CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0)20 7957 5700 E: contact@chathamhouse.org
F: +44 (0)20 7957 5710 www.chathamhouse.org
Charity Registration Number: 208223

International Law Discussion Group Summary

'Abductors Keepers': Is the International Law on Child Abduction Working?

Professor Nigel Lowe

Cardiff Law School, Cardiff University

Henry Setright, QC

Barrister, 4 Paper Buildings Chambers; Reunite

Chair: David Bentley

Associate Fellow, International Law Programme, Chatham House

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INTRODUCTION

This is a summary of an International Law Discussion Group meeting on 31 January 2013[1] on the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) (the Hague Convention).[2]

This summary is divided into three main sections. The first section covers remarks made by Professor Nigel Lowe, in which he explained his research on the Hague Convention and gave a number of reasons why proceedings under the convention have been taking longer in recent years. The second section summarizes the presentation of Henry Setright, in which he surveyed the jurisdictional landscape of abduction cases, and explored the approach of the European Court of Human Rights to the 1980 Hague Convention. The final section summarizes the ensuing discussion.

PROFESSOR NIGEL LOWE

Nigel Lowe has been a Professor of Law at Cardiff Law School since 1991 and Head of School since 2010. He is an expert on family law and is a specialist in child law and in particular, international child law.

Professor Lowe's presentation focused on the Hague Convention and research that he has conducted on various international trends in child abduction cases.

Hague Convention

The 1980 Hague Convention on Child Abduction is a multilateral treaty that seeks to protect children from the harmful effects of abduction and retention across international boundaries, providing a procedure to bring about their prompt return to their home country[3] and facilitating rights of access. The Abduction Convention is the most ratified and acceded to convention in the world concerning children and currently boasts 89 contracting states; yet others have plans to accede to the convention in the near future.

The convention requires that applications for return are made to the country where the child is physically located, that is the country to which he or she has been taken or retained by the abductor. The convention envisages that applications are limited to the issue of return, and that the fuller consideration of matters pertaining to custody is to be had in the child's 'home state' (that is, where he or she is 'habitually resident')

The theory behind limiting procedure under the convention is twofold. First, it avoids children having to remain outside their home country for the extended period of time that litigation on the merits of the case would take. Second, evidence generally speaking is more readily attainable in the child's home state.

Central authority

To assist the parties to achieve the Hague Convention's objectives, each contracting state is required to set up a 'Central Authority.' The operating body for England and Wales is the International Child Abduction and Contact Unit (ICACU), located in London. It is the principal recipient of applications from other contracting states.

When processing an application for return, the ICACU first determines whether the application conforms to the requirements of the convention, including the requirements that the child is located

1 This summary was compiled by Annie O'Reilly.
2 Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=24.
3 Article 1(a). An English judge has described it as a remedy designed to be one of 'hot pursuit.'

in the jurisdiction and is under 16 years of age. Next, the application is assigned to a firm of solicitors, chosen from a panel of approved firms. The solicitors then apply for legal aid for their client, which is obtained without regard to means or merits in England and Wales.

Six-week standard

Article 11 of the convention sets a six-week standard for the length of time within which a case under the convention should be concluded – but the provision is far from definitive. Article 11 reads:

> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.

Council Regulation (EC) No 2201/2003 of 27 November 2003 ('the revised Brussels II Regulation') concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility applies to all EU contracting states to the Hague Convention, except Denmark. It underlines the need for speed and reinforces the six-week standard (see further below).

Special commission

At roughly five-yearly intervals, a special commission is convened in The Hague to review the convention. In advance of the meeting, Professor Lowe and his research assistant, most recently Victoria Stephens, distribute a questionnaire to all of the central authorities, asking them to report on each application they have received during the year. This survey, which is carried out as close in time to the commission as possible, examines the outcome every application up to 18 months after the calendar year of the research (i.e. up to 30 June 2010 in the case of the 2008 survey), with the aim of assessing how quickly applications are being processed.

The findings from the latest survey presented to the commission in 2011 showed a dramatic increase in the number of applications compared to the previous survey in 2003. This strains resources and slows the process of return. The 2008 data shows that, on average, cases resulting in judicial return were resolved within 112 days, whereas cases resulting in judicial refusal to order return took 222 days to resolve. The target for both is 42 days (six weeks). Both of these figures show a marked increase from previous period for which data is available.

Disturbingly, perhaps, fewer applications ended with the child being returned than in the previous reporting period. However, the convention recognizes return of the child is not always the best solution, so it cannot be automatically assumed that a lesser number of returns should trigger concerns.

