; these judges are familiar with the law and procedures necessary for effective mirror orders and can ensure that they are made promptly by the relevant courts and other authorities.

The Time Factor - Court Administration

Court administrators in charge of listing cases may be inclined to regard appeals relating to abduction and relocation as regular civil appeals, and may not be aware of their urgency; and, as we have seen, the judges may not have the necessary knowledge and experience to see to it that these cases are heard promptly[20].

If that were not enough, many countries include several levels of appeal in the state system; countries having a federal system may allow an additional review of cases, at several levels, after the final adjudication by the highest state appeal court; and international courts, to which application can be made only after exhausting remedies in the relevant country, also include appeal instances. Thus, the time taken to litigate through all levels, and the expenses involved, may play into the hands of

[20] In England and Wales, all Hague cases are heard at first instance in the High Court, Family Division, and the Family Procedure Rules provide that an appeal from a return order requires leave from the first instance judge or the Court of Appeal, and that if leave is granted, a stay is ordinarily granted, but cases are fast-tracked for disposal within 6 weeks. See D.L v. E.L. [2013] EWHC 49 (Fam). In Israel, the Family Court hears the case at first instance, appeals to the District Court are as of right, and leave must be obtained for a second appeal to the Supreme Court.

the abducting parent. The stress suffered by the child arising from uncertainty as to his future, and in many cases from separation from one of the parents, is exacerbated as every day goes by.

The *Neulinger* case exemplifies this timescale. The child was born in 2003; the Israeli court issued a *ne exeat* order in March 2005; the mother took the child to Switzerland in June 2005 and hid him from the father; the father found the child in May 2006 through Interpol; the justice of the peace for the district of Lausanne dismissed the father's application under the Hague Convention; and in May 2007, after a 7 month delay by the court appointed expert, the Vaud Cantonal Court dismissed the father's appeal; the Swiss Federal Court found in favour of the father in August 2007 and ordered the child be returned to Israel. By this stage the child had spent two and a half years after the removal to Switzerland. The mother petitioned the ECtHR, and an interim stay of performance of the return was granted[21]; the first judgment of the ECtHR was given, by a 4-3 majority, in January 2009, ordering return of the child; the mother appealed to the Grand Chamber, which ruled in June 2010. By this time the child had been in Switzerland five years[22].

As Jeremy Morley points out at p. 5, the authorities of the European Union have issued regulations requiring EU courts to use their most expeditious procedure in Hague cases (revised Brussels II Regulation (Council Regulation(EC) 2201/2003), as has Israel in its Civil Procedure Rules (Chapter 22(1)).

The important point here is that the courts, including the judges and the administrators, at various (not all) levels, were ignorant of, or

[21] The U.S. Supreme Court in *Chafin v. Chafin* No. 11-1347. (U.S. Feb 19, 2013) was fully aware of the undesirability of granting a stay of execution of return pending appeals of orders under the Convention, citing the likelihood that routine grant of stays would encourage appeals. In that case the appellant suggested that an appeal would become moot if the child was removed before the appeal could be heard, and, dismissing this suggestion, the court added : "In cases where a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been adjUSting to life in her country of habitual residence, even though the appeal had little chance of success. Such routine stays due to mootness would be likely, but would conflict with the Convention's mandate of a prompt return to a child's country of habitual residence."

[22] See note 13 above as to the possible reasons for disregard of the need for prompt action.

disregarded, the need for prompt determination of abduction cases[23]. As stated, the delay plays into the hands of the abducting parent who can claim that the child is now settled and to transfer the child back to what was his habitual residence would cause further disruption, and even trauma, to the child. This claim is at the least disingenuous – the abducting parent caused the initial disruption and trauma. Nevertheless, the court which hears the case, after a period of many months or even years since the abduction, will consider this kind of submission as going to the welfare of the child.

Inappropriate Concepts - Responsibilities, not Rights

There is, however, an underlying issue which goes deeper than the immediate issues of abduction and relocation. So long as the legal discourse is framed in terms of rights, courts are minded to engage in a discussion of whose rights are stronger, those of the abducting or relocating parent, those of the left-behind parent, or those of the child. In addition, Article 8 of the European Convention prohibits interference with family rights, with no indication of what these rights contain.

