Children's participation in Hague child abduction proceedings heard in England and Wales

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Contents

Executive summary

This report summarises key findings from the first empirical study undertaken in England and Wales involving Cafcass staff and legal professionals that considers how children exercise their Article 12 UNCRC participatory rights during Hague Convention child abduction proceedings heard in this jurisdiction.

Parental child abduction occurs when one parent, without the consent of the other, takes their child to another country then refuses to return them. By necessity, the move may have been planned and executed covertly, with little consultation with the child. At the time of the abduction, the trauma of such a move can be immense for the individual child, involving a new home, school and life, where all that is familiar is displaced. Feelings of bewilderment and disempowerment may arise, particularly if there has been little or no consultation prior to the move. Later in life, the long-term effects are reported to include difficulties in personal relationships and with interactions with those in power (Freeman, 2020).

Proceedings for the return of a child are brought under the Hague Convention. They have distinctive rules, practices and procedures. Children's participation in such proceedings heard in England and Wales is limited by legal, practical, and policy barriers. This is so despite there being a strength of feeling among professionals of the importance and value of children's participatory rights.

Cafcass staff have a pivotal role in these cases and the insights gained from their interviews and those of other participants in the study is invaluable to understand the current picture and identify potential changes that may be made.

The study found that:

- The capacity for children to participate is negatively influenced by age expectations.
- Legal and policy hurdles are complex and act as barriers to participation.
- Attitudes of judges towards children hamper their willingness to effectively engage with them.
- Decisions are delivered in a manner that serves the legal process not the child.

Recommendations

Effective child participation is vital given the immediate and long-term consequences of parental child abduction. These consequences can be compounded by a lack of effective involvement in court proceedings.

Such participation is required under the UN Convention on the Rights of the Child, Article 12 (the right to participate) and the related obligation to provide information to a child Article 13 (freedom of expression, including the right to receive information in a variety of formats). Domestically the child's right to be heard is a legal obligation embedded in our established case law and practice guidance.[1]

In order to facilitate effective participation, this report recommends:

- Changes are made to the case. timing and means by which children find out about the outcome of their case.

[1] See Re D (A minor) (Abduction: Rights of Custody) [2006] UKHL 51 containing Baroness Hale's dicta on the child's right to be heard. More recently the Court of Appeal in C v M (A child) (Abduction Representation of Child Party) (Rev 1) EWCA Civ 1449 December 2023 drew attention to paragraphs 2.11(i) and 3.6 of the Practice Guidance on Case Management and Mediation of International Child Abduction voice. Proceedings, issued by Sir Andrew McFarlane P on 1 March 2023 which requires early consideration of how to hear the child's voice.

- There is a review of Legal Aid funding and level playing field created for both parents, thereby improving access to information that children receive during the proceedings.
- The barriers that exist for the separate representation of children are removed.

1. Background

The Hague Convention on the Civil Aspects of Child Abduction (the Convention) is an international treaty created in 1980 in response to the growing phenomenon of parental child abduction. It provides a mechanism by which, when such a wrongful removal or retention of a child has taken place, the Court in the Convention state will order the child's return, and do so quickly, thereby restoring the status quo for the child and minimising harm. Future arrangements for the child should be adjudicated upon by the home court. To make it workable and in an attempt to ensure that lengthy legal arguments would not derail the return, few defences or exceptions to this mandate to return were built in.[2] The defence of particular interest in this study is known as the child objection defence which states that:

> "the judicial or administrative authority may also refuse to order the return of a child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." [3]

This provides the most obvious route for the exercise of a child's legal right to have a say in decisions that affect them, which is enshrined in Article 12 of the UN Convention on the Rights of the Child (UNCRC).[4] Across Hague countries, this

[2] There are four defences in total in the Hague Convention. In addition to the child objection defence and the grave risk of harm defence (see below 5). The remaining two are the defence of settlement and secondly consent/acquiescence. Settlement, contained within the wording of Article 12 provides that a return can still be made despite proceedings beginning a year after the removal/retention unless "it is demonstrated that the child is now settled in its new environment." Article 13 (a) provides a defence if there has been consent or subsequent acquiescence by the left behind parent for the child's removal/retention.

[3] The child objection defence does not have a number attributed to it; however, is normally referred to as Article 13 (2)

[4] In England and Wales, the leading case of Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26 sets out the two-step test as to how the child objection defence is treated. First crossing

defence is used most often alongside the defence known as the 'grave risk of harm' defence. That defence recognises that, if returned, a child will be or is likely to be exposed to physical/psychological harm or be placed in an intolerable situation. Most commonly this is used where domestic abuse is a feature.[5]

The child's right to participate in decisions about their lives has been accepted for decades within our family law system. Yet the realisation of these rights in England and Wales is characterised more by rhetoric than reality and their voices have been described as either unheard or muted (Barnett, 2020). A huge body of research and practice guidance exists on the participation of children in both public and private Children Act 1989 proceedings heard in England and Wales. However, we do not appear to be much further forward. Recent statistical research highlights the lack of participation by children particularly in private family law proceedings (Hargreaves, 2024).

