

## Conversations between children and judges in child abduction cases in Belgium and the Netherlands

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## INTRODUCTION

This article examines the hearing of children in Belgian and Dutch courts in cases of international child abduction. Child abduction is the situation where a child is unlawfully taken by one parent from country A to country B or unlawfully retained in country B while his or her habitual residence is in country A.<sup>1</sup> This radical event can confront a child with an abrupt change of environment, adaptation to another language, an unfamiliar culture and new daily contacts. It can also lead to a feeling of isolation and the discontinuation of contact with the left-behind parent. Although an abduction by one parent is not necessarily always a negative experience for children, the long-term effects can be traumatising – especially in situations where the child experiences stress, grief or conflicts in loyalty as a result of the abduction.<sup>2</sup>

In order to discourage parents from unilaterally embarking on abduction, international legal procedures have been put in place. The left-behind parent can institute a 'return procedure' before the court in country B. The purpose of these judicial procedures is to return the child to country A as soon as possible, unless specific exceptions apply. A return procedure is mainly technical in nature. In principle questions of parental authority and the relations between the parents and their child(ren) are not considered.<sup>3</sup>

The literature, decided cases, and interviews with children and judges indicate the growing attention for an own place for children in return procedures.<sup>4</sup> Nevertheless the hearing of children by judges is not easy in this sensitive and often exceptionally conflict-ridden family context.

This article focuses on tensions and challenges in the communication between judges and children in international child abduction cases that can stand in the way of effective implementation of the right of children to be heard during the return procedure. The first research question is what the judicial and institutional challenges are while the second question concerns tensions related to communication and relationships. In order to answer these questions, the article presents a multidisciplinary study of the Belgian and Dutch data sets from the EWELL project.<sup>5</sup> An analysis of interviews with 11 Belgian and six Dutch young persons between 12 and 19 years who were subjected to an international abduction by one of their parents reveals their opinions and experiences about these abductions.<sup>6</sup> All but one of the children<sup>7</sup> were younger than 12 at the time of the abduction. In Belgium, six of them were heard by the judge, whereas only one Dutch child reports being heard in court.<sup>8</sup> In addition, nine family judges were questioned about their experiences, insights and needs in relation to the hearing of children in international child abduction cases. Seven of them were Belgian, two were Dutch.<sup>9</sup> Findings from these interviews were supplemented with data from an analysis of national case law concerning the hearing of abducted children in Belgium (n=25) and the Netherlands (n=98).<sup>10</sup>

The first part of this article considers the areas of tension on a judicial and institutional level. In the second part we review the tensions in relations or communication experienced by children and judges during the hearing in court more comprehensively. Some concluding recommendations are made in the closing discussion.

## I. JUDICIAL OR INSTITUTIONAL AREAS OF TENSION

Judicial or institutional challenges at the hearing of abducted children are found in the application of the legislative framework regulating the return procedure. In most cases a child abduction is the result of a deeply rooted family conflict with a cross-border element. In this context separation or divorce can lead to specific judicial disputes between the parents concerning authority and contact, leading to the involvement of different courts and legal systems across national borders.

In order to discourage parents from unilaterally embarking on abduction, the international community and the EU have enacted international legal instruments that make provision for the immediate return of the child to his or her habitual place of residence unless stringent exceptions are applicable. Most of the studied case law from Belgium and the Netherlands builds upon the Hague Child Abduction Convention (HC80).<sup>11</sup> In abduction cases between two countries of the European Union,<sup>12</sup> the EU's Brussels II-*bis* Regulation (2003) applies.<sup>13</sup> Both HC80 and Brussels II-*bis* make provisions for the possibility that children and young persons can be heard during the return procedure. Under Brussels II-*bis* this obligation is general, *i.e.* every child has the right to be granted the opportunity to be heard.<sup>14</sup> Age and maturity are only relevant in considering how much weight should be given to these views. On the other hand, the HC80 does not explicitly include the child's

right to be heard. However, the Convention does offer the possibility for the child to oppose return.<sup>15</sup> Here too, the condition applies that the child has a certain age and degree of maturity that makes it appropriate for the child's opinion to be taken into account. In addition, other international standards on children's rights and child-friendly justice, such as Article 12 of the Convention on the Rights of the Child (CRC, 1989),<sup>16</sup> also provide for the right of children to be heard in legal proceedings concerning them. Article 3 CRC adds that in all measures affecting children, their best interests must be a primary consideration. In Belgium, the child's right to be heard is enshrined in Article 22bis(2) of the Constitution. The Code of Civil Procedure also provides in Article 1004/1 that children have the right to be heard by the judge in family matters. From the age of 12, children are invited by the court for an interview; children younger than 12 can be heard on request. Article 1004/2 of the Code of Civil Procedure specifies that children must receive information about the conversation with the judge, and that the judge is not obliged to follow the opinion or requests of the child.<sup>17</sup> However, the opinion of the child must be given appropriate importance in accordance with the age and maturity of the child (Art. 1004/1(6) of Code of Civil Procedure).

In the Netherlands, the judge invites children aged 12 or older to be heard on matters that concern them, unless the judge decides that the case is of minor or urgent importance. The judge has discretionary power to hear children under 12 years of age (Art. 809(1) of the Code of Civil Procedure). In family cases of international child abduction children are routinely heard from the age of six.<sup>18</sup>

### ***1.1) Technical nature of the procedure***

*"You are in a dilemma."*<sup>19</sup>

*"There is no room for delicate distinctions."*<sup>20</sup>

The return procedure is intended to respect the international division of competences after a child abduction from country A to country B. Thus, family judges can decide on the basis of custody and residence disputes about children who have their place of habitual residence in their countries. To all judges interviewed for this study, returning the child to country A so that the court in that country can comprehensively conduct the procedure on the merits, was seen as an important power of the HC80. Exceptions to the return are determined by law,<sup>21</sup> but are interpreted strictly.<sup>22</sup>

How much room the judges create to involve children in this technical procedure differs considerably. Some find it important to hear the child in all cases; others simply briefly weigh up the interests and perspectives of the child when specific grounds for refusal are invoked, for instance where it would be harmful to return the child (Art. 13(1)(b) HC80) or where the child objects to the return (Art. 13(2) HC80). Yet others regard the hearing of the child in a merely technical procedure to be without meaning because of the limited room to take the child's perspectives into

account.

