

106TH CONGRESS }
2d Session }

COMMITTEE PRINT

{ S. PRT.
106-76 }

**HAGUE CONVENTION ON INTERNATIONAL
CHILD ABDUCTION**

**Applicable Law and Institutional Framework Within
Certain Convention Countries**

A REPORT

TO THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

BY THE

LAW LIBRARY OF CONGRESS

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

OCTOBER 2000



Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE

70-663 DTP

WASHINGTON : 2000

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FOREWORD

January 2001.

In recent years, the Committee on Foreign Relations has devoted considerable attention to the problem of international parental abduction, which occurs when one parent removes or retains a child overseas in violation of a custody order or agreement. In October 1998, the Committee conducted a hearing on this issue, and received testimony from the Attorney General and several parents who have been “left-behind” (that is, their children were taken abroad by the other parent). In 1998 and 1999, the Committee included legislative provisions in the annual Foreign Relations Authorization Acts addressing this issue, namely by requiring the Department of State to submit thorough reports to Congress on the issue and by mandating that the Department provide additional manpower to the Office of Children’s Issues, which is the Department of State’s lead office for handling these cases.

This compendium was prepared by the Law Library of Congress at our request following the aforementioned Committee hearing. During the hearing, one witness expressed frustration that there was “no central repository of reliable information” with basic data on foreign legal systems. This report begins to close this information gap by reviewing the laws and procedures of certain nations which are party to the Hague Convention on the Civil Aspects of International Child Abduction. The initial report covers 25 countries which are party to the Convention. The Law Library is continuing work on reports about several other Convention countries.

We express our deep appreciation to the Law Library staff members who contributed to this report. We hope the report and subsequent editions will be useful to parents and other readers.

Honorable JESSE HELMS,

Chairman, Senate Committee on Foreign Relations.

Honorable JOSEPH R. BIDEN, JR.,

Ranking Member, Senate Committee on Foreign Relations.

LETTER OF TRANSMITTAL

THE LIBRARY OF CONGRESS,
LAW LIBRARY, DIRECTORATE OF LEGAL RESEARCH,
Washington, DC, August 28, 2000.

Honorable JESSE HELMS, *Chairman*
Honorable JOSEPH R. BIDEN, JR., *Ranking Member*
Senate Committee on Foreign Relations,
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATOR HELMS AND SENATOR BIDEN:

The attached reports are submitted in response to your request that the Law Library of Congress prepare a series of reports concerning the Hague Convention on International Child Abduction. The purpose of these reports is to identify the applicable law and institutional framework within each of the Convention countries as an aid in understanding how the Convention is implemented domestically in those nations.

The initial series of reports covers 25 countries that are party to the Convention. Work is underway to complete the next phase which will provide reports for an additional 8 of the remaining 29 Convention countries (excluding the United States). As some of the foreign legal specialists who are developing the reports are responsible for more than one country (in some cases up to six countries), we anticipate that the remaining reports, apart from the 8 that constitute the next phase, will be submitted to the Committee over the course of a number of months.

We trust that these reports will be of value to the Committee and to other readers.

Sincerely,

DAVID M. SALE,
Director of Legal Research.

INTRODUCTION

At the request of the Senate Foreign Relations Committee, the Directorate of Legal Research of the Law Library of Congress is preparing a series of reports concerning the implementation of the Hague Convention on the Civil Aspects of International Child Abduction. The purpose of these reports is to identify the applicable law and institutional framework within each of the Convention countries as an aid in understanding how the Convention is implemented by the nations that are party to this treaty. This work is being developed in stages and the initial reports cover 25 countries that are parties to the Convention.

For each country covered in this initial installment, the reports contain a uniform format with the following five major categories of assessment specifically relating to the Convention: domestic laws and regulations implementing the Convention (Part I), domestic laws regarding child abduction and parental visitation (Part II), the court system and structure for the courts responsible for handling cases arising under the Convention (Part III), the law enforcement system (Part IV), and legal assistance programs (Part V). The reports are current as of the date indicated on each document. In addition to identifying applicable statutes, the reports also note case law developments in those countries where domestic courts have applied the Convention.

The mission of the Directorate of Legal Research is to provide research and reference services to the Congress on foreign, international, and comparative law. These initial reports involve the work of 17 members of the Directorate's current staff of 23 multilingual foreign legal specialists. The reports were edited by Ms. Alicia Byers, principal editor, and by Ms. Natalie Gawdiak and Ms. Sandra Jones.

DAVID M. SALE,
Director of Legal Research,
Law Library of Congress.

ARGENTINA

INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction adopted on October 25, 1980, during the XIVth Session of the Hague Conference on Private International Law, was ratified by Argentina¹ effective June 1, 1991. On May 31, 1998, pursuant to art. 45 of the Convention, the Argentinean government transmitted a declaration rejecting the extension of the Convention to the Falkland Islands by the United Kingdom of Great Britain and Northern Ireland. Argentina also reaffirmed its sovereign rights over the Malvinas, South Georgia and South Sandwich Islands.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Central Authority for the Convention in Argentina is the *Direccion General de Asuntos Juridicos-Direccion de Asistencia Judicial Internacional* of the Ministry of Foreign Affairs, International Commerce and Worship.²

A. RESTITUTION REQUESTED FROM ABROAD WHEN THE CHILD WAS TAKEN INTO ARGENTINA

The Central Authority has only administrative and informational functions since it is always the judiciary that will decide on the restitution of the child or the visitation schedule. Once an application for restitution has been received, the Central Authority will verify that the petition complies with all the requirements provided for under the Convention. Before seeking a child's restitution or voluntary visitation from the parent in whose residence the child is located, the Central Authority must obtain the prior approval of the requesting parent.

If the child's restitution or voluntary visitation schedule does not take place at this first stage, the petition will have to be submitted by a private attorney to the competent court. The Central Authority will provide the pertinent court with a general background of the Convention and will also offer its assistance to the court during the proceedings.

However, the Central Authority does not provide legal assistance to private individuals during the proceedings before Argentine courts. Therefore, a private lawyer will have to be hired to carry out the judicial part of the request. Those who cannot afford a pri-

¹Law 23857 of October 19, 1990 in Boletín Oficial [B.O.] Oct. 31, 1990.

²Law 24190 *Ley de Ministerios*, art. 17 inc. 11 and Decree 488/92 and Ministerial Resolution 203/94.

vate lawyer and qualify for it may obtain the assistance of a public defender.

B. RESTITUTION REQUESTED FROM ARGENTINA WHEN THE CHILD HAS BEEN TAKEN INTO A FOREIGN COUNTRY

The petitioner will have to fill out a standard set of forms from the Central Authority and return them to the Central Authority in triplicate. This form requests all the information necessary to locate the child, including identity information concerning the child and the person who has taken the child; the child's date of birth; the reasons for claiming the restitution; and information on the presumptive domicile of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached.³ Seeking legal counsel is recommended in order to complete the form, although this is not required. In case the petition is addressed to a non-Spanish speaking country, the forms will have to be submitted both in English and Spanish.

Once all documents have been submitted, the Central Authority will evaluate whether the case meets all the requirements of the Convention. If the case is admitted, the Central Authority will send the restitution and visitation petition to the Central Authority of the requested country. The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority together with the procedural norms applied by the competent courts. In many cases the petitioner will have to hire a private attorney in the requested country. If this is unaffordable for the petitioner, he or she may investigate whether they qualify under Argentine law to receive free legal advice and therefore become eligible for such assistance abroad.

The petitioner will be kept informed by the Argentine Central Authority about the status of his or her case since both Central Authorities will be in constant contact about the case.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

Under the Criminal Code,⁴ anyone who takes and hides a minor of 10 years of age or younger from the control of his or her parents, guardian, or person in charge of him or her is punished with imprisonment of 5 to 15 years.⁵ Scholarly opinion is not clear on whether a parent who takes a child from the other parent is guilty of this crime.⁶ However, a number of court decisions⁷ have decided that any parent who takes and keeps a child out of the control of

³Jose Carlos Arcagni, *La Convencion de la Haya sobre los Aspectos Civiles de la Sustraccion Internacional de Menores y el Derecho Internacional Privado Tuitivo*, 1995-D Revista Juridica Argentina La Ley, Sec. Doctrina, 1032 (Buenos Aires, 1995).

⁴O. y Florit, *Codigo Penal de la Republica Argentina*, Editorial Universidad, Buenos Aires, 1997.

⁵*Id.* art. 146.

⁶*Id.* at 347.

⁷Camara Nacional Criminal y Correccional, Sala II, December 3, 1987, in *Boletin de Jurisprudencia Camara Nacional Criminal y Correccional*, 1987, No. 4 at 1680; Sala III, May 27, 1992 in *Boletin de Jurisprudencia Camara Nacional Criminal y Correccional*, 1992, No. 2, at 141; Sala I, June 28, 1994, in *Boletin de Jurisprudencia Camara nacional Criminal y Correccional*, 1994, No. 2, at 77.

the parent who has been judicially assigned the custody of the child is guilty of this crime.

Law 24270⁸ created the crime of *Impedimento de Contacto der Hijos Menores con sus Padres no Convivientes* (impeding minors from having contact with the non-custodial parent). Therefore, the parent or a third person who illegally prevents or obstructs contact between a minor and his or her parents not living with him or her will be punished with imprisonment of one month to one year. If the child is younger than 10 years of age or handicapped, the punishment is imprisonment of six months to three years.⁹

The same sanctions would apply to the parent or third person who, in order to prevent the parent not living with the child from contacting him or her, takes the child to another domicile without judicial authorization. If, with the same purpose, such a person takes the child out of the country, the punishment would increase up to double the minimum and half of the maximum.¹⁰

In such cases, the court must take all necessary measures to restore the parent's contact with the child within ten days.¹¹ The court must also establish a provisional visitation schedule to be applied for not more than three months or, if there is already a visitation schedule, must enforce it.¹²

Although articles 5 and 21 of the Convention guarantee some type of visitation schedule during the restitution proceeding, the courts have interpreted these provisions narrowly considering that the Convention does not expressly require member countries to establish or enforce a visitation schedule during the conventional procedure.¹³ There are some scholarly opinions to the contrary—some authors¹⁴ have interpreted the Convention as very clear in requiring Central Authorities to file petitions for visitation as well as restitution purposes. According to J.C. Arcagni, the Convention does not require the precondition of enforcing parental visitation rights to the issue of abduction itself. According to this author, the narrow interpretation that the courts have adopted may be due to the fear that visitation rights—which may require taking the child out of his or her habitual residence or domicile—may create the risk of abduction.¹⁵ Thus, in order to avoid such risks and conflicts, the Central Authorities will have to play a very important role to secure the conditions and timing of the visits through permanent and effective supervision over the minors.¹⁶

According to sources from the Argentine Central Authority, Dr. Ignacio Goicoechea, to date, all Argentine courts have waited for the court deciding on the issue of the custody of the child to establish the visitation schedule provided for under Article 21 of the Convention. However, in many cases a voluntary agreement between the parties was reached during the return proceedings.

⁸Law 24,270 of November 3, 1993, amending the Criminal Code published in *Boletín Oficial*, November 25, 1993.

⁹*Id.* art.1.

¹⁰*Id.* art. 2.

¹¹*Id.* art. 3.1.

¹²*Id.* art. 3.2.

¹³*Id.* at 1034–1035.

¹⁴*Id.* at 1035.

¹⁵*Id.*

¹⁶*Id.*

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

When Argentina is the requested country and there is no voluntary restitution of the child, the competent court for return proceedings under the Convention will be either the civil ordinary courts in the Federal Capital and national territories or the provincial courts—which may be family courts in those provinces that have such—or the civil courts. The case may be appealed to the respective Court of Appeals and, if admissible, to the Supreme Court. So far, there has been only one case that has reached the Supreme Court.¹⁷ In this case, the Supreme Court finally ordered the restitution of the child who was illegally taken from Canada to Argentina by her mother. The child went back to Canada after an extremely protracted process (over a year), under the Convention's standards (not more than six weeks).

IV. LAW ENFORCEMENT SYSTEM

Both the Central Authority and the courts have requested assistance from the police and INTERPOL to locate children and secure the enforcement of authorities' orders.¹⁸

According to the Argentine Central Authority, until April 12, 1999, there have been 181 requests, including restitution and visitation ones, based on the Hague Convention. From those 181 requests, 46 children who were illegally transferred or kept out of their habitual residence have been returned.

V. LEGAL ASSISTANCE PROGRAMS

Not available. A private attorney has to be hired if a voluntary restitution fails and judicial proceedings need to be started. However, a public defender may be available if the claimant can prove that he or she cannot afford a private attorney.

VI. CONCLUSION

The experience of the application of the Convention in Argentina appears to have been a success, particularly in expediting the restitution of minors. The Convention is an example of the humanization of private international law, with its most important goal being the well-being of the child. Of all the cases to which the Convention was applied, the one reaching the Supreme Court in 1995 has had an extensive media coverage. This promotion of the Convention raised public awareness and Argentineans became more conscious about the serious issues involved in International Parental Child Abduction.

Prepared by: Graciela I. Rodriguez-Ferrand, senior legal specialist, Directorate of Legal Research, Law Library of Congress, December 1999.

¹⁷Supreme Court, June 14–1995, “Wilmer, E.M. c/ Oswald, M.G”, La Ley, 1996-A, 260.

¹⁸Soraya Nadia Hidalgo, *Restitucion Internacional de Menores en la Republica Argentina*, 1996-C Revista Juridica Argentina La Ley 1393 (Buenos Aires, 1996).

AUSTRALIA

INTRODUCTION

The Commonwealth of Australia is a federation of the six States of New South Wales, Queensland, Victoria, South Australia, Tasmania and Western Australia, and the Australian Capital Territory and Northern Territory. It has a common-law based system of law. The Constitution of Australia adopts the enumerated powers doctrine, under which the federal Parliament may make laws “for the peace, order, and good government of the Commonwealth,” while the undefined residue of powers is left to the States. Commonwealth laws are guaranteed to prevail over inconsistent State laws, but there is nothing to stop a State from legislating on the subject of a power granted to the Commonwealth. In section 51 (xxi) and (xxii) of the Constitution the federal Parliament is granted legislative power over marriage, divorce, parental rights and the custody and guardianship of infants.

The exercise of the federal power over family matters is represented by the enactment of a Commonwealth statute, the Family Law Act 1975 (“FLA”), as amended. The FLA set up a federal Family Court, a superior court of record with jurisdiction in family laws, including issues relating to children. Many constitutional challenges were mounted against the FLA, most of which have now been resolved, but the State of Western Australia continues to apply its own laws.

It is in pursuance of the powers contained in the FLA that Australia ratified the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and it came into force in 1987.¹ The number of child abductions is reported by the Australian Law Council, a statutory body which advises the federal Attorney General, to be 80–100 child abductions a year to or from Australia, involving signatory countries to the Hague Convention.² The number in relation to countries not covered by the Convention may be much higher. The effect of such abductions on the child can be dramatic and long lasting, and the Council considers them to be a cause for serious concern. It believes that even when an abduction is carried out by a parent it cannot be assumed that children do not suffer as a result of abduction. In the report to the Attorney General, the Council endorsed a finding made in the United Kingdom that:

The main sufferers of abductions of this type are the children themselves. They endure the trauma of being kidnapped and often the continuing nightmare of an upbringing dominated by a parent that has violated the right to maintain contact with a mother or father. The harm which a child suffers as a result of an abduction cannot be underestimated, however high-minded the motive of the abductor . . .³

¹Australian Treaty Series 1987, No. 2.

²Family Law Council, Parental Child Abduction, Discussion Paper 3 (Feb. 1997) (<http://law.anu.edu.au/flc>).

³Family Law Council, Parental Child Sbduction, A Report to the Attorney-General 20 (Jan. 1998) (*id.*).

The cost to the taxpayer of locating abducted children in Australia is also significant. In the case of a child abducted from the United States to Victoria, the Commonwealth Attorney-General's Department estimated the cost in police resources, Commonwealth and State public resources and legal fees to be in excess of A\$1m.⁴

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Family Law (Child Abduction Convention) Regulations ("Child Abduction Regulations") issued pursuant to the powers contained in the FLA 1975 §111B give effect to the Convention. The Convention by itself is not part of Australian law, and only the Child Abduction Regulations are so accorded.⁵ Accordingly, the provisions of the Convention cannot override the terms of the Regulations.⁶

The Hague Convention applies to any child who has attained the age of 16 years who was habitually resident in a Contracting State immediately prior to the removal or retention. The term "habitually resident" is not defined in the Convention, but under Australian case law it is to be understood according to the ordinary and natural meaning of the two words; its determination is a question of fact and is often based on the conduct of the parties.⁷ The Australian Family Court is stated to favor a slightly wider interpretation of the Convention than courts in England, and changing a child's residence requires proof that both parents had a shared intention to remain in a new country.⁸

Under the Child Abduction Regulations, when a child has been removed from a Convention country to Australia, or retained in Australia, an application must be sent to the Commonwealth Central Authority⁹ which must be satisfied that it is in accordance with the Convention (reg. 12). The Commonwealth Central Authority may seek an amicable resolution of the differences between the applicant and the person opposing the return of the child or the voluntary return of the child. "Removal" and "retention" of a child are defined as being in breach of the rights of custody of a person or institution if at the time of removal those rights were actually exercised or would have been so exercised except for the removal (reg. 3).

The information required to be included in the application should be in the form of an affidavit stating that the child was habitually resident in the requesting country at the time of the wrongful removal or retention. The affidavit should include information on the child's place of residence, the person with whom the child lived, any period spent outside the country, the name of the school and the time spent there, the child's grade, etc. The right of custody

⁴*Id.* at 37.

⁵*McCall and McCall; State Central Authority (Applicant); Attorney-General (Commonwealth) (Intervener)*, (1995) FLC ¶92-551 at pp. 81,507, 81,509, 81,517.

⁶Anthony Dicky, *Child Abduction In Family Law* (CCH, 1999).

⁷17 Laws of Australia, Family Law, ¶17.8[23]-[25].

⁸Anne-Marie Hutchinson, Rachel Roberts and Henry Speight, *International Parental Child Abduction* 67 (1998).

⁹The location is: Attorney General's Dept., Civil Law Division, International Civil Procedures Section, Robert Garran Offices, Barton ACT 2600, Australia. Tel: (61) 6 250 6724 Fax: (61) 6 250 5917.

over the child should also be described based on the law of the state or country of habitual residence. The affidavit must also explain the incidents and circumstances surrounding the removal of the child in order to provide a proper understanding of the situation. A copy of any court order granted prior to the removal must be included, and a copy of the applicable statute on custody must also be supplied. Evidence that the applicant was actually exercising the right of custody over the child should be provided in the form of an affidavit from the applicant's lawyer stating how those rights were being exercised.¹⁰

Once accepted by the Commonwealth Central Authority, the application will be forwarded to the relevant State or Territory Central Authority in which the child is located. If a child's exact location is not known, a warrant may be issued by a court for the possession of the child. The State or Territory Central Authority will also assess whether it is appropriate to negotiate a voluntary return and may make initial contact with the abducting party.¹¹ If the negotiations fail or negotiations are considered inappropriate, the case will be forwarded to the Crown Solicitor (State Attorney) who will file an application with the Family Court. Direct contact between the applicant and the Crown Solicitor is discouraged, and communications are normally handled by the Central Authority. The application must be listed for a preliminary hearing before the Family Court within seven days, at which time a date will be set for the defending party to file a response and for a full hearing. The hearing is before a single family specialist judge, and the judgment is usually formulated on the basis of the documentary evidence, together with any affidavits deemed necessary. The court may require a family and child counselor or welfare officer to report on such matters that are relevant to the proceedings, and the reports may include any other matters that relate to the welfare of the child (reg. 26). Oral evidence may be called in cases in which there is a wide discrepancy in the evidence. The Court will take into account the wishes of a child who has sufficient maturity to understand the proceedings.¹² A child of an appropriate age and degree of maturity should be separately represented, and the court should make an order for the presence of such representative.¹³

The Court, if satisfied that it is desirable to do so, may make an order for the return of the child to the country in which he or she habitually resided immediately before the removal or retention, or make any other order it considers to be appropriate to give effect to the Convention (reg. 15). It must make an order for the return of the child if the application was filed less than 1 year after the day on which the child was removed to, or first retained in, Australia (reg. 16(1)). The Court may refuse the return of the child if the person opposing the return establishes that the following prescribed exceptions to the return apply:

¹⁰For fuller details of the information to be included in the affidavits in support of the application, see the United States Department of State Web site: <http://travel.state.gov/abduction-australia.htm>

¹¹Hutchinson, *supra* note 8, at 66.

¹²*Id.* at 67.

¹³Family Law Act 1975, § 68L.

(a) the applicant was not actually exercising rights of custody when the child was first removed to, or retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(b) return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his views into account; or

(d) return would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms (reg. 16).

If a period in excess of one year has elapsed prior to an application being made for the return of a child, the Court is required (subject to the above prescribed exceptions) to make an order for the return of the child immediately, unless it can be proved that the child is now settled in his new environment (reg. 16(2)).¹⁴

The Court must refuse to make an order to return the child if it is satisfied that:

(a) the removal or retention of the child was not within the meaning of the Child Abduction Regulations; or

(b) the child was not a habitual resident of a Convention country immediately before removal or retention; or

(c) the child had attained the age of 16; or

(d) the child was removed to, or retained in, Australia from a country which at that time was not a Convention country; or

(e) the child is not in Australia.

The burden for “substantiating settlement lies with the defending parent who must demonstrate that the child is both physically established in a new location and is emotionally settled and secure.”¹⁵ The rationale of the Hague Convention is considered as being clear in that the object is the expeditious return of the child, and therefore the function of the Court should not be hampered by interpretations which interfere with the administration of the Convention.¹⁶ Similarly, terms in the Convention should be given their literal meaning, and its expressions should be understood according to their ordinary and natural meaning and should not be treated as terms of art with special meaning. The Family Court of Australia has had recourse to the explanatory report of the drafters and negotiators of the Hague Convention.¹⁷

On an order of return being made by the court, the responsible Central Authority must make the necessary arrangements for the return of the child to the country of habitual residence. Unless the court order is stayed within seven days of its making, the child must be returned to the country of habitual residence.

¹⁴ *Supra*, note 7, ¶17.8[29].

¹⁵ Hutchinson, *supra* note 8, at 67.

¹⁶ For citations to Australian case law on this and the following points of interpretation of the Convention, see *supra* note 7, ¶17.8[14].

¹⁷ Hague Conference on Private International Law, Convention and Recommendations adopted by the 14th Session and Explanatory Report by Elisa Perez-Vera (The Hague, 1982).

The Child Abduction Regulations also make provisions granting rights of access to a child in Australia (reg. 24). The Hague Convention, Art. 21, calls on Central Authorities to promote the peaceful enjoyment of access rights, and the Child Abduction Regulations require the Commonwealth Central Authority to take such steps as are necessary for the purpose of enabling the performance of the obligations under the Article.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The FLA, section 65Y, makes provisions against the removal of a child who was the subject of a custody order from the person who had care and control of the child. The penalty for the offense is imprisonment for up to three years. In 1983 amendments were enacted creating a further offense to remove a child from Australia during pending proceedings or in contravention of a court order.¹⁸ For children abducted from overseas into Australia, the FLA provides authority for the issuance by a court of a “location order” and a “recovery order.” A location order calls for any person to obtain and provide to the Registrar of the court information on where a child is to be found. Once located, a recovery order authorizes the return of the child to the person seeking his recovery without exposing the abductor to any violence. The Act grants various enforcement powers to search premises, places, vehicles, aircraft and to arrest, remove or take possession of the child.¹⁹

According to the Family Law Council, the provisions of the Family Law Act have not proven effective in preventing children from being unlawfully removed from or retained outside Australia. First, the offense is limited to cases in which court orders are in force or proceedings are pending. Secondly, the provision has no application to the common situation in which a parent takes a child abroad with the consent of the other parent and then retains the child. In a majority of cases of domestic abductions, the parent from whom the child is taken has no court order, and the abducting parent has not committed a criminal offense.

Under State laws, criminal provisions exist, including child stealing and abducting a child under the age of 16 years. These provisions were not specifically designed to cover parental child abduction, although there are some provisions which may be applicable in cases of such abductions.

The (Commonwealth) Criminal Code Act 1995, Division 27, section 27.2, contains provisions relating to kidnaping, child abduction and unlawful detention. Under it kidnaping is extended to cover the situation in which a person takes or detains another person without consent with the intention of taking the person out of the jurisdiction. A person who takes or detains a child is deemed to be acting without the child’s consent. It is a defense if the person removing the child is that child’s lawful custodian or acts with the consent of the custodian.

¹⁸FLA, § 65Y(1) & 65Z(1).

¹⁹FLA, § 67Q.

The Commonwealth Criminal Code is based on a States-based Model Criminal Code. Proposed clauses in the Model Code relating to child abduction have been drafted, but it specifically excludes parents from the child abduction offense but not from kidnaping.²⁰

The Family Law Council evaluated all the arguments in favor and against the criminalization of parental child abduction and recommended that, neither at the domestic nor at the international level, should abduction by a parent be criminalized.²¹ The Council suggested that alternative means of improving the recovery rate of abducted children should be explored.

A note is made of the change in terminology in Australia regarding custody and access. In 1996 these were replaced by a system of shared parenting based on parental responsibility. The joint responsibility is applicable whether or not the parents are married.²² Reference is now made to a child's "residence," that is, with whom the child lives, and the "contact" that the child has with certain persons. The change, however, does not affect the use of the terms "custody" and "access" in the Hague Convention, as the statute specifically provides that the terminology of the Convention continues to apply to Australian parents.²³

With regard to the effect of the change of terminology on abductions when both parents have responsibility of the child, the removal of a child by one parent prevents the other parent from exercising his responsibilities. This amounts to a parental abduction arising from the taking over of all responsibilities for a child's care without regard for the other parent who shares those responsibilities.²⁴

B. PARENTAL VISITATION

The concept of parental responsibility introduced by the 1995 Act is defined to include "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."²⁵ Each of the parents of a child who is not 18 has parental responsibility for the child, and any change in the nature of the relationship of the parents does not result in a change in the responsibility. "It is not affected, for example, by the parents becoming separated or by either of them marrying or re-marrying."²⁶ Thus, the parents generally retain the same responsibilities they exercised over the children before the breakup of their marriage. This is the situation irrespective of whether the child resides with one parent and the other has contact with the child.

The 1995 Act encourages the parents of a child to agree about matters concerning the child, giving the best interests of the child paramount consideration, rather than seeking an order from a court. A "parenting plan" may be drawn up dealing with various matters, including the person with whom the child is to live; contact between the child and another person; maintenance of the

²⁰ *Supra* note 3, at 25.

²¹ *Id.* at 37.

²² In Western Australia unmarried mothers alone continue to exercise parental responsibility and residence rights over the child.

²³ Family Law Reform Act 1995, § 111B(4).

²⁴ *Supra* note 3, at 37–38.

²⁵ Family Law Act 1995, § 61B.

²⁶ *Id.* § 61C(2).

child; and any other aspect of parenting responsibility. The plan may be registered in a court, and if so done, the court may vary the child welfare provisions in the best interests of the child.²⁷

The Hague Convention also requires that rights of access granted in the laws of members states be respected. The Child Abduction Regulations (reg. 24) vest upon the Central Authority the duty to promote the enjoyment of those rights, a duty which is administrative and non-mandatory in nature. The Central Authority may thus initiate or instruct legal representatives to seek an access order. Moreover, while the Convention does not place an absolute obligation on the Court, it may consider the best interests of the child in determining whether an access order should be made. If a foreign access order is in existence, it is given the “greatest weight” and would be overridden only by the paramount consideration of the welfare of the child.²⁸

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

The federal Family Court deals with all legal matters which follow from family breakups and divorce, the custody and welfare of children, access arrangements and property disputes. In Western Australia, a separate Family Court of Western Australia exists to exercise federal and non-federal jurisdiction in family law and adoption matters. Under a system of cross-vesting of jurisdiction between federal, State and Territory courts, the Family Court of Australia is vested with the full jurisdiction of the State and Territory Supreme Courts.²⁹ Cross-vesting reduces uncertainties as to the jurisdictional limit of the courts and ensures that proceedings which ought to be tried together are tried in one court.

An appeal may be brought as a matter of right to the Appeals division of the Family Court of Australia sitting with three judges, and a further appeal may be made to the High Court of Australia, if the Appeals division or the High Court certifies that a question of law has arisen.

The nature of the litigation arising in administering the Hague Convention is considered to be in a class by itself and is described as being neither adversarial nor inquisitorial. As in other family matters, applications under the Convention are processed expeditiously. Hearings are held in open court, but the names of the persons involved in the proceedings must not be disclosed by the media, the sanction against which is a criminal penalty.

The Child Abduction Regulations (reg. 2(1)) confer jurisdiction of child abduction cases on any court which exercises jurisdiction under the Family Law Act. This includes a court of summary proceedings.

In the majority of cases, a Central Authority makes an application for an order for the return of a child as the Regulations grant them primary responsibility for instituting proceedings. However,

²⁷ *Id.* § 63B.

²⁸ *Supra* note 7, ¶ 7.8[44].

²⁹ Jurisdiction of Courts (Cross-Vesting) Act 1987. Recently, the Australian High Court invalidated parts of the cross-vesting arrangements in *Re. Wakim*, [1999] HCA 27 (17 June 1999). The Jurisdiction of Courts Amendment Bill 2000 has been introduced in Parliament to address some of the objections of the Court.

the Full Court of the Family Court expressed the view in *Panayotides v. Panayotides*³⁰ that such proceedings can be properly brought by any person, institution, or other parties whose rights of custody have been breached by the removal or retention.

In *State Central Authority v. Ayob*,³¹ the Court ruled against a literal interpretation of the Child Abduction Regulations because of the clear import of provisions in the Convention. It is accepted in Australia that the Convention is to be interpreted broadly, without attributing to it any specialist meaning which it may have acquired under domestic law.³² Thus, important expressions in the Convention on “rights of custody” and “habitually resident” have been interpreted more broadly than under Australian domestic law.³³

The reason for the prompt return of the child is to ensure that the courts in the home country determine who should have parental responsibility, and as such, where the child should live.³⁴ It is assumed that the issues are best determined by the courts of the country in which the child has the most obvious and substantial connection.³⁵

IV. LAW ENFORCEMENT SYSTEM

The procedure of the Hague Convention is designed to enable a court or administrative authority to immediately return the child to its country of habitual residence.

In granting an order for the return of a child, a court may grant to the Commonwealth or State Central Authorities:

- a warrant for the apprehension or detention of the child, including the right to stop and search a vehicle, vessel, or aircraft, or to enter and search such premises;
- an order that the child not be removed from a specified place;
- that the child be placed with an appropriate person or institution pending the determination of the application for return.

The procedure is designed to enable the authorities to return the child to the person seeking the child’s recovery without exposing the abductor to possible violence.

However, it is acknowledged that as parental abduction remains solely a civil matter, it does not obtain a priority of police resources, nor are detection procedures, such as telephone interception and the use of listening devices, made available.

V. LEGAL ASSISTANCE PROGRAMS

Applications made in Australia under the Hague Convention are automatically funded by the Government and no means test is applicable. The Hague Convention, Art. 26, paragraph 3, allows a contracting state to make a reservation that it will not be bound to meet certain costs of recovery of a child. Australia has not made such a reservation, while a significant number of countries have done so.

³⁰ (1997) FLC ¶92-733, at pp. 83,883-83,884.

³¹ (1997) FLC ¶92-746 at pp. 84,072, 84,074.

³² As stated by the Family Court in England in *Re. F* [1995] 2 Fam LR 31, 41.

³³ Dickey, *supra* note 6, ¶211.

³⁴ *Re S (A Minor)*, [1993] Fam 242, 250.

³⁵ Dickey, *supra* note 6, ¶202.

The Australian Central Authority does require foreign applicants to deposit sufficient funds with their legal representatives to cover the costs of the air fares, prior to processing an application through the courts. There is an Overseas Custody (Child Removal) Scheme to compensate Australian applicants who do not have the financial means for air travel.

Under the Child Abduction Regulations (reg. 30), the Court can order the abducting parent to pay the expenses of the applicant, including necessary traveling expenses, costs incurred in locating the child, legal representation costs, and other costs incurred for the return of the child. However, in family matters each party bears its own expenses and order for the payment of costs are rarely made.

The parties to a Hague Convention application may engage legal representatives at their own expense and apply for legal aid (assistance). Legal aid is available in all of Australia, subject to means and merits tests. Each State and Territory adopts its own eligibility criteria.

VI. CONCLUSION

Given the object of the Hague Convention to expeditiously return children taken from one country to another, the Family Court of Australia has interpreted the Convention in a manner which accords with its spirit. As required under the Vienna Convention on the Law of Treaties, the Court has followed the primary rule of interpreting the Hague Convention in good faith in accordance with the ordinary meaning to be given to its words. It has also made use of the Explanatory Report to the Convention to confirm the meaning arrived at or to remove an ambiguity or overcome a manifestly absurd or unreasonable result.³⁶

The number of cases of parental abduction has increased since the Hague Convention came into force in Australia in 1988. One explanation for the increase may be the significant increase in the number of countries that have ratified the Convention and the resulting greater awareness of the problem. The Attorney-General's Department, however, notes that the increase has mainly been in relation to the United Kingdom, the United States and New Zealand.³⁷

The statutory Family Law Council after investigating several issues relating to child abductions referred to it by the Attorney-General, has made several recommendations, including that:

- Steps be undertaken to improve the data collected on child abductions.
- Parental child abduction, whether internally or from other countries, should not be criminalized and alternative means should be adopted for improving the recovery rate of abducted children.
- The courts be given broad discretionary powers to recover the costs associated with the recovery of children abducted from abroad from the person responsible for the abduction.

³⁶ *Supra*, note 7, ¶17.8[14].

³⁷ *Supra*, note 3, at 15.

Prepared by: Kersi B. Shroff, chief, Western Law Division, Directorate of Legal Research, Law Library of Congress, March 2000.

AUSTRIA

INTRODUCTION

Austria ratified the Convention on the Civil Aspects of International Child Abduction¹ [hereinafter Hague Convention] in September 1988² and it became effective on October 1, 1988.³ Austria made no reservations to the Convention and the implementing legislation provides effective and generous mechanisms for processing Hague Convention requests. Nevertheless, it has been alleged that refusals to return a child to a foreign country are a frequent occurrence in Austria,⁴ while requests for visitation rights appear to be rare.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

In June 1988, Austria enacted an Implementing Act for the Hague Convention [hereinafter Implementing Act] that was promulgated in September 1988⁵ and became effective together with the Convention on October 1, 1988. The Implementing Act designates the Austrian Federal Ministry of Justice [hereinafter Ministry] as the Central Authority within the meaning of article 6 of the Hague Convention⁶ and makes provision for fitting Hague Convention requests into the Austrian administration of justice.

When a request arrives from abroad, the Ministry must first examine whether the child is located in another country, in which case the request will be forwarded in accordance with article 9 of the Convention. If it appears that the child is in Austria, the Ministry is called upon to have the request and the underlying documents translated into German, if they have been provided in a foreign language. This is done at the expense of the Austrian Federal Government. Thereupon, the Ministry must forward the request to the president of the Austrian District Court [Bezirksgericht] of the place where the child is actually found, and in the absence of such a place, to the district court of the parent's abode or residence. If venue cannot be established according to these criteria, then it is placed with the District Court for the First District of Vienna [Bezirksgericht Innere Stadt Wien].⁷

Upon receipt of the request, the President of the District Court must appoint a law clerk to assist and represent the requester and

¹The Hague, Oct. 25, 1980 T.I.A.S. 11670.

²Promulgated Sept. 14, 1988, Bundesgesetzblatt [BGBl, official law gazette for Austria] no. 1988/512.

³Bundesgesetzblatt [official law gazette of Germany] 1991 II at 336.

⁴A German newspaper article suggested that Austria was almost as reluctant as Germany to return abducted children [C. Brinke, *Im Zweifel für den Kidnapper*, Süddeutsche Zeitung 12 (Oct. 21, 1999)].

⁵Bundesgesetz zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung, June 9, 1988, BGBl. no. 1988/513.

⁶Requests are to be directed to the Federal Minister at the following address: Der Bundesminister für Justiz, A 1070 Wien, Museumstrasse 7, AUSTRIA. Tel: 43 1 521 52 0.

⁷Jurisdiktionsnorm [JN], Aug. 1, 1895, Reichsgesetzblatt [RGBl.] no. 1895/111, § 109.

must assign the case to the competent judge. The court may also involve the youth welfare agencies if this is deemed necessary to protect the interests of the child. The judge must decide the case promptly, in a non-contentious proceeding, unless a voluntary return has been effected. If the judge denies the request, he or she must appoint an attorney to receive the judgment and to represent the requester in any appellate proceedings. The services of this attorney are provided free of charge at the expense of the Austrian Government, regardless of the financial circumstances of the requester.

The President of the District Court must keep the Ministry apprized of any important steps taken in the proceeding. In particular, a justifying report must be filed if the proceeding is not terminated within six weeks. The Ministry in turn may ask about the status of the proceeding, and these inquiries may also be directed to counsel representing the requester.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

Austrian domestic law on custody, child abduction and parental visitation is generally not governing in Hague Convention requests, due to the Convention's focus on a prompt return of the child and on the prompt implementation of visitation rights bestowed by other legal systems. Nevertheless, an explanation of Austrian domestic law on issues related to child care and custody may help to provide understanding of the legal environment in which Hague Convention requests are adjudicated. In particular, an understanding of the concept of the best interest of the child is essential. This concept is of overriding importance in all domestic decisions concerning children,⁸ and it is possible that this philosophy may carry over into the adjudication of Hague Convention requests.

Currently, a major reform on the law of children is in the planning stage. It has been discussed for two years, and it appears that a governmental bill is about to be submitted to Parliament. The purpose of this reform is to strengthen the rights of children in various ways and to give them a hearing, whenever possible, on decisions that affect them. It is not as yet certain whether the bill will permit the awarding of joint custody to divorced parents after a one year cooling off period following the parent's divorce. Current Austrian law does not foresee joint custody for separated or divorced parents and a vigorous discussion on its desirability is currently taking place.⁹ Should the reform bill become law, which appears likely, it could possibly have an influence on Austrian policy on Hague Convention requests.

At present, Austrian law provides that married parents exercise custody jointly, unless there is a problem, in which case, a judicial decision would be made awarding custody to one parent or to another party and specifying visitation rights of the non-custodial parent. In doing so, and in all other decisions affecting the child, the court must consider the best interest of the child as required

⁸Allgemeines Bürgerliches Gesetzbuch, June 1, 1811, Gesetze und Verordnungen im Justizfache no. 946, as amended, § 178 (a).

⁹*Michalek: Neues Gesetz ohne neue Regierung*, Die Presse online (Dec. 11, 1999).

by article 178 (a) of the Austria Civil Code which translates as follows:

In adjudging the welfare of the child, the personality and the needs of the child must be taken into appropriate consideration, in particular, his or her aptitudes, abilities, inclinations, and potential for development, as well as the lifestyle of the parents.

Another important principle in proceedings relating to the care of children is that they must be asked about their wishes, as is expressed in section 178 (b) of the Civil Code:

Prior to issuing an order relating to the care or education of a child, the court shall hear the child in person, to the extent possible; a child below the age of ten may also be questioned through the provider of youth welfare services or in other suitable ways. The child shall not be heard if his or her welfare could be endangered through the questioning or through a delay in the court order, or if, due to his or her age or developmental stage, the child cannot be expected to utter an opinion.

In addition to these substantive and procedural provisions, Austrian conflicts law may also be of interest, particularly in anticipating how Austrian courts may evaluate foreign legal decisions. The provisions of the Austrian Conflicts Code¹⁰ are fairly complex, referring for issues akin to guardianship, in part, to the citizenship of the child and, in part, to the laws of the country which is making the decisions, while rejecting the application of any laws that are contrary to Austrian public policy. In relationship to ten European countries, however, the Hague Convention on the Protection of Minors¹¹ applies which generally makes the law the habitual abode of the child or minor applicable for the taking of any protective measures while deferring to the law of his or her citizenship for the making of status decisions. This Convention also establishes overriding priorities for measures deemed necessary in the best interest of the child.¹²

A decision of 1997 of the Austrian Supreme Court¹³ is an example of how Austrian courts apply the exceptions of articles 12 and 13 of the Hague Convention. In that case, a request to return two children was made by their Australian father, after the Austrian mother had taken the children to Austria where she was awarded custody by the Austrian court. At her time of departure, she was married to the father, but a divorce proceeding was pending that later resulted in divorce. When the mother left Australia with the children, the husband was unemployed, did not have housing, and there was a history of alcohol and drug abuse, as well as violence

¹⁰Bundesgesetz über das international Privatrecht, June 15, 1987, BGBl. no. 1978/304, as amended, §§ 27 and 6.

¹¹Convention Concerning the Powers of Authorities and Law Applicable in Respect to the Protection of Infants, done Oct. 5, 1961, at The Hague, 658 UNTS 143; ratified by Austria Aug. 19, 1975, BGBl. no. 446/1975. The Convention applies to young people who according to their domestic laws are below the age of majority. In the unofficial German translation, the Convention is referred to as the Convention on the Protection of Minors.

¹²F. Schwind, *Internationals Privatrecht* 166 (Wien 1990).

¹³Oberster Gerichtshof (OGH) decision, June 19, 1997, 38 *Zeitschrift für Rechtsvergleichung, Internationals Privatrecht und Europarecht* [ZfRV] 249 (1997).

against the mother; the latter had led to measures by the Australian authorities. The Austrian trial court refused the Hague Convention request for a return of the children on November 29, 1996; the appellate court's refusal was pronounced on March 21, 1997.

The Supreme Court upheld the refusals of the lower courts, and reasoned that the facts indicated that the father would not be capable of caring for the children. The Court also questioned whether the father was actually exercising his custody rights at the time the mother took the children out of the country, which conduct, according to the Court, could hardly be called an abduction under the circumstances. However, the court did not find it necessary to have this fact proven and to adjudge whether the exception of article 13, paragraph 1 of the Hague Convention would apply. Instead, the Supreme Court justified the refusal by holding that the welfare of the child had priority over the Hague Convention's overall purpose of preventing child abductions.