Applications for the summary return of a child under the Convention are heard at first instance in the High Court Family Division by both High Court and Deputy High Court Judges. The work in this area is specialised and the court is supported by the Cafcass High Court Team consisting of both Cafcass reporters and lawyers. Some of the judges hearing these cases have a family law background, others do not.

Cafcass reporters in the High Court Team are all highly experienced. They work within the constraints of resourcing and time pressures managing multiple

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the gateway, i.e., is there is an objection in Convention terms to a return, then whether a child has attained an age or degree of maturity where it is appropriate to take account of the child's views.

[5] The grave risk of harm defence is contained within Article 13 (1) (b) of the Convention provides that, "there is 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." Data showing the frequency of use is contained in the 8th Hague Special Commission Global Report- Statistical Study of Applications made under the 1980 Child Abduction Convention (October 2023).

demands. Many of these cases involve high levels of trauma, and there are practical, cultural and linguistic barriers to participation. There is a reliance on Cafcass reports to inform judges and enable them to reach decisions and they are obliged to work at speed. All Cafcass staff expressed commitment to the furtherance of children's participation within this challenging environment.

By closely examining how children's participatory rights are understood and applied by the professionals working in this specific area of private international law, we gain insights on how secure or superficial the understanding and application of children's legal participatory rights are embedded in family court practice.

The results of the study were produced from analysis of two complementary data sets: case law published between 2017 and 2022 and a series of interviews with Cafcass and legal professionals conducted in 2022.

The report concludes with recommendations for practice and procedural change, in particular relating to new and creative ways of providing information for children to enable their participation and access to justice.

2. Methods

The study's findings arise from two data sets: a sample 20 of reported cases and 9 semi-structured interviews with professionals. These included 5 Cafcass staff, consisting of 3 reporters and 2 lawyers. The remaining 4 participants were legal professionals working in private practice who specialise in this area of private international family law, 3 solicitors and 1 barrister.

The interview data set was essential as reliable conclusions could not be drawn from the case data alone. Insights are gained, yet only a small number of judgments are released for reporting purposes. The move towards greater transparency, particularly the presumption that a case should be reported is

gaining increasing traction; however barriers persist, not least the lack of judicial time (MacFarlane, 2021).[6]

2.1 The case data set

For the case data set, a search of the Bailli database using the key words 'child objection' 'defence' was carried out on 6 March 2022 covering the period from 6 March 2017 to 6 March 2022. This provided a total of 309 cases that were then individually reviewed. [7]

All cases that were outside of the study's parameters, for example cases concerning wardship or non-Hague state jurisdictions were excluded and cases where the child objection defence was formally pleaded were retained. Additionally, cases where the child objection defence was not formally pleaded, yet there was a discussion of the age/maturity and related capacity of the child in the reasoning of the judgment, were also included in the sample.[8] The rational was that their inclusion may provide insights into judicial attitudes towards children's participation more generally as Article 12 participatory rights exist regardless of any particular defence being raised. If the child's views were weighted in the Judge's reasoning it was important to capture this.

[6] MacFarlane, A (2021) Confidence and Confidentiality: Transparency in the Family Courts, see also the Transparency Implementation Group Reporting Pilot (2024).

[7] This five-year period was selected to provide possible insights on digital hearings during the pandemic lockdown periods and to incorporate the years before and after to prevent any data skewing.

[8] For example, where the court considers the position of a non-subject child aged 17 and the impact of their separation upon the subject child if returned. Although Art 13 (2) is not formally pleaded, a main ground of appeal is that this sibling at the age of 17 was not represented, nor do they have a voice in the proceedings There is a discussion of the impact of this exclusion on the subject child and judicial attitudes to age and capacity.

