

# Child Abduction

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## Overview

*Child abduction is probably one of the worst things to happen in a child's life. It is often by a family member, usually a parent. It takes a child away from home and home surroundings. It is a criminal offence. It is the area of family law where countries have shown the greatest international cooperation. Practical action can be taken by parents to minimise the possibility of an abduction. It requires great specialisation and experience by advisers.*

## Introduction

Taking a child abroad without the permission of the other parent (those with parental responsibility and others) is classified as a child abduction.

Retaining a child abroad, beyond the period for which permission had been given to take the child abroad, is also classified as a child abduction.

Abductions tend to be by parents, guardians and other family members, rather than an abduction by a stranger which is purely a police matter and is pursued through the criminal courts when and if the child is found and the abductor is located. Although steps can be taken by the family lawyer in the civil courts to assist the police when a stranger abduction has occurred, it is not covered in this book.

The primary law is the Hague Convention, probably the most successful piece of international family law co-operation and implementation.

It is fundamental in the first instance to ascertain if the child has been taken to/from a Hague Convention country (and to distinguish between a EU state or non EU state) or to/from a non Hague Convention country. The procedure and law is very different. The Hague Convention countries are set out at <http://www.officialsolicitor.gov.uk/docs/Hague-Countries-List.doc>.

In any event, practical steps should always be taken by lawyers and parents to reduce the risk of an abduction. Sometimes, despite much international co-operation and conventions, once the abduction has occurred it can become permanent or long-term. The crucial role of the family lawyer is therefore to do everything possible to reduce the risk on behalf of the client. This can involve court action, often at considerable speed and out of hours work.

International children cases should often be referred up to the High Court but must be transferred up where child abduction is concerned.

The most important organisations in the field of child abduction in England are the International Child Abduction and Contact Unit, the English Central Authority, and reunite, the world's leading charity supporting parents whose children have been abducted and which is based in England. Both provide excellent information and support on their web sites, see Links page on our website.

The Hague Convention does not apply between United Kingdom countries. Scotland and Northern Ireland have separate Central Authorities for child abduction purposes. Courts can transfer cases within the United Kingdom. Special attention must be given when dealing with the Channel Islands and the Isle of Man.

Whilst the Hague Convention was created principally to deal with abduction by the non primary carer

parent, perhaps aggrieved by the lack of contact etc, the present reality is that many international civil abductors are the parent with primary care. Some are fleeing from bad behaviour from the other parent or lack of financial or other parenting support, perhaps unremedied by the local courts. Some return to their home country for much-needed family and other support after parental separation.

The family lawyer is often faced with a real personal dilemma. The abducting parent can often present as the aggrieved, innocent party. In reality they may be. Yet they are tacitly labelled as the “guilty” party, dragged back to the original country and often without necessarily the opportunity to relocate as exists in England. Sometimes there are real feelings that the parent whose child has, in the eyes of the law, been abducted then uses the law to “punish” the parent who may already have badly suffered within the relationship or in the home country. Yet the child abduction law is strict and rigidly enforced in England. Personal sympathies therefore should not dilute the advice given or the serious nature of what has taken place.

Unlike in relocation cases where opposing an application can sometimes result in improved contact arrangements, it is rare for an opposition to an abduction application, being vigorously pursued by the Central Authority’s specialist lawyers, to result in any other terms than a return order although safe harbour and other undertakings can be obtained, as below. The emphasis exclusively on the quick and effective return order is central to the Hague Convention. Child abduction work is a real specialisation even within international family law. The work undertaken by child abduction specialists as to speed, efficiency, manner of approach and similar can often bewilder and catch general family law solicitors very much by surprise. It is a highly distinctive area of work.

The case law is complex. This is only a summary

### Criminal law

Under the s1 Child Abduction Act 1984, it is a criminal offence for **“a person connected with a child under the age of 16 if he takes or sends a child out of the UK without the appropriate consent”**, being primarily the consent of each of the parents and anyone else who has parental responsibility, a residence order or rights of custody, is a guardian and similar, see s1(3). Section 2 is directed to those unconnected with the child. It is a criminal offence if a person, **“without lawful authority or reasonable excuse, takes or detains a child under the age of 16 so as to remove him from the lawful control of any person having lawful control of the child or so as to keep him out of the lawful control of any person entitled to lawful control of the child”**. It carries a penalty of imprisonment. The Act abolished the crime of child stealing and restricted the offence of kidnapping children.

The Act has a number of defences and qualifications to the above offences including reasonable belief of entitlement to remove the child. Although inevitably there is an overlap with family law child abduction, naturally a different standard of proof applies and there are different elements within the criminal offences. The 1984 Act covers only criminal law issues. It is best dealt with by criminal lawyers, in consultation with specialist family lawyers.

Where both parents jointly remove the child forcibly, there is no 1984 Act offence. In exceptional cases a charge of kidnapping may be brought. Moreover it most often arises in the context of forced marriages and now see imminent statutory changes for forced marriages

There is a considerable overlap between criminal law and civil law. Sometimes a person who has abducted a child is guaranteed a **‘safe harbour’** free from prosecution when that parent returns to the original jurisdiction. However an increasing number of arrests and prosecutions are taking place on return, sometimes directly encouraged by the parent whose child has been abducted. The police and prosecution services will not be bound by any civil agreement reached before the civil courts in another country. Police statistics show an increasing number of prosecutions for parental abductions.

Actual or potential abductors must be warned that there is a real risk of criminal proceedings. It should be investigated before the parent returns, if necessary by raising it with the court ordering the return. In some cases, the likelihood of prosecution of the primary carer, ordered to return has resulted in the child returning without the parent who has then had to make the relocation application from abroad. This is a highly unsatisfactory state of affairs and the consequence of the overlap of civil and criminal law

## Hague Convention

### Background

The Hague Convention is the Convention on the Civil Aspects of International Child Abduction, signed at The Hague on 25 October 1980. It has at present been ratified by approximately 80 countries. Each signatory country agrees in respect of a child abduction to its country that it will not enter into a full investigation of custody, contact or other parenting arrangements etc in respect of the child, which instead will be left to the court in the country where the child was last habitually resident, and instead merely secure the child's early and safe return. It is designed to encourage prompt return through administrative and judicial procedures so parents do not resort to self-help and secondary abduction. This is not departing from the principle that the welfare of the child is paramount but applying it, including the belief that it is not in the best interests of a child to be abducted but instead the decisions about the child should be left to the country where the child is or was habitually resident.

In *Re D (Abduction: Rights of Custody)* (2007) 1 FLR 961, Baroness Hale summed it up as *"The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."*

In England a parent from whom a child has been abducted to this country is awarded public funding as of right. It is not means tested. The Central Authority then appoints an experienced solicitor to represent the parent. This is not always so in practice in some European and other Hague convention countries. Practice outside of Europe varies greatly. Some Hague Convention cases abroad are handled for the parent by government or public law departments. In each case it will be operated via the country's Central Authority.

In England and Wales the Central Authority is the Lord Chancellor but the work is carried out by the International Child Abduction and Contact Unit ('the ICACU') under the auspices of the Official Solicitor. The ICACU is based within the office of the Official Solicitor and Public Trustee. They provide an excellent service, giving very good information on their website

The Hague convention is overseen by the permanent Bureau of the Hague Conference on Private International Law. To facilitate the goal of uniform interpretation it has set up a database (INCADAT) of decisions taken under the Convention at [www.incadat.com](http://www.incadat.com).

The Hague Convention is set out in Schedule 1 Child Abduction and Custody Act 1985. By s1(2), the provisions of the Convention have the force of law in the United Kingdom. However this is subject to Brussels II revised which takes precedence over Hague, s1(3). Reference to Articles in this Chapter are to the Hague Convention, set out in Schedule 1 1985 Act, unless the contrary is shown.

The 1985 Act also incorporates the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children, signed in Luxembourg on the 20th May 1980. This provides for the registration, recognition and enforcement of decisions regarding

custody when there has been an improper removal of a child in breach of such a decision. Both the Hague convention and Brussels II overrule the Luxembourg convention, where applicable

In most instances, English lawyers are concerned with an abduction to this country. Abductions abroad are primarily the practical steps which can be taken by English lawyers to help the foreign proceedings. However English lawyers must heed that although English courts will apply its own law of interpretation of the Hague convention on abduction within England, the client whose abduction case is heard before a foreign court applying foreign law must be advised that the foreign courts may have different interpretations of children law, Hague Convention law and different procedures. Local advice, guidance and close communication is always essential.

About 17% of English requests for return of the child under the Hague Convention in the period 2004 to 2006 led to no return orders being made.

