

## **INTERNATIONAL CHILD ABDUCTION**

### **THE HAGUE CONVENTION ON CHILD ABDUCTION**

#### **HAGUE CASES**

The Hague Convention on the Civil Aspects of International Child Abduction 1980 is implemented in the jurisdiction of England and Wales through the Child Abduction and Custody Act 1985 - for the return of the children who have been wrongfully removed or retained from a signatory state and (through Article 21) for issues of international contact.

The United Kingdom comprises of 3 separate entities; Northern Ireland, Scotland and England and Wales. Each of those entities have their own separate Central Authority and each implement the Convention through their own domestic law. If a child is removed from a Hague state to England, proceedings will be brought in the High Court in England, if a child is removed from a Hague state to Scotland the proceedings will be brought to the Court of Sessions in Edinburgh and so forth.

Proceedings under the Hague Convention are always heard at High Court Level.

#### **BRINGING A HAGUE CASE**

##### **Documents Required**

A succinct outline of the relevant facts is needed. These must show (a) the Children are habitually resident (i.e. living) in the home state **and** (b) that the removal/retention was in breach of a custody right i.e. that the child's country of residence cannot be changed without the consent of the other parent or Guardian or without the consent of the Court.

It is not necessary for there to be a prior foreign order in order to make an application in the receiving state for the return of a child. What is required is the breach of a Right of Custody. In most cases a removal will happen at a time when the parents are still living together and there are no divorce or custody proceedings in the 'home state'. It is never advisable for a parent to wait until they have orders from the home state before starting the Hague process. Where there have been prior orders however it is prudent to provide them when making an application to the receiving court.

Following a removal or retention of a child, the left behind parent would normally contact the Central Authority in their home state and complete the pre-requisite application form which will then be passed to the receiving state.

A left behind parent can also directly contact a specialist lawyer in the country the child is taken to.

In cases of emergency, such as one where a child is in transit, it is possible to make an application (usually through a solicitor in the receiving state) directly to the Central Authority in the receiving state. In all cases it will be necessary to provide a copy of the child's birth certificate. If it is not immediately to hand, you should not delay in the making of the application. It can be filed at a later date.

Information including names, dates of birth, nationalities, date of marriage/divorce and details of *all* passports held by the children must be given. In EU cases where the Brussels Regulation applies there are further specific requirements for information.

## **FINANCING A HAGUE APPLICATION**

In England, public funding (legal aid) is provided to Applicants in applications for return of children. The legal costs of the case in England will be paid by legal aid. The Legal aid is automatically provided if the case is approved by the Central Authority whatever the financial position of the parent. The Central Authority of England maintains a list of specialist solicitors who have experience of conducting Hague Convention cases. It will allocate the case to a member of that lawyers' panel or to a solicitor chosen by the applicant.

It is always possible to indicate to the Central Authority that a parent wishes to instruct a lawyer of their choice.

## **ATTENDANCE OF THE PURSUING PARENT IN ENGLAND FOR THE CASE**

In the normal course it is not necessary for the pursuing parent to come to England and Wales for the purposes of proceedings unless it is ordered that there should be oral evidence. It is very unusual for oral evidence to occur in a Hague Convention case. Normally, it would only be in cases where a defence of consent and/or acquiescence has been raised. Where attendance is necessary, provided that it is

pursuant to a court order, reasonable economy fares and reasonable accommodation costs for attendance will be paid by public funding (legal aid).

Legal aid will **not** cover the costs of the flights for returning the child to their home state or of replacement passports etc. It will cover only legal costs.

Respondents in child abduction cases in England are entitled to public funding but it is subject to their financial means. They will only be entitled to be represented by way of legal aid if they have insufficient means (both capital and income).

Dawson Cornwell can act for Respondents on a privately paying and legal aid basis.

### **TIMING AND LENGTH OF CASE**

In England and Wales all child abduction cases are heard in the High Court. Child abduction cases take priority in the court listing. The aim is for all cases to be dealt with within 6 weeks. If the case can't be dealt within 6 weeks the Central Authority can insist that an explanation should be given as to why it cannot be concluded within that timeframe. The average case time is in fact 6-10 weeks.

The proceedings are always started in the urgent applications Court which sits every day. There is also an out of hours Judge for urgent cases at evenings, weekends and holidays. The Respondent parent is never given notice of the first hearing to the urgent applications Court.

