

Can GPS Monitoring Be Viewed as a Bodyguard, Rather than a Prison Guard?: The Use of Electronic Monitoring to Reduce the Risk of Cross-Border Parental Child Abduction

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Globally, the number of cases of international parental child abduction has remained consistent in the past decade, despite the array of legal provisions designed to prevent it. The current legal approach is ineffective. Reflecting on the findings of an empirical study on parental abduction from the UK, the article considers a novel solution which aims to protect children at risk of abduction through electronic monitoring. The electronic monitoring of children has negative connotations, particularly its use in the criminal justice system. The article considers whether electronic monitoring, in the context of family law proceedings, could serve a protective rather than a punitive purpose. Such an approach requires a conceptual shift, to view electronic monitoring as a bodyguard for the privileged few, rather than as a prison guard. The article reflects on the use of electronic monitoring in parental abduction cases by the Family Courts and examines the proposal drawing on the rights found in the European Convention on Human Rights and the UN Convention on the Rights of the Child. A rights-based analysis, as opposed to one constructed solely on the child's best interests in English family law, enables its application in other legal jurisdictions and protective contexts.

INTRODUCTION

Despite the many measures across England and Wales designed to prevent cross-border parental child abduction,¹ the prevalence of abduction cases suggests that the current legal framework is simply not sufficient to protect children from the potential of, and harms associated with parental abduction.

This extract from Lord Justice McFarlane's judgment in the criminal law case, *R v Kayani*,² illustrates how abduction can occur and the damage it can cause:

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1 The Child Abduction Act 1984 provides for the use of criminal sanctions; the available family law provisions include Wardship Orders and Port Alerts; and the Children Act 1989 provides for the use of Prohibited Steps Orders. Additional provisions are available under the High Court's inherent jurisdiction, such as Passport, Location and Collection Orders. These provisions were examined by the author through the use of empirical enquiry and published in Nazia Yaqub, *Parental Child Abduction to Islamic Law Countries: A Child Rights Analysis of the Legal Framework* (Oxford: Hart, 2022).

2 *R v Kayani and Solliman* [2011] EWCA Crim 2871.

The abduction of two children was premeditated and planned. They took place in breach of a [family] court order, and a carefully structured arrangement to obtain the necessary passports, and deception of their mother who believed that she was in possession of the only relevant passports, and so that the appellant would not be able to remove the children. Then, having taken them abroad, he deprived them of the care and love of their mother and refused to countenance any contact between them. Effectively she missed their childhood, and they missed her love. Through no fault of their own, and through no fault of their mother, the children do not wish to see her. The chances that she will ever have contact with them, or they with her, have now become utterly remote.³

Whilst there are proportionately fewer cases such as the one described here by Lord Justice McFarlane than those engaging other child protection concerns,⁴ the number of children abducted by a parent without the left-behind parent's consent has remained steady in the last two decades. It is difficult to provide a precise figure, and the closest estimate is taken from the most recent global survey which specifies that in 2021 at least 2,579 children were the subject of court applications for their return.⁵ The survey only provides a snapshot of cases in that year, however, and does not include the numbers of children who cannot be located, or cases in which the left-behind parent does not have the resources to instruct lawyers and issue court proceedings in another country.⁶ The figure also excludes details of children abducted to states not party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Convention). For example, an empirical study that I conducted of abductions from the UK to Islamic law countries records details of additional cases that would not feature within the survey's statistics.⁷ My empirical study, undertaken between 2017–19, comprises 29 cases of abduction involving 54 abducted children. A total of 48 participants were interviewed: 23 left-behind parents, four abducting parents, 10 abductees (aged 16–24) abducted as children and 11 professionals.⁸ The professionals whose daily work involves responding to cases of parental abduction include members of the judiciary, lawyers, mediators, representatives of NGOs and civil servants of the UK Foreign, Commonwealth and Development Office responsible for liaising with other nations in abduction cases. While the professionals interviewed have experience working with hundreds of cases, for the sake of precision, the only cases included in my study were those 29 cases where firsthand accounts were provided by the abducting parent, left-behind parent or abducted young person.

3 *ibid* at [33].

4 For example, between April 2022 and March 2023 Cafcass received 16,227 public law care cases under the Children Act 1989: Cafcass, 'Annual Data Summaries' at <https://www.cafcass.gov.uk/about-us/our-data/annual-data-summaries> [<https://perma.cc/Q3LZ-UMUD>].

5 Nigel Lowe and Victoria Stephens, *Statistical Analysis of Applications Made in 2021 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global Report* (Hague Conference, 2023). For statistics of Belgian cases, see Thalia Kruger, *International Child Abduction: The Inadequacies of the Law* (Oxford: Hart, 2011).

6 The statistics also only relate to those Hague member states that elect to participate in the survey of Hague Convention cases, Lowe and Stephens, *ibid*.

7 Yaqub, n 1 above.

8 Ethical approval was granted by the University of Liverpool's Ethics Review Committee.

My study records at least 58 reported cases of abduction from the UK to an Islamic law country in 2019, 48 cases in 2018 and 56 cases in 2017.⁹ Moreover, data from this study reveals that many left-behind parents decide not to report the abduction to the authorities and resort to other methods to return the child, such as counter-abduction. Parental abduction is a criminal offence in the UK, carrying a prison sentence of up to seven years.¹⁰ The risk of a lengthy term of imprisonment of a former partner, and the parent of one's child, was one reason why some left-behind parents in my study decided not to make an official complaint to the authorities. It would seem, therefore, that there are likely to be many more cases of parental abduction which do not feature within the statistics.

Drawing on analysis of empirical data and the available statistics, this article argues for a more radical response to this ongoing issue. The focus here is on electronic monitoring. Electronic monitoring of children is presently used in the criminal justice system as a punitive measure and so has strong negative connotations.¹¹ Its use can be regarded as highly contentious and according to academics, 'remains under-theorised, empirically and ethically.'¹² The existing body of work on electronic monitoring examines it in the context of neoliberal political movements, comparing the implementation of English models with other states.¹³ This literature suggests that the expansion of electronic monitoring in England is a result of actuarialism, an approach to crime control that focuses on preventing offending, rather than rehabilitating offenders, along with technomanagerialism, which creates customer advantage through technology, enabling the government to adopt effective business methods to manage crime by allowing private companies to take a lead role.¹⁴

This article contends that electronic monitoring of children at risk of parental child abduction can be employed as a positive protective measure and, in some circumstances, can be an appropriate and necessary response to avoid the harm that is caused by abduction. Electronic monitoring is a tool like any other, and

9 Countries with Muslim majority populations have diverse legal systems. Nigeria, for example, has distinct regions where Islamic law applies and other regions where it does not. It is for this reason that only countries where Islamic family law applies exclusively are included in the sample, ie Algeria; Bangladesh; Bahrain; Jordan; Indonesia; Iran; Iraq; Kuwait; Libya; Malaysia; Morocco; Oman; Pakistan; Qatar; Saudi Arabia; Syria; the UAE and Yemen. Consular data is available for each country which specifies the number of reports made to the Foreign Commonwealth and Development Office for a range of matters, including parental child abduction: Foreign, Commonwealth & Development Office and Foreign & Commonwealth Office, 'Foreign, Commonwealth & Development Office consular data' (last updated 6 March 2023) at <https://www.gov.uk/government/collections/consular-data> [<https://perma.cc/3SQQ-N5B2>].

10 Child Abduction Act 1984, s4(1)(b).

11 The use of electronic monitoring in the criminal justice system has implications for children's rights with respect to data collected and procedures required to enable effective monitoring and informed consent. Eszter Párkányi and Anthea Hucklesby, *Electronic Monitoring in the Youth Justice System of England and Wales* (Leeds: TCBI Report, 2021); Anthea Hucklesby and Raymond Holt, *Tracking People: Wearable Technologies in Social and Public Policy* (Abingdon: Routledge, 2023).

12 See Mike Nellis, Kristel Beyens and Dan Kaminski, *Electronically Monitored Punishment: International and Critical Perspectives* (Abingdon: Routledge, 2013).

13 *ibid*; see also Mike Nellis and Jan Bungerfeldt, 'Electronic Monitoring and Probation in Sweden and England and Wales: Comparative Policy Developments' (2013) 60 *Probation Journal* 278.

14 Mike Nellis, 'Understanding the Electronic Monitoring of Offenders in Europe: Expansion, Regulation and Prospects' (2014) 62 *Law Soc Change* 489, 504.

current negative connotations are largely contextual to the criminal justice system. There are more benign, protective uses for the technology. This article explores how the technology could be utilised in family law proceedings to enable contact visits between the child and parent who poses a risk of parental child abduction. It is anticipated that the parents, having the opportunity to seek independent legal advice, would jointly present the proposed agreement to the Family Court in the form of a consent order, requesting a judge approve the order and authorise electronic monitoring. The judge will only approve the consent order if electronic monitoring is assessed as being in the best interests of the particular child.¹⁵ Whilst this proposal for the availability of electronic monitoring may not be suitable for wide-scale use in all abduction cases, it may assist the small number of families where the authorities accept that there is a high risk of abduction to states where returns prove difficult, as one additional tool in the court's apparatus to prevent abduction. This article analyses the legal and practical arguments relating to this controversial solution, drawing on human rights law, including children's rights, and the wider jurisprudence and research around the use of electronic monitoring. The analysis begins with a review of the existing use of electronic monitoring beyond the more familiar criminal context, in family law cases and dementia care. The following section considers whether electronic monitoring of children for protective purposes can be a proportionate and legitimate means of upholding the child's best interests. The article then goes on to examine concerns relating to the child's liberty and privacy rights, and issues around children's autonomy and consent. The final section identifies some of the key practical issues that arise vis-a-vis electronic monitoring in a parental abduction situation.

PROTECTION NOT PUNISHMENT

Whilst the term 'electronic monitoring' invokes images of micro-chipping and invasive monitoring, the idea may not be as experimental as it first appears. The widespread nature of electronic monitoring is demonstrable in the UK government's monitoring of thousands of individuals each year in the criminal justice system,¹⁶ including children.¹⁷ Children awaiting the outcome of asylum

15 United Nations Convention on the Rights of the Child 1989 (UNCRC), Art 3 and Children Act 1989, s 1(3).

16 The UK government announced in October 2021 that '26,000 extra offenders will be tagged over the next 3 years': Ministry of Justice and the Rt Hon Dominic Raab MP, 'Tens of thousands more criminals to be tagged to cut crime and protect victims' (Press release, 5 October 2021) at <https://www.gov.uk/government/news/tens-of-thousands-more-criminals-to-be-tagged-to-cut-crime-and-protect-victims> [<https://perma.cc/LY5C-WY2S>].

17 Research indicates that approximately 900 children were subject to electronic monitoring in the criminal justice system in 2014: Howard League for Penal Reform, 'They couldn't do it to a grown up. Tagging children without due process' (Briefing, 2014) at <https://howardleague.org/publications/they-couldnt-do-it-to-a-grown-up/> [<https://perma.cc/TDY2-2M8J>]; see also Valerie Forrester and Tim Read, 'GPS Knife Crime Tagging Interim Evaluation Report' (MOPAC Evidence and Insight, 2020) at https://www.london.gov.uk/sites/default/files/gps_tagging_knife_crime_on_licence_final_for_publication.pdf [<https://perma.cc/VKF8-LV4N>].

applications have in the recent past been subject to electronic monitoring¹⁸ and the government has recently employed electronic monitoring in a protective, child protection capacity, to protect children *at risk of* becoming involved in crime. A Ministry of Justice spokesperson explains electronic monitoring might ‘also be used to ensure they attend school or stay away from areas with known gang activity or associates’.¹⁹ The use of electronic monitoring further increased during the Covid-19 pandemic to reduce the number of prisoners in custody to minimise transmission of Covid-19.²⁰ The punitive use of electronic monitoring is criticised for infringing children’s rights, particularly where children are monitored as a result of legal processes that do not require adults to be monitored for the same purpose.²¹ On the other hand, Article 37 of the United Nations Convention on the Rights of the Child 1989 (UNCRC) establishes that young people aged below 18 should only be imprisoned as a last resort,²² and in this respect, it has been suggested that electronic monitoring could be a positive alternative to time spent in custody.²³ But this is only if monitoring is employed alongside other supportive measures to deter re-offending,²⁴