Research on England and Wales

England and Wales is a star jurisdiction, but even there the process is becoming slower, which is why Professor Lowe recently undertook research aimed at identifying methods for improving England and Wales's compliance with the six-week timeframe.

In order to determine which sectors were performing poorly, Professor Lowe broke down the process into phases to compare how long each phase took to complete. The conclusion he came to was that each component worked to its maximum ability, meaning that it was not obvious how to improve efficiency (without also increasing resources).

The ICACU transferred applications to solicitors within, on average, three days.

Solicitors issue proceedings in court usually within two days, though due to some outlying exceptions, the average is eight days.

Cases on average are resolved in the first instance within 70 days.

If the case is appealed (a rare occurrence) the average additional time is seventy-nine days. Just a couple of cases went all the way to the Supreme Court. This might suggest that a separate timeline for appeals is necessary.

This should demonstrate how difficult it is to meet the convention's six-week standard. The conclusion that Professor Lowe's team came to was that there were no steps that could be taken to speed up the process. They were, however, able to identify a number of factors that helped explain why the six-week standard is so difficult to comply with in many circumstances:

Appeals

The appeals process inevitably delays final resolution of cases. England and Wales is an unusual jurisdiction in that there is no right of appeal from judicial decisions on international abduction; leave to appeal must be sought from the court. This has helped limit the number of appeals in England and Wales to just four per cent of cases, whereas the global average is about 24 per cent.

Language issues

The UK interpretation and translation system works quite well but there has been a recent cut in fees which will have an overall impact on the functioning of the system.

Increased caseload

England and Wales is the second busiest jurisdiction in the world, following the United States. Between 2003 and 2008 a significant rise in the number of applications was experienced, from 290 to 383 applications. The case load continued to grow between 2008 and 2011, though not as dramatically. At the moment many cases in England and Wales involve Latvia and Poland, which appears to be related to the economic downturn.

Other factors

Other factors that tend to slow the system down include government cuts to legal aid (which affects respondents – applicants are still favourably treated); exceptions to the presumption of return being argued more frequently; children as young as six being now regularly consulted and for whom welfare reports have to be written, and the increasing incidence of separate representation for children.

The lesson learned is that the requirement of processing applications within six weeks is a good idea in theory, but not in practice. Further, it is unenforceable: there is no remedy in the Hague Convention for failure to comply with the six-week obligation. The revised Brussels II Regulation attempts to make the obligation a legal requirement but is unsupported by adequate legislation.

One possible avenue of redress is the European Court of Human Rights (ECtHR), which has been used where cases have proceeded too slowly. In *Shaw v. Hungary*,[4] for instance, the ECtHR referred to the six-week obligation in finding that the ECHR was breached, where 11 weeks elapsed before the outcome of the first appeal was announced and 13 weeks elapsed before the outcome of the second appeal.

4 Available at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3618031-4101431#

Brussels II cases

In 2008, Professor Lowe carried out research on the average court disposal time for cases in which both states were subject to the revised Brussels II Regulation. He found that Northern Ireland had the fastest average for disposing of cases – just 17 days – but noted also that only two applications were received during the relevant time period. Finland and England and Wales also performed well at 42 and 43 days respectively. At the other end of the scale were Romania, Poland and Bulgaria at 190, 206 and 303 days respectively – well outside the six-week (42-day) target.

Conclusion

Professor Lowe argued that the Hague Convention on Child Abduction is the best available framework for dealing with international child abduction, but that in order to remain relevant, process pursuant to the convention must be prompt.

HENRY SETRIGHT QC

Henry Setright QC specializes in international children's and family work including cases in the UK Supreme Court, the Court of Justice of the European Union, and the European Court of Human Rights, and as lead English counsel in an Amicus brief in the United States Supreme Court. He is one of the originators of the Reunite/Nuffield Foundation pilot scheme for mediation in child abduction cases.

Mr Setright spoke on his own behalf and also on behalf of Reunite International Child Abduction Centre, which he said was the leading UK-based charity specialising in the movement of children across international borders, which works with the relevant arms of government on all aspects of child abduction issues but remains entirely independent.[5] Its objectives include raising awareness of child abduction and working with all those involved to enhance prevention, speedy resolution, and co-operation in the interests of children and families caught up in what is a uniquely emotional field.

