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**National Report: Ireland**

**Guidance Note for the Preparation of National Reports**

**Research Project:** Protection of international families with links to the European Union post-Brexit: Collaborative Scotland-EU partnership

**Summary:** The free movement of people within the EU has resulted in several generations of European citizens forming family relationships across national borders. As a result, there are thousands of families in Scotland whose lives, homes and occupations cross European borders. Similarly, there are many families with connections to Scotland living in the EU. This project seeks to address the legal issues that surround the protection of such international families. It aims to examine the effectiveness of the pertinent post-Brexit legal framework, which no longer comprises European private international law instruments but instead is represented primarily by international Conventions (‘Hague Family Law Conventions’). To this end, the project seeks to enhance collaboration between Scotland and EU Member States in protecting international families in the wake of Brexit; identify good practices in applying the Hague Family Law Conventions; and make recommendations to legal practitioners, judges, Central Authorities and national legislators.

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**Note:**

This Guidance Note is organised into five sections that mirror five important international Hague Conventions, which will be researched in this project:

1. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
2. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
3. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
4. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
5. Convention of 13 January 2000 on the International Protection of Adults

If either of the Conventions is not applicable to your jurisdiction, please briefly indicate so in your Report. The below points are intended to be for guidance only; therefore, please feel free to include any additional information as you see fit.

In your analysis, please include relevant secondary and primary sources, including case-law, as available to you. If you are intending to speak to judges, etc. or planning to organise a/an (online) workshop to collect relevant information, in particular case-law, please let us know so that instructions concerning research ethics, as approved by the University of Aberdeen, can be provided.

We are particularly interested in your comments on how the issues in question are approached differently (if at all) in your specific jurisdiction.

Thank you very much in advance for your work on the National Report!

## **General questions**

1. Are there any data available in your jurisdiction on the number of international family cases involving EU Members States and international family law cases involving third States? If so, please briefly outline the data.

I am not aware of any such data.

1. How is the adjudication of international family law cases organised in your jurisdiction?

As far as I know, there are no special rules for ‘international family law cases’ as such – but there are specific rules on which domestic courts hear particular kinds of international family law cases.

In Ireland the civil courts are divided into 5 levels: Supreme Court (highest court, appellate court, deals with cases of public importance), Court of Appeal (next highest court, hears appeals from High Court in civil cases), High Court (next highest, full original jurisdiction), Circuit Court (next highest, court of local/limited jurisdiction), District Court (lowest court, court of local/limited jurisdiction).

All of these courts will hear some ‘international family law’ cases, but some are given particular responsibility for particular kinds of cases.

For instance, only the High Court can hear a return application under the 1980 Hague Child Abduction Convention (s 7 Child Abduction and Enforcement of Custody Orders Act 1991). The losing parent can appeal to the Court of Appeal – and in theory there may be a further appeal to the Supreme Court but in practice (since the Court of Appeal was established in 2014) very, very few appeals to the Supreme Court are permitted.

Only the Circuit Court and High Court are empowered to pronounce divorce (s 38 Family Law (Divorce) Act 1996) and so only these courts apply/interpret divorce jurisdiction rules laid down in Brussels II*ter* (and previously Brussels II*bis*). These two courts are also tasked with determining the validity of foreign divorces (see s 29 Family Law Act 1995).

The District Court deals with parental responsibility and maintenance in a cross-border context. So this court applies Brussels II*ter* insofar as it deals with jurisdiction in parental responsibility matters - and the 1996 Hague Protection of Children Convention (see s 4 Protection of Children (Hague Convention) Act 2000). The District Court also exercises jurisdiction in maintenance matters under Regulation 4/2009 (see the European Communities (Maintenance) Regulations 2011 (SI No 274/2011)). The District Court is also involved in the administration of the 2007 Hague Child Support Convention: see European Union (Hague Maintenance Convention) Regulations 2019 (SI No 594/2019).

## **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**

## Upon reading all of the Irish Supreme Court and Irish Court of Appeal judgments on the 1980 Hague Child Abduction Convention (HCAC) (and the Irish High Court judgments since 2018), it emerges that while a relatively high volume of the requests for return are to the UK, most are to England. Of 22 return applications to come before the Irish Supreme Court between 1992 and 2019, 8 were requesting return to the UK (seven to England and one to Scotland). Of 15 return applications coming before the Irish Court of Appeal between 2015 and 2022, 2 were requesting return to the UK (both to England). Of 36 return applications coming before the Irish High Court in the past 5+ years (Jan 2018-March 2023), 13 were requesting return to the UK (ten to England and three to Northern Ireland). Thus, in practice, the use of the HCAC as between Ireland and Scotland has been (at the Irish end) very limited (at least as far as is revealed by the published case-law).