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- 18 Kate Smith and Adele Jones, ‘The Rights of All Children in the Context of International Migration’ (Submission to the Committee on the Rights of the Child Day of General Discussion 2012) at [6] at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/2012/Submissions/UniversityHuddersfield.pdf> [<https://perma.cc/TFV6-HYCD>]. For use of electronic monitoring for immigration bail conditions in 2022, see the Home Office, ‘Immigration bail conditions: Electronic monitoring (EM) expansion pilot’ (23 June 2023) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165035/Immigration_bail_conditions_-_Electronic_Monitoring_EM_Expansion_pilot.pdf [<https://perma.cc/SFR9-2QV5>].
- 19 Jason Murugesu, ‘Hundreds of children made to wear GPS tags by UK’s Ministry of Justice’ *New Scientist* 24 March 2023 at <https://www.newscientist.com/article/2365642-hundreds-of-children-made-to-wear-gps-tags-by-uks-ministry-of-justice/> [<https://perma.cc/49GG-9ABU>]; see also Fiona Simpson, ‘Briefing: Use of tags for “at risk” children’ (Children and Young People Now, Analysis, 31 March 2020) at <https://www.cypnow.co.uk/content/analysis/briefing-use-of-tags-for-at-risk-children> [<https://perma.cc/99DC-5HKW>].
- 20 Youth Justice Legal Centre, ‘Young offenders may be eligible for temporary release as a result of Covid-19’ at <https://yjlc.uk/resources/legal-updates/young-offenders-may-be-eligible-temporary-release-result-covid-19#:~:text=Independently%20from%20the%20ECTR%2C%20some,or%20because%20they%20are%20pregnant> [<https://perma.cc/ZVP6-G4ZZ>]; Cara Tabachnik, ‘Covid-19 Created a Bigger Market for Electronic Ankle Monitors’ *Bloomberg News* 14 July 2020 at <https://news.bloomberglaw.com/white-collar-and-criminal-law/covid-19-created-a-bigger-market-for-electronic-ankle-monitors> (last visited 7 October 2024).
- 21 See report that confirms that children were given additional punishment at the midpoint of their Detention and Training Orders known as ‘intensive supervision and surveillance’ (ISS): Howard League for Penal Reform, n 17 above.
- 22 UNCRC, Art 37(b); see also UN Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10 (25 April 2007).
- 23 Dziauddin Haidar, Che Audah Hassan and Nadzriah Ahmad, ‘Electronic Tagging of Offenders and Human Rights: A Clash of Primary Interests’ (2018) 52 *European Proceedings of Social & Behavioural Sciences* 337; Marc Renzema, ‘Evaluative Research on Electronic Monitoring’ in Nellis, Beyens and Kaminski, n 12 above, 247; Miranda Boone, Matthijs van der Kooij and Stephanie Rap, ‘The Highly Reintegrative Approach of Electronic Monitoring in the Netherlands’ (2017) 9 *European Journal of Probation* 46.
- 24 See further Council of Europe, ‘Recommendation of the Committee of Ministers to member States on electronic monitoring’ CM/Rec(2014)4 (19 February 2014) III, 8; William Bülow O’Nils, ‘Electronic Monitoring of Offenders: An Ethical Review’ (2014) 20 *Science and Engineering Ethics* 505.

including dedicated support focusing on the well-being of children provided by specialist youth justice and child protection services.²⁵

Electronic monitoring can also be used more constructively in a legal sense. The protective use of electronic monitoring has gained popularity in the commercial environment with products marketed to parents to monitor children who are at risk of wandering off and are vulnerable due to their young age or additional needs such as autism.²⁶ Monitoring services have also been made available in shopping centres to prevent children from wandering off whilst parents shop,²⁷ at schools to ensure children remain safe on school premises,²⁸ and have been used in hospitals to ensure newborn babies remain safe and are not accidentally handed to the wrong mother.²⁹ More recently a children's watch was marketed in the UK which suggests it allows parents to 'view the live location anywhere in the world. Always find your child anywhere in the world.'³⁰ This protective use of electronic monitoring of children demands some critical reflection on why the rights-based criticisms fall differently when the monitoring intention is to protect rather than punish or constrain the child, and will be explored in this article.

Whilst the wide use of electronic monitoring may be regarded positively in these situations, there is of course another side to this debate that the distinction between the protective and punitive functions of electronic monitoring cannot be drawn so sharply, in a context in which both relate to surveillance. There is also the concern that the technology has the potential to be exploited if electronic monitoring were to be employed in less positive ways, such as a tool to

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- 25 Eszter Párkányi and Anthea Hucklesby, 'Tracking children in their best interests: electronic monitoring in three European juvenile justice systems' (European Commission, 2020) at <https://cordis.europa.eu/project/id/793812/reporting> [<https://perma.cc/4J8R-24G7>].
- 26 Michael Macleod, 'GPS device helps Pilrig Park pupils to school' *The Guardian* 28 January 2011 at <https://www.theguardian.com/edinburgh/2011/jan/28/edinburgh-gps-pilrig-park-pupil-bus-travel> [<https://perma.cc/ZM63-JBD5>]; see further examples at <https://www.friendshipcircle.org/blog/2014/01/15/7-tracking-devices-to-find-a-lost-child-with-autism> [<https://perma.cc/M5DX-WJZH>].
- 27 Alistair Jamieson, 'Parents offered electronic tags for children in shopping centre' *The Telegraph* 19 January 2009) at <https://www.telegraph.co.uk/women/mother-tongue/4286028/Parents-offered-electronic-tags-for-children-in-shopping-centre.html> [<https://perma.cc/YV2D-S2FG>].
- 28 Ashley Willoughby and Mike Nellis, "'You Cannot Really Hide": Experiences of Probation Officers and Young Offenders with GPS Tracking in Winnipeg, Canada' (2016) 34 *Journal of Technology in Human Services* 77; Rosa Golijan, 'Schools use GPS to track students who skip' *NBC News* 18 February 2011 at <https://www.nbcnews.com/tech/tech-news/schools-use-gps-track-students-who-skip-fna124947> [<https://perma.cc/74X6-KSJ4>]. Also used to increase physical activity in schools: Amy Creaser and others, 'The Use of Wearable Activity Trackers in Schools to Promote Child and Adolescent Physical Activity: A Descriptive Content Analysis of School Staff's Perspectives' (2022) 19 *Int J Environ Res Public Health* 14067.
- 29 John Carvel, 'Babies given electronic tags to beat abductors' *The Guardian* 16 June 2005 at <https://www.theguardian.com/uk/2005/jun/16/health.children> [<https://perma.cc/6ULU-XEQH>]; see also 'Q&A: Maternity security' *BBC News* 7 May 2002 at <http://news.bbc.co.uk/1/hi/health/1972328.stm> [<https://perma.cc/96ZP-QL7F>], discussing reasons for and against the use of electronic tagging on maternity wards; and for the availability of the product from suppliers, see <https://www.rfiddiscovery.com/en/solutions/baby-tagging> [<https://perma.cc/GQ7G-WFAP>].
- 30 Through the medium of television and online. See 'Giving Them Freedom While Keeping Them Safe' at <https://moochies.com/pages/why> [<https://perma.cc/EYK7-CWGE>].

enable coercive control in domestic abuse cases. The overall area is complex, not dissimilar to the debate on the development of Artificial Intelligence, resulting in conflicting views. For our purposes here, we begin by examining the topic from the stance that electronic monitoring is already employed in the UK and is being utilised in a protective capacity, both in dementia care for the elderly and by the state to 'protect' children from becoming involved in crime. The question here is whether electronic monitoring should be made available as an option for families to prevent abduction and whether electronic monitoring can be regarded as a bodyguard, ordinarily reserved for the privileged few, rather than a prison guard.

The wider literature, research, and critique around electronic monitoring as a protective measure is overwhelmingly discussed in the context of dementia care.³¹ As such, it is helpful to reflect on this body of work to explore the arguments on the use of electronic monitoring in an abduction context. In dementia care, electronic monitoring is employed as a means to protect the vulnerable from wandering away from their homes. The key argument protagonists make for the protective use of electronic monitoring is that the technology enables individuals to remain living independently in their own homes for longer than might otherwise be deemed safe.³² It has been argued that electronic monitoring can be a more humane solution than various alternative forms of protective restraint, such as the use of sedatives and locking patients in rooms.³³ Objections to the use of electronic monitoring are made by those concerned that dependence on the technology could result in situations where carers spend less time with patients who subsequently lose out on quality care and meaningful relationships, and could therefore be regarded as 'morally ambiguous'.³⁴ Opponents have suggested that the use of technology in this way could create situations in which sales companies electronically bombard caregivers with information

31 Pragma Lodha and Avinash De Sousa, 'Ethics of Electronic Tagging of Dementia Patients' (2020) 5 *Indian Journal of Medical Ethics* 83; Eleanor White, Paul Montgomery and Rupert McShane, 'Electronic Tracking for People with Dementia Who Get Lost Outside the Home: A Study of the Experience of Familial Carers' (2010) 73 *Br J Occup Ther* 152; Alistair R. Niemeijer et al, 'Ethical and Practical Concerns of Surveillance Technologies in Residential Care for People with Dementia or Intellectual Disabilities: An Overview of the Literature' (2010) 22 *Int Psychogeriatr* 112; Alan Parkin, 'The Care and Control of Elderly or Incapacitated Adults' (1995) 17 *Journal of Social Welfare & Family Law* 431; Deborah Sturdy, 'Electronic Support for 21st Century Care' (2005) 34 *Age and Ageing* 421.

32 Ruth Landau and others, 'Families' and Professional Caregivers' Views of Using Advanced Technology to Track People with Dementia' (2010) 20 *Qualitative Health Research* 409.

33 Kevin D. Bail, 'Electronic Tagging of People with Dementia: Devices May Be Preferable to Locked Doors' (2003) 326 *BMJ* 281; Frank Miskelly, 'A Novel System of Electronic Tagging in Patients with Dementia and Wandering' (2004) 33 *Age and Ageing* 304; Catherine Bewley, *Tagging: A Technology for Care Services?* (London: Values into Action, 1998); Dorothy Horsburgh, 'The Ethical and Legal Aspects of Patient Restraint' (2003) 99 *Nurs Times* 26; 'Privacy of Clients: Tags and Television' (1994) 8 *Nurs Stand* 45. On how detention could give rise to an infringement of ECHR, Art 3, see *M.S. v The United Kingdom* Application No 24527/08, Merits and Just Satisfaction, 3 May 2012 and on ECHR, Art 5, see *Stanev v Bulgaria* Application No 36760/06, Merits and Just Satisfaction, 17 January 2012.

34 Scott Welsh and others, 'Big Brother Is Watching You – The Ethical Implications of Electronic Surveillance Measures in the Elderly with Dementia and in Adults with Learning Difficulties' (2003) 7 *Ageing Ment Health* 372; Clive Baldwin, 'Technology, Dementia and Ethics: Rethinking the Issues' (2005) 25 *Disability Studies Quarterly* 2.

about dementia care products, and so thought must be given to how any data is collected and stored, to ensure it adheres to data protection regulation.³⁵

The use of electronic monitoring in dementia care has been considered in the context of the bioethical theory of ‘principlism’, which centres on the four values of autonomy, beneficence, non-maleficence and justice.³⁶ In applying this principlist framework (focusing on the individual and the technology protecting the person with dementia), alongside the ethics of care (focusing on relationships and communication),³⁷ Baldwin observes that both frameworks prompt different questions about the use of electronic monitoring. Adopting a principlist framework in the dementia context considers whether it enhances the autonomy of the individual, whereas adopting the ethics of care approach reflects on whether the technology brings people together in interdependence or enhances the principal practice of caring.³⁸ The examination of the ethics of electronic monitoring³⁹ through other theoretical perspectives draws on Foucault’s notion of governmentality and the political logic (neoliberal, nationalist and techno-communitarian)⁴⁰ and the application of ‘mosaic theory’ to identify legal privacy frameworks to respond to developing technologies.⁴¹ Koops, Newell and Škorvánek examine the legal regulation of location monitoring and suggest lawmakers review electronic monitoring from the perspective of the freedom of movement, or the interest in moving around in publicly accessible places in relative anonymity.⁴² Whilst the analysis of individual rights and

35 Lodha and De Sousa, n 31 above. For a broader discussion on the theory of privacy rights and technology, see Sophie Stalla-Bourdillon, Evangelia Papadaki and Tim Chown, ‘Metadata, Traffic Data, Communications Data, Service Use Information ... What Is the Difference? Does the Difference Matter? An Interdisciplinary View from the UK’ in Serge Gutwirth, Ronald Leenes and Paul De Hert (eds), *Data Protection on the Move: Current Developments in ICT, Privacy and Data Protection* (Netherlands: Springer, 2016); Data Protection Act 2018.

36 Tom L. Beauchamp, and James F. Childress, *Principles of Biomedical Ethics* (New York, NY: OUP, 3rd ed, 1989); Diane P. Michelfelder, ‘Technological Ethics in a Different Voice’ in David M. Kaplan (ed), *Readings in the Philosophy of Technology* (Lanham, MD: Rowman and Littlefield, 2004).

37 On ethics of care see Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley, CA: University of California Press, 1984).

