No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

HENRY SETRIGHT QC
MARCUS SCOTT-MANDERSON QC
DR. MARILYN FREEMAN
JACQUELINE RENTON
4 Paper Buildings
Temple
London EC4Y 7EX

ROBERT A. LONG, JR.
Counsel of Record
MARK W. MOSIER
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Reunite International Child Abduction Centre ("Reunite") is an English-based independent non-governmental organization with charitable status.[1] Reunite was established in 1986, the year in which the Hague Convention on International Child Abduction became effective in England and Wales following its incorporation into English law by the Child Abduction and Custody Act 1985. Reunite is the leading UK charity specializing in international parental child abduction.

Reunite is committed to raising the profile of international parental child abduction on the international stage. It regularly organizes and attends conferences across the world to promote its work, raises awareness of international parental child abduction, and fosters close working relationships with governmental departments and non-governmental organizations, to better enable quick resolution in cases of child abduction, that focus on the best interests of children. In England Reunite works closely with the central government, in particular with the Ministry of Justice, the Foreign & Commonwealth Office and the Home Office, and provides specialist training for

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

government departments, lawyers, academics, the police, and others who have a professional interest in international parental child abduction. Reunite also administers at the House of Commons the All Party Parliamentary Group on Child Abduction. Reunite is partly funded by the Ministry of Justice and the Foreign & Commonwealth Office, and also receives funding for specific projects from charities and trusts, as well as raising independent funds.[2]

Reunite is not advancing or seeking to advance a particular case cause or outcome in these proceedings. In submitting this brief, Reunite seeks to offer assistance and information to the Court with particular reference to the current position in English law with regard to the issue before the Court, namely whether a *ne exeat* clause confers a "right of custody" under the Hague Convention on International Child Abduction. *See generally El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (In interpreting treaties, the Court may

[2] Reunite's counsel Henry Setright QC, Marcus Scott-Manderson QC, Dr. Marilyn Freeman, and Jacqueline Renton are members of the English Bar and specialists in the field of international family law. Henry Setright and Marcus Scott-Manderson were respectively Lead and Junior Counsel for the Respondent in the definitive case of *In re D (Abduction: Rights of Custody),* (2007) 1 A.C. 619 (H.L. 2006), in the UK House of Lords. Dr. Freeman is Reader in Family and Child Law and Co-Director of the Centre for Family Law and Practice at London Metropolitan University, which is dedicated to both academic and practical aspects of Family Law and, in particular, international family law. Jacqueline Renton worked at the International Child Abduction and Contact Unit, the Central Authority for England and Wales, before entering private practice.

consider "'the postratification understanding of the contracting parties'") (citation omitted).

SUMMARY OF ARGUMENT

1. The House of Lords ruling in *In re D (Abduction: Rights of Custody),* (2007) 1 A.C. 619 (H.L. 2006), was based on a wide purposive interpretation of the policy and language of the Hague Convention 1980 and a consideration of the preceding position of English and Scottish law as balanced against the article 3 jurisprudence of the U.S. and other signatories to the Hague Convention 1980. The Speech of Baroness Hale makes clear[3] that this was a decision made in accordance with what appears to be the majority of the Common Law world at the time and it is a position which continues to this day.

2. The relevant development of European Union and Strasbourg Human Rights jurisprudence (which relates to European states, the majority of which do not maintain a Common Law jurisdiction, but can be described as Civil Law jurisdictions) seems to reinforce what the House of Laws observed to be this Common Law majority approach.

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[3] *In re D*, 1 A.C. at 635, ¶ 37.

ARGUMENT

I. English Law Interprets "Rights of Custody" Under the Hague Convention To Include a *Ne Exeat* Right.

A. The House of Lords' Decision in *In re D*

The position in English[4] jurisprudence on the scope of "rights of custody," pursuant to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670 (herein referred to as the "Hague Convention 1980"), is expressed in the decision of the House of Lords in the case of *In re D (Abduction: Rights of Custody)*, (2007) 1 A.C. 619 (H.L. 2006).[5] This decision

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[4] There are a number of separate constituent United Kingdom legal jurisdictions – including (a) England and Wales, (b) Scotland, and (c) Northern Ireland – all of which have their own statutory and judge-made domestic law. The House of Lords is the supreme court of appeal for all these jurisdictions. In this Brief references to "England" or "English" in the context of jurisdiction or domestic law should be read as including "Wales" or "Welsh."

