

# SOME MOOT POINTS ON THE 1980 HAGUE ABDUCTION CONVENTION

*Nigel Lowe\**

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*This article discusses the Hague Convention on the Civil Aspects of International Child Abduction which, despite having been in existence for over 30 years, continues to present a number of uncertainties for Contracting States. The article focuses on the issues around appealing return orders after a child has been taken out of the jurisdiction, the concept of “habitual residence”, and the non-enforcement of return orders with reference to recent case law from the United States, United Kingdom, New Zealand and the European Union.*

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## **I INTRODUCTION**

It is a pleasure to contribute to this celebration of the work of Professor Atkin. I have known Bill for 40 years, having first met him in the mid-1970s when he was visiting lecturer at the University of Bristol. We have maintained contact ever since, fostered in part by our mutual interest in international family law and in part by our long-standing membership of the International Society of Family Law. Bill is undoubtedly a giant among distinguished New Zealand Family Law academics and it has been my privilege and pleasure to have known him for all these years.

The backdrop to this contribution is the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Convention),<sup>1</sup> to which New Zealand became a Contracting State in 1991. The Convention's objectives are set out by art 1, namely:

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are respected in other Contracting States.

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\* Professor Emeritus, Cardiff University. I am grateful to E Parsons (Barrister, Ponsonby Chambers, New Zealand), Professors G Shannon (Law Society of Ireland), L Silberman (New York University School of Law) and R Spector (University of Oklahoma Law Center) for their help.

<sup>1</sup> Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).

Despite the clarity of these objectives the Convention has spawned, particularly in the common law world, a mass of case law, and indeed there is a growing feeling among the English judiciary that Hague litigation has become something of a growth industry. Sir Peter Singer touched on this when he commented in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)*: "I confess that I have over the years developed a mounting sense of frustration at the degree of sophistication with which the Hague Convention ... [has] become encrusted."<sup>2</sup>

While the danger of this contribution is that it may further add to this industry, it nevertheless remains the case that a number of basic issues are surprisingly problematic under the Convention. It is upon some of these that I now focus.

## **II THE PROBLEM OF APPEALING A RETURN ORDER AFTER THE CHILD HAS BEEN TAKEN OUT OF THE JURISDICTION**

One recently raised issue is the position where, following a return order made by the requested state, the child is taken back from whence he or she came and: (a) the respondent lodges an appeal against the return order; or (b) is permitted to appeal and the appellate court reverses the return order. This broad issue has now been considered by the United States Supreme Court, the United Kingdom Supreme Court and the Court of Justice of the European Union (CJEU).

### **A Chafin v Chafin**

In *Chafin v Chafin*<sup>3</sup> (only the second occasion in which the United States Supreme Court has considered a Hague abduction case),<sup>4</sup> the question was whether an appeal could be entertained at all once the parent and child had left the jurisdiction in conformity with a return order. The case concerned a child born in Germany to a British mother and an American father stationed in Germany with the United States Army. Soon after the birth, the mother and child moved to Scotland with the father's consent, following his deployment to Afghanistan. After his transfer back to the United States in 2009, the mother took the child there on a 90-day visa to try to save the marriage. In May 2010 the father filed for divorce and child custody, and in December, following the mother's arrest for domestic violence, the authorities became aware that she had overstayed her visa. She was deported early in 2011. The child remained with her father. The mother then petitioned for her

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2 *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] EWHC 49 (Fam), [2013] 2 FLR 163 at [70].

3 *Chafin v Chafin* 568 US 1 (2013).

4 In the first – *Abbott v Abbott* 560 US 1 (2010) – a *ne exeat* right (that is, a right restricting a removal of a child from the jurisdiction without the right-holder's consent) was held sufficient to confer on a non-custodial parent-father, who otherwise only had visitation rights, "rights of custody" for the purposes of the Convention. Since *Chafin*, a third Supreme Court decision – *Lozano v Alvarez* 134 S Ct 1224 (2014) – held that for the purposes of art 12(2), the one-year period as to whether a child is "settled" is not tolled because the child could not be located. For a discussion of these decisions, see Linda Silberman "United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence" (2014) 9 J Comp L 49.

daughter's return under the Convention, contending that the child had been wrongfully retained in the United States on the basis that, as of May 2010, she was habitually resident in Scotland. The first instance Court agreed and made a return order following which, the father having been denied a stay, the mother immediately took the child back to Scotland. The father's appeal was dismissed on the ground that once the mother and child left the United States the appeal had become moot in that it had become hypothetical since the court ceased to be able to grant the father any effectual relief.<sup>5</sup> The Supreme Court granted the father certiorari to review the appellate decision.

Applying the test that a case cannot be considered moot "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation"<sup>6</sup> save where it is impossible for the court to grant any effectual relief whatever to the prevailing party, the appeal was held not to be moot and the case was remitted for further proceedings.<sup>7</sup> As the Court observed, the dispute was very much alive as to where the child would be raised and, in its view, there was a possibility of effectual relief for the prevailing parent.<sup>8</sup>

The mother had argued that once the parent and child had left the jurisdiction the appellate court had no power to reverse the return order (to make what was dubbed a "re-return order") since it lacked the authority to do so under the Convention. This argument was rejected upon the basis that it confused mootness with a merits argument (that is, it went to the meaning of the Convention and to the legal availability of certain kinds of relief). Because of this ruling, the Court did not rule on the intrinsic validity of the argument, which was surely fallacious. Its basic flaw was to consider the appeal as being entirely separate litigation. The reason that the Convention makes no provision for so-called "re-return orders" is that there is no such thing. In Convention terms the appellate order is simply a refusal to return, nothing more, nothing less.

The more powerful argument was that any appellate return order would be ineffective because it would be ignored by the foreign court in question. But as the Supreme Court said, even if the Scottish court were to ignore the United States return order (which it, in any event, queried)<sup>9</sup> or to decline to enforce it, that did not render the appeal moot. The United States courts would continue to

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5 Which was in line with *Beckier v Beckier* 248 F 3d 1015 (11th Cir 2001), but not with *Whiting v Krassner* 391 F 2d 540 (3rd Cir 2004) and *Fawcett v McRoberts* 326 F 3d 491 (4th Cir 2003).