38 Baldwin, n 34 above.

39 For academic literature on the ethics of electronic monitoring see: Hughes and others, ‘Ethical Issues and Tagging in Dementia: A Survey’ (2008) 3 *Journal of Ethics in Mental Health* 1; Nellis, Beyens and Kaminski, n 12 above; Marita Sturken, Douglas Thomas and Sandra Ball-Rokeach, *Technological Visions: The Hopes and Fears That Shape New Technologies* (Philadelphia, PA: Temple University Press, 2004); Mike Nellis, ‘Techno-Utopianism, Science Fiction and Penal Innovation: The Case of Electronically Monitored Control’ in Margaret Malloch and Bill Munro (eds), *Crime, Critique and Utopia* (London: Palgrave MacMillan, 2013); Julian C. Hughes and Stephen J. Louw, ‘Electronic tagging of people with dementia who wander – Ethical considerations are possibly more important than practical benefits’ (2002) 325 *BMJ* 847; Louise Robinson and others, ‘Balancing Rights and Risks: Conflicting Perspectives in the Management of Wandering in Dementia’ (2007) 9 *Health, Risk & Society* 389.

40 Emma Laurie and Giuseppe Maglione, ‘The Electronic Monitoring of Offenders in Context: From Policy to Political Logics’ (2020) 28 *Critical Criminology* 685.

41 Lance Selva, William Shulman and Robert Rumsey, ‘Rise of the Mosaic Theory: Implications for Cell Site Location Tracking by Law Enforcement’ (2016) 32 *J Marshall J Info Tech & Privacy L* 235.

42 Bert-Jaap Koops, Bryce Clayton Newell and Ivan Škorvánek, ‘Location Tracking by Police: The Regulation of “Tireless and Absolute Surveillance”’ (2019) 9 *UC Irvine Law Review* 697.

appropriateness of electronic monitoring is undertaken below, it is important to highlight at this stage that in dementia care, legal safeguards accompany the use of electronic monitoring in the form of the Liberty Protection Safeguards, under the Mental Capacity (Amendment) Act 2019. The provision is intended to ensure that electronic monitoring is only authorised if ‘the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person’.⁴³ It is a valuable resource that can be used to facilitate autonomy for people with greater dependencies and where necessary, treated as a stop-gap measure until the dementia sufferer can move in with relatives or into a nursing home where monitoring can be undertaken by people rather than technology. The decision to be taken on whether electronic monitoring is an appropriate protective measure is therefore dependent upon the personal circumstances of each individual.

Such examples indicate a growing recognition that electronic monitoring could serve an important protective purpose in ways that positively uphold individual rights and freedoms. It is unsurprising then that the Family Court has utilised electronic monitoring as a remedy for children at risk of parental cross-border abduction. The first known case is that of *Re C (Abduction: Interim Directions: Accommodation by Local Authority)*.⁴⁴ Here, the mother had twice abducted the child from the USA and had assumed a new identity for herself and the child in the UK. To prevent the child from being removed from her care by the court, the ‘very innovative suggestion was made by the mother herself, that she should voluntarily subject herself to electronic monitoring’.⁴⁵ Since that decision, Mrs Justice Parker approved the use of electronic monitoring in a second case, *Re A Minor (Family Proceedings: Electronic Tagging)*.⁴⁶ In this case, the mother had twice previously abducted the child to her country of origin and the child was returned to the father in the UK. The mother sought contact with the child and she voluntarily subjected herself to electronic monitoring to alleviate the father’s concerns of any further abduction attempt. Electronic monitoring was subsequently approved in the joined child protection cases of *X and Y*.⁴⁷ In both cases, the parents were suspected of attempting to travel to ISIS territory with their children and agreed to electronic monitoring so that the court would permit the children to remain living with them until a final decision was made by the Family Court. The former President of the Family Division, Sir James Munby set out in *X and Y* that orders for electronic tagging (which is the phrase adopted by the Family Court) may only be made in the High Court and the question usually arises where there is a real risk of parental abduction.⁴⁸ The decisions in all four family law cases demonstrate that, though

43 Mental Capacity (Amendment) Act 2019, s 13(c). Note that these measures replace Deprivation of Liberty Safeguards under the Mental Capacity Act 2005. The 2019 legislation was expected to be introduced in April 2022 however the Government announced the ongoing delay: ‘Written Statement: Update on the implementation of the Liberty Protection Safeguards’ (Cabinet Statement, 5 April 2023) at <https://www.gov.wales/written-statement-update-implementation-liberty-protection-safeguards> [<https://perma.cc/CY9Z-RPTB>].

44 [2003] EWHC 3065 (Fam); [2004] 1 FLR 653.

45 *ibid* at [5] per Singer J.

46 [2009] EWHC 710 (Fam).

47 *X and Y* [2015] EWHC 2265 (Fam).

48 *ibid* at [100].

rarely used, electronic monitoring is a child protection measure available in family law proceedings and need not be ruled out when considering solutions for cases of parental child abduction.

In each of these cases, the parents, counsel and the courts were in agreement that electronic monitoring was the only method by which the child could be placed in the care of the parent who posed a flight risk.⁴⁹ In each of these cases, the court did not, and could not impose electronic monitoring, but rather approved its use following an application by the parents to voluntarily subject themselves to electronic monitoring to allow their children to remain living with them. It is contended, however, that given the tactics deployed by abductors, electronically monitoring the *parents* is an inadequate response to the risk of cross-border abduction. Research and media reports reveal that children are sometimes abducted from the UK by a third party,⁵⁰ usually a friend or relative of the abducting parent,⁵¹ an incidence in five of the 29 cases examined in my study of children abducted from the UK to Islamic law countries.⁵² In such cases, electronically monitoring of the parents does little to alleviate the risk to the child, and in fact, may compound the risk by luring those monitoring the parent into a false sense of security. This demands some consideration of where and how electronic monitoring should be used and, specifically, who should wear a monitoring device. A suggestion advanced here is that the child him/herself should wear the device. But such a suggestion demands consideration of the proportionality of subjecting children to electronic monitoring. The remainder of this article explores these arguments, adopting a doctrinal approach to interrogate the use of electronic monitoring as a protective measure, and reflects upon the use of electronic monitoring to protect children at risk of abduction.

IS ELECTRONIC MONITORING AN EXCESSIVE AND DISPROPORTIONATE MEANS OF PREVENTING ABDUCTION?

Assessing the appropriateness of electronic monitoring for protective purposes requires an understanding of the proportionality test applicable in human rights

49 Although the case and its *ratio* are discussed in academic literature, the focus is largely on childhood radicalisation and parental involvement in terrorist activity, rather than the issue of electronic monitoring which was discussed as a solution to the court's decision to allow the children to return to their parents' care; see for example Baroness Hale of Richmond, 'Freedom of Religion and Freedom from Religion' (2017) 19 *Ecc LJ* 3; Fatima Ahdash, 'Countering Terrorism in the Family Courts: A Dangerous Development' (2023) 86 *MLR* 1197.

50 O'Reilly reports a two-year-old boy, Faris Heeney, was abducted to Egypt by his paternal uncle using his half-sister's passport: Alison O'Reilly, 'Ireland's child abduction system is "broken"', says grandmother of boy kidnapped' *The Irish Examiner* 20 August 2023 at <https://www.irishexaminer.com/news/arid-41208484.html> [<https://perma.cc/8XCQ-DZLV>]. Five siblings were also abducted to Libya during a contact visit with their father with the help of the father's friend Mustapha Abushim, documented by Sandra Laville, 'Terrorist organised children's kidnap' *The Guardian* 1 July 2005 at <https://www.theguardian.com/uk/2005/jul/01/alqaida.world> [<https://perma.cc/DMB9-X7SF>].

51 See reference to the occurrence in a Belgian study also: Kruger, n 5 above, 75; Nuria G. Martin, 'International Parental Child Abduction and Mediation: An Overview' (2014) 48 *Family Law Quarterly* 319.

52 n 1 above.

law. Rights under the European Convention on Human Rights (ECHR) which are not absolute, ie are qualified, such as the right to liberty under Article 5 and the right to privacy under Article 8 of the ECHR, can be limited if the restriction is lawful, legitimate and proportionate.⁵³ Whilst these rights will be examined in detail below, it is helpful to set out here that the principles of proportionality under the ECHR require a decision-maker to evaluate all available options, consider the circumstances of the individual concerned, and choose the least restrictive option to achieve a legitimate aim, ie in this case to protect children at risk of abduction.⁵⁴ Applying this test to assess the proportionality of electronic monitoring from a human rights law perspective requires weighing up the evidence on the likelihood and potential harm caused by abduction, against the potential harm caused by electronic monitoring for *protective purposes*. Factors that inform this proportionality assessment include an examination of the evidence concerning the damage caused by parental abduction; the viability of any alternative measures; and contemplation of the costs versus benefits analysis of the proposals. Such reflections assist in the overall determination as to whether electronic monitoring can operate in the best interests of the child at risk of abduction.

The damage caused by parental child abduction

There are numerous legal measures in place to respond to cross-border parental child abduction spanning criminal and civil law.⁵⁵ It is difficult to say with any certainty whether existing measures deter or prevent abduction and the steady rate of abduction⁵⁶ suggests that even the most punitive responses, including a prison sentence of up to seven years,⁵⁷ does not act as a sufficient deterrent to abducting parents.⁵⁸

53 See the discussion below on the legal tests the court applied in the case of *X and Y* n 47 above in the context of electronic monitoring of adults. cf the legal test applied in criminal youth courts, where electronic monitoring is utilised in a punitive/rehabilitative capacity, Criminal Justice and Police Act 2001, ss 131–132, which permits electronic monitoring for children. An assessment of suitability for ‘tagging’ by the Youth Offending Service is required before a court can impose electronic monitoring on a 12 to 16-year-old, based on the characteristics of the child/young person. These are the existence of a suitable address for electronic monitoring including consideration about members of the household/establishment and the likely impact upon them and the effect on the child’s education. Youth Custody Services’ guidance suggests the child must be assessed as high/very high risk of serious harm and a high/very high risk of reoffending to be considered for electronic monitoring.

54 See Barak explaining the doctrine of proportionality is the best available option to ensure fair and effective protection of human rights in a pluralistic, democratic society, Aharon Barak, *Proportionality, Constitutional Rights and their Limitations* (Cambridge: CUP, 2012) 457–458; see also David Feldman, ‘Proportionality and the Human Rights Act 1998’ in Evelyn Elis (ed), *The Principle of Proportionality in the Law of Europe* (Oxford: Hart, 2009).

55 n 1 above.

56 Lowe and Stevens, n 5 above.

57 Child Abduction Act 1984, s 4(1)(b).

58 Statistics on the number of criminal convictions under this provision are not readily available. Lower court decisions are unreported and so only details of those cases in which the sentence is appealed appear in the law reports. See *R v Kayani and Solliman* [2012] 2 Cr App R (S) 38;

Positive developments in the civil law response to parental abduction have occurred in the past four decades, through the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Convention). The Convention requires courts in member states to return abducted children unless very limited circumstances apply.⁵⁹ It can be a helpful instrument in some cases, as the provision allows left-behind parents to request the child's return through the Convention's legal process. The Convention is only available in cases where the child is abducted to another Hague Convention state,⁶⁰ however, and so does not provide a remedy for all left-behind parents. We can also see that from the child's perspective, the post hoc response can be too late as by that stage the damage has already been done.⁶¹ Undeniably, whilst the Convention has assisted many families, it is notable that even in Hague Convention proceedings, fewer than half of abducted children return.⁶² The statistics demonstrate that the prospects of protecting children from the harm of abduction are far from ideal, particularly as the proportion of returning children is lower still when children are abducted to a non-Hague Convention state.⁶³ Moreover, the UK's withdrawal from the European Union also means that there is a risk that the country could lose access to the more practical child abduction

R v SB [2012] 2 Cr App R (S) 71; *RH* [2016] EWCA Crim 1754; [2017] 1 Cr App R (S) 23 (165). The author's study illustrates that the Family Courts have sentenced abducting parents in a number of cases under contempt of court provisions, for failing to abide by a Family Court order to return an abducted child to the UK, n 1 above.

