



BRIEFING PAPER

Number 7726, 24 July 2019

International child abduction – preventing abduction and recovering children (England and Wales)

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Summary

This House of Commons Library briefing paper covers international child abduction, including the criminal law, steps to prevent abduction occurring, and what to do if it does happen.

Under the Child Abduction Act 1984, it is a criminal offence for a “connected person”, such as a parent, to take a child out of the UK without the “appropriate consent”. In what could be termed as special cases, this may be required from a local authority for a child subject to a care order, for example. In other cases, it can be required from someone with caring responsibilities for the child (e.g. parent or special guardian) although if certain court orders are in force relating to the child then the appropriate consent is not required for trips that are less than a specified duration.

If someone believes a child to be at risk of abduction overseas, there are a number of steps that can be taken whether that risk is considered to be imminent or not. This can include the “Port Alert” system that warns officials at ports and airports that a child is at risk of abduction.

When a child has been abducted, the Hague Convention on International Child Abduction can facilitate the swift return of the child, although there are three defences against an immediate return.

Although the Convention is in force in the UK, this is not true of all countries; in these cases, seeking recovery is “limited” but may still be possible.

Anyone whose child has been abducted, or who has abducted their child (e.g. fleeing domestic violence) should seek specialist legal advice and seek advice, for example from Reunite International (see section 7.2).

This note applies to England and Wales only.

1. Who can take a child overseas?

1.1 The Child Abduction Act 1984

The Child Abduction Act 1984 provides the following criminal offences:

- section 1 of the Act provides an offence of child abduction by parents and other “connected persons” (see section 1.2);
- section 2 provides an offence of child abduction or detention by other (i.e. non-connected) persons.¹ This offence occurs whether the child, once taken, is retained within the jurisdiction of England and Wales or removed abroad.²

Whether or not a criminal offence under the 1984 Act has occurred does not prevent civil action being taken to recover an abducted child from overseas (see sections 3–5).³

Box 1: The “Nicolaou problem” – retention of a child overseas by a connected person

In the 2012 judicial review of the case of Nicholas Nicolaou, who faced prosecution under section 1 of the 1984 Act for child abduction,⁴ it was found that, in a nutshell, no child abduction offence occurs when a parent has consent to leave UK with their child for a holiday but then fails to return.⁵

The Law Commission summarised the issue arising from the case as follows:

- (a) The law provides an offence of child abduction by parents and connected persons.
- (b) It also provides an offence of child abduction or detention by unconnected persons.
- (c) But it does not provide for the case where a child is lawfully removed from the jurisdiction by a parent or connected person and then retained beyond the time for which permission was given. This is covered by neither child abduction nor kidnapping. (It does, however, fall within the scope of civil procedures for the recovery of the child pursuant to international conventions.)

[...]

The section 1 offence can only be committed by “taking or sending” a child out of the United Kingdom, not by wrongfully detaining the child abroad. [Only] The section 2 offence encompasses “detaining” the child.⁶

The Law Commission concluded: “we consider that there is a deficiency in the section 1 offence that ought to be addressed” and in November 2014 recommended a change in the law to “criminalise child retention by parents or connected persons by amending section 1 of the Child Abduction Act 1984. This would provide a statutory solution to the Nicolaou problem”.⁷

However, the recommendation has yet to be implemented. As the Ministry of Justice noted in July 2018 on this point: “the Government has been considering the feasibility of the Law Commission’s recommendations and aims to issue an interim response to the report in due course”.⁸

The Law Commission notes on its webpage related to this matter that, nearly five years after making its recommendation, “we are waiting for a response from Government”.⁹

¹ Law Commission, [Simplification of Criminal Law: Kidnapping and Related Offences](#), Law Com No 355, HC 797 19 November 2014, p38, para 3.17

² Hershman and McFarlane, *Children Law and Practice*, para G11

³ Law Commission, [Simplification of Criminal Law: Kidnapping and Related Offences](#), Law Com No 355, HC 797 19 November 2014, p38, para 3.17

⁴ [R v Redbridge Magistrates Court & Another \[2012\] EWHC 1647 \(Admin\)](#)

⁵ Family Law Hub, [R v Redbridge Magistrates Court & Another \[2012\] EWHC 1647 \(Admin\), Case note](#), 15 July 2012

⁶ Law Commission, [Simplification of Criminal Law: Kidnapping and Related Offences](#), Law Com No 355, HC 797 19 November 2014, p38, para 3.17 and p43, para 3.28

⁷ As above, p49, para 3.50 and p101, para 5.1

⁸ Ministry of Justice, [Report on the implementation of Law Commission recommendations](#), Cm 9652, July 2018, p18, para 84

⁹ Law Commission, [Simplification of the Criminal Law: Kidnapping and Related Offences](#), webpage accessed on 17 July 2019

If someone commits an offence under either section 1 or 2 of the 1984 Act, the penalties are:

- on summary conviction, imprisonment for up to six months and/or an unlimited fine; or
- on conviction on indictment, imprisonment for a term of up to seven years.

