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"*Peculiar finalities"*: Blurring the Borders Between Abduction and Adoption?

By Alice Diver

1. Introduction

> 'There is now no mechanism in domestic law to preserve any of the rights and responsibilities of birth parents on the making of an adoption order.' (Jackson LJ in *Seddon v Oldham MBC (Adoption:Human Rights)* [2015] EWHC 2609 (Fam), at para 36)

It may be argued that some of the complex case law arising from the Hague Convention (1980)[i] ('Hague') holds relevance for adoptees and their estranged birth relatives, especially in respect of the more difficult aspects of the right to family life: kin contact, access to information, and the notion of parental consent. Judicial interpretations of certain core concepts (best interests, parental responsibility, a need for identity) tend to contain convoluted rights analyses which will likely resonate with those who have been displaced from – or denied access to – genetic kinfolk or original identity. Such discourses tend also to highlight the implications of maintaining or severing natal connections: mention is often made of the need for speedy family reunification, the importance of preserving the child's ties to their country of origin, and the benefits of having some form of contact with family members. Significant also is the child's ability to integrate – or not - into a new familial or socio-cultural setting, cross-border. The human rights implications of losing or gaining access to one's 'roots' via dislocation (or indeed through a court-ordered return to a place of origin) are therefore the focus of this article. It looks firstly to some of the recent child abduction cases that involve Hague and its intersections with the right to family life under Article 8 of the European Convention on Human Rights ('ECHR'). It then discusses a selection of recent domestic adoption law cases (on post-adoption

contact), drawn from several regions of the United Kingdom.[ii] Although Hague does not apply to domestic or cross-border adoption, the jurisprudence associated with some of its provisions often touches upon not dissimilar issues, especially in terms of child rights, the need for identity and family reunification, state obligations to protect child welfare, and the complexities of family life rights.

Analogies involving see-saws and departing aircraft have been used, to attempt illustration of how a relocated child's removal from their former habitual residence might best be understood in terms of rights transfers and the impacts of such 'uprooting.'[iii] The degree of socio-cultural integration within the new - or previous - home state is an important factor in establishing whether a new habitual residence (a key term within the legal framework) has been gained. Terminology also matters, as ever, with agreements on custody (residence) and access (contact) featuring prominently: some of the dicta on child welfare and parental consent (to the loss or diminution of one's parental rights) will also likely resonate with those interested in the less-discussed impacts of domestic adoption. Judicial observations on the child's need for knowable natal identity, tangible socio-cultural connections, and maintained familial contact, appear frequently within Hague jurisprudence but in the absence of adoption law's usual strictures and norms. This merits analysis, to see if there are any useful, hopeful 'messages' (or warnings) for those of us still trying to connect with our original identities, information, or kinships. Perhaps of most interest to adoptees and the origin deprived, however, are the various comments on the child's best interests, and how these fundamental rights might best be protected or promoted against a challenging backdrop of weakened or severed familial ties. The peculiar, child-centric vulnerabilities that attach to displacement, and to permanently altered or lost identities (psychological, socio-economic, medical) are mentioned here too, alongside discussions of socio-cultural rights issues (such as loss of nationality, language, ethnicity, and religion). These

discourses at least serve to raise awareness of the lasting impacts of being deprived of origin, whether this happens via adoption, abduction, or relocation. It is, however, the question of reunion with kin - via a return to lost origins or through contacts with genetic relatives - that calls to mind the typically thorny, perennial adoptee rights issues: familial contact and access to authentic, accurate information on one's original identity.

Whether or not Hague case law might ever prove useful to those seeking to access original birth records or challenge court decisions barring kin contact remains to be seen. In the meantime, some useful comparisons can at least be drawn between Hague cases on the need for identity and those seen in adoption law on rights-balancing, contact, the 'transplantation' of identity, and the relocation of one's roots. Though they are of course distinct branches of law, they do often tend to give rise to similarly nuanced legal concepts and definitions. These include the notion of 'voluntary' parental consent to the removal of a child or the loss of parenthood, the prevention of harm, the promotion of child welfare paramountcy: the best means of achieving a just balancing of sharply conflicting rights and interests (between children and parents) is also discussed. It should be remembered that orders for post-adoption contact remain rare: similar rights issues to those seen in Hague cases do tend to be raised but these are dealt with quite differently, as the concluding section will argue.

2. Recent 'Hague' decisions from Strasbourg: Consent, identity, harm, and the need for speedy reunification

> '…the whole object of the Convention is to secure the swift return of children wrongfully removed from their home country…'[iv] (per Lady Hale, *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at para 48)

States that have signed the European Convention on Human Rights (ECHR) are under a positive obligation to 'act in such a way as to preserve and develop family ties.' (Draghici, 2017:279). Aggrieved parents in signatory states can sometimes seek to challenge domestic decisions involving the Hague Convention via appeal to the European Court of Human Rights ('The Strasbourg Court') on the basis that their family life rights (under Article 8 of the ECHR) have been infringed. Jurists must remain mindful also of the child welfare paramountcy provisions of the UN Convention on the Rights of the Child (1989).[v] They should prioritise the best interests of the child, taking into account their voice, to make adjudications that will further the child's welfare in both the short and long term (even though, under Hague, substantive welfare decisions should not be made).[vi] Such cases often turn almost entirely upon the issue of which jurisdiction can be said to be the 'habitual residence' of the 'transplanted' child. [vii] It is this concept which determines whether Hague's provisions will apply in the first place, prior to deciding which court will have the jurisdictional authority to make, refuse, or quash an order for the child's return. [viii]

The related issue of 'family life' rights, arising under Article 8 ECHR must also be factored in, where the borders being crossed are those of ECHR-signatory states. For UK courts post-Brexit, the loss of certain European Union law provisions (aimed at promoting swift repatriation of abducted children, comity, and mutual recognition and enforcement of agreements and court orders) has served to further complicate matters.[ix] Brexit impacts aside, the effects of Hague - drafted to achieve the speedy return of an unlawfully abducted or retained

child back to the state and parent from which they were removed - can sometimes be staved off. If, for example, the abducting (or, more accurately at times, relocating[x]) parent can establish that the child's habitual residence is elsewhere, then Hague's provisions on enforced return will not apply within the jurisdiction that is hearing the case. Return of the child cannot be ordered by the court in this 'non-habitually resident' jurisdiction. Even where Hague *is* deemed applicable, other grounds may be invoked to convince the court that the child's best interests demand a non-return, for example where there is a 'grave risk of harm' or of an 'intolerable situation' arising, should return by ordered. It bears noting also that the original vision of Hague's drafters is now somewhat outdated: the 'left-behind' parent was seen almost invariably as a female housewife with limited financial means to pursue her absconding, child-abducting husband. Speedy return of an illegally removed child was thus framed as an over-arching priority, with sharp enforcement procedures for foreign court orders for return seen as an essential aspect of the process. More recent case law frequently departs from this older model (Schuz, 2021:2) at times presenting an inversion of it, with female spouses or partners increasingly citing a need to escape domestic violence and perhaps lodging claims for asylum upon arrival in the new state.[xi]

Cases such as *Ignaccolo-Zenide v Romania* (2000) confirm that national authorities are bound to protect the parental right to bring legal proceedings aimed at achieving a child's return 'home.'[xii] When hearing applications involving Hague, ECHR-signatory states must act expeditiously: passage of time can have significant consequences, not least by changing the child's habitual residence via the process of 'settling in' to their new jurisdiction. In terms of Article 8 ECHR rights it has been noted that breaches brought about through 'custody proceedings do not do so solely in relation to the rights of left-behind or abducting parents.'[xiii] Child rights are relevant: the Strasbourg Court must be mindful of the child-welfare protective

principles of the Children's Convention, to reach case-specific decisions which are 'sufficiently reasoned,' with any key questions 'effectively examined.'[xiv] Proper safeguards and tangible protective measures should be apparent or at least capable of being put into place, should a return to the former home state be ordered.[xv] As Florescu (2019) has observed, the law on child abduction is not simply 'a matter of well-established case law which does not require a too detailed analysis.'[xvi] Hague's main objective was to deter would-be abductors. There is often little scope for in-depth, prolonged judicial considerations of the child's best interests, given that their welfare arrangements must generally be decided upon later by the courts within their country of habitual residence. Parental wishes, especially where an objection to a return order has been grounded in domestic violence allegations, do 'pose a particular challenge to the Court in a very difficult and sensitive domain of family law.'[xvii] The inter-relatedness of – and conflicts between – the European Convention, Hague, and the Children's Convention, can spark conflicting norms and differing definitions of family life rights. [xviii] The concepts of parental consent (to the removal of one's child) and of the right to contact with family members, are frequently discussed, although not in quite the same way that they might be in domestic cases involving non-consensual adoptions (as discussed in the next section). The Strasbourg Court cannot substitute itself into – or take the place of – national courts: it does often tend to repeat some of their key findings however in reaching determinations involving child and family law.

