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EXPERT GUIDE 2023

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THE HAGUE CONVENTION
COMES TO HOLLYWOOD

By Valentina Shaknes & Justine Stringer

While celebrities are certainly no strangers to the courtroom, whether it be in their real lives or as part of their jobs, it is not often when two celebrities are engaged in a legal action arising under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). Sophie Turner and Joe Jonas recently made news when Ms Turner filed an action under the Hague Convention against Mr Jonas in the Southern District of New York, alleging that Mr Jonas was wrongfully retaining the parties' two young daughters in the United States, against their prior agreement to reside permanently in the United Kingdom. This news has left many people wondering what is the Hague Convention and what implications does it have on international child custody disputes?

The Hague Convention is a multilateral treaty to which the United States and more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of removal from their home country to another country by one parent without the consent of the other parent. The Hague Convention requires a signatory state to promptly return a child "wrongfully" removed or retained to that state from another signatory state where the child habitually resided. To this end, the Hague Convention establishes an expedited process for the courts to formulate a decision on behalf of the child. The child usually remains in the country to which he or she was taken or retained in until the court determines whether the return should be ordered.

The Convention requires that a child determined to have been "wrongfully removed or retained" be promptly returned to the child's state of habitual residence. The taking or retention is considered "wrongful" if the petitioner proves by a preponderance of the evidence that: (i) the child was removed from or retained outside of the child's country of habitual residence; (ii) the removal or retention was in breach of the petitioner's custody rights; and (iii) those custody rights were actually exercised at the time of removal or retention or would have been exercised but for the removal or retention. Once this burden is met, the Convention requires that the child be returned.

While the convention is titled international child abduction, what people tend to not realise is that any relocation or retention of a child from its home country without the other parent's consent can be an abduction. Thus, this situation arises often when the parents are from different countries or the family is residing in a country where one parent is a foreign national and when relationship breaks down, that parent wants to go back to their home country. This is the typical scenario that triggers the Convention.

There are circumstances where the return may be inappropriate. The Hague Convention provides five narrow defences to the mandatory return: (a) the one-year and well-settled defence – where the child has been in the new country for one year or more and/or is well-settled there; (b) consent or acquiescence – petitioner consented or subsequently acquiesced to the removal or retention; (c) mature child objection; (d) human rights and fundamental freedoms; and (e) grave risk or intolerable situation, also known as an "Article 13(b)" defence.

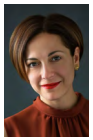
Article 13(b) of the Hague Convention is the most commonly invoked defence. Article 13(b) provides that "the judicial or administrative authority of the requested state is not bound to order the return of the child if [the party opposing repatriation] establishes that…there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Indeed, while the drafters anticipated that the typical abductor would be a non-custodial parent disappointed by or fearing an adverse custody decision by a court in the child's home country, this is no longer true. Over time it has become clear that in many, if not most, Hague Convention cases brought in U.S. courts to secure a child's return, the respondents – i.e., "the taking parents" – are primary caregivers escaping an abusive relationship. These are situations where the home country did not protect the parent and child despite what may be the law on the books. In other words, the law is not enforced, and therefore, the parent flees out of fear. Thus, it is a last resort decision.

There are limits to what Hague judges can determine as the Hague Convention expressly states that it is not a mechanism for resolving custody disputes. To the end, the International Child Abduction Remedies Act ("ICARA"), through which the Hague Convention is implemented in the United States, "empowers courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims."

Thus, the Hague Convention determinations require an entirely different kind of litigation and evaluation of the parties than what typically occurs in family law cases. The litigation focuses solely on the question of whether the child must be returned to his or her "country of habitual residence." The fundamental guiding purpose of the Convention is to ensure that custodial issues are decided by the child's home country by promptly returning the child there rather than in the court of the country to which the child was abducted by a parent.

Turning to the Turner-Jonas matter, the central inquiry that the court will be called upon to answer is whether the parties agreed to permanently move to the United Kingdom. It remains to be seen whether Mr Jonas will be raising any affirmative defences. The court will not be able to determine which parent the children should be with primarily or who will have legal decision making over them – that will be for the courts of the country that the Hague court ultimately determines to be the children's habitual residence.



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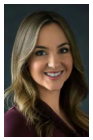

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