

**LAW LIBRARY OF CONGRESS****UNITED KINGDOM****HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION****Introduction**

The United Kingdom has actively implemented the Hague Convention on the Civil Aspects of Child Abduction into its national laws. It has been compliant in pursuing cases under the spirit of the Convention to ensure the safe return of children to their country of habitual residence; however, when the courts have felt that such return would be detrimental to the child, they have utilized the exemptions within the Convention to ensure that the interests of the child are protected.

The abduction of children, i.e., taking them away without the consent or authority of persons who have the lawful right to care for them, has long been considered kidnapping, a common law criminal offense, that is also committable by parents. In recent years, aided by quick and affordable means of travel, an international dimension has been added to the problem of children being wrongfully taken across state frontiers, away from their country of habitual residence.

Acts of local abduction within a country are dealt with by state courts, and the rights of the parties are determined according to the legal test of what is in the “best interest of the child” concerned. The problem is felt more acutely when a family dispute arises among parents of diverse national origins, who reside in one country, and a parent takes a child to the country of his origin to seek protection under its laws. In such cases, the rights of the parent from whom the child has been abducted cannot effectively be enforced in domestic courts. Courts are traditionally hesitant to cede jurisdiction to another country when litigants are present within their own jurisdiction. Reflecting their own cultures, the courts may decide the test of the best interest of a child based on their own notions of family relations.

Increasing concerns about international abductions have led to the formulation of international agreements to combat the problem. At least two such major agreements have been reached in order to deter international child abduction and to provide for the quick return of a wrongfully removed child to his home country. These agreements provide civil law remedies, but do not deal with any criminal aspects of child abduction.

**I. Domestic Laws and Regulations Implementing the Hague Convention**

The United Kingdom ratified the Hague Convention on the Civil Aspects of International Child Abduction on August 1, 1986, when the Child Abduction and Custody Act 1985 came into effect.<sup>1</sup> Section 1 of the Act grants the Convention the force of law in the United Kingdom, and section 2 authorizes the issuance of Orders in Council specifying the contracting states to the Convention.<sup>2</sup> The Convention applies only to children under the age of 16 and only in cases in which the child who has been wrongfully removed or retained had been habitually resident in a contracting state. Under the Act, a removal or retention is considered wrongful under the law of habitual residence when it occurs in breach

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<sup>1</sup> The Child Abduction and Custody Act 1985, ch. 60 [hereinafter the Act]. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter “the Convention”] is set out in Schedule 1 of the Act. The Act also ratified the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody and Children, signed at Luxembourg on May 20, 1980. The European Convention is outside the scope of this report.

<sup>2</sup> The Child Abduction and Custody (Parties to Conventions) Order 1986, S.I. 1986, No. 1159, as amended.

of custody rights, which were exercised or would have been exercised but for the removal or retention. A removal that is not in breach of domestic law may nevertheless be ‘wrongful’ under the Convention.<sup>3</sup> In a case where a person has custody pursuant to an interim order of a foreign court, this in itself does not justify the child’s removal from the foreign jurisdiction, particularly when another person had been granted access to a child under the order.<sup>4</sup> The court is bound to order the return of a child if the application is brought within 12 months of the wrongful removal or retention. For applications made after the 1 year period, the court must still order the child’s return, unless it is demonstrated that the child is now settled in its new environment.

A contracting state is required to set up a Central Authority, which must undertake several measures, including to:

- discover the whereabouts of the child
- prevent further harm to the child
- secure the voluntary return of the child or bring about an amicable resolution of the issues
- initiate judicial proceedings with a view to return of the child
- provide legal aid and advice
- make necessary and appropriate administrative arrangements to secure the safe return of the child<sup>5</sup>

The Act establishes the following Central Authorities within the United Kingdom:

- In England & Wales - the Lord Chancellor,<sup>6</sup> whose duties in this regard are carried out by a Child Abduction Unit (“CAU”)<sup>7</sup> under the administrative control of the Official Solicitor of the Supreme Court, an independent, semi-judicial authority
- In Scotland - the Secretary of State, whose functions in this regard are carried out by the Scottish Court Administration<sup>8</sup>

