UKSC 2019/0145

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL

IN THE MATTER OF NY (A CHILD) (AP)

BETWEEN:

XXXXX

Appellant

and

XXXXX

Respondent

and

REUNITE

INTERNATIONAL CENTRE FOR FAMILY LAW POLICY & PRACTICE

INTERNATIONAL ACADEMY OF FAMILY LAWYERS

Interveners

SUBMISSIONS ON BEHALF OF

THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS

The nature of these submissions

1. The International Academy of Family Lawyers ("IAFL") is a not-for-profit association of specialist family lawyers practising in 57 countries. Fellows of the IAFL are elected on the basis of their experience of family law internationally and their standing in their own jurisdictions. The IAFL has over 800 fellows worldwide. It has Observer status at the Hague Conference and IAFL fellows have attended many of the sessions on the 1980 Convention.

2. The IAFL's application to intervene in this case was made on the basis that the collective knowledge and experience of its fellows would enable us to collate and put before the Court information about how the substantive and procedural issues which arise in this appeal might be addressed in other jurisdictions.

3. Fellows known to have expertise in the 1980 Convention were provided with a summary of the facts of the present case and were asked the following five questions, which were unavoidably formulated and sent out before the Appellant's Case was available:-

   (i) Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?

   (ii) Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?

   (iii) Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?

   (iv) Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?

   (v) Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?

4. We have been able to obtain responses from fellows in 17 jurisdictions, namely Scotland, Israel, USA, Argentina, Germany, Chile, Hong Kong, New Zealand, Singapore, South Africa, Spain, Australia, Canada (Quebec), Ireland, France, The Netherlands and Poland. We attach below versions of those responses which have been edited in the interests of brevity. Each of the contributing fellows has approved the edited version of their contribution. The names which appear below each country heading are those of the contributing fellow(s) from that country.

5. We took the view that it might over-burden the Court if we were to provide copies of the judgments and other supporting material which the contributing fellows have supplied. In any event translations of most of the material from non-English speaking countries are not available. A decision was therefore taken to present these submissions without any supporting material in the way of judgments or otherwise.

6. We hope that the court will be able to read the attached contributions in full. The following summary of the responses to the five questions provides only some headline points. It has not been possible in the time available to have the summary approved by the contributing fellows, and any reference in the summary to the practice of any country should be checked against the relevant contribution:-

   (i) Article 18 has only been considered in a minority of the countries and has not been interpreted consistently:-

   - Appellate courts in USA and New Zealand have held that Article 18 permits a return order to be made even if settlement has been established, but that this power should be exercised sparingly.
   - A Hong Kong judge has held that Article 18 does not create a residual discretion to make a return order under the 1980 Convention. Its purpose was to show that a requested state was not precluded from ordering a return under its domestic law.
   - In Canada there appears not to be a uniform approach among the provinces.

(ii) Singapore, Hong Kong, South Africa, Ireland, Ontario (but not other provinces of Canada) and New Zealand (at High Court but not at Family Court level) have a power directly equivalent to the inherent jurisdiction. Australia has a statutory power which is analogous. France and Argentina also have analogous powers.

(iii) Some countries are willing to make summary return orders to non-1980 Convention countries, others are not. Those countries which are willing to make such orders are generally sparing in the use of this power. Australia and France are the countries whose approach seems to be closest to the English approach. Argentina would only make such an order if the request is made by an authority in the requesting state rather than an individual. In the USA, the same outcome can be achieved at State level by recognising and enforcing a foreign custody order; similarly on occasion in Quebec.

(iv) Apart from one case in Hong Kong there is no reported instance in any country of a child being the subject of a summary return order where 1980 Convention proceedings have been dismissed. In the Hong Kong case a separate domestic application was made after dismissal of the 1980 Convention application.

(v) The courts of Hong Kong and South Africa might be willing to make a summary return order under domestic (non-Convention) powers without a separate application if an application under the 1980 Convention was refused. Hong Kong would be likely to follow the decision of this Court in *Re L* [2014] AC 1017. All other countries would find this procedurally unacceptable.

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15 July 2019

INDEX (HYPERLINKED)

Scotland

Alan Inglis & Rachael Kelsey

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   There is no reported consideration by a Scottish Court of Article 18 of the 1980 Convention.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   There is no exercise of inherent judicial power in Scotland which is comparable to the inherent jurisdiction applied by judges of the Family Division of the High Court in England and Wales. Judges adjudicating 1980 Convention petitions in Scotland do not have recourse to the inherent jurisdiction.

   The inherent jurisdiction of the Court of Session is the *nobile officium*. It is available only where there is an identified *casus improvisus* in the existing law. The jurisdiction is exercisable only by three judges sitting in the Inner House and is therefore not available to an Outer House first instance judge hearing a 1980 Convention petition. A *parens patriae* jurisdiction has recently been held to have been 'subsumed' within the *nobile officium. Cumbria Council Petitioners* [2016] CSIH 92

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   In 1996, the Court of Session made an order under the Family Law Act 1986 section 26 (which applies only to Scotland) for delivery of a child to Malta (which had not then

ratified the 1980 Convention) pursuant to a custody order made there- *Calleja v Calleja* 1996 SC 479.

Section 26 of the 1986 Act provides:

> **Recognition: special Scottish rule.**
>
> (1) An order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom shall be recognised in Scotland if the order was made in the country where the child was habitually resident.
>
> (2) Subsection (1) above shall not apply to an order as regards which provision as to recognition is made by Articles 21 to 27, 41(1) and 42(1) of the Council Regulation.

There is no subsequent report of such an order being made in Scotland.

Calleja has been taken to hold that recognition and enforcement of a foreign custody order could only be refused if it was shown that there was a risk of exposing the child to 'physical or psychological harm'.

If neither the Convention nor section 26 of the Family Law Act 1986 apply, the remedy is an application for Delivery and Residence/Specific Issue Order under the Children (Scotland) Act 1995 section 11. This would engage a full welfare inquiry and is not summary in nature.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

No.

