

# Concurrent Convention and Non-Convention Cases: Child Abduction in England and Wales

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**Abstract:** The courts of England and Wales permit applicants in 1980 Hague Convention child abduction proceedings also to bring concurrent applications for the return of the child to their state of habitual residence based on a summary welfare assessment, which can be issued and heard alongside the Hague application. Given the different nature of these two applications, having them heard concurrently raises a number of challenges for the parties in terms of the evidence required and for the court in terms of the analytical process being undertaken. This article explores the nature of the two applications, the reasons why they might be brought concurrently, and the challenges that can arise in such cases.

**Keywords:** abduction; 1980 Hague Convention; non-Convention abduction cases; court procedure; concurrent applications

## 1. Introduction

When it applies, the 1980 Hague Convention on the Civil Aspects of International Child Abduction provides a robust and effective legal remedy to child abduction.<sup>1</sup> It operates as a sort of ‘forum’ convention, where the welfare of the particular child concerned is not the court’s paramount consideration.<sup>2</sup> By contrast, in abduction cases where the Convention does not apply—colloquially termed ‘non-Convention cases’—the court in England and Wales applies a welfare jurisdiction and determines, often based on a *summary* assessment of welfare, whether the child should be returned to the previous home country or not. While there is no presumption in favour of a return order in non-Convention cases, such orders are not unusual; judges are instructed that they ‘may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there’.<sup>3</sup> Crucially, although the classic case for this non-Convention approach to be applied is where the relevant other state is simply not a signatory to the 1980 Convention, it can also be used even when the Convention is applicable to the case, with the non-Convention application heard either concurrently with the Hague application or subsequently.

Our interest in this article is not with considering the general case law in England concerning either Convention or non-Convention cases, but in examining cases where an applicant runs their case under *both* of these jurisdictions concurrently. While the number of *reported* cases addressing this issue is relatively modest (we think there are about a dozen



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<sup>1</sup> In a continuation of a long-standing pattern, in 2015 England and Wales returned 57% of children in applications under the Convention against a global average ‘return rate’ of 45%: (Lowe and Stephens 2018).

<sup>2</sup> The welfare of children *generally* is safeguarded by the operation of the Convention; the Preamble to the Convention states that parties to the Convention are ‘[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody’.

<sup>3</sup> *Re J (Abduction: Rights of Custody)* [2005] UKHL 40, [2006] 1 AC 80, [32].

reported decisions, though they are difficult to search for), our experience in practice<sup>4</sup> is that it is common for cases to be pleaded simultaneously under both legal routes.<sup>5</sup> More often than not, when deployed simultaneously, our experience is that the Hague application becomes the firm focus of the case, and the non-Convention return is given little more than cursory attention. However, with both applications live, litigants are able to rely on both as the case develops.

As we set out below, the English approach appears to be very unusual when seen in an international context. The English approach of allowing concurrent applications to be made demonstrates an important power of domestic law to supplement the provisions of the 1980 Hague Convention in responding to international child abduction, and the fact that similar provisions are not deployed in other states is notable. There are also serious challenges, though. One view is that a parent whose child has been wrongfully removed or retained should be able to deploy any remedy available to them as swiftly as possible, noting the long-term harms caused to children by child abduction (Freeman 2006, 2014). Against that, as we identify in this article, there are significant challenges that arise from the concurrent approach. Concurrent applications raise questions about the fairness of the procedure in individual cases, rely on intellectually different exercises and ask fundamentally different questions, and consequently can create practical difficulties in marshalling and analysing appropriate evidence for two applications. The particular challenge is that a court focused on a 1980 Hague case may find itself making a welfare decision with an inadequate evidential basis and where, had the case been run fully grounded on the individual child's welfare, different procedures might have been adopted and a different outcome reached.

## 2. Non-Convention Child Abduction Cases

It is trite to observe that international child abduction is a problem that existed long before the 1980 Convention, the Convention being, of course, a response to a problem that had been identified many years earlier. The pre-Convention approach of the English courts drew on the High Court's powers in wardship and under its inherent jurisdiction, based on a welfare assessment.<sup>6</sup> Though grounded in the individual child's best interests, the courts not only permitted but were broadly favourable to return orders being made, requiring children to be returned to their previous home country following an abduction. While some cases have approached these applications on the basis of a full welfare enquiry,<sup>7</sup> the modern approach to non-Convention cases generally focuses on a summary procedure whereby the court considers little or no oral evidence and determines the welfare issue on a summary basis.<sup>8</sup> Welfare evidence is provided to the court in the form of written statements and, often, a welfare report from a social worker at Cafcass (the Child and Family Court

<sup>4</sup> Because this issue is often pleaded but not often reported, we rely to some extent on our experience in practice. James Netto is a Partner at the International Family Law Group in London; his practice focuses on international children cases and he typically runs and oversees dozens of child abduction cases each year. Rob George is a barrister practising from Harcourt Chambers; his practice also focuses on international children cases, and he is involved with around 20 child abduction cases each year, instructed by numerous solicitors. Both authors have also spoken with colleagues who practise in child abduction law in England and Wales, to broaden our understanding beyond our own direct experience.

<sup>5</sup> See, e.g., *W v Z* [2023] EWHC 469 (Fam); unlike the cases we focus on in this article, in that case the applicant mother accepted that the court would address the Hague application first and, only if that application was unsuccessful, then move on to consider her application under the inherent jurisdiction at a later hearing. See also the earlier examples of *W and W v H (Child Abduction: Surrogacy) (No 2)* [2002] 2 FLR 252: the intended parents in a surrogacy arrangement had earlier lost their Hague Convention return application ([2002] 1 FLR 1008), but Hedley J subsequently ordered the child's return to California pursuant to the inherent jurisdiction.

<sup>6</sup> *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250.

