

## Impact case study (REF3b)

<b>Institution:</b> University of Dundee
<b>Unit of Assessment:</b> 20 Law
<b>Title of case study:</b> Protection of Children in Private International Law
<p><b>1. Summary of the impact</b></p> <p>The protection of children in international law requires clear rules identifying: the country in which disputes concerning children should be litigated (jurisdiction); which country's law should be applied to resolve those disputes (choice of law); and when effect should be given to the orders of foreign courts (recognition and enforcement). These Private International Law issues are central to the research highlighted in this Case Study, which has impacted upon:</p> <ul style="list-style-type: none"> <li>• the implementation of an international convention, and drafting of an associated statutory instrument;</li> <li>• the elaboration of judicial decisions;</li> <li>• the uniform interpretation of international instruments at a global level through the INCADAT database; as well as</li> <li>• the focus and content of judicial training.</li> </ul>
<p><b>2. Underpinning research</b></p> <p>In the current era of globalisation the mobility of modern families means that disputes between parents, or the protection of children by the State, increasingly have international dimensions. The research of Peter McEleavy (Professor of International Family Law, since 2006) and Aude Fiorini (Lecturer at Dundee Law School since 2007 and Senior Lecturer, since 2012) on the internationalisation of child protection has been developed across a broad range of publications, including monographs, articles in leading journals, book chapters and research papers. The detailed practical references within their legal analysis have ensured that their research is of particular value to judges and legal professionals.</p> <p><b>International Child Abduction</b></p> <p>McEleavy's work on the protection of children in private international law began through his doctoral research, which was published as an OUP monograph in 1999. This has been extremely influential in the interpretation of the 1980 Hague Child Abduction Convention and has been cited by courts worldwide. In <i>Mozes v. Mozes</i> 239 F.3d 1067 (9<sup>th</sup> Cir 2001) the US Court of Appeals for the Ninth Circuit described the work as "<i>the leading treatise on the Convention.</i>" The impact of the 1999 monograph is on-going and leading appellate courts across the globe have continued to rely upon it during the current REF cycle, including the United Kingdom Supreme Court: <i>Re E. (Children) (Abduction: Custody Appeal)</i> [2011] UKSC 27, [2012] 1 AC 144.</p> <p>More recently, McEleavy has explored the topical issues of the views of abducted children (<i>CFLQ</i> 2008), communication between judges in abduction cases (<i>IJPL</i> 2012) and whether a Protocol should be elaborated to reinforce and renew the 1980 Child Abduction Convention (<i>IFL</i> 2010). Fiorini has investigated the significant and controversial issue of the habitual residence of new-born children (<i>ICLQ</i> 2012).</p> <p><b>EU and the Hague Conference – European and International Family Law</b></p> <p>The decision of the EU to address issues of international family law, and the inter-relationship of the work of the EU and that of the Hague Conference on Private International Law, has been a particular theme of McEleavy and Fiorini's work on the protection of children. In 2007 (<i>Intersentia</i>) McEleavy evaluated the impact of Council Regulation 2201/2003 on United Kingdom law. In 2010 (<i>ICLQ</i>) he investigated the impact of the EU decision that Member States ratify the 1996 Hague Convention on the Protection of Children. The latter study also analysed the inter-relationship of</p>

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the Convention with the existing EU rules on the protection of children contained in Council Regulation 2201/2003.

In 2009 and 2012 he prepared papers for the UK government, as well as a Practice Guide, all on the implementation and domestic effect of the 1996 Hague Convention. In 2012 Fiorini was commissioned to write a briefing paper on how future EU rules on family law should be developed (European Parliament 2013), building on her work in 2008 and 2010 (*ICLQ*). In 2013 she was instructed by the European Commission to advise the government of Montenegro on how to translate the EU civil law *acquis* into Montenegrin legislation.