1.2 The requirement for appropriate consent for a person “connected” with a child

If someone is “connected” with a child (who is under 16 years of age), then they must obtain the “appropriate consent” before they either “take or send” the child out of the UK unless an exception is applicable.¹⁰

The term “take or send” for these purposes is defined as follows:

- “a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken”;
- “a person shall be regarded as sending a child if he causes the child to be sent”.¹¹

A person connected with a child

For the purposes of the Child Abduction Act 1984, the following people are connected with a child:

- a parent of the child; or
- in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child; or
- a guardian of the child; or
- a special guardian of the child; or
- someone named in a child arrangements order as a person with whom the child is to live; or
- a person who has custody of the child.¹²

Appropriate consent in special circumstances (e.g. child in care of local authority or subject to certain adoption-related proceedings)

Special rules apply in regard to the “appropriate consent” in the following circumstances:

¹⁰ The United Kingdom for these purposes includes England, Wales, Scotland and Northern Ireland. It does not include the Channel Islands or the Isle of Man.

¹¹ Child Abduction Act 1984, section 3 as amended

¹² Child Abduction Act 1984, section 1 as amended

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- if a child is “in the care of local authority” i.e. subject to a care order,¹³ then the appropriate consent is the consent of the local authority;
- if a child is “detained in a place of safety” further to certain legislation,¹⁴ or “remanded to local authority accommodation” or “youth detention accommodation”,¹⁵ then the appropriate consent is a reference to the leave (i.e. permission) from “any magistrates’ court acting for the area in which the place of safety, local authority accommodation or youth detention accommodation is”;
- where the child has been placed for adoption,¹⁶ then the appropriate consent is a reference to the consent of each person who has parental responsibility for the child or to the leave of the High Court;
- where an adoption order, a placement order or a section 84 order¹⁷ has either been made or applied for (and not yet disposed of), then the appropriate consent is the leave of the court which made the order or, as the case may be, to which the application was made.

If both the first and also the third or fourth bullet points apply to a child, then the third and fourth bullet points apply only.¹⁸

Box 2: What is parental responsibility?

Parental responsibility is a legal term set out in the Children Act 1989 as amended, and is defined as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.¹⁹

Some people automatically acquire parental responsibility – including the child’s mother and (in many cases) the father. It can also be acquired through an agreement or order, or as a result of a child arrangements order for residence or special guardianship order being made, for example – it is not something that only a child’s birth parents can have.

Further information can be found in the Library briefing paper, [Children: parental responsibility - what is it and how is it gained and lost \(England and Wales\)](#).

In all of these circumstances, even if a connected person has a child arrangements order for residence (or a residence order) or a special guardianship order in respect of the child, they must seek the

¹³ This excludes children who are being provided with accommodation by a local authority under section 20 of the Children Act 1989 as amended. Or in other words, it does not apply to all looked after children, only those subject to a care order [section 105, Children Act 1989 (under the interpretation of “care order”)].

¹⁴ Namely, under paragraph 4(1)(a) of Schedule 1 or paragraph 6(4)(a) of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000 or paragraph 21(2) of Schedule 2 to the Criminal Justice and Immigration Act 2008, or under paragraph 9(3) of the Schedule to the Street Offences Act 1959.

¹⁵ Namely, under paragraph 4 of Schedule 1 or paragraph 6 of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000 or paragraph 21 of Schedule 2 to the Criminal Justice and Immigration Act 2008 or under paragraph 10 of the Schedule to the Street Offences Act 1959 or under section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁶ Under section 19 of the Adoption and Children Act 2002, or an adoption agency is authorised to place the child for adoption under that section.

¹⁷ Specifically, section 84 of the Adoption and Children Act 2002 in regard to giving parental responsibility prior to adoption abroad.

¹⁸ Child Abduction Act 1984, schedules 1 to 4 as amended

¹⁹ Children Act 1989, section 3

appropriate consent from the relevant body or person(s). Further, the provision for holders of such orders to take or send a child named in the order out of the UK for either one or three months (as applicable, see section 1.3) without needing the appropriate consent does not apply.

Appropriate consent in other circumstances

In circumstances other than those listed above and unless one of the matters listed in section 1.3 applies, a person connected with a child must obtain the appropriate consent i.e. the consent of each of the following:

- the child's mother;
- the child's father, if he has parental responsibility for the child;
- any guardian of the child;
- any special guardian of the child;
- any person named in a child arrangements order (or residence order) as a person with whom the child is to live;
- any person who has custody of the child.²⁰

1.3 When appropriate consent is not required

A child arrangements order (for residence) or special guardianship order is in force

If certain court orders are in place, then it is possible to take or send a child overseas without requiring the "appropriate consent" (see section 1.3) and so not commit an offence under the 1984 Act.

Specifically, if:

- the person named in a **child arrangements order** (or residence order as they were previously called) that is in force is the person with whom a child is to live, they may take or send the child named in the order out of the UK for up to 1 month;
- the person named in a **special guardianship order** that is in force can take or send the child they are the special guardian for out of the UK for up to 3 months.²¹

However, it is important to note that these exceptions do not apply if:

- there is a court order preventing the removal of the child from the UK (see section 2).
- one of the special conditions for "appropriate consent" applies (see section 1.2).²²

²⁰ Child Abduction Act 1984 section 1

²¹ Section 1(4), Child Abduction Act 1984

²² Schedules

Box 3: The absence of time limits in other cases

If a child arrangements order or special guardianship order is not in force, there is ambiguity over the rules on consent for holidays abroad.

