

## Reforming the Hague

# Hague International Child Abduction Convention

Reforming International Parental Child Abduction law to lessen its impact on victims of domestic abuse.

### Current Law: Summary

The Hague Convention was introduced to address cross-border child abduction, aiming to return children to their country of habitual residency. It encourages voluntary return, so does not directly punish the taking parent.

Taking parents may defend an application, including by raising Article 13(b) when return poses a grave risk of physical or psychological harm to the child. If this defence fails, however, they must return the child.

This brief will discuss the problems with the Convention and the law governing international child abduction, in the context of its failure to protect victims of domestic violence who flee their abusive partners. It will then set out proposals to address these issues.

### Current Law: Problems

#### *Defences will not be applied to domestic violence*

According to a Hague Conference review, over 73% of abductors are mothers, with the “overwhelming majority” raising Article

13(b) in relation to domestic violence (Reece, 2022). A significant problem however is that Article 13(b) is often disapplied in such cases. Due to their wide discretion, some judges set the threshold for ‘grave risk’ very high; in *Kinnaird v Jones* (2001), even returning to a warzone was not deemed ‘grave’ enough of a risk. Many judges erroneously assume that the child must be the primary target of abuse for there to be a grave risk of harm. In doing so, they dismiss the harm a child suffers in witnessing violence against their mother (Kaye, 1999) or via the effect it will have on her parenting. The *Guide to Good Practice* acknowledges that an exposure to domestic violence undermines a child’s health, emotional and social development. It also leaves them vulnerable to coming between their parents and being physically injured.

Rejection of the defence is somewhat unsurprising given the generous judicial faith in domestic authorities to protect the child and their mother upon return (Weiner, 2021). The Convention’s primary concern is the return of the child, and so courts will often give little to no consideration to what will happen after proceedings. The defence of one victim,

Cassandra Hasanovic was rejected on the belief that home authorities would protect her and her child from harm. Despite the implementation of protective measures, Cassandra was murdered after UK police failed to arrest her partner.

Furthermore, whilst courts may issue protective provisions like non-molestation orders, they are generally not binding in home countries. This, coupled with the aforementioned failings of domestic authorities, leaves women vulnerable when they return to both tangible and “paper abuse” (Masterton et al, 2022) as well as unstable financial situations and homelessness. It illustrates the “gap” between women’s experiences of violence and institutional responses (Busch and Robertson, 1997), demonstrating that Article 13(b), and the Convention as a whole, fails victims of domestic violence.

### *Colluding with the perpetrator*

Some critics accuse the Hague Convention of effectively “colluding with the perpetrator” in its treatment of victim-survivors (Kaye). In some respects, the Convention seemingly affords an unfair advantage to the non-taking parent.

Firstly, the thresholds for ‘well-settled’ and ‘habitual residency’ lack harmony. Convention applications fail after one year has elapsed, when the child is assumed to be ‘well-settled’ in the new country. Applications themselves can be made if

the child is ‘habitually resident’ in the country from which they were taken. The Convention provides no explicit guidance on when a child is ‘habitually resident’ and so this will depend on domestic rules. The UK and EU establish residency after six months. In Australia, an individual is resident as soon as they arrive with the intention to stay.

In other words, a child is settled enough in their home country to justify an application after six months (or less) but would not be deemed settled after the same period in the destination country. This incongruity is illogical and serves only to expedite abusive fathers in taking back their child and regaining control over their partners

Legal aid creates a similar disadvantage for fleeing mothers. Legal aid is automatically available in England and Wales to all non-taking parents regardless of their financial situation. However, it is means-tested for taking parents and therefore unavailable to most people. Without legal aid, taking parents must pay their own fees; a difficult task for any individual, not least those who have fled an abusive partner and have likely been subjected to financial control.

If they cannot do this, they must represent themselves. This disparity is a clear undermining of the equality of arms principle, and once again gives abusers an unfair advantage over their victims.

### *Lack of awareness*

The final problem connected to child abduction law is that there is a significant dearth of awareness about the Hague Convention and its consequences. Many women emigrating with their partner and children are unaware that if they choose to return home, they will be committing a crime and engaging an international convention. Moreover, many public authorities and support agencies such as Citizens Advice still encourage women to leave abusive partners and stay somewhere safe. If that safe space is in another country, such advice will result in her committing a crime and being subjected to legal proceedings that may force her to give up her child or return to abuse.

## **Reform Proposals**

### *Amend Convention*

The most obvious solution to the Convention's problems is its amendment.

One such amendment would be to either alter Article 13(b) to explicitly connect domestic violence with a 'grave risk of harm', or to create an entirely separate defence for those fleeing domestic violence. These changes would give victim-survivors a greater chance to escape abusive partners whilst avoiding criminalisation and retaining their children.

The Convention may also benefit from an amendment introducing provisions similar to the EU's Brussels II regulations, making protection orders issued during proceedings in the destination country binding in the country of habitual residency (regardless of whether any treaty exists between the two). This reform would mitigate the impact of an unsuccessful defence by ensuring that she and her child will be safe. An amendment like this may have saved women like Cassandra Hasanovic.

It would also be useful to provide guidance on when a child is 'well-settled' to ensure consistent application of the defence. Better still, this threshold should match that of habitual residency; logic dictates that if children are habitually resident in one country after a year, they are also well-settled after a year in another.

This change is crucial to eroding the aforementioned advantage enjoyed by abusive men over women during litigation.

### *Guiding domestic courts*

This brief accepts that amending an international convention with over 100 signatories is a difficult task. A second approach to addressing its issues is reform at a domestic level.

It has been argued within the literature that courts should interpret Article 13(b) in a way that explicitly connects domestic violence with a grave risk of harm, in line

with cases like *Davies v Davies* (2017), wherein evidence of exposure to abuse made out the defence. Witnessing domestic violence has been known to cause children psychological harm and seriously undermine their social and emotional development (Weiner). Guidance should be put in place that such factors must be considered by courts when determining whether a grave risk exists. This guidance should also encourage consideration of post-Hague circumstances should the women and her child return, alongside careful analysis of the adequacy of protective measures. These changes would ensure that victim-survivors and their children are protected from abuse.

#### *Legal aid for taking parents*

Perhaps the most straightforward reform suggested in this brief is to extend automatic legal aid entitlement to the taking parent. Allowing both parties legal representation would level the playing field in Hague proceedings and again strip away a layer of the power held by abusers over their victims.

#### *Increase awareness*

Large-scale reform of the Convention, domestic approaches and legal aid may be unlikely in the near future. At the very least, the Government must endeavour to increase awareness amongst victims of domestic abuse and the institutions that

support them. Women must be educated about the Hague Convention's existence and the consequences of fleeing across borders. Consultation with experts and organisations like McKenzie Friends may also be desirable, in order to create a comprehensive public awareness initiative providing accurate guidance about escaping abusers in a way that does not trigger the Convention.

### **Conclusion**

This brief has not suggested that the Hague Convention should be repealed. It remains a useful and necessary tool to safeguard children from abduction by their non-custodial parent to an unfamiliar and potentially dangerous environment.

However, the Convention is not without flaw and, as this brief has illustrated, disadvantages mothers fleeing domestic violence at the hands of the child's father. Amendment of the Hague Convention, alongside reform of domestic approaches to international child abduction is now imperative to protecting victims of domestic violence and recognising the gendered nature of child abduction.

If no such efforts are made, the Hague Convention will continue to be weaponised by abusive men as an instrument of power and control over women.

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