<sup>7</sup> *Re L*, *ibid.*, involved (as the headnote puts it) 'a full investigation of the facts with evidence from both parties' heard over two days. It remains possible for the court to consider a return order application on full evidence: the authors acted in a non-Hague abduction case that involved a 10-day fact-finding hearing and a further 3-day welfare hearing in 2021: *F v M* [2021] EWHC 553 (Fam).

<sup>8</sup> As Moylan LJ has pointed out, this process is often termed 'summary return', but that phrase is inapt. The descriptor is an inaccurate 'shorthand for a return order made after a summary welfare determination': *Re A and B (Children) (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664, [3].

Advisory and Assessment Service), assessed by the judge following submissions from the parties' lawyers.

This approach is not without its critics,<sup>9</sup> but is designed to allow the court to respond speedily to child abduction cases and minimise the extent to which the passage of time becomes a significant factor in the welfare determination. While there may be some passing similarity between this approach and the position of summary return orders under the 1980 Convention, the more recent authorities have stressed that non-Convention cases are not to be approached on the same basis as Convention cases. In Baroness Hale's words, '[t]here is no warrant, either in statute or authority, for the principles of The Hague Convention to be extended to countries which are not parties to it'.<sup>10</sup> More generally, Moylan LJ has stressed that 'the exercise in which the court is engaged when the court is determining an application for a return order under [the court's powers outside the 1980 Convention] ... is *not* the same as when the court is determining an application for the return of a child under the 1980 Convention'.<sup>11</sup> Lord Wilson went perhaps further in saying that the court's approach under the Convention is 'entirely different' from an assessment under the inherent jurisdiction.<sup>12</sup> The reason for this difference of approach stems from the nature of the 1980 Convention. The decision of a State A to sign up to the Convention's rules, and the separate decision of each existing signatory state<sup>13</sup> to accept State A's accession, involves an acceptance of the Convention's rules and a presumptive mutual respect for the legal processes of the other state. This separate system and reciprocity do not exist in child abduction cases outside the Convention, and so the approach to Convention cases cannot be extended to non-Convention situations.

Despite the fact that the Convention approach plainly does not apply to non-Convention cases, the English courts nonetheless take the view that return orders, based on a summary assessment of the child's welfare, should be made in many cases. The English approach to non-Convention cases appears to be relatively unusual by international standards. The International Academy of Family Lawyers (IAFL) surveyed its members from 17 jurisdictions in 2019 (Scott 2019). Their responses found that many jurisdictions do not consider return applications to non-Convention states at all, and of those that do, most are 'generally sparing in the use of this power' (Scott 2019, para. 6(iii)). Going further and considering concurrent or consecutive applications specifically, the Irish High Court has held that if an abduction falls within the scope of the 1980 Convention (in the sense that both relevant states are signatories to it), an application under the inherent jurisdiction would be contrary to principle: 'To use the inherent jurisdiction to make an order returning these children to Australia after holding that they are habitually resident in Ireland would be to circumnavigate the content and the principles of the Hague Convention'.<sup>14</sup>

### 3. Mechanisms under Which the Non-Convention Application Can Be Made

There are numerous possible legal responses in English law to a child abduction case outside the 1980 Convention.<sup>15</sup> Some of these relate to other international law mechanisms,

<sup>9</sup> See, e.g., Holman J in *EF v LC* [2019] EWHC 3791 (Fam), [6], in the context of a case concerning serious allegations of sexual abuse: 'I have, frankly, found this an increasingly unsatisfactory procedure or process as the hearing has progressed. I am being asked to make a welfare judgment on the basis of very partial evidence and a relatively perfunctory inquiry.'

<sup>10</sup> Re J, [22].

<sup>11</sup> *Re A and B (Children) (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664, [3] (original emphasis). See also the explanation of the different processes by Holman J in *EF v LC* [2019] EWHC 3791 (Fam), [2]–[4].

<sup>12</sup> *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962, [24].

<sup>13</sup> Or, in the case of EU states, the collective decision of the European Union: *Opinion 1/13 of the Court* (Grand Chamber) dated 14 October 2014.

<sup>14</sup> *KW v PW* [2016] IEHC 513, O'Hanlon J.

<sup>15</sup> The same is true in some other states. In New Zealand, for example, an application can be brought: (i) as a form of relocation application pursuant to the powers under the Care of Children Act 2004; (ii) as an argument in relation to forum conveniens, such as in the unreported case of *AMD v MMN*, 8 July 2011, Judge E Smith sitting in Christchurch; (iii) by the equivalent to wardship proceedings, having children placed in the guardianship of the High Court and then summary return orders made, as in *SG v DSG* [2019] NZHC 1015 (there, return

such as the 1996 Hague Child Protection Convention<sup>16</sup> or the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children 1980,<sup>17</sup> but our interest in this paper is in the intersection of 1980 Hague cases and English domestic law remedies. As we go on to show, there are two main domestic law remedies—an application under the Children Act for (usually) a specific issue order under s 8, or an application invoking the High Court’s inherent jurisdiction or wardship powers. As it is of some relevance to the argument, we pause briefly to note that each of these applications is made on a different form. An application under the Hague Convention is made on Form C67; an application under the inherent jurisdiction is on Form C66; and an application under the Children Act for a private law remedy is under Form C100. Forms C66 and C67 can be issued *only* in the High Court;<sup>18</sup> conversely, a C100 can be issued *only* in the Family Court (though the proceedings can then be *transferred* to be heard in the High Court).<sup>19</sup> In practice, this technicality should make little difference as Judges of the High Court can sit as Judges of the Family Court, and the court rooms at the Royal Courts of Justice in London are courts of both the High Court and the Family Court.