### Contents of the Convention

By Art 3, "*The removal or the retention of a child is to be considered wrongful where*

(a) *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;*

(b) *and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State"

By Art 5, "*rights of custody*" includes *rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence* and "*rights of access*" includes the right to take a child for a limited period of time to a place other than the child's habitual residence. These are explored below.

By Art 4, the Convention applies to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention ceases to apply when the child attains 16 including if the child is 16 when the application is heard even though the abduction occurred when the child was 15. Nevertheless, the court may then deal with the matter under its inherent jurisdiction. A foetus is not a child so a pregnant mother cannot abduct her unborn child.

Art 8 allows a person whose child has been abducted to apply either to the Central Authority of the country where the child was habitually resident before the abduction or to any other Central Authority to seek assistance, in practice to the Central Authority of the country to which the child has been abducted. For an abduction from the United Kingdom, it is invariably better to go via the English Central Authority rather than direct to the foreign Central Authority.

All available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be should be given, together with a photograph of the child and of the abducting parent if possible. The application must be accompanied by an authenticated copy of any relevant court or administrative decision or agreement or a certificate or affidavit emanating from the state concerning the relevant law of the state from which the child was abducted. The application can be made direct to the courts of the country to which the child has been abducted, and not via the Central Authority, but non-means, non merits legal representation is not then available and in any event is not advisable.

By Article 11, there is a requirement for the judicial and administrative authorities of the state to "*act*

*expeditiously in proceedings for the return of children*". If a decision has not been reached within six weeks of the date of commencement of the proceedings, the applicant or the Central Authority of the state from which the child has been abducted has the right to request a statement of the reasons for the delay.

By Article 12, where there has been a wrongful removal or retention and an application for return is made within 12 months, the court shall return the child "*forthwith*" to the country of habitual residence. If it is more than 12 months, see the "*settled*" defence below.

The defences and exceptions to a return order very rarely succeed as the threshold criteria is very high. They are

- Consent or subsequent acquiescence by the left behind parent, Art 13a
- the person with care of the child was not actually exercising custody rights at the time of the abduction, Art 13 (a)
- "*there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*", Art 13b
- the child objects and "*has attained an age and degree of maturity at which it is appropriate to take account of its views*", Art 13
- the proceedings were commenced more than a year from the date of the abduction and the child is "*now settled in its new environment*". Art 12

The Central Authority of the country being asked to make the return order is entitled to request that the state of the child's original habitual residence obtain a court order or other decision "*that the removal or retention was wrongful within the meaning of Article 3*", Art 15. This includes what rights a parent had under the law of that state and whether they were "*rights of custody.*" This Article 15 determination will be conclusive as to party's rights under the law of the requesting state. Any party with an interest in the child can ask for this determination and the court has discretion to grant it including without notice. It can be of persuasive effect and is often requested of the English High Court if there has been an abduction abroad. Local advice is needed as to its local effect. However the fact of the inevitable delay in requesting an Article 15 declaration means that its use should be kept to a minimum.

Crucially, by Article 16, the judicial and administrative authorities of the state to which the child has been abducted shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention or an application under the Convention is not lodged within a reasonable time. This makes clear that the court to which the child has been abducted should not be making any other orders regarding the child, for instance akin to s8 Children Act orders, apart from return orders.

### Custody rights

A child abduction only occurs where it is in breach of rights of custody. These rights of custody arise by statute or court orders but can also arise by an administrative decision or an agreement.

Rights of custody are *rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. (Art 5(a))*. The right to determine place of residence therefore includes all those with parental responsibility and old style custody orders. However it had been held that the right in foreign law to be consulted on the child's residence but not the right to object to removal was not custody rights. Most countries deem the right of a parent to object to a removal from a country as a custody right, but some countries say it is only access rights and therefore permit a removal by one party against the objections of the other party. It is now settled in UK law, so far as UK law is concerned, that a right to determine a child's place of residence, or veto a change of residence, is a right of custody. Care is needed on this and local advice is essential. Guidance on ascertaining custody rights including use of expert evidence is in Re V-B (Abduction: Custody Rights) 1999 2 FLR 192

Rights of custody extends to unmarried fathers and others without parental responsibility if they had in practice the sole, shared or temporary care of a child including being delegated that responsibility by the natural mother. It will extend to those carrying out duties and enjoying privileges of a parental character which although not recognised by law in a court order would be likely to uphold the interests of the child. Custody rights can be found where solicitors' correspondence has assured a party that there was no intention to remove from the jurisdiction as a result of which steps were not then taken to issue proceedings.

A child abduction will occur when a parent with a residence order, therefore having the right to take the child abroad for up to a month (s13(2) CA), wrongfully retains the child for longer and without the consent of the other relevant parties with custody rights.

If there is any doubt whether a parent or any other interested party has custody rights when there has been an abduction abroad, the party should apply immediately to the English family courts for an order declaring that they had custody rights. This could include an application *by any person appearing to the court to have an interest in the matter* for a declaration *that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention*, s8 1985 Act. It might also include applications for parental responsibility, interim residence orders or specific issue orders. A person having an interest in the matter will include a father without parental responsibility and other family members having care of the child. In this way, the retention abroad then becomes wrongful and unlawful.

As the right of custody is to be determined according to the law of the country from which the child was taken, foreign law advice may be needed, to be taken by expert evidence. However the English courts have shown an inclination to find prohibitions on removal from the jurisdiction in foreign court children orders even though none expressly exist. The consequence is a greater likelihood to invoke the Hague Convention.

Rights of custody may also vest in local authorities, foster parents and adopted parents. The court has rights of custody. This includes when there is a wardship order or when it is actively dealing with a residence order, literally issues about residence, interim residence order or similar section 8 orders including when it has given directions for the future conduct of such proceedings and/or is actively considering applications for parental responsibility. Naturally a removal is wrongful if in breach of a s8 order prohibiting removal from the jurisdiction or from care of the other parent. A custody order alone does not give rights of custody to a court.

Rights of custody and rights of access are not mutually exclusive: a person may have both.

As the intention is to secure the child's return to the country of habitual residence, courts are urged by many higher court decisions to take a very wide interpretation of custody rights, looking at the reality of the situation before the abduction occurred and the objectives of the Hague Convention for the return of the child to his home. However there is substantial case law on the subject of rights of custody both in England and across the Hague Convention countries.

Failure by the central authority or courts to take effective measures to enforce the return order and custody rights is a breach of the right to respect for family life of the left behind parent under Article 8 ECHR

Once a return order is made, English proceedings for a residence order should also be dismissed.

## Wrongful removal or retention

A removal or retention is wrongful when it is in breach of someone else's rights of custody. A retention covers not only acts of physical restraint in not returning the child but also court orders made on the initiative of the abducting parent in the country to which the child has been taken. For this reason, applications in England by the abducting parent, after an abduction to this country, for orders for interim residence, prohibition on removal of the child by the other parent or from the jurisdiction or similar are thoroughly counterproductive. Indeed some alert and pro-active judges will then contact the ICACU as judges have been exhorted to do e.g. Re H (Abduction: Habitual Residence: Consent) (2000) 2 FLR 294

Removal and retention are mutually exclusive: a retention follows a lawful removal. Neither are continuing. Removal is at the date of departure. Retention is the date when permission to take abroad ended, either by the terms of the original agreement or conduct inconsistent with an intention to return the child.

Although the original removal and retention may not have been wrongful because e.g. the unmarried father had no rights of custody capable of being breached, once he had acquired such rights by virtue of a subsequent order giving him care and control, any retention of the child thereafter contrary to that order becomes wrongful. The fact that the abductor had obtained an order from the foreign court permitting the child to stay in the foreign country is irrelevant.

A lawful removal for a holiday can become a wrongful retention before the end of the agreed period if the parent with the child makes clear an intention not to return. This might be shown by making court applications in the country in which she is on holiday with the child to seek to retain the child

## Habitual residence

This term is specifically not defined in either the 1985 Act or the Convention. The term is referred to in other areas of family law and other areas of law. There are similar terminologies of ordinarily resident and simple residence. As a consequence, there is a very considerable body of case law about the definition, some of which is conflicting.

It has been held that habitual residence requires that a person is in a place voluntarily and for "**a settled purpose and with a settled intention**". It has been suggested that there is a need for residence for "**an appreciable period of time**". A mere stay for a holiday is not habitual residence. However a move in connection with the father's employment on a short and temporary basis could be residence for a settled period as could be a move to another country for a trial period. It can be acquired in a matter of months, even exceptionally in a month.