Cases such as the ones examined below reveal much about the darker aspects of human nature - and family life - highlighting the fluid parameters of child and parental rights, and the best interests principle. They speak also to our need for the sort of familial and social 'rootedness,' which can integrate us into a society, culture, or family: they serve also as a reminder of the difficulties associated with trying to protect the rights and best interests of relocated, parent-

estranged, vulnerable children across borders, and over time. In *Michnea v. Romania* (2019)[xix] the infant child's mother had fled with her to Romania: her husband, the child's father, had sought the return of the child to Italy under Hague on the basis that it was the child's habitual residence. The Romanian Court of Appeal dismissed his application. This was held to be an unjustified interference with his family life rights under Article 8 ECHR. Referencing the earlier cases of *X v. Latvia* (2013)[xx] and *Vladimir Ushakov v. Russia* (2019),[xxi] the Strasbourg Court found that, in respect of international child abductions, Article 8 obligations must be interpreted 'in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child.'[xxii] The best interests of the child must be paramount in all decisions concerning them.[xxiii] Thus,

> '…The Hague Convention…associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.' [xxiv]

Put simply, the norm is to return the wrongfully removed child as quickly as possible, thereby restoring the status quo, and reunifying separated family members, unless the child's best interests demand otherwise. [xxv] The Strasbourg Court cannot simply 'substitute its own assessment for that of the domestic courts,' and must instead 'satisfy itself that the decision-making process…was fair and allowed those concerned to present their case fully, and that the best interests of the child were defended.' [xxvi] A 'particular procedural obligation' is placed

upon domestic states when determining Hague cases: if considering applications for the return of a child to their former home, the court must provide 'specific reasons in the light of the circumstances of each case.' [xxvii] Here, the Romanian Court of Appeal had found that Italy had not been the child's habitual residence, noting that her parents had married in Romania (and conceived her there) and were still registered as resident within that jurisdiction. Parental consensus mattered too, insofar as they had not agreed to make Italy their new place of residence. Likewise, the child had been an infant when the removal occurred, and her mother neither spoke Italian nor had she been working in Italy. That said, the child had been born there, and was continuously resident before being taken to Romania at the age of 5 months by her mother: she had clearly been 'integrated in a social and family environment' within Italy.[xxviii] Under Hague, the concept of habitual residence was not the same as that of domicile: the Romanian Court of Appeal had therefore erred by failing to explain why it afforded precedence to the parents' Romanian domicile, as opposed to acknowledging their familial life in Italy. [xxix] The thorny issue of failing to obtain parental consent to the child's removal – highly relevant also to many cases involving contested orders for adoption – was also significant here. The Romanian Court largely ignored the fact that the child's removal from Italy had occurred in the absence of paternal consent, which was in clear breach of his Article 8 family life rights. Had this issue been included in the judges' analysis (together with the fact that the parents had shared custody of the child) the Hague remedy of expeditious return would have been deemed applicable and apposite; in other words the child's removal would have been classed as illegal, triggering the duty of swift repatriation. [xxx] Significantly, the best interests of the child had not been identified during the hearing, meaning that these had not been factored in when the family's situation was being assessed, as is required under Article 8 ECHR. In sum, by failing to interpret Hague's provisions correctly, a violation of Article 8 had occurred, so that the father was awarded damages. [xxxi]

The background details of the case are very telling, with the estranged father having warned the child's mother that 'he would rather give up the child for adoption in Italy than have her raised in her grandparents' home in Romania.'[xxxii] During the divorce proceedings in Romania, it was further noted that their exchanged messages revealed 'an attitude of hatred' on the part of the husband, that he had not contributed towards the child's upbringing, and that he had threatened to bring the child back to Italy, to ensure that her mother would 'never see the girl again.' [xxxiii] Hague hearings are not meant to include substantive child welfare assessments but arguably the Romanian courts seem to have been extremely mindful of the dangers that might arise were they to return the child to her father in Italy. As Dedov J's Dissenting Opinion in *Vladimir Ushakov v. Russia* (2019) stressed, many Hague cases can still easily lead to outcomes favouring 'the father, without taking into account the child's best interests and completely ignoring the vulnerable situation of the mother.'[xxxiv] Clearly, and as noted again in *Thompson v Russia* (2021), there is a need for 'effective rather than merely theoretical equality between the parents,' given that Hague can sharply 'conflict with the ECHR's provisions on equal treatment'[xxxv] and further embed 'systemic deficiencies.'[xxxvi] These include a failure to hear the voice of the child, adequately promote their best interests, and acknowledge that some 'abductions' are in reality a flight from situations of domestic abuse.[xxxvii] A too-swift determination on custody can easily side-line the best interests of the child principle,[xxxviii] causing a worrying and '…sometimes perfunctory application of the children's objections exception.'[xxxix] In *Voica v Romania* (2020),[xl] similar issues arose, but led to a very different outcome. Here, the Romanian court ordered the return of children to France, where their father resided. Their mother, opposing the return order, cited a grave risk of harm, based upon a history of domestic violence. The issue of paternal consent was again central: she had removed the children without the father's permission, and prior to the French courts having had a chance

to make a final decision on her request to travel abroad with the children. The father's abusive behaviour did not, in the court's view, fall within the 'grave risk of harm' exception, however. The level of risk was only such that the court was required to seek cross-border cooperation with the French authorities, to ensure future protections, post-return. Significantly, it was decided that although the children *had* clearly become fully integrated into their new environment in Romania, legalising their stay there would not be in their best interests, given that their 'situation had been unjustly and unilaterally altered by their mother, in violation of the custody arrangements.'[xli] Moreover, she had apparently infringed the children's right to 'maintain personal relations with their father.'[xlii] Returning them to France therefore fulfilled a legitimate aim, namely, the protection of their right to paternal contact. In terms of their best interests, it was stressed that these will not always necessarily coincide with those of the parents. [xliii] It is noteworthy too that, although Hague applies only to breaches of custody rights, its Preamble (plus Article 1 (b) and Article 21) does suggest that it should also protect 'access rights' (contact) between parent and child. The mother's opposition to any contact between father and children would later justify the French courts' decision to award custody to the father. Oddly, although the Romanian court accepted that the children *had* become integrated into their new environment, no significance was placed upon this fact when deciding upon the issue of their best interests. Their integration was not sufficient to 'uproot' them from France, given that

> '…throughout their stay in Romania, the children maintained contact with France and the French culture, which remained present even in their new environment. In particular, they continued their education in French …and, according to the applicant, visited France twice since their relocation to Romania.'[xliv]

The socio-cultural significance of being able to retain – via sustained contact - one's original language and heritage is not likely to be lost on many adoptees, especially those who were adopted across international borders or 'transracially' (for want of a better expression). The decision does not seem to sit easily alongside some of the other recent Hague cases on best interests of the child, domestic abuse, intolerable situations, or grave risk of harm. As was noted in *Thompson v Russia,* 'the child's interest comprises of two limbs.'[xlv] Familial ties must be maintained unless the family in question has 'proved particularly unfit.' Severance of original ties should only occur in very exceptional circumstances, as is the rule of thumb, apparently, when making adoption orders in the absence of parental consent. In Hague cases, 'everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family.' And yet, the child's interests often demand the presence of tangible, visible measures 'to ensure its development in a sound environment…a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.'[xlvi] Applying such a principle to domestic adoption cases could perhaps make it easier for courts to permit – or indeed deny altogether – contact between birth relatives, post-adoption. Significant also was the Court's observation that 'a parent and child's mutual enjoyment of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention.' Moreover, the notion of respect for family life clearly 'implies an obligation for a State to act in a manner calculated to allow these ties to develop normally.' Again, if such guidance were transplanted into judicial discourses involving bars on post-adoption contact, it might lead to different outcomes, especially where courts have tended to find that family life rights have been removed by the processes of adoption.