- 59 The exceptions to return found within the Convention are: the left-behind parent was not exercising rights of custody or acquiesced to the child's removal; the child is of sufficient age and objects to return or is settled in the new environment; the child is at risk of harm if returned; the child's return would breach fundamental principles relating to human rights.
- 60 The treaty is not in force between all member states as newly acceding states must have their accession accepted by states who are already members. See HCCH, 'Status table' (last updated 14 November 2022) at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [<https://perma.cc/QL8Z-NTH3>].
- 61 For research on the harm of parental abduction, see discussion below and the following studies: Marilyn Freeman, *Parental Child Abduction: The Long-Term Effects* (London: International Centre for Family Law, Policy, and Practice, 2014); Kruger, n 5 above; University of Antwerp, *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases* (Antwerp: Missing Children Europe, 2017); Mary Gibbs and others, 'The Consequences of Parental Abduction: A Pilot Study with a Retrospective View from the Victim' (2013) 21 *Family Journal* 313; Geoffrey L. Greif, 'A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent' (2000) 31 *Child Psychiatry and Human Development* 59; Geoffrey L. Greif, 'The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy' (2009) 37 *American Journal of Family Therapy* 273; Geoffrey L. Greif, 'Ambiguous Reunification: A Way for Social Workers to Conceptualize the Return of Children After Abduction and Other Separations' (2012) 93 *Families in Society: The Journal of Contemporary Social Services* 305; Geoffrey L. Greif and Rebecca L. Hegar, 'Impact on Children of Abduction by a Parent: A Review of the Literature' (1992) 62 *American Journal of Orthopsychiatry* 599; Neil Senior, Toby Gladstone and Barry Nurcombe, 'Child Snatching: A Case Report' (1982) 21 *Amer Acad Child Psych* 579; Janet Chiancone, Linda Girdner and Patricia Hoff, *Issues in Resolving Cases of International Child Abduction by Parents* (Washington, DC: United States Department of Justice, 2001).
- 62 According to the 2021 Survey, approximately 39 per cent of children will return to the state from which they are abducted as a result of Convention proceedings. Note that 45 per cent returns were recorded in the 2015 survey, 46 per cent in the 2008 survey but less than 51 per cent in 2003 and 50 per cent in 1999, Lowe and Stephenson, n 5 above at [4].
- 63 See n 1 above; Kruger, n 5 above; Chiancone, Girdner and Hoff, n 61 above.

protective measures supported by the EU, such as early alert processes and judicial cooperation, rendering existing measures even less effective.⁶⁴

The proportionality of the response of electronic monitoring to protect a child from abduction, under the test in human rights law set out above, could be afforded greater weight when assessed against the enormous harm parental abduction causes to the child and families affected.⁶⁵ The harm arising is so significant that children are afforded the right to protection from parental abduction in Article 11 of the UNCRC, a right dedicated specifically to this issue. The gravity of the harm is further demonstrated through the Law Commission's proposal in 2014 for the maximum sentence for abducting parents to be increased from seven to 14 years' imprisonment.⁶⁶

Data collected in my study of abduction cases between the UK and non-Hague Convention Islamic law countries identify the ongoing nature of the harm caused by parental abduction. The accounts of abducted young people who participated in the study provide some insight into the long-term damage to children's relationships with both parents. As one abductee, Samir explains: 'Sometimes I don't even want to see his [abducting father's] face. As a child, you have to grow up with your parents. When I came to Libya, I was four years old, and I forgot how to speak English. [So] I can't speak with my mother normally.'⁶⁷ Another abductee, Aidan explains: 'Of course, I knew they [father's family] were not my mother and I only have one mother and I missed her. But I couldn't do anything about it, just accepting the situation. It had a big impact on my relationship with them [parents], I rarely speak with my father. With my mother, I don't know much about her, but I'm always happy to see her. It's not really a child and mother relationship, I guess, but it's okay.'⁶⁸

Abduction was reported to impact all spheres of a young person's life and remain in adulthood, affecting the decisions abductees make in the context of their adult relationships and subsequent parenting. In my study parents also observed a negative impact of the abduction on their child's behaviour, observing that abducted children were prone to self-destructive behaviour which then also affected the child's schooling and subsequent career prospects. Another abductee Sara explains: 'I wasn't ready to be at uni after everything that had happened; I didn't really go to any of my classes. I had such a sheltered upbringing I then went too much to the opposite; I drank a lot, and did drugs. I'd be on a night out, and I'd start crying, and I wouldn't be able to move, and

64 The UK government's guidance confirms Brussels IIa has been revoked by the UK (even though it is still in operation between EU member states). As a solution, the UK government explains that all cases of cross-border parental child abduction to and from the UK will be dealt with under the Hague Convention. See Ministry of Justice, 'Family law disputes involving the EU: guidance for legal professionals' (Guidance, 31 December 2020) at <https://www.gov.uk/government/publications/family-law-disputes-involving-the-eu-guidance-for-legal-professionals/family-law-disputes-involving-the-eu-guidance-for-legal-professionals> [<https://perma.cc/AHP6-JFLB>].

65 n 61 above.

66 Law Commission, *Simplification of Criminal Law: Kidnapping and Related Offences* Law Com No 355 (2014). Note the recommendation has not yet been implemented.

67 Anonymised data on file with the author.

68 *ibid.*

people would have to like carry me home. I was a weird person for ages after.⁶⁹ Younger children have also demonstrated the impact of the abduction upon them with troubling behaviour. A left-behind mother describes the behaviour of her child who returned to the UK aged 10:

She was so aggressive they were going to put her into care, hitting us, tried to stab us, there was one time when I was driving she tried to get the wheel and tried to drive the car into a lorry. She came back and no one would tell her off because of what she's been through. She was hanging out of car windows shouting 'sexy' to all the men walking past. She wouldn't settle at school, so got put in a special school. She didn't settle into the new one either because the children are a lot older. Her attendance is only 27 per cent.⁷⁰

Whilst the data for this study was collected in relation to abductions to non-Hague Convention states, the findings are also affirmed in studies by Freeman, Kruger and others, undertaken on the impact of parental abduction on children abducted between Hague Convention states.⁷¹ The studies describe how abductees identify profound feelings of estrangement, anxiety and resentment, inability to trust, depression and anger about what happened to them,⁷² trouble with making and keeping friends and trouble recalling important aspects of the abduction.⁷³ Abducted children report a high level of mental health problems, difficulties with intimate relationships decades after the abduction, a constant sense of insecurity, problems with attachment and loss of self-worth.⁷⁴

Conversely, in evaluating the proportionality of the response of electronic monitoring of a child for protective purposes, it is acknowledged that electronic monitoring could itself result in the child potentially being affected by wearing a monitoring device, through recognising or feeling she is different to other children. Measuring the effects of the potential impact of monitoring is difficult,⁷⁵ given that stigmatisation can be subjective and will depend on the age, understanding and personal circumstances of the individual wearing the device.⁷⁶ One of the difficulties in evaluating the stigma on this topic is that

69 *ibid.*

70 *ibid.*

71 n 61 above.

72 *ibid.*, 28.

73 Gibbs and others, n 61 above, 313.

74 Greif, 'A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent' n 61 above, 67.

75 Data specifically on child stigmatisation is limited. Note the observation by Graham and McIvor that 'there has been relatively little research focusing on the perspectives and experiences of monitored people' in Hannah Graham and Gill McIvor, 'Electronic monitoring in the criminal justice system' (IRISS, Insight 40, 10 October 2017) at <https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system> [<https://perma.cc/S2VQ-8Y6B>].

76 The feeling of stigmatisation in adults subject to electronic monitoring for punitive reasons is evidenced: 'Depending on their circumstances, wearers were concerned about having to explain why they were wearing the tag', Jane Kerr and others, 'Process evaluation of the Global Positioning System (GPS) Electronic Monitoring Pilot. Qualitative findings' (Ministry of Justice Analytical Series 2019) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779199/gps-location-monitoring-pilot-process-evaluation.pdf [<https://perma.cc/339P-7YAX>]; see also Bülow O'Nils, n 24 above.

young people who are currently subject to electronic monitoring in the criminal justice system readily accept the situation as a positive alternative to imprisonment.⁷⁷ The data that is available is therefore limited in this context,⁷⁸ and future research on the potential stigma children might experience when wearing a device for 'protective' rather than 'punitive' purposes would be valuable, exploring whether the experience of the protective might potentially be perceived as punitive due to the parents' actions. It would also be helpful to learn whether any feelings of stigma differ between age groups since the available data confirms it is younger children who are at risk of parental child abduction, occurring, on average, when the child is six years of age.⁷⁹ The author is not aware of any data clarifying whether this younger age group is mature enough to understand the negative associations of monitoring so further research in this area would be useful. Any child who is affected by wearing, or the prospect of wearing the device, should of course not be required to do so. A further consideration is that a child who is mature enough to recognise the negative associations of electronic monitoring may also potentially recognise the risks and consequences of abduction and understand that she has not committed an offence and the monitoring is intended to protect, not punish. Indeed, the greater usage of the technology in the 'protective' capacity could, over time, diminish the stigma associated with monitoring. On this point, Nellis observes that electronic monitoring is not just a penal phenomenon; and the decision to adopt it reflects a readiness among governments to infuse technology into social practice, for example in education, healthcare, and the criminal justice system. He suggests the readiness of citizens to accept these technological developments is symbolic of attitudes towards everyday technologies as 'cool' modern possessions regarded as desirable in contemporary media.⁸⁰ And so it may be the case that at some point in the future, the protective use of electronic monitoring as considered here will not result in the stigma it might currently be perceived to cause in other punitive contexts.⁸¹

77 Penelope Gibbs and Simon Hickson, *Children: Innocent until proven guilty. A report on the overuse of remand for children in England and Wales and how it can be addressed* (London: Prison Reform Trust, 2009); Rod Morgan, 'Youth Offending and Youth Justice' in Monica Barry and Fergus McNeill (eds), *Youth Offending and Youth Justice* (London: Jessica Kingsley, 2009).

78 Scottish Government, *Electronic Monitoring: Uses, Challenges and Successes* (Edinburgh: Scottish Government, 2019) 5-16, citing Willoughby and Nellis, n 28 above; James Kilgore, 'Would You Like an Ankle Bracelet with That?' [2012] *Dissent* 70; Robin Elliot and others, *Electronically Monitored Curfew for 10 to 15 Year Olds: Report of the Pilot* (London: Home Office, 2000) 7; Párkányi and Hucklesby, studied the operation of electronic monitoring in England, Hungary, and the Netherlands. They talked to school children in focus groups and interviewed four children subject to electronic monitoring, describing how children sometimes avoid sports and activities with other children their age if a bulky electronic tag is visible and citing strong support for designing smaller devices and improving battery life to improve the wearers' experience: n 11 above.

79 Lowe and Stephens, n 5 above, 10. The average age of six, at which children are abducted by parents, is also confirmed in the study of Belgian cases by Kruger, n 5 above, 27-28 and is confirmed in the author's study of cases from the UK, n 1 above.

80 Nellis, n 14 above, 505.

81 On concerns arising from state use of electronic monitoring without following a legitimate process, see Hadassa Noorda, 'Exprisonment: Deprivation of Liberty on the Street and at Home' (2023) 42 *Criminal Justice Ethics* 1.

In determining the question of proportionality, therefore, there is an argument that the potential harm electronic monitoring may cause a child who is at risk of abduction is unlikely to surpass the life-long harm that is described by those abducted as children in the numerous studies cited.⁸² Particularly where monitoring will only occur with the consent of the parents and child, for the shortest duration deemed necessary to protect the child, and for the monitoring situation in the case to be regularly reviewed by the Family Court. Notably, interference of the child's rights from electronic monitoring will occur if it is adopted, while the harms of abduction are always a risk, rather than a definite harm, in a case where the abduction has not yet occurred. This might be reflected as a trade-off of definite, actual interference through employing the technology, against the possibility of greater harm from abduction, but where the likelihood of that harm eventuating is difficult, if not impossible to calculate. The only available data in the balance at this stage is the voices of abducted children describing the harm they endured as a result of the abduction, which could add weight to the proposal that electronic monitoring could prove an effective preventative measure to reduce the risk of abduction occurring in high-risk cases. And, as illustrated below, the decision on whether or not to utilise the technology as a form of bodyguard would be made by the family affected.

Alternative solutions

A further consideration informing a proportionality assessment under human rights law is whether alternative solutions – including technological solutions – are viable and effective. In considering the use of other global technological advancements to prevent parental abduction, one such alternative is the use of biometric e-passports. E-passports currently in use in the UK contain a microchip and rely upon facial recognition technology.⁸³ Since the technology has the capacity to link with data to identify details of individuals who should or should not be allowed to cross the UK border, in theory, biometric passports could prevent cross-border parental abduction as the authorities would be aware if a child reported to be at risk of abduction is leaving the country.⁸⁴ The UK 'Port Alert System' allows reports of a potential case of parental abduction to be made to the police and the police have discretion on whether the child's name is placed on the 'passenger stop list', a process which is designed to prevent cases of abduction. In cases reported directly to the police, the child's name remains on the list for four weeks, and in cases where an application is made to the court, port alerts can be made indefinitely, to be reviewed and

82 n 61 above.

83 David Neal, Independent Chief Inspector of Borders and Immigration, 'An Inspection of ePassport Gates (June 2020 - January 2021)' (Inspection report, January 2022) at https://assets.publishing.service.gov.uk/media/61dd88e8d3bf7f054c397bb4/An_inspection_of_ePassport_gates_June_2020_to_January_2021.pdf [<https://perma.cc/H5MP-K97T>].