There cannot be habitual residences in more than one place at the same time in accordance with Hague Convention case law, which is the position across Europe in family law and now within England on divorce law following Marinos 2007 2 FLR 1018, preferring the "**centre of interests**" approach. It was made clear that this decision related to the context of divorce and Brussels II divorce jurisdiction rather than necessarily Hague Convention law which requires terms as such as "right of custody" to have "**an autonomous interpretation**". The circumstances in which an adult, perhaps already with residence in one country, can immediately acquire habitual residence is very different to that of a child. Many reported cases turn on their particular facts for example, the arrangements made for the child in the new country and the arrangements in respect of assets in the old country.

Habitual residence is established as a question of fact on the date when the determination has to be made and in the light of the circumstances of each case. It would include for instance whether a person has brought possessions, has a right of abode, sought to bring family and has durable ties with the country of residence or intended residence. The courts are urged not to undertake a microscopic inquiry of residence but instead to stand back and take a general panoramic view of the evidence,

especially as the urgent High Court timetable in child abduction cases does not allow more than “a *quick impression*”.

Where parents separate, the child’s habitual residence invariably follows that of the parent who has primary care. The habitual residence of a newborn child will be that of the parent with parental responsibility for and day-to-day care of the child. The fact that the child is born abroad does not of itself necessarily lead to the conclusion that the child is not habitually resident in England.

Where the mother was the primary carer and then dies, the child will not automatically lose the habitual residence of the mother. The clandestine removal of a child will not give habitual residence of the person removing the child. This includes when the parents were married and together and one parent then unilaterally removes the child.

The longer the child lives in the new jurisdiction without challenge, the more likely the child will be said to acquire habitual residence of those who cared for him without opposition. Habitual residence cannot be declared or ordered by the courts of the country where the child is being wrongly retained. There are special considerations regarding surrogacy.

The habitual residence of a child within England gives the High Court inherent jurisdiction to entertain a number of applications in respect of the child including wardship, interim care and control, custody orders and orders for relocation. This is notwithstanding contrary orders obtained by the abducting parent from the foreign court. In one instance where a child who was abducted to this country by a pregnant mother and within a few months a younger sibling was born whose habitual residence was now in England following the mother’s acquiring habitual residence here, the older child was ordered to be returned under the Hague Convention and the younger child now born ordered to be returned under inherent jurisdiction so that both siblings could be dealt with together in the country of the older child’s habitual residence

#### Hague convention defences

There are essentially five defences or exceptions to an automatic return. Some countries, such as England, give a very narrow interpretation to these defences. If any of the defences or exceptions are established, the court still has a discretion to return the child and it then has to balance the many factors including the objectives of the Convention.

#### Consent or subsequent acquiescence, article 13 (a).

Consent precedes the original removal or retention. Acquiescence follows it, the abduction having already occurred including retention after an agreed period abroad.

The leading case is Re H (Minors) (Abduction: Acquiescence) 1997 1 FLR 872. This and subsequent cases show

- the English law concept of acquiescence had no direct application, instead Convention case law should apply.
- It requires looking at the subjective state of mind of the left behind parent and asking whether he has in fact consented or acquiesced to the continued presence of the child in the jurisdiction to which the child has been abducted.
- It is a question of the actual subjective intention of the left behind parent, not the outside world’s perception of that intention.
- It is a question of fact to be determined by the court in all the circumstances of the case.
- The court is more likely to attach weight to contemporaneous express words and actions than to subsequent bare assertions

- acquiescence requires knowledge of the facts and that the removal was wrongful
- a failure to act can be an acquiescence
- failure to act, for example 18 months, based on incorrect legal advice followed by immediate action on getting correct advice is not acquiescence, but also no excuse for incorrect advice!
- acquiescence once given but swiftly withdrawn will affect the weight given to it
- The evidence to establish consent or acquiescence must be clear, cogent, compelling and unequivocal, normally in writing or evidenced in documentary form.
- The evidence must be positive consent to the removal.
- The evidence can be inferred from conduct but evidence needs to be clear and cogent.
- The burden of proving consent and/or acquiescence is on the abducting parent, once the issue is raised
- consent does not go to the issue of the wrongfulness of the removal or retention but only as a defence or exception
- oral evidence on the issue is rare
- it is on the balance of probabilities, akin to care proceedings
- Judges should be slow to infer an intention to acquiesce from attempts to effect a reconciliation or agree a voluntary return.
- The only exception is where the words or action of the left behind parent clearly and unequivocally lead the other parent to believe that the former is not asserting or going to assert their right to summary return and are inconsistent with such return: justice then requires that parent is held to have acquiesced.
- Consent obtained by fraud, misunderstanding, non disclosure, duress or deception is unlikely to be valid

An attempted but short and unsuccessful reconciliation after an abduction by the mother did not represent consent or acquiescence especially as the father expressly stated at the time of the commencement of the attempted reconciliation that he did not acquiesce in the abduction. This drafting by the lawyer for the father, the parent whose child had been abducted, of the terms of the reconciliation was crucial to allow a second and successful child abduction application when the reconciliation broke down: Re G (children: abduction: habitual residence) 2007 EWHC 2807.

#### Parent not actually exercising custody rights, article 13 (a)

This recognises the reality that if the custody rights are academic, redundant or not effective, then it would be wrong to order a return. This does not include the situation of a parent not actually having day-to-day care and control provided the parent is maintaining a stance of such a parent. This defence is unlikely to arise when the non primary carer parent has an ongoing involvement in the child's life in any way. It is precarious to rely on this defence in other than the most exceptional circumstances of an absentee parent or one who had abandoned or allowed the child to be looked after by others.

#### Grave risk of physical or psychological harm or place in an intolerable situation, Art 13(b)

This defence requires a weighty risk of substantial harm and severity which is much more than the disruption, uncertainty and anxiety of a return to the country of the child's habitual residence. It is only likely in the most extreme cases. Defences under Article 13b very rarely succeed. It would include a risk posed by terrorist attacks or political persecution. It is a risk to the particular child, not a general risk of harm. It could include persecution, discrimination or some other overt harm to which the child and/or abducting parent would be subjected in the criminal process or otherwise denied justice. Expert evidence may be needed regarding the law and practice in the state of habitual residence, provided it does not lead to undue delay.

Account will be taken of measures which could be put in place to protect the parent and child against the left behind parent. Allegations of domestic violence, drug-taking and other lifestyle issues against

the left behind parent, stepparent or others will not alone be sufficient provided protective measures are able to be put in place locally. But if there are inadequate protective measures and a risk of considerable physical violence to the abducting mother who cannot be parted from the child, this may justify the harm test.

The burden of proof, stated to be a heavy one, is on the abducting parent. Allegations need to be thoroughly tested. Problems and stresses created by the abduction itself and/or the return and therefore self-induced will not generally suffice. The fact of probable arrest and criminal proceedings on return is unlikely to amount to grave risk of harm to the child, although safe harbour orders should be sought. However the risk of psychological harm is of greater consequence than the importance of the court marking its disapproval of the abducting parent's behaviour. Where the risks of physical or psychological harm by a return are weighed with the risk of the psychological harm of no return, and both risks are substantial, the court should give due weight to the primary purpose of the Convention namely the swift return of the child.

The fact that a return order would be likely to lead to an immediate permission for relocation back to England was not an intolerable situation and no reason not to make a return order.

Where there would be a delay of 12 months or more ("*unconscionable delay*") in the consequential custody application being determined in the country of habitual residence after the return of the child, this could be an intolerable position. However a high degree of intolerability has to be shown. Hardship, discomfort and the application of religious laws do not apply. The intolerability must relate to the child, not the parent. Dependence on welfare benefits on return is not sufficient but a lack of state benefits and being rendered destitute on return would be. It must be "*a situation which this particular child in these particular circumstances should not be expected to tolerate*".

The concerns of the English High Court of the risk to the child on return, including wanting to be satisfied about the arrangements for the protection of the child in the state to which the child is being returned, has given rise to the practice of the expectation of undertakings to take effect on return and to last until final resolution of all issues in the other country.

Undertakings often sought on a return order

- the child and primary carer may return to live in the former matrimonial home or provided with reasonable alternative and safe accommodation
- the father will live apart from them, often in alternative accommodation
- the father will pay the expenses of their return
- the father will support them financially subject to reasonable means of both parents
- the father will not be violent to them
- The father will not commence criminal proceedings; in some cases this has been found to be a crucial condition to a return order.
- There will be no court hearing within a short time of return
- The father will not be at the airport on arrival, in order to avoid immediate friction
- Any criminal or civil proceedings already in progress will be withdrawn before return

They last until determination of custody and related issues in the home country. The English court would always require to know in advance how likely the foreign court is to give effect to these undertakings. They are not intended to delay the proceedings but sometimes a return may be delayed, or in some rare circumstances refused, unless and until it is known that the undertakings are implemented and/or properly in place.

