CHAPTER TWO

THE SUBSTANTIVE PRINCIPLES OF THE CONVENTION

The central tenet of the Hague Convention is that children should be returned to their State of habitual residence if they have been wrongfully removed from that State or wrongfully retained outside it. It is not a Convention for the reciprocal recognition and enforcement of foreign custody orders. It seeks to protect children by protecting existing "rights of custody". These are rights attributed to a person, institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before its removal or retention. A removal or retention is considered wrongful if it is in breach of such rights (Article 3). The Convention rests on the belief that any change in those rights is best considered by the courts of the State of habitual residence, and not by those of any State to which the child may have been abducted.

Rights of custody

It is important to consider, therefore, what the expression "rights of custody" means. Different countries may have different understandings of the ideas denoted by words such as "custody", "guardianship" and "care and control". Some have the concept of "parental rights"; in others, such as the United Kingdom since the Children Act 1989, this concept and that of "custody" are avoided in current legislation, ideas of "parental responsibility for the child" and of the child's residence being preferred. What is important, however, is the definition of "rights of custody" used in the Convention.

The rights of custody with which the Convention is concerned are defined (Art. 5(a)) as including 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 will include, for example, the right of a parent who does not have custody of a child to give or refuse consent to the removal of the child from the jurisdiction by the custodian parent (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 651, CA).

Such rights, by whatever name they might be called in a State's domestic legal system, are "rights of custody" for the purposes of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated. Hence, if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention.

The father of an illegitimate child, even under a legal system which regards the mother as the sole legal guardian, may be regarded as having 'rights of custody', especially where is both actually caring for a child and has the right to apply to the courts for legal custody rights (Cf *Re J (A Minor: Custody Rights)* [1990] 2 AC 562, HL and *Re B (A Minor) (Abduction)* [1994] 2 FLR 249, CA).

This may be of crucial significance if, for example after a divorce, the court grants joint custody to *both* parents but care and control to one only; or, more generally, if parents share parental responsibility. A joint custodian would normally be entitled to be consulted as to where the child should live, and if the custodian who has care and control removes the child without consulting him or her, that is a wrongful removal. The same holds where, without any court order, parents have joint rights as natural guardians of their children to decide where they are to reside. Again, the result would be the same if the court had specifically stated that a

child should not be removed from the jurisdiction without the consent of one parent; this has been held in an English case (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 651, CA) in respect of an Australian order, and by a French court (*Procureur-General v Baume* (Aix-en-Provence CA, 23 March 1989)) in respect of an English order.

The reference to rights of custody being attributed to an institution or body applies most naturally where the child concerned is in the care of a social welfare agency of national or local government or a charitable institution, but it has also been applied in certain circumstances to a court. These cases are those in which the child has been made a ward of court (*Re J (Abduction: Ward of Court)* [1989] Fam 85) or where, by virtue of being currently seised of a custody issue, the court is actively exercising its power to determine the place of residence of the child (*B v B (Abduction: Custody Rights)* [1993] Fam 32, CA). This has been held to be the case where an interim (as opposed to a final) custody order contains a prohibition on the parent awarded custody removing the child from the jurisdiction (*Thomson v Thomson* [1994] 119 DLR (4th) 235, 279-281, SupCtCan).

The rights of custody must exist under the law of the State in which the child was habitually resident immediately before the removal or retention (*In the Marriage of G and O* [1989] FLC 92-103; *In the Marriage of Brandon* [1990] FLC 92-153) and must have been actually exercised at the time of removal or retention (or would have been but for the removal or retention) (Art. 3. See also Art. 13(a)). The requirement of actual exercise of rights of custody does not mean that the child must have been in the care of the person having those rights; granting permission for the child to spend time with the other parent can be an exercise of those rights, and does not entitle the other parent to retain or remove the child (*Re W (Abduction: Procedure)* [1995] 1 FLR 878).

The custody rights referred to above may have arisen automatically under the law of the State of habitual residence or may have been defined under a decision or agreement operative under the law of that State (Art. 3(2)). This makes it clear that the Convention does not protect only custody rights arising under a court order. If a parent abducts a child before any such order is made, the other parent may seek its return under the Convention without necessarily seeking an order in his or her home State. This should assist in the speed of actions securing the return of such children. On the other hand, the action by that parent in seeking an *ex parte* custody order may help establish the legal position in the State of the child's habitual residence, and possibly remove the need for an enquiry on this matter (see Art. 15).

