The interests of children or the interests of the child? Discretionary non-return of a child under Art 13 of the Hague Convention on the Civil Aspects of International Child Abduction

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Children are not articles to be sent to and fro, even though the circumstances in which they have been taken from their habitual residence are wrongful and the person taken them has clearly acted in breach of an order of a court of competent jurisdiction.

— Sir Stephen Brown P, in *Re M (Minors) (Abduction)* [1992] 2 FCR 608 at 614

The Hague Convention on the Civil Aspects of International Child Abduction[1] (hereafter referred to as 'the Hague Convention' or 'the Convention') implements a procedure for dealing with applications for the return of a child who is the subject of a removal by a parent from the child's state of habitual residence, primarily securing the prompt return of the child. The Hague Convention entered into force in Australia on

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1 25 October 1980, Hague Conference on Private International Law, No 28, TIAS 11670, 1343 UNTS 89 (entered into force 1 December 1983).

The contracting states are Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Peoples Republic of China, Columbia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela and Zimbabwe (current at 2 June 2006).

Available at <http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24> (accessed 16 February 2007).

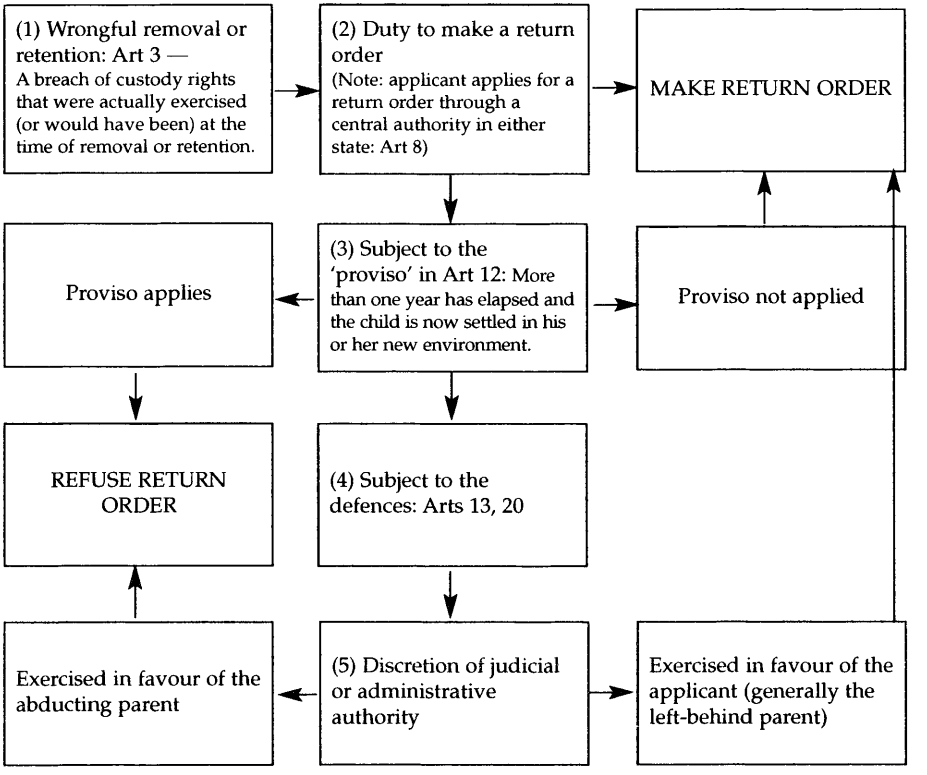
1 January 1987 and is incorporated in the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (hereafter referred to as 'the Australian Regulations' or 'the Regulations'). The exceptions contained within Art 13 of the Hague Convention and reg 16(3) of the Australian Regulations provide defences against applications for return, arising from the action or inaction of the left-behind parent; the existence of a grave risk concerning the child's person; or the child's own objections. If established, an exception relieves the judicial or administrative authority of the obligation to order a return. These exceptions, discussed below, manifest a potential tension between the interests of children generally and those of the individual child. Although imperfections are evident, overall the Hague Convention operates admirably. With minor procedural amendments and regular review and monitoring, the Convention will continue to secure the most appropriate outcome for children.

Objectives of the Convention

The Hague Convention aims to ensure 'the prompt return of children wrongfully removed to or retained in any Contracting State' (Art 1(a)) and 'that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' (Art 1(b)). The status quo of the pre-abduction situation is thereby reinstated, rendering the abduction without practical or juridical effect (Pérez-Vera 1982, 429–30). These objectives are achieved through a summary return mechanism, encapsulated in Art 12, which provides that the judicial or administrative 'authority concerned shall order the return of the child forthwith', thereby returning decisions regarding the merits of the case to courts in the state of habitual residence as warranted by Art 19 (Pérez-Vera 1982, 430). This mechanism is shown in Figure 1. Return is secured in most cases, as shown in Figure 2 and evidenced by a Reunite International study which found that in 19 of 22 cases, the child was returned (2003, 26–27). The Australian 2006/07 statistics of children removed either to or from Australia show the same trend, with a return of the child ordered in 21 of the 29 decided cases (Attorney-General's Department 2006). Such a scheme has the benefit first of allowing merits to be assessed by the courts with the greatest availability of information, and second of deterring potential abductions (Brush 1999, 35; Pérez-Vera 1982, 430). However, this process necessitates an expedient proceeding, as noted by Kirby J in *De L v Director-General New South Wales Department of Community Services* [1996] 70 ALJR 932 at 947.

The Preamble to the Convention illustrates that the presumption of return has been paramount in court decisions since the inception of the Convention, a recognition that non-disruption, prevention of abductions and speedy returns to familiar surroundings are in children's interests (Pérez-Vera 1982, 431–32). The Preamble states that the Convention was conceived as a means of '[protecting] children

Figure 1: Structure of the Hague Convention*



* Adapted from Buck 2005, 135.

Figure 2: Outcome of application for return*

Outcome of application for return	Number	Percentage
Rejection by the central authority	102	11
Voluntary return	173	18
Judicial return	304	32
Judicial refusal	107	11
Withdrawn	137	14
Pending	88	9
Other	41	4
Total	**952**	**100**

* Adapted from Lowe et al 2001, 12.

internationally from the harmful effects of their wrongful removal or retention'. These effects may be adverse and include 'regression, bedwetting or refusal to use the toilet in young children, interrupted sleep, clinging behaviour, fear of windows and doors, extreme fright, grief and rage about parental abandonment aimed at the parent left behind, anger at and rejection of the abductor, depression and a desire to return to the abducting parent if a strong bond was formed' (Greif and Hegar 1993, 152). Furthermore, the Preamble recognises that 'the interests of children are of paramount importance in matters relating to their custody'. While this Convention emphasises the 'interests of *children*', the United Nations Convention on the Rights of the Child[2] (CRC) places the emphasis upon 'the best interests of the *child*' (CRC Art 3(1)). The drafting process of the Convention weighed the best interests of an individual child against other competing factors and has alleviated consideration of the best interests of an individual child at the judicial level (Gray 2003, 10). Waite J in *W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 220 has held: 'It is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases.' Similarly, courts often hold that it is in the individual child's interests to be returned, in addition to the interests of children en masse (*S v S* [1999] NZFLR 625 at 631 per Fisher J; *Re Z (Abduction: Non-Convention Country)* [1999] 1 FLR 1270 at 1277 per Charles J; *Re P (Abduction: Minor's Views)* [1998] 2 FLR 825 per Butler-Sloss LJ). However, this emphasis on the interests of children, rather than those of the individual child, is controversial within the context of children's rights (discussed further below).