On the concept of grave risk of harm (as an Article 13 (b) Hague exception to the making of a return order) it was further stated that this cannot arise on the sole basis of the child having to

be separated (via court-ordered return to their original place of residence) from the parent who wrongfully removed them in the first place. Such separations 'however difficult for the child, would not automatically meet the grave risk test,'[xlix] apparently. To argue otherwise would be to risk Hague's processes being unacceptably circumvented by one parent's 'unilateral will.'[l] Again, as will be discussed below, adoption case law often sees quite difficult decisions on barring kin contact or preventing information release being essentially left almost entirely to the unilateral discretion of the adoptive parents. It is significant however that the Court in *Thompson* noted that 'custody and access are not to be intertwined in the Hague Convention proceedings.'[li] Arguably, if issues such as parental responsibility and contact were perhaps to be more fully teased apart, and treated as discrete, distinct matters within adoption proceedings, this might lead to significantly different outcomes for birth parents seeking contact with their relinquished children, post-adoption.

An interesting overlap of domestic child welfare and international Hague issues can be seen in *In the Matter of DX (A Female Child Aged 11-1/2 Years).*[lii] Here, a child born and living until recently within the Republic of Ireland - and holding dual Hungarian/Pakistani nationality - was being raised by her Guardian, an Irish citizen, having been abandoned in infancy by her birth mother. A shared residence arrangement existed between father and Guardian, her having moved in 2019 to Northern Ireland. The father had taken the child to Pakistan for a family visit, misleading the Guardian as to the nature of their trip: he was arrested for child abduction upon his return, and from then on, the child had resided with the Guardian in Northern Ireland. The Guardian applied for various orders, including wardship, fearful that the father might soon abduct the child to Pakistan. These applications were refused on the basis that the child's habitual residence was still the Republic of Ireland, rather than Northern Ireland. On appeal, it was argued that the court had given insufficient consideration to Hague's provisions (which,

post-Brexit, now held sway in such cross-border cases within the island of Ireland). The correct approach on the part of the court was to fact-find, as recently confirmed in *K v Y (2020):*

> 'The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. Parental intention is relevant but not determinative. *It is the stability of the child's residence as opposed to its permanence*…(emphasis added).'[liii]

A child-centric stance was needed, especially in terms of achieving:

> '…real and detailed consideration of …day to day life and experiences; family environment; interests and hobbies; friends etc. *and an appreciation of which adults are most important to the child.* The approach must always be child driven. …all too frequently, and this case is no exception, the statements filed focus predominantly on the adult parties (emphasis added).'[liv]

Stability - rather than permanence, an oft-repeated aim of adoption policies - should be seen as qualitative rather quantitative in nature, focusing upon the level of integration and not simply the length of time spent in any given place. It was not necessary for complete integration to have occurred, although this could at times happen quite swiftly. The court found however that the child, as an EU and Pakistani citizen did not have a right to reside within Northern Ireland/the United Kingdom. She lacked sufficient connection with Northern Ireland 'either through her shared ethnicity through birth or through her maternal or paternal family

connections.'[lv] Her roots had clearly been put down in the Republic of Ireland, her birth country, and into which she had been sufficiently integrated at the time of the father's trip, taking her to Pakistan. The need for a child-centric focus in this case calls to mind the duty to promote child-welfare paramountcy within other family life scenarios: arguably this differs slightly from the more convoluted rights-balancing exercises seen in many public law cases involving non-consensual adoptions and post-adoption contact applications. *ML v Norway* (2020),[lvi] for example, offers guidance on how national authorities might attempt to fulfil their rights-balancing obligations, noting that where the competing interests of child and parent have 'come into conflict,' Article 8 ECHR requires domestic authorities to strike a fair balance between them. This process demands also that 'particular importance' be afforded to the child's best interests, which may well, 'depending on their nature and seriousness…override those of the parents.'[lvii] Again, as within the Hague jurisprudence, 'family ties may only be severed in '*very exceptional circumstances."* [lviii] And yet, worryingly,

> '…it is in the very nature of adoption that *no real prospects of rehabilitation or family reunification exist* and that it is instead in the child's best interests that he or she be placed permanently in a new family.'[lix]

Such reasoning suggests that, post-adoption, the chances of eventual reunion with birth relatives (including, presumably, siblings or the extended family group) will be highly unlikely, perhaps well into adulthood. It leaves very little room for consideration of the rights of estranged relatives, nor does it offer much scope to factor in the identity rights of adoptees, in the short or longer term.

The next section looks to a selection of recent domestic cases on post-adoption contact (from Northern Ireland, and England/Wales, respectively) all of which refer to some aspects of the rights discussed within the 'Hague' discourses, above. These include the fluid nature of Article 8's role and remit within family life decisions, the changing definitions of best interests, and the rights implications – if any - of dispensing with parental consent or hampering the right to identity. Perhaps most relevant is the question of how rights-balancing (e.g. privacy, family, child welfare protection, identity) might be approached or achieved in situations involving origin deprivation and the loss of family life.

3. Domestic case law: Balancing exercises, family life rights, and post-adoption contact

> 'The act of adoption has always been regarded in this country as possessing a peculiar finality.' (Per Simon Brown LJ, in *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239, para 34)

Cases on non-consensual adoption and post-adoption contact often involve similar Article 8 ECHR rights issues to those seen within some examples of Hague jurisprudence: loss of family life, origin, non-access to identity, concerns over child protection, and bars on kin contact. The best interests of the child must be factored into domestic courts' decision-making processes: this perhaps becomes especially difficult however where parental consent to an adoption has

not been forthcoming. There is a need to achieve rights-balancing, where possible, between adults and children (though not, of course, between adoptive and birth parents in such scenarios, given the transplantation of parental rights and responsibility that adoption requires and enables). The contexts of familial separation clearly differ between Hague cases and domestic adoption ones, in terms of private law versus public law, domestic legal frameworks versus international ones, and the nature of the harms that the children in question might face if they are removed, relocated, or returned to their original situation. There are however some shared themes across these two areas: both are underpinned by an over-arching duty to protect the vulnerable child and promote their best interests rights, and to ensure that, where possible, losses of origins and family life will only occur in exceptional circumstances.

The case law discussed below reflects these overlaps, similarities, and intersections, arguing that they arise from the not dissimilar familial and socio-cultural 'transplantations' seen within stranger adoptions. This is so, often not just in terms of the adopted child's new 'self,' but also in respect of those portable bundles of corollary rights needed to preserve or enable identity access, human dignity, autonomy, and the *visible* kinship sparked by legal relatedness. The potential – or not - for kin reunions at some point in the future is perhaps the most significant rights issue, underpinned by the need to protect the child's best interests. As with the Hague case law discussed above, the various 'rights-balancing' issues of law and policy are most relevant to those affected by non-consensual adoption. These include dispensing with parental consent, loss of parental status, being denied leave to apply for post-adoption contact, and the avoidance of origin deprivation, where possible. As ever, it is often the finer details of these cases which bring home the scale of adoption's impacts upon vulnerable, origin-deprived persons, in human terms. Things taken for granted by the rest of the population – such as the ability to identify ancestors, engage with siblings, or view a photograph of an estranged relative anytime you wish - assume a significance that can perhaps only really be appreciated by those

affected by some of adoption's more egregious socio-legal fictions and constructed barriers to kinship.

In *Seddon v Oldham MBC (Adoption Human Rights)* [2015],[lx] for example, the High Court (England and Wales) examined several issues, namely whether Article 8 ECHR rights were capable of surviving the making of an adoption order. Relevant too was the question of whether s.51A of the Adoption and Children Act (2002) ('ACA') - which grants courts the discretion to make post-adoption contact orders – could serve to preserve or engender Article 8 family life rights between a birth parent and their adopted-out child. The court was tasked also with considering whether or not s.51A(4) of the Act was perhaps incompatible with the ECHR, given that this domestic law provision requires birth parents to firstly seek the permission of the court before applying for post-adoption contact. The court held, unsurprisingly, that adoption orders will *always* have the effect of terminating any pre-existing Article 8 rights, on the basis that these rights must rely upon the presence of an actual 'parent-child relationship,' which is itself ended once an adoption order is made. Here, the applicant birth mother ('Seddon') sought leave to apply for post-adoption contact with the child. She herself had entered the care system aged six and then resided in nine different foster homes over the course of the next decade. Her daughter ('A') had been taken into care a few months after her birth. Although the lower court had noted that the making of the adoption order was 'very much a draconian step,' it was still 'an overriding necessity in the best interests of A' given that her mother was not capable of meeting the infant's 'emotional and holistic needs.' [lxi] Direct contact was not, at that stage, being ruled out completely, but it clearly rested on Seddon's ability to submit to and cooperate with the process, by accepting the reality of the adoptive placement and the fact that 'she is not the parent.' [lxii] The prospective adoptive parents were initially open apparently to the possibility of twice-annual indirect ('letterbox') contact (and potentially, it seems, direct contact) subject however to the opinions of the professionals involved: only after

considering the experts' advice would they be able to 'make their own decision' on allowing contact, post-adoption. They expressed concerns that the child's unusual name might pose a risk to the prevention of unwelcome kin contact, given the 'modern day curse of social networking sites and the Internet' which continue to create 'angst amongst adoption professionals.'[lxiii] Previous norms of indirect contact – including the provision of photographs of the child to the birth mother – were therefore deemed inappropriate, here. The High Court reiterated that the main difficulty was the birth mother's abject refusal to accept the realities of the adoptive placement. She remained 'emotionally and bitterly opposed to the plan for adoption.'[lxiv] As such she was refused permission to apply for a contact order, stressing that the child's adopters would likely '… have a short term and no doubt, as the dust settles, a long term view.'[lxv] Letters between her and the child were initially exchanged twice a year, but because of her lengthy and 'sustained opposition' to the adoption, this was cut to an annual event. Despite much litigation, no order for contact was made, and this was justified on the basis that she was simply unable to accept that she was 'not going to parent.'[lxvi] The lower court had commented, a little glibly perhaps, that

