

Hague Convention cases under the Family Law Act

In the course of my former employment, I have not infrequently received calls from distressed mothers¹ who have been ordered by the Australian Family Court to return their children to the country in which they were habitually resident prior to their wrongful removal to Australia.

Most of these mothers are Australia citizens or residents² returning after a failed marriage overseas. Often they are not aware that they should obtain a court order in the country where they have been living before bringing their children back with them to Australia. A significant number of these women are fleeing from domestic violence and a situation in which they have no family support.

The Application for the return of the children to their country of habitual residence is technically brought by the State or Territory of Australia in which the child is currently located because these applications are brought in fulfilment of Australia's obligations under the Convention. The application is brought however for the benefit of the left behind parent, overwhelmingly the father, in the country from which the child was abducted.

The legal costs of the Application are borne entirely by the Commonwealth in accordance Australia's obligations under the Convention. This source of funding is not means tested.

The lawyers running the case for the Applicant are, in NSW, lawyers from the Department of Family and Community Services, which has a dedicated unit for dealing with these cases and access to barristers who have developed expertise in this arcane area of the law. A similar situation pertains in other states and territories.

The abducting parents, generally the mothers, find themselves in a situation, which, can only be characterised, as desperate.

Because this is quite a technical area of the law, the abducting parent may well have a defence but because they are not familiar with the Convention they do not adequately set that defence out in their application for legal aid. Consequently although they might qualify financially for legal aid, they are routinely excluded on the basis of merit.

Given the limited financial resources available, one can hardly blame Legal Aid Commissions for not taking on cases, which, in all probability, will not succeed in court.

¹ Lowe, Nigel and Stephens, Victoria *Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report — provisional edition, pending the completion of the French version*, Paragraph 37 and paragraph 42.

² *Ibid* paragraph 45.

But where does this leave these young women and their children? If they scrape together enough money to consult a private solicitor and are lucky enough to be referred to one with expertise in family law, the solicitor is unlikely to have a good working knowledge of the Convention and precious financial resources are wasted on trying to mount untenable defences rather than on negotiating orders and making arrangements which will facilitate an untraumatic return of the child.

The lack of expertise in this area is not a criticism of family law solicitors, there simply are not enough cases each year for most practices to develop any expertise and because these cases are expedited in the Family Court, it is hard to get up to speed in the time available.

Consequently most of these abducting parents, these young women, have to personally front up as the Respondent in court proceedings with inadequately cobbled together documents and no knowledge of court processes. If they do find the money to fund a solicitor to represent them, the solicitor will for the most part be unfamiliar to this area of practice. On the other hand a well-informed expert solicitor and barrister, who have had extensive experience in these cases, will represent the overseas father. This representation will be at no cost to the father.

When orders are made for the return of a child as they most often are, the young woman is still without help in understanding exactly what the orders require of her and perhaps more importantly how she can make proper arrangements so that she and her children can be returned to the country of habitual residence in an un-traumatic way.

If a compassionate judge, and most of them are compassionate, has made orders or more commonly notations requiring the father to do certain things such as provide the money for the return ticket, make provision for accommodation and financial support of the mother and child in the country to which they are returning, the young woman will be at a loss about how to get these measures in place before she returns to the overseas country.

Unless the Australian orders can be registered in the country to which the child returns, they are not then enforceable in that country. Even if there is a process for registration of the Australian orders the young woman will still be without funds and resources to get them registered and then enforced in the overseas country.

So the mother will arrive at the airport of a country of which she is usually not a citizen, to be met by the father who is often armed with an ex parte order for custody and who will take possession of the child at the airport.

The abducting parent will then find herself in the very situation which the 1980 Hague Convention was set up to avoid, that is alone in a country in which she may not have any financial resources, often with a precarious right to reside and often with no right to work even if she could immediately find work.

Of course she should never have abducted the child in the first place. That is right, but is the resulting distress caused to the child who may be brusquely taken from the parent who has been principally responsible for her care since birth and let us not mince words, from her mother, into the care of a parent whom she will not have seen for several months or longer and who is commonly very angry and unco-operative, is that distress justified by the unthinking and ill advised actions of the child's mother?

There is plenty of inequity in family law and parties with very different financial resources behind them are not of themselves uncommon. What moves this particular situation out of that paradigm is firstly that the Australian government is funding one of the parties and secondly that the usual resources such as legal aid are not available to step in on the side of the more vulnerable party. It is the children feel the consequence of this situation.

The Convention was set up in order to avoid distress to children suddenly removed from all that they know and being taken to another country. The paradigm, which the drafters of the Convention had in mind, was of a non-custodial father snatching a child and taking her back to his country of origin. The reality is quite different. Approximately 70% of abducting parents are mothers who have the day-to-day care of the child. So while the abduction does mean that the child is separated from their father, there is usually no break in the continuity of day-to-day care received by the child. As a result the original abduction is often less traumatic than a poorly organised return ordered by the court. Such a return may result in the sudden removal of the child from her principal carer and placement in the care of an angry father with whom she has had little contact for months and often longer.

If the 1980 Hague Convention is to survive in the twenty first century it must address this gaping hole in the otherwise very efficient system for ensuring that decisions about children's lives are made in the country of their habitual residence.

Requiring that the Commonwealth to fund both sides of litigation may seem a waste of money but if this can produce faster and fairer resolution of these cases and reduce the trauma, which these children often suffer upon being returned to their country of habitual residence, then it is money well spent.

Please consider making a recommendation, which would require the government to

- Provide a specific legal service to assist abducting parents to obtain free legal advice similar to the service funded by the Commonwealth Government and currently provided by International Social Services Australia for left behind parents. This service would inter alia
 - Advise abducting parents as to their specific circumstance
 - Assist abducting parents to make application for means tested legal aid
 - Act as a referral service so that if the matter proceeds to court the parent would be referred to lawyers with expertise in Hague convention cases.

- Amend the law to require compulsory counselling for parents along the lines of that currently required to commence child related proceedings under the *Family Law Act, 1975*.
- Provide separate legal representation for children involved in Hague Convention proceedings.
- Provide mandatory counselling for children involved in Hague Convention proceedings, including children returned to Australia from overseas
- Provide means tested legal assistance to abducting parents to negotiate the practical conditions of return if a return is ordered

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