The interests of the individual child, however, are not ignored. The best interests of a child are to be determined in a court in the child's state of habitual residence upon return (Gray 2003, 11). Further, the Convention envisages circumstances in which it is not in the individual child's best interests to be returned to the requesting state (Gray 2003, 4). Exceptions provide for instances in which the 'specific welfare of the child is allowed to prevail over any generalised principle that a child should be returned' (per Butler-Sloss LJ in *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550 at 552). Importantly, none of the exceptions permit an overall analysis of the child's interests but necessitate the fulfilment of specified criteria in order to prevent assessment of the merits of the case (Eekelaar 1981, 19–20). The obligation to return children is best understood by reference to the exceptions which define its extent (Pérez-Vera 1982, 432), found primarily in Art 13, but also in Arts 12 and 20. These exceptions are shown in Figure 3. Article 13 places the burden of proving each of these exceptions upon the person who opposes the return, who is not necessarily the abductor (Pérez-Vera 1982, 460).

2 20 November 1989, GA res 44/25, UN GAOR (44th Sess) 108, UN Doc A/RES/44/25, 1577 UNTS 44, 28 ILM 1457 (entered into force 2 September 1990).

Figure 3: Reasons for judicial refusal of return*

Reason for judicial refusal of return	Number	Percentage
Child not habitually resident in requesting state	12	12
Applicant had no rights of custody	8	8
Article 12: one year has elapsed and the child is now settled in the new environment	11	11
Article 13: not exercising rights of custody	3	3
Article 13: consent	4	4
Article 13: acquiescence	4	4
Article 13: grave risk of harm or other intolerable situation	21	21
Article 13: child's objections	13	13
Article 20: return would be contrary to the fundamental principles regarding human rights and fundamental freedoms of the requested state	0	0
More than one reason	17	17
Other	6	6
Total	**99**	**100**

* Adapted from Lowe et al 2001, 17.

Article 13(1)(a)

Article 13(1)(a) of the Hague Convention provides three possible exceptions to an order of return:

> ... 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 removal or retention, or had consented to or subsequently acquiesced in the removal or retention ...

Similarly, reg 16(3)(a) of the Australian Regulations provides the following exceptions to an order of return:

> ... the person, institution or other body seeking the child's return:
>
> (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
>
> (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia.

These exceptions relate to the guardian of the child, acknowledging that the actions, or inactions, of guardians may bring into question the wrongfulness of the abduction (Pérez-Vera 1982, 460–61).

Non-exercise of custody rights

This exception of the non-exercise of custody rights is rarely invoked and is relatively unproblematic. Worldwide, in 1999 there were only three cases in which refusal to return was based on this ground alone and one further case in which the ground was relied on in conjunction with another ground (Lowe et al 2001, 17). There are no reported English cases in which return has been refused on this ground (Lowe et al 2004, 306), an approach consistent with that of Australian courts (for example, *Director-General, Department of Community Services Central Authority v JC and JC and TC* (1996) FLC 92-717). The inclusion of an actual exercise test encompasses the factual constituent of custody (Pérez-Vera 1982, 448–49) and is complemented by Art 3(1)(b): 'The removal or the retention of a child is to be considered wrongful where ... at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.' Together, these provisions prevent abuse of the Convention by custodians who have not been exercising their custody rights prior to the abduction, yet afterwards seek to rely upon them in order to secure a return (Beaumont and McEleavy 1999, 83, 86). The Convention definition of custody rights in Art 5 relates 'to the care of the person of the child' and actual exercise must be determined on a case-by-case basis with reference to such care of the person of the child (Pérez-Vera 1982, 460–61). Actual exercise must be given wide interpretation (*Re H, Re S (Minors) (Abduction: Custody Rights)* [1991] 2 FLR 262 at 272 per Lord Brandon) and thus will not cease by virtue of valid reasons such as hospitalisation (*S v S* 2003 SLT 344), holiday (*W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211), education (Pérez-Vera 1982, 460–61) or the actions of the abductor (Art 3(1)(b); Pérez-Vera 1982, 460–62).

Articles 13(1)(a) and 3(1)(b) are interrelated. The latter imposes an obligation on the applicant (generally the left-behind parent) to prove that custody rights were being exercised (Art 8(c); Beaumont and McEleavy 1999, 114). This is not an onerous burden but requires only preliminary evidence of care of the child (Pérez-Vera 1982, 448–49). Rather, the heavier burden is on the person who opposes return (generally, the abductor), in Art 13(1)(a), to prove that the guardian did not, in fact, exercise such care (Pérez-Vera 1982, 448–49). In *Re P (A Child) (Abduction: Acquiescence)* [2004] EWCA CIV 971, accepted in *Director-General, Department of Child Safety v Stratford* [2005] Fam CA 1115, the English Court of Appeal held that a removal or retention is in breach of custody rights if it is contrary to or interferes with those rights. As such, it is not necessary to consider Art 13(1)(a) in order to determine whether the removal or retention was wrongful for the purposes of Art 3.

Consent to the removal or retention

Consent is an exception that has seldom been made out. Worldwide, in 1999 there were four cases in which refusal of return was based on this ground alone and a further eight cases in which this ground was relied on in conjunction with another ground (Lowe et al 2001, 17). However, there is jurisprudence as to its definition and scope (Lowe et al 2004, 308). Consent must be in relation to the indefinite removal or retention of the child (*Re B (A Minor) (Abduction)* [1994] 2 FLR 248) and, although it can be inferred, must be unequivocal (*T v T (Abduction: Consent)* [1999] 2 FLR 912 at 917 per Charles J). Despite an initial reliance on objective words and conduct (*Re C (Abduction: Consent)* [1996] 1 FLR 414 at 419 per Holman J), there has been a shift towards considering the subjective intention of the left-behind custodian in conjunction with such objective behaviour (*Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72 at 86). *Re H* was endorsed as applying equally to consent and acquiescence in *Re P (A Minor) (Abduction: Acquiescence)* [1998] 2 FLR 835 and has been endorsed by Australian courts: *Commissioner, Western Australia Police v Dormann, JP* (1997) FLC 92-766. This move is beneficial, being sympathetic towards the difficulty and trauma which left-behind custodians face (Beaumont and McEleavy 1999, 131). Consent coupled with reluctance can suffice (*Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171 at 188 per Wall J). To be proved, it will be necessary to produce 'clear and compelling evidence of a positive consent' (*Re W (Abduction: Procedure)* [1995] 1 FLR 878 at 888) which is proportional to the severity of the claim (*Re H and R (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 at 96 per Lord Nicholls). Consent need not be in writing (*Re C (Abduction: Consent)* [1996] 1 FLR 414 at 418 per Holman J) and, although written evidence may 'place the matter beyond argument' (per Wall J in *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171 at 188), it is not guaranteed to be adequate (*Re R (Minors) (Abduction)* [1994] 1 FLR 190). Fraud, deceit and misunderstanding will invalidate the consent (*Re B (A Minor) (Abduction)* [1994] 2 FLR 249 at 261–63 per Waite LJ).

Consent to a possible future removal may be appropriate (*Re K (Abduction: Child's Objection)* [1995] 1 FLR 977 per Hale J) and withdrawal of consent has been contemplated as possible (*Re K (Abduction: Consent)* [1997] 2 FLR 212 at 218 per Hale J), although further deliberation of both these issues may be necessary (Lowe et al 2004, 311).

