

# Articles

## Children abroad: a relational analysis of cross-border child protection cases in the Finnish central authority

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*Children's mobility and concerns relating to child protection in the cross-border context is an emerging field of study that has hitherto largely remained unexplored. Central to the effectiveness of transnational child protection are structures that facilitate collaboration between the local child protection and welfare authorities of different countries. Under the Hague Conventions on Child Protection 1996 and Child Abduction 1980, as well as EU Regulation Brussels IIter, Member States are required to appoint a central authority to serve as a contact point for this collaboration. Drawing on a study of cases handled by the Finnish central authority from 2012 to 2020, this article provides a unique window on the concrete practices of cross-border child protection. Informed by the idea that the state is a social relation and the notion of 'stategraphy', the article examines how the state is brought into being in the practices of authorities who work on child welfare and protection and draw boundaries that exclude or include children. It is argued that particular ideas and normative expectations about the state lead to misunderstandings of local child protection authorities concerning jurisdiction, which may result in a failure to fulfil the positive obligations to secure protection of the child in a cross-border context.*

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### Introduction

Transnational childhoods represent an emerging field in research.<sup>1</sup> A simultaneous trend with the so-called 'transnational turn' in migration studies has been that of increasing attention and growing emphasis on the rights of the child.<sup>2</sup> International human rights conventions, such as the United Nations Convention on the Rights of the Child 1989 and the European Convention

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1 L Assmuth, M Hakkarainen, A Lulle and P Siim (eds), *Translocal Childhoods and Family Mobility in East and North Europe* (Palgrave Macmillan, 2018).

2 P Levitt, 'The Transnational Turn in Migration Studies' (2004) 6 *Global Migration Perspectives*; E Brems, E Desmet and W Vandenhole, *Children's rights law in the global human rights landscape: Isolation, inspiration, integration?* (Routledge, 2017); R Espinosa Calabuig and L Carballo Piñeiro, 'Child Protection in European Family Law' in T Pfeiffer, Q Lobach and T Rapp (eds), *Facilitating Cross-Border Family Life – Towards a Common European Understanding* (Heidelberg, 2021), 49; R Lamont, 'Article 24 – The Rights of the Child', in S Peers, T Hervey, J Kennel and A Ward (eds), *The Charter of*

for the Protection of Human Rights and Fundamental Freedoms 1950, impose a positive obligation on states to protect children and secure their rights to well-being, care and development, and the right to respect for family life.<sup>3</sup> When the family and home environment place the child at risk of harm, the authorities have an obligation to take protective measures. Cross-border mobility of children at risk represents a challenge to child protection, as the services typically operate on a local level. Child protection and welfare are governed by national legislation and provided locally by social services, and the child protection systems vary globally in terms of organisational structures, legal frameworks and resourcing, as well as culturally and historically formed perceptions of childhood, care and the family underpinning the systems.

The legal framework created to harmonise the rules governing cross-border child protection rests mainly on three instruments.<sup>4</sup> Within the EU, child protection is primarily ensured by the Brussels IIter Regulation, which replaced the Brussels IIa Regulation as of 1 August 2022.<sup>5</sup> In addition to the Regulation, all EU Member States have ratified the Hague Convention on Child Abduction 1980, and the Hague Convention on the Protection of Children 1996.<sup>6</sup> All of these instruments base the jurisdiction to issue protective measures on the habitual residence of the child. They also establish a system of central authorities (CAs), who operate on the national level and are responsible for sharing good practice and information on national laws and practices and cooperating in cross-border cases.<sup>7</sup> The contact point function of the CAs means that research into the actual cases of the CA can offer invaluable information as to how cross-border child protection operates in practice. It can also indicate factors enhancing or precluding effective protection of children in transnational situations.

This article examines the child protection cases handled by the Finnish CA between 2012 and 2020, with a particular focus on the gaps discovered in the legal framework and practices of protecting children in transnational contexts. These gaps are related to the ways in which the local authorities perceive jurisdiction in cross-border cases, as well as to how they interpret their legal obligations as applying only within a purely national and local context. Due to a lack of guidelines and training in cross-border situations, the instruments of private international law are insufficiently implemented in the practices of the local authorities. What complicates the issue from the perspective of local authorities is that in the national system, a strict

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*Fundamental Rights of the European Union: A Commentary* (Bloomsbury, 2021); J Fawcett, M Ní Shúilleabháin and S Shah, *Human rights and private international law* (Oxford University Press, 2016).

3 R Lamont, 'The Development of Child Protection Across International Borders for Children at Risk of Harm' in G Douglas, M Murch and V Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Intersentia, 2018), 235; Lamont, above n 2; H Stalford and I Iusmen (eds), *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions* (Barbara Budrich Publishers, 2016); H Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing, 2012).

4 Espinosa Calabuig and Carballo Piñeiro, above n 2.

5 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction. Regulation 2019/1111 replaces Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, commonly known as Brussels IIa (or Brussels IIbis).

6 Hague 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; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

7 On the history of the CA system from the 1956 UN Convention on Maintenance Recovery to the Conventions of the Hague Conference on Private International Law (HCCH) and EU family law, see M Župan, C Hoehn and U Kluth, 'Central Authority Cooperation under the Brussels II TER Regulation' (2020/2021) 22 *Yearbook of Private International Law* 183; R Lamont, 'Central Authorities and the European Judicial Network: Mainstreaming Children's Rights into Cross-border Cooperation in EU Family Law' in H Stalford and I Iusmen (eds), *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions* (Barbara Budrich Publishers, 2014); M Norros, *Judicial Cooperation in Civil Matters with Russia and Methods of Evaluation* (Kikimora Publications, 2009); The Hague Conference on Private International Law Permanent Bureau, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*.

conceptual separation prevails between child welfare and protection orders as part of public law, and family law including custody and access matters as part of private law. In the cross-border context, however, public child protection is dealt with under the instruments of private international law.<sup>8</sup>

As Lamont points out, European family law originated from the need to facilitate free movement, and even though recent years have seen attention being paid to the right of the child within the EU, children as victims of abuse or neglect within the family sphere are still not a clear focus of concern in European family law.<sup>9</sup> Lamont notes that ‘parents who abuse or neglect their children have not been perceived as an aspect of the EU conception of family life, where rights are associated with securing opportunities, rather than preventing and protecting children from harm’.<sup>10</sup> In Finland and other Nordic countries, child protection and welfare in cross-border contexts have not been discussed in previous research, other than in relation to specific issues such as child and forced marriage,<sup>11</sup> female genital mutilation,<sup>12</sup> ‘dumping’ of children abroad,<sup>13</sup> and children detained in Syrian camps.<sup>14</sup>

The article begins by briefly outlining the research background and limitations of the data before describing generally the cooperation facilitated by the CA in cross-border cases and challenges observed therein. Placements abroad and transfers of jurisdiction are discussed from the perspective of complexities discovered, and issues relating to families seeking to avoid interference by child welfare authorities are examined with the analytical assistance of the concept of ‘wrongful removal’. The article ends with a discussion on the positive obligations of the state to issue protective measures or notify foreign authorities and provides a relational analysis of the gaps found in the practices.

## Research background

### Research data

This article draws on a study of all cases related to child protection that were handled by the Finnish CA in 2012–2020 (n=193) and child abduction cases handled by the CA in 2016–2018 (n=53). Of the child protection cases, on which this article focuses, the requesting authority was Finnish in 98 cases and in 95 cases the request came from a foreign CA.

As the figure above shows, the number of cases handled by the Finnish CA are increasing, although compared to many other CAs, the numbers are low. The low number of cases also made it possible to include all cases handled by the CA, which makes Finland an interesting empirical example of practices in transnational child protection. For example in England, Wright analysed 100 care cases with an international dimension between 2015 and 2018, and

8 Public care proceedings fall within the material scope of ‘civil matters’ governed by Brussels IIa and Brussels IIter, as declared by the EU Court of Justice in *Re C* (C-435/06) ECR I-10141, [2008] Fam 27, and *Family proceedings concerning A* (C-523/07) ECR I-02805, [2010] Fam 42.

9 R Lamont, ‘Risk, Borders and Children’s Rights: Child Protection and EU Law’ in MJ Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press, forthcoming 2023).