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<sup>3</sup> In *Re F (A Minor: Abduction, Custody Rights Abroad)*, [1995] Fam. 224, a mother who was not in breach of domestic law in removing her child from Colorado was nevertheless held to be in breach of the father’s right of custody. In relation to unmarried fathers and their rights of custody, a Practice Note delineating those rights discusses court decisions that expand the concept to include more than strictly legal rights: *Practice note: Child Abduction and Custody Act 1985*, 142 Sol. J. 114 (Feb. 6, 1998).

<sup>4</sup> *Re E (A Minor: Abduction)* [1989] 1 FLR 135 (CA).

<sup>5</sup> Convention, art. 7.

<sup>6</sup> Recent constitutional changes have seen the replacement of the Lord Chancellor’s Department with the Department for Constitutional Affairs.

<sup>7</sup> The address is: Lord Chancellor’s Department, Child Abduction Unit, 81 Chancery Lane, London, WC2A 1DD. Telephone: 44 0171 911 7047/7094. Fax: 44 0171 911 7248, available at <http://www.offsol.demon.co.uk/cauopefm.htm>.

<sup>8</sup> Scottish Executive Justice Department, Hayweight House, 23 Lauriston Street, Edinburgh EH3 9 DQ. Tel: 44 131 229 9200. Fax: 44 131 221 6894, available at website: [http://www.scotland.gov.uk/who/dept\\_justice.asp](http://www.scotland.gov.uk/who/dept_justice.asp).

- In Northern Ireland - the Northern Ireland Court Service, as designated by the Lord Chancellor<sup>9</sup>

The Act does not provide specific guidance on how a Central Authority is to proceed in undertaking the measures set out in article 7, and, although section 10 of the Act authorizes rules of court being made, no such rules have been issued.

There is no specified form for making an application to a Central Authority; an application will be accepted in any form provided it includes sufficient details, including:

- the identity of the applicant, the child, and the person alleged to have removed or retained the child
- the date of birth of the child, if available
- the grounds on which the claim for return of the child is made
- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be<sup>10</sup>

The website for the Central Authority in England and Wales contains an application “questionnaire” that also requests information on the circumstances surrounding the removal of the child from the United Kingdom and the subsequent retention overseas, as well as any court proceedings that are underway or that have already taken place.<sup>11</sup>

When a Central Authority receives an application for the return of an abducted child, a solicitor (general attorney) who has experience in child abductions matters is assigned the case. The solicitor will take the applicant’s (now the client’s) instructions; assemble the evidence, if necessary with the help of the Central Authority; and file affidavits of facts on the relevance of the foreign law. A decision of a judicial or administrative authority outside the United Kingdom may be proved by an authenticated copy of the decision; a copy is deemed to be a true copy unless the contrary is shown.<sup>12</sup> The solicitor is also responsible for applying for legal aid under the state program providing assistance to those seeking legal services, based on the merits of the case and a means test (*see* below for further details). The solicitor will also instruct a barrister (litigation attorney) to represent the applicant at the court hearing.

The solicitor may also obtain an *ex parte* court order to protect the child immediately, including an order for the surrender of passports, and for prohibiting the removal of the child from the jurisdiction of the court or a particular location. If the whereabouts of the child are not known, an order will be sought that either authorizes a search for the child or requires the disclosure of information from a person who is believed to have any relevant information.<sup>13</sup> It is generally not necessary for an applicant seeking the return of a child to attend the hearing.

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<sup>9</sup> Northern Ireland Courts Service, Legal Advisor’s Division, Windsor House, 5 Bedford Street, Belfast BT2 7LT. Tel: 44 2890 328594. Fax: 44 1232 439 110.

<sup>10</sup> The Convention, *supra* note 1, art. 8.