6 *Chafin v Chafin*, above n 3, at 6.

7 In fact the Appeals court upheld the determination that the child was habitually resident in Scotland and affirmed the return order: *Chafin v Chafin* 742 F 3d 934 (11th Cir 2013).

8 Not least in respect of the liability to pay court costs, attorney's fees and travel expenses.

9 The argument that a pertinent appellate order would be "ignored" was indeed too strong. The standard common law approach is that, while it might not be binding, a foreign custody order would be considered: see *McKee v McKee* [1951] AC 352 (PC). In any event (see below) an appellate return order cannot be ignored since it has potential Convention effects.

have a personal jurisdiction over the mother which would be triggered should she re-enter the United States.

Consequent upon this ruling the Court had no need to consider what, if any, other effects an appellate return order might have. In fact, as discussed shortly, an appellate return order does have a Convention effect inasmuch as, provided the child's habitual residence remains in the state in which the return order is made, not returning the child will be considered a "wrongful *retention*".

While this was enough to determine that the appeal was not moot, the Supreme Court also considered what practical steps might be taken to avoid the problem. In particular, it examined the position with regard to granting stays pending appeals. The Court was alive to the importance of prompt returns of children wrongfully removed or retained under the Convention and to the deleterious effects of shuttling children between parents and across international borders. It therefore considered that manipulating constitutional doctrine by holding cases moot may undermine the Convention's goals and harm the children it is meant to protect. Instead, the Court held that the well-being of the affected children would be better protected by expediting proceedings and granting stays where appropriate. As it observed, the obvious danger of automatic mootness is that it might encourage parents to flee the jurisdiction. While this may be tempered by courts becoming more likely to grant stays as a matter of course to preserve a right of appeal, that would mean that the child would "lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success",<sup>10</sup> which would be contrary to the Convention's mandate of prompt return. On the other hand, the danger of routine stays is that that might, in itself, encourage more appeals.<sup>11</sup>

The majority's solution<sup>12</sup> was to apply the following well-established factors, namely: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. In addition, the Court urged that steps be taken to expedite appeals.

Delivering a concurring opinion, Justice Ginsberg agreed that stays should not be granted as a matter of course but nevertheless noted the English practice of: (a) requiring leave before any appeal may be made; and (b) expediting appeals. She urged that consideration be given to the introduction

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<sup>10</sup> *Chafin v Chafin*, above n 3, at 12.

<sup>11</sup> The Court noted the finding by Nigel Lowe and Victoria Stephens that only 15 per cent of United States court Hague decisions were appealed, as against a global average of 24 per cent: Nigel Lowe and Victoria Stephens "United States of America" in *A Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part III National Reports* (Hague Conference on Private International Law, Prel Doc No 8 C, November 2011) [2008 Survey] at 207.

<sup>12</sup> Delivered by Chief Justice Roberts, relying inter alia upon *Nken v Holder* 556 US 418 (2009).

of such a model in the United States, acknowledging that that would require congressional legislation.

While there seems to be general agreement that appeals should normally be expedited (which, given the time generally taken to determine appeals in Hague cases in the United States<sup>13</sup> is surely the key reform needed), not all agree on the desirability of introduction of a leave requirement.<sup>14</sup> One commentary has suggested that the better solution would be for the court making a return order to make a routine temporary stay so as to permit the respondent to obtain an expedited hearing from an appellate court or judge, who could then determine whether to continue the stay or to permit the immediate execution of the return order.<sup>15</sup> If a stay is granted, an expedited appeal should then follow.

It remains to be seen what, if any, procedural reforms will be introduced in the wake of *Chafin*.

### ***B Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)***

*Re L* concerned a child born in Texas to a married couple of Ghanaian heritage.<sup>16</sup> His father, a member of the United States Air Force, was an American citizen of dual nationality. His mother, who had been brought up in England, had indefinite leave to remain in the United Kingdom. Until the marital breakdown the family lived in Texas. After starting divorce proceedings the father learned that he was to be deployed to Afghanistan. Anticipating this posting, the parents agreed to a temporary order made by the Texan Court by which it was envisaged that the mother and child would continue to live in the matrimonial home in Texas, but which gave the mother authority to determine the child's residence "without regard to geographic location".<sup>17</sup> In July 2008, soon after the father left for Afghanistan, the mother took the child to London where they remained until

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13 According to the 2008 Survey, above n 11, at 207, in the United States the average time to reach a first instance decision was 209 days compared with 441 days to finalise a case that was appealed. Globally, the respective average timings were 168 and 324 days. See also the comments of Robert E Rains "Possession is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases" (2014) 9 J Comp L 253.

14 Though such an approach was recommended for consideration by the Permanent Bureau of the Hague Conference on Private International Law: *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II – Implementing Measures* (Family Law, 2003) at [6.6].

15 Linda Silberman and Robert G Spector "Dissecting *Chafin v Chafin*: the propriety of appeal after return of a child pursuant to the Hague Abduction Convention – mootness, stays and comity" [2013] IFL 189 at 191.

16 *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] AC 1017.

17 See *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 16, at [4].

February 2010 when they were summoned to return to attend a custody hearing at which the father was granted exclusive custody with access to the mother.<sup>18</sup> Until August 2011, the child lived with the father but spent the summer vacation and Christmas/New Year with the mother.

Rather than pursuing her appeal, the mother applied to a United States Federal District Court for a return order under the Convention. Her case was that, as from March 2010, the child's habitual residence was in England and that consequently by acting upon the Texan custody order the father had wrongfully retained the child. The mother succeeded and, soon after the Court's return order, she and the child returned to London.

On appeal, the Court of Appeals for the Fifth Circuit rejected the mother's plea of mootness and reversed the District Court's decision.<sup>19</sup> Following that decision, the District Court ordered, in August 2012, the mother to return the child to the father in Texas. It was to "enforce" that order that the father brought proceedings in England, which were finally determined by the United Kingdom Supreme Court.