5. **Do you have any comments on the procedural aspects of *Re NY*? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   The concept of 'fair notice' is fundamental to Scottish litigation and it is unlikely that a Court would make an order which had not been intimated timeously to the party against whom it was sought.

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Israel

Edwin Freedman

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   Article 18 has never been considered in a decision by an Israeli court in a 1980 Convention proceeding.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   No. There has never been a reference to such power in any of the abduction proceedings litigated in Israel.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   Prior to the adoption of the 1980 Convention in Israel in December, 1991, the procedure for return of a child unlawfully removed to Israel was by filing a *Habeas Corpus* petition. Subsequent to incorporating the 1980 Convention into Israeli law, the Supreme Court has held that relief by a *Habeas Corpus* petition is still an available remedy. In the case of *Gunsburg vs. Greenwald*, P.D. 39(3) 282 (Supreme Court, 1993), the court referred to the possibility of filing a *Habeas Corpus* petition where the 1980 Convention does not provide relief, " … due to the fact that the country from which the child was abducted is not a party to the 1980 Convention or for any other reason". (p. 297).

   Such an instance occurred in *Manrique vs. Manrique,* (Family Docket 2192/08 Family Court, Hadera). The mother removed a minor child from France during her

pregnancy with a second child. The father successfully obtained the return of the first child in a 1980 Convention proceeding. After the birth of the second child, a *Habeas Corpus* proceeding was filed as the new-born never had habitual residence in France and Israel does not recognize a fetus as a legal person. The court denied the petition.

Although the possibility of initiating a *Habeas Corpus* petition still exists where the 1980 Convention does not apply, there are no reported cases where such a procedure was successful since the adoption of the 1980 Convention in Israel.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

No. If the 1980 Convention application fails, then the case is dismissed.

Furthermore, the Supreme Court has held that if the petition for return under the 1980 Convention fails, you cannot try a second bite of the apple by subsequently filing a *Habeas Corpus* petition, *Bagatz* 4365/97, *Tor-Sinai vs. The Foreign Minister*, et. al., (Supreme Court, 1999).

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

The consideration of a return order despite the failure of the petition is not an option under Israeli procedure. While the courts have discretion to order a return even if an Article 13b defense is successfully made, there is no authority to order a return where the underlying basis of the Convention has not been proven, such as in the present case. Such an order undermines the principles of the Convention in that it permits the court to apply a best interests test in the guise of determining to which state the child has the most contacts.

As stated above, courts in Israel have authority to order a return of an abducted minor under a *Habeas Corpus* proceeding which may be invoked instead of a 1980 Convention petition.

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USA

Dana Prescott & Richard Min

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   Yes. The case law makes clear that Article 18 permits US courts to order the return of the Child even if one of the exceptions have been established.

   This can be seen in the Court of Appeals, First Circuit, case of *ISMAIL OZGUR YAMAN, v. LINDA MARGHERITA YAMAN* (aka *LINDA MARGHERITA POLIZZI*) Nos. 13-1240, 13-1285, September 11, 2013 where the Court considered the text of the 1980 Convention, the case law from "Sister Signatories" to the 1980 Convention, and of "Sister Circuits" (settlement exception made out, court making clear that Article 18 could nonetheless allow order for return, but with no return on the facts in this case) and in a recent case (November 20, 2018) in the Court of Appeals, Eleventh Circuit, case of Roque *Jacinto FERNANDEZ, v. Christy Nicole BAILEY* .No. 16-16387 (settlement exception made out and no return order at first instance, reversed on appeal with Article 18 return order being made). In *FERNANDEZ, v. BAILEY*, the Court wrote:

   > *"We do not suggest that district courts should regularly return a child under the Convention despite a finding of settlement in a new environment. To the contrary, a district court ordering the return of a settled child should be an infrequent occurrence, so as not to swallow the text of Article 12's stated exception. But this case, for several reasons, is unique…"*

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   There is no analogous inherent jurisdiction for a Court to order the summary return of a child to another country.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   A proceeding under the 1980 Convention would not be permitted with a country that does not subscribe to the 1980 Convention.

   One can proceed in State Courts under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enforce a foreign custody order which may result in the return of the child to the foreign country. The UCCJEA has been passed in substantially the same form in 49 of 50 states within the U.S.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   No.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   If no application was made pursuant to the UCCJEA, then no such relief could be granted. Since the 1980 Convention and the UCCJEA are very different procedures, relief granted pursuant to the UCCJEA would usually not be granted in the context of a pending 1980 Convention case. Moreover, considering the nature of Article 16, if a 1980 Convention case were pending it may result in a stay of any pending UCCJEA case. Although I have no cases to reference, it would be possible that one could file under the 1980 Convention and the UCCJEA in State Court (could not do this in Federal Court – only 1980 Convention cases) and seek the return under both laws. The Court could

then theoretically order the return under the UCCJEA without the requisite finding of Article 12 of the 1980 Convention.

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Argentina

Fabiana Quaini

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   Argentine courts have not considered Article 18 yet.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   Courts would have the power to order return of a child, if the judge decides that it is in the best interests of the child. However, the courts would not ordinarily use this power, in my opinion.

   In one case in which I acted, the parents of two American children aged eleven and thirteen who had lived in Florida, agreed that the children should relocate from the US to go to live with their father in Argentina, since the father had been deported and the children wanted to live with the father. After two years, the children wanted to return to Florida and the father objected to the return. I acted for the mother and filed a relocation motion because the 1980 Convention did not apply in the case. Nonetheless, the Court determined the matter with reference to the objects and principles of the 1980 Convention n grounds, and decided that the children had to return to Florida. Article 18 was not mentioned but the basis given by the court in ordering the return of the children was what was in the best interests of the children and with regard to the objects of the 1980 Convention – Caso 250/15/11F *Ferrero Natalia c/Toro Leonardo Sebastián s/Autorización para salir del país*. Juzgado de Familia de Maipú, Mendoza. Argentina.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   Argentine courts would order the return of a child to a non-1980 Convention country, if a foreign authority asked for cooperation in the return of the child.