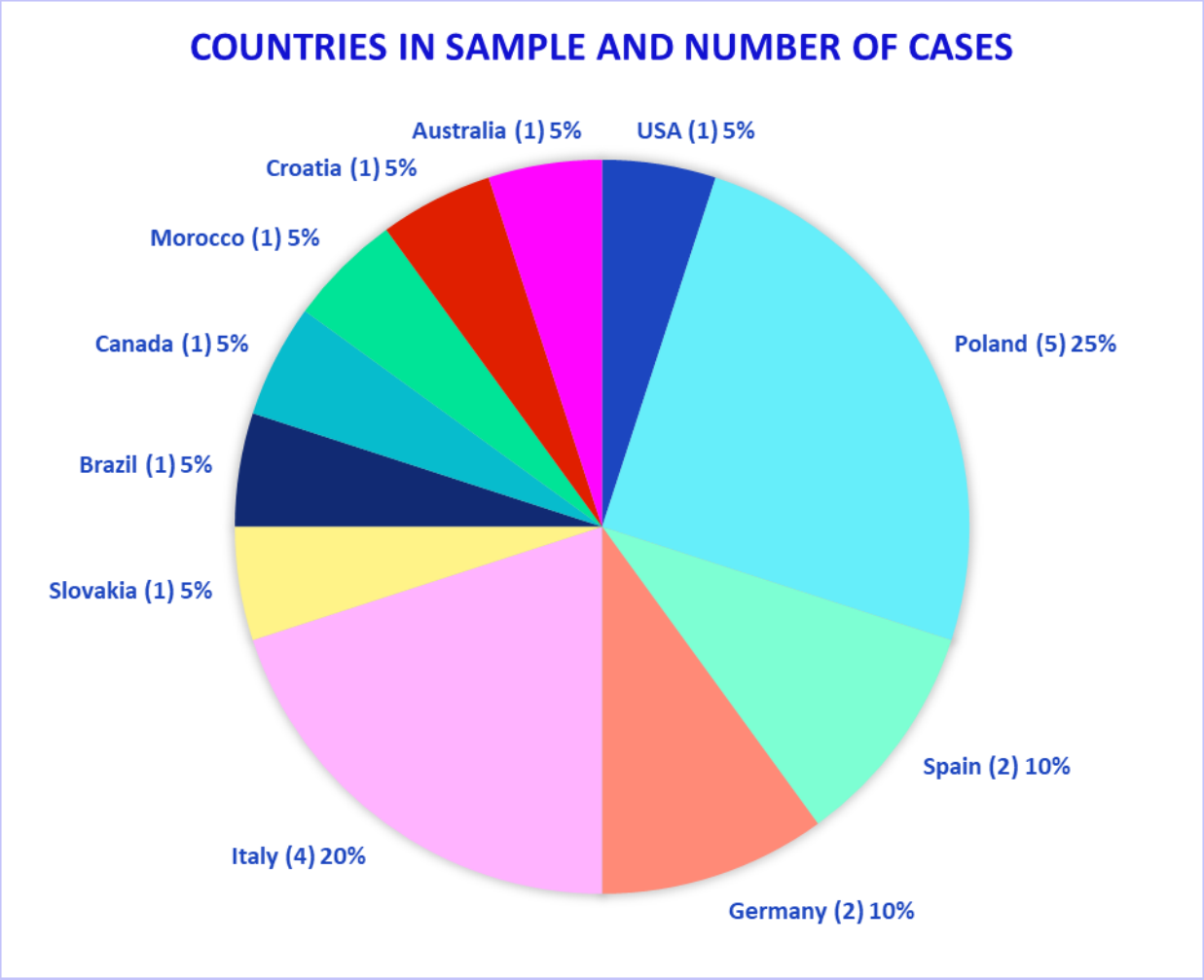
This first sift resulted in a sample of 64 cases from which a final sample of 20 were selected for deeper analysis. The final 20 were chosen on the basis of the following criteria:

- All cases where the judge met the child.
- All cases where the child objection was upheld.
- Cases where the child objection was refused.
- Attitudes to age/capacity are present in the judgment.
- All cases where separate representation is considered/granted.
- Cases where the hearing takes place online, or reference is made to Cafcass staff/judges meeting children online.

A further driver in finalising the case sample was to ensure that it reflected the diversity of the current 103 member states within Convention.[9]

The children in the sample were abducted from a range of countries that are represented in the graph below.

[9] Countries were included in the sample for example from Europe, South America and Africa. One featured parental child abduction from Morrocco, the first Islamic law country to accede to the Convention. For a children's rights discussion of parental child abduction to Islamic Countries, see Yaqub, N (2022).



The case sample provided valuable qualitative insights. In summary it provides that children participate in these cases in the following ways

- Through their parents conflicting accounts of what they think or say
- Through the Cafcass officer's report and oral evidence
- By meeting the judge
- By being joined as a party and being separately represented

In terms of measuring the modes of participation, at the lowest level children may be entirely absent from the proceedings and their views presented through parents in opposition. At the highest, children are separately represented and have equal standing as their parents in the legal arena.

The predominant mode of participation was through the Cafcass report, ordered so that the wishes and feelings of the child be put before the court,

following a meeting between the Cafcass reporter and child. All but one of the cases in the sample featured such a report. Judgments in the sample contained direct quotes from children extracted from the Cafcass reports. In only two of the cases did the judge meet the children at the centre of the dispute. Direct participation by way of separate representation was achieved in only one case in the sample, but advanced in four.