The father first contended that the reversed return order retrospectively rendered the mother's *removal* of the child "wrongful" under the Convention. That argument was roundly rejected. As Sir Peter Singer said, it cannot be right to "introduce a fluctuating and unstable concept of wrongfulness through the prism of which a child's situation would diffract differently each time the validity of the order was successfully impugned on appeal", as that would be "a recipe for confusion, expense and above all delay".<sup>20</sup> The correct analysis was held to be that:<sup>21</sup>

... a Hague court-mandated removal of a child to remedy anterior wrongful removal or retention does not in turn constitute a breach of rights of custody of the parent found responsible for the wrongful act. Nor does it become so if subsequently on appeal that parent is exonerated: one cannot in this context make water flow back under the bridge.

Permission to appeal this point in the Supreme Court was refused.

In his second application, the father contended that the mother's *retention* of the child in England after the United States District Court's August 2012 order was "wrongful". Alternatively, he asserted that the Court should exercise its inherent jurisdiction to order the child's return even if

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18 Evidence was heard regarding the mother's duplicity in declaring to the English authorities and the Texan Court of her intention to remain respectively in England and the United States, and about her resistance to obeying an agreed contact order.

19 The mother filed an appeal with the Supreme Court, asking for her case to be consolidated with *Chafin*, but her case was held in abeyance, pending the outcome in *Chafin*. After that appeal was held not to be moot, the mother's appeal in this case fell away.

20 *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)*, above n 2, at [44].

21 At [45].

not required to do so under the Convention. In support of that he offered undertakings to enable the mother to live in Texas independently whilst the child could divide his time between them in a shared care arrangement. That would enable the mother to apply to the Texas Court to modify its earlier custody and access order.

The Supreme Court accepted that the mother's retention of the child contrary to the United States August order could be "wrongful" for Convention purposes but only if, at the date of the reversed return order, the child was habitually resident in the United States. But on the facts the Court was not prepared to interfere with the first instance finding that the child had become habitually resident in England notwithstanding its recognition that:<sup>22</sup>

... courts in other jurisdictions might decline to hold that 11 months' precarious residence here was sufficient integration or acclimatisation to change the child's habitual residence established in his country of birth.

With regard to the father's alternative argument and, taking the view that art 18 of the Convention preserved any domestic law powers to order a child's return (see further below), the Supreme Court considered it appropriate to apply the inherent jurisdiction, which had been the well-established means of dealing with child abduction before the United Kingdom became a party to the Convention<sup>23</sup> and remains an appropriate jurisdiction to resolve non-Hague abductions.<sup>24</sup> As Baroness Hale said, although under this jurisdiction the welfare of the child is the court's paramount consideration that does not mean that the court is obliged in every case to conduct a full-blown welfare-based inquiry into where the child should live.<sup>25</sup> It might well be in the child's interests to make a summary order for return and particularly so if there will be in merits-based custody hearing in the court of the state to which the child is to be returned. Moreover, it is also well-established<sup>26</sup> that in the interests of international comity an order made by a foreign court of competent jurisdiction is a relevant factor.

On the facts, the Supreme Court concluded that the right order was for the child to be returned to Texas. The crucial factor was that he was a Texan child who was currently being denied an opportunity to develop a relationship with his father and with his country of birth.

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22 At [27].

23 For the *locus classicus* upon which, see *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250 (CA).

24 See *Re J (A Child) (Custody Rights: Jurisdiction)* [1995] UKHL 40, [2006] 1 AC 80. Note: this jurisdiction is dependent upon the child being habitually resident or present in England and Wales: Family Law Act 1986, ss 2(3) and 3(1).

25 *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 16, at [28].

26 For this, the Court relied upon *McKee v McKee*, above n 9.

In this roundabout way, the Supreme Court effectively enforced the United States appellate return order.

*Re L* is not without interest with regard to the application of art 18 of the Convention. That provides: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Article 18 can be interpreted either as conferring a general discretion *under the Convention* to order a return or as simply preserving the application of any domestic law powers outside the Convention to order a return. Although at one time the English courts favoured the former interpretation,<sup>27</sup> in *Re M (Children)(Abduction: Rights of Custody)* the House of Lords came down firmly on the latter,<sup>28</sup> citing Professor Pérez-Vera's comments in her Explanatory Report on the 1980 Convention:<sup>29</sup>

Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision ... which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end.

Baroness Hale said:<sup>30</sup>

Article 18 does not confer any new power to order the return of the child, but simply provides that the provisions of the Convention do not limit any *other* power which the court may have to order the child's return. It is contemplating powers conferred by the ordinary domestic law rather than by the Convention itself.

Hitherto, discussion of the application of art 18 has been in the context of deciding whether, notwithstanding the establishment of one of the exceptions to the duty to return, there is nevertheless a discretion to order a return. This is of particular importance in relation to the application of art 12(2) which, unlike art 13, which is clearly drafted in discretionary form, can plausibly be interpreted as admitting of no discretion.<sup>31</sup> It was held in *Re M* that art 12(2) should be

27 See for example *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 WLR 32 at [62] per Thorpe LJ; *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 (Fam); and *Re S (A Minor) (Abduction)* [1991] 2 FLR 1 (CA).

28 *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288.

29 Elisa Pérez-Vera *Explanatory Report on the 1980 Hague Child Abduction Convention* (Permanent Bureau of the Hague Conference on Private International Law, 1982) [Pérez-Vera Report] at [112].

30 *Re M (Children) (Abduction: Rights of Custody)*, above n 28, at [21]. See also Lord Rodger at [7].

31 This was Kay J's view in *State Central Authority v Ayob* (1997) 21 Fam LR 567 and *State Central Authority v CR* (2005) 34 Fam LR 354, and that of Lord Rodger in *Re M (Children) (Abduction: Rights of Custody)*, above n 28, at [6]. In Lord Roger's view, any power to order a return following the establishment of an art 12(2) exception should be exercised under the inherent jurisdiction: see at [7].



interpreted as vesting a discretion to order a settled child's return even where the application is made more than one year after the wrongful removal or retention. Incidentally, the same position obtains in New Zealand,<sup>32</sup> though this is provided for by the implementing legislation.<sup>33</sup>

The significance of *Re L* is twofold. First, it shows that there can be different contexts in which the application of art 18 can be relevant. Secondly, with regard to ordering returns in the context of appealed return orders made in another Contracting State, the consequence of interpreting art 18 as preserving any domestic law powers rather than conferring a Convention power is that each jurisdiction has to look to its own national law. In other words, there is no commonality of position and, indeed it may be noted that civil law jurisdictions have no equivalent inherent powers and consequently no independent powers to order returns. Although this lack of uniform power is offset by the common position obtaining in European States bound by the revised Brussels II Regulation (the Regulation)<sup>34</sup> (discussed below), the overall global lack of uniformity raises the question of whether art 18 might, after all, have been better interpreted as conferring a general *Convention* discretion to make return orders.

