



New York University Symposium on Child Abduction — 25 February 2000

Celebrating Twenty Years: the past and promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction was the theme of a child abduction symposium that I was privileged to attend in New York. The speakers at the symposium were an illustrious panel in the field of child abduction, including Professor William Duncan, First Secretary of the Hague Conference on Private International Law; Adair Dyer, former First Secretary; William Hilton, Attorney and developer of the Hiltonhouse website; Peter Pfund, Special Adviser on Private International Law at the US Dept of State; Professor Nigel Lowe, Director of the Centre for International Family Law Studies at Cardiff University, Wales; Professor Linda Silberman, Faculty of Law, NYU and Professor Carol Bruch, University of California, Davis.

The first session of the symposium looked at the successes and failures of the Convention and its implementation in individual states. The general consensus was that the Convention is far from perfect and is implemented very unevenly throughout the world by member states, but nevertheless it is preferable to have an imperfect Convention returning some children, than to have no Convention at all.

Common problems identified and discussed were: delays in resolving applications; costs of legal representation; lack of uniform application of the Convention among Contracting States; overuse in some countries of Article 13 defences to return of children; potential abuse of the Convention by non-custodial parents seeking return of a child in order to maintain contact rights; inadequacy of the contact provisions in Article 21 of the Convention; whether acceding countries were always adequately prepared and equipped to fulfil their Convention obligations. Some of these problems were raised by Australia at the 1997 Hague Special Commission meeting and are on the agenda for the Washington Conference.

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In assessing the effectiveness of the Convention, a number of useful points were made:

- To measure a successful Convention, do not attach greater expectations to it than you would to a domestic law;
- It is important to remember that the Convention is a provisional remedy only, and not a final custody hearing;
- The deterrent effect of the Convention is also important but impossible to measure: parents seeking advice should always be advised to work out their problems or seek the permission to relocate.

Important developments and information emerging were:

- changes in Germany mean that abduction matters will be heard in only one of 24 District Courts in large towns and cities (instead of 600 regional courts), with a restricted number of specialist judges. This should improve our prospects of success in that country;
- an international child abduction database called INCADAT will be launched by the Hague Conference in May 2000. Access to the database will be free on the Internet.
- the importance of judicial training as one of the most effective ways of achieving an understanding of the Convention's objects and uniformity of interpretation is being actively supported by the Hague Conference.
- the relationship between the Abduction Convention and the Protection of Children Convention (POCC): POCC provides that in the case of a wrongful removal, the habitual residence country keeps jurisdiction until the child acquires a new habitual residence. If the habitual residence country issues an order, it must be recognised in the other country - a significant strengthening of the Abduction Convention; POCC improves the access/contact procedures; POCC fills gaps in the Abduction Convention. It provides independent means of returning a child and may replace the Abduction Convention if widely adopted.

- in US cases, the role of Federal and State courts was clarified. Federal courts usually deal with treaty cases; State courts usually deal with family and custody matters. Federal courts show less concern for the requirements for expedition; State courts are more parochial and decide cases on merits of custody. Tactical advantages and delays occur as the abductor is able to apply to transfer the matter from one court to the other. There are also long delays for appeals. These are common problems with Australian cases to the US.
- Bill Hilton, an important and respected figure in the field, made some radical comments: (i) there is a lack of knowledge by US judges especially when compared to the highly centralised English system; (ii) US should centralise the courts doing abduction cases; (iii) there should be a presumption that a child will be returned; (iv) there should be more cooperation and communication between judges; (v) the US should undo its reservation regarding legal costs.

The papers of the symposium will be published later in the year as a special issue of the NY University *Journal of International Law and Politics*

Jennifer Degeling

Recent Australian Decisions

DG, FYCC and Bennett (Qld), Hilton J, 22/12/99; Appeal 16/3/00

Judgment was given that a boy of 5 not be returned to England on the following grounds: that the mother was suffering from anxiety and depression and her condition would deteriorate if she was required to return to England; that if she could not personally prosecute her case in England because of her health that would have the effect of placing the child in an intolerable situation; that the child was of Torres Strait Island origin and the English court was not required to take into account his culture and heritage. The Central Authority appealed the decision and the appeal was upheld.



The Appeal Court found that the medical evidence for the mother was based on the false premise that she would be required to return to the husband to live. The court said: “the nature of the proceedings before the court envisage a return of the child to the **United Kingdom**. It did not envisage a return of the child to the husband, nor did it envisage a return of the wife to the husband.”

relied on the grave risk defence to return, claiming that the child had not received proper treatment in Greece and that he had progressed well under treatment in Australia. In a carefully considered decision, the judge relied on the expert evidence of a specialist paediatrician and concluded that in the absence of evidence to the contrary, one could not assume that Greece was “unable

Recent Australian Decisions

However, “it may be open to a court in an appropriate case to refuse to order the return of a child where the personal circumstances of either parent prohibit that parent from returning to the country where it is sought to send the child.”