Identifying these different modes provides a snapshot of how children participate, but it does not reveal the attitudes or issues that act as barriers to participation by children and the fulfilment of their Article 12 rights to participate. A further data set was needed to go behind the case law to identify these obstacles to children's participation as well as possible solutions.

This second data set complements the first, by seeking deeper insights into the practices and views of professionals working in this area, in particular Cafcass reporters.

2.2 The interview data set

Following institutional and Cafcass ethics approval, children and young people who are members of the Family Justice Young People's Board (FJYPB) participated by providing their views on the research study. Interviews subsequently took place with 5 members of Cafcass staff, comprising 3 Cafcass practitioners (reporters) and 2 Cafcass lawyers. The recruitment of interview participants was enabled through the Cafcass research governance process.

Through word of mouth, legal professionals in private practice were then recruited, consisting of 4 legal professionals, 3 solicitors and 1 barrister, all specialists in child abduction proceedings. All participants except one worked in London.

Due to the specialist nature of the work, the number of participants was necessarily limited; however a rich data source ensued due to the quality of the

reflections relayed by the participants of their views and experiences.[10] The total number of participants at 9, aligns with international studies on children's participation the Convention, heard in other jurisdictions, for example where 9 judges were interviewed in Belgium and the Netherlands on their experiences and attitudes to meeting children (Lambrecht, 2019).

All participants work as professionals in the High Court on a regular basis. There was an average post qualification period of 10 years. 7 of the 9 participants were female. Other baseline statistics are not included in light of the small pool in order to protect participant identity.

All the interviews took place using Microsoft Teams and most lasted an hour or more. Following each interview, the transcripts were reviewed to ensure anonymity, then sent to participants for amendment/approval.

The interviews were designed to elicit practitioner views and experiences broadly across the following areas:

- Their views on the value of children's participation.
- Their experiences of the child objection defence and how age/maturity is considered.
- The separate representation of children.
- The information children receive before, during, and at the end of the proceedings.
- Their insights upon the online digital experiences for children and adults in the proceedings and in the preparation of reports.

[10] Nine judges were interviewed for the study "Conversations between judges and children in Belgium and the Netherlands", this work built upon the multidisciplinary three-part EU funded project Enhancing the Well-being of Children in Cases of International Child Abduction (EWELL), summarised in "Bouncing Back: The well-being of children in international child abduction cases" (Van Hoorde, K et al 2017).

3. Quantitative overview of the case law data

A quantitative overview of the case law data highlights key features of the sample. The frequency of use of the child objection defence aligns with its use globally.[11]

The child objection defence was formally pleaded in seventeen of the twenty cases in the sample. In one of these, the mother withdrew her application for an order for return, conceding that her daughter should remain in the UK, and therefore no determination of the outcome was needed by the court. [12] Judges made decisions about the outcomes in the remaining sixteen of the cases. The defence was upheld in three of these and orders for return made in the remaining thirteen.

In the three other cases, where the child objection defence was not pleaded, the defence of settlement was relied upon successfully and no return order was made.[13]

[11] Supra 5.

[12] One of the central issues arising in the case law sample/interviews is the relationship between information and participation and in particular how children know about the outcome. Despite there being no formal adjudication in this case on the objection defence, it was included in the sample as the judgment is written in a conciliatory tone and speaks directly to the child at the centre of the litigation.

[13] See supra 2 for a summary explanation of the settlement defence. The interview data builds upon this as settlement is described by participants as the most "welfare" type defence, these cases provide a contrast to the use of the child objection defence and the time and space afforded to children's participation and are contrasted in the interview data.

The child objection defence was not raised in the sample as the sole defence although one judgment provides that if it had been the only defence pleaded, then it would have succeeded. This is the only judgment that speaks to the relationship between the decision taken by the court and the trust in authority that would be damaged by ordering the child's return.[14]

All four defences were frequently relied upon at the outset as a group, but gradually filtered down.[15] Of the sixteen cases where a judicial decision was reached on the child objection, this was accompanied by the grave risk of harm defence. Again, these two defences are most frequently paired in Convention cases globally.[16]

In all thirteen cases where the child objections were overridden and a return ordered, the policy of the Convention was cited in the reasoning. That is, where a wrongful removal of a child has occurred then they should be returned summarily. The policy depends upon comity and there is frequent repetition of the need to uphold comity in the cases in the sample. In the context of the Convention comity means the international mutual recognition and trust in the jurisdiction of other Convention states. The need to uphold the policy of the Convention and its relationship with comity features prominently in the judgments. In the explanations as to why the objecting child's defence did not succeed, questions over the authenticity of the child's views arose, as did the influence of parental influence/manipulation alongside observations upon the capacity and maturity of the child.

[14] Re C (Abduction: Article 13(b) & Child's objections) [2022] EWHC 311 (Fam) Cobb J '.. an order for return would be likely irreparably to damage her trust in the authorities which are purporting to act in her best interests' para 60.