## Article 13(1)(b)

1. Are you aware of how often the “grave risk of harm” defence under Article 13(1)(b) is used successfully in your jurisdiction? If so, please comment on the frequency of successful defences under Article 13(1)(b) in your jurisdiction.

The grave risk defence is not often used successfully in Ireland. This is illustrated by the following:

1. The grave risk defence was a live issue in 11 out of the 22 HCAC appeals to come before the Irish Supreme Court to date (1992-2019). In the 11 cases in which grave risk was raised, it was found to justify non-return in 3 cases. In the first of the 3 (*PF v MF*, 13 Jan 1993) grave risk was accepted in circumstances where the left-behind father in the US had previously failed to comply with US orders for maintenance and vacating the family home and where there was uncontested evidence of domestic violence. In the second case (*TM v MD* [2000] 1 IR 149), grave risk was established where children had been taken from England to Ireland by the Irish grandmother, in circumstances where it seemed neither parent was able to care for the children (and where there was evidence of domestic violence and alcoholism). In the third and final case where grave risk was successfully invoked (*MS v AR* [2019] IESC 10 [30]), it was based on sibling separation, where the older child had objected to returning (and where the older sibling was not being returned on A 13(2) grounds).
2. The grave risk defence was a live issue in 11 out of the 15 HCAC appeals to come before the Irish Court of Appeal to date (2015-2022). In the 11 cases in which grave risk was raised, it was found to justify non-return in only 1 case. This was in *MS v AR* [2018] IECA 181– based on sibling separation – confirmed on appeal by the Supreme Court – see *MS v AR* [2019] IESC 10 discussed above.
3. The grave risk defence was a live issue in 32 of the 36 HCAC return applications dealt with by the Irish High Court since Jan 2018. In the 32 cases where it was raised, it was found to justify non-return in 4 cases. The first of these was *DH v LH* [2018] IEHC 317 where a non-return order (NRO) was made in circumstances where the abducting mother had secure employment and accommodation in Ireland, and where there were no detailed/credible undertakings as to ensure the safe return of the children and abducting mother (no clear guarantee of financial support/accommodation). The second case was *ZC v AG* (14 May 2020) where non-return was found to be justified in circumstances of Covid 19, because of the health risks involved in international travel, and in particular where the abducting mother was pregnant and therefore reluctant to travel (in a context of a history of miscarriages). This decision was overturned on appeal (see *C v G* [2020] IECA 233 and a return order made). The third of the four High Court cases was *AK v US* [2021] IEHC 845 where it was not possible to make a return order with respect to the youngest child and where a refusal to return the other two (older) children was justified by the need to avoid sibling separation. This decision was also appealed and on appeal it was confirmed that none of the children should be returned – but on the basis of their habitual residence in Ireland (see *AK v US* [2022] IECA 65). The final of the four High Court cases was *DB v HC* [2022] IEHC 627 where non-return was found to be justified in circumstances where there were detailed allegations of domestic violence and where a non-molestation order (in the requesting state) had twice been breached.
4. How has the “grave risk of harm” defence under Article 13(1)(b) been interpreted by the courts of your jurisdiction? Are there any notable differences in your jurisdiction that you are aware of as opposed to relevant case-law of the UK Supreme Court[[1]](#footnote-1) and/or the European Court of Human Rights?[[2]](#footnote-2)

See above. The Irish courts (especially in more recent cases) have adopted a very similar approach to the UK Supreme Court. Indeed, in *CT v PS* [2021] IECA 132 [57] ff, in discussing ‘grave risk’, the Irish Court of Appeal refers (with clear approval) to the UK Supreme Court decisions in *Re D* [2006] UKHL 51 and *Re E* [2011] UKSC 27.

In recent abduction cases, the Irish courts often make explicit reference to Art 8 ECHR and to the jurisprudence of the ECtHR (including *Neulinger* and *X v Latvia*): see eg *CT v PS* [2021] IECA 132 [73] ff.

Are you aware of cases in which Article 13(1)(b) has been interpreted inconsistently within your jurisdiction? If so, please briefly elaborate.

Return orders have sometimes been refused in circumstances where the abducting parent faces a precarious financial situation/lack of secure accommodation in the event of return, but in other apparently similar cases return orders have been made: contrast *DH v LH* [2018] IEHC 317 and *AA v RR* [2019] IEHC 442 (confirmed on appeal [2019] IECA 227). Also there may be a degree of inconsistency in how the Irish courts respond to allegations of domestic violence (compare *DB v HC* [2022] IEHC 627 with *R v R* [2015] IECA 265, *MSH v LH* [2000] 3 IR 390 and *MI v MBR* [2020] IEHC 504).

