

International Parental Child Abduction

by Victoria Miller

Introduction

Let me begin with a number of names: Sarah Payne, James Bulger, Milly Dowler, Madeleine McCann. All of those crimes had one thing in common; the kidnapping of children.

Kidnapping, just how far back does it go? It has been with us since biblical times. The Book of Genesis; Joseph kidnapped by his brothers and sold into slavery. So what was it that caused the rise of kidnapping in the 1960's? Air travel. And why was that? Because it meant that people could travel quickly from one place to another. And its not just air travel. It is the reduction of border checks and controls as well.

There is something about the crime of kidnapping that society finds vile. Look at what Buckley LJ said in the case of *Re L (Minors)* [1974] 1 WLR 250 at 264 – “To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts which are likely to be psychologically disturbing to the child”

But when you add to the mix the fact that the child may never see his other parent, family or friends again, that makes the crime far more severe. Therefore let us be clear: the wrongful removal or retention of children is a form of child abuse.

Civil Aspects

Before the 1980's the law about kidnapping children overseas was a jungle, and then came the instrument that chopped down that jungle: the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

So this monumental Convention was drafted by the Hague Conference with the participation of Member States. The only reason that the convention has worked is because of the numbers game. Obviously if a Convention only attracts a small number

of States it cannot be very effective. However, this Convention has attracted an ever increasing bunch of Member States conscientiously pursuing its objectives.

When we ratified in 1985 there were only 5 Member States. By 1988 the number had risen to 50 and now stands at over 81. Astonishingly, three other countries are planning to join; the world's biggest democracy, India, the world's oldest civilisation, China, and the world's 3rd largest economy, Japan.

I must emphasise that the Hague Convention only deals with the civil aspects of child abduction; it provides a hot pursuit remedy leading to the summary return of an abducted child. The application does not involve any investigation into the welfare of the child. Once the abduction has been established then the duty of the Court is to return the child to the State of habitual residence to enable any welfare issues to be investigated and dealt with in that State. The court determining the return application is not concerned with the wider issues and to investigate them or to weigh them in balance is to trespass upon the territory and responsibility of the court of the child's habitual residence.

There are two aspects to child abduction:

- 1) Wrongful Removal (kidnapping)
- 2) Wrongful Retention (failure to return the child at the end of a holiday visit)

Although the duty to order summary return is general, it is not absolute since the Convention recognises a number of exceptional defences. The essential element of the successful application is the wrongful removal or retention at a time when the applicant was exercising rights of custody. Rights of custody are not specifically defined but may, at a minimum, amount to contact together with a restriction on the other parent's right to relocate abroad without consent or order of the court.

Thus, since the Convention is solely concerned with civil aspects the police will seldom be involved in its process although location orders are frequently made to trace abducting parents who have gone into hiding and the UK police may exceptionally be invoked in locating the abductor and child. Border controls are also

fundamental in preventing further flight when a port alert has been issued by the Judge.

I turn now to consider the risks and dangers for children who are abducted to a country that does not apply the Hague Convention.

The most malign abductor plans to terminate the relationship between the child and its other parent absolutely and permanently. Some abductors very deliberately hop from one Hague State to another; from France, to Italy, to Spain. And what is their objective? To cut off all ties between the child and its parent. This can be achieved because a move frustrates the enforcement of a return order in the state first engaged since it will not be enforceable in another contracting state. The left behind parent is faced with the prospect of commencing a second return application in the state where the child is now present. How clever and cunning these villains are. However, this evil can be stopped by immobilising the abductor in the state of first flight by confiscation of passports and by port alerts.

However, another technique of the malign abductor is to flee at once to a deliberately chosen state that does not apply the Hague Convention. The chosen state is likely to be an Islamic jurisdiction. Once arrived there the abductor anticipates successfully resisting any legal process that would result in the return of the child and frequently anticipates that he (for it is usually the father) will successfully obstruct any further direct contact between child and mother. These are amongst the most tragic cases that a judge will encounter. The prospects for the mother, robbed of the relationship with her child, is truly tragic and the judge in such a situation can only contemplate hopelessness as empty orders are made that have no realistic chance of enforcement in the state where the child is held captive.

So the question is, what has been the response of the international community to these most tragic cases?

The United Kingdom has endeavoured to promote bilateral agreements for the return of children with countries with which we have long standing connection, namely Pakistan and Egypt. The judicial agreement with Pakistan was launched as the

Pakistan Protocol and the agreement with Egypt as the Cairo Declaration. These two agreements are based on the same premise, namely that the state of the child's habitual residence has primary jurisdiction to decide matters of welfare and accordingly the child abducted from that jurisdiction should be returned there expeditiously.

The practical impact of these two agreements will be much enhanced when each is incorporated into domestic law. Without that certainty there will always be challenges to the constitutional propriety of jurisdictional rules crafted by the judiciary and not legislated by the parliament.