It is also possible for orders to be made without any formal application, if the court is otherwise seised of proceedings in relation to the family. The court (either the Family Court or the High Court) can make a private law order under the Children Act of its own motion in any ‘family proceedings’;<sup>20</sup> family proceedings include any application under the inherent jurisdiction but do *not* include a 1980 Hague application.<sup>21</sup> Separately, the High Court<sup>22</sup> can invoke the inherent jurisdiction of its own motion, seemingly in any proceedings before it including 1980 Hague proceedings, though this is not stated in any Act or court rules.<sup>23</sup>

#### *Domestic Law Remedies*

By far the most common is an application under domestic law for one of two orders: a specific issue order under s 8 of the Children Act 1989, or an order under the powers of the High Court’s inherent jurisdiction.<sup>24</sup> As this is our main concern in relation to what we term concurrent applications, we set this out here in some detail.

An application under the Children Act 1989 is for a specific issue order pursuant to the court’s powers in s 8. This type of order can be used to regulate any aspect of parental responsibility in relation to a child. Orders can be made in relation to any child up to the age of 18, but orders in relation to 16 and 17 year olds should be made only if the circumstances are ‘exceptional’.<sup>25</sup> There is clear authority at the highest level that a specific issue order

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orders from India to New Zealand); and (iv) by application for writ under the Habeas Corpus Act 2001, as in *Olsson v Culpán* [2017] NZHC 215 (summary return from New Zealand to Abu Dhabi) and *Kaufusi v Klavenes* [2010] NZHC 1555.

<sup>16</sup> *Re J (1996 Hague Convention: Morocco)* [2015] EWCA Civ 329, [2015] 3 WLR 747 makes clear that the 1996 Convention can, in the right circumstances, be used to respond to child abduction.

<sup>17</sup> The specific powers in relation to cases of what it terms ‘improper removal’ are under Article 8 and 9. For an example, see *T v R (Abduction: Forum Conveniens)* [2002] 2 FLR 544.

<sup>18</sup> FPR 2010, r 12.45 and 12.36, respectively.

<sup>19</sup> FPR 2010, r 5.4.

<sup>20</sup> Children Act 1989, s 10(1)(b); ‘family proceedings’ are defined in s 8(3)–(4).

<sup>21</sup> Children Act 1989, s 8(3) and (4).

<sup>22</sup> The Family Court cannot invoke the inherent jurisdiction.

<sup>23</sup> *Re NY* [54].

<sup>24</sup> These powers are also used in relation to so-called outward abduction cases, where a child has been removed from England and Wales to another state. Separately, in a different use of the phrase, the inherent jurisdiction is sometimes used to justify the English court’s claim to having jurisdiction in relation to an abducted child who is no longer within England and Wales based on the child being a British national, but this is not our concern in this article.

<sup>25</sup> Children Act 1989, s 9(6).

can be used to effect the return of a child following an abduction,<sup>26</sup> and indeed that this should be the preferred legal route unless there are reasons to adopt an alternative path.<sup>27</sup>

The inherent jurisdiction is the name used for the High Court's ancient powers to make orders for the care or protection of children; these powers include the ability to make a child a ward of court, though the powers are wider than that ([Lowe and White 1986](#)). Although reinforced by some statutory provisions,<sup>28</sup> the powers are derived from the Crown's claimed right and duty to defend its citizens. There is no statutory code and, while there are restrictions on the *exercise* of the inherent jurisdiction's powers,<sup>29</sup> the actual powers themselves are said to be 'theoretically limitless'.<sup>30</sup> There is no doubt that the scope of the inherent jurisdiction includes making order for the return of a child following an abduction,<sup>31</sup> and indeed in our experience this remains the most common legal route used in the English courts.

In many ways, applications under s 8 or under the inherent jurisdiction are interchangeable, although specific practical considerations may apply, as explored in more detail below. In our experience, there is often no particular legal reason why one is chosen rather than the other;<sup>32</sup> Though a focus on the inherent jurisdiction may flow from the greater access to legal aid for those applications (which we address later), along with '[t]he instinctive reaction of the English lawyer in these circumstances . . . to reach for the inherent jurisdiction'.<sup>33</sup> However, both legal routes allow the court to make an enforceable order for the immediate return of a child from one country to another, which may or may not also involve a determination of child arrangements issues concerning the care of the child or contact with a parent following that return. While the English court uses these orders in relation both to children who have been abducted *to* England and Wales and those abducted *from* it to another country,<sup>34</sup> our interest with concurrent application cases is only with children who have been wrongfully brought to this country.

The question of whether it was permissible to use the inherent jurisdiction when there was a statutory remedy available under the Children Act was subject to specific consideration by the Supreme Court in *Re NY (Abduction: Jurisdiction)*.<sup>35</sup> Contrary to the appellant's arguments,<sup>36</sup> Lord Wilson held that it was permissible to bring an application under *either* route. In rejecting the argument that, where a specific issue order could be sought, it should not be permissible to apply under the inherent jurisdiction, Lord Wilson said:

<sup>26</sup> The leading authority on non-Hague child abduction is *Re J (Abduction: Rights of Custody)* [2005] UKHL 40, [2006] 1 AC 8, where the order in question was a specific issue order under s 8.

<sup>27</sup> *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962; *Re N (A Child)* [2020] EWFC 35.

<sup>28</sup> Senior Courts Act 1981, s 41 and Sched 1, para. 3(b)(ii), for example.

<sup>29</sup> *HB v A Local Authority and the Local Government Association* [2017] EWHC 524 (Fam), [50].

<sup>30</sup> See, e.g., *Re X (Wardship: Jurisdiction)* [1975] Fam 47, 57 (Lord Denning MR), 60 (Roskill LJ) and 61 (Sir John Pennycuik), though all referring to the limitations on the court in terms of whether it will *exercise* that jurisdiction; see also *Re W (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, 81 (Lord Donaldson MR).

<sup>31</sup> The classic authority is *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250; See generally [Lowe and White \(1986, chp. 17\)](#). On the history of the English court's approach, see [Lowe and Nicholls \(2016, para. 30.6 et seq\)](#).

