1. Introduction

Mutual trust between Member States is a fundamental requirement for both the recognition and the enforcement of judgements across Member States. This common understanding between judicial authorities is central to the functioning of the European Union (EU) and exists between states when the ‘(…) respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union Level, in particular in the Charter of Fundamental Rights’. However, it is arguable that this ‘cornerstone of judicial cooperation’ has been put at risk following recent European jurisprudence in the case of Aguirre Zarraga. This article will demonstrate that in the absence of a power of review by the court of enforcement, a strict interpretation of Brussels IIbis Regulation risks eroding the trust between the courts of the Member States. In addition, it will consider that whereas the principle of mutual trust, in theory, offers a non-rebuttable presumption of equivalent human rights protection, the outcome of this case suggests otherwise.

2. Aguirre Zarraga

A. The Facts

The couple at the centre of the case, Aguirre Zarraga and Simone Pelz, were married in Spain in 1998 and had a daughter, Andrea, in 2000. Following the couple’s separation in 2007, the Spanish courts provisionally awarded custody to the father and the mother returned home to Germany. During the summer of 2008, Andrea...
travelled to Germany to stay with her mother. However, when she was not returned to Spain, the father applied for her return under the Hague Convention on the Civil Aspects of International Child Abduction (the ‘Abduction Convention’). This application was refused by the German courts on the basis of Article 13(b) of the Abduction Convention as Andrea was ‘categorically opposed to return’. The decision was, in part, founded upon the opinion of an expert witness, who stated that Andrea’s views should be taken into account in light of her age and maturity.

The father sought to challenge the German court’s judgement. During subsequent custody proceedings in Spain, the Spanish court attempted to obtain ‘fresh expert opinion’ and a date was set for Andrea’s evidence to be heard there. However, following the imposition of a condition upon Andrea and her mother that they would not be free to leave Spain after the hearing, Andrea failed to attend court in Spain and was also denied permission to be heard via videoconference. In December 2009, the Spanish Court awarded sole custody to Aguirre Zarraga, requiring Andrea’s return to Spain. Following the award of sole custody, a series of appeals were initiated. The first appeal was made by the mother, on the grounds that Andrea should have been heard by the Spanish court. The Spanish court then certified their December 2009 decision in accordance with Article 42 of the Brussels IIbis Regulation, leading the mother to request non-recognition of the judgement by the German courts, which was duly granted. The father, in turn, appealed this decision, which is where the difficulties began.

B. The Judgements

As a requirement of Brussels IIbis, courts have a duty to hear the child and in situations where a judgement is enforced by the issuing of an Article 42 certificate, it is reiterated that the child must be heard. Furthermore, paragraph 11 of the Article 42 certificate requires the court of origin to expressly confirm that the child has been given this opportunity, unless it was considered inappropriate having regard to their age and maturity. To confirm that the child has been heard, when they have not, represents a procedural breach. It would appear reasonable to suggest that a judgement, which contains a procedural breach such as this, cannot be enforceable. However, the European Court of Justice (ECJ) decided otherwise.

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6 Aguirre Zarraga (n 1), Opinion of AG Bot [42].
7 ibid.
8 ibid [44].
9 ibid.
10 Under Art 42 of the Brussels IIbis Regulation, an enforceable judgement for the return of a child given in a Member State is to be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgement has been certified in the court of origin in accordance with Art 42(2).
11 Under Art 2(5) of the Brussels IIbis Regulation, the term “Member State of origin” means the Member State where the judgment to be enforced was issued. Whilst under Art 2(6), the term “Member State of enforcement” means the Member State where enforcement of the judgment is sought. For the purposes of this paper, the former will be referred to as the ‘court of origin’ whilst the latter will be referred to as the ‘court of enforcement’.
12 Brussels IIbis Regulation, Annex IV para 11. Both courts agreed that Andrea’s views could be heard.
Aware that they had no power to review a certified judgement following the decisions found in *Povse* and *Rinau*, the German court referred *Aguirre Zarraga* to the ECJ believing they should have such a power in cases where there had been ‘serious infringements of fundamental rights.’ The German court asked two questions of the ECJ:

(1) Where the judgement to be enforced in the Member States of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Brussels IIbis Regulation] in conformity with the Charter of Fundamental Rights?

(2) Is the court of the Member State of enforcement obliged to enforce the judgement of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Brussels IIbis Regulation] contains a declaration which is manifestly inaccurate?