84 Though note the risk of face morphing technology if an individual wishes to succeed in passing border control with a false passport; Sushma Venkatesh and others, 'Face Morphing Generation and Detection: A Comprehensive Survey' (2021) 2 *IEEE Transactions on Technology and Society* 128.

re-ordered if needed at each hearing.⁸⁵ While placing the child's name on the list could perhaps deter abduction, unfortunately parents fearing an abduction may not have the reassurance of a port alert, and certainly, the process cannot be relied upon as a precautionary measure. This is because the case of *A v B (Port Alert)* emphasises the court should not make port alert orders 'routinely' or 'in reliance on evidence which amounts to no more than mere assertion or which is otherwise flimsy or unsubstantiated'. Rather, what is required is proof of a degree of probability 'not far short' of the more likely than not standard, that the child will be removed.⁸⁶ There are also instances where the police might erroneously fail to issue a port alert, highlighted in the very recent decision in *Bell v Commissioner of Police of the Metropolis*⁸⁷ (*Bell*) where the police made the decision to return the child's passport to the mother, knowing she had plans to travel to Brazil with the child, and failed to issue a port alert. The court accepted evidence that the Metropolitan Police Service in this case 'did not understand the law ... that officers consider that they know best', 'show no curiosity as to the issues' and 'do not try to learn or rectify their knowledge'.⁸⁸ The court declared the left-behind father's right to respect for his family life with his child, pursuant to Article 8 of the European Convention on Human Rights, was violated by the police and awarded him financial damages in excess of £130,000. Significant costs had been incurred by the father applying to the Brazilian courts for the child's return to the UK, albeit unsuccessfully. The court accepted that 'Brazil is, and was known at the time of these events, to be a country that does not comply with the Hague Convention ... and there is no extradition treaty in place with Brazil'.⁸⁹

The reliability of e-passports to prevent parental abduction is also uncertain for several reasons. Firstly, these are only in use in the UK for children aged 10 and over,⁹⁰ and as explained above, data confirm that it is in fact younger children who are at risk of abduction, with the average age of children abducted being age six.⁹¹ Secondly, even if the use of e-passports is extended to younger children, research confirms the use of biometric testing is not wholly accurate and trials have found a much greater rate of false matches than originally claimed.⁹² More significantly, the research confirms iris scanning, where images

85 Ministry of Justice, 'Practice Direction 12f – International Child Abduction' para [4.8] at https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12f [<https://perma.cc/7B44-CY2L>] which supplements the Family Procedure Rules, Part 12, Chs 5 and 6; see also text to n 96 below for an explanation by former President of the Family Division, Sir James Munby on how the port alert system operates.

86 [2021] EWHC 1716 (Fam) at [39].

87 [2024] EWHC 379.

88 *ibid* at [11]–[12].

89 *ibid* at [122]–[123].

90 See the UK Government website confirming biometric passports in use for children aged 10 and over, Border Force, 'Guide to faster travel through the UK border' (Guidance, updated 7 August 2024) at <https://www.gov.uk/government/publications/coming-to-the-uk/faster-travel-through-the-uk-border> [<https://perma.cc/TXW2-JQ5Q>].

91 n 79 above.

92 Nimra Khan and Marina Efthymiou, 'The Use of Biometric Technology at Airports: The Case of Customs and Border Protection' (2021) 2 *International Journal of Information Management Data Insights* 1; Lockstep Consulting, Submission to the Inquiry on the Current and Future Uses of

of the eye are used to identify individuals, is less accurate for younger children,⁹³ such that a child at risk of abduction may not be flagged up through any UK border alert system. Certainly, it could be difficult for machines to decipher between the passport photograph and a child when airport personnel can struggle to do so. The media reports that a two-year-old boy, Faris, was abducted to Egypt from Dublin airport by his paternal uncle using his half-sister's passport, with the boy being dressed as a girl to deceive the authorities.⁹⁴

A third reason e-passports cannot be relied upon to prevent parental abduction is because they are not in use by all countries and so it is possible children can be abducted from the UK through the use of a foreign passport. Incidents where children were abducted to non-Hague states through the use of a foreign passport which the abducting parent was able to obtain for the child without the left-behind parent's knowledge have been reported by the media. Referring to a case of abduction from the UK to Oman, *The Times* reported in 2017: 'She [the mother] was due to pick up Aishah and Faris, then seven and three, from his mother's house in Portsmouth where they had been spending the weekend when she received a text. It said: "The kids are with me. They're never coming home." She had their passports. Unbeknown to her, he had spent the previous week arranging emergency travel documents at the Omani embassy. It is a nightmare faced by a growing number of British parents.'⁹⁵

The precarious nature of border security, despite technological advancements, is also observed by the former President of the Family Division, Sir James Munby who made a similar observation in the child protection cases *X and Y* discussed above:

There are UK border controls at all airports and seaports. In the nature of things, those controls vary in their efficacy. The port alert system, one part of which is familiar to family judges and practitioners, operates by the electronic matching of names on what I shall refer to as the stop list with the names on passenger manifests previously supplied to the relevant authorities by passenger carriers. The system is not fool proof. There are in principle two methods of evading border controls: one is by the use of a false passport (I do not propose to go into the various techniques in use, though two, will be familiar to those who have read the book or watched the film *The Day of the Jackal*); the other is by clandestine departure, for example avoiding a port and leaving by small boat or light aircraft. The witnesses confirmed

Biometric Data and Technologies by the UK House of Commons Select Committee of Science and Technology, 'Written evidence submitted by Lockstep Consulting (BIO0004)' (2014) at <https://committees.parliament.uk/writtenevidence/53331/html/> (last visited 8 October 2024).

93 Serge Masyn and others, 'Overcoming the Challenges of Iris Scanning to Identify Minors (1-4 years) in the Real-World Setting' (2019) 12 BMC Res Notes 448.

94 O'Reilly, n 50 above.

95 Lucy Bannerman, 'British mother of abducted children says it's like they have died' *The Times* 5 August 2017 at <https://www.thetimes.com/uk/law/article/british-mother-lacey-plato-of-abducted-children-aisha-and-faris-says-it-s-like-they-have-died-after-father-usama-al-barwani-was-jailed-for-failing-to-return-them-z00tlc3nv> [<https://perma.cc/RSK9-Q99K>]; see also Ruth Mosalski, 'The Heartbreaking Life of a Mum Who Hasn't Seen Her Daughter Since She Was Abducted Seven Years Ago' *Wales Online* 6 July 2019 at <https://www.walesonline.co.uk/news/politics/talia-belaid-baby-libya-cardiff-16525922> [<https://perma.cc/835U-L4YQ>].

what one would in any case have surmised: that the system of UK border controls, though tight, determined, efficient and usually reliable, is not fool-proof, and that a resourceful individual with adequate resources can, if determined to do so, evade the system and leave the UK without being detected. Plainly, the difficulties in evading the system are greater if a number of adults and young children are involved, but even that is not impossible.⁹⁶

Sir James Munby's statement highlights the difficulties in preventing cases of parental abduction, despite existing provisions. Moreover, the very nature of cross-border abduction further lends itself to the possibility of children being issued foreign passports (whilst holding British passports) through their parents' nationalities. Despite the existence of e-passports, these cannot prevent abduction if a foreign passport has been issued for the child. What is more, the UK courts can order that the UK Passport Office block the use of a child's British passport, yet the same order cannot be enforced upon foreign nations and embassies. As a result, it is entirely possible for an abducting parent to have possession of a foreign passport for the child that could be used to facilitate the abduction.⁹⁷ Indeed, the case of *Kandari v JR Brown*⁹⁸ affirms the Kuwaiti Embassy in the UK was wrongly persuaded by the father to release a passport, which enabled the father to abduct his children, separating them from their mother for several years. Such evidence supports the use of electronic monitoring as potentially a more effective means by which to protect children from cross-border abduction, in high-risk cases.

Costs versus benefits

A further relevant consideration in evaluating the proportionality of monitoring relates to cost, both in terms of developing and monitoring the technology and whether the proposals would be regarded as a proportionate economic expense.⁹⁹ Data suggests that the type of electronic monitoring that is proposed here, where the child's live location can be detected during contact visits, is estimated to cost approximately £9 each day.¹⁰⁰ This figure appears to be the only publicly available estimate of the cost, and it is recognised that the small cohort of children at risk of abduction is likely to result in costs that may exceed this estimate. The infrastructure costs, to ensure the system will work effectively are also likely to impact this estimate.

Consideration of costs is particularly relevant as this issue is pertinent in the postscript of the judgment in the family law case *X and Y* in which electronic

96 *X and Y* n 47 above at [76]–[77].

97 See Lord Justice MacFarlane's comment in *R v Kayani and Solliman* n 2 above at [33].

98 *Kandari v JR Brown* [1988] 1 QB 665 298.

99 See Posner who argues the value of cost-benefit analysis as an evaluative and decision tool for social policy making should not depend on the resolution of philosophical problems: Richard A. Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers' (2000) 29 *The Journal of Legal Studies* 1153.

100 The costs are confirmed in 'Electronic GPS tags to track thousands of criminals in England and Wales' *BBC News* 16 February 2019 at <https://www.bbc.co.uk/news/uk-47256515> [<https://perma.cc/A52R-8FJS>].

monitoring was approved.¹⁰¹ The judgment documents the discussion between the Local Authority, the Ministry of Justice, The National Offenders Management Unit, The Electronic Monitoring Service and the assistant private secretary of the President of the Family Division on the issue of how the electronic monitoring would be funded.¹⁰² Despite the concerns around resources,¹⁰³ the Ministry of Justice accepted in *X and Y* that it ‘does not suggest that the costs implications alone should stand in the way of measures the court considers necessary to safeguard children’s welfare.’¹⁰⁴ The view taken by the court in *X and Y* is that the costs incurred were a proportionate and necessary expense to ensure the children’s safety and also enable the children to live with the parents who posed the abduction risk. As with all resource issues, if a cost versus benefit-analysis is undertaken, the child’s safety is the court’s paramount concern.

In assessing costs, the expenditure incurred in responding to cases of parental abduction appears to weigh more heavily than the outlay of managing electronic monitoring. A significant proportion of those costs arises from the legal process dealing with parental abduction cases. Securing legal advice and representation, payment of court fees to commence proceedings, the costs of lawyers, interpreters and other personnel are all part of the expense of responding to any one case of abduction. Mr Justice Holman also drew attention to the financial implications when adjourning a hearing due to the abducting parent awaiting the outcome of her application for Legal Aid. He explained:

It means that the hearing today has been an almost total waste of time and resources, all of them funded by the taxpayer. In the courtroom are a barrister and solicitor for the father, two interpreters, two court staff and myself, and, earlier today, the Cafcass Officer. We all have to be paid. The court infrastructure has to be provided and paid for. The cost today to the taxpayer, all wasted, will run into several thousands of pounds. Apart from the Cafcass Officer, who is ultimately funded by the Department of Education, all these wasted costs fall ultimately on the same government department, the Ministry of Justice, as does the legal aid budget. So, the decision of the Legal Aid Agency has merely resulted in the same department wasting a lot more money. There is also a cost to the mother and her adult daughter as well, both of whom are missing work and have had to incur travel expenditure from Somerset to London and back.¹⁰⁵

The costs Mr Justice Holman refers to relate to one hearing only during the course of an application by the father for the child’s return to Lithuania. In reality, most abduction cases can result in a number of hearings meaning the corresponding costs stack up. The parents interviewed in the author’s study quoted costs they personally incurred, in some cases exceeding £200,000, and

101 *X and Y* n 47 above.

102 *ibid* at [91]–[99].

103 A request by Counsel for the court to address the issue of funding for electronic monitoring in Family Law cases was made in *Re J-S (Children)* [2019] EWCA Civ 894. The appeal court declined to offer further guidance on the issue, *ibid* at [12]–[18].

104 *In the matter of X and Y (No 2)* [2015] EWHC 2358 (Fam) at [2] (this is a short footnote to the judgment dated 30 July 2015: *Re X (Children)*; *Re Y (Children)* [2015] EWHC 2265 (Fam) and the judgment is to be taken as read).

105 *Kinderis v Kineriene* [2013] EWHC 4139 (Fam) at [20].

a lawyer interviewed revealed that in one case, the Legal Aid bill concerning an abduction between the UK and Pakistan exceeded £150,000.¹⁰⁶ The recent decision in *Bell*, cited above, also illustrates this point on the costs of litigation, and further expenditure can arise in enforcing a return order, proceedings which can be particularly protracted. The costs discussed here arose from court litigation, but the pressure on the public purse is greater still when we reflect upon the other expenditure associated with abduction, such as the child's reintegration once returned, support to catch up with any missed schooling and therapy for both the left-behind parent and child.