**Core Legal Texts**

The culmination of McEleavy's work on the protection of children has been in the extensive chapters he has written for the foremost Scottish (Anton) and English (Dicey, Morris and Collins) texts on private international law. In these he has considered in detail the impact of regional and international private international law initiatives as regards the protection of children on all aspects of Scottish and English law.

**3. References to the research****Books****McEleavy**

*Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> ed., Sweet & Maxwell, London, 2012; (Lord Collins of Mapesbury *et al.*)

*Anton's Private International Law*, 3<sup>rd</sup> ed. SULI, W.Green, Edinburgh, 2011, (with P. Beaumont)

**Article in Refereed Journals****Fiorini**

'Habitual Residence and the Newborn - A French Perspective' (2012) 61 *International and Comparative Law Quarterly* 530-540

**Book Chapter****McEleavy**

'Articles 47 – 52' in *European Commentaries on Private International Law. Brussels II bis Regulation* in P Mankowski & U Magnus (eds.), Sellier, München, pp. 387 – 413

**European Parliament Research Paper****Fiorini**

'Which Legal Basis for Family Law: The Way Forward?', European Parliament, 2013: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=83570>

**United Kingdom Government Practice Guide****McEleavy**

'The 1996 Hague Convention Practice Guide', Ministry of Justice, February 2013: <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/international-child-abduction-and-contact-unit/1996-hague-convention-guide.pdf>

**4. Details of the impact**

The impact of McEleavy and Fiorini's work on the protection of children in private international law may be considered under two headings:

(1) General contribution to promoting understanding and best practice in the application of core regional and international instruments within the legal community, at home and abroad; and

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(2) Specific contributions to the implementation of legislative initiatives in domestic law and the resolution of controversial legal disputes.

**General Impact**

McEavey and Fiorini are editors of the **International Child Abduction Database** ([www.incadat.com](http://www.incadat.com)) for the Hague Conference on Private International Law (the only intergovernmental organisation exclusively focussed on finding solutions to problems of private international law). McEavey and Fiorini prepare summaries in English and French of key judicial decisions dealing with cases of international child abduction, as well as detailed legal analysis commentaries. INCADAT has helped promote the uniform interpretation of the Convention amongst the 90 States Parties and has been relied upon by courts, legal practitioners and scholars across the world. See: Corroborating Evidence 5A & 5C.3.

As experts for the **TAIEX office of the Directorate-General Enlargement of the European Commission**, McEavey (since 1999) & Fiorini (since 2004) have instructed judges from EU candidate countries, new Member States and neighbouring countries (Albania, Bosnia, Malta, Poland, Romania, Turkey, Ukraine – McEavey; and Albania, Bulgaria, Croatia, FYROM, Malta, Montenegro, Serbia, Turkey, Ukraine – Fiorini) on the role and application of international and regional instruments on the protection of children. Both have provided training to judges and prosecutors on aspects of international child abduction at the behest of the **Russian Federation Central Authority** (2011/12) for the operation of the 1980 Convention (the Ministry of Education and Science), while Fiorini has given advice to the latter on the Russian implementing legislation (presently a draft bill). In 2011 McEavey's expertise in child abduction law led to him being invited to join the HELP working group of the **Council of Europe** whereby a pilot on-line distance learning course on human rights law in family matters was created for European judges. McEavey has provided other ad hoc forms of training, including to: the Senators of the College of Justice, Scotland's most senior judges, for the Judicial Studies Committee (Edinburgh 2012); Commonwealth family law judges (Windsor 2010); specialist family law barristers and solicitors on behalf of his own Chambers, 1 Garden Court (London, 2006, 2010, 2011) and to the European Law Academy – ERA (Trier, 2011). Through these activities McEavey and Fiorini have not merely disseminated their research to a diverse specialist audience, but have assisted in promoting understanding and best practice in the application of key international and regional instruments which seek to further the protection of children in private international law. See: Corroborating Evidence 5A & 5C.4.