Criminal Aspects

I turn now to consider the criminal aspects of child abduction as in many jurisdictions the abduction of a child has also been criminalised by legislation.

In the UK we have the Child Abduction Act 1984. Under Section 1 of the Act it is a criminal offence for any person connected with a child, to take or send the child out of the United Kingdom without the consent of any other person who has parental responsibility for the child. Thus, it is not a criminal offence where the removal is to another part of the UK.

The term 'connected with a child' is defined in the Act and includes the parents or guardians of a child and anyone who has parental responsibility for the child. However, this does not prevent a person who has a Residence Order (under Section 8 of the Children Act 1989) in respect of the child, to then take the child abroad for a holiday so long as it is for a period of less than 4 weeks, otherwise they will require the consent of those with parental responsibility or consent of the court.

There are defences to a charge under Section 1 of the Act and the burden of disproving the defence falls, of course, on the Prosecution which may not be unproblematic. The Act also enables one parent to try to stop the other from abducting since it is an offence to attempt to take a child out of the United Kingdom. The police can arrest without a warrant anyone they reasonably suspect of attempting to take a child out of the United Kingdom.

If abduction takes place, the fact that a criminal offence may have been committed will lead to police involvement, which in turn may assist in the recovery of the child. However, difficulties are sometimes encountered in locating children in the UK as a result of steps taken by the abducting parent to keep their location hidden.

Where a police officer has reasonable grounds for suspecting that a person is attempting to commit, or is about to commit, an offence of abduction, the officer may arrest him, thus preventing any abduction before it can take place. If, following the commission of a criminal offence, the child is removed from the UK, extradition proceedings may then be commenced where an extradition treaty exists with the country to which the abductor has gone. However, extradition can only require the return of the alleged offender, not the child; although in many cases the child may also, for practical reasons, return with the abducting parent.

Criminal prosecution can play a significant role in international child abduction cases. However, it can be a double-edged sword. It may deter an abductor from returning with the child to the home state. Some courts use the possibility of criminal prosecution against an abducting parent as a reason not to order a child's return. It may also deter any hope of a workable conclusion to an unlawful removal case and could be detrimental to the child's wellbeing if a parent is imprisoned. As a result, the Court will often accept an undertaking from a person seeking the return of a child not to institute or support the initiation of criminal proceedings, arising out of the removal, against the abductor. Therefore the criminal law needs to be used sensitively and sparingly and thus it is rare for a prosecution to be launched.

Office of the Liaison Judge

Finally I would like to say a few words about the Office of the Head of International Family Justice for England and Wales and its role in achieving the return of abducted children.

The post of Head of International Family Justice, filled by Lord Justice Thorpe, was created by the Lord Chancellor and the Lord Chief Justice in January 2005 in order to

recognise and keep up with the growth of International Family Justice, in particular, child abduction. Primarily we are a judicial liaison office.

International judicial communication and collaboration is essential to abduction cases where often there are numerous courts involved in different jurisdictions. The importance of direct judicial collaboration in achieving the objectives of the Convention (whether to order return, or to refuse return in those rare cases where a defence has been established) can hardly be exaggerated. Direct international judicial communication on a case-by-case basis untangles many knots.

As lawyer to the Head of International Family Justice, it is my job to deal with all of the international enquiries and requests which come into the office. We are able to make diplomatic contact with judges from other jurisdictions with which we see a high volume of child abduction cases. With which jurisdictions do we work with the most? Germany, Spain, France, The Netherlands, Czech Republic, Portugal, Malta, Canada, India and Pakistan.

Whilst the cases that we deal with are never 'happy' ones, we have at least had excellent results with regard to speeding up the process, in keeping with the spirit of the Hague Convention. Equally, there are some Hague Convention jurisdictions that we still find it difficult to communicate with.

As an example of the work load this office handles, since formally taking over this post in August last year, I have dealt with over 100 separate international cases. Each case may take anything from 1 day to 1 week for the query or request to be 'resolved'. Most of the cases can only be 'resolved' for the time being in any event, as child abduction matters, by their very nature, tend to be complex and long-running. Thus as each case progresses, the intervention of this office may well be required again. To illustrate, of the 100 or so initial enquiries, all but 25 or so remain as "ongoing concerns".

To give an example of a case that I have dealt with recently, we received a request from a judge in this jurisdiction to contact the Judge in South Africa where the child had been abducted. The case was somewhat sensitive in that the social services in the

UK helped the Mother to abduct the child to South Africa. As a result the South African Courts were refusing to make a return order. Therefore the judge in this jurisdiction required our help in communicating to the South African judge that despite social services involvement the child's removal from the UK was wrongful. As a result of this the child is due back in the UK imminently.

There are lots of different people working to combat child abduction, whether it is the lawyers, the judges, or the police but we cannot achieve anything alone. We all have the same common goal, we are all working to the same end and, in reality, the practicalities call for an incredible amount of administrative and collaborative work. We have got to pull together, we have got to work together and we have got to combat this together.