

## CHAPTER FOUR

### Questions of Evidence

4.1 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. In the standard case, the evidence will be directed at two issues: the first, the question of fact that the applicant was "actually exercising" care of the person of the child at the time of the wrongful removal, and the second, the question of law that this exercise of the custody right was in accordance with the law of the State of the child's habitual residence. Evidence of the first issue should be reasonably easy to assemble in the form of affidavits by the applicant and other persons concerned with the family supplemented, perhaps, by school or other official records. On the question of law, the Convention seeks to promote speed by allowing the courts of the requested State to 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.

4.2 Although the application should establish a prima facie case both of the custody right alleged to be breached and the actual exercise of it, it does not seem that the applicant retains the ultimate burden of proof on the question of the actual exercise of the right. Article 13 makes it clear that, if it is alleged that the right was not actually being exercised at the time of the removal or retention, the burden lies on the abductor to establish this. So, unless the court is satisfied, on the balance of probabilities, that the custody right was not actually being exercised, the ground for return will have been established. In the same way, the burden lies upon the abductor to esta-

blish any allegation that the other party had consented to or subsequently acquiesced in the removal or retention or that the return of the child would expose the child to physical or psychological harm or would otherwise place him or her in an intolerable situation. Hence, mere assertions to this effect will normally be insufficient to discharge this burden. The onus is placed on the abductor to adduce convincing evidence on these points. Courts should be slow to grant time to abductors to do this unless a convincing case is made out that such evidence is likely to be forthcoming.

4.3 Although the burden of proof on the above matters is placed on the abductor, it seems to remain with the applicant with respect to the question whether the custody right in question was attributed to him or her under the law of the State of the child's habitual residence. Thus, if the abductor puts in issue questions of fact, the burden lies on him or her. But the burden regarding questions of law rests on the applicant. In view of the relatively straightforward way in which evidence of this kind can be submitted, it is thought that questions of law should seldom raise many problems. In this context, reference should be made to 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 greatly to be hoped that States will rarely, if ever, use this provision. The delay which it would undoubtedly cause would go far to frustrating the major purpose of the Convention. If the question in issue was whether the custody rights alleged to be breached were being "actually exercised" at the time of the alleged breach, such a reference would impose on the applicant the burden of proof which Article 13 clearly contemplates should rest on the abductor.

4.4 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). Let us consider, first, such a decision made in the State of habitual residence, and then a decision made in the requested State. In the first situation, it is necessary to stress that any such decision cannot in itself be a

ground either for or against ordering the return of the child under the Convention. This is because the Convention only covers abductions which were in breach of custody rights at the time of the removal or retention. If, for example (as sometimes happens) the decision vests sole custody in the applicant by way of penalty on the abductor, the decision is irrelevant except insofar as it may provide evidence as to how rights of custody were attributed at the time of the alleged breach (see above, para. 2.4(i)). If, on the other hand, the decision vested custody rights in the abductor, the removal will nevertheless remain unlawful. But in this case the court may well conclude that to return the child would place him or her in an intolerable situation because the court in the country of habitual residence would simply hand the child back to the abductor. In the situation where the decision is by a court of the requested State, the Convention makes it plain that any such decision should not inhibit the application of the provisions of the Convention. It seems highly probable that, if any such situation were to arise, the decision would not have been made in full appreciation of all the facts, for if it were known that the child had recently been removed or retained in breach of custody rights actually exercised in another State, it is difficult to see why the case was not decided under the terms of the Convention.