Governing law when convention does not apply

Mr Setright explained that when a child is abducted from one country to another in circumstances where neither an international convention nor a bilateral agreement governs, then the matter is dealt with according to the domestic law of the country to which the child is taken. In England and Wales, the welfare of the individual subject child is paramount in these cases. In some national jurisdictions – for example, in Sharia-law countries – cross-cultural distinctions can lead to a distinctive approach when considering an application for the return of an abducted child.

The 1980 Hague Convention

The 1980 Hague Convention, a very successful worldwide instrument, is not designed to enforce orders; it simply provides for the summary return of internationally abducted children to their countries of habitual residence, whether they have been removed from or retained outside of those countries in breach of the rights of a parent or other person or body with parental responsibility. Nor does it distinguish between primary carer parents, and parents who have parental responsibility but are not main carers. Thus, a child abducted by a primary carer mother to this country is just as likely to be returned as is a child taken by father with parental responsibility, but who only enjoys contact with the child. .

5 See www.reunite.org

The Hague Convention merely allows for cases meeting the requirements of the convention to be fast-tracked. If the basic criteria are met, the limited provision for a non-return is if one or more of the defences listed in the convention is established: (a) that there is a grave risk that the child's return will expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation[6] (b) that there is consent or acquiescence, from the other person, institution or body having care of the child[7], or (c) 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 her or his views.[8] Even then, the court still has the discretion to return.

European Regulation – Brussels II

As Professor Lowe also explained, there is a relatively recently established European system that embodies the 1980 Hague Convention but is designed to co-ordinate and regulate choice of jurisdiction, and to provide for the mutual enforcement of orders. Under the regulation, if Parent A has a custody order for the child in France, and in breach of that order Parent B takes the child to England, Parent A can obtain a certificate in France which can be directly enforceable in England. This marks significant progress, but at the moment, this only covers the European Union countries.

1996 Hague Convention

The 1996 Hague Convention predates the European regulation, but is similar in approach. Support for it was much slower in coming than was the case with the 1980 Hague Convention, possibly because it seeks to do much more than the latter: like the European regulation it obligates the signing country to conformity of jurisdiction and conformity on enforcement of orders. It only came into full effect in the United Kingdom in November 2012.

Reunite is firmly of the view that, notwithstanding the benefits of the regulation approach, the 1980 Hague Convention is extremely important because it provides a worldwide standard, to which an ever-increasing number of countries subscribe. Further, Reunite is of the opinion that the trend in recent years for cases to take longer to resolve is not due to any fault of the convention, but is more likely rooted in the growing diversity of cases. Typical cases are still decided quickly. But 1980 Hague Convention cases, although summary, are judicial proceedings, as opposed to administrative proceedings, which means that some disputed cases – a minority – may be complex, and take a relatively long time to resolve compared with the straightforward majority.

The 1980 Hague Convention's role in promoting consistency

One of the curiosities of the convention is that it is an international convention without an international court, which means that the individual countries must decide the cases. While a worldwide consistency of approach is a goal, inevitably it is not always achieved.

Abbot v. Abbot[9] was the first Hague Convention case to be decided in the US Supreme Court. Mr Setright led an English team for Reunite which was granted permission to intervene in the proceedings. The issue was whether a right of veto against removal is sufficient as a right of custody. The court decided that it was sufficient as a right of custody, which was also the approach to the definition of custody in England and Wales, achieved in an earlier decision of the House of Lords. The US Supreme Court took into account the advantages of conformity and congruence, given the international dimension. This demonstrates how the convention can help to promote consistency among jurisdictions.

6 Article 13(b)
7 Article 13(a)
8 Article 13
9 Available at http://supreme.justia.com/cases/federal/us/560/08-645/.

There is, however, inevitably a certain amount of diversity in approaches with respect to a number of issues. But, Mr Setright suggested, that is the price one pays for a fairly loose international convention, which binds wholly independent jurisdictions.

Welfare of the child

Reunite is particularly concerned with the growing trend in the ECtHR to delve into welfare considerations in deciding Hague Convention cases.

In *Neulinger and Shuruk v. Switzerland*[10] the ECtHR appeared to say that courts are required fully to examine the child's welfare in Hague Convention cases. But this approach if taken literally risks precluding the summary procedure that is the essential basis of the 1980 convention, and rendering nugatory the concept of a return to the country of habitual residence, for the full welfare investigation to be undertaken there, and not in the country to which the child was abducted.

Two recent cases in the UK Supreme Court, in which Mr Setright appeared, and which were set against this background of ECtHR jurisprudence, also spoke to the issue of the extent to which the welfare of the child ought to be considered under the 1980 Hague Convention: *Re E* in 2011 and *Re S* (in which Mr Setright appeared instructed by Reunite as an intervener) in 2012. In between these two cases the ECtHR handed down its first judgment in the case of *X v. Latvia (2011)*.

