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Safety as the best interest of the child

SAFEGUARDING AND EMPOWERING CHILDREN PROJECT

**The Hague Convention on the Civil Aspects of International
Child Abduction proceedings**



ANNEX II

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1. The Hague Convention on the Civil Aspects of International Child Abduction proceedings

The Hague Convention on the Civil Aspects of International Child Abduction (The Hague Convention) not only applies to cases where a child is removed wrongfully from their country of habitual residence, but also to cases where a child has been wrongfully retained in another jurisdiction, for example, if a parent or the court gives permission for the child to travel to another country for a holiday and then refuses to return the child by the agreed date.¹

The Hague Convention is primarily a jurisdictional tool with the aim of deciding where substantive custody issues are heard; therefore the best interests of the child plays a limited role in deciding any application made under the Convention.²

1.1 Wrongful removal and/or retention

The Hague Convention considers the removal or retention of a child as wrongful when

“it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b. 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.”³

Rights of custody for the purpose of a Abduction Convention application include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

This in turn means that a parent who does not have rights of custody over a child, cannot apply for the child's return under the Hague Convention, making it vitally important to determine if such rights exist before attempting to remove a child from their jurisdiction of habitual residence.⁴

This does vary from country to country, so it is recommended to seek legal advice from the country of habitual residence. As an example, in the jurisdiction of England and Wales, a parent must have parental responsibility to be able to make decisions as to where their child lives. This is automatically given to mothers on the birth of their child, whereas fathers are only given automatic parental responsibility if they are married to the mother or if they are named on the child's birth certificate as the father.⁵ If neither of these apply, then the father can apply to the court for an order to assign them parental responsibility for their child. Seeking legal advice on rights of custody is vital. In England and Wales, for example, even if a parent does not have parental responsibility the courts have extended the meaning of rights of custody to include 'inchoate rights' (de facto rights exercised solely by the father in cases where the mother has left the child in his sole care for an extensive period)⁶ and 'rights of custody in the court'⁷ (for example, if there are active court proceedings about custody matters ongoing).

1 The Hague Convention on the Civil Aspects of International Child Abduction 1980, Article 3. Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

2 X v Latvia [2013] ECHR 1172. Available at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%222001-138992%22%5D%7D>

3 The Hague Convention, Article 3

4 The Hague Convention, Article 5 (a)

5 The Children Act, 1989, Schedule 3. Available at: <https://www.legislation.gov.uk/ukpga/1989/41/schedule/3>

6 Re K (A Child) (Northern Ireland) [2014] UKSC 29. Available at <https://www.supremecourt.uk/cases/docs/uksc-2014-0093-judgment.pdf>

7 Re H (Abduction: Rights of Custody) [2000] 2 AC 291. Available at <https://assets.hcch.net/incadat/fullcase/0268.htm>

1.2 Habitual Residence

Another important factor in determining whether the removal of the child is wrongful, is to determine if the child was habitually resident in the Member State to which the return is sought immediately before their removal or retention.⁸

The Hague Convention does not define the term “habitual residence,” therefore the interpretation of what makes a child habitually resident in a Member State is often determined on a case-by-case basis and can vary from country to country.

Focussing on European Union jurisprudence, a child is said to be habitually resident in a country when the child is living in a Member State on a permanent basis and has a degree of integration in a social and family environment.⁹ Factors also taken into account are the reason the child is living in the Member State, the length of time they have lived there and the child’s nationality; however, please be aware that a child can become habitually resident in a country where neither they or their parents are¹⁰ nationals of the Member State.

1.3 Criminal proceedings

It is worth noting that child abduction is a criminal offense in most jurisdictions that have ratified the Hague Convention.¹¹

Although within the Hague proceedings a request may be made by the court to ensure all criminal charges are dropped upon the return of the mother and her child, court orders from other jurisdictions are not always binding on the country of habitual residence, meaning a mother could be subject to criminal legal proceedings upon her return.

2. How can you avoid potential Hague Convention proceedings?

If you are in an abusive relationship and you need to leave the country where your child is habitually resident to feel safe and supported, there are certain procedures you must follow if you do not want to risk becoming involved in Hague Convention proceedings in the future.