<sup>32</sup> There are some differences, though, which can matter in other contexts. For example, in an outward abduction where the English court's jurisdiction may be in doubt, an application for a s 8 order will be caught by the jurisdictional rules of the Family Law Act 1986, whereas an application under the inherent jurisdiction for a 'bare' return order will not unless it also includes an application in relation to the custody, care and control, or education of the child concerned. See *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1, [28], though it is a question of substance rather than of form, with the court looking both at the application and at the applicant's substantive statement to determine whether what s/he is seeking falls within the 1986 Act's jurisdictional rules or not: see *Re A (A Child) (Habitual Residence; 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, [62].

<sup>33</sup> *Re J (1996 Hague Convention: Morocco)* [2015] EWCA Civ 329, [2015] 3 WLR 747, [74].

<sup>34</sup> The law and procedures are the same: *Re N (A Child)* [2020] EWFC 35, [3].

<sup>35</sup> [2019] UKSC 49, [2019] 3 WLR 962.

<sup>36</sup> The authors acted for the appellant in the Supreme Court in *Re NY*, together with Mark Twomey KC and Alex Laing.

... if the issue could have been determined under the 1989 Act as, for example, an application for a specific issue order, the policy reasons to which I have referred will need to be addressed. At the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction. It may be that, for example, for reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue, the judge may be persuaded that the attempted invocation of the inherent jurisdiction was reasonable and that the application should proceed. Sometimes, however, she or he will decline to hear the application on the basis that the issue could satisfactorily be determined under the 1989 Act.

The three reasons given by Lord Wilson as to why the inherent jurisdiction should be available in these cases—urgency, complexity, the need for High Court expertise in cross-border cases—do not stand up to much scrutiny (George and Laing 2020, pp. 275–76). First, not all abduction cases have these qualities, yet it remains common that cases are brought under the inherent jurisdiction. Second, other cases that are brought concurrently, such as a medical treatment cases,<sup>37</sup> do not have the cross-border element to them. Third, other types of case where these characteristics are present, such as some international relocation cases, are not eligible for an application to be made under the inherent jurisdiction. Finally, it is never explained why these characteristics make a case unsuitable for hearing as an application under the Children Act for a s 8 specific issue order, allocated to a judge sitting at High Court level.<sup>38</sup> While some judges have endeavoured to interpret *Re NY* as saying that applications should be brought under the specific issue order route unless there are particular, expressed reasons why the inherent jurisdiction is needed,<sup>39</sup> looking at the reported cases one continues to find a plethora of decisions in this area all made under the inherent jurisdiction.<sup>40</sup>

In reality, the inherent jurisdiction is often preferred because legal aid is more readily available for an applicant issuing an application under the inherent jurisdiction. Under the current legal aid regime, an application in relation to child abduction made by way of Form C66 invoking the court's wardship or inherent jurisdiction powers is eligible for means- and merits-assessed legal aid without any kind of preliminary threshold being met; the respondent would also be eligible to apply on the same bases. By contrast, an application for the same substantive remedy made by way of C100 seeking a specific issue order would face the additional threshold hurdle of needing to demonstrate either that the applicant was at least *prima facie* the victim of domestic abuse<sup>41</sup> or that the case justified 'exceptional case funding';<sup>42</sup> delay can bedevil complex funding arrangements, which is contrary to the need for speedy resolution of child abduction cases. Moreover, even if an applicant can

<sup>37</sup> For criticism of the use of the inherent jurisdiction in these cases, on the basis that an adequate remedy under the Children Act exists, see *Re JM (Medical Treatment)* [2015] EWHC 2832 (Fam), [2016] 2 FLR 235 per Mostyn J; R George, 'The Legal Basis of the Court's Jurisdiction to Authorise Medical Treatment of Children', in [Goold et al. \(2019\)](#); [Bridgeman \(2017\)](#).

<sup>38</sup> Mostyn J makes the same point in robust language in *Re N (A Child)* [2020] EWFC 35, [9]: 'I have referred above to the need to establish exceptionality if the path chosen is an application to the High Court under its inherent powers. It is hard to conceive of circumstances where this would be justified. The matters referred to by Lord Wilson, namely urgency, complexity or judicial expertise can be fully accommodated by allocating the matter upwards within the Family Court, if necessary to High Court judge level.' (Emphasis added.)

<sup>39</sup> See e.g., Mostyn J in *Re N (A Child)* [2020] EWFC 35, [9] Peel J made similar comments in an inward return case where a child aged 16 years and 7 months had been removed to the USA, and the application was brought under the inherent jurisdiction: *Re DD (Inward Return Order)* [2021] EWHC 607 (Fam).

<sup>40</sup> There are at least 11 cases reported on Bailii in 2021–2022 that use the inherent jurisdiction to seek the return of an abducted child. Our experience is that at least half of the final decisions given by the High Court in these cases are not made available on Bailii.

<sup>41</sup> The criteria for demonstrating this are also immensely unhelpful for an international case. For example, a report of domestic abuse to any police force within the United Kingdom will be accepted as adequate evidence, but a report to any foreign police force will not.

<sup>42</sup> It is difficult to secure 'exceptional case funding': since 2015–2016, an average of only 152 family law cases per year have been granted exceptional case funding in England and Wales: Ministry of Justice (2022) *Legal Aid*

meet this threshold, it is unlikely that a respondent would do so. This difference of legal aid availability presumably arises from a lack of understanding on the part of the drafters of the legal aid rules, but creates a serious disincentive for parties to use the available statutory remedies when the consequence of doing so will be to remove the possibility of legal aid to support their proceedings.