The welfare of the child also justified a refusal to return the child in a Supreme Court decision of 1998.¹⁴ In that case, an Austrian mother had abducted her marital child from France, where she had lived with her French husband with whom she shared custody. The Austrian trial court and appellate court ruled for a return of the child. Their decisions, however, were overturned by the Austrian Supreme Court to protect the welfare of the child. While the Hague Convention request was pending before the Austrian trial court, a French court had granted the mother sole custody. The Austrian trial court was informed of the French decision only after it ruled for the return of the child; however, the mother was entitled according to Austrian procedural law¹⁵ to plead this new development on appeal. The Austrian Supreme court held that a return to the French father would hurt the child because the execution of the French custody decree would give the child back to the mother, and thus the child would be shuttled back and forth unnecessarily.

In another decision of 1997,¹⁶ the Supreme Court upheld concurring decisions of the lower court that refused to return a child to Canada, where mother and father resided in 1995. The Austrian mother filed for divorce in December 1995 in Quebec and the Canadian court promptly issued an interim judgment granting custody to the mother and visitation rights to the father, who was both an Austrian and Mexican citizen. The Canadian court also ordered both parents to remain in Canada. The mother left Canada in July 1996 and returned to her native Austria where she petitioned the Austrian court to award her custody, which was granted. Two days after this Austrian decision, the Canadian court awarded custody to the father and on August 1, 1996, the father requested a return of the child under the Hague Convention.

In the Austrian proceeding, the mother argued that the Hague Convention did not apply because she alone had custody at the

¹⁴ OGH decision, Apr. 15, 1998, docket no. 7 Ob 72/98h, *Österreichische Juristen-Zeitung* 667 (1998).

¹⁵ *Ausserstreitgesetz* [AusserStrG], Aug. 9, 1854, RGBl. no. 1854/208, as amended, § 10.

¹⁶ OGH decision, Feb. 12, 1997, docket no. 35/97s, 70 *Entscheidungen des österreichischen Gerichtshofes in Zivilsachen*, no. 27 (1998).

time that she removed the child from Canada. She also alleged that the father was mentally ill and often under the influence of alcohol, that she suspected sexual abuse of the child by the father, and that she had no opportunities to pursue employment in Canada, and, therefore, had to return to Austria to support the child.

The trial court held for the mother by finding that separating the child from the mother would endanger the welfare of the child. The appellate court also refused to return the child but justified its decision by finding that the prerequisites for a request were lacking because the mother had sole custody at the time of the request. The Supreme Court concurred and distinguished the case from its previous decision in 1992¹⁷ in which a child was ordered to be returned to England because the English court had ordered the mother who had custody not to leave England with the children without the consent of the father. In the 1992 case, the Austrian Supreme Court had reasoned, the English court's order could be interpreted as the granting of joint custody, whereas no such grant was made by the Canadian court, even though the mother's departure from Canada was illegal and violated the Canadian court's injunction.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Although Austria is a federated country, procedural law and the administration of justice are centralized in the Federation. Judicial independence is guaranteed by the Constitution which also prohibits forum shopping by requiring the courts to assign all cases to judges according to an assignment plan made in advance.¹⁸ The Austrian court system is very specialized, providing, in addition to the courts of ordinary jurisdiction, special courts for labor disputes and administrative matters, while constitutional issues are decided by the Constitutional Court.¹⁹

Hague Convention requests are adjudicated by the courts of ordinary jurisdiction, in non-contentious proceedings. These tend to be even more inquisitorial than Austrian proceedings in general, thus allowing the judge much latitude in how to organize the proceeding, while requiring a less formal conduct by the parties. The judge decides what use is to be made of the youth welfare offices to provide counseling, evaluations, or other services. The judge may also call for expert testimony by child care professionals. However, in doing so, the judge must balance the desirability of investigations with the obligation to speed the proceeding as much as possible, as is provided in the Convention and the Implementing Statute. In the interest of speed, it is even permissible for the Austrian court to deny a hearing.²⁰ Nevertheless, Austrian case law justifies procedural delays to protect the welfare of the child.²¹

The chain of appeals in Hague Convention requests goes from the single judge at the local court [Bezirksgericht] as the trial level

¹⁷ OGH decision, Feb. 5, 1992, docket no. 2 Ob 596/91, 34 ZfRV 32 (1993).

¹⁸ Bundes-Verfassungsgesetz, BGBl. no. 1/1930, art. 87, as amended.

¹⁹ F. Schwind and Fritz Zemen, *Austria*, in I International Encyclopedia of Comparative Law A 67 (Tübingen, 1973).

²⁰ OGH decision, Apr. 28, 1992, docket no. 4 Ob 1537/92, 34 ZfRV 32 (1993).

²¹ *Supra* note 13.

to a panel of judges at the Regional court [Landesgericht] as the first appellate instance,²² and from there to a panel of judges at the Supreme Court as the second and last appellate instance. An important feature of the appellate process in non-contentious matters is the permissibility of pleading new developments.²³

IV. LAW ENFORCEMENT

Once a court decision on a Hague Convention request becomes final, it becomes enforceable. If there is no voluntary compliance, the winning party may request the local district court to order the necessary steps to give effect to the decision. The primary means of coercion foreseen by statute are the issuance of orders and the imposition of coercive fines or detention. The court of execution may also involve the youth welfare agencies in effecting the return of the child or in the enforcement of visitation rights. If necessary, the court may also appoint a warden, at the expense of the non-complying party.²⁴

A Supreme court decision of 1996 indicates that the welfare of the child can still be raised as an issue even after a court decision ordering the return of a child becomes enforceable.²⁵ In that case, the Supreme Court held that the local court called upon to execute the decree to return the child must first decide whether this execution would serve the welfare of the child. This decision is to be made in accordance with Austrian law, while taking into consideration the purposes of the Hague Convention. It appears that a decision refusing the return of the child at such a late stage in the proceeding must be made by the court on its own initiative if the court becomes aware of circumstances warranting such a measure. In addition, the party ordered to produce the child may also request a denial of the execution at this stage. In order to do so, the party must bring new evidence of circumstances that indicate that the welfare of the child would be seriously endangered by the execution. Such execution decisions are again appealable in two instances up to the Supreme Court.

It should not be difficult to locate a child in Austria because Austria is a small country and residents and visitors must report any changes in their residence or temporary abode to the local authorities. Landlords and innkeepers are required to cooperate in the observance of these legal provisions that are enforced by the Federal police, and in smaller communities, by the local administrative authorities.²⁶

V. LEGAL ASSISTANCE PROGRAMS

Austria grants legal assistance to needy parties in Austrian proceedings. A party must apply for this benefit with the trial court where the case is pending and the decision on the granting of legal aid and on the extent and types of benefits to be provided is made by that court, after evaluation of the circumstances of the indi-

²² JN § 3.

²³ AusserStrG, § 10.

²⁴ AusserStrG., § 19.

²⁵ OGH decision, Oct. 15, 1996, docket number 4 Ob 2288/96 s., 38 ZfRV 33 (1997).

²⁶ Meldegesetz 1991, BGBl. no. 1992/2.

vidual case.²⁷ There appears to be little need for legal aid in Hague Convention requests, because Austria has made no reservation to article 26 of the Convention and, therefore, should be willing to bear the expenses of any administrative actions and court proceedings. Moreover, Austria has provided, in the Implementing Act, that translations of documents will be made at the expense of the Austrian Federal Government and that legal assistance is provided to requesting parties at the trial stage through the assignment of a law clerk, and for appellate proceedings, through the appointment of an attorney, both free of charge to the party requesting the return of the child or the granting of visitation rights. Nevertheless, it may be prudent for a requesting party in reduced financial circumstances to apply for legal aid by requesting from the Federal Ministry the required forms and instructions.

VI. CONCLUSION

Favorable conditions for Austria's implementation of the Hague Convention were created through the Austrian Implementing Act of 1988. In the past twenty years, Austria has processed and adjudicated numerous requests. The reported court decisions reveal that the Austrian courts examine requests for the return of a child carefully as to their prerequisites and are willing to employ the exceptions of the Convention when this is in the best interest of the child. It is possible that in determining what is best for the child, the same high standards may be imposed in Hague Convention requests that are required by law in domestic cases and this may be the reason for the fair number of cases in which the return of the child was denied by Austria.

Prepared by: Edith Palmer, senior legal specialist, Legal Research Directorate, Law Library of Congress, December 1999.

²⁷ Zivilprozessordnung, Aug. 1, 1895, RGBl. no. 1895/113, as amended, §§63 et seq.

REPUBLIC OF BELARUS

INTRODUCTION

The Republic of Belarus, which became an independent state in December 1991, is a non-member state of the Convention on the Civil Aspects of International Child Abduction because it did not participate in the Hague Conference on Private International Law at the time of its Fourteenth Session as required by article 37 of the Convention. The Republic of Belarus acceded to the Convention in 1998. The National Assembly (the Parliament) of Belarus ratified the Convention on October 13, 1997, and the act of ratification entered into force in Belarus on January 13, 1998.¹ The accession of Belarus to the Convention has been accepted by the following countries:

The Netherlands,
Israel,

¹ Vedamastsi Natsyianalnaga Shodu Respubliki Belarus [Bulletin of the National Assembly of the Republic of Belarus, official gazette], 1998, No. 18, Item 209.

Finland,
 Czech Republic,
 Austria,
 Argentina,
 Germany,
 Chile,
 China,
 Spain,
 Republic of Georgia,
 Greece.

According to article 38 of the Convention, Belarusian accession to the Convention is effective only between Belarus and those contracting states that have declared their acceptance of the accession. The United States has not recognized Belarusian participation in the Convention.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Even though the Republic of Belarus acceded to the Hague Convention along with some other European legal documents with the purpose of international recognition and improvement of its image on international arena, Belarus' acceding to the Convention did not influence the development of the national legal system. Unlike those in other newly independent states of the former Soviet Union, the Constitution of Belarus does not provide for the priority of international obligations over domestic regulations, and the conclusion of an international agreement by the Belarus authorities does not require automatic adoption of national implementing legislation.

The basic principles of Belarusian legislation in regard to family relations and child protection have not substantially changed since the mid-1960s. The major documents in this field remain the Code of Marriage and Family of 1969 and the Criminal Code of the Republic of Belarus adopted in 1960, which followed the respective Fundamentals of Soviet Legislation. Amendments introduced in both documents during the last eight years in order to bring them in accordance with the existing realities did not significantly change the content of these laws.

Although a member of the United Nations since the creation of this organization, the Republic of Belarus has very limited experience in independent participation in bilateral and multilateral treaties. National legal tradition does not provide for adoption of special implementation legislation after joining international legal instruments. The problem of parental child abduction, especially international abductions, is not an acute problem for Belarus because of its long years of continuing international isolation, the domination of conservative Soviet traditions in family relations, the strong state interference in private affairs of the citizens, the absence of new legislation, and the lack of resources for enforcement of already passed laws.

A major related legislative provision is included in the Constitution of Belarus—article 32 states that “[m]arriage, the family, motherhood, fatherhood, and childhood shall be under the defense

of the State.” The Constitution establishes that “parents or persons replacing them shall have the right and shall be obliged to nurture children, and be concerned for their health, development, and learning. A child must not be subjected to cruel treatment or humiliation, enlisted for work which may cause harm to his physical, intellectual, or moral development.” In regard to the separation of children from their families against the will of the parents and other persons replacing them, the Constitution permits such separation on the basis of a court ruling, if the parents or other persons replacing them do not fulfill their duties.²

The Law of the Republic of Belarus on Acceding to the Convention on Civil Aspects of International Child Abduction, adopted simultaneously with the instruments of ratification, assigns the Ministry of Justice of the Republic of Belarus to be a Central Authority, with the responsibilities prescribed in article 7 of the Convention.³ Belarus is a unitary state, and the Ministry of Justice has jurisdiction over all the country including all administrative provinces and regions; therefore the Convention extends to all Belarusian territory as required by article 40. Despite the fact that Belarus established a state union with the Russian Federation and the Union Treaty provides for equal rights of citizens of both countries and the unification of legislation as its ultimate goal,⁴ Belarusian international obligations do not extend on Russian territory.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

According to the Criminal Code of the Republic of Belarus, the abduction or exchange of a strange child for mercenary purposes or for other vile motives is punishable by deprivation of freedom for a term not exceeding five years.⁵ The Law considers as an abduction the kidnapping of a child without the consent of its parents or legal guardians if it was committed for a particular purpose. The abduction may be open or hidden, and be a result of deceit, misuse of trust, or of restraining the child. Under the Law, a child is any person under 16 years of age. The child’s consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Law determines “mercenary purposes” as the intention to receive material profits from the abduction, i.e., ransom or taking a child’s clothes. Vile motives are those that contradict moral principles, for example, taking revenge on a child’s parents. If a childless woman abducts a child with the purpose of educating him and creating a good family environment for him, such an abduction does not qualify as an abduction from vile motives.⁶

² Constitution of the Republic of Belarus, Adopted March 15, 1994, with the changes and additions enacted by referendum on Nov. 24, 1996.

³ *Supra* note 1.

⁴ *Supra* note 1, 1999, No. 32, Item 863.

⁵ Criminal Code of the Republic of Belarus, art. 123.

⁶ *Vestnik Verkhovnogo Suda SSSR* [Bulletin of the USSR Supreme Court]. On Practice of Resolution of Family Law Cases by the Courts. 1974, No. 2, at 10.

Parental kidnaping is not considered a criminal offense in Belarus. Only those who abduct somebody else's child may bear criminal responsibility for a child's abduction. Hence biological and adoptive parents may not be prosecuted as kidnappers or child abductors. If divorced or separated parents disagree in regard to who will keep the child, the abduction of one's own child from the other parent or from an orphanage or another special institution is not considered to be an abduction under Belarusian criminal legislation. The Law also prohibits prosecuting close relatives of a child (for example, grandparents) for abduction, if they acted in the child's interests, even if these interests were misunderstood. It should be noted that the criminal legislation of Belarus does not impose punishment for removal of a child from the country or for retaining a child outside Belarus with intent to obstruct the lawful exercise of parental rights. Retainment is not considered as a separate felony.

Criminal acts such as child abduction occur very seldom in Belarus. If a foreigner whose home country recognizes the participation of Belarus in the Convention commits such a crime, the child is subject to return. All other cases fall under the laws of the respective state. In such cases the Ministry of Justice of the Republic of Belarus, which was designated as a National Central Authority to discharge the duties imposed by the Convention, must cooperate with foreign authorities in order to discover the child, to prevent possible harm to the child, and to secure the child's return.

B. PARENTAL VISITATION

Family legislation in Belarus is based on the Code of the Republic of Belarus on Marriage and Family of 1969, which is currently in force. The Code was slightly amended after Belarus adopted its new Civil Code in 1996. The major principle of Belarusian family law is that decisions relating to a minor should be based on his best interests; however, no specific act regulates issues related to parental visitation.

Under Belarusian law, both parents have equal rights and duties with regard to their offspring—even after divorce—allowing, however, for court-awarded custody to one of them in case of a dispute. Unresolved disputes may be taken to the court. The Constitutional Court of Belarus ruled that no other institutions or authorities except the courts are eligible to decide issues related to granting custody.⁷ Parents may recover custody of their children unless the court decides that this would harm the child. In accordance with tradition, custody almost always is awarded to the mother of the child; the father sometimes receives the right of access as determined by the court. However, there is no means of enforcing court decisions and as stories in local newspapers reflect, a father's right

⁷Judgment of the Constitutional Court of the Republic of Belarus On the Conformity Between Part Two of Article 116 of the Code of Marriage and Family of the Republic of Belarus and the Constitution of the Republic of Belarus No. J 68/98 of June 26, 1998, in *Judgments and Separate Decisions of the Constitutional Court of the Republic of Belarus. 1997–1998*. Minsk. 1999, at 181–183.

to visitation is often violated by mothers and other relatives who have been awarded custody of the child.⁸

Usually in the case of the dissolution of a marriage the courts decide which of the parents should get custody of the child. If the parents are absent, the issue of custody for minors is resolved by the guardianship agencies of local public education departments. These agencies: decide disputes about the exercise of family rights; have the power to deprive access to parents living at a distance depending on the interests of the child; are party to custody suits; and may commence actions that would deprive one or both parents of their parental rights.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The structure of the judicial system in Belarus is determined by the Law on Court Organization. In Belarus, the courts consist of the Supreme Court, and regional, city, and district courts of general jurisdiction. Justice is administered by a trial of civil disputes and criminal cases. All cases are tried by a panel that consists of a professional judge and two lay assessors. A number of minor administrative infractions as well as the majority of family matters are tried by a single judge and not by a collegiate court. The judges in Belarus are appointed by the President of the Republic, and the President may relieve them of their office.

Except for economic courts, which have exclusive jurisdiction in commercial disputes, no other special courts exist in Belarus. All cases related to the implementation of international obligations as well as family related matters are handled by regular courts of law. As the Chief Justice of Belarus stated in his interview with the Belarusian newspaper *Vo Slavu Rodiny*, the nation's 'judicial system has not been brought nearer to the realities of contemporary life. The system has proved cumbersome, conservative, and costly.'⁹ A large-scale reform plan of this system was drafted in 1997; however, it has still not been implemented. The program provided for the creation of specialized courts, including courts for family, juvenile, and other cases.

Cases of domestic child abduction occasionally are brought to the court; however, because of national traditions, such cases are usually resolved inside the families. No cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. LAW ENFORCEMENT SYSTEM

The very low number of international parental abductions in Belarus may be attributed in large part to the influence of cultural and ideological traditions that have determined the features of Belarusian society and have prevented international marriages. Other reasons include the international isolation of Belarus and

⁸A. Miasnikau, *Deti Razdora*, *Belorusskaia Delovaia Gazeta [Belarusian Business Newspaper]*, March 17, 1999, via <www.securities.com>

⁹*Belarus: Supreme Court Head Views Judiciary*, via FBIS, Document ID: FTS 19971230000387.

bureaucratic difficulties related to acquiring a valid travel passport for children.

International observers conclude that the enforcement of the Convention might be associated with some difficulties because of the Ministry of Justice's lack of experience in dealing with family related issues.¹⁰ Because both the Ministry of Justice and the Ministry of Education, which supervises local guardianship and curatorship agencies and whose personnel is more familiar with the related work are empowered with the administrative authority to order the return of an abducted child, close interagency cooperation may be required.

Even though the Convention is a direct implementing document, it requires adoption of special laws by the Belarusian Parliament because the Constitution of the Republic of Belarus does not provide priority for and direct application of international legal norms. Belarusian courts still did not deal with the application of international legal norms and may have problems with their enforcement.

V. LEGAL ASSISTANCE PROGRAM

Legal assistance in Belarus could be received through the attorneys licensed to practice law in this country. *Pro bono* work is also practiced by attorneys, even though not very widely. The legal service of the Independent Workers Unions provides qualified legal assistance to the citizens of Belarus free of charge. Because Unions' lawyers are usually involved in civil law matters, they can be of a great help in family-related matters also. The best source of assistance and information are officers of guardianship agencies. Presently, the American Bar Association is involved in bilateral projects aimed at creating legal aid clinics in Belarus.

Belarus' authorities do not accept any costs related to the implementation or enforcing of the Convention. In signing the document, Belarus made a reservation regarding the instrument of accession and stated that the state will not assume any costs resulting from the participation of legal counsel or court proceedings.

VI. CONCLUSION

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution of disputes in regard to the parental abduction of children. Unlike in other participating states, in Belarus these principles did not become the basis for national legislation, and the Belarusian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to reject foreign decisions and international legal acts in favor of traditional domestic laws. The cooperation among the central authorities in each country in order to facilitate the prompt return of children, which is emphasized in the Convention, does not include the Ministry of Justice of the Republic of Belarus because of the political isolation which the country has imposed upon itself. At the same time, the Convention is of great significance for Belarus whose citizens got

¹⁰ Human Rights Watch, *Belarus: Abandoned to the State*, Report, Brussels, 1999, at 119.

the right and possibility of using an internationally recognized mechanism for the return of a child in case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the few countries that recognize Belarusian accession to the Convention.

Prepared by Peter Roudik, Senior Legal Specialist Eastern Law Division, Law Library of Congress, October 2000

CANADA

INTRODUCTION

The problem of international child abduction has received considerable attention in Canada. One reason for this was stated by the Chief Delegate to the 1980 Hague Conference in the following terms:

[This problem is] serious for a country like Canada, blessed in many ways by its pluralistic ethnic mix, but in the present context afflicted by the fact that one or both spouses may retain recent and substantial connections with their country of origin. This fact makes it attractive and possible to spirit the children away in the hope of achieving a more friendly familial and judicial climate in which to assert custody rights in their favour when their marriages turn sour.¹

The concern has been demonstrated in Canada's leading role in the encouragement of international legal reform.

I. DOMESTIC LAW AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Although Canada helped initiate and was one of the first countries to sign the Convention on the Civil Aspects of Child Abduction, the subject matter of that treaty falls under provincial jurisdiction. Consequently, rather than attempting to legislate for the entire country through one Federal act that might well have been found to be unconstitutional, Parliament deferred to the provincial Legislative Assemblies. All ten of these bodies responded by enacting implementing laws that came into force between 1983 and 1987. The exact dates of entry are as follows:

Alberta	February 1, 1987
British Columbia	December 1, 1983
Manitoba	December 1, 1983
New Brunswick	December 1, 1983
Newfoundland	October 1, 1984
Nova Scotia	May 1, 1984
Ontario	December 1, 1983
Prince Edward Island	May 1, 1986
Quebec	January 1, 1985

¹H. Allan Leal, *International Child Abduction in Children's Rights in the Practice of Family Law* 211 (Toronto, 1986).

Saskatchewan

November 1, 1986.

As for the territories, the Yukon brought the Convention into force on February 1, 1985, and the Northwest Territories followed suit on April 1, 1988.²

In implementing an international convention, Canadian legislatures usually enact legislation that incorporates its major features in a more or less paraphrased and sometimes expanded fashion. This common practice was not generally followed in the case of the Convention on the Civil Aspects of Child Abduction. Instead, all of the provinces, except Quebec, passed new laws or amended extant legislation to refer to the Convention and include it as an appendix. Thus, a situation in which each province would have different laws, as is generally the case with other areas of family law, was avoided. The specific provincial and territorial laws that directly adopted the Convention in this manner are as follows:

²Ann Wilton and Judy Miyauchi, *Enforcement of Family Law Orders and Agreements: Law and Practice* 2-34.17 (1999).

Alberta	International Child Abduction Act ³
British Columbia	Family Relations Act ⁴
Manitoba	Child Custody Enforcement Act ⁵
New Brunswick	International Child Abduction Act ⁶
Newfoundland	Act Respecting the Law of Children ⁷
Northwest Territory	An Act to Adopt the Convention on the Civil Aspects of Child Abduction ⁸
Nova Scotia	An Act to Implement the Hague Convention on the Civil Aspects of International Child Abduction ⁹
Ontario	Children's Law Reform Act ¹⁰
Prince Edward Island	Custody Jurisdiction and Enforcement Act ¹¹
Saskatchewan	Act Respecting the Application to Saskatchewan of the Convention on the Civil Aspects of Child Abduction ¹²
Yukon	Children's Act ¹³

³1986 S.A., ch. I-6.5.

⁴R.S.B.C. ch. 128 (1996).

⁵C.C.S.M. ch. 360 (1999).

⁶1982 N.B. Acts, ch. I-12.1.

⁷R.S.N. ch. C-13 (1990).

⁸1987 S.N.W.T. ch. 20.

⁹R.S.N.S. ch. 67 (1989).

¹⁰R.S.O. ch. C.12 (1990).

¹¹R.S.P.E.I. ch. 33 (1988).

¹²1986 S.S. ch. I-10.1.

¹³R.S.Y. ch. 82 (1986).

Unlike the other provinces, Quebec enacted the Convention by restating its major provisions in a provincial statute.¹⁴ In the event of any inconsistency between the provincial law and the Convention, the former would prevail. However, Quebec's law appears to

¹⁴An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction. R.S.Q. ch. A-23.01.

be substantially the same as that of the other provinces. The reason it did not simply adopt the Convention instead of incorporating it in a statute relates to that province's desire to conduct a separate, but not always different, foreign policy.

The Hague Convention on the Civil Aspects of International Child Abduction was created to discourage parents from taking children away from their established homes by providing that disputes over custody and access should be resolved by the courts of a child's habitual residence. The courts of the member countries are generally bound to return an abducted child for that purpose or to enforce an extant order. However, there are exceptions to this rule that will be discussed under a later section dealing with the relevant Canadian case law.

Canada has a Central Authority for the Federal Government and for each of the provinces.¹⁵ The Federal Central Authority generally serves as a liaison between foreign Central Authorities and the provincial Central Authorities. The Federal Central Authority can help locate children whose province of residence is unknown.

Foreign Central Authorities can deal directly with provincial Central Authorities. The provincial Central Authorities are all Ministers of Justice, Departments of Justice, or Attorneys General. These offices attempt to secure the voluntary return of abducted children as is required by the Hague Convention.

Assistance in locating an abducted child can be sought through a number of channels. The Child Find organization is a non-profit group that has offices in a number of provinces. Le Réseau Enfants Retour is this organization's Quebec counterpart. Another non-profit group, the International Social Service, has an office in the capital city of Ottawa.

The Royal Canadian Mounted Police maintains a Missing Children's Registry. Canada Customs has a Project Return program that has reportedly been amalgamated with the Missing Children's Registry at the Royal Canadian Mounted Police's headquarters. Addresses and phone numbers for assistance in locating abducted children have been published.¹⁶

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION.

Canada has general child abduction laws that pertain to persons who are not the subject's parents or guardians and specific laws that apply to a subject's parents and guardians. Under the former, abduction of a person under 16 and abduction of a person under 14 are indictable offenses punishable with imprisonment of up to 5 and 10 years, respectively.¹⁷ These sections have been in force for many years. Because they prescribe penalties that were often thought to be too severe in a family context, parents were not often

¹⁵ Department of Foreign Affairs (JDS), Lester B. Pearson Building, Tower C, 7th Floor, 125 Sussex Drive, Ottawa, Ontario K1A 0G2. (613) 992-6486.

¹⁶ Ann Wilton and Judy Miyauchi, *Enforcement of Family Law Orders and Agreements: Law and Practice*, 2-4.4 to -2-6 (1999).

¹⁷ Criminal Code, R.S.C. ch. C-46, ss. 280-281 (1985).

charged with these crimes. To address this situation, more flexible provisions respecting parents and guardians were created in 1982.

Abduction by a parent, guardian, or person having the lawful care or charge of a person under the age of 14 in contravention of a custody order made in Canada with intent to deprive a parent or guardian of the possession of that person is an offense that can be prosecuted by way of an indictment or in summary proceedings.¹⁸ In the former case, the maximum sentence is 10 years imprisonment; but in the latter case, it is only 6 months.

A parallel provision to the one just quoted states that any parent or guardian who "takes, entices away, conceals, detains, receives or harbors" a person under the age of 14 "with intent to deprive a parent or guardian . . . of the possession of that person" is also guilty of an offense that can be prosecuted by way of an indictment or in summary proceedings. In these cases, the existence of a valid custody order is not required, but no prosecution can be commenced without the consent of the Attorney General of Canada.

The Criminal Code creates one major exception to the abduction offenses. No person who takes, entices, conceals, or detains a young person to protect him or her from imminent harm can be found to be guilty of an abduction offense. The onus of proving that an abduction was necessary to protect a young person is on the accused.¹⁹ An honest but mistaken belief will bring the accused within the exception if the circumstances thought to have existed would have posed a real danger.²⁰

It is not a defense to the abduction provisions to prove that the young person consented to the conduct of the accused.²¹

The Criminal Code is a Federal statute that applies throughout Canada. Sanctions that are sometimes referred to as "civil" or "quasi-criminal" in nature can also be imposed under provincial legislation. For example, under the Children's Law Reform Act, the Ontario Court (Provincial Division) can impose sentences of up to Can\$5,000 and imprisonment for up to 90 days for "any wilful contempt of or resistance to its process or orders in respect of custody or access to a child."²² An order for imprisonment under that section can be made to be conditional upon default so as to put a party on notice as to the consequences of his or her actions in contempt of court.²³ Similar penalties are available for violations of a restraining order.²⁴ Ontario's legislation also provides that a police officer can arrest a person he or she believes, on reasonable and probable grounds, to have contravened a restraining order without first obtaining a warrant.²⁵

B. PARENTAL VISITATION.

Custody and access are normally governed by provincial legislation. In British Columbia, the Family Relations Act provides that if the mother and father of a child live apart, the parent with

¹⁸*Id.* S. 282(1).

¹⁹*Id.* S. 285.

²⁰*R. v. Adams*, 12 O.R. (3d) 248 (Ont.C.A. 1993).

²¹*Supra* note 16, ch. C-46, s. 286 (1985).

²²*Supra* note 10, ch. C.12, s.38(1) (1990).

²³*Id.* S. 38(2).

²⁴*Id.* S. 35(2).

²⁵*Id.* S. 35(3).

whom the child usually resides may normally exercise custody over him or her.²⁶ However, if custody rights exist under a written agreement or under a court order, those rights prevail.²⁷ There is no presumption in favor of joint custody, but joint custody can be awarded. The Provincial Courts and the Supreme Court have jurisdiction to award custody on application of one of the parties. An order for access may be made whether or not a custody order is made.²⁸

Throughout Canada, the general rule is that a parent who has been denied custody is granted access unless access might endanger a child's upbringing.²⁹ It is generally accepted that it is normally in the best interests of a child to have contact with both parents. The courts can order supervised or unsupervised visits. However, the right of access usually includes the right to take a child to an access parent's normal living accommodations.

Orders as to custody and access can be made ancillary to the granting of a divorce under the Divorce Act. The Divorce Act is a Federal law and orders made under it supercede orders made under provincial family laws.³⁰ However, after a custody or access order has been made under the Divorce Act, an application to have the issue reexamined under provincial legislation can be filed in an appropriate provincial court. Such an application may be struck out as an abuse of process if the court believes that it has been brought prematurely, but otherwise it will be heard in a similar manner to a request to revise a custody or access order under provincial legislation. The most common standard that must be met in applying to have a custody or access order varied is that there has been a "material change in circumstances that affects or is likely to affect the best interests of [a] child."³¹

The courts generally have broad discretionary powers in deciding applications for custody or access. They are also empowered to appoint trained persons to assess the needs of a child and the ability or willingness of the parents to satisfy those needs.³²

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Canada does not have parallel systems of Federal and provincial courts. Instead, it has several levels of provincial courts, a national Supreme Court that has jurisdiction to hear appeals from provincial courts, and several specialized Federal courts. Applications to enforce the provisions of the Hague Convention are filed in the superior provincial courts listed in the various provincial laws adopting that Convention. Such applications will be heard by a provincial trial judge. In some provinces, the judge may be a designated family court judge. In all cases, the decision of this judge may be appealed to the Court of Appeal with the leave of the judge or the Court itself. As the highest provincial courts, the Courts of Appeal normally decide cases in panels of three justices. Decisions of the

²⁶ *Supra* note 4, ch. 128, s. 34(b) (1996).

²⁷ *Id.* S. 34(c) and 34(d).

²⁸ *Id.* S. 35(2).

²⁹ *Roy v. Roy*, 19 Man. R. (2d) 278 (C.A. 1983).

³⁰ 1986 S.C. ch. 4, as amended.

³¹ Children's Law Reform Act, *supra* note 10, ch. C.12, s. 29 (1990).

³² *Id.* S. 30(1).

Courts of Appeal may, themselves, be appealed with leave to the Supreme Court of Canada. There are nine judges on Canada's highest court. The entire Supreme Court hears almost all appeals.

IV. LAW ENFORCEMENT SYSTEM

The heart of the Hague Convention is the general requirement that abducted children under the age of 16 be returned to their habitual residence in compliance with a custody order from that jurisdiction or for a determination of a custody issue by a court of that jurisdiction. However, this general requirement is subject to exceptions. Even if an application is filed within a year, a court of a member state can refuse to order a child's return if it would expose him or her to physical or psychological harm or would otherwise place him or her in an intolerable situation. These safeguards were needed to secure the agreement of many member states, but they clearly create potential problems. A court that approaches the issue in bad faith defeats the purpose of the Convention by interpreting the exceptions very broadly.

A review of the available Canadian case law indicates that Canada's courts are generally well aware that in order to be effective, the Convention requires not only good faith, but a willingness to approach questions differently than is often the case in domestic disputes. In the leading case of *Thomson v. Thomson*, the Supreme Court held that in weighing Hague Convention applications, judges are not to employ the usual standard of determining what is in the best interests of a child. They must, instead, follow the language of the Convention.³³ In *Thomson v. Thomson*, the Supreme Court held that only rarely will the risk of separation rise to the level of risk envisioned by the Convention. In that case, an order to return a child to his father in Scotland was issued to a mother who had wrongfully removed him to Manitoba.

In another case of wrongful removal from the United Kingdom, a young girl suffering from a debilitating disease was allowed to stay with her Canadian mother. However, her sister was ordered to be returned as the court found that the two cases had to be weighed independently of one another.³⁴ The onus of showing that a grave risk of harm exists is on the defendant. This means that evidence supporting the allegations will normally be required.

Another safeguard built into the Convention states that a court may refuse to order the return of a child who objects and who has attained a sufficient degree of maturity. In one reported case, the court found that a 10 year-old had reached the required degree of maturity but did not respect her stated wish because it believed the child had been pressured by her mother.³⁵

An application made more than one year after a child's removal may be rejected if the child is found to be well settled in his or her new environment. In one reported case, the Quebec court of Appeal held that determining whether a child is well settled requires an

³³[1994] 3 S.C.R. 551.

³⁴*Chalkley v. Chalkley*, [1995] 3 W.W.R. 589 (Man. C.A.).

³⁵*Thorne v. Drydenhall*, 148 D.L.R. 4th 508 (B.C.C.A. 1997).

examination not only of activities and outward signs, but also of a state of mind.³⁶

V. LEGAL ASSISTANCE PROGRAMS

On signing the Hague Convention, Canada made a reservation respecting the cost of legal proceedings. Canada apparently took this view in agreement with the United States that “legal aid should be made available [to a] foreign applicant but on terms that would not bestow on foreign nationals a more advantageous grant in aid than is available to . . . nationals under the local legal aid plan.”³⁷ Due to its reservation, Canada’s provinces are not obliged to assume the cost of legal proceedings to enforce the Hague Convention except to the extent that their legal aid systems provide for financial support. Thus, anyone filing an application in Canada can apply for financial assistance from a provincial legal aid fund. The Central Authorities assist in directing parties to the appropriate offices. A number of variables determine whether a party may be eligible for legal aid and the amount of the support that may be provided. Each province has its own plan.

VI. CONCLUSION

It is difficult to determine from the reported cases whether Canadian courts have tended to show a bias in favor of persons who have abducted children to Canada. Most judges have been careful to give compelling reasons for their decisions that are based on factual determinations that cannot be independently assessed. One notable development that does stand out in the reported cases is that a majority of approximately 70 percent of the Hague Convention applications filed in Canada have been filed by fathers. At the time the Convention was being considered, most of the cases that had attracted media attention involved fathers abducting children to foreign countries. This points to the fact that the problem of child abductions to Canada appears to typically be of a different nature.

Prepared by: Stephen Clarke, senior legal specialist, Directorate of Legal Research, Law Library of Congress, November 1999.

CYPRUS

INTRODUCTION

The Convention on the Civil Aspects of International Child Abduction (hereafter the Convention) was adopted on October 24th 1980 by the Fourteenth Session of the Hague Conference on Private International Law and was signed on October 25th.¹

The Convention’s key objective, as reflected in its Preamble and Article 1, is the protection of the best interests of children, not over the age of sixteen, who have been wrongfully removed or retained in any contracting state and to ensure the restoration of the *status*

³⁶58 Q.A.C. 168.

³⁷Leal, *supra* note 1, at 232.

¹TIAS 11670.

quo; that is, their prompt return. It also seeks to ensure that rights of custody and access under the national laws of a contracting state are effectively respected in other contracting states.

The Convention requires that contracting states designate Central Authorities to discharge the duties imposed upon them, such as discovering the whereabouts of a child who has been wrongfully retained or removed, securing its return, and exchanging information relating to the social background of the child and others. It also requires that Central Authorities closely cooperate with each other to achieve the goals of the Convention.

Cyprus, as a non-Member of the Hague Conference, acceded to the Convention by virtue of Decision No. 39284 of the Council of Ministers issued on May 12, 1993 and ratified the Convention in 1994, as discussed below. Cyprus's accession to the Convention is effective only between Cyprus and those Contracting States which have declared, or will declare their acceptance of the accession.² The Convention entered into force in Cyprus on February 1, 1995, and between the United States and Cyprus on March 1, 1995.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Cyprus ratified the Convention by Law No. 11(III) of 1994.³ Law No. 11 is cited as 1994 Ratification Law of the Convention on the Civil Aspects of International Child Abduction. The Law includes the text of the Convention in English and Greek. Pursuant to Article 169.3 of the Cyprus Constitution, the Convention has acquired superior force to any domestic law since its publication in the Official Gazette.

Cyprus, as required by Article 6 of the Convention, designated the Ministry of Justice and Public Order as the Central Authority to exercise the duties and rights arising from the Convention.

II. DOMESTIC LAW REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The Criminal Code of Cyprus contains several articles that may be applicable to cases involving child abduction and retention.⁴ Article 185 applies to cases that involve stealing of a child, where as Article 246 deals specifically, as its title indicates, with kidnaping from a lawful guardian. Both articles apply to children under the age of fourteen. However, Article 246 raises the cut-off age for female children to the age of sixteen.

Article 185 on child stealing reads as follows:

Article 185: Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years, of the possession of such a child—

²<<http://www.hcch.net/e/status/stat28e.htm>>

³Episeme Ephemerida tes Kypriakes Demokratias (EEKD) [Official Gazette of the Republic of Cyprus], Part I, at 181 (1994).

⁴The Criminal Code, Ch. 154 as amended.

(a) forcibly or fraudulently takes or entices away, or detains a child; or

(b) receives or harbors the child, knowing it to have been taken or enticed away or detained, is guilty of a felony, and is liable to imprisonment for seven years.

It is a defense to a charge of any of the offenses defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or in the case of an illegitimate child is its mother or claimed to be its father.

Article 246 reads as follows:

Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such a minor or person from lawful guardianship.

Article 248 deals with punishment of kidnaping:

Any person who kidnaps any person from the Republic or from lawful guardianship is guilty of a felony, and is liable to imprisonment for seven years, and is also liable to a fine.

Article 250 deals with secret and wrongful confinement of a person and reads as follows:

Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, is guilty of a felony and is liable to imprisonment for seven years.

B. PARENTAL VISITATION

The relations of parents and children are regulated by Law No. 216, the Parents and Children Relations Law of 1990 and 1995,⁵ as amended.⁶ Parental care is a right and a duty of both parents, who can exercise it jointly.⁷ Parental care includes the right to name a child, care for him or her, administer his or her property, and represent the child in every transaction related to his or her person or property.⁸ Care of a child is defined as including the bringing up of the child, supervision, education, and training, including the designation of the child's place of residence.⁹ Every decision of the parents pertaining to the exercise of parental care must aim at the interest of the child. The Family Court of the district where the child resides, which is the court that has jurisdiction in cases involving relations between parents and children, must also apply the same standard when the entrusting of parental care or the manner of its exercise is at issue.¹⁰ The court may also ask the opinion of the child, depending on the child's maturity, prior to rendering a ruling pertaining to parental care. Every court decision on parental care must respect the equality of the parents

⁵ EEKD, *supra* n.3, Part I, at 2030 (1990).

⁶ Law No. 2, 1997 and Law No. 21(1), 1998.

⁷ *Id.* Art. 5 (1)(a).

⁸ *Id.* Art. 5(1)(b).

⁹ *Id.* Art. 9(1).

¹⁰ *Id.* Art. 6(2)(b).

and must not discriminate on the basis of sex, language, religion, beliefs, citizenship, and national or social origin or property.

The court regulates the exercise of parental care in case of divorce, separation, annulment of the marriage, or void marriage.¹¹ The court, based on an application by the parents, may also decide on the exercise of parental care, if the parents disagree and if the interest of the child requires that a decision must be made.¹² Exercise of parental care may be assigned to one of the two parents, or both jointly. In the latter case, parents must come to an agreement as to the place of residence of the child. The court has the power to assign the exercise of parental care to a third person. In this respect, prior to reaching a decision, the court will take into consideration the child's relationship with the parents, with siblings, if any, and of any agreement between the parents that relates to this issue. In such cases, "the main criterion shall always be the interest of the child."¹³

The Law clearly provides for the right of personal communication between a non-residential parent and a child.¹⁴ The court decides on how the right to personal communication will be exercised in case the parents cannot reach an agreement.

The standard of care that the parents are required to show during the exercise of parental care is the same care that they show for their own affairs.¹⁵

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

A. RIGHT TO SEEK RETURN

In case the custody rights of a person have been violated by the wrongful removal and retention of a child by another, that person is entitled to obtain return of the child based on the Hague Convention. One of the ways to do so is to file an application through the designated Central Authority. In the case of Cyprus, the designated Central Authority as required by Article 6 of the Convention is the Minister of Justice and Public Order. The Minister is empowered to exercise any authorities vested under the Convention. The second way is for the agreed person to proceed through the court system. These two ways are not mutually exclusive. The Ratification Law states that "any judicial process pursuant to the provisions of the Convention commences with the filing of an application by summons supported by an affidavit as provided by the Rules on Civil Procedure, *mutatis mutandis*."¹⁶

Cyprus has a two-level system of courts: (a) first instance courts; and (b) the Supreme Court. The main first instance courts are the District courts, which are made up of district judges, senior district judges, and presidents. The Supreme Court stands as the court of last resort in issues involving constitutional and administrative law.

¹¹*Id.* Art. 14(1).

¹²*Id.* Art. 7.

¹³*Id.* Art. 14(3).