Surprisingly, the ECJ replied that the court of enforcement (i.e. the German court) had no power of review; the court of origin (i.e. the Spanish court) retained the sole power of review. Furthermore, the court of enforcement was obliged to enforce the judgement. The ECJ’s ratio for this was that mutual trust between states was sufficient to protect fundamental rights and that Germany should trust the Spanish court to uphold the obligation to protect fundamental rights.

From the perspective of the Spanish court, they had not breached the child’s right to be heard, as they have provided the child with the opportunity to be heard. The fact that the mother had refused the child this opportunity, does not detract from the fact that it was offered. However, this in itself may be an argument for making a special effort to hear the child using other methods, as the child herself did not refuse; she had her rights denied by her mother. At this point, it should be remembered that the courts do not have a duty to hear the child if the child refuses to participate. Therefore, it could be argued, as was held by the Advocate General, that Spain had satisfied the requirements of the Article 42 return order.

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13 *Case C-211/10 Povse v Alpago* (ECJ, 1 July 2010); [2011] Fam. 199. The enforcement of a certified judgment which requires the return of the child may not be refused either on account of a judgment delivered subsequently by a court of enforcement or on account of a change of circumstances after its delivery.
14 *Case C-195/08 Rinau v Rinau* [2008] ECR I-5271. An application for non-recognition of a judicial decision is not permitted if an Art 42 certificate has been issued.
15 *Aguirre Zarraga* (n 1), Opinion of AG Bot [52].
16 *ibid* [128].
17 *ibid*.
18 *ibid* [44].
21 Biagioni (n 19) section 5.
From Germany’s perspective, Spain’s actions fell short of the requirements for mutual trust; Spain failed to provide an effective and equivalent protection of fundamental rights. Germany’s procedural rules provide a high standard of protection for the right of the child to be heard, indeed, it is ‘(...) standard practice for the child to be interviewed by the judge.’ In the view of the German court, by failing to hear Andrea, the Spanish court breached the requirements of Article 42. Furthermore, it has been suggested that hearing the child is an integral part of the right to a fair trial and by not hearing the child, Spain has possibly breached this right. If, as other authors have suggested, the case of Aguirre Zarraga could proceed to the European Courts of Human Rights (ECtHR), it is likely that the court would find in Andrea’s favour.

Is it really necessary that all children have the opportunity to be heard in abduction cases? If we are to satisfy the standards expressed in the United Nations Convention on the Rights of the Child, then the answer is yes. If we take an emotive stance, then it is argued that giving the child the opportunity to be heard can avoid subjecting vulnerable people to extreme distress. In the English case of Re M, it was decided that it was in the best interest of two boys, aged 11 and 10 years, to return from England to their father in Australia. The judge did not hear the boys and the mother consented to accompany them on their return. However, prior to the return flight ‘(...) the boys, who embarked alone (...) were very upset and the elder one created a scene so violent that the captain of the aircraft refused to take off with them on board.’ Despite the intervening circumstances of the mother’s absence at the time the boys boarded the flight, the strength of the children’s objection to being returned can neither be refuted nor ignored.

The Brussels IIbis Regulation is clear that children in abduction cases have the right to be heard. It also states that a certificate enforcing a judgment under Article 42 cannot be submitted unless the child has been given an opportunity to be heard. In Aguirre Zarraga, the fact that Spain did not hear Andrea was undisputed. Yet for the German court, this represented a procedural breach of fundamental rights. Even so, the Advocate General held that Andrea had been heard – in Germany. So the underlying question centred upon whether the hearing that took place in Germany was sufficient to satisfy the obligation to hear the child under Article 42(2).

The German Government, European Commission, Greece, France and Latvia all submitted views that the hearing in the court of enforcement failed to satisfy the requirements prescribed by Article 42 to hear the child. The reason given was that it would mean that the state of origin would be ‘discharged from their obligation to

