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REPORT ON THE CROSS BORDER
MOVEMENT OF CHILDREN

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Foreword

This collection of papers is the work of a Working Group of practitioners and academic lawyers who have expertise in family law, and an interest in and commitment to that field of law. The Working Group was set up by the Society of Advanced Legal Studies under my chairmanship in April 1998. Its objective has been to take a contemporary view of problems and issues relating to the cross border movement of children. That, I believe, has been well achieved in the papers produced by the various sub groups of the Working Party. They cover a very wide range, including international child abduction, international adoption, EC law, Shari'a law, immigration and movement of children for abusive purposes. You, the reader, will readily appreciate the very considerable amount of work by busy professionals which has gone into producing these papers. You will also appreciate, I hope, the topical interest of the areas of law and practice which they cover.

There is an increasing trend for children, perhaps the most vulnerable class of citizens in the international community, to find themselves being transported from one State to another. Their lives and destinies are largely in the hands of us, the adults, and the laws made by us, the adults, do not always adequately protect them. The papers are working documents which illustrate the questions with which society is faced in dealing with this fact. What this collection of papers shows is that there are many lacunae and defects in the law which result in children finding themselves in difficult circumstances, rarely, if ever, of their own making, when moving between States. They also highlight a number of procedural difficulties that are as important to finding a speedy and effective resolution of issues as is the substantive law.

We hope that they find a wide and interested audience, and that they will be of use both in illuminating some complex and even arcane legal problems, and in stimulating thought and debate. They deal in, certain respects, with law and issues arising from the state of the law that are not always well understood, and we hope that they will be of help to practitioners in particular by making these matters less obscure. In the papers we have given indications of the changes that are needed to simplify and improve the law, and the lot of a child caught up in its toils. If even a few of them are taken on board by law reformers and legislators, then this exercise will have been more than worthwhile. Indeed, if they serve simply to make a useful contribution to the debate the work and careful thought that has gone into them will be well justified.

P.M. Harris
Chairman of the SALS Family Law Reform Working Group
November 1999

The right to remove children from the jurisdiction

James Meston QC

Introduction

While child abduction naturally attracts considerable concern as well as international co-operation and resources, less attention is given to the basis upon which different national jurisdictions (including those subscribing to international child abduction conventions) will allow and refuse permission for children to be removed lawfully and permanently from their countries of habitual residence. There are considerable differences and disparities in the laws relating to the permanent removal by a parent of children from one country to another, when the consent of the other parent has been sought but refused or withheld, so that the court has to decide whether permission should be granted. These differences are prevalent even between countries in which the law purports to determine such issues solely or primarily by reference to the welfare, or best interests, of the child.

Categories of cases

There are three broad categories of situations in which a parent (usually a mother) will wish to remove a child from one country to live in another:

- (a) Cases in which that parent has remarried and the new spouse either lives abroad or has had his job or business relocated abroad.
- (b) Cases in which that parent herself has been offered employment abroad.
- (c) Cases in which that parent wishes to return to her native country or to emigrate to a country in which her family has settled.

Within those broad categories there are, of course, a variety of motivations and circumstances operating in individual cases, including pre-existing relationships between the child concerned and his or her parents and extended family, and pre-existing parental access arrangements. There are also a wide variety of practical factors in individual cases, including the distance between the countries involved, the financial resources of the parents, education systems and language. There is a further distinction to be made between those cases in which the issue of where the child should live is raised as part of a continuing dispute as to custody (or 'residence' in English terminology) in which the proposals of one of the contesting parents include removal to live abroad, and those cases in which the parent seeking to remove the child is the long-term or unchallenged caretaker/custodian of the child.

However the existence of these different categories, and the variation of factors in individual cases do not explain the different approaches taken in different countries. These are not just national differences; but, particularly in the USA, they can be differences between different internal jurisdictions. Moreover there may be significance in the type of border across which the child is to be taken: i.e. distinctions between movement of children abroad and movement of children from one state, territory or

province to another within a single country (which may involve greater travelling distances than movement abroad). Thus it seems that in Australia a difference of approach applies as between interstate cases and overseas cases, with recognition of a legitimate right of personal choice of residence within Australia. The UK has three separate jurisdictions. While the law relating to permanent removal is similar in Scotland and Northern Ireland to that in England and Wales, it was only after Section 13 of the Children Act 1989 came into force that the law was relaxed to extend the permitted area of free movement from England and Wales to the UK as a whole (there is a similar provision in Section 2 of the Children (Scotland) Act 1995).

England and Wales

The apparent fluctuations in English case law on the topic since *Poel v Poel* [1970] 1 WLR 1469 CA can perhaps be explained as differences of emphasis rather than of approach, but they show that such differences can in reality affect the fundamental question of which party has the burden of proof.

It now appears to be the established position that the burden of proof rests on the party opposing emigration of the children with the parent who has the residence order. Thus in the most recently reported decision of the Court of Appeal it was said (per Thorpe LJ):

‘It seems to me to emphasise that these applications for leave are always difficult cases that require very profound investigation and judgment but not a lot is to be gained by seeking support from past decisions, however superficially similar the factual matrix may appear to be. In my judgment the approach that the court must adopt in these cases has not evolved or developed in any way since the decision of this court in *Poel v Poel*. Later cases...do not seem to me to have added anything.’

Re H (Application to Remove from Jurisdiction) [1998] 1 FLR 848, 853D-E

In the same case approval was given to the dictum of Ormrod LJ in *Chamberlain v de la Mare* (1983) 4 FLR 434 CA, referring to his own statement in an earlier case:

‘The question therefore in each case is, is the proposed move a reasonable one from the point of view adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the child[ren] and the interests of the custodial parent are incompatible...’

Thus, once the custodial parent has established that the wish to go abroad is a reasonable one the burden is clearly upon the opposing parent to establish a compelling reason to prevent removal, and nothing less than a compelling reason will suffice.

The position in England has not been substantively affected by the Children Act 1989, even though one of the express statutory considerations is the likely effect on the child of any change in circumstances (Section 1(3)). There remains a presumption in favour of the reasonable application of the custodial parent (*MH v GP (Child: Emigration)* [1995] 2 FLR 106). Generally the impact on access/contact with the non-custodial parent does not determine the case against the party seeking leave, and the position remains that there has been no case on this topic decided by the House of Lords (see ‘Emigration and Leave to Remove from the Jurisdiction’ by Holman, (1983) 3 *Family Law* 92). There

has also been little academic analysis (see 'When did you next see your father?' by Barton [1997] 9 CFLQ 73 at 82).

Australia

The law in Australia, or at least its application, has likewise fluctuated over time, but the decision of the Full Court in *Holmes and Holmes* [1988] FLC 91-918 set out a number of factors and criteria to be satisfied before leave is granted. Consistent with the paramountcy principle the Australian Courts have resisted elevating any propositions into 'rights' or presumptions. Thus when the courts have to consider any proposal to remove a child from the country the ultimate determinant is the welfare of the child and the wishes or desires of one or both parents may if necessary have to give way to that.

USA and Canada

The most informative insight into the law in the USA comes in the summary and analysis by the Ontario Court of Appeal in *Carter v Brooks* [1990] 30 RFL (3d) 53. In reviewing the law in Canada, the court referred also to four legal approaches adopted in the different American jurisdictions summarised in an article (Bertin, 'Relocation: No Common Ground' (1989) 11 *Fam. Advocate* 7):

'First, the approach in favour of relocation, represented by the Minnesota view, by statute and case law, holding that the custodial parent can move in all circumstances, unless the noncustodial parent can prove by a preponderance of evidence that the move would not be in the best interests of the child.

Second, the approach against relocation, represented by the New York view, holding that relocation of the custodial parent and child is prohibited unless the custodial parent can demonstrate compelling, exceptional circumstances or a pressing concern for the welfare of the custodial parent and child.

Third, the middle position, represented by Illinois, Nebraska, South Dakota and Michigan, holding that a child shall accompany the custodial parent whenever the custodian has a legitimate reason and the move is consistent with the best interests of the child.

[Yet another] standard illustrated by a New Jersey case of *Cooper v Cooper*, 99 NJ 42, 491 A.2d.606 (N.J. 1984) embraces a two-phase approach. In the first phase, the custodial parent must prove that there is real advantage to that parent in the move and two questions must be addressed - whether the move will maintain or improve the general quality of life of both the custodial parent and the child, and whether the custodial parent's motive is a desire to defeat or frustrate the noncustodial parent's visitation rights.

If the custodial parent meets her burden of proof on the first phase, the court enters the second phase, which is whether a realistic and reasonable visitation scheme can be developed. In this second phase, the burden of proof shifts to the noncustodial parent to prove the proposed schedule unreasonably and adversely affects his right to preserve and foster his relationship with the child. What is more, a concurring opinion in that case [*Cooper v Cooper*], strongly objecting to

the reasoning of the majority, sounds very much like the approach taken in the New York cases, which opposes relocation.’

The Ontario Court of Appeal then went on to find that none of those approaches was particularly satisfactory. The Court expressed reservations about general rules which did not accommodate all the varying circumstances of different cases, and about broad tests administered by application of the burden of proof. Morden A.C.J.O. (who gave the judgment of the Court) then went on to state:

‘I think that the preferable approach in the application of the standard is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one or other of the parties will be unsuccessful unless he or she satisfies a specified burden of proof. This over-emphasises the adversary nature of the proceedings and depreciates the Court's *parens patriae* responsibility. Both parents should bear an evidential burden. At the end of the process, the Court should arrive at a determinate conclusion on the result which better accords with the best interests of the child. If this is impossible, then the result must necessarily be in accordance with the legal status quo on the issue to be decided.’

Having rejected hard and fast rules, the judgment went on to suggest various propositions as follows:

‘In most cases, I would think, it is an important factor to take into account, in favour of the custodial parent, that the existing custody decision (by order or agreement) shows that from a day-to-day point of view the best interests of the child lie with the child's being with the custodial parent. Added to this, it is reasonable to think that an incident of custody includes the determination by the custodial parent of where the parent and child shall live. Further, if there is a new family unit as a result of the custodial parent having remarried, the well-being of that family unit bears on the best interests of the child.

The nature of the relationship between the child and the access parent will always be of importance. The closer the relationship and the more dependent the child is on it for his or her emotional well-being and development, the more likely an injury resulting from the proposed move will be.

The reason for the move is important. If the motive is simply to frustrate access, then it would not be expected that a court would decide in favour of it. On the other hand, if the move is necessary, for example, for the maintenance of employment, this would count in favour of the move.

The distance of the move is, of course, of basic concern. The greater the distance, the more severe the impact of the proposed move will be on the access parent. The degree of severity is also likely to be affected rather directly by the financial resources of the access parent.

The child's views are relevant.’

Carter v Brooks helpfully summarises the differences of approach and emphasis in different neighbouring jurisdictions, while also demonstrating the difficulty of formulating a sufficiently certain rule or set of rules when the overriding consideration is the welfare of the individual child. In rejecting hard and fast rules, the Ontario Court of Appeal could not avoid stating a number of propositions which, on the one hand, favoured the reasonable decision of the custodial parent, but on the other suggested that the status quo should be maintained if neither party can convince the court that his or her plan should prevail. The Canadian law on this topic became yet more confused with the decision of the Supreme Court of Canada in *Gordon v Goertz* (1996) 134 DLR (4th) 321, in which the majority of the Court rejected a presumption in favour of the custodial parent, while the minority pointed out the unpredictability and inconsistency likely to be fostered by a case-by-case approach.

Conclusion

The above examples show differences between and within common law jurisdictions. Wider differences of approach exist elsewhere. As the international conventions against child abduction are adopted by more and more countries these cultural and legal differences will become yet more apparent and they are likely to be examined critically by the courts asked to order the return of children.

It is suggested that those agencies and groups concerned with the problem of unlawful child abduction should consider the potential benefits of some greater harmonisation of the criteria and conditions for lawful removal of children from one country to another either permanently or indefinitely. It is suggested that harmonisation would diminish child abduction. It would also inform and assist the courts who have to decide whether to order the return of children who have been abducted into their country from another jurisdiction, and it would inform the lawyers who have to advise the parties in such disputes often at short notice and with limited time to obtain information about the law and procedure in the other jurisdiction.

There are several inter-connected reasons for some attempt at international harmonisation in this area:

- (i) Consistency of approach in this universal problem affecting children caught up in parental conflict is desirable in itself. Moreover, it is arguable that countries that wish a common international standard to be applied to deal with child abduction from one country to another, and who therefore subscribe to the Hague Convention to achieve that end, should likewise apply a common, certain standard for those parents who seek to act lawfully in removing a child from one jurisdiction to another.
- (ii) One factor which clearly contributes to international child abduction (in the sense of both wrongful removal and wrongful retention of a child from the jurisdictional territory of his or her habitual residence) is the difficulty which the abductor faces, or believes he or she faces, in removing the child lawfully to another country even if the motives and reasons for such a removal are reasonable. In some other cases, abduction may be not so much the result of such

actual or perceived difficulty as the result of ignorance that it may be possible to obtain permission to remove the child lawfully.

- (iii) Consistent international standards will assist the other parent, whose consent to removal of the child is usually the pre-requisite for lawful removal in the absence of permission granted by a court, to make an informed decision as to whether to consent or withhold consent to removal of the child.
- (iv) Knowledge of the criteria and conditions to be applied in another country will assist the courts deciding whether to return an abducted child, both in assessing the degree of culpability involved in the abduction and also in assessing the likely outcome if the child and abducting parent return and proceedings seeking leave for the lawful removal of the child are commenced.
- (v) A consistent approach will also assist the development of new approaches to long-range access (contact) to ensure that association between children and 'non-custodial' parents is maintained.

Leave to Remove Children from the Jurisdiction: Does English Law Comply with the Treaty of Rome?

Timothy Scott QC

Introduction

Section 13 Children Act 1989 prevents a parent in whose favour a residence order has been made from taking a child who is the subject of that order out of the UK for longer than one month save with the consent of all other persons with parental responsibility or the leave of the court. However, freedom of workers to move between EU Member States for purposes of work is a vital aspect of the free market provisions of the Treaty of Rome. There is a possible conflict between these provisions. The purpose of this paper is to consider whether this possible conflict has substance and, if so, what the consequences are. For convenience of reference the parent will be assumed to be a mother with one child.

Section 13 Children Act 1989

Leaving out the provision about use of a new surname, the section provides in full as follows:

‘Where a residence order is in force with respect to a child, no person may...

- (1) remove him from the UK;
 - (b) without either the written consent of every person who has parental responsibility for the child or the leave of the court.
- (2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.
- (3) In making a residence order with respect to a child the court may grant the leave required by Subsection (1)(b), either generally or for specified purposes.’

A number of points may be noted about Section 13:

- The restriction only arises if a residence order is in force. Thus if the parents have been able to agree the arrangements for the child without such an order, there is no restriction on the mother. She can freely take the child to live abroad: at least so far as this Section is concerned. The father will be able to raise the issue before the court, but the onus is on him to do so if he wishes.
- The restriction only applies to removing the child from the UK, not from the jurisdiction of the English court. Thus a mother living in Dover can relocate with her child to Aberdeen or Belfast, but not (save by agreement

or with leave) to Calais or Brussels. This contrasts with the practice under the earlier law under which (unless the court otherwise directed) every custody order contained a direction prohibiting the removal of the child from *England and Wales*: see Matrimonial Causes Rules 1977 rule 94.

- The restriction does not apply to periods of less than one month. This is clearly intended to make provision for holidays. This again contrasts with the earlier law where, unless general leave to remove was given, an obstructive non-custodial parent could require the custodial parent to make an application to the court before each foreign holiday.

EU Law

Article 48 of the Treaty of Rome provides in full as follows:

- (1) Freedom of movement of workers shall be secured within the Community by the end of the transitional period at the latest.
- (2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other conditions of work and employment.
- (3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
- (4) The provisions of this Article shall not apply to employment in the public service.'

A number of matters arise out of this:

- The 'transitional period' ended in 1969; the article has been in full effect for nearly 30 years.
- The right of freedom of movement is a right of an economic nature: the right to take up an offer of employment and not to suffer economic discrimination. See e.g. *Konstantinidis v Stadt Altensteig* Case C-168/91, where discrimination of a non-economic nature was held not to breach Article 48.
- As a fundamental treaty right, it is 'directly effective' and can be asserted in a national court.

- The right is subject to two separate sets of exceptions: ‘limitations justified on grounds of public policy, public security or public health’; and employment in the public service.
- Article 49 of the Treaty enables subordinate legislation to be introduced to give effect to Article 48.

Is there a *prima facie* conflict?

The first point to be considered is that Article 48 on its face entitles a worker to accept an offer of employment but makes no mention of the worker’s family. Since the European Court of Justice adopts a broad and purposive approach to construction, it might well have been possible to argue that even on the words of the Article, the right of freedom of movement would be so denuded of value unless it included a right for the worker to take her family that such a right should be understood and imported:

‘...the [European Court of Justice] has declared the provisions on free movement of workers to be fundamental to the Community’s aims, and hence deserving of a wide interpretation, while it has, on the whole, restrictively read and curbed those provisions which allow for exceptions and derogations on the part of Member States.’

Craig and de Burca *EC Law* (Clarendon Press 1995)

However, the position was spelled out by Council Regulation 1612/68, which was introduced under Article 49. The ECJ has treated the Regulation as protecting and facilitating the exercise of primary treaty rights rather than as conferring additional rights. Its provisions are therefore also directly effective and can be relied on in national courts. The preamble to this Regulation includes this recital:

‘Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires...that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family...’

Article 10 of this Regulation provides as follows:

- (1) The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
 - (a) his spouse and their descendants who are under the age of 21 years or are dependant;
 - (b) dependant relatives in the ascending line of the worker and his spouse.
- (2) Member States shall facilitate the admission of any member of the family not coming within the provisions of Paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.
- (3) For the purposes of Paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however,

must not give rise to discrimination between national workers and workers from other Member States.

The freedom to relocate therefore does include a right for the worker to relocate with her family. However, it will have been noted that both Article 48 and Regulation 1612/68 are directed primarily at preventing restrictions which might be imposed by the Member State to which the worker is intending to move. This is apparent from the provisions (for instance) of Article 48(3)(c) and (d) and Paragraphs 2 and 3 of Article 10 of the Regulation. The next point for consideration is therefore whether the right of freedom of movement also entails a prohibition on restrictions imposed by the Member State of origin.

One example of a restriction imposed by the Member State of origin is *R v IAT and Singh ex parte Home Secretary* [1992] 3 CMLR 358. This case concerned the position of the Indian husband of a British national. They had moved to Germany to work. UK immigration law restricted the husband's right to return to Britain at the end of this employment. The ECJ held that a national of a Member State might be deterred from exercising the right of freedom of movement if his spouse and children were not permitted to return to and reside in the Member State of origin under conditions at least equivalent to those granted them by Community law in the other Member State.

The general principle that the free market provisions of the Treaty of Rome require the removal of restrictions in both Member States is illustrated in cases concerning the freedom to provide services under Article 59; for many purposes Articles 48-66 are treated as single code governing freedom of movement within the EU for purposes of work and business:

‘Article 48 confers on workers the right of free movement between Member States. Article 52 confers a similar right on the self-employed, which permits freedom of establishment. Article 59 confers a right freely to provide services across borders. All three sets of provisions envisage the liberation of factors of production within the common market. The Court has shrunk from treating the divisions in the Treaty as rigid, and has emphasised the areas of common ground between the three sets of provisions.’

Weatherill & Beaumont *EC Law* (Penguin, 2nd Ed. 1995)

Luisi and Carbone v Ministero del Tesoro [1985] 3 CMLR 52 arose out of Italian currency control rules. The ECJ upheld the argument that since the currency had been exported from Italy to pay for tourism and medical services in another Member State, the restrictions on currency export contravened Article 59:

‘...the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions...’

It will be noted that the restriction on the freedom to provide services in *Luisi and Carbone* was an indirect and collateral consequence of the Italian law, which was directed at control of currency. It therefore seems not only that a restriction imposed by the Member State of origin can amount to an infringement of Article 59, but that it can do so even if this is an indirect (and probably unintended) consequence of the law

which gives rise to the restriction. This must apply equally to restriction of freedom of movement under Article 48.

Pausing to take stock of the matters that have been considered so far, it is suggested that the following propositions seem to be firmly established:

- The right to move to another Member State in order to take up a job offer is a fundamental right under the Treaty of Rome: Article 48.
- The right to relocate for this purpose includes a right to be joined by one's family: Regulation 1612/68.
- Any provision which (even incidentally) restricts this right will *prima facie* infringe Article 48, whether it is a restriction arising out of the law of the Member State where the job is offered or the law of the Member State of origin.

The restriction imposed by Section 13 Children Act is clearly a restriction on the right of the worker to be joined by her family. It is normally a condition of an offer of employment that a decision to accept it must be made quickly. A mother who has to make an application for leave under Section 13 will often not be able to accept an offer as she cannot assume that leave to take the child will be given. One very common ground of opposition to applications for leave to remove permanently is that the opportunity for contact with the father will be reduced and that the welfare of the child will be prejudiced. This raises issues which are resolved on oral evidence, often with the assistance of a Court Welfare Officer. It can be months before the application is heard. Few job offers will be left open for this length of time; in any event the mother will not even be able to say for some time when the final hearing of her application will be.

It is suggested that there is therefore a *prima facie* clash between the right conferred by Article 48 and the restriction imposed by Section 13. It is now necessary to consider the limitations on the right contained in Article 48(3). In relation to the exception in Article 48(4) relating to employment in the public service, it need only be said that this phrase has been construed narrowly.

Article 48(3): the scope of the public policy derogation

It has been seen that Article 48(3) makes the right of freedom of movement subject to 'limitations justified on grounds of public policy, public security or public health'. Neither public security nor public health could be relevant to Section 13. However, could the restriction on freedom of movement imposed by Section 13 be justified on grounds of public policy?

The reported cases on the Article 48(3) derogation have been concerned entirely with administrative decisions concerning the deportation of individuals perceived to be undesirable: a member of a religious cult (*Van Duyn v Home Office* [1974] ECR 1337); a trade unionist (*Rutili v Minister of the Interior* [1975] ECR 1219); prostitutes (*Adoui and Cornuaille v Belgium* [1982] ECR 1665).

However, although there does not seem to be any reported case in which the justification of primary legislation (rather than an administrative decision) has been

considered by reference to the public policy derogation, there are observations in *Rutili* which both make it clear that primary legislation might have to be justified in this way and give some hints as to how this issue might be approached. The following propositions may be derived from *Rutili*:

- Member States continue to be free, in principle, to determine the requirements of public policy in the light of their national needs. Each Member State does have a margin of appreciation, or area of discretion within the limits imposed by Community law.
- The scope of public policy cannot be interpreted unilaterally by each Member State; it is subject to control (in the last resort) by the ECJ.
- The legality of the scope of public policy is subject to review by national courts, which must accord primacy to principles of Community law if national law is incompatible with these. The national court can of course refer a question of Community law to the ECJ for a preliminary ruling.
- National courts must protect and give effect to the exercise of the right of freedom of movement.
- The concept of public policy, when used as a justification for derogating from a fundamental treaty principle such as freedom of movement of workers, must be interpreted strictly and with due regard to Articles 8-11 of the European Convention on Human Rights.

Although this is not specifically mentioned in *Rutili*, the public policy derogation is subject to the overriding principle of proportionality. Any restriction on a right conferred by Community law will only be justified if its scope does not exceed that which is reasonably required to deal with the problem at which it is aimed. In *Van Duyn* the ECJ remarked that the circumstances justifying recourse to public policy may vary from one country to another and from one period to another.

Could Section 13 be justified under Article 48(3)?

We have seen that Section 13 derives from earlier provisions which prevented the removal of a child from England and Wales without the leave of the court. The policy underlying this rule was presumably that once a child was outside the jurisdiction of the court, the court would no longer be able to oversee its welfare. In the event of a further change of circumstances, the non-custodial parent would not be able to bring the case back before the English court. Orders for access could not be enforced. There was a general distrust of the approach of courts in other jurisdictions. Accordingly it was necessary for the court to be satisfied that in all the circumstances, taking account of these matters, a move was in the interests of the child.