One of the judges expressed the view that a purely technical application of the legislation puts the judge in a dilemma that has a limiting effect.<sup>23</sup> Another judge opined that the biggest problem in the return procedure is hidden in the tension between the technical and substantive interpretation.<sup>24</sup> The judges find the fact that the return procedure should first be quick and to the point difficult to harmonize with the careful, individual balancing exercise required by the hearing of the child and the interests of the child as provided by the CRC. In addition, the time available to conduct a meaningful conversation with the child tends to be very limited. Even in cases where the children are heard, it is still difficult to assess their situation. This leads some judges to question the need for a hearing in the return procedure.<sup>25</sup>

In the substantive procedure this group of judges see a bigger role for the children (*e.g.* in the determination of the place of habitation), as one judge says: *“The aim of the return procedure is to ensure that the children tell their story to the correct judge – preferably the judge with jurisdiction on the merits. In situations where the child who has just told his or her whole story to the judge in the return procedure, clearly feels at ease in the new situation, but the judge (...) does not act in accordance with the vision of the child, it will be difficult for the child to build up a trust relationship with the judge who makes the final determination (or more generally, with decision-makers). It is very difficult for the child to comprehend that the return procedure is a technical matter.”*<sup>26</sup>

The first judicial tension is thus found in the interplay between private international law, as emanated in the HC80 on the one hand, and the international law of children’s rights, expressed in the CRC on the other hand. Whereas HC80 aims to discourage child abductions by creating speedy procedures for the immediate return of the child (Art. 11 HC80), the CRC wants to create space to make provision in each individual case for a careful weighing of interests where the child is heard (Art. 3 CRC).<sup>27</sup> Also, in the light of the reform of Brussels II-*bis* whereby the hearing of children is given a more central space,<sup>28</sup> some judges indicated that they would find conversations, interviews or collegial exchanges of best practices with fellow judges helpful to further investigate the balance in the application of both Conventions.<sup>29</sup>

## ***1.2) Hearing young children***

*“I am not invisible, you know!”*<sup>30</sup>

The Dutch judges explained that the conversations (with children from 6 years old onwards) generally run smoothly and that the children are not afraid to speak.<sup>31</sup> They did not see indications that the discussion with the judge would be too arduous for the children.<sup>32</sup> In accordance with Article 12 CRC children are not obliged to accept the invitation to be heard. However, according to the judges it seldom happens that children do not want to be heard.<sup>33</sup> In the interviews one child said that he would rather not be involved in the procedures, because he believed that his

parents should accept full responsibility for where the children were going to live.<sup>34</sup>

Although half of the judges explicitly indicated that there is in principle no age barrier for the hearing of children, the Belgian judges were reluctant to hear young children. The judges indicated that the hearing is no miracle cure and can do much harm, especially in the case of young children.<sup>35</sup> They are concerned and feel responsible for the welfare of the child during the conversation.<sup>36</sup> Therefore, one of the Belgian judges held the view that judges should be able to consider on a case-by-case basis whether it is appropriate to hear a child.<sup>37</sup>

According to the Belgian judges systematically hearing young children (from the age of six) would not be apposite in Belgium. For them 12 is a good age, with occasional exceptions for children of ten<sup>38</sup> or eight.<sup>39</sup> A conversation with a child of six or seven is highly exceptional for these judges. A number of younger children who were not heard by the judge felt that they were excluded because of their age: *“Back to my normal life and my family. That is what I especially hoped for, but I never had the opportunity to tell anyone. [...] The judge was at that time also not really interested in my side of the story, because I was still quite young.”*<sup>40</sup> Another child pointed out that a young age does not mean that he is invisible.<sup>41</sup>

In the Netherlands there is little or no resistance to the hearing of young children. According to one of the judges, this is a direct result of the fact that the Netherlands has a system of concentrated jurisdiction, which means that all cases of child abduction are considered by a limited number of judges.<sup>42</sup> In view of the fact that family judges in the Netherlands are used to dealing systematically with children from 6 years on, there is a greater degree of specialisation and the age threshold can be considerably lower than in Belgium.<sup>43</sup> Also, the Dutch judges experience few problems with the hearing of young children in practice. It is especially important that the expectations be clear and that the children know that their story only forms one element of the decision-making process. The pressure on children should be limited as much as possible in order to make the hearing a positive experience for the children.<sup>44</sup>

### ***1.3) The double criteria of age and maturity***

*“The child’s words are what you as judge can deal with and interpret in a legal way.”*<sup>45</sup>

The extent to which a judge has to give due weight to the child’s views is dependent on a child’s maturity. According to the Committee on the Rights of the Child, maturity should be assessed on an individual case-by-case basis. This assessment should take into account to what extent the child can understand the implications of certain issues and express his or her opinion with a certain reasonableness and independence. The greater the impact of a decision on the life of a child, the more important it is for a judge to thoroughly examine the child’s maturity.<sup>46</sup> How this assessment should take place is not further clarified.