On the first directions hearing, parties are often asked to state what undertakings are sought and what are offered in order to focus attention on the issues and ascertain areas of difference. The giving of undertakings by the applicant for a return order, especially if the abducting party was the primary carer,

is an essential part of many Hague convention cases, extending now beyond the “*harm*” defence cases. Nevertheless some countries of the child’s original habitual residence do not give effect or weight to these English family court order undertakings.

The English court will also want information about the length of time it will take to bring an application to relocate and if such application is impossible in that country, it may be persuasive in the argument for a non return order, the so-called “land locked” parent who cannot in reality ever leave with the child.

### Objection of the child, Art 13

This arises when the child “*has attained an age and degree of maturity at which it is appropriate to take account of its views*”, Art 13. It is a question of fact and degree for the judge on the evidence. It has to be more than preference. “*Objects*” implies a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute. There is a two-stage process: does the child object and if so, is the child of an age and degree of maturity to take account of his views

Questions must be asked as to whether the views expressed are out of free will and choice, whether genuine or influenced by anyone in contact with the child. Children as young as seven and nine have had their views taken into account. The views of children must be carefully and cautiously assessed bearing in mind their mood, adult influence and reaction to the person carrying out the assessment. Of course the younger the child, the less likely the child would have the maturity for views to be appropriately taken into account. Even when the views are taken into account, the court is not obliged to give effect to that preference.

Where a child’s objection arises from a desire to remain with the abducting parent, little or no weight should be given to the views. Difficulties arise where there are siblings who express alternative views or a different degree of maturity and understanding. The objection must be to return to the original country, and not for example to living with the other parent.

Generally the views and objections will be adequately represented by the parties. A CAFCASS officer may assist the court including by preparing a report. Oral evidence from a CAFCASS officer will be allowed if a child’s objections are in issue. Only in exceptional circumstances will the court consider joining the child as a party and ordering separate representation. This will normally be only in “settled” defence cases, below. See also below on hearing the voice of the child under BII. There will now be much more frequent reference to hearing the child in Hague convention cases than in the past, whether or not an Article 13 objection issue is raised. See below on BII changes

### Now settled in its new environment, Art 12

This only arises when at least a year has elapsed between the abduction and the date of the application for the return order. Moreover this is not in the context of consent or subsequent acquiescence, although sometimes pleaded in the alternative. It is to combat the effect of significant delay in the issue of the proceedings. If the child has become settled, the much delayed application, or proceedings if not conducted with due diligence and speed, may be struck out. Just because a child is now settled does not provide an automatic defence if there are other mitigating circumstances. Moreover even though 12 months have elapsed between the abduction and the application, it is still necessary to show that child is now settled otherwise there will be a return order. If the child is settled, the court still has a discretion to return the child. It is more likely that a child will have separate representation in a “*settled*” case than other defences as the point of view of children could be lost in the competing claims of adults. See also impact of 12 month delay in Brussels II cases, below.

Reference to “*now*” is the date when the proceedings were eventually commenced, not the date on which the adjudication occurred, otherwise there could be further delay. “*Settled*” involves a physical

elementary of relating to, being established in, the community and an environment and an emotional constituent denoting security and stability in the sense of permanence. A child is not settled if he has been in hiding or fleeing from detection with the abducting party, the 12 months does not run. The word “*new*” encompasses place, home, school, people, friends, activities and opportunities and not the relationship with the abducting parent. See Cannon 2005 1 FLR 952 and C v C 2005 1 FLR 938 and In re M (FC) 2007 UKHL 55

Delay by the courts in dealing with a matter has no direct relevance but could impact on intolerably. A period of 18 months delay, in Romania, in dealing with a case was a breach of Article 8 of the European Convention of Human Rights.

#### Other Hague Convention aspects

The funding of the legal costs of acting for the parent whose child has been abducted between Hague Convention countries is by the Legal Services Commission. The state may pay for the expenses incurred in return of a child such as air fares. However the state also has power to seek reimbursement of costs and expenses including travel fares and costs in locating the child from the parent found to have abducted the child. The usual expectation is no order as to costs but where a party has been unreasonable in their actions or in the conduct of the litigation (e.g. “*deliberate and persistent falsification of a case*”) or there is a significant disparity in means, the court has a discretion to order costs and will do so.

There is an obligation to act expeditiously, Article 11. If there is no decision within six weeks of the date of commencement of the proceedings, the applicant or the Central Authority of the state from which the child has been abducted can request a statement of the reason for the delay. As a consequence, the listing of a child abduction case in the High Court takes priority over other listings. Sometimes other cases have to be adjourned and taken out of the list to allow this priority. This has been strengthened in BII to which see below

To order separate representation for a child in all cases, even in all child objection cases, is inappropriate save in a very small number of cases, and particularly important in “settled” defence cases.

The burden of proof is on the applicant to show that the case falls within the Convention, to show the child’s habitual residence before removal or retention and the breach of custody rights. It is then for the defendant to prove one or more of the defences or exceptions.

The court’s jurisdiction to order the return of an abducting child is not restricted by the provisions of the Immigration and Asylum Act 1999, specifically the prohibition on removal under s15 of the 1999 Act is directed to immigration authorities and not intended to circumscribe the duty or discretion of the judge dealing with child abduction work in the family courts.

Where having commenced an application for return order, if a party decides he only wants rights of access, known in England as contact, a separate Children Act application has to be made. Public funding is not automatically available. In practice though, as these cases are dealt with very quickly, such applications are not usually formally made but negotiations take place about agreed contact.

#### Interim powers

At any time before the Hague Convention application is determined, the court can give such interim directions as it thinks fit to secure the welfare of the child or prevent changes in circumstances relevant to the application, s5 1995 Act. The application is by summons under r6.13 FPR and in an emergency can be made without notice on sworn statement. The court has a very wide powers. They are dealt with below in relation to the orders made by the court.

Note that there is no power to order an abducting parent, after the child has been found and surrendered, to say how the parent left the country and what happened to the child in the intervening period. This is for the courts of the country of habitual residence.

Lawyers acting for a possible abducting parent should warn the client that the whole panoply of High Court powers including the use of third-party agencies, the tipstaff and police will be used by the lawyers for the Central Authority to seek, find and recover the child and bring the matter before the court. See below for a list. Much of the work of specialist child abduction lawyers acting for the Central Authority involves the appropriate use of the various interim court powers. The reality is that most general family lawyers, inexperienced in child abduction work but acting for a parent who has abducted a child, often very find themselves at a considerable disadvantage because of their lack of knowledge and expectation of such wide ranging and effective action. It puts the abducting parent and lawyer very much on the back foot in matters of timetable, resources and knowledge of appropriate response. Many child abduction cases are won or lost by the use of the interim powers.

### Procedure

The intention of the Hague convention is to provide a simple and summary procedure. Courts should not allow proceedings to become bogged down in protracted hearings and investigation. Every application under the Hague Convention (with Brussels II) is by originating summons in Form No 10 in Appendix A to the Rules of the Supreme Court 1965 and issued in the High Court out of the Principal Registry. See rules at r 6.1-6.18 FPR.

The originating summons should contain the following, r6.3 and 4

- name and date of birth of the child, the subject of the application
- names of parents or guardians
- whereabouts or suspected whereabouts of the child
- the interest of the applicant and the grounds of the application
- particulars of any proceedings including proceedings abroad and concluded proceedings relating to the child
- identity of the person alleged to have abducted the child and, if different, the identity of the person with whom the child is now presumed to be

It should be accompanied by an authenticated copy of any decision, order or relevant agreement together with an affidavit or certificate of the relevant law of the state of habitual residence of the child, from the Central Authority or other qualified person in that state, although this is often dispensed with between EU countries. It must be in the language of the originating state and translated into English.

Within English abduction proceedings, the defendants are, r6.5

- the person who allegedly brought the child here
- the person with whom allegedly the child is now
- any person or guardian or other person with custody rights in the United Kingdom who is not already a party
- any other person who appears to have a sufficient interest in the welfare of the child

The applicant serves the affidavit in support along with the originating summons. The defendant must serve an acknowledgement of service in seven days of service although a longer time for service can be allowed. The court can dispense with service. The defendant files an affidavit in reply, usually within seven days of service. The applicant may then file an affidavit in reply, usually in seven days afterwards.