## C C v M

### 1 *Brief resumé of the revised Brussels II Regulation*

Before examining *C v M*,<sup>35</sup> a brief introduction to the Regulation might be useful for those unfamiliar with it. The Regulation is an EU instrument which is binding on all European Union (EU) Member States, except Denmark. It applies both to divorce, legal separation and marriage annulment, and to parental responsibility. The Regulation provides for common rules of jurisdiction and for the consequential recognition and enforcement of orders. In the case of parental responsibility, primary jurisdiction vests in the court of the state in which the child is habitually resident,<sup>36</sup> though there are special rules governing wrongful removal or retention.<sup>37</sup> There are

32 See *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289.

33 Care of Children Act 2004, s 106(1).

34 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 2003 OJ L 338 [Regulation], repealing Regulation (EC) No 1347/2000.

35 *C v M* (Case C-376/14) [2015] 1 FLR 1.

36 Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments 2003 OJ L338/1, art 8.

37 Article 10. Wrongful removal and retention are defined by art 2(11) to mean "a child's removal or retention where: (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a decision or by

limited grounds upon which recognition and/or enforcement may be refused.<sup>38</sup> "Parental responsibility" has a wide scope and certainly covers custody and access orders or their national equivalents.<sup>39</sup>

Although by art 60(e) the Regulation takes precedence insofar as it concerns matters governed by it, the Convention is not superseded by the Regulation. Instead the basic scheme is to:

- (a) preserve the pre-eminence of the Convention for dealing with applications for the return of abducted children but nevertheless to give some direction on how that Convention should be applied as between Member States;<sup>40</sup> and
- (b) govern the position in cases where a court refuses to make a return order under the Convention.<sup>41</sup>

The final arbiter on the meaning and application of the Regulation is the CJEU, to which national courts can make references whenever they are uncertain as to application of the instrument and, indeed should do so, unless its meaning is clear (*acte claire*).<sup>42</sup>

## 2 *The ruling in C v M*

In *C v M*, following divorce proceedings, a French first instance court determined that parental authority over the child concerned should be exercised jointly by the parents but that the child should live with the mother with access to the father. An order, expressed to be "enforceable as of right on a provisional basis", permitted the mother to set up residence in Ireland. Following the refusal to stay this provisional order, the mother and child left for Ireland where they lived

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operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility." This definition is similar to art 3 of the Convention.

38 See arts 23 and 31.

39 See art 2(7). Query whether the concept of parental responsibility is wide enough to include return orders made under the Convention?

40 Article 11(2)–(5) directs that when applying arts 12 and 13 of the Convention, courts should ensure that both the child and applicant be given the opportunity to be heard; that except where exceptional circumstances make it impossible, a court should issue its judgment within six weeks of the lodging of the application; and that a court cannot refuse a return upon the basis of art 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

41 Art 11(6)–(8) innovatively provides that following a refusal to order a return, the "abduction court" must notify the court or central authority in the state of the child's habitual residence, which in turn must notify the parties, giving them the opportunity to bring custody proceedings, and, if after a merits-based hearing, the court decides that the child should be returned, it can make an order to that effect which is binding on the "abduction court".

42 See Consolidated Version of the Treaty on the Functioning of the European Union 2008 OJ C 115/47, art 267.

throughout the ensuing two years of litigation. Eight months later, a French Appeal Court overturned the original judgment and ordered the child to reside with the father with access to the mother. The father subsequently obtained a further order transferring exclusive parental authority to him and an order for the child's return. He then applied to the Irish courts for a return order under the Convention together with a declaration that the mother had "wrongfully retained" the child in Ireland. That litigation went to the Irish Supreme Court which made a reference to the CJEU.

The reference sought various specific rulings, the overall nub of which required the CJEU to rule on the application of arts 2(11) and 11 of the Regulation (which concern child abduction) to an order requiring the child's return made on appeal after the parent and child had left the jurisdiction in conformity with an order made at first instance by a court of origin. In other words, although the immediate context was different, the reference before the CJEU raised the same issues as faced by the United States and United Kingdom Supreme Courts.

The CJEU held that where a child has been removed from one Member State jurisdiction to another in accordance with a judgment which was provisionally enforceable in the Member State of origin, the subsequent reversal of that judgment does not render the *removal* "wrongful" for the purposes of art 2(11). However, provided the child remained habitually resident in the state of origin, keeping the child in the requested Member State, against a court ruling fixing the child's residence at the home of the parent living in the Member State of origin, constitutes a "wrongful retention" since it is a breach of rights of custody within the meaning of art 2(9).<sup>43</sup>

The CJEU ruled that it is for the court of the Member State to which the child was taken, to determine where the child was habitually resident immediately before the alleged wrongful retention, but emphasised that in no circumstances can the time which has passed since the appeal judgment be taken into account when determining where the child is habitually resident.<sup>44</sup> The CJEU did not expect it to be common for the child's habitual residence to change in the period pending the appeal. If, however, the court of the Member State in which the child has been retained finds that the child's habitual residence *has* changed it is free to dismiss any return application based on the Convention as applied by art 11 of the Regulation.<sup>45</sup>

### ***D Overall Summary***

The three decisions just discussed establish first, that an appeal against a return order is not rendered academic, or in American terms, "moot", because the parent has taken the child out of

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43 Article 2(9) states (in the same terms as art 5(a) of the Convention) that rights of custody "shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence".

44 *C v M*, above n 35, at [56].