¹⁴*Id.* Art. 17(1).

¹⁵*Id.* Art. 13(1).

¹⁶EKD, *supra* note 3.

The judicial system of Cyprus also provides for four Family Courts as first instance courts.¹⁷ For this purpose, Cyprus is divided into four provinces, and each Family Court is located in a province. Issues related to Family Courts are regulated by Law No. 23/1990 on *nomos you pronoei gia ten idryse, synthese, dikaiodosia kai tis eksousies ton oikogeneiakon dikasterion* [Law Providing for the Establishment, Composition, Jurisdiction, and the Authorities Vested in the Family Courts]¹⁸ as amended. In any dispute, except in case of divorce, a Family Court is composed of a single secular judge of the family court. Decisions of the first instance Family Courts are subject to appeal before the second instance Family Courts. The latter are composed of three judges of the Supreme Court, who are appointed by the Supreme Court for a period of two years.

Pursuant to the above Law, Family Courts, in general, may exercise all the duties assigned to them, based on Article 111 of the Constitution, on this Law and on any other law. Family Courts also have territorial jurisdiction to hear cases if: (a) one of the parties has his residence or his business within the province where the Family Court is located, and (b) the dispute concerns a minor and the minor resides in the province of the Family Court.

In 1998, Law No. 23/1990 was amended by Law No. 26(I) of 1998. Article 2 of the Law uses very explicit language as to the jurisdiction of Family Courts. It states that Family Courts have subject matter jurisdiction especially in “issues involving marital relations which are initiated in judicial proceedings arising from bilateral or multilateral conventions to which Cyprus has adhered” and also in “issues related to parental care, maintenance, recognition of a child, adoption, property issues between the spouses and any other marital or family dispute provided that the parties or one of them is a resident of the Republic.” Residence is defined as a uninterrupted stay of more than three months.

B. CASE IN POINT

In 1996, the District Court of Nicosia decided a case involving the wrongful removal of a minor, whose father was a citizen of Cyprus and whose mother was a U.S. citizen.¹⁹ Both parents were awarded temporary custody by a N.Y. court order. The child lived with the mother, while the father had visitation rights. In April 1996, the father brought the child to Cyprus in violation of custody orders.

In examining the facts of the case and in evaluating the evidence, the District Court first analyzed the inquiry as to whether there was a wrongful removal of the minor from the United States to Cyprus pursuant to Article 3 of the Convention. Upon examination of certain factual and legal elements, the Court held that the removal of the minor was in breach of custody assigned to the mother based on a judgment issued by the Family Court in New York. It also held that the mother was indeed exercising custody

¹⁷ Other first instance courts are the Assize courts, military courts, industrial disputes courts, and the Rent Control Tribunals.

¹⁸ EEKD, *supra* n.3, Part I, No. 2485 (1990).

¹⁹ District Court of Nicosia, Appl. No. 405/96 (Dec. 18, 1996), <http://www.hiltonhouse.com/cases/Cy-cyprus.txt> (unofficial text).

over the child prior to its being removed. Subsequently, the Court examined whether the prerequisite of Article 12 of the Convention had been met, that is, whether a period of less than a year had elapsed from the date the child was wrongfully removed. Again, it answered the question in the affirmative.

Furthermore, the Court inquired whether it should use its discretion to refuse to order that the child be returned. In this respect, the Court noted that the child did not possess the necessary maturity because of her young age (7 years of age) to allow her views to be taken into account. It also noted that the child did not refuse to return to the United States but it merely “expressed its desire to stay in Cyprus.” Moreover, the Court in examining the question as to whether or not the mother had acquiesced to her daughter’s staying in Cyprus held that the mother had not.

Finally, the Court dealt with a jurisdictional issue. The advocate of the respondent had raised the argument that the Nicosia District Court lacked jurisdiction because the Ratification Law clearly states that the Family Court has jurisdiction on the basis of Article 111 of the Cyprus Constitution and laws 23/90 and 88/94.

The Nicosia District Court rejected the claim that the Family Courts had jurisdiction over the case. The Court made a distinction between the subject matter that falls within the jurisdiction of the Family Court and the case under consideration. It clearly pointed out that this case involved the wrongful removal and retention of the minor from the United States to Cyprus and that it was called upon to decide whether or not it should order that the child be returned to the United States. Therefore, the Court continued, based on Article 16 of the Convention, which prohibits judicial authorities to decide on the merits of rights of custody, and Article 19, which states that any decision made “shall not be taken as a determination on the merits of any custody issue,” that it, not the Family Courts, had jurisdiction to deal with the case.²⁰

Subsequently, the Court ordered that the child be returned to her mother in New York and that the father pay transportation expenses.

III. LAW ENFORCEMENT SYSTEM

In Cyprus, orders issued by the Family Courts on whether a child should be returned or not are immediately enforceable after being served to the respondent. Their execution is effected by the Central Authority, that is, the Minister of Justice and Public Order, as stated above. The latter is assisted either by the police or another government agency, such as the Welfare Department.

IV. LEGAL AID

No legal assistance is provided in civil cases under the judicial system of Cyprus. However, in cases arising under the Hague Convention, petitioners who opt to proceed through the Central Authority do not pay any legal fees because the filing of the application is undertaken by the Ministry of Justice and Public Order.

V. CONCLUSION

Since Cyprus became a contracting State of the Hague Convention in 1994, it has designated the Ministry of Justice and Public Order as the Central Authority to handle cases involving international abduction of children. Cyprus' well-developed judicial system and especially its law related to children—which is based on best interest of the child principle—provide the requisite foundation for effective application of the provisions of the Hague Convention.

Prepared by: Theresa Papademetriou, senior legal specialist, Directorate of Legal Research, Law Library of Congress, November 1999.

²⁰ It has not been possible to ascertain whether the case was appealed because of lack of jurisdiction. However, the recently enacted Law No. 21, 1998 leaves no ambiguity that the Family Courts have subject matter jurisdiction in cases involving international abduction and retention of children.

CZECH REPUBLIC

INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction was signed by the Czech Republic on December 28, 1992. It was approved by parliament and ratified, and the instrument of ratification was deposited with the government of the Kingdom of the Netherlands on December 15, 1997, with the reservation according to Article 42 of the Convention, that the Czech Republic shall not be bound to assume any costs referred to in Article 26, paragraph 2, of the Convention, resulting from the participation of legal counsel or advisers or from Czech court proceedings, except insofar as those costs may be covered by its legal system of legal aid and advice. The Convention entered in force for the Czech Republic on March 1, 1998.¹

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

In accordance with Article 6, paragraph 1, the Czech Republic has designated as the Central Authority the Central Agency for International Legal Protection of Youth, Benesova 22, 602 00 Brno, Czech Republic. The Agency will represent the applicant under a power of attorney in proceedings under the Convention before Czech courts. The proceedings are exempt from the payment of court fees.

According to the Constitution of the Czech Republic,² the Convention became part of the legal order of the Republic upon its approval by parliament, its ratification and publication, and the courts will apply it whenever called upon.

¹Announcement of the Ministry of Foreign Affairs of March 5, 1998, No. 34, Collection of Laws.

²Constitution of the Czech Republic of December 16, 1992, No. 1 of 1993, Collection of Laws, arts. 49(1) and 52.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

For a decision relating to the wrongful removal and retention of a child, the competent court will be the district court of the place where the child resides by parental agreement, decision of the court, or any other reason.³ This court will also be competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Code of Civil Procedure.

Child abduction may be prosecuted under article 216 (Abduction) of the Criminal Code,⁴ which provides that whosoever shall take away a child (a person under 18) from the care of the person who has the duty under the law or under an official decision to care for him shall be punished by a fine or imprisonment of up to three years. A parent who, for example, takes a child abroad against the will of the other parent pretending that it is only an excursion may be prosecuted under article 209 (Abuse of rights of others) of the Criminal Code.⁵ The punishment is a fine or imprisonment of up to two years.

B. PARENTAL VISITATION

For a decision relating to parental visitation, the competent court will be the district court of the child resides by parental agreement, decision of the court, or any other reason.⁶ This court will also be competent in proceedings under the Hague Convention. The proceedings are governed by provisions of the Code of Civil Procedure.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

General trial courts in civil matters are the District courts; one is located in each territorial district. Appeal against their decisions goes to the Regional Courts, which have also specified trial jurisdiction. Appeal against decisions of the Regional Courts in their trial jurisdiction goes to the Courts of Appeal. A further appeal against decisions of the Regional Courts as courts of appeal and against decisions of the Courts of Appeal goes to the Supreme Court. Trial courts in child-return proceedings, visitation, and enforcement of related orders under domestic Czech law as well as under the Hague Convention are the District courts.⁷

In criminal matters, the structure is identical; however, because the Supreme Court deals only with petitions alleging violation of law by lower courts and prosecutors the Courts of Appeal are the final courts of criminal appeal.⁸

³Code of Civil Procedure, Law of December 4, 1963, No. 99, Collection of Laws, Consolidated Text of March 20, 1996, No.62, Collection of Laws, as amended, arts. 9, 88a and c, 176–177.

⁴Criminal Code, Law of November 29, 1961, No. 140, Collection of Laws, Consolidated Text of April 7, 1994, No.65, Collection of Laws, as amended.

⁵*Id.*

⁶*Supra* note 3.

⁷*Supra* note 3, arts. 7–12.

⁸Code of Criminal Procedure, Law of November 29, 1961, No. 141, Collection of Laws, Consolidated Text of April 20, 1994, No. 69, Collection of Laws, as amended, arts. 13, 252, 266.

IV. LAW ENFORCEMENT SYSTEM

The District courts enforce their decisions. They are immediately enforceable. As regards decisions relating to child return, visitation, and related matters, the court may first request the obligated party to carry out the court decision voluntarily and call upon the pertinent municipal or district office of Legal Protection of Children for its assistance. If there is no result, the court may impose successive fines of 2000 crowns each (US\$1 = 35 crowns) on the obligated party. It may, however, acting in cooperation with the above referred to offices, order the immediate enforcement of its decision by the proper state organs (court bailiffs and the police). The court acts appropriately according to the circumstances of the case.⁹ In the Hague Convention proceedings requiring (A) the return of the child or (B) visitation by the left-behind parent, the court will proceed as above. Under (C), determinations as to the custody of the child, the court will apply articles 15–20 of the Hague Convention.

V. LEGAL ASSISTANCE PROGRAMS

General care and protection of children, both socially and legally, are entrusted to the Office of Legal Protection of Children within the district and municipal administration created by social security legislation and are regulated by Chapter 2 of the Family Code.¹⁰ The Office supervises the healthy development of children and their education, and protects their legitimate interests, including property interests. Any person may contact the office in these matters and request assistance.

VI. CONCLUSION

The Czech Republic is in full compliance with the Hague Convention. The compliance is insured by the Central Authority of the Czech Republic, the Central Agency for International Legal Protection of Youth, which holds the power of implementation and which exercises its legal powers on behalf of the Ministry of Justice in matters pertaining to the Convention.

Prepared by: George E. Glos, special law group leader, Eastern Law Division, Directorate of Legal Research, Law Library of Congress, April 1999.

DENMARK

INTRODUCTION

The provisions concerning the implementation of the 1980 Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] are contained in the Danish Law, known as “the International Child Abduction Act” [hereinafter the

⁹*Supra* note 3, arts. 171, 272–273a.

¹⁰Family Code of December 4, 1963, No. 94, Collection of Laws, Consolidated Text of September 11, 1998, No. 210, Collection of Laws, arts. 27(4), 41–50. Law on the Jurisdiction of Offices of Social Security of the Czech Republic of June 27, 1988, No. 114, Collection of Laws, as amended by Law of March 26, 1991, No. 144, Collection of Laws, arts. 15 and 19.

Act].¹ In conformity with the relevant provisions of the Convention, the Act does not apply to children who have reached the age of 16.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Central Authority is the Civil Law Directorate of the Danish Ministry of Justice, which discharges its duties in accordance with the rules set out in the Convention.

Section 10 of the Act prescribes rules on the return of a child to the person who has the legal custody of the child. Section 11 of the Act contains provisions on the denial of a request for the return of the child. Accordingly, a request for the return of a child, who has been unlawfully removed or retained may be denied if:

(1) at the time of the application for proceedings one year has passed since the child was removed or retained, and the child has already settled in his new environment;

(2) there is a serious risk that the return of the child harms the child's psychological or physical health or otherwise the child will be subjected to a situation which cannot be acceptable;

(3) the child himself opposes the return, and he has reached such age and maturity that his wishes should be respected; and

(4) the return of the child is incompatible with the fundamental principles regarding the protection of human rights and freedom as cherished in Denmark.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

Chapter 23 of the Danish Penal Code prescribes rules concerning the crime against family. According to the provisions of Chapter 23:215, the removal of a child under 18 years of age by one parent from the jurisdiction of a person who has the custody of the child is punishable by the penalties prescribed in section 261 of the Penal Code. The penalty according to section 261 is imprisonment of up to 4 years. In minor offenses, a milder punishment will be imposed. However, in certain aggravated cases the punishment may be from one year to as much as 12 years imprisonment.

B. PARENTAL VISITATION

The answers to questions relating to a child's custody and the right to visitation are contained in the Danish Law on Parental Custody and Visitation.² Accordingly, a child born to a married couple enjoys the custody of both parents. The custody continues until the child is 18 years old. The mother of an illegitimate child is the sole custodian of the child, unless an agreement has been reached by the parents to the effect that both parents should have the custody of the child. Parents who are separating or divorcing

¹Law Nr. 793, November 27, 1990. (see Karnovs Lovsamling, 1995, vol. 3, pp. 4911 ff.).

²Law Nr. 387, June 14, 1995. (see Karnovs Lovsamling, 1995, vol.3, pp. 4870 ff.).

may conclude a similar agreement for the custody of the child. When the custody is disputed, the district court makes the decision on questions of custody and visitation. Under all circumstances, such decisions must be made with due consideration to what is in the best interest of the child. If a child has reached the age of 12, he/she must be heard before a decision on the custody or visitation is made. However, if the circumstances indicate that questioning the child would be harmful to the child's mental health, the child does not need to be interviewed.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The matters concerning the custody of a child are handled by the district court, which in principle is the district in the area where the parties reside. The matters regarding the return of a child are dealt within *fogderetten* (a bailiff's court which enforces the judgments, both domestic and foreign) in the place where the child has been retained. The decisions of both courts can be appealed to the regional court of appeals. The highest instance is the Danish Supreme Court.

IV. LAW ENFORCEMENT SYSTEM

As was stated above, the questions relating to the enforcement of the Convention rules are dealt with by *fogderetten*. The court must handle the matter of a child's return as quickly as possible. If a case has not been resolved within six weeks, the applicant is entitled to question the court as to the reason for the delay (the Act §§ 12–15). However, if appropriate, the court may arrange a meeting with the abductor to negotiate voluntary return of the child before making a decision. Moreover, the court must obtain information about the child's wishes before making a final decision in the case if the child has reached the age and maturity where due consideration should be given to his/her wishes (the Act § 16).

Upon application to it, the court may decide that the child should temporarily stay with one of the parents or, if there is a possibility that the child will be removed, the court may issue an interim order to place the child in the temporary custody of social services (the Act § 17).

According to § 19:1 of the Act, if an application for the enforcement of the Convention has been made, no decision on the question of custody can be made in Denmark before the matter of the return of the child is decided by the *fogderetten*. Moreover, if the Central Authority informs the court dealing with a custody case that the child concerned has been unlawfully brought to or retained in the country, the court shall not make a decision in the custody case even if no application has yet been submitted to the *fogderetten* for the return of the child. In such cases, a reasonable time must be given for the filing an application in the "*fogderetten*" for the return of the child (§ 19:2).

V. LEGAL ASSISTANT PROGRAMS

The Danish rules on legal assistance are contained in the 1997 Ordinance on Legal Aid.³ A person covered by the 1980 Convention

can obtain legal aid in Denmark. However, it should be noted, first, that the grant of legal aid is subject to a means test. Secondly, Denmark has made a reservation to Article 26 of the Convention to the effect that except for the legal aid that covers the court and attorney expenses, no other expenses involved in the process of the return of a child is compensated.

Prepared by: Fariborz Nozari, senior legal specialist, Directorate of Legal Research, Law Library of Congress. May 1999.

³Ordinance Nr. 866, November 25, 1997. (see Karnovs Lovsamling, 1997, vol.7, pp.10544-10545).

FRANCE

INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] was adopted on October 25, 1980. Its objectives are to combat international parental abduction and wrongful retention of children and to ensure the effective exercise of visitation rights across international borders. The Convention sets forth a procedure designed to restore the *status quo ante* existing prior to the child's wrongful removal or retention. Once it has been established that the removal or retention was wrongful within the meaning of the convention,¹ the court, hearing a petition for return, is obliged to return the child to his or her country of residence, where disputes about custody rights will be heard. The duty to return is absolute unless the defendant establishes one of the exceptions provided for in the Convention.²

There are approximately 50 cases pending between France and the United States under the Hague Convention. Most cases deal with the return of children rather than visitation rights. Of these fifty cases, France and the United States are each seeking the return of children from the other in one half of the cases.³

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Hague Convention was published by Decree No. 83-1021 of November 29, 1983, and became effective on December 1, 1983, at first only between France, Portugal and Canada.⁴ Under French law, treaties have an authority superior to that of ordinary laws

¹The court will verify that the removal or retention of the child is in breach of custody rights attributed to the applicant, rights arising by operation of the law of the state in which the child was habitually resident immediately before the removal, or by reason of an agreement having legal effect under the law of that state, or by reason of a judicial or administrative decision.

²Article 12 provides that the court is not obligated to return the child when return proceedings are commenced a year or more after the removal or retention, and it is demonstrated that the child is settled in his new environment.

Article 13 provides three exceptions: (13a) the person claiming the breach of custody rights was not exercising his/her custody rights or had subsequently acquiesced to the removal or retention; (13b) return of the child would expose him to physical or psychological harm or would place him in an intolerable situation; and (13c) a mature child objects being returned.

Article 20 allows a court to refuse to order the return of a child if such return "would not be permitted by the fundamental principles of the requested states relating to the protection of human rights and fundamental freedoms."

³Letter 002630 of April 8, 1999, from the French Central Authority.

⁴Journal Officiel [hereinafter J.O.], Dec. 1, 1983, at 3466.

and are automatically incorporated into domestic law, provided they have been correctly ratified and published, provided, however, that each agreement is applied reciprocally.⁵ The Convention came into force between the United States and France on July 1, 1988, following the enactment of the International Child Abduction Remedies Act by the United States.

The Ministry of Justice, and more specifically, the *Bureau de l'entraide judiciaire en matière civile et commerciale*, has been designated as the Central Authority for France to carry out the duties imposed by the Convention.⁶ Upon receipt of an application for return, the Central Authority will check that it satisfies Convention criteria and is accompanied by the proper documentation. This authority will consider only those applications which are drawn up in French or are accompanied by a translation into French.⁷ The file is forwarded to the public prosecutor (*Procureur de la République*) attached to the civil court of general jurisdiction in the jurisdiction where the defendant resides. This court, known as the *tribunal de grande instance*, has exclusive jurisdiction over family matters. Initially, the parties are systematically encouraged to reach an agreement; if necessary, an experienced mediator will be involved. In addition, all necessary measures will be taken to locate the child, protect his well-being, and prevent the child from being abducted or concealed before the final disposition of the case. If mediation fails, the petition for return will be heard before a specialized judge, the *juge aux affaires familiales* (family affairs judge). However, the judge may decide to remand the case to a panel of three judges. Such remand is mandatory if it is requested by one of the parties.⁸ The decision rendered by the judge or the court is appealable. Provisional enforcement pending the appeal may be granted but the court is not compelled to do so.

Alternatively, the petitioning parent may choose to bypass the Central Authority and instead proceed directly to the *tribunal de grande instance*. This option was confirmed by the *Cour de Cassation* (the highest judicial court in France) in 1995.⁹ The petitioning parent's attorney will use an emergency procedure known as *référé*. The opposing party is informed of it. Application for a *référé* is made by an *assignation en référé*, which is similar to an emergency writ of summons. Special sessions for the hearing of *référé* applications are usually held once a week, more often in the larger cities, or in case of extreme urgency, immediately at a fixed time, in court or at the residence of the judge, even on public holidays. Bypassing the Central Authority may save time, but the public prosecutor services will not be available, and a local attorney experienced in dealing with the Convention will be required. In addition, when the child's whereabouts are unknown, the prosecutor can ask the police

⁵ 1958 Const. art. 55.

⁶ Ministère de la Justice, Direction Des Affaires civiles et du Sceau, Bureau de l'entraide Judiciaire, en matière civile et commerciale, 13, Place Vendôme, 75042 Paris Cedex 01. Téléphone: 33 1 44 86 14 66. Fax: 33 1 44 86 14 06.

⁷ This is in accordance with the provisions of article 42 and pursuant to article 24, paragraph 2 of the Convention.

⁸ Code Civil (C. civ.) art 247, (Ed. Dalloz 1999) & Code de l'organisation judiciaire (C. org. jud.) art. L.312-1 (Ed. Dalloz 1999).

⁹ Cass. Iere., June 7 1995, Bull.civ. I, n° 234.

to investigate further. Such help will not be so easily obtainable if the parent goes directly to court.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The Penal Code contains several provisions covering parental child abduction and withholding access rights from a person entitled to such rights. The offenses are listed in the Code under the heading “Encroachment to the exercise of parental authority.” They are as follows:

- Withholding access rights from a person entitled to these rights is punishable by one year imprisonment and a 100,000 FF fine (approximately US\$ 16,500);¹⁰
- Failure by the person with whom the child habitually resides to give notice within one month of any change in the child’s residence to whoever has access rights to the child resulting from a judicial decision or an agreement approved by a court is punishable by six-month prison term and a 50,000 FF fine (approximately US\$ 8,250);¹¹
- Abduction of a minor by a legitimate, natural or adoptive parent either from a person with parental authority or from a person he was placed with, or from a person with whom he habitually resides, is punishable by one year imprisonment and a 100,000 FF fine (approximately US\$ 16,500);¹²
- Abduction of a minor without fraud or violence by a person other than the persons mentioned in the previous article from a person with parental authority or from a person he was placed with or from a person he habitually resides with, is punishable by five years’ imprisonment and a 500,000 FF fine (approximately US\$ 83,000);¹³

The penalties imposed by articles 227–5 and 227–7 are doubled when (1) the child is retained for more than 5 days and information with regard to the child’s whereabouts is withheld; and (2) when the child is taken out of the territory of the French Republic.¹⁴ These penalties will be tripled up to three years’ imprisonment and a 300,000 FF fine (approximately US\$ 50,000) when the guilty party has lost parental authority.¹⁵

Criminal prosecution may result in a formal judicial investigation conducted by an investigating judge. This judge has broader investigatory powers than a civil judge. Prosecution may also be used as a negotiating tool with the abductor, and in some cases has a dissuasive effect. However, in other cases, prosecution may impede any chance of reconciliation as it tends to exacerbate the situation. Therefore, recourse to criminal prosecution is decided on a case-by-case basis.

¹⁰Code pénal (C. pen.), art. 227–5 (Ed. Dalloz, 1999).

¹¹*Id.* art. 227–6.

¹²*Id.* art. 227–7.

¹³*Id.* art. 227–8.

¹⁴*Id.* art. 227–9.

¹⁵*Id.* art. 227–10.

B. PARENTAL VISITATION

Parental rights and duties referred to as *autorité parentale*¹⁶ are vested jointly in parents on the birth of the child. Divorce does not in principle affect the relationship of rights and duties of former spouses in relation to their children.¹⁷ It is customary for joint parental authority to continue while one parent is awarded custody unless this is deemed to be contrary to the child's interests. A non-custodial parent will retain access rights and the right to influence major decisions affecting the child. The *juge aux affaires familiales* has full authority to decide who will exercise parental authority and who will be awarded custody. The judge will take into account any agreement he ordered, including any agreement between the spouses, reports prepared by social workers,¹⁸ and wishes of the child (provided that the child has a sufficient degree of understanding). Parents are free to seek the modification of an order if a change in circumstance has occurred.

Article 16 of the Convention prohibits a court from making substantive custody decisions during the proceedings. Therefore, only provisional measures in the best interests of the child will be taken by the judge. When return of the child to the country of habitual residence is denied, parental authority and custody will be decided according to the rules stated above.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

France has a dual system of courts, judicial courts on the one hand and administrative courts on the other hand. Judicial courts have two functions, civil and criminal. They carry distinct names depending on which function they exercise. This report discusses only the judicial courts which may be involved in handling Hague Convention child return proceedings.

As seen above, the *tribunal de grande instance* is the court of first instance which will hear the application for return. Such courts are located in each *département*,¹⁹ though some larger departments have more than one. They are competent to hear all civil disputes, apart from disputes which are expressly attributed to another court by reason of their nature or the amount involved. The *tribunaux de grande instance* are the ordinary courts for family matters (marriage, divorce, affiliation, and nationality), as well as for property, patent matters and civil liability. They usually sit as a three-judge panel, although specialized judges, sitting alone, such as the *juge aux affaires familiales*, adjudicate ordinary cases. In principle, the *tribunal de grande instance* of the defendant's residence has territorial competence. When exercising its criminal jurisdiction, the *tribunal de grande instance* is referred to as the *tribunal correctionnel*. Offenses regarding parental abduction listed above in Part II would be heard before the *tribunal correctionnel*.

Appeals of both civil and criminal decisions of the *Tribunaux de grande instance* lie to the *Cour D'appel* (court of appeals). Their

¹⁶ *Supra* note 8, art. 371–2.

¹⁷ *Id.* art. 373–3.

¹⁸ *Id.* art. 287–2.

¹⁹ France is divided into 22 regions and there are 96 *départements* within these regions.

territorial jurisdiction generally covers three *départements*. The court of appeals sits in panels, with a minimum of three members. They re-examine the facts and the legal points of a case. The courts review the files as presented by the lower courts and order additional investigations if necessary.

The supreme judicial court is the *Cour de Cassation*. The court currently has six chambers: three *chambres civiles*, a *chambre commerciale et financière*, a *chambre sociaux*, and a *chambre criminally*. The Court is referred to as the guardian of the law. It decides whether the rule of law has been correctly interpreted and applied by the lower courts. Usually, it does not substitute its own decision for a lower court's judgment with which it disagrees, but merely quashes the judgment and remits the case for rehearing by another court of the same rank. This lower court is not bound to accept the *Cour de Cassation's* view of the law, but will ordinarily do so. If it refuses to do so, and its decision is in turn appealed to the *Cour de Cassation* on the same grounds as before, the court will sit as an *assemblée plénière* (full Court). If the court again quashes the lower court decision, it will either remit the case to a third lower court which will this time be bound by the *Cour de Cassation's* interpretation of the law, or it may decide the case itself.

In most cases it appears that the French courts have ordered the return of the children.²⁰ The two defenses most often raised are (a) the lack of custodial rights of the petitioner, or (b) a grave risk of harm/intolerable situation. As to the first defense, the Court of Appeal of Aix en Provence and the *Cour de Cassation* on two occasions have concluded that a person having visitation rights, the legal right to be consulted and the right to consent to any change in the child's residence, had rights of custody within the meaning of the Convention.²¹ For a grave risk/intolerable situation defense to be successfully raised, the *Cour de Cassation* requires that the grave risk of harm or the intolerable situation be evaluated in regard to the conditions that the child will find upon his return and not in regard to past facts.²² The courts will consider the wishes of the children who have reached the "age of understanding" (generally from the age of 10 or 11 years old). These children may be assisted by their own attorney (who will be always appointed on legal aid). The judge will hear the child separately with only the child's attorney present.

IV. LAW ENFORCEMENT SYSTEM

Judgments are enforceable only after they have been given *force de chose jugée*, i.e. where they are not subject to appeals suspending their enforcement, or where appeals have not been made

²⁰It appears that only three decisions, one of them rendered by the *Cour de Cassation*, have denied the return of the children. The *Cour de Cassation* denied the return of the child on the grounds that such return would subject him to a grave risk of psychological harm. The child had been kidnapped by his mother when he was 6 months old, and, at the time of the court decision, she was the only person he had ever known. See Hubert Bosse-platière, *l'application par les tribunaux Français des Conventions visant à lutter contre les déplacements illicites d'enfants*, l'enfant et les conventions internationales, at 413 (Presse Universitaire de Lyon, 1997), and Jacqueline Rubellin-Devichi, *Droit de la famille*, at 659, (Ed. Dalloz, 1999).

²¹Hubert Bosse-Platière-platière, *l'application par les tribunaux Français des Conventions visant à lutter contre les déplacements illicites d'enfants*, l'enfant et les conventions internationales, at 417.

²²*Id.* at 420,421.

within the time limits.²³ In principle, judgments cannot be enforced until an *expédition* (first authentic copy of the judgment which contains the *formule exécutoire* (enforcement formula) is delivered to the successful party. This enforcement formula specifically requires all *huissiers de justice*,²⁴ public prosecutors and commanders and officers of the police force, to lend their assistance when it is requested. The judgment must be then served on the defendant unless provided otherwise.²⁵

French law possesses no law of contempt of court for the enforcement of civil judgments and other court orders. Therefore, in the absence of voluntary compliance with a judgment or court order, there is no other option than the *exécution forcée* (forced compliance).²⁶ Orders requiring the return of a child under the Hague Convention or orders concerning visitation rights will be enforced with the assistance of the public authorities as specified in the enforcement formula contained in the judgment.

French courts have also developed the technique of *astreintes* designed to induce compliance with court orders. An *astreinte* is a specified amount of money that the court orders to be paid for every day, week or month during which a person fails to perform its order.

V. LEGAL ASSISTANCE PROGRAMS

France made the following reservation to Article 26 of the Convention:

In accordance with the provision of Article 42 and pursuant to Article 26, paragraph 3, the Government declares that it will assume the costs referred to in paragraph 2 of Article 26 only insofar as those costs are covered by the French system of legal aid.²⁷

When the person seeking the return of the child uses the services of the Central Authority and of the public prosecutor, no fee will be incurred. The public prosecutor is a civil servant and he appears in court on behalf of the State. His service is justified on the ground that compliance with international conventions on judicial cooperation is in the public interest. However, a person bypassing the Central Authority will incur costs, though civil litigation is considerably less expensive than in the United States, unless he/she qualifies for legal aid.

Subject to a means test, legal aid is available in France either for legal advice or for litigation. It is available in all civil, criminal, and administrative litigation to plaintiffs as well as defendants. An application must be filed with specially constituted bodies, known as *bureaux d'aide juridictionnelle*, which are composed of judges, lawyers, public officials, and "consumers." These bureaux are found in each *tribunal de grande instance* and the *Cour de Cassation*. They may grant partial or full legal aid, depending on the means

²³ Nouveau code de procédure civile (N.c.p.c.), arts. 500 & 501, (Ed. Dalloz, 1999).

²⁴ The *huissiers de justice* have the exclusive right to notify all procedural acts in relation to legal proceedings and they are responsible for the enforcement of court orders and judgments.

²⁵ N.c.p.c., art. 502.

²⁶ *Supra* note 3.

²⁷ <http://www.hcch.net/e/status/stat28e.htm>

of the applicant. Legal aid is available to French citizens, citizens of the Member States of the European Community, foreign nationals residing in France, minors whatever their status may be, and, exceptionally, to a person who does not fit into any of these categories but whose situation is of a particular interest due to the subject of the litigation or the foreseeable cost of the trial.²⁸

It may be also possible for the winning party to recover some of the costs. French law addresses the recovery of costs incurred in civil litigation as follows:

The Code of Civil Procedure provides for a list of expenditures known as *dépens*, which include expenses incurred by witnesses, remuneration of experts, court fees, emoluments of *officiers publics*,²⁹ and attorneys fees where recourse to an attorney before the court in question is compulsory.³⁰ In principle, the loser of a case pays the *dépens* of the other side as well as his own, but the court has discretion to place all or part of them on another party to the litigation.³¹

The costs which do not count as *dépens* (for example, attorney fees when resort to an attorney is not compulsory), may be also recovered by the winning party. In principle, the person who is ordered to pay the *dépens* is also to be ordered to pay any other costs. However, taking into account what is equitable, the court may in its discretion decline to make such an order or make only a reduced one. In addition, if the losing party has been unfair or vexatious, then he/she may be liable for the loss this causes any other party to the litigation.³²

VI. CONCLUSION

Based upon the available information and the reported cases, it appears that France has been in compliance with the Hague Convention, and that French courts have applied the Convention strictly and without national bias. The Convention has been viewed as a major breakthrough and as an effective tool when applied in good faith.³³ French authorities, however, have expressed concerns that the national reflexes and protectionism of some foreign courts have undermined its effectiveness and resulted in an increase in the number of kidnappings.³⁴ They argue that only true political will to comply with the terms of the Convention by the Central Authorities of such countries will change the courts' attitude.

Prepared by: Nicole Atwill, senior legal specialist, Directorate of Legal Research, Library of Congress, June 1999.

²⁸*Id.* arts. 32-1 (dilatory or abusive suit); 559 (dilatory or abusive appeal); 628 (*abusiv pourvoi en cassation*).

²⁹Les Petites Affiches, Françoise Thomas-Sassier, *La soustraction internationale d'enfants*, Oct 1, 1997. (Ms. Thomas-Sassier is one of the judges in charge of the application of the Convention at the French Central Authority).

²⁸Law N° 91-647 of July 10, 1991, J.O., jul 13, 1991, at 9170.

²⁹This expression covers various categories of practitioners (such as, for example, the *huissiers de justice* as seen above) who have obtained from the administration the exclusive right to perform certain legal acts and/or execute certain legal instruments.

³⁰N.c.pr.c., art. 695.

³¹*Id.* art. 696.

³⁴*Id.* at 6: Ms. Thomas-Sassier notes that abductions by German parents have quadrupled within the last four years because of the unwillingness of German courts to return children to France.

REPUBLIC OF GEORGIA

INTRODUCTION

The Republic of Georgia, which became independent from the Soviet Union in 1991, is a non-member state to the Convention on the Civil Aspects of International Child Abduction. The Republic of Georgia cannot become a member of the Convention because it did not participate in the Hague Conference on Private International Law at the time of its Fourteenth Session as required by article 37 of the Convention; even the national Law on Private International Law is not yet adopted in Georgia. Georgia acceded to the Convention in 1997. The Parliament of Georgia ratified the Convention on July 24, 1997, and the act of ratification entered into force in Georgia on October 1, 1997. The accession of Georgia has been accepted by the following countries:

Argentina
Australia
Czech Republic
Finland
Germany
Hong Kong
Ireland
Israel
Kingdom of Netherlands
New Zealand
Spain
United Kingdom

In accordance with article 38 of the Convention, Georgian accession to the Convention is effective only in the relationship between Georgia and those contracting states that have declared their acceptance of the accession.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Georgia acceded to the Hague Convention along with many other international legal documents at the time of its international recognition and admission to European and international organizations and institutions. Georgia's acceding to the Convention, however, did not influence the development of the Georgian legal system. The issue of international child abduction is not an acute problem for Georgia because of its long years of international isolation, the domination of conservative Soviet traditions in family relations, internal armed conflicts, absence of new legislation, and lack of resources for enforcement of already passed laws.

After the Convention was ratified by the Georgian Parliament, the Minister of Justice of the Republic of Georgia issued an executive instruction assigning the International Law Department of the Ministry of Justice to be a Central Authority, with the responsibil-

ities prescribed in article 7 of the Convention.¹ Because Georgia is a federal state, although with two autonomous provinces, the Ministry of Justice has jurisdiction over all the country; therefore the Convention also extends to all Georgian territories as required by article 40.

In an attempt to join European and international institutions, the Parliament of Georgia ratified 171 international agreements and conventions during 1995–1998. The Convention on the Civil Aspects of International Child Abduction is among them. Most of these documents are still not implemented because the implementing legislation has not yet been passed. This problem was emphasized in Georgian President Eduard Shevardnadze's address to the Georgian Parliament on February 16, 1999, concerning the state of the country's foreign and domestic policy.² He stated that implementation of laws and court decisions is the weakest point in the activities of the Georgian government. Even though the legislation of the Republic has been significantly amended during the last three years, a new Family Code and Criminal Code have not been adopted. It is expected that necessary changes will be made in the newly drafted legislation. A new draft Criminal Code, which is the first coded legal act in the sphere of criminal law drawn up in independent Georgia, has been presented to the Parliament as part of the Georgian president's legislative initiative.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

According to the old Georgian Criminal Code which is in force, the abduction of a child for mercenary purposes or for other base motives is punishable by deprivation of freedom for a term not exceeding five years. The same action committed for other purposes or motives is punishable by deprivation of freedom for a term not exceeding one year or by corrective labor for the same term. The Law considers as an abduction the kidnaping of a child without the consent of parents or legal guardians regardless of the purpose of this action. The abduction may be open or hidden, and be a result of deceit, misuse of trust, or of restraining the child. Under the Law, a child is any person under 14 years of age. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Law determines "mercenary purposes" as intending to receive material profits from the abduction, i.e., ransom or taking a child's clothes. Base motives are those that contradict moral principles, for example, taking revenge on a child's parents. If a childless woman abducts a child with the purpose of educating him and creating a good family environment for him, such an abduction does not qualify as an abduction from base motives.³

Parental kidnaping is not considered a criminal offense in Georgia. Only those who abduct somebody else's child may bear crimi-

¹Legal Acts of Georgia, 1998, No. 2–3, at 37.

²*Shevardnadze's State of Nation Address*. Sakartvelos–Respublika, Feb. 17, 1999, at 1, translated by the FBIS, electronic version, document ID: FTS19990301000810.

³Bulletin of the USSR Supreme Court, No. 2 (1974) at 10.

nal responsibility for a child's abduction. Hence biological and/or adoptive parents may not be prosecuted as kidnappers or child abductors. In case of disagreement among divorced or separated parents, the abduction of one's own child from the other parent or from an orphanage or another special institution is not considered to be an abduction under Georgian criminal legislation. It may be labeled as arrogation, which is the "unwarranted exercise in violation of a legally established order, of one's actual or supposed right, causing substantial harm to citizens or to state or social organizations."⁴ Arrogation is punishable by correctional work for a term up to six months, or by a fine, or by a social censure. The Law also prohibits prosecuting close relatives of a child (for example, grandparents) for abduction, if they acted for the sake of the child, even if the interests of the child were misunderstood.⁵

Furthermore, Georgian criminal legislation does not provide for punishment of removal of a child from the country or for retaining a child outside Georgia with intent to obstruct the lawful exercise of parental rights. Retainment is not considered as a separate felony.

Criminal acts such as child abduction occur very seldom in Georgia. If a foreigner whose home country recognizes the participation of Georgia in the Convention commits such a crime, the child is subject to return. All other cases fall under the laws of the respective state. In such cases, the International Law Department at the Ministry of Justice of Georgia, which was designated as a National Central Authority to discharge the duties imposed by the Convention, must cooperate with foreign authorities in order to discover the child, to prevent possible harm to the child, and to secure the child's return.

B. PARENTAL VISITATION

Family legislation in Georgia is based on the Code of the Georgian Soviet Socialist Republic on Marriage and Family of 1969, which is currently in force. The Code was slightly amended after Georgia gained its independence in 1991. The major principle of Georgian family law is that decisions relating to a minor should be based on his best interests. One of the proposed amendments to the Code provides for increasing the age of a minor from 14 to 16 years. This amendment was submitted to the Parliament at the end of 1998, and, if accepted, may bring Georgian legislation in accordance with the international standard. A draft Law on Private International Justice has also been drawn up by the executive branch. In regard to the protection of a child's rights, the Law on State Support of Children was drafted and submitted to the Parliament for consideration. However, this act does not regulate issues related to parental abduction. Other legislation relating to this field also failed to pass.

Under Georgian law, both parents have equal rights and duties with regard to their offspring, even after divorce, allowing, however, for court-awarded custody to one of them in case of a dispute. Unresolved disputes may be taken to the agency of guardianship

⁴ Georgian Soviet Socialist Republic. Tbilisi, *Techinformi*, 1996, art. 128.

⁵ Commentaries to the Criminal Code of the Georgian Soviet Socialist Republic. Approved by the Ministry of Justice of the Republic of Georgia. Tbilisi, 1992, at 510.

and curatorship, and/or to the court depending on the particular situation. Parents may recover custody of their children unless the court decides that this would harm the child. In accordance with tradition, custody almost always is awarded to the mother of the child; the father sometimes receives the right of access as determined by the court. However, there is no means of enforcing court decisions and as stories in local newspapers reflect, a father's right to visitation is often violated by mothers and other relatives who have been awarded custody of the child.⁶

Usually, in the case of the dissolution of a marriage the courts decide which of the parents should get custody of the child. If parents are absent, the issue of custody for minors shall be resolved by the guardianship agencies of local public education departments. These agencies decide disputes about the exercise of family rights; have the power, taking into consideration the interests of the child, to deprive access to parents living at a distance; should be, but apparently are not always, a party to custody suits; and may commence actions that would deprive a parent or parent of their parental rights.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The court system in Georgia is based on provisions of the Constitution and the Law on the Judiciary. The Constitution states that judicial power is independent and is exercised only by the courts (art. 82–91). The courts are the Supreme Court of Georgia and district and city courts at the lower levels of state administration. Justice is administered in Georgia by a trial of civil disputes and a trial of criminal cases. Lawful penalties are applied to those found guilty of crimes and those found not guilty are acquitted. Declaratory statements are elicited from the court through non-contentious procedures. A number of minor administrative infractions are tried by a single judge and not by a collegiate court.

Except for the courts of arbitration, which have exclusive jurisdiction in commercial disputes between legal entities, no other special courts exist in Georgia. All cases related to implementation of international obligations as well as civil and family related matters are handled by regular courts of law. Occasionally, cases of domestic child abduction are brought to the court; however, because of national traditions, such cases are usually resolved by family elders. No cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. LAW ENFORCEMENT SYSTEM

The very low number of cases of international parental abduction in Georgia may be attributed in large part to the pervasive influence of cultural and religious traditions that have determined the monolithic features of Georgian society and have prevented bi-national marriages. Other reasons include the difficulty of inter-

⁶Georgia: UNICEF *Official Comments on Family Related Court Rulings*. Moscow, Interfax in English. Published by FBIS. Document ID: FTS 19990212001179.

national travel to Georgia and to the bureaucratic difficulties related to acquiring a valid travel passport for children.

