

1996 Hague Convention

Richard Harrison QC

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BETAMAX IS 45





HC96 or BIIA

- Art 67 of the Withdrawal Agreement
- Arts 61 and 62 of BIIA
- Matters governed by the Regulation
- *Re AA* [2021] EWFC 17

FLA 1986 s2 (as amended by EU Exit Regs)

2.- Jurisdiction: general

- (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless-
- (a) it has jurisdiction under the Hague Convention, or
 - (b) the Hague Convention does not apply but-
 - (i) the question of making the order arises in or in connection with matrimonial proceedings [or civil partnership proceedings] and the condition in [section 2A](#) of this Act is satisfied, or
 - (ii) the condition in [section 3](#) of this Act is satisfied.

3.— Habitual residence or presence of child.

- (1) The condition referred to in [section 2\(1\)\(b\)\(ii\)](#) of this Act is that on the relevant date the child concerned—
- (a) is habitually resident in England and Wales, or
 - (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,
- and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

HC96: main features

- Rules of jurisdiction
- Recognition and enforcement of orders
- Applicable law
- Co-operation

HC96 v BIIA: key similarities

- Much similarity; HC 96 pre-dated and informed drafting of BIIa
- Art 5 general jurisdiction based upon habitual residence [Art 8 BIIa]
- Art 6 jurisdiction over refugee/displaced children, and where children's habitual residence 'cannot be established' [Art 13 BIIa]
- Art 7 retained jurisdiction in cases of child abduction [Art 10 BIIa]
- Art 8 & 9 mechanism for transfer between Contracting States [Art 15 BIIa]
- Art 11 & 12 protective/urgent measures [Art 20 BIIa]
- Scheme for recognition and enforcement of orders (Ch IV); grounds for non-recognition Art 23 are similar to those under BIIa; no review on merits: Art 27
- See Lagarde Explanatory Report and the Handbook for guidance on HC 96

HC96 v BIIa: key differences

- No *perpetuatio fori* under Art 5 HC96 – compare the wording with Art 8 BIIa
- Subtle differences in Art 8 - no need party agreement, where does ‘best interests’ feature?
- Urgent necessary measures of protection under Art 11 capable of extra-territorial effect/enforceable, unlike Art 20 BIIa; scope of Art 11-12 HC 96 wider
- No free-standing prorogation for children proceedings – only possible where there is an ongoing related divorce (Art 10); unlike Art 12 BIIa
- Recognition & enforcement: need declaration enforceability/registration: Art 26 / Ch IV
- Convention applies up to age 18: Art 2
- Continuance of parental responsibility following change in habitual residence: Art 16(3)
- Co-operation provisions in HC96
- HC 1980 will continue to apply to child abduction cases but without BIIa ‘enhancements’

Habitual residence

- The key to jurisdiction
- European principles now incorporated into domestic law and will continue to apply
- ‘some degree’ of integration in a social and family environment
- Constellation of factors to consider: Hayden J in Re B [2016] EWHC 2174 (Fam)

Determining habitual residence

- Focus on situation of child; parental intention is relevant but usually secondary
- Need to compare the situation of the child in relation to the two jurisdictions in play
- Comparison needs to be current: i.e. what is the position of the child's situation in each of those two jurisdictions **NOW**
- Wrong to compare present situation in jurisdiction A versus past situation in jurisdiction B

quick v slow transfer of HR

- No single factor
- Relocation with extensive pre-planning and severance of ties – very quick (Re B [2020] EWCA Civ 1187)
- Unilateral move with loss of contact to a parent left behind – likely to be slow (Re B [2016] UKSC 4)
- Agreed but time limited move – can still occur quickly (a few weeks or months) (Re R [2015] UKSC 35)
- Watch out for unhappy teenagers – their state of mind can slow / prevent a transfer (Re LC [2014] UKSC 1)

Perpetuatio Fori

- Once seised does not mean forever seised
- Jurisdiction can transfer mid proceedings
- Scenario 1: Interim relocation order
- Scenario 2: Protective applications when child outside jurisdiction
- Article 13: requirement of second court to abstain

Abduction to non-HC96 State

- Article 7
- Similar to Art 10 BIIA
- SS v MCP C-603/20
- Re H [2014] EWCA Civ 1226 overruled

Prorogation

- Ability to confer jurisdiction by agreement more limited under Art 10 HC96 than Art 12 BIIA
- Can only be based upon divorce proceedings – not ‘substantial connection’
- One of the parties must be HR in jurisdiction

Urgent cases / Art 11

- Art 11 jurisdiction to secure return of abducted child
- Undertakings to supplement return orders are 'measures' – subject to automatic recognition
- Orders made in urgent cases are subject to more limited exceptions for non-recognition under Art 23
- Obtain recital recording case of urgency

Recognition and enforcement

- Art 23: limited grounds for non-recognition (similar to BIIA)
- Child no opportunity to be heard (n/a in case of urgency)
- Person with PR no opportunity to be heard (n/a in case of urgency)
- Public policy – v high threshold
- Incompatible with later measure in non-Contracting State of HR of child
- **What about later measure in Contracting State?**
- Art 33 procedure not complied with (placement of children in foster care or institutional care in another Contracting State)

Enforcement v Variation

- Re E [2020] EWCA Civ 1030
- Based on Art 23(e) BIIA: ‘irreconcilable with a later judgment ... in the Member State where recognition is sought’
- No direct equivalent in HC96
- But will the principle hold good? Purposive construction of Art 5(2).

Applicable law

- General principle: courts apply own law
- Exceptionally 'may' take into consideration law of another State in so far as protection of person or property of child requires
- PR governed by law of State of HR
- Existing PR subsists after change of HR

Co-operation

- Art 32: requests for reports
- Art 35: request for assessment of suitability of parent to have access