

When the 1980 Hague Child Abduction Convention Does Not Apply: The UK-Pakistan Protocol

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The 1980 Hague Child Abduction Convention is an extremely successful instrument. There are currently 81 State parties to the Convention (see http://www.hcch.net/index_en.php?act=conventions.status&cid=24). This means that, in most cases concerning abductions between those 81 State parties, children who are wrongfully removed or retained from their States of habitual residence will be returned there forthwith. The exceptions to the duty to return are narrow and, within Europe, have been narrowed still further by the coming into force of the revised Brussels II Regulation (BIIR) in 2005. 'Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility' came into force on 1 August 2004, applied as from 1 March 2005 and repeals Brussels II (Council Regulation (EC) No 1347/2000. It applies to all EU States except Denmark.

Although there are occasions where it can be argued that international child abduction can be justified in cases where the abduction has occurred against a background of violence and/or abuse. See, for example, M Freeman, (1998) 32(3) *Family Law Quarterly* 603 and also M Freeman, 'Primary carers and the Hague Child Abduction Convention' [2001] IFL 150 in which I refer to the Procès-Verbal No 18 (Acts and Documents of the Fourteenth Session of The Hague Conference on Private International Law, Tome 111, 'Child Abduction' in which at p 386 there is a discussion about the situation where an abduction was found to be in the child's best interests and not harmful. See also Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38(3) *Fam Law Quarterly* where research has shown that the effects of abduction are serious and long-lasting and, where possible, abductions should be avoided: as the statistics demonstrate that international child abduction continues to be a growing problem, the 1980 Hague Child Abduction Convention is a very useful tool in achieving that aim. My thanks go to Matt Wood and Victoria Damrell of the International Child Abduction and

Contact Unit for providing and discussing the recent statistics of that unit which show an increase in the overall number of return cases being dealt with by ICACU from 344 in 2006 to 369 in 2008. The outgoing cases have increased substantially during those years from 153 in 2006 coinciding with the economic downturn, to 181 in 2008. Incoming cases have slightly decreased from 191 in 2006 to 188 in 2008. The reunite statistics indicate that 164 Hague abduction cases were dealt with in 2006 and 186 in 2008, again demonstrating the increasing trend in such cases.

However, there are many jurisdictions which are not parties to the 1980 Convention. This means that abductions between these jurisdictions, or between jurisdictions where only one of the countries is a State party to the 1980 Hague Convention, will not be governed by its provisions and will, instead, be subject to the domestic law of the abducted-to State under which the left-behind parent will need to seek the return of his or her child. The left-behind parent will be faced with significant hurdles in that task, not having the benefit of the Central Authority system which is inherent in the Hague process, having to find a reliable lawyer who is conversant with such cases and who is familiar with the language of the left-behind parent who may not speak the local language, having to fund the litigation in circumstances where legal aid is unlikely to be available, and to do all this in a legal system which might be predicated upon principles which do not provide for the return of the child to someone of a different race, religion or nationality.

Non-Convention Countries

Why, when the 1980 Hague Convention has attracted so many members, contains an attractive Central Authority system under which assistance is given to left-behind parents seeking the return of their abducted children, where legal aid and free representation may be available in the abducted-to country to pursue the Hague Convention litigation for return of the child (for example England and Wales), are there still jurisdictions, and many of them, which have chosen not to 'join the club'?

This may be answered directly by reference to the title of the conference at which the paper upon which this article is based was delivered – because of 'Family Law in a Multicultural Environment', ie the world, and because of 'Civil and Religious Law in Family Matters'. Eighty-one countries seems a lot:

Features

that is, until you start to consider which countries are not parties to the Convention. Although it is difficult to find an agreed number of countries in the world, there is something like double the number of those which are parties to the 1980 Hague Convention. Countries like Egypt, Morocco, Tunisia, Algeria, Lebanon, India, Pakistan, are not parties to the 1980 Convention. These countries, however, are certainly not immune from the growing trends in international child abduction. The Foreign and Commonwealth Office reports a steady increase in incidence of these cases. The reunite statistics show that there were 129 abduction cases to non-Hague countries reported to them during January-December 2008. The highest number of cases within that overall total involved India (11 cases), the next highest involved Pakistan (9 cases), followed by Nigeria (8 cases), Dubai (6 cases) Jamaica and Thailand (5 cases each). In 2006 the reunite statistic show that there were 105 abduction cases to non-Hague countries; in 2007 there were 119 such cases. Again, it is notable that this shows a steadily increasing trend. Cases occur frequently between these countries and other Hague Convention jurisdictions. What happens in such cases?