However, what is clear is that the child's maturity cannot be linked solely to the child's age.<sup>47</sup> Belgian case law falls short in this respect. Belgian courts mainly refer to the age of the child to indicate the decision on the maturity of the child, which, in the Committee's view, does not go far enough.<sup>48</sup> Unlike Belgian judges, Dutch judges do explain their assessment of the child's maturity in the case law. Yet here too, it appears that the lack of concrete guidelines poses challenges for judges. For example, the Dutch judges interviewed experienced that assessing the maturity of children is not only a legal, but also an educational exercise. However, in his or her role and expertise as a legal professional, whose task it is to interpret and settle the case legally, the judge can only rely on words, on what the child says or does not say during a conversation. As a result, judges rely primarily on the intellectual, cognitive and rational abilities of children to assess whether or not they are mature enough to give due weight to their views. For example, judges are more inclined to take into account the opinions of children who are verbally better able to express their thoughts, ideas and feelings than the opinions of children who are less able. Judges mainly consider how much understanding of the situation the child shows, to what extent he or she can assess the consequences of decisions, to what extent the child expresses himself or herself in a verbally strong, consistent and free manner, the arguments the child puts forward and the way the child speaks. As a result, children who are shy or less able to express themselves verbally often have difficulty passing the maturity-test. The judges also indicate it is more difficult to hear a child who is less developed or in a vulnerable situation (*e.g.* a child who has been placed in alternative care or who is struggling with behavioural problems), let alone to draw direct consequences from what the child has said.<sup>49</sup> Unlike psychologists, judges can at most take developmental psychology as a background framework and feel insufficiently specialised to determine the maturity of the child.<sup>50</sup>

One judge indicates that help from the *guardian ad litem* may be appropriate when there are doubts about the maturity of the child. In the Netherlands the *guardian ad litem* was introduced via the pilot project 'the guardian ad litem in child abduction cases'. During the pilot, a *guardian ad litem* was systematically appointed for children aged three and older to represent the child's voice and interests in the proceedings. This pilot has now been evaluated positively. At the beginning of 2018, it was decided to apply this procedure as a standard practice in the Netherlands.<sup>51</sup> In other family cases, it has long been possible for the court to appoint a *guardian ad litem* for a child on the basis of Article 1:250 of the Dutch Civil Code. This can happen, for example, in a highly adversarial divorce, which creates a conflict between the interests of the child and the interests of the parents.<sup>52</sup>

For very introverted, timid children, this same judge would prefer to have further research conducted by someone who specialises in the development of children in order to determine to what extent their opinion can be taken into account.<sup>53</sup>

#### ***1. 4) Preference versus resistance***

“A child must be able to reside where he or she has the best future.”<sup>54</sup>

The refusal ground of the objection by the child only appears in a minority of the cases coming before law courts. An analysis of the decided cases indicates that the judges interpret the phrase ‘objections’, as contained in Article 13(2) HC80, very strictly. Only in respectively 12% (Belgium) and 16% (the Netherlands) of the cases in which children were heard, Article 13(2) was applied and the return refused based on the resistance of the child.<sup>55</sup> Determining whether the communication of the child embodies a preference or resistance,<sup>56</sup> is an additional challenge for the judges.<sup>57</sup> This distinction is relevant, because whereas resistance can lead to a refusal to return on the basis of Article 13(2) HC80, a mere preference cannot. Nevertheless, a preference can be relevant in the assessment of the child’s best interests, as well as in determining whether return would put the child in an intolerable situation (in the sense of Art. 13(1)(b) HC80).

Sometimes it is very difficult to determine what the real wishes of the child are. It is then especially important to determine why children say certain things or on what ground their preference or resistance is based.<sup>58</sup> From the interviews with children it appears that this distinction causes much confusion. As one child explains: *“What I do not understand is that the judge in [country X] made a normal decision, and that all of a sudden in [country Y] they say something else and they went to [country Y]. And then I was like, wow, what do I have to say in this? I do not want the decision of [country Y], I want the one from [country X].”*<sup>59</sup> Another child pointed out he did not want to stay in the country where he was abducted to because he was experiencing violence. According to the child, the judge had said that he could not do anything: *“I told the judge they were beating me. (...) They say yes well we [the judges] cannot do anything about that. Yes, and then I started crying. They did see that I did not want to go back, but they couldn’t do anything. But then apparently it turns out they could have. So this is something I do not really understand.”*<sup>60</sup>

The children talking to the judge are however not aware of the narrow interpretation of ‘objection’. They want to feel that the judge actually listens to them.<sup>61</sup> From the interviews with children, it is clear that they expect the judge to give due weight to their perspective: *“If we say something... I mean, it is our life, you know? The judge has to... I mean... Take this into account.”*<sup>62</sup> For example, for them the living conditions are very important. For this reason, a number of children believe that a child should not live in a poor area or in a poor country, but where he or she has the best future<sup>63</sup> and with the parent with whom the child feels the most comfortable.<sup>64</sup> One of the children stressed that it is important for children to be happy. These elements will however not often be seen as ‘objection’ and are therefore not decisive for application of Article 13(2) HC80.<sup>65</sup> Because this distinction is difficult to comprehend for children, it calls for additional interpretation and explanation,<sup>66</sup> more so because the validity of the distinction between preference and objection is disputed in the literature.<sup>67</sup>

## II. TENSION IN COMMUNICATION OR RELATIONSHIPS

The fact that the hearing of abducted children is a complex matter is revealed by the diverse attitudes and experiences of both judges and children. In addition to judicial and institutional areas of tension, judges and children also experience challenges of a communicative or relational nature before, during and after the hearing.