Because there have been no requests for return of children and no court decisions regarding the problem of parental abduction have been reported, one may conclude that this issue is not thought to be of great importance in Georgia. However, when enforcement of the Convention is required, some difficulties may arise because of the Ministry of Justice's lack of experience in dealing with family related issues. Because both the Ministry of Justice and the Ministry of Education, which supervises local guardianship and curatorship agencies and whose personnel is more familiar with the related work, are empowered with the administrative authority to order the return of an abducted child close interagency cooperation may be required. Even though the Convention is a direct implementing document and the Georgian Constitution provides priority for and direct application of international legal norms, Georgian courts have never dealt with the application of international legal norms and may have problems with their enforcement.

V. LEGAL ASSISTANCE PROGRAMS

There is little available legal assistance in Georgia: *pro bono* work is not practiced by attorneys, and legal aid services are just being established. The best sources of assistance and information are officers of the guardianship agencies. Presently the American Bar Association is involved in bi-lateral projects aimed at creating legal aid clinics in Georgia.

VI. CONCLUSION

The Hague Convention prescribes basic principles of resolution of disputes in regard to the parental abduction of children. These principles serve as the basis for national legislation in all participating states. For Georgia, the Convention provides a new approach: the rejection of traditional provisions in favor of the recognition and enforcement of foreign decisions. The Convention also emphasizes the importance of fostering cooperation among the central authorities in each country in order to facilitate the prompt return of children. The Georgian legal system still has not elaborated national norms that correspond with the provisions of the Convention. However, citizens of the Republic of Georgia already have the right and the possibility of using an internationally recognized mechanism for the return of a child in case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the few countries that recognize Georgia's accession to the Convention.

Prepared by: Peter Roudik, legal specialist, Eastern Law Division, Law Library of Congress, April 1999.

GERMANY

INTRODUCTION

Germany ratified the Convention on the Civil Aspects of International Child Abduction¹ [hereinafter Hague Convention] on April 5, 1990² and at the same time enacted an Act Implementing Custody Agreements [hereinafter: Implementing Act]³ that implements both the Hague Convention and the European Convention on Recognition on Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.⁴ The Hague Convention entered into effect for Germany on December 1, 1990⁵ and it has been applied more frequently in Germany than the European Convention.⁶ Most of the requests received under the Hague Convention ask for the return of a child; visitation cases are rare.⁷

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Implementing Act⁸ designates the Federal Public Prosecutor of the Federal Court of Justice as the Central Authority⁹ for both Conventions. The Central Authority is called upon to undertake all necessary measures to locate a child and to effect its return to the claimant from the requesting country and to assist in visitation cases. For these purposes, the Central Authority is empowered to communicate with other German and foreign authorities, file appropriate actions in German courts, represent the claimant from the requesting state in and out of court, and to act on its own initiative to uphold purposes of the Convention. Decisions of the Central Authority can be appealed to the Appellate Court for the district where the Central Authority is located.

Claimants under the Hague Convention may submit their applications either to the German Central Authority or by routing the application through the Central Authority of the requesting country. They also may forego the services of either Central Authority and make their claims directly in the German court. In cases where a voluntary solution appears unlikely, the latter approach may save time. In either event, applications and accompanying documents must be translated into German.

¹The Hague, Oct. 25, 1980, T.I.A.S. 11670.

²Gesetz-Bundesgesetzblatt, Apr. 5, 1990 (BGBl., official law gazette of the Federal Republic of Germany, II 206).

³Gesetz zur Ausführung von Sorgerechtsübereinkommen, Apr. 5, 1990 (BGBl. I 701).

⁴Luxembourg, May 20, 1980, ratified by Gesetz, *supra* note 2.

⁵Bekanntmachung, Nov. 12, 1990 (BGBl. 1991 II 329).

⁶P. Finger, *Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 86 Zentralblatt für Jugendrecht [ZfJ] 15 (1999); other recent articles on the German practice are A. Bach, *Das Haager Kindesentführungsübereinkommen in der Praxis*, 44 Zeitschrift für die gesamte Familienrechtspraxis [FamRZ] 1051 (1997); N. Lowe and A. Perry, *Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland*, 45 FamRZ 1073 (1998); M. D. Krüger, *Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 52 Monatsschrift für Deutsches Recht 695 (1998).

⁷Information given by the Central Authority to the German Parliament in 1994 (Bundestag Drucksache [BT-DRs]13/160 at 18).

⁸*Supra* note 3.

⁹On August 1, 1999, the Central Authority moved from Berlin to Bonn. The new address is: Der Generalbundesanwalt beim Bundesgerichtshof—zentrale Behörde nach dem Sorgerechtsübereinkommens-Ausführungsgesetz, Heinemannstrasse 6, 53175 Bonn, Germany. Tel: 49 228 580. Fax: 49 228 584800.

The German Central authority will check received applications for propriety and completeness. Then, the person who has abducted the child will be requested to return the child within five days. If there is no compliance, the Central Authority will first work toward a voluntary return of the child before recommending legal action. Throughout the pendency of an application the Central Authority may involve the German youth welfare offices to provide various services, to facilitate the voluntary return of the child. If a child cannot be located, the Central Authority may ask the Federal Prosecutor for assistance.¹⁰ If the abductor continues to refuse cooperation, a court proceeding will be initiated (see below). In visitation cases, the process is similar, also involving the youth welfare offices.

Generally, it appears that the German authorities and courts comply with the Hague Convention. Criticism, however, has been voiced to the effect that the German courts are inclined to apply the article 12 and 13 exceptions of the Hague Convention too readily in favor of the abducting German parent, and also that some proceedings are slow.¹¹ There is, however, some expectation that recent reforms and clarifying court decisions may change this state of affairs (see below).

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

In most requests for the return of a child, substantive German law on custody and child abduction will not become applicable because the German courts will determine, in accordance with article 3 of the Hague Convention, whether the claiming parent has custody according to the laws of residence of the child. Nevertheless, an understanding of the German substantive provisions may be helpful in understanding the German practice in Hague Convention requests, particularly its constitutional overtones, the general philosophy of the law on children and parents, and the intertwining of substantive and procedural law. Moreover, a custody decision may be made by the German courts if the child cannot be returned, and this decision may at times be governed by German substantive law.

In December, 1997, Germany enacted a major reform on the law of children and parents that became effective in 1998.¹² Its purpose was to modernize German law by removing any vestiges of discrimination of children born out of wedlock. The reform also introduced the possibility of giving joint custody to divorced parents. Until now the German courts have been reluctant to award joint custody even in cases where the foreign law called for its application. Hopefully, under the new legislation the German courts will

¹⁰ A. Hutchinson, Rachel Roberts, and Henry Setright, *International Parental child abduction* 100 (London, 1998).

¹¹ Complete statistics on convention requests appear to be unavailable. However, some figures for the years 1993 through 1996 have been evaluated. They lead to the conclusion that roughly 25% of Convention request end up before the courts and it is these cases that are likely to be reported to the Permanent Office in the Hague. Between 1993 and 1996, a total of 38 cases were reported by Germany. Of these, the return of the child was ordered in 20 cases and was refused in 17 cases [N. Lowe and A. Perry, *Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland*, 45 FamRZ 1073 (1998)].

¹² Gesetz zur Reform des Kindschaftsrechts, Dec. 16, 1997, BGBl. I at 2942.

be more inclined to honor joint custody decisions and this also may have a positive effect on visitation cases.

The reform also strengthened the rights of the child, by allowing the family court to appoint counsel to represent the interests of the child when there is doubt as to whether the parents are properly representing those interests or when there may be a conflict between the interests of the child and the parent. In addition, the reform ensures that children are heard, even at an early age, in all proceedings concerning them.

In German domestic law, child abductions are governed by § 1632 of the Civil Code.¹³ This section provides that custody over a child includes the right to claim the child from anyone who keeps it unlawfully. If one parent claims the child from the other parent, then jurisdiction lies with the local family court. In the ensuing court proceeding, the judge examines any arising custody issues and also hears the child. German domestic law does not have a summary proceeding that would correspond to the Hague Convention's return mechanism. Instead, each German domestic request for the return of an abducted child may lead to a review of the custody issue, and it is generally advisable for a parent who leaves the marital home to take the children with him or her, as long as they do not take the child abroad. It has been suggested that this practice in domestic cases may also lead the German courts to conduct a more thorough evaluation of the circumstances in Hague Convention requests¹⁴ for the return of the child than might be done in other countries.¹⁵

According to German substantive law, custody is held jointly by a married couple until the child reaches the age of 18. For children born out of wedlock, custody is usually held by the mother; however, the father may obtain joint custody together with the mother through a joint declaration made before a notary or by marrying the mother. During and after divorce proceeding, the family court awards custody either jointly to the parents or to one parent while giving rights of visitation to the other, unless this would be harmful to the child under the circumstances. In all custody decisions, the guiding principle of the court is the welfare of the child, and the decision will be made so as to promote this purpose.¹⁶

The Civil Code provisions on visitation (§§ 1684 through 1688) have been reformed in the above described 1998 reform of family law, thus expanding visitation rights to grandparents and siblings. If a German court were called upon to rule on a Hague Convention request for visitation, it is conceivable that the court might apply the law of the state of residence of the child, in keeping with Germany's membership in the Hague Convention on the Protection of

¹³ Bürgerliches Gesetzbuch, Aug. 18, 1896, Reichsgesetzblatt [RGBl.], official law gazette of the German Reich] at 195, as amended.

¹⁴ It would, however, be unadvisable to take the children abroad when there are unresolved custody or visitation issues. Such a removal of the child to a foreign country may constitute the criminal offense of the abduction of a minor [Strafgesetzbuch, re-enacted March 10, 1987, BGBI. I at 945, as amended, § 235]. In a decision of February 11, 1999, the German Federal Supreme Court [Bundesgerichtshof] upheld a conviction of a German parent of Pakistani origin who had custody over his child for removing him to Pakistan to be educated by the child's grandfather and this violated the visitation rights of the mother [docket no. 4 StR 594/98].

¹⁵ W. Gutdeutsch and J. Rieck, *Kindesentführung—ins Ausland verboten—im Inland erlaubt*, 45 FamRZ 1488 (1998).

¹⁶ BGB, §§ 1627–1671.

Minors.¹⁷ Nevertheless, it appears that the German courts would not apply any foreign law in a manner that would not be deemed to be in the best interest of the child.

An important aspect of German law are the human rights guarantees of the Federal Constitution, in particular, article 6 guaranteeing the family and rights of children and parents, articles 1 and 2, guaranteeing human dignity and liberty, as well as article 103, guaranteeing due process. These come into play in adjudicating both domestic and international child abductions. Three recent decisions of the Federal Constitutional Court may indicate how various aspects of German domestic law may influence decisions to return a child under the Hague Convention, particularly on how the exceptions of articles 12 and 13 are applied.

The first case [hereinafter *Tiedman* case]¹⁸ involved two children of a French mother and a German father. The children had first been abducted to France by the French mother, contrary to a German court order, and had then been re-abducted by the German father and brought back to Germany. The mother's request for a return of the children was granted by the German appellate Court; however, this decision was reversed by the Federal Constitutional Court. The Court held that a careful examination of the welfare of the child is constitutionally mandated in re-abduction cases so that the child will not be shuttled back and forth due to conflicting court decisions of different countries. Moreover, the Court held that the Constitution mandates the appointment of special counsel for a family court proceeding on child abductions if there is a possibility that the interests of the child may conflict with those of the parents, as is required since the 1998 law reform (see above). In the case at issue, such counsel had been appointed and had initiated the complaint to the Federal Constitutional Court.

In the second case¹⁹ the Federal Constitutional Court upheld the decisions of the lower courts that ordered the return of two children to Sweden from where their German mother had abducted them. The court distinguished the case from the *Tiedman* case by stating that it did not involve a re-abduction and the possibility of having the children moved back and forth on the basis of contrary court decisions.

In the third case, the Federal Constitutional court upheld decisions of a German family court and appellate court that refused to return a child under a Hague Convention request. The Court upheld the use of the exception of article 12 because the children had been questioned about their preference and stated that they preferred to stay with the German parent.²⁰ The Court held that there is no rigid minimum age for considering the wishes of the child within the meaning of article 13, paragraph 2 of the Hague Convention. In the case at issue, the children were seven and four years old when they were questioned. One of the lower courts had

¹⁷ Convention Concerning the Powers of Authorities and Law Applicable to the Protection of Infants, done Oct. 5, 1961, at The Hague, 658 UNTS 143; ratified by Germany April 30, 1971, BGBl. II at 217.

¹⁸ Decision of Bundesverfassungsgericht [BVerfG], Oct. 29, 1998, Docket No. 2 BvR 1206/98, *Europäische Grundrechte-Zeitschrift* 612 (1998).

¹⁹ BVERFG decision March 9, 1999, Docket No. 420/1999.

²⁰ BVERFG decision, May 3, 1999, Docket No. 2 BvR 6/99, reprinted 46 *FamRZ* 1053 (1999).

held that the statements of the older child were relevant and that separating the children would have been too hard on the children.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Germany is a federated country that consists of 16 states. Nevertheless, substantive and procedural law on domestic relations is federal law. There is one uniform court structure under which the trial courts and appellate courts are state courts whereas the courts of last resort are federal courts.²¹ Hague Convention requests are adjudged by the family courts which are divisions of the local courts (Amtsgericht).

Until recently, venue for Hague Convention requests was placed in the court of the district where the child was located. This provision of the Implementing Act, however, has been amended in 1999²² so as to centralize jurisdiction over Hague Convention requests in one family court in each higher appellate court district and to allow each of the states to have an even more centralized jurisdiction over Hague Convention requests by designating one family court to have jurisdiction over all or several appellate court districts within the state. It is hoped that the more centralized jurisdiction over Hague Convention requests will lead to more uniformity in the decisions, which until now had been lacking.²³

A petition to the family court to have a child returned under the Hague Convention should be accompanied by motions to have the costs awarded and to have the decision executed. The petition should be to have a child returned must be accompanied by a written justification describing family relationship and the age, citizenship, and residence of the children. In addition, all existing decisions dealing with the divorce of the parents, and with custody and right of access must be presented, preferably translated by a translator that is sworn-in and recognized by the court. Moreover, the abduction of the child must be described, and details must be furnished on the social and cultural circumstances, family structures and relationships, on the language spoken in the home, and on the efforts undertaken to have the child returned voluntarily.²⁴

Proceedings on Hague Convention requests are non-contentious.²⁵ The judge moves the proceeding and orders whatever measures and testimony are deemed necessary, including the involvement of the youth welfare agencies. It is advisable that the parents are represented by counsel. In addition, the court may appoint on its own initiative counsel for the child, if in situations where there may be conflicting interests between the child and the parent. The judge may also insist on granting the children a hearing, even if they are quite young. The family court may involve the youth wel-

²¹ W. Heyde, *Justice and the Law of the Federal Republic of Germany* 7 (Heidelberg, 1994).

²² Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz, Apr. 13, 1999, BGBl. I at 702.

²³ P. Finger, *Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 86 *Zentralblatt für Jugendrecht [ZfJ]* 15 (1999).

²⁴ M. D. Krüger, *Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 52 *Monatsschrift für Deutsches Recht* 695 (1998).

²⁵ Zivilprozessordnung, re-enacted Sept. 12, 1950, BGBl. I at 533, as amended, § 621 et seq.; Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, re-enacted May 20, 1898, BGBl. I at 771, as amended.

fare office to give information on the social circumstances of the parties. In addition, the family court may also request an expert opinion of a psychologist. However, because this might delay the proceeding, this should only be done in exceptional cases.²⁶

Allegedly, delays in proceedings have been a problem. It was the legislative intent of the German Implementing Act to have the family court decide Convention requests within six weeks.²⁷ Nevertheless, the Federal Supreme court found that the due process guarantees of the German constitution were not violated when a proceeding before the family court for the return of a child took eleven months.²⁸ In that case, the court reasoned, the fault for the delay lay not with the German family court. Instead, the delay was caused by the courts' request that the applicant furnish a decision of the French court of residence of the child to prove that the removal of the child from France was wrongful, as is foreseen in article 15 of the Convention. In the absence of special circumstances, however, the court indicated that a six week's time limit for the decision of the family court was appropriate.

Decision of the family court can be appealed to the higher regional court [Oberlandesgericht], and an appeal usually stays enforcement.²⁹ The decisions of the appellate court is final and enforceable and the only remedy against such a decision could be a constitutional complaint to the Federal Constitutional Court, alleging alleging the violation of civil rights through the proceeding or the applied legislation. Ordinarily the lodging of a constitutional complaint does not stay the execution of a final judgment. However, in exceptional cases, the Federal Constitutional Court may issue an injunction to postpone execution. The Federal Constitutional Court accepts constitutional complaints only if they are significant from a constitutional point of view and have a reasonable chance of succeeding.³⁰

IV. LAW ENFORCEMENT

If a German court decides that a child should be returned in response to a Hague Convention request, the judgement will usually order the retaining parent to return the child to the claiming parent or other designated agent who then can remove the child to the requesting country. The retaining parent will not be ordered to take the child to the foreign country, but merely to hand it over in Germany. If there is no compliance, then the Court may impose a coercive fine or coercive detention and the costs of the execution proceeding on the person detaining the child.³¹ The fine is to be commensurate with the income of the party to be coerced but may not exceed Deutsche Mark 50,000 (approx. U.S. \$30,000). A fine can be imposed repeatedly, yet must always be preceded by a

²⁶ Bach, *supra* note 6 at 1056.

²⁷ BT-DRs. No. 11/5314 at 54, note 105.

²⁸ *Supra* note 20.

²⁹ FGG, § 24.

³⁰ Bundesverfassungsgerichtsgesetz, re-enacted Aug. 11, 1993, BGBl. I at 1473, as amended, §§ 90 et seq.

³¹ Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit [FGG], re-enacted May 20, 1898, RGBl. At 771, § 33.

warning.³² In addition, the court may order the use of force through the marshal of the court who in turn may ask for the assistance of the local police. If the child is not found, the court may order the party responsible to bring the child forth to give an explanation under oath as to the child's whereabouts.

Decisions on visitation rights are enforced in a similar manner. However, in all such cases, the courts will aim at achieving the desired results as much as possible with non-coercive means, such as involvement of the youth welfare offices, the appointment of special counsel for the child, and the acting of the court as a mediator.³³ The tools for the application of such gentler pressures have been given to the courts in the 1998 reform of family law.³⁴

Finding a child in Germany should be facilitated by the registrations laws that require all individuals to register their residence or their place of sojourn with the police. These registration requirements are regulated and implemented by the states, on the basis of the Federal Framework Act on Registration.³⁵ The police may also become involved in finding a child or the abducting parent either through the involvement of the Federal Prosecutor, upon referral by the Central Authority or through an international warrant of arrest through INTERPOL. Nevertheless, there may be circumstances under which it might be advisable for a Hague Convention claimant to hire a private detective to find the child.³⁶ Moreover, even if the police locate a child or parent in an INTERPOL request, Germany does not extradite a parent for foreign criminal charges of child abduction.³⁷

V. LEGAL ASSISTANCE PROGRAMS

Germany ratified the Hague Convention under the reservation that Germany will assume the costs of attorneys and court proceedings of a requesting party only to the extent that the applicant is deserving of legal aid according to German law. In keeping with this reservation, the German Central Agency may require that an applicant submit a payment for the expected fees in advance. The work of the Central Agency itself is provided free of charge. If an applicant wishes to claim legal aid, an application to that effect should be submitted.

Legal aid for court costs is governed by sections 114 through 127 a of the Code of Civil Procedure.³⁸ According to these provisions, the court will grant legal aid for court costs and for counsel in the proceeding if representation is required or advisable. The party must apply for legal aid to the court, however, the Central Authority will apply for the claiming parent.

Legal aid will be granted if the party is unable to defray these costs from current income or other available assets, and if the intended legal action has an adequate chance of success and does not appear to be vexatious. The court has some discretion to consider

³²P. Bassenge and G. Herbst, Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit 172 (Heidelberg, 1995).

³³S. Motzer, *Die gerichtliche Praxis der Sorgerechtsentscheidung*, 46 FamRZ 1101 (1999).

³⁴FGG, as amended, §§ 50, 52, and 52 (a).

³⁵Melderechtsrahmengesetz, re-enacted June 24, 1994, BGBl. I at 1430, as amended.

³⁶Finger, *supra* note 23.

³⁷Krüger, *supra* note 24.

³⁸Zivilprozessordnung [ZPO], re-enacted Sept. 12, 1950, BGBl. I at 533, as amended.

individual circumstances in the granting of legal aid. However, the statutory income thresholds are quite low. For 1999, they have been set at a net monthly income of DM 672 (approx. U.S. \$420) for each party, plus DM 672 for the spouse of the party, plus DM 473 for each dependent child of the party.³⁹ Parties of higher income levels that still have difficulties paying for their court costs must pay the incurred expenses in monthly installments that are graduated in accordance with the income level.

Legal aid for attorney services outside of a proceeding may also be granted under conditions similar to those prevailing for court costs. Such assistance is governed by the Federal Act on Counseling Assistance⁴⁰ which is further implemented by state legislation. Consequently, there may be local changes in how this form of assistance is granted. In most of the states, however, the petitioner will be given a voucher that he can use with the attorney of his choice. It appears that no legal assistance is available for the services of private detectives. However, the court decision on the return of the child may award the expenses of the detective to the successful claimant.⁴¹

VI. CONCLUSION

Germany appears to have a high incidence of cases in which the return of a child is refused. In particular, a decision to keep the child in Germany may be made in cases of re-abductions and conflicting court decisions and also when children of a relatively young age express their preference to stay with the German parent. However, some improvements in the German practice may result from a recent reform that centralizes the venue for Hague Convention cases in larger court districts.

Prepared by: Edith Palmer, senior legal specialist, Western Law Division, Legal Research Directorate, Law Library of Congress, November 1999.

GREECE

INTRODUCTION

On October 25, 1980, Greece was among the first four countries which signed the Final Act of the Fourteenth Session of the Hague Conference on Private International Law. The Final Act contained the text of Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention) and a Recommendation on the model form to be used for applications requesting the return of children who fall under the scope of the Convention. Greece ratified the Convention more than ten years later, on December 2, 1992. The Convention entered into force between United States and Greece on June 1, 1993.

The Convention's central purpose is to protect children not over the age of 16 from wrongful international removal or retentions. Greece is required by Article 2 of the Convention as a contracting

³⁹ Prozesskostenhilfebekanntmachung 1999, June 6, 1999, BGBl. I at 1268.

⁴⁰ Beratungshilfegesetz, June 18, 1980, BGBl. I at 689, as amended.

⁴¹ Finger, *supra* note 23.

state to take all appropriate steps to implement the Convention's objectives as established in article 1: (a) to ensure the prompt return of children who have been wrongfully removed or retained; and (b) to ensure that rights of custody and access under the law of other contracting states are respected.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

On December 2, 1992, Greece enacted Law No. 2102/1992 on Ratification of the Convention on the Civil Aspects of International Child Abduction.¹ Pursuant to Article 28, paragraph 1, of the Greek Constitution of 1975, upon its ratification the Convention constitutes an integral part of the domestic legal system and prevails over any contrary provision of the law. The ratifying law, which comprises the entire Convention, in English and Greek, entered into force as of its publication in the Official Gazette of Greece on December 2, 1992.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The Hague Convention does not deal with the criminal aspects of child abduction. Hague cases brought before Greek courts are civil disputes. Under the Greek Criminal Code, a child abduction by a parent is a criminal offense as well. The Criminal Code contains a specific article on abduction of minors which is also applicable in case the child is removed by a parent.

ART. 324:² A person who abducts a minor from his parents, guardians or anyone who has custody of the child by law, or one who assists the voluntary escape from the authority of such persons shall be punished by imprisonment for not more than three years. If the life of the minor or his physical health, because of lack of care, was endangered, the perpetrator shall be punished by imprisonment of at least a year.

If the minor has not completed 14 years of age, the perpetrator shall be punished by imprisonment up to 10 years, unless the act was committed by parents, in which case the previous paragraph is applicable. In case the perpetrator committed the act for profit or with the intent to engage the minor in immoral activities or to alter the family unity of the minor, he/she shall be punished by imprisonment up to 10 years.

If the perpetrator intended to ask for ransom or to compel one to act or not take some action, he/she shall be punished by imprisonment. The perpetrator shall be punished by jailing if he frees and returns the child safe and sound voluntarily and before any of his requests were fulfilled.

¹ Ephemeres tes Kyverneseos tes Hellenikes Demokratias [Government Gazette of the Hellenic Republic], part. A. No. 193, Dec. 2, 1992.

² 4 Kodikes: Poinikos Kodikas [4 Codes: Criminal Code] (Nomike Vivliotheke, 1995) at 741.

B. PARENTAL VISITATION

Relations between parents and children during marriage and in case of divorce, separation or annulment of marriage, are dealt with in chapter 11 of the Family Law of the Civil Code.³ Articles 1510 and 1511 provide for parental care of a minor child, which is a right and obligation of the parents and is exercised jointly. Parental care includes the care of the child, administration of his property, and representation of the child in any legal act or before the court. Under Greek family law and on the principle of equality of sexes, both parents have the right and obligation jointly to care for the child during marriage.

Article 1518 defines child care as nurturing, supervision, education, and guidance as well as determination of the child's place of residence. Parents may request the appropriate judicial authority for assistance and support in the exercising of their right to parental care. The latter are obliged to conform.⁴

In case of a divorce, separation, or annulment of a marriage and if both parents are alive, the exercise of parental care is decided by the court. Custody may be assigned to one parent. Custody may also be assigned to both parents if they both agree and if the parents mutually decide upon the child's place of residence. The court may opt to decide otherwise, especially to divide custody between the parents, or to assign custody to a third person.⁵

Every decision of the parents that relates to the child must be in the best interests of the child. The court must also apply the same standard when it decides custody issues, including who will be assigned custody and how it will be exercised. Every court decision must be based on the equality of the sexes, without discriminating on the basis of ethnicity, race, sex, political or religious beliefs or social status.⁶ A non-residential parent has the right of personal access to a child.⁷ Parents cannot bar contact between child and that child's grandparents unless there are serious reasons to do so. The right to access is determined by the appropriate court in a detailed manner.⁸

The care of minor children born out of wedlock belongs to the mother. If the child is subsequently recognized by his father, then the father has the right to care for the child in the following two instances: (a) if the mother ceases to care for the child, or (b) if the mother is unable to exercise such care due to legal or factual reasons. The father may request that he be assigned total or partial custody of the child by the court, if the mother agrees to it.⁹

³4 Kodikes, astikos kodikas [Civil Code] art. 1505–1541 (Nomike Vivliotheke, 1995).

⁴*Id.* art. 1519.

⁵*Id.* art. 1513 and 1514.

⁶*Id.* art. 1511.

⁷*Id.* art. 1520.

⁸*Id.*

⁹*Id.* art. 1515.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

A. RIGHT TO SEEK RETURN

When a person's custody rights have been violated by another's wrongful removal or retention of the child, that person may request the return of the child based on the Convention. There are two means to do so. One is through application to the designated Central Authority, and the other is through direct application to the appropriate court in the place where the child is located.

As required by article 6 of the Convention, Greece established the Ministry of Justice as the Central Authority.¹⁰ Thus, in Greece, the aggrieved person may file a request with the Ministry of Justice. Greece further designated the local offices of the Legal Counsel or the Judicial Offices of the Legal Council of the State to perform judicial acts on behalf of the Central Authority. Where such offices do not exist, then this responsibility will be assigned to a government attorney by the President of the Legal Council of the State.

The application and all attached documentation must be translated into Greek. Pursuant to the Convention, translations need no authentication. After the application is examined for accuracy and completeness, it is forwarded to the Public Prosecutor through the local office of the Ministry of Justice where the child is presumed to be. Police assistance is sought if the child is not found. At this point, the non-custodial parent is notified and negotiations are arranged for the child's voluntary return. If the child is not returned voluntarily, the Public Prosecutor will file an application with the district court.¹¹ An interim order may be also requested to ensure that the child remains in Greece.¹²

Since the Hague Convention requires that abduction cases be expedited, such cases in Greece are handled pursuant to articles 682–703 on provisional remedies (safety measures) as provided by the Code of the Greek Civil Procedure.¹³ Provisional remedies are ordered by the courts in emergency situations or in order to avert imminent danger, to sustain a right, or to regulate a situation. Provisional remedies can be ordered by the court where the main litigation is pending.¹⁴

The courts that are competent to handle child abductions are one-member first instance courts (*Monomele Protodikeia*), since they are able to order provisional remedies.¹⁵ Provisional remedies may be ordered also by the court which is nearest to the place where the provisional measures will be enforced, provided that the court has subject-matter jurisdiction.¹⁶

Article 16 of the Convention prohibits domestic courts, upon receiving notice of wrongful removal and retention, from passing a

¹⁰*Supra* note 1.

¹¹International Parental Abduction, "Greece," 104–108 (1998).

¹²*See* Arts. 731 and 735 of the Code of Civil Procedure. Under the latter, the competent court has the authority to decide who has the temporary custody of children, to remove the custody of the child from his parents, and to arrange visitation rights.

¹³*Supra* note 2, Kodikas Politikes Dikononias [Code of Civil Procedure] at 520.

¹⁴Code of Civil Procedure art. 682.

¹⁵*Id.* art. 683, para. 1.

¹⁶*Id.* para. 3.

judgment on the merits of the custody issue. This is contrary to Greek Civil Procedure, which provides that a decision on provisional measures does not prevent the adjudication on the merits.¹⁷

B. CASES ON POINT

As a rather recent contracting state, Greece has dealt with a relatively small number of child abduction cases. The most significant problem that the Greek courts have faced in applying the Convention has been procedural. In Greece, civil disputes involving international child abduction are handled pursuant to the procedure provided by the Code of Civil Procedure on provisional measures. The burden of proof required by law under an application for provisional measures is based on probability,¹⁸ rather than on the more substantial standard required by the Convention. Another question is whether or not a decision on provisional measures is subject to appeal. Pursuant to article 699, decisions which allow or deny provisional measures are not subject to appeal, unless provided otherwise. The Supreme Court of Greece (*Areios Pagos*) has held that such decisions are subject to appeal, whereas the Appeals Court of Corfu has held otherwise.¹⁹

The following two cases indicate how the Greek courts have interpreted and applied the 1980 Hague Convention, especially articles 12 and 13. No definite conclusions may be drawn, since the number of cases examined in the preparation of this report is minimal. It is also unclear whether domestic courts tend to favor “home forum” litigants. In the first case, the father, a Greek citizen, was awarded the custody of the two children. In the second case, the siblings were separated and the custody of only the boy was awarded to his Greek father. However, as stated above, Greek courts, when deciding custody issues, are prohibited from discriminating on the basis of the ethnicity, race, sex, or social status of the parents.

The Court of First Instance in Thessaloniki passed the following judgment (No. 13601/1996)²⁰ concerning an abduction case. The mother, a resident of Alaska, was awarded custody of the two children ages 7 and 9, by virtue of a divorce decree while the father, a Greek citizen was granted visitation rights. In 1994, the father brought the children to Greece without the required authorization. Two years after the children were removed, the mother filed an application on wrongful removal and retention through the appropriate office of the Central Authority in Greece. The competent court of Thessaloniki established its international jurisdiction to decide the case, since one party was a Greek citizen. The court for purposes of expediency decided the case based on article 682 of the Code of Civil Procedure and subsequent articles on provisional measures. The court then made a determination as to the wrongfulness of the conduct within Article 3 of the Convention. The court, taking into consideration Article 1511 of the Civil Code,

¹⁷ See *id.* arts. 693 and 695. However, art. 16, because of the superior force of the Convention in the legal system of Greece, will apply. See the analysis of the Convention and its effect on the Greek legal system in I. Voulgares, *The Hague Convention of 1980 on Civil Aspects of International Abduction of Children* [in Greek] Harmenopoulos 23 (1990).

¹⁸ *Supra* note 14, art. 690.

¹⁹ Harmenopoulos 895 (1996).

²⁰ <http://www.hiltonhouse.com/cases/Meredith-grc.txt>

which mandates application of the principle of the best interest of the child in custody issues, held that parental custody must be granted to the father for the following reasons: pursuant to article 12 of the Convention, if the petition is filed within a year from the unlawful removal, the court is compelled to return the child immediately. If the petition is filed after the year, the court is obliged to return the child unless it is proven that the child has adjusted to its new environment. Thus, the court in applying the exception of Article 12, paragraph 2 of the Convention, held that the children “were well adjusted in the new environment, happily living with their father and grandmother and doing extremely well in school.” In deciding whether to send the children back to Alaska to live with their mother, the court noted that such a dramatic change would have a severe psychosomatic impact upon the children. Therefore, the court temporarily awarded the custody of both children to their father.

The second case was handled on appeal by the Appeals Court of Thessaloniki.²¹ Apart from the court’s having ordered the separation of siblings, this case is noteworthy because the Supreme Court of Greece (*Areios Pagos*), which annulled the decision of the Court of Appeals due to the insufficient standard of proof as required by the Convention, decided on the question of whether or not civil disputes arising from the Convention which are handled pursuant to the provisional measures of the Civil Procedure are subject to appeal. The court answered the question in the affirmative.

The facts of the case involve a Greek father and a Swedish mother both of whom lived in Sweden and who had joint custody of their two children, pursuant to the Swedish family law. In 1989, the couple moved to Grevena, Greece and established their residence. In 1992, they decided to move back to Sweden. A year later the couple visited Greece temporarily. The parents could not agree as to their permanent place of residence. The mother secretly attempted to take the children back to Sweden. Her attempt was thwarted by the police authorities at the instigation of the father. The mother returned to Sweden and submitted an application to the Minister of Justice in Sweden in order to start proceedings based on the 1980 Hague Convention. The Minister of Justice of Greece ordered a social worker to examine the case. The report of the social worker indicated that the wish of the children, especially that of the boy, was to remain in Grevena because of their many friends and relatives. The lower court (a one-judge court of first instance of Grevena) handled the case pursuant to the procedure of provisional measures and held that the children must remain in Grevena because it was their habitual place of residence. It also held that the court was not bound to return the children to Sweden, based on the presumption that the children were settled in Grevena. The mother appealed the case to the Court of Appeals of West Macedonia. The Court held that Sweden was most likely the children’s habitual place of residence and that the requirements of article 13 of the Convention were not met. The father requested that the Supreme

²¹The Supreme Court of Greece (Decision No. 1382/1995 published in Harmenopoulos 355 (1995) annulled the decision of the Court of Appeals of West Macedonia on the grounds that the court based its decision on returning the children to Sweden on probability. The Supreme Court ordered that the case be remanded to the one-member Court of First Instance of Grevena.

Court annul the decision of the Court of Appeals of West Macedonia. The Supreme Court (decision 327/1994) suspended the decision of the Court of Appeals regarding the return of the boy because the child was well settled with the father in Grevena. It also annulled the decision of the Court of Appeals because its decision was based on insufficient proof. Thus, the Court of Appeals had not met the standard of proof as required by the Hague Convention. The case was remanded to the Court of Appeals of Thessaloniki.

The Thessaloniki Court of Appeals in its Decision No. 1587/1996²² partially upheld the decision of the lower court and stated that the civil dispute that arose due to the international abduction, as provided by the 1980 Hague Convention, is not a provisional measure as provided for in article 682 of the Code of Civil Procedure, nor is it a measure regulating a situation. It is adjudicated on the basis of article 2 and 11, paragraph 1, of the Convention only for purposes of expediency. Thus, in Greece such expedient procedure is provided by article 682 of the Civil Procedure. Therefore, the Court, following the Supreme Court Decision 1382/1995, held that the decision which adjudicates the case arising from the Convention is subject to appeal, irrespective of article 699 of the Code of Civil Procedure, which holds otherwise. The Court of Appeals in applying article 13, ordered that the boy stay in Grevena with his father after taking into consideration the stated wishes of the boy and his level of maturity and also because his return to Sweden would endanger his physical and mental well-being. Moreover, the court ordered that only the girl should be returned to her mother in Sweden because it could not establish any of the exceptions which allow a court not to order the return of a child.

IV. LAW ENFORCEMENT SYSTEM

Greece has designated the Ministry of Health, Welfare and Social Insurance, through its appropriate offices and based on a prior authorization by the local public prosecutor, to be responsible for the temporary safeguarding of the child until the latter is returned to the rightful parent.

Following a court order, the return of the child to the rightful parent can be effected under the power of the bailiff. In the Greek legal system the bailiff (*dikastikos epimeletes*) is authorized to enforce court orders pertaining to custody issues.²³

Pursuant to article 19 of the Convention, a decision of a Greek court regarding the return of a child is not a final determination on the merits of the custody issue. Thus, remaining issues involving visitation rights by the non-custodial parent and determinations of custody of children will be decided pursuant to articles 681B, paragraph b, and 681, paragraph 2, of the Code of Civil Procedure. In accordance with these articles, disputes concerning parental custody of the child, the joint exercise of parental care, and parental and grant-parental access during marriage and in case of divorce, or in case of children born out of wedlock are dealt with by a one-judge district court or by an appointed judge of a three-

²² *Supra* note 19, at 890–895.

²³ Pursuant to art. 950 of the Code of Civil Procedure.

member court. The judge has the discretion to contact the child, if it is deemed necessary, before passing a judgment.²⁴

V. LEGAL ASSISTANCE PROGRAMS

It appears that the Ministry of Justice will provide free legal assistance only for proceedings under the Hague Convention before the appropriate court in Greece.²⁵ That means that no *pro bono* legal advice will be given for court proceedings related to divorce or custody issues unless the applicant meets the requirements of legal aid as provided by Greece's judicial system. This is in accordance with a reservation made by the Greek government pursuant to Article 42 of the Convention. Under this Article, Greece reserved its right not to be bound to assume any expenses provided for in paragraph 2 of article 26 pertaining to the participation of legal counsel or advisers or court proceedings except to the extent that these expenses concern instances of free legal or judicial aid as provided by the Greek judicial system. In addition, Greece is a signatory to the 1977 European Agreement on the Transmission of Applications for Legal Aid.

In general, the domestic rules on legal aid are provided by articles 194–204 of the Code of Civil Procedure.²⁶ The terms of its provision are detailed and cumbersome. Legal aid is granted upon furnishing proof that one may not cover legal expenses without jeopardizing his own and his family's support. Legal aid also is provided to foreigners as well on condition that they meet the requirement of need and under the clause of reciprocity.

Legal aid is given based on application to the one-member court of first instance or the president of the court where the case is pending. The judge who decides on this issue has the discretion to request additional proof, and may examine witnesses including the applicant, with or without requiring them to take an oath.²⁷

The application to receive legal aid must be supported by documentation. One must submit a certificate from the mayor in the place where the person resides—certifying his professional, financial and family status, along with a certificate from the tax authorities pertaining to his tax return. If the applicant is a foreigner, he must also submit a certificate from the Minister of Justice verifying the reciprocity clause.²⁸

VI. CONCLUSION

Since the ratification of the Hague Convention in Greece in 1992, it appears that the number of cases involving international abduction of children that have been tried is relatively small. Overall, the Greek legal system provides the necessary judicial remedies in order to facilitate and ensure a speedy return of wrongfully removed or retained children. The system also provides for an aggrieved person to enforce his or her right to seek return of a child, either through an application to the Minister of Justice, as the designated authority, or through the appropriate court. In the two cases examined in this report, Greek judges followed the provisions

²⁴ *Supra* note 13, at 519.

²⁵ <http://travel.state.gov/abduction-greece.html>

²⁶ *Supra* note 13, at 388–391.

of the Hague Convention. As stated above, no definite conclusions can be made as to whether the courts in Greece tend to favor “home forum” litigants.

Prepared by: Theresa Papademetriou, senior legal specialist, Western Law Division, Directorate of Legal Research, Law Library of Congress, June 1999.

²⁷*Id.* art. 196.

²⁸*Id.*

HONG KONG

INTRODUCTION

Since 1997, the former British Crown Colony of Hong Kong has been a Special Administrative Region (SAR) of the People’s Republic of China (PRC). The PRC is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, but it has made the Convention applicable to the Hong Kong SAR.¹

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Hong Kong Child Abduction and Custody Ordinance, promulgated in September 1997,² is subtitled “An Ordinance to give effect in Hong Kong to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980.” This implementing law thus makes the Hague Convention part of the domestic law on child abduction since 1997.

Section 3 of the Ordinance stipulates that the provisions of the Convention as set out in Schedule I shall have the force of law in Hong Kong. Section 4 states that for the purposes of the Convention as it has effect under this Ordinance, the Contracting States are those specified by an order issued by the Governor and published in the Gazette under this section. It further provides that an order under this section shall specify the date of the coming into force of the Convention between Hong Kong and any State specified in the order. Also, unless the order provides otherwise, the Convention will apply between Hong Kong and that State only in relation to wrongful removals or retentions that occur on or after that date.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

In addition to the Child Abduction and Custody Ordinance cited in Part I above, the following domestic law contains provisions pertaining to child abduction:

- the Protection of Children and Juveniles Ordinance, which specifically provides that any person who unlawfully takes or causes any unmarried female infant to be taken, or any young

¹T.I.A.S. 11670.

²31 laws of hong kong, Cap. 512.

person or child to be taken against the father's or mother's will or any other person having the lawful care or charge of such infant or young person or child is guilty of a misdemeanor.³

- the Guardianship of Minors Ordinance, which stipulates that a mother and father are to have equal rights and authority in the custody or upbringing of a minor child;⁴
- the Separation and Maintenance Orders Ordinance, which gives the District Court power to issue an order providing that the legal custody of any children of the marriage be given to the husband or to the wife.⁵
- the Matrimonial Causes Ordinance, under whose provisions the Supreme Court or the District Court is empowered to make orders providing for the custody of children.⁶

It should be noted that the Child Abduction and Custody Ordinance itself states that an order issued by the High Court in the exercise of its jurisdiction relating to wardship, so far as it gives the care and control of a child to any person, is within the definition of a custody order. Under the Convention, the removal or retention of a child would be considered wrongful if the removal or retention is in breach of custody rights granted under the law of Hong Kong (regarding a child who was a habitual resident immediately before such removal or retention). Such custody rights may arise, according to the Convention, either by operation of law or by reason of a judicial or administrative decision, or by reason of a legal agreement under the law of that State.