[5] The five Law Lords who sat in judgment in *In re D* were unanimous in the decision to allow the appeal. However, *In re D* did not just determine the scope of "rights of custody," pursuant to article 3 of the Hague Convention 1980 and only the speeches of Lord Hope of Craighead and Baroness Hale of Richmond address the article 3 question. A third Law Lord, Lord Brown of Eaton-Under-Heywood, states he is in respectful agreement with the opinions of Baroness Hale of Richmond and Lord Hope of Craighead "on all issues," 1 A.C. at 648, ¶ 84, and a fourth Law Lord, Lord Nicholls of Birkenhead, states he is in agreement with Baroness Hale of Richmond (albeit without the specificity as to "all issues"). *Id* at 624, ¶ 1. The fifth Law Lord, Lord Carswell, accepted the cogency of the "rights of (continued…)

establishes that a *ne exeat* right in English domestic law amounts to a "right of custody" within the meaning of article 3 of the Hague Convention 1980. This right is expressed by Baroness Hale as a "right of veto": "[I]n common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the common law world, I would hold that a right of veto does amount to 'rights of custody' within the meaning of article 5(a)." *Id.* at 635, ¶ 37.

The Hague Convention 1980 clearly differentiates between "rights of custody" and "rights of access." Article 5 of the Hague Convention 1980 acts as a definitional aid to article 3 of the Hague Convention 1980.

In her discussion of the difference between "rights of custody" and "rights of access" in *In re D*, Baroness Hale refers to the Explanatory Report of Professor Elisa Pérez-Vera (April 1981):

> It is quite clear from the Explanatory Report of Professor Elisa Pérez-Vera (April 1981) that the original parties to the Convention drew a deliberate distinction between rights of custody and rights of access and did not intend that mere rights of access should entitle a parent to demand the summary

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custody" arguments posited in the speeches of Baroness Hale of Richmond and Lord Hope of Craighead but reserved his position on the issue; he did not disagree with the views of Baroness Hale of Richmond and Lord Hope of Craighead. *Id* at 646, ¶ 74.

> return of the child. As Professor Pérez-Vera pointed out, such an approach would ultimately lead to "the substitution of the holders of one type of right by those who held the other."

1 A.C. at 631, ¶ 25 (quoting Professor Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 65 (April 1981)).

The Respondent in *In re D* submitted that the aims of the Hague Convention are directed at preventing the harmful effects of international child abduction: the contention was made that the Hague Convention is a living instrument. It was further contended that the Convention relied for its effectiveness on a broad, purposive and robust interpretation.[6] Reference was made[7] to the case of *In re D (Abduction: Custody Rights)*, (1999) 2 F.L.R. 626, where Stephen Brown, the President of the Family Division, was confronted with the position that the law of Zimbabwe, being the law of the state of habitual residence, gave all custody rights to the mother on parental separation. It was argued that this meant that the removal of the child by the mother was not wrongful in Hague Convention terms. The President's decision was to the effect that an overly technical or restrictive interpretation of the domestic law of the State of the habitual

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[6] As summarized in the note of submissions before the House in the Law Report.

[7] In the written case for the Respondents as lodged with the House prior to the oral hearing.

residence would effectively negate the working of the Hague Convention. *Id.* at 629-30. He cited with approval the words of Waite LJ:

> The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

Id. (citing *In re B (A Minor) (Abduction)*, (1994) 2 F.L.R. 249, 260).