Children protected by the Convention

The convention applies to any child who was habitually resident in a Contracting State immediately before the breach of custody rights (Art. 4). The phrase "habitually resident" is, as a matter of policy, left undefined so that the facts can be considered free from any technical rules. In practice, the courts have seldom found any difficulty on this point. See, for example, *Re A (Minors) (Abduction: Habitual Residence)* [1996] 1 WLR 25 (two years' military posting of father gave habitual residence.

The court, in considering a request for the return of the child, must determine the issue of habitual residence on the basis of the available evidence; the normal rules as to burden of proof are inapposite, as the proceedings are not adversarial but *sui generis* (*Re N (Child Abduction: Habitual Residence)* [1993] 2 FLR 124, CA; *In the Marriage of Hanbury-Brown and Hanbury-Brown* [1996] FLC 92-671, Full Ct). Of particular relevance in abduction cases is the established in many jurisdictions that the unilateral removal of a child by one parent, without the consent or acquiescence of the other, does not change the habitual residence of the child

(*Re J (A Minor) (Abduction)* [1990] 2 AC 562, 572, CA; *Re A F (A Minor) (Abduction)* [1992] 1 FCR 269, CA). In this context, it is not possible to treat a child as habitually resident in two different countries; such a finding would be incompatible with the aims of the Convention (*Re V (Abduction: Habitual Residence)* [1995] 2 FLR 992; *In the Marriage of Hanbury-Brown and Hanbury-Brown* [1996] FLC 92-671, Full Ct; *Cameron v Cameron*, 1996 SLT 306, IH).

The Convention ceases to apply when the child attains the age of sixteen years (Art. 4), and any pending applications automatically lapse at that date.

Wrongful removal and wrongful retention

The Convention refers to "wrongful removal" or "wrongful retention", meaning in each case removal or retention out of the jurisdiction of the courts of the state of the child's habitual residence. The contrast between the two phrases is between an act of removal which at once breaches custody rights, and a keeping of the child which only breaches those rights when it is continued beyond the limits of lawfulness in terms of time; a typical example of wrongful retention occurs when a child is not returned after an agreed period of access (*Re H (Abduction: Custody Rights)* [1991] 2 AC 476). For the purposes of the Convention, "retention" is not a continuing state of affairs, but something which occurs when the child should have been returned to its custodians, or when the person with rights of custody refuses to agree to an extension of the child's stay in a place other than that of its habitual residence. The Convention only applies where the removal or retention takes place after it came into force as between the relevant countries.

Where a child is removed by the only parent with rights of custody, the removal cannot be wrongful. A later order of the courts of the foreign State giving custody rights to the other parent cannot render the continuing keeping of the child "wrongful retention" (*Re J (A Minor) (Abduction)* [1990] 2 AC 562 (also reported *sub nom C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961); *Thomson v Thomson* (1994) 119 DLR (4th) 235, 284, SupCtCan).

The Convention contains provisions as to the taking of judicial notice of the law of the State of the habitual residence of the child, and of decisions taken in that State (Art. 14). An application for the return of a child may be accompanied by certificates or affidavits as to the law of the State of the child's habitual residence; but this is not a mandatory requirement and failure to observe it is not fatal to, though may delay, the application (Art. 8(f)). The judicial or administrative authorities of a Contracting State may request the applicant to obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention was wrongful (Art. 15); this will only be done if there is real doubt as to the legal position in the State of habitual residence, for unnecessary delays are to be avoided (*Perrin v Perrin*, 1994 SC 45).

Action to return the child

The Central Authority established for the purposes of the Convention (for the system of Central Authorities, see Chapter Three) in the State where a child is, on receiving an application for the return of the child either directly from a person, institution or body concerned or from another Central Authority, must take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child; failing an amicable settlement it must initiate, or facilitate the institution of, proceedings with a view to obtaining an order for the return of the child. The competent authorities are to act expeditiously in such proceedings,

and where there has been wrongful removal or retention must order return of the child forthwith, unless certain grounds for refusal are made out (see Arts 7-12).