   The Civil and Commercial Code in Argentina, under article 2642, provides that in any case where a wrongful removal or retention has happened, authorities must cooperate and to apply the conventions in force signed by Argentina.

   If there is not a convention in force, courts must still consider the principles and objects of conventions signed by Argentina, taking into account the best interests of the child.

   If no foreign authority asked for cooperation in the return of the child, the Argentine courts would not return the children.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   Not at all. I must say that Argentina demonstrates a pattern of noncompliance according to the compliance report of the US State Department 2019. There are serious delays by the Argentine judicial authorities in deciding 1980 Convention cases. Argentine authorities are not always able to enforce these orders. If it is not easy to return a child between 1980 Convention countries, it could be more difficult with countries who did not sign the 1980 Convention, and much more problematic if there is no authority in the foreign country ordering the return of the child.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   If a 1980 Convention case is submitted and the wrongful retention or removal cannot be proved, return will not be ordered. Plaintiff will have to file a relocation motion. It is an ordinary process that can take years to have a final decision. Courts will not order a return under other provision if the plaintiff files a 1980 Convention case.

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Germany

Alice Meier-Bordeau

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   To our knowledge, the German courts have never had occasion to consider Article 18 of the 1980 Convention.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   No, such a power does not exist in Germany.

   In Germany, only 22 family courts have jurisdiction for proceedings concerning return of a child who has been abducted to Germany from another Contracting State to the 1980 Convention. These courts have exclusive jurisdiction and an international child abduction case cannot be brought in another court in Germany.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   The German courts can order the return of a child who has been abducted on the basis of Section 1632 of the German Civil code, but German law does not provide a summary proceeding that would correspond to the 1980 Convention's return mechanism.

   According to the German Federal Department of Justice, the only possibility that remains to obtain the return of the child is to request help from the judicial or administrative authorities of the relevant State and if necessary to employ a local lawyer or to seek support from local non-governmental organisations.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   No, if the criteria set by the 1980 Convention are not met, the return of the child is refused (see for example Karlsruhe Higher Regional Court, 2 UF 266/14, 16 December 2014).

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   As mentioned above, German law does not provide a summary proceeding that would correspond to the 1980 Convention's return mechanism. Therefore, apart from the 1980 Convention, there is no other provision that could be applied by German courts to obtain a summary order.

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Chile

Daniela Horvitz & Juan Francisco Zarricueta

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   The 1980 Convention entered into force in Chile in 1994. Since then, Article 18 has never been applied or considered in a decision for a summary return of a child by our Family Courts, Courts of Appeals or our Supreme Court.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   Until April of 2016, the Chilean Supreme Court had the power to review a decision made by the Court of Appeals in a child abduction case in a cassation action (which is an appeal for annulment). As a result of that review, the Supreme Court could order the summary return of a child to another country, based mainly on the principle of the best interests of the child.

   In April of 2016, a new procedure rule for cases under the 1980 Convention entered into force ("Acta 205-2015") which states that a decision made by a Family Court in a child abduction case can only be reviewed through an Appeal to Court of Appeals. In other words, this rule no longer allows the Supreme Court to review a decision in a child abduction case. Accordingly, the Chilean Courts have no similar or analogous power to that of English High Court.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

The Chilean Courts have never made orders requiring the return of a child to a country which does not subscribe the 1980 Convention.

Since the Chilean legal system is based on the civil law system, our Courts stick rigidly to the letter of the law, particularly about admissibility requirements. For that reason, a request for a return order under the 1980 Convention in relation to a non-signatory state will not be admissible.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

After reviewing a considerable number of cases, it has not been possible to find any decision made by the Chilean Courts ordering a summary return of a child when the criteria under the 1980 Convention have not been not made out.

On the contrary, there are some cases where our courts refused to return a child despite the fact that the criteria for ordering the immediate return had been made out. In these cases, return was refused based on the principle of the best interests of the child.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

If the application is made under the 1980 Convention but the wrongful retention or removal cannot be proved, return will be refused.

However in one case, the Chilean Family Court ordered that a child be returned immediately to the USA only after just one hearing. This was because Chilean law states that the custody parent has the right to seek the “immediate return” of children

when the non-custody parent infringes the terms of any agreed visitation, as happened in this case.

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Hong Kong
Corinne M. D'Almada Remedios

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

The Hong Kong courts have had to consider Article 18 of the 1980 Convention. In the case of *AC v PC (Abduction: Settlement)* [2005] 2 HKC 90 the Father had wrongfully removed the two children from their country of habitual residence in Australia in 1999. The children were later smuggled into Hong Kong but their presence there was not discovered until 2004. Hartmann J (as he was then) held inter alia:

- Article 18 does not create a residual discretion to make a return order under the 1980 Convention. Its purpose and effect were to make it clear that the 1980 Convention did not limit or preclude a requested state from ordering return pursuant to its own domestic laws;

- if the Court is satisfied pursuant to Article 12(2) that a child is settled in his/her new environment, the application was within the ambit of the 1980 Convention entirely and no discretionary power to order a return subsisted;

- however even if the Court had a discretion under Article 18 to order the return of the children, the Court would not order their return in this case given the length of time resident in Hong Kong and circumstances of their lives since leaving Australia. The best interests of the children now dictated that matters concerning their future should be decided by the courts of Hong Kong.

As far as I am aware, there are no Hong Kong Court of Appeal decisions commenting on this decision or the issues raised above.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   Yes: see *K v K* considered below but decided under a separate domestic application after dismissal of the 1980 Convention application.

   Further, the Hong Kong Court is mindful of comity and *forum conveniens* principles. In *TSFJSW v TLT FCMP* 131/2010 HH Judge Melloy declined to hear an application involving children who had been brought from Dubai to Hong Kong, following a full relocation hearing in England, which had permitted the Mother to relocate to Dubai.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   Yes, however there have not been many such decisions. Examples of cases are *K v K* (which is considered below) and *C v N (Wardship)* [2016] HKFLR 125, in which case the Mother failed to show that Taiwan (being a non-contracting state) was not an appropriate forum and so summary return of the children was ordered.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   Yes but again there have not been many decisions.

