



International Relocation of Children – The Hague Convention

In May 1991 New Zealand signed up to the Hague Convention on International Child Abduction. The Convention is a means by which a person, usually a parent or guardian, can seek to have a child returned who has been taken from one country to another without their permission (provided both countries have signed up to the Convention).

We will use the example of Sam and Alex, a recently separated couple who have a son, Carlos, who is five years old. Sam was born in New Zealand, went to study in England, met Alex and they lived together for six years. After the separation Carlos was living week-about with each parent. About six months after the separation Alex goes to pick Carlos up from school as usual, only to be told that Sam has taken Carlos out of school and said they were moving to New Zealand to be closer to family! After some frantic phone calls to friends and family and a rather intense discussion with Sam's brother in Taranaki, Alex discovers that Sam has left England with Carlos and is not planning on coming back.

WHY DO WE NEED THE CONVENTION?

Without the Convention, if someone removed a child from or to New Zealand then you would need to try and go through the legal system of the country the child has been removed to if you wanted to try and have them returned. Alex would have to find a lawyer in New Zealand, provide them with instructions and pay them to take on the case (Legal Aid would not be available). Add to this the difficulty of signing affidavits and applications, potential language problems, different legal views on childcare and the possible need to travel to the other country for a Court case, and things can get very complicated, stressful and expensive. The road blocks in the way of Alex being able to get Carlo back to the country he has grown up in and that is all he knows are huge.

The Convention, however, means Alex can take steps to have Carlo returned relatively quickly, easily and without undue cost.

WHAT DOES THE CONVENTION DO?

Every country which signs up to the Convention has a number of obligations. If they receive an application from another country that has signed up to the Convention for a child to be returned, they must immediately take steps to find the child. Often this is not be difficult, but sometimes people do go into hiding, and extra efforts need to be made to find them and to ensure that they are safe. Secondly an attempt must be made to have the child returned amicably. If that is not successful an application must be filed through the Courts for the return of the child.

HOW DO YOU MAKE AN APPLICATION?

Every signatory country has a Central Authority which deals with these applications. Alex can file an application with the English Central Authority stating that Carlo has been removed from England to New Zealand. Our Central Authority will then be contacted by their English counterparts, and will take steps to find Carlo, and if necessary file proceedings in the Family Court for his return.

WHAT IS THE COURT'S ROLE?

Unfortunately after Sam and Carlos are tracked down Sam refuses to agree to Carlos' return to England. An application is made to the Family Court for an Order to have Carlos returned.

The Court is only interested in whether Carlos should go back to England. It does not decide who he should live with, how often he should see the other parent or anything else about the actual parenting dispute. All it looks at is where those sorts of decisions should be made, either back in England where Carlos was born and raised or in New Zealand if it decides Carlos does not have to be returned.

The Court looks at four things to start with:

1. Is Carlos in New Zealand?
The Central Authority finds Sam and Carlos living with family in New Plymouth, Taranaki.
2. Was Carlos usually resident in England?
Carlos has lived his entire life in England up until the point where Sam brought him to New Zealand, so he was clearly usually resident in England
3. Was Carlos removed from England in breach of Alex's rights of custody?
Given the week-about care arrangement Carlos has definitely been removed in breach of Alex's rights of custody.
4. At the time of Carlos' removal was Alex exercising his rights of custody, or would he have done so?

When Carlos was removed from England Alex was exercising custody rights through the shared-care arrangements, and would be still if Carlos had not been removed. Because the answer is "yes" to all of these questions, then the Court MUST order that Carlos be returned, unless Sam can show that he has a defence to the application. The defences are:

1. The application was brought more than a year after Sam and Carlos left England
As soon as Alex found out Carlos was gone he immediately saw a lawyer, who advised him to go to the Authority. The application was sent to the New Zealand Authority a couple of days later.
2. Alex was not actually exercising his custody rights, and would not have done even if Carlos had not been removed.
The care arrangement prior to Sam and Carlos leaving clearly shows that this defence would not work for Sam.
3. Alex either consented to the removal, or later acquiesced in the removal.
If Sam can show that Alex had agreed that Carlos could be taken to live in New Zealand, or if Sam had said that it was ok for Carlos to stay in New Zealand after he left England, then Sam could argue this defence. Fortunately for Alex there was no discussion about Carlos moving to New Zealand before leaving, and there was no agreement to Carlos staying there after his arrival.