The legal text Children Law and Practice notes that “there is no authority upon the question of whether, where there is no residence [or child arrangements] order, a person with parental responsibility can take or send the child abroad for a holiday without the consent of the other(s) with parental responsibility”.²³

It is therefore arguably best to seek the “appropriate consent” of the relevant parties before taking a child abroad. For the avoidance of doubt, relevant legal advice should be sought.

Other situations where the appropriate consent is not required

More generally, an offence is not committed even if the appropriate consent is not obtained where it is required and a connected person takes or send a child out of the UK if one of three exceptions apply:

- the connected person does it in the belief that the other person—
 - (i) has consented; or
 - (ii) would consent if he was aware of all the relevant circumstances; or
- they have taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or
- the other person has unreasonably refused to consent.

However, this final provision does not apply if the person who unreasonably refuses to consent is: named in a child arrangements order (or residence order) as someone with whom a child is to live, or; a special guardian of the child, or; has custody of the child. In addition, it does not apply if there is a court order in force that is breached by removing the child from the UK (see section 2).²⁴

For example, the legal text Children Law and Practice notes that “there is no defence under this provision if the person named in the child arrangements order as the person with whom the child is to live has not consented to the trip, no matter how unreasonable his stance may be”.²⁵

Box 4: Other considerations when taking a child abroad

In addition to the matters stated above, it is very important to check the entry requirements for the country being visited.

For example, some countries require a minimum amount of time before expiry for a child’s passport, or for a full birth certificate to be presented alongside a child’s passport. For more information, see the Foreign and Commonwealth Office’s “[Foreign travel advice](#)” webpages, in particular the webpage entitled “Entry requirements” for a particular country.

In particular, if a child’s surname does not match that of the parent or carer travelling with them, additional documentation may be required. This should be checked with the country being visited (e.g. through their Embassy or High Commission in London) as well as with the relevant UK authorities for the return journey.

²³ Hershman and McFarlane, Children Law and Practice, para A33

²⁴ Child Abduction Act 1994, section 1 as amended

²⁵ Hershman and McFarlane, Children Law and Practice, para G24

2. Measures to prevent a child being abducted overseas

2.1 Risk of abduction but not imminent

Where someone is concerned that a child may be at risk of abduction abroad at some point in the future, then there are a number of steps that they can take including:

- a prohibited steps order;
- a child arrangements order;
- wardship proceedings;
- an injunction under the inherent jurisdiction of the High Court.²⁶

Taking each in turn briefly:

Prohibited steps order

A prohibited steps order is an order made by a court under section 8 of the Children Act 1989 as amended. As such, when a court is considering whether to make, vary or discharge such an order, the welfare of the child is the court's "paramount consideration".

A prohibited steps order is an order that "no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court". It can apply to a range wide of matters, including the removal of a child from the UK.²⁷

Such an order can only be made in respect of a child who has yet to reach 16 years of age, and will only have effect until the child reaches 16, unless exceptional circumstances apply to the case (in which case the age limits stated here are increased to 18 years).

Children Law and Practice explains that:

The order may be made against 'any person' or against a named person or persons. A prohibited steps order in the latter form may be useful in some cases even where there is a residence order in force, so that the general embargo created by the residence order can be particularised to one or more persons who can be served personally with the order.

It adds that such an order "affects the exercise of steps which a parent could take ... but not the activities of the child himself". This means, for example, that an older child who wishes to visit, for example, his estranged father abroad would not be prevented by a prohibited steps order.²⁸

When a prohibited steps order is made "prohibiting or otherwise restricting the removal of a child from the UK", then the court may

²⁶ Hershman and McFarlane, *Children Law and Practice*, para G46

²⁷ Hershman and McFarlane, *Children Law and Practice*, para B372

²⁸ Hershman and McFarlane, *Children Law and Practice*, para G41

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require any person to surrender any UK passport issued to a child.²⁹ Children Law and Practice notes that:

There is a standard precedent held by the Tipstaff's office for a 'passport order' under which a party, or any other person served with the order, is required to surrender passports and other documents to the Tipstaff.³⁰

A prohibited steps order can also be applied for where a child is at imminent risk of abduction overseas (see section 2.2).

Child arrangements order

A child arrangements order can specify with whom a child is to reside or to have contact with – for these purposes, it concerns a child arrangements order for residence. Such an order can be made for a child up to the age of 16 years (unless exceptional circumstances apply) but may have effect until they reach 18 years of age.

As noted above in section 1.3, a child arrangements order has important consequences in regard to taking a child out of the UK, including allowing someone in whose favour a child arrangements order for residence has been made to:

- remove the child for up to one month without the "appropriate consent" (unless it concerns a "special case" as outlined above), but also to
- "unreasonably refuse" to allow a child to be taken abroad.

