A polished convention?

Daniel Sanders discusses recent cross-border disputes involving Polish children and considers the way the Hague Convention and Brussels II Revised have been applied

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With the expansion of the European Union in recent years and the resultant free movement across Europe of the workforce comes the inevitable movement of families and the formation of new relationships. This in turn creates an international dimension to family life, and with that, an increased international focus on family law and an increased frequency of cross-border disputes. Poland joined the EU on 1 May 2004, and in Southampton alone it is estimated that there are now some 25,000 Polish immigrants within a city population of approximately 250,000. This article will outline the basic principles of the Hague Convention and Brussels II Revised, and will focus specifically on cross-border disputes concerning children, together with a snapshot of recent Anglo-Polish litigation, which sheds some interesting light on the way international child law principles have, or have not, been applied.

The Hague Convention

The Hague Convention on the Civil Aspects of Child Abduction has been in force since 1 December 1983 and boasts 74 worldwide signatories. In essence, the Convention is a civil mechanism designed to counter child abduction, which provides within its articles for parents who are:

- seeking the return of their children; or
- seeking access to their children; where
- the children are under the age of 16 years; and
- the children have been wrongfully removed from their country of habitual residence; or
- wrongfully retained in another jurisdiction by another person (usually the other parent, who overstays on holiday having been given limited permission to travel in the first place); and
- the removal or retention is without the permission of the other parent or the court in the country of habitual residence; and
- the parent seeking the return of their children has been exercising the right of custody up to the point of removal or retention.

There are specified defences to abduction (outlined in Article 13 of the Convention) which are, broadly, limited to:

- the acquiescence of the aggrieved;
- the child's views (subject to age and maturity considerations);
- circumstances in which a return to the country of habitual residence would present a grave risk of harm to the child; and
- circumstances in which the child would be placed in an intolerable situation if they were returned to the country of habitual residence.

An administrative body known as the Central Authority deals with an application made by an aggrieved

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parent. The Central Authority for England and Wales is based at the Office of the Official Solicitor and Public Trustee and is known as the International Child Abduction and Contact Unit.

The key issue to be determined at the centre of any Convention dispute is therefore simply where the child is habitually resident. The idea here is that the 'home' country is, generally, best equipped to deal with any issues of child welfare that arise.

Family lawyers have been grappling with the concept of habitual residence for many years and will need little reminder that it is not defined in any legislation but, rather, is often purely a consideration of the country in which an individual ordinarily lives.

The spirit of the Convention is very much based on cooperation between member states, given that it is recognised by the Convention signatories that the interests of children are of paramount importance – a theme very much echoed in s1(1) of the Children Act (CA) 1989 and in which family practitioners are well versed, with matters of a child's welfare being the court's paramount consideration.

Article 5 of the Hague Convention refers to both the 'rights of access' and the 'rights of custody' of a parent. The former is easily reconcilable with established contact provisions and permissions that family lawyers are familiar with. The latter, however, does not sit comfortably with the concept of residence as embodied in CA 1989. A right of custody is more about the decision-making process for a child and who may be entitled to determine the place of residence for the child. In this sense, it is more akin to parental responsibility than residence. This poses a significant problem therefore for the unmarried father who has not acquired parental responsibility. In such a case, if the mother decides to move abroad, the father will face an uphill struggle under the Hague Convention to force a return of the child and succeed in an argument for the return of the child to the country of habitual residence, because the father has no *de facto* rights of custody.

Practitioners should note that it is not for the Convention to determine issues of 'custody' or 'access' but rather to determine the place of

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Brussels jurisprudence

Brussels II Revised (Council Regulation (EC) No 2201/2003) came into force on 27 November 2003 and applies, non-exhaustively, to jurisdictional conflicts concerning orders and agreements relating to residence, contact and parental responsibility made since 1 March 2005. Brussels II Revised is an expansion of Brussels II (Council Regulation (EC) No 1347/2000) and underpins international principles for the prompt return 'home' of children in abduction cases. In this sense, Brussels II Revised supplements the Hague Convention in a useful way, given that the main difficulties faced in abduction cases are where orders made in one jurisdiction are not recognised or enforced in another country. Brussels II Revised remedies this jurisdictional loophole.