B. PARENTAL VISITATION

Domestic laws governing questions of parental visitation are the Child Abduction and Custody Ordinance, previously cited, and the following:

the Guardianship of Minors Ordinance, which contains a number of sections on court orders for custody and maintenance of minors, and specifically regarding the right of access to the minor of either parent. Both the High Court and the District Court are authorized under this ordinance to make such orders.⁷

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

In the Hong Kong SAR, the hierarchy of the court system is as follows: the Court of Final Appeal (taking the place of the Judicial Committee of the Privy Council), the Court of Appeal, the Court of First Instance, the District Court, and the Magistrates Court. A number of other courts and tribunals are also part of the court system; these bodies include the Coroner's Court, the Lands Tribunal, and the Juvenile Court, rulings from which may be appealed to either the Court of First Instance or the Court of Appeal. The High

³ 14A, Laws of Hong Kong, Cap. 213, § 26.

⁴ 3 Laws of Hong Kong, Cap. 13, § 3.

⁵ *Id.* Cap. 16, § 5(b).

⁶ 14 Laws of Hong Kong, Cap. 179, § 48.

⁷ 2 Laws of Hong Kong, Cap. 13, § 2.

Court (formerly called the Supreme Court) is the amalgamation of the Court of Appeal and the Court of First Instance.⁸

The Court of Appeal hears both civil and criminal appeals arising from the Court of First Instance, the District Court, and the Lands Tribunal. Cases are heard by a panel of judges (usually three) but only after “leave” or special permission has been granted by the court to do so. The Court of First Instance has unlimited jurisdiction in both civil and criminal matters, and it has original or first instance jurisdiction in all civil matters that involve damages, where the claim involves an amount over HK\$120,000. It also exercises exclusive jurisdiction over such matters as bankruptcy, adoption, and probate. The Court of First Instance tries serious crimes, although court proceedings in these cases are first heard by a Magistrates Court unless the accused waives the right to committal and has the case go straight to the Court of First Instance. Criminal cases coming before the Court of First Instance are heard by a judge and a jury made up of seven or nine jurors. This Court also hears appeals from decisions of the Magistrates Courts, the Labour Tribunal, and the Small Claims Tribunal.

In its Article 7, the Convention refers to Central Authorities, and the Hong Kong Child Abduction and Custody Ordinance provides that the functions under the Convention of a Central Authority are to be discharged by the Attorney General. The Ordinance further stipulates that any application made under the Convention by or on behalf of a person outside Hong Kong may be addressed to the Attorney General as the Central Authority in Hong Kong.¹⁹

Under the Hong Kong Child Abduction and Custody Ordinance cited above, the High Court, which is the Court of Appeal and the Court of First Instance, has the jurisdiction to hear and determine an application under the Convention on International Child Abduction.¹⁰

IV. LAW ENFORCEMENT SYSTEM

Reports are available on only two Hong Kong cases that involve child abduction or removal and they were heard after the Convention came into force for Hong Kong in September 1997: the case of *S. v. S.*,¹¹ heard by the Court of First Instance in March, 1998 and the case of *N. v. O.*,¹² which came before the same court in October of that year. *S. v. S.* was initiated in January 1998 by the Department of Justice by means of an originating summons. The child had been abducted by the defendant-mother from the United Kingdom, after the Ordinance implementing the Convention had come into force in Hong Kong. On the plaintiff’s application, the Lord Chancellor of Great Britain made a request to the Secretary for Justice in Hong Kong for the return of the child under the Convention. Application was also made to secure the whereabouts of the child and for an injunction order to prevent mother and child from leaving Hong Kong pending the hearing of the originating sum-

⁸See I. Dobinson and D. Roebuck, introduction to law in the Hong Kong Sar (Hong Kong, Sweet & Maxwell, 1996), Chap. 6, 68–71.

¹⁹*Supra* note 2, § 5.

¹⁰*Id.* § 6.

¹¹[1998] 2 HKC 316, retrieved from the Lexis-Nexis database.

¹²[1999] 1 HKLRD, at 68.

mons, and for the surrender of their passports. These orders were made by the court *ex parte*.

The case of *N. v. O.* involved an application made by the plaintiff-father, a citizen of Luxembourg, for custody of his child, who had been taken by the defendant-mother, a U.S. citizen, to Hong Kong. The judge in this case issued a number of orders, including one making the child a ward of the Hong Kong court, one that this Court itself would resolve the matter of the child's custody, and one that, pending the determination of the custody issue, the child was to remain in the care and control of his mother, the defendant. Another order was issued granting the father reasonable rights of access to the child, to be exercised only in Hong Kong. The Court forbade either party from removing the child from Hong Kong without first obtaining the leave of the Court.

The Rules of Court which govern civil procedure in Hong Kong will be followed in giving effect to and enforcing orders made by the Hong Kong courts,¹³ including orders issued by the High Court in cases involving international child abduction regarding return of the child, visitation, or custody determinations. The Rules of Court dealing with the enforcement of judgments and orders in civil cases detail the methods by which such judgments are to be executed, e.g., judgments for payment of money, for possession of land, delivery of goods, or for an act to be done or not done. Where a judgment or order requires an act to be done, such as the return of a child to a parent, the procedure is set out in detail in the rules, including such steps to be taken as serving a copy of the order on the person required to do the act. If a party does not obey the order, a writ of execution may be issued.

The Court may also exercise its power to punish a disobedient party for contempt of court by an order of committal. Civil contempt, or contempt in connection with civil proceedings, arises from the breach of a court order or from the breach of an undertaking made to the Court. Under the Rules of Court, "committal is available to enforce orders which are prohibitory or injunctive in nature and those mandatory orders which specify a time within which the act(s) must be done (mandatory 'time' orders)."¹⁴

V. LEGAL ASSISTANCE PROGRAMS

The Legal Aid Ordinance, Chapter 91 of the Laws of Hong Kong, makes provision for the grant of such aid in civil actions, according to a test of eligibility that embraces both income and capital.¹⁵ In order to be eligible for legal aid, a ceiling is set on the amount of the person's financial resources. For most proceedings in the High Court or the Court of Appeal, the ceiling is now HK\$169,700 (US\$21,842.90).¹⁶ Corporated or incorporated bodies of persons are not eligible.

The original Ordinance was amended in 1984 to add a system of supplementary legal aid for any person not eligible under the provisions cited above because his financial resources exceed the ceiling,

¹³ 2A Laws of Hong Kong, Cap. 4.

¹⁴ G. N. Heilbronn, C. N. Booth, and H. McCook, *Enforcement of Judgments in Hong Kong* (Hong Kong, Butterworth, 1998), 129.

¹⁵ 8 Laws of Hong Kong, Cap. 91.

¹⁶ *Id.* § 5.

which at the time was HK\$120,000 (US\$15,445.80). The ceiling for such supplementary aid was readjusted in 1997 at HK\$471,600 (US\$60,702).¹⁷

The Ordinance defines the scope of legal aid as consisting of representation by the Director of Legal Aid¹⁸ or by a solicitor, and so far as necessary, by counsel, including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to bring to an end any proceedings.¹⁹

Legal aid is available to any eligible person, whether plaintiff or defendant, including a person “taking, defending, opposing or continuing . . . proceedings or being a party thereto.”²⁰ The language of the Ordinance would make legal aid extendable to appellate proceedings.

In the Magistrates Courts, there is a *duty lawyer* system whereby barristers and solicitors are assigned to provide “on-the-spot” advice as well as to represent persons accused of certain crimes. Free legal advice is also available, given in the evenings by volunteer (i.e. unpaid) lawyers at offices in different locations.²¹ Like the *duty lawyer* system, this program is administered by the Law Society.²²

VI. CONCLUSION

Hong Kong has been extremely strict in its application of its Child Abduction and Custody Ordinance, the legislation passed to implement the Hague Convention. *S. v. S.*, discussed above, was the first ruling made in Hong Kong under this Ordinance. After the decision was handed down, the abducting wife was ordered to hand her child over to her husband, who was planning to take the child back with him to the United Kingdom. The case was heard in chambers before Justice William Waung Sik-ying between March 30 and April 3. On April 13, the wife killed both the child and herself by lethal injection. Social workers in Hong Kong have urged the Government to be more flexible in implementing the law.²³

Prepared by: Mya Saw Shin, senior legal specialist, Eastern Law Division, Law Library of Congress, February 2000.

²²The Law Society is the governing body for solicitors, with responsibility for maintaining professional and ethical standards, and for considering complaints filed against solicitors. For barristers, the governing body is the Bar Committee.

²³*New law was used on mother in killing* (South China Morning Post, April 18, 1998), 4.

REPUBLIC OF IRELAND

INTRODUCTION

The Republic of Ireland is comprised of 26 counties grouped together in four provinces. The Republic covers a great deal of the

¹⁷*Id.* § 5A(6).

¹⁸This may include a Deputy Director of Legal Aid, Assistant Director of Legal Aid, or any Legal Aid Officer. *Supra* note 15, § 6.

¹⁹*Id.* § 5A.

²⁰*Id.* § 10(3).

²¹P. Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong, Oxford University Press, 1987), 100.

island of Ireland; the remainder, Northern Ireland, a part of the United Kingdom. Ireland is a sovereign and independent democratic state.

The Constitution of Ireland recognizes the family as the natural and primary fundamental unit group of Society; being a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. As a result of this high regard, the State guarantees protection of “the family” in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare on the Nation and the State.¹

The Guardianship of Infants Act 1964² deals with the care of children upon the breakup of a marriage:

Sec. 3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

The Act seeks to give joint guardianship to both parents. It also provides for court orders for custody, access, maintenance and fit person orders. The Act’s intent is to provide an order that promotes the well being of the child in question.

The Status of Children Act 1987³ eliminated the differences between legitimate and illegitimate children, allowing for the protection of both. The Judicial Separation and Family Law Reform Act 1989⁴ refined the idea of custody in cases of judicial separation.

While Ireland holds the family in high regard, it sees the welfare of children as of the utmost importance. The 1964 Act is a prime example of the importance Ireland places on the health and welfare of children.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Child Abduction and Enforcement of Custody Orders Act 1991⁵ gives effect to the Hague Convention on the Civil Aspects of International Child Abduction. Section 6 of the Act gives the Convention the force of law in the Irish State, and therefore it receives judicial notice⁶. The Act originally gave the power to act under the Convention to the Minister of Justice, working through the Department of Justice, as Ireland’s Central Authority. The Act was amended in 1997 to include the Minister for Justice, Equality and Law Reform, but this was merely a technical matter⁷. The 1991 Act applies to children under the age of 16 who are habitual residents in a contracting state.

Pursuant to its powers, the Irish Central Authority will take steps to locate a child who has been abducted into the State. It will

¹ Irish Constitution, Art. 41, 1.

² No. 7.

³ No. 26.

⁴ No. 6.

⁵ No. 6.

⁶ *Id.*, § 6.

⁷ Children Act 1997, No. 40, § 18.

also seek the return of the child or secure access to the child. If required, the Central Authority will also arrange for court proceedings to secure the return of or secure access to the child. Should a child be abducted from the State, the Central Authority will assist the wronged party in seeking the return of the child. The Central Authority will also take upon itself the task of gathering and sending information about the abducted child to other Central Authorities. The Central Authority will not impose charges in relation to applications submitted to it, but it may however recoup the expenses it incurred in bringing the child back home.

The High Court of Ireland has jurisdiction to hear and determine applications under the Hague Convention. Prior to the enactment of the Hague Convention, the High Court was the proper place to hear child abduction cases. It is available twenty-four hours a day, which satisfies the expediency requirement of the convention. There are cases where the Court will have to make a child a ward of the court, which is within the jurisdiction of the High Court. The High Court is also experienced in child abduction cases which arise in an international setting that also raise constitutional questions. As a result, the High Court may receive direct applications from those seeking help. The High Court also has the power to discharge any order regarding the custody of, or access to, the child so long as it is making an order under the Hague Convention.⁸

Prior to its determination of an application under the Convention, the High Court may also give interim directions as it thinks fit, on its own motion or on an application, for securing the welfare of the child, or preventing prejudice to interested persons or changes in the circumstances relevant to the determination of the application. The High Court also has the authority to order any person to disclose any relevant information regarding the whereabouts of the child. As a result, the person revealing information may not rely on the rule against self incrimination or the incrimination of a spouse. However, the same person is protected from having the information admitted to prove perjury and perjury of a spouse.

While there is an obligation to follow the convention the High Court does have room to refuse the return of a child. In certain cases, the Court may refuse to return a child if (1) the person opposing the return of the child establishes that the person who had the child in the other state did not exercise rights of custody at the time of his removal, (2) there is a grave risk that return of the child would expose him to physical or psychological harm or place him in an intolerable situation, or (3) the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of his views. The court may also refuse the return of a child if it would be contrary to the fundamental principles of the State relating to the protection of human rights and fundamental freedoms.

⁸Child Abduction and Enforcement of Custody Orders Act 1991 § 6.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

In dealing with child abduction, Ireland passed the Nonfatal Offences Against the Persons Act, 1997.⁹ Under this Act, a person is guilty of an offense, who takes, sends or keeps a child under the age of sixteen years out of the state or causes a child under that age to be so taken, sent or kept, (a) in defiance of a court order, or (b) without the consent of each person who is a parent, or a guardian or a person to whom custody of the child has been granted by a court unless the consent of the court was obtained. This offense applies to a parent, guardian, or a person to whom custody of the child has been granted by a court, but does not apply to a parent who is not a guardian of the child.

Section 17 of the same Act states that a person, other than to whom section 16 applies, is guilty of an offense who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of sixteen years or causes a child under that age to be so taken or detained, (a) so as to remove the child from lawful control of any person having lawful control of the child; or (b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child. This section serves two purposes. First, it codifies the common law offense of kidnaping. The section also protects Garda Síochána (Police) from any cause of action which occurred while performing their duty under the Hague Convention¹⁰

B. PARENTAL VISITATION

The Guardianship of Infants Act 1964¹¹ deals with parental rights of guardianship, custody and access to children upon the breakup of a marriage. The High Court has jurisdiction for all matters dealing with the guardianship of infants. In response to a parental application to it, the Court may give directions as to what it thinks is proper regarding the right of access to the infant by the mother or father. Section 18 deals with custody upon separation of the parents. This section was repealed, however, by the Judicial Separation and Family Law Reform Act 1989.¹² Article 41 of the 1989 Act states that when the court grants a decree of judicial separation, it may declare either spouse to be unfit to have custody of any dependent child of the family.¹³

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

The courts receive their authority from articles 34 through 37 of the Irish Constitution. The High Court may receive cases from the Central Authority, or the Court may take cases directly without intervention of the Central Authority. While the High Court has

⁹ No. 26.

¹⁰ The Act allows for those acting with their lawful authority to act in securing the safety and well-being of a child in question.

¹¹ No. 7.

¹² No. 6.

¹³ Id. § 41 (3).

the jurisdiction, and is the best place to hear cases arising under the Hague Convention, the Supreme Court of Ireland has the authority to review the High Court's decisions.

The 1991 Act implementing the Hague Convention uses the Judicial Separation and Family Law Reform Act 1989 to express the requirements of court proceedings. It calls for an informal and fair process. It states that Family law proceedings before the High Court shall be as informal as is practicable and consistent with the administration of justice.¹⁴ In hearing and determining such proceedings as are referred to in subsection (3) of this section, neither judges sitting in the High Court, nor barristers or solicitors appearing in the proceedings, wear wigs or gowns.¹⁵ These requirements are used to foster an expedient result, which is necessary in cases arising under the Hague Convention.

IV. LAW ENFORCEMENT SYSTEM

The Garda is given the power to detain a child who he reasonably suspects is about to be or is being removed from the State in a breach of an order of the High Court. When this occurs the Garda must at the earliest opportunity return the child to the custody of the person in favor of whom a court has made an order of custody of or right of access to the child. If the child in question is in the custody of the Health Board the Garda must return the child immediately to the Health Board. When this occurs, the Garda is required to inform the child's parent, the person acting in loco parentis or the Central Authority, as soon as possible.

V. LEGAL ASSISTANCE PROGRAMS

The Central Authority refers cases to the Legal Aid Board. Law Centres were set up in Ireland by the Scheme of Civil Legal Aid and Advice in 1980.¹⁶ This was a response to the fact that Ireland had become a party to the European Agreement on the Transmission of Applications for Legal Aid in 1977. This three-year gap caused a number of problems which led Ireland to establish the scheme to set up Law Centres to give legal aid in family law matters. The Legal Aid Board was created by the Civil Legal Aid Act 1995.¹⁷ The Act gave the Scheme official statutory basis and set out to regulate the powers and duties of the board. It also sets out to establish the criteria for the granting of legal aid and advice as well as the initiation of litigation for which it is proper to have legal aid. The Law Centres are staffed by full time solicitors and provide mainly family law services.

In order to receive legal aid a person must pass both a merits and a means test. The merits test consists of numerous standards. Initially there must be a reasonable case in the law. The process of law must be the best means of solution. Also, the probable outcome must justify the legal costs necessary to achieve it. The means test includes requirements, such as, a disposable income that does not exceed Irish punt 7,350 (US\$8,175). Disposable cap-

¹⁴ *Id.* § 33 (3).

¹⁵ *Id.* § 33 (4).

¹⁶ Report on Civil Legal Aid in Ireland, Ch. 3, at 4.

¹⁷ No. 32.

ital of a potential recipient must not exceed Irish punt 200,000 (US\$223,000). Applicants under the Convention are entitled to legal aid.

VI. CONCLUDING REMARKS

In cases of parental abduction, Ireland has consistently looked to the best interests of the child. This had been the case prior to Ireland becoming a Member State of the Hague Convention. There have been cases in which children have been returned, and others in which children were allowed to stay with the offending party, because the child's best interest lay with that party. Ireland's judiciary has helped to shape the way in which the spirit of the Convention is incorporated into its own laws. In *Northampton County Council v. ABF and MBF*¹⁸, the return of a child to England was refused because doing so would have created an adoption without consent of one of the parents. In this decision, the Court relied heavily on Article 41 of the Irish Constitution. It understood Article 41 to grant the father the right to enforce his rights as the natural father in a foreign jurisdiction. The Court believed that this result was in concert with the protection of the rights of the father and the infant pursuant to Article 41.

In *Kent County Council v. C.S.*,¹⁹ the Court returned a child abducted from England. The court found that although the family receives the highest protection from the Constitution, it would be in the best interests of the child to be returned to England. This decision shows that although Ireland was late in adopting the Convention, its judicial decisions incorporate the ideology of the Convention.

In more recent decisions, Irish courts have continued their tradition of acting in the best interests of the child. In *T.M.M. v. M.D.*,²⁰ two children were removed from England to Ireland by their maternal grandmother. In looking at the circumstances of the situation, including the opinion of one of the children²¹, the children were not returned to their mother due to the grave risk of physical and psychological harm it would have caused.

In *W.P.P. v. S.R.W.*,²² the Court differentiated between rights of custody and rights of access. A mother who had full custody of her children removed them from California to Ireland. The Court held the father's right to access did not require the return of the children to the jurisdiction in which they had been habitual residents.

The most recent statistics on how Ireland has dealt with cases arising under the Convention are from 1997. The Minister for Justice, Equality and Law Reform compiled and released the statistics, which show a 14 percent increase from the previous year. There were sixty nine cases in which children were brought into the State twenty of which required the return of the children. There were fifty six cases in which the children were removed from the State, in eighteen of these cases the children were returned. In cases aris-

¹⁸ (1982) I.L.R.M. 164 (MC).

¹⁹ (1984) I.L.R.M. 292 (MC).

²⁰ (1999) I.E.S.C. 8.

²¹ Judge McGuinness spoke with the older of the children who was eleven years old. The Judge found the child to be mature enough to appropriately take her views into account, pursuant to Article 13 of the Hague Convention.

²² (2000) I.E.S.C. 11.

ing under the Convention, eighty percent dealt with the United Kingdom, while only eight percent concerned the United States.

Prepared by Kersi B. Shroff, Chief, Western Law Division, and Matthew Nugent, Law School Extern, Western Law Division, Law Library of Congress November 2000

ISRAEL

INTRODUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction was incorporated into Israeli law in December of 1991. The implementing law offers a speedy route for the return of minors to the country from which they were illegally removed so that the courts of the other country are able to deal with the issue of custody. The remedy under the Convention is return of the status quo that existed prior to the abduction.¹

According to statistical data submitted by the State of Israel in March 1997 to the third conference of the Special Commission to Review the Operation of the Hague Convention, Israeli courts ordered the return of abducted children in 70 percent of cases. Similarly, children abducted from Israel to other countries were returned in 70 percent of cases.²

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Implementing Law

The Knesset passed the Hague Convention (Return of Abducted Children Law), 5751–1991³ on May 29, 1991. The law incorporates the Convention on the Civil Aspects of International Child Abduction, signed in the Hague on Oct 25, 1980 (hereinafter the Convention),⁴ into Israeli domestic law subject to a reservation regarding the reimbursement for legal expenses in accordance with article 26 of the Convention.⁵

According to the law,⁶ the Attorney General's Office is designated as the Central Authority for the purpose of discharging the duties under the Convention.⁷ The Attorney General is authorized to designate qualified welfare officers within the meaning of Welfare Services Law, 5718–1958,⁸ in order to carry out necessary tasks in accordance with the Convention.

The delivery of information necessary for implementing the Convention depends on a receipt of a guarantee of secrecy by the Attorney General and a promise that the information shall not be used for any purpose other than that for which it was delivered.⁹

¹ Civil appeal 7206/93 *John Dow v. Jane Doe*, 97(1) Takdin-Elyon (Juridisc data base, decisions of the Supreme Court) (5757/58–1997).

² Referred to by Z. Hanegbi, Minister of Justice in response to an inquiry before the Knesset (Israel's Parliament) on March 11, 1998, <<http://www1.knesset.gov.il/tql/mark1/H0000680.html>>.

³ Sefer Hachukim [Book of Laws, official gazette] No. 1355 (5751–1991).

⁴ T.I.A.S. No. 11670, available at <<http://www.hcch.net>>.

⁵ *Supra* note 3, see also <<http://www.hcch.net/e/status/stat28e.htm>>.

⁶ *Id.* § 4.

⁷ The address is: The Attorney General, International Department, Ministry of Justice, P.O.B. 1087, Jerusalem 91010, Israel. TL: 972(2) 670–8797; Fax: 972(2) 628–7668.

⁸ 12 Laws of the State of Israel (hereinafter LSI) 120 (5718–1957/58).

⁹ *Supra* note 4, § 5.

The law designates the family court as the authorized court to adjudicate suits involving application of the Convention.¹⁰ In accordance with Article 16 of the Hague Convention, after the government receives notice of a wrongful removal or retention of a child, no decision on the merits of rights of custody of the minor can be made until it is determined that the child is not to be returned under the Convention. Therefore, any proceedings relating to custody of children, either in civil or religious courts in Israel, will cease until a determination is made on the status of return under the Convention.

Procedure in Hague Convention Actions

The implementing law authorizes the Minister of Justice to pass implementing regulations. In accordance with Civil Law Regulations (Amendment) 5756–1995,¹¹ Chapter 22(1) titled “Return of Abducted Children Abroad” was added to the principal regulations. The regulations provide that an action for the return of a child abroad under the Convention shall begin with the delivery of a pleading to the court in the geographical jurisdiction in which the child is present. If the location of the child is unknown, the pleading should be filed with the authorized court in Tel-Aviv.¹²

The pleading should be in the form of an affidavit that includes personal information regarding the child and the parents such as names, place of birth, passport and Israeli identity card, place of marriage, place of last shared residence, information regarding the person holding the child, and circumstances of the transfer of the child to a different address. The affidavit should be accompanied by the following: an authentic original or copy of a decision or an agreement regarding the plaintiff’s right to have the child in his custody; any other document substantiating the pleading, including proof of the law governing in the child’s regular place of residence; and an affidavit from any other person the plaintiff deems necessary.

At the time of filing the request, the plaintiff may request any relevant temporary relief. The court may decide *ex parte* (in the presence of the plaintiff only) in the following matters:¹³

- (1) the issuing of exit orders against an abductor and/or a child to prevent their departure from Israel;
- (2) the prohibition of the removal of a child from a location specified in the orders;
- (3) the issuing of a decree for deposit of the child’s passport or a passport where the child is registered;
- (4) the issuing of an order for the police to investigate the circumstances of the abduction, locate the child and assist a welfare officer to bring the child before the court;
- (5) the issuing of an order directed at other judicial or administrative agencies not to review the matter;
- (6) the issuing of any order necessary to prevent any additional harm to the child or to the rights of the parties or that

¹⁰ *Id.* § 6.

¹¹ Kovets Hatakanot [Regulations] (Sept. 29, 1995).

¹² Civil Courts Regulations, 5754–1984, as amended, § 258c, Kovets Hatakanot [Regulations] 4685, p. 2220 (5754–Aug. 12, 1984); see also 6 Dinim [Laws] 3037 (1991).

¹³ *Id.* § 295(5).

will guarantee the return of the child by consent or by peaceful means.

A notice on the date of the hearing and a copy of the pleading and any order handed by the court should be provided to the respondent, who is under an obligation to respond not later than two days before the hearing. The respondent should provide an affidavit and any document or any other person's affidavit substantiating his response. The hearing should take place not later than 15 days following the filing of the suit.

Before reaching a decision, the court may order the plaintiff to provide proof of a decision or a determination from the authorities of the country of the child's regular residence indicating that the child's removal was carried out illegally. A respondent who claims that the return of the child would deprive him of the protection of human rights and fundamental freedoms will similarly be requested to provide clear and convincing evidence to substantiate such a claim.¹⁴

The Court may order the immediate return of the child to his regular place of residence, even in the presence of one party, as long as a summons for the hearing was delivered to the respondent or his designee. When such an order is issued, the court will provide instructions as to the return of the child to all relevant parties as well as to a welfare officer and the Israeli police.¹⁵ The court should provide a detailed decision no later than six weeks following the filing of the suit.

An appeal on the decision or on any other order should be filed within seven days from the date it was made. Copies of the appeal pleading should be delivered by the appellant to all parties at the time of the filing.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The taking or enticement of a minor under sixteen years of age from the custody of his lawful guardian without the consent of such guardian is punishable by twenty years of imprisonment.¹⁶ If the abduction involves removing of the minor from the country, the perpetrator may be subject to an additional penalty of twenty years imprisonment.¹⁷

Although there are some cases where abducting parents were convicted for criminal violations of the penal law, it has been suggested that the preferred policy should be to avoid resorting to criminal intervention as long as civil remedies are available.¹⁸

¹⁴ Rule 295(11).

¹⁵ *Id.*

¹⁶ Penal Law, 5737–1977, LSI Special Volume (5737–1977), § 373(a), as amended in Penal Law (Amendment No. 12) Law, 5740–1980, § 28 (34 LSI 125 (5740–1979/80)).

¹⁷ *Id.* Penal Law, § 370.

¹⁸ P. Shifman, 2 Family Law in Israel 238 (1989). *See also* Family Appeal 41/97 *Lifmanovitz v. Kovaliakov*, 97(2) Takdin Mehozi [District Court Decisions on Takdin] at 54 (5757/58–1997).

B. PARENTAL VISITATION

Israeli law recognizes the principle of equality in respect to guardianship of children. Although both parents are considered “the natural guardians of their children,” a competent court is authorized to determine guardianship “with the interest of the children as the sole consideration.”¹⁹

According to the Capacity and Guardianship Law, 5722–1962,²⁰ as amended, parents of a minor who live separately may agree on custody arrangements of the minor, including visitation rights.²¹ The court will determine custody and visitation arrangements only in cases where the parents either have not reached such an agreement or have not carried out the agreement they had reached. In so doing, “[t]he Court may determine it to be the best interest of the minor: Provided that children up to the age of six shall be with their mother unless there are special reasons for directing otherwise.”²²

A decision by an authorized court in Israel under the Hague Convention does not determine the merits of any custody issue.²³ Rather, such a decision offers an emergency remedy: by ordering the immediate return of an abducted child, the Israeli court enables the court of the country in which the abduction took place to deal with custody related issues.²⁴

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Court System and Structure

In accordance with a 1995 amendment of the Hague Convention (Return of Abducted Children Law), the authorized court for purpose of implementation of any judicial or administrative function relating to abducted children is the family court.²⁵ The latter court, thus, handles all Hague Convention child-return proceedings, visitation, and enforcement of related orders.

Family courts are magistrates’ courts that have been designated as family courts by a decree signed by the Minister of Justice, with the consent of the Chief Justice of the Supreme Court. Judges can be appointed to the family court if they prove to have knowledge and professional experience in this area.²⁶

The Israeli court system is composed of a general court system and a number of specialized courts. The general court system is comprised of three instances: magistrates’ courts, district courts, and the Supreme Court.²⁷ As explained above, the courts that have jurisdiction over implementation of the Hague Convention are the

¹⁹ Women’s Equal Rights Law, 5711–1951, as amended, 5 LSI 171 (5711–1950/51).

²⁰ 16 LSI 106 (5722–1961/62).

²¹ *Id.* § 24.

²² *Id.* § 25.

²³ The Hague Convention § 19.

²⁴ *See, e.g.* Civil Appeal 7206/93 *Doe et al. v. Joe*, 51(2) Piske Din, [Decisions of the Supreme Court] 241 (5757/58–1997) [hereinafter PD].

²⁵ *Supra* note 4, § 6. *See also*, The Family Courts Law, 5755–1995, as amended, § 1(5), Sefer Hachukim [Book of Laws, Official Gazette] issue No. 1537 at 393 (August 7, 1995).

²⁶ *Id.* § 2 & 3.

²⁷ Basic Law: Adjudication, § 1(a), 38 Laws of the State of Israel (hereinafter LSI) 101 (5744–1983/84).

family courts, which are magistrates' courts and thus part of the general court system.

Appeals on decisions of magistrates' courts are entertained by district courts. The five Israeli district courts are located in Jerusalem, Tel Aviv, Haifa, Beer-Sheva, and Nazareth. District courts have residual jurisdiction over all criminal and civil matters that do not fall within the jurisdiction of the magistrates' courts, and general residual jurisdiction to hear any matter that is not under the exclusive jurisdiction of any other court or tribunal.²⁸

The Supreme Court sits in Jerusalem and has jurisdiction throughout the whole country. Its substantive jurisdiction lies mainly in two areas: it hears appeals against judgements and other decisions of the district courts, and also sits as a High Court of Justice. "When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court . . ." ²⁹

In addition to the general system of courts, Israel has some special courts, including labor courts, military courts, and religious courts. The rulings of the appellate tribunals of these courts are subject to a limited review by the Supreme Court sitting as a High Court of Justice.

Although family courts have exclusive jurisdiction over requests for implementation of the Hague Convention,³⁰ the issue of permanent custody may be adjudicated by either the family court or the appropriate religious court.

The religious courts in Israel have jurisdiction in matters of personal status relating to members of their communities. According to the Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953,³¹ "matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of the rabbinical courts."³² Matters incidental to divorce, including suits for maintenance and custody of children, however, are not within the exclusive jurisdiction of the rabbinical courts. Jurisdiction by a family court may be established by filing an action there before filing an action for divorce and other incidental matters in the Rabbinical court. The Christian religious courts and the Druze courts have jurisdiction similar to that of the rabbinical courts. The religious courts of the Muslim community (the Sharia courts), enjoy the highest level of substantive independence in that they are empowered with general exclusive jurisdiction over all personal status matters, not merely over marriage and divorce.³³

Court Decisions

Numerous cases involving implementation of the Hague Convention (Return of Abducted Children Law) have been entertained by Israeli courts. In most cases the Israeli courts have ordered the return of the children. The Supreme Court repeatedly held that the general rule dictated by the Convention is the return of an abducted child to the country of habitual residence and the protection

²⁸ Courts Law (Consolidated Version), 5744-1984, § 40, 38 LSI 282 (5744-1983/84).

²⁹ *Id.* § 15.

³⁰ Hague Convention (Return of Abducted Children Law), 5751-1991, § 6, *supra* note 4.

³¹ 7 LSI 139 (5713-1952/53).

³² *Id.* § 1.

³³ S. Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* 105-108 (1994).

of rights of access. While the general rule enjoys broad interpretation, exceptions to it are interpreted very restrictively. In the absence of proof of severe harm to the child expected as a result of the return, the child should be returned. The time that lapsed since the abduction, the child's positive adjustment to the new place and the strong contact with the abductive parent are all important considerations in the determination of custody. Israel's highest court, however, held that such considerations should be evaluated by the court of the country from which a child was abducted during the process of determining the custody of a child based on the best interest of the child.³⁴

The following is a summary of recent decisions of the Supreme Court on this matter reflecting its approach to implementation of the convention. According to the rule of *Stare decisis* as applicable in Israel decisions by this court bind all other courts.

*Joe v. Doe*³⁵—Decision rendered on April 29, 1999.

Facts:

The petitioner, (the mother), was married to the respondent (the father). They lived in Italy and had two daughters. In accordance with the divorce agreement, the mother was awarded custody of the daughters and the father visitation rights. The mother was prohibited from taking them out of Italy. In violation of the agreement, the mother took the girls to Israel. Following the district court decision to return the daughters to Italy based on the Hague Convention, the mother petitioned to the Supreme Court to allow an appeal.

Decision of the Supreme Court:

After reviewing all the evidence including the testimony of the psychologist, Justice Strasberg-Cohen held that although the girls have adjusted to life in Israel, their arrival there was wrong, being in violation of a court order given in Italy. Their continued stay in the country was also in violation of Israeli court orders. The continued efforts of the mother to avoid compliance with her obligation by repeatedly disappearing and changing her address convinced the Court that the mother should not be given even temporary custody. Furthermore, the lapse of time since the petitioner abducted the daughters was not in her favor, since the Hague Convention did not recognize extending legal proceedings as a defense.

*D.S. v. A.S.*³⁶—Decision was rendered on June 1, 1999.

Facts:

The petitioner, the mother, was born in Israel, left the country as a child and settled in the U.S. with her parents. She had dual U.S. and Israeli nationality. The respondent, the father, was born in Israel, and was an Israeli citizen who resided in the U.S. for 23 years and held an American work permit. The parties married in the U.S. in 1979 where they had a child born in 1986. They main-

³⁴*Dr. Gonzburg v. Elena Gail Grinwald*, 49(3) Piske Din (Decisions of the Supreme Court, hereinafter PD) 282 (5755/56–1995).

³⁵Civil Appeal Request 2610/99, 99(2) Tadkin Elyon 55 (5760–1999).

³⁶Appeal Request 3052/99, 99(2) Takdin-Elyon (Juridisc) 1129 (5759/60–1999).

tained close contacts with Israel and visited it frequently. The child was bilingual. They planned to move to Israel. For this purpose, they sold their residence and deposited the proceeds in their joint account in a bank in N.Y. In 1998, the relationship between the parties deteriorated and the petitioner reversed her plan to immigrate to Israel. She conveyed her decision to the respondent and to the child and filed for custody with the authorized court in New York. The respondent then withdrew all the money from their joint account and transferred it to Israel. He convinced the child to immigrate with him to Israel using a new passport based on a false claim that the child's passport, which was held by the mother, was lost. The petitioner filed a request for the return of her son with the Haifa family court. The respondent's defense was that the petitioner agreed that the child would live in Israel and that the child objected to being returned. An appeal to the Supreme Court was lodged following the district court decision accepting an appeal over the family court decision accepting the request for return.

Decision of the Supreme Court:

The Court accepted the appeal and determined that the child should be returned to the U.S. Justice Dorner held that a child's objection was not sufficient for the application of the exception to the rule of return. Rather, the Court should apply its own discretion by interpreting the exceptions specified by the Convention very restrictively. Moreover, the Court should always presume that the best interest of the child is not to be abducted by one parent and lose contact with the other parent. The child's wish to remain in the country to which he was abducted and his positive adjustment to it are considerations that should be reviewed in the process of determining custody. The determination over custody, in accordance with the best interest of the child, is to be made by the court of the country from which he was abducted.

In the circumstances of the case, it was determined that the child loved his mother. The need to choose between his parents resulted in a deep anguish to him. The court found that the child was not mature enough to make a determination based on consideration of all the circumstances. In light of the restrictive interpretation of the exception laid by Article 13 of the Convention, the Court accepted the appeal and ordered the return of the child to the U.S.

*T.D. v. S.D.*³⁷—Decision was rendered on June 14, 1999.

Facts:

The parties were Israeli citizens and did not hold any additional citizenship. They arrived in the U.S. in the summer of 1994 for a two-week visit to the petitioner's parents who had been living there for twenty years. During the visit, they agreed to stay in the U.S. for a period of two years during which the petitioner would develop a business and the respondent would study. They applied for a green card and bought an apartment. The petitioner established a company with his father. The respondent completed her studies for a masters' degree and started looking for a job in the U.S. In December 1995, the minor—the subject of the request—was born. He

³⁷ Appeal Request 7994/98, 99(2)Takdin-Elyon (Juridisc)1472 (5759/60–1999).

was an American citizen. In 1996, the respondent, with the consent of her husband, flew to Israel with her one year old son for a visit. Although their tickets were round trip tickets, the respondent and the child did not return to the U.S. on the date specified on the tickets as the date of return. Both parties started custody proceedings—the petitioner in New Jersey, U.S.A., and the respondent in Israel. The petitioner submitted a request for return of the minor to New Jersey under the Hague Convention. The Israeli family court accepted the petitioner’s request for return of the child to the U.S., holding that he was removed from his regular place of residence and was illegally prevented from returning to it. This determination was reversed by the district court.

Decision of the Supreme Court:

In accepting an appeal on the decision of the district court, Justice Beinisch analyzed several aspects of the Hauge Convention. She held that the court’s role in handling requests under the convention was viewed as “putting out fires” or the provision of “first aid,” for the purpose of nullifying the results of the abduction and preventing the abductor from benefitting from the abduction by returning the status quo prior to the abduction. According to Justice Beinisch, the Convention presumes that any court by virtue of its nature and its judicial role will do the utmost to make sure that the abducting parent will not benefit from the abduction. The court will refrain from ordering the return of an abducted minor only in rare cases enumerated by the Convention, such as high probability of physical, psychological or other harm to the child. Determination of the custody should rely on the best interest of the child. The latter, however, is to be decided by the court in the country of habitual residence and not by the court in the country to which the child was abducted.

In the circumstances of the case, Justice Beinisch held that the respondent abducted the child. The date of the return ticket was the date of the “abduction” for the purpose of implementation of the Hague Convention. There was insufficient evidence to conclude that the petitioner gave up his claim to the return of his child. In her decision, Justice Beinisch recognized the anguish of the mother who wished to continue her life in Israel, supported by her family and in the social and cultural environment she was best familiar with. The Convention, however, does not recognize these circumstances as justification for not returning the minor to the U.S. Although holding that the child should be returned, the court recommended that the parties reach an agreement rather than continue litigation.

As noted above, exceptions to implementation of the general rule regarding the return of abducted children are interpreted very restrictively. However, in accordance with article 20 of the Convention, when the court is satisfied that the return of a child contradicts Israel’s fundamental principles, the Supreme Court held that it would refuse a return of a child. One such case is where the child’s return is requested to a country which would sever his contact to the other parent. This holding was made in reference to decisions made by Spanish courts in the matter of *John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney*

*General and two others.*³⁸ The decision exemplifies the extent of injustice to the parties and to the child which may result from manipulation and deception by abductive parents.

John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney General and two others—Decision rendered on July 1, 1999.

Facts:

The petitioner (the husband) married the respondent (the wife) in Israel in a Jewish ceremony. The couple resided in Israel. Following the birth of their daughter, the relationship between the spouses deteriorated. The respondent sued the petitioner for alimony in the district court. The petitioner, on his part, filed for divorce at the rabbinical court. As part of the proceedings before the latter court, the petitioner initiated a proceeding aimed at declaring his wife as *Isha Moredet* (“rebellious” wife).³⁹ At the time all these proceedings were pending before the Israeli courts, the respondent and her daughter disappeared. They were found half a year later in Barcelona, Spain, residing in proximity to the wife’s relatives, among whom was Mr. M., the wife’s uncle, who at the time served as Honorary Consul of Israel in Barcelona. During the search for the mother and daughter, the rabbinical court issued an *ex parte* injunction for the wife to return the child to Israel and to transfer custody of the minor to the petitioner. After the discovery of their whereabouts, the petitioner requested the Israeli authorities to start proceedings under the Hague Convention.

The Spanish family court in Barcelona rejected the Israeli request for return of the minor to Israel. An appeal lodged by the respondent to the Spanish court of appeal was also rejected. Both courts applied Article 20 of the Convention in deciding that the transfer of the custody of the child from the mother to the father was against the basic principles of Spanish law, and that the child would be severely harmed if the mother would be declared a rebellious wife, and as a consequence, lose all her custodial rights. Custody of the child was given to the wife while the petitioner was awarded very limited visitation with his daughter under conditions described as *de facto* not conducive to establishing any meaningful parent child relationship.

In his suit, the petitioner requested that the Court order the Israeli authorities to resort to any legal or diplomatic means, to change the Spanish ruling in the matter. The petitioner also requested assistance in financing legal representation, a psychologist, and an interpreter in Spain, for the purpose of guaranteeing the return of the minor to Israel.

³⁸ High Court of Justice 4365/97, 99(1) Takdin-Elyon 7 (5759/60–1999).

³⁹ According to Jewish law, *Isha Moredet* is a wife who persistently refuses to cohabit with her husband either because of anger or quarrelling, or for other reasons offering no legal justification, or because she cannot bring herself to have sexual relations with him and can satisfy the court that this is for genuine reasons, which impel her to seek a divorce. In both cases, the *moredet* immediately loses her right to maintenance, and in consequence thereof, her husband loses the right to her handiwork since he is only entitled to this in consideration of her maintenance. Ultimately, this may lead to a divorce. See M. Elon, *The Principles of Jewish Law* 381 (Encyclopaedia Judaica, 1975).

