Four practical steps towards informed and core rights-compliant grave risk cases

Note for HCCH Forum on Domestic Violence and the Operation of Article 13(1)(b)*, June 2024*

Ben Keith[1]

Alongside wider questions of the grave risk safeguards under the Convention, states parties and their courts can take simple steps to promote fair, informed and child-centred decisions, in accordance with the Convention and to avoid breach of core human rights treaties.[2]

(1) Legal representation/support on equal terms for fair and informed proceedings

Applicant parents in grave risk cases are often extensively supported under article 7(g), while respondent parents are not, even if at significant personal and financial disadvantage. Such disparity is inconsistent with fair and well-informed Convention proceedings and core treaty obligations. As very recently said by the Attorney-General of Australia on the entry into force of reforms to that state party's law and practice:[3]

> "… The government meets the legal costs associated with seeking the return of a child, "and a defending or responding parent must cover their own legal costs. Most defending parents are women, primary carers for their children, and allege they were experiencing family violence. …
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> Access to legal representation and advice for defending parents in Convention cases will strengthen legal justice and safety outcomes for women and children in particular, and families and the community as a whole."

These steps can ensure not only fairer representation, but greater equality in practical rights of access to experts, information and other resources, and so better decisions.

(2) Proactive case management / Court steps to ensure adequate evidence

Grave risks cases can also fail to afford fair and informed decisions for want of needed evidence, whether because of disparity in resources or timeliness. The answer, as put by the New Zealand Court of Appeal in 2020, is early and proactive case management:[4]

> "Appropriate case management is essential to ensure that the issues are identified, and evidence relevant to those issues is provided to the court, in the shortest feasible timeframe. At an early stage the court should consider what evidence the parties propose to provide, and whether additional evidence is needed to enable the

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1 New Zealand barrister specialist in constitutional and human rights law and member, advisory panel to Hague Mothers. Views given are personal/professional and not those of any client or other entity. appellate Hague Convention matters include *LRR* v *COL* [2020] 2 NZLR 610; [2020] NZFLR 98; [2020] NZCA 209., and *Cresswell v Roberts* [2023] NZFLR 412; [2023] NZSC 62; further practice details at website below and also here.

2 See, for example, *X v Latvia* (2014) 59 EHRR 3, [2013] ECHR 1172 (grave risk proceedings breached right to family life); *NERÁ v Chile* CRC/C/90/D/121/2020 (breach of best interests obligation); and see also Hague Conference *Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim* (August 2023) (reconciliation of stringent non-refoulement obligations).

3 Hon Mark Dreyfus KC MP "Speech to Family Violence Symposium" 19 April 2024.

4 *LRR*, above n 1, paras [104] & [106].

> court to make an informed decision …. Depending on the issues raised, it may be desirable to appoint an independent psychologist to prepare a report. …
>
> We add that it will often be unsatisfactory to determine issues that arise in the context of Convention applications by reference to the burden of proof, or to one party's failure to adduce evidence in a timely way. The burden is, as noted above, on the person opposing return of the child. But as we have already emphasised, the court's focus is on the interests of the child, not the interests of the parents. This is not a context in which a court can properly proceed on the basis that a party who fails to provide relevant evidence to support their case must bear the consequences of that failure. That approach would risk compromising the interests of the child because of deficiencies in the way in which one or other parent has conducted the litigation. …."

(3) An even-handed role for Central Authorities in securing needed information

At least some Central Authorities provide information and assistance only to the applicant parent, again risking inadequately or unfairly informed proceedings. As put by Pérez-Vera, however, article 13(3) provides for a non-partisan and facilitative role:[5]

> "[Article 13(3)] seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence[...] [s]uch information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs [13(1) and 13(2)] of this article."

That also ensures that Central Authorities, as state organs, also act consistently with relevant core treaty obligations to which their respective governments are party.[6]

(4) Recourse to parties' own access to official information in the state of residence

Further, the parties to Convention proceedings have rights of access, often rapidly and at little or no cost, to their and their children's official records. Consistent with the broader need for duly informed proceedings, courts hearing Convention proceedings can require information bearing on disputed factual aspects of grave risk, such as social service and police records. As put by the New Zealand Court of Appeal in 2019:[7]

> "We do not accept that the making of the order [to require the applicant to produce his criminal and social service records] subverts the onus on the absconding parent, any more than disclosure orders in any proceeding do. The onus remains unaltered, but the respondent is in control of relevant information which should have been disclosed at an earlier stage by him …"

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5 E Pérez-Vera *Explanatory Report* (Offprint from the *Acts and Documents of the Fourteenth Session* (1980), tome III, Child abduction) at p [48]/461, para 117.

6 The 2020 *Guide to Good Practice: Part VI – Article 13(1)(b)* states (at p36) that this ought to occur "only where necessary and having due regard to the need for expeditious proceedings", but there is no reason why such steps cannot be taken efficiently where – as will often be the case – relevant information exists. Failure to do so is also at odds with the core treaty obligations at n 2 above.

7 *LRR v COL (interlocutory applications)* [2019] NZCA 620, para [24].