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The aims of Brussels II Revised can be more specifically summarised as follows:

- to extend the already established rules on mutual recognition and enforcement of Brussels II to all decisions on parental responsibility;
- to reinforce the obligation of the courts to order the return of children abducted within the EU (signatory members); and
- to establish, as a fundamental principle, that the most appropriate forum for matters of parental responsibility, rights of custody and rights of access is the country of the child's habitual residence.

Brussels II does not apply to Schedule 1 to the Children Act 1989 or to any other financial or maintenance provisions regarding children.

In the context of cross-border children disputes, Brussels II Revised affords the opportunity for the parent in the 'home' country to be heard before the other country makes a decision on whether or not to return the child. Brussels II Revised also allows the home parent to apply to the court in their own country to seek the mandatory return of the child on the basis of Hague Convention principles surrounding habitual residence. If, on hearing the application, the court is satisfied, then under Brussels II Revised any such order made by that court must be followed by the other country.

It is noteworthy, however, that under article 15 the court retains discretion to transfer proceedings to another jurisdiction of its own motion if it considers another jurisdiction to be better placed to hear the case, and where this would be in the best interests of the child.

habitual residence, thus enabling the appropriate court in the appropriate jurisdiction to deal with the wider issue of the child's future residence or contact.

The Polish cases

In *Re S (Brussels II Revised: Enforcement of Contact Order)* [2008] a seven-year-old child of Polish parents was removed to England with the mother. This was not a wrongful removal, however, as the father's parental rights were limited and he only had some ordered provision for contact. Under Polish law this did not amount to rights of custody. Accordingly, the mother did not have to inform the father of her planned move out of the jurisdiction – and indeed she did not.

The contact, predictably, ceased shortly after the move to England. The Polish Court attempted to enforce the order but dismissed the father's free-standing application concerning parental responsibility, as well as the mother's own retrospective application for leave to remove the child from the jurisdiction on the basis that it considered that the child was now habitually resident in England and therefore the child's future ought to be decided by the English courts.

The father applied to the English courts, seeking recognition of the Polish contact order under Brussels II Revised, and enforcement of that judgment accordingly.

The English Court recognised the Polish order but, as the child was now habitually resident in England, it felt that a fresh approach should be taken to future welfare considerations for the child. That fresh approach was to protect contact between father and child and to place stricter controls on enforcement (by way of penal notices) for any further breach by the mother, given the history of breaches. A new order was therefore made by the English Court, replacing the Polish order.

This case is eye-catching if for nothing more than the English Court's decision to recognise an order made in another jurisdiction but to fall short of enforcing it on the basis of the circumstances of the particular case, which required a 'fresh approach'. Following this decision, it is difficult to conceive of a scenario where, in the aftermath of a lengthy and complex jurisdictional dispute, a court would conclude that a fresh approach was not appropriate, particularly where the place of habitual residence was deemed to have changed. The very fact of a change of habitual residence would, it seems, always mean a significant change of circumstances, requiring a fresh approach.

In *F v M & N (Abduction: Acquiescence: Settlement)* [2008] there was a wrongful removal of a four-year-old child from Poland to England in circumstances where, within Polish proceedings, the father held an interim residence order. By the time the father had gone through the correct channels under the Hague Convention, the child had been in England for almost two years.

The father claimed that he had not been advised about the Hague Convention, but showed evidence of many other endeavours to actively seek a remedy to the wrongful removal, including his raising of the issue in ongoing Polish proceedings.

Despite the child having been unarguably habitually resident in England, the Court decided that the child should be returned to Poland so that the Court there could determine the child's future. It was not accepted that there had been any acquiescence by the father to the removal, given his endeavours. The Court went further, saying that while the child had no doubt become settled in England that did not remove the discretion of the Court to order a return.

The decision here was based on having to determine the child's welfare, and because that decision-making process had already been commenced two years earlier, in Poland, the Court there was best placed to conclude that process, which would then steer any future welfare considerations such as contact provision.

The fundamental assumptions embodied in Brussels II Revised about dealing with matters in the country of habitual residence may have been very thinly interpreted in this case, where, despite there being a wrongful removal, the child's position was such that the period of settlement in England was viewed as significant. The proceedings could easily, by the Court's own motion, have been transferred. Instead, the Court did give permission to the mother to apply to vary the interim order and to consider seeking an interim order allowing her to bring the child back to England. If a child is moved from jurisdiction to jurisdiction within short periods of time, on any variation application made by a parent, this could severely limit the child's ability to acquire a habitual residence, or at the very least cause a significant delay in the child doing so. It is unclear from the authorities whether this would be considered to be in the best interests of the child.

