

ADVANTAGES FOR STATES IN BECOMING A PARTY TO THE HAGUE CHILDREN'S CONVENTION 1996

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Abstract

Turkey is already a party to the Hague Convention on International Child Abduction of 1980. This brief paper will consider some of the reasons why Turkey may find it advantageous to become a party to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental responsibility and measures for the protection of Children (the Hague Children's Convention 1996).

Keywords: *Child Abduction, Protection of Children, Custody, Parental Responsibility, Habitual Residence.*

1996 TARİHLİ LAHEY ÇOCUK KONVANSİYONU'NA TARAF DEVLET OLMANIN AVANTAJLARI

Öz

Türkiye, hâlihazırda, 1980 tarihli Uluslararası Çocuk Kaçırmanın Hukuki Veçhelerine Dair Lahey Konvansiyonu'na taraf bir ülkedir. Bu çalışmada, Türkiye'nin, Velayet Sorumluluğu ve Çocukların Korunmasına İlişkin Önlemler Hakkında Yetki, Uygulanacak Hukuk, Tanıma, Tenfiz ve İşbirliğine Dair Lahey Konvansiyonu'na (Lahey Çocuk Konvansiyonu 1996) taraf olmasının sağlayacağı avantajlara ilişkin çeşitli nedenler değerlendirilecektir.

Anahtar Kelimeler: *Çocuk Kaçırma, Çocukların Korunması, Velayet, Ebeveyn Sorumluluğu, Mutad Mesken.*

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This Convention has 44 State Parties¹ and because it is part of the EU *acquis communautaire* the Convention has been adopted by all the EU Member States². The other Contracting Parties are Albania, Armenia, Australia, Dominican Republic, Ecuador, Georgia, Lesotho, Monaco, Montenegro, Morocco, Norway, Russia, Serbia, Switzerland, Ukraine, and Uruguay. Argentina and the USA are signatories.

The best way to get an up to date overview of the Hague Children's Convention 1996 is to read the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* which was published in 2014 by the Hague Conference on Private International Law and is available free on its website³. It highlights some of the children who can benefit from a State becoming a Party to the Convention and I will focus on three of the categories mentioned:

- a) "those who are the subject of international parental disputes over custody or access/contact;"
- b) "those who are the subject of international abduction";
- c) "those who relocate internationally with their families"⁴.

a) Those Who Are The Subject of International Parental Disputes over Custody or Access/Contact

When no child abduction has taken place but those who want to exercise parental responsibility (custody) in relation to a child or have access to a child live in different countries then it is helpful to agree the private international law rules that regulate such matters. The 1996 Convention does this by providing comprehensive jurisdiction rules whenever a child is habitually resident in a Contracting State – with the main rule of jurisdiction being the courts of the habitual residence of the child (Article 5)

¹ See the Hague Conference website status table for the 1996 Convention, http://www.hcch.net/index_en.php?act=conventions.status&cid=70, accessed 28 July 2016.

² See Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to the 1996 Convention in the interest of the European Community [2008] OJ L151.

³ <http://www.hcch.net/upload/handbook34en.pdf>, accessed 28 July 2016.

⁴ *Practical Handbook*, 11.

which can be replaced by the courts where the divorce or legal separation of the child's parents is taking place if all parental responsibility holders agree, at least one parent is habitually resident there, at least one parent has parental responsibility and the court believes it to be in the best interests of the child for it to hear the case (see Article 10). It also has some jurisdiction rules that apply to certain categories of children even when a child is not habitually resident in any Contracting State to the 1996 Convention (to refugee children, internationally displaced children or children with no habitual residence) allowing the courts of the place where such a child is present to exercise general jurisdiction (see Article 6). Finally it applies to children who are not habitually resident in a Contracting State but who are present, or their property is present, in a Contracting State in certain limited situations: in cases of urgency or on a provisional basis (see Articles 11 and 12).⁵In addition the Convention allows for transfer of jurisdiction in custody or access cases if the court having jurisdiction under the Convention "considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child" (see Articles 8 and 9) and these provisions are proving useful within the EU under the equivalent provision in the Brussels IIa Regulation (Article 15).

Generally speaking any court that has jurisdiction will apply its own law (very practical and cost saving) but it has the flexibility to apply foreign law in exceptional cases where that would be in the best interests of the child.⁶ A custody or access order given on the basis of the 1996 Convention's jurisdiction rules will be recognised by operation of law in any Contracting State to the Convention and can be enforced in any Contracting State subject to limited grounds for non-recognition (public policy, irreconcilable judgments, and, in non-urgent cases, the right of the child or of a parental responsibility holder to be heard was not respected)⁷.

⁵ *Practical Handbook*, 25.

⁶ *Practical Handbook*, 91.