Where consent has been given, it is possible to conclude that the removal or retention was not wrongful. Two valid and competing claims exist: a custodian may relinquish care to another and, by permitting a child to go or stay overseas, the left-behind custodian no longer has power to consent to a removal or retention (Beaumont and McEleavy 1999, 132). However, where consent is raised as an issue, it is questionable that genuine consent was ever given (*BB v JB (Child Abduction)* [1998] 1 IR 299 at

312–13 per Denham J). If the prior consent is accepted as legitimising the removal or retention, Art 3 is relevant: the removal or retention will not be regarded as wrongful and therefore there will be no return. Conversely, if the prior consent is not accepted as legitimising the removal or retention, Art 13(1)(a) will allow the court to consider whether or not to return the child, given the circumstances (Beaumont and McEleavy 1999, 133). Such analysis and discretion justify the consideration of consent under two different provisions (Beaumont and McEleavy 1999, 134). Some courts have, indeed, considered consent to be relevant to the wrongfulness of the removal or retention: *In the Marriage of Regino and Regino v Director-General, Department of Families and Services and Aboriginal and Islander Affairs Central Authority* (1995) FLC 92-587; *Re O (Abduction: Consent and Acquiescence)* [1997] 1 FLR 924. However, the prevailing judicial approach is to consider consent in relation to Art 13(1)(a) in order to give effect to the provision: *Director-General, Department of Child Safety v Stratford* [2005] Fam CA 1115; *Re C (Abduction: Consent)* [1996] 1 FLR 414; *Re P (A Child) (Abduction: Acquiescence)* [2004] EWCA CIV 971.

Acquiescence in the removal or retention

Notwithstanding much discussion of the meaning of acquiescence, it has proved hard to establish (Lowe et al 2004, 315) and to understand (Bainham 2005, 757). Worldwide, in 1999 there were four cases in which return was refused based on this ground alone, and a further two cases in which this ground was relied upon in conjunction with another ground (Lowe et al 2001, 17). Acquiescence is recognition of the post-abduction circumstances without action to re-establish the prior situation (Beaumont and McEleavy 1999, 115). Factually, acquiescence and consent cannot both occur (Lowe et al 2004, 308): 'Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it' (per Lord Donaldson MR in *Re A (Minor) (Abduction: Custody Rights)* [1992] Fam 106 at 123). Also, the word 'subsequently' refers to acquiescence but not consent in Hague Convention Art 13(1)(a). The rationale of the acquiescence exception is that it is inequitable for the left-behind custodian to request an immediate return after he or she has implied that the child is allowed to stay indefinitely (*Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72 at 89 per Lord Browne-Wilkinson). Earlier English cases invoked an active/passive distinction within the acquiescence exception. Active acquiescence is manifested by clear communication while passive acquiescence is inferred from a course of conduct (for example, *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 217; the high-water mark was found in *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570 at 577 per Waite LJ). This has been displaced by an analysis of the subjective and objective position of the left-behind custodian (*Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72 at 86 per Lord Browne-Wilkinson, endorsed in *Commissioner, Western Australia Police v Dormann, JP* (1997)

FLC 92-766 per Holden CJ). This is preferable and is similarly investigated in other jurisdictions (*Horlander v Horlander* (1992) 16 July, Bulletin Civil No 228; *Wanniger v Wanniger* (1994) 850 F Supp 78; N° de role: 02/7742/A, Tribunal de première instance de Bruxelles 6/3/2003; *Dagan v Dagan* 53 PD (3) 254). In Australia, a similar and narrow test was set in *Police Commissioner of South Australia v Temple (No 1)* (1993) FLC 92-365 per Murray J. For a parent to acquiesce in a removal or retention, there must be clear evidence that he or she was aware of the removal or retention; of its wrongful character; and of his or her rights in relation to the other parent.

Acquiescence may arise from words (*Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106), or be inferred from action (*Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72; *Director-General of the Department of Community Services v MS*, 15 October 1998, Family Court of Australia (Sydney), unreported) or inaction (*W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211). Delay generally is inadequate unless it is lengthy and unexplained. A delay of 10 months was sufficient in *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 and a delay of almost a year was sufficient to establish acquiescence in *Re D (Abduction: Acquiescence)* [1998] 2 FLR 335. In Australia, a delay of six months was considered sufficient to show acquiescence in *Director-General, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785. Wall J in *Re K (Abduction: Child's Objections)* [1995] 1 FLR 977 at 987 held that: 'To establish acquiescence, inactivity must be evidence of a state of mind.' Confusion and uncertainty may prevent inferring acquiescence from inactivity (*Laing v Central Authority* (1996) FLC 92-709). Acquiescence must be express ('clear and unequivocal' per Stuart-Smith LJ in *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 120; *Paterson, Department of Health and Community Services v Casse* (1995) FLC 92-629) and unambiguous (*Re A and another (Minors) (Abduction)* [1991] 2 FLR 241 at 249). Acquiescence must be relied upon (*Re A and Another (Minors) (Abduction)* [1991] 2 FLR 241). There are circumstances in which acquiescence cannot be inferred, such as where the left-behind custodian endeavours to negotiate (*Re S (A Minor) (Abduction)* [1991] 2 FLR 1 at 13 per Purchas J), reconcile (*Re K (Abduction: Child's Objections)* [1995] 1 FLR 977 at 986) or seek a voluntary return (*Re H (Minors) (Abduction: Acquiescence)* [1997] 1 FLR 872 at 882 per Lord Browne-Wilkinson). Contextual elements of the acquiescence are important and a statement or action in isolation will generally be insufficient (for example, a sentence in a four-page letter is insufficient: per Millett J in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 773).

To amount to acquiescence, the left-behind custodian will ordinarily need to know that the removal or retention was wrongful, though need not know of the Hague Convention (*Re S (Abduction: Acquiescence)* [1998] 2 FLR 115 at 122 per Butler-Sloss LJ). Acquiescence has even been negated by unawareness of the Convention (*Re D (Abduction: Acquiescence)* [1998] 2 FLR 335). Acquiescence cannot be withdrawn (*Re S*

(Abduction: Acquiescence) [1998] 2 FLR 115 at 122 per Butler-Sloss LJ) except through immediate words, suggesting that the initial acquiescence was not genuine (*Re A (Minors) (Abduction: Custody Rights)* [1992] 2 FLR 14 at 30 per Lord Donaldson MR).

Habitual residence

Article 13(1)(a), in conjunction with Art 3, raises the question of habitual residence. Returning a child to a country with which there is little, or no, connection may not be beneficial. Custodians are determined by the courts in the state of habitual residence and the habitual residence is often resolved by custodians (Beaumont and McEleavy 1999, 46). Where it was shown that the parents did not share an intention for Australia to be the state of habitual residence, a period of seven months' residence was insufficient to acquire habitual residence in that country (*De Lewinski and Legal Aid Commission of New South Wales v Director-General New South Wales, Department of Community Services* (1997) FLC 92-737). However, where documentation that both the mother and the father intended Australia to be the state of habitual residence, a period of two months' residence was sufficient to establish Australia as such in *Paterson, Department of Health and Community Services v Casse* (1995) FLC 92-629. In this case, Kay J also notes that the term 'habitual residence' is not defined in the Convention in order to allow a fluid definition as is relevant to the facts and circumstances of each case. While courts in Australia, England, New Zealand and Canada (*B v H (Habitual Residence: Wardship)* [2002] 1 Fam Law R 388; *C v T* [2001] NZFLR 1105; *DeHaan v Gracia* [2004] AJ No 94 (QL)) have held parental intentions as relevant in this way, courts in the United States have followed a purely geographical approach (*Friedrich v Friedrich* 983 F 2d 1396 (1993)).

Article 13(1)(b)

Article 13(1)(b) provides that there is no obligation to return a child where:

> ... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The Australian Regulations mirror this in reg 16(3)(b), such that a child need not be returned where:

> ... there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

These provisions stipulate three situations that are exceptions to the order of the

return of the child: grave risk of physical harm, grave risk of psychological harm and grave risk of an otherwise intolerable situation. Although each alone is a sufficient ground upon which to oppose return (*Gsponer v Johnston* (1989) FLC 92-001; *Damiano v Damiano* [1993] NZFLR 548), they are often considered together (*Re S (Abduction: Custody Rights)* [2002] 2 FLR 815). These exceptions originate from a concern for the interests of the child, allowing non-return where it would imperil the child (Pérez-Vera 1982, 433). Art 13(1)(b) is the defence most commonly relied upon, although in accordance with the Convention's objectives, only a small number of these applications succeed (Hague Conference on Private International Law 2001, 12).