The Children Act 1989 followed a long programme of consultation. In 1988 The Law Commission published its Report No. 172 to which a draft Bill was appended. That draft Bill did not include any provision corresponding to the eventual Section 13. However, Clause 12 of the Bill which was introduced in the House of Lords did in due course become Section 13. When the Bill was considered in committee in the House of Lords, there was a debate about Clause 12 in which various points were made. A passing reference was made to the change from England and Wales to the UK, but no explanation was given for this. There was no reference to a possible European dimension.

It seems that the change from England and Wales to the UK was made because Chapter 5 of the Family Law Act 1986 provided for the recognition and enforcement in any part of the UK of orders relating to children made in any other part. Section 36 of the Family Law Act provided for the enforcement in other parts of the UK of orders made in England not to remove a child from England and Wales. In view of these statutory developments it was logical to introduce a scheme whereby the three jurisdictions within the UK were to be treated as one for the purposes of restricting the removal of a child.

However, it is not clear that any consideration was given to the consequences of the Child Abduction and Custody Act 1985 which had brought into English law the Hague and European conventions on the abduction of children. It may be noted in passing that the scheme and terminology of Chapter 5 of the Family Law Act (recognition and enforcement of orders) are in some respects the same as those of the European Convention.

All EU Member States belong to one or both Conventions. The Hague Convention aims to protect rights of custody while the European Convention calls for the recognition and enforcement of decisions relating to custody. The Conventions between them provide a means by which abducted children can be swiftly returned to the country of their habitual residence. Although many lawyers practising in this area believe that some countries apply the letter and spirit of the Conventions more rigorously than others, such private doubts would be unlikely to be given much weight in an EU context.

It has been pointed out in the quotation from Craig and de Burca above that the ECJ has on the whole adopted a restrictive approach to the interpretation of the exceptions and derogations to the Treaty provisions on free movement of workers. If the policy of Section 13 is as suggested above, it is likely that the ECJ would be unsympathetic to any underlying distrust of foreign courts when the courts in question were those of another Member State.

It is further suggested that the ECJ would accept that any residual need for the protection of children is amply met by the provisions of the Hague and European Conventions. It would disapprove of a provision which appears to repose trust in the courts of Scotland and Northern Ireland by permitting an unrestricted right to relocate to those jurisdictions, while requiring the leave of the court to relocate to another Member State. While the protection of the welfare of children would of course be capable in principle of giving rise to a public policy justification, the blanket requirement of Section 13 would be seen as disproportionate to any real need to protect children who are merely moving between Member States. Accordingly it is suggested that Section 13 could not be justified by reference to the public policy exception in Article 48(3).

Where does the English court stand?

Let us assume that in an appropriate case concerning a proposed move to another Member State to take up a job offer, an English court is persuaded of the correctness of the arguments advanced so far. It concludes that Section 13 on its natural

construction does infringe Article 48 in these circumstances. What can and should it do?

In the great majority of cases the question will be academic. A parent's wish to take up a job in another Member State will normally be a sensible and considered plan: possibly an important career move. It will probably commend itself to the court on its merits. It has been re-affirmed in *Re H (Application to remove from jurisdiction)* [1998] 1 FLR 848 that there has to be a compelling reason to justify a court preventing the custodial parent from taking a reasonable decision to live outside the jurisdiction. In any event the majority of cases under Section 13 concern proposed moves to countries such as New Zealand where future contact will present real problems. Perhaps moves within the EU are not always so contentious.

However, the case could arise where the court was at least very doubtful about the merits of a proposed move to another Member State and thus had to confront this question. It has been clear at least since *Factortame Ltd v Secretary of State for Transport (No 1)* [1990] 2 AC 85 that the principle of supremacy of EU law requires an English court to enforce effective provisions of Community law (which includes Article 48) directly - even if this means disapplying an inconsistent Act of Parliament. In *Bossa v Nordstress Ltd* [1998] IRLR 284 the EAT disapplied Section 8(1) Race Relations Act 1976 in circumstances where it infringed Article 48.

It would in principle be open to the court to approach the question on a construction basis rather than by disapplication. The court will always strive to construe a statute in a way which conforms with a treaty obligation. Accordingly the court might be attracted to the idea of construing Section 13 as being subject to rights conferred by Article 48 rather than to disapply Section 13 in a case where freedom to relocate was properly claimed under Article 48. The effect of this would be that the court would be obliged to grant leave, whereas on the disapplication approach the court would say that leave was not required.

Alternatives to Section 13: Section 8 Children Act 1989

However, if the construction route is adopted and leave is granted, the court would be in difficulty if it wished to bring other statutory provisions into play. If on the other hand it is held that Section 13 has no application, it will be open to the court to turn to Section 8 Children Act 1989 and consider whether a specific issue order should be made in relation to the proposed move. Under Section 10(1)(b) Children Act the court has power to make such an order of its own motion. Alternatively the court could invite the other parent to apply on short notice for such an order when it became clear that the welfare of the child would be served by opening up this option.

In any case where there is not a residence order in force it is in any event necessary for a father who wishes to prevent the emigration of the mother and child to apply for a prohibited steps order. This was the position in *MH v GP (Child: emigration)* [1995] 2 FLR 106. In that case Thorpe J treated the father's application exactly as if it were an application by the mother under Section 13. Indeed the case headnote refers to an application by the mother to remove the child from the jurisdiction, but it does not appear from the judgment that such an application was or needed to be made, since no residence order was in force.

Thorpe J directed himself that leave to remove from the jurisdiction should not be withheld (*sic*) unless the interests of the child and those of the custodial parent were clearly shown to be incompatible. He then found that the mother's proposed emigration to New Zealand was incompatible with the child's welfare because of the importance of the relationship between the child, the father, and the father's family.

Section 8 Children Act and Article 48

The question must then arise: If Section 13 infringes Article 48, is the position any different if the court is considering an application by the non-custodial parent for a prohibited steps order rather than an application by the custodial parent for leave to remove from the jurisdiction? Although Thorpe J in *MH v GP* treated the prohibited steps application as a mirror image of a Section 13 application, it is suggested that for the purposes of Article 48 there is an important difference.

The distinction lies in the concept of proportionality. It has been suggested above that an attempt to justify Section 13 on public policy grounds would fail because of the blanket nature of the provision. Every custodial parent who wishes to relocate to another Member State has to obtain the leave of the court. However, it would probably be seen as much less objectionable if it is left to the non-custodial parent to obtain a prohibited steps order.

A provision which enables the court to weigh the objections of a non-custodial parent on the facts of a particular case is different in kind to a provision which requires every custodial parent to seek the leave of the court to relocate. Suppose that the non-custodial father can show that the proposed move will be seriously detrimental to the child's schooling, as well as making contact very difficult. These are genuine and serious welfare issues. It is suggested that an English court would, as a matter of Community law, be entitled to weigh the child's welfare against the mother's Article 48 freedom.

It may be said that this is a distinction without a difference since (as *MH v GP* shows) if the non-custodial parent does raise objections, the matter will be considered in exactly the same way as under Section 13. However, the fact that under Section 8 it is left to the non-custodial parent to raise the objections would probably be regarded as less invasive of the Article 48 freedom of movement of the custodial parent, and thus as being more proportionate to the legitimate public policy goal of protecting those children who need the court's protection. A court might conclude in these circumstances that whatever the mother's own right, she should not be entitled in the particular circumstances to take the child with her if she insisted on exercising that right.

The Hague Convention

In *Re E (Residence: Conditions)* [1997] 2 FLR 638 the Judge had made a residence order in favour of the mother subject to a requirement that the children continue to live at a named address in the UK. Butler-Sloss LJ, having referred to and distinguished Section 13, said at 642C:

‘A general imposition of conditions on residence orders was clearly not contemplated by Parliament and where the parent is entirely suitable and the court intends to make a residence order in favour of that parent, a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the UK or with whom.’

Following through the arguments which have been set out above to their logical next step, it might be said that the phrase ‘within the UK’ in that passage should be substituted by ‘within the European Union’, since it is the distinction between the UK and the EU which (it has been argued) contravenes Article 48. However, it is suggested that it cannot be right to take the argument this further stage, at least in respect of relocation to Member States which are also contracting states of the Hague Convention. In point of fact all Member States of the EU now are or are about to become contracting states of the Hague Convention.

The interaction of the Hague Convention and the freedom of movement provisions of the Treaty of Rome is far from clear. The basis of the Hague Convention is that removal of a child from one country to another is wrongful if it is in breach of rights of custody attributed to a person or institution. Retention of the child in the second country in breach of rights of custody is also wrongful.

‘Rights of custody’ is a broad concept which goes far beyond ‘custody’ in pre-Children Act English law. Many of the fathers of the notional child presently under consideration either would have rights of custody already, or else could acquire such rights by an application to the English court in the event of the mother relocating to another country without notice. It is probable that merely making the child a ward of court would be sufficient for the mother’s retention to become wrongful for Hague Convention purposes when she was notified of the English order.

Accordingly in any case where the father either already has or else takes steps to acquire rights of custody, a mother who has relocated to another Hague Convention country without obtaining either the agreement of the father or the leave of the court will find herself up against the Convention. She will probably be ordered by the court of the country to which she has gone to return the child to England. However, it seems possible that she might be able to rely on her Article 48 freedom of movement against the Hague Convention: in effect, to set up a right under one treaty against a duty under a different treaty. She might also argue that the principle of the supremacy of EU law requires that the Article 48 freedom of movement should prevail.

In any event, it must never be forgotten that the Hague Convention is concerned purely with the jurisdictional question: ‘Where should this child’s future be determined?’ Suppose that a father succeeds in having a child sent back under the Hague Convention from another Member State in circumstances where the Article 48 argument arises, he has done no more than to secure that the argument is heard and determined in England. He has won a battle and bought some time, but he may still have to meet the Article 48 point in a residence dispute in the English court.

Summary

It is suggested that the following points which have been argued above are worthy of debate and clarification:

- (i) In a case where a custodial parent wishes to take up an offer of employment in another EU Member State, there is a prima facie conflict between the restriction on relocation imposed by Section 13 Children Act 1989 and the freedom of movement conferred by Article 48 of the Treaty of Rome.
- (ii) The restriction imposed by Section 13 cannot be justified on public policy grounds under Article 48(3) as a blanket requirement for leave is disproportionate to need for the protection of children who are moving between Member States.
- (iii) In an appropriate case the English court can and should give effect to the supremacy of EU law by disapplying Section 13.
- (iv) The effect of (i)-(iii) is not as drastic as it might appear, since a court which feels obliged to disapply Section 13 can nevertheless protect the welfare of any child concerned by considering whether to make a prohibited steps order under Section 8 Children Act 1989.
- (v) There is no infringement of Article 48 in permitting a non-custodial parent to seek a prohibited steps order in these circumstances, since that is proportionate to the need to protect a child in a specific case. In such a situation the Article 48 freedom of movement of the custodial parent would be one factor in the balancing exercise.
- (vi) The interaction between Article 48 and the Hague and European Conventions on child abduction is not easy. It may in some circumstances be possible to set up the Article 48 freedom of movement in opposition to obligations imposed by the child abduction conventions.

The Status of Immigrant Children in the UK and Conflicts between Immigration Law and Procedure and the Welfare of the Child

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Introduction

Entry and stay in the UK is controlled by the Immigration Act 1971, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the Asylum Act 1996 and the rules made in accordance with provisions set out in the legislation. There is considerable scope for the exercise of discretion over entry and stay, such discretion being exercised by the Home Office and the Immigration Service in accordance with various instructions and policy statements, some but not all of which are published. Only British Citizens are not subject to immigration control. That does not however mean that British Citizens are not, in some circumstances, directly affected by immigration legislation.

The Children Act 1989 sets out the legal responsibilities of local authorities in connection with the welfare of children, together with the regulatory framework as it affects children in both private and public law.

The fundamental precept of the Children Act is that the welfare of the child shall be a paramount consideration. This is not reflected in immigration legislation, case law or policy. Case law developed through the immigration appellate process has made clear that the discretion of the Secretary of State in implementing immigration control is not to be fettered by decisions taken in the family courts.

Children (who are not British Citizens) whether looked after and/or accompanied by adult carers or unaccompanied are subject to immigration control. The vast number of differing situations that children find themselves in are affected by their immigration status. There are conditions controlling their rights to be joined by or to join their family, as a natural or adopted child; their ability to claim asylum and the way in which their claim is determined; their access to social and welfare benefits, health care, education; their rights to be represented and have their views taken into account in any decisions or court proceedings; their protection in zones of conflict; their rights as British citizens if their parents or parent is not British and their rights under international human rights instruments .

The rights of a child are an integral part of human rights. But children are entitled to special protection because of their vulnerability and dependency on adults. Human rights are not simply civil and political rights but include economic, social, welfare and cultural rights. This recognition and understanding is reflected in the specific references to children in the various international conventions and covenants

promulgated since 1959, when the General Assembly of the United Nations adopted a Declaration on the Rights of the Child. On 20 September 1990, the 1989 Convention on the Rights of the Child came into force. The rights of the child are detailed and defined throughout this convention. It covers human rights accruing to the child as an individual; rights concerning parents and family; rights to education, health, nutrition, sports and leisure; and rights covering specially vulnerable groups of children, such as refugees, children who have been abused or subject to trafficking etc.

A study of the welfare implications of UK immigration and asylum policy for children and young people found:

‘evidence of discrimination and inconsistencies in practice based on factors such as age, gender, nationality, country of origin and immigration status of parents. The imposition of adult restrictions and requirements on children were found to be a major barrier to the achievement of children's rights and the handling of some cases resulted in harm...Decisions were often based on arbitrarily applied criteria and there were inadequate systems, accessible by children, for remedy and redress...The implementation of immigration legislation in regard to children was found to be at odds both with domestic and international developments on children's rights [as set out in the UN Convention on Rights of the Child and the principles underlying the Children Act 1989].’

Adele D. Jones; *The Child Welfare Implications of UK Immigration and Asylum Policy*, (The Manchester Metropolitan University 1998).

The variation between immigration legislation, the Children Act 1989 and the UK's obligations and reservations under the various international Conventions can result in difficulties and practices that either cause direct harm as defined in the Children Act or place children at risk of such harm. There is a need for coherent review of all legislation affecting children and families, whether they are British Citizens or not, to ensure that the contradictions, inconsistencies and gaps are amended to ensure that children are granted the protection required under the Convention on the Rights of the Child 1989 (CRC).

It is not possible in this paper to cover all the aspects of immigration law as they affect children. We have therefore selected those circumstances that appeared to us to have the most immediate impact and which are capable of an early resolution beneficial to the welfare of the child. In these areas, we outline the current position, its implications and make recommendations for change.

Representation

A child has no right to representation either before the decision-makers in immigration cases or before the appellate courts once a decision has been taken. This is in stark contrast to the rights that children have under the Children Act 1989 to be represented in the family courts either in their own right, through a solicitor as a party to the proceedings, or through a guardian ad litem.

The right to participation in decision making is an important corollary of the recognition that children are not just objects of concern but also individuals with recognised rights that have to be met.

Article 12 of the CRC states that:

‘States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. [and] ...the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

Parties to the CRC have a positive duty to help a child capable of forming her own views to express them and not merely a passive obligation not to interfere in a right to freedom of expression.

The UNHCR Handbook calls for the appointment of a guardian to promote decisions in the best interest of the child asylum seeker. Aside from the assistance that a guardian can give to the discharging of the evidential burden, it is clear that a child will need a guardian to safeguard her right to shelter, education and rehabilitation and to instruct representatives in court proceedings. The Canadian guidelines (Child refugee claimants: procedural and evidentiary issues. Ottawa. September 1996) specifically require the appointment of a guardian for children. This may in some cases be the carer or parent but the specific appointment goes some way to ensuring that the child has some say in decisions being taken about her future.

But it is not just in refugee cases that a child will be putting forward her views. Issues of deportation or removal of either her, her parent or parents or siblings or carer require consideration of her views in order that her rights and obligations under the CRC are not breached. The failure to enable a child's views to be put before the administrative body taking the initial decision through lack of representation and the further failure to enable her to be represented in immigration court proceedings means that decisions are frequently taken without the child's voice being heard.

All children who are involved in immigration applications, whether as applicants, or indirectly as siblings or dependants have the right to have their views taken into account and for the effects on them of decisions taken by the State to be heard and considered.

Unless a guardian is appointed for all such children, paid through legal aid or some similar funding, decisions will continue to be taken without consideration of the obligations of the State under the CRC and the child will not be heard or considered properly.

Detention

Introduction

Immigration Authorities in the UK have the power to detain individuals, including asylum seekers under the Immigration Act 1971. Young people under 18 years of age, that is children as defined by Section 105 of the Children Act 1989 and Article 1 of the 1989 UN Convention on the Rights of the Child are not necessarily excluded from the provisions of the 1971 Act. There have been instances when children, most of whom are unaccompanied, have been detained and indications are that children are detained far more frequently and for longer periods than responses from Government ministers would imply.

The Machel study expressed concern that 'one consequence of current policies is that a number of asylum seekers, including children are detained while their cases are considered'. The detention of asylum seekers is restricted under Article 31 of the Refugee Convention which prohibits contracting states from imposing penalties on or from restricting the movements of refugees on account of illegal entry or presence. The position of detained children under Article 37 of the CRC is 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'.

The meaning of 'unlawfully' does not solely depend on domestic law but is determined in addition by reference to international standards. Where refugee children are detained there is a possible violation of Article 37 of the CRC as well as a possible violation of Article 10(3) and 14(4) of the International Convention on Civil and Political Rights. The detention of refugee children for whatever reason breaches obligations under Article 22 of the CRC.

Detention of refugee children not only involves potential violations of international law but also a whole body of standards relating to the treatment of children and prisoners such as the UN Standard Minimum Rules on the treatment of prisoners, The UN Standard Minimum Rules on the Administration of Juvenile Justice (the Beijing Rules) and Guidelines such as the UNHCR Handbook and the UNHCR Guidelines on Refugee Children and the Ex comm conclusions.

There are however numbers of children who are detained who are known as 'disputed age' children where the immigration service consider the individual to be an adult despite the person in question stating that they are in fact a minor. The current Home Office policy on detention of minors does not apply to these 'disputed age' children and they are detained under the same terms and conditions as adults.

Reasons for detention

In practice minors are detained 'as a very last resort' (ILPA Ministerial Statements, paragraph 13.8.1) or 'to facilitate removal'. However this does not apply to 'disputed age' children who are detained for the following reasons:

- their credibility is questioned because, for example, they travelled to the UK on false documents or presented themselves to the Immigration Service with no documents.

- the immigration service believe that the applicant will not comply with the terms of temporary admission (that is they will not present themselves for subsequent interview(s) or assessment of their claim)
- the applicant has no known contacts in the UK
- to facilitate removal

Invariably though not exclusively, where children are detained under Immigration Act powers the Immigration Service do not accept the stated age and thus do not regard the detainee as a child. The assessment of age of asylum seekers is not a task that can be undertaken lightly. Where the Immigration Service is considering detention and the asylum seeker claims to be under 18 it is usual for the opinion of the Port Medical Inspector to be sought. However these Inspectors are unlikely to have specialised in paediatrics, their examination is cursory and informed consent may well not have been obtained. In any event it is not possible to accurately assess age closer than 5 years of the actual age, particularly for post pubertal minors, by way of medical examination (Royal College of Paediatrics and Child Health in consultation with the British Medical Association and the British Society of Endocrinologists). Any assessment of age should include a holistic medical examination of the minor together with an awareness of how differing cultural backgrounds and the expectations and responsibilities placed upon children can influence perceptions of a child's age. Informed consent of the child to any examination should in any event be obtained and the patient's right to confidentiality should be respected.

Place of detention

At present, since many of those detained are alleged to be over 18 years old they are detained in 'adult' detention centres. This despite the fact that many of those initially detained as adults are subsequently released from detention once it has been determined and accepted by the Home Office that the young person is in fact a minor. This means that minors have been detained in centres where there has been no checking or control of staff as to their fitness to have care over minors, the other detainees may themselves be a potential risk to the minor and the local authority has not been able to carry out its statutory duties in accordance with the Children Act 1989 as to the minor's safety.

Furthermore detention of a child under immigration legislation does not comply with criteria, contained in the Children Act 1989, which is applied when children are detained in secure accommodation as defined in the Children Act 1989.

UK legislation and the UN Convention on the Rights of the Child

According to the Police and Criminal Evidence Act 1984 the maximum that a child can be detained at a police station without the authority of a magistrate is 72 hours. Under no circumstance can a child be held beyond a maximum period of 96 hours.

Similarly those children placed in secure accommodation under the provisions of the Children Act 1989 can only be held for 72 hours without the authority of the court.

The UK has signed the Convention on the Rights of the Child. The two most pertinent articles of the Convention are Articles 37 (deprivation of liberty) and 22 (refugee children).

Article 37 is clearly breached in respect of:

- the arbitrary nature of the detention
- the length of most detention
- the failure to take account of the children's needs.
- the lack of access to legal advice and the right to challenge the detention

Article 22 is breached owing to:

- the failure to provide adequate protection or promotion of the child's welfare
- the failure to provide humanitarian assistance

Articles 3,9,12,14,19,24,30,31,39 are also breached in more minor ways.

Recommendations

- (a) In order to address disputes relating to age any assessment should include a holistic medical examination of the minor together with an awareness of how differing cultural backgrounds and the expectations and responsibilities placed upon children can influence perceptions of a child's age. Informed consent of the child to any examination should in any event be obtained and the patient's right to confidentiality should be respected
- (b) Where minor asylum seekers or disputed age asylum seekers are held in detention, written reasons should be provided by the Immigration Service, in a language that the child understands, outlining why detention is necessary and stating the exceptional circumstances relevant in each instance. With the permission of the detainee these written reasons should be forwarded to the child's legal representative or other advocate.
- (c) That consistent with current UK child care legislation the decision to detain an asylum seeker under 18 years of age should be approved before a magistrate who specialises in family or juvenile proceedings within 72 hours of the decision to detain. Where the age of the child is disputed a similar order to be sought until age has been established as above.
- (d) Children should not be placed in local authority secure accommodation because of the danger they may face from other detainees. If a decision is taken to detain a child in such secure accommodation the criteria for such a decision should be as for children not subject to immigration control.
- (e) The duties and obligations of the local authority towards children in immigration detention should be clarified.

Requirement of Guidelines to Determine Asylum Claims

Children who claim asylum may do so as part of a family or other unit or they may be unaccompanied. Many States have expressed concern about unaccompanied children seeking asylum either on entry or at some later time. But children have frequently had little or no choice in their travel or the country to which they have sought status, whether they are travelling alone or with others. Children who have claimed asylum have special problems with respect to assistance; protection and long term plans (the so called 'durable solution'). The UN High Commissioner for Refugees points out that, usually, more than half of any refugee population are children. Not all of these children will be unaccompanied, indeed the majority will be with their mothers, but this does not make the refugee child any less vulnerable. The UNHCR points out that any discussion of the protection of refugee children must include the protection needs of women who are overwhelmingly the care givers. (See discussion of issues relating to refugee children in *Justice for Children*, eds. Stewart Asquith & Malcolm Hill, 1994). Refugee children are particularly vulnerable. They are vulnerable not only as refugees, but also as children dependent on women who are themselves alone and vulnerable. Unaccompanied children are in an especially difficult position, without even a nominal carer to ensure survival.

At present unaccompanied minors who claim asylum are referred to the Refugee Council Children's Panel for assistance in, *inter alia*, finding representation. This procedure must be extended to 'disputed age' children to ensure that there is adequate protection.

The Geneva Conventions and Protocols echo concerns about children in war and the need to reunite them with their families if separated. The importance of family unity is a constant theme, not only in humanitarian law but also in human rights law and international standards on the treatment of refugees.

The 1989 Convention on the Rights of the Child recognised that children not only have needs to be met but also rights to be respected. As the first priority in ensuring these rights are respected, the Machel study (UN GA A/51/306) pointed out the enormous importance of identifying the child as unaccompanied and ensuring her survival and protection. Identification of the child is considered so important that details of what information must be taken form part of international humanitarian law (Article 78(3) Protocol I additional to the Geneva Conventions of 1949). It is only when a child has been identified that her needs can be met and rights guaranteed. For refugee children the UNHCR has characterised those rights in the CRC which are immediately relevant to refugee children as a triangle ensuring survival and development (guaranteed by Article 6 of the CRC). The three rights identified by the UNHCR are 'the best interests' principle (Article 3), non-discrimination (Article 2) and participation (Article 12).