Referring to the ‘intolerable situation’ defence, the Court said that this case was not “a suitable vehicle for defining the limitations on the *Ardito* principle.” The Central Authority argument that “*Ardito* should be limited to circumstances where the return of the abductor to the place of return of the child is impeded or prohibited by the laws of the requesting country, may place too much of a fetter on the trial Judge’s capacity to find circumstances in the return of the child which could be considered to be intolerable.”

The Torres Strait Islander issue did not have to be determined in this case: “The return of a child of Aboriginal or Torres Strait islander heritage to a foreign country is not per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established.”

Commonwealth Central Authority and P (NT), *Mushin J, 23/12/99*

Judgment was given that a boy of 5 should be returned to Greece. The mother brought the child from Greece in breach of an order restraining the mother and child from leaving. The child suffers from autism and the mother

to provide the various services necessary to care for an autistic child”. As the return was not to a particular area of Greece where there may be no such services, the child should be ordered to return to Greece. The mother appealed the decision. The appeal was heard on 9 February but the decision of that court is not yet available.

DG, DOCS and Potier (NSW), *Chisholm J 21/3/00 (draft)*

The abducting father relied on 3 arguments to oppose return of a 2 year old child to the UK: (1) The court could not make orders for return as the Central Authority had not complied with Reg 13(4)(a) ie the Central Authority had not sought to mediate the dispute. This argument was rejected on the ground that obligations on the Central Authority did not affect the jurisdiction of the court. (2) The court could not make orders for return as the child was habitually resident in Scotland and the application for return came from the English Central Authority. This was rejected on the basis that it attempted to lift a definition from the Convention (Art 31) and read it into the Regulations; and the Regulations did not appear to restrict a Central Authority from applying for the return of a child to some other country. (3) There was a grave risk of harm if the English mother took the child to live with her new Australian partner in Australia. The judge said that while there was clearly evidence for some concerns, it fell far short of the grave risk required by Reg 16. The judge permitted oral evidence. He was very critical of some affidavits.

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DG, DOCS and Odierna (NSW) Lawrie J - access; 17/3/00

This was an access application from a father in Italy seeking contact with his 13 year old son in Australia. The access application followed an unsuccessful wrongful removal application according to which the child was not returned to Italy because of his objections. The father had a right of custody according to the Italian Civil code, upon which he based his return application. The father did not have a contact or access order.

It was the Central Authority's submission that the father had the larger "right of custody" which by its nature must encompass a "right of access" and was therefore a sufficient basis for a Hague access application. There was reliance on the New Zealand Court of Appeal decision of *Gross v Boda* which ruled that "rights of custody" and "rights of access" are not mutually exclusive. That approach was rejected and the judge took a narrow view of the Convention, stating that "there is no inclusion of the right of access within the rights of custody in the Convention." The judge followed the decision in *Castell* that there must be an access order from the requesting country and dismissed the application, and advised the father to obtain "an order for access in Italy which he may then consider asking to have enforced under the Convention." A costs order was made against the Central Authority for asserting powers or functions outside the scope of "what was necessary to give effect to the Convention."

The Central Authority may appeal this decision to get a clear interpretation of this point of law, having regard to the purpose of the Convention. In preparation for this case, our research and requests to some foreign Central Authorities did not find any precedents to follow.

*Recent Foreign Decisions***Re H (Abduction: Rights of Custody) Eng Court of Appeal, 11/11/99. [2000] 1 FLR 201**

An Irish unmarried father had no parental responsibility and a consent order for contact. The mother removed

the child to England without the father's consent in 1997 and he applied for guardianship. The child was not located until 1999. The father sought to re-establish contact. This was not successful and so he applied for the return of the child.

The judgment traces the jurisprudence to determine when rights of custody vest in a court. It supports the important English decision of Hale J in *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146 which concluded that "where the court is actively seized of proceedings to determine rights of custody, removal of the child from the jurisdiction without the leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court." The case is a good example of the English courts giving the phrase "rights of custody" a purposive and wide construction. It is also interesting that a return was ordered after more than 2 years from the time of the child's removal.

Re M and J (Abduction: International Judicial Collaboration) Singer J; 16/8/99. (High Court, Family Division, London)

This decision has been well received in the child abduction field because it demonstrates what can be achieved through judicial collaboration. The children resided with their grandmother in California. She had parental responsibility for the eldest child. Both parents had convictions for drug offences. The father had been deported to England and the mother was released from prison on probation. The children were wrongfully removed to England by the mother. Singer J initiated contact with the Californian judge dealing with the criminal matters who arranged that no further action would be taken against the mother until issues of parental responsibility were resolved. Singer J was also put in contact with the judge hearing the family matters who arranged to expedite a hearing of those matters upon the children's return.

