

Holiday abductions: far from home (Pt 3)

In the third part of his series on the Hague Convention, **Mani Singh Basi** offers advice on efficient timetabling & evidence of habitual residence

IN BRIEF

► Provides some practical considerations which lawyers representing clients in 1980 Hague Convention proceedings must bear in mind.

► Notes the Hague Convention exists to secure the swift return of children who have been wrongly removed from their home country.

► Sets out processes which family practitioners should follow to ensure clients have the greatest opportunity to have their child returned.

The 1980 Hague Convention cases in the High Court are a specialist area of the law, and it is essential that practitioners working in this field stay on top of developments and procedures. To start with, Art 11 of the 1980 Hague Convention states the following:

‘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. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.’

Practical points for lawyers

The above outlines the duty for the judicial/administrative authorities to act expeditiously. In light of the fact that lawyers acting for clients in this area of the law are specialist, there is a positive obligation to ensure proceedings are efficiently timetabled.

Service, timetabling & Cafcass

Applicants to 1980 Hague Convention cases are entitled to legal aid automatically (it is different for respondents). Therefore, upon papers being served on-notice by the applicant’s solicitors, the first practical step to assist a respondent is to provide with service a list of specialist lawyers in this area of the

law, which is available on the *gov.uk* website titled ‘Child abduction list: accredited solicitors referral list’ (bit.ly/3YZrqZD).

If the first hearing is without notice, it is essential that if any Tipstaff orders are sought (for example passport order/location order), those representing the applicant contact Tipstaff (court officers) in advance of the hearing and complete the necessary paperwork for them.

By the time the matter reaches court (on-notice), the proceedings then need to be duly timetabled. One issue in the case may be the involvement of Cafcass (on the issue of ‘child objections’ or settlement). If this is likely to be an issue, there is a duty to raise it with the court. Thorpe LJ commented, at para [16] of *Re F (Abduction: Child’s Wishes)* [2007] EWCA Civ 468, [2007] 2 FLR 697:

‘But a clear distinction has to be drawn between obligations that flow from a pleading of the child’s objections and the court’s obligation, quite apart from anything that may be pleaded, in all cases to hear the child, unless that necessity is excused by reference to the child’s age and understanding.’

Thorpe LJ commented at para [24] that it ‘must be considered at the first directions appointment and any subsequent directions appointment to ensure that that central ingredient of the case is never out of the spotlight’. Further comments in the case were raised by Munby LJ (as he was then) at para [31].

If involvement from the Cafcass High Court team is therefore likely to be an issue, representatives should contact Cafcass in advance to enquire as to how long they are currently taking to prepare reports. These timescales can inform the court timetable. This issue needs to be tackled at the first hearing.

Evidence of habitual residence

In terms of evidence, as the first two articles highlighted (see Pt 1, 172 *NLJ* 7988, p8, and Pt 2, 172 *NLJ* 7996, p9), the 1980 Hague Convention has a vast amount of case law and procedures in existence, different to domestic law such as the Children Act 1989. As a consequence of it being a specialist area of the law, the evidence needs to be focused on the issues at hand. Hayden J, in the context of

habitual residence, for example, explained in *Re B (A Minor: Habitual Residence)* [2016] EWHC 2174 (Fam), [2016] All ER (D) 15 (Sep):

‘I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties. Thus: i) the solicitors charged with preparation of the statements must familiarise themselves with the recent case law which emphasises the scope and ambit of the enquiry when assessing habitual residence; ii) if the statements do not address the salient issues, counsel, if instructed, should bring the failure to do so to his instructing solicitors attention; iii) an application should be made expeditiously to the court for leave to file an amended statement, even though that will inevitably result in a further statement in response; iv) lawyers specialising in these international children cases, where the guiding principle is international comity and where the jurisdiction is therefore summary, have become unfamiliar, in my judgement, with the forensic discipline involved in identifying and evaluating the practical realities of children’s lives. They must relearn these skills if they are going to be in a position to apply the law as it is now clarified.’

‘The simple message must get through to those who prepare the statements that habitual residence of a child is all about his or her life and not about parental dispute. It is a factual exploration.’

Keep Tipstaff informed

The same can be said in respect of all the exceptions contained within the 1980 Hague Convention. There has to be a focus on the relevant issues within the evidence such as witness statements/exhibits.

Further, during the course of the proceedings or at the end of the proceedings, if there is any variation/discharge/continuation of Tipstaff orders, then again Tipstaff should be informed. Very specific wording has to be utilised (which Tipstaff will provide) and practically, practitioners should keep Tipstaff updated and run through wording with them. **NLJ**

Mani Singh Basi, barrister at 4PB (www.4pb.com). Find Mani on Twitter at [@mani_basi](https://twitter.com/mani_basi).