The Convention relating to the Status of Refugees 1951 and the 1967 Protocol is on the face of it 'neutral' in its language, as it does not discriminate between children and adult asylum seekers. However, asylum seeking children are not well served by the Convention or by the determination process established to recognise refugee status. The Handbook recognises that children will, in particular face difficulties in establishing a claim for asylum and calls for objective indications of risk to be looked

at as well as a liberal application of the benefit of the doubt. (Paragraphs 213 - 219 UNHCR Handbook).

Decision makers frequently see a refugee as a young male political activist. (See *Gender Guidelines for the determination of asylum claims in the UK*, Refugee Women's Legal Group, 1998) Indeed asylum is frequently referred to as 'political asylum'. But it seems that decision makers do not recognise the specific forms of harm that children face or specifically that the degree of harm faced cannot necessarily be measured in the same way as in an adult claimant's case. Children may suffer deprivation and harm that is common to all refugees.

Guidelines would assist immigration officials at points of entry and at the Home Office to identify children's needs and ensure that they are met. Guidelines would also ensure that their CRC rights were met. The use of guidelines would not lower the standard of proof but rather would increase awareness of the special needs of children, emphasise the importance of a comprehensive, co-ordinated approach and draw attention to the international standards with which States should comply.

The UNHCR issued guidelines relating to the protection and care of refugee children in 1994 and in 1997 (*Refugee Children - Guidelines on Protection and Care 1994; Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum 1997*) and has stated that it considers it 'imperative' that receiving States ensure that effective protection and assistance is delivered to unaccompanied children in a 'systematic, comprehensive and integrated way.' To date only one State party, the Canadian Immigration and Refugee Board has established guidelines on children (Child refugee claimants: procedural and evidentiary issues. Ottawa. September 1996).

The drafting and implementation of detailed guidelines for the consideration of all claims by children for asylum would ensure that the claim is considered not only if the child is unaccompanied but also in terms of their relationship to their carer and any possible independent claim that they may have. Such guidelines would ensure that the UK's obligations under the various international Conventions are fully complied with in a non discriminatory, consistent and sensitive way.

Family Reunion

The cross border movement of children will often result in them becoming separated from their parents, siblings, grandparents or other close family members. Under immigration law, as presently formulated in the UK, their chances of being reunited with those family members are restricted by a myriad of rules and policies which do not recognise their fundamental human right to live with and receive the necessary social and emotional support from their immediate family.

Article 8 of the European Convention on Human Rights provides every individual with the right to enjoy family and private life unless separation from other family members can be shown to derive from a pressing social need, which is proportionate to a legitimate policy being promoted by the Member State concerned. European Member States accept that there is a need to control the entry and exit of foreign nationals into their States and, therefore, immigration controls per se do not breach

the right to family life. However, in individual cases, the State will be expected to weigh the damage which will accrue to the individuals being denied family or private life against the need to strictly enforce immigration controls in every case.

The case of *Berrehab v The Netherlands* 11 EHRR 322 indicates the importance attached to regular face to face contact between parents and their children, even if they are not living in the same household. In that case a divorced father's right to remain in Holland to have contact with his daughter was held to be more important than the enforcement of his deportation as a non national. The test of proportionality was spelt out even more clearly in the case of *Beljoudi v France* 14 EHRR 801. In that case a man with a very poor criminal record was permitted to remain in France with his family.

When the Human Rights Act 1998 comes into force in 2000, the right to family life will become part of British law and applicants for leave to enter or remain in the UK will be able to rely on the provisions and case law of Article 8. This is likely to mean that there will be challenges to the legality of many immigration rules relating to family reunion in proceedings before the Immigration Appellate Authority and in the High Court.

A child's right to family life is also protected in the Convention on the Rights of the Child, where Article 9 states that a child shall not be separated from its parents against their will unless it is in their best interests to do so. Article 3 also states that in all actions concerning children, their best interests shall be the primary consideration. Unfortunately, the British Government in power at the time at which the Convention was entered into reserved the right to disapply the provisions of the Convention when applying immigration legislation. However, the United Nations Committee on the Rights of the Child has criticised their action in doing so and the UK's compliance with the Convention is presently being reviewed by the Committee. A number of organisations, such as UNICEF, are lobbying for the reservation to be lifted. The lifting of the reservation would accord with the central principle of the Children Act 1989, which states that the interests of the child shall be the paramount consideration.

At present the existence of restrictive immigration rules relating to family reunion and a high rate of refusals leading to a large volume of appeals means that there is considerable delay between an application for family reunion and any reunion actually occurring. This is also contrary to a central principle of the Children Act, which is that delay is not in the child's best interests. However, as British law stands the statutory provisions contained in the Act cannot fetter any decision made by the Secretary of State for the Home Department in relation to immigration control, as he is said to be exercising the powers of the prerogative when making such decisions. Section 33(5) of the Immigration Act 1971 expressly maintained this prerogative power. The Court of Appeal accepted that the Secretary of State's decision making powers could not be fettered by any Children Act order made by the courts in *Re T* [1994] Imm AR 368.

This has led to a very unsatisfactory situation where legislation and practice relating to children in the UK has increasingly recognised the international human rights accorded to children and yet children subject to immigration control have not been able to benefit from this recognition. As indicated above, it is likely that when the

Human Rights Act 1998 comes into operation, challenges under a combination of Article 8 of the European Convention on Human Rights (the right to family life) and Article 14 of the Convention (the prohibition against discrimination) may lead to a fundamental challenge to this anomaly.

Meanwhile, many children entering into the UK or given leave to remain in the UK are faced with the choice of remaining here without their families or being forced to return to their countries of origin to join their families and risk persecution, inhuman treatment or destitution. For example, adult asylum seekers granted refugee status in the UK will be permitted to bring their spouse and any children under 18 to join them, as of right, by Paragraph 349 of the Immigration Rules 349. No such provision exists for unaccompanied minors who are granted asylum. In the last few years the number of such minors has greatly increased due to the nature of many of the present conflicts around the world. Children are being conscripted into armies at a very early age and in many wars they are also being specifically targeted for persecution and torture. They are also often being separated from their parents and having to seek protection under the Convention on the Status of Refugees in their own right.

If unaccompanied children were given the right to bring their parents into the UK to join them this would accord with the definition of 'family' used in European Community Law. Those seeking, for instance, to exercise their rights of free movement for the purposes of obtaining and taking up employment within the European Economic Area are permitted to take with them ascendants as well as descendants.

There will also be a number of children who will not qualify for refugee status, largely because their age will make it more difficult for them to substantiate a claim to have, for instance, been persecuted on the basis of a recognised convention reason, such as their political opinion. They will, however, have been able to show that they have been persecuted or tortured. There are proposals in the Immigration and Asylum Bill to bring such applications within the remit of asylum applications. At present, though, they will not qualify for asylum, but may be granted exceptional leave to remain on a discretionary basis.

Even adults granted exceptional leave may not as of right bring their families to the UK immediately. The practice is that their spouse and dependent children under 18 can only apply to join them after they have remained in the UK in that category for four years. They also have to show that they can financially support and accommodate their family without recourse to public funds. Clearly, even if minors given exceptional leave to remain were to be accorded the rights to bring their ascendants into the UK, a four year delay before they would be permitted to do so would offend against the provisions of the Children Act and any requirement to provide maintenance and accommodation would make any such right meaningless.

Children born in the UK may also face separation from their immediate family. The British Nationality Act 1981 abolished the right to acquire British nationality by reason of birth within the UK. This has meant that in some families older children will be British and have the right to remain here and younger children will not. The Act does permit children born in the UK, who then spend the next ten years living here to apply to register as British citizens. However, as the Immigration Rules HC 395 do

not provide opportunities for parents to remain with or join their British children in the UK, except in very limited circumstances, this does not guarantee that families will be able to remain together.

Furthermore the 1981 Act does not enable an unmarried British Citizen or settled father to pass on his British Citizenship to his children. Given the large number of families who now live together outside of a traditional marriage relationship, this omission causes much hardship and leads to many families being split up. The United Nations Committee on the Rights of the Child has criticised this omission. It is also likely that when the Human Rights Act comes into force, it will be possible to challenge the relevant Sections of the British Nationality Act on the grounds that they breach Articles 8 and 14 of the Human Rights Act.

At present, however, if steps are taken to remove a parent of a child with the right to remain in the UK, by deportation, as an overstayer, or removal, as an illegal entrant, the family will have to rely upon the provisions of a series of instructions issued by the Secretary of State for the Home Department to his officials, entitled DP2/93, DP3/96, DP4/96 and DP5/96. The recent Court of Appeal case of *R v Secretary of State for the Home Department ex parte Ahmed and Patel* [1998] INLR 570 held that there was a legitimate expectation that the Secretary of State would act in accordance with these policies, as a practical manifestation of how he intended to meet his obligations under Article 8 of the European Convention on Human Rights.

The provisions of these policies are fairly limited. Broadly speaking, following the case of *Salah Abdadou* (unreported), spouses will not be separated from each other, and by implication their children, if they have married before being informed that they are liable to deportation or served with a notice of illegal entry, there is a genuine and subsisting marriage, and it would be unreasonable for the British or settled spouse to accompany their partner abroad. There is also a presumption that families should not be removed if there is a child who has lived in the UK for the previous ten years and certain other factors apply.

If the policies do not apply, for instance because the parents are in the country on temporary admission, they have to rely on an application outside of the policy and outside of the Immigration Rules HC 395. The basis of such an application will be reliance on Article 8 of the European Convention on Human Rights and the acceptance by the House of Lords in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 that a reasonable Secretary of State would take the provisions of the Convention into account when reaching any decision. This will not necessarily assist the child and her parents as Convention case law, and most recently *Ahmut v the Netherlands* 24 EHHR 62, clearly states that the right to family life does not guarantee that the family can choose between possible countries of residence.

The right to family life may be of greater assistance where there is an extended family with children from different relationships or marriages and where some members of this extended family have the right to remain in the UK and some do not. It is likely that in this situation, any attempt to remove those without the right to remain, and to expect present members of their nuclear family to accompany them abroad, would cause a breach of family life between members of the nuclear family and members of the extended family. A breach would also occur where there was a nuclear family

within which one parent had the right to remain here and the other did not. This will often occur where there has been a marriage after enforcement action has been taken but not implemented for a large number of years and the couple have had a number of children during the intervening years. The status of the children in this situation will vary, but usually if the parents are married they will have the right to remain in the UK. If the parents are unmarried and it is the father who is British or settled here, they will not, due to the limited provisions of the British Nationality Act.

There will also be situations where one of a child's parents, usually a single parent, is settled in the UK, but the child has remained living abroad for a number of years, usually with a grandparent or other close relative. The arrangement may have been made to enable the parent to study or to get established in employment. However, once the child has reached the age of 12 if she is to join her parent in the UK, it will be necessary for the parent to demonstrate that despite being abroad they have had a controlling interest in that child's life and have also been solely responsible for them and their financial support or that there is now a compelling reason to demonstrate that their present carers can no longer look after them.

Paragraph 297 of the Immigration Rules HC 395, which imposes these conditions, has led to much hardship and the separation of many children from their parents. It is also based on a very eurocentric and narrow view of child rearing and fails to take account of the fact that the UK is now a multicultural country. The imposition of a requirement that the parent must be able to maintain and accommodate the child without recourse to public funds also discriminates against children who have been living abroad and again will arguably breach the provisions of the Human Rights Act 1998 when they come into force. It is also a very harsh condition which, for example, prevents a mother staying at home to care for a severely disabled child from bringing an older child, who has been staying with grandparents until the disabled child is slightly older, to join her.

As stated above, a parent of a child can only apply to join the child in the UK, in very limited circumstances. Paragraph 317 of the Immigration Rules 395 restricts applications to widows or widowers over the age of 65, unless they are living alone, outside the UK, in the most exceptional compassionate circumstances. It also imposes a condition of maintenance and accommodation without recourse to public funds, which the vast majority of children will not be able to fulfil.

The Immigration Rules are equally restrictive in relation to the rights of adopted children to join their adoptive parents in the UK. Unless the adoption has taken place in a country whose procedures are recognised here and unless it can be shown that the natural parents were unable to care for the child, leave to enter will only be granted on a discretionary basis outside the rules. This has a particularly adverse affect on those who choose to adopt children of other family members abroad and those from Muslim countries, where there is no provision for legal adoption.

As can be seen the UK law as presently formulated places many obstacles in the way of children seeking to be reunited with their families.

Revocation of the Reservation to the Convention of the Rights of the Child

Efforts have been made for well over a century to protect children under international law. The Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations in 1959, affirms the right of the child to special protection, opportunities and facilities for a normal healthy development. The standards set out in the 1951 UN Convention on Refugees and 1967 Protocol apply equally to children as to adults. This means that:

- a child who has a well founded fear of being persecuted for a Convention reason is a refugee
- a child who holds refugee status cannot be forced to return to the country of origin (the principle of non refoulement)
- no distinction is made between children and adults in social welfare and legal rights except for Article 22.

These and other rights have been transformed into binding legal obligations through the adoption by the General Assembly in 1989 of the Convention on the Rights of the Child. This Convention came into force on 20 November 1989. A committee on the Rights of the Child established under the Convention meets regularly to monitor the progress made by States parties in fulfilling their obligations. The Committee can make suggestions and recommendations to Governments and to the General Assembly on ways in which the objectives of the Convention may be met.

In addition the 1948 Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, explicitly or implicitly, include children's rights, wherever applicable, within the human rights they expound.

All children are covered by the CRC because all CRC rights are granted to all persons under 18 years old (Article 1) without discrimination of any kind (CRC Article 2). The child's best interests are to be of overriding concern (Article 3) and children are to be permitted to participate in decisions concerning them (Article 12). The CRC sets comprehensive standards for virtually every aspect of the child's life from health and education to social and political rights. Article 22 refers specifically to refugee children.

The UK instrument of ratification to the CRC contains two declarations and four reservations on certain provisions and principles of the Convention. The UK has reserved the right to apply legislation relating to entering into, remaining in and departing from the UK and the acquisition and possession of citizenship, as it may deem necessary from time to time. This appears to be particularly aimed at frustrating Article 22 (dealing with refugee children) and Article 9 (concerning contact between a child and her parents).

The best interests principle and the non discrimination guarantee are clearly important in establishing a child's right to protection and assistance. The extent to which this can be negated by the reservation is open to challenge both in international and domestic

law. The reservation in relation to Article 22 could be seen as particularly invidious given that it seeks to protect children who have suffered more than others. But the guarantees under Articles 2 and 3 are important in establishing that all children within the jurisdiction must be afforded the rights within the Convention.

The Committee on the Rights of the Child has expressed its concern regarding the broad nature of the reservations made to the CRC by the UK. In paragraph 7 of its 1995 report, the Committee concluded that these reservations:

‘raise concern as to their compatibility with the object and purpose of the Convention. In particular the reservation relating to the application of the Nationality and immigration Act does not appear to be compatible with the principles and provisions of the Convention, including those of its Articles 2,3,9 and 10.’

These articles concern:

- (i) the duty to ensure that the rights set forth in the Convention are applied to each child within their jurisdiction without discrimination of any kind (Article 2.1) and the obligation by State parties to take all appropriate measures to ensure ‘that the child is protected against discrimination or punishment on the basis of the status...(Article 2.2)
- (ii) the best interests of the child as primary consideration ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’ (Article 3.1) together with the duty to ensure the child's well being ‘... taking into account the rights and duties of his or her parents...(Article 3.2);
- (iii) the duty to ‘ensure that a child shall not be separated from his or her parents against their will, except when... necessary for the best interests of the child’, and
- (iv) the duty to deal in an expeditious positive and humane manner with family reunification. (see Concluding observations of the Committee on the Rights of the Child [CRC/C/15/Add.34] of 15.1.95 regarding specifically the United Kingdom of Great Britain and Northern Ireland.

In paragraphs 22 and 24 of the same report the Committee encourages the UK to consider ‘reviewing its reservations to the Convention with a view to withdrawing them’ an argument that is supported by the agreements made at the world Conference on Human Rights and incorporated in the Vienna Declaration and Program of action.

In paragraph 29 of the report the committee suggests that a ‘ review be undertaken of the nationality and immigration laws and procedures to ensure their conformity with the principles and provisions of the Convention’

The principle set out in Article 3.1 of the CRC and the principle of family unity should apply irrespective of the immigration status of the family members of the child. This is evident in respect of applications involving refugee children. There is concern that applications in the UK for reunification in the UK of other family members (frequently children) who are themselves asylum seekers in another country are often rejected. Observation of Article 3 and confirmation of the best interests of

the child being a primary consideration would in such instances result in the child being granted entry to the UK and reunion with her/his family.

In cases of family breakdown of refugees and asylum seekers decisions frequently have to be made on whether either the child or her parent(s) has the right to enter and/or stay in the UK. Consideration of 'the best interests of the child' should be of primary consideration.

Where the asylum application of an unaccompanied minor is rejected, Article 3 of the CRC should be of paramount consideration. The UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (February 1997) set out guidelines for the return of rejected asylum seekers who are unaccompanied minors. They recommend that the best interests of the child require that the child not be returned unless prior to the return:

- (a) a parent has been located in the country of origin who can take care of the child and the parent is informed of all the details of the return, or
- (b) a relative, other adult carer, government agency or child care agency has agreed and is able to provide immediate protection and care upon arrival.

Lifting of the reservation would avoid conflict with Article 8 of the European Convention of Human Rights and the right to family life, defined as:

'no interference by public authority with the exercise of right (family life) except such as in accordance with the law and is necessary...in the interests of national security, public safety or economic well being of the country, for the prevention of disorder or crime, protection of health or morals, or rights and freedoms of others'

'Constructive Deportation' and Removal of British Citizen and Other UK Born Children

Introduction

- (a) Born in the UK - citizens and non citizens

Historically anyone born in the UK (other than children of diplomats) had full citizenship. The British Nationality Act 1981 however ended this age old principle of *ius soli* with the effect that from 1 January 1983 a child is British by birth in the UK only if his/her mother (or father if the parents had married) had settled status or full citizenship at the time of the birth.

Children are thus born in the UK every year who are not British Citizens. There are provisions to apply to register such a child as British upon payment of a fee (currently £120) in the event that the mother (or father if the parents are married) subsequently acquires settled status, or if the first 10 years of the child's life are spent here. Until then such children have no claim to British Citizenship.

(b) Legal position of British Citizen children:

Children who are British (whether by birth in the UK before 1 January 1983, or since then to settled parents or by registration) are, like any other full British Citizen (as opposed to the various second class citizenship categories created by the 1981 Act) free from immigration control. They cannot as a matter of law be subject to deportation proceedings or denied the right to live in the UK.

Their rights do not extend to the right to have non British parents, siblings or other family members live with them in the UK. It is when attempts are made to enforce departure of such relatives that the issue of what may be characterised as the 'constructive deportation' of British Citizen children arises.

(c) Legal position of non British Children born in the UK:

Non citizen children born in the UK may be stateless, or they may inherit another nationality from one or both parents. Either way from an immigration point of view their position is odd. They are 'subject to immigration control' but if they have been in the UK since birth they will never have been granted 'leave to enter' and therefore cannot be said to be overstayers, unless they were subsequently granted leave to remain and this has expired. Neither can they be classified as 'illegal entrants'.

This does not amount to the same legal right to live in the UK as is attached to children who are citizens. The question of whether or not the departure of UK born non citizen children can be enforced has to be answered by reference to the immigration status of their parents:

(i) Port and illegal entry cases:

If the parents were not granted leave to enter because they were illegal entrants, they will be subject to removal. They may alternatively be children born in the UK to parents on temporary admission pending decisions on applications, usually but not necessarily for asylum, made at a port of arrival. The Immigration Service will usually offer the opportunity for the UK born children of such parents to accompany their parent or parents on their removal at public expense. If that offer is refused the departure of those children cannot be enforced.

(ii) Overstaying and breach of condition cases:

If parents who are acknowledged to have or to have had valid leave to remain in the UK are to be removed they must first be subject to deportation proceedings. In such a case their non British UK born children can also be subject to deportation proceedings as family members by virtue of Section 3(5) (c) of the Immigration Act 1971.

(iii) Non conducive to the public good and criminal cases:

Deportation proceedings may be taken on these grounds regardless of whether valid leave to enter has ever been granted. Such cases are relatively rare, but where they arise a UK born non citizen child of the deportee can also be subject to deportation under Section 3(5) (c) of the 1971 Immigration Act.

Interaction with family law

The paramountcy given to the welfare of the child in the Children Act 1989 is not reflected in immigration law. As Hoffmann LJ stated in the case of *ex parte Teame* [1995]1 FLR 293 CA:

‘For the Home Secretary it was only one of the matters to be taken into account. He was also entitled to have regard to the enforcement of immigration policy.’

Nevertheless it is a matter that must be taken into account and the powers of the family courts to make residence, contact, care and wardship orders should be invoked in appropriate cases so that relevant welfare issues may be clarified. This will be of obvious potential relevance in the cases of British citizen and other UK born children whose parents or other close relatives or carers face deportation or removal.

International law

(a) UN Convention on the Rights of the Child

Notwithstanding the UK reservation it is worth noting specifically in the present context that Article 7 gives the right to acquire a nationality which is relevant to children born stateless in the UK. Also of particular relevance to UK citizens and other non removable children are the Article 7 right ‘as far as possible...to know and be cared for by his or her parents’ and the Article 9 provision that children are not separated from their parents against their will...‘unless such separation is necessary for the best interests of the child’.

(b) European Convention on Human Rights

The Article 8 right to respect for private and family life applies to all children and adults within the jurisdiction, whether they are British citizens or not, even if their parents are subject to deportation proceedings or removal. The right is of course not absolute and not necessarily enforceable within the UK if family life is deemed to be safely and reasonably enjoyable elsewhere. The Strasbourg jurisprudence on the point is so far disappointing. Nevertheless the principle of universality of application is crucial to non British citizen children and parents and the siblings and other relatives of British children and this is an area where progressive development should be aimed for following incorporation in the Human Rights Act.

Some implications and problems

The fact that the departure from the UK of non British citizen children of parents who entered illegally cannot usually be enforced while that of children of parents who entered legally can is both an outrage and an absurdity which serves to illustrate the unacceptability of a policy based on anything other than a paramount regard for the welfare of children regardless of the immigration status of their parents.

The idea of the constructive deportation of a child who has full British citizenship has a particular repugnance and people unfamiliar with immigration law are often shocked to learn that British children do not by simple virtue of their own citizenship have the right to have their parents and siblings live with them. But to many the idea of children being born in the UK without UK citizenship, especially if the result is that they are stateless, is also repugnant.

The issue of whether under the present state of nationality law, an immigration policy should be developed which favours citizens over non citizen children is therefore a minefield given the current political climate and the fact that the restoration of *ius soli* appears to be nowhere on the Government's agenda, despite the Labour Party's strong opposition to its abolition in the 1981 Act. We must recognise that the more rights we manage to attach to the fact of a child's citizenship, the less likely we are to win the *ius soli* argument in the face of the popular perception (popular with the government and the judiciary as well as the gutter press) that given the chance, parents will unscrupulously use children as bridgeheads to mass adult immigration.

It is submitted that the way through the minefield is to keep focussed on the fundamental concept of the welfare of the child and, like the ECHR, to regard the technicality of citizenship as secondary. Undoubtedly it is the case that children who are irremovable, whether by virtue of citizenship or merely of birth, which place the issues into sharpest focus and are most likely to result in progressive developments in the law but the aim must be to move on from there towards recognition of an obligation to give paramountcy to the welfare of all children within the jurisdiction.

Recommendations

List Recommendations arising out of all the Sections

- The welfare of the child shall be the paramount consideration irrespective of the immigration status of the child or her parents or carers.
- All children who are involved in immigration applications, whether as applicants, or indirectly as siblings or dependants to have the right to have their views taken into account and for the effects on them of decisions taken by the State to be heard and considered.
- The lifting of the reservation entered by the UK to the Convention on the Rights of the Child 1989.
- A guardian to be appointed to promote decisions in the best interest of child asylum seekers to assist in the discharge of the evidential burden and to safeguard their right to shelter, education and rehabilitation.
- Guidelines on policies and procedures relating to the protection and care of children seeking asylum and refugee children to be drawn up.
- Informed consent of the child to any examination to be obtained and her right to confidentiality to be respected.