> '…this is a tragedy in the case. However distressing the outcome may be, *the mother must move on* and it would be, and perhaps will be, very much against her long-term interests and emotional equilibrium if she refuses to move on and fights a hopeless fight against A's removal from her and the court's considered decision, in the light of the most intensive assessments of the mother, not to return A to her.'[lxvii]

Amongst all the litigation, one case had also been brought under the Human Rights Act 1998, in connection with the Council's decisions on barring all contact. This asked whether any

vestiges of her Article 8 EHCR rights might yet still exist, post-adoption. At one point also the Strasbourg Court declared her complaints to them to be inadmissible, holding that the various decisions made by the English courts had been both 'reasoned and justified,' and firmly grounded in this child's 'need for stability with her new parents.'[lxviii] It is significant that the court took a dim view of the expert opinion that had been adduced by Seddon - including a reference made to some academic research on the need for origin - in separate litigation on her own harsh upbringing within the care system. This testimony, from her social worker, had apparently transgressed 'beyond the scope of his instructions,' amounting to an attempt to highlight the likely adverse effects of the adopted child having 'an inaccurate sense of her true identity' and an 'absence of genealogical connectedness.'[lxix] Seddon further annoyed the child protection authorities by using their 'letterbox contact' system to forward a copy of this report directly to them, along with a plea from her lawyers to have her suitability for direct contact at least assessed. Also included was a letter addressed to the child's adopters asking them for some level of direct contact. (This was not forwarded to them by the authorities however given that it 'would be likely to unsettle them.') Her subsequent request to send cards and presents to the child was vetoed by the adoptive parents. It is quite telling that, before relenting on the point, the authorities had originally - and quite bizarrely - sought to frame their post-adoption letter box service as not falling within the realm of public or state functions, presumably so that its statutory obligations under the Human Rights Act 1998 (and the ECHR) might not be triggered. In answering the question of whether or not any trace of Article 8 family life rights might have somehow survived the making of the adoption order, the court observed that the 'as if born to the adopters' paradigm still held sway, via s.67 of the Adoption and Children Act 2002 ('ACA'). There was clear 'transplantation' of the child – together with her various rights - in terms of her new status and identity: adoptees ceased to be a member of their original family, so that they could 'become an adopted person.' [lxx] Invoking case law from three decades

earlier, the judge further stressed that the closed off, irreversible nature of adoption orders is still very apparent:

> 'The act of adoption has always been regarded in this country as possessing *a peculiar finality.* This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. *It effects a change intended to be permanent*…'[lxxi]

A useful summary of the effects of ACA 2002 was included in this judgment: prior to its enactment the courts could (under the since-repealed s.12(6) of the Adoption Act 1976) impose various terms and conditions upon an adoption order, for example, in respect of post-adoption contact. This power was however seen as limiting the parental rights of adopters and leaving dangerously 'unextinguished the parental rights of the natural parents.' [lxxii] The court mentioned Article 10 of the 1967 European Convention on the Adoption of Children (revised in 2008) reminding us not only of the stigmatizing effects of 'illegitimacy' but also that adoption 'confers on the adopted person …the rights and obligations of every kind that a child born in lawful wedlock has in respect of his father or mother.'[lxxiii] Clearly, the existence or otherwise of family life – and the right to have it protected from unlawful interferences – still rests mainly upon questions of fact, and the presence of close personal ties to demonstrate psycho-social connections beyond those of 'mere' biology. For children removed from their mother at birth – or shortly thereafter - family life is unlikely to be seen as sufficiently 'present' or meaningful so as to spark juridical rights: Article 8 ECHR rights do not easily arise in early relinquishment scenarios. [lxxiv] Significantly, even the making of a post-adoption contact order at the same time as an adoption order will not necessarily give rise to Article 8 rights grounded in natal ties. Rather, this unusual arrangement by the court would instead somehow create a

'new' Article 8 right to engage in familial contact.[lxxv] Such legal gymnastics means that this new right does not represent a 'preservation or extension of a previous right held by virtue of being a birth parent,'[lxxvi] given that any such right becomes 'extinct' upon adoption. It does however suggest that these rights must have previously existed in some shape or form. This surely undermines the argument that they cannot - or do not – easily arise via biological connection, alone. Relinquished infants are presumably similarly ineligible to be afforded the protections of Article 8 rights, by not having forged significant familial connections beyond those of inherent, genetic ties.

In any event, Seddon's arguments on the significance of the blood-tie were not accepted by the court, nor was her quite poignant contention that the child would always be her daughter, voiced alongside the pragmatic and conciliatory concession that the little girl was 'the Adoptive Parent's Daughter as well.'[lxxvii] In sum, the court stressed that any connection she might have had with the child was 'entirely historic' [lxxviii] and refused her application for permission to apply for a contact order, again. As Hollis (2015) has argued, there were 'no surprises in the conclusions' reached. [lxxix] Had the court taken into account the decision in *I.S v Germany*,[lxxx] he argued, this might have opened the door slightly to a fuller consideration of the significance of (and need for) genetic kinships, and their potential to attract even basic Article 8 rights protections. The concept of an 'intended family life' – even if only as a potentially more justiciable aspect of the right to enjoy some measure of 'privacy' under Article 8 – clearly merited some fuller discussion, here. Likewise, there was no mention of the child's right to identity, either as an ingredient or element of a fuller analysis of what might fall within the remit of best interests. This right has however been identified and articulated in some of the Strasbourg cases involving post-adoption contact, such as, for example, *Anayo v Germany* (2010). [lxxxi] This failure to consider such issues as the child's right to identity or need for psychological integrity, makes it is difficult to gauge what weight, if any, should be given to

such matters in future if the child were to perhaps seek contact as she grew older. In terms of ensuring proportionality, it is difficult too to determine whether this has been demonstrated by the court, given that little to no discussion of fundamental rights issues - or indeed of the need to balance these against the child welfare considerations – seems to have occurred here. There are conflicts within the court's reasoning, also. On the one hand, family life rights will not arise where early relinquishment has occurred, given that biology alone does not constitute family life. On the other, just in case any such rights might have somehow managed to arise, courts should declare that 'all pre-existing rights' have been extinguished by the making of the adoption order.

A 'holistic balancing exercise' was however used in *Z (A Minor:Freeing For Adoption)* (2022),[lxxxii] where a freeing order was applied for, to dispense with the birth mother's consent and enable the child to be adopted. This methodology again required the court to adopt the 'least interventionist' approach: non-consensual adoptions demand consideration of the 'proper evidence' from both the state and the guardian ad litem (the child's representative in such proceedings), to achieve a 'global, holistic evaluation.' In other words, all options required consideration, via a 'multi-faceted evaluation of the child's welfare which would take into account *all* the negatives and the positives, *all* the pros and cons, of *each* option.' [lxxxiii] This does not mean a direct comparison of what might be best: rather, it is an exercise in gauging

> '…whether or not the particular child's welfare demands adoption… All will depend upon the judge's assessment of the whole picture determined by the particular characteristics and needs of the child in question no doubt often informed by the harm which s/he has suffered or been exposed to.'[lxxxiv]

The birth mother argued here that the court should not decide upon adoption merely on the basis 'that it would probably provide the best outcome.'[lxxxv] Instead, if long-term foster care were available to meet the child's needs, then this 'less draconian' solution should be favoured. This would also reflect the proportionality exercise. Several issues of process arose: the birth mother was not legally represented at a key point in the proceedings (the 'Looked After Children' ('LAC') review) nor did the minutes of that meeting record her objections to the proposed Care plan. In respect of her chronic issues with alcohol, there was some confusion between the Psychological Therapy services and her GP, who had recommended – incorrectly – that she could not engage in therapy prior to completing work with the Addictions Team. The court noted that she was 'an articulate and intelligent individual' who had accepted that, absent significant efforts to change her circumstances, family rehabilitation was not going to be possible. She compared the loss of her child to a bereavement, though she had begun to establish 'a good working relationship in a short space of time without the tensions that are so often evident between carers and biological parents.' [lxxxvi]