Inherent jurisdiction of the High Court

The inherent jurisdiction of the High Court is "a description of the court's common law powers, insofar as they have not been removed or replaced by statute". An article by Janet Bazley QC and Sharon Segal notes that:

The inherent jurisdiction of the High Court to make orders in relation to a child derives from the right and duty of the Crown to take care of those who are not able to take care of themselves. This is often referred to as *parens patriae*, an archaic concept that a child owed allegiance to the Crown and in return the Crown had a protective jurisdiction over the child wherever they were.³¹

Wardship proceedings

A child can be made a ward of court by the issue of an application in wardship (unless the child is in local authority care) under the inherent jurisdiction of the High Court.³² Children Law and Practice explains that:

The result of becoming a ward of court is that no important step in the child's life may be taken without the prior leave of the court. The application in wardship must state that the ward cannot leave or be removed from the jurisdiction of England and Wales without the consent of the court.³³

²⁹ Hershman and McFarlane, *Children Law and Practice*, para G53

³⁰ Hershman and McFarlane, *Children Law and Practice*, para G53

³¹ Thompson Reuters: *Practical Law*, *Inherent jurisdiction of the High Court*,

³² Ministry of Justice, [Practice Direction 12d – Inherent Jurisdiction \(including Wardship\) Proceedings](#), 11 January 2018, para 1.3

³³ Hershman and McFarlane, *Children Law and Practice*, para G45

where the term “important step” (sometimes called a “major change”) that requires the court’s leave (i.e. permission) includes “the ward leaving the jurisdiction of the court (meaning outside England and Wales)”.³⁴

Injunction

Children Law and Practice notes that “the High Court, under its inherent jurisdiction, has power, in the interests of the child, to make wide-ranging injunctions for his protection ... whenever it is ‘just and convenient to do so’”.³⁵

Practical steps to reduce the risk of abduction

Reunite International, an international child abduction charity (see section 7.2), highlights that “as well as getting court orders there are other practical measures you can take to minimise the risk that your child is abducted”, including the following examples:

- Inform your child’s school or nursery of your concerns and share with them any court orders that you have. Clarify with the school or nursery how they can support you and how much information they are able to share with you, especially if your child or the other parent says or does something in school that confirms your concerns of abduction.
- Share your concerns with anyone who looks after your child, such as a childminder, friend or leader of any extra-curricular activities, so that they can act accordingly.
- If you have a good relationship with anyone close to the other parent, such as a neighbour or a friend, ask them to let you know if they see or hear anything that confirms your concerns of abduction. Examples of this could be that they hear that the other parent’s house is up for sale, or they see the other parent and your child get into a taxi with lots of luggage.
- If your child is old enough and it is not going to scare them, make sure they know what to do if the potential abductor attempts to take them out of the country. For example, tell them to go to a police officer, airport security officer or a person in authority and ask them to contact you.³⁶

2.2 Imminent risk of abduction

In situations where it is believed a child is at an imminent risk of abduction from the UK, there are a number of possible steps that can be taken including:

- the criminal law, namely the Child Abduction Act 1984;
- prohibited steps order;
- surrender of the child’s passport;
- the “port alert” system;

³⁴ Hershman and McFarlane, *Children Law and Practice*, para B1060

³⁵ Hershman and McFarlane, *Children Law and Practice*, para B1286

³⁶ Reunite International, [International Parental Child Abduction: Prevention Guide for England and Wales](#), 2018, pp12–13

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- automatic protection within wardship proceedings.³⁷

Taking each in turn briefly (except the first bullet point, which is set out in section 1 above):

Prohibited steps order (in an emergency)

As detailed in section 2.1, a prohibited steps order can be made to prevent the removal of a child from the UK when there is considered to be no immediate risk. However, a court can also make such an order when there is an imminent risk of abduction.

Children Law and Practice notes that “in an emergency it is possible for the court to grant the order on a without notice basis”.³⁸

The charity for victims of abuse, Rights of Women, provides the following explanation of without notice applications:

In certain circumstances, you can ask the court to hear your application without the other parent knowing about it. This is called a without notice application. In order to have a without notice hearing you will need to show that if you told the other parent that you were making the application:

1. this would enable the other parent to take steps which would defeat the purpose of your application (for example, take the child abroad before the hearing);
2. you, or the child, would not be safe if you gave notice to the other parent (for example if he has been abusive in the past or threatened abuse);
3. there is some other exceptional urgency, which means there is no time for you to give notice.

During a without notice hearing, the judge will hear your reasons for making the application without informing the other party and may make the order you request or may postpone making the order until they have also heard from the other party. Even if the court makes the order you have requested, it will usually set a date for a further hearing to decide whether or not the order should continue. The other parent will be informed of this hearing date and asked to attend the hearing to put forward their views.³⁹

Control of passports

As noted above, if a prohibited steps order is made by a court “prohibiting or otherwise restricting the removal of a child from the UK”, then the court may require any person to surrender any UK passport issued to a child.⁴⁰

An application can be made to the High Court for a “passport order” which, if made, which requires “a party, or any other person served with the order, ... to surrender passports and other documents to the Tipstaff”.⁴¹

³⁷ Hershman and McFarlane, Children Law and Practice, para G46

³⁸ Hershman and McFarlane, Children Law and Practice, para G42 and B676

³⁹ Rights of Women, [Children and the law: the Family Court process: What if I need to take urgent court action?](#), August 2014, pp4–5

⁴⁰ Hershman and McFarlane, Children Law and Practice, para G53

⁴¹ Hershman and McFarlane, Children Law and Practice, para G53

Such an order can only be made in respect of a UK passport – however, “where there is a threat of removal by a foreign passport holder, the High Court’s inherent jurisdiction may be invoked to order the surrender of the foreign passport in order to protect the interests of the child”.⁴²

The “port alert” system

Also known as “port stop”, this operates as follows: “if the police are notified that an attempt may be made to remove a child unlawfully from the UK, they can, through their national computer system, alert all other police forces and notify immigration officers of the details of the child who is at risk”.⁴³

A port alert is sent to immigration officers at all UK ports and airports, and the name of the child at risk of abduction is held for four weeks.