[15] Supra 2 for a summary of the four defences.

[16] Supra 5.

In 14 of the of the 20 cases, the mother was the abducting respondent parent. The gender of the abducting parent in the sample once again aligns with the global picture. [17]All were in heterosexual relationships and in eighteen the parties were or had been married or in a civil partnership.

The average age of the children in the sample was ten and median age seven. The number of single children in the data set was high, featuring in 11 of the 20. It is noteworthy that the trend for single children to be the abducted by one or other parent is increasing. [18] The reasons are not known but this increase has also recently been observed in private child law proceedings in England and Wales (Hargreaves, 2024).

In addition to the quantitative findings, the themes that emerged from the case analysis informed the questions posed in the interviews with the professionals. Both data sets connected iteratively, leading to the study's findings. An overall summary of these findings now follows.

[17] Supra 5.
[18] Supra 5.

4. Findings

4.1 Practitioner Views on Children's Participatory Rights

All participants were asked for their personal views on children's participatory rights. Without exception, they expressed their views of the importance of participation, some doing so emphatically. However, in the explanations of why this was so, differences emerged. There were variations in the understanding by the participants of the meaning and interpretation of participatory rights.

For some, participation was purely about being "heard" and having a voice. For others, there was a broader understanding that incorporated Article 13 UNCRC obligations for the supply of information to children. For this group, participation was linked in their responses not just to a child expressing their views, but to the information provided to the children, whether this was at the start of the case, during the proceedings or at the end when children find out about the outcome.

Some explained the importance of participation but caveated this by setting out the limitations created by the Convention. For example, they highlighted its summary nature, where a swift response was needed rather than time to explore welfare issues. Cafcass reporters stressed the parameters and limitations of participation. In particular, it was challenging to explain to children that they had a voice but that they could not dictate or control the outcome of the case. They reflected that it was important to explain this honestly but sensitively. As one participant noted:

Yeah, I mean, I think that it's important… that their voice is heard and I think it is important for them too, I mean, it's sometimes it can be difficult because their understanding varies obviously. So that they can say, I don't want to go back and then if the judge decides against them then, they can sometimes feel frustrated and understandably so because you know, they can feel that their wishes are determinative of the outcome, which is obviously not the case.

This concentration on the summary nature of Convention proceedings and its parameters by way of explaining participation, suggests an emphasis upon the exercise of Art 12 UNCRC rights as outcome rather than process focused.

Participants who related the supply of information to the child's participation, also reflected upon what would happen once the proceedings were concluded. Here the need to repair the relationship between the child and both parents, particularly the one who has been unsuccessful, was highlighted. Observations were made upon the value of knowledge and the supply of information as key to potentially rebuilding the relationship with the absent parent and acceptance of the court's decision. In this sense, participants considered the importance of participation as the consequences of exclusion and lack of participation were directly linked to potential future harm to the child.

… child abduction and the consequences lifelong can be quite stark. It's really important for them to be able to participate in proceedings, I think because sometimes it can be the ending of a relationship really between them and the parent. If for example, there is a background of hostility and then this one parent takes a decision to remove and you know, even though we can say, well, this is what needs to happen to repair the relationship once the proceedings have ended. If the left behind parent was going to issue proceedings to enforce contact for example,

sometimes they won't because it's you know, the whole process of the abduction proceedings it's just been too difficult. And so you do worry about those children and whether or not they ever get to repair that relationship with the other parent…

4.2 Age expectations and participation

There is a fundamental obligation in law for the court to consider early in the proceedings how and when the child's wishes and views are to be heard.[19] This obligation does not mean that the court has to hear from them directly.

The case data, analysed in isolation, implies that the manner in which wishes and views (or feelings) are put before the Court is invariably by way of a Cafcass report. Oral testimony and cross examination of the findings may follow. However, a Cafcass report will not be prepared in every case, and we know that not all cases are reported. The reasons why a report is considered unnecessary by a judge in the many unreported cases is unknown.

The interview data provides us with some insights upon this. In the absence of either a report or the grant of separate representation, children participate purely through the voices of their parents in opposition. The reasons provided for their exclusion from reporting are explained using the starting point of chronological age.

Overall, participants recorded that reports were only ordered for verbal children of school age, adding that this is normally about 7 or 8, and very unusually 6. If a

[19] Re F (Abduction: Child's Wishes) [2007] EWCA Civ 468, [2007] 2 FLR 697

child is younger than this, then the report would only be ordered if the child was part of a sibling group. To an unknown extent therefore, children below the age of 6 are excluded from reporting, unless they have siblings who are also the subject of the proceedings.[20] The study shows that age is used as a factor to exclude the participation of younger children.[21] The exclusion of younger children from the expression of their Article 12 rights in England and Wales is of concern, particularly as the global picture indicates that increasingly single children are being abducted and are the subject of Convention proceedings.[22]

There was a mixed picture in the interview data of the presumed capabilities of children. Chronological age was predominantly used as a starting point, although not determinative to the assessment of maturity. This was built upon preconceptions. Equally in the case data set, the expectations of Cafcass reporters and judges provided examples where children were noted to exceed expectations of their chronological age, for example in their capacity to weigh up information.