Please consider Article 13(1)(b) in conjunction with Article 11(4) of the Brussels IIa Regulation.[[3]](#footnote-3) Can you identify a difference in the treatment of the grave risk of harm defence in intra-EU and non-intra EU cases? What do you consider to be the most problematic points?

There have been some suggestions in the Irish case-law that the grave risk defence might be narrower in intra-EU cases because of mutual trust: see *R v R* [2015] IECA 265 [40]; *C v G* [2020] IECA 233 [49], [131]. However, the Irish courts have always used undertakings and protective measures to allow for a safe return (even prior to the adoption of Article 11 Brussels II*bis –* see eg *P v B* [1994] 3 IR 507) so in practice it seems unlikely that Article 11(4) Brussels II*bis* brought about any significant change in approach (or resulted in a notably different treatment of intra-EU and non-intra-EU cases). It is also noteworthy that in recent Irish cases – after the UK left the EU – the Irish courts have repeatedly asserted their trust in the UK authorities and in their ability to safeguard children. See eg *F v C* [2022] IECA 194 [20], [44]; *LB v AH* [2021] IEHC 849 [6.12]-[6.13]; also *Lincolnshire CC v McA* [2018] IEHC 514 [42].

1. Please consider Article 13(1)(b) in conjunction with Article 11(6)-(8) of the Brussels IIa Regulation.[[4]](#footnote-4) Has the application been smooth and explain why/why not?

The Irish caselaw does not reveal any particular difficulty with these provisions – although there have been some problems with delay in the Article 11(6)-(8) proceedings and some difficulty in determining how much documentation should be supplied (eg where there have been multiple hearings in the requested state). See Articles 11(6)-(8) Brussels II*bis* (and Art 10 Brussels II*bis*) discussed in *AO’K v MK* [2011] IEHC 82; *EE v O’Donnell* [2013] IEHC 418; *MHA v AP* [2013] IEHC 611; *DMM v OPM* [2019] IEHC 238; *Z v Z* [2021] IEHC 20; *RH v AR* (High Court, 12 April 2021).

## Article 13(2)

1. Please consider Article 13(2) - the “child’s views.” What is the main approach in your jurisdiction in respect of matters such as the minimum age of the child to use this provision, possible automatic hearing of the child in non-intra EU cases, court’s approach to the hearing of the child (e.g., direct communication with the judge; through a child psychologist report; separate representation, etc.)? Please note any differences in approach between your jurisdiction and other jurisdictions that you are aware of.

The approach in Ireland is very similar to that laid down in English law: see *Re M* [2007] UKHL 55 [46] cited with approval in *DM v VK* [2022] IECA 207 [93] ff; also *JV v QI* [2020] IECA 302 [101]. Children are heard through the report of a clinical psychologist. There does not seem to be any significant difference in approach as between intra-EU cases and non-intra-EU cases. Even if Art 11(2) Brussels II*bis* did not apply (now A 26 Brussels II*ter*), the Irish courts would still take broadly the same approach: see *MS v AR* [2019] IESC 10 [47]; also *F v C* [2022] IECA 194 (where children were heard in the context of a request for return to England after the UK left the EU). The Irish courts have however emphasised that Article 11(6)-(8) Brussels II*bis* may be a consideration in exercising discretion under A 13(2) HCAC in intra-EU cases (ie it may be relevant to consider that the requesting court may issue an overriding custody order which will be directly enforceable): *MS v AR* [2019] IESC 10 [57], [66].

The Irish courts have emphasised that ‘there is no chronological threshold below which the views of the child will not be taken into account’ (*JV v QI* [2020] IECA 302 [68]; *F v C* [2022] IECA 194 [45]). Abducted children aged 6 and 7 and older are routinely interviewed by clinical psychologists for the purposes of return proceedings (see eg *F v C* [2022] IECA 194; *C v G* [2020] IECA 223). In practice, it seems that Irish courts are likely to take the view that children aged 5 and under are not capable of forming a view and do not need to be interviewed: see *AK v US* [2022] IECA 65 [1], [33]; *CT v PS* [2021] IECA 132 [2], [18]; *CDG V JB* [2018] IECA 323 [18], [90]-[95]; *R v R* [2015] IECA 265 [63]; *MS v AR* [2019] IESC 10 [30] – although there are examples of five year olds being interviewed for return proceedings: see *KW v PW* [2016] IECA 364 [20]-[22].

