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Coronavirus Research by the European Children's Rights Unit

COVID-19 and International Child Abduction: Children's Stories



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Research and response

Briefing Paper #9

Allison Wolfreys

COVID-19 and International Child Abduction: Children's Stories

Allison Wolfreys

This paper considers two recent High Court cases conducted remotely during the COVID-19 lockdown that concern international parental child abduction which is governed by the [Hague Convention on Child Abduction 1980](#) (The Convention).¹ The cases shed some light on the currency of the rights of children to participate in decisions around whether they should be returned to where they were living prior to the abduction.

The Convention's purpose (stated in Article 1) is to secure the prompt return of a child if they have been wrongfully removed or retained by a parent. If the court finds that a child has been wrongfully removed from the place of their habitual residence without the consent of the other parent, then return will almost always be ordered with very few exceptions. The two that are of interest in this paper are known as the "grave risk" and "child's objections" exceptions, set out in Article 13. The first argues that a return order will expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b)). The second exception allows the authorities to refuse the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

Alongside the Convention, Article 12 of the United Nations Convention on the Rights of the Child 1980 (UNCRC) provides that the courts should hear and give due weight to the views of children in all decisions that affect them, including in the context of these two exceptions (See also Baroness Hale's support for hearing children in international child abduction proceedings *In re D (a child)* [2006] UKHL 51).

The cases summarised below reveal how COVID-19 has been treated by the court as part of a defence to considering a return, but also on a deeper level, to understand the procedural barriers that stand in the way of making this the child's story rather than that of the adults involved. By analysing the judgments, we can in a small way understand how far children's participatory rights are entrenched or side-lined in times of

¹ Incorporated by the Child Abduction and Custody Act 1985

crisis. The introduction of [remote hearings](#) will also be touched upon and, building on some [recent research](#), will point to some of the positive opportunities this may provide for enabling judges to hear directly from children.

Two noteworthy cases relating to international parental child abduction have been heard by the High Court during the Covid-19 lockdown. Both cases took place by remote platforms: Zoom and Microsoft Teams respectively.

***Re N (A Child)* [2020] EWFC 35 (1 May 2020)**

This case concerned a 12-year-old Greek boy ('N'), born to Greek national parents. Their relationship broke down in 2009 and by agreement N lived with his mother. In 2017, N's father came to London and a few months later N and his mother followed. Although the parents did not resume their relationship, they lived together in East London. On 20th March, three days before the Westminster Government's lockdown, N's mother unilaterally travelled with N to the Island of Paros in Greece to stay with her own mother. Paros had a zero rate of Covid-19 infection and also has its own medical facilities. The judgment records that due to the pre-emptive action taken in Greece, there was a much lower infection and mortality rate than in England. The father issued an application for a declaration that N was habitually resident in England and for a whole series of other orders. He also instructed a Greek lawyer and after some administrative delay the application for summary return order under the Convention was accepted by the Greek Central Authority. During the hearing the mother submitted to the court that her reasons for leaving were directly related to the Covid pandemic. It was her assertion that she was doing what she could in the belief that her son would be safer from the virus in Paros than living in England. It was not her intention to remain there, but since she had arrived there had been a total lockdown initiated and she had no way of knowing when she would be able to return to London with N. A declaration of habitual residence was made, following submissions by father that this would greatly help the progress of the Convention application in Greece. On this basis the Judge adjourned the balance of all other applications and made it clear that they would not have proceeded in any event without evidence from the mother as well as a report from a Cafcass Officer relating to the wishes and feelings of the child.

The judgment makes it clear that Covid-19 should not be used as a justification for a wrongful removal. It is acknowledged that it may very well be the case that it would be safer for N in Paros than in England where the rate of infections was rising, but this does not override “even slightly” the “removal from habitual residence” and “more importantly, from (the) father” (para 16).

How remote hearings might provide an opportunity to hear the child’s voice

The Mother’s ability to participate by Zoom from Paros during the hearing was recorded in the judgment as a success.” *There is no doubt that the mother was able to participate far more effectively and fairly by means of the hearing proceeding by Zoom than if it had been a traditional attended hearing in court in London.*” (para 20).

No such observations are made in relation to the child’s participation, however. Indeed, the child’s views are completely absent from the proceedings and no effort is made to harness the opportunity of the remote hearing to facilitate his direct participation. We have no knowledge whether the child was even aware that they were going on. The priority was simply to secure the immediate return of the child to his place of habitual residence.

