Holiday abductions: far from home (Pt 2)

Mani Singh Basi examines the benefits & limitations of the Hague Convention in child abduction cases

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IN BRIEF

- The Hague Convention exists to secure the swift return of children who have been wrongly removed from their home country.
- However, when a child has been abducted to a country that is not part of the Convention, securing their return can be much more difficult.

In the July edition of *NLJ*, I published 'Holiday abductions: far from home' (*NLJ*, 22 July 2022, p8), which touched upon the 1980 Hague Convention in respect of wrongful removal/retention cases when a child does not return from a planned holiday. This article considers the limitations (if any) of the Hague Convention 1980.

Barriers to a swift return

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Convention') is a treaty developed by the Hague Conference on Private International Law. At the time of writing, there are 101 contracting parties to the Convention.

There are many benefits that arise directly from the Convention. Taking it from an English perspective, since the introduction of the Convention there have been countless reported judgments, from the High Court to the Supreme Court, considering some of the most complex parts of the Convention. The ultimate benefit of the Convention can be summarised in the following passage in *D (a child) (abduction: custody rights), Re* [2006] UKHL 51, [2006] All ER (D) 218 (Nov), where Baroness Hale of Richmond observed: 'The whole object of the 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' (at para [48]).

There are of course a number of defences which are spelt out in the Convention. In terms of limitation, the first obvious one is if there is an abduction to a country which is not part of the Convention. In such circumstances, the swift nature of the Convention does not apply. Taking an example, if a child is abducted from England and Wales to a country which is not a signatory to the Convention, then the only real option may be to initiate the assistance of the inherent jurisdiction of the High Court and to attempt to seek a return in England. As the other country is not a signatory to the Convention, then the aims, rules and procedures which arise from the Convention do not apply. There may be little success in securing a return, or it may be a slow process (albeit each case is fact-specific, and the High Court has a vast number of powers which can be utilised to assist).

In circumstances where there is a Convention case in England and Wales, one limitation can be that of delay. Article 11 states that:

> 'The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> 'If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay...'.

In practice, this six-week date is not always a possible deadline to achieve. There can be a delay for any number of reasons. Applicants in Convention cases are entitled to automatic legal aid while respondents are not, and there is a need to file evidence for the purposes of the final hearing, which takes time. Further, for certain defences, such as settlement or child objections, the assistance of the High Court Children and Family Court Advisory and Support Service (Cafcass) team is required in order to prepare reports considering such defences. They will need time to undertake their enquiries and the parties will need to respond to such evidence.

Accordingly, there can be delay, but generally, proceedings are heard swiftly in this jurisdiction. In respect of other jurisdictions, I imagine each country which is a signatory to the Convention will have different experiences and timescales which can be dependent upon a number of matters, such as how quickly certain courts can hear final hearings in these types of cases.

Welfare issues

Further, one major difference between Convention cases and Children Act 1989 (ChA 1989) cases is the issue of the child's welfare. In domestic applications—for example when one party is seeking a child arrangements order—ChA 1989 applies. Section 1(1), ChA 1989 outlines that a child's welfare shall be the court's paramount consideration. In comparison, the Convention opens up at Art 1 highlighting the aims of the Convention which are:

a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and
b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

In practice, this can be a difficult concept for the parties caught up in the case to

appreciate. If there is a return order at the end of Convention proceedings, it is for the country of the child's habitual residence to decide upon issues in respect of welfare. Therefore, in Convention cases, issues such as welfare are not directly relevant, unless such issues have a direct impact upon a particular defence.

Another issue to consider is that in respect of the Art 13 (b) defence. This applies where the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes their return establishes that there is a grave risk that the child's return would expose them to physical or psychological harm, or otherwise place the child in an intolerable situation. In this defence, issues such as domestic violence are often considered. In ChA 1989 cases, where domestic abuse is raised and FPR 2010, PD 12J is engaged, a fact-finding hearing can be listed. This hearing considers the nature of the allegations to determine the truth in them and whether findings are made or not, whereupon the final child arrangements or welfare issues can be considered. In Convention cases, fact-finding hearings do not arise. There are a number of authorities, all the way up to the Supreme Court, in respect of Art 13 (b) defences, and as Mr Justice Mostyn summarised the following in *B v B (abduction: BIIR)* [2014] EWHC 1804 (Fam) in respect of the defences:

'The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.

'...Equally, if the exception that is relied on is that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation, that again has to be seen through the lens of the objective of the Convention. We are not talking here about long- term risks. We are not talking here about long-term harm. We are talking about risks and harm that would eventuate only in the period that it takes for the court of the child's homeland to determine her long-term future and to impose the necessary safeguards, if necessary, in the interim' (at paras [3]–[4]).

Accordingly, it is apparent that if a return is ordered, again any allegations that have a direct impact upon welfare can be considered in the home state, and contracting states will be regarded as competent to consider any welfare issues.

Unified principles

It is important to emphasise that this article focuses on the application of the Convention in English cases. The courts in England and Wales have dealt with Convention cases now for many years and as indicated at the start of this article, there are a number of key authorities in existence in respect to each of the defences. The domestic system therefore works well, and cases are often case-managed appropriately.

Notwithstanding this, it is a very specialist area of the law with concepts that are not found within the standard family cases such as those which relate to ChA 1989. Further, as there are many contracting states to the Convention, how certain defences are interpreted and applied in each jurisdiction will undoubtedly be different; but at least there is a unified set of principles found within the Convention, and more countries signing up and adopting the Convention can only be a good thing for cases where there is an alleged abduction. NLJ

Mani Singh Basi, barrister at 4PB (*www.4pb.com*).