It is extremely difficult to reconcile the differences in approach to the issue of child custody where a parent from a secular legal system, and a parent from a religious legal system, separate or divorce. The allocation of custody and guardianship of the child will depend on the relevant law of the legal system governing these issues and, even where Islamic law applies in the jurisdiction concerned, these issues will depend on the particular tradition of Koranic law followed in that jurisdiction: reunite has established an Islamic Information Resource which includes an overview for 40 selected countries summarising information on the structure of the court system, paternity and legitimacy, custody, guardianship, nationality, leaving the jurisdiction, international law and child abduction. Copies of key legal texts are provided at:

http://www.reunite.org/pages/islamic_information_resource.asp.

The rights and duties of each parent will relate to both the gender and age of the child. For example, according to Hanafi jurisprudence (applicable, for example, in Pakistan for the majority Sunni Muslims) the mother has the most right to custody, which lasts until a male child reaches 7 years of age and a female child reaches puberty. In Jaafari jurisprudence (applicable in, for example, Iran for the majority Shia Muslims) the period of custody continues until a male child is 2 and a female child is 7. The mother would lose custody if she removed the child at a distance away from the guardian so as to make it impossible for him to fulfil his duties as guardian of the child. The natural guardian of the child is the father. For this reason it is difficult for a non-Pakistani mother to get custody of a child that she intends to raise outside of Pakistan (see:

<http://www.reunite.org/edit/files/Islamic%20Resource/Pakistan%20text.pdf>). In Tunisia, the dominant

school of Islamic jurisprudence is Maliki, with some input from the Hanafi School as a result of Ottoman influence in the region. In Maliki jurisprudence the mother has custody of female children until they marry and male children until they reach puberty, the maximum age for puberty in males being set at 15 years. In Shaafi jurisprudence (applicable in Bahrain in addition to the Shia Jafaria and Maliki schools), the mother would have custody of her children until they reached the age of discretion, the minimum age for this normally being set at 7 years after which the children would have the choice of remaining with the mother or going to live with the father.

There have been attempts to address the problems through bilateral agreements between States which are not parties to the 1980 Hague Convention. Examples of bilateral agreements are those between Australia-Egypt (2000), Belgium-Morocco (1981), Belgium-Tunisia (1982), Canada-Egypt (1997), Canada-Lebanon (2000), France-Algeria (1988), France-Egypt (1982), France-Lebanon (2000), France-Morocco (1983), France-Tunisia (1982), Sweden-Egypt (1996), Sweden-Tunisia (1997), Switzerland-Lebanon (2005) and USA-Egypt (2003). It is notable that there are 4 such agreements involving Egypt). These were the subject of a research paper by Gosselain 'Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States' (Preliminary Document No 7 of August 2002) for the attention of the Special Commission of September/October 2002) which was commissioned by the Permanent Bureau to identify some of the special issues which arise in relation to international abduction and cross-frontier access/contact cases where one of the countries concerned is an Islamic State (Gosselain, p 4). These agreements are specific to the State parties and may take different forms, some very basic, some more complex. Gosselain concludes at p 27 that:

'[B]ilateral conventions in this field operate with difficulty . . . [w]ithout a relationship of confidence between the authorities, no system of co-operation can be effective . . . [B]ilateral co-operation is an elementary and useful legal framework serving on the other hand as a channel of information and communication between authorities, and on the other hand in some situations rendering possible . . . the return of the child and the arrangements for access across international borders.'

It must be said that reunite has found that bilateral agreements are, generally, ineffective. Certainly, this has been the experience with the Swedish-Tunisian bilateral agreement where it appears that it was not possible to achieve success for contact in any of the nine cases which were the subject of negotiations under the agreement between delegations from the respective parties to that agreement.

The UK-Pakistan Protocol

One bilateral agreement which has been of particular interest has been the UK-Pakistan Protocol on Children Matters 2003, executed between the UK and Pakistan, which is not a party to the 1980 Hague Child Abduction Convention. The Protocol came into being because of the rising trend in abduction cases between the two jurisdictions, and the severe difficulties that parents encountered in securing the return of their abducted children when this occurred. The Protocol, in fact, resulted from a judicial initiative and is a judicial agreement. It does not have the force of law in either country. It sets out guiding principles which include those which are reflective of those in the 1980 Hague Convention in that it wishes to protect children of the two jurisdictions from what it accepts to be the harmful effects of abduction. The Protocol continues by agreeing that the welfare of a child is normally best determined by the courts of the child's habitual residence; that jurisdiction will not ordinarily be exercised by a judge of the court of the country to which the child has been removed without the consent of the parent who is required to give consent; that applications under the Protocol should be decided expeditiously. The Protocol recommends that urgent consideration is given to establishing an administrative system like that of the Central Authorities under the 1980 Hague Convention, and that liaison judges be appointed in both jurisdictions (the latter has occurred subsequently, but the former has not).