In his consideration of the language of article 5, Lord Hope of Craighead states that the phrase "child's place of residence" must be seen in the context of the Hague Convention 1980 being an international Convention designed to regulate cross-border movement of children. *In re D*, 1 A.C. at 626, ¶ 10. Accordingly, the word "place" should include

the country of the child's residence, as well as the location within a country and thus a *ne exeat* right can amount to a "right of custody."[8]

Baroness Hale makes clear in *In re D* that the quality of a parent's relationship with a child should not be a consideration for a court when seized of a Hague Convention 1980 application (save where issues of welfare are considered within the framework of the Convention.) 1 A.C. at 634-35, ¶ 36. The quality of the relationship is only to be assessed (if necessary) upon the requesting state having determined the Hague Convention 1980 application. Further, Baroness Hale observes:

> It would, at the very least, be an odd result if a Hague Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the

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[8] The Petitioner unsuccessfully argued that a "right of custody" required a positive right to choose a child's place of residence, not a negative right to prevent a move as in most cases the abductor was the child's primary caregiver and therefore, given the need of the child for a secure home with a competent and caring parent, the court ought not too readily order a summary return because the other parent has a right a veto. *See TB v. JB (Abduction: Grave Risk of Harm)*, (2001) 2 F.L.R. 515, 526-27, ¶¶ 43-44 (C.A.) (Eng.). Further, Baroness Hale, by virtue of accepting that a *ne exeat* right amounts to a "right of custody," also rejected the Petitioner's contention as article 5 stipulates: "rights of custody '*shall include*' the right to determine the child's place of residence" it is not enough for a parent to simply have a *ne exeat* right. *In re D*, 1 A.C. at 633-35, ¶¶ 32-37 (emphasis added).

> return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country.

Id.

It is important to note that Baroness Hale places a limitation on the scope of the "right of veto" by stipulating that a "potential right of veto" could not amount to a "right of custody" because "to hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' altogether." *Id.* at 635, ¶ 38.

B. Past English and Scottish Jurisprudence

In *In re D*, the House of Lords surveyed past English and Scottish article 3 jurisprudence. Baroness Hale makes clear that since the case of *C v. C (Abduction: Rights of Custody)*, (1989) 1 W.L.R. 654 (Eng. C.A.), the English courts have held that a *ne exeat* right amounts to a "right of custody." *In re D*, at 633, ¶ 31.

C v. C was followed in *In re W (Minors) (Abduction: Father's Rights),* [1999] Fam. 1; *In re B (A Minor) (Abduction: Father's Rights)*, (1998) 3 W.L.R. 1372. In *In re W*, Mrs. Justice Hale (as she then was) made clear that the court's interpretation of "rights of custody" was an interpretation commonly held by other signatories to the Hague Convention 1980. Further, Lord Justice Wall made clear in *In re P (Abduction Consent)*, [2004] EWCA Civ 971, that *C v. C* and subsequent decisions in England to the same effect were correct. In *J,*

Petitioner, [2005] CSIH 36, 2005 GWD 15-251 (Scot.), the Inner House of the Court of Session in Scotland held that a *ne exeat* right amounts to a "right of custody," the court having applied *C v. C* and *In re B*.

C. The Article 3 Jurisprudence of the United States and Other Countries

In *In re D*, Lord Hope of Craighead notes the academic opinion of Professor Silberman, who is highly critical of the approach that the courts in the United States have considered the scope of "rights of custody":

> As I have indicated, it is important to separate [Hague] Convention concepts from domestic analogues found in particular judicial systems. The term "rights of custody" is an important concept within the meaning of the Convention and rests on an autonomous definition that triggers the return remedy. Contracting States have agreed to those situations in which they will order return – i.e. a breach of "rights of custody" – and domestic definitions of custody rights are not necessarily the equivalent of the concept created by article 5 (a).
>
> Recent decisions by courts in the United States have been the most blatant offenders of this important principle by imposing parochial domestic notions of custody on the Convention concept,

> effectively undermining the goals and objectives of the Convention.

In re D, at 628, ¶ 15 (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U. C. Davis L. Rev. 1049, 1069 (2005)).