### II. 1) *Experiences of children and judges*

*“The judge has to genuinely listen, not just hear us to make us feel a bit better.”<sup>68</sup>*

From the interviews with judges and children it appears that both judges and children have a notion of each other that can stand in the way of a smooth conversation. Apparently, children have a narrow view of judges. Prior to the interview at the court, the children mainly imagine the judges to be angry: *“I did indeed have a wrong idea about that. Because such a judge...then I always think of crime. And then I think, oh. Shit. What have I now done wrong again?”<sup>69</sup>* Because of this rather negative notion children have about judges, they do not enjoy sitting and waiting alone before being heard.<sup>70</sup>

In spite of the fact that children often have a positive attitude to the opportunity to be heard, they frequently find the experience unpleasant for various reasons. For instance, children see no clear common thread in the procedures and/or they do not understand why a particular final decision is taken.

The children equally do not understand why the judge from country B is empowered to take a decision while they always lived in country A. Almost all children, however, find it important that they be given the opportunity to express their views. Who can better inform the judge about what they experienced than they themselves? From the interviews with children it appears that the children who were not heard are very curious about what occurred during the judicial process, what was said between the parties and why their opinions were not requested. Even more than children who were heard, these children miss clear communication and did not know what was happening. For instance, one of the children thought that the court could do nothing to help them in an international child abduction case because of the fact that the judges, in her perception, *“do not talk to the children, but only to the parents”<sup>71</sup>*. At the same time, the children were aware that the return process was important for their future. More than half of the interviewed children said that they found it extremely important that a child does not get the impression that nobody is interested in his or her story. Furthermore, children found it important that the judge does not only hear them, but also takes them seriously. *“[...] I found it very, very annoying that every time I had to speak to these people, that it always, they genuinely treated me like a child who knew nothing, while I was in the whole situation, while it concerned me.”<sup>72</sup>*

When asked whether their voice had been heard, many children



answered negatively.<sup>73</sup> For example, a number of children doubted the capacity of the judge. They described ‘their’ judge as biased and unreliable, especially when they were confronted with the ‘least pleasant decision’ for them. Also, one child got the impression that the judge wanted them to say negative things about one parent.<sup>74</sup> One child was asked questions about hobbies, school and favourite meals, while nothing was asked about the family situation, hence the hearing felt more like a job interview for this particular child. As a consequence of these indirect questions, the child got the feeling that the conversation amounted to him having to make a choice between his parents. He also felt the judge was selective in what he put into the report about what was being said.<sup>75</sup> One of the Belgian judges finds it important to mention that when a child is not satisfied with the result, the child can be angry with the judge instead of with him- or herself: *“That is good, being cross with me. Then they can at least utter their feelings. They can blame me instead of themselves, because the guilt feelings of children in divorce cases are enormous. They tend to think that somehow it was caused by them, that they are too much, that the parents actually fight because the children are there [...]”*.<sup>76</sup>

According to one Dutch judge, adults or professionals, including judges, can sometimes be reluctant to hear young children because they tend to protect children. When they focus too much on protection, they fear that children will be scared or burdened with the argument between their parents. For this judge, such concern does not feature in practice: *“I have never found that a child does not want to talk about what happened in the past or is happening now; also not a small child, to the extent that such child can understand it.”*<sup>77</sup>

Apart from the information that judges get from the children, it is also a good opportunity for judges to see for themselves who is actually involved in the procedure. Judges believe that this allows them to form a better picture of the context of the child. Especially judges in the Netherlands feel more comfortable on this level: *“The story of the child is also genuinely a view through coloured glass, by means whereof you can see the story of the parents better.”*<sup>78</sup> Furthermore, it can also be helpful for the children that the judge can delicately force them to learn to see two sides of the story.<sup>79</sup>

## **II. 2) Coping with family conflicts**

*“Always two people and one side loses.”*<sup>80</sup>

A second relational and communicative area of tension can be found in the role played by the judge in the conflict within the family. When the seeking of an agreement between the parents is concerned, the views of the child can hamper the procedure before the judge. It often happens that judges get the feeling that the child is trying to mislead them.<sup>81</sup> The experiences of the children show a similar trend. The interviews reveal children grapple with the question as to how honest they can be during the procedure. They often have difficulty trusting the judge or they want to be loyal to one of or both their parents. One parent can, for

instance, ask them to mention or leave out certain matters. Because of the parental pressure experienced by the child, the child cannot report how it genuinely feels. Sometimes, the children even have the impression that they are conducting the conversation because the abducting parent wants them to. That puts the children in a difficult situation. In this regard, one of the interviewed children said: *“It is a fact that both my father and mother are present. As son or daughter you will in that situation for instance bear in mind that you say one thing and not another whereby you will harm your father or mother severely. They were the people who brought you up. You have a very strong bond with them. You do not want to hurt their feelings.”*<sup>82</sup>

The children also indicated that they want to avoid that the contact and the relationship with the parents deteriorates due to the hearing, because the entire abduction process already invokes tensions between the parents: *“If I make this choice [to return], I am afraid that the bond that they now have will disappear [between the parents]. I do not want people to get cross with me. And even if I wanted to return, I need proceedings before two courts of law... There are always two people and one side loses.”*<sup>83</sup> Another child found the disturbing effect of such procedure on her family and relatives difficult: *“[...] I found it devastating to see how much stress it actually caused both my parents [...]”*<sup>84</sup>

### ***II. 3) Communication, transparency and feedback***

*“It concerns the voice of the child, not the choice.”*<sup>85</sup>

When the child has been appraised of the judicial procedure, or when he or she has been heard, there is almost always a lack of communication about the procedure, the role of the child, the weight that can be given to the view of the child and the responsibility of the person hearing the child. That is evident from the interviews with both the children and the judges and this also causes tension.