   In *K v K (Application to Return Child to the Jurisdiction)* [2007] HKFLR 67 HH, Judge Bruno Chan ordered the summary return of a child to Mainland China even though the 1980 Convention proceedings for return had been unsuccessful. In this case, by way of Hong Kong Consent Order, the child was to live with the Father in Mainland China

with access to the Mother and the parties agreed to submit to the jurisdiction of Hong Kong. The Mother moved to and then retained the child in Australia. The Father's application to the Australian Court for return of the child to Hong Kong under the 1980 Convention was rejected after Hartmann J (as he then was) held that the child had been habitually resident in Mainland China and so the 1980 Convention did not apply. However, the Father's application to the Hong Kong Family Court was granted on the basis that:

- the welfare of a child who has been abducted is best promoted by his or her return to the country where he or she habitually resided;

- the welfare of the child was the paramount consideration and the principles underlying the 1980 Convention were applicable: the prima facie position is in favour of return of the child but the presumption could be displaced in certain circumstances which are shown to be incompatible with the child's best interests;

- there was no evidence at all to suggest there was any risk that the child's return to his Father in Mainland China would expose him to any physical harm or otherwise place him in an intolerable or any situation incompatible with his best interests.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

Accordingly, in my view, the Hong Kong Court could and would invoke its inherent jurisdiction in an appropriate case, and if necessary, do so of its own accord where no specific application had been made. The persuasive decision of the Supreme Court in *In re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75 together with the authorities cited above are such that the Hong Kong Court would likely hold that :

- Article 18 does not limit the court's inherent jurisdiction to make a summary order for return at any time;

- although the child's welfare is the paramount consideration, the court is not obliged to conduct a full welfare inquiry as to where the child should live and, in the interests of comity, an order of a foreign court of competent jurisdiction is a relevant factor;

- there is a presumption that in the absence of good reasons to the contrary, the welfare of a child who has been abducted is best promoted by his or her return to the country where he or she habitually resided;

- the prima facie position is therefore in favour of return of the child but the presumption could be displaced in certain circumstances which are shown to be incompatible with the child's best interests;

- similar to the procedure under the 1980 Convention, the return of an abducted child should be pre-emptory and summary.

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New Zealand
Simon Jefferson QC

1. **Have your Courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   The only case in which Article 18 has been considered in *NZ is HJ v Secretary of Justice* (2006) NZFLR 1005. The objection to return was founded on an assertion of "one year and settled" (Article 12). It was held by the Court of Appeal that "a Court retained a residual discretion" prescribed by Article 18 of the 1980 Convention to order the return of a child even if the defence in s.106(1)(a) applied (which is the statutory equivalent of Article 12). In the event, and on the facts of the case, the Court of Appeal declined to exercise the discretion contained within Article 18 in favour of a return. That decision was upheld by the Supreme Court which did not explicitly refer to Article 18 but nevertheless exhaustively examined the nature of the "residual discretion" in circumstances where an objection in terms of s.106(1)(a) had been made out.

2. **Do your Courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the Court's inherent jurisdiction?**

   The Family Court is the Court of originating jurisdiction under the 1980 Hague Convention. The Family Court does not have "a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the Court's inherent jurisdiction" because it has no inherent jurisdiction. However, an appeal from an order of the Family Court is heard in the High Court, which does have inherent jurisdiction similar or analogous to the power of the English High Court. Moreover, if the proceedings are transferred to the High Court then, again, there is an "inherent jurisdiction" in play.

3. **Do your Courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   There have been some rare examples of orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention. The Court has either utilised its "wardship" (guardianship) jurisdiction or the provisions of the Habeas Corpus Act 2001. Cases in point are *Olsson v Culpan* (2017) NZHC 217 and *Kaufusi v Klavenes* (unreported). For cases in which relief pursuant to the Habeas Corpus Act 2001 was declined see *G v R* (2018) NZHC 2587 and *D v N* (2011) NZAR 276. In each case, resort to the provisions of the 1980 Convention was not available.

4. **Have there been any cases where your Courts have found that the criteria for a summary return order under the 1980 Convention are not made out but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   I have been unable to find any NZ case in which the criteria for a summary return order under the 1980 Convention was not made out but where a summary return order was, nevertheless, made.

5. **Do you have any comments on the procedural aspects of Re NY? Would your Courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   I do not have any useful comment to make on the procedural aspects of Re NY save the somewhat general observation that, in my opinion, it is extremely unlikely that a NZ Court would make an order under its inherent jurisdiction in the context of an unsuccessful 1980 Convention application without due notice having been given to the parties of the intention to do so. I can point to no specific authority for that proposition.

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Singapore

Kee Lay Lian

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   By way of background, Singapore acceded to the 1980 Convention on 28 December 2010 and passed the International Child Abduction Act (Cap. 143A) ("ICAA") with effect from 1 March 2011. Under Section 3 of the ICAA, the Act implemented only Articles 1, 3 to 5, 7 to 10, 12 to 15, 17 to 22, 24 and 26 to 32 as part of Singapore law.

   To our knowledge and on a review of published judgments, Article 18 of the 1980 Convention has never been considered in a decision by a Singapore Court.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   The Singapore Courts are empowered under Sections 3 and 5 of the Guardianship of Infants Act (Cap 122) ("GIA") and Section 125 of the Women's Charter (Cap 50) ("WC") to make relocation orders if they deem relocation to be in the best interests of the child.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   Yes, in *TSH v TSE* [2017] SGHCF 21, the application was for relocation to UK. However, the Court found that the 1980 Convention in that case was not applicable as at the time that the child had been wrongfully retained, Singapore had not gazetted the UK as a contracting state under the ICAA, as UK had not recognized Singapore's accession to the Hague Convention.