10 Ibid.

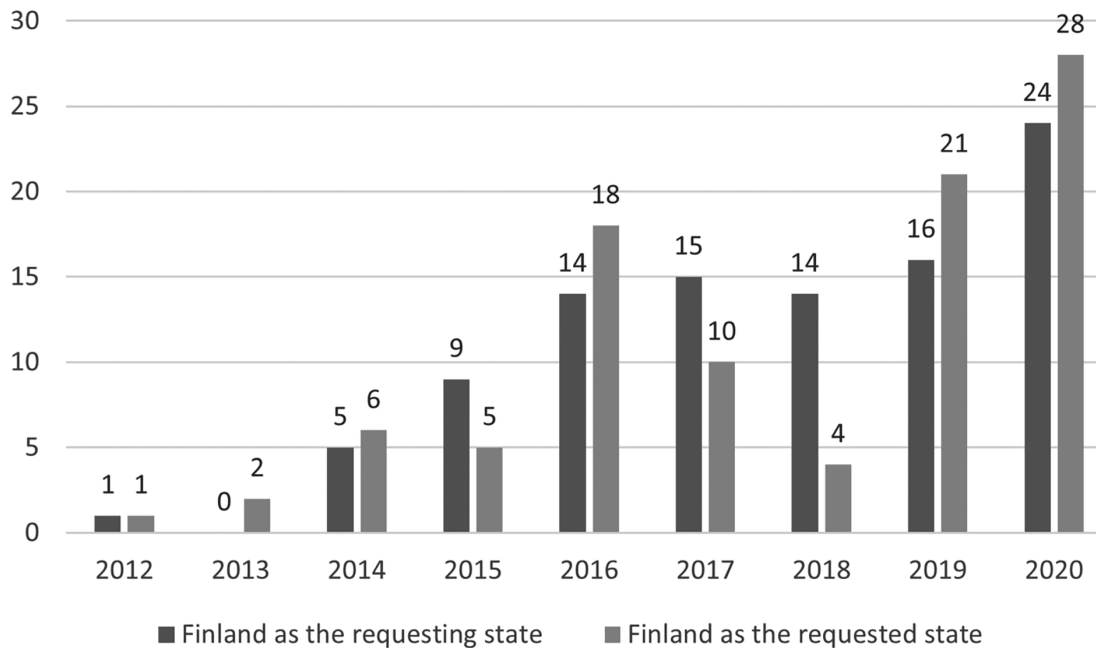
11 T Hong, ‘Kohtaako lainsäädäntö pakkoavioliiton uhrin?’ (2020) 118 *Lakimies* 3.

12 L Grans, ‘The concept of due diligence and the positive obligation to prevent honour-related violence: beyond deterrence’ (2018) 222 *The International Journal of Human Rights* 733.

13 S Johndotter, ‘European Somali Children Dumped? On families, parents, and children in a transnational context’ (2013) 18 *European Journal of Social Work* 81.

14 S Mustasaari, ‘Affective constructions of justice: ISIS-families and the law in the Finnish public debate’ (2021) 11(4) *Oñati Socio-Legal Series* 1036; S Mustasaari, ‘Finnish Children or “Cubs of the Caliphate”? Jurisdiction and State “Responsibility” in Human Rights Law, Private International Law and the Finnish Child Welfare Act’ (2020) 7 *Oslo Law Review* 22.

Figure 1: Finnish CA: child protection cases 2012–2020



Kruger's study included 443 child abduction cases open in the Belgian CA in 2007 and 2008.<sup>15</sup> It should also be noted that the data does not include all cross-border child protection cases handled by the Finnish authorities during the examined period, because the local child welfare authorities may have established direct contact with the local authorities in other countries without involving CAs.<sup>16</sup> In this respect, the situation has changed as of 1 August 2022, when Brussels IIter replaced Brussels IIa. The new Recast Regulation introduces a centralised method of communication, as at least the first requests must be made via the CAs.<sup>17</sup>

These cases involve 188 families and 282 children. As the figure below shows, the children involved represent all age groups, with almost no gender-based differences.

The study on the CA files is part of the research project 'Children Abroad: A Relational Analysis of Finnish Child Protection and Welfare in Transnational Contexts (CARELA)', where other sets of data from the courts, authorities and private individuals are also collected, including interviews with officials handling the cases in the Finnish CA and Finnish Ministry of Justice.<sup>18</sup>

As a whole, the project adopts the approach of 'stategraphy', developed by the anthropologists Thelen, Veters and von Benda-Beckmann. The approach is grounded in an understanding of the state existing 'within the relations between actors who have unequal access to material, social, regulatory, and symbolic resources and who negotiate over ideas of legitimate power by

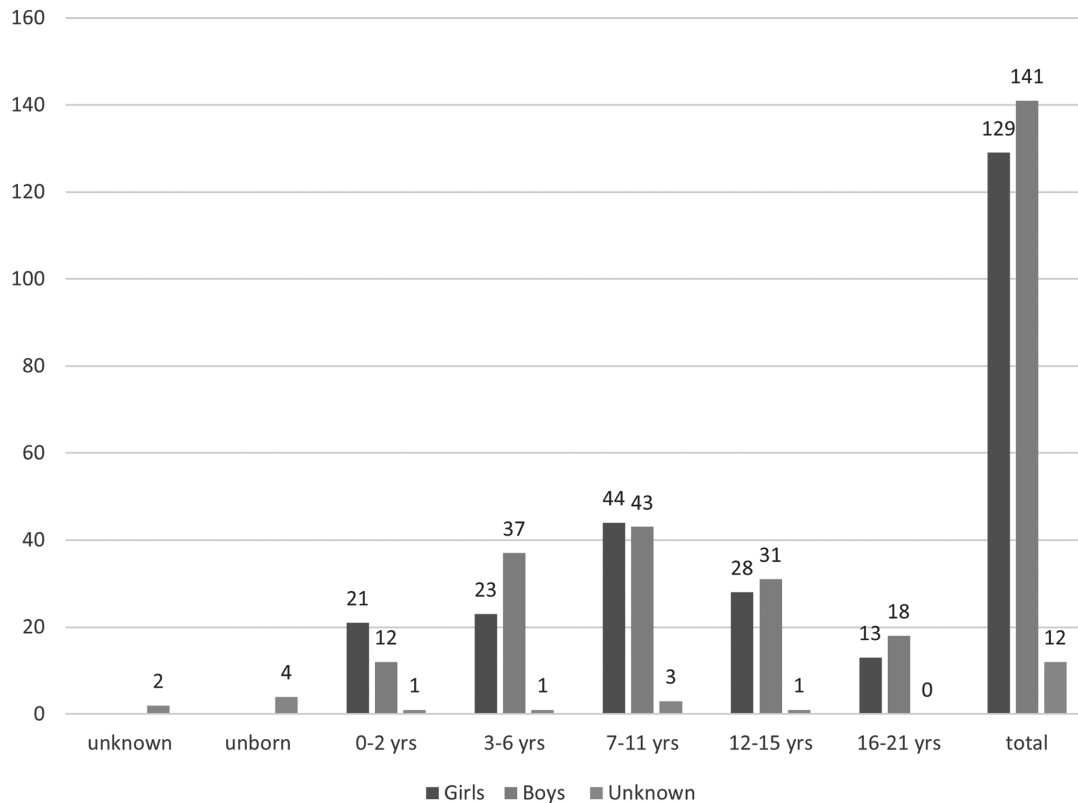
<sup>15</sup> M Wright, 'Care proceedings and international kinship care', p 381 below; T Kruger, *International Child Abduction: The Inadequacies of the Law* (Hart Publishing, 2011); see also N Lowe and V Stephens, 'A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6598&ctid=32>, accessed 15 July 2022.

<sup>16</sup> This would explain, for example, the low number of requests from the neighbouring country Sweden; in 11 cases, Finnish authorities requested assistance from their Swedish colleagues via the CA, while in only one case did a request come from Sweden to Finland. By way of comparison, in 47 cases the request came from the Estonian CA or vice versa.

<sup>17</sup> See Brussels IIter, Art 78; Župan et al, above n 7.

<sup>18</sup> Academy of Finland 2020–2024.

