

THE IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION WITHIN THE UNITED KINGDOM

A paper prepared by the Government of the United Kingdom

PART I: LEGISLATIVE ASPECTS

This paper has been prepared on a slightly false pretence. Although the United Kingdom has enacted the Child Abduction and Custody Act 1985 Part I of which will give effect to the Hague Convention on International Child Abduction of 1980 (hereafter "The Hague Convention") this Act only comes into force on 1st August of this year. Therefore this paper will concentrate on the problems encountered in implementing the 1985 Act and in particular Part I and on the arrangements which have been made by the United Kingdom in respect of the Central Authorities and the procedure for these Authorities to receive applications under the Convention. Practical problems cannot be described although it is hoped that few or even none will occur.

2. The Child Abduction and Custody Act 1985 will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention of the same year on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (hereafter "The European Convention"). The latter Convention is of less importance in the context of the Commonwealth than the Hague Convention. However, Article 23 of the European Convention enables a state which is not a member of the Council of Europe to accede to the European Convention. In the interests of combating the growing social problem of child abduction each Commonwealth country should weigh up the advantages and disadvantages of acceding to the European Convention. The rest of this Paper deals with the Hague Convention.

3. The impetus behind the Hague Convention came from the Commonwealth. In October 1976, following a suggestion made in January 1976 by the Canadian representative the Hague Conference on Private International Law agreed to include in its programme for the Fourteenth Session the preparation of a Convention dealing with the problem of international child abduction. This proposal was given added momentum by the recognition at the meeting at Winnipeg in August 1977 of the Commonwealth Law Ministers of the need for international agreement on the subject. A special Commission drafted the Convention which was put in its final form at the meeting in October 1980 of the Fourteenth Session. The resulting Convention is given effect to in the United Kingdom in Part I of the 1985 Act. As the impetus came from the Commonwealth, there is much to be said for this process to be continued by as many Commonwealth countries as possible by their ratification of this Convention.

4. The Hague Convention has now been ratified by Canada, France Portugal and Switzerland. The U.S.A., West Germany and The Netherlands already have intimated that they intend to ratify the Hague Convention within the next two years. It is interesting to note the experience of Switzerland, which has not experienced any cases of child abduction since ratifying the Convention.

5. In proceedings in the United Kingdom the general principle where the custody or upbringing of a child is in question is that the court is required to have regard to the welfare of the child as the first and paramount consideration (see section 1(1) of the Guardianship of Minors Act 1971 and *J v C* (1970) A.C. 668). The first problem which the United Kingdom was confronted with when deciding whether to implement the Hague Convention

was whether the provisions of the Convention would derogate from the paramountcy principle. In the United Kingdom Government's view this is not so and it was reinforced in this view by the following arguments. First, the general principle of law that the child's welfare is paramount is now widely recognised in other countries particularly in the Commonwealth and in Europe as well as in the United Kingdom. Indeed the preamble to the Hague Convention recites that the states signatory to the Convention are "firmly convinced that the interests of children are of paramount importance in matters relating to custody". Secondly, as was succinctly put by Buckley L.J. in *Re L* (1974) 1 WLR 250 and is enshrined in the provisions of the Hague Convention, where a child has been abducted to another country, a full investigation of the merits of the case may be incompatible with the welfare of the child. In such circumstances as the Hague Convention so provides, an order that the child should be returned forthwith to the country from which he has been removed, in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as in his best interests. However, there may be an exceptional case where the child should not be returned to his or her home jurisdiction because, for example, the custodial parent has become inadequate or it is necessary to protect the child against ill treatment.

Articles 12 and 13 of the Hague Convention provide grounds on which the judicial or administrative authority hearing an application under the Hague Convention can refuse to return a child. Such cases will be very exceptional, both because any country which ratified the Convention must pay regard to the preamble and the great majority of these countries do already accept the paramountcy principle. Therefore, abducted children will be returned to their home jurisdiction which is the proper and only forum for determining custody disputes over these children.