There is no automatic right of oral evidence although there is discretion to admit but this is exercised

rarely due to the timetable commitments. There can also be affidavit evidence from experts including court welfare officers, doctors and foreign lawyers about the law and procedure in the courts of the country to which it is proposed the child will return.

The defendant files a short statement setting out simply and concisely the nature of the defence, often with a skeleton argument. The courts have told legal advisers to define distinctly the issues and limit the evidence and not allow underlying emotions to provoke irrelevance, prejudice or prolixity. The first directions appointment will normally cover matters such as foreign evidence, securing the position of the child, opportunity for the child and the party seeking the return order to be heard, and issues of any undertakings. The final hearing is in Chambers by a High Court judge. Deputy High Court judges and section 9 judges should not deal with Hague Convention (including Brussels II) cases.

The hearing of the originating summons cannot be adjourned for more than 21 days at any time, r6.10. This is to ensure cases do not go slowly or lapse.

Child Abduction within the EU: Brussels II revised

### Introduction

In child abduction, Brussels has significantly strengthened the Hague Convention by BII revised, although only within Europe. Nevertheless English law and practice in Hague Convention child abduction cases outside of the European Union is now to apply the law and practice of EU child abduction cases. These elements did not appear in the original Brussels II but reference throughout this chapter to BII is to Brussels II revised

Where there has been a wrongful removal to or from, or a wrongful retention of a child in, a European Union country, the Hague Convention must now be considered in the light of Brussels II revised. BII prevails over the Hague convention in matters between EU member states. Brussels has produced an excellent Practice Guide which can be downloaded from [www.europa.eu.int/civiljustice](http://www.europa.eu.int/civiljustice). It is **good practice** to download and read before the child abduction case arrives in the office.

BII revised has strengthened the likelihood of a return. The Practice Guide states that BII aims at deterring child abduction and, when it occurs, to ensure the prompt return to the member state of origin.

The main principles are

- jurisdiction remains with the courts of the child's original state of habitual residence
- the courts of the country to which the child has been abducted should ensure the prompt return of the child
- if a court decides not to return the child, it must send a copy of its decision to the court from which the child was abducted which shall notify the parties and the two courts shall cooperate
- if the court from which the child was abducted decides that the child shall nevertheless return, this decision is directly enforceable in the country in which the child is now living. This is known as a trumping provision
- a non return order cannot be made unless the person requesting the return has been given an opportunity to be heard
- the child must be given an opportunity to be heard
- the Art 13b defence, harm test, does not apply provided adequate protective arrangements are in place
- the issue of return is to be adjudicated within six weeks of the application

## Changes to Hague Convention made by Brussels II

BII gives a continuing jurisdiction for the Member State from which the child was taken to deal with the matter, Art 10 BII. By contrast, under the Hague Convention, the country from which the child has been abducted has no ongoing jurisdiction if a return order is not made. This jurisdiction under BII of the country of origin continues until the child has acquired habitual residence in another member state and

- everyone with rights of custody has acquiesced in the removal or retention; or
- the child has resided in the country to which he was abducted for at least 12 months after those with custody rights should have known of his whereabouts and the child is settled in his new environment and either
  - \* within that year no request for return has been lodged; or
  - \* the request has been withdrawn and no new request lodged; or
  - \* the opportunity for a trumping order, referred to below, is not exercised within the three months; or
  - \* the courts of the country from which the child has been abducted makes an order which does not entail the return of the child

Generally, definitions of rights of custody and wrongful removal or retention are similar to the Hague Convention, Art 2 BII. However helpfully it states that custody is considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility, Art 2(11)(b). As a result, the removal without the consent of the other person with parental responsibility clearly constitutes child abduction.

Although the Hague convention requires an explanation for delay if there is no decision within six weeks of the application for return, BII requires in Art 11(3) that courts should act expeditiously "***using the most expeditious procedures available in national law***". It then goes on to say that "***the court shall, except where there are exceptional circumstances making it impossible, issue its judgment no later than six weeks after the application is lodged***". It is the interpretation of Brussels that this six-week deadline period includes any appeal which in practice means appeals are also highly expedited.

This is crucially much more demanding than the Hague Convention. It doesn't permit of explanations for delay. The English High Court has significantly changed its listing procedures to give top priority to child abduction cases in order to comply with this six-week deadline. Mostly it does comply. In Vigreux v Michel (2006) 2 FLR 1180, para 33, the Court of Appeal gave practice guidance on how to comply with the BII six-week period including marking Family Division files, listings and expeditious transcripts of judgements. A good number of other EU countries are much slower and do not comply. However for the English family lawyer, it means that there will be a very fast timetable to deal with the case.

As a matter of general practice, the English High Court now extends this six-week expectation of resolution to all Hague Convention cases, not just those between EU countries.

Although the Hague Convention allows a defence if a return order would create a grave risk of physical or psychological harm or place the child in an intolerable situation, BII directs that this defence cannot be used "***if it is established that adequate arrangements have been made to secure the protection of the child after his ... return***" Art 11(4). The rationale is that within the smaller group of countries represented by the European Union, all countries should be able to trust each other to provide adequate protection for the child. This protection should then make sure that physical or psychological harm or an intolerable situation would not arise. However it is not sufficient that protection procedures exist generally. They must be for the child in question. Central Authorities will coordinate regarding the protection measures. The lawyer should nevertheless check in advance precisely what protective arrangements would exactly be in place including on arrival back in that jurisdiction.

One of the bigger issues within Europe is the importance of hearing the voice of the child. It is a precondition of recognition of children orders. Similarly, BII requires that the child should be given an opportunity to be heard during the child abduction proceedings “*unless this appears inappropriate having regard to ... age or degree of maturity*”, Art 11(2) BII. This replaces the Hague Convention defence that the court is not obliged to return a child if the child objects and has attained a certain age and maturity. In Re D (abduction: rights of custody) (2007) 1 FLR 961, the House of Lords expressly extended the obligation to hear the child to all Hague Convention cases, not just Brussels II, and not just Article 13 issues. The first directions appointment should consider how the voice of the child is to be heard. There is a substantial body of case law on hearing the voice of the child and the child's objections under Art 13 Hague Convention.

In England, hearing the voice of the child is invariably through a CAFCASS report but could exceptionally be by separate representation, especially where the child's views are not being properly presented to the court an/or legal arguments the adult parties were not putting forward, or a face-to-face meeting with the judge. Across much of Europe, the expectation is that the judge will privately see and hear the child.

In a similar fashion, the court cannot refuse to return a child unless the person requesting the return “*has been given an opportunity to be heard*”, Art 11(5). In many Hague Convention cases, the parent whose child has been abducted remains in his home country awaiting the outcome of the proceedings, often only in touch with the proceedings through the Central Authority appointed lawyer. Brussels gives an opportunity to be heard before any refusal of a return order. This does not have to be a physical attendance and there is much greater use in England of videoconferencing. Some countries request the taking of evidence by the courts of the country in which the parent is situated although this requires swift action and considerable efficiency to comply with the six-week deadline.

### Trumping orders

Brussels II has added an additional protection for the parent whose child has been abducted. If there is an Order for non return from the Member State to which the child has been abducted on the basis of an Art 13 Hague Convention defence, the order must be sent to the Court or Central Authority of the country from which the child was taken. This has to be received within a month of the date of the non return order, Art 11(6) BII. Also sent should be a transcript of the hearings before the court and any reports or any other documents on which the judge has based his decision; it is the judge who made the non return order to decide which documents are relevant. The receiving court or Central Authority then notifies the parties, obviously including the parent whose child has been abducted, and invites them to make submissions to the court within three months of the date of notification so that the court can examine the question of custody of the child, Art 11(7) BII. In the usual course of events, the parent would most likely then apply for a custody order, in effect a requirement for a return order. A trumping order is not available if the non return is on the bases of any defence apart from Art 13 Hague Convention

Notwithstanding the judgment of non return of another member state's court, the courts of the country from which the child has been abducted can then make a subsequent judgment requiring the return of the child and this shall be enforceable in order to secure the child's return, Art 11(8) BII. This subsequent judgment may include orders as to custody, residence but might include contact orders. The court should deal with it as if the abduction had not taken place and the child was before the court.

This Art 11(8) BII decision to order the return of the child, in effect trumping the non return order of the court of the country to which the child had been abducted, is recognised and enforceable in all other EU member states without the need for a declaration of enforceability and without any possibility of opposing its recognition, Art 42(1) BII, provided certain criteria are met and certified namely (Art 42(2)) all parties are given the opportunity to be heard

- the child is given an opportunity to be heard unless a hearing is considered inappropriate having regard to the age and maturity of the child
- the judgment takes into account the reasons for and evidence underlying the decision on the non return, the order being trumped; the respective judges are encouraged to communicate direct to establish proper understanding of the reasons behind the respective orders
- if any protective measures for the child after its return are put in place, these are communicated to the court which ordered the non return.