Figure 2: Age groups



drawing on existing state images – at once reaffirming and transforming these representations within concrete practices'.<sup>19</sup> The inquiry focuses on the ways in which the state is understood, experienced and reproduced in different encounters, and uses three axes of analysis: relational modalities (ie normative images of the state); boundary work (ie how actors understand and reproduce boundaries of the state); and embeddedness (networks of different actors). Distinctive to 'stategraphy' in comparison to other approaches to legal effectiveness or implementation of international instruments or policies, is the relational view it provides into what is often viewed as merely 'the state' or 'the practice'. Consequently, the approach directs the researcher to integrate enquiries into the normative visions of the state, which are often fragmented, and concrete practices. Hence, the enquiry does not stop at merely recognising what is done or neglected in official practices, but probes further into how the decision-making in the mundane bureaucratic practices is connected to normative visions about the state and legitimate use of its power and how these visions are produced and reproduced in practical encounters.

The analysis draws mainly on cases of the Finnish CA. In addition, the analysis is informed by interviews with officials working at the Ministries of Justice and Foreign Affairs. Cases alone might be considered insufficient in providing material for a fully fledged relational analysis of (Finnish) child protection in transnational situations. Nevertheless, the cases can be read as encounters between different authorities, and they are certainly indicative of how and why authorities reach certain decisions, for example, regarding their jurisdiction and obligation to

<sup>19</sup> T Thelen, L Vetter and K von Benda-Beckmann, 'Introduction' in T Thelen, L Vetter, L and K von Benda-Beckmann (eds), *Stategraphy: Toward a Relational Anthropology of the State* (Berghahn Books, 2018), 7.

act in particular cases. Moreover, the theoretical approach adopted provides a framework for understanding the results of the study and conducting the analysis, as well as discussing possible venues for future research.

### **Conducting the research**

A research permit to study the cases and interview officials was sought from the Finnish Ministries of Justice (the CA under Brussels IIa and the Hague Conventions) and Foreign Affairs (non-Convention countries). Access to the case files was granted only by the Ministry of Justice, but both ministries granted the research permit to interviews. Every request coming into the CA is registered in the electronic case management system and given a diary number and a handler. All actions and documents related to the case are recorded in the system and follow the case throughout the process, until the case is closed and archived. Until the end of 2020, all documents were printed so that the physical document bundle contained all the material submitted to the CA relating to a case. The cases were studied at the premises of the CA, as agreed in the research permit. The notes were compiled while reading the cases. The research was undertaken in the autumn of 2020, and spring and summer of 2022. During the research periods, I had the possibility to discuss with staff at the ministry, and in addition to these discussions I interviewed three officials working at the CA, and one official working at the consular assistance unit of the Ministry of Foreign Affairs.

The diary numbers of the cases were listed and given a case identifier number, which is used in the analyses of the cases. The names of the individuals were not recorded, and other details (such as the ages or gender of the children or number of siblings) that might lead to a risk of individuals being recognised are modified to secure anonymisation in all publications.

### **Limitations of the study**

The material submitted to the CA varies considerably depending on the case. In some cases, the case file is large and contains a lot of material, such as child welfare reports and court rulings with translations. Sometimes the file consists only of a short e-mail enquiry, for example, about whether relatives of a child residing in another country can be found in the Finnish population information system. The detail in which the situation of a child and a family is described in the case file varies. This disparity of the data means that no far-reaching conclusions can be made about the children, the families, or how the authorities work. For example, estimations on the numbers of cases of violence against the child or parental substance use that endangers the child's development cannot be made drawing on this material alone. Similarly, this data does not provide for a sound analysis of, for example, discourses in which the authorities define and evaluate parenthood in cross-border contexts or make sense of their own obligations.<sup>20</sup> Instead, the material offers a bird's eye view of the activities of authorities in the field of cross-border child protection as well as particular challenges pertaining to this field.

This article focuses particularly on the gaps in the legal framework and practices of protecting children in transnational contexts. Importantly, based on this material it is not possible to estimate how often children fall into a 'transnational void'<sup>21</sup> when relocating to another country; the fact that a case reaches the CA's desk means that someone has recognised that the

20 N Gilbert, N Parton and M Skivenes (eds), *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011); E Keddell, 'Algorithmic Justice in Child Protection: Statistical Fairness, Social Justice and the Implications for Practice' (2019) 8(10) *Social Sciences* 281; J Hiitola, *Hallittu vanhemmuus: Sukupuoli, luokka ja etnisyyss huostaanottoasiakirjoissa* (University of Tampere, 2015), available at: <https://trepo.tuni.fi/handle/10024/96664>, accessed 20 June 2022.

21 R Lamont, 'Care Proceedings with a European Dimension under Brussels IIa: Jurisdiction, Mutual Trust and the Best Interests of the Child' [2016] CFLQ 67, 81.

child's situation has been risky and that something must be done to help. Still, of the child protection requests analysed for this article, approximately ten cases indicate that the local authorities might have failed to take appropriate measures to protect the children in question. These examples are informative of the problems and obstacles of protecting children in transnational contexts.

At the time of writing this article, the research project is still ongoing. The transnational lives of some families add a particular dimension to the cases in the form of challenges related to multi-locationality or placelessness, but in general the problems families face in cross-border contexts appear to be similar to those usually faced in child protection work: substance use, mental health problems, and in many cases indications of intimate partner violence. In addition, the data appears to reflect certain migratory contexts and challenges particular to some ethnic, cultural or migrant groups, such as conflicts and violence against women within Nordic Romany families, especially in relation to the mother's position as the custodian and guardian of the child after the parents' separation; the mobility of ethnic majority Finns to the Spanish region of Costa del Sol; and work-related mobility between Estonia and Finland, which explains the high number (47) of requests between Estonian and Finnish CAs. In addition, some difficulties in cross-border collaboration appear to arise particularly in relation to Russia and Eastern European states.<sup>22</sup> In addition, a particular group of cases involved the placements of young people taken into care in Germany and placed via private arrangements in foster families in Finland. None of the requests were related to female genital mutilation (FGM) or forced marriage.<sup>23</sup>

### **Competent, cooperative and responsive central authorities at the heart of international child law**

In cross-border cases, the successful protection of children at risk within their families depends on the cooperation of authorities in different countries. Competent, cooperative and responsive CAs are, as the 1996 Child Protection Convention Handbook puts it, at the heart of the Convention.<sup>24</sup> The general tasks of CAs are described in Article 77 of the Brussels IIter (previously Article 54, Brussels IIa) and Article 30 of the 1996 Child Protection Convention. One of the main functions of the CAs is transmitting requests and information to the appropriate competent authorities in their states, as well as transmitting requests and information to CAs in other Member States or contracting states.

While transmitting information is essential in all cases, in the majority of the cases studied this was the only or the main content of the request. Most of the enquiries related to individual children, but in some cases the CA was requested to obtain more general information about laws and procedures in another state.

‘The Finnish CA was requested to obtain information about the prison conditions for newborn babies and their mothers in Greece in a case that concerned a woman who was due to give birth very soon. The woman was held in a Finnish detention facility, where she was waiting to be deported to Greece to serve a 19-year sentence for human trafficking. The father-to-be of the unborn child did not wish to take care of the child. Both parents

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22 S Mustasaari, ‘Challenges of cross-border child protection between Eastern and Western Europe: Russia and Eastern Europe in the files of the Finnish Central Authority’ in D Wiedemann, K Duden and J Antomo (eds), *Changing families, changing family law – Convergence or divergence in Europe?* (Intersentia, forthcoming). Three themes emerge from the cases: politicisation of international child cases; issues relating to return of children wrongfully removed from the country of habitual residence or prevented from returning there; and placements of children across borders.

23 In one request from the English CA, a FGM protection order had been issued about a girl with Somali background.

24 The Hague Conference on Private International Law Permanent Bureau, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* (HCCH, 2014).

were from different African countries, and the child had no relatives in Finland, so the connection of the baby to Finland was considered weak.<sup>25</sup>

Specific tasks of the requested CAs are listed in Articles 79 and 80 of the Brussels II*ter*, including an obligation to provide assistance in discovering the whereabouts of a child when it appears that the child may be present and in need of protection within the territory of the requested state. A similar obligation is found in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996, Article 31(c). In 23 cases the request concerned discovering the whereabouts of the child, and in most of these cases there were severe concerns for the well-being of the child.