The Ministry of Justice, referred to by Mr Justice Holman in his judgment as being ultimately responsible for government spending on court hearings and legal aid, is the same government department with responsibility for the budgeting and resourcing of electronic monitoring in the criminal justice system. It follows that the cost versus benefit analysis in that department alone is likely to demonstrate that a sensible option could be to invest resources to prevent abduction through monitoring rather than incurring a host of costs in the aftermath of abduction cases. The costs of managing electronic monitoring in the small number of cases in which the child is regarded as at risk of abduction by the Family Court appears entirely feasible, particularly as the monitoring could be an extension of the Ministry's existing contracts for the service in the context of criminal justice, as was arranged in the four family law cases discussed above in which electronic monitoring was ordered.¹⁰⁷ The UK Ministry of Justice announced in October 2021 that it plans to 'invest a further £183 million to support near doubling of number of people on tags.'¹⁰⁸ Attempting to stay clear of a discussion on neoliberalism,¹⁰⁹ as the discussion here is not to reduce government spending but to explore why electronic monitoring may not be an additional expense, the evidence appears to support the proposals being regarded as a proportionate economic expense. The fact that the technology now exists to ensure the child is protected from the harm of abduction is a positive development in itself and would have been a welcome measure for those families and children, in particular, who have suffered the long-term effects of parental abduction. Certainly, if the funding is not available from the state, families may agree to fund the monitoring themselves,¹¹⁰ as is generally the case in dementia care. However, it is worth

106 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the entitlement of legal aid in family law cases. In cases where an abduction risk is identified, but has not yet occurred, legal aid will be difficult to obtain and this is a reason why applicants may elect to utilise the inherent jurisdiction of the family court, where legal aid is more accessible, despite exhortation against doing this in *Re NY* [2019] UKSC 49 and *Re N* [2020] EWFC 35.

107 nn 45, 46 and 47 above.

108 Ministry of Justice and the Rt Hon Dominic Raab MP, n 16 above; For use of electronic monitoring for immigration bail conditions in 2022, see details of the Home Office Pilot Study, Home Office, n 18 above.

109 See further Nellis, Beyens and Kaminski, n 12 above, Nellis and Bungefeldt, n 13 above and Nellis, n 14 above, arguing that electronic monitoring should be understood as a form of e-governance and theorised in terms of the 'network society' and that its expansion is an expression of neoliberal penalty.

110 See n 100 above, where it is confirmed the costs of £9 per day are estimated for UK government contracts. Note the cost may be greater for individuals requesting the service. The services are

emphasising that electronic monitoring arranged by parents will differ greatly from that issued by the court, because as the analysis below identifies, the most effective monitoring service available is that which is currently utilised by the state, as it provides the quickest police response in the event of tampering, or entry into an excluded area. Commercially available monitoring services are unlikely to be able to provide equivalent protection and so whilst parents may be willing to fund electronic monitoring, access to the state-approved service is likely to be most effective at protecting children at risk of abduction.

CAN THE INFRINGEMENT OF CHILDREN'S LIBERTY AND PRIVACY RIGHTS BE OUTWEIGHED BY THE BEST INTERESTS IMPERATIVE?

Electronic monitoring of children raises fundamental issues of liberty and privacy even if employed as a precautionary, protective measure. The 'right to liberty' protected under Article 5 of the ECHR¹¹¹ is relevant insofar as electronic monitoring, by its very nature, implies the curtailment and monitoring of children's movements. Article 8 of the ECHR which protects an individual's right to respect for their private and family life, their home and correspondence is also applicable to the live data that is gathered on the child's movements whilst she is wearing the monitoring device.¹¹² Data protection has been identified by the European Court of Human Rights (ECtHR) as an expression of the right to privacy.¹¹³ Moreover, attaching the device to the child's ankle could also compromise the child's right to bodily integrity (examined below), potentially engaging the Article 3 right to protection from inhuman or degrading treatment, in addition to protection of physical and psychological integrity and the right to exercise personal autonomy which is also encompassed by Article 8 of the ECHR.¹¹⁴

available commercially for parents in the USA and the data suggests costs are approximated at \$10 a day or \$300 each month. See Leah Mack, 'Electronic Monitoring Hurts Kids and Their Communities' (JJIE essay, 24 October 2018) at <https://jjie.org/2018/10/24/electronic-monitoring-hurts-kids-and-their-communities/> [<https://perma.cc/7R7G-M6Z8>].

- 111 ECHR, Art 5(1): 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. Subsections 1(a)-(f) refer to examples of the lawful *detention* and *arrest* of individuals.
- 112 The GPS tag logs data as to the device's position and uploads that data to a central server. In *X and Y* n 47 above at [8]-[10] it was specified that the location is logged every five minutes, and the data uploaded every 15 minutes.
- 113 *Amann v Switzerland* Application No 27798/95, Merits and Just Satisfaction, 16 February 2000; *Rotaru v Romania* Application No 28341/95, Merits and Just Satisfaction, 4 May 2000; *Segerstedt-Wiberg and Others v Sweden* Application No 62332/00, Merits and Just Satisfaction, 6 June 2006. For a discussion on the court's approach, see further Julianne Kokott and Christoph Sobotta, 'The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 *International Data Privacy Law* 22.
- 114 Electronic monitoring and the right to bodily integrity is discussed below. On the overlap of the right to bodily integrity, autonomy and consent, see Adrian M. Viens, 'The Right to Bodily Integrity: Cutting Away Rhetoric in Favour of Substance' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge: CUP, 2020).

This raises questions as to whether the electronic monitoring of children at risk of cross-border parental child abduction can be regarded as a proportionate response to achieve the desired aim of protecting the child and a legitimate intrusion of children's Article 3, 5 and 8 ECHR rights. Whilst there are conceivable limits to a rights-based framing in this context, the child's rights are central to this analysis, as the very nature of the abduction dispute illustrates the parents are unable to agree on what is best for the child.

An infringement of children's liberty rights

The Article 5 ECHR right to liberty is a 'limited right' because the right to liberty can be restricted in accordance with the exceptions set out in Article 5(1)(a)–(f). For example, Article 5(1)(a) provides that the right to liberty is not violated where: the detention of an individual is lawful after conviction by a court; 5(1)(d) the detention of a child is for the purpose of educational supervision or bringing the child before the competent legal authority; and subsection 5(1)(f) refers to the lawfulness of detention if this is to prevent an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Article 5 jurisprudence illustrates that 'arrest and detention' can cover most situations where individuals are deprived of their physical liberty, such as to prevent crime, being detained in an 'open ward' in a mental health hospital and for the purposes of deportation.¹¹⁵ Jurisprudence on the restriction of movement/liberty specifically through electronic monitoring largely relates to cases in which suspected terrorists are subjected to electronic monitoring without a court hearing or criminal conviction.¹¹⁶ Case law has established that electronic monitoring can constitute 'imprisonment' under Article 5, and it is for the court to decide in each case whether the authorities have violated the individual's right to liberty and whether any infringement is a legitimate and proportionate response.¹¹⁷ The jurisprudence suggests that exceptions under Article 5(1) generally relate to situations of physical confinement such as imprisonment, but the English court has determined that electronic monitoring can violate the applicant's right to liberty. Such was the case in *DD v Secretary of State for the Home Department*¹¹⁸ where the applicant was made subject to electronic monitoring without conviction because he

115 See *Ashingdane v United Kingdom* Application No 8225/78, Merits, 28 May 1985; European Commission on Human Rights, *X & Y v Sweden* Application No 7376/76, Admissibility Decision, 7 October 1976.

116 *A v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009; *R (on the application of Hassan Tabbakh) v The Staffordshire and West Midlands Probation Trust, Secretary of State for Justice* [2013] EWHC 2492 (Admin) (*Tabbakh*). See also *DD v Secretary of State for the Home Department* [2015] EWHC 1681 (Admin) (*DD*).

117 *R (on the application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2020] UKSC 4 affirms that the imposition of curfew/monitoring requirements on a person subject to deportation does constitute 'imprisonment' for the purposes of the tort of false imprisonment which warranted the award of damages of £4,000.

118 n 116 above.

was suspected of being engaged in terrorist-related activities.¹¹⁹ Though the judgment refers to DD's 'liberty',¹²⁰ the ECHR right under discussion in the judgment is the Article 3 right to protection from inhuman and degrading treatment. The court stressed that electronic monitoring is not in itself an infringement of Article 3 but accepted that after several periods of detention for breaching the monitoring restrictions, the monitoring impacted DD to such an extent that this amounted to an infringement of his rights under Article 3.

In the present child abduction example, the proposed use of electronic monitoring of children at risk of abduction would restrict the child's movements, but only to the extent that the authorities would be alerted if the child is taken to a UK port. Though technically an infringement of Article 5, the imposition on the child's liberty does not appear to meet the threshold, nor does it fall within any of the exceptions under Article 5(1)(a)-(f). The Article 5 jurisprudence examined above demonstrates the threshold of a violation of Article 5 generally requires unlawful detention by the authorities, which is not the case in the present child abduction example. The proposed use of electronic monitoring is not intended to restrict the child's day-to-day movements but serves to alert the authorities if the child is taken to a port and is at risk of imminent abduction. It is also relevant that the use of electronic monitoring would only take effect once the parents, who are vested with parental responsibility for the child, agree to monitoring before this is approved by a Family Court and so the child's liberty is not infringed by the 'authorities' through 'arrest and detention' as is required to evidence a limitation of Article 5 of the ECHR.

Since there are no reported cases on whether the use of electronic monitoring is legitimate as a *protective* measure under Article 5, it is worth drawing inspiration from the UNCRC. This kind of cross-fertilisation between the UNCRC and the ECHR is an accepted method where the ECHR – which was not drafted with children in mind – is silent on a particular interpretation pertaining to children.¹²¹ Article 15 of the UNCRC could also be pertinent to the child's liberty rights in this situation as the provision requires states to recognise the child's right to freedom of association and freedom of peaceful assembly. If the right is broadly interpreted, Article 15 of the UNCRC provides children the right to liberty and freedom of movement and if this is the case, the right could be infringed through electronic monitoring. Following this line of reasoning, Article 15(2) of the UNCRC permits the protected right to be limited where necessary 'in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety,

119 DD was subject to electronic monitoring under Terrorism Prevention and Investigation Measures (TPIMs) pursuant to the Terrorism Prevention and Investigation Measures Act 2011, without having been convicted of an offence. Individuals subjected to monitoring as part of TPIMs are believed to have engaged in terrorism-related activity, but who can neither be prosecuted nor deported, but continue to pose a risk to the public. See the legal analysis of this form of 'expropriment' by Noorda, n 81 above.

120 DD n 116 above at [72].

121 Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308.

public order, the protection of public health or morals or the protection of the rights and freedoms of others.’

If we apply the limitations to the proposal to electronically monitor the movement of children at risk of cross-border parental abduction, it is clear that the child will not have his or her voluntary movements curtailed as a result of the monitoring. This is because the evidence suggests, as explained above, that it is in fact younger children who are at risk of abduction: the average age of children abducted is six, and most often children aged between three and seven years.¹²² On the basis of this evidence, it is predominantly younger children who are likely to be at risk of abduction and would require monitoring during contact visits with the parent who poses an abduction risk. Younger children at risk of abduction are also likely to be within the control and supervision of their parents when not at school so the electronic monitoring would have less effect on their day-to-day movements as compared with older children, for example, those aged 12 upwards and at secondary school. The monitoring would only be necessary for a finite period of time, while the court determines that the child is at risk of abduction. On this basis, the independent social movements of older children as envisaged by Article 15 of the UNCRC – when children wish to independently socialise and engage in activities – are unlikely to be infringed, and so the proposed use of electronic monitoring does not appear to contravene Article 15 of the UNCRC. Notwithstanding this position, if it is decided in a particular case that an older child requires the protection of electronic monitoring, it is arguable that the exceptions under Article 15(2) of the UNCRC permit an infringement since electronic monitoring as proposed in this article would only be employed with the necessary consents and with the legitimate aim of protecting the child from the harm of abduction.¹²³

A limitation of children’s privacy rights

Article 8 of the ECHR protects an individual’s right to respect for their private and family life, home and correspondence. To reduce the risk of abduction, electronic monitoring would enable the child’s live location to be detected during contact visits to ensure the child is not taken to a UK port.¹²⁴ In this situation, the Article 8 right encompasses the child’s privacy through protection of the data that would be collected on the child’s movements.¹²⁵ Jurisprudence of the ECtHR suggests that data collected on the child’s movements could interfere with the child’s right to privacy under Article 8 of the ECHR.¹²⁶

122 n 79 above

123 On the application of UNCRC, Art 15 exceptions, see Aoife Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and to Freedom of Peaceful Assembly* (Leiden: Brill, 2016).

124 As in *X and Y* n 47 above.

125 For a discussion on the court’s jurisprudence on these two overlapping areas see further Kokott and Sobotta, n 113 above.

126 See *Amann* n 113 above at [69] and [80], which determined that telephone calls received on private premises are covered by notions of ‘private life’ within the meaning of ECHR, Art 8; *Rotaru* n 113 above at [48], establishes storing information relating to an individual’s private life

Article 8 is not an absolute right, however, and public authorities are permitted to interfere with the right if it is lawful and proportionate to do so under Article 8(2).¹²⁷ This specifies that any interference ‘must be in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ Article 8(2) of the ECHR permits an interference with privacy rights if these are restricted for a legitimate aim or purpose and provides that a legitimate aim would be to prevent a crime, which will encompass the crime of parental child abduction, pursuant to section 1 of the Child Abduction Act 1984. If a complaint were to be made to the court that the data collected on the child’s location during contact visits is an infringement of the child’s Article 8 ECHR right, it would be for the court to decide whether the limitations found in Article 8(2) sufficiently permit the limitation in order to prevent a crime, and the court would determine how the competing right, to be protected from the harm of parental abduction, can be balanced fairly with the right to privacy.

