

## CHAPTER THREE

### ADMINISTRATIVE ARRANGEMENTS AND PROCEDURE UNDER THE CONVENTION

The Preamble to the Convention makes explicit the twin premises upon which the Convention is based: first, that the interests of children are of paramount importance in matters relating to their custody and, second, that, in cases of international abduction, these interests are best served by the establishment of procedures ensuring their prompt return to the place where they were habitually resident prior to their removal.

Insofar as the central issue of the Convention concerns the way judges decide cases, its major objective can be achieved without implications for resources or the imposition of administrative burdens. But, in order properly to safeguard the interests of a child who has recently been brought into one country from another and whose presence in the recipient country is challenged by a person living abroad, some administrative machinery needs to be available. This machinery has three major roles. One is to facilitate the passage of information concerning the child; another is to provide, or help to secure, the provision of assistance to the party who lives abroad; the third is generally to concern itself with the welfare of the child in question.

#### Central Authorities

The Convention adopts the method of some other Hague Conventions of channelling administrative arrangements in Contracting States through "Central Authorities" to be designated by each State. It must be stressed that this does not involve the establishment of any new administrative authority. The designation can be pro forma only. The bodies so designated will become the points of contact between Contracting States in matters concerning the Convention. Provision is made for Federal States, and States with more than one system of law, to appoint more than one Central Authority, although one of them must be authorised to receive applications from abroad for transmission to the appropriate Authority within the State (Article 6).

#### Role of Central Authorities

The duties of Central Authorities are set out in Article 7 of the Convention:

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures-

- a to discover the whereabouts of a child who has been wrongfully removed or retained;
- b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d to exchange, where desirable, information relating to the social background of the child;
- e to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

It is important to notice that the duties are qualified in two ways. First, the Authority need only take "appropriate" measures to achieve the specified objectives; each State may determine for itself which kinds of measures are appropriate given its own legal and administrative structure. Second, the Authority may achieve this through "any intermediary"; thus, it may pass the matter over to an appropriate agency, whether public or private. It is probable that most countries would wish to proceed in this way with respect to many of the functions listed in Article 7.

Most Governments locate the Central Authority in the office of the Law Minister (or Attorney-General, if different). How far the functions specified in that Article could be appropriately discharged by personnel of that office would be a matter for judgment in each case. It is likely that function (e) (provision of information of a general character about the law of the State) could be adequately discharged within the Department. On the other hand, function (a) (discovery of the child) would probably be passed on to the police. Function (b) (taking action to prevent further harm to

the child) might in some cases be passed over to (public or private) social welfare agencies.

The other functions will normally require the services of someone acting on behalf of the absent parent. That person may become involved in negotiations to secure the voluntary return of the child or to bring about an amicable settlement of the dispute (function (c)) or the initiation of legal proceedings (function (f)). This suggests that he might appropriately be a lawyer. Indeed, one of the functions of the Central Authority is "where the circumstances so require", to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers (function (g)).

### Legal aid; costs and expenses

Article 25 entitles nationals or persons habitually resident in the Contracting State from which the request for return of the child has come to legal aid and advice in the requested State as if a national and habitually resident in that State. Where the requested State has a legal aid system, the solution to the problem of representation lies in putting the case in the hands of a lawyer who operates under that system (at least, if the applicant would qualify for such aid under the system). But the Convention has been careful to state that such an entitlement exists only where it exists for citizens of the requested State. If it does not, the Central Authority can do no more than to "facilitate" the provision of legal aid and advice, which will presumably mean seeing whether the applicant's case will be taken on by a local lawyer in private practice. In a number of countries, lawyers are willing to handle these cases without fee, pro bono publico.

This whole matter was discussed in the course of the review of the Convention conducted by a Special Commission of the Hague Conference in October 1989. This also took into account the provisions of Article 26 which gives States a choice so far as legal costs and expenses are concerned. If the State ratifies the Convention without making a Reservation on this point, it may not require the applicant to make any payment towards these costs (though charges may be made in respect of fares and other costs incurred in the actual return of the child). A State may however enter a Reservation in accordance with Article 42 saying that it is not bound to assume any legal costs except insofar as they are covered by its system of legal aid and advice.