A report of the situation of a child can be requested from another Member State or contracting state.<sup>26</sup> Most of the analysed cases included such a request, and in the majority of cases the requested information was provided. Personal data protection rules must be respected when information is being transmitted. As Kruger points out, ‘care should be taken not to infringe the right to privacy of the very children we are aiming to protect’.<sup>27</sup> As privacy of the family sphere may work contrary to the interests of the dependent family members, discretion concerning what information can be transmitted requires careful balancing of interests.

Schulz has observed that the obligation provided in Article 55 of Brussels II*a* was unclear as to whether it included an obligation to draw up a social report or merely transmit existing reports.<sup>28</sup> In addition, Schulz pointed out that the personal scope of the request for information was unclear, as Article 55 spoke of ‘information on the situation of the child’ but was silent about information concerning the child’s family. Since the jurisdiction is based on the country of habitual residence of the child, information is often needed from foreign authorities concerning family members and not the child directly. The Recast Brussels II*ter* strengthens the legal basis of such requests as, in addition to reports on the situation of the child, CAs, competent authorities or other bodies shall provide any other information relevant to procedures in matters of parental responsibility in the requesting Member State.<sup>29</sup>

Another layer to the obstacles in getting information from foreign authorities related to the national rules on personal data protection and the General Data Protection Regulation (GDPR) Regulation (EU) 2016/679.

‘The authorities of an EU State refused to provide the requested information about the possible criminal records, health records concerning mental health and substance abuse, and social benefits received by the father of 7 and 12-year-old children. The foreign CA advised the Finnish authorities to request this information through the police.’<sup>30</sup>

If information cannot be obtained under Brussels II or the 1996 Child Protection Convention, a request can be made under the Evidence Regulation, which seeks to improve, simplify and accelerate cooperation between courts in the taking of evidence.<sup>31</sup> This regulation applies

25 Case no 8.

26 Art 80, Brussels II*ter*, previously Art 55, Brussels II*a*, and Art 32, 1996 Child Protection Convention.

27 T Kruger, ‘Enhancing Cross-border cooperation’ in *Recasting the Brussels IIa regulation*, Workshop 8 November 2016, Compilation of briefings for the JURI Committee, Directorate General for internal policies policy department C: Citizens’ rights and constitutional affairs, 36.

28 A Schulz, ‘The Cooperation between Central Authorities under the Brussels IIa Regulation’ in I Viarengo and F Villata (eds), *Planning the future of cross border families: A path through coordination* (Hart Publishing, 2020), 407.

29 Brussels II*ter*, Art 80.

30 Case no 70.

31 Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (2020) OJ L 405 (taking of evidence (recast)) replaced Council Regulation (EC) No 1206/2001 as of 1 July 2022.



between all Member States of the European Union with the exception of Denmark. Between Denmark and the other Member States the 1970 Hague Convention on the Taking of Evidence<sup>32</sup> applies, as is the case also in relation to many non-EU states, including the UK. The concepts of ‘evidence’ or ‘court’ are not defined in the Evidence Regulation but should be given a broad interpretation. According to Recital 5 of the Evidence Regulation, the term ‘court’ should also be understood to mean authorities that exercise judicial functions, that act pursuant to a delegation of power by a judicial authority or that act under the control of a judicial authority, and that are competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters. This includes in particular authorities that qualify as courts under other EU legal acts, including the Brussels II<sup>ter</sup> Regulation. ‘Court’ thus includes all relevant authorities in the Member States with jurisdiction in the matters falling within the scope of the Evidence Regulation. ‘Evidence’ includes hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, or expertise on family or child welfare.<sup>33</sup> In some cases the requests related to custody cases without any child protection element. In other cases, the reports on the situation of the child or the guardian were requested and received under Article 55 of Brussels II<sup>a</sup>, while some authorities rejected the request in these cases and wanted the request to be made under the Evidence Regulation.<sup>34</sup>

Little is known about the resourcing and staffing or training of CAs, other than that their roles and resourcing vary significantly between states.<sup>35</sup> However, a broadly acknowledged difficulty in the cooperation of the CAs relates to delays in the handling of the requests.<sup>36</sup> In earlier research, it has been suggested that long delays of several months or even years are caused by inefficient organisation and insufficient financial resources and personnel affecting some CAs.<sup>37</sup>

The issue of delays was reflected in the data. In the requests concerning families who had moved from Finland to Spain, the parents typically had problems with substance use or mental health, and concerns over the children’s situation in these families were urgent. Delay of the process inevitably placed the children at risk.

‘The mother decided to move to Spain with her baby.<sup>38</sup> Several child welfare notifications had been made about the mother’s substance use during pregnancy and after the birth of the child. The Finnish authorities requested help in locating and checking the circumstances of the child from the Spanish authorities. The reply was transmitted by the Spanish CA five months later, stating that the local child welfare authorities had not been able to locate the child and her mother. The case was eventually closed without further notice, although the

32 Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters; see also Norros, above n 7, 63.

33 Practice Guide for the Application of the Regulation on the Taking of Evidence (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters); A Nuyts and J Sepulchre, ‘Taking of Evidence in the European Union under EC Regulation 1206/2001’ (2004) 5 *Business Law International* 305; D McClean, *International Co-operation in Civil and Criminal Matters* (Oxford University Press, 3rd edn, 2012).

34 Cases nos 70, 72, and 111.

35 Lamont, above n 7; Lamont, above n 21, 79.

36 Schulz, above n 28; Župan et al, above n 7; ‘Study on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment (Final Report) and Analytical Annexes’: <https://op.europa.eu/en/publicationdetail/-/publication/924728ec-9148-11e8-8bc1-01aa75ed71a1>; ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000’, Brussels, 15 April 2014 COM (2014) 225 final.

37 L Fridrich, ‘The experience of a national central authority’ in *Recasting the Brussels IIa regulation*, Workshop 8 November 2016, Compilation of briefings for the JURI Committee, Directorate General for internal policies policy department C: Citizens’ rights and constitutional affairs, 45.

38 Case no 33.

correspondence suggests that the police would perhaps be contacted. Later, when the child was a toddler, a new request was made by the Finnish child welfare authorities based on the continuing substance use of the mother, suspicions of violence towards the child and neglect of its basic care.<sup>39</sup>

In the case described above, the police could have been contacted to issue a yellow notice on a missing person if necessary to locate the baby, as the CA route was known to be inefficient. The Commission's Proposal for the Recast Brussels II Regulation included an Article establishing an obligation on the Member States to properly resource CAs, as their workload has expanded over the years.<sup>40</sup> However, the issue was debated and eventually only addressed in Recital 72 of the final text of the Regulation.<sup>41</sup>

### Placements abroad and transfers of jurisdiction

The child has the right not to be separated from their parents except when it is necessary for the purpose of protecting the child.<sup>42</sup> Even when protective measures are issued, the rights of the child to be cared for by a parent or a relative, when possible, enshrined for example in Article 9 of the UN Convention on the Rights of the Child 1989, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and Article 24 of the EU Charter of Fundamental Rights, need to be respected as far as possible.<sup>43</sup> The details vary according to national legislation, but generally authorities will try to find the most appropriate placement available, and usually preference is given to people connected with the child through family or other social relationships.<sup>44</sup> When care proceedings are initiated, the authorities will sometimes need to assess the possibility of placing the child abroad, if the most suitable placement might be found there.<sup>45</sup> The placement of a child in another Member State or contracting state is regulated under Article 82 of Brussels II<sup>ter</sup><sup>46</sup> and in Article 33 of the 1996 Child Protection Convention.

When the child has a particular connection to another state, that is she or he has been resident in that state or is a national of that state, it might be that the court of that state is better placed to hear the case. In Brussels II<sup>ter</sup>, the rules on the transfer of jurisdiction are found in Articles 12 and 13.<sup>47</sup> In the 1996 Child Protection Convention, these rules are found in Articles 8 and 9.