4. That returning Carlos would place him at grave risk of being exposed to physical or psychological harm, or otherwise place him in an intolerable situation.

This might seem to be a fairly straightforward defence. However, the courts have found that not only must there be a grave risk of physical or psychological harm, but it must also be a risk that the country the child would be returning to cannot protect the child from. This makes the defence a lot more difficult to succeed with, as not only would Sam have to show the risks exist, but that the English system could not protect Carlos if he was returned. Given the similarities between the two legal systems, and the protective view England takes towards children in such cases Sam would have a difficult time succeeding with this defence.

5. That Carlos has expressed a view that he does not want to be returned and is old and mature enough that it is appropriate for the Court to give weight to his views

While children's views are able to be considered by the Court, unless the child is old enough and mature enough to fully understand what the options are their views are unlikely to carry much weight. There is also the potential risk of parental influence which the Court must consider. At the end of the day there is no hard and fast rule as to when a child's views will be sufficient under this defence, and often a lawyer will be specifically appointed for the child and/or a psychologist asked to present a report on the child's views if this defence is raised. In Carlos' case as a five year old it is very unlikely that he would be found to be old and mature enough for his views to be given much weight.

6. That returning Carlos would be contrary to the fundamental principles of the law relating to the protection of human rights and fundamental freedoms.

This defence can only be relied on if there is some compelling reason why returning Carlos to England would be contrary to his human rights and fundamental freedoms. Short of famine, civil war or other such major upheaval it is difficult to see too many scenarios where the defence would succeed, especially when the fact that a country has signed up to the Convention would tend to indicate a certain recognition of the importance of children's rights. Again, Sam is likely to be out of luck.

Even if the Court finds that one of the defences does exist, for example if Carlos was 14 and wanted to stay in New Zealand, or if there was some level of consent or acquiescence in the relocation, then the Court can still Order Carlos to be returned to England. Instead, the Court must weigh the interests of the child against the purposes of the Convention, namely that parents should not be allowed to move children out of their home country without consent.

SO WHAT HAPPENS WITH CARLOS?

As you can see, Sam has an uphill battle trying to keep Carlos in New Zealand. But that's the idea, the point of the Convention is to prevent people from uprooting children from their home country and taking them elsewhere without the consent of people who are entitled to be making those decisions.

If the Judge finds that Carlos should be returned to England the Judge can also issue a warrant (either immediately or if the parent who has the child does not take steps to obey the Order for return) to allow the police or social workers to uplift the child to ensure the return.

SO WHAT CAN YOU DO IF YOU FIND YOURSELF FACING A SIMILAR SITUATION?

First of all if you want to relocate overseas with your child you should get written consent from any other parents or guardians to allow you to do so. If there are problems after you leave then you can prove there was consent. A formal agreement drafted by your lawyer is the safest bet.

If the other party or parties do not agree you can apply to the Court for a Parenting Order which will allow you to relocate overseas with your child. Getting assistance from a Family Court lawyer is advised, as the bar is pretty high and there are a number of things you need to convince the Court of if you want to succeed.

If you have moved overseas without agreement it is advisable to see a lawyer without delay to get some advice. It may be that an agreement can be reached after the fact, or you may be better to sit tight and wait and see if the other party or parties takes any steps.

If you think your partner is planning on leaving the country with your child you can apply for an Order preventing the removal of the child from New Zealand. If such an Order is granted the child can be listed with Interpol and border alerts put out so that the child would be prevented from leaving.

If your child has already been taken overseas we can help you with your application to the Central Authority. Most important of all, if you are unsure about where you stand in relation to your child or children get some help!

David Tyree is a lawyer at Govett Quilliam and has a particular interest in the Hague Convention. If you have any questions regarding abduction matters or the Hague Convention please contact David.



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