- In order to address disputes relating to age any assessment should include a holistic medical examination of the minor together with an awareness of how differing cultural backgrounds and the expectations and responsibilities placed upon children can influence perceptions of a child's age.
- Any decision to detain a minor asylum seeker to be approved before a magistrate who specialises in family or juvenile proceedings within 72 hours of the decision to detain. Where the age of the child is disputed a similar order to be sought until age has been established.
- Where an asylum seeker under 18 years old or a 'disputed age' asylum seeker is held in detention, written reasons to be provided by the Immigration Service, in a language that the child understands, outlining why detention is necessary and stating the exceptional circumstances relevant in each instance.
- All unaccompanied minors and 'disputed age' minors to be referred immediately to the Refugee Council Children's Panel.
- The duties and obligations of the local authority towards children in immigration detention should be clarified.
- Minors who are granted asylum or exceptional leave to enter/remain to be permitted to bring their parents/siblings into the UK to join them without any requirement to provide maintenance and accommodation.
- Applications of children seeking leave to enter the UK to join their families be determined according to the best interests of the child; the current requirements of maintenance and accommodation be eliminated.

The Adequacy of Safeguards against the Cross Border Movement of Children for Abusive Purposes

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Introduction

The movement of children across international borders for abusive purposes has increased significantly in the last few years. In particular the sexual exploitation of children by way of involvement in prostitution and pornography is now recognised as a major problem. To what extent is Britain involved in the cross border movement of children for abusive purposes? Is there any evidence of children being brought into the country, taken out, or of Britain being used as a staging post for abusive ends? What safeguards are there and are they adequate?

We do not pretend to have carried out any kind of in-depth study of this important and disturbing area. However, we have, in particular, made contact with and questioned some of the people working in the relevant areas in central and local government, in police forces, in social services, in the legal professions, in the media, in academia, and in voluntary organisations. What has emerged is necessarily piecemeal and in places anecdotal. However, we strongly believe that sufficient facts have surfaced to justify the call for the relevant authorities to conduct a much more comprehensive study. This should encompass, for instance:

- whether the authorities and the systems in place are properly geared to discover the cross border movement of children for abusive purposes;
- what is the extent of the problems?
- how can they be dealt with more effectively? and
- what legislation, if any needs to be introduced to make the safeguards more adequate?

Time after time we have received the comment that more information is needed in order to assess what may be happening to children and how they might be better

protected.

International yardstick

In order to assess what kind of problems may exist in Britain, it is helpful to use the United Nations Convention on the Rights of the Child (Treaty Series No 44 of 1992, Cm 1976) as a general yardstick, and briefly look at the often frightening events taking place in other countries. We can then turn to what we have discovered is or may be happening here, and make some suggestions as to the future.

UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child was adopted by the UN General Assembly on 20 November 1989. It provides detailed minimum standards for testing the treatment of children throughout the world. It was ratified by the UK on the 16 December 1991, just over two months after the implementation of the Children Act 1989 in England and Wales. The Convention carries great authority as it has now been ratified by over 190 countries. A number of the Convention's articles cover the potential cross border movement of children for abusive purposes: for example, Articles 35, 32, 33, 34, 36, 11, and 6.

Article 35, a wide-ranging provision, deals with the prevention of the abduction of, the sale of, or traffic in children for any purpose or in any form. This Article complements Article 11 (see below) which only applies to international abductions. Article 35 was introduced mainly because of increasing concern at the sale of children for adoption from developing to developed countries. *Article 32* recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, health or development. *Article 33* provides that States must take all appropriate measures, including legislative, administrative, social and educational to protect children from the illicit use of drugs and to prevent the use of children in the illicit production and trafficking of such drugs. *Article 34* covers the protection of children from all forms of sexual exploitation and sexual abuse; in particular in regard to unlawful sexual activity, prostitution, and pornography. *Article 36*, another broad provision, protects against all other forms of exploitation prejudicial to any aspects of the child's welfare. *Article 11* deals with child abduction and provides that measures must be taken to combat the illicit transfer and non-return of children abroad. *Article 6* enforces recognition of every child's right to life (including preventing a possible trade in organs for transplants). The Convention's implementation is monitored by the Committee on the Rights of the Child, which receives regular reports from State parties.

Abusive Activities outside the UK

In his comprehensive report *Sexual Exploitation of Children* (UN publication E.96 XIV.7, 1996), Vítit Muntarbhorn, a former Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography, (at page iii) states that:

‘...sexual exploitation of children is a global phenomenon which, although varying in intensity, is found in both developing and developed countries... In recent decades...sexual exploitation of children has become increasingly complex due to its transnational scope. Children are sold and trafficked across frontiers.’ (emphasis added).

He adds that traditional safety nets are failing in many societies. This being exemplified by family breakdown and break-up, aggravated by continual migration. Children are often sold, abducted, tricked, or drugged into sexual exploitation and are faced with an industry that lures them into exploitation.

The 1996 Report chillingly states that:

‘...at times, the transnational trafficking of children is linked with abduction and disappearance of children across frontiers. In the absence of multilateral and bilateral agreements to facilitate the tracing and return of those children, the scenario remains intractable and opaque... There is an extensive criminal system at work which exploits children for sexual purposes. Such operations range from small-scale activities to large-scale Mafia-type networks. There is at times a linkage with the drugs trade. More worrying still is the fact that some high-ranking policy makers and law enforcement personnel often have a hand in the process. The abuse is multi-layered.’ (see page 3).

In respect of child prostitution, the report (at page 7) identifies:

‘transnational elements at work, trading and trafficking across borders. This trade may take the form of abduction or employ other modalities such as false identity...or sham marriages... At another level, the rise of sex tourism increases the occurrence of transcontinental prostitution.’

Suggested transnational routes of trafficking in children are: from Latin America to Europe and the Middle East; from South-East Asia to Northern Europe and the Middle East; an international regional market in Europe; traffic from various regions in Africa; and an Arab regional market. The 1996 report observes that:

‘Given the fact that demand and supply in regard to transnational prostitution are worldwide, the problem of child prostitution clearly affects all countries.’ (page 8).

Trafficking of people is said to be on the increase around the world. The UN estimates that 4 million people a year are traded against their will to work in some form of slavery - in domestic work, construction, for begging, or for prostitution. Many of these are children (see World Vision Briefing Paper No 4, November 1998, ‘Child Trafficking in Asia’, pages 3 and 4). The Paper notes that:

‘reports from West Africa talk of a high demand for children from Togo, particularly girls, to work as domestics in relatively wealthy areas around Lagos in Nigeria and Libreville, Gabon. Children are also trafficked to work market stalls or as shop assistants. Children are trafficked from South Asia to the Gulf to supply a demand for camel jockeys. One recent press report from

The Times claimed children were being smuggled from Africa and Latin America by European football clubs in search of the next Ronaldo. In South-East Asia, most of the victims are girls, trafficked for the purposes of prostitution.'

Anecdotal accounts from experienced field workers suggest that there is a traffic in children for prostitution from a number of East European countries to other parts of Europe including Germany and Belgium. Children are reported to be taken, for example, from Bulgaria to Macedonia and Rumania, and from there to Cyprus, Turkey, Belgium, France, Germany, Italy, Austria and the Czech Republic. Bulgaria is also said to be a staging post for children brought in from some of the countries in the former Soviet Union and Rumania.

Further abuses include some reports of a traffic in children for the sale of their organs. Police in Nepal reported a case in 1993 in which children had been trafficked into India for this purpose (see UN Doc E/CN.4/1994/84). Adoption is also used as a cover for economic or sexual exploitation of children, and there is a trade in the sale and trafficking of children for the purposes of adoption.

Cross Border Activity and the UK

At a preliminary stage we identified the following areas of potential or actual cross border illegality in this country:

- forced marriages (e.g. between the UK and Asia);
- trafficking of children for sexual exploitation;
- economic exploitation of children (including the UK as a staging post between Africa and Europe);
- trafficking of children for intercountry adoption (involving corruption and exploitation).

Forced Marriages

We were told that the experience of those working in social services and education was that marriages in the UK may be forced through physical or cultural pressure. In the latter case it may sometimes be very difficult to decide when a cultural norm becomes a breach of the criminal law and a breach of human rights. Often the pressure is indirect or veiled. A recent high profile case demonstrates how unscrupulous parents may send a daughter out of the country, against her will, in order to be married (see *The Times*, 28 May 1999, page 3 and *Re KR (a minor)(abduction: forcible removal)* [1999] 2 FLR 542).

KR was born into a Sikh family in 1981. She has an older brother B, and an older sister P. All three children were born in England, although the mother and father were born and brought up in India. They all have British nationality. In 1997 P left the family home and established a lasting relationship with a young man with whom she

now lives. The parents deeply disapproved of both actions. There was further disapproval when KR left home in April 1998. KR attempted to establish herself with her elder sister. The police were involved by both sides. P asserted that KR was at risk of forcible removal and detention by the parents. The father reported KR as a missing person and accused P of in effect kidnapping KR.

Eventually, KR was returned to the care of the father with the assistance of the police who may not have realised the extent to which she was unwilling for that to happen. She was then 17 and in hindsight greater attempts should have been made to find out precisely what her own wishes were. P continued to try to enlist help to avert what she correctly predicted would be her parents' likely reaction, to remove KR to India. The police were unable to speak directly to KR in circumstances in which she could speak freely. The parents took KR by an indirect route to Delhi and then to a village in the Punjab. KR was left in the custody of a paternal aunt. KR managed to send a letter to her sister in which she pleaded for help. She described being beaten by the father and being kept against her will. Her passport was removed and her movements watched. She had thoughts of suicide and asked P to telephone the local social services in England.

P heard of the charity Reunite who advise and support parents of children abducted or believed to be at risk of abduction. She was referred by Reunite to solicitors who issued wardship proceedings. When the matter came before the court in February 1999, two opposing views were put forward. A teacher well acquainted with KR said that she would not have gone to India voluntarily in the hasty manner that had occurred. She simply disappeared from school without any notification being given. As against that view, the parents maintained that it was KR who wished to live in India and who was happy to remain there. They added that there was no element of duress involved and they would be happy to co-operate in whatever steps could be taken to satisfy the court that this was indeed the position.

Mr Justice Singer, who heard the case, brought in the Official Solicitor to act for KR and the Foreign Office who agreed to arrange an interview with KR at the High Commission in Delhi. It would be confidential and give her the opportunity to express her true wishes. Before this could be arranged, what was described as a 'wholly stage-managed' contribution from KR was produced in the form of a tape of a telephone call and a faxed letter, purporting to support the parents' position that she was happy to be in India and that there was no substance to her earlier letter asking for help. The parents agreed to assist KR to travel to the High Commission in Delhi. However KR could then not be found and the court, through the Foreign Office, invited the co-operation of the Indian police and also Interpol in the search for KR.

After further abortive inquiries, the court made an order inviting 'all judicial and administrative bodies' in India to help in finding KR and returning her to England. Eventually KR's older brother B made contact with her. She persuaded him to take her to the High Commission in Delhi by saying that she would indicate that she wanted to stay in India. KR was able to speak to the Official Solicitor's representative on the telephone and make her true feelings known. She was then returned to England. The wardship was continued and her position was protected by injunctions, supported by powers of arrest under the Family Law Act 1996. The court concluded that the parents had been deceiving the court as to KR's position.

Singer J, in his judgment said that:

‘Child abduction is still child abduction when both parents are the abductors and the child is very nearly an adult. The circumstances of this case may at first glance appear to be somewhat extreme and unusual, but in fact highlight the extent to which courts and other agencies concerned need to be alert to safeguard the individual integrity of children from attack, even from their own parents and family. This case has also highlighted what I am sure is not an isolated instance of the risk which adolescents, and in particular young girls, face if and when they seek to depart from the traditional norms of their religious, cultural or ethnic group. In a wider context, this case also illustrates the sort of pressures to which young persons may be subject, driven by the desire of their parents and family that they should marry in the manner culturally expected of them. Similarly there may be (although in this case there was no suggestion of it) an element of exploitation of young persons if in effect treated as goods for sale in a trade, whether that trade be the making of marriages or the improvement of immigration or nationality prospects.’

The judge added:

‘My hope is that practitioners who may not be fully aware of these issues may become so; that the likely attitude of the English courts may be made clear to parents and families in the relevant communities; and that perhaps greater vigilance and protection may be afforded by local authorities, educational authorities and others in a position to react in the child's interests.’

He concluded that while the courts would be sensitive to traditional and/or religious influences, those influences would usually have to give way to:

‘...the integrity of the individual child or young person concerned. In the courts of this country the voice of the young person will be heard and, in so personal a context as opposition to an arranged marriage, will prevail. The courts will not permit what is at best the exploitation of an individual and may in the worst case amount to outright trafficking for financial consideration’.

The judge made the following suggestions:

- education authorities and local authorities should, if they have not already done so, consider creating policies which would easily enable children to seek their help;
- teachers should have established procedures for notifying local authorities;
- local authorities should consider, if there is no-one to take wardship proceedings, whether the threat (most usually of removal abroad with a view to marriage there) constitutes likely significant harm such as to justify care proceedings;
- lawyers should be alive to the sort of issues KR's case illustrates;

- there is a need to help parents to understand that they may face considerable difficulties if they hope on the one hand to bring up children in an English educational system and society but at the same time to retain every aspect of their own traditions and expectations.

We were told by many sources, within the immigrant communities from the Indian subcontinent in particular, that the practice of removing children against their will from this country for the purpose of marriage is widespread. It is not surprising that it is virtually impossible to gauge the actual extent of the problem. One suspects that there are few 'happy endings' (if that is the right description) as in the case of KR described above. That case may well be the 'tip of the iceberg'. The Official Solicitor, for example, has experience of similar cases including one involving the Yemen. We were also told that many agencies, including the police, were often reluctant to intervene, even when information was available, because of the fear of being labelled as racist. Clearly there would seem to be considerable scope for further investigation into this area and for greater alertness and intervention by those agencies, such as social services, education authorities and the police in order to rescue what may well be a large number of child victims. One must not, of course, underestimate the human and other problems that face those in the front line. On a national level one would hope that the Home Office, the Department for Education and Employment and the Department of Health would look further at the issues.

We were also told that there are some cases of children brought to this country under duress in order to be married. Once here they are often in a hopeless situation: unable to speak the language, with no family or friends, and sometimes made to work for many hours and beaten. It has not been possible to obtain any further details.

Trafficking of Children for Sexual Exploitation

We could discover very little information about the trafficking of children for sexual exploitation into or out of this country. There appears to be no research of any kind on the subject and no statistics that cover the area in any precise aspect. The criminal law envisages potential problems. Section 23 of the Sexual Offences Act 1956, for instance, provides that it is an offence for a person to procure a girl under the age of 21 'to have unlawful sexual intercourse in any part of the world with a third person'; and the Sexual Offences (Conspiracy and Incitement) Act 1996, aimed primarily at the sex tourist rather than a trafficker, makes it an offence to conspire in respect of, or incite, certain sexual acts outside the UK.

We gained the impression that law enforcement agencies do not specifically target trafficking of children but occasionally learn of some activities as a result of other inquiries being made, for instance into pornography or other international criminal activity. Recently, for example, a man was intercepted by customs officers at Heathrow airport on a flight from a country in Eastern Europe. He was a motor mechanic by trade who had surgical gloves and medicines in his baggage. He was also carrying correspondence which showed that he had attempted to obtain a visa to allow him to bring two 12 year old girls from Eastern Europe into the UK. It emerged that he had been posing as a doctor, approaching the parents of sick children and persuading them to allow him to bring them to this country for treatment. He also had

in his possession some stories describing children being abused by adults. Further inquiries are being carried out.

The prevalence of child prostitution on the streets of many of our cities (e.g. London, Cardiff, Leeds, and Manchester, and see *Child Prostitution in Britain*, ed. David Barrett, The Children's Society, 1997) gives rise to justifiable fears that children are being brought into this country and taken out for the purposes of prostitution. Recent trials at the Old Bailey of so-called 'Russian gangsters' have revealed a disturbing trade involving women and girls, some described as being younger than 18, being forced to come from Russia and Lithuania to work as prostitutes in the UK. They are often subjected to considerable violence by the pimps who smuggle them into this country (see *The Observer*, 14 March 1999, page 7, and *The Evening Standard*, 1 March 1999, page 10). A series of articles by Lee Gordon in the *Camden New Journal* recently highlighted the fact that girls as young as 13 were working in brothels and massage parlours in King's Cross. Some of them were said by local protection agencies to have also worked abroad in places such as Amsterdam.

This also appears to be an area of potential and actual risk to children (particularly children who have run away from home or local authority care) that merits much greater investigation by both the police, customs and immigration officers, and local authorities. The law is in place. The Children Act 1989 provides powerful provisions that are probably in many areas not being utilised fully in order to protect children, and the criminal law has many sanctions. While recognising that there are often real difficulties in getting witnesses to come forward to give evidence in the criminal courts, there would still appear to be considerable room for more preventative action.

Economic Exploitation of Children

The cross border economic exploitation of children overlaps to some extent, of course, with exploitation for sexual purposes particularly prostitution. This is yet another area where information is sparse and in the main anecdotal. We were confidently told that this country is a staging post for children being sent from West Africa to Italy to work as servants or employees. Hard facts are unfortunately not available. The International Social Services of the UK provided us with two examples of economic exploitation that came to the notice of social services departments in London.

S was born in Benin, West Africa, but, after her parents separated, she spent most of her early life in Nigeria with her mother. After her primary school education was completed, one of her teachers suggested to her mother that S should be taught to sew by one of her relatives who lived in Lagos. S went there but found out that the woman was in fact a prostitute. Eventually S agreed to go with the woman on what was described as a 'holiday' to London. In London S had to do all the housework for the woman and look after her baby. She was physically and emotionally abused by her. Fortunately she eventually came to the notice of social services and was accommodated under the Children Act 1989.

The other case concerned C who was also born in Benin in 1971, the fifth of six children. Her family was very poor. She was sent to live with an older sister and her family when the sixth child was born. She was not sent to school. When her sister

divorced her husband, C went back to live with her parents. Within a short time an aunt took her to Nigeria, saying that she was going to be trained as a hairdresser. When she arrived she found that she was employed as a servant to a family with two children. In 1981, the Nigerian family decided to live in London. C was taken with them, travelling on a false passport. She often had to look after the children herself and do all the housework. She was frequently beaten. Social services became aware of her plight when, on her own initiative, she went to a local school seeking education. Subsequently, C discovered that her aunt in Nigeria had been paid for her services as a servant. International Social Services were able to trace her family in Benin.

Trafficking of Children for Intercountry Adoption

Aspects of intercountry adoption have given rise to concern for many years. Certain notorious cases have revealed that some children have been abducted or bought from parents in, for example, some Central and South American countries by unscrupulous people and organisations, who then forge documents and bribe officials in order to conceal their activities, before passing the children on to prospective adopters from this country. Strictly speaking these cases may not fit into the category of cross border movement for abusive purposes as it could be argued that the children probably benefit overall in most cases and the ultimate adopters do genuinely want to and do care for them properly. However, there is considerable evidence that in other parts of the world some adoption processes have been a sham and that children have been exploited sexually and economically. We have found no evidence that this occurs here. A further safeguard will be in place in the near future when the provisions of the 1993 Hague Convention on Intercountry Adoption are incorporated into our law by the Adoption (Intercountry Aspects) Act 1999: see pages 105-107 of the paper 'International Adoption – the recognition of foreign adoptions in the simple and full forms'.

Conclusion

One of the most important points to come out of our enquiries about the cross border movement of children for abusive purposes in respect of the UK, is that so little is known about the potential or actual problems. There appears to have been no research, no systematic investigation of any kind and, not surprisingly, there is no detailed or statistical information available. We consider that there is an urgent need for these gaps to be filled. In one area, that of forced marriages as exemplified by the recent case of KR (described in detail above), there are some hard facts which demand that there should be greater efforts to protect the children at risk. The suggestions which come out of that case (see above) should be systematically implemented by local and education authorities, by the police, and by customs and immigration officers amongst others. In addition skilled mediators may well have a role to play in some of the cases.

The trafficking of children for sexual and economic exploitation is another important area that certainly merits further investigation. As in the case of forced marriages, the legal safeguards in respect of this aspect, whether in the criminal law or, for instance, the Children Act 1989 or the Family Law Act 1996, would appear to be in place, although not sufficiently used. What has in particular been lacking is any real focus on the problem areas and with it investigation into, and preventative work in respect

of, the actual abuses that children have suffered and are continuing to suffer. In this sense there are virtually no adequate safeguards in place.

Child abduction in relation to Islamic Law and issues relating to comity in decisions about residence and contact

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Defining the Problem - The Approach of English Judges To Shari'a Jurisdictions in Children Cases

The English approach

English judges are used to the well-developed English jurisdiction, but (certainly at High Court level) they have extensive experience of international children's cases. Many of the fundamental characteristics of the English jurisdiction set out below are shared by other signatory countries to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. However in a number of Shari'a jurisdictions such characteristics are not present. Their absence may concern English Judges that welfare (as understood in England) will not be the paramount consideration if a Shari'a court considers the future of a child, judicially returned from England, or that a returning parent will not have the same even handed treatment from a Shari'a court that he or she would receive in England.

Comity and welfare

English judges prefer to act in comity with other jurisdictions in children's cases where possible, but (save in Convention cases where it is presumed) welfare is the overriding consideration. When considering whether to act in comity with a Shari'a system in a children's case, an English judge will consider all the circumstances of the individual case, including the characteristics of the particular Shari'a jurisdiction, and the likely consequences of acting, or not acting, in comity, all measured against the welfare interest of the child or children concerned. In a case where neither parent will suffer a juridical disadvantage as a result of a child returning to a Shari'a jurisdiction, and/or where there are no decisions for a Shari'a court to make in relation to a returning child, there may be fewer difficulties in maintaining comity than in one where (e.g. following an abduction to England) fundamental welfare decisions are deferred to the Shari'a court, including the choice of carer, and the place and country of residence.

Characteristics of the English Jurisdiction

The best welfare interest of children is, and for very many years has been, the paramount consideration in children's cases under English domestic law. In particular, there are no formal presumptions based on the age, gender, nationality, or religion of

children, or of the gender, nationality or religion of their parents, whether married or not, or failing this by one of them. Beyond this, there is no presumed structure of succession for the care of children within a family.

A parent can apply to the court for leave to remove a child permanently from the jurisdiction, and the court has the unquestioned power to grant such leave, and impose the decision on the other parent. Such an application can, and generally will, be granted, where the applicant parent is the principal carer, and has reasonable plans to emigrate, despite the opposition on the other parent, if it is in the best interests of the child.

Children's cases are heard in three levels of court at first instance. The top level, the High Court, has a specialist bench of family judges. Difficult international cases, and all Hague Convention child abductions, are heard by judges at this level. At other levels, judges receive special training of children's cases. The courts are entirely secular. There is provision for children to be independently represented where necessary (a provision to which frequent recourse is made in all cases other than international child abduction). The instruction at public expense of court welfare officers to investigate and prepare reports on the welfare of children in the context of litigation is commonplace where those children are not represented.

Legal aid is freely available, subject to a means and merits test, without a residence requirement, for persons who are parties to children's cases heard in England. Legal Aid allows access on a lawyer and own client basis, to a wide range of independent specialist solicitors and barristers in private practice (and interpreters where needed). Lawyers and unrepresented parties have free access as of right to the courts.

The Application of Shari'a in the Islamic World

Introduction

This section aims to introduce the Islamic world as a legal area and legal culture by way of background to more detailed discussion of the legal rules applicable in the Shari'a (Islamic law) and in countries which apply the Shari'a to the question of custody and guardianship of children.