## Article 4 – “habitual residence”

1. Is the concept of “habitual residence” interpreted differently in your jurisdiction in: 1.) intra-EU cases, 2.) cases involving third states, and 3.) cases involving states that are not contracting parties to the 1980 Convention (i.e., when applying national PIL rules)? Please explain.

Again, Irish law closely follows English law in defining ‘habitual residence’: see eg *AK v US* [2022] IECA 65 [38]-[39] referring to *A v A* [2013] UKSC 60 and *Re R* [2015] UKSC 35 with approval. It appears to be accepted that the same conception of habitual residence should be used in intra-EU HCAC return proceedings and non-intra-EU HCAC return proceedings: see eg *AK v US* [2022] IECA 65 [42], [57], [63] ff referring to *A v A* [2013] UKSC 60 [54] and citing EU case-law on habitual residence in assessing a post-Brexit application for return to the UK; also *KW v PW* [2016] IECA 364; also *J le J v AT* [2021] IEHC 219 [3.4], [6.5]-[6.6]. It also seems to be accepted in Ireland that the same (EU) concept of habitual residence should be used in cases involving non-HCAC countries: *AQ v KJ* [2022] IECA 297 [21] ff.

## **Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children**

There is very little Irish case-law to date on the 1996 Protection of Children Convention (POCC). In those cases where POCC is mentioned, it is usually only to confirm that it does not apply: see eg *KJ v AMQ* [2022] IECA 295 [6]; *AMQ v KJ* [2018] IECA 97; *PM v VH* [2018] IECA 4 [114].

## Jurisdiction

1. Do the courts of your country examine their jurisdiction *ex officio* or only if raised by the parties?

There is no case-law directly on point in the context of POCC; however, it was suggested by the Irish Court of Appeal in *AMQ v KJ* [2018] IECA 97 [50]-[51] and in *PM v VH* [2018] IECA 4 [57] that in transnational proceedings concerning children, jurisdiction should be considered of the court’s own motion from the outset.

1. Do you consider the approach taken by the courts of your country to be different from the approach taken in other countries, especially non-EU countries? Please mention any notable examples of case law that demonstrate the difference.

N/A – see above.

1. Is the process of determining jurisdiction by the courts of your country different intra-EU cases and cases involving third countries? Please mention any notable examples that demonstrate such differences.

N/A – see above.

## Applicable law

1. Do the courts of your country apply applicable law rules *ex officio* or only if raised by the parties?

N/A – see above.

1. How do you consider the approach taken by the courts of your jurisdiction to be different from the approach taken in other jurisdictions, especially non-EU jurisdictions? Please mention any notable examples of case law that demonstrate the difference.

N/A – see above.

1. Do you consider the process of determining applicable law by the courts of your jurisdiction to be different in intra-EU cases and cases involving third states? If so, what are the differences? Please mention any notable examples that demonstrate such differences.

N/A – see above.

## Recognition and Enforcement

1. How does the ease of recognition and enforcement of foreign judgments compare between intra-EU (Brussels IIa Regulation) and third states’ judgments (1996 Convention)? Are you aware of any examples of relevant cases decided by the courts of your jurisdiction?

N/A – see above.

## International cooperation of authorities

1. Please comment on how international cooperation is approached in your jurisdiction, noting any case law or other secondary sources you consider important. E.g. are separate or the same authorities responsible for these instruments?

The same authority (Minister for Justice) acts as Central Authority for Ireland under both POCC and Brussels II*ter*: see section 9 Protection of Children (Hague Convention) Act 2000 and Reg 3 of European Union (Decisions in Matrimonial Matters and Matters of Parental Responsibility and International Child Abduction) Regulations 2022 (SI No 400 of 2022).

## **Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations**

Ireland is not party to this Convention. Because of the EU policy of exclusive external competence, it would be for the EU to determine whether Ireland could participate. There were some very vague suggestions at EU level that this *might* be considered in the context of the UK’s departure from the EU (see the EU Commission ‘Notice to Stakeholders’ of 27 August 2020 referring (at p 8) to the fact that ‘*currently* only 12 EU Member States are contracting parties’ to the 1970 Convention (emphasis added)). However, at the domestic level in Ireland, adoption of the 1970 Hague Convention does not appear to be under active consideration. The Irish Law Reform Commission has included foreign divorce recognition in its (next) Fifth Programme of Law Reform, but has given no indication that the 1970 Hague Convention will be considered in this context (see <https://www.lawreform.ie/_fileupload/Programmes%20of%20Law%20Reform/LRC%20120-2019%20-%20Fifth%20Programme%20of%20Law%20Reform.pdf>). Irish law is mostly very restrictive in its recognition of third-country divorces (generally requiring a spouse to be ‘domiciled’ in the common law sense in the country of origin at the date of institution of proceedings: s 5 Domicile and Recognition of Foreign Divorces Act 1986); however, specific legislation was adopted to provide for continuity (or something close to continuity) for recognition of UK divorces post-Brexit: see ss 124-126 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020).