Again, the UNCRC is instructive in how to interpret children’s privacy rights under Article 8 of the ECHR in the context of electronic monitoring. Article 16 of the UNCRC establishes additional privacy rights for the child, specifying: ‘no child shall be subjected to arbitrary or unlawful interference with his or her privacy’. In contrast to Article 8(2) of the ECHR, however, the Article 16 UNCRC right is not subject to any limitations and so consideration of whether the electronic monitoring of the child’s movements amounts to ‘an arbitrary or unlawful interference’ with the child’s privacy is therefore necessary.¹²⁸ The Article 8 ECHR interpretation both enriches and lends support to the Article 16 UNCRC interpretation to ensure the right is considered from the perspective of individual children. It is intended that the movements of the child are only monitored during periods of contact with the parent who presents a risk of abduction. Data on the child’s location will therefore only need to be viewed during those contact visits. Data on the child’s movements is collected for the sole purpose of ensuring the child is not abducted and, in this respect, will fall under the exceptions as set out in Article 8(2) of the ECHR because the purpose of the infringement is to protect the child and to prevent a crime.¹²⁹

In determining whether an infringement of Article 16 of the UNCRC (through monitoring the child’s movements) is a proportionate response to

by the authorities and the release of such information can come within the scope of ECHR, Art 8.

127 See *Tabbakh* n 116 above and *DD* n 116 above.

128 UN Committee on the Rights of the Child, General Comment No 25: Children’s Rights in Relation to the Digital Environment, CRC/C/GC/25 (2 March 2021) at [69].

129 Párkányi and Hucklesby highlight that ‘whilst most jurisdictions do not routinely access all of the data collected by devices in the criminal justice system, the fact that data are available means that it is possible to do so’: Eszter Párkányi and Anthea Hucklesby, ‘Comments on the Draft General Comment No. 25 on Children’s rights in relation to the digital environment’, 2 at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/GCChildrensDigitalEnvironment/2020/others/eszter-parkanyi-university-of-leeds-anthea-hucklesby-university-of-birmingham-2020-11-15.docx> (last visited 15 October 2024).

achieve a legitimate aim (of protecting the child from the harm of abduction), it is important to recognise that no viable alternative to electronic monitoring exists to protect children from the harm of abduction, unlike, for example, the situation of dementia patients considered above. To protect dementia patients from harm, the alternative to electronic monitoring can be achieved through employing additional carers to protect the individual's safety, and so in dementia care, electronic monitoring may not be a 'necessary' infringement. Conversely, whilst the legal process under the 1980 Hague Abduction Convention exists as a potential remedy 'after the event,' abductions to a non-Hague Convention state are not covered by this legal process.

The example of Adam (whose name has been changed), one example of the 29 cases of abduction examined in my study, highlights the lack of alternative measures available, in comparison with dementia care. The example further illustrates that electronic monitoring, rather than being prohibitive, could enable children to enjoy contact with the parent who poses a risk of abduction, where contact might not otherwise be permitted by the family court: Adam is aged six, his parents are divorced, and he lives with his mother in England. Adam's father moved to his home country after the divorce but has now returned to England and wishes to spend time with Adam. Adam's mother is unwilling to agree to unsupervised contact as Adam's father previously threatened to take Adam to live with him in his home country. What is the solution to this predicament if Adam's mother does not agree to unsupervised contact because she is fearful of an abduction? The Family Court would be required to assess the risk of abduction, and the assessment will determine whether contact would be permitted between Adam and his father on a 'supervised' or 'unsupervised' basis.

In permitting contact visits, the court has powers to order that Adam's father does not remove Adam from England, but if Adam's father disobeys the order, and Adam is abducted, any court orders for Adam's return are unenforceable in many parts of the world.¹³⁰ Currently, the legal provisions are limited and rely upon Adam's father not to break the law, nor to apply for a foreign passport for Adam that could be used for an abduction.¹³¹ Adam's father could apply to the embassy of his home country for a passport for his child, and to evade any 'alerts' at UK ports he can alter the spelling of Adam's name using a non-Anglo spelling, such as Adham or Adem, an occurrence in four of the 29 cases examined in my study.

130 It is recognised that women also abduct their children to flee domestic violence. If a child is subject to electronic monitoring because the father convinces the court the child is at risk of abduction by the mother, the proposals suggested in this article could conceivably make matters difficult for the mother. Domestic violence and child abduction is a topic outside the scope of the article but is addressed by the author elsewhere, n 1 above. See also commentary by Lamont who discusses how the process of upholding the rights of abducted children can operate against the mothers' rights: Ruth Lamont, 'Mainstreaming Gender into European Union Family Law? The Case of International Child Abduction and Brussels II Revised' (2011) 17 *European Law Journal* 366. See also the work of Freeman and Taylor who explore the challenges for the Hague Convention arising as a result of domestic abuse: Marilyn Freeman and Nicola Taylor, 'Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention' (2020) 42 *Journal of Social Welfare and Family Law* 154.

131 For confirmation, see n 1 above and, for comments of the former President of the Family Division, Sir James Munby, see *X and Y* n 47 above at [76]-[77].

Alternatively, if the Family Court accepts the argument of Adam's mother that there is a risk of abduction, then the court can order that the only contact Adam will have with his father is on a supervised basis. Supervised visits are not easy to facilitate, and if the parents are unable to agree or find an appropriate supervisor for every visit, such as a trusted relative, the only viable alternative is for Adam to have supervised contact with his father at a contact centre.¹³² Contact centres are generally available for families in cases where the Family Court or Local Authority decide that a parent is unable to have unsupervised contact with their child to ensure the child's safety. Contact centres can either be voluntarily run, by a church for example, or by an organisation that employs staff and so requires fees to be paid to supervise each visit.¹³³ Limiting contact to visits at a contact centre will undoubtedly affect the quality of the relationship Adam enjoys with his father, unable to play football in the park, go for a bike ride, or visit the local bowling alley or cinema. Adam's father may also not be in a position to afford the contact centre fees, estimated at £75 per hour, which he must pay for the supervision.¹³⁴ If supervision is regarded as necessary for Adam to see his father, utilising electronic monitoring could facilitate contact between Adam and his father outside a contact centre, whilst alleviating concerns about the risk of abduction, and could therefore be regarded as a proportionate response to achieving a legitimate aim. Whilst the collection of data on the child's movements may amount to an infringement of the child's privacy rights, it does not amount to 'an arbitrary or unlawful interference' as protected by Article 16 of the UNCRC. Conversely, if this view is not accepted, and electronic monitoring is regarded as an infringement of the child's Article 16 UNCRC right to privacy, it is suggested here that the right can be superseded by other competing UNCRC rights because the intrusion on the child's privacy rights is intended only to achieve a legitimate aim, ie to uphold other rights of the child under the UNCRC: to prevent cross-border abduction (Article 11), to facilitate contact between the child and the non-resident parent (Article 9) and following what the Family Court decides is in the best interests of the child (Article 3).

It is recognised that the proposed use of electronic monitoring to prevent abduction could potentially have a greater impact, for example, on children from poor backgrounds, or minority ethnic communities. The effect of this type of intersectionality is not limited to the use of monitoring, however, and also exists in the context of the risk of abduction, parental separation and custody disputes.¹³⁵ These factors are explored elsewhere,¹³⁶ and for the purpose of

132 On the difficulties arising for families using contact centres, see Emily Schindeler, 'Family Law Court Orders for Supervised Contact in Custodial Disputes – Unanswered Questions' (2019) 44 *Children Australia* 194. In the UK context, see Tracey Bullen and others, 'Interventions to Improve Supervised Contact Visits Between Children in Out of Home Care and Their Parents: A Systematic Review' (2017) 22 *Child & Family Social Work* 822.

133 For example the contact centre Families Forward confirms in its application form that its current fees are a £100 non-refundable fee to register and the charges for supervised contact are £75 per hour, see <https://www.familiesforward.org.uk/contactservices> [<https://perma.cc/PEA9-GNVA>].

134 *ibid.*

135 See further the causes of parental child abduction in studies cited at n 61 above.

136 *ibid.*

analysis here it must suffice to highlight that the legal test the Family Court will apply to determine whether electronic monitoring is appropriate in any given case is based upon the welfare and best interests of the individual child. The legislation specifies that in making any order, the welfare of the child must be the court's paramount consideration and the court must have regard to the child's wishes, feelings, needs, the effect of the electronic monitoring on the child's circumstances, the child's characteristics and any harm the child is at risk of suffering.¹³⁷

ELECTRONIC MONITORING AND CHILDREN'S CONSENT

The proposed use of monitoring is premised on the agreement of both parents to resolve a predicament on whether unsupervised contact is permitted between the child and parent who poses a risk of abduction. A request to the court for the child to be electronically monitored would only be made where both parents confirm they agree to the child's monitoring, before asking the court to assess whether monitoring is in the individual child's best interests. The decision is voluntary, or as voluntary as it could be in so far as relates to this particular set of circumstances, where one parent poses a risk, and this is the solution agreed upon by all concerned to facilitate contact between the child and the parent who presents the abduction risk. Yet it is the child who is required to wear the device for her protection, and so the child's consent is pivotal.

Failing to address the issues of consent can result in a breach of the child's right to bodily integrity.¹³⁸ The child's right to bodily integrity is recognised in legislation¹³⁹ and the established position is that if a child understands the implications of what she is consenting to, that consent will generally suffice even if the child is aged below 16.¹⁴⁰ However, the courts will not allow children to consent to anything harmful that undermines their best interests, such as refusing life-saving treatment.¹⁴¹ The ECtHR has also interpreted the Article 8 ECHR right to respect for privacy to encompass the protection of physical and psychological integrity and the right to exercise personal

137 Children Act 1989, s 1.

138 For further discussion on the right to bodily integrity, autonomy and consent see Viens, n 114 above.

139 The Family Law Reform Act 1969, s 8 confirms that young people aged 16 or 17 can consent to treatment; The Mental Capacity Act applies to those aged 16 and above and its section 3 specifies that a young person (from the age of 16) can make their own decision if they can demonstrate the abilities to: understand the information given to them; retain that information long enough to be able to make the decision; weigh up the information available to make the decision; and communicate their decision.

140 See the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 in which it was established that in some circumstances children aged below 16 can consent to medical treatment (the case concerned contraception) without their parents' knowledge or approval. Lord Scarman proposed that a minor will be able to consent to treatment if they demonstrate 'sufficient understanding and intelligence to understand fully what is proposed'.

141 *Re R (A Minor) (Wardship: Consent to Treatment)* (1991) 3 WLR 592; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64; *Re E (A Minor) (Wardship: Medical Treatment)* (1993) 1 FLR 386; *Re M (A Child) (Refusal of Medical Treatment)* [1999] 2FLR 1097.

autonomy to refuse medical treatment or to request a particular form of medical treatment.¹⁴² Thus, if the gravity of interference with the right to bodily integrity is significant, Article 3 of the ECHR (protection from torture, inhuman or degrading treatment or punishment) could apply as it did in the electronic monitoring case of *DD* discussed above.¹⁴³

It may be helpful at this stage to reflect again on the context of dementia care, where the issue of consent is one of the primary factors undermining the use of electronic monitoring.¹⁴⁴ Without actual consent, the act of applying the device to an individual's ankle could amount to the offence of battery.¹⁴⁵ Thus in the example of dementia care, if an individual does not give consent while still capacitous, electronic monitoring could only be imposed following the Liberty Protection Safeguards under the Mental Capacity (Amendment) Act 2019 and would only be authorised if 'necessary and proportionate to provide protection as the least restrictive method of ensuring the individual's safety'.¹⁴⁶ If a similar approach is adopted in the context of children at risk of abduction, autonomy issues can be equally complex. Article 12 of the UNCRC grants children a right to participate in decision-making that affects them,¹⁴⁷ subject to the proviso of 'the child who is *capable* of forming her own views' and 'the views of the child being given due weight in *accordance with the age and maturity of the child*'. Accordingly, securing the consent of any child to be voluntarily subject to monitoring is dependent on the child's maturity and understanding of the associated risks, both relating to the abduction and electronic monitoring itself. The child's capacity and autonomy in decision-making is also, of course, made in the unenviable circumstances in which both parents wish for the child to live with them, in the country of their choosing, and are unable to agree, so the voluntary decision by a mature child is also a decision taken in a particular set of circumstances. It was identified above that the average age that a child is abducted is age six and, in most cases, abductions occurred when children were aged between three and seven.¹⁴⁸ The UN Committee on the Rights of the Child explains in General Comment 12 that, whatever the child's age, if the child has sufficient understanding, the parents should consult with their child to agree whether the benefits of monitoring are great enough to outweigh the disadvantages to the child.¹⁴⁹ Where possible, the child needs to be part of the

142 *Glass v the United Kingdom* Application No 61827/00, Merits and Just Satisfaction, 9 March 2004; *Tysiac v Poland* Application No 5410/03, Merits and Just Satisfaction, 20 March 2007.