The agreed conclusions of the Special Commission on this point are as follows:

The Special Commission saw a correlation between the obligations of Central Authorities under Article 7f to assist in the initiation of court proceedings for return of a child and the reservation under Article 26 concerning lawyers' fees, made by a number of States. Countries with broad territories and either no legal aid

system or territorially non-unified legal aid had experienced or might experience in the future difficulties in obtaining legal representation for applicants who could not afford legal fees. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved.

In many Commonwealth jurisdictions there will be some public official - a Director of Social Welfare, an Official Solicitor, or the Attorney-General himself - whose department has functions in child protection cases. It is thought that in most jurisdictions, any necessary legal proceedings could most conveniently be set in train through such a department and the costs could properly be carried on the public funds available to that department. In Australia, for example, the application is made to court by the appropriate Central Authority (see the Family Law (Child Abduction Convention) Regulations, reg.15, set out in Appendix B), which will instruct counsel to represent it.

### Making an application for the return of a child

An applicant under the Convention is given the option of three methods of mobilising its provisions. He may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State (which means in practice the State where the child is thought or known to be) (Article 8). However, this is without prejudice to the right of the applicant, if he so wishes, to bypass the Central Authorities and make a direct application to the courts of a Contracting State (Article 29).

So long as the removal or retention is wrongful within the meaning of the Convention, the outcome should not be affected by the manner in which the proceedings originate. Use of the Central Authority network is almost always preferable, as official channels are at once made available (which may prove of particular value in the essential first task of locating the child) and the expense and delay which can result from employing a lawyer agent in the foreign country may be avoided.

If the application is made through Central Authorities, the Convention requires it to be accompanied by certain information, set out in Article 8. The information must include (a) the identity of the applicant, the child and the alleged abductor; (b) where available, the date of birth of the child; (c) the grounds on which the claim for return is based; (d) all available information relating the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The information may also include (a) an authenticated copy of any relevant decision or agreement; (b) a certificate or affidavit from a Central Authority, or other competent authority of the State of the child's habitual residence, or

from a qualified person, concerning the relevant law of that State and (c) any other relevant documents. The Hague Conference has recommended a standard model form of application which is appended to the Convention.

An Authority may also require (and this might be useful) that the application be accompanied by written authorisation empowering it or some other person to act on behalf of the applicant (Article 28). These communications should (where relevant) be accompanied by a translation into the official language, or one of the official languages, of the requested State, or, "where that is not feasible" into French or English (Article 24). However, a State may, by entering a reservation under Article 42, object to the use of French or English in this connection, but not to both.

### Response by the requested Central Authority

On receipt of an application, the Central Authority of the requested State may proceed no further with it if it is "manifest" that it falls outside the provisions of the Convention or is otherwise not well founded. If it does this, it is bound to inform the applicant, or the Central Authority through which the application was submitted, of its reasons for reaching this conclusion (Article 27).

If the application is accepted, the first step is to confirm the whereabouts of the child and the abducting parent, or to take whatever steps are necessary to locate them if their whereabouts were unknown to the applicant. It is here that the expertise which Central Authorities acquire can be most valuable: locating a family called "Smith" who are known to be "in the London area" is no easy task, but the provision of information such as the address of a known relative in the area might save many weeks of investigation and delay.

The next step is that identified in Article 10, that the Central Authority should "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". So, if the whereabouts of the child are known, it may deem it best in the first instance to approach some social agency (for example, an officer of the International Social Services; or a local state or voluntary child welfare agency) to ascertain whether this can be achieved. Experience has shown that some abductors do decide on a voluntary return once the Convention rules are explained to them and the strong likelihood of a successful court application for the return of the child becomes apparent.

The Central Authority should also keep in view its duty, under the Convention, to prevent further harm being caused to the child "by taking or causing to be taken provisional measures". The appropriateness of taking such measures may best be judged by a child welfare agency. If these measures fail to secure the voluntary return of the child or an agreed resolution of the dispute, the Authority (or the lawyer acting on behalf of the applicant) should institute proceedings for the return of the child. The judicial procedure should be

simple and rapid. The court should be able to act on the basis of the documents submitted with the application. Opportunities for delay by the abductor should be reduced to a minimum, and courts should attempt to determine the matter within days rather than weeks. In order to encourage rapidity, Article 11 states that if a decision has not been reached within six weeks from the institution of proceedings, the applicant or the Central Authority is entitled to ask for the reasons for the delay.

If an order for the return of the child is made, it is the duty of the Central Authority to ensure that appropriate arrangements exist for ensuring the safe return of the child. Any expenses so incurred may be recovered by the Central Authority, and the court ordering the child's return may direct that these be met by the abductor (Article 26).