1. If relevant, please comment on the use, operation, and notable case law concerning the 1970 Convention in your jurisdiction. Otherwise, please comment on what you consider to be the obstacles to your jurisdiction becoming a Contracting Party to the Convention.

See above: this would be a matter for the EU.

## **Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance**

1. We note that there is limited case law in the UK interpreting the 2007 Maintenance Convention. Are you aware of any case law that links to the UK or is otherwise significant for this jurisdiction? If so, please briefly outline such case law.

I could not find any Irish case-law on this Convention.

## Applicable law (especially where different from the *lex fori*)

1. We understand that a challenging point can be establishing the contents of foreign law when the applicable law is different from the *lex fori*. For example, when a party purports to apply foreign law in UK courts, that party must plead foreign law as facts before the court. What are the methods and techniques used by the courts of your jurisdiction to establish the contents of foreign law?

In general, Irish law mirrors English law on proof of foreign law: see Binchy, *Irish Conflicts of Law* (1988) 104 ff.

1. If you are aware of case(s) where UK law (either the law of England and Wales or Scots law) was the applicable law, how did the court(s) interpret the said UK law?

I could not find any Irish case-law on the 2007 Hague Maintenance Protocol.

1. In the same context, do you consider the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and/or the 1968 European Convention on Information on Foreign Law (‘the London Convention’) to be a useful tool?

I could not find any Irish case-law on the 2007 Maintenance Convention or on the 2007 Maintenance Protocol.

## Recognition and enforcement

1. If you are aware of case(s) where recognition and enforcement was sought in jurisdictions outside the EU, please comment on the procedural or other practical differences between the Brussels IIa Regulation and the 2007 Maintenance Convention regimes. Where relevant, please comment also on pertinent cases under the Lugano Convention.

I am not aware of any such cases.

## **Convention of 13 January 2000 on the International Protection of Adults**

Ireland is not yet party to this Convention, however, it is a signatory and domestic legislation (the Assisted Decision-Making (Capacity) Act 2015 (at part 11)) makes provision for giving effect to the Convention in Irish law. I have been advised by an official at the Department of Justice that it is currently proposed that Ireland will ratify the Convention very shortly so that it will enter into force in Ireland before the end of 2023.

## Recognition and enforcement

1. Please comment on how recognition and enforcement of measures of protection are approached in your jurisdiction. If possible, please refer to examples from case law.

N/A – see above.

1. Please comment on how and to what extent foreign powers of attorney are capable of recognition and enforcement in your jurisdiction. If possible, please refer to examples from case law.

N/A – see above.

## Applicable law

We note that determining the law applicable to *ex lege* powers of representation highlights several existing issues, which are explored in the following questions.

1. Is it possible for *ex lege* powers of attorney to arise under the 2000 Convention in your jurisdiction?

N/A – see above.

1. How is the above question classified in your jurisdiction, as a matter of personal law or protection?

N/A – see above.

1. What do you consider the greatest pitfall of the 2000 Convention to be in this regard?

N/A – see above.

## **Cooperation and training**

1. Do you consider the cross-border cooperation between courts and other authorities involved in handling international family cases under the Hague Conventions listed above to be efficient?

I have no information on this.

1. Can you compare its functioning among EU Member States on one hand and between EU Member States and third states on the other hand?

I have no information on this.

1. Is the usage of modern technologies in cross-border cooperation equally represented in EU and non-EU cooperation?

I have no information on this.

1. What steps should be taken to make cross-border cooperation more efficient, timely and successful?

I have no information on this.

1. Is judicial training in international family matters contributing to better understanding, interpretation and uniform application of EU Regulations and/or Hague Conventions listed above?

I have no information on this.

1. Is information on the Hague Conventions listed above accessible to judges and other relevant officials in your country? For example, is the information available to them in their language, and do they possess skills to find the information in the digital format from reliable online sources?

I have no information on this.

1. In particular, *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, *Re E* [2011] UKSC 27, and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10. [↑](#footnote-ref-1)
2. In particular, *X v Latvia* Application no. 27853/09, Grand Chamber [2013]. [↑](#footnote-ref-2)
3. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Article 27. [↑](#footnote-ref-3)
4. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Article 29. [↑](#footnote-ref-4)