Grounds for refusing to return a child

The policy of the Convention is to secure the swift return of the child. A heavy burden therefore rests upon an abducting parent who seeks to invoke one of these grounds for refusal. In considering the grounds for refusal, the court must take into account the information as to the social background of the child provided by the Central Authority or other competent authority of the State of the child's habitual residence (Arts 7(d), 13); but the mere making of allegations against the applicant will not cause the court to adjourn for further such information or for other evidence where the resulting delay would defeat the purposes of the Convention. In general, the court will decide the case on the basis of the affidavits; to adjourn for the taking of oral evidence is likely to lead to delays incompatible with the speedy response expected under the Convention (*Re E (A Minor) (Abduction)* [1989] 1 FLR 135, CA; *Parsons v Styger* (1989) 67 OR (2d) 3, 11, OntCA; *In the Marriage of Gazi* [1993] FLC 92-341, Full Ct; *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan).

Judicial or administrative authorities in the requested State are obliged to return "forthwith" to its habitual residence any child removed to or retained in that State in breach of custody rights as defined in the Convention provided that proceedings for the child's return have been instituted within a period of a year from the removal or retention. The only grounds for refusing to return the child are those expressly permitted by the Convention.

These grounds will be examined in turn:

(i) If the party opposing the return of the child establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention (Article 13(1)(a)).

This does little more than to reiterate the requirement that, for the removal to be wrongful, the custody rights breached must have been actually exercised, either jointly or alone, at the time of the breach or would have been so exercised were it not for the breach. However, it does make it clear that the burden of proving this lies on the party opposing return, at least where the custody right alleged to have been breached is the right relating to the care of the person of the child.

Where the right breached is the right to determine the child's place of residence, this ground of opposition does not seem to apply, although it is possible to conceive of such a right being "actually exercised". It is also hardly conceivable that this ground of opposition could apply where the reason why the rights were not exercised is precisely because the child was abducted. It was to cover this situation that the words "or would have been exercised but for the removal or retention" were added to Article 3(1)(b). In order to avoid contradiction within the Convention, and also to give effect to its manifest purpose, some words such as "unless those rights would have been exercised but for the removal or retention" must be implied after "retention" where it first occurs in Article 13(1)(a).

Thus the Convention covers the case where a parent, who has had the care of a child during the course of litigation, removes the child the moment the court orders its transfer to the other parent. That other parent "would have" exercised custody rights were it not for the removal or retention. Even if the removal took place *before* the order was made such a case would normally come within the Convention for while custody is in dispute the parents will normally

retain their equal rights to possession of the person of the child (and it could be argued that the parent who does not exercise this right during the dispute waives it on the understanding that the matter will be decided by the court and would not have done so if the child was likely to be removed) or at least the right to determine the place where the child should live.

One situation does, however, fall outside the Convention. This is where one of the parties to the proceedings (A) has no rights of custody, the other party (B) removes the child before the decision is made and the decision confers custody rights on A. The removal would not have been in breach of any custody right of A existing at the time of the removal. The situation could arise where a parent who has been given access rights only in an earlier order seeks, and obtains, custody; or where a welfare authority is seeking an order granting it parental rights. The Convention does not *prevent* the return of such children if this is thought appropriate (Articles 18 and 36).

So far as consent or acquiescence is concerned, it is curious that the ground of opposition expressly applies only where the person, institution or other body "having the care of the person of the child" consents to or acquiesces in the removal and not, at least expressly, where the person having the right to determine the place where the child shall live so consents or acquiesces. It is surely highly relevant to such circumstances. It would be gravely anomalous if the ground did not apply to that situation and it would seem reasonable, when implementing the Convention, that States should make it do so.

In the structure of the Convention text, "consent" is something which occurs at or before the time of removal or retention, in contrast to subsequent acquiescence. Consent can be inferred from the dealings between the parties some time before the removal or retention. Evidence of consent must be clear and compelling, and the onus of proof lies on the party alleging consent. Apparent consent obtained by deception will be disregarded (*Re B (A Minor) (Abduction)* [1994] 2 FLR 249, CA). A limited consent, for example to the abducting parent removing the child for a short period for a foreign holiday, does not amount to "consent" to a wrongful removal taking place within that period, e.g. by overstaying (see *Ottens v Ottens* (Family Court of Australia, 1988, unreported)).

"Acquiescence" in the sense in which it is used in the Convention is a pure question of fact, to which rules of domestic law as to the meaning of the term in other contexts have no application. The House of Lords in *Re H (minors) (abduction: acquiescence)* ([1997] 2 All ER 225, HL) rejected a distinction between "active" and "passive" acquiescence, a distinction not found in the text of the Convention, but one which had found favour in earlier English cases. The court is to enquire into the subjective state of mind of the wronged parent: has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? As with any enquiry into a state of mind, the court may draw inferences from the parent's outward and visible acts.

