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NEW ZEALAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

New Zealand is a relatively isolated island nation that has traditionally accepted immigrants from many developed countries. The country, therefore, has been viewed as a potential place for settlement for persons in other countries who are contemplating defying a court order by abducting a child and fleeing that court's jurisdiction. In the 1980s, there were a couple of highly-publicized cases of this nature. One involved the child of a mother who had been imprisoned in the United States for refusing to allow her former husband unsupervised visits with their daughter in violation of a court order. Upon being released with Congressional assistance, the mother joined her child, who was then revealed to have been living in New Zealand. The mother and daughter stayed in that country until further Congressional action made it possible for her to return to the United States in 1997, without complying with the original court order or facing further contempt of court proceedings.

One reason refuge was found in New Zealand by parties fleeing such other countries as Australia and the United Kingdom, was that New Zealand did not accede to the Hague Convention on the Civil Aspects of Child Abduction until 1991.¹ The Convention is designed to ensure that, except in limited circumstances, questions of custody be determined by the court of a child's habitual residence and that, pending the outcome of such proceedings, an abducted child should be returned to that jurisdiction. Prior to 1991, a full custody hearing was generally required before the courts could order the return of a child to his place of habitual residence. The Convention creates a presumption in favor of return that did not previously exist in New Zealand law. The existence of this refutable presumption is sufficient to make New Zealand far less attractive to a parent looking to take a child abroad in violation of a custody order than it previously was, but it has not completely stopped the practice. In 1995, foreign authorities reportedly referred 44 new cases to authorities in New Zealand involving children abducted from parents who had had custody of them in foreign countries.² This indicates that the difficulties and expense of tracking down parties in New Zealand from Australia,³ Europe, or North America still make it attractive to some parties who wish to disappear. In many cases, parents implicated in foreign custody abductions have argued that the courts should invoke the exceptions contained in the Convention and New Zealand law to refuse to order the child's return. New Zealand case law in this area will be detailed in Part III, *infra*.

¹ New Zealand acceded to the Convention on May 31, 1991. It came into force in that country on August 1, 1991. The dates that New Zealand's accession was individually accepted by the other parties to the Convention are set out at <http://hcch.net/e/status28e.html#nz>.

² Tom Cardy, *Custody Abductions on Rise*, EVENING POST (Wellington) July 19, 1997, at p.9. In this article, the Chief Family Court Judge is quoted as having stated that the number of foreign custody abductions would have been approximately four times higher had New Zealand not acceded to the Convention.

³ New Zealand is reportedly the country most favored by abducting parents from Australia. Michael McKinnon, "New Zealand destination for most ex-spouses abducting children," Courier Mail (Queensland), May 23, 2002.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hague Convention of the Civil Aspects of International Child Abduction was incorporated in New Zealand law through the enactment of the Guardianship Amendment Act of 1991.⁴ This statute was signed into law on April 14, 1991; and it was brought into force on August 1, 1991, through the issuance of a separate regulation.⁵

The Guardianship Amendment Act designates the Secretary to be the Central Authority for the purposes of the Hague Convention. The Secretary is the chief executive of the Department of the Courts and is directed to perform all the functions that a Central Authority has under the Convention. These include responding to foreign requests for assistance in securing the return of an illegally abducted child. The Secretary cannot be ordered by New Zealand's courts to pay costs for any proceedings in which he is a party or on behalf of private parties.⁶ Forms for Hague Convention applications are contained in the Guardianship (International Child Abduction) (Forms) Rules, 1991.⁷

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

New Zealand's Crimes Act contains one offense that relates specifically to child abduction. The section of the Act creating this offense states that:

everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 16 of the possession of the child, or with intent to have sexual intercourse with any child being a girl under that age, unlawfully (a) Takes or entices away or detains the child; or (b) receives the child, knowing that the child has been so taken or enticed away or detained.⁸

It is not a defense to this section to prove that the child consented to the abduction or that the person who enticed him thought that the child was at least 16 years old. However, it is a valid defense for the person charged with this offense to prove that at the time he took the child, he claimed in good faith a right to possession of the child.⁹ How these terms are to be interpreted in this context is somewhat unclear. For that reason, it appears that charges of abducting a child under the age of 16 are seldom laid against a parent or guardian. However, there may be aggravated circumstances in which a parent could be convicted of this offense and be sentenced to a term of imprisonment under the Crimes Act.