The role of the CA is central in the assessment stage when a decision about the placement of the child is being made. The placement requires consent from the competent authorities of the state in which the child is being placed.<sup>48</sup> The process is more clearly defined now in Brussels II<sup>ter</sup>.<sup>49</sup> As Wright describes in this issue, care proceedings with an international element rely mainly on local assessments conducted by professionals in the country where the child will be living.

<sup>39</sup> Case no 98.

<sup>40</sup> Kruger, above n 27, 36; and Fridrich, above n 37.

<sup>41</sup> Recital 72; see also Župan et al, above n 7.

<sup>42</sup> For example Art 9 of the UNCRC.

<sup>43</sup> Lamont, above n 21.

<sup>44</sup> English law: Children Act 1989, s 22C(5); Finnish law: Child Welfare Act 417/2007, s 50.

<sup>45</sup> Lamont, above n 21; G Cuniberti and C Camara, 'The EU Forum Non Conveniens Rule in Child Care Proceedings Cases Involving Public Bodies' (2016/2017) 28 *Yearbook of Private International Law* 431.

<sup>46</sup> Previously Art 56, Brussels IIa. As Župan et al point out, the new provision introduced in Art 82(3), Brussels II<sup>ter</sup> may have considerable practical consequences as it allows other Member States to intervene in the family procedures by indicating a close connection with the child, effectively meaning the nationality of the child. See Župan et al, above n 7.

<sup>47</sup> Previously Art 15, Brussels IIa.

<sup>48</sup> *Health Service Executive v SC and AC* (C-92/12) ECLI:EU:C:2012:255, [2012] 2 FLR 1040.

<sup>49</sup> For a thorough analysis, see Župan et al, above n 7.

Children from some families need support throughout their childhood, and when they cross borders the need for support will continue. This will often require close and long-term cooperation between the authorities.

‘A 10-year-old child had moved to an EU State from Finland with its mother. The father lived in Finland, and the parents were in contact. A care order was issued by the foreign authorities due to the instability, mental health issues and aggressive behavior of the mother and her inability to take care of the child, and court proceedings regarding the placement of the child out of home were pending. Under the foreign law, the responsible authority is required to make arrangements for the child to live with a parent if this is possible, so the foreign CA requested the Finnish CA under Brussels IIa Article 55 to contact the local authorities to make an assessment of the father’s willingness to care for the child and his suitability as a guardian.

Before moving from Finland, the family had been supported by child welfare services due to concerns about the well-being of the child at home. The child had absences from school, and at home the child had no space because the mother’s obsessive-compulsive disorder had led to the house being completely full of stuff. Eventually the lease of their home had been terminated. Due to the mother’s anxiety, the child had then been placed in a foster family.

During the assessment at the request of the foreign authorities, the Finnish social workers visited the father at his home, and also met with him and the mother at the social welfare office. The father felt that he could not take care of the child all by himself, as he had no experience of taking care of young children. His plan was to get a suitable apartment where he could stay and take care of the child together with the mother. Concerns remained concerning the ability of the father to understand the severity of the issues that the mother had from the perspective of the child, and placement of the child to live with the father was not recommended. The foreign authorities then requested assessment about other relatives and the previous foster family of the child, but unfortunately long-term solutions could not be found. The case involved assessments made by the authorities in four municipalities.

At this point the foreign and Finnish authorities had agreed that Finland would nevertheless be the most suitable place for the child to live, and the request concerning the placement under Brussels IIa Article 56 was being prepared. Meanwhile, the father had moved to an apartment suitable for the child and was willing to receive support from the social workers in order to be able to care for his child should the child move in to live with him. The Finnish authorities were heard via video connection in the foreign court. They recommended that the child be placed in foster care in Finland, first for an assessment period of approximately five months. During this time, the relationship between the child and the father would be monitored and their need for support would be assessed. About one month after approval of the official request under Article 56 to place the child in Finland, the child arrived in Finland and was placed in a reception home.<sup>50</sup>

The principle of mutual trust underpinning international family law, especially European family law,<sup>51</sup> reflects a particular relational modality that draws on a specific image of the state and expectations about its functions. Here, the analytical focus of ‘stategraphy’ on embeddedness and concrete relations highlights how such an image is reproduced (or not) in concrete encounters between the authorities. In the case described above, finding the most suitable placement for the child required smooth collaboration across national borders but also on the

<sup>50</sup> Case no 62.

<sup>51</sup> Lamont, above n 21.

national level, as assessments were carried out by authorities in four municipalities. The collaboration between the Finnish and foreign authorities was successful, but the complexity of the case suggests that challenges can occur, especially if the child protection systems of the countries are very different.

As Wright points out in her contribution to this issue, placing children with family or kin abroad is an issue that can touch upon children who have lived their whole life in a country, as, for example, in the case of the family described below. This case also brings up the conceptual separation between the transfer of jurisdiction and the placement of the child abroad, which despite being interrelated, are separate legal issues.

‘The children, whose ages ranged from a toddler to eight, had been taken into care by the foreign local authorities of an EU State because of neglect in basic care and physical abuse. The children were dual nationals; they were born abroad and had lived there their whole lives. The parents were Finnish nationals. The father was in prison, the mother had mental health issues, and there were reports of the father’s violence towards the mother, also during her pregnancy. The mother resisted the care order and placement of the children in a foster family or residential institution in the EU state in question and wanted the children to be transferred to Finland and placed to live with her parents.

The foreign CA requested the Finnish CA under Brussels IIa Article 55 to contact the local authorities to assess the suitability of the grandparents and their ability to care for the children. According to the assessment of the local Finnish child welfare authorities, the grandparents were willing and capable of taking care of the children. They lived in a spacious home, and they were both healthy and working. Also other members of the extended family of the mother and the father lived near to the grandparents, so the children would be surrounded by the extended family.

The placement of the children was a lengthy process that lasted 20 months from the urgent foreign care order. The foreign authorities set conditions on the placement in Finland (the mother was not to live with the children), and despite the placement of the children in Finland from the other EU State under Article 56 of Brussels IIa, the foreign court ordered the jurisdiction to be retained for a period of 10 months, during which the foreign authorities would continue to monitor the situation of the children.’<sup>52</sup>

As Lamont has pointed out, there were interpretative weaknesses in Article 15 of Brussels IIa, which failed to adequately define all elements of the transfer.<sup>53</sup> To some extent, these are addressed by the Recast Brussels IIter, but the situation remains unclear for example in cases in which the jurisdiction has been transferred but the placement fails to occur for some reason, as was the situation in *Bristol City Council v AA and HA*.<sup>54</sup> The case described above is the reverse in that in this case the child was placed in Finland but the jurisdiction, according to the foreign court, was retained abroad. As habitual residence is not a matter of court order, and the intention or will of the holder of parental responsibility or the purpose of moving is only indicative of habitual residence, it might be that the foreign court’s order concerning retaining jurisdiction became assessed under the rules governing recognition of foreign judgments. Recognising such an order could have proved difficult if the circumstances of the boy had changed after he moved to Finland.

Under both Brussels IIter (Article 15<sup>55</sup>) and the 1996 Child Protection Convention (Article 11), only emergency protective measures should be issued when the habitual residence of the child is

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<sup>52</sup> Case no 40.

<sup>53</sup> Lamont, above n 21, 80.

<sup>54</sup> [2014] EWHC 1022 (Fam), [2015] 1 FLR 625, discussed in Lamont, above n 21, 80.

<sup>55</sup> Art 20, Brussels IIa.

in another country and the jurisdiction has not been transferred.<sup>56</sup> However, in some cases the authorities appeared to bypass the provisional nature of the protective measure.

‘A three-year-old child, a Finnish national and habitually resident in Finland, was placed urgently in care in a children’s home in a Hague 1996 Contracting State. A neighbour had called the police to the apartment, where the parents were intoxicated and fighting. The child was found in poor condition, malnourished, hungry, thirsty, dirty and had had a bald patch on its head lacking even the roots of hair.

The foreign court issued a care order, and the situation of the child was assessed by a multiprofessional team. According to the assessment, the father suffered from alcoholism, used cocaine and had an antisocial personality disorder. The mother suffered from chronic alcoholism with cirrhotic changes in the liver, cocaine poisoning and osteomyelitis, and had a purulent wound in the back of her head, broken bones and a probable brain injury. The authorities suspected domestic violence. The parents had difficulties in understanding the situation of the child. There was a clear power difference between the parents; the impulsive father was found to dominate and attack the mother, who was 20 years younger and unable to defend herself and be independent of the father. Both parents belittled their use of alcohol and drugs.

