

## **A change in international law affecting children - the 1996 Hague Convention**

### **Background**

Without much noise the Hague Convention of 1996 finally came into force as law in the United Kingdom (UK) on the 1<sup>st</sup> November 2012. It has had a long history from the point of its inception on the 19<sup>th</sup> October 1996. The UK ratified the Convention finally on the 27<sup>th</sup> July 2012 with many other countries worldwide. The initial delays in ratification partly came about because the European Union did not ratify this Convention until 2008. The actual full title of the Convention is “*Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children*”. It is otherwise known as “The Hague Convention on child protection” or as described here “The 1996 Hague Convention”.

Although it had a quiet entry into the statute books in the UK it is probably the most significant international Convention for children and has far wider consequences than the two other previous international Hague Conventions, which are in existence (the 1980 Convention of Civil Aspects of International Child Abduction and the 1993 Convention on protection of Children and co-operation in respect of inter country adoption). All these Conventions have developed over the years to accommodate the changing environment that children are in with the opening up of national borders and the ease of travel. The 1996 Convention is designed to protect children not only in extreme cases where there is cross border trafficking and exploitation of children but also children who are caught up on a turmoil of broken relationship with transnational families. The Convention does this by imposing a uniform set of rules across the countries that have signed up to the Convention (which is most of the world) and takes protective measures for children. According to the Hague conference on the private international law:

*“The function of the 1996 Convention is to avoid legal and administrative conflict and to build structures for effective international co-operation in child protection matters between the different systems”.*

The 1996 Hague Convention is now the principal legislation that guides international matters for children and has global impact.\*

### **Main features**

#### **1. Jurisdiction**

At the core of the Convention is the principle that the courts of the ‘contracting states’ where a child ordinarily lives are responsible for making decisions about that child – otherwise known as ‘habitual resident’ rule. (Article 5.) The rules prevent parallel proceedings in two contracting states. The application, which is first in time,

will have priority unless and until that jurisdiction is declined. There is also the possibility of transfers of cases between contracting states subject to certain conditions being met especially as a court may take urgent or provisional measures to protect a child who lives in their country but is not habitually resident there. This general jurisdiction rule can be overturned in unusual cases e.g. for internationally displaced children or those children whose habitual residence cannot be established. Generally however the 'habitual residence' rule will lead. If habitual residence changes there are new provisions designed to ensure a degree of security and continuity after a court in the country a child is leaving from has made its decision. This will prevent a disgruntled parent in seeking a different outcome in a different country.

## 2. Law applied

The general rule is that each contracting state will apply its own law to decision making. They will not apply another country's law e.g. if a case is brought before the English courts the English courts will apply English law. One further feature of this is that once 'parental responsibility' has been acquired in one country, (parental responsibility being described as the rights and responsibilities that a parent has in relation to all matters concerning their child) it will be recognised in any other contracting state even though the other state would not under their law have accepted that parent had parental responsibility.

## 3. Recognition and enforcement of decisions

A court's decision in one contracting state will be recognised in all others without any further action being required (Article 23). This can only be challenged in limited circumstances e.g. when the contracting state did not have a right of jurisdiction or there were other irregularities or unfairness in the decision making but overall once an order has been made, it can be enforced as if the courts in the other state had made it. They must however do it "taking into consideration the best interests of the child". The aim of this is to ensure that the procedure for enforcement is quick and rapid. Recognition of a court's decision can be obtained also in advance of a physical move which is helpful where it is proposed that a child is moved on a permanent basis from one country to the other.

## 4. International contact

There are new procedures under the Convention to ensure that access can be secured effectively (Article 35). Once a contact order is made where permission is granted to relocate it will automatically be recognised and enforced in the country where the child moves.

## 5. Emergency protection

There are further rules supporting children who are either abducted by parents, moved because they have been displaced due to national disturbances in their own countries (refugees) or child abandoned or trafficked. There is a further part of the Convention that permits one country to raise concern about the care a child is having in another contracting state. This will lead to a report being prepared and measures made if appropriate to protect the child in the other contracting state.

## 6. Transnational foster care

The Convention requires consultation between two contracting states where foster care is to be provided across two states. The relevant agency where the child lives

must prepare and transmit a report giving reasons why transnational placement is proposed. It will only be effective if the other contracting state consents to it and it is considered to be in the child's welfare. The Convention has been designed to apply also to the Islamic institution of Kafala.

## **Summary**

The 1996 Hague Convention will have a major impact on the movement of children worldwide. If a case involves a child moving from one country to another whether by agreement or otherwise, the Hague Convention will be the relevant law to follow. It aims to avoid legal and administrative conflicts between countries that exist now and we will hopefully see it work favourably for transnational families.

\*For details of all the countries that have ratified the Convention please go to:  
[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=70](http://www.hcch.net/index_en.php?act=conventions.status&cid=70)

For more information then please contact:

Putney Office:

### **Fiona Read**

Partner

+44 (0)20 8394 6324

Fiona.Read@russell-cooke.co.uk

Bedford Row Office:

### **James Carroll**

Partner

+44 (0)20 7440 4839

James.Carroll@russell-cooke.co.uk

### **Kate Hamilton**

Partner

+44 (0)20 7440 4841

Kate.Hamilton@russell-cooke.co.uk

Kingston Office:

### **Lauren Hall**

Solicitor

+44 (0)20 8541 2015

Lauren.Hall@russell-cooke.co.uk

### **Sarah Williams**

Solicitor

+44 (0)20 8541 2010

Sarah.Williams@russell-cooke.co.uk

### **Samantha Little**

Partner

+44 (0)20 8541 2025

Samantha.Little@russell-cooke.co.uk

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