CHAPTER TWO

THE SUBSTANTIVE PRINCIPLES OF THE CONVENTION

The central tenet of the Hague Convention is that children should be returned to their State of habitual residence if they have been wrongfully removed therefrom. It is not a Convention for the reciprocal recognition and enforcement of foreign custody orders. It seeks to protect children by safeguarding the relationships which they actually have with those exercising care over them. It does this by protecting "rights of custody" attributed to a person, institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before its removal or retention if such rights were "actually exercised", or would have been so exercised if the child had not been removed or retained. A removal or retention is considered wrongful if it is in breach of such rights (Article 3).

Rights of custody

It is important to consider, therefore, what the expression "rights of custody" means. Different countries may have different understandings of the ideas denoted by words such as "custody", "guardianship" and "care and control". Some have the concept of "parental rights"; in others, such as the United Kingdom since the Children Act 1989, this concept and that of "custody" are avoided in current legislation, ideas of "parental responsibility for the child" and of the child's residence being preferred. What is important, however, is the definition of "rights of custody" used in the Convention.

This definition is open-ended in that it specifies rights of custody as <u>including</u> rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5). Such rights, by whatever name they might be called in a State's domestic legal system, are "rights of custody" for the purposes of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated. Hence, if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention.

This may be of crucial significance if, for example after a divorce, the court grants joint custody to <u>both</u> parents but care and control to one only. A joint custodian would normally be entitled to be consulted as to where the child should live, and if the custodian who has care and control removes the child without consulting him or her, that is a wrongful removal. The same holds where, without any court order, parents have joint rights as natural guardians of their children to decide where they are to reside (see <u>In the Marriage of Hicks</u> (Family Court of Australia, 1987, unreported), discussing English law). Again, the result would be the same if the court had specifically stated that a child should not be removed from the jurisdiction without the

consent of one parent; this has been held in an English case (C v C (Minor: abduction: rights of custody abroad) [1989] 2 All ER 465, CA) in respect of an Australian order, and by a French court (Procureur-Général v Baume (Aix-en-Provence CA, 23 March 1989)) in respect of an English order. Where a child is a ward of court, the court may be the body with relevant "rights of custody" (Re J (Abduction: Ward of Court [1989] 3 WLR 825).

The custody rights referred to above may have arisen automatically under the law of the State of habitual residence or may have been defined under a decision or agreement operative under the law of that State (Article 3(2)). This makes it clear that the Convention does not protect only custody rights arising under a court order. If a parent abducts a child before any such order is made, the other parent may seek its return under the Convention without necessarily seeking an order in his or her home State. This should assist in the speed of actions securing the return of such children. On the other hand, the action by that parent in seeking an ex parte custody order may help establish the legal position in the State of the child's habitual residence, and possibly remove the need for an enquiry on this matter (see Article 15).

The provision that the custody rights must have been actually exercised at the time of the removal or retention seeks to exclude claims by persons who, though they may technically retain such rights, have ceased to exercise them. Where the right in question is only the right to determine the child's place of residence, it may be more difficult to understand what is meant by this right being "actually exercised". However, it is probable that in practice this will not be difficult to establish: a person's conduct may easily show that he or she has retained the expectation to be consulted about the child's place of abode.

Children protected by the Convention

The convention applies to any child who was habitually resident in a Contracting State immediately before the breach of custody rights (Article 4). The phrase "habitually resident" is, as a matter of policy, left undefined so that the facts can be considered free from any technical rules. In practice, the courts have seldom found any difficulty on this point. (See, however, In the Marriage of Gollogly and Owen (Family Ct of Australia, Townsville, October 1989) where the child had left Alaska in 1986 (before the US became a Contracting State) and an argument that the child could be regarded as habitually resident there in early 1989 was rejected.) The Convention ceases to apply when the child attains the age of sixteen years (Article 4), and any pending applications automatically lapse at that date.

Grounds for refusing to return a child

Judicial or administrative authorities in the requested State are obliged to return "forthwith" to its habitual residence any child removed to or retained in that State in breach of custody rights as defined in the Convention provided that proceedings for the child's return have been instituted within a period of a year from the removal or retention. The only grounds for refusing to return the child are those expressly permitted by the Convention.

These grounds will be examined in turn:

(i) **If the party opposing the return of the child establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention (Article 13(1)(a)).**

This does little more than to reiterate the requirement that, for the removal to be wrongful, the custody rights breached must have been actually exercised, either jointly or alone, at the time of the breach or would have been so exercised were it not for the breach. However, it does make it clear that the burden of proving this lies on the party opposing return, at least where the custody right alleged to have been breached is the right relating to the care of the person of the child.