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24 ibid.
26 ibid.
27 ibid.
28 Aguirre Zarraga (n 1), Opinion of AG Bot [63].
29 ibid [65].
hear the child’ if it was acceptable to only consider the evidence from the court of enforcement.\textsuperscript{30} They also argued that the two states would have differing reasons for the hearing; the hearing before the court of enforcement related to the return of the child whereas the hearing for the purpose of Article 42(2)(a) was intended to enable a final ruling to be given on rights of custody in respect of the child and, therefore, had a much wider scope. With these differing objectives, the information gathered in the state of enforcement would have little value to the state of origin.\textsuperscript{31} It was also contended that the evidence was outdated due to the fact that nine months had elapsed between the time when Andrea had been heard in Germany and when the Spanish judgement for enforcement took place.\textsuperscript{32} However, the Advocate General did not share this view. It was decided that the hearing held in Germany was sufficient to satisfy the requirements for the child to be heard under Article 42. Even if it did not and Andrea had not been heard, a Member State could not oppose a certified judgement. In the Advocate General’s opinion, the hearing in Germany had to be given an interpretation which would be understood by all Member States.\textsuperscript{33} Moreover, the Advocate General held that Spain had given Andrea the opportunity to be heard and that a child’s opinion was not binding on the court.\textsuperscript{34} Recognition was also given to the fact that Spain had considered the evidence from the German hearing.\textsuperscript{35}

The reasoning expressed above by the German Government unwittingly supports genuine mutual trust. It is a valid point that the state of origin should not be able to discharge their obligations when the protection of fundamental rights is the issue. This was, unfortunately, not followed in the final ruling from the ECJ in Aguirre Zarraga, whereby the court of enforcement is unable to oppose a certified judgement even if there is a fundamental procedural breach. Moreover, the court of origin has exclusive jurisdiction to assess any breach, creating an imbalance of power between the Member States. In order for it to be acceptable to Member States, the principle of mutual trust is usually tempered by the ability to refuse cooperation based on their human rights obligations found within Article 23(b) of the Brussels IIbis.\textsuperscript{36} It states that a ground for the non-recognition of the judgement is ‘(…) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought.’ Yet Article 42 is an exception to this rule as where there is a violation of the principle of procedure of the Member State in which recognition is sought, there is no possibility of opposing the recognition of the judgement.

The principle of mutual trust has great value in the functioning of the Abduction Convention and the European judicial system. It should not, therefore, be undermined. If Spain had made arrangements to hear Andrea, arrangements that were available to the Spanish courts at the time, then the argument by Germany for

\textsuperscript{30} ibid.
\textsuperscript{31} ibid.
\textsuperscript{32} ibid.
\textsuperscript{33} ibid [78].
\textsuperscript{34} ibid.
\textsuperscript{35} ibid [103].
\textsuperscript{36} Dautricourt (n 5) 13.
non-return based on the procedural breach of the right of the child to be heard would not have stood. However, it should be remembered that if this were solely an Abduction Convention case, as opposed to one which falls under Brussels IIbis Regulation, Germany’s non-return order would have been final. Under the Abduction Convention, Article 13(b) provides grounds for non-return by the court of enforcement in order to protect the child in exceptional circumstances. Brussels IIbis, therefore, seriously undermines the Abduction Convention by introducing the Article 42 certificate which overrules these exceptions. The argument in support of the Article 42 certificate is that Member States should trust one another to ensure genuine protection of rights. Yet it could be argued that trust should exist between Member States not to take advantage of these exceptions.

C. The Consequences of the Judgement

The ECJ’s decision leaves Member States with a judgement which undermines the Abduction Convention, mutual trust and fundamental rights. It also fails to clarify whether Germany must wait until after the appeal in the Spanish court in order to enforce the judgement or whether they have to enforce it irrespective of the appeal. The first option causes additional delay which is not in the child’s best interests, but creates the possibility that the breach may be amended by the Spanish court asking that the child be heard. However, it is likely that Spain could argue that having given the child the opportunity to be heard, which was turned down, they have satisfied their legal requirement. The second option results in the enforcement of a judgement which Germany considers to be in violation of fundamental principles of their procedural rules, which would also constitute a breach of Article 6, ECHR. Furthermore, Germany would also be held liable for the breach of the procedural rules. Both options are unsatisfactory with regard to the child’s best interest.

Therefore, the ECJ may be seen to have failed to consider the practical application of the judgement. Following the introduction of the Abduction Convention and the subsequent evolution of children’s rights, it is questionable whether child abduction cases can continue to be held without granting respect to the right of all children to be heard. Despite this, the current jurisprudence from the ECJ remains unsupportive of this position. The margin of appreciation inherent in interpretation of procedural rules and of legislation by Member States erodes the possibility of a genuine mutual trust, thereby reducing the protection of fundamental rights for some European children. Furthermore, the recent suggestion that Europe must clarify whether mutual trust should prevail over human rights failed to take into account the contribution that mutual trust can make to the overall protection of

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37 Walker and Beaumont (n 23) 247.
38 ibid 243.
39 ibid.
40 ibid 244.
these rights. In sum, the ECJ has interpreted this principle to the detriment of fundamental rights, a situation that demands urgent review.