#### 4. Why Would Concurrent Applications Be Made?

The provisions of the 1980 Convention envisage explicitly that there will be cases where the remedies under the Convention itself are not complete. Article 18 says in terms: ‘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.’ While this provision does not confer any new powers on the court,<sup>43</sup> it makes clear that the fact that an application is brought under the Convention does not limit the court’s ability to rely on other, non-Convention powers to respond to the case before it. As Baroness Hale explained, Article 18 shows ‘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.’<sup>44</sup> That in itself says nothing about *concurrent* applications, rather than (as we understand the approach in other states to be) *consecutive* applications.

Nonetheless, there are a number of reasons why an applicant might want to argue their case both under the Convention and outside it. In practice, experienced practitioners will often simply add a line to their applicant Hague statements, highlighting that, in the alternative, the applicant seeks the child’s return pursuant to the inherent jurisdiction. Our experience is that there may be a fleeting and unremarkable reference to the inherent jurisdiction in the headers of documents, and perhaps a short concluding paragraph of counsel’s written summary (‘position statement’) before a first hearing noting the option of an alternative case being made under the inherent jurisdiction. Very occasionally, a C66 (inherent jurisdiction) application form is filed alongside the usual C67 (1980 Hague Convention) and C1A (allegations of harm) forms, but otherwise the issue rarely occupies much further thought until during (or after!) the final hearing.

##### 4.1. Cases Where an ‘Element’ of the Convention Is in Doubt

It is not uncommon for an applicant to issue a 1980 Convention case knowing that one or more aspect of what we term the ‘elements’ of the case—that is, the requirements of Article 3: habitual residence, rights of custody that were being exercised, and breach of those rights amounting to a wrongful removal or retention—is in doubt. Early cases tended to relate to unmarried fathers where the applicant might technically lack rights of custody,<sup>45</sup> but there are numerous other examples. In *Re KL*, the father’s case was brought on the basis of a 1980 Convention case that ‘depend[ed] upon whether K was still habitually resident in Texas on [the relevant date]’, and—to safeguard against a negative answer to that question—also ‘asserted that the court should exercise its inherent jurisdiction to return the child even if not required to do so under the terms of the Convention’.<sup>46</sup> In *Re KL*, therefore, a child who had become habitually resident in England and Wales prior to the date of wrongful retention was nonetheless returned after a summary determination of welfare using the court’s domestic powers under the inherent jurisdiction.

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Statistics Quarterly: April to June 2022: [gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022](https://gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022), Table 8.2.

<sup>43</sup> *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [7] and [21]; *Perez-Vera* (1980, para. 112).

<sup>44</sup> *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [21].

<sup>45</sup> See, e.g., *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119; in *T v R (Abduction: Forum Conveniens)* [2002] 2 FLR 544, concurrent applications were made under the 1980 European Convention and the inherent jurisdiction, with no application under the 1980 Hague Convention ‘because it was accepted that the mother’s removal of the child from Sweden was not wrongful within Art 3 because at that time the mother had sole custody of the child under an order of a Swedish court.’

<sup>46</sup> *Re KL (Abduction: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017, [13].

*Re NY* can be seen as another such case,<sup>47</sup> though the issue there arose in a procedurally irregular way. The application by the father for the return of the child to Israel was brought only under the 1980 Convention. However, at first instance MacDonald J, in ordering return under the Convention, commented in passing that in addition he would also have ordered the child to be returned under the inherent jurisdiction.<sup>48</sup> On appeal, the Court of Appeal held that the 1980 Convention was not applicable on the facts of the case, because the mother's retention of the child in England and Wales was not 'wrongful' and therefore the Convention did not 'bite'.<sup>49</sup> However, relying on MacDonald J's passing comments, the Court of Appeal went on to make an order for return under the inherent jurisdiction on their summary assessment of welfare. Moylan LJ added that he would 'caution against applications under inherent jurisdiction being made save in circumstances when there are real doubts as to whether the 1980 Convention applies'.<sup>50</sup> It is less clear why the court issued this warning; while we identify in this paper the complications of concurrent applications, there seem to be distinct advantages as well. The Court of Appeal's own return order was subsequently overturned by the Supreme Court,<sup>51</sup> which criticised not only on the procedural unfairness of the Court of Appeal's approach (making an order for which there was no application and indeed no warning to the mother that it was in contemplation), but also the inadequacy of the evidential foundation available to the court. Because the parties had only ever filed evidence relevant to the 1980 Hague Convention proceedings, the court was ill-equipped to consider a welfare-based order. As we explore elsewhere in this article, the scope of the evidence before the court is crucial. Because the 1980 Hague Convention is expressly not about the individual child's best interests, even in cases where the court gains a discretion about the return of the child because an exception has been successfully invoked,<sup>52</sup> the evidential focus of a Convention case is quite different from a welfare case. Consequently, while the Supreme Court's judgment is open to criticism,<sup>53</sup> we agree that the court's focus on the evidence available to the court was crucial.

#### 4.2. Cases Where a Child Is Over the Age of 16

By virtue of Article 4 of the 1980 Hague Convention, the provisions cease to apply to children once they reach the age of 16. Applicants therefore who are seeking the return of an older child (either alone or as part of a sibling group) may therefore need to consider a non-Hague mechanism for return.<sup>54</sup> Where the two relevant states are both parties to the 1996 Hague Convention, that instrument will usually provide a remedy in relation to the wrongful removal or retention of a child aged 16 or 17.<sup>55</sup> Outside the 1996 Convention, recourse is again had to the English court's domestic remedies.

This was the approach adopted in *Re Q and V (1980 Hague Convention and Inherent Jurisdiction Summary Return)*,<sup>56</sup> regarding an application for the return of two children to Poland. The child 'V' was 13, whose return was sought pursuant to the 1980 Hague Convention, while 'Q' was 17, where the application was pursuant to the inherent jurisdiction. Williams J rejected the arguments for any exceptions under the 1980 Convention in relation to V, in particular under the 'grave risk/intolerability' provisions of Article 13(b), and ordered that he should be returned. In relation to Q, the judge held it was in his welfare

<sup>47</sup> [2019] UKSC 49, [2019] 3 WLR 962.