Strict interpretation

These exceptions are tightly worded to avoid assessment of the merits of the case, which would jeopardise a summary-return procedure. Similar strictness is necessary for judicial and administrative authorities for the Convention to be successful (Beaumont and McEleavy 1999, 138). Consequently, these defences have been read narrowly, requiring, in the words of Ward LJ, 'clear and compelling evidence ... which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence' (*Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 at 1154; see also *DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services* [2001] HCA 39). Emphasis has been placed on the need to assess the risk (*Re K (Abduction: Child's Objections)* [1995] 1 FLR 977 at 982) and not the child's welfare generally (*C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465 at 471). However, the harm may arise from return to the state of habitual residence or to the left-behind person (*Thomson v Thomson* [1994] 3 SCR 551; *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* [2001] HCA 39). While careful not to trespass into the merits, it is also important not to be superficial in analysing these exceptions (Beaumont and McEleavy 1999, 140–41).

A significant, although perhaps too often overlooked, point is that 'grave' is a qualifier for 'risk' and not the ensuing harm (*Re E (A Minor) (Abduction)* [1989] 1 FLR 135 at 143 per Balcombe LJ). The relevant grave risk is that which would result from a return, and that would be experienced imminently, rather than a potential harm which may arise in the future (*McCarthy v McCarthy* 1994 SLT 743 at 747 per Lord Prosser; *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir 1996) at 1069; *Chatelard c Yan Guo* 23 October 1980, 80 *Rev crit* 1991, 407). Abductors cannot generate and subsequently rely upon a risk (*Re C (A Minor) (Abduction)* [1989] 1 FLR 403; *Director General, Department of Community Services Central Authority v JC and JC and TC* (1996) FLC 92-

717); thus, generally, return is ordered where an abductor refuses to accompany the child (*Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478). However, in *D v D (Child Abduction: Non-Convention Country)* [1994] 1 FLR 137, the non-return of the mother was held to be a relevant factor in refusing to order a return of the children. The risk of harm of return can be compared with that of non-return (*Re A (A Minor) (Abduction)* [1998] 1 FLR 365 at 372) and often evidence of the pre-abduction life will be relevant (*Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478 at 487–88 per Thorpe LJ). The United States 6th Circuit Court of Appeals suggested two situations amounting to grave risk of harm: where return puts the child 'in imminent danger ... [for example,] a zone of war, famine or disease' or 'in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court ... may be incapable or unwilling to give the child adequate protection' (*Friedrich v Friedrich* 78 F 3d 1060 at 1069 (6th Cir 1996)). Correspondingly, in considering risk, it is assumed that the authorities of the requesting state are capable of protecting children (*Re H (Abduction: Grave Risk)* [2003] 2 FLR 141) and even speculative deficiencies will be insufficient (*Re F (Child Abduction: Acquiescence: Risks of Return)* [1995] 2 FLR 31). A lack of legal aid (*Foster v Foster*, 24 May 1993, North Ireland, unreported) or representation (*Re K (Abduction: Psychological Harm)* [1995] 2 FLR 550) will also be inadequate and return was even ordered where there was risk of gender discrimination in a religious court (*Re S (Abduction: Intolerable Situation: Beth Din)* [2000] 1 FLR 454). Rather than refuse to order a return, protective measures, such as undertakings, are often stipulated (*Re M (Abduction: Undertakings)* [1995] 1 FLR 1021).

The initial position in Australia was to adhere to a strict construction of this exception, resulting in many return orders (*Director General of the Department of Family and Community Services v Davis* (1990) FLC 92-182). However, more recently this approach has been relaxed, preferring a focus on the risk to the child and the post-return circumstances which the child would face if return were ordered (*DP v Commonwealth Central Authority; JLM v Director-General, New South Wales Department of Community Services* [2001] HCA 39). Thus, the existence of a risk must be established and subsequently the gravity of this risk evaluated (*JMB and Ors & Secretary, Attorney-General's Department* [2006] FamCA 59). Despite the change in approach, there remain many cases in which the exception is not made out (for example, *HZ v State Central Authority* [2006] FamCA 466; *State Central Authority v Keenan* [2004] FamCA 724).

Physical harm, such as domestic violence or sexual abuse, rarely satisfies a refusal to order a return. Ordinarily, proof of physical harm prior to the removal or retention of the child would be necessary (Beaumont and McEleavy 1999, 142). Furthermore, it would be difficult to rebut the presumption that the requesting state is able to protect

the child (Lowe et al 2004, 335). For example, return has been ordered where a father was soon to be released from imprisonment for a conviction of murder (*Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 where return was qualified by undertakings on behalf of the father), or where a mother had previously successfully safeguarded her child from harm (*Re M (Abduction: Acquiescence)* [1996] 1 FLR 315). Domestic violence has sufficed where there is clear evidence of extreme harm, such as photographs and eyewitnesses (*Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550) or developmental and psychological impairment of the child (*Re F (Child Abduction: Acquiescence: Risk of Return)* [1995] 2 FLR 31). While evidence of past domestic violence may indicate the future, it was held not to be determinative in *HZ v State Central Authority* [2006] FamCA 466. This conservative approach has been adopted across jurisdictions (for example, *Gollogly and Owen* (1989) 13 Fam LR 622; *Mahler v Mahler* (1999) 3 RFL (5th) 428 (Man QB); *AS v PS* [1998] 2 IR 244; *Starr v Starr* 1999 SLT 335; and *Nunez-Escudero v Tice-Menley* 58 F 3d 374 (8th Cir 1995)) and reflects 'awareness that a return to the country of origin need not necessarily entail exposure to the alleged harm' (Beaumont and McEleavy 1999, 143). However, recently North American, New Zealand and Australian courts have become more likely to refuse to order a return in domestic violence cases in which the child has suffered physical or psychological harm (Gray 2003, 13–20; see *Blondin v Dubois* 19 Supp 2d 123 (SDNY 1998); *Pollastro v Pollastro* (1999) 171 DLR (4th) 32; *Mok v Cornellison* [2005] NZFLR 583; *DP v Commonwealth Central Authoriy; JLM Director-General NSW Department of Community Services* [2001] HCA 39). Grave risk of physical harm may also be in the form of a dangerous security situation in the requesting state as considered by the government of the requested state (*Janine Claire Genish-Grant and Director-General Department of Community Services* [2002] FamCA 346).

Claims of psychological harm are contested due to its vague character (Beaumont and McEleavy 1999, 143–44). Expert evidence is, arguably, essential (*Re K (Abduction: Child's Objections)* [1995] 1 FLR 977 at 989), although not necessarily sufficient (*Re L (Child Abduction) (Psychological Harm)* [1993] 2 FLR 401). English and French courts will only admit such evidence where there is already a prima facie case of psychological harm (*Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64). Psychological harm arising from separation from an abductor refusing to return is generally insufficient: 'If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return' (per Butler-Sloss LJ in *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465 at 471). In extreme cases, this requirement may be relaxed. For example, in *Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64, the court refused to order return where a breastfeeding mother suffered from a serious psychological disorder which would have been worsened if return had been ordered.