In that case, the Court at [42] followed the UK's position in *In re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 in relation to the applications for return of children to non-contracting states:

- The Court has a statutory duty under section 3 of the GIA (which has the same effect of section 1(1) of the Children Act 1989) to regard the child's welfare as its paramount consideration (*In re J* at [18], *TSH* at [43])

- The application to the welfare principle may be specifically excluded by statute, this may take the form of a statue which is passed to give effect in domestic law to the 1980 Convention. In the absence of such exclusion, there is no warrant for the principles of the 1980 Hague Convention to be extended to non-contracting parties. Singapore's approach to the applicability of the 1980 Convention, through the enactment of the ICAA, suggests that Parliament did not intend for Convention principles to apply in relation to non-convention states. Absent the application of the ICAA, the welfare principle must be applied by the Court. (*In re J* at [22], *TSH* at [44])

- The Court has the power in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits (*In re J* at [26], *TSH* at [45])

Relocation was also ordered to India in *URQ v URR* [2018] SGFC 121 under the GIA.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

There does not appear to be a case where the application was not made out under the 1980 Convention, but the court ordered the return nevertheless.

In *TSH v TSE* [2017] SGHCF 21, the Court held at [42] that "the position between Convention states was clear; the Convention was to be followed".

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

In *UIK v UIL* [2018] SGFC 2, the Father applied under the GIA for the child's relocation to India. The Court affirmed that the Father had rightly taken out the application under the GIA and not the ICCA since India is a non-contracting party.

It is unclear how the Singapore courts would treat a case such as *Re NY* if an application for return to a non-contracting state was made under the ICAA. However, as a matter of practicality, the court may, at a case management stage, ask the applicant to consider re-filing or amending the application.

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South Africa

Zenobia du Toit

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   There does not appear to be any reported case by a South African Court in regard to Article 18 of the 1980 Convention.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   The South African High Court is upper guardian of all minors within its area of jurisdiction and has a very broad discretion to intervene between a parent and his or her child. These powers are substantially similar to those exercised by the English Courts in their delegated capacity as *parens patriae*. However the High Court exercises its powers sparingly and usually only when requested to do so. Good cause for intervention must be shown and the court must be satisfied that the child's welfare requires intervention. The 1980 Convention's presumption that the abduction of a child will generally be prejudicial to his or her welfare and that in most cases it will be in the best interest to return the child to the state from which he or she has been removed, has been followed by the South African Courts. Decisions made in terms of the 1980 Convention are not taken to be a determination of the merits of any custody issue. The South African Courts have found that the limitation set in the 1980 Convention is manifestly reasonable and justifiable in an open and democratic society based on human dignity, quality and freedom and that the 1980 Convention is accordingly consistent with the Constitution (*Central Authority vs H* 2008(1) SA 49(SCA)).

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

In *K vs K* 1999 (4) SA 691(C) the court held that, in non-1980 Convention cases, the best interests of the child concerned remained the paramount consideration and the principles of the 1980 Convention were applicable only to the extent that they indicated what was normally in the interests of the child.

There have been applications in South Africa for the return of children to a country which does not subscribe to the 1980 Convention. These applications for return were made in terms of Sections 7 and 9 of the Children's Act, namely that the child's best interest is of the paramount importance in all matters concerning the care, protection and wellbeing of the child.

The South African Court will have jurisdiction over any child within its borders. Foreign orders, if validly made in terms of that foreign country's laws, will be recognised in South Africa.

In practice, the courts have applied the principles of the 1980 Convention when considering the return of such children. However, they are able to exercise their inherent jurisdiction, outside of the parameters of the 1980 Convention.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

No.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   In a South African case, the Presiding Judge would most likely have called for representations to be made on the best interests of the child and the Court's powers of inherent jurisdiction. It is unlikely that an order would be made without the parties having been given an opportunity as to argument before the Court.

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Spain

Esther Susin

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   I could not find any judgment where Article 18 has been considered in a decision by a Spanish court in a 1980 Convention proceeding.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   I could not find any reference to such situation in any of the abduction cases I was able to look at.

   However, in any event, I do not think this would be possible in abduction cases according to the Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. The judicial power "Poder Judicial" of Spain is the set of courts and tribunals, composed of judges and magistrates, who have the power to administer justice. According to the Spanish Constitution, justice emanates from the people and is administered in the name of the King of Spain. Exclusive to these courts and tribunals corresponds the exercise of jurisdictional authority, judging and enforcing judgments. In the exercise of said powers, the courts and tribunals decide the jurisdictional processes of the civil, criminal, contentious-administrative, social and military orders. The knowledge and decision of said processes consists of the processing and ruling on the merits of the matter raised by the parties, whether these are authorities or individuals.

   The only possibility where this may happen would be in Brussels IIa abduction cases (2201/2003) if an application was made under Article 15 to seek the transfer to a court better placed to hear the case.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   I do not think this would be possible according to our legal system. We could apply for the principle “orden público” as a legal basis. The judge states that although the concept of public order is contemplated in different provisions, there is no definition of the term. Therefore, it goes to the doctrine and analyses different concepts concluding that it is: "principles, norms and institutions that function as a limit by means of which the State restricts the faculty of the individuals on the realization of certain acts that affect the fundamental interests of society".

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   No. If the 1980 Convention application fails, then the case is dismissed.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   This would be not possible because there is no authority to order a return where the underlying basis of the 1980 Convention has not been proven.

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Ian Kennedy AM

Australia

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   The Australian courts have considered Article 18 on various occasions.

   There have been differing views expressed by judges of the Family Court at first instance as to whether there is residual discretion to order a return of the child even if the grounds for return under the Convention are not made out. This question has usually arisen when the return application has been made more than a year after the wrongful removal or retention and there is an issue as to whether the child or children are settled in their new environment.