<sup>48</sup> [2019] EWHC 1310 (Fam), [52] and [73].

<sup>49</sup> [2019] EWCA Civ 1065, [59].

<sup>50</sup> *Ibid.*, [64].

<sup>51</sup> [2019] UKSC 49, [2019] 3 WLR 962.

<sup>52</sup> *Re M*—the policy of the Convention remains relevant and can be balanced against welfare.

<sup>53</sup> See above, text from fn 50; see also R George and A Laing, 'Return Orders and the Inherent Jurisdiction After *Re NY*' [2020] *Family Law* 271.

<sup>54</sup> *Re DD (Inward Return Order)* [2021] EWHC 607 (Fam) is an example of a non-Convention application brought in relation to a young person aged 16 years and 7 months who had been removed to the USA.

<sup>55</sup> Unlike the 1980 Convention, the 1996 Convention applies until a child's 18th birthday: see Article 2.

<sup>56</sup> [2019] EWHC 490 (Fam).

interests to be returned to Poland pursuant to the inherent jurisdiction. In that case, the mother's track record of non-compliance with Polish court orders was a significant factor, and policy considerations were particularly forceful in what was a 'hot pursuit' matter. The interconnection between the factors relevant to Article 13(b) for V and the welfare arguments for Q was noted specifically by Williams J:

My discussion in the following paragraphs is of relevance to the application for V's return pursuant to the 1980 Hague Convention where the Article 13(b) and child's objections exceptions are deployed. However it is also relevant to the welfare of Q which is the paramount consideration in relation to the application for his return pursuant to the inherent jurisdiction. The interplay between the evidence, issues arising and conclusions does not facilitate clear dividing lines.<sup>57</sup>

Williams J identifies here some important considerations which we think apply generally to concurrent applications, and which highlight the challenges that these cases can create. In *Re Q and V*, the evidence in relation to the two children under the two different legal mechanisms overlapped to a significant extent, though clearly the fact of the two separate applications in relation to two separate children will have allowed the parties to prepare evidence that was directed explicitly to both issues.<sup>58</sup> In other cases, the factual evidence may not so easily overlap, creating a greater challenge for a judge asked to consider both types of case simultaneously.

A further conceivable set of circumstances could involve a half-siblings or other non-subject child having been abducted as part of a family unit, where a 1980 Convention application can be brought regarding one child but not the other. The applicant may, for example, struggle to establish rights of custody in relation to this child, but nonetheless seek their return, both for its own sake but also to avoid the risk of arguments about sibling separation being made in the 1980 Convention proceedings.

#### 4.3. Settlement Cases?

One potential reason that both applications might be made relates to 'settlement' cases, where more than a year has passed since the child was brought to this country and has subsequently become 'settled' here pursuant to Art 12(2) of the Convention. Article 12 sets out the *requirement* to return a child where an application is brought within a year of the date of the wrongful removal or retention, and then provides in sub-paragraph (2):

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

As [Lowe and Nicholls \(2019\)](#) explain in their detailed analysis of Article 12(2) cases in different jurisdictions, there is presently a divergence of views globally about the scope and interpretation of this provision.

The now-established English approach takes a wide interpretation of Article 12(2), holding that in such cases, even when a year has passed *and* the child is settled in their new environment, the court retains a discretion *under Art 12(2) of the Convention itself* to order the child's return (or not).<sup>59</sup> In exercising that discretion, the court considers a wide range of factors, and welfare is relevant but not determinative; the court can also consider, crucially, the policy objectives of the Convention.<sup>60</sup> Courts in some other jurisdictions, including the USA (though there relying in part on Article 18) and New Zealand and Japan (in both

<sup>57</sup> *Ibid.*, [58].

<sup>58</sup> Cf. the approach in *Re NY*, discussed above, where the Court of Appeal sought to use evidence prepared only in relation to Article 13(b) to support a welfare-based return order, an approach criticised by the Supreme Court.

<sup>59</sup> *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 ('*Re M*'), per Baroness Hale, with whom Lord Bingham, Lord Hope and Lord Brown agreed on this point—a decision that Baroness Hale held to be 'very difficult' and that she reached 'not without considerable hesitation'.

<sup>60</sup> *Re M*, [5] (Lord Hope) and [31] *et seq* (Baroness Hale).

cases interpreting their own domestic law) have reached the same conclusion, holding that the court retains a discretion to order the child's return even if settlement is established (Lowe and Nicholls 2019, pp. 42–44).<sup>61</sup> This approach, as well as creating consistency of approach with the other reasons why the court might not order a child's return under the Convention, also 'avoid[s] the separate and perhaps unfunded need for proceedings in the unusual event that summary return would be appropriate in a settlement case'.<sup>62</sup>

While this approach to Article 12(2) reduces the need for concurrent applications, because the court's discretion under the Convention (including consideration of policy) is likely to yield a more positive outcome from the applicant's perspective anyway, there are exceptions. In *Re B (A Child)*,<sup>63</sup> a Spanish child who had been abducted from Spain but had remained missing for over two years came to the attention of social services in London, following which the father was alerted as to the child's location. The father issued proceedings pursuant to the 1980 Hague Convention *and* under the inherent jurisdiction, seeking for the child's return to Spain. The judge determined the Hague Convention application first, holding (perhaps inevitably) that the child was indeed settled in England and Wales. However, following a more detailed, welfare-based evaluation (including a further Cafcass report), the judge determined that the child's welfare required a return order to be made under the inherent jurisdiction. As we go on to discuss in the next section, this case is illustrative of some of the challenges that concurrent applications can create.