I conducted a research project for reunite and the Foreign and Commonwealth Office to enquire into the way in which the Protocol is working in both jurisdictions (see the Pakistan Protocol Report at www.reunite.org and [2009] IFL 84). We sent questionnaires to firms of lawyers in both jurisdictions, and considered orders in 86 cases which were kindly provided by the UK liaison judge, Lord Justice Thorpe, as well as documents in some, but not many, Pakistani cases which were provided by the British High Commission in Islamabad. The quantitative differential was indicative of a major problem with the working of the Protocol – it is not well used in Pakistan. This is mainly due to the Protocol not being part of Pakistani law. Although it is not part of UK law either, we understand that it is not considered necessary to incorporate it as there is no conflict between domestic law and the provisions of the Protocol. This is not the same as in Pakistan which operates under Sharia law which creates specific challenges for the implementation of the Protocol which, therefore, requires support through legislation. This was discussed at a Panel Session Meeting at the Royal Courts of Justice on 13 February 2006. If a child is wrongfully removed from Pakistan to the UK, or wrongfully retained in the UK, a Pakistani parent will not, it seems, seek an order from the Pakistani court under the Protocol, having no expectation that it will be granted.

The scheme envisaged by the Protocol is that the left-behind parent must instruct lawyers in the

abducted-to State to institute proceedings for the return of the child. The President's Guidance to Judges on the Implementation of the UK-Pakistan Judicial Protocol on Child Contact and Abduction, 21 May 2004, para 11 states: '[i]t is important to note that the Protocol differs from the Hague Convention in that there is no system of enforcement through a central authority. Furthermore, there is no automatic procedure for a mirror order to come into existence in Pakistan when a UK court order is made. Accordingly, if a child is wrongfully taken to or detained in Pakistan in contravention of a UK order, it will ordinarily be the responsibility of the aggrieved party to institute proceedings in the Pakistani courts to obtain compliance . . . it is the enforcing party who has to instruct Pakistani lawyers and obtain an order from a Pakistani court' The same would be true in reverse. The high costs of pursuing proceedings in the UK are prohibitive for most left-behind Pakistani parents which means that, in circumstances where the child has been abducted to the UK, other methods of securing the child will be pursued, for example, family or elder influence.

The Protocol is better used in the UK, especially for 'holiday orders', that is orders which provide for the temporary removal of a child to Pakistan, for example, for the purposes of a holiday or family function. These orders provide for the removal and return of the child on certain dates. These orders, in general, seem to produce the desired outcome in that the children are usually returned without problem. However, our finding was that this was due largely to the fact that those parents who seek such an order are those who always intended to return the child. We believe, therefore, that the Protocol operates as a deterrent by default but that these may not be the cases where the most effective remedies are required. Where, for example, return orders are made under the Pakistan Protocol by the UK courts in respect of children who have been abducted to Pakistan, or wrongfully retained there, parents are unable to enforce those orders in Pakistan as the Protocol does not have legal effect there. These parents are left to finance litigation in Pakistan, there being no legal aid in that country, under local laws, often using the remedy of habeas corpus. During the research, we were unable to find any case where the child had been returned as a result of an order made under the Pakistan Protocol. Judges are currently able to do little more in Pakistan than to 'have in mind' the Protocol when making orders.

We made recommendations in the report regarding the need for a system of case recording and monitoring to be introduced, a programme of awareness to be undertaken for practitioners and judiciary in both jurisdictions, the development of a specialist network of lawyers in Pakistan and the UK willing to undertake cases involving the Protocol on a pro bono basis, the introduction of legislation to support the operation of the Protocol, and the undertaking of scientific research once the suggested measures have been implemented. We are very

pleased that an initiative, which is being funded by the Foreign and Commonwealth Office in partnership with reunite, and which is based on the reunite specialist model of mediation, is now being pursued between the UK and Pakistan for the introduction of a mediation project in abduction cases.

The Malta Process

Bilateral agreements are often expressions of willingness to co-operate but, without proper structures to support them, they remain just that. It is doubtful whether these agreements, in their present form, are the answer to the problems faced in non-Convention cases. More is required to deal with the serious problems of child abduction between States which are not parties to the 1980 Hague Convention.