The proposed reduction of contact, post-Freeing order, from once monthly to every three months would, she argued, 'undoubtedly fracture the relationship' between mother and child, and thus impact adversely upon his wellbeing. And yet, adoption, as urged by the other side, was still needed to provide this child with a 'stable and harmonious home' via 'total integration into family life with his carers.'[lxxxvii] Their gaining of parental responsibility, would avoid them having to undergo future visitations by social workers, bi-annual LAC reviews, and so on. There were fears too that, with long term foster care, the birth mother might exercise her right to attempt repeated litigation, such as contact applications, attempts to end the Care order, or a Human Rights Notice aimed at preventing any decisions being made about the child unless she agreed to them. The Guardian ad Litem argued therefore that the child's 'emotional security and a sense of belonging' required adoption. This would also, apparently, avoid the 'stigma

[which] attaches to long-term foster care' and prevent the unwanted 'scrutiny in respect of every aspect of his life' that a continued engagement with Social Services would create. The Freeing order was made, dispensing with maternal consent, on the statutory basis that this was being unreasonably withheld. [lxxxviii] A similar approach had been taken by the Northern Ireland High Court in *Northern Health and Social Care Trust v AR and BR (In the Matter of a Child MR)* (2018).[lxxxix] Here, Weir LJ noted 'the interplay between issues of proportionality' stressing that the seminal Supreme Court decision in *Re B (A Child) (*Care Proceedings: Threshold Criteria) (2103)[xc] had initially

> '…caused a considerable fluttering in the dovecotes of family practitioners and much judicial and other ink has since been spilled by those anxious to offer their own gloss upon its message…the many feathers ruffled by what was initially thought to have been a strong wind of legal change became smooth again as it began to be appreciated that *Re B* simply unearthed, blew the dust off, restated and re-emphasised the existing law of proportionality which had in places fallen into a state of greater or lesser desuetude as exemplified by the many judgments in which only a faint and formulaic passing nod in its general direction is to be discerned.'[xci]

In other words, little if anything has really changed, bird-ruffling breezes notwithstanding. Significantly too, in *In the Matter of Two Children: Freeing for Adoption* (2022) [xcii] it was held that parental consent to the making of an adoption order could be dispensed with *only* where the children's welfare so demanded. There was no point in making a care order - with a view to adoption - unless there were good grounds for considering that the statutory test would be satisfied. On this point, domestic law largely coincided with much of the ECHR jurisprudence: it is the interests of the child which demand the making of an adoption order. Severance of legal ties with one's birth parents is a measure that clearly 'should only be applied in

exceptional circumstances.' It will be justified in law only where there is an 'overriding requirement pertaining to the child's best interests.'[xciii] That said, the court immediately went on to stress that:

> 'It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family.'[xciv]

The mother currently had had contact with the children once every two weeks, but a gradual reduction was planned so that only two direct contacts per year would eventually occur. It was suggested that she might consider bringing little presents for the children, for example, Latvian foodstuffs, together with sending them cards at set times. She was to be permitted to keep a photograph of herself with the children provided that she did not post it on social media. Such a concession marks some degree of growing recognition of the importance of knowable ancestry and accessible cultural identity. However, in *A Biological Mother v The Adoptive Parents* (2022)[xcv] the High Court, on appeal, refused the birth mother's application for indirect contact with her adopted-out children. At the time of their freeing for adoption, contact had been court-ordered for three times per year, comprising a mix of direct and indirect forms, to be continued post-adoption (via a signed agreement with the adoptive parents). Only one episode of direct contact had occurred however, some seven years earlier, after which the adoptive parents had claimed that 'significant behavioural difficulties' had been seen in the children. Despite this, a 'broad level of agreement' was still eventually reached and written up, apart from a few issues which the court was now tasked with adjudicating upon (discussed more fully below). The court stressed that, as ever, genetic connections were to be afforded no particular significance *per se:*

> '…the biological mother has no special status, although the biological relationship is a very important factor to be taken into account when considering the best interests of the children. However, it is just one of the factors to be taken into account.'[xcvi]

On the purpose of kin contact, it was noted that this 'alters radically' in the wake of adoption. It was not meant to 'retain or develop any attachment, but rather was done to enable the child to understand more fully its life-story.'[xcvii] Citing *Down & Lisburn HSCT v H (2006),* [xcviii] it was held that such contact might 'contribute to their reassurance and security and their feeling of identity as adopted children.'[xcix] However, the Court of Appeal's stance was also relied upon, to find that the 'imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual.'[c] It was agreed in the end that a 'two-way provision of information twice a year' would occur, with the birth mother receiving non-identifying information on the children's likes, dislikes, and hobbies. There was disagreement however over how the children might be meaningfully involved in this 'contact' activity. The birth mother wanted this element of the arrangement to be compulsory, whereas the adoptive parents preferred instead to be obliged to use only 'their best efforts' to include the children. Likewise, she wished for these newly agreed terms to be copper fastened via court order, with the adopters preferring an informal arrangement. A photograph of each child would also be made available, but it fell to the court to decide what would happen with these. The birth mother, understandably, wanted to keep them: the adoptive parents were fearful that she might misuse them in public pleas for information on their whereabouts. Although there was no evidence to suggest that the applicant had previously – or was planning in future to - publicise the photographs, the proceedings were still at a fragile, 'confidence building stage' (presumably in relation to gaining the cooperation of the adopters). As such, the birth mother

was not permitted to keep the pictures but would be able apparently to access them 'whenever she wished' at the Trust's premises. The court had relied here upon the reasoning in *Re Kate & William* (2017),[ci] wherein it was held that orders or agreements made at the point of adoption or freeing should be preserved, bar the arising of any fresh or newly significant developments that might require changes. The instant case was seen as having had fresh developments, not least the break down in contact that had happened eight years earlier, for which the Trust was partly to blame, through its inaction. Although the adoptive parents had themselves moved address without letting the Trust know, the birth mother was also seen as sharing some responsibility for this: she had not pushed for a meeting, after the adoptive parents had offered to speak with her.

The court outlined in some detail one fraught meeting that had later occurred, however, between the upset birth mother and the adopters, as detailed by the social worker. The birth mother's vocal insistence on 'having rights' was, it seems, taken by the court as evidencing a failure on her part to understand or appreciate the adoptive parents' inviolate legal position, in the sense that they, as legal parents, now held exclusive parental responsibility. This extended to them 'protecting the children, promoting their well-being and meeting their needs at a physical, psychological and emotional level.'[cii] Likewise, under the Court of Appeal's decision in *Re R* (2005), it would have been 'extremely unusual' for courts to impose unwelcome conditions upon adoptive parents. The judge opted to follow *Re R*, ultimately concluding that the adopters '…do not wish to have imposed on them conditions that they are unhappy with. That alone would be enough for me to rule that these three outstanding issues should be determined in their favour.'[ciii] On the enforcement of indirect contact, it was noted that the earlier agreements had not been adhered to. However, significantly, it was reiterated the adoptive parents were the persons 'best placed to make decisions involving the children, and

not the applicant or the court.'[civ] The best interests of the children were deemed to have been met via this outcome, which, it must be remembered, would be entirely reliant upon the 'best endeavours' of the adoptive parents for meaningful realisation. Should they decide unilaterally that indirect contact was not in the best interests of the adoptees, then there is little reason to believe that it would continue.

Arguably, birth mothers seeking some form of child contact must navigate a tricky behavioural path situated somewhere between indicating that they do respectfully accept the authority of the court - and the weightier superiority of adopters' parental rights – without quite vanishing away altogether. The repeated efforts of the birth mother in *Seddon* to convince the court to permit her to apply for contact served to work against her, evidencing her failure to accept her loss of maternity and new position of 'rights-lessness.' And yet the absence - and initial acquiescence - of the birth mother in *A Biological Mother* was taken as evidence of a fresh development - her apparent disinterest - which required subsequent revisions to the originally agreed arrangements for contact.