2.1 Permission from the other parent

You can remove the child from their country of habitual residence if you obtain permission from the child’s other parent,¹² or anyone who has rights of custody which would be protected if the child were removed from the jurisdiction. The consent of the other parent is also a defence to a return order (see further below).

8 The Hague Convention, Article 4

9 Case C-497/10 PPU *Mercredi v Chaffe*, Judgment of First Chamber, 22.10.2010 at para 56. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:50df8849-1210-45b0-bc75-ac13e92bbb5c.0002.05/DOC_1&format=PDF

10 C-111/17 OL v PQ at para. 22, 37, 50, 54. Available at <https://interlex-portal.eu/FindLaw/Doc/CourtAct/5488681>

11 In England and Wales, the Child Abduction Act 1984, makes child abduction a criminal offence, although does not apply to unlawful retention.

12 The Hague Convention,, Article 3

This is very difficult to obtain when escaping an abusive relationship, due to the nature of abusive relationships and the danger that reaching out to the perpetrator of abuse could have, given the risk of separation violence and the homicide timeline, according to Dr Jane Monckton-Smith.¹³

If permission is granted by the other parent, it is important to have the permission written and witnessed, preferably by a legal professional, so that the permission has more standing should the other parent withdraw or dispute their consent at a later date.

2.2 Seek permission to leave the jurisdiction from the Court

If you cannot seek permission from the father, either because it is too dangerous for you to do so or because he is refusing to give his consent, then you can apply to the local court and ask them for their permission to remove the child from the child's country of habitual residence to reside permanently in the country where you wish to live.¹⁴

This process is not mirrored in every Member State, hence it is highly recommended you seek legal advice from a professional who specialises in child removal applications.

When making an application in England and Wales for example, the following aspects are considered:¹⁵

- Is the relocating parent's application genuine, realistic and well researched
- Is the parent's opposition motivated by genuine concern or an ulterior motive?
- What would be the extent of detriment to the father and his future relationship with the child if the application were granted?
- What would be the impact to the relocating parent of the refusal of her realistic application?

Yet *Re F*¹⁶ made it clear that it is the welfare principle that should be of paramount consideration and to treat the above from *Payne* as guidance only.

Therefore, you should include factors such as how contact will take place, how often and at whose cost. Consider schooling, finances, where the child will live and with whom etc. and focus on how this decision is in the best interests of the child and not just to the adults in the family.

3. What if you have already left the country?

If you have already left the country of the child's habitual residence, then it is advisable to seek legal advice from the country to where you have fled even if Hague Abduction Proceedings have yet to be filed. The left behind parent can apply for the return of the child under the Hague Convention at any time, although if they apply after 12 months following the child's removal the court has a discretion to refuse a return order.¹⁷ Reference in footnotes: The Hague Convention Article 12. Then start new sentence: Therefore even if you have yet to 'be Haged' this does not mean that an application cannot be subsequently made.

¹³ Monckton-Smith, J, *In Control: Dangerous Relationships and How They End in Murder*, Bloomsbury Publishing PLC, 2022

¹⁴ The Children Act 1989, Schedule 8

¹⁵ *Payne v Payne*; P v P, CA 13, Feb 2022

¹⁶ *Re F* [2012], EWCA Civ 1364; [2013] 1 FLR 645

3.1 The Defences

Several limited defences can be raised in response to a Hague Abduction Application which may prevent the mandatory return order being made;¹⁷ however, the bar is set very high when applying the defences to Hague Convention cases.

Article 12 – the ‘well settled’ defence: it is required that a left behind parent make an application within a year from the date of the unlawful removal or retention. However, an application can still be considered after the first year has passed and a return order can be refused if the taking parent can prove the child is now well settled in their new environment and it would not be in the best interests of the child to order a return to their former country of habitual residence. Even in these circumstances, however, it is still open to the court to make a return order.

Note that hiding the child until the year has passed will not suffice as evidence that the child is well settled and an application for the child’s return could still succeed.