When the children enquire about the procedure via their parents, a number of children doubted the credibility of the message: *“I could also not tell whether that [what the parent gave as feedback] was true. I simply didn’t know exactly.”*<sup>86</sup> Another child formulated his concern as follows: *“I do not know what happened. I do not know what the discussion was about. I heard nothing of what happened inside because I was simply sitting in the corridor outside. [...] I asked about it, but mother gave no information about what was said inside.”*<sup>87</sup>

Furthermore, children said that they found it difficult to trust the judge. In the absence of feedback the children cannot form a view about the case. One of the children said in this regard: *“Yes and that I could never see. I mean, I could indeed say something to the judge, but I do not know what the judge will then say, he can say whatever he wants, isn’t it.”*<sup>88</sup>

A few judges encountered a stubborn attitude in that children believe that they themselves can make the decision.<sup>89</sup> It is very important to both the judges and the children that there is clarity about the purpose of

the conversation: “*As judge you have to manage expectations*”,<sup>90</sup> not only during the conversation, but also beforehand and afterwards. For example, the judge can attempt to sketch what could happen in different scenarios.<sup>91</sup> Another judge said that the communication of the decision must take place in a clear and systematic manner.<sup>92</sup> As such, the child should not get the impression that he or she carries the burden of having to decide.<sup>93</sup> With this approach, as a judge, you do not put all responsibility on the child, which is often the downside of a hearing and which brings about a great deal of pressure for the child. According to the judges and the children, this communication about how the final decision is made is still inadequate in practice. The information provided to the children prior to the interview is insufficient.<sup>94</sup>

One judge pointedly remarked that she never refers to what the child said in her ruling: “*I always seek out other reasons to support my finding that are not dependent upon what the child said. That is important to me.*”<sup>95</sup> The judges find it important that there is clarity about the fact that the judge is not bound by the opinion of the child in order to make a final decision.<sup>96</sup>

The judges take the view that the children should at least have a place to go to for information and support. Current practice often falls short in this regard. Preceding the conversation, they have to be informed what exactly is going on and what they can expect. Afterwards, it is important that children receive feedback concerning to what extent the judge agreed with the view of the child and why. In this manner the child will have the feeling that due weight was given to his or her views.<sup>97</sup> The judges, however, also pointed out that the judge is not by definition the most appropriate person to give this feedback. After the ruling it is difficult for the judge to further communicate with the child, in view of the fact that after the ruling discussion is actually no longer possible.<sup>98</sup> In the Netherlands this need is catered for by a *guardian ad litem*, who can guide the children through the entire procedure. This could also be an interesting route in Belgium, where such information and support is practically non-existent.

## DISCUSSION AND CONCLUSIONS

In spite of the growing attention for and acceptance of the importance of an own place for children in such procedures, the hearing generates tension for all family members – and not least for the children who are involved.

In response to the first research question, we have found that the tensions and challenges on the institutional level include the technical nature of the return proceedings, which makes a full-blown legal procedure impossible, the difficulty to hear children younger than the prescribed age, the related difficulty for judges to assess maturity, and the delicate distinction that judges have to take into account concerning whether children express an objection to return or merely a preference. Secondly, communication tensions exist in the sense that children sometimes feel that judges do not really listen to them and they miss feedback from the judge, while judges have difficulties in finding the

right balance between resolving the family conflict and paying attention to the child.

We conclude this article with some overarching conclusions and give three recommendations for possible solutions, areas for improvement or further research.

A first general conclusion leads back to the right of children to be heard, as laid down in Article 12 CRC and further elaborated by the Committee on the Rights of the Child in General Comment 12. According to the Committee, the right of children to be heard goes beyond the formal interpretation of a contact moment between the judge and the child.<sup>99</sup> In the context of an international child abduction this means that the child, regardless of any resistance, must be given the opportunity to express his or her feelings and thoughts to the judge, so that the judge can also look at the situation through the child's eyes. The children who were interviewed in the context of this study see an added value in a neutral institution in being able to tell their story, but the judge does not always trust this. This tension is further increased because the wishes of the children are not always in line with the functional considerations made by the judge to reach the final decision, which sometimes makes it difficult to bridge the distance between the story of the judge and that of the children.

A second common thread in the research shows that hearing children can be risky. In the best interest of the child it can sometimes be necessary not to hear children. However, not hearing children out of fear of not being able to support them sufficiently does wrong with the obligations under Article 12 CRC.<sup>100</sup> It is the responsibility of adults that hearing children will always be safe and will go well. That is why it is important that judges learn to properly assess real risks and, where necessary, can call on the help of other professionals in order to deal with any difficulties as well as possible or to limit them.<sup>101</sup> The caution of the judges, who from a reflex of protection want to avoid that children get the feeling that they have to choose between their parents or express a preference with whom or where they want to live, leads to uncertainty or suspicion among the children. Ensuring the right framework conditions, such as an appropriate way and method of hearing children, can help to remove these barriers.<sup>102</sup>

Thirdly, in order to meet the right to information and thus the full participation of the child in the procedure, it is important that the child receives some form of feedback on how the final decision is taken.<sup>103</sup> Interviews with judges and children show that in practice this rarely or never happens. Transparency about the procedure, the role of the child, the weight that can be given to the child's opinion and the responsibility or decision-making power of the person hearing the child can prevent disappointment and unrealistic expectations. This does not mean that the judge should simply follow the child's opinion. Other research shows that children who feel that their opinion has been taken into account are better able to reconcile themselves with a final decision, even if it does not reflect their wishes accurately.<sup>104</sup> It remains a major challenge to strike a balance between, on the one hand, the technical nature of the return procedure and, on the other hand, the rights of the children

concerned to have a full place in the procedure. Acting quickly within the time limits set under the HC80, on the one hand, and taking sufficient time to deepen the child's perspective and to be able to place it in an already complex family situation, on the other hand, calls for a constant balancing.

