
Radhika Handa, barrister, of Coram Chambers compares the court’s consideration of children's wishes in Hague Convention and Children Act cases, in both private and public law.

Introduction
This article will analyse how children's views are considered in proceedings under the Hague Convention on the International Aspects of Child Abduction 1980, through what is colloquially known as the 'child's objections defence' under article 13. It will then compare this approach with the way in which the courts have regard to children's views in terms of their 'wishes and feelings' under s1(3) of the Children Act 1989, in proceedings under s8 and s31. The article concludes that the 'objections' or strong, clear 'wishes and feelings' of a young child should not necessarily be determinative of outcome. However, those involved in the family justice system must give more attention to analysing and weighing young children’s views in Children Act proceedings. They must ensure that children's views are paid more than mere lip-service, so that children can understand why decisions are made which do not accord with their views; live with those decisions; and perhaps even respect them.

The emphasis in this article will be on the weight given to the child's view once they have been heard, rather than on considering how the views of the child should be heard – that is, through a family court advisor, separate representation or by way of direct meeting with the judge.

The nature of Hague Convention proceedings
The following points particularly distinguish Hague Convention proceedings from Children Act proceedings:

i. The role of a court deciding a Hague Convention case, as opposed to a case under s8 or s31 of the Children Act, is not to make substantive decisions about the child's future or upbringing. It is to ensure, unless the defences in articles 12 or 13 are successfully argued and a discretion arises, the summary return of children wrongfully removed or retained in breach of custody rights to their country of habitual residence, in order to allow the 'home court' to make any necessary welfare decisions.

ii. In Hague Convention proceedings, welfare is not the court’s paramount consideration and therefore, unlike proceedings under s8 and s31 of the Children Act, neither s1(1) of that Act nor the s1(3) 'welfare checklist' applies. The court does not engage in a detailed investigation of the child's circumstances. That is not to say the concepts of 'welfare' or 'best
interests' are completely irrelevant. Baroness Hale of Richmond and Lord Wilson of Cusworth, giving the judgment of the court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, rejected the submission that s1(1) of the Children Act 1989 should apply to Hague Convention proceedings, stating "These are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided, whether by agreement or in legal proceedings between the parents or in any other way" [paragraph 13; emphasis added]. However, in considering the requirement under article 3(1) of the United Nations Convention on the Rights of the Child 1989 (UNCRC) that 'the best interests of the child shall be a primary consideration', the Supreme Court concluded that both the Hague Convention and the Brussels II Revised regulation,¹ have been devised with the best interests of children generally, and of individual children, as a primary consideration.² There is also an underlying general assumption, rebuttable in certain circumstances, that the child’s best interests will be served by a prompt return to the country of habitual residence.³

iii. Therefore the extent of the discretion the court exercises in Hague Convention proceedings is limited and circumscribed by the Convention and its purposes.

**Hague Convention proceedings and the child's objection defence**

**Ensuring the child is heard in Hague proceedings**

Baroness Hale in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51 observed at paragraph 57:

"As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."[emphasis added]

Baroness Hale noted at paragraph 58 that article 11.2 of Brussels II Revised explicitly recognised this thinking. She opined that the
presumption (contained in article 11.2 of that regulation) that the child be given an opportunity to be heard unless this appears inappropriate, was also of application to non-EU cases and indeed to all Hague Convention cases. Baroness Hale noted that 'hearing the child' is not to be confused with 'giving effect to his views'.

She stated that it followed that children should be heard far more frequently in Hague Convention cases than had previously been the practice [paragraph 59]. Baroness Hale went on to consider the various ways in which the child could be heard and stated that the question of whether and how a child should be heard should be considered at the outset of a case [paragraphs 60-61].

Baroness Hale specifically did not limit the circumstances in which a child should be heard to only those cases where a defence under article 13 was raised [paragraph 58]. However, this article shall focus on the child being heard within the context of the "child's objections defence".