6. As has already been mentioned in this Paper, Part I of the 1985 Act gives effect to the Hague Convention. The provisions in Part I give legislative force to those Articles of the Convention which could not be directly applied into United Kingdom law as was the case for the Hague Convention Articles set out in Schedule 1 to the 1985 Act. Certain other Articles were not given direct force within the United Kingdom by the Act. The provisions of these Articles either created only international obligations to which the United Kingdom is of course bound or were already reflected in the law of the United Kingdom.

7. There are two important lynch pins under the Hague Convention. First, the Central Authority which by virtue of Article 6 all the contracting states to the Convention are obliged to designate and secondly, the judicial or administrative authorities who are required to hear applications under the Convention (see Articles 11 to 15 and Article 21). The Central Authority assumes responsibility for making the administrative arrangements necessary to achieve the objectives of the Convention. The functions of the Central Authority which are set out in Articles 7 to 10 are extensive, including, inter alia, receiving from and sending to other Central Authorities applications under the Convention, tracing the whereabouts of the child, initiating or facilitating the institution of proceedings. The functions of the United Kingdom Central Authorities are described in more detail later on in this Paper. All that needs to be said at present is that without the Central Authority the Hague Convention cannot fully operate. By virtue of section 3 of the 1985 Act the Lord Chancellor is designated the Central Authority for England and Wales and Northern Ireland and, is also, because the United Kingdom has more than one Authority, the Supreme Central Authority for the United Kingdom. The Secretary of State for Scotland is the Central Authority for Scotland.

8. Although it is to the Central Authorities to which applications under the Convention will normally come (direct application to the judicial or administrative authorities is permitted by Article 29 of the Convention), it is for the designated judicial or administrative authorities under the Convention to determine whether or not a child should be restored to the person whose rights of custody have been infringed. Section 4 of the 1985

Act designates the High Court in England and Wales and Northern Ireland and the Court of Session in Scotland as the judicial authority to determine Hague Convention Applications. The reason why these courts have this jurisdiction conferred on them is:

- (i) their jurisdiction extends throughout the whole of the parts of the United Kingdom in which they sit;
- (ii) the provision of rules to determine which lower court should have jurisdiction could lead to considerable difficulties and complexities;
- (iii) the importance of securing consistency and speed in the giving of decisions; and,
- (iv) the international nature of the jurisdiction.

The rules of court which have been made for the Hague Convention for these courts further ensure that Hague Convention applications will, in accordance with reason (iii) above be determined expeditiously.

9. The United Kingdom Government was faced with a number of problems when devising the legislative scheme to implement the Hague Convention. The first issue arises because Article 16 of the Convention provides that:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

It was decided that the effect of this Article was that it would impose a Stay (or Sist in Scotland) on any existing proceedings. Section 9 of the 1985 Act defines for the purposes of Article 16 what are proceedings determining "the merits of rights of custody". Such proceedings include, for example, care orders made under section 1 of the Children and Young Persons Act 1969 and custody orders made in matrimonial proceedings, under sections 42 and 43 of the Matrimonial Causes Act 1973. The effect of Article 16 and section 9 of the 1985 Act is that once a Hague Convention Application has been made, any custody proceedings in respect of the same child will be stayed and the stay will only be lifted if the Convention application is unsuccessful. These provisions therefore ensure that the child's home jurisdiction has primacy in determining questions of custody.

10. The second issue was what was to be the effect of a United Kingdom custody order as defined in section 27(1) of the 1985 Act when the court had ordered the return of a child under the Hague Convention. In addition, Article 17 of the Hague Convention provides that the sole fact that a decision relating to custody had been made in the requested Contracting State was not a ground for not making a Hague Convention Order. The solution, which is contained in section 25(1) of the 1985 Act was to provide that once an order for the return of a child had been made under the Hague Convention any custody order relating to the child would cease to have effect. Section 25(1) of the 1985 Act also prevents the issue of custody being raised in the child's home jurisdiction on the basis that there is an existing (and possibly conflicting) custody order made in the United Kingdom.

11. The third issue concerned the question of the costs of applications under the Hague Convention. Article 26 of the Convention provides that Central Authorities are not to require any payment from an applicants in respect of measures taken by them, including the costs involved in representation in legal proceedings for the return of the child.