Decision of the Supreme Court:

The Supreme Court reviewed the decisions of the Spanish courts in the process of evaluating the petitioner's claim. Justice Cheshin concluded that the Spanish courts' decisions were detrimentally influenced by a false document signed by the wife's uncle, Mr. M., on formal stationery of the Israeli Consulate. The document purported to describe the consequences of the potential declaration of the wife as *Isha Moredet* by the Israeli Rabbinical Court. According to the statement, such a declaration would result in the full and lifelong disconnection between the mother and her child.

Justice Cheshin held that the Israeli court, faced with proof of a similar rule applied by another country, would decide the same way the Spanish court did in this case. He stated the following:

An Israeli court would not even imagine, under Israeli law, to "extradite" a child to a country which is about to disconnect him from his mother only because of a quarrel between the mother and the father.⁴⁰

Thus the Spanish courts applied a just rule. The problem, though, was that they were misled by Mr. M's statement. The statement by the wife's uncle was provided without authority or permission. Not being an expert on the Israeli legal system, Mr. M. was not authorized to provide such a legal opinion. Such a document would not be admissible in Israeli courts. Moreover, the statement was completely false. A declaration of a wife as *Isha Moredet* has nothing to do with her rights toward her children. The implications of such a declaration may only affect the relationship between the husband and the wife, mostly in financial issues and not her custodial or visitation rights. A legal opinion explaining the meaning and implications of such a declaration was submitted to the Barcelona court of appeals by the chief Rabbi of Israel, who served as the president of the Rabbinical Court of Appeals, a person who was regarded as the top rabbinic legal authority on the subject in the State of Israel. The Spanish Court of Appeals, however, refused to accept the Chief Rabbi's expert opinion into evidence.

As to the specific remedies requested by the petitioner against Israeli authorities, the Court concluded that such are not normally provided. Justice Cheshin recognized that the Ministry of Foreign Affairs could not have foreseen the irresponsible action of Mr. M. Once the false statement was made, the Ministry should have resorted to stronger measures in order to contradict the statement in Mr. M.'s document. According to the Court, this would have prevented a personal harm to the petitioner, and a harm to the State of Israel, which was falsely identified as a backward country which removes custodial rights from a mother due to controversy with the father. Considering that Mr. M. resigned from his voluntary post as an honorary consul, that the Ministry of Justice in Israel assisted and continue to assist the petitioner, and as the nature of the remedies requested, the Court rejected the petition, but the Court expressed the wish that the Spanish courts would revisit the case in total disregard of the statement issued by Mr. M.

⁴⁰ *Supra* note 39, translated by the author, R.L.

IV. LAW ENFORCEMENT SYSTEM

The Execution Law, 5727–1967,⁴¹ as amended, regulates the enforcement of court decisions for the “surrender of a minor.” The law provides:

62. (a) Where the judgment directs that a minor shall be surrendered, or that contact, interviews or communication between the parent and the minor child not in his custody shall be enabled or that anything else shall be done in connection with the minor, the Execution Officer shall take all steps required for the execution of the judgment, and for that purpose he shall avail himself of the assistance of a welfare officer, within the meaning of the Welfare (Procedure in Matters of Minors, Sick Persons and Absent Persons Law), 5715–1955.⁴²

(b) Where the Execution Officer finds that the judgment can only be executed against the will of the minor and, in his opinion, the minor is capable of understanding the matter, or where the execution of judgement involves other difficulties, the Chief Execution Officer may apply to the court which gave the judgment for directions.

Although requests for stay of enforcement until a final decision in an appeal is made can be filed, the courts normally do not grant such stays in cases where there is no clear chance for winning on appeal. This policy is based on the essence of the Convention itself, which is designed to return children immediately to the country from which they were kidnaped.⁴³

V. LEGAL ASSISTANCE PROGRAMS

Israel has made a reservation on Article 26 of the Convention. Accordingly:

[T]he State of Israel hereby declares that, in proceedings under the Convention, it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.⁴⁴

Legal aid is provided to those applicants who would qualify in their own jurisdiction.⁴⁵ Clients resorting to private attorneys are usually charged \$10,000, exclusive of taxation at 17%, or more to handle the case in the family court. Appeals are billed separately.⁴⁶ The party held by the court liable for the abduction may be ordered to cover legal and related expenses, such as hotel stay and travel expenses of the other party.

VI. CONCLUSION

Following its adoption of the Hague Convention on the Civil Aspects of International Child Abduction, Israel incorporated the Convention into its domestic law and passed implementing regulations to enable proceedings under the Convention. A study of relevant

⁴¹ 21 LSI 112 (5727–1966/67).

⁴² 9 LSI 139 (5715–1954/55).

⁴³ *Lifmanovitz v. Kovaliakov*, *supra* note 21.

court decisions indicates an overall compliance with the obligations under the Convention.

According to Israel's Minister of Justice, neither the actual implementation of the Convention, nor the policy of his office and the Office of the Attorney General include any reference to the religion of the minor or the parents.⁴⁷ Return will be denied only under the limited reasons enumerated by the Convention.

Prepared by: Ruth Levush, senior legal specialist, Eastern Law Division, Directorate of Legal Research, Law Library of Congress, September 1999.

⁴⁴ <<http://www.hcch.net/e/status/stat28e.htm>>.

⁴⁵ A. Hutchinson et al., 2 International Parental Child Abduction (1998).

⁴⁶ *Id.*

⁴⁷ Minister of Justice Z. Hanegbi, in response to a Constituent Request <<http://www1.knesset.gov.il/tql/mark1/H0000680.html>>.

ITALY

INTRODUCTION

Italy ratified and implemented the Convention on the Civil Aspects of International Child Abduction (hereafter the Convention), done at The Hague on October 25, 1980, through Law No. 64 of January 15, 1994.¹ Following ratification, the Convention entered into force in Italy on May 1, 1995.²

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

According to article 3 of Law No. 64, the Central Office for Juvenile Justice at the Ministry of Justice has been designated the Italian Central Authority pursuant to article 6 of the Convention. In the discharge of its responsibilities, the Central Authority avails itself, whenever necessary, of the assistance of a state attorney (*Avvocatura dello Stato*), as well as of the Juvenile Services of the Justice administration (*Servizi minorili*). It may further request the cooperation of any public administrative body, the police, or any agency or authority whose objectives correspond with the functions entrusted to the Central Authority under the Convention.

Any judicial documents for the implementation of Law No. 64 in the judicial proceedings initiated at the request of the Central Authority are free of any charge or fee, including the stamp-duty and registration tax.

Applications for the return of a removed child or for securing the effective exercise of the rights of access are filed through the Central Authority pursuant to articles 8 and 21 of the Convention; however, the interested party may apply directly to the appropriate authorities, according to article 29 of the Convention.³

According to Law No. 64, the Italian Central Authority, having made the necessary preliminary investigations, must expeditiously send all documents to the Public Prosecutor attached to the Juve-

¹ Gazzetta Ufficiale della Repubblica Italiana [official law gazette of Italy, G.U.] No. 23 of Jan. 29, 1994, Ordinary Supplement.

² G.U. No. 97 of April 27, 1995, Ordinary Supplement.

³ Law No. 64, art. 7.

nile Court of the place where the minor was found, for the purpose of making an urgent request to this Court to order the return of the minor or the effective exercise of the rights of access. The date of the hearing in chambers is set by the presiding judge and is communicated to the Central Authority. The applicant is informed by the Central Authority of the date of hearings so that he/she may appear, being responsible for his/her own expenses, and may be heard. The Court should issue a decision within 30 days from the date the application was received. The person having the care of the minor, the public prosecutor, and, when appropriate, the minor must be heard.

The decree of the Court is immediately enforceable. The filing of an appeal to the Supreme Court (*ricorso per Cassazione*) does not stay its enforcement. The public prosecutor, with the cooperation of the Juvenile Services of the Justice Administration when needed, provides for the enforcement of the decisions of the Court and immediately informs the Central Authority.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

Under Italian penal law, removing a child under the age of fourteen from a parent exercising parental authority, a guardian, or from anyone having supervision or custody of him, or detaining a child against the will of those persons, constitutes a crime punishable, on complaint of the offended party, by imprisonment of from one to three years. Removing or detaining a minor who has attained the age of fourteen without the minor's consent entails the same punishment.⁴

The crime may be committed by anyone, including the parent who does not have custody rights over the minor, and by either one of the two parents inasmuch as parental authority is exercised by mutual agreement of both parents, according to article 316 of the Civil Code.⁵ Furthermore, when the removed or retained child is also deprived of his personal freedom, the perpetrator of the crime may also be subject to the provisions of article 605 of the Penal Code on abduction (*sequestro di persona*) and may be subject to more severe punishment.⁶

B. PARENTAL VISITATION

Family relations and the resulting rights and obligations, whether the parents are married or unmarried, as well as guardianship, adoption, separation, and divorce are regulated by numerous provisions of the Civil Code and by special legislation.⁷

Parental authority is exercised by mutual agreement by both married parents.⁸ The same criterion applies to unmarried parents

⁴ See art. 574 of the Italian Penal Code, in T. Padovani, ed. *Codice Penale* (Milano, Giuffrè, 1997).

⁵ *Id.* at 2089 and 2091.

⁶ *Id.* at 2091 and 2179.

⁷ See Law No. 184 of 1983, as amended, on Adoption and Custody of minors; and Law No. 898 of 1970, as amended, on the Dissolution of Marriage, in G. De Nova, ed. *Codice Civile e Leggi Collegate* [Civ. C.] (Bologna, Zanichelli, 1996/97).

⁸ *Id.*, Civil Code, art. 316.

who live together. When unmarried parents do not live together, parental authority normally belongs to the parent with whom the child lives, but the judge, in the exclusive interest of the child, can provide otherwise. The judicial authority can also exclude both parents, whether married or unmarried, from the exercise of the parental authority and provide for the appointment of a guardian.⁹

Civil courts (*tribunali*) deciding cases of separation or divorce provide for the custody of children. They also provide for access rights for the parent not entitled to custody and adopt any other measure relating exclusively to a child's moral and material interests. The courts establish the extent and the manner of the non-custodian parent's contribution to the support, education, and rearing of the child. The parent may petition the court if he or she deems that decisions prejudicial to the interest of the child have been adopted.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Competence in matters pertaining to family relations, guardianship, adoption, and custody of minors, as well as to separation and divorce, belongs to Juvenile Courts (*Tribunali per i minorenni*), to Civil Courts (*Tribunali ordinari*), and to Guardianship Judges (*Giudici Tutelari*). In a few special situations pertaining to suspension or loss of parental authority in connection with penal matters, competence belongs to the Penal Courts. Appeals are heard in the Court of Appeals.

Applications for the enforcement of the provisions of the Convention are submitted, according to Law No. 64 (*see supra* under Part I) to the Juvenile Courts, which are part of the Italian judicial system. Ordinary magistrates, as well as honorary magistrates selected from among citizens for their expertise in the fields of biology, psychiatry, criminal anthropology, education, and psychology and who have distinguished themselves in community service, sit on these courts.

These Courts avail themselves of the cooperation and assistance of the Juvenile Services of the Justice Department and of the welfare services instituted at the local government level for all the needs of minors, for their support and protection, as well as for emotional and psychological assistance to them.

IV. LAW ENFORCEMENT SYSTEM

Enforcement of Italian court orders in Hague Convention cases is carried out by the Public Prosecutor (*see supra* under Part I). It has been pointed out that in the event that an abductor refuses to comply with the order, it becomes the duty of the Chief Public Prosecutor in the region of the child's residence to ask the police Minor Division for assistance in removing the child, usually with the support of social services.¹⁰

⁹*Id.*, Civil Code art. 317 *bis*, 330, and 343.

¹⁰A. Hutchinson and H. Straight, *International Parental Child Abduction*, (Family Law, Reunite, 1998) at 135.

Under the provisions of the Italian System of Private International Law,¹¹ any judicial rulings by foreign authorities relating to the existence of family relations are effective in Italy if they have been issued by the authorities of the state to which reference is made in the Italian law, provided that they do not conflict with the requirements of public policy and provided that the fundamental rights of the defense have been complied with.

Regarding determinations pertaining to the custody of a child, a recent ruling of the Italian Supreme Court (*Corte Di Cassazione*) needs to be considered.

In 1997 the Italian Supreme Court decided an appeal in a case of removal of a child by his father from Australia to Italy, and upheld a Juvenile Court's decision that ordered the immediate return, in application of the Convention, of the removed child to his mother, who had been assigned custody of him by an Australian family court.¹²

The Supreme Court rejected challenges of constitutional illegitimacy of Italian Law No. 64 implementing the Convention, on the consideration that the Convention aims at the protection of minors from the wrongful behavior of their parents or relatives independently of any control over the merits of the case by the authorities of the requested contracting state.

Having acknowledged the Convention's primary purpose—namely the protection of the minor from the harmful effects of wrongful removal or retention in breach of custody rights—the Court underscored the fact that the main objective in such cases is to discourage any form of “legal kidnaping” by a parent or relative. This is done by providing forms of protection that attempt, above all, to re-establish the preexisting conditions and to neutralize any interest of the perpetrator of the removal or retention to obtain through his wrongful behavior any beneficial effect from forum shopping.

The Court excluded any conflict with article 30 of the Constitution, which pertains to parents' rights and obligations to support and educate their children, on the basis of two considerations: (a) that the Convention is a duly accepted international instrument, whose function is the effective protection of minors against wrongful behavior of parents or relatives; and (b) that the limitations imposed on the requested state's judicial authority pertaining to any control over the merits of the case are not applicable when it is determined that a serious risk exists that the child would be exposed to physical or psychological harm or would be placed in an intolerable situation upon his return.

The Court stated that only in the presence of such a risk may Italy's judicial authority refuse to restore custody and review the merits of the case. The existence of a situation of risk, the Court observed, was not invoked by the removing father, and the condition that allows the judicial authority to ascertain whether or not the child objects to being returned was not met.¹³

The Court went on to clarify that in the Italian system the decision to return the child, as such, is not even potentially capable of

¹¹ Law No. 218 of May 31, 1995, G.U. No. 128 of June 3, 1995, Ordinary Supplement.

¹² *Carte Di Cassation*, Decision No. 507 of January 18, 1997, in *Rivista Di Diritto Internazionale Privato e Processuale*, No. 1 (1998), at 145–149.

¹³ The Convention, art. 13.

conflicting with the decision to be issued in the separation case between the two parents pending before an Italian court.

In the same decision, the Court also confirmed that Hague Convention-related cases are adjudicated by the court of the place where the minor is found, pointing out that such a legislative solution regarding territorial competence is not a novelty, but rather is found in the Law on Adoption as well.¹⁴

V. LEGAL ASSISTANCE PROGRAMS

Legislation enacted in 1990 contains adequate provisions on legal aid for minors in a criminal proceeding; however, a satisfactory regulation is still missing regarding civil matters.¹⁵ It has been pointed out that there is no automatic right to legal aid. It is granted only to individuals who are able to prove that they have minimal income and are resident in Italy. The creation of additional legal aid resources is not envisaged for the future.¹⁶ Article 25 of the Convention applies.

VI. CONCLUSION

With the ratification and implementation of the Convention, Italy has provided its legal system, although after a long delay, with an instrument whereby it can confront situations of great social relevance, such as abduction of minors.

The Italian implementing legislation has fully adhered to the principles contained in article 2 of the Convention, which requires the use of the most expeditious procedures available in cases of abduction of minors. The implementing legislation, accordingly, mandates proceedings in chambers, imposes a short term for deciding the case, and limits appeals to a petition to the Court of Cassation. Such a petition, however, does not stay the enforcement of the lower court's order.

Judging from the decisions discussed in Part IV of this report, which are among the very few reported,¹⁷ it appears that the rulings of Italian courts strictly adhere to the spirit of the Convention, which is aimed at the protection of children, a concern of paramount importance in matters relating to their custody.

Prepared by: Giovanni Salvo, senior legal specialist, Western Law Division, Law Library of Congress, October 1999.

¹⁷ See also Carte Di Cassation, Decision No.10090 of October 15, 1997, in *Rivista Di Diritto Internazionale Privato e Processuale*, No. 4 (1998), at 831-836.

LUXEMBOURG

INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction was signed by the Grand-Duchy of Luxembourg on December 18, 1984. It was ratified on October 8, 1986, with the

¹⁴ *Supra* note 7.

¹⁵ As stated in the report to the Minister of Justice by the Committee for the Study of Organizational Problems of Juvenile Justice, in *Esperienze Di Giustizia Minorile*, No. 3-4, 1995, at 19.

¹⁶ International Parental Child Abduction, *supra* note 10, at 136.

reservation according to article 42 of the Convention, that the Grand-Duchy of Luxembourg shall not be bound to assume any costs referred to in article 26, paragraph 2, of the Convention, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs are covered by the Luxembourg system of legal aid and advice. The Convention entered in force for the Grand-Duchy on January 1, 1987.¹

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

In accordance with article 6, paragraph 1, the Grand-Duchy has designated as the Central Authority the State Procurator-General, Batiment de Justice, 1450 Luxembourg, 12, Cote d'Eich.

According to the Constitution of the Grand-Duchy of Luxembourg,² the Convention became part of the legal system of the Grand-Duchy upon its approval by Parliament, its ratification and its publication. The courts will apply it whenever called upon to do so.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

For a decision relating to the wrongful removal and retention of a child, the competent court will be the District court (Tribunal d'arrondissement) of the place where the child resides or is found, and this court will also be competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Code of Civil Procedure.³

Child abduction may also be prosecuted under articles 368–371–1 (Abduction of Minors) of the Criminal Code.⁴ Abduction of a minor is punishable by imprisonment from 1 to 5 years and a fine from 10,001 to 200,000 francs (1 dollar equals about 45 francs). For abduction of a minor below the age of 16, the punishment is imprisonment from 5 to 10 years. If the minor below the age of 16 consented and voluntarily followed the abductor, the punishment is imprisonment from 6 months to 3 years and a fine from 10,001 to 80,000 francs. If the abduction is done by the father, mother or others to take the minor from the person who has custody or in breach of a judicial order, the punishment is imprisonment from 8 days to 2 years and a fine from 10,001 to 80,000 francs.

B. PARENTAL VISITATION

For a decision relating to parental visitation, the competent court will be the District court of the place where the child resides or is found. This court will also be competent in proceedings under the

¹Law of May 16, 1986, on the Approval of the Convention, Memorial A–41, May 24, 1986, p. 1379, rectified in Memorial A–63, August 20, 1986, p.1808, further rectified in Memorial A–79, October 6, 1986, p. 2064.

²Constitution of the Grand-Duchy of Luxembourg of October 17, 1868, consolidated text of June 2, 1999, Memorial A–63, June 8, 1999, p.1401, art. 37.

³New Code of Civil Procedure, Law of August 11, 1996, Decree of August 3, 1998, Memorial A–64, August 17, 1998, p.1106, arts.1108–1116.

⁴Criminal Code, Law of June 16, 1879, consolidated text of January 1, 1997, Ministry of Justice, Luxembourg, 1997.

Hague Convention. The proceedings are governed by provisions of the Code of Civil Procedure.⁵

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

General trial courts in civil matters are the District courts, one in each territorial district. Appeal against their decisions goes to the Court of Appeal (*Cour d'Appel*), which also has specified trial jurisdiction. Decisions of the Court of Appeal as well as those of the District courts are subject to annulment by the Court of Cassation (*Cour de Cassation*) for breach of law. Trial courts in child-return proceedings, visitation, and enforcement of related orders under the domestic Luxembourg law as well under the Hague Convention are the District courts.⁶

In criminal matters, the structure is identical.

IV. LAW ENFORCEMENT SYSTEM

The District courts enforce their decisions. Decisions not subject to further remedy are immediately enforceable. This is done by court bailiffs and the police.

V. LEGAL ASSISTANCE PROGRAMS

The office of the State Procurator-General is entrusted with legal assistance under the Hague Convention. Further assistance can be obtained from the court in legal proceedings.⁷

VI. CONCLUSION

The Grand-Duchy of Luxembourg is in full compliance with the Hague Convention. The powers under the Convention are exercised by the Central Authority, the State Procurator-General and by the pertinent courts.

Prepared by George E. Glos, Special Law Group Leader, Eastern Law Division, Law Library of Congress, September 2000

MONACO

INTRODUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] was incorporated into Monegasque domestic law by ordinance No. 10-767 of January 7, 1993,¹ with an effective date of February 1, 1993. Monaco, which was not a member of the Hague Convention Conference on Private International Law, acceded to the Convention in accordance with

⁵*Supra*, note 3.

⁶*Id.*

⁷Law of August 18, 1995, on Legal Assistance, Memorial A-81, October 3, 1995, p. 1913, and Regulation of September 18, 1995, on Legal Assistance, *id.* at 1916.

¹Journal de Monaco [Official Gazette of Monaco], Jan. 22, 1993, at 90.

Article 38.² The instruments of accession were deposited on November 12, 1992, with the Ministry of Foreign Affairs of the Kingdom of The Netherlands. The accession has effect only between Monaco and the contracting states that have accepted the accession. The accession of Monaco was accepted by the United States on March 5, 1993, and the Convention became effective between the two countries on June 1, 1993.³

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Article 2 of the ordinance⁴ designates the *Direction des Services Judiciaires* as the Central authority.⁵ Because of the size of its territory and the uniqueness of its administration and justice, Monegasque authorities perceived the designation of a Central Authority as less indispensable than larger nations where the petitioner is more likely to face problems regarding the courts' territorial competence. However, the Central Authority still has its importance, as it will be the first to receive the application for return.⁶ Upon receipt, the Central Authority will check that the application satisfies Convention criteria and is accompanied by the proper documentation. At this time, all measures necessary to ensure the return of the child or the effective exercise of visitation rights will be taken. However, these measures will be decided on a case-by-case basis and will depend on the specific necessities of each instance since no implementing measures to the Convention have been taken, and no specific procedure has been set forth.⁷

The *Direction des Services Judiciaires* felt that domestic laws already in place offer all the necessary tools for the implementation of the Convention. In addition to the investigations which can be carried out by the *Services de la Sureté Publique* (Public Safety Services), one may resort to the procedure of educational assistance before a specialized judge, the *juge tut3laire*, who deals with family problems, including guardianship of children. The Code of Civil Procedure contains provisions covering legal aid, and the Penal Code contains provisions covering parental child abduction and withholding access rights from a person entitled to such rights.⁸ These provisions are examined in greater detail below.

²The Convention was open for signature to the state members of the Hague Conference on Private International Law. However, Article 38 provides that any other state may accede to the convention by depositing the instruments of accession with the Ministry of Foreign Affairs of The Netherlands.

³Article 38 provides that the Convention enters into force as between the acceding state and the state that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

⁴*Supra* note 1.

⁵Direction des Services Judiciaires, Palais de Justice, 5, Rue Colonel Bellando de Castro, MC 98000 Monaco. Telephone: 3 77 93 15 84 11. Fax: 3 77 93 50 05 68.

⁶Letter of April 26, 1999, from the Director of The *Direction des Services Judiciaires*.

⁷*Id.*

⁸*Id.*

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The Penal Code provides that, when the custody of a child has been awarded by a court decision, withholding access rights from the person entitled to these rights, or abduction of the child from the person who has custody (even without fraud or violence by the father, mother or any other person), is punishable by imprisonment up to one year, a fine, or both.⁹

In addition, the Code provides that refusal by the person in charge of a child to present the child to the person(s) entitled to claim him/her is punishable by a minimum imprisonment of 5 years and a maximum imprisonment of 10 years.¹⁰

B. PARENTAL VISITATION

The judge has full authority to decide visitation rights and to set the contribution of each parent for the education and support of their children. The Code Civil further states that, irrespective of the judge's decision, the father and mother maintain the right to monitor the education of the children and their support. They must contribute to their children's support according to their means.¹¹

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

The *Tribunal de Première Instance* (Court of First Instance) is the court of general competence. It is competent to hear all actions, apart from actions which are expressly attributed to another court.¹² This court functions with a panel of judges, presided over by the president. The court hears civil, criminal, commercial, and administrative cases. The President of the Court of First Instance presides over emergency procedures known as *référé*s. The president may order *en référé* any provisional measures whose aim is to prevent imminent harm or to end manifestly illegal behavior.¹³

The *juge tutélaire* is a judge from the Court of First Instance, specialized in family matters.¹⁴ Under the educational assistance procedure, he has exclusive competence to take all necessary measures to protect the well-being of children whose health, security, morality or education is threatened. He may order any type of investigation he feels is necessary to help him reach his decision. Petitions before the *juge tutélaire* may be filed by the mother, father, legal guardian of the child, the minor himself or the *procureur général* (general prosecutor). In addition, in case of divorce or separation, he has full authority to modify a custody order if a change in circumstance has occurred. For example, to organize visitations rights, and to modify the amount of alimony set for the child.¹⁵

⁹ Code pénal (C. pén), art. 294.

¹⁰ *Id.* art. 289.

¹¹ Code Civil (C. civ.), art. 206–20.

¹² Code de procédure civile (C. pro. civ.), art. 21.

¹³ *Id.* arts. 20 and 414–421.

¹⁴ *Id.* art. 832.

¹⁵ C. civ., art. 317 and following & C. pro. civ., arts. 833 and following.

Appeals of decisions of the Court of First Instance and of the *juge tutélaire* lie to the *Cour d'Appel* (Court of Appeals).¹⁶ The Court of Appeals sits in panel with a minimum of three members. It re-examines the facts and the legal points of a case. The court reviews the files as presented by the lower court and orders additional investigation if necessary.

The supreme judicial court is the *Cour de Révision*. It decides whether the rule of law has been correctly interpreted and applied by the court of appeal.¹⁷

IV. LAW ENFORCEMENT SYSTEM

To be enforceable, a judgment must contain the *formule exécutoire* (enforcement formula), and it must have been served on the defendant.¹⁸ The enforcement formula requires, in the name of the Prince, the sovereign of Monaco, all *huissiers de justice*,¹⁹ the general prosecutor and the officers of the public force to lend their assistance to the enforcement of the judgment when requested.²⁰

In the absence of voluntary compliance with a judgment or court order, one needs to resort to the *exécution forcée* (forced compliance) and request the assistance of the public authorities as specified in the enforcement formula.

V. LEGAL ASSISTANCE PROGRAMS

Monaco made the following reservation to Article 26 of the Convention:

In conformity with Article 26, paragraph 3, of the Convention, the Principality of Monaco declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsels or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Legal aid is available to a person who can show he "is not able to pay for legal expenses without drawing from resources which are necessary for his and his family livelihood."²¹ Applications and justifications must be addressed to the general prosecutor.²² Decisions are generally made within 15 days of the application date by a body (*bureau d'assistance judiciaire*) composed of the general prosecutor, a representative from the treasury and an attorney designated for a year by the President of the Court of First Instance.²³ The decision is notified within 3 days and cannot be appealed.²⁴

Legal aid covers the following expenditures:²⁵ court fees, expenses incurred by witnesses who have been authorized by the court, remuneration of experts, emoluments of *officiers ministériels*²⁶ and attorneys fees.

¹⁶C. pro. civ., art. 22.

¹⁷*Id.* art. 23.

¹⁸C. pro. civ., arts. 470 & 478.

¹⁹The *huissiers de justice* have the exclusive rights to notify all procedural acts in relation to legal proceedings, and they are responsible for the enforcement of court orders and judgments.

²⁰C. pro. civ., art. 471.

VI. CONCLUSION

Although the Principality of Monaco did not establish specific procedures for the implementation of the Convention after its incorporation into domestic law, the Monegasque court structure and its substantive laws offer all the necessary tools that are needed to effectively meet the Convention's objectives.

Prepared by: Nicole Atwill, senior legal specialist, Directorate of Legal Research, Law Library of Congress, September 1999.

²¹C. pro. civ., art. 38.

²²*Id.* art. 40.

²³*Id.* art. 39.

²⁴*Id.* art. 42.

²⁵*Id.* art. 44.

²⁶This expression covers various categories of practitioners who have obtained from the administration the exclusive right to perform certain legal acts and/or execute certain legal instruments.

THE NETHERLANDS

INTRODUCTION

The Netherlands ratified the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) on December 6, 1990. The Convention entered into force on January 9, 1990. The text of the Convention was published in the Bulletin of Netherlands Treaties.¹ With respect to cases of child abduction, The Netherlands can also apply the European Convention regarding the Recognition and Execution of Decisions concerning Custody over Children, which was implemented at the same time as the Hague Convention.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The Convention was implemented by the Law of May 2, 1990.² This Law not only implements the Convention but also is applicable to those cases relating to the international abduction of children that are not covered by the Convention.³ The designated Central Authority is the department dealing with the International Legal Assistance of the Ministry of Justice.⁴

When the Central Authority decides not to deal with a request for the return of a child or when it decides to halt the discussion of a case, this decision is immediately communicated to the applicant. The applicant can request the Central Authority to document the reasons for its decision in a decree. Within one month after receiving the decree, the applicant may submit a petition against the decree to the District Court in The Hague, which will hear the case.⁵ This Court is empowered to quash the decision of the Cen-

¹Tractatenblad van het Koninkrijk der Nederlanden 139 (1987).

²Law of May 2, 1990, Staatsblad [official law gazette of the Netherlands, Stb.] 202, as amended.

³*Id.* art. 2.

⁴*Id.* art. 4.

⁵*Id.* art. 6.

tral Authority, allowing the applicant to pursue the matter in the Juvenile District Court (*see* Part III).

The Central Authority informs the person with whom the abducted child resides by registered letter of the request for the return of the child and of the grounds on which the request is based. The Authority also notifies the person of its plans to obtain a court order for the return of the child, unless the request is voluntarily complied with within a reasonable time. This notification is not carried out if due to the circumstances of the case it appears unlikely that the person with whom the child is staying will not comply voluntarily or because of the urgency of the case.⁶

The local authorities, the civil registration service, and the public prosecutor's office will assist the Central Authority by supplying the Authority with all information needed and copies of all registries at no cost.⁷

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

Under Dutch Penal law, the person who intentionally removes a minor from the custody of the person or persons exercising legal authority over him or from the supervision of a person legally vested with such supervision is liable to a fine or a term of imprisonment for a maximum term of six years. If the abduction is a ruse, or if an act of violence or threat of violence has been used, or if the minor is under the age of 12, a maximum 9-year prison term or a fine may be imposed.⁸

A person is liable to a fine or imprisonment for a maximum term of three years if he or she intentionally hides, or conceals from the investigation by judicial officers or police officers, a minor who has been removed or had himself removed from the custody of the person or persons exercising legal authority over him or from the supervision of a person legally vested with such supervision. In case the minor has not reached the age of 12, a maximum 6-year prison term or a fine may be imposed. This provision is not applicable to the person who:

- (a) without delay, communicates the minor's whereabouts to the Child Care Protection Board;
- (b) has been granted funding pursuant to the Law on Assistance to Young Persons⁹ and acts in accordance with certain articles of the Law; or
- (c) acts for the purpose of providing conscientious aid to the minor.

B. PARENTAL VISITATION

Family relations and the resulting rights and obligations, whether the parents are married or not, as well as custody, separation,

⁶*Id.* art. 10.

⁷*Id.* arts. 8 and 9.

⁸The Penal Code of The Netherlands of March 3, 1881, as amended, art. 279.

⁹Law of August 8, 1989, Stb. 358, as amended.

divorce, and visitation rights, are regulated by numerous provisions in the Civil Code.

During marriage both parents exercise parental authority jointly. After divorce the parents can ask the court for continuing joint parental custody. If the parents have not requested joint custody, the court decides which of the parents will be entrusted with custody.¹⁰ Parents who are not married and have not lived together can jointly exercise parental custody if they have registered their combined request in the “Custody Registers.”¹¹

The child and the parent who does not have custody have reciprocal right to see and meet each other. The court mandates the rules for this access, including the frequency of the visits. The court is also competent to deny the parent this claim. It will do so only if:

- the contact would be seriously disadvantageous to the child;
- the parent is considered clearly unsuitable or unable to have contact with the child;
- a child who is twelve years or older has serious objections against the visitation rights of his non-custodial parent.¹²

The parent who has custody over the minor has the obligation to inform the non-custodial parent about important circumstances concerning the person and the property of the child.¹³ The rules about visitation and information can be amended by the court if circumstances change.¹⁴

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

Justice is administered in criminal and civil cases by 61 Sub-District Courts, 19 District Courts, 5 Courts of Appeal, and the Supreme Court of The Netherlands. All courts are presided over by judges appointed for life who retire on reaching a certain age set by law. There is no trial by jury. The Sub-District Courts and the District Courts are Courts of First Instance. Either party may then lodge an appeal with, respectively, either a District Court or Court of Appeal. Each Court of Appeal has jurisdiction over a number of District Courts, each of which in turn has jurisdiction over a number of Sub-District Courts. The Supreme Court of The Netherlands is the highest court in the country in civil and criminal matters. The Supreme Court can also pass judgement in cases that have been heard by courts in the Netherlands Antilles and Aruba.

The Juvenile Judge of the District Court in whose jurisdiction the child has been retained is authorized to take all cases into consideration with respect to the application of the Convention. In case it cannot be determined where the child is kept, the Juvenile Judge in the District Court in The Hague is authorized to hear the case.¹⁵ The judge who deals with the request of the return of a child must handle the case speedily; the court proceedings are closed. A deci-

¹⁰ Civil Code of The Netherlands, Book I, art. 251.

¹¹ *Id.* art. 244 and 252.

¹² *Id.* art. 377a

¹³ *Id.* art. 377b.

¹⁴ *Id.* art. 377e.

¹⁵ *Supra* note 2, art. 11.

sion shall not be made before the child has been given the opportunity to express his or her opinion.¹⁶ If the child is not able to come to the court, the judge may interview the child at another location.¹⁷ At the request of the applicant or by virtue of his own office a judge may order that the child be placed under temporary custody with an institution especially assigned custody.¹⁸

Appeal from the final decision of the District Court has to be made to the Appellate Court within two weeks after the decision was made.¹⁹ The highest instance for decisions made by the Appellate Court is the Supreme Court.

IV. LAW ENFORCEMENT SYSTEM

If the judge approves an applicant's request, he orders the handing over of the child to the person who has the custody of the child, or, in case that is not immediately possible, the child is temporarily placed in the custody of an especially designated institution. The judge can furthermore order that each person who is responsible for the international abduction of the child make a payment of money for costs incurred as a consequence of the abduction and the subsequent return of the child. The payment is to be made to the Central Authority or to the person who has custody of the child. Each one of the persons involved in the abduction is liable for the full amount.²⁰ The Prosecutor's Office will assist with the enforcement of the decisions.

The Juvenile Judge of the District Court in whose jurisdiction the child has been retained is authorized to take all circumstances into consideration with respect to visitation procedures.²¹

A judge who has to decide on a petition concerning the custody of a child for whose return an application has been made with the Central Authority puts his decision on custody on hold until an irrevocable decision has been made with respect to the return of the child.²² If a judge in a custody case has good reason to believe that the child has been internationally abducted, he waits a reasonable time before making a decision on custody.

V. LEGAL ASSISTANCE PROGRAM

Anyone who wants to go to court in The Netherlands with respect to the application of the Convention or with respect to the Law that implements the Convention may be entitled to legal assistance if the person's resources are insufficient to pay for the litigation.²³ The matter is governed by the Law on Legal Assistance.²⁴ However it should be noted that The Netherlands made a reservation with regard to the second paragraph of Article 26 of the Convention; the reservation states that The Netherlands shall not be bound to assume any costs referred to in that paragraph resulting from the participation of legal counsel or advisors from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

¹⁶*Id.*, art. 13, sec. 2.

¹⁷Law on Civil Procedure, Sept. 16, 1896, Stb. 156, as amended, art. 802.

¹⁸*Supra* note 2, art. 13, sec. 4, in conjunction with *supra* note 8, art 60.

¹⁹*Supra* note 2, art. 13, sec. 7.

²⁰*Id.*, art. 13, sec. 5.

²¹*Id.*, art. 11.

VI. CONCLUSION

By the Law of May 2, 1990, The Netherlands has implemented the Hague Convention on the Civil Aspects of International Child Abduction and the European Convention with respect to the Recognition and Execution of Decisions Concerning Custody over Children. Both Conventions can be applied to the international abduction of children.²⁵ The Law of May 2, 1990 is also applicable to those cases relating to the international abduction of children that are not covered by the Conventions. The implementing legislation has fully adhered to the principles contained in the Conventions, which require expeditious procedures, the establishment of a central authority insuring compliance, and strict procedural rules.

Prepared by: Karel Wennink, senior legal specialist, Western Law Division, Law Library of Congress, October 1999.

²² *Id.*, art. 15.

²³ *Id.*, art. 16.

²⁴ Law of December 23, 1993, Stb. 775, as amended.

²⁵ *Supra* 2.

PANAMA

INTRODUCTION

Law No. 22 of December 10, 1993 approved the findings of the Hague Convention on the Civil Aspects of International Child Abduction on October 25, 1980.¹

The Convention applies to Panama as a result of accession.² Therefore, according to Article 38 of the Convention, the accession has effect only regarding the relations between Panama and such contracting states as have declared their acceptance of the accession.³ The Convention came into force between the United States and Panama on June 1, 1994.⁴

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

In compliance with Article 6, ¶ 1, of the Convention,⁵ Panama has designated as the Central Authority the *Dirección General de Asuntos Jurídicos y Tratados* of the Ministry of Foreign Affairs.

According to the Political Constitution of Panama, the Convention became part of the legal order of the Republic upon its enactment, approval and promulgation.⁶ Panama is a party to the Vienna Convention on the Law of Treaties,⁷ which states that

¹ Law No. 22 of Dec. 10, 1993 (Gaceta Oficial, Dec. 15, 1993).

² Hague Conference on Private International Law, Convention # 28 of 25 October 1980 on Civil Aspects of International Child Abduction. [Http://www.hcch.net/e/authorities/caabduct.html](http://www.hcch.net/e/authorities/caabduct.html)

³ Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980), art. 38.

⁴ Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, <<http://travel.state.gov/hague-list.html>>.

⁵ *Supra* note 3, art. 6.

⁶ Constitución Política de la República de Panama (Editorial Publipan, Panama, 1993), art. 179, § 9, and 167.

⁷ Vienna convention on the law of treaties, with annex, 8 ILM 679.

“[e]very treaty in force is binding upon the parties to it and it must be performed by them in good faith.”⁸

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The competent courts to decide on cases related to the wrongful removal and retention of a child are the *juzgados seccionales de familia* of the city where the child resides.⁹ There are six *juzgados seccionales de familia* located in the judicial district of Panama City. The procedure involves assigning each case to any of the six courts of the judicial district that is governed by the Judicial Code of Panama. The same rules are applicable to the rest of the country.¹⁰ Panama has promulgated no legislation implementing the Hague Convention on the Civil Aspects of International Child Abduction. Therefore, courts apply directly the text of the Convention on proceedings related to these types of cases.¹¹

Child abduction by close relatives is a criminal offense punished with imprisonment from two to six years. However, parents are excluded from this provision.¹²

B. PARENTAL VISITATION

The competent courts to decide parental visitation include the *juzgados seccionales de familia* at the place where the child resides.¹³ This same court is competent in proceedings under the Hague Convention.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The trial court is the *juzgados seccionales de familia*.¹⁴ The court of appeals for these cases are the *Tribunales Superiores de Familia*.¹⁵ Up until today no decision has been issued by the Supreme Court on cases of child abduction under the Hague Convention.¹⁶

IV. LAW ENFORCEMENT SYSTEM

Final decisions of the court are enforceable immediately. If there is a refusal to comply with the court's final judgment, the court may issue an order of imprisonment and request the assistance of the police and the immigration authorities to prevent the obligated party from leaving the country and taking the child with him/her.¹⁷

IV. LEGAL ASSISTANCE PROGRAMS

The Panamanian Central Authority after receiving a Hague Convention case presents the case to the *Tribunal Superior de Familia*

⁸*Id.* art. 26.

⁹Código de La Familia, special edition (Asamblea Legislativa, Panama, 1996), art. 752.

¹⁰Código Judicial (Editorial Jurídica Bolivariana, Panama, 1997), Chapter II.

¹¹Telephone interview with Carla Ramirez, an attorney and an officer at the Central Authority of Panama (Dec. 14, 1999).

¹²Código Penal de la República de Panama, Editorial Mizrachi & Pujol, Panama (1993), art.

212.

¹³*Supra* note 9.

which then refers the case to the appropriate *Juzgado Seccional de Familia*. In addition, the Central Authority is present at court hearings and provides assistance to the judge on the interpretation and implementation of the Hague Convention if necessary. The Central authority is impartial. It does not represent the parties nor does it advocate for them. The *Fiscalia de Familia*, under the authority of Attorney General (*Ministerio Publico*), represents the interest of the minor in court. Applicants are free to hire a Panamanian attorney to represent their interests in a Hague case.¹⁸

Prepared by: Norma C. Gutiérrez, senior legal specialist, Law Library of Congress, Legal Research Directorate, December 1999.

¹⁴*Id.*

¹⁵*Id.* art. 755.

¹⁶*Supra* note 11.

¹⁷Telephone interview with Ianna Quadri, head of the Panamanian Central Authority (Dec. 16, 1999).

¹⁸*Id.*

POLAND

INTRODUCTION

The Hague Convention

The Republic of Poland ratified the Hague Convention on July 6, 1992, with reservations as to art. 26, para. 3 of the Convention.¹ Pursuant to its provisions, the Convention came into force as to Poland on November 1, 1992.² However, the publication of the text of the Hague Convention in *Dziennik Ustaw* (Polish official gazette), as required by Polish law, was delayed for several years after its ratification. The Convention, together with its Polish translation, was published in *Dziennik Ustaw* No.108 on September 25, 1995, thereby removing any doubt concerning the Convention's binding affect on all Polish courts, government authorities, and citizens.

