
Protecting an Accompanying Parent upon Return

DCI-A National President Danny Sandor reports on recent developments arising from a review of the Hague Convention which he attended as part of the Australian Delegation.

Special Commissions are held every four years to review the operation of The Hague Convention on the Civil Aspects of International Child Abduction. They examine both the interpretation of the Convention and the activities of the Central Authorities that have carriage of seeking the return of children.

At the 1997 Special Commission, the meeting adopted a resolution that Article 7(h) imposed an obligation on Central Authorities to protect the welfare of the returning child (subject to certain qualifications relating to the powers of Central Authorities under the legal and welfare systems of each country). Article 7(h) states:

“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 –

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.” (emphasis added)

Neither Article 7(h) nor the resolution addresses the responsibility of Central Authorities to protect the person (usually the mother) who had unlawfully taken the child out of the country. This is especially significant in cases where the person who unlawfully removed the child alleges that she was the victim of family violence and that this was (at least partly) why she fled with the child.¹

Such allegations are prevalent and the operation of the Convention has been criticised for failing to adequately meet the safety of returning parents.

The Special Commission met again in March 2001 and the Australian Delegation successfully pressed for recognition of this issue. Paragraph 1.13 of the resulting Conclusions and Recommendations of the Meeting states:

“It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.”²

It is noteworthy that the statement identifies the accompanying parent's entitlement to protection as a derivative one. It is plainly anchored in the obvious

damage that would accrue to the child if his or her parent were harmed upon return.

Why is the statement framed in this way? The Special Committee meeting highlighted a concern among some Contracting States to the Convention about the potential for “abductors” to return to a “better” position than before they left and a desire to ensure that the deterrence features of the Convention were not compromised. The “realpolitik” of achieving consensus therefore required the child to be the basis of any obligations upon the Central Authorities to provide service to the parent who unlawfully took the child..

While the recent acknowledgment of the need to sometimes protect a returning parent is an important principled advance in the scope of Central Authority obligations under the Convention, it remains to be seen how the new understanding translates into practice. There is no minimum standard of services, systems or resources that can be assumed among existing Contracting States or those which may seek to join.

Further Reading:

S. Bourke, M. Green, J. Kay and D. Sandor “Issues Surrounding Safe Return of the Child (and the Custodial Parent)”, paper presented to International Child Custody – A Common Law Judicial Conference, 18 – 21 September 2000, Washington DC U.S.A, sourced from

<http://members.dynamite.com.au/dci-aust/html/safe1.html> and

http://travel.state.gov/safe_return_issues.html

J. Kay “The Hague Convention – Order or Chaos? An update on a paper first delivered to a Family Law Conference in Adelaide in 1994”, paper presented at New York University U.S.A, September 1999, sourced from:

<http://www.familycourt.gov.au/papers/html/kay.html>.

The Family Court of Australia website includes a page of selected judgments relating to the Convention at: http://www.familycourt.gov.au/judge/index/html/child_abduction.html and links to Australian legislation.

D. Sandor (2001) “Review of the Hague Abduction Convention: Protecting Both Children and Adults Until and Upon Return” Vol 15 No 2 *Australian Journal of Family Law* forthcoming.

Footnotes:

¹ M. Kaye (1999) “The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned By Coach and Four” Vol 13 *International Journal of Law, Policy and the Family* 191. M. Weiner (2000) “International Child Abduction and the Escape from Domestic Violence” 69 *Fordham Law Review* 593.

² Sourced from <http://www.hcch.net>