The House of Lords nonetheless laid down a rule of law, which justice required by way of exception. In exceptional cases, where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the children and are inconsistent with such return, he will be held to have acquiesced and will not be allowed to assert that he secretly intended to claim their return.

The scope of this exceptional class of case is not wholly clear. The House of Lords expressly approved *Re AZ (A Minor) (Abduction: Acquiescence)* ([1993] 1 FLR 682, CA) where a parent knowing of his rights made a statement indicating his acceptance of the situation at least for

the time being. This suggests, as was held in earlier cases, that even express words will not give rise to an inference of acquiescence where they are spoken without knowledge of the possibility of the rights being enforced; but awareness in general terms may suffice, even if the wronged parent was unaware of the expeditious and effective enforcement machinery provided by the Convention. Although it was formerly held as a matter of law that a single statement would amount to acquiescence even if retracted a short time later, the approach of the House of Lords supports the view, taken in reaction against that rigorous position, that a statement may be disregarded if it is clearly withdrawn before the abducting parent has done anything in reliance upon it, and that statements made in a state of confusion and emotional turmoil may to some extent be discounted (*Dept. of Health and Community Services v Casse* [1995] FLC 92-629).

In considering the effect of inactivity by the wronged parent, the court may take into account the fact that the wronged parent had initially received erroneous legal advice, and will examine whether in all the circumstances the failure promptly to commence proceedings does point to an acceptance of the situation. In *Re H. (minors) (abduction: acquiescence)* itself, the House held that for an Orthodox Jew to pursue remedies in the rabbinical courts in the country of habitual residence, which the abducting parent would know to be a binding religious requirement, was not inconsistent with an intention later to seek a remedy under the Convention.

(ii) If the party opposing the return of the child establishes that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation (Article 13(1)(b)).

This is the ground relied upon in almost all contested cases. The courts have recognised that some psychological harm to the child may be inherent in the very conflict which is before the court or might normally be expected to occur on the transfer of a child from one parent to another; the Convention envisages more substantial harm, a severe degree of harm hinted at by the later reference to the child being "*otherwise* ... in an *intolerable* situation" (*Re A (A Minor) (Abduction)* [1988] 1 FLR 365, CA; *In the Marriage of Gsponer* (1988) 94 FLR 164; *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan).

A parent may not rely on his own conduct, for example a refusal to accompany a child were the child to be returned to the foreign country, as creating a grave risk of psychological harm (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, CA; *McCarthy v McCarthy*, 1994 SLT 743; *Medhurst v Markle* (1995) 17 RFL (4th) 428, Ont; *Thorne v Dryden-Hall* (1995) 18 RFL (4th) 15, BC).

The reference to the child being placed in an intolerable situation was in fact prompted by a consideration during the drafting of the Convention of the facts of an English case (*Re C (Minors)* [1978] Fam 105, CA) where it seemed very likely that the return of children to a distant jurisdiction would ultimately lead to their transfer back to England. The phrase in the Convention has been applied in similar circumstances but the courts have also considered in this context the material circumstances in which the child would be placed were he returned.

There are relatively few reported cases in which return has been refused. Examples are the Scottish case of *McMillan v McMillan* (1989 SLT 350, IH), where the applicant parent had a history of alcoholism and depression, and the abducting parent would probably be unable to accompany child if returned and the English case of *Re F (A Minor) (Abduction: Custody Rights Abroad)* ([1995] Fam 224, CA), where, if returned, the child would have to live in the family home where father had mistreated him, which would disturb the child.

Where the risk is of relatively slight harm, or where the risk is countered by the protection afforded by the courts and social welfare agencies of the State of habitual residence, the child will be returned for the issues to be resolved in the courts of that State (*Murray v Director, Family Services, ACT* [1993] FLC 92-416; *Cooper v Casey* [1995] FLC 92-575, Full Ct). The courts have adopted the practice in a number of cases of requiring the applicant, before return will be ordered, to accept conditions or to give undertakings, for example as to the maintenance and accommodation of the child and the abducting parent after their return; for examples of terms which may be agreed, see *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA) and *Re G (A Minor) (Abduction)* ([1989] 2 FLR 475, CA). Although the use of such undertakings has won judicial approval in a number of countries (see *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan; *De L v Director General, NSW Dept. of Community Services* (High Ct. of Aust, 1996, unreported) there are dangers in the practice of accepting undertakings of this sort. The practice can come close to qualifying the clear duty of the court to order the child's return; and the court "must be careful not to usurp or be thought to usurp the functions of the court of habitual residence"(*Re M. (Abduction: Undertakings)* [1995] 1 FLR 1021, CA).