**The "child's objections" defence**

This is contained within article 13 of the Hague Convention:

"Notwithstanding the provisions of the preceding Article.... The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and had attained an age and degree of maturity at which it is appropriate to take account of its views" [emphasis added]

There are therefore three limbs to the "child's objections" defence:

(a) Does the child object to being returned? If so: -

(b) Has the child attained an age and degree of maturity at which it is appropriate to take account of his or her views?

If so (and only if a) and b) are both established): -

(c) How should the court exercise its discretion as to whether to order a summary return?

*a) Does child object to being returned?*

In S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 it was held that the phrase 'the child objects' is to be construed by reference to its literal meaning without adding a gloss to the language.

In addition, 'wishes and feelings' and 'objections', as Thorpe LJ observed in Re K (Abduction: Case Management) [2011] 1 FLR 1268, are not one and the same:
"There must be a very clear distinction between the child's objections and the child's wishes and feelings. The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article." 7

There are a number of ways of establishing whether the child objects; perhaps the 'typical' approach is by way of a CAFCASS report prepared by an officer of the High Court team. It is beyond the scope of this article to consider the merits of the various methods of establishing whether the child objects to return.

(b) Has the child attained an age and degree of maturity at which it is appropriate to take account of his or her views?

In relation to the meaning of the phrase 'take into account', Wilson LJ in Re W (abduction: child's objections) [2010] EWCA Civ 520 stated that the phrase

"...means no more than what it says so, albeit bounded of course by considerations of age and degree of maturity, it represents a fairly low threshold requirement. In particular it does not follow that the court should 'take account' of a child's objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise which is to follow". 8

Ward LJ in the earlier case of Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192 had suggested that a discrete finding as to 'age and maturity' was needed, before considering whether it was appropriate to take account of the child's views. He suggested therefore, that to ascertain the strength and validity of the child's views, the following matters should be considered:

"(a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?"
(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"\(^9\)

In relation to the issue of age, the Hague Convention does not specify any minimum age below which it would not be appropriate to take account of a child's views. In *Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716*, the Court of Appeal (by a majority) held that the trial judge was not wrong to have taken the wishes of boys aged 7 ½ and 6 into account. In general, the court considered that the younger the child, the less likely it would be that he had the maturity which made it appropriate to take his views into account.\(^10\) However, the trial judge had erred in not ordering return. The Court of Appeal unanimously allowed the appeal and ordered return of the children. In *Re W (abduction: child's objections)* (above), the Court of Appeal refused permission to appeal against Black J's decision not to return children then aged 8 and almost 6. The decision was as a result of Black J's findings that the children objected to being returned to Ireland, and that each of them had attained an age and degree of maturity at which it was appropriate to take account of their views.

Wilson LJ accepted that whilst the defence was originally devised with mature adolescents in mind, over the last thirty years the need to take decisions about much younger children, not necessarily in accordance with, but in any event in light of, their wishes, had taken hold. He acknowledged and shared the concern that any lowering of the age at which a child's objections may be taken into account, might gradually erode the high level of achievement of the Convention's objective. That is, in the vast majority of cases, to secure the summary return of children to the states from which they have been abducted. He said this consideration should always carry significant weight in the exercise of the discretion whether to refuse to order the return of an objecting child, but particularly so if that child is young. He noted however that a considerable safeguard was to be found in the expectation that in the discretionary exercise, the objections of an older child will deserve greater weight than those of a younger child.\(^11\)

(c) How should the court exercise its discretion as to whether to order a summary return?

In *Re M (Abduction: Zimbabwe) [2007] UKHL 55*, Baroness Hale described the exercise of discretion where a child's objection exception has been established:

"....Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of
influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.'

Whilst the age of the child is relevant to the exercise of discretion, it is apparent from Re W above that the discretion not to order return may be exercised in favour of a child as young as 6. Where older children are concerned, in *Re G (Abduction: Children's Objections) [2010] EWCA Civ 1232*, it was held that courts have to consider the implementation of a judgment for return and should be alive to the difficulties of implementation where the subject of the return order is an 'articulate, naturally determined and courageous adolescent'.