The form of the certificate is set out in Annex IV of Brussels II, is in the language of the judgment and completed by the judge who made the order. Hearing the child and the abducting parent, who will invariably still be in the other country, will often require videoconferencing, the taking of evidence through other member states and similar.

Trumping cases should be transferred up to the High Court: see the guidance of Singer J. in HA v MB 2007 Fam Law 1058, also see on trumping cases Re A (Custody order after Maltese non return order) 2007 1 FLR 1923

### Recognition and enforcement of return orders

Brussels II makes provision for the recognition and enforcement of children orders, which in England would normally be s8 CA orders. This process is differentiated between general orders regarding children and orders in respect of rights of access, conventionally known in England as contact orders, and orders regarding the return of the child. General children orders, although not specifically requiring any special procedure before they can be recognised, Article 21 BII, proceed by way of declaration of enforceability, which in England is known as the registration process. Under no circumstances may a judgment be reviewed as to its substance, Article 26, nor can jurisdiction of the court which made the order be reviewed, Article 24. However Brussels II provides much greater, and even more simplified, recognition and enforceability in matters of rights of access and return of a child. In these circumstances, the order itself, certified in a particular form by the court which made the order, is itself automatically sufficient across Europe.

In the context of child abduction, it applies to the return of a child given pursuant to Article 11(8) of Brussels II. See references above to the general provisions of Article 11, specifically the trumping provision whereby if a court to which the child has been abducted makes an order for non return, the court of the country of the child's original habitual residence can nevertheless make an order for return of the child. This order takes precedence over the non return order, so-called trumping it.

By Article 42(1) BII, this return order shall be recognised and enforceable in another member state without the need for a declaration of enforceability, including registration process, and without any possibility of opposing its recognition provided the judgment has been certified by in accordance with Article 42(2). This requires the judge who delivered the return order to issue a certificate that the child was given an opportunity to be heard unless inappropriate having regard to age and degree of maturity, the parties were given an opportunity to be heard and the court had taken into account the issues in Article 13 Hague Convention in coming to its decision. If the court has directed any measures to ensure the protection of the child after its return, the certificate should include these details of such measures. The judge who made the order should issue the certificate in the form in Annex IV. Procedure is in r7.49 and r5.51.

One benefit of the return order made by the courts of the country from which the child was abducted being recognised in all EU member states is that if the abducting parent then abducts the child to yet another European Union country, it is not necessary to start new Hague Convention child abduction proceedings as the Art 11(8) BII return order is recognised and enforceable across the whole of the European Union provided it complies with the procedural requirements of Article 42(2) BII.

### Hague convention: outside of the EU

Outside the EU, there is no similar mechanism to strengthen the Hague Convention as there is with Brussels II. For example, if a country where a child has been taken decides not to return a child, there is nothing the courts of the country from which the child was originally abducted can do to change that decision.

With the experience in the English High Court of operating the much stricter requirements and tighter timetables of Brussels II, the practice has now developed of dealing with all Hague Convention cases as if under the requirements of Brussels II.

### Non Hague convention country cases: abduction to this country

When abduction cases concern the wrongful removal or retention of children from non Hague convention countries, reference is made to the inherent jurisdiction of the court and any available statutory powers. The English courts take into account the principles and defences set out in the Hague Convention. However it is the child's welfare which is paramount. Moreover procedure is very different including:

- No Central Authorities are involved
- There is no automatic public funding for the parent from whom the child has been abducted
- No reciprocal time scales and procedures to be adopted
- No persuasive measures or automatic recognition of orders in the other country concerned, although see later on bilateral agreements

Practitioners should first consider whether sufficient powers exist under the Children Act 1989 to afford sufficient protection for the child including his recovery and possible return rather than commence Wardship proceedings. Otherwise (and often, primarily because of the speed of the order taking effect) application is made in Wardship under the High Court's inherent jurisdiction. Also other countries are more likely to take notice of a High Court order rather than a county court order. The child who is the subject of the proposed Wardship Order must not be over 16 years of age unless there are very exceptional circumstances.

The child automatically becomes a Ward of Court once the Originating Summons has been issued which means that no important steps can be taken in that child's life without the permission (leave) of the Court. Once a child has been made a Ward of Court, it is important for the matter to come back before the Court within 21 days of the Wardship Order being made, otherwise it will lapse. Within Wardship proceedings, the English courts apply the welfare principles in respect of the child.

The leading case is Re J (child) (returned abroad: convention rights) (2005) 2 FLR 802, House of Lords. These and other cases show

- in reaching its decision in non Hague cases, the welfare of the child is the paramount consideration of the English courts
- this principle is not precluded by contrary orders of foreign courts such as return orders
- the House of Lords emphatically rejected the straight application of the Hague convention principles to countries who were not parties to it
- the issue is not the question of any harm of being sent back but whether a return order would serve the best interests of the child.
- Normally it is in the child's interest not to be abducted
- Normally the best interests of the child are served by having his future decided in the jurisdiction of his habitual residence, and a case against doing so had to be made

- the fact of the child acquiring habitual residence in England does not justify a refusal of return
- speed and diligence of the application for return are relevant factors on making a return order
- it is not so much the Hague Convention criteria but forum non conveniens; which of two sets of proceedings is best suited to the interests of the child
- the English court will look at the defences and exceptions to the Hague Convention but not apply them so literally and will be subject to the paramountcy of the welfare of the child
- the English court will not return a child if there is a risk of persecution or discrimination or the foreign courts regime is contrary to the child's welfare; this information is secured from the foreign court but foreign lawyers may assist
- English courts will expect to be satisfied that if a return order is to be made, foreign courts will apply principles broadly similar to and acceptable to English law
- English courts may accept or impose undertakings if in the best interests of the child to safeguard the child's interest on return pending a new decision of the foreign court
- the child's religious, ethnic and cultural background may have special significance
- the child's welfare may be served by the application of local law and different values e.g. Sharia law, on the premise that the child is or was a part of a society with these values and norms, see below
- the court will take full evidence including oral evidence and use the s1 Children Act checklist
- there is an emphasis on the principle of international comity and that foreign courts will take account of orders and undertakings of English courts and vice versa

Particularly sensitive issues arise with Islamic states to which many non Hague Convention cases relate. In Re M (Abduction: Peremptory Return order) 1996 1 FLR 478, the Court of Appeal returned a child to Dubai relying on the husband giving undertakings as to provision for the mother and child and that the courts of Dubai would allow the mother and child to retain custody of the child. In Re JA (Child Abduction: Non-Convention Country) 1998 1 FLR 231, the Court of Appeal said it would examine the courts of the country to which the child would return, here UAE, to see if it applied the welfare test: otherwise to allow a return would be an unjustifiable abdication of responsibility of the English court, a position supported by the House of Lords in Re J (A Child: Custody Rights: Jurisdiction) 2005. Differences in legal systems could not be irrelevant and depend on each individual case. If foreign courts had no choice but to do as the father wanted, the English court would ask if it was in the best interests of the child for the future for issues to be decided by such courts. However in some cases, the connection of family and child with the country may be so strong that differences in legal systems may make little difference.

The procedure is by way of an Originating Summons and affidavit in support by the client or by the solicitor upon their behalf, usually submitted to the Court by way of a without notice application. See FPR Rule 5 for more details. A copy of the child's Birth Certificate must also be filed. Any person with a genuine interest in the child may apply. Personal service is required by process server but take care regarding the rules of service in other jurisdictions.

Unless the Court has directed otherwise, the Acknowledgement of Service Form must be filed within 14 days of service if served within the jurisdiction. If served outside the jurisdiction, the Court should give directions in respect of what is good service and any other time limits that may apply. Although the rules provide for the document to be filed at Court, the case may proceed without this document being filed at Court.

#### Non Hague convention country cases: abduction from this country

These cases often involve proceedings in the country where the child has been taken, which can be long, expensive, frustrating and complex.

Close working with a lawyer in the country to which the child has been abducted is essential. The

foreign lawyer must not feel that they are being supervised by lawyers with different standards and ways of working. The English based client should be able to deal direct with the foreign lawyer. However co-operation and communication between lawyers will be needed. English court orders or other declarations may assist the case. The English lawyer will need to know from the foreign lawyer what sort of order and form of words in any English order will have their greatest impact on the local courts to help secure a return. Advice will be needed about recognition and affect of any English order. Check whether legal aid or other public funding might be available in the other country and if possible, take steps to obtain this as soon as possible. Discussion is needed about both criminal and civil law actions in the other country to secure return and which administrative authorities can be contacted. Much lateral thinking is required including what pressure can be placed on other family members, whether in England or abroad, to encourage a return.