In *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA), the court ordered the return of a child to Australia; the mother faced Australian proceedings for contempt of court if she returned, and the relationship between the mother and child was such that its disruption would create a grave risk of psychological harm. Before the Court of Appeal hearing the father agreed to drop the contempt proceedings, and offered to pay air fares, maintenance, and school fees and provide a car and accommodation for the mother. The mother was still unwilling to return, but the court held that the abducting parent could not in that way create, and rely upon in her own favour, a risk of harm. The case is interesting in that it raises the general issue of the effect of contempt or criminal proceedings against the abductor; opinion amongst Central Authorities as reflected at meetings of the Special Commission of the Hague Conference to review the workings of the Convention is divided, some seeing these as useful additional pressures for return, others fearing that they might actually be a basis for arguments against the return of the child in certain circumstances.

Undertakings given to the court ordering return cannot, however, be enforced in the State of habitual residence, and there have been some notable cases in which the parent giving the undertakings has reneged on them once the child has arrived in that State (see *In the Marriage of McOwan* (1993) 17 FLR 377). An alternative approach, with the same object of ensuring the welfare of the child after return, is being stressed by the courts and was welcomed by the Special Commission of the Hague Conference at its March 1997 meeting. This is to stress the responsibility of the Central Authority of the State of habitual residence to "provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child" (Art. 7(h)). This was f

(iii) If the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views (Article 13(2)).

In giving weight to the wishes of the child, the Convention is in harmony with Article 12 of the UN Convention on the Rights of the Child. The term "objects" is to be given its natural meaning (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242, CA; *Urness v Minto*, 1994 SC 249, IH; *De L v Director General, NSW Dept. of Community Services* (High Ct of Aust, 1996, unreported)). The courts have been careful to avoid laying down a particular age below which a child's views will not be given weight. The child's age and maturity are first assessed; if it is judged appropriate to take the child's views into account, the court must then

decide what weight to give to them in the light of the other facts of the case (*Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819, CA).

(iv) If the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).

This ground for opposition embraces a broad public policy element. The Convention does not *require* States to adopt it and Governments must decide, in the light of the following discussion whether they wish to avail themselves of it. It is to be noted that it is strongly drawn and it does not include situations where all that can be shown is that the principles of family law of the requested state differ from those in the requesting state. However, it may be that the circumstances prevailing in the requesting State are such that to return the child there would seriously endanger his future exercise of basic human rights and fundamental freedoms, or those of the parent who would accompany him. In such a case, the policy of the requested State must prevail; an example might be a case of child refugees.

Longer-term cases

The grounds already examined apply to cases in which the application for the return of the child is made within twelve months of the wrongful removal or retention. If the application is made outside that period (and in practice such cases appear to have been few) an additional ground is applicable:

If more than a year has elapsed between the removal or retention and the institution of proceedings and it is demonstrated that the child is now settled in its new environment (Article 12).

This ground of opposition comes closest to allowing the court to review the merits. The Convention sought to strike a balance between the overriding policy of deterring abductors by encouraging the rapid return of abducted children and the realisation that, in time, return of such children might indeed be against their best interests. After a year had passed since the abduction or retention it was felt that the new circumstances generated by the child's new environment compelled genuine consideration. Therefore, once that period has passed, it is open to the abductor to demonstrate that the child has settled in his or her new environment. If he fails to establish this (perhaps because the child has been continually moved) the requirement to return the child, subject to the grounds of opposition already discussed, remains; if he succeeds, the court will be free to decide the case on a full review of its merits.

"Settled" is to be given its natural meaning, which includes an examination of the existing facts demonstrating the establishment of the child in a community and an environment, and a consideration of the perceived stability of the position into the future. It is submitted. however, that it is going too far to insist that the settlement should be "permanent insofar as anything in life can be said to be permanent" (*Re N (Minors) (Abduction)* [1991] 1 FLR 413 (where an inoperative fax machine in the Lord Chancellor's Department took the case over the 12 month limit)). The "new" features of the situation are to be examined: they will include place, home, school, friends, activities and opportunities, but not *per se* the continuing relationship with the abducting parent (*Ibid; In the Marriage of Graziano and Daniels* (1991) FLC 92-212; *Perrin v Perrin*, 1994 SC 45). The court has to consider whether the child is so settled in its new environment that it is justifiable to set aside the otherwise mandatory requirement to return the child, whether the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention (*Soucie v Soucie*, 1995 SLT 414, IH).