Where the right breached is the right to determine the child's place of residence, this ground of opposition does not seem to apply, although, as has been argued, it is possible to conceive of such a right being "actually exercised". It is also hardly conceivable that this ground of opposition could apply where the reason why the rights were not exercised is precisely because the child was abducted. It was to cover this situation that the words "or would have been exercised but for the removal or retention" were added to Article 3(1)(b). In order to avoid contradiction within the Convention, and also to give effect to its manifest purpose, some words such as "unless those rights would have been exercised but for the removal or retention" must be implied after "retention" where it first occurs in Article 13(1)(a).

Thus the Convention covers the case where a parent, who has had the care of a child during the course of litigation, removes the child the moment the court orders its transfer to the other parent. That other parent "would have" exercised custody rights were it not for the removal or retention. Even if the removal took place before the order was made such a case would normally come within the Convention for while custody is in dispute the parents will normally retain their equal rights to possession of the person of the child (and it could be argued that the parent who does not exercise this right during the dispute waives it on the understanding that the matter will be decided by the court and would not have

done so if the child was likely to be removed) or at least the right to determine the place where the child should live.

One situation does, however, fall outside the Convention. This is where one of the parties to the proceedings (A) has no rights of custody, the other party (B) removes the child before the decision is made and the decision confers custody rights on A. The removal would not have been in breach of any custody right of A existing at the time of the removal. The situation could arise where a parent who has been given access rights only in an earlier order seeks, and obtains, custody; or where a welfare authority is seeking an order granting it parental rights. The Convention does not prevent the return of such children if this is thought appropriate (Articles 18 and 36).

So far as consent or acquiescence is concerned, it is curious that the ground of opposition expressly applies only where the person, institution or other body "having the care of the person of the child" consents to or acquiesces in the removal and not, at least expressly, where the person having the right to determine the place where the child shall live so consents or acquiesces. It is surely highly relevant to such circumstances. It would be gravely anomalous if the ground did not apply to that situation and it would seem reasonable, when implementing the Convention, that States should make it do so.

A limited consent, for example to the abducting parent removing the child for a short period for a foreign holiday, does not amount to "consent" to a wrongful removal taking place within that period, e.g. by overstaying (see Ottens v Ottens (Family Court of Australia, 1988, unreported)).

(ii) If the party opposing the return of the child establishes that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation (Article 13(1)(b)).

This is the ground relied upon in almost all contested cases. The courts have recognised that some psychological harm to the child may be inherent in the very conflict which is before the court or might normally be expected to occur on the transfer of a child from one parent to another; the Convention envisages more substantial harm, a severe degree of harm hinted at by the later reference to the child being "otherwise ... in an intolerable situation".

An illustration of the courts' approach is provided by the English case of Re E (A Minor) (Abduction) ([1989] 1 FLR 135, CA). The abducting parent, the father, alleged in affidavit evidence that the mother's promiscuity and drug abuse made her unfit to have the care of the child and on this ground resisted the application for the child's return to South Australia. The Court of Appeal gave effect to the policy of the Convention in two respects. Procedurally, it refused to allow the possibility of oral evidence by the parties because of the delay this would create; and substantively they ordered

the return of the child notwithstanding the allegations, noting that the child would be adequately protected by the law (and if need be the social work agencies) of South Australia. By way of contrast stands one of the few cases in which return has been refused on the ground that there was a grave risk of such harm. This was a Scottish case (MacMillan v MacMillan 1989 SLT 350) which concerned an abduction from Canada. The applicant for return was a parent with a history of depressive illness and alcoholism.

Another illustration underlines the willingness of the courts to return the child. In C v C (Abduction) (Rights of Custody) ([1989] 1 WLR 654, CA) the English Court of Appeal reversed the first instance judge who had refused to order the return of a child to Australia; the mother faced Australian proceedings for contempt of court if she returned, and the relationship between the mother and child was such that its disruption would create a grave risk of psychological harm. Before the Court of Appeal hearing the father agreed to drop the contempt proceedings, and offered to pay air fares, maintenance, and school fees and provide a car and accommodation for the mother. The mother was still unwilling to return, but the court held that the abducting parent could not in that way create, and rely upon in her own favour, a risk of harm. The case is interesting in that it raises the general issue of the effect of contempt or criminal proceedings against the abductor; opinion at the Hague Special Commission was divided, some experts seeing these as useful additional pressures for return, others fearing that they might actually be a basis for arguments against the return of the child in certain circumstances.