According to the assessment, the child had developed well in the children’s home and benefited from care and nurturing, and the bald spot and skin symptoms had improved during the stay in the children’s home. The likely explanation of the bald spot was that the child had been soothing itself by tearing its hair, which is a common reaction in a state of deprivation caused by significant emotional neglect. Such behaviour is a sign of a widespread and severe psychological disorder, and the bald spot could not have developed in three weeks, as the parents had claimed. The child’s social and intellectual resources were good, but the attachment relationship was deemed insecure. The multiprofessional team recommended that the child be placed in a residential institution in Finland, rather than in a foster family, as there were concerns that the parents would put heavy pressure on the foster parents.

The father fiercely resisted the actions taken by the authorities, and his lawyers sent numerous letters and emails to Finnish and foreign authorities. The foreign authorities charged the father over 90 000 euros for the costs of the child protection measures taken in the foreign state. Eventually, after 10 months in the foreign children’s home, the transfer was arranged, and two Finnish social workers travelled to fetch the child to Finland. Upon the arrival, the child was placed in a reception home for an assessment period.<sup>57</sup>

As the boy was clearly habitually resident in Finland, the Finnish authorities had the substantive jurisdiction to issue protective measures. Following Article 11 of the 1996 Child Protection Convention, the foreign authorities had the jurisdiction to take necessary measures to protect the child, but these measures should have lapsed as soon as the Finnish authorities were able to take the measures required by the situation. However, it still took over 10 months before the Finnish social workers were allowed to pick up the child. It appears from the documents of the case that the child was assessed and received treatment in the foreign children’s home, from which the child benefitted but which clearly exceeded the scope of emergency measures. In this particular case, the thorough investigation into the situation of the child already at the stage of provisional measures provided invaluable information to the care

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56 L Sandrini, ‘Provisional measures and best interests of the child in the field of parental responsibility’ in E Bergamini and C Ragni (eds), *Fundamental rights and the best interests of the child in transnational families* (Intersentia Publishing, 2019); Lamont, above n 21.

57 Case no 1.

proceedings and long-term care plans for the child in Finland. Nevertheless, harmonised international jurisdiction rules rely on the principle of mutual trust in the equivalence of child protection systems. If these rules are not respected by all contracting states, handling cases that easily become politicised may become even more difficult.<sup>58</sup>

## Cross-border relocation and children at risk

### *Wrongful removal in the context of public care*

The problems related to cross-border relocation of children are often addressed through the lens of child abduction and perceived as part of a conflict between the parents regarding the custody and living arrangements of the child.<sup>59</sup> By relocating the child to another country, the parent or other guardian may seek to make it more difficult for the other holders of parental responsibility to use their rights. Parental abduction and the escalated conflict are harmful to the child, but the relocation of children across borders can also be a risk to the child from the perspective of child protection.<sup>60</sup>

Both *Brussels IIter* (and its predecessor) and the 1996 Child Protection Convention make an exception to the general rule of habitual residence as the basis of jurisdiction over proceedings of parental responsibility when the child was wrongfully removed or retained from the state of its habitual residence.<sup>61</sup> A wrongful removal may lead to a change in the habitual residence, but in these cases the jurisdiction does not follow the main rule but is retained in the previous state.

Of the cases analysed in this study, 13 involved children who had been taken into care at the time when he or she was wrongfully taken abroad. The person taking the child abroad was the parent in most cases, although not always. Some situations fall under the rules of both child abduction and child protection. In addition, parental child abduction can include issues relevant from the child protection perspective.<sup>62</sup> To classify as child abduction, the abductor should be a parent or a holder of parental responsibility.

‘A 16-year-old girl had been taken into care and placed out of home, but her grandmother took her to a Hague 1996 Contracting State. The reasons behind the care order related to the reckless and boundaryless behaviour of the girl, and there was great concern that the grandmother would not set limits to such behaviour. The local authorities heard the grandmother, who stated that the girl was old enough to make decisions concerning her own life. The grandmother had filed for residence permits for herself and the child. Four

<sup>58</sup> Mustasaari, above n 22.

<sup>59</sup> Kruger, above n 15; K Trimmings, A Dutta, C Honorati and M Župan, *Domestic Violence and Parental Child Abduction* (Intersentia, 2022); K Trimmings and O Momoh, ‘Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings’ (2021) 35(1) *International Journal of Law, Policy and The Family* 1; C Bruch, ‘The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases’ (2004) 38 *Family Law Quarterly* 529; R Lamont, ‘Protecting children’s rights after child abduction: the interaction of the CJEU and the ECtHR in interpreting *Brussels IIbis*’ in E Bergamini and C Ragni (eds), *Fundamental rights and the best interests of the child in transnational families* (Intersentia, 2019); M Baruffi, ‘A child-friendly area of freedom, security and justice: work in progress in international child abduction cases’ (2018) 14 *Journal of Private International Law* 385; P Beaumont, L Walker and J Holliday, ‘Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)–(8) *Brussels IIa* Proceedings across the EU’ (2016) 12 *Journal of Private International Law* 211; P Beaumont, L Walker and J Holliday, ‘Parental Responsibility and International Child Abduction in the proposed recast of *Brussels IIa* Regulation and the effect of Brexit on future child abduction proceedings’ [2016] *IFL* 307.

<sup>60</sup> *Child and Family Agency v JD* (C-428/15) ECLI:EU:C:2016:819, [2017] *Fam* 248; *Hampshire County Council v CE and NE* (Joint cases C-325/18 and C-375/18) ECLI:EU:C:2018:739, [2019] 1 *WLR* 2091.

<sup>61</sup> *Brussels IIter*, Art 9, previously Art 10, *Brussels IIa*; Art 7, 1996 Child Protection Convention; see also Arts 3 and 4, 1980 Child Abduction Convention.

<sup>62</sup> A Liversage, ‘Abducting children abroad: gender, power and transnational mobility in immigrant family conflicts’ (2022) 28(5) *Violence Against Women* 1139; Trimmings et al, above n 59.

months later the grandmother left the girl abroad alone. The girl returned to Finland heavily pregnant a few weeks before her 17th birthday.<sup>63</sup>

The 1980 Child Abduction Convention and the 1996 Child Protection Convention use different ages to determine the scope of the Convention. According to Article 4, the Abduction Convention ceases to apply when the child reaches the age of 16, whereas the 1996 Child Protection Convention applies to all children under the age of 18. In the case described above, the foreign authorities appeared to afford the 16-year-old child a wider scope of self-determination than the 1996 Child Protection Convention would permit.

When a child who has been taken into care is wrongfully taken abroad, the authorities should take appropriate measures to locate and return the child. The fact that the whereabouts of the child are unclear should not prevent care proceedings and other effective measures in cases where the taking of the child abroad has been wrongful. Thus, even if the habitual residence of the child has changed, the authorities confer jurisdiction if the person taking the child abroad was not the holder of custody rights at the time of the removal.<sup>64</sup> However, in some cases the local Finnish authorities appeared to be unaware of the jurisdictional rules, and consequently, their responsibilities to act to safeguard the rights of the child.

