

CHAPTER TWO

Substantive principles

2.1 The central tenet of the 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). It is important to consider, therefore, what the expression "rights of custody" means. In common law, the term "custody" does not simply mean the actual possession of the child (this is often referred to as "care and control" but refers to a bundle of "rights" respecting the child. These will include the day to day care of the child, but can also comprehend the rights to determine the child's religion, education and place of residence. Sometimes these "rights" may be fragmented and shared between a

number of persons, or between a person and an institution. (See J.M. Eekelaar, "What are Parental Rights?" (1973) 89 L.Q.R. 210). Now, States may define the term "custody" in whatever way they choose, but what is essential for determining their obligations under the Convention is the definition used in the Convention. This definition is open-ended in that it specifies rights of custody as including 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 both 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 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 (or the court)

for, although the expression "custody" may not have been used, that parent would possess a right to determine the child's place of residence which falls within the protection of the Convention.

2.2 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. 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 facility should assist in the speed of actions securing the return of such children. 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. This point is returned to in para. 2.4(i). 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. It should be

noted, in this context, that the custody rights in question may be vested in "a person, an institution or any other body". Hence a state or voluntary body to which custodial rights have been transferred by virtue of agreement, court order (or any other manner) may apply under the Convention for the return of a child abducted in breach of those rights.

2.3 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. The grounds may be conveniently set out as follows:

(i) If 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 (Article 13(a));

(ii) if the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention (ibid);

(iii) if 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(b));

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

In (i) to (iii) the burden of proving the ground is expressly placed on the person, institution or other body opposing the child's return. In the case of (iv), the Convention says only that this must be "demonstrated". It is suggested that the effect of this is similarly to place the burden of proof on the abductor.

In addition to the above grounds, return may be refused if the court finds:

(v) that 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);

(vi) that 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).

2.4 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 (see para. 1.1). 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. It is in the light of this that the following brief comments on each of the six grounds for refusal mentioned in 2.3 above must be seen:

(i) this does little more than to re-iterate 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 (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 (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. What would be the situation if the removal took place before the order was made? The parent in whose favour the order is made cannot rely on the order itself because the Convention covers only rights of custody existing at the time of the removal or retention and, furthermore, it must be shown that these rights were, or would have been, exercised at that time. It is suggested that such a case would normally come within the Convention for the following reasons: (a) normally while custody is in dispute the parents will retain their equal rights to possession of the person of the child, although, if they have separated, one of them will in fact not be exercising this right. 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. Hence such a parent "would have" exercised the right were it not for the removal. (b) Alternatively,

during the dispute each parent would normally retain the right to determine the place where the child should live. This right is "actually exercised" during the dispute in the sense described in para. 2.2 and it is this right which is breached by the removal before the court makes its order. 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. But to have covered this case would have required recognition of the decision as a basis for ordering the return of the child, which was not the approach of the Convention. It is not thought that the omission is serious as very few cases of this kind are likely to arise. If they do, the Convention does not prevent the return of such children if this is thought appropriate (Articles 18 and 36).

(ii) The purpose of this ground of opposition is clear enough. It is curious that it 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.

(iii) This emergency clause is clearly necessary lest the working of the Convention becomes oppressive to children. The addition of the expression "or otherwise place the child in an intolerable situation" valuably covers situations where the return, at any rate at that very moment, might subject the child to extreme disruption, if not to actual physical or psychological harm.

(iv) 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, although it must be assumed that the longer the child has in fact been away from its original place of habitual residence the more likely it is that a court might find the ground for opposition mentioned in sub-paragraph (iii) above to be satisfied. If he succeeds, the court will be free to decide the case on a full review of its merits.

(vi) 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 seems that it is unlikely, without strain, to include situations where the principles of family law of the requested state differ from those in the requesting state: for example, if the latter state operated a system of preferred custody rights in one parent. This is important because family law in particular reflects different cultural patterns and, if the Convention is to operate successfully, there must be mutual respect among States for these differences. The child's future should normally be determined according to the cultural practices of the place of his habitual residence. 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. At this level, the view of the requested State must prevail.

(An example might be a case of child refugees). How this view is to be ascertained could be controversial. Is the decision to be left to the judge, on a broad discretionary basis, or should a certificate of a Minister of the requested State be required? My preference would be to leave it to the judge, for to do this would at least require the matter to be openly argued and considered.

How closely should this judicial discretion be guided? It would seem desirable to try to direct the inquiry as far as possible so as to minimize the risk of open-ended surveys of a quasi-political nature. Certain matters could, for example, be specified as the primary or exclusive grounds for establishing this objection to a return. Clause 3 in the Draft Model Act appended to this Report gives an illustration of one method of approaching this problem.

2.5 These provisions apply to breaches of rights of custody, as defined in para. 2.1 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 other-

wise) 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. The reason for this is that disputes about access are notoriously difficult to unravel (it might be alleged that the absent parent was visiting very infrequently, or that the children disliked the visits) and to order the return of the children when such matters may well be in dispute is to provide too drastic a remedy. But it must also be remembered that, if the parent with access rights has also the right to determine where the children shall live, the latter right is a "right of custody" within the Convention and, if breached, may be remedied by return of the children. It seems right to draw a distinction in this manner because a parent with the latter right who can be held to be "actually exercising" it is likely to be more involved with the children and it seems proper that if any dispute over its exercise arises, this should be resolved at the place where the children habitually reside. Problems may, of course, arise about how an order for the return of the children is to be implemented in such a case, for it is not clear that it will always be appropriate for the children to be returned to the care of a parent who has hitherto not been actually caring for them. If it would not be appropriate to do this, the court may want to be satisfied that the abducting parent returns with

the children so as to be able to continue their day to day care. If that parent refuses to do this, the court may have to be satisfied that other appropriate arrangements are available for the children when returned (and it may be assumed that the abductor would not readily wish to be separated from the children) but, if these cannot be made, it may be necessary to refuse the order, at least for the time being, on the ground that to return the children would place them in an intolerable situation.

2.6 While withholding the remedy of return in a case of breach of access rights only, the Convention seeks to re-inforce 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 agreement between the parties or institute whatever proceedings may be necessary in the local courts on behalf of the party living abroad (see paras. 1.5 - 6). The most effective way in which the Convention protects access arrangements is in the provisions requiring return of a child which

is wrongfully "retained" (for example, by a parent exercising access rights) in breach of the rights of custody of the other parent, for access rights are defined as including the right to take a child for a limited time to a place other than the child's habitual residence (Article 5(b)).

2.7 Two final points of substance must be made. The Convention applies only to children habitually resident in a Contracting State immediately before the breach of custody (or access) rights (Article 4). There is no reason, of course, why a State implementing the Convention should not go further if it so wishes and apply the protection of the scheme of the Convention to children wrongfully brought within its jurisdiction from non-Contracting States. However, States may prefer to proceed on the basis of reciprocity for in that way they can encourage a more widespread adoption of the Convention and, of course, safeguard the interests of children habitually resident in their own territory who may be abducted to those other States. It is therefore assumed that States will in fact proceed in this manner. The second point is that the Convention ceases to apply when a child reaches 16 (Article 4). The intention is that when a child reaches that age, even if this should happen after an application is lodged and proceedings have started, jurisdiction under the Convention should

terminate forthwith, for a child of that age is considered capable of deciding for himself or herself where to live. It is likely that a court would in any case give great weight to the views of a child approaching that age. Of course, it is open to States under whose laws a child reaches majority only at a later age to retain judicial jurisdiction with respect to the child in terms of its domestic law even if it is no longer obliged to operate the scheme of the Convention in his case.