⁷ *Practical Handbook*, 105-106. For a case showing how an order can be recognised and enforced under the 1996 Convention in England and Wales see *Re P (Recognition and Registration of Orders under the 1996 Hague Child Protection Convention)* [2014] EWHC 2845 (Fam). For a discussion of the public policy exception to non-recognition applying the rule in the 1996 Convention to a non-1996 Convention case because of the stale nature of the foreign custody order (3 years old) and other factors see *Re: U (Children)* [2014] EWHC 4535 (Fam) [16] – [18] Mostyn J.

b) Those Who Are The Subject of International Abduction

The Hague Convention on International Child Abduction 1980 has 95 Contracting States including Turkey⁸. This remains an extremely important Convention and is not replaced by the 1996 Convention. Instead the two Conventions are designed to work in harmony and the 1996 Convention “can be useful as a complement” to the 1980 Convention⁹. The international jurisdiction of the courts of the habitual residence of the child immediately before the wrongful removal or retention (the abduction) is turned from a presumption on which the 1980 Convention is based into an agreed legal reality by the 1996 Convention (see Article 5).

The 1996 Convention does help to plug a gap in the 1980 Convention when a court in the State where the child has been abducted to wants to return the child to the country of his or her habitual residence before the abduction but is worried about a grave risk of harm to the child if he or she is returned to that country without some legal safeguards being put in place. Article 11 of the 1996 Convention allows the court in the country to which the child has been abducted to “take any necessary measures of protection” if they regard it as a case of “urgency”. It seems reasonable to regard cases where an abducted child would not be returned to the country of the child’s habitual residence because it would constitute a grave risk of harm or create an otherwise intolerable situation for that child unless necessary measures of protection are in place, as being “urgent”. Article 11 of the 1980 Convention requires that the “judicial... authorities of Contracting States shall act expeditiously in proceedings for the return of children.” Therefore the court needs to decide quickly whether it can return the child without creating the grave risk of harm or the otherwise intolerable situation mentioned in Article 13(1)(b). It can take the “urgent” step of ordering some protection measures. These could include that the left behind parent cannot see the child alone and perhaps only with the supervision of a public authority. Such an urgent measure has the advantage that it will be recognised by operation of law in the State where the child is being returned to (Article 23(1)) but will lapse “as soon as the authorities” in the State of the child’s

⁸ See http://www.hcch.net/index_en.php?act=conventions.status&cid=24 , accessed 28 July 2016.

⁹ *Practical Handbook*, 139.

habitual residence “have taken the measures required by the situation” (Article 11(2))¹⁰. The 1996 Convention improves upon the system of mutual trust that exists under the 1980 Convention whereby judges are encouraged to assume that the authorities in the State of the child’s habitual residence will take the necessary measures to protect a child from physical or sexual abuse. In cases where that trust has broken down or not been properly established judges may not take the risk of returning children under the 1980 Convention. The 1996 Convention gives the judges confidence that they can order protection measures which will be recognised in the State of the child’s habitual residence (if it is also a party to the 1996 Convention) in the crucial period when the child is returning to that country (usually with the abducting parent) before the courts there have a chance to deal with the case.

Article 11 of the 1996 Convention is also a useful tool to enable the courts of the country to which the child has been abducted to award interim access (contact) to the left behind parent in the country where the child has been abducted to while the child abduction proceedings are pending¹¹. Given that these proceedings should be expeditious these access provisions should not be long lasting but even in a few months it would be detrimental to the child if he or she could not have contact in person with the left behind parent wherever that is practically possible (and of course contact by phone or internet video should always be possible).

c) Those Who Relocate Internationally with Their Families¹²

Where a child and its parents (or others holding custody or access rights, eg a grandparent) are all living in the same State it will be useful to be a party to the 1996 Convention as soon as one of these persons wants to leave the country. If an adult who holds custody rights or access rights wants

¹⁰ *Practical Handbook*, 141. For a discussion of the way Article 11 of the 1996 Convention should apply to Article 13(1)(b) 1980 Convention cases and how that should operate in intra-EU cases governed by the Brussels IIa Regulation, see Paul BEAUMONT, Lara WALKER, Jayne HOLLIDAY, *Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)-(8) Brussels IIa Proceedings Across the EU*, *Journal of Private International Law*, 2016, 211, 219-221.

¹¹ BEAUMONT, WALKER, HOLLIDAY, 141. See also Mr Justice Mostyn in *RB v DB* [2015] EWHC 1817 (Fam) at [28] – [29].

¹² BEAUMONT, WALKER, HOLLIDAY, 148-149.

to leave the country but not take the child with him or her then that adult will be keen to ensure that new arrangements can be put in place for seeing their child. If the country where the child is habitually resident orders new access arrangements for the adult leaving the country this order can be recognised or enforced in any Contracting State to the 1996 Convention (see Article 23(1)). Advance recognition can even be put in place in the country where the adult is going to before the child goes there for visiting access (see Article 24).

Of course if the court orders the relocation of the child to another country it is good that the provisions for access laid down in that relocation order to ensure that the child can maintain his or her relationship with the adult(s) that are not relocating with the child can be recognised and if necessary enforced under the 1996 Convention in the country where the child is relocating to. Admittedly the courts in the country where the child relocates to will in the fullness of time have jurisdiction to vary the order once they become the courts of the habitual residence of the child. However, it should only review or vary this foreign order in the same circumstances as it would vary a domestic order¹³. The Practical Handbook believes that the “court dealing with the review application should be very slow to disturb the arrangements concerning access/contact made by the authorities which decided upon the relocation”¹⁴.

¹³ BEAUMONT, WALKER, HOLLIDAY, 149.

¹⁴ BEAUMONT, WALKER, HOLLIDAY, 149.

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