The relationship and potential separation from siblings may be a relevant factor in determining the existence of this exception (*MQ and A v Director of Community Services* [2005] FamCA 843). A strict construction has been maintained where it is argued that psychological harm would result from returning to pre-abduction circumstances: a level of psychological harm is inevitable (*C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 FLR 403; *DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services* [2001] HCA 39). If the child is suffering from a psychological disorder which arose as a result of the pre-abduction situation which would be exacerbated by return, there is a greater likelihood of non-return. For example, return was not ordered where the child's aggression, bed-wetting and nightmares decreased upon fleeing the country but resumed when he learnt he would have to return (*Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] Fam 224). Nor was return ordered in a case where the children, due to previous disruption and abduction, would have suffered severe anxiety and distress if return had been ordered (*Re M (Abduction: Psychological Harm)* [1997] 2 FLR 573).

'Intolerable situation' is not to be given a wide interpretation (Pérez-Vera 1982, 461). This exception will be upheld only where the situation is severe and compelling (*Laing v Central Authority* (1996) FLC 92-709). Factors which are themselves insufficient may together constitute an intolerable situation (*E v E (Child Abduction: Intolerable Situation)* [1998] 2 FLR 980 at 984 per Hughes J). Financial disadvantage is insufficient (*Re M (Abduction: Undertakings)* [1995] 1 FLR 1021) and it is likely that educational prospects are also (Pérez-Vera 1982, 461). Separation from a sibling may constitute an intolerable situation (*B v K (Child Abduction)* [1993] 1 FCR 382). Generally, arguments concerning the inadequacy of the legal system of the requesting state will be disregarded (*Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349).

Criticisms of a strict interpretation

Article 13(1)(b) has been identified as the subject of inconsistent interpretation (Nakdai 2002, 255). Some critics argue that it has been interpreted too broadly by some courts (Moskowitz 2003, 588–90); indeed, the French appeals process has been said to be too liberal (Beaumont and McEleavy 1999, 155). More commonly, however, it is argued that the provision is unable to adequately protect children due to the stringent barriers imposed (Kaye 1999, 198–205). The merits of these claims will be considered below; however, it is imperative that the tension between the interests of the individual child and the summary-return mechanism is kept in the right balance — a balance evidenced between the minority and majority decisions in *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515.

Article 13(2)

One further exception is provided for in the Hague Convention Art 13(2):

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

A similar exception is found in the Australian Regulation 16(3)(c), where:

> ... each of the following applies:
> (i) the child objects to being returned;
> (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
> (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.

Akin to the Hague Convention Art 13(1)(b), this provision emanates from concern for the interests of the child (Pérez-Vera 1982, 433). This exception comprised a reasonable proportion of the cases in which return was refused in 1999 (Lowe et al 2001, 17), covering a range of ages as shown in Figure 4. There is evidence of an increase in reliance on this defence in resisting applications for return (Beaumont and McEleavy 1999, 201–02).

Figure 4: Ages of children objecting to return in cases of refusal of return*

Age (in years)	Number of children	Percentage
Under 6	1	4.7
7	0	0
8–10	6	28.6
10–11	8	38.0
12	0	0
Over 13	6	28.6
Total	**21**	**100**

* Adapted from Lowe et al 2001, 17–18.

A mature child

The Hague Convention recognises that children are not parental property but people in their own right, and are entitled to have their views taken into account in decisions relating to their welfare (Pérez-Vera 1982, 431). The inclusion of Art 13(2) was

justified on the basis that the Convention applies to children under 16 years (Hague Convention Art 4) and any stipulation of a minimum age for this exception would have been arbitrary. Article 13(2) was considered 'absolutely necessary' and is separate from the remainder of the provision, rendering the child's views decisive where he or she is deemed to have the appropriate maturity (Pérez-Vera 1982, 433). No risk of harm or intolerable situation is necessary (*Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392 at 397–98 per Hale J). There is no obligation upon a judicial or administrative authority to inquire into children's views (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 394 per Butler-Sloss LJ). However, once they have been raised, the authority is to judge, first, whether the child objects and, second, whether the child of the requisite age and maturity (*Re T (Abduction) (Child's Objections to Return)* [2000] 2 FLR 192 at 204 per Ward LJ). Once a child's objection as well as age and maturity have been established, the applicant may seek to provide evidence which would compel a return. However, this is a cumbersome task: if the child is 'of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will *not* be returned against his wishes unless there are countervailing factors which require his wishes to be overridden' (per Millett LJ in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 734).

Courts have been hesitant to stipulate a threshold age (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 729–30 per Balcombe LJ), yet it is unusual to base a refusal solely upon the objection of a child below age 11 (Lowe et al 2004, 362). The weight placed upon the objection may be proportional to the child's age (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 731 per Balcombe LJ). However, age and maturity are different concepts (*Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 825–26 per Waite LJ). In *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 at 203, Ward LJ stated: '[a] child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained the level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making.' In assessing the maturity of the child, regard will be had to the ability of the child to reason (*A v A (Child Abduction)* [1993] 2 FLR 225 at 241); the child's understanding of the situation and the available options (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 395); and the child's aptitude (*Urness v Minto* 1994 SC 249 at 259). Additionally, external circumstances may be relevant in order to determine whether the child's objections are valid (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 735 per Millett LJ). The judgment of the authority not only allows refusals to return a child to be based on the objections of quite young children (for example, ages seven and nine in *B v K (Child Abduction)* [1993] 1 FCR 382), but also permits a court to order a return against the desires of teenagers (*Marshall v Marshall* 1996 SLT 429).

A valid objection

Although it has been contended by Bracewell J in *Re R (A Minor: Abduction)* [1992] 1 FLR 105 at 108 that the child's objection must entail 'strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute', this has been rejected in favour of a literal interpretation without 'additional gloss' (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 at 250 per Balcombe LJ). The Australian Regulations, however, impose the former requirement, necessitating 'a strength of feeling beyond the mere expression of a preference or of ordinary wishes' (reg 16(3)(c)(ii)). The objection ought to be to returning to the country of habitual residence (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 at 250 per Balcombe LJ; *Commissioner, Western Australia Police v Dormann, JP* (1997) FLC 92-766); however, it has been accepted that a distinction between an objection to the country and to the left-behind person may be impossible for a child to make (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 per Butler-Sloss LJ; *De Lewinski and Legal Aid Commission of New South Wales v Director-General New South Wales Department of Community Services* (1997) FLC 92-737). Nevertheless, the case for applying the exception will be stronger where the objection relates to the requesting state (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242), such as difficulty assimilating to a culture (*S v S (Child Abduction)* [1992] 2 FLR 31) or a lack of confidence in the legal system (*Re M (A Minor) (Abduction: Child's Objections)* [1994] 2 FLR 126). The exception will not be made out if the objection amounts to a preference for the abducting parent (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 at 252 per Balcombe LJ) or a desire for the family to stay together (*Re Nicholson* 1997 WL 446432 at 446435 (1997)).

Little or no regard will be had to an objection which has been brought about through the persuasion of another person, such as the abducting parent (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242). However, it has been noted that it is unavoidable that a child will be swayed by the views of his or her parent, particularly in regard to litigation (*Urness v Minto* 1994 SC 249 at 259 per Lord Ordinary).

Changing perceptions of children

The Hague Convention entered into force in 1983. Since then, the general perception of children has evolved (Beaumont and McEleavy 1999, 177), particularly through recognition of children's rights, principally contained in the CRC. Article 12 ensures the right of the child to be heard in all matters affecting the child. While neither the CRC nor the Hague Convention binds an authority to judge in accordance with the child's views, the CRC ensures that the child is nevertheless heard, whereas the Hague Convention fails to impose this requirement (Beaumont and McEleavy 1999,

179; Lowe et al 2004, 357–58). English courts have tended to emphasise that inquiry into children's views is not necessitated (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 394 per Butler-Sloss LJ), while other courts have held that children must be heard in accordance with the CRC (*Hollins v Crozier* [2000] NZFLR 775). Specifically, German courts have a practice of hearing children's views (s 50bll of the *Law of Non-Contentious Matters;* Hutchinson et al 1988, 98–99).