Preconceived ideas of age and capacity can therefore be displaced depending upon a reporter's view, if expected parameters for age/maturity have been exceeded. Although age can be a useful starting point, it is internationally understood to be limiting if used as a defining feature.[23] It is for this reason that age does not stand alone and is linked to maturity. The study shows that General Comment 12 has not been embedded into practice in this area of law in England and Wales in a meaningful way.[24] This is so as expectations of maturity are benchmarked by that starting point of chronological age and naturally

[20] Interview 6.
[21] Cases were marked by paternalistic shielding, where a direction for a Cafcass report on wishes and feelings was declined. For example, "… due to the child's age, they need to be "troubled" by a Cafcass enquiry or embroiled further.." a 6 year old child In the matter of BS (A Child) EWHC [2021] 2643.
[22] Supra 5.
[23] General Comment 12 to the United Nations Convention on the Rights of the Child (UNCRC) para 29.

influenced by this. Just as younger children are excluded by their chronological age, so too is age used to look for expected norms. Instead, the starting point could be finding out more about the uniqueness of the individual child and the sum total of their experiences.

4.3 The practical arrangements and provision of information to the child

For children who are to be the subject of a report directed by the court, a Cafcass officer sends a welcome letter directly to the child inviting them to travel to meet them on a specified date and time. A sample letter, kindly provided by Cafcass, is included at Appendix A.

This means wherever they are in the country, the child has to travel to London for the purpose of the meeting and if felt appropriate is given a tour around the Royal Courts of Justice. Normally the report is prepared after a single meeting with the child lasting 90 minutes.

During the lockdown periods, these meetings were carried out online.[25] For older children it was felt that this was the most effective. Overall, Cafcass reporters felt that it was more enjoyable/productive to conduct these interviews face to face. Many of the interviewees reflected on their practice during that time as

[25] Covers the three main periods of public health restrictions as identified by ONS, namely spring 2020 lockdown (23 March 2020 to 13 May 2020) autumn and winter restrictions (14 October to 4 January 2021) early 2021 lockdown 5 January 2021.

during the interviews participants reported that meetings for the preparation of reporting had reverted back to face to face as the default arrangement.

It was also recorded that Judges had met children online and participants provided examples where particular Judges engaged very well with children to make the online meeting successful.

Where children seek separate representation by directly contacting a solicitor, these meetings take place at the young person's request and can in contrast be in any location. Examples include solicitors travelling many miles to meet children in public places such as coffee shops.

4.4 Judges meeting children

There were only two examples found in the case law data of judges meeting children, despite attempts to incorporate as many as possible into the data set. Although some positive examples were cited in the interviews, a varied picture emerged of the willingness of judges to meet children face to face, despite requests from children to do so.

There were examples of judges meeting children online and interacting well with them. For children who wanted to meet the judge deciding their case, seeing what they looked like and hearing from them directly, understanding that there was a person behind the decision, was important to them, whether the meeting was online or face to face.

These meetings are reported upon cautiously, with neutral language used and with a clear record of an independent note being taken of the interaction. Observations by participants in the interviews support the view that these meetings exist in an uncomfortable space, where the value is questioned and for some were characterised as mere window dressing. The overwhelming concern for judges in the reported judgments was the possibility of evidential

challenge.[26] It is quite possible that this defensiveness and focus upon the potential for legal challenge reduces the value of such a meeting for the child.

This would explain the paucity of available reported judgments recording such meetings. Participants recorded that in light of the potential for challenge within the legal process, some judges preferred to meet the children after the case had concluded.

4.5 Information and outcomes for children

The recent move to greater transparency in the family court in England and Wales has a clear objective. [27] By demystifying how judges make difficult decisions in family law, in time there will be greater confidence in the system. In other words, information about how family law works will lead to improved access to justice, or at least to a greater understanding of it for more people.[28] The value of this was apparent in this research: examining the cases in the data set produced initial insights and themes that were developed further in the interviews. As such the cases held value for the author, as an adult researcher.

However, what, if any information could the children that feature in this 20 case data set learn about their cases? Would any of the children reading their own judgment feel that they are recognised and presented as real human beings affected by the decision rather than as legal objects?

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[26] Guidelines for Judges Meeting Children in Family Proceedings 2010. Further debates and proposals ensued in 2014 following criticism of the Judge's approach to meeting children in Re KP [2014] EWCA Civ 554. The caution against taking an evidential approach is made clear in the case of MR and JN Q & V {2019] EWHC 490 (Fam).