⁴ 1991 N.Z. Stat. No. 19. The Act has republished in 38 R.S.N.S. at 659 (1998).

⁵ 1991 S.R. No. 120.

⁶ 38 R.S.N.Z. § 7.

⁷ 1991 S.R. No. 121.

⁸ Crimes Act, 1961, 1 R.S.N.Z. § 210 (1979).

⁹ *Id.*

Custody orders in New Zealand are generally made pursuant to the Guardianship Act, 1968.¹⁰ This statute does not contain a provision that makes it a specific criminal offense for a parent to refuse to observe or comply with a custody order. However, it does contain a section providing for the issuance by the Family Court or a District Court of a warrant to enforce a custody or access order. Under this section, any person who is entitled to the custody of a child under the Act or a court order can apply for an order to have a constable, social worker, or other named person to take possession of the child and deliver the child to him. The court order can be one issued in New Zealand or an overseas order that has been transmitted to the Secretary and registered with a local court. The court is given broad powers to decide whether a warrant should be issued. The statute provides that anyone who resists or obstructs a person in executing a warrant or who refuses to afford immediate entrance to any premises is liable to a fine of NZ\$1000 (US\$673).¹¹ However, this section is not the only provision that can be invoked to enforce a custody order. The Guardianship Act specifically preserves judicial powers that existed prior to its commencement.¹² This allows courts to enforce custody orders through separate contempt of court proceedings. The courts have broad powers to determine what types of sanctions should be imposed upon a person found to be in contempt. Imprisonment is one possibility.

B. Parental Visitation

The general rule in New Zealand is that the mother and father of a child are each guardians of that child until such time as one or both of them are removed from that role through a court order.¹³ However, even in the absence of such an order, one parent can lose custody of his child. The Guardianship Act, 1968 provides that the courts may make interim or permanent orders with respect to custody, as is deemed appropriate, on applications from a father or mother, step-parent, guardian, or other person who has been granted leave to apply.¹⁴ The Guardianship Act, 1968 does not create a presumption in favor of joint custody, but it does allow for the awarding of joint custody. New Zealand's courts have found that joint custody is, as a general rule, only appropriate when there is a high level of cooperation between the parties. In one reported case, the judge awarded joint custody to parties who, despite protracted litigation over their child, had remained "civilised." This judge also believed that joint custody would avoid a "disproportion of power" in favor of the child's mother.¹⁵

A parent who has been denied custody can apply for access rights. Such rights will normally be granted as being in the best interests of a child. However, the Guardianship Act, 1968 creates special rules for the granting of custody or access orders in cases involving allegations of violence against one or more of the parties. A parent who has used violence against the other parent or a child may be denied access depending on the nature and seriousness of the violence, the date it occurred, its frequency, and its likelihood of reoccurring. The courts are expressly empowered to make such orders as they see fit "in order to protect the safety of [a] child."¹⁶

¹⁰ 38 R.S.N.Z. 614 (1998).

¹¹ *Id.* § 19.

¹² *Id.* § 19A.

¹³ *Id.* § 6.

¹⁴ *Id.* §11.

¹⁵ *Mueller v. Mueller*, [1997] N.Z.F.L.R. 597 (Fam. Ct.).

¹⁶ Guardianship Act, 1968, 38 R.S.N.Z. § 16B (1998).

The penalties for hindering or preventing access in violation of an access order are more clearly set out in the Guardianship Act, 1968 than they are for a violation of a custody order, but they are not substantially different. A section of this statute states that a person who hinders or prevents access to a child is liable to a fine of NZ\$1,000 or a punishment to be determined by the court for being in contempt.¹⁷

III. Court System and Structure - Courts Handling the Hague Convention

The Guardianship Amendment Act, 1991 provides that the duties, powers, and functions conferred on judicial authorities by the Hague Convention are to be exercised or performed in New Zealand by the Family and District Courts.¹⁸ The former are divisions of the latter that have existed since 1980. Family Court judges are District Court judges. New Zealand has a Principal Family Court judge.