45 In fact the Irish Supreme Court upheld a subsequent ruling that the child's habitual residence *had* changed by the time of the French Court of Appeal decision: *G v G* [2015] IESC 12.

jurisdiction in conformity with the original ruling. Secondly, *removal* is not retrospectively rendered "wrongful" by the subsequent reversal of that order permitting such a removal. Thirdly, however, not returning the child in conformity with the appellate ruling will be considered a "wrongful retention" for Convention purposes provided the child remains habitually resident in the state in which the appellate ruling is made. Fourthly, it is for the court in the requested state to determine where the child is habitually resident at the time of the appellate judgment. In determining that question, the court is required to examine all the circumstances in the period between the first instance and appellate order but not afterwards. Fifthly, if the child's habitual residence is not found to have changed then, as failure to return will amount to a wrongful retention, the requested court should make a return order unless one of the exceptions provided for by the Convention has been successfully established. Sixthly, if the child's habitual residence is found to have changed, there is no Convention obligation to order a return but a court could still do so under its domestic powers, if it has any, as preserved by art 18 of the Convention. But in cases governed by the Regulation, courts will still be bound, subject to the establishment of any defences, to recognise and enforce any order considered to concern parental responsibility as, for example, a custody and access order as in *C v M*.

Of course, these problems could be avoided by staying enforcement of orders pending appeals. In the Convention context, in some jurisdictions, such as New Zealand, England and Wales, and Ireland, this indeed is the norm. However, as the discussion in *Chafin* shows, in jurisdictions where appeals can take a long time to be heard, automatic stays are not unproblematic and in any event, as *C v M* illustrates, the problem is not necessarily confined to out-and-out abduction cases. Nevertheless, it seems clear that in the abduction context the Convention will work better if appeals are limited and expedited at all court levels.

### **III THE MEANING OF HABITUAL RESIDENCE**

#### **A Introduction**

Integral to the foregoing discussion and to the very concept of "wrongfulness", is the question of the child's habitual residence. By art 4, the Convention only applies to a child who was "habitually resident in a Contracting State immediately before any breach of custody or access rights", while by art 3 a child's removal or retention is to be considered wrongful if it is:

... in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention.

Habitual residence is similarly a basic and controlling issue in abduction issues governed by the Regulation.<sup>46</sup>

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<sup>46</sup> See art 2(11), set out at above n 37.

The idea of using habitual residence as the basic connecting factor is to provide a means of identifying the state with which the child has a real and natural connection, thereby seising the courts best placed to determine the child's long-term future. Such a factor has long been thought preferable to the traditional factors of nationality and domicile which can lead to giving jurisdiction to courts of a state to which the child has never been and with which he or she has no real connection.

The test of habitual residence, which is basically designed to identify where the child lives or has his home, was envisaged to be a factual one and, as such, required no definition.<sup>47</sup> In reality, the concept is elusive, not least because of its subjective nature concerning the required quality and duration of residence, which makes the reality of regarding it as having an autonomous<sup>48</sup> and consistently applied meaning exceedingly difficult. But over and above that, the test is beset with a number of basic difficulties to which discussion now turns.

### ***B The Relevance of Intention and Permanence***

Two simple examples illustrate the inherent difficulty in defining habitual residence. First, while it is clear that habitual residence cannot be acquired simply by holidaying in a place, is that because of the intention not to stay there, or because of the brief duration of residence, or a mixture of both? At what point will a holiday period mature into habitual residence, and is it of relevance that the holidays are regularly spent in the same place? At the other end of the spectrum, what is the position if the family move from one jurisdiction to another intending to set up a new home, only for the plan to be abandoned shortly afterwards? Has the original habitual residence been lost; has a new one been acquired and, if so, at what point; or is the child properly regarded as having no habitual residence?

Reflecting these dilemmas is the running tension between insisting that the concept is a factual one, which has been the long-standing "English" position,<sup>49</sup> and the relevance of intention, which is more of an element in the "European" definition. Intention had been particularly relevant due to the "centre of interest" test, which was said to be the place "established, with the intention that it should

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47 See Paul Beaumont and Peter McEleavy *The Hague Convention on International Child Abduction* (Oxford University Press, Oxford, 1999) at 88–90, citing Alexander E Anton "The Recognition of Divorces and Legal Separations" (1969) 18 ICLQ 620 at 629. The Pérez-Vera Report, above n 29, merely says that habitual residence is "a well-established concept in the Hague Conference, which regards it as a question of pure fact" (at [66]).

48 For authority that it has an autonomous rather than a national law meaning, see *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2014] AC 1 per Lord Hughes at [80(i)], relying upon *A (Case C-523/07)* [2009] ECR I-2805 at [26].

49 See for example *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 (CA) at 890 per Balcombe LJ; and *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 at [23]–[25] per Thorpe LJ.

be of a lasting character, the permanent or habitual centre of his interests".<sup>50</sup> Happily, the differences between these two positions have now been reduced almost to vanishing point with the CJEU's abandonment in *A*<sup>51</sup> of the "centre of interest" test under the Regulation. It was abandoned in favour of a new test and the acceptance of the application of that test, not just to applications governed by the Regulation, but to Convention cases generally by the United Kingdom Supreme Court.<sup>52</sup>

According to *A*, "habitual residence":<sup>53</sup>

... must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

*A* was followed by *Mercredi v Chaffe*<sup>54</sup> in which the CJEU re-emphasised that habitual residence must be distinguished from mere temporary residence and, as a general rule, must have a certain duration (though no minimum period was laid down) to reflect an adequate degree of permanence. The Court added:<sup>55</sup>

Before habitual residence can be transferred to host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

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50 See for example *Magdalena Fernández v Commission of the European Communities* (Case C-453/93) [1994] ECR I-4295 at [22]. A similar tension is evident in United States jurisprudence: compare *Robert v Tesson* 507 F 3d 981 (6th Cir 2007) with *Mozes v Mozes* 239 F 3d 1067 (9th Cir 2001).

51 *A*, above n 48.

52 See *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48.

53 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48, at [44].

54 *Mercredi v Chaffe* (Case C-497/10) [2010] ECR I-14309: the first reference under the Regulation from a United Kingdom court.