The High Court can make an order under its inherent jurisdiction or s8 CA requiring the child to be returned to England or to a specified person. It may declare a removal or retention to be wrongful. Such orders can be made without notice. English High Court judges have worded orders to have maximum impact in the country to which the child has been abducted. If there is any issue of habitual residence, the left behind parent should apply immediately and before habitual residence or residence can be established abroad. A local authority can also apply if a parent removes the child including where care powers are insufficient.

It may be necessary for Court Orders and documentation to be notarised or apostilled, particularly when obtaining an order made in this jurisdiction to be mirrored in the jurisdiction where the child has been abducted. Local advice as to these requirements is needed.

Contact should be made with the Foreign and Commonwealth Office (0207 008 0878 and [www.fco.gov.uk](http://www.fco.gov.uk)) and the other country's Embassy in London. They may be able to provide a list of local lawyers who speak English. The FCO will assist in ensuring that the proceedings are moved very quickly through the Court in the other country where the child has been taken. The FCO may also assist in locating the child and discretely checking on the welfare of the child. The Foreign and Commonwealth Office may also put the lawyer and client in touch with the relevant Consul in the other country. They can offer practical, but specifically not legal, advice

Finding a lawyer to assist in a child abduction case abroad is not easy.

- First, there are not many jurisdictions around the world so specialist as England. Many countries still have many generalists.
- Secondly, most jurisdictions are not so aware, alert and geared up to the international aspects of family law as England.
- Thirdly, very few countries have any number of specialist child abduction lawyers, including who speak English.

The position in England is exceptional. Finding a lawyer will therefore often take considerable time but is an essential task. Reunite have a list of lawyers committed to child abduction work which can be located from their website. The IAML consists of lawyers specialising in international family law work but has historically they have been mostly finance rather than international children work. Contact specialist solicitors and barristers in children abduction work in England. Make enquiries of embassies and law societies and of the Web.

### Anglo Pakistan Protocol

In January 2003, a "judicial protocol" was signed by judges from Pakistan and from the UK. The judges agreed that the child's welfare is a priority and also that the Courts in the country where the child normally lives are usually best placed to determine matters of custody and where the child should live. This is without regard to any issues in respect of nationality, culture or the religion of the parent.

Liaison Judges are appointed to deal with these cases both in Pakistan and the UK. The Judges communicate with each other in respect of each particular case ensuring that the Judge in the other country is aware of the Court Orders that are already in place. The Liaison Judge for England is Lord Justice Thorpe.

The Protocol requires the Judges to consider existing Court Orders made in the child's home country. The Judge will normally then order that the child is returned to the country where they normally lived prior to the abduction or wrongful retention. The protocol will assist where there are existing Residence Orders or Prohibited Steps Orders against a person who has taken a child

The client can either consult a solicitor in this jurisdiction explaining to the court that the child has been taken to Pakistan or wrongfully retained there, alternatively, a client can consult a lawyer in Pakistan (the client does not need to travel to Pakistan) who will start Court proceedings in Pakistan using the protocol.

Automatic legal aid for court proceedings in Pakistan as with the Hague convention is not available.

Copies of all relevant Court Orders and details of any Court proceedings in Pakistan should be sent to the Liaison Judge in the UK at the Royal Courts of Justice and the Judge will then communicate with the Pakistani Liaison Judge, drawing attention to the UK Court orders and request that the child is returned to this jurisdiction.

The Anglo Pakistan protocol has already had some successes.

#### Practical action: The lawyer's role

Child abduction applications can require a considerable amount of work to be undertaken by the solicitor over a very short period of time. Such applications should therefore only be undertaken with care and when there is a good knowledge of the action to be taken and knowledge of the relevant contacts. It is always advisable for family law practices with a client base with any significant international element to prepare documentation, checklists and other forms in advance.

If approached to act for a parent whose child has been abducted from a Hague Convention country, there is a duty to advise that they are entitled to free legal representation from the Central Authority even if that will mean the firm may no longer be instructed.

In all cases in which a child abduction is a real anxiety, practical steps must be taken in order to minimise the risk. This is fundamentally more important where the risk is that the child will be taken to a non Hague convention country. This includes risk issues arising on periods of holidays abroad.

If a child is being taken from England to a non Hague Convention country but via a Hague Convention country, perhaps even landing in transit at an airport, the Hague Convention can still be invoked although very urgent action is needed in conjunction with the Hague Convention country where the transit airport is situated.

#### Professional obligations

Child abduction is one of only two circumstances, the other being child abuse, when the family law solicitor may have to breach his duty of confidentiality to his client. See 3.3.5 of the Law Society Family Law Protocol (2<sup>nd</sup> edition) referring: ***there may be exceptional circumstances involving children where solicitors should consider revealing confidential information to an appropriate authority***, now Rule 4

note 14 SRA Solicitors Code of Conduct. *“Solicitors are reminded they are obliged to disclose the whereabouts of a child who is the subject of a collection and/or location order or a child is a ward of court or otherwise if so directed by the court, regardless of the rules of client confidentiality. If solicitors feel concerned that such disclosure puts a client and/or their child at risk they must seek directions from the court as a matter of urgency.”* (3.3.5)

Great care and sensitivity is needed. A solicitor *may have to justify any breach of the duty of confidentiality to their professional body*, (3.3.6). If in any doubt, contact the Professional Ethics section of the SRA for guidance. Also consider discussing with other members of the profession, partners in the firm and perhaps professional insurers. See 3.3.6 and also 3.3.7 of the SRA family law protocol.

Child abduction work is a distinct specialisation within the specialisation of international family law work, as stated by the SRA in its Family Law Protocol.

The Family Law protocol (2<sup>nd</sup> edition) para 3.4.2

*‘Solicitors must recognise that international child abduction law is a rapidly developing highly specialist area of law and that specialist advice is essential for clients. Before agreeing to represent a client in such a case (including a child who is the subject of abduction proceedings) solicitors should consider whether they have the necessary specialist knowledge and expertise, and where appropriate, the client should be referred to an appropriate specialist firm. ...The consequence of bad or tardy advice can be devastating for the client, and may result in a substantial damages claim for negligence’.*

In Re H (Abduction: Habitual Residence: Consent) (2000) 2 FLR 294 Holman J found that all three members of the family had suffered needlessly from the failures by the English legal system, in which he included both the judges and the lawyers. He said *“there may be a tendency to think that child abduction is a specialist branch of family law and only to spot it when there has been an obvious ‘snatch’.* *It is specialist, which is why it is heard only by the very small number of judges in the Family Division of the High Court. But, just as every general practitioner must be alert to spot a rare illness even if he does not have the expertise to treat it, so also anyone, whether judge or practitioner, having any involvement with cases concerning children, must always be alert to spot a possible case of international child abduction.*

*As soon as a court learns that it is concerned with a child who has formerly lived abroad in a Convention country, and whom one parent does, or may, wish to return to that country, a possible case under the Hague Convention may arise. The concept and ambit of ‘wrongful retention’ extends the arm of the Convention way beyond a ‘snatch’, and means that it can apply even after a child has been here for a substantial period of time. The alarm bells should ring at once, and if there is any doubt at all the practitioners or the judge, as a matter of the court’s own responsibility, should at once consider transferring the case to a full-time judge of the Family Division, and/or seeking expert advice from experienced practitioners in the field of the Hague Convention and international child abduction, and/or seeking the advice and help of the ICACU, which is always available to give it.*

*These duties upon practitioners and the court arise at the outset. It is, indeed, particularly important that judges and district judges who hear without notice applications should be alert to the possibility that underlying the case in which the without notice application is made, there lurks a wrongful removal or wrongful retention. In order to assist judges to discharge that duty and their duties under Art 16 of the Hague Convention, there is, in my view, a duty upon practitioners ..., though acting for the ‘abducting’ parent, to draw the attention of the court to the possibility that the Hague Convention may apply ... at the first opportunity in any legal proceedings.*

Actions in negligence have been brought against solicitors who have taken on child abduction cases

and failed their clients though lack of knowledge of law, procedure and practice so care is needed.