The starting point of the House of Lords in its consideration of the article 3 jurisprudence of the United States was the decision in the case of *Croll v. Croll***,** 229 F.3d 133 (2d Cir. 2000). The House of Lords stated that the majority in *Croll* based its determination on:

> the deliberate distinction drawn in the Convention between rights of custody and rights of access, the lack of international consensus on the issue, and the published views of Professor A.E. Anton, chair of the [Hague] Conference Commission which had drafted the Hague Convention (1981) 30 ICLQ 573, 546.

In re D (Baroness Hale), 1 A.C. at 633-34, ¶ 33.[9]

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[9] Professor A.E. Anton was the chair of the Hague Conference Commission which drafted the Hague Convention. Writing in 1981 he appears to have suggested that a *ne exeat* right might not be the basis of an abduction – this suggestion having been raised by a Canadian delegate at the final diplomatic conference on the Hague Convention in October 1980 and not pursued by the conference.

In *In re D*, Baroness Hale comments at 634, ¶ 34 that the international case law used by the majority in *Croll* to support their interpretation of "rights of custody" was two Supreme Court of Canada decisions – namely, *Thomson v. Thomson* [1994] 3 S.C.R. 551 (Can.), and *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 (Can.). *In re D*, 1 A.C. at 634, ¶ 34. In *Thomson*, the court drew a distinction between a *ne exeat* clause in an interim custody order and a final custody order; the former said to invest a court with rights of custody (the *ne exeat* clause having been placed in the interim custody order so as to preserve the court's jurisdiction until there is a final custody determination) but the latter said to not invest a parent with rights of custody (the *ne exeat* clause having usually been inserted into a final custody order so as to ensure permanent access to the non-custodial parent and thus granting the parent a "right of access" not a "right of custody"). *Thomson* is followed by *D.S.* However, both cases' commentary on *ne exeat* clauses were only *obiter dictum* observations.

The court also noted that the majority's decision in *Croll* was followed in the cases of *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), but in the latter case of *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the court unanimously rejected the reasoning of the majority in *Croll* and supported the dissent of then-Judge Sotomayor on the basis that the court's construction of the *ne exeat* right thwarts the purpose of the Hague Convention 1980. *Furnes* makes clear that welfare considerations were not altered by virtue of

accepting that a *ne exeat* clause amounts to a right of custody but simply ensured that the pre-abduction, jurisdiction status quo would be maintained—namely, a preservation of the requesting state's welfare jurisdiction—if a summary return of a child was ordered by the court in the requested state, pursuant to article 12 of the Hague Convention 1980. The last U.S. case referred to is *Bader v. Kramer*, 445 F.3d 346 (4th Cir. 2006), which cites *Gonzalez* and *Fawcett* (which followed *Croll*) without disapproval.

In *In re D*, Baroness Hale made clear that apart from the aforementioned Canadian cases, known opinion in the common law world was united in an acceptance that a *ne exeat* right is a "right of custody" within the meaning of article 3 of the Hague Convention 1980. 1 A.C. at 634, ¶ 35. The following case law was used to exemplify this point:

- The Constitutional Court of South Africa in *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC) (S. Afr.), had approved the dissenting opinion of then-Judge Sotomayor in *Croll*, reasoning that the majority in *Croll* did not accord with the majority of international jurisprudence;

- The full court of the Family Court of Australia in *J.R. v. M.R.*, (unreported) (22 May 1991) (Fam. Ct.) (Austl.), had followed the English decision of *C v. C*, as had Judge Lindemayer at first instance in *Director General, Department of Families, Youth and Community Care v. Hobbs* (1999) FamCA 2059 (Austl.);

- The Israeli High Court in A 5271/92 *Foxman v. Foxman* [1992] IsrSC (unreported) (Isr.), held that rights of custody should include a *ne exeat* right;

- The Court of Appeal in New Zealand in *Gross v. Boda*, [1995] N.Z.F.L.R. 49 (C.A.) (N.Z.), and *Dellabarca v. Christie*, [1999] N.Z.F.L.R. 97 (C.A.) (N.Z.), had gone further than the other states by declaring that a "right of access" can amount to a "right of custody."