There are policy reasons to maintain either a strict or a liberal interpretation of this provision. A broad reading is compatible with the CRC and an expansion of recognition of children's rights (Greene 2005, 142). Furthermore, it would prevent such situations as occurred in *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 and *Re F (Hague Convention: Child's Objections)* [2006] FamCA 685, in which return orders were made and the children refused to board the planes. To hear a child's objections does not compromise the purposes of the Hague Convention, as courts may exercise discretion in refusing to order a return (*De L v Director-General, NSW Department of Community Services* (1996) FLC 92-706). Conversely, a narrow reading protects the summary-return mechanism and prevents traversing the merits of the case. It prevents the child from feeling as though he or she must choose between two parents (*Robinson v Robinson* 983 F Supp 1339 (D Colo 1997) at 1344. Pérez-Vera 1982, 433), ensures the abductor is not manipulating the situation (Greene 2005, 140) and acknowledges that the child may not be in a position to assess his or her best interests (Greene 2005, 141).

Discretion to refuse to order return

The establishment of an exception will not ensure a refusal to order a return; rather, it provides the court with discretion in whether or not to order return. The Hague Convention Art 13 provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes [one of the exceptions discussed above] ...
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Coupled with Art 18, the authority is empowered to exercise discretion, once an exception is made out, as to whether or not to order the return of the child in light of the circumstances of the case. Examination of the contextual situation will aid the

authority both in determining the existence of an exception (Pérez-Vera 1982, 461) and in exercising discretion.

A similar discretion is afforded to Australian courts in reg 16(5) of the Australian Regulations:

> The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.

Aims of the Convention and the interests of the child

It is pertinent that return is limited to exceptional cases only (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242). There is a tension between the objectives of the Convention — namely, the prompt return of the child as provided for under Art 1 — and ensuring that decisions accord with the interests of the child involved. This was a tension foreseen prior to implementation of the Hague Convention (Pérez-Vera 1982, 428) and has plagued its application ever since (*Re A (Minors) (Abduction: Acquiescence) (No 2)* [1993] 2 FLR 396). In exercising its discretion, the authority must balance the aims of the Convention, the interests of the child and other relevant factors, such as any delay by the applicant: *Re S (Child Abduction: Delay)* [1998] 1 FLR 651. Waite LJ has suggested consideration of the following: the appropriateness of the forum to determine the child's interests; the potential result of custody hearings; the effect of the establishment of an exception; the consequences for the abductor if return were made; the likely reaction of the child upon return; and the policy of the Convention (*W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 219).

The objectives of the Convention in ensuring the prompt return of the child are twofold: to re-establish the pre-abduction situation; and to deter potential abductions (*Armstrong v Evans* [2000] NZFLR 984 at 1002 per Judge Doogue; Pérez-Vera 1982, 429–30). While a child's interests are to be considered, there is no obligation contained in the Hague Convention that they be treated as paramount (*Re A (Minors) (Abduction: Custody Rights) (No 2)* [1993] 1 FLR 396 at 404–05). Courts have decided cases differently: some in favour of the objectives of the Convention (for example, *Townsend v Director-General, Department of Families, Youth and Community* (1999) 24 Fam LR 495) and others in favour of the child's interests (for example, *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192).

The existence of an ultimate discretion of this sort is open to judicial abuse (Greene 2005, 128). Australian courts have noted that '[t]he robust presumption of return

requires courts to exercise a degree of self-denial with respect to an otherwise natural inclination to make its own assessment about the best interests of children who are currently in their jurisdiction' (per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *De L v Director-General, New South Wales Department of Community Services* (1996) 139 ALR 417 at 421). This sympathetic approach to the child's interests is met with near rigidity in emphasising the Convention's policy in other courts, such as the Outer House of the Court of Session in Scotland (*Cameron v Cameron (No 2)* 1996, SCLR 552 at 557 per Lord Ordinary) and the High Court in England (*Re K (Abduction: Child's Objections)* [1995] 1 FLR 977). Similarly, some cases have treated the discretion superficially — failing to mention it or dealing with it only in passing (for example, *Re C (Abduction: Consent)* [1996] 1 FLR 414) (Beaumont and McEleavy 1999, 131).

Conditional return

Attempting to strike a balance within this tension, it has become common (especially within common law jurisdictions) to order a return, accompanied by protective measures:

> Often the strength of the Convention's presumption in favour of return may outweigh, in the exercise of discretion, the finding that a particular exception has been established; and if an applicant's undertakings are accepted by the court these could well neutralise a defence that might otherwise have resulted in a judicial refusal to order return. [Caldwell 2001, 134.]

However, it must be noted that, although return is the usual response, the Convention did contemplate circumstances in which return would be refused (Beaumont and McEleavy 1999, 165) and this provision must be given a 'meaningful' application (per Fisher J in *S v S* [1999] NZFLR 625 at 632).

Undertakings regarding material allowances are common (*Re O (Child Abduction: Undertakings) (No 2)* [1994] Fam Law 651). For example, the provision of accommodation, babysitting services, medical care and support were required in *MG v RF* [2002] RJQ 2132. Likewise, return may be contingent upon the minimisation of an identified risk (noted in *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349 at 352 per Singer J), or upon certain events, such as overcoming immigration hurdles of the abductor (*Jabbaz v Mouammar* (2003) 226 DLR (4th)) or the filing of certain documents with a court (*Director-General, Department of Families, Youth and Hobbs* [2000] FLC 93-007). Furthermore, the assistance of Central Authorities (*KS v LS* [2003] 2 NZLR 837) or other judges (*Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422 at 428 per Thorpe LJ) may be deemed necessary in order to safeguard the child upon return.

Applications of discretion

Discretion is conferred upon the authority and accordingly may be exercised as the authority sees fit in the circumstances of the case. It is a moot point whether the authority may exercise its discretion differently depending upon the exception established (see discussion in *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 at 36). For example, a discretionary refusal to order the return of the child may be less likely where a risk of harm to the child is involved than where return poses no difficulty for the child. However, it is likely that a court will exercise its discretion to refuse return if more than one exception is established (*U v R* [1998] NZFLR 385).

In a case in which consent has been established, it has been noted that refusing return is compatible with the Convention's policy, as the removal or retention can be understood as not 'wrongful' (*Re K (Abduction: Consent)* [1997] 2 FLR 212 at 220 per Hale J). Thus, return is rarely ordered if consent is established (*Re C (Abduction: Consent)* [1996] 1 FLR 414 at 423 per Holman J). However, consent was found and yet return was ordered in *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24, the court emphasising that there was no difficulty for the children to return to the requesting state and that doing so avoided inconsistent orders between the two states. This is also the case with acquiescence (*Re A (Minors) (Abduction: Acquiescence) (No 2)* [1993] 2 FLR 396). Acquiescence was established and yet return was ordered in *Townsend v Director-General, Department of Families, Youth and Community* (1999) 24 Fam LR 495). Particularly in cases in which a grave risk has been established, it is unlikely for a court to order a return, due to the high threshold of the test (*Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64 at 69). Although it has been hypothesised that return could be ordered even if a grave risk has been found (*Cameron v Cameron (No 2)* 1996 SCLR 552 at 557 per Lord Ordinary), to date there are no known cases in which this has occurred (Lowe et al 2004). Indeed, where grave risk has been found, the discretion has been ignored or dealt with only summarily (*MacMillan v MacMillan* 1989 SLT 350). There is varied case law in regards to a child's objections and the exercise of discretion. On some occasions, the child's objection is overridden and a return order made (*Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 at 212); on other occasions, it is acknowledged that weight must be given to the views of a child of the requisite age and maturity (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 734 per Millett LJ). The approach of the courts of the United States has been criticised for too often ignoring the views of children, without explanation of grounds for doing so and rendering the provision empty (Greene 2005; notably, the US is not a party to the CRC). Conversely, Germany tends to inquire into children's views (Hutchinson et al 1988, 98–99).