<sup>11</sup> The Office of the Solicitor to the Supreme Court and the Public Trustee, *Application (Questionnaire) for Return of a Child*, available at, [http://www.offsol.demon.co.uk/cau\\_questionnaire\\_return.doc](http://www.offsol.demon.co.uk/cau_questionnaire_return.doc).

<sup>12</sup> The Act, *supra* note 1, § 7.

<sup>13</sup> *Id.* § 24A.

Article 13 of the Convention provides for certain defenses to an application that, if successful, grants a court the discretion not to order the return of the child. The defenses arise in cases in which the person having the care of the child was not actually exercising the custody rights at the time of removal; the removal or retention was consented to by the applicant parent, or where he had subsequently acquiesced to it; the return would pose a grave risk of physical or psychological harm to the child or place him in an intolerable situation; or the child objects to being returned, and has reached an age or degree of maturity at which it is appropriate to take account of those views.<sup>14</sup>

The United Kingdom has not adopted article 20 of the Convention, which provides that the return of a child “may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.” The article was omitted as it was considered unnecessary given the other defenses and because at that time it had no clear meaning in English law. The United Kingdom has since enacted the Human Rights Act 1998,<sup>15</sup> which incorporates the European Convention on Human Rights into domestic law. However, an amendment to incorporate article 20 of the Hague Convention was rejected.<sup>16</sup>

## II. Domestic Laws Regarding Child Abduction and Parental Visitation

### A. Child Abduction

The common law offense of kidnapping may be committed by a parent who takes away by force or fraud his own unmarried child under the age of 18, without lawful excuse and without the child’s consent.

Under the Child Abduction Act 1984,<sup>17</sup> it is an offense for a person connected with a child under the age of 16 to take or send the child out of the United Kingdom without the appropriate consent. A “person connected with the child” is considered to be a parent, a reputed father,<sup>18</sup> a guardian, a person who has a residence order with respect to the child, or a person who has custody of the child. “Appropriate consent” can be given by each of the following: a child’s mother, a child’s father, if he has parental responsibility for the child; a guardian; a special guardian; anyone with a residence order or custody; or a person who has the leave of the court. No offense is committed if a person who has a residence order takes or sends the child out of the United Kingdom for less than 1 month, or in the case of a special guardian, less than 3 months.<sup>19</sup>

The maximum penalty under the 1984 Act is 7 year’s imprisonment. However, prosecutions can only be brought with the consent of the Director of Public Prosecutions and are relatively rare.

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<sup>14</sup> Re: T (Abduction: Child’s Objections to Return) [2000] 2 FLR 192 (CA).

<sup>15</sup> Human Rights Act 1998 Ch. 42 (Eng.).

<sup>16</sup> 583 Parl. Deb., H.L. (Nov. 27, 1997).

<sup>17</sup> Child Abduction Act 1984, ch. 37 (Eng.).

<sup>18</sup> Re C (Child Abduction) (Unmarried Father: Right of Custody) [2003] FLR 252 (Fam).

<sup>19</sup> *Supra* note 17, § 1(4).

The Children Act 1989,<sup>20</sup> section 8, makes provisions for the issuance of a contact order, a prohibited steps order, or a residence order; all are referred to as “a section 8 order,” and impose an automatic prohibition on taking the child out of the United Kingdom. Such orders can be made *ex parte*, if necessary. In case of a contact order, if it is feared that the child may be abducted by the person exercising contact, the order may be varied to provide for the contact to be supervised. A child may also be made a ward of the High Court,<sup>21</sup> which prohibits his removal from the United Kingdom.<sup>22</sup> In such cases, a passport issued to a child may be required to be surrendered.<sup>23</sup>

An order preventing the removal of a child from the United Kingdom may be enforced by requesting the police to issue a “Port Stop” at points of departure.