In *Re S* Lord Wilson stated as follows:

> In the present appeal Reunite has drawn to this court's attention that on 13 December 2011, in *X v Latvia* (Application No.27853/09), the ECtHR (Third Section) has unfortunately reiterated, at para 66, in terms identical to those in para 139 of the *Neulinger* case, the suggested requirement of an in-depth examination in the determination of applications under the Hague Convention. With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction, as Reunite requests us to do, that neither the Hague Convention nor, surely, article 8 of the European convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be entirely inappropriate.[11]

X v. Latvia is currently awaiting a final judgment following a hearing in the ECtHR's Grand Chamber in which proceedings Mr Setright led a team on behalf of Reunite also as an intervener. Reunite's concern is that the ECtHR runs the risk, if the approach in *X v Latvia* and *Neulinger* is affirmed, of making the 1980 Hague Convention unworkable, by importing a welfare element which undercuts the sensible, consistent disposable of Hague cases.

There are diverse, speculative views as to what will be the outcome of this case, and as to what will happen internationally to the 1980 Hague Convention if the Grand Chamber maintains the above-mentioned approach. Mr Setright said that he was, in this context, an optimist.

10 Available at http://www.incadat.com/index.cfm?act=search.detail&cid=1001&lng=1&sl=2#.
11 In the Matter of S (a Child) [2012] UKSC 10.

DISCUSSION

Processing cases from different communities

One participant asked whether there was evidence to demonstrate that applications emanating from certain social groups – for instance immigrant communities – were more difficult to process than others. He noted that Latvia, in addition to being the poorest of the Baltic states is also home to the highest number of ethnic Russians, and stated that it might be interesting to learn if any differences had been observed between cases against members of the Latvian and Russian communities.

Mr Setright pointed out that Professor Lowe's statistics, based on English cases, could not deal with matters of this kind, and that he could not answer the question directly. He suggested that research in Latvia would resolve the point. Internationally, local conditions might result in a diversity of effectiveness of approach. Mr Setright noted that the ECtHR has achieved some positive results in this field,[12] by requiring states to 'beef up' their internal systems to find and retain children, and ensure that return is actually effected after an order has been issued. There have been particularly noticeable improvements in this respect in Spain.

Professor Lowe observed that Latvia performs well overall in processing child abduction cases, and is in the process of legislating to improve its performance. He conceded that the number of cases in Latvia was increasing, but ironically perhaps, this might also help it to process cases more efficiently because it provided them with more experience and encouraged the building of greater capacity to handle the growing number of cases.

Whether an in depth consideration of welfare is appropriate

Another participant asked whether the speakers would agree that the ECtHR's move towards an in depth consideration of the child's welfare, while desirable insofar as a review of the child's welfare may not be guaranteed in the state to which the child is returned, at the same time undercuts the Hague Convention's central objective, which is to ensure speedy return.

Professor Lowe agreed with this assessment and stated that the ECtHR in his opinion had overstepped this line. In most other areas of the law, he noted, the European system is very welfare-oriented, so it is perhaps unsurprising that they have adopted the same approach in Hague Convention cases.

Mr Setright pointed to *Re S,* in which the court addressed the extent to which the child's welfare ought to be taken into account under an Article 13(b) case regarding grave risks.[13] The court in that case held that the child's welfare ought only to be taken into account to the limited extent provided for in Article 13(b). Many other states follow the same approach and, in Mr Setright's view, this approach is necessary in order to make the convention work. He added that it is absolutely right that not *all* children ought to be returned, such as where a grave risk to the child exists, but proportionately those cases are likely to be relatively rare.

Situations where children are in care

Another participant asked whether any specific legal issues arise when a child is abducted from a children's home. Professor Lowe observed that the Hague Convention does not distinguish between different rights of custody; all persons or organisations having a right of custody are treated equally.

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12 See *Ignaccolo-Zenide v. Romania* (2001), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58448#; *Iglesias Gil & AUI v. Spain* (2003), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-745898-758695#.

13 Article 13(b) reads: '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 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.'