The Hague Convention is binding only between Contracting States. In the Declaration on Accession of Poland to the Convention, the Polish Ministry of Foreign Affairs declared that pursuant to article 38 of the Convention, the following Contracting States had expressed their acceptance of the accession of the Republic of Poland to the Convention: Holland, the United States of America, Luxembourg, and the United Kingdom of Great Britain and Northern Ireland. Between the United States and Poland, the Convention became binding immediately, i.e., on November 1, 1992.³ Information on States which joined the Convention at later dates can

¹See Oświadczenie Rządowe z dnia 17 maja 1995 r. w sprawie przystąpienia Rzeczypospolitej Polskiej do Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę, sporządzonej w Hadze dnia 25 października 1980 r. [The Government Declaration of May 17, 1995, on the Accession of the Republic of Poland to the Convention on Civil Aspects of International Child Abduction, Done in The Hague on October 25, 1980, [hereinafter the Declaration], *Dziennik Ustaw* [Polish official gazette [hereinafter Dz.U.], No. 108, item 529 (1995). The text of the Hague Convention [hereinafter the Convention] was published in Dz.U. No. 108, item 528 (1995).

²See also Ciszewski, J., Konwencja dotycząca cywilnych aspektów uprowadzenia dziecka za granicę [The Convention on Civil Aspects of International Child Abduction [hereinafter Ciszewski], 2 *Przegląd sadowy* [Court Review (Polish law review)] 23-31 (1994).

³The Declaration, para 5, *supra* note 1.

be obtained in the Department of Laws and Treaties of the Ministry of Foreign Affairs in Poland.

Due to the relatively short time span of the application of the Hague Convention by Polish courts, there are very few court cases available which would apply the Convention. Generally accessible materials consist of the text of the two Polish Supreme Court decisions and an analysis of twelve district court decisions in a scholarly article by W. Skierkowska. There are relatively few scholarly legal publications on the topic of the Convention. Except for several publications on various aspects of the Hague Convention, cited in this report, there are no comprehensive analyses of its application in the Polish legal system.

The Hague Convention uses different terminology than Polish domestic law—*e.g.*, “wrongful removal or retention of a child” [translated into Polish in the official text of the Convention as “bezprawne uprowadzenie lub zatrzymanie dziecka”], “rights of custody and of access” [translated as “prawa do opieki i odwiedzin”], etc. Even though these terms are defined in the text of the Convention, their application in the Polish domestic legal system may cause some problems. During the short time since the application of the Convention in Poland, neither jurisprudence nor legal scholars—with very few exceptions⁴—have been able to develop an appropriate and satisfactory way of transferring these terms into the Polish legal system. This report, therefore, having a mainly informative character, does not attempt to undertake such a difficult task, except where it is absolutely necessary.

Other International Agreements

Aside from the Hague Convention, the Republic of Poland is also bound by other bilateral and multilateral agreements dealing with international abductions of children.

Poland has signed bilateral agreements relating to recognition and execution of civil and family judgments dealing with child custody with various countries, including, but not limited to, France,⁵ former Czechoslovakia,⁶ Hungary,⁷ Lithuania,⁸ Byelorussia,⁹ and former USSR.¹⁰ The Hague Convention provides that bilateral agreements between the particular Contracting States have priority over the Convention. The Convention states the following in article 26:

Nothing in this Convention shall prevent two or more Contracting States in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

⁴ See further in the text, *e.g.*, 1997 (unpublished) and 1998 Supreme Court decision, note 40, *infra*. See also 30–35 Holewinska-Lapinska, E., Konwencja Haska: Urowadzenie dziecka za granice as “prawo do opieki” w prawie polskim [The Hague Convention: International Child Abduction and “the Rights of Custody” in Polish Law], *Jurysta* [Polish law journal] no. 10–11 (1999) [hereinafter Holewinska].

⁵ Dz.U. No. 4, item 22 and 23 (1969).

⁶ Dz.U. No. 39, item 210 and 211 (1989).

⁷ Dz.U. No. 8, item 54 and 55 (1960).

⁸ Dz.U. No. 35, item 130 and 131 (1994).

⁹ Dz.U. No. 128, item 619 and 620 (1995).

¹⁰ Dz.U. No. 32, item 147 and 148 (1958). Some agreements concluded by the USSR were confirmed by several FSU countries.

The Republic of Poland is also bound by other international agreements dealing with international child abduction, including, but not limited to, the Convention on the Rights of the Child,¹¹ the European Convention on Recognition and Execution of Judgments Concerning Child Custody and on Return to Custody,¹² and the Convention on the Appropriate Authorities and Law for Minors' Protection.¹³

When applying the Hague Convention, Polish courts take into consideration the provisions of the Convention on the Rights of the Child:

Speaking about the interpretation and application of the 1980 Hague Convention while taking into consideration the provisions of the 1989 Convention on the Rights of the Child, one should mainly consider such provisions of the latter which indicate that the primary and superior value in each proceedings relating to the child is "interes dziecka" ["the interest of the child"] (art. 3). According to the resolution of seven justices of the Supreme Court¹⁴ of June 12, 1992, III CZP 48/92; OSNCP No. 10, item 179 (1992) "the interest of the child" corresponds with the Polish term "dobro dziecka" ["best interest of the child"]. As provided by the Preamble to the 1980 Hague Convention "interes" ["interest"] in the meaning of "dobro" ["best interest"] of a child is "of paramount importance in matters relating to its custody." Therefore, the general directive for deciding parental conflicts resulting from exercising children's custody, particularly resulting from such situation as in this case when one parent leaves the present residence together with children, should be best interest of children.¹⁵

In another decision, the Polish Supreme Court held:

When the conditions described in the Convention happen (wrongful removal or retention of a child), its provisions concerning the return of a child should be implemented, unless the circumstances justifying refusal of return provided in article 13 of the Convention will be established, as interpreted and applied taking into consideration "dobro dziecka" ["the interest of a child"] defined in the Convention on the Rights of the Child . . .¹⁶

¹¹ Adopted by the General Assembly of the United Nations on 20 November 1989, and ratified by Poland. See Konwencja o prawach dziecka, Dz.U. No. 120, item 526 and 527 (1991).

¹² Done in Luxemburg on May 20, 1980 [hereinafter the European Convention]. Ratified by Poland. See Europejska Konwencja o uznawaniu i wykonywaniu orzeczen dotyczacych pieczy nad dzieckiem oraz o przywracaniu pieczy nad dzieckiem, Dz.U. No. 31, item 134 (1996), correction: Dz.U. No. 32, item 196 (1997).

¹³ Done in Hague on October 5, 1961, [hereinafter the 1961 Hague Convention]. Ratified by Poland. See Konwencja o wlasciwosci organow i prawie wlasciwym w zakresie ochrony maloletnich, sporzadzona w Hadze dnia 5 pazdziernika 1961 r., Dz.U. No. 106, item 519 (1995). The 1961 Convention replaced the previous Convention on Minors' Protection, done in Hague on June 12, 1902, also ratified by Poland.

¹⁴ By their own decision, resolutions adopted by a bench composed of seven justices of the Supreme Court may become a binding legal principle which has a precedence value. See arts. 13, 16, 21, and 22, Ustawa z dnia 20 wrzesnia 1984 o Sadzie Najwyzszym [The Law of September 20, 1984 on the Supreme Court], consolidated text: Dz.U. No. 13, item 48 (1994), as amended.

¹⁵ See decision, note 28, *infra*, OSNC No. 9, item 142 (1998) at 63-64. See also 16 Gronowska, B., Jasudowicz, T., O prawach dziecka, Wydawnictwo Comer, Torun 1994.

¹⁶ Supreme Court decision of March 31, 1999, SN I CKN 23/99.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

In Poland's Declaration of Accession to the Convention (art.6), the Ministry of Justice was designated as the Central Authority obliged to discharge the duties imposed by the Convention on the territory of the Republic of Poland.¹⁷ An aggrieved party may apply to the Ministry of Justice and request it to perform its Central Authority duties, particularly those described in article 7 of the Hague Convention.¹⁸ The aggrieved party may also bypass the Central Authority and apply directly to the judicial or administrative authority of a Contracting State, pursuant to Article 29 of the Hague Convention.

In order to help Polish judges in the application of the new Conventions and other international agreements ratified by Poland, the Polish Ministry of Justice and the Dutch Ministry of Justice concluded agreements on mutual cooperation. Pursuant to these agreements, Polish judges may refer, free of charge, questions concerning private international law to the International Legal Institute in The Hague, Holland.¹⁹ Information on these services may be obtained in the Polish Ministry of Justice or directly at the International Legal Institute in The Hague.

A. THE CONSTITUTION

When the Hague Convention was ratified, the Polish Constitution that was in force at that time did not define the place or implementation of international agreements in the domestic legal order. The present Polish Constitution²⁰ lists explicitly ratified international agreements as a source of universally binding law.²¹ The Constitution provides that the ratification and denunciation of some categories of international agreements requires prior consent granted by a statute. Such categories are enumerated in article 89 of the Constitution and include those concerning "freedoms, rights, or obligations of citizens, as specified in the Constitution" and "matters regulated by statute or those for which the Constitution requires a statute."²² The Hague Convention falls within these categories.

The Constitution is based on principles of direct application of international agreements, the so-called transformation,²³ and their supremacy over domestic law. It states:

1. The ratified international agreement, after its promulgation in the Official Gazette (*Dziennik Ustaw*) of the Republic of Poland, constitutes a part of the domestic legal

¹⁷ Para. 6, *supra* note 1. Ministerstwo Sprawiedliwosci, Al Ujazdowskie 11, 00-950 Warszawa, Poland. Tel. 628-44-31, Fax 628-73-68.

¹⁸ Such was the situation in the Supreme Court decision cited in note 28 *infra*, at 60.

¹⁹ The address of the Institute is: Hoenstraat 5, 2596 HX's-Gravenhage, Netherlands. Tel.: 070-356 09 74, Fax: 070-330 71 82. See Konwencja o ochronie dziecka oraz Konwencja o uprowadzenia dziecka [The Convention on the Protection of the Child and the Convention on Child Abduction], 5 *Przegląd sadowy* 84, 84-88 (May 1995).

²⁰ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., [The Constitution of the Republic of Poland of April 2, 1997], Dz.U. No. 78, item 438 (1997) [hereinafter Constitution].

²¹ *Id.* art. 87, sec. 1.

²² *Id.* art. 89, sec. 1.

²³ Banaszak, B., *Prawo konstytucyjne* [Constitutional Law], C.H. Beck, Warsaw (1999) [hereinafter Banaszak], at 126.

order and applies directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by a statute shall have precedence over a domestic statute if such a statute cannot be reconciled with the provisions of the agreement.²⁴

Most international conventions ratified by Poland concerning human rights have precedence over domestic laws.²⁵

The Hague Convention was ratified prior to the entering into force of the new Polish Constitution, at a time when there was no requirement of prior legislative delegation for its ratification. In such a situation, article 241, sec. 1 of the present Polish Constitution applies. It provides that some international agreements—relating to categories mentioned in art. 89, sec. 1 of the Constitution—ratified by the Republic of Poland pursuant to previous laws and promulgated in *Dziennik Ustaw* are treated the same as those ratified after prior legislative delegation.²⁶ The Hague Convention falls within this category.²⁷

The content of this provision [art. 241, sec. 1] permits an assumption that, from the moment it came into force, it includes all international agreements ratified until this date. As far as the Convention [on the Civil Aspects of International Child Abduction] is concerned, it permits an assumption that it constitutes a part of the domestic legal order and applies directly, provided that specific provisions of the Convention concerning the civil aspects of child abduction should be interpreted and applied taking into consideration provisions of the Convention on the Rights of the Child, binding Poland, and adopted by the General Assembly of the United Nations on November 20, 1989 (Dz.U. No. 120, item 526 (1991)).²⁸

According to the Polish law,²⁹ the Hague Convention is self-implementing, it applies directly and its application does not require any implementing domestic laws. After its ratification and publication in the Polish official gazette, the provisions of the Hague Convention became part of the Polish domestic legal order automatically,³⁰ pursuant to the so-called transformation. Furthermore, pursuant to article 27 of the Vienna Convention on the Law of Treaties,³¹ ratified by Poland on July 2, 1990,³² a Party may not rely on its domestic law to justify its failure to comply with a treaty.³³

²⁴ *Supra* note 20, art. 91, sec. 1 & 2.

²⁵ 30 Holewinska, *supra* note 4.

²⁶ *The Constitution*, Chapter XIII: Transitional and Final Provisions.

²⁷ Smyczynski, T., (Ed.), *Konwencja o prawach dziecka-analiza i wykladnia* [Convention on the Rights of the Child—Analysis and Interpretation], Poznan (1999), [hereinafter Smyczynski Konwencja].

²⁸ Polish Supreme Court decision of January 16, 1998, [hereinafter 1998 Supreme Court decision]. Case No. II CKN 855/97. OSNC No. 9, item 142 (1998) at 63.

²⁹ *The Constitution*, art. 91, sec. 1.

³⁰ See *supra* note 28, OSNC No. 9, item 142, summary at 59.

³¹ Concluded in Vienna on May 23, 1969.

³² Dz.U. No. 74, item 440 (1990).

³³ 17 Smyczynski Konwencja, *supra* note 27.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

1. *The Constitution*

The Polish Constitution does not have any provisions referring directly to child abduction. However, its article 72 states:

1. The Republic of Poland ensures the protection of the rights of the child. Everyone has the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and demoralization.
2. A child deprived of parental care has the right to care and assistance provided by public authorities.
3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, as far as possible, give priority to the views of the child.
4. The statute shall define the competence and procedure for the appointment of the Commissioner for Children's Rights.

2. *Administrative Law*

The Regulation of the Council of Ministers of April 29, 1997, on the Commissioner for Children's Rights³⁴ established the Office of the Commissioner for Children's Rights [hereinafter the Commissioner], and defined his duties. Pursuant to the Regulation, the Commissioner is obliged to coordinate the implementation of children's rights as established by domestic laws, government programs, and international agreements and recommendations of international organizations.³⁵ The Commissioner's duties also include cooperating with international organizations and institutions dealing with children's affairs, as well as safeguarding compliance with international agreements by Poland.³⁶

A draft law on a Children's Ombudsman has been introduced in the Sejm (Polish Parliament).³⁷

3. *Family Law*

The whole concept of parental authority, as specified in arts. 92–113 of the Family Code,³⁸ is intended to prevent wrongful removal or retention of children. It is based on an idea that neither parents nor children have any influence on the contents of the parental authority. All Family Code provisions relating to parental authority

³⁴ Rozporządzenie Rady Ministrów z dnia 29 kwietnia 1997 r. w sprawie Pełnomocnika Rządu do Spraw Dzieci, Dz.U. No. 47, item 302 (1997) [hereinafter the Regulation].

³⁵ *Id.* sec. 2.1.

³⁶ *Id.* sec. 2.3.

³⁷ Poselski projekt ustawy o Rzeczniku Praw Dziecka, Parliamentary Print No. 2456, introduced May 9, 1997.

³⁸ Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz.U. No. 9, item 59 (1964); amended: Dz.U. No. 45, item 234 (1975); Dz.U. No. 36, item 180 (1986); Dz.U. No. 34, item 198 (1990); Dz.U. No. 83, item 417 (1995); Dz.U. No. 117, item 757 (1998) [hereinafter the Family Code].

constitute *ius cogens* and parents may not “release” a child from their parental authority.³⁹

The rights of custody (“prawo do opieki”) protected by the Hague Convention, as defined in its article 5, “. . . shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” The Convention states in article 3 that “the rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

The Polish Supreme Court in its decision No. I CKN 653/97 (unpublished) of October 16, 1997,⁴⁰ equated this right of custody with the “parental authority” specified in articles 92–113 of the Family Code. In scholarly legal writings, the opinion has been expressed that this “right of custody” constitutes a significant part of parental authority. However, it has been pointed out that in the Polish legal system “the right of custody” may arise only by operation of law or by reason of a judicial decision. It may not arise by reason of an administrative decision or by an agreement.⁴¹

The Family Code does not provide the definition of parental authority. It only states that “parental authority includes in particular a duty and right of care over a person and property of a child, as well as of raising a child.”⁴² Parental authority is defined in the scholarly legal writings as “the totality of rights and duties of parents toward a minor child intended to provide care over his person and property.”⁴³ It is generally accepted among Polish legal authorities that parental authority includes the right to determine the child’s place of residence.⁴⁴ The Civil Code⁴⁵ states:

1. The place of residence of a child under parental authority shall be the place of residence of his parents or of one parent who is entitled to exclusive parental authority or to whom the exercise of parental authority has been entrusted.
2. If both parents are equally entitled to parental authority and have separate places of residence, the place of residence of the child is with the parent with whom the child remains permanently. If the child does not remain permanently with either of the parents, his place of residence shall be decided by the guardianship court.⁴⁶

In certain situations, a guardianship court may intervene into implementation of parental authority.⁴⁷ The court may limit, suspend, or, finally, terminate parental authority. Parental authority may be limited when the best interest of a child is endangered,

³⁹ 469 Ignatowicz, J., *Kodeks rodzinny i opiekunczy z komentarzem* [Family and Guardianship Code with a Commentary], Warszawa 1993.

⁴⁰ Also cited in the 1998 Supreme Court decision, *supra* note 28.

⁴¹ 31–32 Holewiska.

⁴² Family Code, art. 95.

⁴³ Smyczynski, T., 134 *Prawo rodzinne i opiekuncze* [Family and Tutelage law], Wydawnictwo C.H. Beck, Warsaw 1997 [hereinafter Smyczynski *Prawo*].

⁴⁴ 372 Smyczynski *Konwencja*.

⁴⁵ Ustawa z dnia 23 kwietnia 1964 r., *Kodeks cywilny* [The Law of April 23, 1964, Civil Code], Dz.U. No. 16, item 93 (1964), as amended [hereinafter Civil Code].

⁴⁶ *Id.* art. 26.

⁴⁷ 216 Winiarz, J., Gajda, J., *Prawo rodzinne* [Family Law], Wydawnictwa Prawnicze PWN, Warszawa 1999 [hereinafter Winiarz].

when the child is in danger of being demoralized, or due to a particular situation of the parents. A particular situation may be due to actual separation of parents or other situation causing limitation of trust in implementation of their parental authority.

Actual separation of parents occurs when:

1. parents live apart due to a divorce or marriage annulment decree.⁴⁸ Pursuant to art. 58, sec. 1, Family Code, the court issuing the divorce decree is obliged to determine parental authority over minor children of both spouses. This is one of the major duties of the divorce court.⁴⁹ The court may entrust only one parent with parental authority while limiting the other to specifically defined duties and obligations towards the child.⁵⁰

2. parents are still married but they live apart;⁵¹ or

3. both parents of an out-of-wedlock child living apart have parental authority (acknowledgment of a child or paternity and parental authority established by a court).

The limitation of trust in proper implementation of parental authority occurs when both parents have parental authority but are not married,⁵² only one parent is entrusted with parental authority⁵³ or the child has been declared totally incompetent.⁵⁴

As a rule, parental authority belongs to both parents.⁵⁵ However, parental authority may belong to only one parent if the other parent is deceased, unknown, or does not have full legal capacity; the other parent has been permanently or temporarily deprived of parental authority; or the fatherhood was established by a court decision and the court did not provide the father with parental authority.⁵⁶

One of the most important provisions protecting children from wrongful removal or retention is article 100 of the Family Code which states:

The guardianship court and other state authorities are obliged to provide help to parents when it is necessary for proper exercise of their parental authority. In particular, each parent may petition the guardianship court for return of a child removed by an unauthorized person.

The right to request the return of a child removed by an unauthorized person has its source in parental authority. Only a person entrusted with parental authority may request the return of a child. When a person's parental authority has been limited, he/she may pursue such a request only if his/her parental authority provides that the child resides with him/her.⁵⁷ However, the category

⁴⁸ Family Code, art. 58, sec. 1.

⁴⁹ Wytoczne Sadu Najwyzszego z dnia 18 marca 1968 r. [Supreme Court Directives of March 18, 1968], No. III CZP 70/66 (OSN 1968, item 77), point V.

⁵⁰ Family Code, art. 58, sec. 1.

⁵¹ *Id.* art. 107, sec. 2.

⁵² *Id.* art. 107, sec. 1.

⁵³ *Id.* art. 104.

⁵⁴ *Id.* art. 108.

⁵⁵ *Id.* art. 93, sec. 1.

⁵⁶ 207 Winiarz.

⁵⁷ Gajda, J., Kodeks rodzinny i opiekunczy. Komentarz [The Family and Guardianship Code. Commentary], Wydawnictwo C.H. Beck, Warszawa 1999 [hereinafter Gajda], art. 100, comment 9.

of persons entitled to help under this article includes not only parents but also foster parents, legal guardians, or curators.⁵⁸

An “unauthorized person” in the meaning of article 100 of the Code is any person who refuses the return of a wrongfully removed child. This category also includes a parent who retains the child in contravention of the court decision.⁵⁹

“Other state authorities” should include all state authorities, in particular police, the prosecutors’ office, and state administration authorities.⁶⁰

There are also other provisions of the Family Code which are meant to prevent wrongful removal and retention of children. They include those regulating deprivation⁶¹ and limitation of parental authority;⁶² prohibition of personal contacts with the child by parents deprived of parental authority;⁶³ and supervision on exercising custody and release of the custodian.⁶⁴

Performing or permitting the wrongful removal of a child may be a triggering factor for the court to implement sanctions proscribed by these provisions.

4. *Civil Procedure*

Article 100 of the Family Code constitutes substantive grounds for a request to return a child. Judicial proceedings in matters regulated in the Family Code are governed by the Code of Civil Procedure⁶⁵ and will be discussed in part III of this report.

5. *Civil Law*

Wrongful removal or retention of a child affects his/her dignity, freedom, personal inviolability, and the right to contact his parents and relatives. These rights constitute personal rights protected under articles 23 and 24 of the Civil Code.

When, as a result of wrongful removal or retention, a child suffers bodily injury or health impairment, he/she may request damages and/or compensation on a tort basis, pursuant to article 444 of the Civil Code.

6. *Criminal Law*

Wrongful removal or retention of a child may constitute a crime and result in criminal prosecution and penalties defined in the Criminal Code.⁶⁶ Article 211 of the new Criminal Code⁶⁷ states the following:

[w]hoever, contrary to the will of the person appointed to take care of or supervise, removes or retains a minor less

⁵⁸*Id.* art. 100, comment 8.

⁵⁹*Id.* art 100, comment 10.

⁶⁰*Id.* art. 100, comment 7.

⁶¹*Id.* art. 111.

⁶²*Id.* art. 109.

⁶³*Id.* art. 113.

⁶⁴*Id.* arts. 165, 168, and 169.

⁶⁵Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [The Law of November 17, 1964, Code of Civil Procedure] [hereinafter the Code of Civil Procedure], Dz.U. No. 43, item 296 (1964), as amended.

⁶⁶Ustawa z dnia 6 czerwca 1997 r. Kodeks karny [The Law of June 6, 1997, Criminal Code] [hereinafter Criminal Code], Dz.U. No. 88, item 553 (1997) which came into force in 1998.

⁶⁷In the former Criminal Code of 1969, the crime of removal or retention (kidnapping) of a minor was dealt with in art. 188.

than 15 years old . . . shall be subject to the penalty of imprisonment for up to 3 years.

The purpose of article 211 of the Criminal Code is to protect legal institutions of care and supervision [opieki i nadzoru], and not to protect the freedom of a person wrongfully removed or retained. Removal constitutes the violation of the legal order of exercising the rights of care or supervision over a minor.⁶⁸ The latter is protected by article 189 of the Criminal Code. According to scholarly legal writings, “wrongful removal” is the active removal of a minor from the care or supervision of authorized persons. “Retention,” on the other hand, takes place when a perpetrator authorized to have temporary custody does not return a child to the permanent custodian.⁶⁹ Removal is an act, while retention constitutes a forbearance.⁷⁰

The commission of a crime under article 211 does not require the use of threat, force, or fraud. Permission of a minor is immaterial and does not exclude the liability of a perpetrator;⁷¹ it is enough that the perpetrator acted against the will of persons authorized to care for or supervise the child.⁷² The category of “authorized persons” includes persons authorized by the Family Code—i.e., natural and adoptive parents who have full parental authority, legal guardians, or foster parents. It also includes persons authorized to exercise care and supervision by other laws—*e.g.*, teachers.

Since the crime of kidnaping has to be committed “against the will of a person authorized to exercise care or supervision,” usually it cannot be committed by a parent or legal guardian exercising parental authority. However, when one or both parents are divested of parental authority, or their parental authority has been suspended or limited pursuant to articles 107, 110, and 111 of the Family Code, then such parents may become perpetrators of the crime of kidnaping.⁷³ The fact that the perpetrator did not take a minor under his care but abandoned him/her or transferred him to a third person, is not a defense.

B. PARENTAL VISITATION

The “rights of access” protected by the Hague Convention “shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”⁷⁴ Polish domestic law does not use the term exactly corresponding to the “rights of access.” The “rights of access” has been translated in the Polish version of the Hague Convention as “prawo do odwiedzin” [visitation rights]. The latter term, however, does not have any term exactly corresponding to it in Polish domestic law. The closest term in Polish law to “rights of access” used by the Hague Convention,

⁶⁸ Andrejew, I, Kodeks karny. Krotki komentarz [Criminal Code. A Short Commentary] [hereinafter Andrejew]. Państwowe Wydawnictwo Naukowe. Warszawa 1986, art. 188, comment 1.

⁶⁹ 374 Wojciechowski, J. Kodeks karny—komentarz, orzecznictwo [Criminal Code—Commentary and Jurisprudence]. Warsaw 1997.

⁷⁰ Marek, A., Prawo karne. Zagadnienia teorii i praktyki [Criminal Law. Problems of Theory and Practice] [hereinafter Marek]. Wydawnictwo C.H. Beck. Warszawa 1997, note 836.

⁷¹ Supreme Court decision of December 18, 1992. Inf. Prawn. No. 7–9 (1992). See also Marek, note 836.

⁷² 369 Smyczynski Konwencja, *supra* note 27.

⁷³ Supreme Court Resolution of November 21, 1979, No. VI KZP 15/79; OSNKW No. 1 (1980), item 2. See also Andrejew, comment to art. 188; Marek, note 835 and 836.

⁷⁴ *Supra* note 2, The Hague Convention, art. 5.

is “personal contacts with a child” [osobista styczność z dzieckiem] used in article 113 of the Family Code. Article 113 states the following:

1. When an interest of a child so requires, a custodial court will prohibit parents divested of parental authority from personal contacts with a child.
2. In extraordinary situations, a custodial court may limit personal contacts with a child by parents whose parental authority has been limited, by placing a child with a foster family or in a custodial-educational facility.

In Polish scholarly legal writings, the right of parents to personal contacts with a child has its source in a close personal and emotional relationship with a child and does not depend on parental authority.⁷⁵ Even divesting parents of their parental authority does not deprive them of the right of personal contacts with the child. Only when the interest of a child is endangered, the court may prohibit parents deprived of parental authority from personal contacts with a child, pursuant to article 113 of the Family Code. Personal contacts include not only visitation rights but also all other means of contact, *e.g.*, correspondence, telephone conversations.

The Supreme Court of Poland has stated that:

Entrusting one parent in a divorce decree or decree annulling the marriage with parental authority does not deprive the other of the right to personal contacts with a child. Therefore, there is no need for precise definition of this right in a decree. Prohibition or limitation of personal contacts of parents with the child may be declared only when their parental authority has been abrogated or limited and not when the divorce or annulment decree vests parental authority with one parent.⁷⁶

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION.

Judicial power in Poland has been handled mainly, but not exclusively, by the Supreme Court, courts of general jurisdiction, administrative, and military courts.⁷⁷

The matters connected with the application of the Hague Convention are handled by the courts of general jurisdiction⁷⁸ and the Supreme Court.⁷⁹ Pursuant to article 1, sec. 2 of the Law on Courts, the following are courts of general jurisdiction: district, voivodship (regional), and appellate. Together with the Supreme

⁷⁵ 163 Smyczynski Prawo, *supra*. See also 74 Krzeminski, Z., Rozwód [Divorce] [hereinafter Krzeminski]. Kantor Wydawniczy Zakamycze. Krakow 1997.

⁷⁶ Supreme Court decision of September 30, 1980, Case No. IICR 277 (1980); Gazeta prawnicza No. 7–8 (1991).

⁷⁷ 169 Majchrowski, J., Winczorek, P., Ustrój konstytucyjny Rzeczypospolitej Polskiej [The Constitutional Structure of the republic of Poland] [hereinafter Majchrowski], Hortpress. Warszawa 1998.

⁷⁸ Organized pursuant to Ustawa z dnia 20 czerwca 1985 r. Prawo o ustroju sądów powszechnych [The Law of June 20, 1985, on Courts of General Jurisdiction], [hereinafter the Law on Courts], consolidated text: Dz.U. No. 7, item 25 (1994), as amended.

⁷⁹ Its organization and functioning has been based on The Law of September 20, 1984 on the Supreme Court.

Court, there are four court instances.⁸⁰ However, the Polish Constitution guarantees only two instances in judicial proceedings.⁸¹ As a rule, district courts have subject matter jurisdiction in all cases except those which are transferred to voivodship courts.⁸² Courts of general jurisdiction handle criminal, civil, family and guardianship matters, as well as labor law and social security, except for those which are transferred by law to other courts. Different divisions specializing in particular cases, *e.g.*, criminal, civil, family, commercial, or labor and social security, may be created in courts of general jurisdiction.

The Law on Courts provides that a person who does not possess proficiency in the Polish language has the right to use his/her native language in court as well as to be provided with a translator free of charge.⁸³

The Supreme Court handles annulments [Cour de Cassation]. It has four Chambers: Civil, Criminal, Military and Administrative, Labor and Social Security Chamber.

The Code of Civil Procedure gives subject matter jurisdiction for requests for return of a child to the custodial district court.⁸⁴ Territorial jurisdiction belongs to the court of the child's residence or stay.⁸⁵

Judicial procedure for return of a child may be initiated at the request of an authorized party or by the court's own motion.⁸⁶ The motion may be submitted by any parent provided that he/she has parental authority. A copy of a motion is delivered to the prosecutor who has to be informed about the date of the trial.⁸⁷ However, the prosecutor does not become a party to the proceedings unless he submits an official joinder.⁸⁸ Therefore, there is no requirement to serve him a copy of the court's decision.⁸⁹

Article 579 of the Code of Civil Procedure contains some departures from general rules provided for some family matters in articles 568–578, as well as from rules for the non-contentious procedure provided in articles 506–525, namely: (1) the court's substantive decisions on return of a child may be made only after a trial; and (2) the decisions become effective and enforceable only after they become final. The latter constitutes a departure from a general rule provided in article 578 of the Code of Civil Procedure that substantive decisions become immediately effective and enforceable.

There is no departure from the general rule provided in article 577 that a custodial court may change its decision any time, even after it becomes final, when the interest of a person affected so requires.⁹⁰

⁸⁰ See Courts of Law in Poland from Piasecki, K. *Organizacja wymiaru sprawiedliwosci w Polsce* [Organization of Justice Administration in Poland], [hereinafter Piasecki], PWSBiA. Warszawa 1995.

⁸¹ *The Constitution*, art. 176, sec. 1.

⁸² The Law on Courts, art. 3

⁸³ *Id.* art. 8.

⁸⁴ *The Code of Civil Procedure*, art. 568.

⁸⁵ *Id.* art. 569, sec. 1.

⁸⁶ *Id.* arts. 506 and 570.

⁸⁷ *Id.* art. 580

⁸⁸ *Id.* art. 60.

⁸⁹ *Id.* art. 517. See also Korzan, K., *Postepowanie nieprocesowe* [Non-contentious Procedure], Wydawnictwo C.H. Beck. Warszawa 1997, [hereinafter Korzan].

⁹⁰ *The Code of Civil Procedure*, art. 577.

IV. LAW ENFORCEMENT SYSTEM

As a general rule, judgments are enforceable only after they become final, i.e., when they are not subject to appeal. This rule has exceptions applicable to the return of a child which were discussed in part III of this report.

The Code of Civil Procedure contains a separate Chapter VI entitled, The Enforcement of Judgments Concerning the Return of a Person Subject to Parental Authority or Care, which contain articles 1089–1095(1). These special provisions regulating procedure for return of a child are meant to avoid the negative impact that use of force could have on a child.

Pursuant to these provisions, the bailiff should use particular care and do everything in order to avoid any physical and moral damage to the child.⁹¹ The forceful removal of a child, subject to parental or custodial authority and his/her return to the authorized person may take place only in the presence of the authorized person or his/her designee. The act of return of a child can not take place in absence of this person.⁹² When performing his duties connected with the return, the bailiff is subject to strict court supervision.

V. LEGAL ASSISTANCE

The Republic of Poland signed the Hague Convention with reservations to article 26, para 3 of the Convention. As a result of this reservation, Poland is bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings only to the extent to which those costs may be covered by the Polish system of legal aid and advice.

VI. CONCLUSION

Due to the relatively short time in which of the Hague Convention has been applied in Poland, it is difficult to evaluate the compliance of the Polish government and courts with its requirements. There are very few cases available and there is no comprehensive official or unofficial analysis of its application in the Polish domestic legal system.

The present report, being the first brief description and analysis of the topic, is obviously limited by this lack of scholarly writings on the subject. However, a brief analysis of the cases to date did not detect any major problems with the application of the Hague Convention in the Polish legal system.

Prepared by: Bozena Sarnecka-Crouch, senior legal specialist, Law Library of Congress, November 24, 1999.

SOUTH AFRICA

In 1996, South Africa ratified the Hague Convention on the Civil Aspects of International Child Abduction of 1980. Without the benefit of the Convention, it was usual for a child abducted from his/

⁹¹*Id.* art. 1092.

⁹²*Id.* art. 1091.

her parent in South Africa to remain in a foreign country up to two years before being returned, often at enormous legal expense.

Dullah Omer, Justice Minister, praised the Convention in that the international cooperation would offer important relief to the custodian parent whose child has been abducted by the other parent.¹

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

THE LAW

The South African Parliament passed the Hague Convention on the Civil Aspects of International Child Abduction Act in November 1996.² The Act, which entered in force on October 1, 1997, made the provisions of the Convention part of the domestic law of South Africa by incorporating it in full.³

However, because of the two reservations taken by South Africa, the country is not bound to assume any costs and expenses arising from court proceedings unless such costs are covered by the South African legal aid system. In addition, it does not accept applications and documents in French although that is one of the official languages of the Convention.

To fulfill the requirement of the Convention, the Law designates the Chief Family Advocate⁴ as the Central Authority.⁵ In writing, he/she may delegate his/her powers to any Family Advocate.⁶

Article 5 of the Law authorizes the Minister of Justice to make regulations to give effect to additional provisions of the Convention. Furthermore, such regulations may prescribe fees and provide for the expenditure that is incurred due to the application of the Convention.

The Minister can also prescribe a penalty of imprisonment for a period not exceeding twelve months or of a fine for any contravention or failure to comply with the regulations.⁷

The Law also requires the regulations to be tabled in Parliament within 14 days after the publication in the Government Gazette. Any one of these regulations or any of their provisions may be repealed by a resolution passed by both houses of Parliament during the session in which such regulation has been tabled.⁸

REGULATION

The Minister of Justice issued the regulation required by the Act and it also took effect on October 1, 1997.⁹ It regulates certain practical aspects of the Chief Family Advocate's duties that are imposed by the Convention.

¹ Africa News Service of January 27, 1998.

² Act No. 72 of 1996 in Statutes of the Republic of South Africa Classified and Annotated From 1910-1996 (Durban, 1997).

³ Reg. 65 of 1997 in Republic of South Africa Government Gazette, No. 18322, Oct. 1, 1997, p. 1.

⁴ The Chief Family Advocate is appointed by the Minister of Justice under the provisions of the Mediation in Certain Divorce Matters Act, 1987.

⁵ *Supra* note 2, art. 3, at 191.

⁶ *Id.*, art. 4.

⁷ *Id.*, art. 5.

⁸ *Id.* at 192.

⁹ *Supra* note 3, reg. No. 1282 of 1996, at 2.

The Chief Family Advocate is authorized to appoint a Family Advocate or any persons to assist him/her in discharging his/her duties that are imposed by the Convention. The appointment must be in writing and should contain the conditions of the appointment. However, in urgent cases an appointment may be given orally with a confirmation in writing made subsequently.¹⁰

When a person who has the right to custody applies to the Chief Family Advocate for assistance under the provisions of the Convention, the application constitutes authorization to perform all the duties imposed on him/her by the Convention. The Chief Family Advocate or the person designated by him/her may appear on the applicant's behalf in any proceeding to give effect to the provisions of the Convention.¹¹

If the applicant does not want to appoint a legal representative and does not qualify for legal aid, "the Chief Family Advocate or a Family Advocate shall appear on behalf of an applicant in any court proceedings that may be necessary to give effect to the provisions of the Convention."¹²

Any person who obstructs the Chief Family Advocate or a person designated by him/her to carry out the duties he/she is charged with by the Convention may be fined or sentenced to imprisonment for a period up to a year.¹³

If an application for the return of a child or for the right of access to a child is successful, the Chief Family Advocate may recover the expenses or costs incurred by the Advocate or persons assisting him/her. The fee for the Chief Family Advocate or Family Advocates is 50 rand per hour and a maximum amount of 300 rand per day.¹⁴

If the person who is assisting a family Advocate is not an officer in the public service, such as a tracing agent, the fee for locating the child is 280 rand plus expenses.¹⁵

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION AND CHILD ABDUCTION

CUSTODY AND PARENTAL VISITATION RIGHTS

Under South African law, custody of children vests in both parents unless they are divorced or separated. Courts must settle the custody issue before they can grant a divorce.¹⁶

Parents may conclude a custody agreement, which has to satisfy the court to be incorporated in the divorce decree. In the absence of such an agreement, the court makes the custody order by taking into consideration the best interests of the child. A custody order does not deprive the non-custodian parent of all his/her rights. He/she is entitled to reasonable access unless the court finds that it is in the child's best interest to deny it.

The non-custodian parent can obtain access to his/her minor child by an arrangement with the custodian parent. In the absence

¹⁰ *Id.*, sec. 3, at 3.

¹¹ *Id.*, sec. 2.

¹² *Id.*, sec. 5.

¹³ *Id.*, sec. 4.

¹⁴ *Id.*, sec. 6.

¹⁵ A rand is equivalent to US\$ 1,610, as of June 7, 1999.

¹⁶ *Supra* note 2, act 70 of 1979, sec. 6(1) at 425.

of an agreement, the court can make an order regarding visitation rights and lay down its particulars. The access order may be given when the high court is granting a divorce decree or when a parent applies for it.¹⁷

PARENTAL CHILD ABDUCTION

If a non-custodian parent abducts his/her child, he/she may be held in contempt of court. A custodian parent whose child has been abducted may apply to the court for the child's return. "In such a case a court may order that the child be returned to the custodian spouse or it may order that the sheriff take possession of the child in order to deliver it to the custodian spouse. . . ."¹⁸

At present, South Africa does not have a special penalty for parental abduction.

OBSTRUCTION OF PARENTAL VISITATION

If a custodian parent obstructs the visitation rights of the other parent in any way, he/she may be held criminally responsible and may be liable to a fine not exceeding two hundred rand and/or to imprisonment for a period not exceeding one year.¹⁹

A custodian parent is required to notify the other parent of any change in his/her residential address in writing. Otherwise he/she may be liable to a fine not exceeding one hundred rand.²⁰

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The South African court system consists of general courts and special courts. General courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts including any high court of appeals, and the Magistrate Courts. Such courts as the Water Courts, Income Tax Court, the Patents, Trade Marks and Copyright Courts are specialized in certain matters.

The Constitutional Court consists of a president, deputy president, and nine members. This Court is the highest court on constitutional matters.

The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice, and as many members as determined by an act of Parliament to meet the need of the Court. It is the highest court of appeal except for constitutional matters.²¹

The High Court may decide on any matter that is not assigned to another court because of its nature or the amount involved. However, "the judge president . . . may at any time direct that a matter be heard by a full court consisting of as many judges as he may determine."²²

The Magistrate Court is a lower court with only a limited jurisdiction.

The High Court is the court of first instance that will hear cases when brought under the provisions of the Convention. It is also the

¹⁷ W. A. Joubert ed., 16 the Law of South Africa 170–172 (Durban, 1998).

¹⁸ Id. at 176.

¹⁹ *Supra* note 2, Law No. 93 of 1962, sec. 1(1), at 181.

²⁰ Id., sec. 1(3).

²¹ *Supra* note 2, Law No. 108 of 1966, secs. 167, 168, at 1291.

²² *Supra* note 16, at 103.

court that determines the custody of minor children and the visitation rights of the non-custodian parent.

IV. LAW ENFORCEMENT SYSTEM

As explained above, in the absence of voluntary compliance with a court order in regard to the return of an abducted child, the court may order the sheriff to take possession of the child in order to deliver him/her to the custodian parent.

Denial of visitation rights is an offense in South Africa, and the offender may be prosecuted to force him/her to comply with the court order.

In addition, the penalties prescribed by the regulation for obstructing the Chief Family advocate helping the return of a child or securing visitation rights under the Convention is a serious deterrent.

V. LEGAL ASSISTANCE PROGRAMS

The Legal Aid Act²³ establishes the Legal Aid Board with the objective of rendering legal aid to indigent persons and providing legal representation at State expense.²⁴ The Act does not define an indigent person. However, the Board lays down "a means test" which it revises from time to time.²⁵

The Board appoints legal aid officers who work under the supervision of the Director of Legal Aid. When an application for legal aid is made to one of the legal aid officers, he/she considers whether an applicant qualifies for aid under the guideline established by the Board. Qualified applicants are referred to an attorney whose fee is paid by the State.

VI. CONCLUSION

The Hague Convention on the Civil Aspects of International Child Abduction was ratified by South Africa because of the enormous legal expense and time spent for the return of an abducted child by a parent to his/her custodian parent in South Africa. In the opinion of the South African Justice Minister, international cooperation due to the Convention would offer important relief to such parents.

South Africa has taken full advantage of the Convention. There has been a considerable number of outgoing applications for the return of the abducted children to South Africa. However, the number of incoming applications has been small, and there have been no published cases as yet. Therefore, it is unclear how the South African courts will approach the child abduction cases under the provisions of the Convention.