Before issuing a port alert, the police will need to be “satisfied that the threat of removal is both real and imminent”, where “imminent” means “within 24 or 48 hours” and “real” means “that the port alert is not being sought by, or on behalf of, the applicant merely as a means of insurance”.⁴⁴

Automatic protection within wardship proceedings

As noted in section 2.1 above, a child can be made a ward of court by the issue of an application in wardship (unless the child is in local authority care) under the inherent jurisdiction of the High Court.

An issue of an application for wardship “automatically makes the subject child a ward of court” (except when the child is in care).

Children Law and Practice explain that:

Becoming a ward of court immediately on the issue of the application provides the child with instant legal protection because, whilst he is a ward of court, no important step can be taken in his life without the leave of the court. This has otherwise been expressed as: no serious change in the arrangements for him should be made without reference to the court.⁴⁵

⁴² Hershman and McFarlane, *Children Law and Practice*, para G53

⁴³ Hershman and McFarlane, *Children Law and Practice*, para G54

⁴⁴ Hershman and McFarlane, *Children Law and Practice*, para G61

⁴⁵ Hershman and McFarlane, *Children Law and Practice*, para B1056

3. The Hague Convention on international child abduction

3.1 An explanation of the Hague Convention on the Civil Aspects of International Child Abduction

The Hague Conference on Private International Law is a global inter-governmental organisation which “develops and services multilateral legal instruments, which respond to global needs”.⁴⁶ It has 81 members – 80 states and the European Union.

The Conference has published a number of conventions on international law, including the Hague Convention on the Civil Aspects of International Child Abduction (known as the “Hague Convention” for this note).

As the Hague Conference explains:

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to combat parental child abduction by providing a system of co-operation between Central Authorities and a rapid procedure for the return of the child to the country of the child’s habitual residence.

Central Authorities in each country provide assistance in locating the child and in achieving, if possible, a voluntary return of the child or an amicable resolution of the issues. They also co-operate to prevent further harm to the child by initiating or helping to initiate proceedings for the return of the child, and by making necessary administrative arrangements to secure the child’s safe return.⁴⁷

The explanatory report to the Hague Convention states that it:

does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken — in which case the violated custody rights were exercised *ex lege* [i.e. by law or legal right] — as to a removal in breach of a pre-existing custody decision.⁴⁸

⁴⁶ Hague Conference on Private International Law, [A World Organisation](#), website

⁴⁷ Hague Conference on Private International Law, [The Hague Children’s Conventions](#), September 2017, p4

⁴⁸ Hague Conference on Private International Law, [Explanatory Report by Elisa Pérez-Vera](#), April 1981, p430, para 19

3.2 Countries where the Hague Convention is in force

Not all members of the Hague Conference have brought this particular Hague Convention into force, while a number of non-members have.

A full list in the form of a status table can be found online at:

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>

The Hague Convention entered into force in the UK on 1 August 1986.

It should be noted that not all countries that have acceded to the Convention have had this accepted by the other countries that are Party to the Convention (shown as an "A*" on the online status table). For example, the Hague Convention entered into force in Guatemala in May 2002, but this has yet to be accepted by the UK.⁴⁹

Box 5: The European Convention

The UK is also a signatory to the European Convention on Recognition and Enforcement on Decisions Concerning Custody of Children.

The Council of Europe's⁵⁰ European Convention only applies to "decisions concerning custody" i.e. court orders already made; in contrast,⁵¹ the Hague Convention concerns the "enforcement of *rights* of custody".⁵² Children Law and Practice notes that "it is not necessary for there to be a court order concerning the custody of the child before the Hague Convention can operate to enforce a right of custody which may exist independently of any such order", and adds that even if there is a court order relating to custody, "that too can be enforced under the Hague Convention insofar as it confers a right of custody".⁵³

The operation of the European Convention is limited to Council of Europe (CoE) member states (whereas the Hague Convention is international), and for the UK only operates between:

- the UK and members of the Council of Europe that are not also Member States of the European Union; and
- the UK and Denmark.⁵⁴

3.3 How the Brussels IIR regulation supplements the Hague Convention

As the European Commission explains:

The Hague Convention of 25 October 1980 on the civil aspects of International Child abduction ("the 1980 Hague Convention") has been ratified by all the Member States of the European Union and continues to apply in relation to cases of child abduction between Member States. However, the 1980 Hague Convention is supplemented by certain provisions of the [Brussels IIR] Regulation, which come into play in such cases. Thus, as regards

⁴⁹ See: <https://www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=663>

⁵⁰ The Council of Europe is not related to the European Union or any of its bodies. Rather, it is a separate organisation concerned with human rights. Its membership is much broader than the EU area including, for example, Russia and Azerbaijan.

⁵¹ A list of the members of the Council of Europe who have signed, ratified and brought the European Convention into force can be found at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105/signatures>

⁵² Hershman and McFarlane, *Children Law and Practice*, para G147

⁵³ Hershman and McFarlane, *Children Law and Practice*, para G147

⁵⁴ Official Solicitor (ICACU), [ICACU guide to completing the application form](#), undated, p3

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the operation of the 1980 Hague Convention in relations between Member States, the rules of the Regulation prevail over the rules of the Convention in so far as it concerns matters governed by the Regulation.⁵⁵

Brussels IIR (also known as Brussels IIa or Brussels II bis) applies in all EU members states except Denmark, which opted out of it.

