

CHAPTER ONE

THE NEED FOR A CONVENTION

Introduction

On 25 October 1980 a Convention on the Civil Aspects of International Child Abduction was signed at The Hague. The English text of the Convention is reproduced in Appendix A, below. The Convention was drawn up under the auspices of the Hague Conference on Private International Law, the specialist inter-governmental agency working in that field and in which the Commonwealth Secretariat enjoys Observer status; the inclusion of the subject of international child abduction in the agenda of the Hague Conference was largely the result of an initiative by the Canadian Government.

By the date of a review of the working of the Convention by a Special Commission of the Hague Conference in October 1989, fourteen States had become parties to the Convention. These were

Australia
Austria
Belize
Canada
France
Hungary
Luxembourg
Norway
Portugal
Spain
Sweden
Switzerland
United Kingdom
United States.

At the October 1989 review commission, representatives of seven other States indicated that legislation to implement the Convention was before their Parliament, or about to be introduced:

Argentina
Finland
German Federal Republic
Greece
Ireland
Mexico
Netherlands.

It is also understood that New Zealand is considering legislation to the same end.

It will be seen that the Convention has already gained very considerable support from both common law and civil law countries, and that a number of Commonwealth countries are already Parties to it. Its principles are also clearly

reflected in the Inter-American Convention on the International Return of Children signed in Montevideo on 15 July 1989, and it may well be that consideration of the Inter-American Convention by signatory Governments will lead to additional accessions to the Hague Convention itself. For the Commonwealth, Law Ministers made their collective view clear in the Communiqué of their Meeting at Harare in July-August 1986:

"Ministers were concerned at international child abductions by parents, a topic they had discussed at length in the past. They re-affirmed their belief that the Hague Convention on the Civil Aspects of International Child Abduction offered an effective international mechanism for ensuring the return of a child abducted in violation of custody rights, and that this should serve as the basis for expanding Commonwealth cooperation in this area."

The unsatisfactory legal position

International child abduction is undoubtedly a growing problem, although it is difficult to give precise figures. It is also a problem with which traditional legal rules provide no satisfactory solution. A foreign court order as to the custody of a child may not be recognised and enforced under the normal legislation as foreign judgments, because it will almost certainly be variable by the foreign court, and may be regarded as not "final and conclusive". In any event, that legislation is usually apt only for judgments requiring the payment of sums of money, not those affecting personal status or the care of children. All this means that child custody has to be treated as a distinct category, and distinct principles have to be developed for the resolution of cases falling within it.

It has to be admitted that the courts in common law jurisdictions have failed to develop a consistent approach to the handling of international child abduction cases. That state of affairs is not at all surprising when one considers some characteristics of the cases and of the legal context in which they have to be addressed.

The first characteristic is that the cases are extremely 'fact-sensitive'. That means in turn that it is difficult for courts to state guiding principles at other than a very generalised level.

The second is that where such principles have been stated, as in the leading Privy Council case of McKee v McKee ([1951] AC 352), their interpretation has proved to be controversial. Some courts have interpreted McKee v McKee as requiring the courts of a country in which the abducted child is found to review the merits in full, others as allowing the peremptory return of the child to the country from which he was abducted without an examination of the merits, and others again as requiring such a return in the absence of evidence of a grave risk to the child were such an order made.

The final characteristic is the prevalence of the view that in this as in other types of case involving children, the welfare of the child should be the paramount consideration. This is undoubtedly an important factor, but the 'welfare principle' is not actually self-defining. It embodies the assumptions prevalent in a particular society, on such matters as whether a young boy is better brought up by his father or his mother. So an appeal to the welfare principle is not to some international standard but to the values of a particular legal system; an appeal to the welfare principle may encourage a court to form its own judgment of the merits of the case rather than accept the position applying under some foreign system of law or indicated in a decision of a foreign court. It compounds the underlying legal uncertainty as to the weight to be given to foreign law in this area as a whole.

There is, indeed, a tension within the welfare principle in the particular context of international child abduction which presents the courts with a dilemma. A full examination of the factors which need to be examined to give proper weight to the welfare principle would require the assembly of a quantity of evidence, much of which would have to be obtained from the other country concerned. This could take a very considerable amount of time, creating delay in the resolution of the case which all would recognise as itself likely to prejudice the welfare of the child.

International action

The unhappy state of the common law position as reached by case-law development makes recourse to international agreement, of value in itself for purely practical reasons, even more desirable. One approach is to provide for the international enforcement of custody orders along the lines familiar within federal states, as in the Extra-Provincial Custody Orders legislation of the Canadian jurisdictions. This type of approach is found in some regional arrangements such as the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, prepared under the auspices of the Council of Europe and signed on May 20, 1980. A decision relating to custody given in a Contracting State is to be recognised, and where it is enforceable in the State of origin made enforceable, in any other such State. The problem with this approach is that it relies entirely upon the existence of a court order in the foreign State, and invites difficulties as to jurisdiction. The approach may be helpful in some cases, but a broader set of principles is necessary.

This set of principles is to be found in the Hague Convention. Its main characteristics are that

- it covers a very wide range of circumstances in which a child is taken across an international boundary or retained outside his own country;

- it does not depend upon the existence of any court order in that country;
- it provides a clear general rule that the child must be returned forthwith, with limited and carefully drafted exceptions to protect the child's interests;
- it ensures that official assistance is made available promptly both to assist parents wishing to invoke its provisions and also to intervene effectively to secure the welfare of the child pending its return.

Most countries find that becoming a Party to the Hague Convention, while it may add some administrative expense, saves much time and expense in terms of legal aid costs, and the time of judges and other court staff. The law is much clearer, and often a child is returned voluntarily once the position is explained to the abductor. The whole process is swifter and less stressful than the long-drawn out battles which can be found in the pre-Convention cases. Above all, this serves the interests of the child. The future of the family can be resolved without the added pressures created by the abduction, and decisions as to the child's future will be taken in the most appropriate forum, and so be more soundly based.

In Chapter Two a detailed account of the principles of the Convention is given, with reference to the case-law in a number of jurisdictions (much of which was collected by the Permanent Bureau of the Hague Conference at the time of the 1989 Special Commission). Information as to the actual operational details is in Chapter Three, and Chapter Four examines accession and legislative implementation.