Don't take on such cases unless:

- the lawyer, or another at the firm as supervisor, is a specialist in this complex area of law
- the lawyer has a team of lawyers and/or very good support staff in place who can handle this work, much of which is front-loaded
- the team is prepared to work anti-social hours – these cases often involve the need to communicate urgently with clients and lawyers in different time zones.
- The team is able to work late in an emergency. Often these cases will not wait until the following day as urgent steps have to be taken.
- The lawyer is aware how to operate the 'out of hours' judiciary service in the High Court PRFD via their number 0207 947 6000, manned 24 hours
- Use experienced Counsel (Do your own research. Ask questions of the experience of your Barrister including asking experienced solicitors. Do not rely solely on Counsel's Clerk to recommend a suitable barrister)
- If not experienced in this work, always seek advice from a lawyer who is experienced, although in this area of work many very experienced solicitors are reluctant to give informal informed advice as they have seen too many cases where real hardship has been caused to the child and the abducted parent by non-specialist lawyers attempting to act
- The lawyer is aware of the impact on other client work: child abduction cases must take all priority
- the lawyer is aware of the guidance and good practice set out in the SRA Family Law Protocol.

Lawyers should immediately after instructions of an abduction abroad submit to ICACU the completed child abduction questionnaire together with photographs of the abducting parent and child. The forms are available from ICACU by fax or e-mail. The application is then forwarded to the appropriate central authority in the other country with a view to the Hague convention proceedings being instituted. It is **good practice** for a law firm anticipating undertaking any child abduction work to have these forms already available and accessible for completion by clients in an emergency.

ADR such as mediation is exceptionally difficult in the arena of abduction. However a pilot project run by the reunite in 28 cases recently proved quite successful. It found the following features as set out on their website

- there was a benefit in the co mediation model bringing together a specialist child abduction lawyer mediator and a non lawyer mediator; the non lawyer mediator having acknowledged communication and other therapeutic skills to help the parties understand why the abduction had occurred and the separate issues faced by each parent
- the lawyer mediator should be a specialist in child abduction law
- the mediation had to be undertaken quickly and in parallel with the court proceedings
- the final mediation outcome document sometimes, called a memorandum of understanding, should be converted into an order of the court and perhaps an order of the relevant foreign court
- even when it does not produce a settlement, experience was often that the understandings reached or created in mediation made future contact arrangements work better

Lawyers should consider ADR including mediation in child abduction cases to be run in parallel with the proceedings.

See separate fact sheet on the issues to consider with clients

#### Using the media.

In some situations it may be necessary to seek the assistance of the media to locate a child. If so, it is necessary to seek a Publicity Order from the High Court. These orders are restricted in that information for release to the media about the case is only for the purpose of locating the child. Take

care not to release copies of documents to the media without specific permission to do so from the Court. However, a copy of the Publicity Order will need to be released to the press. Sometimes it will be necessary to negotiate an embargo with the media until the lawyer is ready for information to be released into the public domain.

Whenever the media is involved, plan within the office who will make statements to the media and who will take the media telephone enquiries to the office. Don't allow more than one person to do so otherwise contrary, even conflicting, messages or information can be given inadvertently which can harm the case and reputation of the law firm. Prepare a press release, a story attractive to the media with personal interest episodes and characteristics, with digital photos of the children and also separate photos of the children with the left behind parent. Much care and experience is always needed in dealing with the media and sometimes outside help may be invaluable.

### Reunite

Reunite International Child Abduction Centre is the UK charity specialising in international parental child abduction. The objects are to provide advice, information and support to parents, family members and guardians whose children have been abducted or who fear abduction. They will also provide advice and information to parents who may have abducted their children to the UK, and also assist and advise in international contact issues and cases of "permission to remove". They offer an advice line service in the UK specialising in international parental child abduction, open Monday to Friday, 9.30am to 5.00pm. An emergency number is available 24 hours a day by calling the advice line number, **0116 2556 234**.

They produce a prevention guide which is invaluable, **good practice** reading for solicitors and should be provided to clients who are anxious about an abduction. See <http://www.reunite.org/uploads/ppackmastersengwales.doc>. The opening page says as follow

*"This Prevention Guide has been provided to allow you to gather together information relating to your children which will be required in the event of an abduction.*

*Some of the information will be required by your local police force so that details of your children can be circulated in order to prevent them leaving the country without your permission and/or return them to you.*

*Some of the information MAY be required by others, such as your solicitor, so that if your children are taken from the country they may hopefully be returned to you.*

*Please take your time in reading ALL the advice in the Guide and if you are in doubt as to what is required of you, ASK your solicitor or contact reunite for advice.*

*This Guide has been jointly produced by the Police Service and reunite International Child Abduction Centre with the support and guidance of The Home Office, The Department for Constitutional Affairs, The Foreign and Commonwealth Office, The Passport Service and The Immigration Service.*

Acting for the party who has abducted the child to England

See the separate fact sheet

### Practical action: The court's powers

There are a vast number of orders available to the courts. The lawyer's role is to decide which orders are needed in which cases and when. A full list is set out in "**A Practical Guide to International Family Law**" (Jordans 2008) by David Hodson

### Collection and location orders

A collection order requires that the child is placed in the temporary care of the applicant or another person, which could be a local authority, until the further hearing, within three working days, and that the defendant or any other person looking after the child delivers the child into the charge of the Tipstaff. It incorporates a bench warrant to enable the Tipstaff to arrest and detain anyone he reasonably believes is disobeying the order and to bring to court as soon as practicable. Only the police or the Tipstaff can serve location and collection orders. If a person is not in a position to deliver up the child, he is required to inform the Tipstaff of the child's whereabouts and all other information in his knowledge to help locate the child and hand over any passports or travel documents. Collection orders are appropriate for instance when there is a fear that the abducting party will leave the jurisdiction with the child once it is known that she has been located and when great lengths have already been taken to hide the child from the other party.

The location order is confined to locating rather than handing over but otherwise is the same as a collection order.

These orders require completely separate forms which lawyers should have available in advance of the application.

The Tipstaff is the enforcement officer of the High Court of the Royal Courts of Justice. His function is to execute orders of the High Court. He acts with the assistance of the police. However he has no enquiry agency role. He cannot investigate himself and relies on information supplied to him e.g. from lawyers, who must therefore carry out their own investigation and brief the Tipstaff. The Tipstaff has authority to enter and search premises and use such force as is necessary to give effect to the order if he reasonably believes that the child may be found. He cannot serve the without notice orders so needs to work with service agents.

### All ports warnings

This is a 24 hour service to alert police and immigration officers via the police National computer at air and sea ports, as well as the Channel Tunnel, to prevent children leaving the jurisdiction. This can be obtained direct from the police. It is appropriate where there is a real and imminent danger of unlawful removal. An order is not necessarily required for children under 16, although in practice the police invariably require one. The authority is found in Practice Direction (Children: removal from the jurisdiction) (1986) 2 FLR 89

Solicitors should contact the applicant's local police station (or in urgent cases, any police station) including informing them of any orders already made. The police will initiate the all ports warning. Alternatively, once a wardship order is obtained, it will be put in place by the High Court Tipstaff.

The request for assistance should include as much information as possible and specifically

- the child's name, sex, date of birth, description, nationality and passport number of known
- the persons likely to have removed the child, their names, age, sex, date of birth, description, nationality and relationship to the child
- whether the child is likely to be co-operative in the move
- the person applying for the all ports alert, their name, relationship to the child, nationality, telephone number and details of the solicitor including out of hours telephone number
- likely destination
- likely time of travel and port of embarkation
- grounds for the port alert e.g. a court order or suspected offence of child abduction
- details of the person to whom the child should be returned

Immigration officers can invoke various statutory powers to stop departure if the abductor will not voluntarily agree!

A port alert is a preventative step to take but it has its limitations. Unfortunately some children slip through the net. It is most effective for the first week or so after the port alert is activated. After four weeks, the child's name is removed from the port alert list unless renewed.

However beware that it is immensely easy to leave England without passports or other basic travel documents and then to leave Europe for the rest of the world. There are relatively limited embarkation searches and scrutinies at most ports.

#### Court order prohibiting the child's removal from the jurisdiction

This is a s 8 CA Prohibited Steps order which can be made without notice if there is a real risk of an imminent departure. It is not needed if there is already a residence order in favour of the parent fearing a removal as this order automatically forbids removal. Normally this order is ancillary to other preventive orders but in a number of cases this order alone suffices to disincline a potential abductor.

#### Wardship

This extreme order puts the child under the jurisdiction of the court and so the child cannot be removed without the court's consent. It enables considerable ancillary powers to be invoked. Any unlawful removal is then contempt of court. See more details above

This is taken from "*A Practical Guide to International Family Law*" (Jordans 2008) by David Hodson, with acknowledgement. Further details can be found within the book and from David Hodson

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