These issues have been addressed within what has become known as The Malta Process – a process of non-binding dialogue. In 2004, 2006 and 2009, judges and experts met in Malta to discuss how to secure better protection for cross-frontier rights of contact of parents and their children and problems posed by international abduction between the States concerned. The 2004 meeting, ‘The Malta Judicial Conference on Cross-Frontier Family Issues’ hosted by the Government of Malta in collaboration with the Hague Conference on Private International Law, resulted in a declaration which was accepted to be non-binding but which was hoped to inspire, although not to replace, possible bilateral or other arrangements between States. The declaration affirmed the principles of the United Nations Convention of the Rights of the Child 1989 as a basis for action. The 2009 meeting considered the development of a more effective structure for the mediation of cross-border family disputes involving a State party and a non-State party of the 1980 Hague Convention (see further the report by the Permanent Bureau at [2009] IFL 118).

One of the recommendations was for the establishment of a working party under the aegis of the Hague Conference to draw up a plan of action for the development of mediation services to assist where appropriate in the resolution of cross-frontier disputes concerning custody of and contact with children. The Hague Conference on Private International Law has considered mediation in terms of both international child abduction and wider cross-border matters, see Vigers, Preliminary Document No 5 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Note On The Development Of Mediation, Conciliation and Similar Means To Facilitate Agreed Solutions In Transfrontier Family Disputes Concerning Children Especially In The Context Of The Hague Convention Of 1980. The note focuses on the use of mediation in international child abduction cases. The 1980 Convention does not specifically refer to mediation

but requires central authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues. However, Vigers discusses the inclusion of mediation within the duties of central authorities in B11R and 1996 Hague Conventions so highlighting at p 6 the importance placed upon the use of mediation in international family disputes. A feasibility study on cross-border mediation in family matters was undertaken and The Council on General Affairs and Policy of The Conference invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters, asking the Permanent Bureau to begin work on a Guide to Good Practice on the subject which will focus on the use of mediation in the context of the 1980 Child Abduction Convention. As a first step, a Guide to Good Practice is to be prepared and submitted for consideration at the next meeting of the Special Commission to review the practical operation of the 1980 Convention, which is likely to be held in 2011.

Mediation has the potential to be a valuable potential tool in non-Hague cases. Mediation can also assist in cases covered by the Hague Convention by assisting the parties to come to terms with the realities of their situation, consider the alternative solutions about where the child will live and how contact will take place where the focus may need to be on the maintenance of contact between the child and the left-behind parent, rather than the return of the child. In the light of findings about relocation (see the Report on Relocation, at www.reunite.org) mediation also avoids the very serious difficulties that may otherwise result from a subsequent relocation of the child). Therefore, the mediation initiative set out by the 2009 Malta Process is to be particularly welcomed. It may be that the best chance of success for such initiatives is through the co-operation of non governmental organisations in the jurisdictions concerned which can evaluate the ways in which the issues involved in these cases can best be practically addressed within those jurisdictions, and for a bilateral agreement based on those findings to be subsequently put in place, rather than the other way around which provides only an agreement without any infrastructure to support it. The practical work of operating the agreement, which can be undertaken by these specialist non governmental organisations once the agreement is in place, will need to be fully supported by government, both in terms of supporting the initiative, and in providing the necessary financial support that would be required for the implementation of the process.

More needs to be done to prevent abductions in terms of raising awareness of the problems that can occur, particularly in cases which involve jurisdictions outside of the 1980 Hague Convention, lobbying for improvements on emigration checks at exit ports, and other ways of preventing the problem from occurring. However, abductions will still happen, and non-Convention States will still be involved. We

cannot rely on simply creating bilateral agreements without providing the necessary support for them to work. If, as seems to be the case, they do not work effectively as bilateral agreements, we must investigate and identify whether any aspects of them work at all and to what extent. It is important to recognise the limitations of these agreements and develop the use of whatever aspects, however minor, are capable of such development. The use of non-governmental organisations should be encouraged as much practical work can be done through these informal associations, especially if sufficient resources are provided to enable their valuable, on-the-ground work to be undertaken.

The initiative of the Hague Conference in the continued dialogue provided through the Malta Process, and the work on the Guide to Good Practice, are very important provisions in this area. The 1996 Hague Child Protection Convention, which is due to come into force in June 2010, may be of some help although we have concluded that there is nothing which can guarantee that contact will work in practice as envisaged by the original order, including the advance recognition of orders under Art 24 (see reunite's Relocation Report, above) Mediation between non-Convention States may, indeed, be the most promising and realistic of the possibilities for dealing with these cases. We must watch this space.