   The debate has often centred on the wording of domestic Regulations (implementing the 1980 Convention rather than the text of the 1980 Convention itself. It is clear that Australian Family Court judges take the view that the source of any such discretion must be the Regulations.

   The Full Court of the Family Court of Australia in *Secretary, Department of Family and Community Services & Magoulas* [2018] FamCAFC 165 ("Magoulas") has recently endorsed the view that there is no discretion, holding at [33] that the Regulations do not contain an equivalent to Article 18 of the 1980 Convention.

   It is worth noting that the Full Court in *Magoulas* also stated:

   - "2. As the child remains in Australia, on application, a court exercising jurisdiction under Part VII of the Family Law Act 1975 (Cth) ("the Act") could now decide whether the welfare of the child required the making of a summary order that he be returned to Ukraine. If it was determined that the welfare of the child did not require the making of such an order,

questions of parental responsibility, residence and the like could be determined in Australia (*De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 657-658)".

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   The Family Court of Australia is a court of statute and does not have inherent jurisdiction.

   The Family Court does, however, have jurisdiction, conferred by statute, to order the summary return of a child to another country. See answer 1 above re *Magoulas*. The court is empowered to exercise this power whether of the court's own initiative or by the request of one or more of the parties.

   Subject to one exception, the ordinary principles of Australian domestic law apply to such applications, including that the court must consider the child's best interests as the paramount concern when making a parenting order. The sole exception to the rule that the ordinary law relating to children applies concerns those cases where the court is required to recognise a registered overseas order from a reciprocating jurisdiction in respect of the child.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so?**

   The Family Court does make orders requiring the summary return of a child to non-1980 Convention countries. The leading case on summary orders for return of children to non-1980 Convention countries is the decision of the High Court of Australia in *ZP v PS* [1994] HCA 29 which sets out a two-step process by which:-

The Court must first consider if a summary hearing is appropriate to resolve the matter; and, if so, the court must, to the extent that it is able without testing the evidence, make a determination of the application for summary return. If a summary hearing is not appropriate to resolve matters, the court should then undertake a full hearing of the matter.

It is possible that, having determined that a summary hearing is not appropriate, and upon a full hearing of the matter, a court may decide that it is in the child's best interests to be returned to the non-Convention country.

ZP v PS was very recently considered by Justice Cronin of the Family Court in *Nejem & Nejem* [2019] FamCA 113 ("Nejem") at paragraphs[69] –[73]. His Honour noted that the High Court has determined that what must be balanced was the need for a speedy determination against the desirability of an adequate inquiry into welfare generally. It was held that a presumption must not be applied that a child's welfare was better served in Australia or conversely, by ordering a return to the previous country. To take the latter option, the court had to be satisfied that this course was, in itself, in the best interests of the child. His Honour also commented that the court should be highly critical of child abductions, but those public policy considerations must always be no more than a part of an exercise which determines what is in the best interests of the child. Further, the court also has to be conscious of the damage that can be done by allowing a lengthy hearing which has the effect of causing delay as well as exacerbating the child's absence from a country of birth and familial ties.

Whether the Court will make an order for a child or children to be returned to a non-1980 Convention country depends upon the facts of the particular case and the best interests of the children. There is no presumption in favour of or against making such an order.

The Australian cases indicate that if an application is made promptly, a summary return is more likely to be ordered. So, too, might it be if there is every reason to believe that the Courts of the other country will hear the matter promptly.

If there is a delay in making the application, the children become settled in Australia and/or the parent having their primary care indicates that he or she will not return with the children, these may lead to the matter being heard in Australia.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   There are no reported cases of a summary return order in these circumstances.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   It may be possible for a summary return order to be made pursuant to the FLA, but the 1980 Convention application would need to be determined first; and the domestic application would need to be lodged, on foot and before the Court at the same time.

   Procedural fairness under Australian law would require not only that any such alternative application is made and on foot, but also that the respondent had appropriate notice of it and a chance to respond.

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Canada (Quebec)

Caroline Harnois

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   Article 18 of the 1980 Convention has not been integrated into Quebec's domestic implementing legislation.

   Only one judgment in Quebec addresses Article 18 and the fact that it has not been integrated into the provincial implementing legislation, namely *Droit de la famille* - 2785, 1997 CanLII 10219 (QC CA). In this case, the father abducted his son from Spain to Canada where they lived with the father's new wife, unbeknown to the child's mother. Three years after the removal of the child from Spain, the mother found him in Montreal and filed a 1980 Convention return application. At first instance, the return of the child to Spain was ordered. The Court of Appeal of Quebec however found that the child was settled in his new environment. The Court of Appeal asked whether a court, as per Article 18 of the 1980 Convention, retains discretion to order the return of the child to his state of habitual residence despite finding that the child is settled in his new environment. The Court stated that because Article 18 was not integrated into Quebec's implementing legislation, once the «settled in» defense is established, it must prevail. The Court added that the decision in this case would have been the same even if Article 18 of the 1980 Convention had been integrated into the legislation. The Court stated that under domestic law and the 1980 Convention, it is assumed that a return to the state of habitual residence is in the child's best interests when less than one year has elapsed since the removal but that it is different in cases when the child has been three times longer in the country he was abducted to than in his country of habitual residence. The appeal was therefore granted and the application for return was dismissed.

As for the other Canadian provinces, only few judgments addressing Article 18 of the Convention have been found. Even though this document deals with the legal issues from a Quebec's perspective, those judgments could be of interest.

In *Ivakic v. Bacic*, 2017 SKCA 23 (CanLII), the Court of Appeal for Saskatchewan also analysed Article 18 to determine whether, when it is demonstrated that the child is settled, the court retains a discretion under the Convention to nonetheless decide that the child should be returned to its jurisdiction of habitual residence. The Court concluded that a two-stage analysis should be applied under which even if a child has become settled in the state to which he or she has been taken or is being retained, the court nonetheless has a discretion to order the return of the child. According to this approach, the question of whether the child is settled and the question of whether there are larger considerations that might tip the balance in favour of a return are addressed separately. The appeal was granted and the father's application for the return of the child to Croatia was dismissed.