**Proceedings under the Children Act 1989**

**Principles**

Section 1(1) of the Children Act 1989 provides:

"(1) When the court determines any question with respect to –

   (a) The upbringing of a child; or
   (b) The administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

Section 1(3) sets out the matters the court shall have regard to in particular in s8 proceedings, and when considering making, varying or discharging a special guardianship order or an order under Part IV:

"(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

   (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
   (b) his physical, emotional and educational needs;
   (c) the likely effect on him of any change in his circumstances;
   (d) his age, sex, background and any characteristics of his which the court considers relevant;
   (e) any harm which he has suffered or is at risk of suffering;
   (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
The Children Act does not specify a minimum age a child should have reached, before their wishes and feelings should be ascertained or taken into account. However, reference is often made to the following paragraph of Dr Clare Sturge and Dr Danya Glaser's expert report to the court in Re L (Contact: Domestic Violence) [2000] 2 FLR 334:

"... while this needs to be assessed within the whole context of such wishes, the older the child the more seriously they should be viewed and the more insulting and discrediting to the child to have them ignored. As a rough rule we would see these as needing to be taken account of at any age; above 10 we see these as carrying considerable weight with 6—10 as an intermediate stage and at under 6 as often indistinguishable in many ways from the wishes of the main carer (assuming normal development). In domestic violence, where the child has memories of that violence we would see their wishes as warranting much more weight than in situations where no real reason for the child's resistance appears to exist."

In terms of the obligations of the UK under international law, articles 3 and 12 of the UNCRC are particularly relevant:

"Article 3
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

.....

Article 12
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

**Application in contact and residence proceedings under section 8**

The case of *Re R (Residence Order)* [2009] EWCA Civ 445 is useful in emphasising that there is an important difference between simply 'hearing' the child and actually listening to and evaluating what he has to say. The Court of Appeal (by a majority) allowed the appeal of a mother against a residence order made to the father of her 9½ year old son. The boy had lived with his mother following the parents' separation. However by the time of the hearing he had been with his father for several months, following the mother's request that the father look after the child, whilst she was suffering from various difficulties. The CAFCASS officer (who was not called to give evidence) had reported that on balance the child should return to his mother as he had said he preferred to return to her, he felt more relaxed in her care, and (the officer found) the level of risk or distress the boy had suffered was not sufficient to permanently remove him from his mother's care. Rix and Moore-Bick LJJ found the judge had erred in setting on one side the firm evidence of the child's own wishes, and in rejecting the CAFCASS officer's clear recommendation, together with the reasons for both, without any new evidence or any reasoned challenge to either, and without having heard the officer's oral evidence. There had been no agreement by the parents that the child's residence would permanently transfer to the father. The child's successful adaptation to his change of home and school was not a reason to discount the child's expressed, reasoned, and accepted, wish to be with the mother, or to ignore the CAFCASS officer's recommendation that the child return to the care of the mother who had been the foundation of the child's successful upbringing. By referring to the child's wishes, accepting them, but thereafter essentially ignoring them, the judge had in effect wholly discounted them. He had not 'listened' to the child. The judge had failed to articulate the basis of his disagreement with the CAFCASS officer's report, and had ignored her recommendation.

However, by way of comparison, in *Re S (Contact: Intractable Dispute)* [2010] EWCA Civ 447, [2010] 2 FLR 1517 the Court of Appeal (in a mere 4 page judgment...) allowed an appeal against an order which contained a condition that the children had to decide whether to take up contact or not, and remitted the matter to a judge of the Family Division. The court found that such order was effectively no order. The children were aged 12 and 13, but Thorpe LJ (with whom Aiken LJ and Wall LJ agreed) stated that despite their clearly expressed wishes and feelings,
children of their age had to have their lives regulated by adult judgment. The current provision burdened them with a responsibility they should not have to bear at their respective ages.\textsuperscript{13}

**Application in section 31 Proceedings**

There is something of a dearth of reported cases which consider children's wishes and feelings within the context of care proceedings. In *Re H (Care order: Contact)* [2009] 2 FLR 55 the Court of Appeal allowed an appeal against a care order with a plan for long term fostering in respect of a 10 year old girl, and made a residence order to the mother and 12 month supervision order to the local authority. The local authority had removed the girl from her mother's care in circumstances which included concerns about the mother's association with a man with whom she had a violent and emotional relationship, and her refusal of contact between the child and her father and maternal grandmother. The girl had consistently said she wished to return home to her mother and had recently turned up at her mother's home in a state of significant distress.