The approach adopted in C v C was endorsed in a later Court of Appeal decision (Re G (A Minor) (Abduction) [1989] 2 FLR 475, CA) but not before the Australian Central Authority had expressed some concern, a concern which at one stage threatened to promote the case into a test case before the House of Lords. The Australian concern may rest in part on its own interpretation of Article 12 of the Convention as requiring not just return to the State of habitual residence but return to (the care of) the applicant. This interpretation is reflected in the relevant Australian Regulations, reproduced in Appendix B, but is not justified by any corresponding language in the Convention text.

The reference in the text of Article 13 to the child being placed in an intolerable situation was in fact prompted by a consideration during the drafting of the Convention of the facts of an English case (Re C (Minors) [1978] Fam 105 (CA)) where it seemed very likely that the return of children to a distant jurisdiction, California, would ultimately lead to their transfer back to England. The phrase in the Convention has been applied in similar circumstance by a Swiss court (Surdez v Surdez (Trib des Franches-Montagues, Switzerland, 3 July, 1989) (return to France refused as child almost certain to be returned to Switzerland on merits)) but the courts have also considered in this context the material circumstances in which the child would be placed were he

returned (Re A (A Minor) (Wrongful Removal of Child) (1988) 18 Fam Law 383).

(iii) If the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views (Article 13(2)).

The expressed wishes of the child are not binding on the court, which must decide what weight to give to them in the light of the other facts of the case (Re Turner (Family Ct of Australia, 1988; unreported but cited (1989) 15 CLR at 631)).

(iv) If the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).

This ground for opposition embraces a broad public policy element. The Convention does not require States to adopt it and Governments must decide, in the light of the following discussion, whether they wish to avail themselves of it. It is to be noted that it is strongly drawn and it does not include situations where all that can be shown is that the principles of family law of the requested state differ from those in the requesting state. However, it may be that the circumstances prevailing in the requesting State are such that to return the child there would seriously endanger his future exercise of basic human rights and fundamental freedoms, or those of the parent who would accompany him. In such a case, the policy of the requested State must prevail; an example might be a case of child refugees.

Longer-term cases

The grounds already examined apply to cases in which the application for the return of the child is made within twelve months of the wrongful removal or retention. If the application is made outside that period (and in practice such cases appear to have been few) an additional ground is applicable:

If more than a year has elapsed between the removal or retention and the institution of proceedings and it is demonstrated that the child is now settled in its new environment (Article 12).

This ground of opposition comes closest to allowing the court to review the merits. The Convention sought to strike a balance between the overriding policy of deterring abductors by encouraging the rapid return of abducted children and the realisation that, in time, return of such children might indeed be against their best interests. After a year had passed since the abduction or retention it was felt that the circumstances generated by the child's new environment compelled genuine consideration. Therefore, once that period has passed, it is open to the abductor to demonstrate that the child has settled in his or her new environment. If he fails

to establish this (perhaps because the child has been continually moved) the requirement to return the child, subject to the grounds of opposition already discussed, remains; if he succeeds, the court will be free to decide the case on a full review of its merits.

It has to be conceded that there may be cases in which this particular provision operates to "reward" a successful abductor, and who manages to conceal his whereabouts for a whole twelve-month period. Provided that the other parent acts promptly to invoke the Convention, and the Central Authority of the recipient country works effectively, such cases will be few.

Perceived merits not a ground for refusal

It is significant that none of these grounds for refusal is equivalent to a simple finding that "to return the child would be contrary to the child's best interests". To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the Convention. The grounds set out all require an express finding of the presence of a specific element in the situation and it is on this that the objection to return must be based, not an omnibus survey of the child's general condition.

Access cases

These provisions apply to breaches of rights of custody, as defined above. It is to be noted that they do not apply to breaches of access rights only. Thus if a parent who has the day to day care of the child but who is under an obligation (whether imposed by court order or agreement or otherwise) to allow the other parent to visit the children removes the children, thus rendering it impossible for the visits to take place, such removal is not wrongful under the Convention.

While withholding the remedy of return in a case of breach of access rights only, the Convention seeks to reinforce access arrangements which involve children moving between Contracting States. Thus Article 21 allows a party resident outside a Contracting State to present to that State's Central Authority an application for making arrangements for organising or securing the effective exercise of rights of access. Central Authorities are not placed under any mandatory duties with respect to such applications other than generally to promote co-operation on these questions and in practice this can be achieved by passing the matter on to a local lawyer who may then either negotiate an agreement between the parties or institute whatever proceedings may be necessary in the local courts on behalf of the party living abroad.

In an English case under the Convention, the court said that, subject to the welfare principle, it would seek to give effect to access rights under the law of the applicant's country with any necessary modifications (B v B (Minors: Enforcement of Access Abroad [1988] 1 WLR 526).