In terms of how Brussels IIR complements the Hague Convention, Children Law and Practice highlights that:

the key provisions of Brussels IIR which complement the Hague Convention are:

- Actual exercise of rights of custody [...];
- Acquiescence [...];
- Settlement [...];
- Where the relevant 12-month period has elapsed, a child has acquired a new habitual residence, it is established that the child is settled in his new environment and no application for return has been made within the 12-month period, the country from which the child has been removed or retained will cease to have jurisdiction over him [...];
- Child's views [...];
- Duty to act expeditiously [...];
- Grave risk [...];
- Non-return orders [...];
- Enforceability of judgments which override non-return orders [...];
- Habitual residence [...].⁵⁶

The European Commission has published the "Practice Guide for the application of the Brussels IIa Regulation" which sets out how Brussels IIR complements the Hague Convention in more detail.

For example, the Practice Guide notes that "when a court of a Member State receives a request for the return of a child pursuant to the 1980 Hague Convention, it shall apply the rules of the Convention as complemented by Article 11(1) to (5) of the Regulation",⁵⁷ and sets this out in a table (see overleaf, where "MS" is shorthand for "Member State"):⁵⁸

⁵⁵ European Commission, [Practice Guide for the application of the Brussels IIa Regulation](#), p49, section 4.1.1

⁵⁶ Hershman and McFarlane, Children Law and Practice, para G172AA

⁵⁷ European Commission, [Practice Guide for the application of the Brussels IIa Regulation](#), 2015, p53, section 4.3.1

⁵⁸ As above, para 4.3.6

	Relevant rules of the 1980 Hague Convention	Relevant rules of the Regulation
The obligation to order the return of the child	Article 12: The court of the MS to which the child has been abducted ("the court") shall in principle order the immediate return of the child if less than a year has elapsed since the abduction.	Article 11(2) to (5): The Regulation confirms and reinforces this principle.
The exception to this obligation	Article 13(1)(b): The court is not obliged to order the return if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.	Article 11(4): The court cannot refuse to order the return of the child on the ground that it would put the child at risk, if it is established that the authorities in the MS of origin have made adequate arrangements to secure the protection of the child upon her/his return.
Hearing the child	Article 13(2): The court may refuse to order the return of the child if she or he objects to being returned and has attained an age and maturity at which it is appropriate to take account of her/his views.	Article 11(2): The court shall ensure that the child is given an opportunity to be heard during the proceedings, unless it is inappropriate having regard to the child's age and maturity.
The hearing of the non-abducting custody holder	(No provision)	Article 11(5): The court cannot refuse to return the child unless the person who requested the return has been given an opportunity to be heard.
The time limit for handling requests for return	Articles 2/11: Art 2: Contracting States shall take all appropriate measures to secure the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available. Art 11: The court shall act expeditiously in proceedings for the return of the child. If the court has not reached a decision within 6 weeks, it may be requested to state the reasons for the delay.	Article 11(3): The court shall use the most expeditious procedures available in national law. The court shall issue its decision no later than 6 weeks from the lodging of the application, unless this proves impossible due to exceptional circumstances.

Box 6: Brexit and Brussels IIR

Should the UK leave the European Union (EU) without a deal, Brussels IIR would no longer apply. It is possible that should the UK join an international organisation such as the European Economic Area (EEA) then, according to an article in Practical Law, "it would in all likelihood decide to join the Lugano Convention, and therefore be under a regime similar to Brussels Ia [or IIR]".⁵⁹ For more information, see the Library briefing paper, [Brexit: the Brussels Ia regulation – cross-border child contact cases, and child abduction](#).

⁵⁹ Thomson Reuters: Practical Law, "[Practical Law's Brexit summary: a watching brief](#)", 27 July 2016

4. The provisions of the Hague Convention (and Brussels IIR)

4.1 For whom can an application under the Hague Convention be made?

The Hague Convention applies in respect of a child who is aged under 16 years.

Article 3 of the Convention defines wrongful removal or retention of a child as where the child was:

- habitually resident in a state that has adopted the Hague Convention (i.e. a “contracting state”) immediately before their removal from it; and either
 - has been wrongfully removed to or retained in another contracting state in breach of rights of custody
 - there has been a breach of access rights exercisable.⁶⁰

It should be noted from the above that the state that the child is removed from and the state that the child is removed to or retained in both have to be “contracting states” to the Hague Convention on international child abduction.

The authority concerned “shall order the return of the child forthwith” where a child:

- was habitually resident in a Contracting State immediately before any breach of custody or access rights;
- the child has yet to attain the age of 16 years.
- has been wrongfully removed or retained in terms of Article 3 (see above), and either:
 - at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention; or
 - the judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.⁶¹

However, for international child abduction cases between EU member states (except Denmark), Brussels IIR supplements the Hague Convention to the effect that where one year has elapsed (and the child is settled in their new environment and no application was made within

⁶⁰ Hershman and McFarlane, *Children Law and Practice*, para G147A

⁶¹ Hague Conference on Private International Law, [28. Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980, Articles 4 and 12

12 months of the removal or retention) then the country from which the child was removed or retained ceases to have jurisdiction.⁶²

The Hague Convention cannot be applied retrospectively i.e. to acts of wrongful removal, or retention, that predate the entry into force of the Convention in the individual state concerned.⁶³

If one of the three “Article 13” defences is proven, then the immediate return of the child under the Convention is not required.

