

# 1KBW

## International child abduction

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# Why would I be interested in child abduction

- My clients don't abduct children
- Child abduction cases can seem like a scary world with lots of law
- I'll be out of my depth: those lawyers do little else
- Specialist international solicitors
- Acronyms which no one else uses: ICACU, HCCH, Article 13(b)

# What is child abduction anyway?

Moving a child from one state to another without the permission of the court or the consent of all of those who hold parental responsibility.

# More formally.....

- The removal or retention
- Of a child aged 15 or under in circumstances:
  - where the left behind parent holds Rights of Custody
  - and the child was removed or retained away from their state of habitual residence
- Is a wrongful removal or retention
- Proceedings issued within 12 months lead to an order for the summary return of a child unless one of the exceptions (known as defences) apply, in which case the court has discretion not to order the child's return

# When would I ever encounter such a case?

In an increasingly interconnected world:

- Your client may want to take a child abroad – to return home; because of work; due to a new relationship; for a holiday
- Or you may be acting for the parent on the other side of such a case, and may wish to prevent the child leaving the UK
- Your client may arrive in the UK from another state – on holiday; returning home; fleeing an abusive relationship; seeking to establish substantive jurisdiction
- As new states ratify the 1980 Hague Convention, such cases become more common
- The mandatory requirements of rule 15.52 of the FPR 2010
- The prospect of making the wrong application in the wrong circumstances - see *R v R (Jurisdiction and Acquiescence)* [2016] EWHC 1339 (Fam)

# The 1980 Hague Convention

- The central premise of HC80 is following the abduction of a child, steps should be taken to ensure the swift restoration of the child to the country of his or her habitual residence to enable the courts in that 'home' country to take any necessary decisions about substantive issues of custody
- Protecting the subject child, and protecting children generally from harmful effects of wrongful removal and retention
- Ensuring prompt return of abducted children to country of habitual residence
- Respecting rights of custody and rights of access held in one Contracting State in other Contracting States

# Summary return

Summary denotes both:

- speedy (the process is intended to be completed in under six weeks from issue to judgment if the child was habitually resident in another EU Member State); and
- Not driven by welfare concerns.

# How do you oppose a summary return

Guaranteed success:

- The child was not habitually resident in the requesting state at the date of removal/ retention
- The applicant did not have rights of custody

The gateway to discretion:

- The applicant consented to removal or has acquiesced in the retention;
- The child objects to a return;
- 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
- More than a year has passed since the removal or retention and the child is now settled



# What about welfare?

The welfare of the child is not ‘the paramount consideration’ in proceedings under HC80 and indeed is not referred to in any of its articles. However, the preamble records the general principle that *‘the interests of children are of paramount importance in matters relating to their custody’*.

The English courts have interpreted this as meaning that welfare is an element of any discretionary decision.

# The process of an application

Issue: considered by a judge and ex parte orders made if justified; locate the child

First hearing: statements; engagement of the child; final hearing listed

Final hearing: usually on submissions only

Return order: enforcement, including collection order

# Cases decided in Hague proceedings which are relevant to other fields

Habitual residence:

- Re A (Children) [2013] UKSC 60
- KL (Children) [2013] UKSC 75
- LC (Children) [2014] UKSC 1
- AR v RN (Scotland) [2015] UKSC 35
- Re B [2016] UKSC 4
- Re C (Children) UKSC 8
- UD v XB [2018], CJEU

The role of the court in hearing from children, including children meeting with judges

# The Inherent Jurisdiction of the High Court

A welfare based order which can be used:

- Where a child has been removed to or retained in a state which is not a HC1980 signatory
- Where a child has been brought to E&W from a state which is not a HC1980 signatory
- Where a child has been brought to E&W from a state which is a HC1980 signatory but HC1980 does not apply (young person aged 16; left behind parent has no rights of custody; issues in relation to habitual residence)
- In relation to new born babies?

# The Inherent Jurisdiction of the High Court

- These are welfare based orders
- The court must “have regard to” the welfare checklist and to PD12J
- The proceedings are not summary in nature, although the court is not required to conduct a “full blown welfare inquiry” in every case (per re L [2013] UKSC)
- Niche point (1): it is unlikely that the former practice of determining both a HC1980 application and an Inherent Jurisdiction application in one breath survives NY [2019] UKSC
- Niche point (2): the inherent jurisdiction is not available where the 1996 Convention is engaged is Re I-L (Children) [2019] EWCA Civ 1956

# Recent cases

- re H (Abduction: Retention in Non-Contracting State) [2019] EWHC Civ 672  
Child retained in a non-HC1980 state travelled to E&W; provided still HR in the home state, the jurisdiction exists to make a return order to the home state
- Re C and another (Children) (International Centre for Family Law, Policy and Practice intervening) [2018] UKSC 8  
Anticipatory or repudiatory breach of an agreement involving (i) a subjective intention not to honour the agreed arrangement; and (ii) Some objectively identifiable act or statement which manifests the repudiation of custody rights
- Re E (Abduction: Article 13b Deferred Return Order) [2019] EWHC 256 (Fam)
- Re NY [2019] UKSC 49  
there is no requirement to demonstrate that the issue cannot be resolved under Section 8 of the CA 1989, as previously appeared to be suggested by the wording of Para 1.1 of PD12D

