

Cross-Border Movement of Children after Brexit: Recognition and Enforcement of Orders and the Return of Abducted Children

1. Hello everyone. I'm Dr Rob George, barrister at Harcourt Chambers and Associate Professor of Family Law at University College London. In both my practice and my academic research and teaching, I focus on child law issues, and on relocation, cross-border movement of children and jurisdiction in particular.
2. In this talk, I am going to talk about some of the changes that cases involving the cross-border movement of children face following the UK's final departure from the European Union at the end of 2020. This is a pretty big topic, so inevitably what I can cover is something of an overview, and I hope that is helpful to you in getting a clearer picture of where things are from 2020 onwards.
3. To give you an overview of the talk I will give, I will talk mainly about relocation cases, and then turn more briefly to talk about international child abduction. Within my section on relocation law, there will be three broad areas that I cover. First, I am going to give a quick reminder of relocation law. Second, although not an area with major changes at this point in time, I will talk about internal relocation within the UK, and what the consequences of this are in terms of recognition and enforcement. Then to the final section of this first part of the talk, and I will cover international relocation and go through the main things you need to know about the recognition and enforcement of orders. With that done, I will turn to consider international child abduction and the changes that come about in that area as a result of Brexit.

Relocation overview

4. So, let's begin with a brief reminder about relocation law in general terms. This is an area where disputes are widely recognised as being amongst the most difficult for the parties and for the courts. Relocation cases are applications by one parent who is seeking to move a child to live in a different geographic location, either elsewhere within the UK or more commonly in terms of the litigated cases internationally. While some cases of this nature are resolved by agreement or through mediation, many of them are litigated and end up at final hearings.

5. The legal framework in relation to international relocation disputes is not complicated, but its application to a particular case can be difficult. The decision is governed by s 1 of the Children Act 1989 – the child’s welfare is ‘the only authentic principle’ applicable to relocation cases.¹ Judges must approach the welfare question with reference to the welfare checklist in s 1(3) of the Children Act,² and may be assisted by adopting a ‘balance sheet’ approach.³
6. The higher courts have given significant amounts of ‘valuable guidance’ about how to approach relocation cases, but these judgments must be seen ‘as guidance not as rigid principle or so as to dictate a particular outcome’ to the application.⁴ In other words, ‘the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child’.⁵ Whatever tools are used to assist, ‘the court’s ultimate task is to identify the available options, and to select the one that best meets the child’s welfare needs’.⁶
7. For many years, the Court of Appeal’s decision in *Payne v Payne*⁷ was the source of the principal guidance in international relocation cases. However, while the factors identified as relevant in that case (such as the need to consider the practical plans put in place by the applicant) may remain relevant in some cases,⁸ it is no longer appropriate to treat *Payne* as the leading case. Rather, the ‘required reading’ for those concerned with an international relocation case, as identified by Ryder LJ in *Re F (International Relocation Cases)*,⁹ comes principally from *K v K (Relocation: Shared Care Arrangement)*,¹⁰ and in particular paragraphs 86, 96 and 140-145 of that case. Vos LJ has also offered a helpful summary of the court’s approach in *Re C (Internal Relocation)*.¹¹

As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary

hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

8. One significant issue in most international relocation cases concerns the practical viability of on-going meaningful contact between the child and the non-moving parent. The court will have regard to the arrangements that can be put in place in terms of practicalities (which vary depending on distance and the parties' financial resources), but also in terms of the legal safeguards that can be put in place. And that, of course, links us to the rest of this talk, on the question of recognition and enforcement of orders.

Recognition and enforcement within the UK

9. Moves within England and Wales involve no special considerations at all. If the move is of a significant distance, it may be that any new application to enforce orders that are in place will be best made to a different local Family Court, but otherwise enforcement will be no more difficult – or perhaps that should be no more straightforward – than for any other domestic Children Act order.
10. For moves to Scotland or Northern Ireland, on the other hand, recognition and enforcement of orders is governed by the Family Law Act 1986. The general rule is that any order that falls within Part I of the Act and that relates to a child who is under the age of 16, 'shall be recognised in any other part of the United Kingdom as having the same effect in that other part as if it had been made by the appropriate court in that other part'.¹² 'Part I orders' include s 8 orders under the Children Act 1989.¹³
11. While recognition is automatic, if enforcement is required then the person 'on whom ... rights are conferred' by the relevant substantive order must 'apply to the court which made it for the order to be registered in another part of the United Kingdom'.¹⁴ Provided that the order remains in force, the relevant court must then issue a certified copy of the order and send it to the specified court in the other part of the UK,¹⁵ which is then registered on receipt.¹⁶ If the substantive order is later revoked or varied by the

issuing court, it must notify the courts of the other state, and the registration may be cancelled.¹⁷