4.2 The three “Article 13” defences to prevent an immediate return

Under Article 13 of the Hague Convention, there are three exceptions to the requirement that a child be immediately returned following a case of international child abduction. The Hague Convention states that:

the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return 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 removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation[; or]
- the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.⁶⁴

Box 7: Criticism of the Convention in regard to those fleeing an abusive partner

The Michigan Journal of International Law noted that, notwithstanding the Article 13 defences, critics of the Hague Convention “highlight one of the Convention’s biggest shortcomings: its failure to anticipate that many abductors would be victims of domestic violence fleeing their abuser”. It was argued that “the Convention was not written with this possibility in mind and can often lead to unfair and dangerous results in those situations”.⁶⁵

As noted in section 4.1, a Contracting State can determine a matter under the Hague Convention once a child is deemed to be habitually resident in that country. An article published in 2015 in The Guardian noted that the Convention “does not take in to account short-term moves or trial migrations, and there is no fixed definition of what constitutes a child’s habitual residence: in some cases it can change the moment a plane touches the ground on foreign soil”. As a result, victims of domestic

⁶² Hershman and McFarlane, Children Law and Practice, para G172AA

⁶³ As above

⁶⁴ Hague Conference on Private International Law, [28. Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980, Article 13

⁶⁵ Salmeron, A., [Seeking Reform of the Hague Convention on the Civil Aspects of International Child Abduction](#), Michigan Journal of International Law

abuse could face “a stark choice between being prosecuted for abduction or accused of child abandonment – all because they took their family to a foreign country and split from their partners”.⁶⁶ There have been campaigns to introduce a definition of habitual residence in the Convention – the charity GlobalARRK has called for a 12 month period to be stated in the Convention before someone is deemed to be habitually resident in a new country.⁶⁷ The next opportunity to amend the Convention would appear to be the eighth “Special Commission” on its practical operation which has been proposed for 2022.⁶⁸

4.3 Tracing a child overseas

The Hague Convention makes provision for central authorities to work together to trace a child who has been taken abroad.

Article 7 of the Convention states that “Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention”, with particular reference that they “shall take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained”. This can be achieved either directly or through any intermediary, according to the Convention.⁶⁹

4.4 How quickly should a child be returned?

Under the Hague Convention, the judicial or administrative authorities of Contracting States “shall act expeditiously in proceedings for the return of children”. No time limit is set, although if after six weeks (from the date of commencement of the proceedings) no decision has been made, then the applicant or the Central Authority of the requested State shall have the right to request a statement of the reasons for the delay.⁷⁰

However, where the Hague Convention is complemented by Brussels IIR, then there is a time limit of six weeks. As the European Commission explains: “The court must apply the most expeditious procedures available under national law and issue a decision within six weeks of being seised with the application for return of the child. This time limit may only be exceeded if exceptional circumstances make it impossible to achieve”.⁷¹

⁶⁶ [“The mothers fighting to get their children back home again”](#), The Guardian, 16 May 2015

⁶⁷ GlobalARRK, [Areas of concern: Creating solutions](#), webpage accessed on 24 July 2019

⁶⁸ Hague Conference on Private International Law, [Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions \(10-17 October 2017\) – Conclusions and Recommendations](#), p11, para 82

⁶⁹ Hague Conference on Private International Law, [28. Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980, Article 7

⁷⁰ As above, Article 11

⁷¹ European Commission, [Practice Guide for the application of the Brussels IIa Regulation](#), p56, section 4.3.5

5. Seeking the return of a child under the Hague Convention

5.1 How to apply for the return of a child from overseas

Applicants would be strongly advised to seek legal advice.

In order to seek the return of a child from overseas, where the country concerned is one in which the Hague Convention on International Child Abduction is in force (and recognised by the UK), applications should be made to the appropriate central authority:

- England and Wales – The International Child Abduction and Contact Unit Office of the Official Solicitor;
- Scotland – Scottish Executive Justice Department (Private International Law Branch);
- Northern Ireland – Northern Ireland Court Service (Civil and Family Branch).

For England and Wales, the form and associated guide to making an application can be found at the GOV.UK website.⁷²

Once an application is received and accepted by the Central Authority, then “it shall directly and without delay transmit the application to the Central Authority of that Contracting State [where the child is believed to have been abducted to] and inform the requesting Central Authority, or the applicant, as the case may be”.⁷³

The Hague Convention sets out the roles and responsibilities of the overseas Central Authority when it receives such a request:

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make

⁷² GOV.UK, [International Child Abduction and Contact Unit application form](#), 13 June 2019

⁷³ Hague Conference on Private International Law, [28. Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980, Article 9

- arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
 - h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
 - i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.⁷⁴

5.2 What happens when a court hears a case under the Hague Convention

As the preamble to the Hague Convention on international child abduction notes, the purpose of the Convention is to “establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”.⁷⁵

The case will be heard by a court in the Contracting State that the child has been taken to – as such, it will be the laws of that country that determine how the Hague Convention and any application made under it is interpreted. There may be differences in an overseas country’s law compared to that of England and Wales, for example in regard to the definition of habitual residence.