‘A teenager, a Finnish citizen of immigrant background, had been taken into care urgently due to severe concerns about her well-being. Her development was delayed, and she had autistic features and needed continuing support and rehabilitation therapy. Her mother, with whom she lived in Finland, could not take care of her treatment on a regular basis. The girl had previously spent long periods of time abroad and away from school. The parents were divorced, and the father lived in another Nordic country. Despite the care order and placement, the father resisted the child welfare workers’ interference and took the girl to live with him. Care proceedings were initiated in the administrative court for a long-term care order, and the Finnish authorities requested the authorities of the other Nordic country under Brussels IIa Article 55 to check the situation of the child and assist in her return. The authorities visited the father, who was very defensive and refused the home visit. He had not registered the child in the country, and when he finally agreed to meet with the authorities, he informed the authorities on the morning of the meeting that he and the child had moved to another EU State. The Finnish child welfare authorities issued a new request to the next foreign CA, but their response was that nothing could be done as the whereabouts of the child were unknown. After three months, the Finnish local authorities closed the case and the care proceedings were withdrawn from the court, as the authorities had failed to locate the child and the mother did not want the authorities to interfere.’<sup>65</sup>

The Court of Justice of the EU (CJEU) has emphasised that concepts under EU law have an independent meaning and that they must be interpreted as uniformly as possible.<sup>66</sup> However, defining the habitual residence depends on the context and the goals of the regulation, and cannot be defined similarly in all cases.<sup>67</sup> Hence, habitual residence in other areas cannot be

63 Case no 138.

64 See Finnish Supreme Administrative Court, KHO:2012:110 10.12.2012/3387; (C-572/21); M Celis, ‘Case C-572/21: The Court of Justice of the EU on the interrelationship between the Brussels IIbis Regulation and the 1996 Child Protection Convention – The perpetuatio fori principle’ *Conflict of Laws.net* (22 July 2022), available at: <https://conflictoflaws.net/2022/case-c-572-21-the-court-of-justice-of-the-eu-on-the-interrelationship-between-the-brussels-ii-bis-regulation-and-the-1996-child-protection-convention-the-perpetuatio-fori-principle/>, last accessed 10 September 2022.

65 Case no 165.

66 For example, *Mercredi v Chaffe* (C-497/10), ECLI:EU:C:2010:829, [2012] Fam 22, para [45]; *UD v XB* (C-393/18) ECLI:EU:C:2018:835, [2019] 1 FLR 289.

67 K Karjalainen, *Ikääntyminen, liikkuvuus ja kansainvälinen yksityisoikeus Euroopassa: Vertaileva tutkimus rajat ylittävistä ongelmista sekä edunvalvonnasta Suomessa ja Espanjassa* (Suomalainen lakimiesyhdistys 2016), 171.

directly transposed in the context of the assessment of the habitual residence for the purposes of defining which state has the jurisdiction to take protective measures concerning a child.<sup>68</sup> Stone notes that ‘the grounds of jurisdiction established by the Regulation are shaped in the light of the best interests of the child and the criterion of proximity’.<sup>69</sup> In this sense it is logical that public authorities do not cling to their jurisdiction but take into account where the child can be most efficiently protected. However, in the case described above, it seems that despite the girl being in need of protection, limited efforts were made to provide it.

### **Relocation to avoid intervention by the child welfare authorities**

Sometimes moving to another country can be a risk to the child even when the parent is legally entitled to decide in which country the child is to live. When a family is known to the child welfare authorities, but a care order has not been issued, nothing prevents the parents (or other guardians) from moving to another country. ‘Wrongfulness’ of the removal in the context of private international law only covers situations in which the relocation to another state violates the rights of a holder of parental responsibility, for example when the other parent has not given consent to the relocation, or the child has been taken into care. Taking the child abroad is not ‘wrongful’ even when the goal of relocation is to escape child welfare interference or when the conditions abroad are detrimental to the child, or even when taking the child abroad is part of criminal activity. For example, a parent who takes the child to a war zone or as part of trafficking clearly exceeds the scope of his or her parental authority and rights.<sup>70</sup> Nevertheless, such an act is not ‘wrongful’ in the sense of the instruments in private international law. Under Brussels IIa and Brussels IIter, what is relevant for the jurisdiction of local authorities is the habitual residence of the child at the time when the proceedings were initiated.<sup>71</sup> This principle, known as *perpetuatio fori*, which means that the court retains jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings, is not adopted in the 1996 Child Protection Convention.<sup>72</sup> When the relocation of the child has been lawful, the jurisdiction can change during proceedings if the habitual residence of the child changes.

The phenomenon of avoiding child welfare interference by taking the children abroad is recognised in previous literature, and online advice services even exist to promote this possibility.<sup>73</sup> The phenomenon also comes across in the requests transmitted by the Finnish CA. The fact that parents are trying to avoid child welfare services can place the child at great risk, which is why the obligation on the authorities to act when this occurs should be clear.

When the habitual residence of the child changes and the authorities no longer have the jurisdiction to issue protective measures, the obligation of the authorities to pass on the information they have about the circumstances of the child is defined in national rules and depends on the authorities’ evaluation concerning the danger to which the child might be exposed.<sup>74</sup> Under Finnish law, several persons, including persons employed by education and social and health-care services, have a duty to notify the competent child welfare authorities if

68 P Stone, *EU Private International Law* (Edward Elgar Publishing, 3rd edn, 2016), 449.

69 *Ibid.*

70 In Finnish law, the authority of the guardian is accompanied by a requirement to act in the best interests of the child: Act on Child Custody and Right of Access, s 1.

71 Finnish Supreme Administrative Court, above n 64; (C-572/21) above n 64, para 28.

72 P Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (Hague Conference on Private International Law 1999) para 42; (C-572/21) above n 64, para 40; Celis, above n 64.

73 Lamont, above n 3.

74 See the discussion in C Fenton-Glynn, *Adoption without Consent, Report for the European Parliament PETI Committee* (2015), available at: [www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL\\_STU\(2015\)519236\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf), accessed 15 July 2022.



they are aware of a child possibly in need of child welfare services.<sup>75</sup> If a child is a client of child welfare services or whose need of child welfare services is being assessed the authorities must, notwithstanding confidentiality regulations, immediately notify the authorities of the child's new place of residence.<sup>76</sup> The obligation to notify covers situations of moving abroad. Nevertheless, concerns remain as to whether child welfare and other relevant authorities are aware of this obligation in cross-border cases.

‘A teenager had contacted the Finnish Embassy in Spain and reported that her parents used a lot of alcohol and physically abused the children. Before the family's relocation from Finland to Spain, several child welfare notifications had been made concerning the family and diverse forms of support had been offered to the family. Their older sibling was placed in a residential institution. The conditions at home had been unstable; the parents had financial problems and substance use issues. The eldest child had told the authorities that it was not safe for the younger children to stay with the parents. At the time of the care order concerning the eldest child, the father was homeless and the mother had left to Spain, where she stayed for five months while the father remained in Finland with the children. The family were evicted from their home due to unpaid rent.

Five months after the first request, a new request was made as the child had sent a message to a family counselor whom the child had previously been in contact with, in which the child said that the parents continued to use a lot of alcohol and physically discipline the children. The child said they wanted to return to Finland. Five months after the request was sent to the Spanish CA, a response was received that the family could not be reached at the address given. Since there are no centralized registers in Spain, and the correct address was unknown, it was impossible to locate the family with the limited resources of the local child welfare workers and police. The address was then checked and corrected.

Three months later, the child contacted the local consulate. A new baby had been born in the family, but the parents continued their substance use, stayed out at night and were violent towards the children. The older children were often left alone with the baby, and one of the children was self-harming. Another request was made by the Finnish CA, requesting that urgent measures be taken by the Spanish authorities to protect the children. At this point it turned out that the Spanish authorities had made a home visit, in which the apartment was found to be unhygienic and untidy. An interpreter was needed because nobody in the family spoke Spanish.

Half a year later, the Spanish authorities visited the school and talked to the children again. According to the principal, the children were often absent unannounced. Ten months after the first request, one of the children was transferred to Finland and moved to live in a foster home. The younger siblings remained with the parents, but the older siblings continued to receive alarming messages and pictures from the younger siblings concerning their situation at home.<sup>77</sup>

It appears that the problems in the family had been accumulating for a long time, and that the Finnish authorities were aware of the instability and insecurity of the children's everyday life. The concerns were not reported to the Spanish local authorities even though the children had requested help and the authorities were aware of the parents' plans of moving to Spain with the children. Moreover, despite the children reaching out, no one stayed in touch with them regularly to communicate with them directly and assess their situation. This lack of reporting came across in other cases too.

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<sup>75</sup> Child Welfare Act, s 25.

<sup>76</sup> Ibid, s 25d.

<sup>77</sup> Case no 49.