The first important point is that the Islamic world (in its widest sense) is an extremely heterogeneous area. For the purpose of this section, the Islamic world is treated as including any territory where Muslims live, although it will not (because of reasons of space) be possible to deal in detail with all this area. The Islamic world proper covers countries where Islam is the state religion and Muslims are the numerical majority. For example what one may call the heartlands or the core of the Islamic world is represented by states such as Saudi Arabia and other states in the Arabian Peninsula, as well as the states of North Africa and the Levantine area. But the Islamic world also includes states outside this area (which is perhaps more traditionally known as the Middle East) such as the Sudan, Iran, Afghanistan, Pakistan and Indonesia. The Islamic world further covers countries where Islam is not necessarily the state religion or the religion of the majority of citizens such as the Lebanon, India, and certain West African countries. Finally the definition of the phrase 'the Islamic world' can be said to also cover those countries that have a

substantial minority community of Muslims which includes a number of European countries, such as the UK. In this section reference is made to certain of the countries within the definition of Islamic world in its widest sense but not necessarily all of them.

The second important point to note is that although all Muslims are bound together in the religion of Islam, the expression of that religion contains as many sects as does Christianity. All Christians are bound together in that they accept certain general tenets of faith but there are considerable differences of interpretation and authority between different sects such as Catholicism, Anglicanism, Methodism and other non-conformist sects. Similarly Muslims are bound together by certain general tenets of faith but there are considerable differences of interpretation and authority between different sects. The major schism is between the Sunnis and the Shias where the defining difference is one of authority to propound and interpret the religion. But within each of the Sunni and the Shia groups there are a large number of sub-sects which have grown up historically.

At the most general and simple level all Muslims accept (at least theologically) that the Quran is the holy book of Islam and contains the revealed wisdom handed down by God (Allah) to the Prophet Muhammad in the 7th Century in what is now Saudi Arabia. Saudi Arabia contains the two holiest cities of Islam: Medina and Mecca. Both these cities had close connections with the life of the Prophet Muhammad and visits to them are part of the pilgrimage which Muslims are exhorted to take which is known as the Hajj. All Muslims accept that certain acts are considered the pillars (arkan) of the religion. These are such things as prayer five times a day, fasting in the holy month of Ramadan, giving alms or charity to the poor and undertaking the pilgrimage or hajj. However although all Muslims accept these pillars of the faith as a general framework, the religion itself in its many sects has many different interpretations relating to other aspects of faith and the details of its organisation.

The Shari'a

The Shari'a (which is generally translated as Islamic law) is fundamental to an appreciation of the religion of Islam. In theory to be a Muslim means that the individual must accept and follow the religious law. At a basic level it is considered that this law has been promulgated by God in the Quran and that this provides the detailed framework on how a Muslim is to lead a good life so as to obtain passage to the hereafter. The Shari'a is seen as all encompassing. In theory a Muslim need know no other law. In practice this has never been the true situation.

The Quran itself is an historical and religious document more than a legal code. The amount of strictly legal (in the western sense of providing rules for behaviour to be followed and that are enforceable by courts) is very small. Commentators vary as to the exact number of verses but it is in the order of 100 to 200 out of a total of over 6,000. Thus the Quran cannot and never has been an exclusive legal code applicable to Muslims. From the earliest times of Islam it has needed to be interpreted and developed. During the lifetime of the Prophet Muhammad this was done by the Prophet himself.

The Prophet (we are told) was constantly asked to decide matters of law and asked to settle disputes. He did so either by interpreting the words of the revealed wisdom (at that time a written Quran did not exist and did not come into existence until about 20 or 30 years after the Prophet's death) or by making decisions which he considered were consistent with the revealed wisdom. Some time after the Prophet's death these decisions (known as traditions or Hadith) were collected together as being every bit as important as the written words of the Quran because it was said that the Prophet was guided in his decision making by his closeness to God. These traditions were collected in many different series of volumes and became a source of legal rules known as the Sunna. The Quran and the Sunna together are the two most important written sources that make up the Shari'a. Unfortunately although the written text of the Quran was decided upon very soon after the Prophet's death and is approved by all Islamic legal scholars, the texts of the traditions that make up the Sunna were not collected together until a long time after the Prophet's death and so there was considerable diversity in the collections made within the Islamic world. The Sunni collections, for example, differ widely from those accepted by the Shia. Even within the Sunni community there are wide variations between the collections. Six collections are canonical and perhaps the most famous of these are the collections of Al-Bukhari and Muslim.

Apart from these two textual sources traditional Islamic law accepts a number of further subsidiary sources. These, although called sources, are not formal sources of law but rather methods by which the law can be added to or expanded by the juristic interpretation or religious scholars (ulama). Thus the most widely accepted additional subsidiary sources are qiyas, normally translated as 'analogy'. This is a method of development which was used by scholars to expand from one ruling to another. It requires the Islamic jurists to investigate what is the core (or illa) of the initial ruling (a little like finding the ratio decidendi of a common law decision) and then applying that core by analogy to a different set of facts. Most schools of Islamic law accept that this is a subsidiary source of law. The second accepted subsidiary source is that of Ijma, normally translated as 'consensus'. This refers to the permissibility of a consensus of religious scholars within a particular school to determine a particular ruling on a matter of legal interest. Further sources also exist but vary between schools, including in some schools the ability to consider public interest.

One subsidiary source of law which was available to the early religious jurists was that of Ijtihad which is normally translated as 'exerting oneself to the utmost'. This refers to the powers of the acts of the early jurists in interpreting and considering the written texts of the Quran and the Sunna in deciding upon particular rulings. This particular power certainly existed amongst the earliest jurists for approximately one or two centuries following the death of the Prophet Mohammed. After that time however it became less common for religious jurists to interpret the written sources anew, instead they were limited to acting in imitation (taqlid) of the originators of a particular school. This legal phenomenon is known as 'the closing of the gate of Ijtihad'. There is much controversy in the modern day concerning the call for the re-opening of the 'door of Ijtihad' by modern Islamic scholars in order to produce new interpretations of the two written sources which might then be more consistent with contemporary mores.

As can be seen from the above the Shari'a is not and never has been a single system of legal rules applicable throughout the Islamic world. Different sects in different parts of the Islamic world at different times have applied different sets of legal rules which they have called the Shari'a. Again there are certain principles which all the sects accept. This is particularly true of those legal rules which have a foundation in a verse of the Quran. But in other areas there is considerable divergence. This is particularly true of criminal law. The Quran mentions only a few specific crimes and does not go into great detail about their definition. Hence there is a great deal of diversity between the different sects and schools of Islamic law concerning criminal law and the definition of crimes. Another area similar to this is that of custody and guardianship of children which is not dealt with in detail in the Quran. Consequently there is considerable variation in the detailed rules applicable in this area of law between the different schools of Islamic law particularly as to how long the custody of a mother lasts.

Schools of Law

There are four main Sunni schools of law. The most common is the Hanafi school of law. This is the most common because it was the official law of Abbasid Caliphate and the Ottoman Empire and therefore had the widest dissemination. The other schools are the Maliki which is prevalent in North Africa and the Southern Gulf area; the Shafi'i school, which is prevalent in East Africa and South East Asia (particularly Malaysia), and the Hanbali school which is the official school in Saudi Arabia, and also exists in some of the Emirates of the Southern Gulf area. The main Shia school is the Ithna Ashari (Twelver) school which is the official school applicable in Iran. It is known as the Twelver school because it reveres the 12 descendants of the Prophet and considers that they alone had the right to interpret and develop the principles of the law for the community. These rights ended with the twelfth Imam who disappeared in the desert but who is considered to be in waiting. The Twelvers revere the religious head of the community, the Grand Ayatollah, as having the power to interpret and develop the law on behalf of the hidden Imam. They in other words have a very different attitude to the Sunnis who considered that after the Prophet's death there was no one to interpret and develop the law in the way that the Shias accept.

Thus one can see that different schools of Islamic law grew up in different geographical areas throughout the Islamic world. The result of this for the modern day is that it is not possible to say that there is a uniform Islamic law. One must consider each country or state in the Islamic world separately. Each Islamic State generally applies the law of a particular school of Islamic law as an officially accepted school although there are some exceptions to this. The most obvious exception is Bahrain which, although it professes to be a Sunni country, has an extremely large Shia population (officially less than half the population although many writers consider that the Shia in fact outnumber the Sunnis). As a result both Sunni and Shia law apply in Bahrain. Bahrain is one of the few countries to have two sets of Islamic law courts, one Sunni applying Sunni law and one Shia applying Shia law. The Shia law applied is not that of the Twelver school, instead it applies the law of the Jaafari school. Even within a particular country however it may be that particular individuals or small communities may follow a different school from that which is applied officially. Thus one has to consider the country with which one is dealing, and

sometimes the individual or the community from which an individual comes before one can decide what school of Islamic law is or may be applicable.

However it is uncertain that whether classical or traditional Islamic law of whatever school will necessarily apply to the determination of any legal question. Again states in the Islamic world have adopted very different attitudes to the continuation and applicability of the Shari'a and its enforcement by Shari'a courts. It is to this question that we now turn.

The Codification of Shari'a

The extent to which traditional Shari'a is applied in the Courts of the Islamic world is also a question which has to be treated separately in regards to each state. A modern tendency has been to codify or otherwise reform areas of the Shari'a which a court in the Islamic world has to apply. This is particularly true in the area of family law. Most states in the Islamic world have reformed or codified the family law rules that are applicable in some way or another. This began in 1951 in Jordan and has continued until the most recent code promulgated in Yemen in 1992. Only a few states have not reformed or codified the law. Saudi Arabia is one which still applies the traditional law found in the Quran, the Sunni and the authoritative Jurassic texts without any change or reform. Others are Oman, Bahrain, Qatar and the UAE. In other Islamic states family law statutes and codes apply although the traditional law may still be used to fill in gaps that occur in such codes. Some states, although not producing a code, have amended aspects of the law in a fragmentary way. A good example of this is Egypt which has amended the law on marriage and divorce in a number of small statutes in 1920, 1929, 1979 and 1985 without ever producing a comprehensive code of family law principles. Thus again the extent of the application of the traditional Shari'a and its amendment must be considered on a case to case and country to country basis.

Shari'a Courts

Shari'a courts are historically those courts headed by an Islamic judge known as Qadi which apply the Shari'a of the particular school to which the Qadi is attached. Shari'a courts have existed from the earliest times of Islam. The earliest Qadis were appointed by the Islamic ruler and had exercised judicial as well as quasi administrative control over an area or province. The Qadi acted alone in his Court and there was no appeal except by way of petition to the ruler as the source of all justice. It is thought that the Qadi initially applied the rules in the Quran and any decisions of the Prophet that he knew of, although some research suggests that the earlier Qadis also applied local custom and practice. The development of Islamic law (apart from the writing down of the traditions of the Prophet) came through the writings of Islamic religious scholars, not through the decisions of the Qadis which were never written down and never created precedent. Thus we have very little material to help us to discover what the Qadis actually did until relatively recently. Material in fact exists in the registers of the Qadis courts (The Sijallat) dating from about 1600 which is now being studied to give an idea as to what mediaeval Qadis actually decided.

The procedures developed in the Qadis courts were very rigid. Also the Qadis were restricted from dealing with a large swathe of regulatory rules that were developed by the Islamic rulers. Special tribunals were set up to deal with this type of jurisdiction which were not bound by the strictures of the Shari'a court procedures. Hence a dual type of legal system developed. This duality has continued down to the present day in a number of countries where Shari'a courts exist side by side with secular tribunals or courts. Each has its own area of jurisdiction, its own procedures and its own judges. In the modern day however the tendency has been to reduce the jurisdiction of the Qadis courts. This is particularly so in the areas of criminal and civil law. The main jurisdiction of present day Qadis courts (where they exist) is in the areas of family law and inheritance.

Thus one may distinguish between groups of states in the Middle East in relation to whether they have Shari'a courts, and if so the scope of their jurisdiction. At one end of the spectrum is a state such as Turkey which has abolished all the Shari'a courts in favour of secular courts staffed by secular Judges and which apply a wholly secular law. This is unusual however in the Islamic world and of course is the subject of much continuing controversy within Turkey itself. At the other end of the spectrum is a state such as Saudi Arabia where in theory the only courts in existence are Shari'a courts which have complete jurisdiction over all cases. In practice however in Saudi Arabia a number of tribunals have been set up to deal with certain questions such as a banking and cheques tribunal, a commercial tribunal, a labour tribunal and an administrative tribunal. Thus although in theory Shari'a courts are the only courts, there is in fact a duality of jurisdiction in Saudi Arabia.

Between these two extremes lie most other Islamic countries where there is an accepted or an implied duality. In the Gulf countries there is generally an accepted duality. Shari'a courts exist alongside secular courts and each has its own jurisdiction and is staffed by its own judges. This is true of Kuwait, Bahrain and the United Arab Emirates. It is also true of states in North Africa and the Levantine area. Some countries however have an implied duality. This is true of Egypt where the Shari'a courts were abolished in 1955 and their jurisdiction given to the secular courts, but in fact Shari'a cases go to a special bench in the secular courts which are staffed by judges who have specific expertise in Shari'a matters. Generally also now lines of appeal exist in Shari'a courts in the same way as in secular court. This is true even in Saudi Arabia. This is a considerable modification of the traditional view.

Islamic Codes and Laws of Personal Status

As indicated above a large number of states in the Islamic world have at various times promulgated laws and/or codes relating to the area of Islamic personal status. A complete list of these laws and/or codes is too detailed for a report such as this. But it must be borne in mind that each state must be treated as having its own individual characteristics as far as the application of the Shari'a law of personal status is concerned. The questions to be asked in relation to any individual state would be:

- (i) the extent to which Shari'a applies in that state;
- (ii) the official school of law which applies in that state;
- (iii) the school to which the parties adhere if it is different from (ii) and the attitude of the state to that difference;

- (iv) the existence of Shari'a courts;
- (v) the existence of any laws or codes in that state;
- (vi) any material academic or judicial indicating the interpretation of any such laws or codes in that state.

Islamisation

There is a well-recognised and well-trodden path of codification of family law in Islamic countries and particularly those which make up what is traditionally known as the Middle East. It can be said that there has been a considerable amount of inter-Arab borrowing in relation to the reforms by codification that have taken place since the first main code of family law was produced in Jordan in 1951. However recent developments in the Middle East have resulted in political upheaval (a particular example is the Iranian Revolution of 1979) which has had an important influence in the recent development of legislation in this area. In relation to Iran itself reforming legislation in 1967 and 1975 was repealed by the incoming Islamic government in 1979 and Iran now applies the traditional Shia law once again. Other states in the Middle East have either postponed codification in this area of law or introduced amendments to some of the more radical reforms.

This retrenchment of traditional ideas is all part of a process that is perceived to come out of a desire for increased 'Islamisation' of political and legal structures in the Islamic world. There is therefore a certain dynamic in some countries which oscillates between a desire to become more traditional and a desire to reform. This dichotomy exists in almost all states in the Islamic world and is often seen in the way in which constitutional development adheres to or promotes one or other of these desires.

A number of examples may be cited in relation to this dichotomy. One clear example is that of Pakistan which adopted a reforming piece of legislation in the area of family law with the Muslim Family Laws Ordinance of 1961. Since the early 1970's however Pakistan has gone through a series of 'Islamising' Decrees which have sought to apply more and more traditional Islamic law in Pakistan. It is no surprise that this has gone hand in hand with changes in the constitution to promote the application of Islamic law in Pakistan. The Muslim Family Laws Ordinance has not yet been repealed but has been the subject of considerable discussion, both politically and judicially, in relation to its continued application. Another example is that of Egypt. Here the traditional law has been amended by a number of fragmentary statutes since the 1920's. Again there has been an Islamising tendency both politically and judicially. The Constitution was amended in 1981 to make Islamic law the primary source of law. It has been used in a number of cases before the constitutional court of Egypt to attempt to strike down legislation which is considered to be contrary to the traditional law. This has met with an uneven success.

Thus the continuing dichotomy of opinion about the importance and efficacy of reforming and/or codifying the Islamic family law is one which is of great importance to any understanding of the law in this area.

Custody and Guardianship in the Islamic World

Introduction

Islamic law accepts two distinct relationships of care in respect of children, they are defined as: custody (*hadana*) and guardianship (*wilaya*). The custodian is known as the '*haadina*', which indicates the assumption common to all schools that the custodian is a female, whereas the guardian is known as the '*wali*', which also indicates the assumption common to all schools that the guardian is a male.

'*Hadana*' derived from an Arabic word meaning 'to nurture' or 'to protect', is defined as the physical nurturing or upbringing of a child until such time as he or she can manage for him/herself. Guardianship is the authority and supervisory powers that the guardian has over the person and/or property of a child, which will include the power to make decisions on such matters as education, travel and finance.

The functions of custody and guardianship overlap in that whereas custody is a temporary right, guardianship is a permanent one. Once the functions of the custodian are ended then the guardian's duties continue until such time as the child is completely adult and capable of organising his/her own affairs.

There is no consideration as such in the traditional Islamic law concerning the best interests of the child, although it is assumed and accepted that the rules are predicated upon the idea that they are indeed in the best interests of the child. In the modern Islamic world a court is often given a discretion and/or flexibility in relation to the traditional rules based upon what is in the best interests of the child.

Custody

Traditional law identifies the natural mother as being the natural custodian of her children. If the mother is unable to act as custodian then each school has an elaborate array of female relatives to whom the right of custody may pass. Some schools allow the custody eventually to pass to the father but this is only possible where the father has a female relative (such as his mother) who can actually perform the obligations of the custodian. Modern laws have generally adhered to the traditional patterns to identify the closest custodian. The final custodian is the Qadi who may appoint anyone he considers proper in the best interests of the child.

The rights of the custodian and the guardian are balanced by obligations on their part. The mother has a right to be a custodian giving her physical charge of her children and thereby she incurs certain obligations. The guardian has a right to see that certain aspects of the child's life are discharged but is under an obligation to pay for them (including an obligation to pay the custodian) and the child has a right to proper custodianship and proper guardianship. A majority of the Sunni schools for example do not permit a mother to waive her right of custody as part of the exchange for a divorce by the husband. The mother cannot waive this right - it is not hers to waive because it is the right of the child to receive her custodianship.

At all times the guardian, generally the father, as well as the child's grandparents, will have rights of access to the child. The above rules apply to legitimate children. Special more limited rules apply to illegitimate children.

Conditions of Custodianship

Although the normal custodian is the natural mother she must still satisfy certain conditions in order not to lose her right of custody. These conditions also apply to any other custodian. The mother must have attained majority, must be sane and free from communicable disease. More importantly she may lose her right of custody if she remarries. It is not all remarriages however that cause this. It is only if she marries a man who is outside the degrees of prohibited relationship to the child. In other words it would be possible for her to retain custody if she married her former husband's brother or cousin but not if she married a total stranger. There are however certain limitations on loss of custody if the husband does not choose to challenge the remarriage or if he acquiesces to it for a period of time.

Another condition is that the custodian does not work. Generally custodianship requires that the mother apply herself solely to the duty of bringing up her children. Some modern laws have amended this condition.

The most important condition is that the mother must be a Muslim. Again the schools differ as to the severity with which they enforce this condition. Some schools permit a woman who is a Christian or a Jew to be a custodian as long as she brings up the child as a Muslim or until the child attains an age when it becomes religiously aware, or until such time as it is feared that she may influence the child to adopt a religion other than Islam.

Generally a custodian will be expected to reside at a particular place of residence and will not be able to take the child away from that residence without the consent of the father (who is the natural guardian). However it also means that the guardian will not be able to take the child away from residence with the mother.

Fees and Maintenance

The father as guardian is under an obligation to meet the financial obligations arising from the custodianship. This will include a special fee if the child has not yet been weaned (known as the 'fee for suckling') and after this time will include amounts for the child's education, the child's maintenance and the child's accommodation which will all be payable to the mother.

Termination

The custody of the mother ends at different times depending on the different schools of Islamic law.

The classical Hanafi position was that custody ended when a boy attained the age of seven and a girl the age of nine. In the Malaki school it was until boys obtained puberty and girls until they were married. In the Twelver school it was until boys attained the age of two (which the Quran lays down as the maximum age of weaning)

and when girls had attained the age of seven. Certain schools however permitted a Qadi to extend these dates in certain circumstances.

Comparison with English Law

It may be seen that the notion of custody has some similarities with that of 'residence' under the Children Act 1989. The difference being that in Islamic Law there will be mandatory female hierarchy. Access equates to the English notion of contact. Guardianship equates to the principle of parental responsibility but rests only with the father and other male relatives. Custody is a temporary order just as a residence order is in English law and both are capable of variation. In practice a mother who wishes to remarry is likely to lose custody under Islamic law but not under English Law.

Modern Law and Reform

Some states in the Islamic world have not altered the traditional law at all. Thus Saudi Arabia, Oman, Qatar, Bahrain and the UAE still apply the traditional law as outlined above. However even in these states there is some flexibility. Shari'a courts will look at the best interests of the child in relation to taking away custody from a mother who has remarried, who is a non-Muslim, or who has come to the end of her tenure as custodian under the traditional rules.

Elsewhere then there have been considerable changes in the traditional law of custody and guardianship. Most Islamic family laws have definitions which comply with the traditional law but most have changed the duration of custodianship. For example the Jordanian law of 1951 extended the traditional Hanafi rules from the ages of 7/9 to 9/11 for a boy and girl respectively. In 1976 however Jordan adopted a new family law in which the ages were extended to puberty which in traditional law is generally considered as occurring at any time up to the age of 15. The 1951 law almost certainly was based upon a change to the Egyptian Law in 1920. This law was amended in Egypt in 1985 to the ages of 10/12 for a boy and girl respectively with power given to an Egyptian court to extend these ages to 15 if the Court considered that it was in the best interests of the child.

Other important changes are that modern laws often permit the mother to work as long as there is a suitably diligent and qualified person to care for the child while the mother is out at work. Also sometimes legislation will permit a Court to continue the mother's right of custody even if she remarries someone who is a total stranger to the child if this is in the best interests of the child. This will occur particularly where it can be shown that the father has no interest in the child or there is a likelihood that the child will be ill-treated if he or she is to live with the father's new family.

The Hague Convention on International Child Abduction: a General Description of its Application and Operation.

The 1980 Hague Convention on International Child Abduction ('the Convention') sets out to provide for the speedy return of children who have been abducted internationally, to their countries of habitual residence. Its objective is not to judge (or pre-judge) the competing claims to physical custody of either parent, nor to punish the abductor, although by the establishment of a reliable, summary jurisdiction, it is

hoped that international child abduction will be discouraged, and 'forum-shopping' prevented. Instead, the Convention seeks to protect children from the harmful effects of international abduction.

There are two fundamental underlying principles - the first is that it is normally in the best welfare interest of abducted children to be returned speedily as above. The second is that the courts of the state in which the return is requested can trust the courts and the authorities of the country of habitual residence to protect and uphold the welfare interests of the returned child, and do justice to the child and to the parents, both generally and specifically, in setting about the resolution of any custody dispute.

The description of the Convention and its operation which follows is a broad summary of its main features, and is not, and is not intended to be, comprehensive.

The application of the Convention

The Convention applies to children aged below 16 years who have been wrongfully removed from or wrongfully retained outside of their country of habitual residence. A wrongful retention characteristically occurs when a child is taken away for an agreed holiday period, or sent away for an agreed access period, and is not returned. The country of habitual residence is the country in which, as a matter of fact, the child is living, in accordance with the settled intention of the persons who have him or her in their care (normally the parents).

To make a removal or retention wrongful, it must be in breach of the rights of custody of the parent who seeks the return. Rights of custody in the context of the Convention does not mean physical custody, but can include broader rights held by one parent jointly with another in respect of the upbringing and care of the child. Specifically, a right to determine the place of residence of a child will suffice. In most, if not all, Convention countries, married, or formerly married parents, whether or not they are physical custodians, are likely to have rights of custody. Unmarried fathers are in a more diverse position, depending to some extent on the domestic laws of individual states. Other bodies or individuals, such as courts and local authorities, may in particular circumstances have rights of custody, and request returns.

Rights of custody are, however, usually distinct from rights of access. Despite Article 21 covering them, in most countries they are not enforced under the Convention and application has to be made in the domestic law. The rights of custody must also have been exercised at the time of the removal or retention, or would have been but for the removal or retention.

If the above conditions are made out, and an application is made within 12 months of the wrongful removal or retention for a return, the court in the requested state has no discretion but to order the return of the child immediately unless one of the exceptions in Article 13 is made out.