In *Nowacki v. Nowacki*, 2015 ONSC 973 (CanLII), the Ontario Superior Court of Justice analysed Article 18 in different circumstances. The Court held that due to the Courts of Poland's failure to comply with the terms of the 1980 Convention, the Ontario court must fill the gap and exercise its own residual discretion as per Article 18 of the 1980 Convention, for the protection not only of this child but of abducted children in general. The Court added that neither Canada nor Poland, by becoming a signatory to the 1980 Convention, had surrendered its autonomy, or the duty each has to protect the rights of children who are habitually resident within its borders. Each retains a residual discretion in its courts, to be exercised judicially, having regard to the considerations set out in the Convention.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

There is no inherent jurisdiction for a Court in Quebec seized with a 1980 Convention application to order the summary return of a child to another state which would be comparable to the inherent jurisdiction in this case.

Outside of Quebec, the above-mentioned case of *Nowacki v. Nowacki* is the only one found which would suggest specifically that the Ontarian Courts could have an inherent jurisdiction to order a return.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

Quebec law does not provide for a summary proceeding that would correspond to the 1980 Convention's return mechanism for non-1980 Convention states nor for other provinces of Canada.

The only legal basis in Quebec for requesting the return of a child to a non-1980 country or to another province of Canada are the following:

- to recognize and enforce a foreign custody order;
- to obtain custody and permission to relocate for a child previously abducted to Quebec (from a non-1980 Convention state or other Canadian province);
- to ask the Court to decline jurisdiction based on the fact that the child is not domiciled in Quebec together with a request for an interim order allowing the parent to leave the country with the child;
- to apply *forum non conveniens* with a request for an interim order allowing the parent to leave the country with the child.

Only a few return orders are made to non-1980 Convention states. An example of this is *Droit de la famille* — 161174, 2016 QCCS 2304 (CanLII) where the Court allowed the

return of the children to Lebanon with their mother, which was their state of habitual residence.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   No. In Quebec, there have been no cases where the criteria set out by the 1980 Convention were not met but a summary return was ordered in any event.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   As mentioned above, Quebec has not integrated Article 18 of the 1980 Convention into its implementing legislation. Also the legal basis to obtain a return outside the 1980 Convention are limited and usually applicable to cases involving non-1980 Convention countries or other Canadian provinces. Those recourses would usually not be requested while 1980 Convention proceedings were ongoing as Article 16 of the 1980 Convention prevents the Quebec Court from ruling on custody while a 1980 Convention application is pending. In addition, 1980 Convention proceedings are heard by preference in Quebec and are the fastest remedy for a left-behind parent. Therefore, it would not be advisable for a left behind parent to request the return under a legal basis other than the 1980 Convention and if no application was made for another relief under Quebec law, then no such order could be made.

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Ireland

Dervla Browne S.C. & Justin Spain

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   We know of no cases where Article 18 has been dealt with directly by the Irish courts. It is not usual to specifically plead Article 18 as an alternative in 1980 Convention cases. Article 1980 was considered by Whelan J. in *PM v VH* (Court of Appeal Peart J., Birmingham J., Whelan J.) 24 of January 2018i where it was held that applications for return pursuant to the inherent jurisdiction can be made in the High Court.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   The Irish High Court has an inherent jurisdiction to order return of children to other countries.

   It is well established that the High Court has an inherent jurisdiction to make orders about children where the proceedings fall outside the scope of any international Convention. It should be noted that on the 28 April 2015 the Thirty First Constitutional amendment was signed into law which inserted Article 42A into Bunreacht na hEireann (the Constitution of Ireland) primarily providing that the best interests of the child shall be the paramount consideration and that the views of the child should be ascertained and be given due weight having regard to the age and maturity of the child.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

In the exercise of the inherent power to order the return of children to other countries the High Court must make the decision on the basis of the best interests of the children. This does not mean a summary return cannot be made. It depends on the case. At paragraph 72 of *AMQ v KJ*, Whelan J stated:

> *"It goes without saying that the High Court does have power in accordance with the welfare principle to order the expeditious return of children to a foreign jurisdiction without conducting an exhaustive investigation on the merits whenever it is considered that the welfare of the child in question is best served by doing so. Much would depend on the facts of the case and the extent to which the child or children have any nexus whatsoever with this jurisdiction".*

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

The application can be made on the basis of inherent jurisdiction or under the Guardianship of Infants Act 1964 (as amended). Even if made under the legislation, the High Court is the appropriate forum and not the lower courts.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

Our view is that the Irish court could well make an order such as that made in the *NY* case, if it was considered that such an order was necessary to protect the welfare of the children. It is likely that the court would require a specific application to be made either under the 1964 Act (as amended) or on foot of the inherent jurisdiction.

On foot of the approach of the Supreme Court, the case of *CB v. PB and The Attorney General*, (12 July 2018), Article 42A would be a relevant principle in the Court interpreting Article 18 of the 1980 Convention. In this important case, the Supreme Court had to deal with how the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoptions and implemented by domestic legislation should be interpreted in light of the Constitution and in particular in light of Article 42A. McMenamin J (majority judgment) stated at paragraph 122

> *"…The Convention may be seen as an international agreement, which became part of the law of the State, as determined by the Oireachtas pursuant to Article 29.6 of the Constitution. It was, in my view, thereby taken from the realm of foreign relations and, by Act of the Oireachtas, rendered as part of domestic law. An article of the Constitution, such as Article 42A, cannot be "stood down" or placed at naught by Statute simply because the Statute translates an international agreement into part of domestic law. The Act cannot circumscribe, or derogate from, the Constitution, or any part of it. ……It is, therefore, to my mind, entirely constitutionally proper that the Constitution should at least be an interpretative point of reference. As such, one cannot, I consider, set to one side the explicit provision of Article 42A …."*

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France

Charlotte Butruille-Cardew

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   To my knowledge, Article 18 has never been considered in a decision by a French court in 1980 Convention proceedings.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   No, such a concept does not exist in France.