[27] Supra 6

Obvious markers are included, such as country, age, and siblings, but does the judgment reveal these children as individuals with likes, hobbies, dislikes? Does the judge speak to them in the writing of the judgment?

Largely the cases in the sample are devoid of personalised descriptions which would enable children to see themselves in likes/dislikes such as enjoying brownies, or disliking maths. Instead, the judgments provide impenetrable accounts that speak to the adults and legal system, not the children. The sample is at odds therefore with the growing practice acceptance of the need to communicate decisions directly to children, established in research (Stalford and Hollingsworth, 2020).[29]

Written judgments are generally produced later, so the question in the interviews that could not be answered from the reported judgments was **how** do children find out about the outcome of their case? That is whether they are to remain or return. This is the stark binary choice within Convention cases and for many children this may be perceived as one or other parent winning or losing.

In this jurisdiction is it very rare for a child to be in court to hear the judge's decision. Participants recorded that children will normally find out about what will happen from the parent they live with, that is the "taking" parent, after the hearing. For the legal professionals who are present at the final hearing, there

[29] Influenced by this research judgments are increasingly addressing children directly. A recent example is Judge John's Letter' (Recorder John McKendrick QC, 30th August 2022, Family Court London). Earlier examples of the practice include Re A: Letter to a Young Person (Peter Jackson J) [2017] EWFC 48 Mr Patrick(a pseudonym) v Mrs Patrick (a pseudonym) [2017] SC GLA 46 (Sheriff Aisha Anwar) Furthermore the practice is being adopted in other jurisdiction, for example see New Zealand Police/Oranga Tamariki v SD [2021] NZYC 360.

can be a direction of who relays the information to the child. Cafcass reporters indicated that they themselves were often unaware of the final outcome for children that they have reported on.

As to the practice of providing written judgments for children, participants recounted examples of being involved in and consulted by judges in the writing of letters appended to judgments for children, including having input into the style, tone and explanation in the letter. Yet this was noted to be uncommon. No participant had, as yet, been involved in the production of such a letter in Convention proceedings although unreported examples were cited involving countries outside of the Convention, heard under the inherent jurisdiction of the family court. The production of such a document, it was noted, takes judicial and professional time. Where legal professionals had been involved in this, it was reported that this was carried out with great professional care.

4.6 The professionals' views on improvements be made

The participants were asked to identify any one aspect they thought should be changed to improve how children in these cases exercise their Article 12 UNCRC participatory rights. The question was presented in a deliberately general way so that participants could select any area, whether of practice, process or law.

There were different responses across the professional groups, but all answers related to the link between participation and the provision of information.

This was broken down as follows:

- For Cafcass reporters the key change identified was that better information should be provided to children at the start of the proceedings and more work could be done on how children find out about the outcome.
- For Cafcass lawyers, the child's participation would be improved by creating better equality of access to legal aid, and this was directly linked to the provision of information. As legal aid funding is available for the

left-behind parent automatically, they have recourse to legal advice and information. However, the abductors, the vast majority of whom are mothers, do not receive public funding if their means are out of scope. This differs from all left behind parents who receive legal aid on a non means tested basis. Having fled their country of residence, a taking parent may not have ready access to financial paperwork to support a means assessment and will therefore remain unrepresented.

This group suggested that access to legal advice would mean that children would be better informed of their right to object. The interview data provides that at the start of the case, the left-behind parent will be aware of the child objection defence, but that the taking parent and abducted child will not.

It was felt that levelling the playing field here may set the tone for better negotiation/resolution of the dispute, with a reduction in stress and anxiety for the unrepresented parent that the child lives with. Equal access to information and advice would enable justice for children through a better understanding of their legal and participatory rights, and in particular how their objection to a return will be considered in law.

- Information regarding the possibility of separate representation and how children find solicitors needs to be made more transparent. At the moment, there is a messy picture relating to solicitors working in this space. They often work without court papers, including statements or pleadings until if and when the court accepts the child's competence and an application for party status is successful.

  This was the primary practical area for improvement for those in private practice. Added to this, the current complexities in the Family Proceedings Rules need to be brought in line with those that apply in other family proceedings. That is that a guardian need not be appointed where a child is deemed competent and has been made a party to proceedings. At the moment frequently solicitors acting for children granted party status often work in the dual capacity of both solicitor guardian. The requirement for a guardian remains within Convention proceedings and is yet a further unnecessary and paternalistic barrier to the acknowledgement of their competence and right to participate. Where

adults are deemed competent there is no requirement for them to have a guardian, nor should it be for competent children. This aspect has most recently been the subject of judicial scrutiny.[30]

[30] The role of Solicitor Guardians and the need to consider changes to the FPR has recently been discussed by the judiciary see C v M (a child) (Abduction Representation of Child Party) Rev 1 EWCA Civ 1449 December 2023.