3. The Approach Elsewhere

A. The Approach of the European Court of Human Rights

The ECtHR has confounded the balance between mutual trust and fundamental rights, erring in favour of fundamental rights. Recent jurisprudence from the ECtHR appears to support the idea that Article 8 of the European Convention on Human Rights ‘trumped’ the Abduction Convention, indicating that there needed to be ‘a full best interests’ test in child abduction cases. This approach potentially undermined the functioning of the Abduction Convention, not to mention the principle of mutual trust, enforced or otherwise. Indeed, the rulings from Neulinger and Rabin caused great consternation amongst family lawyers and academics alike, prompting the Hague Conference to highlight the lack of harmony and consistency created by the ECtHR rulings against the purpose of the Abduction Convention. As Van Loon pointed out in his address to the Legal Advisers of the Council of Europe in March 2011, it is ‘(…) not the function of a court dealing with a return application under the 1980 [Abduction] Convention to conduct an in-depth examination into the entire family situation i.e. a full ‘best interests’ test.’ Extrajudicially, the President of the ECtHR, Jean Paul Costa, made a point of emphasizing that the jurisprudence from the ECtHR in no way undermined the Abduction Convention, asserting that the need for a full welfare assessment in Neulinger was due to the ‘crucial factor of time’ and arguing that delay in the court proceedings necessitated a fresh look at the circumstances.

As observed, if the mother in Aguirre Zarraga decided to take the case to the ECtHR, it is highly likely that the ECtHR would rule in favour of the child staying in Germany due to the fact that she is now settled there. Walker and Beaumont

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43 ibid.
44 Neulinger and Sharuk v Switzerland App no 41615/07 (ECtHR, 6 July 2010).
45 Rabin v Romania App no 25437/08 (ECtHR, 26 October 2010).
48 ibid.
49 Walker and Beaumont (n 23) 247.
suggest that the ECtHR is no longer ruling on a true child abduction case but rather a breach of the child’s right to a family life, which has been detrimentally affected by the delays in the court proceedings that relate to child abduction. The reason for the delay needs to be reviewed but this is outside the scope of this article. Many of the delays would appear to be avoidable if measures were put in place to support genuine trust and fundamental rights, thus avoiding the need to go to the ECtHR at all.

B. The Approach of the UK Courts

The decision of the Supreme Court in Re E demonstrates a balanced approach to mutual trust and indicates the support given by the UK courts to the ECtHR President’s extrajudicial interpretation of the jurisprudence in Neulinger. Re E concerned the removal by their mother of two girls, aged seven and four and their elder step-sister, aged seventeen, from Norway to the UK. The father applied for the return of the children but the mother argued that an exception to the return under Article 13(b) applied, due to alleged serious psychological abuse the family had experienced at the hands of the father. The Supreme Court dismissed the mother’s appeal and ordered the return of the children to Norway. The Supreme Court urged:

(...) the Hague Conference to consider whether machinery can be put into place, whereby, when the courts of the requested state identify protective measures as necessary if the Article 13(b) exception is to be rejected, those measures can become enforceable in the requesting state.

This request supports the earlier premise that by creating mechanisms such as those proposed by the Supreme Court, it encourages genuine trust between Member States, while the aims of the Abduction Convention are respected. Such changes would require legislative reform in order to be effective.

C. Legislation Reform

There is no simple solution to the problems created by enforced trust and overridden fundamental rights. On a practical level, the role that mediation and negotiation can play in avoiding these problems from the very start should be fully explored, for with sensitive handling, encouraging parents to discuss the welfare of their child can produce results in some instances. This could increase the possibility that the court case could be avoided altogether, which has to be in the child’s best interests, not to mention the interests of the family.