The Court of Appeal considered that the judge had not sufficiently taken on board the child's understanding of her predicament and the depth of her feeling. Her understanding had been sufficiently astute, well developed and mature to permit her to be separately represented, and should have been taken into account. In his analysis of the child's needs, the trial judge had failed to refer to the child's need to maintain the very significant relationship with and attachment to the mother. The child's wish to be with the mother and the perpetuating of the strong and significant attachment to the mother were weighty factors. The judge had erred in failing to perpetuate the fundamental importance of a relationship and life with a parent if that was at all possible.

**Analysis**

It may be observed that there is a wealth of guidance in the case law in relation to Hague Convention proceedings as to how the exercise of assessing and giving weight to children's objections should be conducted, compared to that available in relation to both s8 and s31 proceedings under the Children Act. In addition, whilst *Re W* does not create any precedent that a 6 year old's objections will always be taken into account or lead to a decision of non-return, it is certainly a significant addition to the body of case law in that area. It makes it easier to construct an argument that a child as young as 6 may be capable of being a 'moral actor in their own right', to paraphrase Baroness Hale.

It is also submitted that in this sense there is a stark difference between Hague cases and private law Children Act cases as to the way in which the wishes and feelings of young children are considered. The latter may be considered to be paternalistic. A 6 year old's wishes and feelings, if 'heard' at all, seem unlikely (from both practical experience and the
guidance available from the authorities) to be afforded great weight. A child of 10 or even older (as in Re S, above) may well have his 'wishes trumped by his welfare'.

As to care proceedings under s31, most care practitioners will be able to recall examples from their own practice where adolescent children's wishes and feelings have resulted in a change of care plan by the local authority, as a result of pragmatic concerns relating to the child simply 'voting with their feet' if their views are not given effect to. However, a submission that the wishes and feelings of a child aged 6 in favour of returning home rather than remaining in foster care – or even for a higher level of parental contact – should be given effect to (or even given any significant weight), can be predicted to flounder no sooner has it been voiced.

It may be said that it is incorrect to attempt to compare 'objections' and 'wishes and feelings' under the umbrella of 'views' – 'objections' being something other than 'mere wishes and feelings' (see Re K, above). However, it is submitted that judges and professionals in the family justice system are capable of differentiating between a 'mere preference' and a strongly felt expression of views.

It may also be argued to be futile to draw comparisons across different legislation enacted for different purposes, and that the existence of detailed guidance available in Hague cases may be as a result of the courts recognising a need to protect the integrity and aims of the Hague Convention, by ensuring the discretion is not exercised arbitrarily or too freely. Meanwhile, it may be said, the discretion being exercised by the court in Children Act proceedings is much wider and therefore should not be overly fettered.

It is of course accepted that the purposes of the Hague Convention and the Children Act are different. However, the concept of best interests is inherent in both; and, on a more basic, fundamental level, both Hague Convention proceedings and Children Act proceedings involve decisions being made which may have an immediate and significant impact on children's lives. After all, giving effect to the objections of a 6 year old (or indeed an older child) to returning 'home' following an abduction, may have long term effects. These potentially include a significant loss of contact with the 'left behind' parent, resulting in an impact on a child's relationship with them and possibly other family members. In Dr Marilyn Freeman's study for Reunite, some interviewees who had been abducted detailed a range of consequences including ongoing stress, resentment, anxiety, and distrust of adults in their lives including professionals. The report concluded that "Where continued contact is not facilitated and encouraged between separated siblings and other separated family members it appears to result in complete misery for
those involved”.