## **B. Parental Visitation**

Under the Children Act 1989, married parents have joint and equal parental responsibility over a child up to the age of 18 years. The Family Law Act 1996,<sup>24</sup> section 11, lists factors that a court must take into account in proceedings for a divorce or separation order. With regard to children of marriage, the court must treat the welfare of the child as paramount and have particular regard for:

the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by (i) his having regular contact with those who have parental responsibility for him and with other members of his family; and (ii) the maintenance of as good a continuing relationship with his parents as is possible...<sup>25</sup>

With regard to living arrangements, a court may issue a residence order in favor of two or more persons who do not live altogether.<sup>26</sup> The residence order may specify the periods during which the child is to live in the different households concerned. This order introduces an element of “time sharing,” which is a feature of joint custodial arrangements in other countries.

The court may also issue an order requiring a parent with whom the child lives to allow him to visit or stay with the other parent.<sup>27</sup> The authority for a contact order is based on a presumption of reasonable contact in favor of parents and certain other individuals. The order is subject to the principle of welfare of the child and the courts’ power of intervention. However, the power to deprive the child and parent of contact is not exercised lightly, and there must be sound justification for doing so. The fact

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<sup>20</sup> Children Act 1989, c. 41 (Eng.).

<sup>21</sup> Supreme Court Act, 1981, c. 54 (Eng.), § 41.

<sup>22</sup> Family Law Act 1986, ch. 55 (Eng.), § 38.

<sup>23</sup> *Id.* § 37.

<sup>24</sup> Family Law Act 1996, ch. 27 (Eng.).

<sup>25</sup> *Id.* § 11(4)(c).

<sup>26</sup> *Supra* note 22, at § 11(4).

<sup>27</sup> *Id.* § 8.

that contact arrangements may be difficult to operate, or that the child or the parent would prefer not to have contact, does not by itself provide justification for refusing it.<sup>28</sup>

In a great majority of divorces, however, the parties themselves work out the arrangements informally for the custody of children and rights of contact.

### **III. Court System and Structure – Courts Handling the Hague Convention**

#### **A. Family Proceedings Generally**

Jurisdiction in family matters and matters relating to children is vested in three levels of courts: the High Court, the county courts, and magistrates' courts. The lowest level of proceedings is conducted in the magistrates' courts by lay persons assisted by a legally qualified clerk. In major metropolitan areas, legally qualified stipendiary magistrates sit in these courts. A number of proceedings, such as the issuance of care and supervision orders, parental contact, etc., must be commenced in magistrates' courts. Divorce and matrimonial matters must be commenced in a county court in which decisions are made by a district judge or circuit judge. The highest level of family proceedings is the Family Division of the High Court, which consists of specialist family judges. There is a selective divorce jurisdiction in the High Court, which has exclusive jurisdiction to issue an order making a child a ward of the court. Cases with an international aspect are most appropriately heard in the High Court.

Hearings in family matters are notionally adversarial, and a combative or hostile approach in cases involving children is discouraged by the court. The welfare of the child is paramount, and the court will restrict evidence that detracts from this focus. Although it is usual to present oral evidence with a chance to cross examine on contentious facts, affidavits or statements in advance are relied upon to a great extent in cases involving children. Moreover, such hearings are "in chambers," with parties and their lawyers present, but without public access. Thus, confidentiality is protected and publicity is actively discouraged.<sup>29</sup>

#### **B. Under the Convention**

All applications for the return of children wrongfully brought into the jurisdiction of the court are dealt with in London by a judge of the Family Division of the High Court.<sup>30</sup> The Clerk of the Rules, a Court official responsible for listing cases, ensures that they are listed for hearing very quickly, sometimes in 2 days. The court exercises control over the progress of the case; the litigants are not allowed to let the case "drift," and adjournments are limited to a maximum of 21 days.

The application brought in the High Court should be initiated by originating summons in a prescribed form,<sup>31</sup> but in emergencies applications may be made *ex parte*. The time limited for

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<sup>28</sup> ANDREW BAINHAM, *CHILDREN: THE MODERN LAW* 128 (2d ed. 1999).

<sup>29</sup> ANNE-MARIE HUTCHINSON AND HENRY SETRIGHT, *INTERNATIONAL PARENTAL CHILD ABDUCTION* 180 (1998).

<sup>30</sup> The vesting of jurisdiction in a single high level court avoids the problem of a large number of courts having potential jurisdiction to hear Convention applications.