55 At [51].

The reference to "permanence" in *Mercredi* led to some concern being expressed in the English courts. However, following Sir Peter Singer's analysis in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)*<sup>56</sup> at first instance, endorsed by the Supreme Court in *A v A*,<sup>57</sup> in which he compared the French and English texts of the judgment in *Mercredi*, it is accepted that the reference to "permanence" was not being used by the CJEU in the sense of forever or even necessarily indefinite. Rather, the contrast is with the idea of "temporary" or stability.

While the CJEU test might be thought to provide a reasonable definition of habitual residence it will not guarantee uniformity of approach as individual cases are so fact specific.<sup>58</sup> Moreover, it does not solve all intrinsic difficulties, two of which have recently been faced by the United Kingdom Supreme Court: namely, the relevance of the child's view and the position of newborn children.

### ***C The Relevance of the Child's View***

*Re LC (Children) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* concerned the relevance of an older child's standpoint in establishing his or her habitual residence.<sup>59</sup> In that case, after their marriage broke down, the mother, with the father's agreement, moved with their four children to Spain. The children later returned to England for a holiday with their father and made it clear that they wished to stay. The mother issued Convention proceedings for the children's return. The central question was where the children were habitually resident, the focus being on the eldest child, a 12-year-old girl, who was found to be intelligent with a maturity beyond her years. She said that she hated it in Spain and that it had never been home. The Supreme Court held that her state of mind should have been considered in determining her habitual residence. Although the issue of all four children's habitual residence was remitted for a re-hearing, there was difference of opinion as to the relevance of the younger children's state of mind, with the majority confining their decision to adolescents or those having the maturity of an adolescent, and the minority extending their decision to younger children generally.<sup>60</sup>

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56 *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)*, above n 2.

57 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48, at [51] per Baroness Hale and at [80(vii)] per Lord Hughes.

58 In *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48, at [54(iv)], Baroness Hale thought the test appropriately focused on the child's situation with the purposes and intentions of the adults being merely one of the relevant factors.

59 *Re LC (Children) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038.

60 See respectively, Lord Wilson at [43] with whom Lords Toulson and Hodge agreed, and Baroness Hale at [58], with whom Lord Sumption agreed.

Although *Re LC* must be right in principle, particularly if one takes child's rights as conferred by the United Nations Convention on the Rights of the Child<sup>61</sup> into account, it will not make it easier in any particular case to determine habitual residence, and it remains to be seen whether the majority or minority position with regard to younger children's views will be eventually adopted.

### ***D Determining the Habitual Residence of Newborn Children***

In *A v A* the issue was whether it is ever possible to be habitually resident in a state in which one has never set foot.<sup>62</sup> This question has exercised the courts on previous occasions, particularly in relation to newborn children.<sup>63</sup> The facts were stark. After the breakup of their marriage, the father, who had dual English and Pakistani nationality, returned to Pakistan. The mother, a Pakistan national with indefinite leave to remain in the UK, remained in England with the three children who had each been born and brought up there. Unaware that her husband was already there, the mother took the children to Pakistan to visit her family. But whilst there, her family forced her to reconcile with the father. She was made to give up her own and the children's passports. In effect, she was kept in Pakistan against her will. Whilst in Pakistan she became pregnant and gave birth to a fourth child. She subsequently managed to retrieve her passport and returned to England but without her children whose return she then sought.

At first instance, the Judge made each child a ward of court and ordered their return. However, the question arose as to whether there was jurisdiction to ward the baby who, though a British subject through his father, had never been outside Pakistan. There was no such problem with regard to the older children: they were habitually resident in England and on that basis could clearly be made wards of court.

It was held that there was jurisdiction to ward the baby. The Supreme Court ruled that jurisdiction to ward is governed by the Regulation as it concerns a matter of parental responsibility but falls outside the terms of the national legislation, the Family Law Act 1986 (UK). Although under the Regulation, jurisdiction must normally be based on habitual residence, or failing that,

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61 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

62 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48.

63 See *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388 (Fam), in which Charles J held that "generally a baby of a married couple (who are habitually resident in England at the time of the birth of the child) will also at birth generally be habitually resident in England notwithstanding that he (or she) is born abroad". Compare with *Re F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam), [2007] 1 FLR 626 in which Hedley J commented that while habitual residence might exceptionally be possible notwithstanding physical absence, the usual approach is to look for some physical presence. He refused to make a declaration concerning the habitual residence of a mother and child, the mother having travelled to Israel during her pregnancy with the father's consent and who remained there with the baby after the birth.



presence, by art 14, in cases where no Member State has jurisdiction under arts 8–13, a state is free to apply its own rules. Given that the 1986 Act did not apply to the making of the wardship order, regard could be had to the common law and, in this context, to jurisdiction based on allegiance through nationality.<sup>64</sup> The case was remitted to determine whether jurisdiction should in fact be exercised.<sup>65</sup>

According to the majority, as jurisdiction could be determined on the basis of art 14, there was no need to decide upon the baby's habitual residence. Had jurisdiction turned on that question, a reference to the CJEU would have to have been made as the matter could not be said to be *acte claire*. In fact, of course, it was a necessary consequence of the decision to apply art 14 that the child was found not to be habitually resident in England and Wales, and the majority view seemed to be that a factum of residence is required to establish habitual residence,<sup>66</sup> which also seems implicit in CJEU decision, *Mercredi v Chaffe*.

Lord Hughes dissented, arguing that a requirement that there be some physical presence amounts "to a rule of law at least to the extent that it propounds a general proposition that factual habitual residence *cannot be achieved* without physical presence at some time".<sup>67</sup> In his view it is consistent with the concept that habitual residence can be established in the absence of any physical presence. As he observed:<sup>68</sup>

... it is well established that although rules of law are generally inappropriate the concept of habitual residence is necessarily to some extent a legal one ... And it is well established that habitual residence can and often does co-exist with actual current absence. If current physical presence is not essential, then so can habitual residence exist without any physical presence yet having occurred, at least if it has only been prevented by some kind of unexpected force majeure.

However, while Lord Hughes' approach would achieve the right jurisdictional result, it is surely stretching too far what is intended to be a factual test to hold that a person can be habitually resident in a state to which they have never been. The truth is that the concept does not really work for newborn children and it would be better if both the Convention and Regulation were expressly amended to deal with the point.