The exceptions apply when the abducting parent can show:

- that the other parent consented to the removal or retention

- that the other parent acquiesced subsequently to the child remaining in the jurisdiction to which he or she has been wrongfully removed, or in which he or she has been wrongfully retained
- that to return the child would be to place him or her at grave risk of physical or psychological harm
- that to return the child would be to place him or her in an intolerable situation
- that the child objects to the return, and has reached an age and degree of maturity at which it is appropriate to take account of his or her views

If one or more of the exceptions is established, the court has a discretion not to return.

The operation of the Convention

The Convention operates between signatory states. Both the requesting state and the state addressed must have been full members of the Convention at the date of the wrongful removal or retention which is the subject of any application. Central authorities are established in each state, to process applications, both incoming and outgoing. It is to the central authority of his or her own state that a left-behind parent will normally initially apply.

Having accepted an application for a return, that central authority will then transmit it, often by fax, to the central authority in the state to which the child has been abducted. That central authority will make provision (which varies in quality from state to state) for the location of the child, and for the commencement of proceedings to secure a return. In some countries, free access to independent lawyers is provided, in others, a state prosecutor conducts the case, in others, where an exception to the provision for free representation has been sought, the individual litigant may have to make private provision for representation. The court then hears the case, usually giving it priority so that Convention cases are heard speedily.

The Convention provides for a simplification of procedural requirements for the proof of foreign law, and for the requesting and giving of declarations as to whether there has been a wrongful removal or retention in cases where the court of the state addressed may find it difficult to determine the law of the requesting state.

The Convention also provides for the obtaining of reports on the social circumstances of the child in the requesting state. These are usually sought when the abducting parent raises one of the exceptions relating to harm to the child on a return, or to an allegedly intolerable situation.

No formal checks are made as to the operation of existing domestic family legislation and the possible introduction of new legislation prior to the accession of a new signatory. Administrative assistance can be given as to the setting up of a new central authority and the introduction of legislation to help implement provisions in the Hague Convention but there is no concept of minimum standards as a requirement prior to signature.

In practical terms, it is almost impossible to institute any sort of minimum standards as it could result in some existing signatories rejecting a potential new signatory that

others accept. It is felt that the existence of the Hague Convention and accession to it is better than nothing at all. Also signing up to the Convention means that a country opens itself up to scrutiny and it may be better to assist such a country in setting up its procedures rather than rejecting that country outright. Contact with embassies or Consular Offices can be effective where a new country signs up to the Hague Convention as an additional way of ensuring co-operation and compliance with obligations. (See appendix for current list of Parties to the Hague Convention and for a general note on Muslim and Arab states).

Issues Relating to Practice in Selected Islamic Jurisdictions: the United Arab Emirates, the Republic of Turkey, and the Republic of Pakistan

United Arab Emirates

Application of the law

The legal terms applied in the Emirates in respect of children are 'Guardianship' for which the Arabic word is 'Wilaya' and 'Residency' for which the Arabic word is 'Hadana'.

Guardianship (Wilaya)

This is automatically granted to the father and gives him the right to decide on matters such as schooling, travelling, the dealing with any of the minor's assets (wherever they may be in the world), health of a minor etc. The father cannot give up this right. A Judge under Shari'a law in the United Arab Emirates cannot deprive him of the Wilaya for his child or restrict its scope.

Residency (Hadana)

As mentioned above, the Arabic word 'Hadana' comes from the Arabic verb which translates as 'to nurture' or 'to protect'. It consists of the day to day caring of the child, such as providing meals, washing clothes and such everyday care as might be given by a nanny. A mother with Hadana has no legal right to make any of the decisions concerning the child's welfare which fall within the scope of 'Guardianship'.

There is limited access to the Civil Courts for family matters. If the marriage was a Shari'a one then any matters in relation to the family would automatically be dealt with through the Shari'a Courts. The Dubai Civil Courts deal with non-Shari'a marriages now but only if both parties are resident in Dubai and agree to co-operate with the process.

It is likely that a Court in the United Arab Emirates would grant the 'Hadana' to the mother of a young child provided she is resident in the Emirates. However, the 'Hadana' returns automatically to the father when a child reaches puberty or if the mother remarries (see above). It is accepted law that the mother, if entrusted with the 'Hadana' of a child, should not remarry. There is no such assumption in relation to the father.

The 'Hadana' will only be granted to a mother providing she remains resident in the Emirate in which the Court is held e.g. Sharjah. The mother would not be allowed to reside elsewhere in the Emirates, for example in Dubai which (even though being only 20 minutes away and still within the United Arab Emirates) would be considered to be beyond the boundaries of the Emirate of Sharjah's jurisdiction. Therefore, without the father's consent the mother could not live in Dubai. The Court has no power to override the father's consent. Furthermore, the mother would not be allowed to travel outside the Emirates with the child at any time without the consent of the father. If the travel is for a visit or holiday to the mother's country of origin then the Court can give her permission irrespective of whether the father agrees. However in practice it is highly unlikely that a local Shari'a Court would override a local father.

A mother is unable to apply to a Court for leave to permanently remove a child from the jurisdiction and in any event the Court has no power to grant such leave. There is no facility for an application to be made for the return of a child to another country, even if that other country had been the child's 'habitual home'. In circumstances where a non-Muslim expatriate father removes a child to the jurisdiction of Dubai and an order is obtained in England for the child's return, there is a possibility that the police will enforce the order without requiring a local Dubai Civil Court Order to do so. It is easier to obtain the return of an expatriate child without any Muslim connections through the Civil Courts. However, if the child is a Muslim, it will be virtually impossible to secure the return of that child.

The father has control over the issue of marriage for his child and in the case of a daughter he can arrange for a marriage at any time after she has reached puberty. However under Shari'a law the father should not arrange for a marriage for his daughter without her approval and consent. It is a matter of practice and varies between families as to how this is interpreted and the legal control remains with the father.

Federal Law number (17) for 1972 (Article 3) stipulates that:

'A foreign woman married to a local in the United Arab Emirates can acquire the nationality of her husband if she wishes on condition of notifying the Minister of the Interior of that wish'.

However it is important to note that in order to acquire the right of citizenship the woman would have to remain married to the local and give up her original nationality, otherwise she has no right of citizenship or domicile.

Practice and Procedure

There is no access in the Emirates to Legal Aid or its equivalent for any Dubai Courts and the expense of going to court in the Emirates is substantial. Generally local advocates would require a minimum deposit of approximately £1,700 in respect of fees before taking on such a case. There is also no provision for a child to be independently represented if appropriate and no provision for the equivalent of Court Welfare Officers to investigate and prepare reports on the welfare of the children.

All parties need to be represented by Arabic Advocates recognised and licensed by the Courts, and official business in the United Arab Emirates and all Court proceedings are conducted in Arabic. Translators are allowed to be present but are frequently silenced if their translation is seen to be interfering with the process.

In the Emirates, in practice a wife requires her husband's consent for all matters and this continues even after divorce. This includes, inter alia, applications for driving licences, job applications, the leasing of property, the employment of staff, etc. For example the wife would not be able to work without a work permit which would not be granted without the consent of the husband, whether or not the parties were divorced. Although there does not appear to be a Federal law or article relating to this practice, it is what takes place, and the policy is followed by administration officers throughout government departments and elsewhere.

Actual Operation and Practical Effect

In theory the mother of a child that has been returned to the United Arab Emirates by a foreign jurisdiction would have the right to apply to the Shari'a Courts for the Hadana of a child to be granted to her. This would mean that, assuming the divorce proceeded through the Shari'a Courts, the child would live with its mother according to the specific terms set out above. However in practice a defence frequently raised by a father to a mother's claim for Hadana is that the mother would interfere with the religious upbringing of the child. For example, if the mother was a non-Muslim or non practising Muslim she may well eat pork, drink alcohol, or break the other tenets of the Islamic faith. The father may bring these points to the notice of the Court who would then regard such failings as an absolute bar to the mother having the Hadana of the child.

For many Western women the risk of losing contact with her child is too great for them to approach the Shari'a Courts. Instead they choose to come to an agreement with their husbands which in effect means living in the Emirates on terms set by him if they wish to retain frequent contact with their children.

There are relatively few reported cases of children being returned to the United Arab Emirates by the English Courts but, of the cases where children have been returned, there are no examples of proceedings being taken by mothers through the local Courts following the return. In two recent cases, one of which was a Court of Appeal case ordering the return of the children, the mother has returned to the home of the husband in the UAE and is living once again as his wife in order to ensure that she retains contact with her children. In the other, the mother is living separately with the children during the week but the father retains the ability to come and go from the family home as and when he wishes, the mother is not 'allowed' to pursue an independent social life and has to comply with her husband's wishes absolutely.

It is felt that it should be possible to make applications to the Dubai Civil Courts for orders that 'mirror' the orders of the English jurisdiction. There is respect within the Dubai Civil Court Judges for the orders and law of England and this may be a possibility in the future. The law in the Emirates is developing with each case, particularly as the number of marriages between Muslims and non-Muslims increases. Therefore, in situations where such cases occur, it is always worth considering with

local lawyers the possibility of making applications within the local legal systems. However, the rules in relation to children are seldom challenged.

Under Shari'a law or indeed United Arab Emirates civil law it is not a recognised prerequisite that the best welfare interests of the child is the first and paramount consideration. There is an automatic assumption that the father will be the best carer of all the interests of the children.

Turkey

Statute

The Turkish Civil Code is an important statutory reference which regulates family law, inheritance law and the law of property. The Code of Obligation is considered to be a supplementary part of the Civil Code. Custody of children is considered in the second division, fifth part between Articles 263 to 277 of the Turkish Civil Code. In addition to the fifth part of the Civil Code is Article 148 of Civil Code in particular and many other articles considered to be applicable to the custody of Children.

Effect of local custom in different regions of Turkey

Article 148 of Turkish Civil Code gives judges extensive discretion, power and privilege to act according to their own and conscience according to the facts of individual cases and allows them to consider local custom. Although there are many long standing opinions from the Supreme Court of Appeals, because of Article 148 Turkish Judges can still bring local custom into their judgment through Article 148 of the Civil Code.

The authorised court for custody of the children is the Civil Court of First Instance (Asliye Hukuk Hakimligi). This is the essential and basic court in Turkey. Its jurisdiction covers all civil cases other than those assigned to the civil Courts of the Peace. There is one in every il and ilice, and they are sometimes divided into several branches according to necessity. There are 958 such courts in Turkey. There are also a number of basic civil courts established by the Ministry of Justice. Some of them are specially authorised to try particular categories of disputes, such as commercial disputes, labour disputes etc. But there are no specially authorised courts for custody of children. Generally this type of case costs approximately £500 and is likely to last more than a year. There is Legal Aid in Turkey under the Civil Procedure Code, but in practice the majority of lawyers will not accept instructions in these types of cases.

Article 90 of Turkish Constitution provides, *inter alia*, that international agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional. Interpretation of this paragraph and general principle of Turkish Constitution indicate that Turkish judges should apply international law into Turkish courts.

Pakistan

Problems if children are returned to jurisdiction

Two recent cases in which children were returned to the U.K. from Pakistan are taken as examples illustrating the generality of issues. In both cases orders of the High Court were obtained in England and an application was made to the Court in Pakistan for a Writ of Habeas Corpus. The procedures were not quick but the return was obtained in both cases. In the first case the mother was of British origin and in the second case the mother was of Pakistani origin but a British national. It appears that the courts in Pakistan will only recognise orders made by the High Court in England and Wales.

The family is the main social support system in Pakistan and if the father did not wish the mother to have contact then the family could simply move the children between family members and make it impossible for her to see the children. It appears that if the mother is able to exercise some influence in the country she may be able to get assistance from the police to help enforce an order, but in law there was no appropriate enforcement procedure for contact orders.

Appendix

General Note on Countries Parties to The Hague Convention on the Civil Aspects of International Child Abduction

The Convention applies in the following States or territories as a result of ratification, acceptance or accession:

Argentina, 1 June 1991;
Australia (only for the Australian States and Mainland Territories) 1 January 1987;
Austria, 1 October 1988;
Bahamas, 1 January 1994;
Belgium, 1 May 1999;
Belize, 1 October 1989;
Bosnia and Herzegovina, 1 December 1991;
Burkina Faso, 1 August 1992;
Canada, 1 December 1983;
Chile, 1 May 1994;
China, Hong Kong Special Administrative Region only, 1 September 1997;
Colombia, 1 March 1996;
Croatia, 1 December 1991;
Cyprus (Southern), 1 February 1995;
Czech Republic, 1 March 1998;
Denmark (except The Faroe Islands and Greenland), 1 July 1991.
Ecuador, 1 April 1992;
Federal Republic of Yugoslavia 27 April 1994;
Finland, 1 August 1994;
France (for the whole of the territory of the French Republic), 1 December 1983;
Georgia, 1 December 1997;
Germany, 1 December 1990;
Greece, 1 June 1993;
Honduras, 1 March 1994;
Hungary, 1 September 1986;
Iceland, 1 November 1996;
Republic of Ireland, 1 October 1991;
Israel, 1 December 1991;
Italy, 1 May 1995;
Luxembourg, 1 January 1987;
Macedonia, 1 December 1991;
Mauritius, 1 June 1993;
Monaco, 1 February 1993;
Mexico, 1 September 1991;
Netherlands (for the Kingdom in Europe), 1 September 1990;
New Zealand, 1 August 1991;
Norway, 1 April 1989;
Panama, 1 December 1991;
Poland, 1 November 1992;
Portugal, 1 December 1986 and Macau, 1 March 1999;
Romania, 1 February 1993;

Slovenia, 1 June 1994;
South Africa, 1 December 1997;
Spain, 1 September 1987;
St Kitts & Nevis, 1 June 1994;
Sweden, 1 June 1989;
Switzerland, 1 January 1984;
Turkmenistan, 1 May 1998;
United Kingdom of Great Britain and Northern Ireland, 1 August 1986 and
Dependencies, namely Isle of Man, 1 September 1991, Cayman Islands, 1 August
1998, Falkland Islands, 1 June 1998, Montserrat, 1 March 1999, and Bermuda, 1
March 1999;
United States of America, 1 July 1988;
Venezuela, 1 January 1997;
Zimbabwe, 1 July 1995

The Convention also applies in the following States as a result of accession, but their
accession is not accepted by the UK government:

Belarus, 1 April 1998;
Costa Rica, 1 February 1999;
Republic of Moldova, 1 July 1998;
Paraguay, 1 August 1998; and
Republic of the Fiji Islands, 1 June 1999.

General Note on The Hague Convention and Muslim and Arab Countries

The Hague Convention on the Civil Aspects of International Child Abduction, which entered into force on 1 December 1983, has no Islamic or Arab members. Indications from Arab governments suggest that they are unlikely to join it in the near future. The member that is closest to the definition of an 'Islamic country' is Turkmenistan, which acceded to the treaty on 1 March 1998.

Turkey has signed, but is not a party to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, together with the Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons. A number of Arab countries have, however, joined other Hague Conventions dealing with personal status issues. These include Egypt, which on 20 June 1980 became a party to the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. Egypt has also signed, but is not a Party to the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.

Morocco is a party to the following treaties: Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children (27 April 1972); Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (25 June 1973); Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1 November 1983); Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (1 November 1983). It has also signed, but is not a party to, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

Enforcement of Access and Contact Internationally and the Security and Support Provided to Minors Abducted Internationally on Their Return to Their State of Habitual Residence

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Access and the 1980 Hague Child Abduction Convention

The primary purpose of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention') is to provide, as set out in Article 3, for the summary return of children who have been removed from or retained outside of their countries of habitual residence, in breach of the rights of custody of the 'left-behind' parent. The Convention (as incorporated into domestic law) empowers and requires requested contracting states to return such children forthwith, with only limited access to a discretion set out in Articles 12 and 13, where the primary grounds are met.

However, the Convention also refers to access. By Article 5, it is plain that there is a distinction drawn between rights of custody and rights of access. English (and other) cases have tended to suggest a judicial view that a breach of a right of access, even if a flagrant breach of an order of the court of the requesting State, will not be a breach of a right of custody (and hence will not come within the terms of Article 3) unless the 'left behind' parent has independent rights of custody. For example see the judgment of Hale J in the case of *S v H (Abduction: Access Rights)* [1997] 1 FLR 971.

The Convention deals with access in Article 1 (which is not incorporated into English law), and in Article 21, (which is incorporated), and which reads:

'An application to make arrangements for organising 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 the 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 fulfilment of any conditions to which the exercise of those rights may be subject.'

'The Central Authorities shall take such steps to remove, as far as is 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 organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.'

For a time, albeit in a small number of cases, the English High Court applied the Convention to access cases in the same way that it did to breaches of custody rights. That is to say, where there was a clear breach of a right of access (usually by the removal or non return of a child for access ordered by the court of the requesting state), the English court would return the child forthwith for access to take place, subject to any defence under Article 13 being made out. However, this is not the present position in England and Wales, nor is it the majority view of Article 21 by Convention countries.

In the case of *Re G (a Minor)(Hague Convention: Access)* [1993] 1 FLR 669 Hoffmann LJ, as he was then, during the hearing of an appeal against a Convention access decision, took of his own motion a point of construction. He observed that it appeared, notwithstanding the apparent intent of Article 21, that the Convention as incorporated into domestic law did not actually confer a power upon the court to make orders to remedy the breach, by return or enforcement.

Shortly after, but this time with rather more warning to the advocates and to the court, the same point was considered by Bracewell J in the case of *Re T (Minors)(Hague Convention: Access)* [1993] 2 FLR 617. In a reserved judgment, Bracewell J made it clear that, in contradistinction to the approach to breaches of custody rights, the English position is that Article 21 does not confer a power on the English court to determine matters relating to access, still less to recognise or enforce foreign access orders or provisions. Since *Re T* (in which Bracewell J refused an application for a leap-frog appeal to the House of Lords) Convention access applications have followed the suggested course contained in that judgment.

The missing 'teeth' are provided by the institution of proceedings under the Children Act 1989. Applications are still received by the England and Wales Central Authority, and properly so under the Convention, because of the Article 21 obligation. The applicant is then put in touch with solicitors. However they will not be able to seek the non-means, non-merits-tested legal aid available as of right in a pure Convention application. Assuming that public or private funding is forthcoming, he or she will then start proceedings under Section 8 of the Children Act 1989, probably in the High Court.

In some cases (and there is not a very great number of access applications made to England and Wales under the Convention) the system can work well. Provided that the hearing (not controlled by the speedy Convention timetable) is not too delayed, and that on the face of it the original access order is not deemed unusual or unreasonable in English terms, the left-behind parent can find that his or her access right is enforced effectively, and with minimal disruption. The major practical difficulty for the applicant is that, in contradistinction to the position in breach of custody rights cases, where the court's primary responsibility is not the paramount welfare principle in the Children Act 1989, but is to '...ensure the early return of the abducted child' (per Thorpe LJ in *Re C* Friday 23 April 1999) in a hybrid Convention/Children Act 1989 access case, the access order in the requesting state is:

'... of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare of the child is paramount' (per Butler-Sloss LJ in *Re G* above, and as applied by Bracewell J. in *Re T* above).

Thus foreign access orders are subject to an overriding welfare consideration by English judges, without the formal restriction to the matters contained in Article 13 of the Convention. Given that some foreign access orders can appear alien (and some, for example, US 'shuttle' orders, can seem in their very nature contrary to welfare) to English eyes, it follows that something very much less than a sure and quick road to comity on access is provided.

Arguably, much more use can be made of Article 21. It can be promoted as a viable and humane alternative means of securing the relationship between a left-behind parent who has rights of custody which have been breached, and a child removed to or retained in this country. In many Convention cases under Article 3, the reality is that the 'left-behind' parent is not (currently 70 per cent of incoming English cases) and is probably never likely to be, a primary carer. The trauma and expense of a summary return, and then a series of hearings in the requesting State, perhaps leading to an access order, and leave to remove back to England, could be avoided, but only if the route was well-signposted, reliable, and readily available. This applies in cases where the left-behind parent already has an access order, and would wish to see it re-stated in England, with such amendments as are required (for example, provisions for international travel). However, unlike the Luxembourg Convention, the Convention is emphatically not order-based, and Article 21 is not restricted to cases where there is already an order in existence in the requesting state. A genuinely accessible 'fast track' to access orders in such cases could prove in the long run to be a cheaper, quicker, and kinder route for non primary-carer 'left-behind', and abducting parents, and their children, than a return under Article 3. It would also provide some recourse to an effective relationship with an otherwise lost child for those (relatively few) 'left behind' parents who do not have Convention rights of custody.

Enforcement of Access Orders by the 1980 Luxembourg Convention

The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children ('the Convention') signed in Luxembourg on 20 May 1980 is intended to ensure the mutual enforceability in contracting states of orders concerning the custody of and access to children. It is incorporated into English domestic law as Schedule 2 to the Child Abduction and Custody Act 1985.

Thus the approach of the Convention contrasts with the 1980 Hague Child Abduction Convention, which has a much greater number of signatory states, and which is designed to secure the speedy return of abducted children, so that decisions in respect of their future welfare, including the resolution of any custody applications, can be achieved in their countries of habitual residence, thus avoiding forum shopping by abduction. The 1980 Hague Convention is not order-based, and a return under its provisions is a return to a jurisdiction, not a return to the custody of one parent or another, or an enforcement of a custody order.

The Convention, which is signed by a range of European countries which all have welfare-based systems of children's law, has at its heart the provision, in Article 7, that:

‘A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State’.

By Article 11 (1), the Convention provides that:

‘Decisions on rights of access and provisions of decisions relating to custody which deal with rights of access shall be recognised and enforced subject to the same conditions as other decisions relating to custody’.

The Convention operates. Where a parent in the state of origin who has a valid order or decision, made in that state, and wishes to enforce it in the state addressed, to which the child has been taken, he or she applies to the central authority in the state of origin (Article 4). The application is passed to the central authority in the state addressed, which is then obliged (Article 5) to take all appropriate steps (including by the institution of any proceedings) to locate the child, protect the interim position, secure the recognition and enforcement of the decision, and to secure the delivery of the child to the applicant parent. As part of the process, and preceding recognition and enforcement, the order is first registered.

In England and Wales, the same ‘fast-track’ approach obtains to access applications under the Convention as is applied to applications for enforcement of custody orders, and for returns under the 1980 Hague Convention (r 6.10, Family Proceedings Rules 1991, SI 1991/1247). The Convention is expressed, and in England and Wales is construed, purposively. The routes to resistance of enforcement are thus strictly limited. By Article 9 (3) the Convention provides that:

‘In no circumstances may the foreign decision be reviewed as to its substance.’

Thus an attempt at a welfare-based re-hearing as a means to avoid enforcement is proscribed. Welfare can be a consideration, but only in the restricted circumstances set out below. The Convention works well, and although it has been (in comparison to the 1980 Hague Convention) relatively infrequently used in England in custody cases, it provides a reasonably reliable and accessible means of securing the enforcement of access. There are, of course, saving provisions, which allow a limited discretion not to recognise and enforce - these are contained in Articles 9 and 10. They include cases where the decision was made in the absence of the respondent parent or his or her lawyer, incompatibility with some subsequent decision, and where either the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed, or where a change in circumstances including the passage of time, but not including a mere change in the residence of the child following an improper removal, mean that the effects of the original decision are manifestly no longer in accordance with the welfare of the child. There is discretion to adjourn where there is a pending appeal or review of the decision in respect of which enforcement is sought, or where there are pending proceedings in the State addressed which were commenced before those in the State of origin.

In access cases, there is an additional saving provision, in Article 11 (2), which provides that:

‘... the competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter.’

There is also a permissive provision in Article 11 (3) which allows the central authority in the State addressed to apply in its domestic courts for an access decision where no such decision has been made in the State of origin, or where enforcement of a custody decision (and thus a return) has been refused. This may be viewed as analogous to the permissive (as interpreted in England and Wales) provisions of Article 21 of the 1980 Hague Convention.