‘Four children under the age of five were taken into care by the English authorities. The family had previously lived in Finland and had moved to England, where the youngest of the children was born. The English authorities requested information about the possible history that the family might have with the child protection authorities in Finland. According to the reply by the Finnish authorities, several child welfare notifications had been made about the children, and the family had been supported by the child welfare in several ways. The mother had then announced that the family was about to move to England. The Finnish authorities did not notify the English authorities of the family’s situation. Instead, the child welfare social worker sent the following letter to the mother: “A child welfare notification has been made about your children. We will not investigate your family’s need for family services or child welfare, because we do not have the grounds to prevent you from leaving Finland. It is the parent’s responsibility to ensure a non-violent environment for their children, and if your family is threatened with violence in England, you must contact the local child welfare authority. I urge you to contact your own designated social worker in the adult social services because there have been concerns about the situation of your family due to canceled appointments. If you would like to discuss the child welfare notification or have any questions, you can contact me”.’<sup>78</sup>

Sometimes it is sufficient that the child welfare authorities merely notify the authorities of the country where the child is resident and pass on the relevant information. As the jurisdiction to issue protective measures follows the habitual residence of the child, the active role of the authorities ends and new authorities step in after the child moves to another country. In practice, however, some of the analysed cases raise concerns as to whether both Finnish and foreign authorities interpret the change of jurisdiction the same way.

‘The mother of a toddler and two older children contacted the social services of the family’s hometown in Finland. The family had travelled abroad for a holiday and could not return because of Covid19 pandemic travel restrictions. The mother was experiencing a mental breakdown. The family had run out of money, and they were hungry and living in temporary accommodation hosted by a friend. The social welfare authorities requested through the CAs that the local social welfare authorities would check the circumstances of the family. The foreign CA reported that the authorities were unable to locate the family but that they were known to receive help from NGOs and charity organisations. In addition, the children could not register to school because they only had tourist visas. The Finnish child welfare authorities closed the case, and no further actions were taken.’<sup>79</sup>

In the case described above, it seems likely that after the relocation, the children fell into a gap of being perceived to belong neither to the jurisdiction of the Finnish authorities nor of the foreign authorities. The foreign authorities perceived the family as tourists and thus not to fall in their jurisdiction for the purposes of providing child protection or other welfare services. In the latter case it is likely that the authorities were not able to locate the child. In both cases, it seems that the authorities were not able to reach and visit the families and check the living conditions of the children. The concern remains that these children slip under the radar of support services and protection.

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<sup>78</sup> Case no 93.

<sup>79</sup> Case no 147.

## **Conclusions: positive obligations to issue protective measures in cross-border situations**

As Lamont has noted, the status of children who are or are at risk of being victims of abuse or neglect within their families is a poorly appreciated aspect of European family law.<sup>80</sup> Even though children have the right to protection when they move from one jurisdiction to another, the rules are sometimes unclear as to exactly what measures the authorities are obliged to take in transnational cases. The cases handled by the Finnish CA suggest that amongst the Finnish child welfare authorities, misunderstandings prevail about jurisdiction in cross-border child protection cases.

The CAs play a valuable role in securing children's rights in transnational situations: 'As a public authority', Lamont points out, 'they are obliged to take decisions and actions in relation to children with the child's best interests as their primary consideration under Article 24(2) of the Charter. Since central authorities' decision-making processes often involve children, this is an important obligation running throughout central authority practice'.<sup>81</sup> Before this potential can be realised, awareness needs to be raised at the level of local competent authorities. Even though some guidance as to the obligations of authorities to pass on information can be found in the practice of the CJEU,<sup>82</sup> it is crucial that the local authorities comprehend their obligations and the legal framework pertaining to transnational situations. This clearly requires investment into the training of local authorities and CAs.<sup>83</sup>

In Finland, currently no national guidelines are provided to social workers in child welfare concerning the legal framework in cross-border cases or transnational families more generally. This may result in a failure to fulfil the positive obligations to secure protection of the child if there is abuse or neglect in the family and the parents decide to relocate abroad. In some cases, the child protection measures were withdrawn even when a care order had been issued and the relocation of the child was wrongful. When a care order had not been issued but there were concerns about the well-being of the child, the relocation of the family abroad meant in some cases that no notification was made about the concerns over the well-being of the child to the authorities of the new country of residence. Considering the lack of guidelines and the workload of local child welfare authorities, the confusion concerning cross-border cases is understandable.

The rules established in the *Brussels IIter* and the 1996 Child Protection Convention mainly concern the duties of the state to take measures at the request of the CA of another Member State or contracting state. Before the Recast, only Article 36 of the 1996 Child Protection Convention laid out a general obligation to inform the authorities of another contracting state about the danger to which a child might be exposed.<sup>84</sup> *Brussels IIter* improves the situation to some extent by obligating the competent authority contemplating or having taken measures for the protection of the child to inform the competent authorities of the other Member State about the danger involved and the measures taken or under consideration to protect the child.<sup>85</sup> Hopefully, this *ex officio* obligation will raise awareness and improve the protection of children.<sup>86</sup>

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80 Lamont, above n 9.

81 Lamont, above n 7, 94.

82 *Family proceedings concerning A* (C-523/07) ECR I-02805, [2010] Fam 42; *Health Service Executive v SC and AC* (C-92/12) ECLI:EU:C:2012:255, [2012] 2 FLR 1040.

83 Lamont, above n 7.

84 Lamont, above n 59, 225.

85 Article 80(2).

86 Župan et al, above n 7.

The importance of private international law instruments should be more broadly recognised in the field of child protection and children's rights, as they generate content and substance for the concept of 'jurisdiction' in international human rights conventions and on the national level. As clear as it is that an unstable and harmful family environment is in breach of several human rights norms and rights of the child, and that the state has the positive obligation to protect children from circumstances that endanger their rights, for example, to well-being, physical and psychological integrity and development, it is also true that such obligations can only be imposed on states when the children in question are within the state's jurisdiction.<sup>87</sup> The definition of jurisdiction goes beyond the territory of the state; the Committee on the Rights of the Child, for instance, declared admissible several communications concerning requests for the repatriation of children of European nationalities, whose parents had allegedly collaborated with ISIL and who were being held in the Roj, Ain Issa and al-Hol camps, stating that under the Convention, states have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a state's jurisdiction to 'territory'. A state may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders.<sup>88</sup> Rules that define jurisdiction in cross-border cases should be considered essential in the definition of jurisdiction.

Finally, to state that the authorities merely lack knowledge or awareness of their obligations in cross-border child protection cases is an unanalytical simplification. By focusing the inquiry on the ways in which the state is understood, experienced, and reproduced in the diverse encounters of cross-border child protection, a more nuanced understanding can be reached concerning the reluctance of authorities in some cases to take measures when the child has relocated abroad. An examination of the relational modalities highlights 'differing normative concepts of what a state should be and how it should act and embody past experiences in structural environments that translate into contingent expectations for the future'.<sup>89</sup> These modalities are negotiated in the authorities' discretion as they draw boundaries of the state in deciding whether or not a case is their responsibility after the child has relocated abroad. In this process, their personal embeddedness within state hierarchies as well as within other (transnational) networks feeds back to the relational modalities and boundary work and is thus decisive for their practices and the decisions they make. These processes definitely merit more research, especially amongst the local authorities.

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87 UNCRC, Art 2; ECHR, Art 1. See the case of *HF and Others v France* (Application nos 24384/19 and 44234/20) 14 September 2022. The applicants argued that the decisions of France not to repatriate its nationals, the applicants' daughters and minor grandchildren, from the camps of Al-Hol and Roj in Syria, constituted violations of their Convention rights, especially their right not to be subjected to torture or inhuman or degrading treatment (Art 3) as well as their right to enter the territory of the state of which they are nationals (Art 3(2) of Protocol No 4). The court considered that the applicants' daughters and grandchildren did not fall within the jurisdiction of France in respect of the complaint under Art 3 of the Convention, but found them to be within the jurisdiction of France for the purposes of alleged violation of Art 3(2) of Protocol No 4, in accordance with Art 1 of the Convention.

88 Decision of 4 February 2021, para 8.6; UN Committee on the Rights of the Child, decisions of 2 November 2020 and 4 February 2021 (CRC/C/85/D/79/2019, CRC/C/85/D/109/2019, CRC/C/86/D/R.77/2019).

89 Thelen et al, above n 19.