Perceived merits not a ground for refusal

It is significant that none of these grounds for refusal is equivalent to a simple finding that "to return the child would be contrary to the child's best interests". To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the Convention. The grounds set out all require an express finding of the presence of a specific element in the situation and it is on this that the objection to return must be based, not an omnibus survey of the child's general condition.

Article 16 of the Convention prohibits the judicial and administrative authorities of a Contracting State, after receiving notice of a wrongful removal or retention of a child (which presumably need not be in the form of an actual application for the return of the child), from deciding on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

The sole fact that a decision as to custody has been taken in the requested country, or is entitled to recognition there, is not a ground for refusing to return a child under the Convention, but the court considering an application under the Convention may take into account the reasons for the earlier decision (Art. 17). This means, on the one hand, that a court which had previously decided on the merits to award custody to one parent may, after a series of kidnappings and rekidnappings, be obliged to order that parent to return the child to a foreign country of habitual residence of the child (see *Sheikh v Cahill,* 546 NYS 2d 517 (SupCt of New York, King's County, 1989) where after conflicting custody orders in England and New York, the New York court found itself in this position); but that the grounds for a previous decision, *e.g.* that one parent be declared unfit to have the care of the child, could be taken into account in considering the application of Article 13 to the facts of the case.

Securing the child's safe return

Courts in a number of jurisdictions have sometimes required the parent seeking the return of the child to accept conditions or to give undertakings before return will be ordered. So, in *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA) the court ordered the return of a child to Australia, accepting undertakings by the father to drop the contempt proceedings instituted against the mother, to pay air fares, maintenance, and school fees and provide accommodation and a car. For approval of the practice in general, see *Thomson* v. *Thomson* [1994] 119 DLR (4th) 235 (SupCtCan.); *De L v Director General, NSW Dept. of Community Services* (1996) 70 ALJR 932 (High Ct of Aust). However, courts have held that they have no power to impose conditions when ordering return under the Convention (*Police Commissioner of South Australia v Temple* (1993) FLC 92-365 (Full Court); *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (NZ CA) (though it might be otherwise if one of the grounds of Article 13 were held made out, and the court returned the child as a matter of discretion)).Undertakings are unenforceable once the parties have left the jurisdiction and there have been cases in which a parent giving undertakings has reneged on them after the return of the child (e.g., *McOwan v McOwan* ((1994) FLC 92-451).

The use of conditions and undertakings is, therefore, problematic. A rather different approach gained considerable support at the recent Special Commission of the Hague Conference. It was brought to the attention of the Special Commission by the Australian delegation, and has its origins in a number of Australian and New Zealand (*ZP v PS* (1994) FLC 92-480; *Cooper v Casey* (1995) FLC 92-575; *A v Central Authority for New Zealand* [1996] 2 NZLR 517,

NZCA). This approach places an obligation, within limits of available resources, on the Central Authorities of the two countries concerned, in terms of Article 7(h) of the Convention, to take steps to ensure that the child was adequately protected. The Australian working paper at the meeting of the Hague Special Commission in 1997 spoke, inter alia, of a duty "to assist and protect returning parents" and of the need to alert the appropriate protection agencies and judicial authorities of the return of any child who might be in danger.

Access cases

Article 21 allows a party resident outside a Contracting State to present to that State's Central Authority an application for making arrangements for organising or securing the effective exercise of rights of access. Central Authorities are not placed under any mandatory duties with respect to such applications other than generally to promote co-operation on these questions and in practice this can be achieved by passing the matter on to a local lawyer who may then either negotiate an agreement between the parties or institute whatever proceedings may be necessary in the local courts on behalf of the party living abroad. In an English case under the Convention, the court said that, subject to the welfare principle, it would seek to give effect to access rights under the law of the applicant's country with any necessary modifications (*B v B Minors: Enforcement of Access Abroad* [1988] 1 WLR 526).

However, in access as in custody cases, the Convention only applies to a child who was habitually resident in a Contracting State immediately before any breach of the relevant rights, and this means that the Convention must have been in force as between the countries concerned at the relevant time (*B v B (Enforcement of Access Abroad)* [1988] 1 WLR 526).