Taken together, the above conclusions confirm the importance of supporting both children and judges throughout the procedure, in accordance with the evolving capacities and context of the child. This support can be given shape in various ways. Based on the research results, we formulate three suggestions: 1) explore and evaluate the possibilities of structurally embedding a supportive figure in the return procedure, for example in the role of *guardian ad litem*; 2) invest in training and more specialisation possibilities for judges in order to be able to represent the best interests of the child; and 3) pay extensive attention to feedback to the children involved about how the final decision is made.

Further research into and evaluation of the role of the *guardian ad litem*, following the example from the Netherlands, offers various possibilities to meet the concerns and suggestions of both children and judges. This person can be an important support figure for both the judges and the children. The *guardian ad litem* looks after the interests and the sense of security of the child and can advise the judge. In addition, the child can also turn to the *guardian ad litem* for guidance and assistance during the proceedings. In the Netherlands, the *guardian ad litem* as a good practice has since been further developed and structurally anchored in international child abduction cases. Following the Dutch example, Belgium can examine and develop the path of a supportive figure during the return procedure. The Netherlands can continuously evaluate the role of the *guardian ad litem* and actively propagate this example to other countries.

The judges are asking for more support, training and exchange with colleagues. More specialisation opportunities for judges to represent the best interests of the child are an important intermediate step in this process. In addition to the concentrated jurisdiction system, which is present in both countries, this allows judges to specialise more quickly in specific problems that are relevant to child abduction (*e.g.* in hearing young children, recognising loyalty conflicts or learning to know and build trust in other legal systems).

Finally, it is recommended that the person accompanying the child during the proceedings, whether the judge, the *guardian ad litem* or a social worker, be explicitly mandated to provide the child with extensive feedback on how the decision was made. This would prevent children from filling in the gaps with their own fantasies, often constructed around their fears. All interviewed children consider it extremely important to have clarity about how their views have been taken into account and to what extent their voice has influenced the outcome of the process. This communication should be conducted in such a way that the child is comfortable and understands what is being said before, during and after the procedure. Abducted children need help to restore trust in their surroundings, because they have often been lied to or excluded

from the truth.

The implementation of these recommendations should better support judges and children to address both the judicial-institutional and communicative-relational challenges identified in this article, so that children can participate more fully in the return procedure following an international child abduction.

## Noten

\* A Dutch version of this article has been published: S. Lembrechts, M. Putters & K. Van Hoorde, 'Kinderen en rechters in gesprek in familiezaken van internationale kinderontvoering in België en Nederland', *Tijdschrift voor Jeugd en Kinderrechten*, 2018(3), pp. 274-290. The authors wish to thank Albert Kruger for his translation and linguistic help. All the quotes by children are translated as literally as possible from the original versions.

**1** In this context 'wrongful' means that the removal (1) is contrary to the law of the country where the child has his or her habitual place of residence, and (2) took place without the consent of the other person having parental responsibility (see Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, The Hague, 25 October 1980 & EU Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 23 December 2003, L338/1- 29).

**2** M. Freeman, M. (1997). 'The Best Interests of the Child? Is the best interest of the child in the best interests of children?', *International Journal of Law, Policy and the Family*, 1997, vol. 11, pp. 360-388; M. Freeman, 'Parental Child Abduction: The Long-Term Effects. International Centre for Family Law', *Policy and Practice* 2014, accessible at [www.famlawandpractice.com/researchers/longtermeffects.pdf](http://www.famlawandpractice.com/researchers/longtermeffects.pdf); G.L. Grief, 'The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy', *The American Journal of Family Therapy*, 2009, vol. 37, pp. 273-286.

**3** It is not always straightforward to distinguish return procedures from cases related to parental responsibility. For example, the judge can order non-return on the basis of Art. 13(1)(a) when the requesting parent was not actually exercising custody rights at the time of removal or retention. Also, when the judge needs to decide whether there is a 'grave risk' in the sense of Art. 13(1)(b), the question may arise whether the parent is looking after the child or allowing contact with the child's other parent.

**4** N.G. Martín, 'International Parental Child Abduction and Mediation', *Anuario Mexicano de Derecho Internacional*, 2015, vol. 15(1), pp. 353-

412.

**5** The EWELL research (*Enhancing the Wellbeing of Children in Cases of International Child Abduction*) was conducted between January 2016 and December 2017, with the financial support of the European Commission. This project investigated the well-being of children in cases of international child abduction in Belgium, France and the Netherlands from a social-psychological and legal perspective. The French component of EWELL is not dealt with in this paper as only one child could be interviewed. Besides, no conversations with French judges were conducted. The research report can be consulted online via [http://missingchildreneurope.eu/Portals/1/Docs/Compiled\\_research\\_report\\_final.pdf](http://missingchildreneurope.eu/Portals/1/Docs/Compiled_research_report_final.pdf) (Van Hoorde *et al.*, 2017). The project partners were Child Focus (coordinator), the University of Antwerp, the International Child Abduction Center (Center IKO), CFPE Enfants Disparus, the French Ministry of Justice, Missing Children Europe and Cross-border Family Mediators.

**6** The children were interviewed in a semi-structured and personal way. The interviewer made use of an accompanying questionnaire to make sure the interviews were comparable.

**7** K17, 13 or 14 years old at the time of the abduction, 19 years old at the time of the interview, NL.

**8** The other five Dutch children did not report that they were heard by the judge. Although one of them told that someone came to their place for a conversation, but the child does not remember who this person was. Another child had written a letter to the judge. Another one talked to Child Protection and just two children said they were not heard at all (although we know that one of them was heard in mediation, but clearly could not remember it).