It is important to note that while the House of Lords in its judgment in *In re D* explicitly balanced the jurisprudence of the United States against five other countries' "rights of custody" jurisprudence, the Law Lords also had before them documentary material which included all the article 3 case law found on the INCADAT website[10] and responses from

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[10] At the time of *In re D*, the INCADAT (International Child Abduction Database) revealed the following case law in respect of "rights of custody": *A.J. v. F.J.*, [2005] CSIH 36 (Scot.); *Ministere Public c. M. B*, Courd'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990)); *Gross v. Boda*, [1995] N.Z.F.L.R. 49 (N. Z.); *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 (Can.); *Thorne v. Dryden-Hall*, [1997] 28 R.F.L. (4th) 297 (Can.); *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); Oberlandesgericht Celle [OLG] [Court of Appeal] Aug. 17, 1999, 18 UF 34/99 (F. R. Ger.); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999); *W.P.P v. S.R.W*, [2001] I.L.R.M. 371 (Ir.); *Hunter v. Murrow*, [2005] E.W.C.A. (Civ) 976 (Eng. & Wales); *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004); *In re V-B (Abduction: Custody Rights)*, [1999] 2 F.L.R. 192 (Eng. & Wales); *Dellabarca v. Christie*, [1999] (continued…)

the Central Authorities in countries that are signatories to the Hague Convention 1980 who had been asked by the Respondent to consider, *inter alia*, the meaning of "rights of custody" within their jurisdiction.[11]

Baroness Hale also recognized in *In re D* the potential importance of developments in the jurisprudence of the European Union through Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Revised Regulation) (herein referred to as "Brussels II Revised") and Strasbourg Human Rights jurisprudence – through the European Convention on Human Rights 1950: *see* 1 A.C. at 642-44, ¶¶ 61, 63-65.

II. The English Interpretation of Article 3 of the Hague Convention In the Context of Other International Obligations.

A. Article 3 and the Brussels II Revised Regulation

The Brussels II Revised Regulation is a European Union regulation incorporated into the law

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N.Z.F.L.R. 97 (N. Z.); Oberlandesgericht Koln[OLG] [Court of Appeal] Apr. 12, 2001, 21 UF 70/01 (F.R. Ger.).

[11] The following Central Authorities were approached: Ireland, Germany, Denmark, Italy, New Zealand, Hong Kong, Isle of Man, Portugal, Scotland, Sweden, Canada (Province of Manitoba), Finland, Lithuania, Bosnia, Falkland Islands, Holland, South Africa, Iceland.

of all European Union member states except Denmark. Article 2 (11) of the Brussels II Revised Regulation states:

> the term 'wrongful removal or retention' shall mean a child's removal or retention where:
>
> (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
>
> (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

Brussels II Revised Regulation (EC) No. 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, art. 2 (11), 2003 O.J. (L 338) 1.

The Practice Guide for the Application of the New Brussels II Regulation, which is advisory and not binding,[12] comments in Part VII (The Rules on Child Abduction), Section 2.1 that:

> The judge shall first determine whether a "wrongful removal or retention" has taken place in the sense of the Regulation. The definition in Article 2 (11) is very similar to the definition of the 1980 Hague Convention (Article 3) and covers a removal or retention of a child in breach of custody rights under the law of the Member State where the child was habitually resident before the abduction. However, the Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply.

Practice Guide for the Application of the New Brussels II Regulation, pt. VII, ¶ 2.1 (Jun. 1, 2005).

[12] The Practice Guide was drawn up by the European Union Commission services in consultation with the European Judicial Network in civil and commercial matters.

The interrelationship of the Brussels II Revised Regulation with the Hague Convention is governed by article 60 of the Regulation: "In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation."

Article 60 then sets out five Conventions over which the Brussels II Revised Regulation shall take precedence, one of those Conventions being the Hague Convention 1980.

