



Holiday abductions: far from home

How should a left behind parent proceed when their child is wrongfully retained abroad? **Mani Singh Basi** reports

IN BRIEF

► Wrongful retention of children under the 1980 Hague Convention: the options available to the parent left behind.

► The inherent jurisdiction of the courts of England & Wales when a child is retained in a country which is not a signatory to the Hague Convention.

In the field of family law, there are unfortunately circumstances when a parent either takes a child from or does not return a child to their home country. Taking an example, a child's mother and father may have an informal arrangement for contact. It may have been envisaged that one of the parents would take the child for a holiday from England to another country for three weeks during the summer holidays and this pattern may have occurred in the past, on each occasion the travelling parent returning with the child. On the next occasion, the travelling parent may not return with the child and may indicate an intention not to do so. In some circumstances, contact may have been completely ended and the left behind parent may have no explanation as to why the child has not returned home.

Securing swift return

Fortunately, there are options available for the left behind parent. The first question is whether the country the child has travelled to is party to the 1980 Hague Convention. The Convention operates in two circumstances. Firstly, a parent may take a child abroad without the other parent's permission for a period of time, which would amount to wrongful removal. Secondly, a parent may have had permission to take the child to another country for the purposes of a holiday only (through the

court or agreed by the other parent) and then does not return the child at the end of the agreed period. This is termed 'wrongful retention', and is the focus of this article. The scope of the Convention is set out in Art 1 which reads as follows:

'The objects of the present Convention 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'.

There is a list of signatories to the 1980 Hague Convention. If a country is a signatory and implements the Hague Convention, then there are strict procedures that apply. For example, as Mostyn J stated in *B v B (abduction: BIIR)* [2014] EWHC 1804 (Fam):

'The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world...

'There are very few exceptions to this and the exceptions that do exist have to be interpreted very narrowly in order that the central premise of the Convention is not fatally undermined... 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' (paras [2]–[3]).

As indicated in the above, there are a number of limited defences that of course can

be argued, depending upon the particular set of circumstances. However, ordinarily, the principal aims of the Convention are clear in respect of securing the swift return of the relevant child/children, and Art 11 of the Convention specifically sets out the duty for all judicial or administrative authorities of contracting states to act expeditiously in proceedings for the return of children. The Hague Convention case will be issued to be heard in the country the child is in (ie if the child has not returned to England and is in Spain where there is an allegation of wrongful retention, the application will be heard in Spain).

Inherent jurisdiction

Notwithstanding the effectiveness of the 1980 Hague Convention, there are many countries that are not signed up to it and have no specific statutory agreement with England and Wales. If a parent overstays on a holiday to a non-Hague country and there is a concern of retention, then the appropriate applications may need to be made to initiate wardship proceedings under the inherent jurisdiction of the High Court. These proceedings will be listed in England, as opposed to the country the child is in. As para 1.1 of PD 12D of the Family Procedure Rules 2010 sets out: 'It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of...'. Under the inherent jurisdiction, the court has a vast amount of power to protect the subject children in circumstances where the Hague Convention does not apply. Arguably, the process is more challenging simply because the Convention does not apply, but there are mechanisms and orders that can be sought to assist in returning the subject children back to this jurisdiction. It must however be appreciated that each case will be fact-specific, and the strategies adopted and the orders sought will depend on the particular set of circumstances of that case.

In terms of avoiding issues, it is recommended that any arrangements for holiday or travel abroad is recorded clearly in writing well in advance of any proposed holiday: for example, the scope of the agreement, how long for, which location, and the return date. Having a copy of the return ticket would be helpful. That way, if there are arguments in court, there is evidence that can be adduced in respect of the initial agreement. If something goes wrong, the High Court is capable of making appropriate orders whether it is a 1980 Hague Convention case or a wardship case.

NLJ

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