As I have written elsewhere, language of rights is inappropriate for a description of family relationships[24]. The preferable language is that of responsibilities – those of each parent to the child, so as to reflect a full understanding of the roles the members of a child's family should play for his healthy upbringing, and adoption by legislators, judges, law

[23] Nigel Lowe identifies three reasons why speedy disposal is important: to deter abductions, to minimise the disruption caused to the child, and to prevent the child from becoming settled. *The 1980 Hague Convention and Timing*, International Family Justice Judicial Conference, Hong Kong, August 2012. The paper also contains statistics as to the time taken to conclude proceedings in various types of cases in various countries, and while it appears that almost no countries process abduction proceedings within the six week target set by international documents, few countries exceed 180 days for disposal.

[24] See my LL.M thesis *Hohfeld Without Rights*, and my paper for the 6th World Congress on Family Law and Children's Rights, *Towards a Convention on Responsibilities and Obligations to the Child*. I have in preparation a paper proposing that parent-child relationships be framed in terms of parental responsibilities and allocation of parenting tasks; and I hope to be able in the near future to present a paper discussing the changes needed, *inter alia* to the Hague Convention, if my suggestions for changes in terminology are accepted.

academics and lawyers of an appreciation that family relationships are a highly complex web of connections on a wide variety of levels, physical, psychological, emotional, and many others.These responsibilities include that of each parent to ensure that the child has a close relationship with the other parent despite the failure of the relationship between the parents; such a responsibility will prohibit unilateral relocation[25], including relocation of the non-custodial parent[26].

The majority in the US Supreme Court in *Abbott v. Abbott*[27] recognized the difficulty inherent in the existence of differing legal traditions relating to the content of rights of custody, and understood the problems of fitting a situation where the father had rights of access and the power to prevent the child from leaving the country where he lived into the Convention's definition of rights of custody. With respect, the Supreme Court's suggestion of creation of a new definition of custody, applicable in cases involving international conventions, is no less problematic than the present situation.

There is an increasing trend in many countries to move away from the use of "custody" and "access" and "visitation" to describe relations between children and their parents[28], so that strengthening the outdated terminology of custody at this time would seem to be anachronistic. However, the question whether the internal law of the place of habitual residence includes a ban on unilateral relocation will still have to be considered in each case; my suggestion here is that the content of that law, rather than the use of specific terminology, is crucial. In other words, courts dealing with Hague Convention cases are called upon to

[25] In Israel s. 15 of the Guardianship Law of 1962 imposes upon parents jointly the power and duty to determine where the child will lives, as part of the natural joint guardianship which exists as a matter of law from the fact of the child's birth, irrespective of the legal status of the relationship between the parents – married, never married, divorced, separated, etc. This provision implies a ban on unilateral relocation, even within the country.

[26] See note 4, above

[27] 130 S. Ct 1983 (2010)

[28] I had the privilege of taking part in the Hong Kong Forum in 2012, which devoted considerable time to this paradigm shift.

understand the definition of rights of custody, in Articles 3 and 5, in the country of ordinary residence of the child.

How to Make Things Better

From the above it will be clear that all is not well with the way in which abduction and relocation cases are dealt with by appeal courts and courts of international jurisdiction. Of course, courts of first instance also make mistakes, arising out of some of the defects referred to in this paper, but it is the role of appeal courts to put right these mistakes and give guidance for the future.

Family proceedings, especially those where children are involved, have potential for severe harm if not dealt with correctly.

In abduction and relocation matters, the stakes are very high. A child may have been separated from one of his parents, and the result of a judgment in a Hague Convention case may be to render the separation permanent, or to make one of the parents dissatisfied with having the abduction reversed. In a relocation application, also, one of the parents is likely to be deeply disappointed. Regardless of the result, during the course of the proceedings the children and the parents will be under stress and uncertainty, and this will be at the expense of time, resources and emotional availability to answer the child's needs.

It appears that in recent years more and more jurisdictions have reached the conclusion that Family Law is a specialised field, requiring at the least an acquaintance with other, extra-legal disciplines and techniques – psychology, social work, psychiatry, mediation and the like. For this reason, many jurisdictions have set up departments, if not separate courts, at the first instance level, to deal with family cases[29].