   The Cour de cassation regularly approves the immediate return or fixation of habitual residence in the country of origin "*in consideration of the best interests of the children, which lie in maintaining links with both their parents*".

   Practically, the use of such a concept allows the "return" of children from where they have been abducted in the absence of international or bilateral conventions.

   The Cour de cassation recently reiterated that in the light of Article 3(1) of the United Nations Convention on the Rights of the Child of 30 November 1989, according to which, in all decisions concerning children, whether taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration: "the risk of serious harm or the creation of an intolerable situation must be assessed in relation to the child's best interests".

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   If not made under the 1980 Convention, summary returns may be ordered under the provisions contained in the several bilateral conventions existing between France and other foreign states (including Algeria, Benin, Brazil, Congo (Brazzaville), Dijibouti, Chad, Egypt, Morocco, Niger, Portugal, Senegal, Togo, Tunisia, Lebanon).

   These conventions create cooperation mechanisms between Central Authorities designated by the states, with a view to ending an aggravated offence and initiating proceedings to obtain the return of the child wrongfully removed from, or retained in, the country of his or her habitual residence.

   As mentioned above, in the absence of any convention, the Judge can also decide to "return" the child by fixing his/her habitual residence in the country from which he or she was wrongfully removed, using the principle of the "best interests of the children".

   When a child is taken to a state which is not a party to the 1980 Convention, nor to a state which has bilateral convention with France, diplomatic channels can be used to try to obtain the return.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

   To my knowledge, no such decision has been rendered by French courts.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

We do not think the French courts would/can do this.

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The Netherlands

Sandra Verburgt

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   There are two reported cases in the Netherlands where an appeal to Article 18 of the 1980 Convention was made. Only one was successful.

   In the case Court of Appeal before the Court of Appeal *Den Bosch* (15 November 2006, R200601056) there was a successful appeal to Article 18. In this case, the father removed the child from Italy to the Netherlands. As per Article 12(2) it was established that the child was rooted in the Netherlands and so the District Court decided that it was not in the best interests of the child to order return. However, the Court of Appeal had a different opinion. They established that the mother and child had a good bond, the mother could rely on support from the guardian in the context of care and upbringing and also the father faced a prison sentence in Italy. The Court was concerned that an undesirable situation could arise in that the child ultimately resides in the Netherlands without parents (namely if the father was imprisoned and the mother remaining in Italy). Accordingly, an order for the child's return was made as per Article 18.

   In the District Court case before the district court *The Hague* (22 September 2011, 398865 - FA RK 11-5528), the Court refused to order return under Article 18 because the child was settled in the Netherlands and on the evidence of the unbearable situation in which the child would find himself on return to Hungary.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

The courts do not have inherent jurisdiction in the common law sense. Jurisdiction is based on 1980 Convention only, if it concerns contracting states.

If it concerns a non-1980 Convention state, jurisdiction could be based on common rules for international jurisdiction, as laid down in Articles 1-14 Dutch Code of Civil Procedure. However, I have not found reported cases were a child was ordered to return to a non-1980 Convention.

The reverse situation – an order for the child to be returned from a non-1980 Convention state to the Netherlands - does happen, although not frequently. A recent example of this is the reported case of the Supreme Court dated 5 July 2019, 18/0214, dealing with the return of child from India.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

I have not found reported cases or policy on this. However, it is also not excluded. The principle of the best interests of the child is leading.

In the reverse situation we would however apply the 1980 Convention as far as possible analogously.

When a child is wrongfully removed to, or retained in, a country that is not a party to the 1980 Convention the Dutch Central Authority still assists in the same way were it a 1980 Convention abduction.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

The Dutch Courts do apply the criteria for a return under the 1980 Convention very strictly. If the requirements of the 1980 Convention are not met, then no summary return order is made.

The reported case of the Court of Appeal *Den Bosch* above in which an appeal to Article 18 was successful is an exception.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

No, this is not possible.

Under Dutch law, the boundaries of the dispute are determined by the parties. The judge will only be able to decide on requests submitted to him or her by the parties. A judge cannot make orders that have not been requested.

On the basis of the grievance system, the Appeal Court may, in principle, only rule on properly challenged complaints against the judgment of the court of first instance.

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Poland

Natalia Ołowska-Czajka

1. **Have your courts had occasion to consider Article 18 of the 1980 Convention? If so, in what context and with what outcome?**

   No, there has not been a case of the application of this article ever. This status quo has been confirmed with me with the Polish Central Authority, from where I also got information that in the reciprocal dealings of Poland with other countries within the scope of the 1980 Convention there has never been a case involving the application of Art. 18 of this Convention.

2. **Do your courts have a power similar or analogous to the power of the English High Court to order the summary return of a child to another country under the court's inherent jurisdiction?**

   Under Polish law there is no such discretionary power.

3. **Do your courts ever make orders requiring the summary return of a child to a country which does not subscribe to the 1980 Convention? If so, what is the legal basis for doing so? Is this done regularly or only occasionally?**

   Applicants from the countries which are not parties to the 1980 Convention, cannot rely on the 1980 Convention and therefore the mechanism of return will not apply at all. If such an applicant wishes to institute a case for return of the child, they need to apply – most probably - for establishing the place of residence (main custody) with the applicant and for the relocation of the child.

4. **Have there been any cases where your courts have found that the criteria for a summary return order under the 1980 Convention are not made out, but a summary return order has nevertheless been made? If so, on what legal basis? Has this been done regularly or only occasionally?**

There has not been such a case according to my best knowledge.

5. **Do you have any comments on the procedural aspects of Re NY? Would your courts be willing to make a summary return order under some provision other than the 1980 Convention if no specific application had been made under that provision?**

   No to the first question and again, no to the second one.

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UKSC 2019/0145

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL

IN THE MATTER OF NY (A CHILD) (AP)

SUBMISSIONS ON BEHALF OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS

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