As the High Court has recently observed in *IK (A Child), Re (Hague Convention: Evidence Consent)* (2022), [cv] the issue of dispensing with parental consent generally (albeit in connection here with removal beyond the jurisdiction) is seldom straightforward. Parental consents should of course be 'viewed in the context of common-sense realities of family life and not in the context of the law of contract.'[cvi] Children are not items to be possessed or exchanged, despite the objectifying terminologies that still tend to attach to them and to their whereabouts, such as custody, and access. Parental consent can, quite rightly, be dispensed with fairly easily where a child's welfare so demands, within the frameworks of both Hague and domestic adoption law. It becomes a much less fragile concept however where the wishes of adoptive parents are

concerned, as seen in cases where they have unilaterally vetoed contact or the sharing of information, post-adoption.

Unlike in Hague cases, the voice of the child in adoption proceedings is less frequently called upon despite an increasing awareness of how the issue of identity rights - and needs - might best be addressed. (In fairness, this is often perhaps due to the child's young age, lack of understanding, and an increased vulnerability to significant harm). As Pérez-Vera's Explanatory Report on the Hague Convention (1981) outlined, the vagueness of the notion of the best interests of the child often means that it 'seems to resemble more closely a sociological paradigm than a concrete juridical standard.'[cvii] This can potentially work in the favour of the child, to secure their protection by removing them from an abusive situation, or enabling them to have contact with an estranged relative on the basis of the need for identity and some sense of psychological integrity (Santona et al, 2022). Moreover, for the relocated child, it is worth bearing in mind that they can readily suffer a

> '…sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives (Dyer, 1977:11).' [cviii]

Whilst not all of the above will necessarily be relevant to domestic child adoptions, certain aspects of these judicial discourses and decisions will likely resonate with some adoptees and their estranged genetic relatives. There is a perennial need for many of us to seek out answers to a wide range of questions and to understand the socio-legal reasoning behind such judicially

sanctioned things as: the loss of kin contact, the absence of family life rights, changes to one's original identity, lack of voice, and bars to accessing origin that are perhaps lifelong in nature.

4. Conclusion

> 'It is …likely one day that A will read the court papers concerning her history and her adoption. She will learn how vigorously her mother 'fought' to have her returned to her care, and how they were prevented from maintaining contact with each other.' (Peter Dale, expert witness testimony in *Seddon v Oldham MBC (Adoption Human Rights)* [2015] EWHC 2609 (Fam), at para 22)

Comparison of Hague case law with that arising in the wake of contested domestic adoption can lead to some blunt conclusions and conjectures. Under Hague, familial reunions tend, in essence, to be the key aim, with the relocated child likely to be returned to their place and family of origin; in domestic adoption cases, the message seems to be that relinquishing parents should have few or no expectations over contact with - or access to information about - the relinquished child. This is down to the workings and understanding of the best interests principle, of course, but it seems that some of the recent Hague hearings are more tolerant of episodes of domestic violence, and of ordering a return to a home situation steeped in risk. In terms of how definitions of 'grave risk of harm' and 'intolerable situations' are interpreted in Hague cases, these do not necessarily present insurmountable barriers to ordering the return of

a child to their former home. Preservation of the child's original identity – in the widest sense of the word - is also a key aim, as argued in section 2 above. Adoptees, however, are often uprooted completely in a bid to secure the sort of reassuring placement 'permanence' that will sit well with their adoptive parents. As Keegan J stressed in *K v Y* (2020), 'The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. *Parental intention is relevant but not determinative* (emphasis added).' [cix] In cases involving freeing and post-adoption contact, the wishes, views, and rights of birth parents can be quite easily dispensed with, while those of the adoptive parents are not. They are often taken as the deciding factor in interpreting how the child's best interests will be defined and best protected. Although legislative reforms are currently underway in Northern Ireland (with a Parliamentary Inquiry into the human rights aspects of 'historic' adoption practices in England and Wales currently drawing to a close[cx]) it seems that certain legal fictions will continue to predominate here. That of the 'reasonable parent' - who calmly and quietly relinquishes their child, and never seeks out some form of subsequent contact – seems likely to linger on in some form, despite changes to the statutory frameworks. Arguably, decision-makers in the field of post-adoption contact, could look to some of the reasoning seen in Hague cases, if only to gain a greater insight into the possible socio-legal impacts – and rights implications - of permanently relocating children away from their origins.

Family life rights are highly prized within Hague jurisprudence, but not so much in adoption, it seems, where they either do not arise (with genetic realities often disregarded) or are easily extinguished with the making of an adoption order. The need for some level of contact between estranged kinfolk offers the most striking contrast between the two areas. Within Hague cases, contact is generally framed as a useful, perhaps essential device for retaining some sense of identity for the removed or relocated child, even in the shadow of domestic abuse. It is often

deemed an essential element of family life, and Article 8 ECHR rights. Post-adoption, it can become the opposite, regarded frequently as a threat to the stability of the adoptive placement and thus harmful to the child's welfare. Cross-border agreements drawn up between estranged parents in Hague are similarly seen as things that should be honoured where possible, via formal recognition and enforcement mechanisms. Post-adoption contact arrangements, if present at all give their 'exceptionality,' are often left entirely to the goodwill and wide discretion of the adoptive parents, whose wishes generally tend to be highly prioritised. In sum, the 'peculiar finalities' of adoption law mark it out as an anomalous deviation from the field of family life rights as they sit within the wider discipline of human rights law. These odd endings tend to be absent from the reasoning applied to most Hague cases, where judges seem much more determined to preserve some sense of origin for the 'transplanted' child, if at all possible.

It would be inappropriate of course to suggest that all adopted children – especially those who might have suffered egregious abuse or neglect at the hands of their birth parents – have somehow been illegally abducted, in the sense of Hague's provisions, either by the state or their adoptive parents. Likewise, the two branches of law clearly differ, with many adoptees having already experienced ill-treatment or abandonment. Some of the rights issues arising via child abduction and adoption do however have a similar ring to them, from the perspective of the displaced child, if not in childhood, then perhaps later in life. Certain overlaps can be discerned, particularly in terms of those judicial discourses that look to the child's need for accessible identity and knowable origin. Hague case law seems to suggest that speedy kin reunions and ongoing contact are desirable outcomes. These are sometimes termed repatriations or reunifications, suggesting that family life and privacy issues in this context perhaps have more to do with political rights and freedoms than they do with the often less robust socio-economic protections. Original heritage matters in cross-border scenarios,

meriting preservation and respectful treatment, perhaps because it tends to nestle amongst a number of other visibly valuable 'items' and markers of authentic familial identity: nationality, ethnicity, communal knowledge, language, traditions, religion, and socio-cultural behaviours and norms. In adoption, conversely, the message from the UK's courts seems to be one of warning: birth parents should not expect to be easily reunited with their children, or readily afforded the privilege of post-adoption contact, except in very exceptional circumstances. Relinquishing mothers should increasingly be prepared for the eventuality that they will not be allowed even to keep 'letterbox' photographs of their adopted-out children, should indirect contact be permitted in the first place. Repeated requests for leave to apply for contact, likewise, are not being tolerated by the courts, at present.

Enforcement of agreements made between adoptive and birth parents is another issue that merits mention. As in many Hague scenarios, ensuring the recognition and honouring of arrangements made previously across borders and jurisdictions is not easy: agreements forged between adoptive and birth parents over contact – and across the 'borders' of different family units - often must also rely upon comity, mutual trust, and respect. Different jurisdictions, much like families, tend to have distinct norms, customs, and rules of behaviour. Likewise, there seems to be a fear that the 'transplanted' child venturing beyond their usual boundaries (to engage in contact with their former relatives, say) might not wish to return. The issue of where such removed, relocated children truly 'belong,' especially as they grow older and begin to seek out information on their origins, is also one that the law clearly struggles with. And yet, as in Hague cases, there is a clear duty to both acknowledge and enforce such 'cross border' agreements on contact. As Rogana (2012:12) has argued on the use of Article 8 ECHR in rights claims, '…societal changes might soon move the boundaries of Article 8 further ahead…' Until then, it seems that the 'passporting [of] children from the public care system into the adoption

process' will remain 'jurisdictionally divisive' (O'Halloran, 2018:309). Whether a human rights-led approach to the issue of adoption law reform will (in the absence of meaningful socio-cultural changes in attitude) ever prove useful or workable, remains to be seen.

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Thompson v Russia (Application no. 36048/17) (2021)

Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, §§ 65-68 and 102, ECHR 2010).

Edina Tóth v. Hungary, no. 51323/14, § 49, 30 January 2018).

Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII).