Mr Setright noted that cases involving children abducted from care are relatively common, and both the 1980 Hague Convention and Brussels II are capable of handling such situations, and others which are distinct in character from 'ordinary' parental abductions. He had appeared in a reported case where an English court found that a child had been wrongfully retained when not returned to an adoption agency in Texas, and had appeared in another case which addressed the issue of foetal surrogate abduction. Although the case was found not to be governed by the Hague Convention, a 'return' was ordered in exercise of the inherent jurisdiction of the court. He said that although these cases present all sorts of complexities the Hague Convention, backed up where necessary by a national jurisdiction, has proved sufficiently flexible to address them. On this point, Professor Lowe added that the English system is far more flexible than the largely codified continental legal systems, where they find it more difficult to deal with unusual cases.

Origin of cases

Another participant asked how many of the cases discussed during the Chatham House Meeting involved Europe and North America by comparison to those involving states from other parts of the world, for instance Bangladesh, Pakistan and India, that have not signed up to the convention.

Professor Lowe answered that about 60 per cent of cases in the courts of England and Wales involve other European states, many of which are from Ireland. Cases involving Australia and North America are also common, but, he noted, there are cases in the courts of England and Wales from all over the world. And while there are African and Middle Eastern cases, many of these will not fall under the Hague Convention.

Mr Setright stated that in his experience the greatest source of non-convention traffic is the Indian sub-continent – Pakistan, India and Bangladesh. There are also significant numbers of cases from the Gulf States and North Africa.

It was agreed by both speakers that the Hague Convention is truly global, and is not restricted in its practical application to Europe and America. Professor Lowe said the biggest bloc of countries where it operates outside Europe and North America is Latin America. As more Pacific countries join the convention, there will be significant regional traffic.

Two regions which remain largely outside the convention are Central Africa and the Islamic world, which in broad terms finds it difficult to reconcile Hague Convention terms with its own laws.

Civil v. criminal process

Another participant asked whether the speakers had observed any tension, whether in theory or in practice, between the civil and criminal forms of redress.

Mr Setright stated that criminal and civil remedies can be complementary and can also create tension. To illustrate complementarity, he explained that quite often the threat, or the substance, of a criminal process has the indirect effect of securing a return which might be seen as an incentive for the left-behind parent to pursue criminal charges.

Tension could hypothetically arise where a very young child who is still being breast-fed is abducted by his or her primary carer mother who alleges that the father has been abusive towards the child. If the father proceeds with and obtains a return, and if there is also a warrant for the mother's arrest for criminal abduction, then the child may lose her or his primary carer if, on return, the mother is taken into custody. This could result in the father obtaining custody of the child before there has been a finding in the court of the country of habitual residence on whether he has been abusive. The alternative is that the child is placed in care, which is also far from ideal. These dilemmas often arise, and can be dealt with by undertakings not to pursue a prosecution if the child is returned.

Mr Setright added that, in December 2011, the Criminal Division of the Court of Appeal indicated that Article 8 human rights could not be relied on to mitigate the wrongfulness of abduction; that abduction was a very serious offence; that it may be under-prosecuted; that the maximum statutory sentences were too low and that relatively substantial custodial sentences were appropriate. He stated that Reunite's view is that the criminalization of abduction on balance serves an important objective.

Middle East

Another participant asked whether there was a central authority for the Middle East, and how courts deal with culturally specific notions of the welfare of the child.

Professor Lowe pointed out that many Middle Eastern countries are not parties to the convention, and to the extent that that is the case there is no need for a central authority. There have been a number of attempts to reach bilateral agreements or memoranda of understanding, but the problem has by no means been resolved. The Malta Process, which has been ongoing for some years, was established in order to address these sorts of issues. And while there is a tendency to place Islamic countries in one bloc, there is considerable diversity among Islamic countries.

He said meaningful progress on the establishment of adequate legal standards is very difficult, except on a country-by-country basis, and that Morocco was a very interesting example in that regard, being party to both of the Hague Conventions.

Mr Setright added that there are also multilateral agreements in some groups of Middle Eastern counties which operate reasonably well because of a conformity of outlook in these Sharia jurisdictions, so perhaps from the point of view of Islamic countries, the problem lies with the West.

He noted some Sharia law jurisdictions would take the view that an adoption was impermissible, so that the rights of adoptive parents do not exist under the law and there may be problems in successfully applying the 1980 Hague Convention under such circumstances.

In his concluding remarks, the chairman said his former Home Office colleague Aleck Thomson, had he been able to be present, would have emphasized the need for close cooperation between border controls and the local social services in ensuring the proper treatment of children crossing borders. Practice at Heathrow for instance was exemplary.

Mr Thomson's consultancy, at the instance of the European Commission, had participated in a comprehensive review of EU regimes and mechanisms concerned with the cross-border protection of children. It was hoped that the final report will be published later this year.