**9** This difference in number of judges is justified by the fact that jurisdiction is concentrated for child abduction (return) proceedings at one court in the Netherlands and six courts in Belgium. This means that there are only three judges in The Netherlands that deal with these cases. The interviews with judges were also conducted in a semi-structured way. Five judges (three Belgian and two Dutch) were interviewed in their office. One Belgian judge was interviewed via telephone, three others have answered our questionnaire in writing.

**10** The investigated case law includes accessible cases from Dutch and Belgian family courts of first instance, regional or national appeal courts, as well as superior courts. All decisions date between 1 March 2005 (entry into force of Brussels II-bis) and 1 February 2016 (start of the EWELL research project). Only cases in which the hearing of children was discussed by the court, regardless of whether the hearing effectively took place, are included in the analysis.

**11** Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, The Hague, 25 October 1980, available at [www.hcch.net/en/instruments/conventions/full-text/?cid=24](http://www.hcch.net/en/instruments/conventions/full-text/?cid=24). This Convention finds international application in 98 member states, including all countries of the European Union (EU).

**12** With the exception of Denmark.

**13** EU Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 23 December 2003, L338/1-29, consult via <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>. The Council of Europe also has a relevant instrument concerning the recognition and enforcement of judgments on parental authority (Luxembourg Convention, ETC No. 105, 20 May 1980, available at [www.kekidatabank.be/index.php?lvl=notice\\_display&id=48](http://www.kekidatabank.be/index.php?lvl=notice_display&id=48)). In cases of international child abduction, however, the mechanism under this Convention is used less frequently than HC80 and Brussels II-*bis*. For example, the Luxembourg Convention does not apply when an abduction takes place without a prior decision on parental authority. In addition, Brussels II-*bis* takes precedence over the Luxembourg Convention in intra-European abduction cases (see Art. 60(b) Brussels II-*bis*). Finally, this Convention is used only once in the examined case law. For these reasons, the Luxembourg Convention does not have a central place in this article.

**14** Art. 11 Brussels II-*bis*.

**15** Art. 13(2) HC80.

**16** United Nations General Assembly, *Convention on the Rights of the Child*, A/RES/44/25, New York, 20 November 1989, consult via [www.un.org/documents/ga/res/44/a44r025.htm](http://www.un.org/documents/ga/res/44/a44r025.htm).

**17** P. Senaeve, 'Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank', *T. Fam.*, 2014, vol. 8, pp. 176-195, at pp. 179-180.

**18** Bureau Liaison Judge International Child Protection (BLIK), Annual Report 2017, p. 8.

**19** Judge, personal interview R8, NL.

**20** Judge, personal interview R2, BE.

**21** The grounds for refusal are contained in Art. 12(2) HC80, Art. 13(a) HC80, Art. 13(b) HC80, Art. 13(2) HC80 and Art. 20 HC80.



- 22** E. Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention', *Acts and Documents of the Fourteenth Session* 1980, vol. III, also available at <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>.
- 23** Judge, personal interview R8, NL.
- 24** Judge, personal interview R9, NL.
- 25** Judges, personal interview R2 and R7, BE; Judge telephone interview, R4, BE; Judge, personal interview R8, NL.
- 26** Judge, personal interview R7, BE.
- 27** See also the judgment of the Grand Chamber of the European Court of Human Rights in *X v. Latvia*, application no. 27853/09, 26 November 2013.
- 28** Proposal of the European Commission for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016)411 final, 2016/0190(CNS), consult via <https://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:52016PC0411&from=EN> (relevant paragraphs are the motivation, proposal 23, Art. 20 and Art. 24). See also T. Kruger, 'Brussels II-a recast moving forward', *NIPR* 2017 (3), pp. 462-476.
- 29** Judge, telephone interview R4, BE; Judge, personal interview, R8.
- 30** Child, personal interview K7, 12 years old at the time of the abduction, 15 years old at the time of the interview, BE.
- 31** Judge, personal interview R2, NL.
- 32** Judge, personal interview R1, NL; judge, personal interview R9, NL.
- 33** Judge, written interview R3, BE; judge, telephone interview R4, BE; judge, written interview R5, BE; judge, written interview R6, BE.
- 34** Child, personal interview K5, 10 years old at the time of the abduction, 14 years old at the time of the interview, BE.
- 35** Judge, personal interview R7, BE; judge, written interview R5, BE.
- 36** Judges, written interviews R5 and R6, BE.
- 37** Judge, personal interview R1, BE.
- 38** Judge, written interview R3, BE.

**39** Judge, written interview R4, BE.

**40** Child, personal interview K10, 9 years old at the time of the abduction, 14 years old at the time of the interview, BE.

**41** Child, personal interview, K7, BE.

**42** This system came into effect in the Netherlands on 1 January 2012 with the Act amending the Implementation Act for Conventions on International Child Abduction and the Implementation Act for Conventions on International Child Protection, *Bulletin of Acts and Decrees* 2011, p. 530. See also Bureau of the Liaison Judge on International Child Protection (BLIK), annual report 1 January 2012 - 1 January 2013, included in Hague Conference on Private International Law, *The Judges' Newsletter* 2013 vol. XIX, pp. 15-16, available at <https://assets.hcch.net/upload/newsletter/newsletter2013en.pdf>. Note that there is also concentrated jurisdiction in Belgium, but not in a single court: six courts have the task of dealing with return proceedings. These are the family courts of Brussels Antwerp, Eupen, Ghent, Liège and Mons (Art. 1322ter and Art. 633sexies Belgian Code of Civil Procedure).