5. Conclusions and Recommendations

The findings demonstrate that some children, to some extent, exercise their Article 12 participatory rights in these proceedings but that this is limited. Their voices are heard predominantly through either their parents or, if ordered, through the Cafcass report and often the Cafcass officer's oral evidence. Such reports are usually compiled following a single meeting. This is so despite research indicating that where children do wish to participate in family law cases, their preferred option is in fact to be heard directly rather than through a third party (Raitt, 2007).

Frequently, separate representation for children is considered late in the proceedings, unless there is Cafcass support for this in the early stages. The ability for children to become a party in their own proceedings is subject to approval and delays undoubtedly ensue where applications are heard late in the proceedings.

This study found that underlying barriers to children's participation include attitudes representing protectionism and paternalism. This has been shown to exclude children in contravention of our international treaty obligations under Article 12 of the UNCRC. Furthermore, resource limitations undermine children's participation, whether this is due to the lack of time to prepare a letter explaining the judgment to children, the need for children to travel to see Cafcass staff for reporting purposes, lack of legal aid provision, or not allowing children sufficient time and space to express their wishes and feelings in a mode and forum that meets their needs not the court process and legal system.

Five practical recommendations arise from the project findings.

- Information about how they can participate and when should be provided to all children. This should include information on the possibility of being separately represented. A list of ICACU solicitors should be provided to all children at the start of the case.

- Legal aid for both parents should be reconsidered including relaxation of the means assessment for the taking parent, in particular where the Article 13 (1)(b) defence is raised.
- The requirement to attend a meeting in London between the Cafcass reporters and children should not be the automatic default position. Early consideration should be given to whether the child may prefer that the meeting takes place online.
- Training Judges and Deputy Judges on Article 12 UNCRC rights in the context of abduction proceedings should be considered, particularly for those without child/family law experience.[31]
- There should be a specific direction in every case that the outcome should be delivered to children in a timely manner and by a means that suits the child, meeting our Article 13 UNCRC obligations.[32] This study notes that participants' viewed positively the potential for judges making pre-recorded messages reading a letter that explains the judgment and reasoning to the child directly. Whichever format of communication is used to convey the judgment, it should be neither a superficial nor sentimental exercise. [33] It should demonstrate the neutrality of the judge, acknowledge the child has been heard and the importance of their views and that they are afforded dignity and respect, engendering the child's trust in the system, and the legitimacy of the final decision. In turn this will provide for a more ready acceptance of the decision for a child, particularly where they have objected and are being ordered to return enabling them to move forward with their lives.

[31] Additionally, all judges holding a section 9 "ticket" entitling them hear these cases pursuant to s9(1) Senior Court Act 1981
[32] All participants considered that the possibility of a recorded video message provided by the Judge deciding the case, scripted in consultation with Solicitors/Guardians/Cafcass as a direct way to explain the judgment and reasoning to a child.
[33] There should be four functions of a judgment for children, communicative, instructive, developmental and legally transformative. (Stalford, H and Hollingsworth, K 2017).

Such proposals are made with an understanding of the difficulties that Cafcass staff, legal professionals and judges working within a challenging landscape of dwindling resources and busy court lists. It is only when these issues arising from inadequate funding are addressed will progress be made in meeting international legal obligations to children.

In summary, the findings of this study do not paint a picture of Article 12 UNCRC rights being embedded or meaningfully applied within the family court of England and Wales. Its recommendations are offered subject to the views of children and young people who have lived experiences of these cases. It is recognised that it is only with their insights and suggestions that effective changes to support Art 12 and 13 CRC rights will become a meaningful reality.

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Appendix A

Welcome letter

For children and young people

28 March

Hello D!

My name is …... I am your Family Court Adviser.

What does a Family Court Adviser do?

I work for Cafcass to help children and families when their parents or carers can't agree on what's best for them, and they go to the Family Court to get help.

My job is to listen to what children and young people say, and let the Family Court and their parents know about this.

It's important that I meet with you and understand what you think and how you feel so that I can help your family and the Judge make the right decision.

I am interested in how you feel and what you think should happen. It is important to make sure that your voice is heard.

I would like to arrange to meet with you

We can meet:

- at my office on Tuesday 29th March at 2.00pm

My offices are in London

If you want to email me my email address is: xxxxx@cafcass.gov.uk

About you

When we meet it would be great to hear about these things – you might want to write them down to help you remember.

- Who is important to you?
- Where do you call home?
- How does your family celebrate special occasions?
- What types of food do you eat at home?
- What is the best/unique/most special thing about you/your family?
- What big things have changed your life recently?

I am looking forward to meeting you and your family! Remember I am here to help ☺

Best Wishes

The Open University
Law School