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The contrast between *Re S* and *F v M & N* is significant, with the main difference being a lawful removal in one case and a wrongful removal in the other. On the face of it, the Court's approach in *F v M & N* is wholly irreconcilable with that in *Re S*. However, the practical way of looking at the cases is to look at the wording of articles 9 and 10, in particular of Brussels II Revised. In summary:

- Where a child is moved lawfully from one member state to another and acquires habitual residence there, the courts of the former place of habitual residence may retain jurisdiction for three months. This is for the purpose of modifying a contact order made in that jurisdiction before the child moved, unless the parent in whose favour the contact order is made

accepts the jurisdiction of the new place of habitual residence for the child. The new country of habitual residence is free to make its own determinations.

- Where there has been a wrongful removal or retention, the courts of the member state where the child was habitually resident immediately before the wrongdoing shall retain jurisdiction until:

  (a) the child has acquired habitual residence in the new member state; and
  (b) the person with rights of custody has acquiesced in the removal or retention; or
  (c) the child has resided in the new country for at least one year after the complainant had knowledge of the wrongdoing and the child is settled there now, and at least one of the following conditions is also met:

    (i) no request has been lodged for a return of the child within one year of the knowledge of the wrongdoing;
    (ii) a request lodged within one year has subsequently been withdrawn and not renewed within one year of the original knowledge of the wrongdoing;
    (iii) a case opened in the original country of habitual residence before the wrongdoing has been closed and no submissions on the issue of residence received within three months of the closure of the case; or
    (iv) a judgment on custody alone has been made by a court in the original country of habitual residence before the wrongdoing.

The court must therefore carry out a multi-pronged exercise as follows:

- Determine whether there has in fact been a wrongful removal or retention.

- If not, there is a technical process to be followed to ensure that any pre-existing orders in the old jurisdiction can be recognised, enforced or mirrored.

- If there was a wrongdoing, the court must determine whether the new country is in fact the country of habitual residence, whether the complainant has in fact acquiesced to the wrongdoing, and whether the complainant has failed to meet any of the specified procedural criteria set down in article 10. If any of these matters are made out then jurisdiction passes to the new country.

If a child is moved from jurisdiction to jurisdiction within short periods of time, on any variation application made by a parent, this could severely limit the child's ability to acquire a habitual residence, or at the least cause a significant delay in the child doing so.

In *M v M (Abduction: Settlement)* [2008] two children were wrongfully retained in England, following holiday contact with their father, who had relocated from Poland. The father, by consent, returned to Poland with the children following Hague Convention proceedings initiated by the mother. Curiously, the agreement was for the children to live with the father in Poland. The father later returned to England with the children, without permission. The Polish Court then ordered a return of the children to Poland and the father refused to comply. By the time fresh Hague proceedings had been commenced the children had been in England for a year. The issue was whether the English Court should retain jurisdiction.

The Court again decided that the children should be returned to Poland on the basis of a finding that they had not settled and that there had been undue influence on their individual wishes imparted by the father. The Court decided that the children's wishes should not have been given any weight, and that the best forum for the determination of the children's futures was in Poland, which was to be treated as their place of habitual residence. This is another example of the court using its discretion in cases where the established Brussels principles have afforded insufficient clarity or legislative decisiveness to reduce the broad application of discretion under article 15.

Conclusion

In summary, the Hague Convention and Brussels II Revised are designed to provide a clear and established framework for the resolution of international child cross-border disputes. However, the reality suggested by the Polish litigation, which represents just one branch of the voluminous multi-jurisdiction Hague/Brussels litigation, is that the principles are often interpreted in a way that does not necessarily always recognise the spirit of the Hague and Brussels scripts.

In some of the abduction cases, the lack of Hague Convention proceedings being initiated in a timely manner has seemingly resulted in courts having to use their discretion to determine cases through a broad-brush approach. It is hoped that the lack of a uniform approach in different jurisdictions to child law principles in cross-border disputes will not hinder the prompt and correct application of the Hague Convention spirit and Brussels II Revised guidance. ■

F v M & N (Abduction: Acquiescence: Settlement) [2008] 2 FLR 1270
M v M (Abduction: Settlement) [2008] 2 FLR 1884
Re S (Brussels II Revised: Enforcement of Contact Order) [2008] 2 FLR 1358