**Specific Impacts**

In 2009 McEavey was instructed by the Ministry of Justice to advise on the implementation of the 1996 Hague Convention on the Protection of Children into the domestic law of England and Wales. The advice McEavey provided had a direct and crucial impact on the drafting of the associated statutory instrument, the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 (SI 2010/1898). For example, he discovered that the failure of the EU to adapt the parallel EU rules in Council Regulation 2201/2003 for co-existence with the 1996 Hague Convention, would have led to a partial application of the choice of law rules in the latter instrument. This led the Parliamentary draftsman to extend the scope of application of the choice of law rules in the 2010 Regulations, r. 7. See: Corroborating Evidence 5C.1.

In 2012 McEavey was further commissioned by the Ministry of Justice to draft a Practice Guide for judges and practitioners on the 1996 Hague Convention. See: Corroborating Evidence 5C.1.

In late 2012 Fiorini's work on the development of EU family law (*ICLQ* 2008, 2010) led to her being commissioned by the European Parliament to draft a briefing paper on how future EU rules on family law, including as regards children, should be developed. She twice addressed EP Committees on this topic in 2013. Her advice to the government of Montenegro in 2013 assisted in the formulation of Chapters 23 and 24 of the Montenegrin Action Plan in the context of accession

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negotiations with the European Union. See: Corroborating Evidence 5C.5.

McEleavy's expertise in the protection of children in private international law, led to him giving evidence to the Irish High Court as to whether Council Regulation 2201/2003 could apply to cross-border cases involving the detention of children for the purpose of their receiving specialist therapeutic treatment. He subsequently advised the Irish Health Service Executive in advance of an urgent preliminary ruling application before the Court of Justice of the European Union (CJEU), and was a member of the HSE legal team at the oral hearing. McEleavy's assessment, given in written and oral evidence to the High Court (January 2012), that Council Regulation 2201/2003 could apply in cases involving deprivation of liberty, was ultimately followed by the CJEU (April 2012). See: Corroborating Evidence 5C.2.

**5. Sources to corroborate the impact**

**A** McEleavy's work within *Anton's Private International Law*, 3<sup>rd</sup> ed. has been cited by the Court of Session in Scotland to assist in the interpretation of the concept of habitual residence, as used in the 1980 Hague Convention, see: *P v P* [2012] CSOH 121, 2012 G.W.D. 25-524.

**B** Examples of courts referring to the INCADAT website to assist in their interpretation of provisions of the 1980 Hague Convention include:

**Scotland:** *Z Petitioner*, [2009] CSOH 136; 2010 S.L.T. 285; 2009 Fam. L.R. 162 at [14]

**England & Wales:** *Cannon v Cannon* [2004] EWCA Civ. 1330, [2005] 1 W.L.R. 32 at [30]

**Court of Justice of the European Union:** *Proceedings Brought by A* (C-523/07) [2010] Fam. 42 at [31]

**C Referees**

- 1 A lawyer at the Ministry of Justice, London can corroborate the impact of McEleavy's research on the implementation of the 1996 Hague Convention in the United Kingdom.
- 2 A senior Irish Barrister can explain the central role of McEleavy's research in the determination of the Irish Health Service Executive litigation on the detention of children overseas for the purposes of obtaining specialist therapeutic treatment.
- 3 The First Secretary, Hague Conference on Private International Law, can speak to the impact of McEleavy & Fiorini's research on the development of the INCADAT database of child abduction case law.
- 4 The Head of Section Justice and Home Affairs can corroborate the impact of McEleavy & Fiorini's research on training of judges and prosecutors across Europe on behalf of the TAIEX Office of the European Commission.
- 5 The Ambassador of Montenegro to the French Republic can corroborate the impact of Fiorini's research on the development of Montenegrin policy with regard to the Action Plan on Chapters 23 (Judiciary and Fundamental rights) and 24 (Justice, Freedom and Security) for the accession negotiations between the EU and Montenegro.