G.S. v. Georgia, no. 2361/13, § 56, 21 July 2015)

*X v. Latvia (*2013) (application no. 27853/09), Grand Chamber, (93-108)

Re B [2016] EWHC 2174

Re L [2016] EWHC 1844

K v Y and Moylan LJ in *Re M* [2020] EWCA Civ 1105

R. and H. v. the United Kingdom, no. 35348/06, § 88, 31 May 2011)

KS v United Kingdom Application No. 62110/10 at para 44

In Re B (Adoption: Jurisdiction to Set Aside) [1995] Fam 239

In Re D (A Minor) (Adoption Order: Validity) [1990] Fam. 137

K v United Kingdom [1986] 50 DR 199 at para 207

Re B-S [2013] EWCA Civ 1146, para 22.)

In Re M-H [2014] EWCA Civ 1396, at para 11

R. and H. v. the United Kingdom, (2011) no. 35348/06

In the Matter of TM and RM (Freeing) [2010] NI Fam 23;

Re W (An Infant) [1971] 2 AER 49,

Re C (a minor) (Adoption: Parental Agreement, Contact) [1993] 2 FLR 260;

Down and Lisburn Trust v H and R [2006] UKHL 36

Re R (Adoption: Contact) [2005] EWCA Civ 1128.

Re B [2014] UKSC 4

Re D (A Child: Abduction Rights and Custody) [2006] UKHL 51

International law

The Hague Convention on The Civil Aspects of International Child Abduction (1980)

The UN Convention on the Rights of the Child (1989)

[i] The Hague Convention on The Civil Aspects of International Child Abduction (1980), available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (accessed 20.05.22)
[ii] Northern Irish and English case law has been chosen on the basis that the legislation is currently undergoing long-overdue reform (in N. Ireland) (see The Adoption and Children (Northern Ireland) Act 2022, available at https://www.legislation.gov.uk/nia/2022/18/notes/contents, accessed 25.06.22) and that a parliamentary Inquiry is currently being held (in England and Wales) on *The right to family life: adoption of children of unmarried women 1949-1976* (https://committees.parliament.uk/work/1522/the-right-to-family-life-adoption-of-children-of-unmarried-women-19491976/publications/written-evidence/ accessed 28.06.22).
[iii] See further Lord Wilson in Re B [2014] UKSC 4 (at para 45) using the analogy of the see-saw: '…probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.'

[iv] *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51 (per Lady Hale, para 48)
[v] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (accessed 23.05.22)
[vi] See further Elrod (2011) on how 'The drafters of the Hague Abduction Convention intended that the mature child's objection to return be a separate and independent ground for a judicial refusal to return the child. It does not [unlike parental objections] depend on a grave risk of harm or an intolerable situation existing in the habitual residence.' Linda Elrod, '*Please Let Me Stay'*: Hearing the Voice of the Child in Hague Abduction Cases' 63 *Okla. L. Rev.* (2011) 663- 691 p. 677
[vii] Only courts within the child's 'habitual residence' should make substantive decisions on their future welfare (e.g. on contact arrangements between parents and child, or on issues of residence, education, domestic violence, asylum claims or social security for example). See further: WEINER, Merle H 'International Child Abduction and the Escape from Domestic Violence' (69) *Fordham Law Review* (2000) 593; TRIMMINGS Katarina and MOMOH Onyo´ja 'Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings' *International Journal of Law, Policy and The Family* (2021) 1–19; GREENE, A.M. 'Seen And Not Heard?: Children's Objections Under The Hague Convention On International Child Abduction' 13 *U. Miami Int'l & Comp. L. Rev.* (2005) p. 105 – 162.
[viii] See further MC ELEAVY Peter 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection? *Netherlands International Law Review* (2015) 62 (3) 365–405
[ix] See further, BEAUMONT Paul, 'Private international law concerning children in the UK after Brexit: Comparing Hague Treaty law with EU Regulations' *CFLQ* (2017) 213; BEAUMONT Paul et al, 'Conflicts of EU courts on child abduction: The reality of Article 11(6)- (8) Brussels IIa proceedings across the EU' 12 *Journal of Private International Law* (2016) 211; KALAITSOGLOU Konstantina, 'International family law post-Brexit: A cliff edge? Reflecting on the Brussels *II-bis* Recast' *Legal Compass* (2021) (https://www.thelegalcompass.co.uk/post/international-family-law-post-brexit-a-cliff-edge-reflecting-on-the-brussells-iibis-recast); KRUGER Thalia and SAMYN Liselot, 'Brussels II-*bis*: Successes and Suggested Improvements' *J. Priv. Int'l L* (2016) (12) 1 p. 132-168; LOWE Nigel, 'The Application of Art. 10 of Brussels II-*Bis* to Children Abducted Out of the EU: The Last UK Reference on Family Law?' *Insight - European Papers* (2021) 6 (1) p. 219-228. The UK is currently also in the process of replacing its Human Rights Act (1998) with a home grown – and extremely concerning - new Bill of Rights, which is aimed, apparently, at altering the way in which ECHR-relevant cases are dealt with by the UK courts. See further: https://www.theguardian.com/law/2022/jun/21/uks-new-bill-of-rights-will-curtail-power-of-european-human-rights-court (accessed 21.06.22)
[x] See further KAYE Miranda, 'The Hague convention and the flight from domestic violence: how women and children are being returned by coach and four' *International Journal of Law, Policy and the Family*, (1999) 13 (2) 191–212

[xi] As Rhona Schuz notes, the Convention may be 'invoked in types of cases which were not envisioned by the drafters and which might not naturally be classified as abduction cases.' See further Schuz, The Hague Child Abduction Convention and Re-Relocation Disputes *International Journal of Law, Policy and The Family*, (2021) 1–36
[xii] App no 31679/96
[xiii] Ibid p. 279

[xiv] Press Unit, European Court of Human Rights '*International child abductions'*(available at https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf accessed 10.09.21)
[xv] *X v. Latvia (*2013) (application no. 27853/09), Grand Chamber, (93-108)
[xvi] Simona FLORESCU 'Parental Child Abduction is back on the Agenda of the European Court of Human Rights' *Strasbourg Observers* (2019) (available at https://strasbourgobservers.com/2019/07/23/parental-child-abduction-is-back-on-the-agenda-of-the-european-court-of-human-rights/ accessed 02.07.21)
[xvii] Thalia KRUGER '*Adžić V. Croatia: The Difficult Task That Child Abduction Brings'* Strasbourg Observers (Blog) (2015) (available at https://strasbourgobservers.com/category/cases/adzic-v-croatia/ accessed 01.08.21)
[xviii] Carmen DRAGHICI '*The Legitimacy of Family Rights in Strasbourg Case Law: Living Instrument or Extinguished Sovereignty*?' (2017) Hart: Oxford, p. 280 on challenges to the Strasbourg Court's 'authority to monitor the implementation of a different treaty lacking an international enforcement mechanism.'
[xix] Application no. 10395/19
[xx] Grand Chamber, Application no. 27853/0992-108
[xxi] Application no. 15122/17, §§ 76-83
[xxii] Ibid, at para 36. On mutual trust within the EU, see also *Avotiņš v. Latvia* [Grand Chamber], no. 17502/07, §§ 46-49, ECHR 2016).
[xxiii] Para 37, citing *Strand Lobben and Others v. Norway* [Grand Chamber], no. 37283/13, § 204, 10 September
[xxiv] Ibid
[xxv] The Court further noted 'that the European Union subscribes to the same philosophy, in the framework of a system involving only European Union member States and based on a principle of mutual trust. The Brussels II bis Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its Preamble to the best interests of the child (see paragraph 42 above), while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child's best interests must be a primary consideration.' (see *X v. Latvia*, § 97, op cit, n.20, above).
[xxvi] Ibid, Para 38 (citing *Blaga v. Romania*, no. 54443/10, § 67, 1 July 2014).
[xxvii] Ibid, Para 39
[xxviii] Ibid, Para 48
[xxix] They also failed to distinguish the European Court of Justice decision in *Barbara Mercredi v Richard Chaffe (Judicial cooperation in civil matters — Regulation (EC) No 2201/2003 (Case C-497/10 PPU): Judgment of the Court (First Chamber) of 22 December 2010 (reference for a preliminary ruling from the Court of Appeal of England and Wales (Civil Division)* (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CA0497 accessed 30.05.22)
[xxx] The duty to repatriate arises under Article 12 of the Hague Convention, provided that none of Article 13's exceptions apply (grave risk of harm, intolerable situation).
[xxxi] In line with the procedural (rather than substantive) remit of the Strasbourg Court, the child remained in Romania.
[xxxii] *Michnea v. Romania* (2019) op cit, n 19, above, at Para 6
[xxxiii] Ibid Para 20
[xxxiv] (Application no. 15122/17) (2019) p 30 (available at http://hudoc.echr.coe.int/eng?i=001-193878 accessed 06.08.21)
[xxxv] *Thompson v Russia* (Application no. 36048/17) (2021) at para 5 (available at http://hudoc.echr.coe.int/fre?i=001-208878 accessed 01.09.21)
[xxxvi] Dedov J, *ibid*, noting also that oral evidence is generally not adduced in Hague proceedings save in respect of disputed habitual residence or alleged consent/acquiescence.
[xxxvii] *Ibid*
[xxxviii] *Ibid*, arguing that Hague does not regulate those situations where parents might have been granted joint custody; it may also rest upon quite specific interpretations of the best interests of the child which are tied to expeditious return and the prioritising of parental custody rights.
[xxxix] Marilyn FREEMAN and Nicola TAYLOR 'Domestic violence and child participation: Contemporary challenges for the 1980 Hague Child Abduction Convention' *Journal of Social Welfare and Family Law* (2021) 42 (2) p. 154 -175.
[xl] *Application no. 9256/19)*
[xli] Ibid at Para 22
[xlii] Ibid Para 35
[xliii] Ibid Para 49. Interference here was 'in accordance with the law' as it pursued one or more legitimate aims and was 'necessary in a democratic society.' Custody rights, within the meaning of the Hague Convention, are taken to have an autonomous meaning, given that it has to be applied to all the States Parties to that Convention but may be defined differently within their various legal systems (see further *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 65-68 and 102, ECHR 2010).
[xliv] Ibid Para 68