- G (A Child: Child Abduction) [2020] EWCA 1185  
Interplay between child abduction proceedings and immigration issues, in the context of asylum applications
- B (A Child) (Abduction: Habitual Residence) [2020] EWC Civ 1187  
The court has the power, under HC1980, to order the return of the child to a state other than the state of the child's habitual residence at the relevant date of the wrongful removal or retention
- K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation) [2020] EWHC 2394 (Fam)  
the commencement of the child's asylum application prohibits the enforcement of the return order. Even if the the court concludes that the asylum application is a sham, a return order could not be enforced and all the court can do if it has doubts is to communicate its judgment to the Secretary of State

# The impact of Brexit

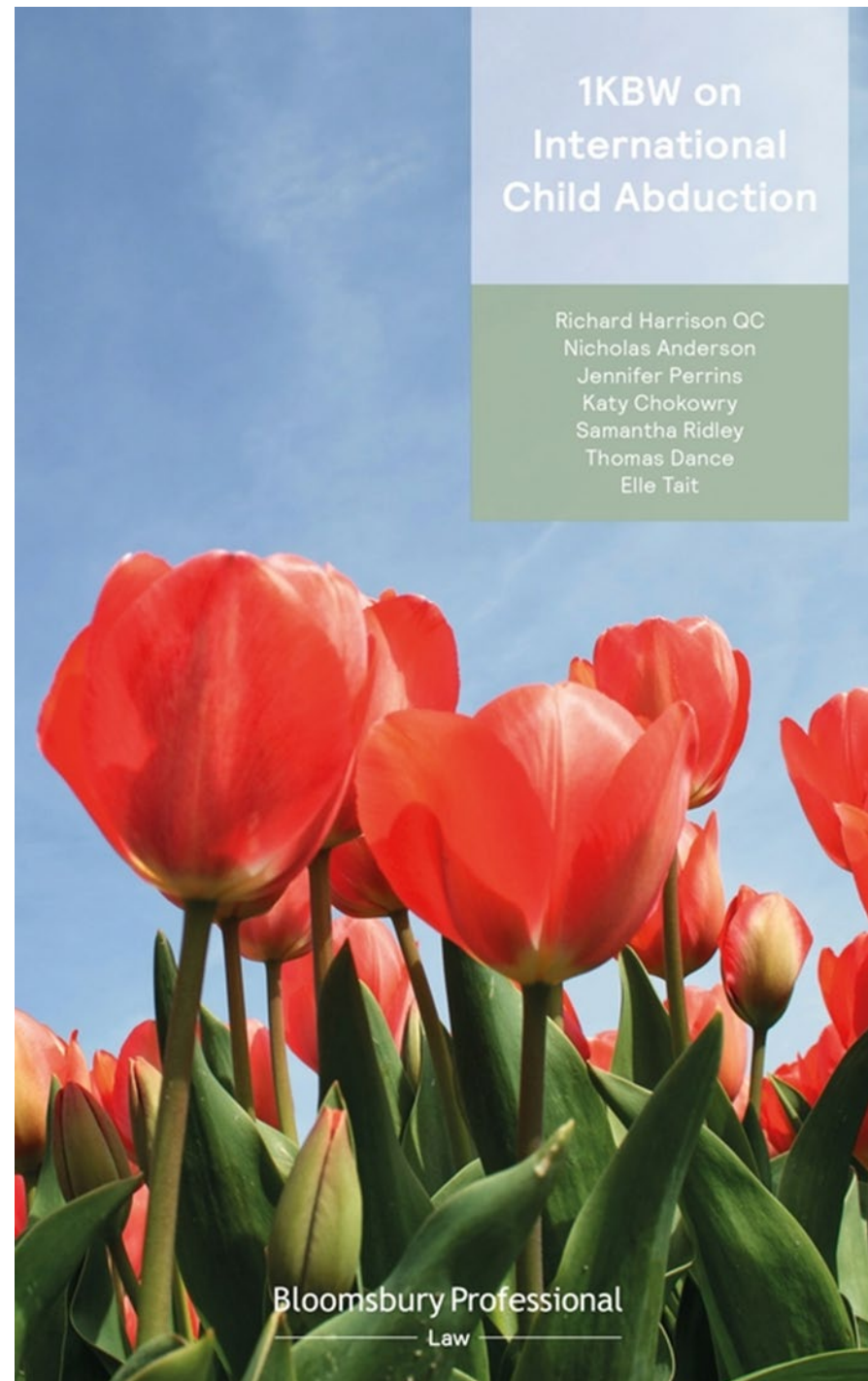
- The expedited procedure for the resolution of child abduction cases will be lost (Article 11(3) of BIIR); but the reality is that the English High Court prioritises abduction work whether it is a BIIR case or not
- all Member States are parties to the 1996 Hague (welfare) Convention so the court of an EU Member State in a case with a UK connection will apply the rules of the 1996 Hague Convention to decide whether it has jurisdiction in children cases
- Brussels IIR provided a mechanism for the enforcement of protective measures and the effective transfer of substantive jurisdiction from one Member State to another. The loss of automatic cross-border recognition may mean that mirror orders will need to be considered in appropriate cases



# Brexit

- the override mechanism provided by Article 11 of Brussels IIR will no longer be available. This mechanism has enabled a court in an EU Member State where a child was habitually resident before the child's abduction to another EU Member State to override the non-return order by that other State if it was based on Article 13 of the Hague 1980 Convention. The override return order was automatically enforceable with no grounds for refusal in all EU Member States

**If you want  
to know  
more.....**



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