<sup>31</sup> Family Proceedings Rules 1991, S.I. 1991/1247, ¶ 6.2.

acknowledging service of an originating summons is 7 days or such further time as the court may direct.<sup>32</sup> The plaintiff may lodge an affidavit in support of the application and serve a copy on the defendant, and the defendant may reply again by lodging an affidavit and serve a copy on the plaintiff within 7 days after service of the originating summons. The hearings are heard and determined by a judge in chambers unless the Court otherwise directs.<sup>33</sup> The Court may give interim directions as it thinks fit for the purpose of securing the welfare of the child or for preventing changes in circumstances. Thus, the Court may direct that the child is to reside with a specified person or at a specified place while the application is being considered.

Hague Convention hearings are usually conducted on written evidence and submissions made by lawyers. Oral evidence is taken in only a minority of cases. A foreign applicant may instruct a solicitor to bring proceedings without approaching the Central Authority as an intermediary. Judgments and orders are usually given at the end of the final hearing, but in difficult cases judgment may be reserved for 14 days or less.

#### IV. Law Enforcement System

The mandate in article 12 of the Convention “to order the return of the child forthwith” is considered to be binding, and the Court returns the child speedily, once a decision has been made. In many instances, children leave the country within 7 days of the hearing. In enforcing the return, the Court makes frequent use of undertakings, voluntary promises made formally in writing by parties, given to the Court. These amount to binding orders, and their breach may result in imprisonment for contempt. The undertakings are meant to regulate and mitigate the effects of a return until a hearing is held in the requesting state, and to ensure that conditions are met without which a return would be impossible. “The English court is often concerned to ensure that the *voluntary but binding* nature and effect of these undertakings is understood and accepted in countries to which the children are returned.”<sup>34</sup>

The orders made by the High Court are enforceable by the Tipstaff, a court official who can seek help from the police. Failure to comply with an order of return is also a civil contempt punishable by imprisonment for up to 2 years, sequestration of property, or a fine. The Court also uses the Tipstaff to find missing children and seize passports and travel documents.

#### V. Legal Assistance Programs

The Legal Aid Act 1988<sup>35</sup> allows anyone, whether within the jurisdiction or not, to apply for legal aid for instituting civil legal proceedings in which such assistance is available. The Legal Aid Board applies merits and means tests to determine whether a litigant has reasonable grounds for taking or defending an action and whether he meets the financial eligibility criteria. The United Kingdom has made a reservation under article 42 of the Hague Convention that requires Central Authorities not to impose any charges in relation to applications submitted under the Convention. However, free legal aid, not subject to the merits and means tests, is available to applicants seeking the return of a child under articles 3 and 8. The expenses of returning the child are not available from public funds, however, the applicant may

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<sup>32</sup> *Id.* ¶ 6.6.

<sup>33</sup> *Id.* ¶ 6.8.

<sup>34</sup> *Supra* note 24, at 186.

<sup>35</sup> Legal Aid Act 1988, c. 34 (Eng.).

request “that an order for travel costs be.” Legal aid is also available, subject to the two tests, to those seeking rights of access under the Children Act 1989, section 8.

Applications for legal aid by non-United Kingdom residents are made to the Legal Aid Board.<sup>36</sup> In 1998, a spokesman for the Lord Chancellor’s Department made the following policy statement in response to a question in the House of Commons on the availability of legal aid to overseas litigants in child abduction cases:

It is the Government’s policy that any person whose case is accepted by the Central Authority under the Hague or European Child Abduction Conventions will receive legal aid. This is because of the vital importance of cases affecting the residence of children litigated before the English and Welsh courts. The availability of legal aid in other countries is not considered. The award of legal aid to foreign nationals is perfectly proper under the terms of the existing legal aid scheme.<sup>37</sup>