Appeals against Family Court orders and refusals to make an order can usually be made to the High Court without first requesting permission within a period of 28 days or within such further time allowed by the High Court upon an application filed within a month of the expiration of 28 days.¹⁹ Orders and decisions of the High Court are usually final. An exception to this rule allows for the appeal of questions of law to the Court of Appeal with the leave of that body.²⁰ The Court of Appeal does not usually hear evidence in cases involving orders made by the Family or District Courts. The Guardianship Act, 1968 provided that decisions of the Court of Appeal were final.²¹ This meant that final appeals to the London-based Judicial Committee of the Privy Council were not allowed even before the government enacted legislation to abolish such appeals in 2003. The Act that abolished Privy Council appeals replaced it with a new Supreme Court that is presently scheduled to begin hearing cases near the middle of 2004.²² The Supreme Court will have jurisdiction to hear appeals in Hague Convention cases.

Although the primary purpose of the Hague Convention is to have questions of custody decided by the court of a child's habitual residence, it does not require parties to automatically return any child who has been abducted. Instead, it contains certain safeguards to allow Members to protect abducted children in limited circumstances. The section of New Zealand's Guardianship Amendment Act, 1991 that incorporates these exceptions in New Zealand law is section 13.

Section 13 begins by stating that a New Zealand court can refuse to order the return of an abducted child if the application is filed more than one year after his removal and the child is now settled in his new environment. It then provides that an application can also be refused if the person who filed it was not actually exercising custody rights or would not have been exercising custody rights if the child had not been removed. In these cases, the court may decide that the child had not been abducted in violation of the Convention.

The section 13 exception that has attracted the most judicial attention states that a New Zealand court can refuse to order the return of an abducted child if "there is a grave risk that the child's return ...

¹⁷ *Id.* § 20A.

¹⁸ 38 R.S.N.Z. § 8 (1998).

¹⁹ Guardianship Act, 1968, 38 R.S.N.Z. § 31(2) (1998).

²⁰ *Id.* § 31B.

²¹ *Id.*

²² Supreme Court Act, 2003 N.Z. Stat. No. 53.

would expose the child to physical or psychological harm or ... would otherwise place the child in an intolerable situation.” Read broadly, these exceptions could be invoked to justify the courts refusing to order the return of an abducted child in a great many cases. However, New Zealand case law indicates that the exceptions have generally been read restrictively so as not to virtually undermine the country’s adherence to the Hague Convention. The higher courts have been particularly sensitive to this potential problem in overruling Family Court judges who had rendered decisions in favor of parents who had abducted children in a number of difficult cases.

In *S v. S*, the High Court and the Court of Appeal both overruled a Family Court judge and ordered the return to Australia of children who had been abducted by their mother. This case involved a father who had allegedly abused the mother and had so intimidated her that she was psychologically unable to return to Australia for custody hearings. The appeal courts sympathized with the situation of the mother, but found that the Guardianship Amendments Act, 1991 and the Hague Conventions did not contain applicable exceptions. The children in question were not afraid of their father and wished to return to their home in Australia. Moreover, the appeal courts held that it was not enough to show that the children could suffer physical or psychological harm if they were returned; it was necessary to show that the courts and authorities of their habitual residence could not provide sufficient protection for the children. One judge stated that this might well be the case if a parent seeking the return of his children was “poised to strike” or if the country was in turmoil. As this was not found to be true in the case at hand, the Family Court’s decision to refuse the return of the children was overturned. The appellate judges noted that a firm adherence to the Hague Convention was needed in order to ensure that applications filed in other countries by New Zealand parents and authorities would receive favorable consideration.²³

The case of *S v. S* is very similar to a 1996 case in which the names of the parties were not reported. This earlier case also involved an application from a foreign father for the return of children who had been abducted by their mother. The mother had opposed this application by contending that the father had sexually abused one of the children while he had custody of her. The Family Court judge who heard this application agreed that there was a grave risk that the child would be exposed to physical or psychological harm or would be placed in an intolerable situation if she was returned to her habitual residence in Denmark. On appeal, the High Court held that Family Court judges are not to treat applications for return of children as custody hearings. Instead, the courts must consider whether the foreign legal system contains adequate safeguards for children. In the instant case, the High Court found that the Danish legal system provides that, in family matters, the best interests of children are paramount and that Denmark would take steps to protect the child if there was a reasonable possibility that she would be sexually abused. The Court of Appeal agreed with these findings and cited Australian, Scottish, and American cases in support of its interpretation of the Hague Convention.²⁴

Since the above cases were decided, the High Court has reviewed a number of applications for the return of allegedly abducted children who were habitually resident in Australia. In *KS v. LS* (No. 2)²⁵ and *P v. Secretary of Justice*,²⁶ the return was ordered. However, in *El Sayed v. Secretary of Justice*,²⁷ the

²³ *S v. S*, [1999] 3 N.Z.L.R. 513.

