

The Hague Convention 1980, Article 21 – How is it working in practice?

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The Hague Convention 1980 (‘the Convention’) is an important multilateral treaty concerning the civil aspects of international child abduction. This article will start by giving a brief overview of the Convention and its role in international family law. It will then outline the provisions contained in Art 21 of the Convention and explain what the key terms mean and how it operates in practice in England and Wales.

While Art 21 makes provision for parental rights of access in international family cases, it has been suggested by practitioners and academics that there is an issue with the lack of uniformity in implementation and enforcement.

Is Art 21 fit for purpose?

The Convention

The Convention is geared towards protecting rights of custody and access. As is well known, the Convention requires all signatories to return abducted children to the country of their habitual residence, subject to specific exceptions. It was designed to protect children from the harmful effects of wrongful removal or retention and to establish procedures to ensure the prompt return of abducted children to the country of their habitual residence, as well as to organise or secure the effective rights of access to a child.

The Convention came into force in December 1983 and there are currently 101 Contracting States. The Convention has been extremely successful and has resulted in the summary return of thousands of abducted children.

Rights of access

Rights of access are dealt with in Arts 5 and 21.

Article 5 states that ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

Article 21 specifically deals with the protection of rights of access. Under this Article, a parent living abroad can present an application ‘to make arrangements for organising or securing the effective exercise of rights of access’.¹

Article 21 provides:

‘An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.’

¹ Hague Convention 1980, Art 21.

Implementation in practice

Article 21 confers rights upon a parent whose child is living in another Contracting State to apply for access with the child.

There are two ways in which the provision is generally interpreted: the narrow approach takes the view that this provision does not provide any independent source of jurisdiction; this is the approach adopted by the courts of England and Wales, as explored below. The wider view is that the provision does confer jurisdiction. This is the view taken in countries such as Israel.²

Despite the lack of uniformity, it was suggested by Rhona Schuz in her book *The Hague Child Abduction Convention, A Critical Analysis* that Art 21 ‘mandates a minimum standard of action by Central Authorities and that there is nothing wrong with the fact that some Contracting States want to do more to assist non-custodial parents to exercise their access rights within the framework of this provision’.³

However, the issue at present is the lack of uniformity in how it is implemented and how access rights are enforced. One reason for this lack of uniformity is that the Convention does not provide procedures to implement access orders. Many Contracting States fail to ensure the enforcement of their own orders.

The approach in England and Wales

On the issue of interpretation of Art 21, the courts of England and Wales gave judgment in the following case: *H v M* [2005] EWCA Civ 976, [2005] 2 FLR 1119. In determining access rights, the court is required to apply the autonomous law of the Convention and not English law. However, the Convention could not be construed differently in different jurisdictions: it had to have the same meaning and effect under the laws of

all Contracting States. In any case that involved the construction of an Article of the Convention, the answer was to be found in the international jurisprudence of the Contracting States.

In the case of *Re G (A Minor) (Hague Convention: Access)* [1993] 1 FLR 669, the Court of Appeal took the view that Art 21 conferred no jurisdiction to determine matters relating to access, or to recognise or enforce foreign access orders. An access order that does not fall within the Council Regulation or the (very limited) application of the European Convention⁴ may only be enforced by applying for a child arrangements order under s 8 of the Children Act 1989.⁵

As outlined, an application under Art 21 of the 1980 Hague Convention must be made by a domestic application for contact under the Children Act 1989. The determination of such applications and enforcement will take place in accordance with the law of England and Wales. On such an application, the foreign order is entitled to grave consideration but the court’s paramount consideration is the welfare of the child.⁶ In essence, Art 21 opens up a ‘private’ law case between parents/family members.

Article 21 – on the ground in England and Wales

In England and Wales, applicants for child arrangements orders under Art 21 have the benefit of non-means, non-merits based legal aid. One of the unintended consequences of this is that applicants for child arrangements orders based abroad have automatic public funding, whereas domestic applicants do not.

Children Act 1989 proceedings arising out of an Art 21 application bring up a number of issues in practice. The applicant can be

2 *MAB v ER Nevo* (Fam C 89790/00) (2001).

3 R Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Bloomsbury Publishing, 2014).

4 This case was pre-31 December 2020.

5 Family Procedure Rules 2010, Practice Direction 12F – International Child Abduction, Part 5 – Applications about rights of access.

6 *McKee v McKee* [1951] AC 352, PC; *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA.

from any country that is a signatory to the Hague Convention 1980 and therefore, from the outset, issues such as travel abroad for the purposes of contact are relevant. This is because, for example, a parent may want their child to spend holidays or have time in the country where the parent is based. In making any welfare decision, the court is, of course, guided by the key principles in the Children Act 1989.

Further, Practice Direction 12J is also considered at the first hearing following the safeguarding letter from Cafcass. This safeguarding letter will assess and consider whether there are indeed any safeguarding concerns such as domestic violence, previous social work involvement, substance misuse or any other relevant safeguarding concern or allegation. In Art 21 cases, Cafcass often undertakes international police checks, which form part of the safeguarding letter. During the Covid-19 pandemic, in practice, there have been cases where there are delays in securing these checks.

In practice, Art 21 applications often arise after a failed summary return application. In these circumstances, the only real option for a formal court order for contact would be through an Art 21 application where the relevant considerations of the Children Act 1989 will be in play.

Rights conferred on a non-parent

In *A v C (Hague Convention: Rights of Access)* [2018] EWHC 2048 (Fam), [2019] 1 FLR 429, the High Court of England and Wales was asked to consider whether Art 21 of the 1980 Hague Convention is engaged in respect of a non-parent. Cohen J concluded that a non-parent without rights granted by a court or by someone with parental rights could avail him or herself of Art 21 of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

The child had been living with his mother and the maternal family in Poland until the mother's death in late 2016. In June 2017, the father returned to the UK with the child and the maternal family had not had contact with him since.

The maternal aunt and maternal grandmother made applications for disclosure orders as to the whereabouts of the child in this country and for rights of access pursuant to Art 21 of the Convention.

Cohen J sets out the relevant definitions of 'rights of access' at [14]:

'Rights of access under the 1980 Convention are defined at Article 5 (B) as follows:

"Rights of Access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'

This wording is almost identical to the Brussels IIA definition, which, at Art 2.10, describes:

' "Rights of Access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time.'

In coming to his conclusion, Cohen J considered the case of *Valcheva v Babanarakis* [2018] 1 FLR 1571 in which it was determined that rights of access must be understood 'as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility'.

Cohen J adopted this reasoning and concluded:

'... my initial reaction that the application by the aunt fell without the terms of Article 21 was incorrect and that both grandmother and aunt, as people to whom it is important that the child maintains a personal relationship fall within the Article.'

Conclusion

There is no doubt that Art 21 provides an important framework within which states can assist parents seeking to obtain and

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enforce rights of access. It seems that the difference in interpretation among signatory states is what leads to the lack of uniformity in implementing and enforcing Art 21.

In practice in England and Wales, Art 21 applications work well as they provide a

gateway to the Children Act 1989, fully funded by legal aid. The narrow interpretation of the Article, so as to ensure that it can be enforced under domestic law, may provide a guide for other signatory states for the effective use of the Article.