The alternative, narrower view of Article 12(2) is quite different, holding that once a year has passed and the child is settled, the Convention no longer provides a mechanism to order the child's return.<sup>64</sup> This approach appears to accord more naturally with the wording of Article 12(2) itself (Lowe and Nicholls 2019, p. 46; Schuz 2013, p. 234). However, if this approach were adopted, the potential need for concurrent applications becomes greater, because the Convention remedy can fall away entirely if the child is shown to be settled (which experience suggests is a low bar, given that at least a year has passed since the wrongful removal or retention).

This narrower approach to Article 12(2) was taken by the Full Court of the Family Court of Australia in *Department of Family and Community Services v Magoulas*.<sup>65</sup> The position in Australia is slightly different, because the 1980 Hague Convention is incorporated by separate domestic law provisions, rather than being given direct effect; consequently, as Bennett J has noted in the context of the 1996 Hague Convention, 'It is [the] legislation and regulations, rather than the 1996 Convention per se, which have the force of law in Australia'.<sup>66</sup> In considering the Regulations that transpose Art 12(2) of the 1980 Convention into domestic law, the Full Court in *Magoulas* held that

there is nothing in Reg 16 which signals that a court is obliged, or in the exercise of some residual discretion, may order the return of a child if Reg 16(2) applies and the person opposing return establishes that the child is settled in his or her new environment.<sup>67</sup>

As Lowe and Nicholls summarise it, if the application under the 1980 Convention is made more than a year after the date of the wrongful removal or retention, and the child has become settled in their new environment, 'the court *cannot* make a return order' (Lowe and Nicholls 2019, p. 42). In the Australian view, there is a discretion under the Convention

<sup>61</sup> Citing in particular *Lozano v Montoya Alvarez* 134 S.Ct, 1224 (2014) and *Fernandez v Bailey* 2018 WL 6060380 on the US position, and *Secretary of State for Justice (as the New Zealand Central Authority) on behalf of T v HJ* [2006] NZSC 97 on New Zealand.

<sup>62</sup> *Re M*, [31].

<sup>63</sup> [2018] EWHC 1643 (Fam).

<sup>64</sup> This was the view in some early English cases (see, e.g., *Re S (A Minor) (Abduction)* [1991] 2 FLR 1 (CA) and *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 WLR 32, [62]), and commended itself to Lord Rodger in dissent in *Re M*, [7].

<sup>65</sup> (2018) 57 FamLR 371.

<sup>66</sup> *Adel and Banes* [2019] FamCA 7, [20].

<sup>67</sup> (2018) 57 FamLR 371, [18].

itself only where more than a year has passed, but the child has not yet become settled. The same approach is taken in France, Germany and Hong Kong (Lowe and Nicholls 2019, p. 44).

This approach has some support from the Perez-Vera Explanatory Report (Perez-Vera 1980; see also Eekelaar 1982). Describing the bright-line rule that applies up to the anniversary of the child's wrongful removal or retention as 'perhaps arbitrary', the report comments that:

in so far as [summary] return of the child is regarded as being in its best interests, it is clear that after a child's has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. (Para 107)

The Perez-Vera report goes on to note that the provisions of Article 18 may have particular relevance to a case caught by Article 12(2):

[Article 18] 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. This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e. where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment. (Para 112)

These two approaches to Article 12(2) are, on the surface, quite different. However, as *Re B* shows, even when the wider approach is taken, there may be cases where a concurrent application is required, or is at least desirable, though such instances will be significantly rarer in states where the wider view of Article 12(2) is taken.

## 5. Challenges of Concurrent Applications

Asking a court to consider a non-welfare summary assessment under the Hague Convention and a welfare determination under either the inherent jurisdiction or the Children Act simultaneously opens up significant challenges. The intellectual exercise that the court is being asked to undertake is markedly different in the two types of case, and asking judges, litigants (and their lawyers, if they are represented) and Cafcass to consider both concurrently raises a number of concerns.

The involvement of Cafcass is one area that warrants particular attention. Cafcass is the Children and Family Court Advisory and Support Service, an independent body whose employees are social workers, employed to assist the court in making assessments in relation to children. There is a specialist 'High Court team' within Cafcass, with particular expertise in the kinds of work that arise in cases heard by High Court Judges, including international child abduction work. In Hague cases, the role of Cafcass is generally limited to objections reports for children regarding defences under Article 13(2), and for most cases involving the defence of settlement under Article 12(2).<sup>68</sup>

By contrast, in a non-Hague case, the role of Cafcass is to advise the court broadly in relation to the child's welfare. *Re NY* specifically records the obligation to consider a Cafcass report,<sup>69</sup> but how is a Cafcass Officer meant to straddle both applications? Should an Officer be specifically instructed to report, or not report, on certain matters? Can a single report simultaneously be expected to address the strictly limited issue of child's objections and the broader issues relevant to a welfare assessment?

Similarly, the contrast of the two approaches may influence the evidence parents would wish to file. Whereas judges routinely highlight the summary nature of Hague

<sup>68</sup> *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288.

<sup>69</sup> *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962, [62].

proceedings and stress that statements must not traverse every aspect of a child's life,<sup>70</sup> in non-Hague proceedings the evidence that the parents provide will likely need to address broader factors relevant to the child's family life. As the Supreme Court made clear in *Re NY*, an attempt to construct a welfare judgment based only on evidence directed to an Article 13(b) 'grave risk' defence under the Hague Convention will be an appealable error of approach.<sup>71</sup>

Intrinsically linked to issues of evidence and welfare reports is the question of findings amidst disputed allegations, often in relation to domestic abuse. For disputed allegations in Hague Convention matters, the court embarks down the well-trodden path of taking the relevant allegations "at their highest" with a view to determining the sufficiency of protective measures. In *Re S (Abduction: Rights of Custody)*, Lord Wilson went as far as saying that it would be 'entirely inappropriate' to descend into an 'in-depth' analysis of what the European Court of Human Rights had termed 'the entire family situation' in a Hague return application.<sup>72</sup>

By contrast, it was Lord Wilson who, when considering an inherent jurisdiction welfare-based return order in *Re NY*, listed the need to consider 'fact-finding' as a central concern, second only to the need for 'up-to-date evidence' in his list of relevant considerations. While the court is not mandated to conduct a separate fact-finding exercise in a non-Hague case,<sup>73</sup> it is a 'major judicial determination' whether to do so or not;<sup>74</sup> in a Hague application, the English court would (almost) never embark on a fact-finding hearing within the Hague process. These contrasting approaches to allegations of domestic abuse highlight the challenges that we have sought to explore in this article.