## **B. Recent Changes**

The legal aid system went through a substantial change in 2000, when the Legal Aid Act 1988 was largely repealed by the Access to Justice Act 1999,<sup>38</sup> which replaced the Legal Aid Board with a Legal Services Commission. As required by the 1999 Act, the Legal Services Commission has produced a Funding Code that sets out criteria under which it determines funding for individuals.<sup>39</sup> This guide states that legal aid, on a non means, non merits basis, is still available for individuals that apply under the Hague Convention to the Lord Chancellor’s Child Abduction Unit for the return of, or contact with, an abducted child.<sup>40</sup>

## **VI. Conclusion**

The High Court places a very heavy emphasis on the purposive intent of the Hague Convention to return children wrongfully removed from their habitual residence jurisdiction. The approach is practical, based on the facts of each individual case, including an examination of the implications for the child of a return or a refusal and the likely outcome of litigation thereafter. The Court considers the Convention to provide “a high and reliable standard of justice and protection for children.”<sup>41</sup>

Several studies bear out the successful working of the Convention. Since the coming into force of the Convention in England and Wales, in 2000, there have been a total of 1,314 cases, of which 668

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<sup>36</sup> Legal Aid Board, 29/37 Red Lion Street, London, WC1R 4PP.

<sup>37</sup> 307 PARL. DEB., H.C. (6th ser.) c.712wa (1998).

<sup>38</sup> Access to Justice Act 1999, c. 22 (Eng.) [hereinafter the 1999 Act].

<sup>39</sup> *Id.* and see also: FUNDING CODE, available at, <http://www.hms.gov.uk/si/si2000/70248902.htm>.

<sup>40</sup> THE FUNDING CODE: DECISION MAKING GUIDE AT 20.24, available at, [http://www.legalservices.gov.uk/old\\_docs/lsc/pdf/manual6/2b-consult-dec01-release6.pdf](http://www.legalservices.gov.uk/old_docs/lsc/pdf/manual6/2b-consult-dec01-release6.pdf).

<sup>41</sup> *Supra* note 29, at 185.

resulted in the return of children.<sup>42</sup> An examination of applications dealt with in 1996, found that while the United States handled 653 applications, England and Wales was the next most active Convention jurisdiction, making 206 and receiving 166 applications.<sup>43</sup> Of the incoming applications, which involved 271 children, 94% were for the return of the child or children, while only 6% concerned access. In the vast majority of the cases, the abductor was one of the child's parents, with most often the mother being the abductor. Among the incoming cases that were completed by the time of the study, 43% were resolved by a court ordering the child's return and only 5% of the cases resulted in a judicial refusal to return the child; 21% had not been completed, 8% resulted in a voluntary return, and 6% of the applications were withdrawn. The authors were able to conclude:

The Hague Convention is generally considered to be a success, a fact evidenced by the growing number of countries signing the Convention... None of our evidence suggests that the reputation of the Hague Convention is in any way undeserved: applications are dealt with speedily (England and Wales appears to have the most expeditious system for dealing with Convention applications; in our sample the average length of a completed application here was 6.5 weeks compared to an average of 11.5 weeks among "outgoing" cases), and relatively few result in refusals to return children.<sup>44</sup>

An earlier study of the cases determined under the Convention also showed that the United Kingdom, along with the United States, is adhering to the spirit of the Convention by refusing to liberally construe its limitations and exceptions:

“[J]udicial authorities in both countries are consistently demonstrating to parents that an international abduction will no longer aid them in obtaining a favorable custody decree. In decisions to date, the courts in the United States and the United Kingdom have fostered and served the Convention's most important goal deterring international child abduction.”<sup>45</sup>

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<sup>42</sup> 343 PARL. DEB., H.C. (5<sup>th</sup> Ser.) 93 W (2000).

<sup>43</sup> International Child Abduction - *The English Experience*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 127 (1999).

<sup>44</sup> *Id.* at 147.

<sup>45</sup> Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?* 2 GLOBAL LEGAL STUDIES JOURNAL (Spring 1995), available at <http://www.law.indiana.edu/glsj/vol2/no2/todd.html>. See also Re: T (Abduction: Child's Objections to Return) [2000] 2 FLR 192 (CA).