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Professor Bailey-Harris comments that “by taking the initiative on direct judicial collaboration across national frontiers, and by thoughtful use of the power of adjournment in relation to the English proceedings, Singer J effected an interim solution far more conducive to the welfare of all concerned than would have been the result of a routine Hague Convention hearing. The unusual procedure adopted was entirely within the spirit of Art 7 of the Convention which exhorts co-operation amongst competent authorities in their respective states to secure the return of children, and, where possible, amicable resolution.”: *Family Law*, vol.30. Feb 2000, p82. A copy of this decision was provided to attendees at the October 1999 Conference of Central Authorities.

Pollastro v Pollastro [Grave risk of harm established] (1999) 171 DLR (4th) 32 (Ontario Court of Appeal)

At issue was whether Art 13(b) is a defence to return when the reason for the child’s removal arose from violence in the home directed primarily at the parent who removed the child. The trial judge had ordered the return of the young child to California, saying that “evidence of harm generally goes to the merits of custody” and is therefore not relevant in satisfying the Art 13 criteria. The Appeal court found that this interpretation deprived Art 13(b) of its content. Abella J in the Appeal Court also said that “it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological or physical harm.”

The mother provided extensive and credible evidence of the father’s physical and verbal abuse, his uncontrollable temper, his hostility, irrationality, irresponsible behaviour, and unreliable and irresponsible parenting. Although the father had not harmed the child, the child’s interests were “inextricably tied to the psychological and physical security” of the mother. To return the child to California where the potential for violence is overwhelming, would expose the child to a grave risk of harm.

New Countries

The Convention will enter into force between Australia and both **Fiji** and **Costa Rica** on 1 May 2000. Other countries which have joined the Convention are Malta, Uruguay and Uzbekistan. Turkey will be joining soon. Australia’s action to accept these countries is underway.

Our first application to Hong Kong was sent recently. The Hong Kong Central Authority in the Department of Justice has responded very promptly and was able to inform us that unfortunately the children have been removed to China, which is not a party to the Convention. However, enquiries will continue.

Child Abduction Website and 1800 Number

The Child Abduction Website is expected to be available in late April or early May. At present, the following items will appear on the website: Introduction to the Convention and role of Central Authorities; an application for return (Form 1); Child Abduction Kit; Information for parents of abducted children; Child Abduction Regulations; Court forms; Convention text; Child Abduction Newsletter 1999+; an address for sending queries and draft applications in electronic form. Suggestions for other items are welcome. A 1800 number for free calls to the Commonwealth Central Authority from anywhere in Australia is also being established.

Articles

Bennett, Margaret H: Successful workings of the Hague Child Abduction Convention. *International Legal Practitioner* 24 (4) December 1999 : 99-101

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Harris, David: Is the strength of the Hague Convention on Child Abduction being diluted by the courts? : the English perspective. *International family law* July 1999 : 35-49

Johnston, J et al: Developing profiles of risk for parental abduction of children from a comparison of families victimized by abduction with families litigating custody. *Behavioral Sciences and the Law*, v.17(3), 1999, pp.305-322.

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Lowe, N et al: International child abduction - the English experience. *International and Comparative Law Quarterly*, v.48(1), January 1999, pp. 127-155.

Otlowski, Margaret: Hague Convention: whether the court has a discretion to return a child found to be settled in his or her new environment. *Current Family Law* 5 (6) 1999 : 264-273

Vickers, Lesley: International child abduction. *Solicitors journal* 143 (43) 12 November 1999 : 1056-1057

New Books

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Dickey, A: Child Abduction in family law. Sydney, CCH Australia Ltd., 1999. ISBN. 1 86468 070 9

Hutchinson, Anne-Marie and Setright, H: International parental child abduction. Bristol, Family Law (Jordan Publishing), 1998. ISBN 0-85308-466-1

The *International Child Abduction News* is a quarterly newsheet which aims to provide coverage of recent developments in international parental child abduction. The News is produced in the International Family Law Section of the Commonwealth Attorney General's Department. The purpose of the News is to provide general information and not legal advice. Every care is taken in the preparation of the News but readers are advised to check the details of any legislation, cases or other material in it. All inquiries about the International Child Abduction News should be directed to the Principal Legal Officer, International Family Law Section, Family Law Branch, Family Law and Legal Assistance Division, Attorney-General's Department, National Circuit, Barton, ACT 2600. Editor: Jennifer Degeling.

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