### Evidence

In order to achieve the purposes of the Convention, it is necessary that courts can act on the basis of the evidence presented to them in the documentation accompanying the application. Thus Article 30 requires that the application and supporting documentation should be admissible in court proceedings. It is, therefore, obviously desirable that Central Authorities should try to ensure that this documentation is as complete as possible when the application is submitted.

So far as the legal position in the State of habitual residence is concerned, the court asked to order the return of a child needs to be satisfied that there were "rights of custody" interfered with by the wrongful removal or retention. The Convention contains a number of provisions designed to minimise potential evidential problems in this area.

First, Article 8(f) permits (but does not require) an application to be accompanied by a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from "a qualified person" concerning the relevant law of that State. Ewbank J in the English case of Re A (A Minor) (Wrongful Removal of Child) (1988) 18 Fam L 383 made it clear that the existence or otherwise of an affidavit, and whether or not it accompanied the application or the subsequent originating process in the court proceedings, was not crucial; the court will be slow to allow procedural technicalities to delay the consideration of the case.

Second, in deciding whether there has been a wrongful removal or retention within the meaning of the Convention, the courts of the requested State may take notice "directly of the law of, and of judicial or administrative decisions, formally recognised or not, in the State of habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable" (Article 14). Thus if, for example, the adult parties had merely separated without

the intervention of a court order, a general statement of the law of the State (provided, for example, by the Central Authority of that State) concerning the custody rights of parents of legitimate children (if the parties were married) or of illegitimate children (if they were not) should be accepted. If the rights were exercised under a court order or formal agreement, the court should accept an authenticated copy of the order or agreement.

There is a third provision in Article 15, which permits the courts of the requested State, prior to ordering the return of the child, to request that the applicant obtain from the authorities of the State of the child's habitual residence "a decision or other determination" that the removal or retention was wrongful within the meaning of Article 3 "where such a decision or determination may be obtained in that State". It is to be hoped that this will seldom be necessary, and the procedure could lead to delays. It was used, however, in Re A (A Minor) (Wrongful Removal of Child) (supra) and the English court was still able to make an order for the return of the child 26 days after the issue of the originating summons (and those 26 days included the Christmas-New Year holiday periods).

#### Evidence on factual issues

A person seeking to oppose the application for the return of the child will seek to raise one of the issues set out in Articles 12 and 13 and examined in Chapter Two, above. There may, for example, be an allegation of abuse of the child by the applicant parent; or an assertion of close bonding between child and the abducting parent. Evidence on these matters will normally be by affidavit, and the courts have made it very clear that they will not delay the hearing of applications to allow for the assembly of fuller material.

The policy of the Convention is to secure the swift return of the child, the merits of the case being reserved to the courts of the child's habitual residence. The party opposing return has a heavy burden of proof; return will be refused only if the evidence presented is "both obvious and incontrovertible" (Re D (A Minor) (Child Abduction) [1989] 1 FLR 97n). It is not enough merely to make allegations; that will not cause the court to adjourn for further evidence where the resulting delay would defeat the purposes of the Convention (Parsons v Styger (1989) 67 O.R. (2d) 3, 11).

#### Earlier decisions in the recipient country

The Convention makes provision for the contingency that, prior or subsequent to the application being heard, a decision relating to the custody of the child might have been given in the requested State or be entitled to recognition in that State. It is stated that any such decision shall not of itself be a ground for refusing to return the child but that the reason for the decision may be taken into account in determining the application (Article 17). This means, on the one hand, that a court which had previously decided on the

merits to award custody to one parent may, after a series of kidnappings and rekidnappings, be obliged to return the child to the foreign country of habitual residence of the child (a New York court found itself in this position in Sheikh v Cahill (546 NYS 2d 517 (Sup Ct, 1989))); but that the grounds for a previous decision, e.g. that one parent be declared unfit to have the care of the child, could be taken into account in considering the application of Article 13 to the facts of the case.

#### **No fresh decision on the merits**

Once the courts of the recipient country have received notice of the wrongful removal or retention of a child (in the usual case by receiving an application for the child's return, but possibly also by being asked to take provisional measures) those courts may not seek to determine the underlying custody issues unless and until they have decided that the child is not to be returned (Article 16). A decision to return the child is not to be taken as a determination on the merits of any custody issue (Article 19).