South Africa was well aware of the advantages of the Convention when it ratified it. However, it has tried to reduce its financial burden by taking reservations to court costs and language. Thus, expenses arising from court proceedings must be borne by the applying parent unless they are covered by the South African legal aid

²³ *Supra*, note 2, act. No. 22 of 1969, at 343.

²⁴ *Id.*, sec. 3.

²⁵ *Id.*, sec. 3(d), at 343(1).

system, and all submitted documents must be in English or Afrikaans, so that there will not be any translation costs.

Prepared by Belma Bayar, Senior Legal Specialist, Eastern Law Division, Law Library of Congress, October 2000

SWEDEN

INTRODUCTION

Sweden is a participant in the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention). Sweden ratified the Convention in 1989. The text of the Convention in French and English together with a Swedish translation is published in the Swedish Treaty Series.¹

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Sections 11–23 of a 1989 Law entitled “On Recognition and Enforcement of Foreign Custody Decisions and on Returning of Children,”² contain provisions on the implementation of the 1980 Convention.

The Swedish Ministry of Foreign Affairs is designated as the Central Authority in order to render the task of discharging the duties which are imposed by the Convention.³

According to Section 2, the law does not apply to a child who has reached the age of 16.

Section 11 deals with the rule on the return of the child. According to section 12, the return of the child may be denied by the court if:

- (1) at the time of the application for proceedings a full year has passed since the abduction was carried out, and the child has already settled in the new environment;⁴
- (2) there is a serious risk that the return of the child harms the child’s psychological or physical health or otherwise the child will be subjected to a situation which cannot be acceptable;
- (3) the child himself opposes the return, and has reached such age and maturity that his wishes should be respected; and
- (4) the return of the child is incompatible with the fundamental principles regarding the protection of human rights and freedom as respected in Sweden.⁵

¹ Sveriges Överenskommelser med Främmande Makter 1989:7.

² Svensk Författningssamling (SFS) 1989:14, as amended by SFS 1993:212.

³ SFS 1989:177, as amended by SFS 1993:329.

⁴ This rule is in conformity with Article 12 of the Convention.

⁵ This provision is in conformity with Article 20 of the Convention.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The provisions of Chapter 7:4 of the Swedish Penal Code prohibit parental child abduction. Accordingly, if a person without authority separates a child under 15 from the person who has the custody of the child, he or she will be convicted for an arbitrary undertaking with a child to a fine or imprisonment up to one year, provided that the action does not constitute a deprivation of freedom, in which case a more serious punishment will be in order.

The same rule applies if a person who has joint custody of a child under 15, together with another person, who without any acceptable reason arbitrarily separates the child from the other custodian, or the person who shall have the custody but before obtaining the legal authority acts arbitrarily with regard to the child. If the crime so committed is considered aggravated, the penalty will be imprisonment of a minimum of six months and a maximum of four years. According to Chapter 7:6, the public prosecutor may not “*ex officio*” proceed in matters of arbitrary actions regarding the children unless the prosecution is necessary from the public point view.

B. PARENTAL VISITATION

Chapter 21 of the Swedish Parents and Children Code⁶ contains rules on the enforcement of judgments on child custody and visitation. The right forum for cases concerning the enforcement of custody judgments is the county administrative court. The provisions of Chapter 21, sections 9 and 11–16 are equally applicable to the questions relating to the implementation of the Convention.

According to section 9, the measures relating to a child must be carried out in a mild and compassionate manner. When a child is to be picked up by a court order, a close person to the child, who can be of mental support to the child, should be present. If there is such person in the capacity of a social worker that person should be present. If possible, a pediatrician, a child psychiatrist or child psychologist should also assist in the process. If due to sickness, a child should not be removed, or if there is any other hindrance to the execution of the court order, the enforcement should be postponed.

Section 11 empowers the court to order a medical examination of the child. According to section 12, the court must hold a hearing unless such hearing appears to be manifestly unnecessary. Sections 13 and 14 are on the payment of the legal expenses, according to which the court may order one party to pay the party’s expenses. Section 15 empowers the court to reconsider a decision, if there are changes of circumstances or if other specific reasons call for it. Section 16 provides for the participation of lay judges in the proceedings in the administrative court of appeal (see question 3).

⁶SFS 1995:974.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

According to section 13 of the 1989 implementation law⁷ an application for the enforcement of the provisions of the Convention must be submitted to the county administrative court.

The appeal instance is the regional administrative court of appeal. The highest instance for decisions made by the administrative courts is the Supreme Administrative Court. The proceedings in the administrative courts are carried out by application of the rules contained in the Law on Administrative Procedures.⁸

IV. LAW ENFORCEMENT SYSTEM

According to section 15 of the 1989 implementation law,⁹ cases concerning the return of children must be handled speedily by the courts. If a case concerning the return of a child has not been resolved by the court within six weeks after the date the application for the enforcement was made, the court is obligated to explain the reason for delay, if the applicant so requests.

Before the court decides on the enforcement, it may instruct an official of the social services to attempt to convince the party who is holding the child to return the child to the party who has the custody of the child. Even another person who conveniently can fulfill this task may be entrusted if the court believes that the child can be returned without unnecessary delay (sec. 16).

The court must obtain knowledge about the child's wishes before making a final decision on the enforcement and the return of the child, unless with due consideration to the child's age and maturity obtaining such information appears to be impossible (sec. 17).

If the court decides to issue an order for physical enforcement, it may in the first place impose a conditional fine, if such decision can lead to the return of the child without a delay. Otherwise the court may decide that the child should be returned through the enforcement executed by the police authority (sec. 18).

In case a judgment or a decision to be enforced concerns a visitation right, the court may order an enforcement by the police authority only if it appears that the enforcement by other means cannot be carried out (sec. 18:2).

When there is a risk that the child might be moved to another country, or the enforcement of an order on the return of the child may cause difficulties later on, the court may order that the child should immediately be taken into custody, and make a plan on the conditions or timing for visitation. In such circumstances, every effort must be made to prevent causing harm to the child. If it is possible, a physician and a social worker should be present, or as the case may be, a person having close contact with the child should be present. On the whole, any action taken in this respect must immediately be reported to the court, which will decide on the continuation of such undertaking (secs. 19 and 20).

As a matter of principle, parental custody in Sweden is jointly held by a married couple from the birth of the child until the child

⁷ *Supra* note 2.

⁸ SFS 1971:291, as amended.

⁹ *Supra* note 2.

reaches the age of 18 or the child marries before reaching that age.¹⁰ Sole custody rests with the mother of child born out of wedlock, unless the father of the child marries the mother. Unmarried parents may also jointly apply for the joint custody of their child.

The court must raise the question of custody and visitation in a divorce proceedings. However, the court must respect an agreement between the parents, unless it finds that the agreement is not in the child's best interest.

If it shows that in a case concerning a petition for custody of a child an application for the return of the child has already been made, the court may not proceed in the custody question before the matter relating to the return of the child has been duly reviewed and resolved. If in a custody case the Central Authority (for Sweden, The Ministry of Foreign Affairs) informs the court that the child has been unlawfully brought to the country or unlawfully retained in Sweden but no application has yet been made, the court may not reach a decision on the question of custody before giving a reasonable time for filing the application for the return of the child.¹¹

V. LEGAL ASSISTANCE PROGRAMS

The rules governing the legal assistance program are contained in the 1996 Law on Legal Aid.¹² According to the provisions of section 35 of the Legal Aid Regulation,¹³ citizens and permanent residents of a country participating in the Hague Convention are entitled to legal aid, on the same basis as Swedish citizens and permanent residents, in matters concerning the application of the Convention. However, it should be noted that Sweden has made a reservation with regard to Article 26:2 of the Convention, meaning that Sweden shall not be bound to assume any costs referred to in that provision of the Convention resulting from the participation of legal counsel or advisors or from court proceedings, except insofar as those costs may be covered by the Swedish system of legal aid.

Prepared by: Fariborz Nozari, senior legal specialist, Western Law Division, Law Library of Congress, April 1999.

¹⁰Parents and Children's Code, SFS 1995: 974, Chapter 6 on custody and visitation.

¹¹*Supra* note 2, sec. 22.

¹²SFS 1996:1619.

¹³SFS 1997:404.

UNITED KINGDOM

INTRODUCTION

The abduction of children, i.e. taking them away without the consent or authority of persons who have the lawful right to care of them, has long been considered kidnaping, a criminal offense at common law, that is also committable by parents. In recent years, aided by quick and affordable means of travel, an international dimension has been added to the problem by children being wrongfully whisked across state frontiers, away from their country of habitual residence.

Acts of local abduction within a country are dealt with by state courts, and the rights of the parties are determined according to the legal test of what is in the “best interest of the child” concerned. The problem is felt more acutely when a family dispute arises among parents of diverse national origins who reside in one country and a parent takes a child to the country of his origin to seek protection under its laws. In such cases, the rights of the parent from whom the child has been abducted cannot effectively be enforced in domestic courts. Courts are traditionally hesitant to cede jurisdiction to another country when litigants are present within their own jurisdiction. Reflecting their own cultures, the courts may decide the test of the best interest of a child based on their own notions of family relations.

Increasing concerns about international abductions have led to the formulation of international agreements to combat the problem. At least two such major agreements have been reached in order to deter international child abduction and to provide for the quick return of a wrongfully removed child to his or her home country. These agreements provide civil law remedies, but do not deal with any criminal aspects of child abduction.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

The United Kingdom ratified the Hague Convention on the Civil Aspects of International Child Abduction on August 1, 1986, when the Child Abduction and Custody Act 1985 came into effect.¹ Section 1 of the Act grants the Convention the force of law in the United Kingdom and section 2 authorizes the issuance of Orders in Council specifying the Contracting States to the Convention.² The Convention applies only to children under the age of 16 and only in cases in which the child who has been wrongfully removed or retained had been habitually resident in a Contracting State. Under the Act, a removal or retention is considered wrongful when it occurs in breach of custody rights under the law of habitual residence, which rights were actually exercised or would have been exercised but for the removal or retention. A removal that is not in breach of domestic law may nevertheless be “wrongful” under the Convention.³ In a case where a person has custody pursuant to an interim order of a foreign court, this in itself does not justify the child’s removal from the foreign jurisdiction, particularly when another person had been granted access to a child under the order.⁴ The court is bound to order the return of a child if the application is brought within 12 months of the wrongful removal or retention.

¹ Ch. 60 (“the Act”). The Hague Convention (“the Convention”), signed on October 25, 1980, is set out in Schedule 1 of the Act. The Act also ratified the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody and Children, signed at Luxembourg on May 20, 1980. The European Convention is outside the scope of this report.

² The Child Abduction and Custody (Parties to Conventions) Order 1986, S.I. 1986, No. 1159, as amended.

³ In *Re F (A Minor: Abduction, Custody Rights Abroad)*, [1995] Fam. 224, a mother who was not in breach of domestic law in removing her child from Colorado was nevertheless held to be in breach of the father’s right of custody. In relation to unmarried fathers and their rights of custody, a Practice Note delineating those rights discusses court decisions that expand the concept to include more than strictly legal rights: *Practice note: Child Abduction and Custody Act 1985*, 142 Sol. J. 114 (Feb. 6, 1998).

⁴ *Re E (A Minor: Abduction)* [1989] 1 FLR 135 (CA).

For applications made after the one-year period, the court must still order the child's return, unless it is demonstrated that the child is now settled in its new environment.

A Contracting State is required to set up a central authority, which must undertake several measures, including to:

- (a) discover the whereabouts of the child;
- (b) prevent further harm to the child;
- (c) secure the voluntary return of the child or bring about an amicable resolution of the issues;
- (d) initiate judicial proceedings with a view to return of the child;
- (e) provide legal aid and advice; and
- (f) make necessary and appropriate administrative arrangements to secure the safe return of the child.⁵

The Act establishes the following Central Authorities within the United Kingdom:

- In England & Wales—the Lord Chancellor, whose duties in this regard are carried out by a Child Abduction Unit (“CAU”)⁶ under the administrative control of the Official Solicitor of the Supreme Court, an independent, semi-judicial authority.
- In Scotland—the Secretary of State, whose functions in this regard are carried out by the Scottish Court Administration.⁷
- In Northern Ireland—the Northern Ireland Court Service, as designated by the Lord Chancellor.⁸

The Central Authority on the Isle of Man, which is not a part of the United Kingdom, is:

HM Attorney-General's Chambers.⁹

The Act does not provide specific guidance on how a Central Authority is to proceed in undertaking the measures set out in Article 7, and, although section 10 of the Act authorizes rules of court being made, no such rules have been issued.

There is no specified form for making an application to a Central Authority; an application will be accepted in any form provided it includes sufficient details, including:

- the identity of the applicant, the child, and the person alleged to have removed or retained the child;
- the date of birth of the child, if available;
- the grounds on which the claim for return of the child is made; and

⁵Convention, Art. 7.

⁶The address is: Lord Chancellor's Department, Child Abduction Unit, 81 Chancery Lane, London, WC2A 1DD. Telephone: 44 0171 911 7047/7094. Fax: 44 0171 911 7248. The CAU operates a Web site at the following URL: <<http://www.offsol.demon.co.uk/cauopefm.htm>> This report concentrates on the practice and procedure followed in England and Wales only.

⁷Scottish Courts Administration, Hayweight House, 23 Lauriston Street, Edinburgh EH3 9 DQ. Tel: 44 131 229 9200. Fax: 44 131 221 6894.

⁸Northern Ireland Court Service, Legal Advisor's Division, Windsor House, 5 Bedford Street, Belfast BT2 7LT. Tel: 01232 328 594. Fax: 01232 439 110.

⁹HM Attorney General's Chambers, Government Offices, Douglas, Isle of Man. Tel: 01624 685 451. Fax: 01624 629 162.

- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.¹⁰

When a Central Authority receives an application for the return of an abducted child, a solicitor (general attorney) who has experience in child abductions matters is assigned the case. The solicitor will take the applicant's (now the client's) instructions; assemble the evidence, if necessary with the help of the Central Authority; and file affidavits of facts on the relevance of the foreign law. A decision of a judicial or administrative authority outside the United Kingdom may be proved by a authenticated copy of the decision; a copy is deemed to be a true copy unless the contrary is shown.¹¹ The solicitor is also responsible for applying for legal aid under the state program providing assistance to those seeking legal services, based on the merits of the case and a means test (see below for further details). The solicitor will also instruct a barrister (litigation attorney) to represent the applicant at the court hearing.

The solicitor may also obtain an *ex parte* court order to protect the child immediately, including an order for the surrender of passports, and for prohibiting the removal of the child from the jurisdiction of the court or a particular location. If the whereabouts of the child are not known, an order will be sought that either authorizes a search for the child or requires the disclosure of information from a person who is believed to have any relevant information.¹² It is generally not necessary for an applicant seeking the return of a child to attend the hearing.

Article 13 of the Convention provides for certain defenses to an application that, if successful, grant a court the discretion not to order the return. The defenses arise in cases in which the person having the care of the child was not actually exercising the custody rights at the time of removal; the removal or retention was consented to by the applicant parent, or where he or she had subsequently acquiesced to it; the return would pose a grave risk of physical or psychological harm to the child, or place him or her in an intolerable situation; the child objects to being returned, and has reached an age or degree of maturity at which it is appropriate to take account of those views.

The United Kingdom has not adopted Article 20 of the Convention, which provides that the return of a child "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." The Article was omitted as it was considered unnecessary given the other defenses and because at that time it had no clear meaning in English law. The United Kingdom has since enacted the Human Rights Act 1998,¹³ which incorporates the European Convention on Human Rights into domestic law. However, an amendment to incorporate Article 20 of the Hague Convention was rejected.¹⁴

¹⁰The Convention, Art. 8.

¹¹The Act, § 7.

¹²*Id.* § 24A.

¹³Ch. 42.

¹⁴Parl. Deb. HL, Nov. 27, 1997.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

The common law offense of kidnaping may be committed by a parent who takes away by force or fraud his own unmarried child under the age of 18, without lawful excuse and without the child's consent. Under the Child Abduction Act 1984,¹⁵ it is now an offense for a person connected with a child under the age of sixteen to take or send the child out of the United Kingdom without the appropriate consent. A "person connected with the child" is considered to be a parent, a reputed father, a guardian, a person who has a residence order with respect to the child, or a person who has custody of the child. An "appropriate consent" can be given by each of the following: a child's mother; a child's father, if he has parental responsibility for the child; a guardian; anyone with a residence order or custody; or a person who has the leave of the court. No offense is committed if a person who has a residence order takes or sends the child out of the United Kingdom for less than one month.

The maximum penalty under the 1984 Act is seven years' imprisonment. However, prosecutions can only be brought with the consent of the Director of Public Prosecutions and are relatively rare.

The Children Act 1989,¹⁶ section 8, makes provisions for the issuance of a contact order, a prohibited steps order, or a residence order; all are referred to as "a section 8 order," and impose an automatic prohibition on taking the child out of the United Kingdom. Such orders can be made *ex parte*, if necessary. In case of a contact order, if it is feared that the child may be abducted by the person exercising contact, the order may be varied to provide for the contact to be supervised. A child may also be made a ward of the High Court,¹⁷ which prohibits his removal from the United Kingdom.¹⁸ In such cases, a passport issued to a child may be required to be surrendered.¹⁹

An order preventing the removal of a child from the United Kingdom may be enforced by requesting the police to issue a "Port Stop" at points of departure.

B. PARENTAL VISITATION

Under the Children Act 1989 married parents have joint and equal parental responsibility over a child up to the age of 18 years. The Family Law Act 1996,²⁰ section 11, lists factors that a court must take into account in proceedings for a divorce or separation order. As regards children of the marriage, the court must treat the welfare of the child as paramount and have particular regard for:

the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by—

¹⁵Ch. 37.

¹⁶Ch. 41.

¹⁷Supreme Court Act 1981, ch. 54, §41.

¹⁸Family Law Act 1986, ch. 55, §38.

¹⁹*Id.* §37.

²⁰Ch. 27.

- (i) his having regular contact with those who have parental responsibility for him and with other members of his family; and
- (ii) the maintenance of as good a continuing relationship with his parents as is possible. . . .²¹

With regard to living arrangements, a court may issue a residence order in favor of two or more persons who do not themselves all live together.²² The residence order may specify the periods during which the child is to live in the different households concerned. This order introduces an element of “time-sharing,” which is a feature of joint custodial arrangements in other countries.

The court may also issue an order requiring a parent with whom the child lives to allow him to visit or stay with the other parent.²³ The authority for a contact order is based on a presumption of reasonable contact in favor of parents and certain other individuals. The order is subject to the principle of welfare of the child and the courts’ power of intervention, but the power to deprive the child and parent of contact is not exercised lightly and there must be sound justification for doing so. The fact that contact arrangements may be difficult to operate, or that the child or the parent would prefer not to have contact, does not by itself provide justification for refusing it.²⁴

In a great majority of divorces, however, the parties themselves work out informally the arrangements for the custody of children and rights of contact.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING HAGUE CONVENTION

A. FAMILY PROCEEDINGS GENERALLY

Jurisdiction in family matters and matters relating to children is vested in three levels of courts: the High Court, the county courts, and magistrates’ Courts. The lowest level of proceedings is conducted in the magistrates’ courts by lay persons assisted by a legally qualified clerk. In major metropolitan areas, legally qualified stipendiary magistrates sit in these courts. A number of proceedings, such as, for example, the issuance of care and supervision orders, parental contact, etc., must be commenced in magistrates’ courts. Divorce and matrimonial matters must be commenced in a county court in which decisions are made by a district judge or circuit judge. The highest level of family proceedings is the Family Division of the High Court, which consists of specialist family judges. There is a selective divorce jurisdiction in the High Court, which has exclusive jurisdiction to issue an order making a child a ward of the court. Cases with an international aspect are most appropriately heard in the High Court.

Hearings in family matters are notionally adversarial, and a combative or hostile approach in cases involving children is discouraged by the court. The welfare of the child is paramount, and the court will restrict evidence that detracts from this focus. Al-

²¹ *Id.* § 11(4)(c).

²² Children Act 1989, § 11(4).

²³ *Id.* § 8.

²⁴ Andrew Bainham, *Children: The Modern Law* 128 (2d ed. 1999).

though it is usual to present oral evidence with a chance to cross-examine on contentious facts, affidavits or statements in advance are relied upon to a great extent in cases involving children. Moreover, such hearings are “in chambers,” with parties and their lawyers present, but without public access. Thus, confidentiality is protected and publicity is actively discouraged.²⁵

B. UNDER THE CONVENTION

All applications for the return of children wrongfully brought into the jurisdiction of the court are dealt with in London by a judge of the Family Division of the High Court.²⁶ The Clerk of the Rules, a Court official responsible for listing cases, ensures that they are listed for hearing very quickly—sometimes in two days. The court exercises control over the progress of the case; the litigants are not allowed to let the case “drift,” and adjournments are limited to a maximum of 21 days.

The application brought in the High Court should be initiated by originating summons in a prescribed form,²⁷ but in emergencies applications may be made *ex parte*. The time limited for acknowledging service of an originating summons is seven days or such further time as the court may direct.²⁸ The plaintiff may lodge an affidavit in support of the application and serve a copy on the defendant, and the defendant may reply again by lodging an affidavit and serve a copy on the plaintiff within seven days after service of the originating summons. The hearings are heard and determined by a judge in chambers unless the Court otherwise directs.²⁹ The Court may give interim directions as it thinks fit for the purpose of securing the welfare of the child or for preventing changes in circumstances. Thus, the Court may direct that the child is to reside with a specified person or at a specified place while the application is being considered.

Hague Convention hearings are usually conducted on written evidence and submissions made by lawyers. Oral evidence is taken in only a minority of cases. A foreign applicant may instruct a solicitor to bring proceedings without approaching the Central Authority as an intermediary. Judgments and orders are usually given at the end of the final hearing, but in difficult cases judgment may be reserved for 14 days or less.

IV. LAW ENFORCEMENT SYSTEM

The mandate in Article 12 of the Convention “to order the return of the child forthwith” is considered to be binding, and the Court returns the child speedily, once a decision has been made. In many instances, children leave the country within seven days of the hearing. In enforcing the return, the Court makes frequent use of undertakings, voluntary promises made formally in writing by parties, given to the Court. These amount to binding orders, and their

²⁵ Anne-Marie Hutchinson and Henry Setright, *International Parental Child Abduction* 180 (1998).

²⁶ The vesting of jurisdiction in a single high level court avoids the problem of a large number of courts having potential jurisdiction to hear Convention applications.

²⁷ Family Proceedings Rules 1991, S.I. 1991, No. 1247, r. 6.2.

²⁸ *Id.* r. 6.6.

²⁹ *Id.* r. 6.8.

breach may result in imprisonment for contempt. The undertakings are meant to regulate and mitigate the effects of a return until a hearing is held in the requesting state, and to ensure that conditions are met without which a return would be impossible. "The English court is often concerned to ensure that the voluntary but binding nature and effect of these undertakings is understood and accepted in countries to which the children are returned."³⁰

The orders made by the High Court are enforceable by the Tipstaff, a court official who can seek help from the police. Failure to comply with an order of return is also a civil contempt punishable by imprisonment for up to two years, sequestration of property, or a fine. The Court also uses the Tipstaff to find missing children and seize passports and travel documents.

V. LEGAL ASSISTANCE PROGRAMS

The Legal Aid Act 1988³¹ allows anyone, whether within the jurisdiction or not, to apply for legal aid for instituting civil legal proceedings in which such assistance is available. The Legal Aid Board applies merits and means tests to determine whether a litigant has reasonable grounds for taking or defending an action and whether he or she meets the financial eligibility criteria. The United Kingdom has made a reservation under Article 42 of the Hague Convention that requires Central Authorities not to impose any charges in relation to applications submitted under the Convention. However, free legal aid, not subject to the merits and means tests, is available to applicants seeking the return of a child under articles 3 and 8. The expenses of returning the child are not available from public funds. Legal aid is also available, subject to the two tests, to those seeking rights of access under the Children Act 1989, section 8.

Applications for legal aid by non-United Kingdom residents are made to the Legal Aid Board.³² In 1998, a spokesman for the Lord Chancellor's Department made the following policy statement in response to a question in the House of Commons on the availability of legal aid to overseas litigants in child abduction cases:

It is the Government's policy that any person whose case is accepted by the Central Authority under the Hague or European Child Abduction Conventions will receive legal aid. This is because of the vital importance of cases affecting the residence of children litigated before the English and Welsh courts. The availability of legal aid in other countries is not considered. The award of legal aid to foreign nationals is perfectly proper under the terms of the existing legal aid scheme.³³

VI. CONCLUSION

The High Court places a very heavy emphasis on the purposive intent of the Hague Convention to return children wrongfully removed from their habitual residence jurisdiction. The approach is

³⁰ *Supra* note 25, at 186.

³¹ Ch. 34.

³² 29/37 Red Lion Street, London, WC1R 4PP.

³³ 307 Parl. Deb., H.C. (6th ser.) c.712wa (1998).

practical, based on the facts of each individual case, including an examination of the implications for the child of a return or a refusal and the likely outcome of litigation thereafter. The Court considers the Convention to provide “a high and reliable standard of justice and protection for children.”³⁴

Several studies bear out the successful working of the Convention. An examination of applications dealt with in 1996 found that while the United States handled 653 applications, England and Wales was the next most active Convention jurisdiction, making 206 and receiving 166 applications.³⁵ Of the incoming applications, which involved 271 children, 94 percent were for the return of the child or children while only 6 percent concerned access. In the vast majority of the cases, the abductor was one of the child’s parents, with most often the mother being the abductor. Among the incoming cases that were completed by the time of the study, 43 percent were resolved by a court ordering the child’s return and only 5 percent of the cases resulted in a judicial refusal to return the child; twenty-one percent had not been completed, eight percent resulted in a voluntary return, and six percent of the applications were withdrawn. The authors were able to conclude:

The Hague Convention is generally considered to be a success, a fact evidenced by the growing number of countries signing the Convention. . . . None of our evidence suggests that the reputation of the Hague Convention is in any way undeserved: applications are dealt with speedily (England and Wales appears to have the most expeditious system for dealing with Convention applications; in our sample the average length of a completed application here was six and a half weeks compared to an average of 11.5 weeks among “outgoing” cases), and relatively few result in refusals to return children.³⁶

An earlier study of the cases determined under the Convention also showed that the United Kingdom, along with the United States, is adhering to the spirit of the Convention by refusing to liberally construe its limitations and exceptions:

“[J]udicial authorities in both countries are consistently demonstrating to parents that an international abduction will no longer aid them in obtaining a favorable custody decree. In decisions to date, the courts in the United States and the United Kingdom have fostered and served the Convention’s most important goal deterring international child abduction.³⁷

Prepared by: Kersi B. Shroff, senior legal specialist, Directorate of Legal Research, Western Law Division, Law Library of Congress, November 1999.

³⁷Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?* 2 *Global Legal Studies Journal* (Spring 1995). <<http://www.law.indiana.edu/glsj/vol2/no2/todd.html>>

³⁴*Supra* note 25, at 185.

³⁵International Child Abduction—*The English Experience*, 48 *International and Comparative Law Quarterly* 127 (1999).

³⁶*Id.* at 147 (footnote deleted).

ZIMBABWE

INTRODUCTION

The Convention on the Civil Aspects of International Child Abduction of October 25, 1980¹ emanated from the Final Act of the 14th Session of the Hague Conference on Private International Law to which about 37 countries were participants. The Draft Convention from this Conference was then submitted to governments of participating countries for accession and adoption. It was modeled on the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children of 1980.²

Zimbabwe was not a delegate to the Hague Conference. At the time of the Conference, Zimbabwe was just emerging from a neo-colonial status initially known as Rhodesia and then Zimbabwe Rhodesia. To turn the country from minority white rule to independence, a Constitutional Conference held at Lancaster House in London from September to December 1979 ushered in the new independent Republic of Zimbabwe.³ In order to render the Convention applicable to Zimbabwe, the President of the country on May 24, 1996, declared that consistent with Article 2 of the Convention on contracting states, the Child Abduction Act of 1995, to which the Convention was attached as an integral part of this law, would become effective as the law of Zimbabwe on June 1, 1996, as seen below.⁴ On August 2, 1996,⁵ and June 6, 1997,⁶ respectively Zimbabwe published a list of countries which the country considers its contracting partners with respect to the Convention. These include the following:

- United States
- United Kingdom of Great Britain and Northern Ireland
- Luxembourg
- The Netherlands
- New Zealand
- Mexico
- Australia
- Chile
- Cyprus
- Ireland
- Norway
- Argentina
- Germany
- Italy
- Switzerland, and
- Spain

¹ 19 I.L.M. 1501-1505 (July-Nov.1980).

² *Id.* at 273.

³ *Id.* at 387-408.

⁴ *Infra* notes 7 & 8.

⁵ Stat. Ins. 154, 1996. *Supp. to the Zimbabwean Gazette* of August 2nd, 1996, at 869-870.

⁶ Stat. Ins. 127, 1997. *Supp. to the Zimbabwean Gazette* of June 6, 1997, at 863.

I. DOMESTIC LAWS AND REGULATIONS IMPLEMENTING THE HAGUE CONVENTION

Zimbabwean national law with respect to the Hague Convention on the Civil Aspects of International Child Abduction is the Child Abduction Act, No. 12 of 1995.⁷ This law became operative on June 1, 1996.⁸ The Child Abduction Act is a short piece of legislation of 13 sections with a long schedule or annex, which is the text of the Convention. The Act is enabling legislation, and hence the Convention can be—and currently is—enforced as an integral part of Zimbabwean national law. In Zimbabwe, therefore, national law is the Convention itself.

The Convention requires that a Central Authority handle matters relating to this instrument. This role in Zimbabwe is performed by the Secretary in the Ministry of Justice, Legal and Parliamentary Affairs according to section 2 of the Child Abduction Act. However, the President of the country enjoys discretionary powers to designate any other ministry of the government to fulfill this role.

II. DOMESTIC LAWS REGARDING CHILD ABDUCTION AND PARENTAL VISITATION

A. CHILD ABDUCTION

Section 10 of the Child Abduction Act requires that the High Court on an application for the purposes of Article 15 of the Convention by any person who appears to the court to have an interest in the matter, may declare that the removal of any child from or his retention outside Zimbabwe was wrongful within the meaning of Article 3 of the Convention.

B. PARENTAL VISITATION

The Children's Protection and Adoption Act, 1972 as amended;⁹ the Guardianship of Minors Act as amended,¹⁰ and the Matrimonial Causes Act, 1986 as amended¹¹ are relevant to Article 16 of the Convention. This Article gives priority to decisions relating to the return of a child over decisions concerning child custody. According to section 11 of the Child Abduction Act, 1996, the reference in Article 16 of the Convention to deciding on the merits of rights of custody means issuing, altering or evoking appropriate orders for the custody of the child in terms of the three above-mentioned pieces of legislation.

III. COURT SYSTEM AND STRUCTURE—COURTS HANDLING THE HAGUE CONVENTION

The primary court for matters arising under the Convention is the High Court of Zimbabwe. The High Court enjoys jurisdiction to deal with applications and other proceedings with respect to the Convention consistent with section 6 of the Child Abduction Act.

⁷ 1 Stat. L. of Zimbabwe, Ch. 5:05 (rev. 1996).

⁸ Stat. Ins. 80, 1996, *Supp. to the Zimbabwean Gazette* of May 24, 1996, at 525.

⁹ *Supra* note 7, Ch.5:06, 223–247 (rev. 1996).

¹⁰ *Id.* Ch.5:08, 253–256 (1996).

¹¹ *Id.* Ch.5:13, 277–280 (rev. 1996).

According to section 9 of the Child Abduction Act, the Court is also vested with power to issue interim directions and other temporary orders to secure the welfare of the child or to prevent changes pertinent to the determination of issues involved in the case.

The High Court of Zimbabwe used to sit in two divisions, the Appellate Division and the General Division.¹² On August 28, 1981, the Appellate Division was named the Supreme Court of Zimbabwe, and the General Division was reconstituted as the High Court of Zimbabwe as required by the High Court Act of the same date.¹³ Currently, the Supreme Court is organized under the Supreme Court Act, also of August 28, 1981.¹⁴ The Supreme Court of Zimbabwe constitutes the ultimate court of appeal for the country. It does not exercise original jurisdiction. Below the Supreme Court and High Court are the Magistrates Courts which are administered under the provisions of the Magistrates Courts Act (1932), as amended,¹⁵ and the Local Courts established under the Customary Law and Local Courts Act, which traces its history to the Customary Law and Primary Courts Act, No. 6 of 1981.¹⁶ Local Courts apply customary law in civil cases only. Appeals are sent to Magistrates Courts from Local Courts. Magistrates Courts enjoy both civil and criminal jurisdiction. Appeals are sent to the High Court from Magistrates Courts.

The High Court

According to the High Court Act of 1981 as amended,¹⁷ the Court is organized in terms of composition, original jurisdiction in civil and criminal matters, powers of review, appellate jurisdiction in both civil and criminal matters from the Magistrates Courts, and appeals from the High Court to the Supreme Court.

The doctrine of *judicial notice* in matters of proof stated in Article 14 of the Convention has been adopted by Zimbabwe. Therefore, in any proceedings of the High Court of Zimbabwe under the Convention, a document purporting to be an authenticated copy of a decision or determination of a court or judicial authority outside Zimbabwe is admissible on its face value as presented to the court. However, this fact does not preclude any other inquiry the court may wish to make regarding any document presented to it, whether such a document be local or foreign.

IV. LAW ENFORCEMENT SYSTEMS

The High Court under the above-mentioned provisions enjoys powers to issue orders, as well as their execution by the nation's law enforcement agents, pertaining to the return of the child under the Convention, visitation by the left-behind parent, and determination as to the custody of the child. These powers of the High Court as contained in the High Court Act are further reinforced by the provisions of the Child Abduction Act itself. Sections 9 to 11 confer on this Court the power to issue interim orders, declaratory

¹² See generally, R. Redgment, *The Legal System of Zimbabwe* in Modern Systems Cyclopedia (R. Redden ed., 1990 at 200.25; see also, Zimbabwe: A Country Study, 199 (1982).

¹³ *Supra* note 1, Ch. 7:06, 417-429 (rev. 1996).

¹⁴ *Id.* Ch. 7:13, 485-492 (rev. 1996).

¹⁵ *Id.* Ch. 7:10, 439-455 (rev. 1996).

¹⁶ *Id.* Ch. 7:05, 411-416 (rev. 1996).

¹⁷ *Supra* note 13.

orders and any others deemed relevant to enforce the Convention. The nation's law enforcement assets for purposes of enforcing the Convention include the Sheriff's department, consistent with the provisions of sections 19–22 of the High Court Act and the Zimbabwe Republic Police under the Police Act, 1995 as amended.¹⁸ Section 3 of the Preservation of Constitutional Government Act, 1963 as amended,¹⁹ further enables law enforcement agents to pursue a matter upon a resolution of Parliament initiated by the Ministry of Home Affairs declaring that any provision of law of Zimbabwe is of extra-territorial effect.

To this end, such a provision would apply to any person resident in Zimbabwe, but abroad at the time when declaration is made. If such person acts or speaks in a manner which would be considered a violation of the laws of Zimbabwe, law enforcement officers have the power to pursue through appropriate channels the apprehension of such an individual and bring him to justice in Zimbabwe.

In addition, legislation such as the Civil Matters (Mutual Assistance) Act, 1996, as amended,²⁰ assure the reciprocal enforcement in Zimbabwe of civil judgments issued in foreign countries and territories and those of Zimbabwe in the foreign countries and territories. Similarly, the Criminal Matters (Mutual Assistance) Act, 1991, as amended,²¹ also provides reciprocal arrangements in criminal matters between Zimbabwe and foreign countries. The Extradition Act, 1990 as amended,²² further affords an opportunity to any foreign country and Zimbabwe itself to extradite any person to and from the country to Zimbabwe for appropriate matters as regulated by this law. Finally, the general criminal law of Zimbabwe is available to parties to the Convention, as recognized by Zimbabwe, to ensure that all provisions of the Convention have been complied with. Thus an ample regime of law enforcement mechanisms is at the disposal of the government of Zimbabwe to ensure putting into effect and enforcing orders issued by the nation's courts, in particular the High Court with respect to matters of the Convention.

V. LEGAL ASSISTANCE PROGRAMS

Article 26 of the Convention regulates liability for administrative and other costs, expenses, and charges. The premise of this Article is that the Central Authorities and other public services connected with the contracting states do not impose any charges with respect to applications filed under the Convention.

In particular, they may not require any payment from the applicant towards the costs and expenses of the proceeding or, . . . those arising from the participation of legal counsel or advisers. However, they may require the payment of expenses incurred or to be incurred in implementing the return of the child. However, a Contracting State may, by making a reservation in accordance with Article 42 declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except

¹⁸ 2 Stat. L. of Zimbabwe, Ch. 11:10, 161–174 (rev. 1996).

¹⁹ *Id.* Ch. 11:11, 175 (rev. 1996).

²⁰ *Supra* note 7, Ch.8:02, 511–516 (rev. 1996).

²¹ *Id.* Ch. 9:06, 563–573 (rev. 1996).

²² *Id.* Ch.9:08, 657–664 (rev. 1996).

in so far as these costs may be covered by its legal system of legal aid and advice. Upon the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay the necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant and those of returning the child.

But section 13 of the Child Abduction Act stipulates that Zimbabwe having made a reservation as required by the third paragraph of Article 26 of the Convention, the costs referred to in that paragraph shall not be the responsibility of the State or any government official of Zimbabwe, except in so far as they are so borne consistent with the grant of legal aid under any legislation.

Furthermore, the Legal Assistance and Representation Act, 1969 as amended²³ ensures granting legal assistance to indigent persons appearing in the courts of Zimbabwe with respect to criminal proceedings only. There are no identical provisions to cover civil cases. The law of 1969 also provides terms to compensate attorneys who appear for such persons in the High Court and Supreme Court. One should also be mindful of section 13 of the Child Abduction Act, noted above, which prohibits the state bearing costs as a reservation to Article 26 of the Convention.

VI. CONCLUSION

It is hard to gauge the effectiveness of the Convention in Zimbabwe in the absence of any case law to this effect. However, the fact that Zimbabwe, though not an original participant in the Hague Conference of 1980 has deemed it fit to integrate the Convention as part of its national law is indicative of the importance the government of Zimbabwe attaches to the subject of child abduction, internally and across national boundaries.

Prepared by: Charles Mwalimu, senior legal specialist, Eastern Law Division, Directorate of Legal Research, Law Library of Congress, April 1999 (rev. Sept. 17, 1999).

²³*Id.* Ch.9:13, 673 (rev. 1996).

APPENDIX

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION [TIAS 11670]

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—
a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—
a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—
a. ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
b. ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

- a.* to discover the whereabouts of a child who has been wrongfully removed or retained;
- b.* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c.* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d.* to exchange, where desirable, information relating to the social background of the child;
- e.* to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f.* to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g.* where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h.* to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i.* to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

- a.* information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b.* where available, the date of birth of the child;
- c.* the grounds on which the applicant's claim for return of the child is based;
- d.* all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

- e.* an authenticated copy of any relevant decision or agreement;
- f.* a certificate or an affidavit emanating 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;
- g.* any other relevant document.

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Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request bbbbr. a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b. 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

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 the Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER VI—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of such rights may be subject. The central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall 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, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application.

In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a. any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b. any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting State, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provision of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration

shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservations shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

1. for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2. for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period.

It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

1. the signatures and ratifications, acceptances and approvals referred to in Article 37;
2. the accession referred to in Article 38;
3. the date on which the Convention enters into force in accordance with Article 43;
4. the extensions referred to in Article 39;
5. the declarations referred to in Articles 38 and 40;
6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7. the denunciation referred to in Article 44. In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Party Countries and Effective Dates with United States

ARGENTINA—1 June 1991	ITALY—1 May 1995
AUSTRALIA—1 July 1988	LUXEMBOURG—1 July 1988
AUSTRIA—1 October 1988	FORMER YUGOSLAV REPUBLIC OF
BAHAMAS—1 January 1994	MACEDONIA—1 December 1991
BELGIUM—1 May 1999	MAURITIUS—1 October 1993
BELIZE—1 November 1989	MEXICO—1 October 1991
BOSNIA & HERZOGOVINA—1 December	MONACO—1 June 1993
1991	NETHERLANDS—1 September 1990
BURKINA FASO—1 November 1992	NEW ZEALAND—1 October 1991
CANADA—1 July 1988	NORWAY—1 April 1989
CHILE—1 July 1994	PANAMA—1 June 1994
CHINA—	POLAND—1 November 1992
• HONG KONG SPECIAL ADMINISTRA-	PORTUGAL—1 July 1988
TIVE REGION—1 September 1997	ROMANIA—1 June 1993
• MACAU—1 March 1999	SLOVENIA—1 April 1995
COLOMBIA—1 June 1996	SOUTH AFRICA—1 November 1997
CROATIA—1 December 1991	SPAIN—1 July 1988
CZECH REPUBLIC—1 March 1998	ST. KITTS AND NEVIS—1 June 1995
CYPRUS—1 March 1995	SWEDEN—1 June 1989
DENMARK—1 July 1991	SWITZERLAND—1 July 1988
ECUADOR—1 April 1992	TURKEY—1 August 2000
FINLAND—1 August 1994	UNITED KINGDOM—1 July 1988
FRANCE—1 July 1988	• BERMUDA—1 March 1999
GERMANY—1 December 1990	• CAYMAN ISLANDS—1 August 1998
GREECE—1 June 1993	• FALKLAND ISLANDS—1 June 1998
HONDURAS—1 June 1994	• ISLE OF MAN—1 September 1991
HUNGARY—1 July 1988	• MONTserrat—1 March 1999
ICELAND—1 December 1996	VENEZUELA—1 January 1997
IRELAND—1 October 1991	ZIMBABWE—1 August 1995
ISRAEL—1 December 1991	

NOTE: Convention does not apply to abductions occurring prior to the effective date.

[Revised November 7, 2000].