Issues arising from the application of the exceptions

The tension between the interests of children generally (demanding return) and the interests of the individual child (often insisting upon non-return) is the source of

numerous difficulties. There are proponents for each side (Hague Conference on Private International Law 2001, 15 is optimistic, while Kaye 1999, 202–03 is not) and it is a fine balance struck within the Hague Convention (Pérez-Vera 1982, 428).

Some difficulties emanating from the Hague Convention

Changes since entry into force

It is necessary that courts are able to appreciate changes in factors affecting abductions in order to ensure that the interests of children are upheld (Gray 2003, 12). There are two notable variations since entry into force: an increase in recognition of children's rights; and a change in the characteristics of the likely abductor. The conjunction of rights, particularly as embodied in the CRC and the Hague Convention, is most notable in the context of child objections. Despite failing to impose an obligation to inquire into the child's views (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 394 per Butler-Sloss LJ), the Convention's objectives would not be compromised by so doing (*De L v Director-General, New South Wales Department of Community Services* [1996] 70 ALJR 932 at 939). The child's views are relevant whether the child wishes to stay or to return: 'Either a mature child's wishes are to be respected ... or they are not' (per Fisher J in *S v S* [1999] 3 NZLR 513 at 521). Where the states involved are EU states, the 2003 Brussels IIbis Regulation[3] Art 11(2) obliges courts to hear the views of the child, unless this would be unsuitable for the age or maturity of the child (Silberman 2005, 1080). Furthermore, the child's views regarding the state of habitual residence ought to be heard, supplementing the concept of 'settled in its new environment' in Art 12 and preventing return to states in which the child resided only briefly. Complemented by a requirement of six months' residency (suggested by Beaumont and McEleavy 1999, 263), these measures may ensure a 'real and substantial connection between a child and his place of habitual residence' (Beaumont and McEleavy 1999, 263).

Conversely, rights may be the basis for a return: the 'right not to be removed or retained' (Pérez-Vera 1982, 431). The right to contact with parents embodied in Arts 9 and 10 of the CRC may be relevant to the order of return. Even where a parent has no rights of custody under a state's law, he or she retains rights of custody for the purposes of the Hague Convention (*Re B (A Minor) (Child Abduction: Consent)* [1994] 2 FLR 249). Similarly, this right may be invoked in order to ensure contact despite living in different countries (Smith 2003, 341–59). The right is unsatisfactorily dealt

3 Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

with in this instrument (Nygh 2002, 74) and the Convention could be reframed by replacing the terminology of 'custody rights' and its inherent emphasis on the rights of parents with terminology of the rights of the child (Schuz 2002, 449–50). Further measures ought to be taken in order to ensure international access as provided for in Art 10(2) of the CRC (Beaumont and McEleavy 1999, 263). Although the status of the individual child is increasingly acknowledged in Hague Convention cases (Caldwell 2001, 134), there remain many cases in which this is ignored (Schuz 2002, 449–50) — particularly through a narrow construction of the grave risk of harm exception (for example, *Gollogly and Owen* (1989) 13 Fam LR 622; *Mahler v Mahler* (1999) 3 RFL (5th) 428 (Man QB); *AS v PS* [1998] 2 IR 244; *Starr v Starr* 1999 SLT 335; and *Nunez-Escudero v Tice-Menley* 58 F 3d 374 (8th Cir 1995)).

The Convention was drafted with a different abductor in mind: no longer are non-primary care-givers the majority, but primary carers make up 69 per cent of abductors (Lowe et al 2001, 8), principally these are mothers (Reunite International 2003, 5, 18). In part this is due to an increase in mothers fleeing domestic violence, as it has been found that domestic violence occurred in 54 per cent of relationships in which a removal or retention of a child occurred (Greif and Hegar 1993, 36, 272). It may no longer be in the interests of children to maintain a strict summary-return mechanism where domestic violence has initiated the removal or retention of a child, as it appears inappropriate to encourage the deterrence of abductions in such cases (Gray 2003, 12).

International cooperation

Indeed, claims of domestic violence by the left-behind parent against the abductor pose a difficulty for the operation of the Hague Convention, and such claims have been met by little sympathy from many courts and return is often ordered (for example, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930). Moreover, courts have emphasised the harm that the abductor has caused (*Re C (A Minor) (Abduction)* [1989] 1 FLR 403 at 410 per Butler-Sloss LJ) — an inappropriate response to a woman fleeing violence against herself and possibility the child (Kaye 1999, 197–98). The assumption that protection in the state of habitual residence is adequate (*Re H (Abduction: Grave Risk)* [2003] 2 FLR 141) can be misguided (Kaye 1999, 198–200). In practice, court orders are completely incapable of adequately protecting victims of violence (Bruch 1999, 40–41). Undertakings have been acknowledged and endorsed, despite lacking a legal basis (Beaumont and McEleavy 1999, 159), and no effective enforcement is practicable (*Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349; *McOwan and McOwan* (1994) FLC 92-451 at 80,691 per Kay J). Undertakings have been criticised for lacking compliance measures (Kaye 1999, 200–02), as they have been found to be broken in 67 per cent of cases (Reunite International 2003, 31).

Furthermore, undertakings are inconsistent across jurisdictions, as they depend upon domestic law (Silberman 2005, 1076). Undertakings can be lodged in courts in both affected states, as was ordered by Lindenmayer J in *Director-General, Department of Families, Youth and Hobbs* [2000] FLC 93-007.

Where a removal or retention has occurred between two EU states, the 2003 Brussels IIbis Regulation Art 11(4) prevents a court from refusing to order a return, despite a finding of a grave risk of harm, 'if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'. If return is refused, the requested state must provide the decision to the appropriate court in the requesting state (2003 Brussels IIbis Regulation Art 11(6)). While this ensures consistency within the EU, diversity remains across other jurisdictions. For example, in Australia an order of return was refused based on the grave risk of harm exception where a mother threatened suicide if she were to lose custody (*DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services* [2001] HCA 39; see further, Silberman 2005, 1079).

Where an exception based upon a grave risk of harm is established, there ought to be more reliance on the power to refuse to order return, reserving undertakings for cases in which exceptions are not upheld yet a risk of harm is nevertheless identified, for '[u]nless Contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that the Contracting States and courts will become reluctant to order the return of children' (per Kay J in *McOwan and McOwan* (1994) FLC 92-451 at 80,692). This would go further to ensure the safety of the child than employing a measure based on good faith. The Convention itself could address this issue to ensure consistency between jurisdictions (Gray 2003, 13).

International cooperation can also take the form of judicial collaboration (endorsed in *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422 at 428 per Thorpe LJ); however, this lacks facilitation mechanisms and may be unrealistic (Beaumont and McEleavy 1999, 170). Measures for international cooperation necessitate trust of other member states, their authorities and their custody orders. Articles 37 and 38 of the Hague Convention provide for an acceptance of accessions such that the Convention is in force only between states which have declared their acceptance of one another. In order to ensure that states are able to trust the mechanisms and processes within other states, a stringent process in the acceptance of accessions is required (Bruch 1999, 42, 48). Regrettably, acceptances are not always preceded by such careful examination (Bruch 1999, 41).

