

CHAPTER THREE

Matters of Procedure

3.1 An applicant under the Convention is given the option of three methods of mobilising its provisions. He may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State (presumably the State where the child is thought or known to be) (Article 8). However, this facility is without prejudice to the right of the applicant, if he so wishes, to bypass the Central Authorities and make a direct application to the courts of a Contracting State (Article 29). If the removal or retention is wrongful within the meaning of the Convention, it should not matter in which way the proceedings originate. But if the application is made through Central Authorities, the Convention requires it to be accompanied by certain information. This is set out in Article 8. The information must include (a) the identity of the applicant, the child and the alleged abductor; (b) where available, the date of birth of the child; (c) the grounds on which the claim for return is based; (d) all available information relating the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The information may also include (a) an authen-

licated copy of any relevant decision or agreement;

(b) a certificate or affidavit from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State and (c) any other relevant documents. The Hague Conference has recommended a standard model form of application which is appended to the Convention. An Authority may also require (and this might be useful) that the application be accompanied by written authorisation empowering it or some other person to act on behalf of the applicant (Article 28). These communications should (where relevant) be accompanied by a translation into the official language, or one of the official languages, of the requested State, or, "where that is not feasible" into French or English (Article 24). However, a State may, by entering a reservation under Article 42, object to the use of French or English in this connection, but not to both.

3.2 On receipt of such an application, the Central Authority of the requested State may proceed no further with it if it is "manifest" that it falls outside the provisions of the Convention or is otherwise not well founded. If it does this, it is bound to inform the applicant, or the Central Authority through which the application was submitted, of its reasons for reaching

this conclusion (Article 27). If the application is accepted, there may be a number of choices open to the Central Authority of the requested State as to how to proceed. It probably should keep uppermost in mind, at this stage, the requirement of Article 10 that it should "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". So, if the whereabouts of the child is known, it may deem it best in the first instance to approach some social agency (for example, an officer of the International Social Services; or a local state or voluntary child welfare agency) to ascertain whether this can be achieved. If the whereabouts of the child is not known it might be necessary, in addition to or instead of taking the above steps, to contact the appropriate section of the police department. The Central Authority should also keep in view its duty, under the Convention, to prevent further harm being caused to the child "by taking or causing to be taken provisional measures". The appropriateness of taking such measures may best be judged by a child welfare agency. The Central Authority may also consider it right, even at this early stage, to obtain a lawyer to act on behalf of the applicant (see para. 1.5). That lawyer may be able to assist in negotiations between the parties and could institute relevant proceedings to safeguard the child's interests if available and appropriate.

3.3 But if these measures fail to secure the voluntary return of the child or an agreed resolution of the dispute, the Authority (or the lawyer acting on behalf of the applicant) should institute proceedings for the return of the child. It is assumed that the legal systems of Commonwealth countries would not permit the forcible removal of the child from the abductor for the purpose of returning the child home without a court order. The judicial procedure should be simple and rapid. The court should be able to act on the basis of the documents submitted with the application. Opportunities for delay by the abductor should be reduced to a minimum. Courts should attempt to determine the matter within days rather than weeks. In order to encourage rapidity, Article 11 states that if a decision has not been reached within six weeks from the institution of proceedings, the applicant or the Central Authority is entitled to ask for the reasons for the delay. If an order for the return of the child is made, it is the duty of the Central Authority to ensure that appropriate arrangements exist for ensuring the safe return of the child. Any expenses so incurred may be recovered by the Central Authority, and the court ordering the child's return may direct that these be met by the abductor (Article 26).