12. Enforcement itself is a matter for the domestic law of the part of the UK that has primary jurisdiction at the relevant time. Once an order is registered, the courts of that state ‘have the same powers for the purpose of enforcing the order . . . as it would have if it had itself made the order’.¹⁸ The court has power to make interim directions ‘for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application’ if an application for registration has been made but not yet determined.¹⁹

Recognition and Enforcement of Orders beyond the UK

13. There are two main Conventions that provide for the international recognition and enforcement of private law child orders: the Hague Convention 1996,²⁰ and the Luxembourg Convention 1980.²¹ The former has direct effect in English law,²² whereas the latter is incorporated within the Child Abduction and Custody Act 1985.
14. Under the Hague Convention, recognition and enforcement are addressed in Chapter IV. Where a measure taken in one contracting state is both enforceable in that jurisdiction and is entitled to recognition under the Convention, it must be recognised and either declared enforceable or registered for enforcement in any other contracting state, at the request of any interested party.²³ Recognition in general is governed by Article 23, providing for measures within the scope of the Convention to be ‘recognised by operation of law’ (which is to say, without need for any further court order, for example). There is no standard procedure for this to happen, but where an order is intended from the outset to be recognised in another 1996 Hague Convention state, a recital on the face of the order to that effect is advisable.
15. There is also scope under Article 24 for so-called *advance recognition* of orders, allowing another contracting state to confirm in advance of a child being habitually resident there that it will accept an order made in the originating state – a procedure that is particularly valuable for relocation cases.²⁴

16. There are limited grounds on which recognition of decisions of the original state can be refused,²⁵ and the state being asked to recognise and enforce is forbidden from undertaking a review of the merits of the decision.²⁶ Once recognised in the new state, the original decision must be enforced in the same way as if it were a validly-made domestic order, ‘taking into consideration the best interests of the child’.²⁷
17. The Luxembourg Convention will come into play only where the Hague Convention is not applicable. The Convention covers children under the age of 16, and regulates decisions that relate ‘to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him’.²⁸ Any such decision ‘shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State’,²⁹ with procedural requirements set out in the Convention.³⁰ As with the Hague Convention, reviews of the merits of the decision are forbidden,³¹ and again there are limited reasons why recognition and enforcement may be refused.³²
18. Where neither Convention applies, there is no clear means of recognising or enforcing foreign orders in this jurisdiction. The court has recognised a jurisdiction to make ‘mirror orders’, which reflect the provisions of a foreign order in a new, domestic order, usually prior to the arrival of the child in this jurisdiction (albeit the jurisdiction basis for doing so is expressly unclear).³³ The High Court has held that the inherent jurisdiction can be used to recognise and give effect to foreign orders where doing so supports an international scheme,³⁴ but the scope of this decision is unclear. The recognition and enforcement of English orders abroad will be a matter for the domestic law of the foreign state.

Child abduction

19. While there are changes to the law on international child abduction following the UK’s departure from the EU, those changes are modest, and apply only to wrongful removals or retentions of children within the UK. In all such cases, the 1980 Hague Convention on the Civil Aspects of International Child Abduction will continue to apply.

20. The main differences in practical terms as compared to the pre-2021 situation will be that Article 11 of the Brussels IIA Regulation³⁵ will no longer apply. This means a number of things:

- i. First, theoretically the requirement under Article 11(2) that children in Hague proceedings must be given the opportunity to be heard unless this is ‘inappropriate’ will no longer apply, though in practice this provision has a wider basis in English law in any case, and it is unlikely that any practical difference will be seen.
- ii. Second, again theoretically, the requirement that judgments should be given no later than six weeks after applications are lodged will no longer be a legal requirement – but since that rule was largely honoured in the breach, and EU cases were not given any special status in listings anyway, it probably makes no difference in practice.
- iii. Third, the restriction in Article 11(4) was drop away – this rule prevents a court from making a non-return order on the basis of Article 13(b) of the Hague Convention if adequate protective measures are available upon the child’s return. Again, in practice, this rule is probably inherent in the operation of Article 13(b) anyway, and the court will always ask about protective measures available in cases where Article 13(b) is raised.
- iv. Finally of note, the provisions in Article 11(6)-(8) will cease to apply. These provisions provide for what is referred to as the ‘second bit of the cherry’ in abduction cases, where another EU state made a non-return order under Article 13 of the Hague Convention, the court of previous habitual residence can still make an enforceable return order. In practice, this provision has been next to useless anyway, with judges rarely making such orders and foreign courts even more rarely giving effect to them when they are made.

21. Similarly, the little-used 2013 Regulation on Protective Measures³⁶ will not have effect for proceedings initiated after 31 December 2020. As regards protective measures applicable to adults, such as non-molestation orders or similar protections,

this is a significant loss. However, where protective measures were about the child concerned (such as orders that the child not be removed from the care of a particular person until a further court hearing), in practical terms the Regulation does little that cannot be accomplished under the 1996 Hague Convention. Again, as discussed earlier, that Convention allows for both the recognition of orders after a child has moved internationally, but also permits advanced recognition of orders so the English court and the parties can be clear that the protections ordered will be recognised and given effect to prior to the child's arrival in the other state.

Concluding thoughts

22. To wrap things up, I suppose that in many ways the story of the law about the international movement of children following the UK's departure from the EU is one of significant continuity peppered with some significant changes. While there are some different procedural issues to get to grips with, most of the substantive provisions that we have become used to over the last few years will continue in more or less the same format.

23. I hope that has been a helpful overview. As I say, there is of course a lot more detail to this than I have been able to cover today, and I am always happy to take questions or give advice on any of these issues.

¹ *K v K (Relocation: Shared Care Arrangements)* [2011] EWCA Civ 793, [141] (Black LJ).

² *Re C (Internal Relocation)* [2015] EWCA Civ 1305, [82].

³ *Re F (International Relocation Cases)* [2015] EWCA Civ 882, [29].

⁴ *Ibid*, [142] (Black LJ).

⁵ *Ibid*, [86] (Moore-Bick LJ).

⁶ *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121, [48].

⁷ [2001] EWCA Civ 166.

⁸ *Re C (Internal Relocation)* [2015] EWCA Civ 1305, [83].

⁹ [2015] EWCA Civ 882, [20].

¹⁰ [2011] EWCA Civ 793.

¹¹ [2015] EWCA Civ 1305, [82]-[83]. See *Relocation within the UK*.

¹² *Ibid*, s 25.

¹³ Family Law Act 1986, s 1.

¹⁴ *Ibid*, s 27(1).

¹⁵ *Ibid*, s 27(3).

¹⁶ *Ibid*, s 27(4).

¹⁷ *Ibid*, s 28.

¹⁸ *Ibid*, s 29(1).

¹⁹ *Ibid*, s 29(2).

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- ²⁰ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (“1996 Hague Convention”).
- ²¹ European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980.
- ²² Previously under the European Communities Act 1972, and now under the Public International Law Act 2020 (before Parliament at time of writing).
- ²³ 1996 Hague Convention, Art 26.
- ²⁴ N Lowe and M Nicholls, *The 1996 Hague Convention on the Protection of Children* (Family Law, 2012), [5.6].
- ²⁵ 1996 Hague Convention, Art 26(3).
- ²⁶ *Ibid*, Art 27.
- ²⁷ *Ibid*, Art 28.
- ²⁸ European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (“1980 Luxembourg Convention”), Art 1.
- ²⁹ *Ibid*, Arts 7 and 11.
- ³⁰ *Ibid*, Art 13.
- ³¹ *Ibid*, Art 9(3).
- ³² *Ibid*, Arts 9 and 10.
- ³³ *SW v CW (Mirror Orders: Jurisdiction)* [2011] EWCA Civ 703.
- ³⁴ *Re Z (Recognition of Foreign Judgments)* [2016] EWHC 784 (Fam).
- ³⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.
- ³⁶ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on Mutual Recognition of Protection Measures in Civil Matters.