²⁴ [1996] N.Z.F.L.R. 99 (C.A.).

²⁵ [2004] N.Z.F.L.R. 236 (H.C.).

²⁶ [2003] N.Z.F.L.R. 673 (H.C.).

²⁷ [2003] 1 N.Z.L.R. 349 (H.C.).

High Court reversed the decision of a trial judge to allow a child to stay in New Zealand on the ground that the child would face a grave risk of physical or psychological harm if he was returned to Australia. In reaching this decision, the judge found that the fact that Australia provides protection to children through its social services did not eliminate the risk in the instant case. However, the judge was careful to note that most cases in which such concerns are raised will not result in an exception being granted to allow a child to stay in New Zealand. Similar sentiments were expressed in *B v. C*.²⁸ In that case, a child habitually resident in the United Kingdom was allowed to stay in New Zealand. The major reason for this decision was that the child was a teenager who had indicated a strong preference to remain in the country.

The above cases demonstrate that New Zealand courts have applied the Hague Convention in aid of foreign parents who have had children abducted by former spouses, but they have also found that certain cases fall within the exceptions under the agreement. In the latter cases, the courts have tended to stress the unusual facts to avoid the impression that they do not take their obligations under the Hague Convention as seriously as was intended by its framers.

IV. Law Enforcement System

New Zealand's Guardianship Amendment Act, 1991 provides for the enforcement of orders for the return of a child who has been abducted. Under the applicable section, a Family Court or District Court judge can issue a warrant that authorizes a police officer or social worker to take possession of a child and deliver him to a person or authority who will arrange for his return.²⁹ A judge or the Registrar of the High Court, if no judge is available, can also issue orders to prevent children who are the subject of a Hague Convention application from being removed from New Zealand. To enforce such an order, a judge or the Registrar can direct that a child be taken into official custody and that any passports, tickets, and other travel documents be surrendered.³⁰

V. Legal Assistance Programs

The Guardianship Amendment Act, 1991 provides that where an applicant for the return of an abducted child is not represented by a barrister or solicitor, "the Authority shall, where the circumstances so require, appoint a barrister or solicitor to represent the applicant for the purposes of the application."³¹ Legal fees are then paid by the court. The Court can order a party to reimburse the Crown such amount as it deems appropriate. It appears that this is not usually done when the dispute involves questions of law. Legal aid can be applied for by parties who are unable to pay the legal costs of bringing an application for the return of an abducted child.

VI. Conclusion

Prior to 1991, several well-publicized cases gave New Zealand the reputation of being a country that at least sometimes harbored children who had been abducted in violation of foreign custody orders. However, New Zealand acceded to the Hague Convention of the Civil Aspects of International Child Abduction. The primary purpose of the Hague Convention is to ensure that, except in very special cases,

²⁸ [2002] N.Z.F.L.R. 433 (H.C.).

²⁹ 38 R.S.N.Z. 659, s.26 (1998).

³⁰ *Id.* § 25 and Guardianship Act, 1968, 38 R.S.N.Z. 613, § 20 (1998).

³¹ 38 R.S.N.Z. 659, § 23 (1998).

questions of custody are dealt with by the courts and authorities of an abducted child's habitual residence. The Hague Convention was incorporated in New Zealand law through the adoption of the Guardianship Amendment Act, 1991. That statute does not depart from the Convention in significant respects. Moreover, in interpreting the Guardianship Amendment Act, 1991, New Zealand's appellate courts have demonstrated a determination to support the legal regime it creates as being in the best interests of both foreign children who have been abducted and brought to New Zealand and New Zealand children who might be abducted and taken to foreign jurisdictions.

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