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64 As established by *Hope v Hope* (1854) 4 De GM & G 328 (HL); *Harben v Harben* [1957] 1 All ER 379 (Prob) at 381 per Sachs J; and *Re P (GE) (An Infant)* [1965] Ch 568 (CA) per Lord Denning MR at 582 and per Pearson LJ at 587.

65 Which it in fact was. See *A v A (Return Order on the Basis of British Nationality)* [2013] EWHC 3298 (Fam), [2014] 2 FLR 244.

66 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, above n 48, particularly at [55] per Baroness Hale.

67 At [84].

68 At [92].

## IV THE NON-ENFORCEMENT OF A RETURN ORDER

### A *Butler v Craig*

The final matter for discussion is whether it is possible to discharge a Convention return order. In the leading case, the New Zealand Court of Appeal decision, *Butler v Craig*, protracted litigation lasting two years ended in a return order being made under the Convention.<sup>69</sup> However, no steps were taken to enforce the order and the child remained in New Zealand. Eight months after the conclusion of the Hague proceedings, the mother applied under the High Court's inherent jurisdiction for the discharge of the return order. The child was then five years old and had lived continuously in New Zealand for three-and-a-half years.

The mother's application was dismissed. It was common ground that there was no express power to discharge a return order, either under the Convention nor under the then-New Zealand implementing legislation. Furthermore, as all available appellate processes had been exhausted, it was not possible to revisit the finding made in the Convention proceedings. It was equally common ground that there was no scope for invoking the *parens patriae* jurisdiction,<sup>70</sup> as that "would invite a merits based approach, contrary to the objects of the Convention".<sup>71</sup> Instead argument centred on the application of the inherent jurisdiction based on the High Court's supervisory role over inferior courts which, it was argued, gave the High Court jurisdiction to "resolve any unexpected problems arising from the post-return order delay".<sup>72</sup> The Court of Appeal held, however, that in the abduction context, "the High Court's inherent jurisdiction is not available to assist a Family Court when the latter is given express jurisdiction by a statute to exercise originating jurisdiction over all Convention issues".<sup>73</sup> The Court considered whether jurisdiction to discharge a return order could be implied from the power under the Care of Children Act 2004, s 119(1) dealing with enforcement (it accepted that in exceptional cases enforcement could be declined as, for example, whether the applicant had died), but concluded that, tempting though it was to do so, it would "amount to an inappropriate usurpation of the Legislature's functions".<sup>74</sup>

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69 *Butler v Craig* [2008] NZCA 198, (2008) 28 FRNZ 112.

70 The *parens patriae* jurisdiction is part of the inherent jurisdiction (see for example *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA); and *Re an Unborn Child* [2003] 1 NZLR 115 (HC)), which is preserved by s 13(2) of the Care of Children Act 2004.

71 *Butler v Craig*, above n 69, at [34].

72 At [32].

73 At [52]. By s 101(1) of the Care of Children Act 2004, only a Family Court or a District Court can exercise originating judicial jurisdiction conferred by the Convention, though in appropriate cases applications can be transferred to the High Court.

74 At [54].

The Court acknowledged that its decision left the law in an unsatisfactory state. If no enforcement application was made (which is what happened in this case – no enforcement application has ever been made) the child would remain living in New Zealand and the New Zealand-based parent might be prevented<sup>75</sup> from taking the child out of the jurisdiction, even for a short holiday. It recommended that New Zealand follow the Australian example<sup>76</sup> and amend the 2004 Act to make express provision for a discharge. Following that recommendation, s 122A of the 2004 Act<sup>77</sup> now provides that a party to the return proceedings may apply for a discharge provided more than one year has elapsed since the making of the return order (or the determination of any appeal) and the child is now settled in his or her new environment in New Zealand and, having regard to all the circumstances, the discharge is warranted, *or* all the parties to the return proceedings consent.<sup>78</sup> In *Butler*, the mother, it may be noted, would not have satisfied this test and indeed the Court did not agree with Panckhurst J at first instance that, had there been a discretion, the return order should have been discharged.

Section 122A rendered academic any debate about the correctness of *Butler* so far as New Zealand is concerned, but such arguments may not be irrelevant for other jurisdictions, notably England and Wales, and Ireland, which are not reticent to use their inherent powers in the abduction context. In this respect, it may be queried whether it was right to have dismissed the application of the *parens patriae* jurisdiction on the basis that it invited a merit-based approach, contrary to the objects of the Convention. Quite apart from the argument that, strictly speaking, enforcement falls outside the Convention, as Baroness Hale said in the House of Lords' decision, *Re M (Children) (Abduction: Rights of Custody)*, the further one gets from the speedy return envisaged by the Convention, the less weighty its general considerations must be.<sup>79</sup> There certainly seemed force in the mother's argument in *Butler* that the need to protect the child from the "harmful effects" of abduction no longer existed and that a prompt return was no longer possible. Furthermore those arguments become stronger the longer enforcement is delayed. In that respect, regard might also be had to the Grand Chamber of the European Court of Human Rights' ruling in *Neulinger and Shuruk v Switzerland* that to enforce a return order three years after its making and five years after the

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75 By reason of s 118(1) of the Care of Children Act 2004, which empowers courts to prevent a child's removal from the jurisdiction.

76 See reg 19A(1) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth), as amended, on the application of which, see *Re F (Hague Convention: Child's Objections)* [2006] Fam CA 685.

77 Inserted on 16 November 2011 by the Care of Children Amendment Act 2011, s 16.

78 Compare the Australian provision, which requires *all* of the following criteria to be satisfied before a discharge can be ordered: that all the parties consent; that since the order circumstances have arisen making it impractical for the order to be carried out; the existence of exceptional circumstances justifying the discharge; and the passage of one year since the making of the return order or the determination of any appeal (reg 19A(2)).