If a child is abducted to England or Wales, an application under the Hague Convention case will be considered by the High Court. The remainder of this section provides more information on this process as an example as to how such cases are dealt with, although as noted above this will not necessarily be the same in other countries.

Unlike the Children Act 1989, which states that, for example, when a court “determines any question with respect to (a) the upbringing of a child; or (b) the administration of a child’s property or the application of any income arising from it”, then “the child’s welfare shall be the court’s paramount consideration”, different rules apply when a court is considering a matter under the Hague Convention.

As the legal text Children Law and Practice notes, “the English courts have consistently emphasised that in Hague Convention proceedings the child’s welfare is not the paramount consideration and that the primary object of the Hague Convention is to ensure the summary return to the country of habitual residence of children wrongfully removed or retained”.⁷⁶

⁷⁴ Hague Conference on Private International Law, [28. Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980, Article 7

⁷⁵ As above, 25 October 1980, p1

⁷⁶ Hershman and McFarlane, Children Law and Practice, para G159

6. Taking action if abduction occurs – non-Hague Convention cases

6.1 Available remedies

As the legal text Children Law and Practice notes, “the remedies available to bring about the return of a child who has been removed from England and Wales to a country that is not a signatory of either the Hague Convention or the European Convention are limited, and, compared to the system under those Conventions, primitive”.

Possible remedies include:

- making a direct application for custody and the return of the child in the foreign court;
- seeking the extradition of the adult who has taken the child if a criminal offence has been committed;
- taking proceedings for contempt in England and Wales if an order has been breached so as to obtain an order for sequestration;
- seeking the forfeiture of any bond or surety that may have been given;
- instigating wardship proceedings in the High Court.⁷⁷

However, while some countries may not be a signatory to the Hague Convention they may “actively cooperate as if they are”.

Additionally, some non-Convention countries have entered into a bilateral arrangements with the UK similar to the Convention: Pakistan and Egypt are two such countries.⁷⁸

6.2 Safeguards to ensure a child is returned from an overseas trip

Where there is an issue about the possible abduction of a child during a foreign trip to a non-Convention country, it is possible to seek the imposition of certain safeguards by a court.

Children Law and Practice notes that:

Where there is an issue about whether a child will be returned to the jurisdiction following a holiday, it would be usual for there to be a hearing involving oral evidence and consideration of what, if any, safeguards need to be put in place. Where travel is proposed to a non-Hague Convention state, the court must conduct a careful analysis and apply rigorous scrutiny to the proposals. In such cases, normally the court should proceed on the basis that expert evidence concerning the foreign jurisdiction is necessary to evaluate practical and legal safeguards and, if no expert evidence

⁷⁷ Hershman and McFarlane, Children Law and Practice, para 197

⁷⁸ International Family Law Group LLP, [Child abduction: What happens if our child has been abducted to a country which is not a signatory to the Hague convention?](#), webpage accessed on 24 July 2019

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is admitted, the court must give a clear explanation of the reasons why expert evidence was not necessary. The following are possible safeguards:

- undertakings given to bring the child back to the jurisdiction at a particular time (or via a particular route) on a specified day; or
- a solemn declaration which the person taking the child would regard as binding;
- a 'bond' for a sum of money to be entered into to secure compliance with an order for return;
- 'mirror orders' made in the country of travel to reflect the orders made within the jurisdiction, in particular specifying the return of the child;
- a requirement that a copy of the airline tickets and travel visa be provided to the other parent (and, if appropriate, lodged with the British High Commission in the holiday destination);
- a direction that there be no application to seek passports in the holiday destination;
- the children made wards of court and declarations made as to their habitual residence.

In *Re L and B (Children)* the court refused permission for the children to travel to a non-Convention country (Algeria) where expert evidence had established that none of the potential safeguards against abduction would have effect.⁷⁹

⁷⁹ Hershman and McFarlane, *Children Law and Practice*, para A35

7. Helpful resources

The following resources provide additional information which might be of interest.

7.1 Information on the Hague Convention

In regard to the Hague Convention on the Civil Aspects of International Child Abduction, the following resources are available:

- [The text of the Convention;](#)
- [Explanatory Report by Elisa Pérez-Vera;](#)
- [List of other related publications by the Hague Conference.](#)

7.2 Reunite International

The charity, Reunite International, which receives funding from the Government, describes itself as the “leading UK charity specialising in the movement of children across international borders”.

It explains that it “provides neutral advice and information to all persons involved in child abduction matters”, including people accused of international child abduction. It adds that “a person facing child abduction allegations requires specialist and urgent assistance and reunite will ensure that this is given”.⁸⁰

Reunite has an advice line:

- 0116 2556 234, or
- +44 1162 556 234 if calling from outside the UK.

The advice line is staffed Monday to Friday, between 9.30am and 5.00pm, although for emergency situations the advice can be called at anytime.

Reunite’s website is: <http://www.reunite.org/>

⁸⁰ Reunite International, International Parental Child Abduction - Frequently Asked Questions, website [taken on 4 October 2016]

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Version control

1.0	4/10/16	Published
2.0	24/7/19	Sections 1 and 2 and boxes 1 to 7 added, redrafted and restructured throughout, and title and template changed

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