Why, then, should a 6 year old's wishes and feelings not be given more respect as to the level of contact they wish to have with their non-resident parent? Or as to the perhaps even more essential question of whether they should be raised within their birth family; or the level of contact they should have with their birth family if placed outside it? It is not suggested that the wishes and feelings of children so young should be determinative. One can easily understand that, prima facie, the younger the child, the less maturity or competence they have to assess what the risk or long term consequences might be if their wishes and feelings were followed. For example, a child may need to be protected from the emotional harm which may result from giving effect to their wish to have contact with a parent who has been found to have no remorse or insight into their violent behaviour to the other parent. Conversely, a young child may be adamant they do not wish to see their father but lack the ability to appreciate the long-term consequences to their emotional wellbeing and understanding of their identity, that would be caused by giving effect to such feelings. Similarly it could be argued that the wishes and feelings of younger children in public law proceedings may frequently be trumped by their welfare, as they may not understand the risk that their parent or wider family poses to them.

It would seem from the available research that a significant proportion of children involved in contact and residence cases feel dissatisfied by their participation in those proceedings. The 2007 NSPCC *Your shout too!* study asked children aged between 11 and 16 the extent to which they felt they could have a say; 34% answered 'a bit' and 16% said 'not really'. As to the extent to which they felt what they said had made a difference; 21% of respondents said 'a bit' and 34% said 'not really'.

The NSPCC's earlier 2003 study *Your Shout!* in relation to children's views on public law proceedings is now almost a decade old. However, Ofsted's more recent publication 'Children's Care Monitor 2011 – Children on the state of social care in England' (24 February 2012, reported by the Children's Rights Director for England) provides an interesting insight into children and young people's perceptions of the extent to which they are heard. It surveyed 1,870 children and young people, aged between 4 and 24, who were receiving services from 168 social care departments throughout England. They were asked what decisions they thought they should have more say about, than they usually do (this was a completely open question with no suggestions or options given). Of the 882 children who answered the question, 11% answered 'decisions about contact with their family'.

The Reunite research clearly demonstrates that children who have been the subject of abduction proceedings are affected in a number of ways.
Perhaps if there is anything the court can legitimately or usefully do to mitigate the long term consequences and general 'fallout', it is to continue carefully analysing what the child is saying when they are said to object to the return, and provide cogent reasons for decisions. As to the NSPCC research, it offers a rather sad indictment of the court process in contact and residence cases, given the children’s perceptions. It is not clear how much matters have improved in the five years since that study was published. The findings should be seen as an impetus to all those within the family justice system, and perhaps result in a renewed focus at the time when a great many other (potentially unnecessary) legislative and procedural changes are being imposed. As to care proceedings, whilst it is not clear from the Ofsted survey whether any of the children surveyed were involved in court proceedings at the time they completed the survey, it is suggested that this expression from young people underlines the importance of the court 'getting it right' in relation to the respect to be given to children’s wishes and feelings.

**Conclusion**

Courts and professionals must not simply 'hear' children who are able to express a view, we must actively listen to what they have to say; weigh it, evaluate it, and always give reasons for not giving effect to it. Children should of course not bear the burden of 'choosing'. However, given it is they who live with these decisions, surely it is of imperative importance that children feel they have been given a fair and adequate opportunity to participate and feel they can understand and ideally respect those decisions, even if they do not agree with them.

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**Footnotes:**

[2] Ibid, at paragraph 18
[3] Ibid at paragraph 15
[4] However, see the remarks of Wilson LJ in *Re W (abduction: child’s objections)* [2010] EWCA Civ 520 at paragraph 18 which interpret Baroness Hale’s observation otherwise!
[6] See, for example, speech of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at paragraph 60; Baker J in *WF v FJ and others* [2010] EWHC 2909 (Fam) at paragraph 27
[7] p.499
[8] Paragraph 24 at p.1273; emphasis added
[9] Paragraph 22
[10] pp.203-204
[12] p.340; emphasis added
[13] Paragraphs 2 and 7, p.1518

[15] pp. 60-65. The sample of children interviewed ranged from a child who is placed in the '0-5' category, to adults aged up to 37 who were abducted as children.

[16] p.64