In practice, the problems arising in Convention access cases in England usually relate to allegations that the original decision is no longer in accordance with the welfare interests of the child, because of changed circumstances since the making of the order. Plainly the longer the time between the making of the order in the State of origin and the attempt at enforcement in the State addressed, the more scope there is for such arguments, and the more practically advantageous it may become to commence primary litigation in the State addressed, as the State of habitual residence of the child. Sometimes, the access order was made at a time when the child was living in the State of origin, and without specific contemplation of the intended move to the State addressed. Thus where an order was made in Germany for mid-week visiting access, alternate weekend staying access, and two weeks’ staying access in each of the school holidays, at a time when the child was living in Germany, parts of the order are in practical terms amenable to enforcement, and parts not, with the child living (on the basis of a lawful removal) in England, but the parent with whom he or she is to have access remaining in Germany.

In the case of *Re A (Foreign Access Order: Enforcement)* [1996] 1 FLR 561 the Court of Appeal approached the question of change of circumstances in the light of an allegation that the children’s views had hardened against access since the original order was made. On the facts of that case, the court found that this came ‘nowhere near’ a change in circumstances as contemplated in the Convention. However, in the case of *Re H (a Minor)(Foreign Custody Order: Enforcement)* [1994] Fam 105, where it had been held at first instance that the child was now unwilling to stay with the applicant parent, the terms of the access order which required this were manifestly no longer in accordance with welfare, the Court of Appeal decided that, whilst registration of the order would be allowed, enforcement would not. Article 11 (2) has been interpreted in the case of *Re A (Foreign Access Order: Enforcement)* [1996] 1 FLR 561 as allowing the court to make some modifications to the terms of the order. However these must not be radical - for fear of offending against the provision in Article 9 (3) - and could not, on the facts of that case, allow the court to substitute staying access in the State addressed for the staying access in the State of origin provided in the original order. Thus unless the parties agree to a modification, subject to minor changes, the court must either enforce the substance of the order, or refuse enforcement.

The scope for enlargement of the Convention is probably limited - part of its success is based on the relatively homogenous nature of the children's jurisdictions of the signatory States, including their approach to access orders. Rather other conventions in respect of the same countries are likely to build on the principle of comity where there is international movement, in family cases. Meanwhile, there is scope for an increased use of the Convention, particularly to enforce access.

Undertakings and the 1980 Hague Child Abduction Convention

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention') provides that, so long as the primary grounds in Article 3 are met - the child has been wrongfully removed or retained outside his or her country of habitual residence, in breach of rights of custody - the court in the State addressed must order a return forthwith unless one of the defences under Article 13 is made out, or the proceedings have not been started within 12 months of the removal or retention. Quite deliberately, in a Convention that is designed for consistent, summary use in a very wide range of jurisdictions, no real scope is provided for finer interpretation. Strictly, a court can either order an immediate return, or dismiss the application.

In England, however, a distinctive and well-entrenched practice has developed in Convention cases, by which judges invite parents to give undertakings which serve to define the circumstances of and surrounding a return. The reason for seeking the undertakings is in part from a desire to ensure that as little disruption comes to the child from the process of returning as is possible. The Convention is designed merely to return the child to the jurisdiction of habitual residence, and is not intended to affirm or enforce a custody order, or give a moral judgment on the conduct of, or an advantage to, one or other of the parents. Thus if a child has been abducted by his or her primary carer (as in about 70% of incoming English cases), the English court may feel it is advantageous to the child, irrespective of the moral or legal blame which may be attached to that parent's actions, for the return to be in that parent's actual custody, and for the child to remain with that parent until a welfare-based hearing can take place.

In part, undertakings are also sought to neutralise what might otherwise be a viable defence under Article 13(b). Where, for example, a child is demonstrably in need of medical treatment to address a serious condition, which is being provided by the State in the country to which he or she has been abducted, an undertaking may be sought from the 'left-behind' parent to put in place funding or medical insurance to allow that treatment to continue following a return to a country which does not have state-funded medicine. Without such an undertaking, the court might be driven to find that there was a grave risk of physical harm arising out a return, if this meant that the treatment ceased. The return might then be refused. This approach has generally ensured that Article 13(b) defences are only upheld in a very small number of genuinely intractable cases in England.

Common undertakings in Convention cases include undertakings not to prosecute or cause the arrest of the abducting parent, not to remove the child from the abducting parent's care on a return, to keep away from the abducting parent and the child on a return, except for agreed access, to pay maintenance, to provide accommodation for

the returning parent and child, and to pay for the air fares of the returning parent and child.

Undertakings have proved problematic on occasion. At times, the Court of Appeal has reminded litigants (and judges at first instance) that they are limited in their scope, and that in particular they should not become so elaborate in their construction and demands that they hold up and complicate the summary process. Perhaps the greatest difficulty has been where undertakings are either not understood in, or are simply rejected by, the courts of the State to which the child is returned.

An undertaking is a promise made by a litigant to the court. Undertakings are a feature of the common law, and their scope can extend beyond that of the statute upon which the litigation in which they are given is based. Thus in English law, they can properly be sought despite the restricted terms of the Convention. They are strictly voluntary, and thus if a parent does not wish to give an undertaking in a Convention case, he or she cannot be forced to give it (although the judge can refuse a return if as a result an Article 13(b) defence can be made out). However, once given, it is enforceable as if it were an order of the court. Thus a breach of an undertaking is a contempt, and can be punished (in England) by a fine, or by up to two years' imprisonment.

Sometimes, this voluntary, promissory concept is completely alien to a non common-law jurisdiction, and is not understood. Explanation, on a case-by-case or more general basis should relieve this difficulty. Sometimes, there is a problem of nomenclature. In the US, the concept of undertakings is unfamiliar, but that of stipulations is understood. For some years, a draft form of order has been available in English Convention proceedings, developed with the approval of a US Superior Court judge, in which 'undertakings' are styled as 'stipulations', and their voluntary nature, as well as the court's dependency on them in ordering a return, are stressed. In this way, the 'stipulations' are understood, and will hopefully be respected.

Sometimes, and more fundamentally, the undertakings are felt to be *ultra vires* - an improper and misconceived departure from proper Convention practice, and worse, an infringement of what is properly the exclusive jurisdiction of the court of the requesting state. Even some common law based Convention jurisdictions can take this view. English judges have consistently stressed that they only seek (with the possible exception of the 'non-prosecution' undertaking) to regulate matters up to the effective assumption of jurisdiction in the requesting state following the return. Until that stage the requesting State cannot offer effective protection, or impose effective control, and an *ex parte* application by the 'left-behind' parent to which the other parent (or the child) is unable to respond can lead to abuse. Once, after the return, the foreign court is seised effectively of the matter at an *inter partes* hearing, the undertakings cease to have substantive, or even persuasive effect. All matters fall to be determined, as the Convention intends, by the courts of the state of habitual residence.

Where undertakings are sensitively and conservatively sought in the State addressed, and are respected and upheld in the requesting State, it can be argued that they do not conflict with either the intent and philosophy of the Convention, or with the law. English judges have up to the present tended to trust their counterparts in requesting Convention States to uphold undertakings, and are highly resistant to the obtaining of

mirror orders, because obtaining them can delay by many months what is meant to be a speedy summary process. However, if they are offered by a 'left-behind' parent to an English judge, and then cynically disregarded by that parent on the return which they have (in part) produced, and if the courts of the requesting State do nothing to uphold them, the end result is likely to be reluctance by the English judges to accept undertakings in respect of returns to that country in the future, and a consequential increase in the success of Article 13(b) defences, and the non-return of children.

This is not merely theoretical. There are instances of English judges ordering the return of children in the care of their primary carer abducting parents, in contested hearings where extensive undertakings have been offered to neutralise Article 13(b) defences, where the 'left-behind' parent has obtained an ex parte order for the child to be removed from the abducting parent on arrival, and has procured the immediate arrest and imprisonment of the returning primary carer. These orders have been obtained on the 'left-behind' parent's behalf by lawyers who have been supporting the Convention process, and made by courts which should have understood and honoured the undertakings.

If the practice of allowing undertakings to be accepted as mitigating or neutralising Article 13(b) defences is to continue, English courts (and the litigants before them) need to have assurances as to their reliability. Thus far, the only officially negotiated formula for reciprocal acceptance is in respect of the US jurisdiction, and even that has not proved an infallible means of ensuring compliance. There are two ways that further progress could be made. The first is that the English Central Authority could investigate the position with each of the other Convention States, and provide the courts, and litigants, with the results. The second is that in any case where an English judge is minded to make an order for a return based on undertakings, he or she should send a letter to the court in the requesting jurisdiction, annexed to the return order, explaining the purpose, nature, importance and extent of the undertakings. The English judge may also seek assurances on an individual case basis from the Central Authority of the requesting state that the undertakings will be upheld. This should be a speedier and more secure means to protect the returning child (and, where appropriate, the returning parent) than by the obtaining of a mirror order. Follow-up work could also be carried out by the English Central Authority to check on a limited number of return cases where undertakings have neutralised an Article 13(b) case to see what actually happened.

Provisions for International Contact

The Central Authority for England and Wales does not differentiate, in its statistics, between applications made for the enforcement of contact under the European Convention and applications made under Article 21 of the Hague Convention. It is anticipated however that where the European Convention applies as it provides an order enforcement jurisdiction and the provision of Legal Aid, it would be utilised. (See Annex B - CD Statistics 1994-1998)

The number of applications for contact applications is surprisingly small when compared with the figures in any one year for applications for the return of minors, both incoming and outgoing. For example, in 1998 there were 12 concluded applications in respect of contact to children who were living within England and

Wales and five pending applications. Of the 12 concluded applications six were withdrawn. In the same period, in respect of applications made by parents residing in England and Wales for contact/access to children outside of England and Wales there were 23 concluded applications (of which nine were withdrawn) and a further 17 pending. A further nine were rejected by the State addressed. The statistics show that considerably more applications are made in respect of contact to outgoing children than in respect of children residing in this jurisdiction.

The statistics however show that in any one year almost as many applications as are concluded are in fact withdrawn. It is important to consider the reasons that so many applications, both incoming and outgoing, are withdrawn. It is clear that the pattern of withdrawn applications applies not only to England and Wales but also to the States addressed by this jurisdiction in respect of contact applications. The question is whether applications are withdrawn because of the complexities of, and difficulties placed in the way of applicants by the procedures, or for some other reason.

Access

The Third Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction took place between 17 and 21 March 1997. Prior to the meeting a comprehensive checklist of issues to be considered was circulated through the Central Authorities. Article 21 and considerations relating to it were given particular prominence. The question put to the Commission was: 'Have any applications been made to your Central Authority under Article 21? If so, what were the results?' The checklist reaffirmed the importance of Article 1(B) of the Convention: '...to ensure that rights of custody and of access under the Law of one contracting State are effectively respected in other contracting States'.

The Second Commission in 1993 had concluded:

'Access to children is a normal counterpart to rights of custody. It would be desirable to have more information about the ultimate arrangements made for the exercise of access following the wrongful removal or retention of a child, both in cases where the child has been returned and in cases where return has been refused'.

Article 5 of the Convention at 5(B) defines rights of access as follows:

'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. Thus, access rights under the Convention also include the right of access crossing a national frontier.'

The Central Authority for England and Wales (through its consultation paper) submitted a detailed explanation of how English Courts deal with applications made under Article 21 (in this regard see above **Access and the 1980 Hague Child Abduction Convention p 69-71**).

The Third Special Commission reported as follows:

- Article 21 was incorporated into the Convention to allow Central Authorities to deal with applications for exercise of access rights whether or not a wrongful removal had occurred. There was a general feeling within the meeting that disputes as to access/contact might lead to abductions taking place. However, Central Authorities must be left to exercise their own discretion when deciding whether or not to assist a parent seeking access - this was felt to be in line with the provisions of Article 7(F) 'in a proper case to make arrangements for organising or securing the effective exercise of rights of access'.
- While no specific recommendations were made as to the implementation of Article 21 in a more consistent manner the Commission did make specific reference to the potential advantages of the new Child Protection Convention (see below).

Hague Child Protection Convention

The Convention of the 19 October 1996 on Jurisdiction, Applicable Law Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the Hague Child Protection Convention') was adopted by the Member States present at the 1996 plenary session and signed by Morocco. It has not yet been ratified or implemented in any Member States.

The preamble to the Convention states that its purpose is: '...to improve the protection of children in international situations'. The Convention's underlying principle is to avoid conflicts of law, jurisdiction and of recognition and enforcement in matters relating to the protection of children and in respect of decisions for the future welfare of children. The Convention seeks to avoid situations whereby a country in which the child is not habitually resident assumes jurisdiction in respect of decisions as to the child's welfare. Thus the competent authorities in respect of a child are those of his or her State of habitual residence.

Article 1 of the Convention describes its objects and the matters of importance in relation to decisions as to contact in the following terms:

- to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- to determine which law is to be applied by such authorities in exercising their jurisdiction;
- to determine the law applicable to parental responsibility;
- to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- to establish such co-operation between the authorities of the Contracting States as may be necessary to achieve the purposes of (the) Convention.

[The Convention applies to children from birth to the age of 18 years compared with the Hague Abduction Convention where the jurisdiction ends at 16 years.]

Article 3 describes the measures which states may take in respect of children under the Convention as:

- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as the rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- guardianship, custodianship and analogous institutions;
- the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution.
- the supervision by a public authority of the care of a child by any person having charge of the child;

The foregoing are the main measures which may be taken in respect of a child by an appropriate authority.

By Article 5 (subject to Article 7, the abduction article) when a child changes its habitual residence from one Contracting State to another the receiving State (i.e. the State of the child's new habitual residence) obtains jurisdiction over the child.

Article 7 specifically states:

'In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
- (b) the child has resided in that other state for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending and the child is settled in his or her new environment.'

The definition of 'wrongful removal or retention' follows that of the Abduction Convention.

Under Article 7(3) so long as the first State retains its jurisdiction the contracting State to which the child has been removed or in which he or she has been retained can only take measures for the purposes of the urgent protection of the child.

Comment

The Child Protection Convention clearly envisages a situation whereby a court might refuse a return of the minor under the Child Abduction Convention but the courts of the receiving State would not acquire jurisdiction to make orders as to the future of the child under the Child Protection Convention because no change of habitual residence has taken place. It is difficult to envisage a situation whereby the State addressed would refuse to return a minor to the requesting State in circumstances where the requesting State fully retains the jurisdiction to make decisions about the future welfare of the child, which would include decisions as to contact and access.

Article 9 provides the means by which the State addressed can request authorisation from the State of habitual residence to make future decisions in relation to the child. In practice it is likely that the summary Child Abduction jurisdiction would not allow for a prolonged procedure for such consents to be acquired.

Article 10 preserves jurisdiction over a minor in certain circumstances when a contracting state has a divorce jurisdiction in respect of the family of a child who is habitually resident in another state. This jurisdiction will appertain provided that one of the parents is habitually resident in the contracting (divorce) State, one of them has parental responsibility for the child and the parents accept that the authorities of that (divorce) State should exercise jurisdiction in relation to the child, and it is in the best interests of the child.

It is important to note that the jurisdiction over a child who is not habitually resident ceases once the decree is final or the proceedings otherwise cease. This provision is similar to the provisions on jurisdiction as set out in the Brussels Convention on Jurisdiction and Recognition and Enforcement in Certain Family Matters (not in force). If the States concerned are members of both the Child Protection Convention and the Brussels Convention, it is anticipated that the Brussels Convention would, with the overriding and ultimate power of the European Court, take precedence. It should be noted that the Brussels Convention is likely to be superseded by a European Community Regulation in similar terms, in accordance with the Treaty of Amsterdam.

Rights of access/visitation/contact.

Article 35 has been specifically drafted to compensate for the ineffectual provisions of Article 21 of the Child Abduction Convention.

Article 35 provides:

‘(1) The competent authorities of a Contracting State may request the authorities of another Contracting States to assist in the implementation of measures of protection taken under this Convention, *especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.*’ [emphasis added]

‘(2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Article 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and findings before reaching its decision.’

‘(3) An authority having jurisdiction under Article 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph (2) in particular, when it is considering an application to restrict or terminate access rights granted in the State of a child's former habitual residence.’

This article provides a comprehensive and, hopefully, effective mechanism for dealing with the issue of contact within the framework of a Hague multilateral convention.

The article is far more extensive than Article 21 of the Child Abduction Convention. The new Convention provides for mutual assistance not only to secure the effective exercise of rights of access but also in relation to the right to maintain direct contact on a regular basis. The new Convention does not specify who has the right to maintain regular contact. However, the Convention has been drafted to be wholly compatible with the UN Convention on the Rights of the Child, Article 10(2) of which provides that:

‘A child whose parents reside in different states shall have the right to maintain on a regular basis save in exceptional circumstances personal relations and direct contacts with both parents’.

Accordingly the right is a right of both parents and a child.

The Protection Convention empowers Contracting States to request, and obliges Contracting States to assist in securing, effective access rights as well as the right to maintain direct contact on a regular basis.

Under Article 35(3) where a child changes its State of habitual residence the courts of the new State may adjourn proceedings in order to obtain information from a State of previous habitual residence before it makes a decision to restrict or terminate rights granted in the previous State of habitual residence.

When implemented the Article will provide a means to deal with the fundamental concern of States when granting leave to remove minors permanently to another jurisdiction. At present the first State in practice loses its jurisdiction over future decisions relating to the child, and loses any effective means to ensure that the contact arrangements put in place at the time that leave is granted are maintained.

It is that insecurity and concern over the implementation and enforcement of contact arrangements that leads to a reluctance in courts to allow a removal that will ultimately negate any role for the original State in future decisions about the child. (see *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314). The State of Origin will, if not immediately, ultimately lose the ability to have any effective control over future arrangements, despite the fact that the original contact arrangements will normally have been made following a full welfare-based hearing in the State of Origin.

The Child Protection Convention recognises that the State in which the non-custodial parent resides (usually the State of the child's previous habitual residence) is in the best position to gather information as to the suitability of the non-resident and non-custodial parent to have access rights, and as to the appropriate frequency, duration and conditions of such contact/access.

The State of Origin will not have jurisdiction to grant or implement access rights but its authorities will play a pivotal role in the assessment process which will take place in the State of the child's new habitual residence. Most importantly that State may adjourn proceedings on an application to restrict or terminate rights granted in the State of the child's former habitual residence pending the outcome of a request for information and evidence, and a finding of suitability to exercise access directed to the State of Origin.

Provided that the parents in the relevant contracting States have access (including legal representation) to relief under the Convention, then the Convention will provide a coherent mechanism to apply for, secure and have reconfirmed appropriate rights of access when children are to reside in a jurisdiction other than that of their non-custodial parent.

The Child Protection Convention could provide an important means of redress to parents and children where children are to move across international borders on a permanent basis. Its implementation may have the effect of obtaining a more uniform international exercise of the leave to remove jurisdiction. The purpose of the Convention is to avoid lengthy and protracted hearings as to forum and jurisdiction which are not in the best interests of children. It is to be hoped that litigation about competing (and thus ineffectual) jurisdictions on the issue of contact will be avoided if the Convention is acceded to and implemented.

Bilateral Conventions and Contact across International Borders

Hague Convention

Whilst the 1980 Hague Convention on the Civil Aspects of International Child Abduction sets a world-wide standard for the return of children who have been abducted internationally, it is not likely that it can be ratified by all nations in the foreseeable future. If a country becomes a Hague signatory where its internal systems of administration and enforcement are undeveloped, and where resources are not made available to support the operation of the Convention, the value of that country's Hague membership, and ultimately of the Convention itself, may be reduced. Equally, where there is no commonality of approach (at least in relative terms) to

dealing with the defences under Article 13 of the Convention (child's wishes and feelings and exposing the child to grave psychological or physical harm) its effectiveness will also tend to be reduced.

Where there are major differences in law and the administrative infrastructure between countries, and mutual acceptance of the Hague Convention is impossible, at least in the short term, bilateral agreements or formal treaties offer a way to introduce at least a degree of certainty and order into what, in human terms, are likely to be urgent and invariably distressing cases.

In England and Wales, the courts' response to non-Convention abduction cases is to consider the return of the abducted children to the countries from which they have been taken on the basis of comity and with consideration to the principles underlying the Hague Convention. This is subject to important caveats dictated by the welfare of the child concerned, and in the light of the protection afforded to the principle of the paramountcy of the welfare of the child by the legal system of the other country.

This approach is clearly set out in the decision of the Court of Appeal in the case of *Re JA (Child Abduction: non-Convention Country)* 1998. 1 FLR 231. For England and Wales, as for many other jurisdictions, real difficulties remain in co-operating in this way with countries with which general comity in children's cases is impossible. It is in these cases that the sharpest problems are raised which probably only bilateral agreements can and should address.

Bilateral Agreements

The advantage of bilateral agreements is that they can be tailored to the specific needs, resources and circumstances of the particular countries concerned. It is plainly important that they be realistic in their ambit, so that they are readily enforceable. This may mean that they do not come close to the scope of the Hague and other multilateral Conventions, although they may be seen in some cases as stepping stones towards eventual Hague compliance. In particular, because automatic returns of children, without safeguards of any kind to deal with 'exceptional' cases are likely to be impracticable, and because there may be disparity between the two contracting States in respect of legal and procedural matters, or even over what is (or is not) important in considering a child's welfare. Some countries may simply not be able to agree on a framework for the return of abducted children. On the other hand arrangements for contact may be easier to achieve.

Maintaining Contact where return orders are not an option

An 'all or nothing' approach, to return orders, does not necessarily operate in the best long-term interest of children. The impossibility of providing a framework for the return of children makes reaching more limited agreements the more important. Rather than dealing with the return of the children, they may concentrate on dispute resolution, and ameliorating the effects of an abduction, by addressing communication between States, agencies, and parents, provision of representation (or legal aid) in domestic courts, visas and passports, travel costs, accommodation and access. These may be vital considerations where comity cannot be achieved because of fundamental differences in legal systems, and where a child is at risk of becoming cut off from one

of their parents.

In November 1997 the Government of Canada and the Government of the Arab Republic of Egypt entered into a *Convention Regarding Co-operation on Consular Elements of Family Matters* (see annex).

This particular bilateral agreement between an advanced western Commonwealth country with a common law legal tradition, and an advanced Arab country with a codified system of law, in the Shari'a tradition is of limited scope. It seeks to establish practical arrangements to resolve specific problems, such as granting of visas (Article 2(c)) and by providing for a joint consultative commission.

The agreement will operate by the establishment of a joint Commission. Although only actual experience will indicate the value of these arrangements, their limited scope and practical approach will mean, it is to be hoped, that within its own terms the agreement will enable practical solutions to be found. It is noted that (Article 3) there are no provisions for reciprocal enforcement through the domestic courts, or sanctions for failure to follow the Commission's recommendations. This may, initially, be of little value. It depends on how the Commission sets its own agenda, and the use that is made of it in individual cases.

Comment

Bilateral agreements are likely to bring significant benefits to children and their parents, whether seen as a limited but valuable way to ameliorate or assist in the resolution of child abduction disputes between non-Convention countries, especially where obstructions to general comity exist, or as a stepping stone to the establishment of full Hague Convention compliance. The value will be highest where at present the lowest levels of comity and understanding exist, and where, therefore, the hardest cases are generated and the least can be done. Whilst the objective must be to allow contact to take place between the left-behind parent and child, it must be accepted that there is a risk that the prospect of certainty of future contact might be 'traded' off against any prospects of a workable agreement to allow the return of children to their State of habitual residence. It can be argued that there is an urgent, pressing need for the UK government to immediately pursue bilateral agreements with those States where, for want of comity, abduction cases presently give rise to intractable problems.

Undertakings given to an English Court by the Applicant successfully seeking the Return of a Child to a Foreign Jurisdiction

(For convenience it is assumed in the following discussion that the mother is the primary carer and has brought child to England from the State of child's habitual residence).

The common circumstances which give rise to particular difficulties in terms of the risk to the welfare of the child and mother may most conveniently be explained by the following propositions:

- Mother brings child to England from State of child's habitual residence.

- Father applies for an order for the child's return to the State of habitual residence.
- Mother's removal of the child is held to have been wrongful.
- Mother expresses concerns as to welfare/safety of herself and/or child on return to the State of habitual residence.
- English Judge requires, and/or Father offers, undertakings to reassure Mother and to provide for her and child's safety/welfare until the court in the State of habitual residence can be seised of the case.