Further international cooperation can be attained through other treaties and

agreements, such as the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children and the European Convention on the Recognition and Enforcement of Custody of Children and on Restoration of Custody of Children 1980. Bilateral agreements also exist between the United Kingdom and Pakistan (2003); Australia and Egypt (2000); France and Algeria (1988); France and Egypt (1982); France and Lebanon (1999); France and Morocco (1981); France and Tunisia (1982); and Spain and Morocco (1997). A greater number of countries and instruments counteracting abductions decreases the number of available places of refuge for abductors (Bruch 1999, 38). These may provide further mechanisms with which to resolve abduction cases, such as allowing judges to make orders enforceable in other jurisdictions (provided for under the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children).

Additional international cooperation in ensuring consistent interpretation of the Convention would also be beneficial. While Australia has implementing legislation (the Regulations), the Convention has been incorporated directly into the domestic law of other states (for example, the UK *Child Abduction and Custody Act 1985*). Coupled with the inherent differences in legal systems, there will inevitably be varying interpretations of the Convention (Silberman 2005, 1079). Key terms of the Convention, such as 'habitual residence' and 'wrongful removal or retention', are given diverse meanings across jurisdictions, leading to differences in applications and uncertainty (see the discussion in Kay 2000 and Silberman 2005, 1080–81).

Issues with legal systems

The implementation of the Hague Convention is not uniform; rather, it varies in efficacy and interpretation (Nakdai 2002, 257). There are states in which the implementation of the Convention is commendable, such as the institution of specialised courts in England (Beaumont and McEleavy 1999, 260) and specialised judges in Germany (Nygh 2002, 69). However, there are other states in which legal mechanisms are deficient (Nygh 2002, 67), with a lack of implementing legislation (Nygh 2002, 68), delay (Beaumont and McEleavy 1999, 259) or courts with inadequate knowledge (Nygh 2002, 68). For example, Canada identified difficulties with training those involved in child abduction cases, data collection and discrepancy between provinces (Nakdai 2002, 256–57). Beyond levels of procedural efficacy, there is inconsistency in the interpretation and therefore in the application of the Convention (Nygh 2002, 70–71). This compromises effectiveness, allowing abductors the potential of choosing a state for its leniency.

Proposals for overcoming difficulties

Some difficulties are more easily overcome than others. The Special Commission represents states parties to the Convention and member states of the Hague Conference. It reviews the operation of the Convention every four years and delivers recommendations. The following may assist the facilitation of consistency and expediency: appointment, training and communication of liaison judges (Hague Conference on Private International Law 2001, 11, 13); expansion and utilisation of an international database of decisions (INCADAT, <www.incadat.com>); continued research (Hague Conference on Private International Law 2001, 14); adherence to 'key operating principles' (Hague Conference on Private International Law 2003, 9–11); reference to interpretation tools (such as the Pérez-Vera Explanatory Report, international jurisprudence, reports of Special Commissions and academic writings; Hague Conference on Private International Law 2003, 44–45); and ensuring periodical reviews (Hague Conference on Private International Law 2003, 51–54). Implementation could be more consistent were an international body or court created to decide cases. This is impractical due to the inherent delay that would ensue and the Special Commission is able to encourage consistency through dissemination of recommendations and international jurisprudence.

Central authorities ought to expand their participation in cases at all stages, building upon Art 7 of the Convention. Such measures may include promotion of resolution without referral to court; liaison; coordination of social welfare both during and after the proceedings; seeking compliance with any protection orders; and guaranteeing that substantive custody and/or relocation hearings are conducted (Beaumont and McEleavy 1999, 260, 265). Admittedly, investigation into how central authorities could secure these procedures is needed. Similarly, the role of independent organisations may improve efficacy through the provision of practical services. For example, *Reunite* (International Child Abduction Centre, <www.reunite.org>) provides advice to each parent, including available lawyers; collects and exchanges information; and trains professionals (Hutchinson et al 1988, 21–28). Central authorities and organisations should, therefore, provide further services during and after cases in order to ensure that return is not arbitrary but rather one stage in securing the best interests of the child.

Other issues are more difficult to surmount, specifically those relating to securing the best interests of the individual child. To relax the interpretation of Arts 1(b) and 2 is not the most satisfactory solution, since it would undermine the summary-return mechanism and weaken the deterrent effect. Abduction is not the solution to familial problems (Reunite International 2003, 46–47) and it, along with self-help and re-abductions, must be prevented. However, the Convention provisions may be modified in order to recognise practicalities, notably in regards to domestic violence.

To allow an exception solely on these grounds is problematic: not only is domestic violence difficult to define (Chamberland 2005, 75), it necessitates analysis of the merits and basis for abduction, potentially jeopardising the summary-return mechanism (Chamberland 2005, 75). Instead, a mechanism allowing the return proceedings to be stayed until custody is decided by a court in the state of habitual residence has been suggested as a way to overcome these difficulties (Weiner 2000, 698–703). Unfortunately, this not only complicates the custody hearing but causes delay, favouring the abducting parent in the Hague proceedings, and would not discourage abductions (Chamberland 2005, 76–77).

Therefore, it is pertinent to consider whether the purposes of the Convention remain relevant over a decade after its implementation. In the interests of children, abductions need to be avoided. Abduction does not solve familial problems; it merely moves them (Reunite International 2003, 46–47). Though discussion of the exceptions is constructive, it is necessary to remember the large number of children for whom return is suitable. In the absence of clear evidence otherwise, the summary-return mechanism ought to remain: it is beneficial for the majority of abducted children and has the greatest deterrent effect.

Balancing the tension

Although success is not easily determined (Beaumont and McEleavy 1999, 261), the Hague Convention has been held in high regard (Dyer 2005, 66–67). The tension between the interests of children generally and of the individual child is palpable. It is not simply a choice between preventing abductions and upholding children's rights (Schuz 2002, 451–52): rights enter both sides of the argument. Abductions give rise to a complex mix of emotional, psychological, practical and legal considerations. It is imperative that the sorrow of abductions is not lost in examining the exceptions and also that re-abductions are not the alternative to return. The balance must be tread finely: all considered, the Hague Convention provides this favourably.

Thus, the Convention itself ought to remain as it is with a potential reframing of the use of 'custody rights'. This does not alleviate the necessity of regular review and monitoring. Furthermore, ancillary measures ought to be strengthened or implemented. Three measures involve the judicial or administrative authority. First, children's views ought to be elicited (through social services, court representatives or the central authority). The weight given to them in proceedings would be discretionary; however, this measure would ensure compliance with the CRC and consistency across jurisdictions. Second, a definition of habitual residence ought to be supplied by the Special Commission to ensure its consistency and relevance to the individual child. Third, protection orders and undertakings ought to be used more

sparingly. If an exception is established, there ought to be a stronger presumption of non-return, rather than resorting to conditional return which so often exacerbates the original pre-abduction problem.

There are also three measures on a governmental and administrative level that ought to be taken. First, awareness of international jurisprudence and specialised training ought to be increased. In particular, the introduction of specialist judges and courts would be beneficial. This should enhance consistency and expediency. However, this may not be feasible, given the relatively small number of cases per year — for example, in Australia there were 162 abduction and access applications received in 2005/06 (Attorney-General's Department 2006). Second, expansion of the role and participation of central authorities and organisations should be encouraged in order to secure the interests of the individual child on a case-by-case basis. Third, governments should seek to secure agreements and treaties to ensure the consistent operation of the Hague Convention.

These recommendations attempt to ensure that the balance between a summary-return and recognising the interests of the child is upheld in a practicable way.

Conclusion

The operation of the Hague Convention is commendable. The exceptions have been interpreted strictly, giving rise to imperfections and discrepancies in the treatment of the interests of the individual child. However, this strict approach has achieved the prompt return of the majority of children in accordance with the aims of the Convention and the interests of children generally. While the Convention may be imperfect, it is difficult to conceive a more satisfactory mechanism to balance these interests. With minor adjustments, the Convention ought to continue in its present form, with regular review, monitoring and research. ●

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