143 See *DD* n 116 above.

144 n 33 above.

145 See Criminal Justice Act 1988, s 39; *Collins v Wilcock* [1984] 1 WLR 1172; *Re K, W and H* [1993] 1 FLR 854; *Re W* [1993] Fam 64; *Re R* [1992] Fam 11.

146 It has been argued that electronic monitoring can be a more humane solution to a difficult problem because consent is in fact not sought when the same category of dementia patients can be subjected to 20 different forms of restraint ranging from tying down patients, the use of sedatives, locks, glass panels in doors and threats: Miskelly, n 33 above, 304–306; Bewley, n 33 above. For a discussion of these concerns see Horsburgh, n 33 above, 45.

147 For a discussion on how the UNCRC, Art 12 right has evolved since 1989, see UN Committee on the Rights of the Child, General Comment No 12: The Right of the Child to be Heard, CRC/C/GC/12 (1 July 2009).

148 n 79 above.

149 General Comment No 12, n 147 above.

discussion on whether or not she should wear the device, since it is the child who is most affected by the abduction and evidence suggests that even young children are capable of understanding complex matters if these are explained in an age-appropriate way.¹⁵⁰

Younger children who are most at risk of abduction and unable to appreciate the complexities of the risk of parental abduction will, in any event, require the decision to be made on their behalf by those with parental responsibility for them.¹⁵¹ As a fail-safe, it is proposed that the Family Court decide if the child should be subject to electronic monitoring based on what the court considers to be in the best interests of the particular child, as it would already do so in the context of custody and contact proceedings. Allowing the Family Court to undertake the best interests assessment is comparable to the requirement of the Liberty Protection Safeguards when imposing electronic monitoring upon non-capacitous adults, as outlined above.¹⁵² Such an approach would uphold the child's right to have her views considered and to have her best interests treated as a primary consideration.¹⁵³ Later, as the child matures, she can be asked to share her views and participate in the decision, in a manner consistent with the evolving capacities of the child,¹⁵⁴ in a manner that assures the Family Court that the child's choice was given freely.¹⁵⁵ Once the child is mature enough to understand the implications of monitoring and/or the risk of abduction, the child should have a choice to decide whether or not she is subject to electronic monitoring.

IS THE TECHNOLOGY EFFECTIVE ENOUGH TO PREVENT ABDUCTION?

This article advocates that children should be subject to electronic monitoring for as short a period as possible, ideally only during contact visits, as the empirical data suggests that this is when children are at most risk of parental abduction. There will of course be additional cost implications to be factored in if the monitoring device is applied and removed for each contact visit. Limiting electronic monitoring during contact visits could also displace abduction

150 Priscilla Alderson and Virginia Morrow, *Ethics, Social Science Research and Consulting with Young People* (London: Barnados, 2004); Laura Lundy and Lesley McEvoy, 'Children's Rights and Research Processes: Assisting Children to (In)formed Views' (2012) 19 *Childhood* 116.

151 Parental Responsibility is defined in Children Act 1989, s 3 as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. See also UNCRC, Arts 5 and 18.

152 Which Hughes and Louw also propose in the context of dementia care, n 39 above, 847-848.

153 UNCRC, Arts 3, 11 and 12.

154 For discussion on the evolving capacities of children, see further Gerison Lansdown, *The Evolving Capacities of the Child* (Sweden: UNICEF 2005); Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306.

155 For discussion on how the courts can respond to the influence of adults in children's decision-making across a range of issues, see Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (London: Hart, 2017).

attempts to other situations, however, and so careful thought on the potential risks in each child's situation could necessitate monitoring at times other than during contact visits when the child is not with the resident parent or in school. The circumstances could subsequently result in monitoring being employed for an extensive period, raising questions for the court and the families affected on the proportionality of employing this precautionary measure and precisely when, and for how long the child's movements should be monitored. Notably, the duration would be longer in this example, compared with the four family law cases examined above in which electronic monitoring was utilised. In those cases, the court was working to conclude the legal proceedings within a fixed duration, whereas in this proposal the period during which the risk of abduction is regarded as 'high' could be indeterminate. Thus, a realistic assessment of the risk, balanced alongside the practical arrangements for applying and removing the device, may require the child to wear the device for as long as the risk of abductions remains, in a similar way to how a family may incur the expenditure and inconvenience of hiring a bodyguard for the child. These discussions on duration would inevitably occur in the context of whether 'supervised' or 'unsupervised' contact visits are permitted between the child and parent who poses an abduction risk, and this additional factor of electronic monitoring would be deliberated as part of those existing discussions on how long it would be appropriate to continue 'supervising' contact. As with all arrangements made before the Family Court, a right of review for both parents (and the child) would exist.

The recommendations on electronic monitoring of the Council of Europe define it by three characteristics: the monitored phenomenon, the devices and institutional arrangements needed and the technology that is used.¹⁵⁶ The types of electronic monitoring that can be employed vary. In *X and Y* the court suggested the only suitable method of tracking the whereabouts of parents who posed a risk of abducting their children was to employ Global Positioning System (GPS) electronic monitoring, which uses satellites to track the live location of a GPS tag.¹⁵⁷ The most current literature, at the time of writing, which examines the use of electronic monitoring in the UK, explains that GPS monitoring comprises a tamper-resistant transmitter worn around the ankle that receives transmissions from satellites and identifies the wearer's location.¹⁵⁸ A mobile phone network communicates the location information to a central computer at a monitoring centre in real-time, enabling the movements of the device to be plotted against locations and times.¹⁵⁹ Graham and McIvor, examining the technology, explain that monitored individuals are set location restrictions, such as an 'exclusion zone' and that 'buffer zones' surrounding exclusion zones are also set, so that, if entered, an alert of a violation of the exclusion zone can result in a police response.¹⁶⁰ In the context of this abduction situation, an exclusion

156 Recommendation CM/Rec (2014)4 of the Committee of Ministers to Member States on electronic monitoring.

157 *X and Y* n 47 above at [76]-[77]; see also Bert-Jaap Koops and others, n 42 above.

158 Graham and McIvor, n 75 above; Bert-Jaap Koops and others, *ibid*; Párkányi and Hucklesby, n 11 above.

159 Graham and McIvor, *ibid*.

160 *ibid*.

zone around all UK ports could be set, for example, with a ‘buffer zone’ of a 50 mile radius of all UK ports, to enable sufficient time for an emergency response.

Whilst the use of electronic monitoring in the criminal justice system has been in place for decades, the use of GPS monitoring was extended to children in March 2021, and the data confirms that 388 children were monitored through the use of a GPS ankle tag in 2021, and 550 children in 2022, including a 12-year-old.¹⁶¹ The practical difficulties in employing electronic monitoring in this situation, therefore, appear to relate not to whether the device could be adapted and made suitable for children, but to whether there could be any potential difficulties in the operation of GPS monitoring. Concerns about the effectiveness of the technology relate largely to whether any problems in the strengths or signals of the transmissions from satellites could prevent identifying the child’s location, and whether a response system in the UK is efficient.¹⁶² In the family law case of *X and Y*¹⁶³ evidence was heard from both the police and the head of equipment services for Electronic Monitoring Services in the UK, Mr Fearnley, who provided the court with expert evidence on the technical aspects of electronic monitoring. The judgment summarises the evidence on GPS electronic monitoring:

A more sophisticated system of GPS monitoring is also available, which is programmed to track the tagged person’s movements at defined intervals (if desired, a period measured in minutes or even parts of minutes) and programmed to send an automatic report to the monitoring control of those movements at pre-determined intervals (which, again, can be a matter of minutes rather than hours). It also alerts the monitoring control if the tagged person either interferes with the tag or travels outside a previously defined zone. The equipment is designed to ‘fail safe’, so it may occasionally send a false report that someone has absconded or interfered with the equipment when in fact neither has happened. Mr Fearnly [the expert] was not aware of any occasion on which the equipment had failed to report when it should have done so.¹⁶⁴

The technology is of course only as good as the response, which raises questions about the mechanism by which the authorities would be alerted to a potential abduction and what would be done to prevent the abduction from occurring. A response system for monitoring GPS tags currently exists in the UK as part of the criminal justice system and this could potentially be extended to assist in cases of parental abduction, as ordered by the Family Court in the four cases discussed above. There will of course be resource implications to monitor the child’s movements and to alert the police to respond swiftly to abduction attempts, and this is factored into the costs assessment undertaken above.

The risks associated with electronic monitoring were also considered by the court in *X and Y*, in which the court observed:

161 Murugesu, n 19 above.

162 Graham and McIvor, n 75 above.

163 *X and Y* n 47 above.

164 *ibid* at [78].

The tag is designed to be very difficult to remove and any attempt to do so will send out an alarm message. However, even the GPS system is not foolproof. If the tagged person is able to remove the tag and make an escape from his last known position before the authorities arrive, he may be able to evade capture, even though the alarm will have been transmitted within seconds of the equipment being tampered with. Mr Fearnly [the expert] was aware of two such cases.¹⁶⁵

Notably, these were two failed examples of electronic monitoring in contrast to the thousands of examples of effective electronic monitoring each year. Thus, despite the acceptance of the court ‘that there is *some* degree of risk [of the parents abducting their children] ... the degree of that risk is very small, indeed, so small that it is counter-balanced by the children’s welfare needs’¹⁶⁶ and the court concluded in that case that GPS electronic monitoring did offer the greatest level of protection available. The court further stipulated that a named contact, such as a police officer or solicitor, should be provided whom the monitoring service provider could reach in the event of any concern.¹⁶⁷ The provision for a named contact is expected to speed up the response times in the event the child’s monitoring device is tampered with or if the child is in the vicinity of an ‘exclusion zone’ and could alleviate concerns about the effectiveness of the emergency response.

This analysis aims to give thought to an alternative solution for families in a predicament and to consider some potential objections to the use of electronic monitoring in a protective capacity. The analysis has, incidentally, also identified the dearth of literature on the use of electronic monitoring in a protective capacity, and as far as the author is aware, there are no comparative examples from other jurisdictions to examine. The discussion highlights that whilst the proposal for electronic monitoring may not be suitable for all children at risk of abduction, it does offer the potential to reduce the risk of abduction in situations where families feel they have no other alternative, such as in the case of Adam considered above, where the child may otherwise miss out on valuable contact with his father. The analysis suggests that GPS monitoring appears to be the most pragmatic solution available to protect children from abduction at this particular time.

CONCLUSION

There is a clear polarisation of views on the appropriateness of electronic monitoring amongst academics and practitioners because of the implications of electronic monitoring for an individual’s liberty and privacy rights. At the same time, however, cross-border parental child abduction is known to cause children long-term harm, and so careful thought must be given to whether the temporary restriction of the child’s rights whilst he or she is subject to monitoring is equal to or greater than the long-term harm described by

165 *ibid* at [79].

166 *ibid* at [89] (emphasis in original).

167 *ibid* at [88]–[89] and [100].

those abducted as children. This analysis has aimed to respond to concerns about the proposed use of electronic monitoring of children, specifically for protective purposes. This article does not seek to discount the possible damage a child may experience from wearing a monitoring device, but endeavours to highlight that the available empirical data suggests that the injury children encounter from the life-long effects of parental abduction could be greater, and so the decision on the risks to a specific child and in a specific family must be carefully considered and ultimately the decision is one made by the parents and children affected, depending on their family circumstances.

Based on the analysis undertaken, this article contends that a modest loss of liberty could be a price worth paying for the safety of the child at risk of abduction because the long-term harm abducted children encounter far outweighs the concerns relating to the limitation of liberty and privacy. Any limitations on the liberty and privacy rights of children are justified by exceptions found in Articles 5 and 8 of the ECHR, as the restriction is nominal and is only permitted to resolve a predicament to facilitate contact visits between the child and the parent who poses an abduction risk. The proposed measure would be utilised in only a small number of cases in which the risk of abduction is perceived as high and unsupervised contact with the non-resident parent would otherwise be denied in response to the level of risk. As stressed above, electronic monitoring may not be suitable for every case, but is an option that should be available in the toolkit of potential solutions, to allow the parents to decide whether or not to utilise it. It is suggested that a consent order agreed between the parents could be presented to the Family Court for approval. Middle ground is best achieved, this analysis suggests, through asking the Family Court to assess individual cases, so that only the court can decide whether it is in the best interests of a child to be subject to electronic monitoring. To limit any effects of stigmatisation caused by wearing the device, children at risk of abduction who have sufficient understanding and capacity should be allowed to make that decision themselves, where they are mature enough to weigh up the risks. Children who are not fully capacitous would only be subjected to electronic monitoring if the Family Court determines that this is in their best interests.