50 ibid.
51 [2011] 2 WLR 1326.
52 ibid [37].
Another relevant factor in preventing breaches of the child’s right to be heard is to remove obstacles to the return of the child.\textsuperscript{54} In \textit{Aguirre Zarraga}, the child was given the opportunity to be heard within Spain, however, she was not able to take this opportunity, not because she was unwilling to express her view but because Spain refused to grant the mother the freedom to leave Spain after the hearing. Removing the threat of criminal prosecution of the abducting parent would eliminate one of the barriers for non-return, thereby increasing the chances of the child returning to the state of origin where the court would have the opportunity to hear the child.\textsuperscript{55}

However, under the current European legislation,\textsuperscript{56} it is not essential to return the child to the state of origin in order to take their evidence. The Taking of Evidence Regulation grants Spain the ability to hear Andrea in Germany and, therefore, meet the requirement of the right of the child to be heard. However, it could be argued that the state of origin may see this as potentially delaying the return of the child. Providing the child with the opportunity to be heard and in an appropriate manner is in the child’s best interests. In the UK, it is standard procedure for a CAFCASS\textsuperscript{57} officer to interview the child.\textsuperscript{58} Having trained professionals appointed by the court to interview the child in a manner sympathetic to their age and maturity is in the child’s best interests. These working methods have allowed evidence to be presented in abduction cases from children as young as six years – evidence which is now coming to be accepted.\textsuperscript{59}

Confusion over differing procedural rules within Europe is a harder problem to address. The doctrine of the margin of appreciation allows European Courts to consider the fact that a member state may interpret a human right differently due to cultural, historic or philosophical reasons.\textsuperscript{60} However, although a Member State could not refute the existence of the child’s right to be heard, it is possible that the procedural rules of a Member State could limit the opportunities to be heard.\textsuperscript{61} Indeed, the difference seen in \textit{Aguirre Zarraga}, where Germany will always hear the child, compared to Spain’s belief that they had given Andrea an opportunity to be heard satisfied this requirement, highlights the differing standards in this area. Granting the court of enforcement the power to stay the recognition of a

\textsuperscript{55} ibid.
\textsuperscript{57} Children and Family Court Advisory and Support Service.
\textsuperscript{58} Hutchinson (n 22) [22].
\textsuperscript{59} McEleavy advocates that it is possible to satisfy the obligation of the Hague Abduction Convention and the right of the child to be heard by ascertaining the child’s views at the beginning of the proceedings. In this way it should not cause a detrimental delay: P McEleavy ‘Evaluating the views of abducted children: trends in appellate case-law’ [2008] Comparative Family Law Quarterly 230.
\textsuperscript{60} A Daly, ‘The Right of Children to be heard in Civil Proceedings and the emerging law of the European Court of Human Rights’ (2010) 15 The International Journal of Human Rights 3 441, 444.
\textsuperscript{61} ibid.
summary judgement until procedural breaches have been amended would help to uphold consistency and support the fundamental rights of the child to be heard. However, if a genuine judicial area is argued for and Europe has identified the child’s right to be heard as being a fundamental procedural right, it is difficult to comprehend why Member States can have such differing values which can lead to a child’s rights being breached in one Member State and upheld in another. If genuine trust were established through a requirement for both Member States to uphold certain fundamental rights, this would go some way to avoid the conflict found within Aguirre Zarraga. Finally, the most complex issue is the reinterpretation of the principle of mutual trust itself. It could be argued that the current principle of mutual trust has more in common with blind faith than with genuine trust. Mutual trust is fundamental to the functioning of the Abduction Convention which when genuine, will actively contribute to the support of fundamental rights. The ECJ needs to review their approach to mutual trust.

4. Conclusion

The relationship between child abduction, the principle of mutual trust and fundamental rights is complex. Society’s view of the child has changed significantly in the last thirty years since the drafting of the Abduction Convention. The rights that the child has been afforded since then should be reflected in current legislation and, to a certain extent, this has been the case. However, legislation can be weakened by a lack of clarity such as that found in the Brussels IIbis Regulation. The ambiguity in the law surrounding whether the opportunity to be heard in the court of enforcement can satisfy the obligation to be heard in the court of origin, requires urgent evaluation as Member States are not yet ready for unconditional trust.

This analysis of Aguirre Zarraga highlights the disparity between the professed understanding of the principle of mutual trust and the reality of its application. If mechanisms could be established which encourage genuine trust, such as readdressing the balance of power between states so that one court is not given the sole power of enforcement, especially given a breach of fundamental procedural rights, or the proposals put forward by the Supreme Court in Re E, then this will be one step further towards the goal of the genuine judicial area.

The ECJ cannot remain complacent about the imbalance between the principle of mutual trust and fundamental rights. A genuine judicial area would be beneficial to the functioning of Europe. However, it ought not to be a case of choosing between one principle and another; the encouragement of genuine trust between Member States would protect fundamental rights. Any revision of the principle of mutual trust needs to be considered carefully; it cannot be rushed but should form part of the evolution of the fledgling European legal order.