### **EVIDENCE OF OVERSEAS LAW**

Sometimes in a case it will be necessary for evidence of the law of the home state to be provided particularly in relation to issues as to who holds rights of custody. Where an issue as to whether or not a pursuing parent has a right of custody (within the meaning of [Article 3](#)) arises, the court in England and Wales may make a request pursuant to [Article 15](#) that the court in the home state make a declaration whether or not the removal was wrongful. English public funding is not available for the purposes of those proceedings. The pursuing parent would have to either meet the costs themselves or make an application for legal aid in their own state. There is an obligation on the Central Authorities to assist in the obtaining of an [Article 15](#) declaration. In some cases the English Court will ask for an expert's evidence on the law in the home state (affidavit of laws).

## **COST OF REPATRIATION**

The costs of returning a child (flight costs etc) are not payable by public funding. However in appropriate cases the English court can make an order that the abducting parent bear those costs.

## **PROVISIONS FOR RETURN (SAFE HARBOUR ORDERS/UNDERTAKINGS)**

In England (as in many other jurisdictions) in cases where the children have been abducted by a primary carer the court will set out provisions that should apply upon the child's immediate return i.e. who should accompany the child and who should pay for flights pending the matter coming before the court in the home state. The purpose of the Hague Convention is to return the children to the country from which they have been wrongfully removed or retained and it is not a custody decision. Save in cases where there has been a clear kidnap/abduction the court normally prefers that the abducting parent return with the children.

The Orders and arrangements are limited in time and are not intended to fetter or impede the jurisdiction of the court of the home state.

## **MEDIATION**

Mediation within international child abduction cases is becoming more common in England. At no time should mediation be entered into as a replacement for an application to the court. The proceedings for the return of the child should commence and within those proceedings the parents can be referred to mediation. Mediation will take place in tandem with the ongoing court process. Anything that has happened within the mediation process cannot be disclosed within the court proceedings unless the parties reach a concluded binding agreement.

The Reunite International Child Abduction Centre is a non-profitable organisation in the United Kingdom. It has a mediation model which has been followed in a number of cases and which has been endorsed by the Hague Secretariat and by the High Court Judiciary. The mediation model does not delay the court process and is accelerated mediation. The link for Reunite is [www.reunite.org](http://www.reunite.org). Public funding can be made available for the mediation process.

## **CHILDREN'S WISHES (CHILD OBJECTION DEFENCES)**

In appropriate cases with older children, a child can instruct their own lawyer, usually at aged 12 years plus.

Where a defence of child's objections (Article 13) is raised the court will, in age appropriate cases, order that the High Court CAFCASS team (welfare officers) carry out an interview with the children and prepare a report (written or in urgent cases oral). The objection must relate to a return to the specific country and not return to a specific parent. The English court does not automatically join the children as a party when an objection of defence is raised.

A CAFCASS officer may also be asked to prepare a short report where a defence under Article 12 of settlement is raised. Settlement can be raised where the period of 12 months has passed prior to the commencement of proceedings. Where a child's whereabouts have been unknown that period will not normally be counted for the purposes of deciding a child is settled.

### **NON-LEGAL EXPERTS' REPORTS**

In England the use of reports from child psychologists, psychiatrists etc will not be ordered or allowed save in exceptional circumstances. The Article 13 defence - grave risk of physical, psychological or other harm or intolerable situation has a very high threshold to meet. The burden of proof in making out a defence is on the Respondent.

The Court will very rarely hear oral evidence on Article 13 defences. The Court will seek to meet defences of 'intolerable situation' by the provision of 'safe harbour' orders and undertakings. (i.e. an undertaking not to molest a Respondent or an order to provide interim maintenance).

### **APPEALS**

There is no appeal as of right in England. Permission to appeal to the Court of Appeal is required. Appeals are expedited. Appeals to the Supreme Court are rare.

### **NON-CONVENTION CASES**

Where a child is abducted to England from a non-convention country i.e. India, Japan, Cambodia, proceedings for the children's return can and should still be made.

The proceedings will be in the High Court under the Inherent Jurisdiction. In essence the Court will apply summary return principles of law, similar to those in Hague cases. There is no central authority for non-Hague cases. The application is made in the Court for a summary return of the children and the cases are listed with priority. Legal aid (including for overseas parents) is available subject to passing a

financial means test. The application forms can be found on the Legal Services commission website.

### **FREQUENTLY ASKED QUESTIONS:-**

1. Q I know that my child has been taken to United Kingdom but I do not have an address. Should I delay commencing proceedings until I have an address?

A No, do not delay. Proceedings are frequently instituted where there is no precise address for a child. The court process can be used with orders directed to third parties (such as state agencies) to locate the children. If a child is known to have come to the UK but not which part i.e. England, Scotland or Northern Ireland, it would be sensible to commence proceedings in England. If it then transpires that the child is in another part of the UK the proceedings can be transferred through the Central Authority.