[xlv] *Thompson*, op cit n 35, at para 50
[xlvi] *Voica,* op cit, n 40, at para 50
[xlvii] Para 54. See also *Edina Tóth v. Hungary*, no. 51323/14, § 49, 30 January 2018).
[xlviii] See further *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII).
[xlix] Para 69 (see further *G.S. v. Georgia*, no. 2361/13, § 56, 21 July 2015)
[l] Para 71
[li] *Thompson* op cit n 35, at para 71
[lii] NIFam 2 (18 January 2022)

[liii] [2020] NIFam 16 at [32]
[liv] Hayden J in *Re B* [2016] EWHC 2174 at para 18: see also Cobb J in *Re L* [2016] EWHC 1844 establishing a list of relevant factors: this list was added to soon after by Hayden J in *Re B*. Both decisions relied on the jurisprudence of the UK's Supreme Court and the EU's Court of Justice (CJEU) to distil and highlight the key factors to be considered. These factors have since received approval from Keegan J in *K v Y* and Moylan LJ in *Re M* [2020] EWCA Civ 1105
[lv] *K v Y* (2020) *op cit* n 53 at para 31
[lvi] *(Application Number 64639/61)* [2020] ECHR 927,
[lvii] Ibid, para 80
[lviii] Ibid
[lix] Ibid Para 89 (Citing *Strand Lobben and Others*, REF paras 206 and 207). See also *R. and H. v. the United Kingdom*, no. 35348/06, § 88, 31 May 2011)

[lx] EWHC 2609 (Fam) (2015)
[lxi] Ibid, para 100, stating that 'with profound sadness, but without hesitation' the plan was approved.
[lxii] Ibid para 101
[lxiii] Ibid para 102.
[lxiv] Ibid para 102
[lxv] Ibid para 103
[lxvi] Ibid para 35
[lxvii] Ibid, at para 36, adding that '…direct contact would manifestly not be in A's interests and that the mother is confusing her own and the child's interests. [and yet, adoptive parents' interests?] any direct contact, given the bitterness and depth of the mother's opposition, will have the potential to unsettle A and/or her carers. It would be very much against A's interests. In any event, the harsh reality is that the carers know what mother's current position is and would, I have no doubt, find it extraordinarily difficult to embrace contact with such an oppositional mother.'
[lxviii] *KS v United Kingdom* Application No. 62110/10 at para 44
[lxix] Kwame Owusu-Bempah '*Children and Separation: Socio-Genealogical Connectedness Perspective'* (2007) Routledge: London, (cited at para 22). Oddly, 'a further regrettable consequence of the civil litigation' saw the solicitors for the Council 'unaccountably sen[d] confidential documents from the adoption file to Ms Seddon's solicitors in error.' (para 23).
[lxx] *Seddon* op cit n 60, at Para 33. The dramatic nature of this process is still evident given that even yet 'no provision in our law is more elemental than s. 67' of this 2002 Act.
[lxxi] *In Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239 per Simon Brown LJ at para 34
[lxxii]Ibid, at para 35. See further Balcombe LJ in *Re D (A Minor) (Adoption Order: Validity)* [1990] Fam. 137 on the effects of this rarely used power.
[lxxiii] Available at https://rm.coe.int/168006ff60 (accessed 20.06.22). The 1967 Convention was substantially revised in 2008: https://rm.coe.int/1680084823#:~:text=Article%2010%20%E2%80%93%20Preliminary%20enquiries&text=These%20enquiries%20shall%20be%20entrusted,their%20training%20or%20their%20experience (accessed 20.06.22).
[lxxiv] *K v United Kingdom* [1986] 50 DR 199 at para 207
[lxxv] *Seddon, op cit* n 60, at para 53
[lxxvi] Ibid
[lxxvii] Ibid at para 56
[lxxviii] Ibid at para 88
[lxxix] HH Keith Hollis '*Does Article 8 survive adoption*?' (2015) https://ukhumanrightsblog.com/2015/10/06/does-article-8-survive-adoption/
[lxxx] Application no. 31021/08
[lxxxi] (Application no. 20578/07)

[lxxxii] NI Fam 1 at para 24. The decision of the court in *Re B* was the subject of a comprehensive assessment by Sir Munby (See further *Re B-S* [2013] EWCA Civ 1146, para 22.)
[lxxxiii] Ibid, para 44
[lxxxiv] See further *In Re M-H* [2014] EWCA Civ 1396, at para 11
[lxxxv] *Re Z, op cit,* n 82 at para 26
[lxxxvi] Ibid at para 72
[lxxxvii] Ibid at para 80
[lxxxviii] See Article 18 of the Adoption Ireland (Northern Ireland) 1987 (available at https://www.legislation.gov.uk/nisi/1987/2203/article/18new accessed 20.06.22). Please see also the Adoption and Children Act (Northern Ireland) 2022, (available https://www.legislation.gov.uk/nia/2022/18/notes/division/2, accessed 29.06.22) which is intended to 'ensure decisions about whether adoption is the right option for the child, whether the birth parents consented and, if not, whether parental consent should be dispensed with *are taken earlier in the adoption process than at present*, with court involvement where necessary. The system aims to provide greater certainty and stability for children by dealing as far as possible with consent to placement for adoption before they have been placed; to minimise the uncertainty for prospective adopters, who possibly face a contested court hearing at the adoption order stage; and to reduce the extent to which birth families are faced with a fait accompli at the final adoption hearing.'
[lxxxix] [2018] NI Fam 2
[xc] [2013] UKSC 33
[xci] Ibid at para 25
[xcii] NIFam 5 (27 January 2022)
[xciii] Ibid at para 20
[xciv] Ibid. See further *R. and H. v. the United Kingdom*, (2011) no. 35348/06; *In the Matter of TM and RM (Freeing)* [2010] NI Fam 23; *Re W (An Infant)* [1971] 2 AER 49, *Re C (a minor) (Adoption: Parental Agreement, Contact)* [1993] 2 FLR 260; and *Down and Lisburn Trust v H and R* [2006] UKHL 36
[xcv] NIFam 21 (20 May 2022)
[xcvi] Ibid at Para 9
[xcvii] Ibid at Para 10
[xcviii] [2006] UKHL 36 at para 44
[xcix] Ibid at para 44
[c] *Re R (Adoption: Contact)* [2005] EWCA Civ 1128.
[ci] [2017] NIFam 13
[cii] Ibid at Para 23
[ciii] Ibid at Para 25
[civ] Ibid at Para 28
[cv] (2022) EWHC 396 (Fam)
[cvi] Ibid para 25
[cvii] Para 21 (available at https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf, accessed 20.06.22)
[cviii] Dyer, A., *The Report On International Child Abduction By One Parent ('Legal Kidnapping')* (Doc. No 1, August 1977) p.11 . See also Dyer, A. The Hague Convention on the Civil Aspects of International child abduction – towards global cooperation, *The International Journal of Children's Rights* (1993) 1 : 273-292, Kluwer Academic Publishers.
[cix] [2020] NIFam 16 at para 32
[cx] https://committees.parliament.uk/work/1522/the-right-to-family-life-adoption-of-children-of-unmarried-women-19491976/publications/written-evidence/ (Accessed 29.06.22)