Re PT (A Child) summary return KR v HH[2020] EWHC 834 Fam

This case concerned a 12-year-old Spanish girl (PT), born to Spanish national parents. The parents’ relationship broke down in 2012 and a custody order was made in Spain for PT to live with her mother and have contact every other weekend with her father with holidays to be shared. The mother left Spain with PT and arrived in London in February 2020, although the exact date has been excluded for reporting purposes. PT’s father issued an application on 10th March for a variety of orders, including an application for a return order under the Convention. On the 13th March mother attended court in person and so did PT who spoke to the CAFCASS officer at court. By the time of the final hearing on 27th March lockdown had begun and the hearing took place by Microsoft Teams.

In her previous conversation with the Cafcass officer, PT stated emphatically that she wished to return to Spain and that she was very unhappy about being removed from all that was familiar to her. The Cafcass officer asserted that PT did not grasp how far she would miss her

mother if a return was to be ordered but noted that overriding her wish to return would do even more harm. A return order was made.

Covid and Wrongful Removal

Once again, the mother invoked the higher rate of infection of Covid-19 in Spain as a factor justifying the child's removal to England.² However, the court concluded that infection rates were constantly changing and the contrast and comparative risks may well become less marked in time. Moreover, the likelihood that PT could contract the virus was similarly small both in the UK and in Spain. Whilst international travel (required in order for the child to return) posed an additional risk, it was not deemed to be sufficiently "grave" to support a defence to the wrongful removal.

The case was complicated by the fact that the mother had requested an adjournment as she had yet to secure legal representation. She also stated that she had film footage to evidence her claims of domestic violence (and in support of a 'grave risk' defence) but was unable to access the footage due to the Covid-19 restrictions.

PT's father (represented by Counsel), opposed the adjournment, arguing that the impending travel restrictions in the UK could make it even harder to secure the child's return to Spain if there was further delay. To support his position, he also invoked PT's need to have the situation resolved quickly, as well as the mother's failure to facilitate contact.

The child's views and interests

PT's expressed wish to return to Spain aligns with the return order made by the court, but the circumstances in which her views were obtained raises some questions. PT's views were recorded in the Cafcass officer's report and had been obtained following only one interview at court due to the time pressures. There was no opportunity to fully explore the situation or to ascertain whether PT understood the implications of being returned to Spain: this would effectively necessitate a complete transfer of her primary carer from that of her mother to her father.

² At the time, the death toll in the UK was 1,228 compared to 6,528 in Spain, see para 46 (1)

It is acknowledged that PT has not had a chance to reflect upon and understand how separation from her primary carer (mother) might affect her. She would not be returning to the same living arrangements: even though she would be returning to her 'habitual residence' of Spain, she would be living with her father full time rather than seeing him every other weekend. A return would be under lockdown conditions and the change would also mean transfer to a different school.

The summary nature of abduction proceedings does not allow the child's interests and wishes to be fully explored, the presumption being that such issues will be pursued before the courts of the child's habitual residence following their return. But with lockdown conditions in place, delays likely to affect many court proceedings due to the Covid-19 backlog, and further restrictions on children's ability to take part in such proceedings, there seems little chance of gaining a fuller picture of the child's needs in Spain.

Conclusion

These two cases confirm that Covid-19 and the risk of contracting the virus should not be used to justify a 'grave risk' defence to return. With the shift to online proceedings, it would have been relatively easy for the judge to engage directly with the children concerned. And yet, procedural conventions under the Hague Convention, coupled with the imperative to secure the immediate return of the child no matter what, signal a wasted opportunity for more meaningful and routine participation of children in these major life decisions.

The expansion of the use of virtual hearings during the pandemic provides a real opportunity to revisit children's participation more directly in decisions that affect them. Although there are limitations inherent in the Convention, there is also a chance to expand our thinking not just about the barriers to participation but the opportunities that are presented by the current crisis to meaningfully engage children in decisions that are made about them.

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Allison Wolfreys

Allison Wolfreys is a PhD candidate (jointly supervised by the Open University and the University of Liverpool) and a member of the European Children's Rights Unit.

She is a full time Lecturer in Law at the Open University Law School and teaches European Union Law. As a Solicitor, she spent many years in practice specialising in family law and her research focuses on the participatory rights of children in international child abduction law.

- Allison can be contacted at allison.wolfreys@open.ac.uk

See also '*COVID-19 and the Family Court - Justice at our Fingertips*' found at the Open University Law School:

- <http://law-school.open.ac.uk/news/covid-19-and-family-court-justice-our-fingertips>

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