
In **O, Re (A Child: The Vienna Convention on Consular Relations 1963) [2021] EWHC 908 (Fam) (14 April 2021)** the High Court today published a Judgment that provides important guidance to local authorities on the extent of their notification duties under Article 37 of the Vienna Convention on Consular Relations 1963.

The question arose as to whether a local authority is under a duty to notify a relevant consular authority that a child is the subject of public law proceedings in which a children's guardian has been appointed to represent his/her interests.

The guardian supported the local authority's application that it was lawful not to notify the Congolese authorities, on the basis that [paragraph 12]:

i) O writes that it is not safe for her to go back to the Congo and she is fearful about what would happen to her if she returned. She has said the same thing to the Guardian, her social worker and her foster carer. She has described her fear of arrest and death if she were returned and she has witnessed brutality including the murder of people by soldiers;

ii) the social worker's statement recorded O's evident extreme fear when talking about her experiences in the DRC and of possible notification to the Congolese embassy. The social worker noted that O:

"believes that at any stage she could be sent back to Congo and becomes inconsolable her face changes shape, her bottom lip starts to quiver and tears form in her eyes, she is convinced if she is sent back to Congo then will be killed, she requires a lot of consoling to let her know this will not happen; "

iii) O's clearly expressed position is that the DRC should not be informed of her arrival in the UK because she is fearful of the implications to her and her family of such knowledge. She is fearful of social services attempting to contact her mother in case it alerts officials within the DRC and jeopardises her safety and that of her mother;

iv) both her parents were arrested: O understands that for her father this was related to political activism and her mother told O that she believed her father died in prison;

v) under what must have been terrifying circumstances for a 12-year-old girl, O fled her home without warning when the police attended in the summer of last year and arrested her mother and removed her and her two younger brothers from their home;

vi) O has no knowledge of the whereabouts of her immediate or wider family;

vii) her mother's Facebook page has highly distressing images of murdered women and children and O herself has described seeing the murdered bodies of children on the ground;

viii) notifying the Congolese authorities runs a real risk of putting O's family in the DRC at risk of arrest, detention or worse;

ix) she has experienced disrupted sleep in the UK as a result of her past experiences and further anxiety about what may follow after consular notification would not be in her best interests; and

x) to all intents and purposes O's position is akin to that of an asylum seeker.

The court went on to agree with and incorporate the local authority's submissions as to the ambit of Article 37 in England and Wales, namely [at paragraph 23] that:

iii) It is important to note that the Vienna Convention on Consular Relations 1963 was ratified before the Vienna Convention on the Law of Treaties 1969. The Convention on the Law of Treaties 1969 codified pre-existing international customs in the interpretation and codification of international treaty obligations in domestic law. It did not have retrospective effect but provides at Article 31(1) that:

"a treaty should be interpreted in good faith and in accordance

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"

iv) This principle, expressed in slightly different terms in McNair's The Law of Treaties (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is

"the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances"

v) It is submitted therefore that in circumstances where Article 37 is not enshrined in domestic statute:

a) Article 31(1) of the Vienna Convention on the Law of Treaties 1967 is persuasive through custom in applying a duty under a convention ratified before it.

b) If there were any doubt, the customary rule existing before the Vienna Convention on the Law of Treaties 1967 was ratified as expressed in McNair must bite.

c) In these circumstances, the domestic courts are bound to consider Article 37 of the Vienna Convention on Consular Relations 1963, as a necessary but not sufficient consideration in applying domestic legislative duties. In particular to the index case, when making decisions in the child's best interests (s.1(1) of the Children Act 1989.

The court concluded:

- 31. In the premises does Article 37(b) impose an absolute and binding duty in all circumstances to notify a foreign authority where a court appoints a guardian in respect of one of its nationals? In my judgment it does not.*
- 32. In the vast majority of cases where Article 37(b) is engaged, the court will have no difficulty or face any impediment in complying with the terms of the Vienna Convention and giving the requisite notification to the foreign authority. There will be rare cases, such as the circumstances of this case, where it would wholly inimical to the welfare best interests of the child to give the requisite notice to the foreign authority.*
- 33. The Vienna Convention is not enshrined in our domestic law. The terms of the Convention should ordinarily be complied with but where to do*

so would be contrary to the welfare best interests of the child concerned, I am satisfied that the court may conclude it would not be appropriate to give the requisite notification.

The Court determined that in these circumstances, O's welfare needs indicated that that the Congolese authorities were not to be notified. Edward Lamb appeared on behalf of the local authority and Tara Vindis appeared on behalf of the guardian.