Paragraph 3 of Article 26 enables a Contracting State to enter a reservation to limit this financial help to those costs covered by the Contracting State's system of legal aid and advice. The United Kingdom has entered such a reservation. The effect of this reservation is that an applicant under the Hague Convention seeking the return of a child who has been taken to the United Kingdom will be given free legal aid when he or she applies to the appropriate United Kingdom Central Authority. All the costs of the proceedings will be paid by the United Kingdom Government under the legal aid system. There will be no means test for the applicant and he or she will not be required to pay any contribution. A similar system is in operation in Canada.

12. As this Paper has already mentioned the 1985 Act will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention. A conflict may arise if simultaneous applications are made in respect of the same child by different persons under both Conventions. The United Kingdom Government was determined to avoid this conflict. The 1985 Act provides that any application under Part I of the Act in respect of the Hague Convention will be determined before the application under the European Convention can be considered (section 9(b) and 16(4)(c)). An application under the European Convention will only be entertained if the application under the Hague Convention is in accordance with the statements made by the United Kingdom representatives at the time of the adoption of this Convention at the Fourteenth Session of the Hague Conference. Article 19 of the European Convention permits the Hague Convention to prevail where the Contracting States are parties to both Conventions: Article 20.1 permits the Hague Convention to prevail where one State is party to the Hague Convention but not to the European Convention. The United Kingdom has entered reservations against the European Convention to this effect.

PART II: PRACTICAL ASPECTS

13. When the United Kingdom central authority receives a request for the return of the child who has been allegedly abducted to the United Kingdom the first task is to ensure that the application is not manifestly outside the scope of the Convention. This is not considered to be an onerous task but clearly requires a lawyer or other person with knowledge of the scope and operation of the Convention to consider the application. When the application is accepted Article 7 provides that the central authority itself must take certain measures which cannot be delegated e.g. to solicitors. Generally, these duties will simply amount to collection, transmission and coordination of information, and where appropriate, the initiation of procedures by other internal authorities such as insuring that the immigration authorities prevent further abduction of the child. It is envisaged that the central authorities will have close but nevertheless informal links with the police, social services and probation departments, immigration and customs authorities etc. It will sometimes be necessary to give urgent instructions to one or another agency and for these reasons it is important for close links to be maintained so that an atmosphere of trust between internal agencies may be developed. Likewise, it is obviously important that the assistance of those agencies is invoked only in those cases where it is necessary.

14. Having, if necessary, taken whatever provisional measures are indicated, the central authority will then place the application in the hands of a solicitor. The problem arises how the solicitor should be chosen. It is clearly important that the central authority is not accused or suspected of favouritism in its choice of solicitors: likewise, it is important that the solicitors chosen should have experience of family law in general and, where possible, the operation of the Convention in particular. It is therefore proposed that, in consultation with the Law Societies in the three jurisdictions, a panel of approved solicitors should be established to cover the whole country and from which the solicitor should be drawn. It would be open to all solicitors to apply to join the panel. In this way it is hoped that a high standard of service may be maintained without any question of "favouritism" arising.

15. Although the central authorities are obliged, under the Convention, to work efficiently and quickly, nevertheless there is always the possibility that for any number of reasons (not the least of which may be possible delays in the post), applications may fail to be dealt with rather less speedily than may be hoped. In order to combat this difficulty and in order to try to obtain a speedy and informal method of exchanging information both on particular cases and on general experience of operation of the Convention, the European Community countries (all of which have signified their intention to ratify either or both the Hague Convention and the European Convention on Recognition and Enforcement of Custody Decisions) have set up a system of "correspondents". This system provides for one official within the central authority in each country, giving his or her name, address and telephone number who may be contacted informally and quickly by any other of the "correspondents" with a view of finding out what has happened in a particular case, giving or receiving further information. Such a system helps to avoid the possibility that urgent cases might get lost in the necessarily somewhat bureaucratic machine and it is to be hoped that the trust, mutual knowledge and cooperation which will grow up between the various correspondents will supplement the operation of the Convention in a useful way. A similar system of correspondents may be useful between the countries of the Commonwealth.

16. Finally, the value of the Convention is apparent in combating the social evil of child abduction. With mutual trust and sensible co-operation the countries of the Commonwealth, with their shared Common Law tradition, can make a valuable contribution to stamping out this evil ensuring the best possible future for the innocent children involved.