Article 13 (a) – the left behind parent is not exercising custody rights at the time of removal or retention or has consented to or acquiesced in the removal or retention. To raise the consent defence, you will need evidence to show the other parent knew you were leaving the jurisdiction permanently and agreed to you taking the child with you. This is why seeking legal advice and/or having an official document showing the other parent consented is so important, to prove the removal or retention was not unlawful. ‘Acquiescence’ as a defence means that the other parent did not give his consent to the removal of the child but clearly demonstrated by his words or actions that he would not seek the child’s return.¹⁸

Article 13 (b) – the grave risk of harm defence: the return of the child will expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This defence is most raised by mothers fleeing domestic abuse, yet it is rarely successful. If raising this defence, you would need to make it clear that the risk of harm is grave and is aimed towards the child, and not yourself. Although England and Wales now recognise that a child who witnesses domestic abuse is a victim of abuse in their own right,¹⁹ not all jurisdictions have this principle ratified in law, and we have yet to see how this provision will be applied to Hague Convention proceedings, given that limited consideration is given to the welfare of the child in Hague Convention cases.²⁰ It is very difficult to succeed in the ‘grave risk’ defence in many signatory countries because they apply the defence so strictly. Additionally, very often the courts take the view that if ‘protective measures’ are put in place, then the risk of harm to the child will be reduced, and that a return order should therefore be made. In EU countries, a Regulation called Brussels II Revised applies.²¹ Article 11(4) of Brussels II Revised states that: ‘A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.’ In order to avoid a return order being made on the basis that ‘protective measures’ such as restraining orders would reduce the grave risk to the child, it is advisable to obtain in advance

¹⁷The Hague Convention, Article 12

¹⁸ *Re H (Minors) (Abduction)* 1997 2 All ER 225. Available at: <https://publications.parliament.uk/pa/ld199697/ldjudgmt/jd970410/in-reh01.htm>

¹⁹ The Domestic Abuse Act 2021, Schedule 3. Available at: <https://www.legislation.gov.uk/ukpga/2021/17/contents/enacted>

²⁰ *X v Latvia*, European Court of Human Rights, 26 November 2013. Available at: [https://hudoc.echr.coe.int/fre#\(item-id%22:%22001-138992%22\)](https://hudoc.echr.coe.int/fre#(item-id%22:%22001-138992%22))

²¹ 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, repealing Regulation (EC) No 1347/2000. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R2201>

of any court hearing as much evidence as possible of the risks to your child and to you of a return order despite 'protective measures'. This could include medical, psychological or psychiatric reports of the effect of a return order on the child and on you, and evidence of the father breaching previous protective orders such as restraining orders, or otherwise reneging on his promises.

■ **Article 13(2)** – child's objection defence: the court has a discretion to refuse a return order if the child objects to being returned and is of a sufficient age and degree of maturity to have his or her views taken into account. Additionally, a child has the right to be heard in court proceedings under the UN Convention on the Rights of the Child,²² and in EU states that are party to Brussels II Revised, the child must be 'given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age and degree of maturity'.²³ However, please be aware that the child has to demonstrate a clear objection to returning to his or her country of habitual residence, and even if the court decides that they do object, the court could still order the child's return if, for example, it considered that the child's views were not genuine and had been influenced by you or someone else.

■ **Article 20** – the return of a child may be refused if this would not be permitted by the fundamental principles of the requested State relating the protection of human rights and fundamental freedoms. This defence is politically fraught, as essentially it would mean that one Member State is accusing another of not adhering to their human rights obligations.

3.3 What if you have already fled and are in hiding?

As mentioned above, if you are hiding as a temporary measure to avoid Hague Abduction proceedings, then if you are found, regardless of the time that has passed since the removal or retention of the child, you could still be subject to Hague Abduction proceedings.

A further consequence of this decision is, if caught, you may lose custody of your child in subsequent family law proceedings in the child's habitual residence.

You will subsequently be unable to leave the country where you are hiding in and cross borders as there is a risk you will be arrested at the border and face criminal proceedings.

²² United Nations Convention on the Rights of the Child, Article 3. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

²³ Brussels II Revised Article 11 (2). See fn 21



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