Similar issues arise in other contexts, an obvious example being the question of whether Cafcass (the court's social workers) should be asked to give input by way of a full analysis of the child's welfare. Cafcass get involved in 1980 Hague cases to provide the court with evidence about child's objections or settlement, if applicable, but generally not otherwise (unless the case reaches the high threshold of the child being joined as a party<sup>75</sup>, when a guardian from Cafcass can be appointed to represent the child's interests in the litigation). However, Cafcass's role is limited; they do not, for example, provide evidence specifically going to the full range of issues that might be relevant to the exercise of the court's discretion. By contrast, in a welfare-based decision, the court might order a full welfare analysis from Cafcass.<sup>76</sup> Again, this dichotomy of approaches raises challenges for cases being run concurrently.

Finally, there is also a question about the policy of the 1980 Hague Convention. We quoted earlier from the Irish High Court, where O'Hanlon J rejected the principle of concurrent applications because using a domestic remedy to order an abducted child returned after finding that the 1980 Hague Convention applied but did not require the child to be returned would be 'to circumnavigate the content and the principles of the Hague Convention'.<sup>77</sup> The argument is that the 1980 Convention provides both a rule (return of the child) and exceptions (sometimes termed defences), and if a respondent successfully makes out an exception to the rule, the Convention therefore provides for the child to remain in the destination country. However, we do not find this argument convincing. Article 18 of the 1980 Convention states explicitly that the Convention's provisions 'do not limit the power of a judicial or administrative authority to order the return of the child at any time'. As the Perez-Vera report explains, Article 18 'authorizes the competent authorities to order

<sup>70</sup> See, e.g., most recently *C v M* [2023] EWHC 208 (Fam) at [4]; see also Sir Andrew McFarlane P's *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings*, March 2023, para. 3.7.

<sup>71</sup> *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962.

<sup>72</sup> [2012] UKSC 10, [2012] 2 AC 257, [38].

<sup>73</sup> See, e.g., *Re A and B (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664. Permission to appeal to the Supreme Court was refused.

<sup>74</sup> *K v K* [2022] EWCA Civ 468, [2022] 1 WLR 3713, [43].

<sup>75</sup> On joinder of children, see Part 16 of the Family Procedure Rules 2010 and Practice Direction 16A.

<sup>76</sup> Children Act 1989, s 7.

<sup>77</sup> *KW v PW* [2016] IEHC 513, O'Hanlon J.

the return of the child by invoking other provisions more favourable to the attainment of this end' (Perez-Vera 1980, para. 112). The Convention is fully committed to its primary aim—'to secure the prompt return of children wrongfully removed to or retained in any Contracting State'<sup>78</sup>—and permits non-Convention means to be used to achieve that aim if they will be more effective than the Convention's own tools.

## 6. Conclusions

Perhaps reflective of the scant case law in this area, it is rare for a case to be run all the way concurrently under the Hague Convention and the non-Hague route. Although the Supreme Court has paved the way for dual applications to be made, this has not yet led to a notable uptick in cases being brought in this manner. The Court can only be commended for arming practitioners and left-behind parents with a further tool in its armoury for the protection and return of abducted children. That in itself is a fairly unimpeachable principle, and the court's power to bring applications in this manner is beyond reproach—even if it appears to be a uniquely English creation. However, launching concurrent applications at present risks opening a Pandora's box of unresolved issues of policy and procedure; until this is remedied, caution is needed.

It is the nitty-gritty framework of concurrent cases—e.g., the evidence, the remit of any fact-finding, the role of Cafcass, the structure of proceedings, and so on—that perhaps throws up the biggest issue, intrinsically linked with the difficulties of asking the court to undertake two separate and in some ways incompatible intellectual exercises simultaneously. Thus far, this crucial issue has attracted little guidance. As a consequence, in any concurrent application, the possibility of an appeal arising out of this less-well-trodden area of law remains, in our view, a realistic prospect. Any appeal injects an inevitable delay that can only prejudice an applicant's case; in an international abduction matter, it may even prove catastrophic and is frequently lamented by the Court of Appeal.<sup>79</sup>

Further judicial clarity is probably needed in relation to specific evidential requirements, necessary timelines, and the structure of hearings in concurrent cases. Considered and pragmatic guidance on the structure of concurrent return applications should, we suggest, follow the broad-brush approach adopted by the Supreme Court in *Re NY*. Applicants are entitled to choose the most suitable vehicle for their case, even when the factual matrices involved border on the esoteric. They must be allowed to weigh up the risks versus the rewards of launching one or more applications, without fear of confusion or appeal. Respondents conversely have the right to challenge what is being prosecuted, and how best to set out their stall accordingly. Judges should feel empowered to proceed down this route in appropriately structured trials with the requisite evidence before them, allowing the making of a considered, unchallengeable decision. For now, cases embarking on concurrent applications may remain few in number, but if approached with sufficient care they present interesting opportunities for challenging cases.

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<sup>78</sup> Article 1(a).

<sup>79</sup> See, e.g., *Re F (Return Order: Appeal)* [2016] EWCA Civ 1253, [2017] 4 WLR 4, [28].

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