**43** Judge, personal interview R9, NL.

**44** Judges, personal interviews R8 and R9, NL.

**45** Judge, personal interview R9, NL.

**46** United Nations Committee on the Rights of the Child, *General Comment 12. The right of the child to be heard*, 2009, p. 8.

**47** *Ibid.*

**48** *Ibid.*

**49** Judge, personal interview R8, NL.

**50** Judge, personal interviews R8 and R9, NL.

**51** See Bureau Liaison Judge International Child Protection, Annual Report 2017, pp. 10-11.

**52** See also International Child Abduction Centre, Annual Report 2017, available via [www.kinderontvoering.org/uploads/Marije/Jaarverslag%202017%20zf.pdf](http://www.kinderontvoering.org/uploads/Marije/Jaarverslag%202017%20zf.pdf).

**53** Judge, personal interview R8, NL.

**54** Child, personal interview K7, BE.

**55** For the full numbers, see Van Hoorde *et al.*, 2017, pp. 115-116 & 129.

**56** On the importance of this distinction and the legal consequences attached to it, see Schuz, 2013, 328-329.

**57** Also here the analysis of the decided cases illustrates the criteria used by judges to show whether or not resistance is in issue. The analysis of Van Hoorde *et al.* 2017, pp. 115-138 illustrates that both Belgian and Dutch judges try to look beyond superficial and inconsistent objections and do their best to attempt to determine what the long-term consequences of a decision will be for the child.

**58** Judge, telephone interview R4, BE.

**59** Child, personal interview K2, BE.

**60** Child, personal interview K6, BE. In this case, return to the child's country of residence before the abduction was ordered and executed.

**61** Further research about children's perception of their conversation with judges in the return proceedings is needed to determine to what extent factors like age, context, length of the abduction and available support mechanisms have an impact on the children's feeling of whether or not they had been heard and taken seriously.

**62** Child, personal interview K2, BE.

**63** Child, personal interview K7, BE; Child personal interview K13, 3 years old at the time of the abduction, 12 years old at the time of the interview, NL; K14, 2 or 3 years old at the time of the abduction, 14 years old at the time of the interview, NL.

**64** Child, personal interview K5, BE; Child, personal interview K16, 9 or 10 years old at the time of the abduction, 17 years old at the time of the interview, NL; child, personal interview K17, NL.

**65** For a thorough analysis, see Van Hoorde *et al.*, 2017, pp. 117-118, 124-125 & 134-135.

**66** Judge, written interview R3, BE.

**67** Schuz, 2013, pp. 327-335.

**68** Child, personal interview K2, BE.

**69** Child, personal interview K8, 9 years old at the time of the abduction, 13 years old at the time of the interview, BE.

**70** Child, personal interview K6, BE.

**71** Child, personal interview K1, BE.

- 72** Child, personal interview K12, NL.
- 73** See also above at ‘Preference versus resistance’.
- 74** Child, personal interview K12, NL.
- 75** Child, personal interview K8, BE.
- 76** Judge, personal interview R7, BE.
- 77** Judge, personal interview R9, NL.
- 78** Judge, personal interview R9, NL.
- 79** Judge, personal interview R7, BE.
- 80** Child, personal interview K9, 11 years old at the time of the abduction, 16 years old at the time of the interview, BE.
- 81** Judges, personal interviews R1 and R2, BE; see also above “The double criteria of age and maturity”.
- 82** Child, personal interview K10, BE.
- 83** Child, personal interview K9, BE.
- 84** Child, personal interview K12, NL.
- 85** Judge, personal interview R8, NL.
- 86** Child, personal interview K5, BE.
- 87** Child, personal interview K10, BE.
- 88** Child, personal interview K2, BE.
- 89** Judges, personal interviews R8 and R9, NL; judge, personal interview R7, BE; judge, telephone interview R4, BE.
- 90** Judge, personal interview R9, NL; see also judge, personal interview R1, BE.
- 91** Judge, written interview R5, BE.
- 92** Judge, written interview R3, BE.
- 93** Judge, personal interview R7, BE.
- 94** In Belgium this is done through a form, in accordance with Art. 1004/2 of the Code of Civil Procedure.

**95** Judge, personal interview R7, BE.

**96** Judge, telephone interview R4, BE; judge, personal interview R7, BE.

**97** Judge, personal interview R8, NL.

**98** Judge, personal interview R7, BE; judges, personal interviews R8 and R9, NL.

**99** UN Committee on the Rights of the Child, 2009.

**100** A. Parkes, *Children and international human rights law: The right of the child to be heard*, New York: Routledge, 2013, p. 91.

**101** UN Committee on the Rights of the Child, 2009, p. 27.

**102** Schuz, 2013, pp. 115-116.

**103** K. Tisdall, 'Children and Young People's Participation – A Critical Consideration of Article 12', in W. Vandenhoe, E. Desmet, D. Reynaert & S. Lembrechts (eds.), *Routledge International Handbook of Children's Rights Studies*, London: Routledge 2015, p. 187; E. Welty & L. Lundy, 'A children's rights-based approach to involving children in decision making', *JCOM, Journal of Science Communication*, 2013, vol. 12, p. 1; L. Lundy, "'Voice" is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child', *British Educational Research Journal*, 2007, vol. 33, p. 927; UN Committee on the Rights of the Child, 2009, p. 8; G. Lansdown, 'Every child's right to be heard: A resource guide on the UN committee on the rights of the child general comment No. 12', 2011, p. 23, available at [https://www.unicef.org/adolescence/files/Every\\_Childs\\_Right\\_to\\_be\\_Heard.pdf](https://www.unicef.org/adolescence/files/Every_Childs_Right_to_be_Heard.pdf).

**104** Schuz, 2013, p. 115.

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