2. Q My children have been taken to England and I am bringing a case for their return but I want to see my children in the interim and have contact with them. What should I do?

A The court has powers to make orders for interim contact to take place. It is very important for pursuing parents to ensure that the arrangements for that contact are made through their legal representatives so there is no danger that the defending parent can seek to argue there has been acquiescence by virtue of the fact of interim contact.

3. Q My ex-partner has been in communication with me and wants to talk to me about the situation. I am worried about speaking with her in case she uses that as a defence.

A In normal course it would never be discouraged and parents should try and talk to each other in the best interest of their children. Applicants are advised to be especially careful. Ideally, if discussions are to take place they should take place within the context of an approved mediation scheme such as the Reunite mediation scheme.

4. Q Prior to the children being removed my partner and I were living together and jointly caring for the children and we have no court orders. Is a court order necessary for me to start proceedings under the Hague Convention?

A No a court order is not necessary. What must be shown is that the removal or retention was in breach of a right of custody within the meaning of Article 3 of the Convention i.e. that your consent was needed.

5. Q My partner took the children on a holiday to which I agreed but at the end of the holiday I was informed that she did not intend to return. Because I consented to the initial removal can I bring Hague Convention proceedings for the return of the children?

A Yes. This is a wrongful retention. The Convention makes specific provision for the return of children where they have been kept beyond the point in time at which they should have been returned following a holiday or other visits. The retention becomes effective (and wrongful) as soon as the indication not to return is given.

6. Q My children were removed before my country signed the Hague Convention, can I now use the Hague Convention for their return now?

A No. The implementation of the Hague Convention is not retrospective. If the removal took place before the signature of the Convention then the Hague Convention itself cannot be used. It may be possible to obtain the return of the children by an application for a “non-convention” return. In the jurisdiction of England the English Court frequently makes orders for return of children to non-convention states in appropriate circumstances.

7. Q Should I tell my ex partner that I am going to invoke the Hague Convention if (s)he does not return the children.

A Normally it is not advisable to give a warning especially if it is feared that the abducting parent may move or go into hiding.

8. Q My children are in England however as soon as proceedings are served the abducting parent will move to another country. How can this be stopped?

A The English High Court will make orders to ensure that the children cannot be removed from the address at which they are located or from England. The English Court make provision for their passports, ID cards, and the passports of the abducting parent to be held. A port alert will be placed on all national ports to avoid a re-abduction. This happens before the Orders are served on the abducting parent.

9. Q My ex partner has turned the children against me. When the CAFCASS officer speaks to them, will they take it into account that the children have been influenced?

A Yes. CAF/CASS officers are always aware of the danger of the children being influenced by the abducting parent.

10. Q My children are living in England and my ex-partner is now refusing contact with them. How can a Hague Convention assist me?

A Article 21 of the Hague Convention makes provision for the assistance to be provided with the acquisition of the organising and protecting of rights of access. Public funding is available but it is means tested. The proceedings will be commenced in the High Court.

11. Q My children have been removed but I am not certain whether the Hague Convention applies, what should I do?

A You should take urgent legal expert advice in the country to which you believe the children have been taken as to whether or not an application under the Hague can be brought. We will be happy to assist at Dawson Cornwell.

12. Q How will I pay?

A. Applicant parents are entitled to Legal Aid for their legal costs.

13. Q Child abduction is a crime in my country and I have reported it as a crime. Why can't I just have the abductor arrested?

A Criminal proceedings will only deal with the offender *not* the children. It will be necessary to invoke Hague proceedings for the children's return.

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## **USEFUL CONTACTS**

Dawson Cornwell – [www.dawsoncornwell.com](http://www.dawsoncornwell.com) – for information and contact numbers

Anne-Marie Hutchinson - [amh@dawsoncornwell.com](mailto:amh@dawsoncornwell.com) (telephone number: 0044 (0)207 242 2556, Direct line: 0044 (0) 207 539 4832)

Reunite – [www.reunite.org](http://www.reunite.org) (telephone number of advice line: 0116 2556 234)

Hague Conference on Private International law – [www.hcch.net](http://www.hcch.net)

International Child Abduction and Contact Unit – [www.officialsolicitor.gov.uk/os/icacu](http://www.officialsolicitor.gov.uk/os/icacu)

Legal Services Commission - <http://www.legalservices.gov.uk/>

Central Authority for Scotland - [www.scotland.gov.uk/Topics/Justice](http://www.scotland.gov.uk/Topics/Justice)

Central Authority for Northern Ireland - [://www.courtsni.gov.uk](http://www.courtsni.gov.uk)