However, it is rare for appeals against judgments and decisions of these trial courts to be heard in separate Family Appeal courts, and this may be because there are not enough appeals to justify a separate judicial and

[29] Section 2(c) of the Israel Family Courts Law 1995 provides that a person is qualified to be appointed as a Family Court judge if he has "knowledge and experience in this field".

administrative apparatus, or for budgetary or other reasons. Unless an attempt is made to ensure that judges who have knowledge and experience in the Family Law field sit in the appeal courts, the appeals may be heard by judges for whom family proceedings, and the allied disciplines, are unfamiliar. It can be assumed that a judge who is appointed to an appellate court, or indeed a court of international jurisdiction, is an eminent jurist with a fine legal mind; it cannot however be assumed that he has all the experience and knowledge, and the mental and emotional qualities, required for adjudicating highly charged family cases.

It is this lack of familiarity, and the consequent lack of confidence or overconfidence (both are possible adverse results of lack of knowledge), which lead to the inappropriate decisions we have pointed to earlier.

Lack of understanding of the underlying principles of the Hague Convention, in particular those relating to the proper forum and the need for prompt action; excessive regard for the supposed rights of the parents and disregard of their joint and mutual responsibilities to the child; the failure of court administrators to familiarise themselves with the time restraints and the need to prioritise these cases; and lack of familiarity with the care needed in drafting judgments and orders - all of these contribute to the unsatisfactory results in many cases.

There are, I suggest, a number of steps which need to be taken. Judicial reform, in the sense of setting up specialist family courts or divisions, at the trial and appellate level, may require legislation or indeed be practically impossible, at least in international courts. However, most jurisdictions have some institutions or arrangements for judicial in-service training and for keeping administrative staff aware of what is required of them.

Education

A number of failures of the system can be remedied by a short but concentrated programme of education.

At all judicial levels, state, federal or international, cases involving the future and welfare of children should be dealt with by judges who have had the benefit of a short seminar given by experts, practitioners and academics, in the relevant fields: law, developmental psychology, social work and the like. Familiarity with the Hague Convention, its ideology and the case law which has developed over the years, with the advantages of mirror orders, and with the services available, including the Network judges, should avoid some of the mistakes described above.

Court administrators also need to be familiar with the special need for prompt listing and disposal of relocation and abduction cases, and the possibility of contact with their opposite numbers on other countries so as to facilitate easy and quick communication of orders and judgments for action in both countries.

Each jurisdiction will find the proper persons to carry out training of judicial and other officers. But it is to be expected that the Central Authority under the Hague Convention in each jurisdiction will have at an interest in encouraging such courses and will play a role in the education of those involved, since it is they who are in direct communication and whose workload is probably increased if the judicial authorities do not carry out their roles competently and expeditiously.

Where lawyers represent parties in cases of this kind, it is essential that they be familiar with the law, precedents and procedures which are unique to this field. It is likely that some of the erroneous decisions, or delay in giving decisions, could have been avoided if the lawyers appearing had politely drawn the attention of the court to the special characteristics and requirements of these cases. There is, therefore, a need for educational resources for lawyers, and a realisation that a lawyer who is unfamiliar with the material is negligent, and in breach of his duty to his client, if he takes upon himself to advise and appear in cases for

which he is unqualified. It is for Bar Associations, or others concerned with training and certification of lawyers, with the involvement of Central authorities, to make the necessary arrangements.

Constitution of Courts

It is preferable, where possible, that all the judges dealing with abduction and relocation cases should be experienced in family law and have the relevant extra-legal knowledge; but at the very least, one of the judges of the court hearing a particular appeal should have familiarity with the relevant material, from previous judicial experience or from attending an appropriate seminar. The presiding judges of appeal courts hearing such cases should be aware of the need for such training and should instruct those responsible for allocation of cases to ensure that the bench hearing these cases contains at least one judge who can advise his colleagues where necessary.

Conclusion

It is my hope that by drawing attention to some of the reasons for mistakes by appeal and international courts in abduction and relocation cases, and by modest recommendations for changes, this paper will contribute to prompt and efficient disposal of these highly charged and fateful cases.

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