A reading of Recitals 17 and 18 and articles 11 and 12 of the Brussels II Revised Regulation reveals that the Brussels II Revised Regulation is intended to be a supplement to, not replacement for the Hague Convention 1980. Indeed, the Practice Guide comments in Part VII (The Rules on Child Abduction), preamble 1 state that:

> The Hague Convention . . . which has been ratified by all Member States, will continue to apply in the relations between Member States. However the 1980 Hague Convention is supplemented by certain provisions of the Regulation, which come into play in cases of child abduction between Member States. The rules of the Regulation prevail over the rules of the Convention in relations between Member States in matters covered by the Regulation.

The objectives of the Hague Convention 1980 and the Brussels II Revised Regulation in matters of international child abduction appear to be the same.

The Brussels II Revised Regulation's definition of "rights of custody," as defined by article 2 (11) of the Brussels II Revised Regulation 2003 appears to concur with the definition of "rights of custody" provided by the House of Lords in *In re D*. However, it is important to note that the House of Lords in that decision did not contemplate whether or not article 2 (11) explicitly posits that a *ne exeat* clause is a "right of custody" as such deliberation was superfluous given that at the time Romania was not a Member State of the European Union. Further, this issue has not been explicitly considered by an English court since *In re D*.

B. Article 3 and European Human Rights Jurisprudence

There has been an increasing body of case law from the Strasbourg-based European Court of Human Rights in which stress is placed upon the positive obligations on States that are signatories to the European Convention on Human Rights 1950, in both international child abduction and trans-frontier contact/access cases, as a result of article 8 of the European Convention on Human Rights 1950 (the right to respect for a private and family life).

The Strasbourg Human Rights jurisprudence impacts on Hague Convention 1980 decisions in English law in two ways: firstly, directly *via* the

Human Rights Act 1998[13] and secondly, in any application of Brussels II Revised Regulation principles due to the growing acknowledgment in European Union jurisprudence (and vice versa) of Strasbourg Human Rights jurisprudence.

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[13] Section 3(1) of the Human Rights Act 1998 states that primary and subordinate United Kingdom (England, Wales, Scotland and Northern Ireland legislation), so far as it is possible, should be read and given effect in a way which is compatible with the European Convention on Human Rights 1950. However, section 4(2) of the Human Rights Act 1998 states that a court, if satisfied that a provision is incompatible with a Convention right, may make a declaration of incompatibility.

An article 20 "human rights defence" is yet to be successfully presented by a Defendant in an English court. Article 20 is not incorporated into the Child Abduction and Custody Act 1985 (the English statute which incorporates the Hague Convention 1980 into domestic English law) but in *In re D*, Baroness Hale made clear that:

> The Human Rights Act 1998 has now given the rights set out in the European convention legal effect in this country. By virtue of section 6 of the 1998 Act, it is unlawful for the court is bound to give effect to the Convention rights in Hague Convention cases just Act, it is unlawful for the court, as a public authority, to act in a way which is incompatible with a person's Convention rights. In this way, the court is bound to give effect to the Convention rights in Hague Convention cases just as in any other. Article 20 has been given domestic effect by a different route.

In re D, 1 A.C. at 643, ¶ 65.

Article 8 of the European Convention on Human Rights 1950 places on Member States a positive obligation to have measures and legal safeguards to support the right to a family life. *See, e.g., Marckx v. Belgium*, 2 Eur. H.R. Rep. 330 (1979-1980); *Neulinger & Shuruk v. Switzerland*, App. No. 41615/07, Eur. Ct. H.R. (Jan. 8, 2009).

By accepting that a *ne exeat* right amounts to a "right of custody," it could be argued that a State's ability to protect and safeguard family life, pursuant to article 8 of the European Convention on Human Rights 1950 is strengthened.

CONCLUSION

Reunite submits this brief to offer information and assistance to the Court. It takes no position on the proper disposition of this case.

Respectfully submitted,

HENRY SETRIGHT QC
MARCUS SCOTT-MANDERSON QC
DR. MARILYN FREEMAN
JACQUELINE RENTON
4 Paper Buildings
Temple
London EC4Y 7EX

ROBERT A. LONG, JR.
Counsel of Record
MARK W. MOSIER
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

September 2009

Counsel for Amicus Curiae