79 *Re M (Children) (Abduction: Rights of Custody)*, above n 28.

removal of the child, would violate both the mother's and the child's human rights under art 8 of the European Convention on Human Rights<sup>80</sup> (which confers a right to respect for private and family life).<sup>81</sup>

### ***B The position in England and Wales***

There have been no reported English cases on the simple non-enforcement of return orders akin to *Butler*<sup>82</sup> but a number have concerned post-return order enforcement issues.

Although the power to set aside a return order (it is a nice point as to whether "setting aside" is synonymous with "revoking" or "discharging") is well established, the basis and means for doing so is not free from doubt. It seemed to be accepted<sup>83</sup> that as return orders are "final" orders, applications to set them aside had to be made by way of an appeal to the Court of Appeal, which was said to have a residual power (the source of which was unarticulated) to deal with exceptional change of circumstances which might render the order impracticable to enforce or impossible to implement. However, in *Re B (Children) (Abduction: New Evidence)* it was also accepted that the Court of Appeal had the power to revisit its own order for the purpose of enforcement or implementation.<sup>84</sup>

The "orthodoxy" that a court of equivalent jurisdiction has no power to set aside a return order was challenged in *Re F (A Child) (Return Order: Power to Revoke)*, in which it was held that power to do so is conferred by the Family Procedure Rules 2010, r 4.1(6) (which simply provides that a "power of the court under these rules to make an order includes a power to vary or revoke an order").<sup>85</sup> In so holding, Mostyn J purportedly applied a Supreme Court decision, *Re L (Children) (Preliminary Finding: Power to Reverse)*,<sup>86</sup> but whether he was right to do so can be debated. *Re L*

80 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

81 *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31 (Grand Chamber, ECHR).

82 Though in *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422 (CA), in which the child concerned refused to board the aircraft to return her to Denmark, the mother was said to have virtually abandoned the return order. The case was remitted for a re-hearing in the light of the child's (who had since been made a party to the proceedings) objections and the Hague proceedings were dismissed: *Re HB (Abduction: Children's Objections) (No 2)* [1998] 1 FLR 564 (Fam).

83 Principally by Butler Sloss LJ in *Re M (A Minor) (Child Abduction)* [1990] 1 FLR 390 (CA) at 397; *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 (CA) at 1024; and, as President, in *Re B (Children) (Abduction: New Evidence)* [2001] EWCA Civ 625, [2001] 2 FCR 531 at 537.

84 *Re B (Children) (Abduction: New Evidence)*, above n 83. On this basis, an English court might not have followed *Butler v Craig* in holding that exhaustion of the appellate process precluded revisiting the making of the return order.

85 *Re F (A Child) (Return Order: Power to Revoke)* [2014] EWHC 1780 (Fam), [2014] 1 WLR 4375.

86 *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634.

specifically concerned the power of a judge in care proceedings to reverse a preliminary decision before making a formal order. Although the Court considered that the sealing of the order would have made no difference, such that *Re L* can fairly be interpreted as holding that r 4.1(6) applies to final orders, it is a bold step to hold that it establishes that the rule confers a *general* revocation power even in Convention proceedings, and particularly so (as Mostyn J acknowledged) as Baroness Hale commented<sup>87</sup> that children cases may be different from other civil proceedings. Furthermore, it seems an odd way of introducing a general power to revoke a Convention return order. It remains to be seen whether the *Re F* ruling becomes the accepted position.

Regardless of the means of doing so, it is established that to justify setting aside a return order, the circumstances must be exceptional. It is not enough for the abducting parent to say that he or she and, consequently, the children cannot return.<sup>88</sup> In *Re C (Abduction: Setting Aside Return Order: Remission)* an application to set aside a return order made upon the basis of a 15-year-old child's apparent wishes to return, but where the child was subsequently found to have changed her mind, was dismissed, there being sufficient reason to remit the case for a rehearing to resolve outstanding issues.<sup>89</sup> In contrast, a return order was set aside in *Re F* principally upon the basis of "a sea change in the relevant evidence appertaining to the [respondent] mother's mental health",<sup>90</sup> but also because the father was advocating for the first time the separation of the child from the mother.

As this review shows, in one way or another the English courts regard themselves as having power to set aside a Convention return order. However, whether failure to take steps to enforce it would in itself justify setting it aside and, if so, at what point, has still to be decided.

## V SOME CONCLUDING REMARKS

Despite the intense scrutiny given to the Convention over the 30 years and more of its operation, there remain some basic uncertainties, three of which have just been discussed. Contracting States have found their own pragmatic solutions to these gaps and uncertainties, via implementing legislation, reliance upon the inherent jurisdiction (where available) or, in the case of the EU, by the Regulation. However, this is not ideal in the context of an international Convention that aims to provide a common global approach.

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87 At [41].

88 In *Re B (Children) (Abduction: New Evidence)*, above n 83, a mother, having adduced fresh evidence as to her psychological inability to return, failed to have the return order made in *TB v JB (Abduction: Grave Risk Of Harm)* [2001] 2 FLR 515 (CA), set aside; the Court of Appeal not being convinced that the case was exceptional.

89 *Re C (Abduction: Setting Aside Return Order: Remission)* [2012] EWCA Civ 1144, [2013] 1 FLR 403.

90 *Re F (A Child) (Return Order: Power to Revoke)*, above n 85, at [42].

As this article points out, there is a need to address the issue of appealing return orders after the child has been taken out of the jurisdiction. Good practice would suggest that appeals should be limited and, where available, expedited, and any return order stayed pending its outcome. Nevertheless, it would still be helpful if art 18 could be interpreted as providing a general *Convention* power to order a return even if a wrongful retention cannot be established because, pending the appeal, the child's habitual residence changed to that of the requested state.

There is a clear need for an express power to discharge a return order to be added to the Convention. In this respect, the Australian and New Zealand implementing legislation provide possible models.

The time has also surely come to acknowledge that the concept of habitual residence is problematic. However, it is suggested while it may be too much to expect there to be global agreement on a general definition (though the EU test set out in *A* seems basically sound), there is a pressing need to deal with the position of newborn children for the whom the factual test is inappropriate.

These latter two recommendations require changes to be made to the Convention itself. This has been resisted by previous Special Commissions to review its operation, but it is suggested that at the next Special Commission, which is likely to take place within the next two years, the time has come to abandon such reticence.