Such Undertakings may include for example:

- to pay for return travel to State of habitual residence;
- to arrange/pay for accommodation/car there;
- to pay maintenance;
- to abandon any criminal (or similar) proceedings in being in State of habitual residence;
- to initiate and progress with diligence proceedings in State of habitual residence as to future of child;
- to be responsible for mother's legal costs in such foreign proceedings;
- to vacate the matrimonial home and permit mother and child to live there pending proceedings;
- to permit mother to care for the child until an *inter partes* hearing (sometimes despite father having an order for care and control in jurisdiction of habitual residence);
- not to use violence towards/harass/communicate with mother/child.
- The Judge accepts the undertakings and mother and child return to the State of habitual residence.
- Father then reneges on such undertakings, putting the mother and child into greater or lesser states of hardship and difficulty according to the circumstances.

In above circumstances there are several possible outcomes according to the law of the State of habitual residence, and the willingness of the courts there to accept the validity, and purpose, of undertakings. It is unlikely, save perhaps in such common law states as Australia where the judiciary and lawyers are familiar with the concept of undertakings, that a foreign court would directly enforce undertakings given to an English court. It might well be that the most that would be done is that the foreign court would try to recreate the situation as had been promised to the English Court,

provided it felt that this was in best interests of child. It would presumably also look askance at further promises by, and the evidence of, the father and regard him with caution.

But this presupposes that the foreign Court becomes seized of the case, which would not necessarily have happened, especially if the father had reneged wholesale on his undertakings. It also presupposes that the foreign Court, when seized, has some knowledge and understanding of the serious and voluntary nature of undertakings, and that without them the English Court might not have returned child.

Possible Solutions

Possible solutions which might be sought in practice are 'mirror orders' (but normally there is no time to obtain them); or mirror undertakings, as per *C* [1989] 1 WLR 654; & *G* [1989] 2 FLR 475. It is recommended, however, that a more direct approach to remedies might be taken by the Government by:

- a system of automatic reciprocal and direct enforcement of undertakings as between the courts of the Convention States
- a system of registration of undertakings (together with standard explanation of undertakings for countries unfamiliar with concept) so that at least the State of habitual residence would definitely be aware of the English Court's terms for the child's return
- some limited English legal aid for the mother to be able to get legal advice/assistance in the State of habitual residence (if not otherwise available) and, if necessary, to commence proceedings to protect her/the child's position.

Security of and Support provided to a Child on his/her Return to his/her Country of Habitual Residence and the Value of Undertakings and Stipulations in that Process

The checklist of issues to be considered at the Third Meeting of Special Commission raised specific questions as to the value of undertakings and provisions for the welfare of children on return. The question proposed to the Commission was:

'Have the Courts in your country refused to order the return of any child on grounds set out in Article 13(B)?'

The question created considerable response and in particular the submission of a comprehensive working document by the Australian Central Authority - see annex 3 - Special Working Document No. 3 distributed 17 March 1977. The Australian Working Document made two general proposals:

- a proposal that State Parties to the Convention accept that the Central Authority in each country has a responsibility to protect the welfare of children returned to that country;

- proposals for formal recognition by State Parties to the Convention of the practices developed in the Courts requiring undertakings from applicants as a condition for ordering the return of a child.

The 'concerns raised in response to the Working Document' in broad terms were as follows:

- that Article 13(B) must be given a restrictive interpretation; if Article 13(B) is misused it will destroy the effectiveness of the Convention;
- that the Court should not commence a detailed social enquiry solely on the basis of an allegation that a child would be at risk of harm if returned;
- that the safety of returning children must be given importance, given the growing trend for a large percentage of abductors to be primary carer mothers;
- that the extent of the duties of Central Authorities under Article 7(H), which creates a duty: '...to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of a child;' should be interpreted sensitively;

Reservations were expressed with regard to the proposal of the Australian Central Authority. Central Authorities cannot formally undertake responsibilities beyond their powers as defined by the national law of their countries. Many Central Authorities would not be able to provide for the services required although they might be able to provide returning parents with information on social, welfare and legal aid services in the country of habitual residence and could even initiate contact with such services in order to assist the returning parent. It was felt a case-by-case approach would be more appropriate than an institutionalised general obligation on Central Authorities to exchange information. There was general concern as to the placing of specific obligations on Central Authorities not least in terms of resources and the effect that this would have. Most Central Authorities would be reluctant to accept further obligations.

A further working document (see annex 4), document no. 20 distributed 20 March 1997, was submitted by the Delegations of Australia, the UK, Monaco, New Zealand, Norway, Sweden and Switzerland. After much discussion further amendments were made to that document which took into account the reservations expressed by the Central Authorities present. It is clear from the discussions that took place, and from the concerns raised by the different Central Authorities, that it would be difficult to achieve an agreement that would bind Central Authorities as to obligations in monitoring and securing the safe return of minors and to remove the assessment of that obligation from the discretion of each contracting State.

In particular, all Central Authorities wished to make it clear that the purpose of the proposals is to provide for the safety of minor children and that this must be the objective. They should not be seen as a means of rewarding the abducting parent by allowing him or her to return to better conditions than they would have been able to obtain had they remained in the jurisdiction of habitual residence, and not wrongfully removed/retained the child.

Conclusions and Recommendations

Contact

1. There is a danger of confusion and over-complexity if there are to be competing jurisdictions in the form of multi-lateral conventions. The Hague Convention, Article 21, the European Convention on Recognition and Enforcement of Decisions Concerning Custody of children and Restoration of Custody of Children, the Brussels Convention on Jurisdiction and Recognition and Enforcement in Certain Family Matters (not in force), and the Convention of October 1996 on Jurisdiction, Applicable Law, Recognition Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (not in force) provide four potential jurisdictions - all of which would operate within the EU on implementation.
2. It is not in the best interest of children that the confusion as to appropriate applicability which appertains to the enforcement of money orders jurisdiction, should appertain also to the arrangements for the welfare of children.

Hague Convention

1. In order to provide an effective (and alternative) mechanism to applications for the return of minors the Article must be assured of effective implementation by way of:
 - fast tracked summary proceedings in the High Court before designated Judges;
 - proceedings being subject to the provision of appropriate and efficient legal advice and assistance including the provision of assistance with legal fees;
 - a core absence of any power in a contracting state to question the principle of contact, save in cases where a prior jurisdiction has made a finding against contact taking place.
2. Where it is unrealistic to expect the accession of further States to the existing multi-lateral conventions in their present form there should be a positive investigation and pursuit of bilateral agreements.
3. Central Authorities should be obliged to maintain detailed records of cases relating to Enforcement/Recognition of Contact orders. Those records should include:
 - details of the duration of the proceedings in the State addressed;
 - details of the welfare investigations undertaken and the extent of them;
 - where an overseas order has been fundamentally changed, details of the court's reasons for the order made;
 - details of the financing of the litigation on both sides.

Undertakings and stipulations

1. The Central Authority for England and Wales should undertake an investigation into the provision of undertakings (or arrangements that are akin to them) in other jurisdictions, and as to the acceptance or otherwise of them in requesting States. It is proposed that a form of questionnaire be sent out to the Central Authorities of all other contracting states in this regard.
2. The Lord Chancellor's Department should follow up two cases from the five contracting states where the traffic (both ways) in returns is at its highest. The purpose would be to monitor the immediate and long-term welfare of the minors who are returned. It is proposed that this should be done where an Article 13 grave risk defence has been raised and failed, and where the returning court has made an order which contains undertakings to provide for the welfare and safety of the child on its immediate return. It is proposed that Reunite - which has an impartial stance - should participate in this research.
3. All return orders which provide undertakings should be accompanied by a letter from the Trial Judge addressed to the appropriate court in the receiving State. It should be the duty of the Trial Judge to ensure that the letter explains:
 - the purpose of the undertakings and the reason for their provision;
 - the anticipated extent in terms of obligation and duration.
4. Where undertakings are stated to apply until an *inter partes* hearing, in the requesting State such *inter partes* hearing should be a full hearing and not merely an application of a procedural nature in which no substantive welfare test is applied.
5. The Permanent Bureau of the Hague should promote judicial training in which the issues of undertakings and stipulations are covered. In particular it should be ensured that the attending Judges should be those Judges who will hear Convention cases within their own jurisdiction and/or be in a position to oversee such hearings.
6. A comprehensive research programme to establish what happens to returned primary carers and children should be undertaken.

The principal authors of the above sections were:

Henry Setright

- Access and the 1980 Hague Child Abduction Convention
- Enforcement of Access Orders by the 1980 Luxembourg Convention
- Undertakings and the 1980 Hague Child Abduction Convention

Anne-Marie Hutchinson

- Provisions For International Contact
- Hague Child Protection Convention
- Security of and Support provided to a Child on his/her return to his/her Country of Habitual Residence and the Value of Undertakings and Stipulations in that Process

Anne-Marie Hutchinson, Denise Carter and Henry Setright

- Bi-Lateral Conventions and Contact across International Borders

Mr Justice Bodey and Mark Overall QC

- Undertakings given to an English Court by the Applicant successfully seeking the Return of a Child to a Foreign Jurisdiction

International Adoption - the recognition of foreign adoptions in the simple and full forms.

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Summary

The Sub Group was asked to identify and consider some of the more important issues relating to the recognition by the UK of the effects of certain types of adoption orders made overseas, known as 'simple' adoptions. At present the UK's laws do not provide for their recognition. The group undertook to suggest how recognition of the effects of 'simple' adoption orders might be reconciled where at least one of the adoptive parents is a British national. The Sub Group looked at these issues in the context of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption which the UK signed in January 1994 and which it intends to ratify as soon as the necessary legislation is in place. The latest list of countries that have signed, ratified or acceded to the Convention is at Annex D.

Background

In very general terms, adoption is a legal mechanism applied in most countries throughout the world. It provides for the recognition of a legal relationship between an adult and an unrelated child; confers some degree of parental responsibility on the adult for the child including safeguarding the child's welfare, providing the child with food, clothing and lodging, making arrangements for the child's education and access to available medical and welfare agencies. In most cases adoption takes place where the prospective adopter is not the birth mother or birth father of the child and, more often than not, is unrelated to the child.

Variations in adoption law are as broad as society itself. In Ethiopia, for example, it is possible to adopt an unborn child. However, the birth mother is able to cancel such an arrangement within three months of the birth of her child. In Argentina, a full adoption is only available where a child has been orphaned or abandoned or the birth parents have been legally deprived of parental rights.

In Chile and other South American countries, simple adoption confers on a boy the status of a son but only to that extent determined by an individual court after evaluating all the circumstances, thus creating variations of simple adoption.

Adoption of adults is permitted in several countries, including Turkey. Reasons to justify this provision are often linked to the transfer of inheritance or to ensure that the adopted son or daughter takes responsibility for the care of the adoptive parents in their later years.

Many thousands of children in the world face a childhood in institutional care, never having the experience of knowing what it is to be a permanent member of a family, or worse - left to fend for themselves from their earliest years, sometimes as young as five years of age. Motivation for adopting such children is also varied, in many cases having a direct link to infertility; other motives often contain a mixture of altruism and a desire to start or extend a family. Pressure from within certain communities - both religious and social - are strong motivators towards adoption for couples unlikely to have children of their own. The drive to retain a dynastic power base through continuation of the family name, business and tradition is also a strong motivator for adoption; also, legitimising illegitimate children through adoption, as provided in French law for example, is not uncommon.

The legal adoption of children is no longer confined (if it ever was) to adoptive families living within the jurisdiction of the child's own country. Intercountry adoption is now the accepted term used to describe the process which allows a child resident in one country to be adopted by prospective adoptive parents living in another. In almost all cases, intercountry adoption entails the child leaving his or her country (and in most cases family and friends) to live in a foreign country and eventually become a citizen of that country. In only a few cases is the child likely to be related to the adopters.

It is not the purpose of this paper to set out the many arguments for and against intercountry adoption, make moral judgements about the principle of intercountry adoption, highlight its pitfalls or describe abuses which occur when proper safeguards to protect the interests of the children are either deliberately ignored or not in place. So far as the UK is concerned, a person is able to adopt a child living abroad and there are procedures in place to facilitate such adoptions. In 1998 the total number of intercountry adoption applications processed by the Department of Health was 258. A list of the countries and a breakdown of figures of intercountry adoption applications processed by the UK for the years 1993-1998 is set out in Annex C.

Current UK Adoption Law on Recognition

One consequence of adopting a child from overseas is recognising the effects of the adoption order made in the child's own country. Within the UK, adoption legislation currently provides for the recognition of two types of adoption orders made overseas:

- an order made according to the Articles of the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions;
- an order made in those countries whose names are included in the Adoption (Designation of Overseas Adoptions) Order 1973 (as amended).

Recognition within the UK of these two types of adoption orders has the effect of conferring a status on the adoption order equivalent to an order made in a UK court. The effects of all other adoption orders made overseas are not recognised in the UK. In all

other cases, therefore, it is necessary for adoptive parents who have obtained such orders and who wish the legal relationship between them and their children to be recognised in the UK as an adoptive relationship, to apply for an adoption order to a court in the UK.

Only three countries ratified the 1965 Hague Convention: Austria, Switzerland and the UK. Between all three countries, no more than five or six adoption orders have been made according to the Articles of this Convention.

The 1973 Regulations on the designation of overseas adoptions have been amended only once when the People's Republic of China was added to the list in April 1993.

The 1993 Hague Convention

The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption was concluded on 23 May 1993. It is a significant and major step forward in international co-operation to protect children from private, partisan competition or unregulated procedures to secure the adoption of children in States of origin by prospective adopters residing in Receiving States. Its Articles establish practices and principles which provide the framework for better regulation of intercountry adoption and provide the opportunity for countries to apply effective sanctions to those who violate the Convention and, by implication, the consensus of a large part of the world community. The principles of the Convention are firmly set within the 1989 UN Convention on the Rights of the Child and the 1989 European Convention on Human Rights. A copy of the 1993 Hague Convention is at Annex F.

The scheme of the Convention

The 1993 Hague Convention (referred to here as 'the Convention') provides for the regulation and recognition of adoptions of children habitually resident in one Contracting State by persons habitually resident in another Contracting State. The basic scheme of the Convention is that States of origin (i.e. the State in which the child is placed for adoption with a family resident in another State) have the responsibility to establish that:

- the child is adoptable and that intercountry adoption as opposed to placement within the country of origin is in the child's best interests: Article 4 (a) and (b);
- the requisite consents to the child's adoption have, after due counselling, been freely given with a full understanding of what is involved and without financial inducement: Article 4(c); and
- having regard to his or her age and maturity, the child has been counselled and duly informed about the effects of adoption and, where required, freely consented to the adoption without financial inducement: Article 4(d).

Receiving States on the other hand (i.e. the State in which the adopted child will live) have the responsibility to determine that prospective adopters are eligible and suitable to adopt. They must ensure that they have been counselled as necessary and to have

determined that the child is or will be authorised to enter and reside permanently in that State: Article 5.

Applications are made through the Central Authority of each Contracting State. A Convention adoption order may be made either by a court in the State of Origin or in the Receiving State, though normally it will be in the former.

Under Article 17 any decision in a State of Origin that a child be entrusted to prospective adopters may only take place if the Central Authorities of both States agree that the adoption may proceed. The Central Authority of the State of Origin will have ensured that the prospective adopters agree and that the Central Authority of the Receiving State has approved such a decision, having considered the prospective adopters suitable and having determined that the child is or will be authorised to enter and reside permanently in that State.

Entrustment is a legal process whereby the competent adoption authority in the State of Origin is permitted to place a child in the care of the prospective adopters and to allow them to return with the child to the Receiving State. Circumstances leading to entrustment might be, for example, to avoid prospective adopters having to live in the State of Origin for many months to qualify for residential status before being allowed to make an adoption application. Where adoptive parents have been entrusted with a child, they are required to make an adoption application to the appropriate court in the Receiving State; the resultant adoption order will be recognised as a Convention adoption under Article 21.

Recognition and effect

Chapter V of the Convention deals with the important issues of the recognition and effect of a Convention adoption. The basic provision is Article 23 (1), which provides that:

'An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States.'

The only exception to the obligation to recognise a Convention adoption is provided by Article 24 which states that recognition may be refused 'only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.' Reasons for refusing to make an adoption order on grounds of public policy could include evidence of forgery, kidnapping and illegal payments.

Under Article 26(1)

'...recognition of an adoption includes recognition of:

- (a) the legal parent-child relationship between the child and his or her adoptive parents;
- (b) parental responsibility of the adoptive parents for the child;

- (c) the termination of a pre-existing legal relationship between the child and his or her mother and father, *if the adoption has this effect in the Contracting State where it was made* [emphasis added]

Article 26(2) further provides that where the adoption has the effect of terminating a pre-existing legal parent-child relationship:

'...the child shall enjoy in the Receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoption having this effect in each such State.'

Article 26(3) adds that neither Article 26(1) nor Article 26 (2) shall prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

Finally, Article 27(1) provides that where an adoption granted in the State of Origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the Receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect provided that:

- (a) the law in the Receiving State so permits, and
- (b) the requisite consents have or are being given for the purpose of such an adoption.

Under Article 27(2) any other Contracting State is bound to recognise any such conversions.

It is generally recognised that the rather loose wording of these provisions, particularly Article 26(2), is the result of compromise and reflects the minimum consensus that could be reached, particularly in the case of Article 26 (see the Parra-Aranguren Explanatory Report at paragraph 439 and see William Duncan 'Conflict and Co-operation, The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption' in *Families Across Frontiers* (eds. Lowe and Douglas) 577 at 587. The provisions pose two particular issues for the UK in ratifying the Convention, namely what is the scope for 'converting' adoptions that do not terminate the pre-existing legal parent-child relationship and, secondly, assuming that it has to, how can a system that has no concept of the so-called 'simple' adoption, recognise one?

The Issues

The following part of the paper, dealing with the issues of recognition and effect, is based on paragraphs 4.31 to 4.34 of the consultation document *Adoption - A Service for Children* published by the Department of Health and the Welsh Office in March 1996.

The document contained comprehensive new legislative proposals for the adoption service in England and Wales following a review of adoption law carried out by an inter-departmental working group. Work on the review began in 1989. The consultative document included a draft of an adoption Bill. Parts of the Bill, particularly those dealing with adoption with a foreign element, were to extend to the whole of the UK.

These proposals reflected the then Government's policy on adoption, announced in the House of Commons in November 1993 with the publication of the White Paper 'Adoption - The Future'. The respective Secretaries of State for Health and for Wales endorsed the consultation document which was designed to bring some much needed improvements to the quality and efficiency of the adoption service.

Recognition of simple adoptions

In the UK, adoption law has the effect of creating a new relationship between the child and the adoptive parents and severs completely the relationship between the child and his or her birth parents ('a full adoption'). In many countries adoption creates the new relationship but does not have the effect of severing the relationship between the birth parents and the adopted child. The effect will vary from country to country but in essence a child maintains some legal ties with his or her birth family. An adoption of this type is known as a 'simple' adoption.

The UK does not recognise simple adoptions. All adoptions which are recognised in the UK (including those on the present designated list) are treated for the purposes of UK law as having the same effect as an adoption made in a UK court. However, the Convention recognises simple adoptions. It is proposed that where the UK is the Receiving State a simple adoption made under the Convention in the child's State of Origin and in accordance with the Convention, will be converted automatically to a full adoption.

This is conditional upon the UK being satisfied that the birth parents consented to the adoption after being informed that the adoption would be converted to a full adoption in the UK. This is in accordance with Article 27 of the Convention which permits the conversion of simple adoptions to full adoptions.

However, the position is more complicated where the UK is not the Receiving State. The UK will be obliged to recognise adoptions made in accordance with the Convention in other Contracting States, including simple adoptions and their effects. This presents a difficulty for the UK. There may be circumstances where for example, British citizens resident abroad in a country which recognises simple adoptions – e.g. France - apply under the laws of that country to adopt a child under the Convention from a country which has only simple adoptions. Eventually a simple adoption is made.

That simple adoption is not converted to a full adoption because France recognises full adoptions. The adopter may want to return to live with the child in the UK some time later. In these circumstances the UK is obliged to recognise the effects of the simple adoption.

The question is what effect should a simple adoption be given?

Options

To resolve this question, the drafters of the Department of Health consultative document *Adoption – A Service for Children* set out four options.

Option 1 Recognise a simple adoption as equivalent to a parental responsibility order.

This may not be considered consistent with the spirit of the Convention as it fails to recognise the new relationship between the adoptive parents and the adopted child. It creates uncertainty for the adopted child and adoptive parents by denying the child the permanent status of adoption.

Option 2 Recognise a simple adoption as having the same effect in the UK as it has in the Contracting State in which the simple adoption was made.

This would lead to a great deal of uncertainty for the adopted child and adoptive parents. Simple adoptions have different effects in different countries and even different effects in the same country. A court in the UK may have difficulty obtaining evidence as to the effect of a simple adoption in the State where it was made. In some cases it could lead to lengthy and costly litigation before, for example, an adoptive parent's estate could be distributed.

Option 3 Afford a simple adoption a special status which would include:

- creating a legal relationship between the adoptive parents and the adopted child,
- providing for the adoptive parents to have parental responsibility for the adopted child,
- providing for the adoptive parents to be responsible for the maintenance of the child, and
- providing for the adopted child to have the possibility of inheriting from his or her birth parents as well as from the adoptive parents.

The fundamental uncertainty would remain however because the child would have two sets of parents, the birth parents and the adoptive parents. Furthermore, the concept is unknown in UK law.

Option 4 Recognise a simple adoption as a full adoption, but give the parents the right to apply for a contact order.

This has the advantage of clarifying the status of the child and not making their adoption to some extent second-rate. It may be justified under Article 26(3) of the Convention as being more favourable for the child, provided that the birth parents have the opportunity to maintain contact with the child if they wish, either by agreement or under a contact order. The parent of a child who has been adopted would normally have to obtain the leave of the court before being able to apply for a contact order under the Children Act, but this requirement would be waived for these cases.

Option 4 seemed to the drafters of the consultative document to be the most satisfactory solution in that it put the child on the same footing as any other adopted child and gave it a clear and permanent status under the law of the UK. However, the concern must be

that it does not protect the rights of the birth parents as the Convention intended that it should. This is a difficult issue. The status of an adopted child is very important. The concern must be to provide a satisfactory solution which is in the best interests of the adopted child and removes uncertainty for the adoptive parents.

Analysis

On close analysis there are six different situations in which the effect of a Convention adoption needs to be considered, though by no means all are problematic. These situations are set out under two separate headings: 'full adoptions' and 'simple adoptions'.

'Full adoptions'

The first situation is where the Convention order, having the effect of terminating the pre-existing legal parent-child relationship (referred to here as a 'full adoption order') is made by the State of Origin upon the application of prospective parents habitually resident in the UK so that the child comes to live here immediately.

The second is where the full adoption order is made by the State of Origin on the application of prospective parents habitually resident in another Contracting State but subsequently the adoptive family move and become habitually resident in the UK

The third situation is the less usual scenario of the Convention Order being made by a UK court as a court of the Receiving State.

None of these situations pose any particular problem for the UK in ratifying the Convention. In each case the order will have the same effect as any other adoption order made in the UK. This is obviously the case in the third situation since a UK court has no other power and the first two situations seem clearly governed by Article 26(2) which provides:

'In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the Receiving State, and in any other Contracting State where the adoption is recognised rights equivalent to those resulting from adoption having this effect in each such state.' [emphasis added]

The full effects of an adoption order made in England and Wales [but note: not Scotland or N. Ireland] are set out in Annex A to this paper.

'Simple adoptions'

The second group of situations is where the original adoption order does not have the effect of terminating the pre-existing legal parent-child relationship (referred to here as 'simple adoptions').

The first situation is where a simple adoption order is made in the State of Origin upon the application of parents habitually resident in the UK so that the child immediately comes to live here. In such a situation it would seem open to the UK, applying Article 27, to 'convert' such an order into a 'full adoption' where:

- it is made clear in the implementing legislation (this seems implicit in Article 27(1)(a)); and
- the birth parents and child (having regard to his or her age and degree of maturity) having been counselled and duly informed of the effects of a full order, have freely given their consent as required by the law of the State of Origin (Article 27(1)(b)).

In other words the UK will have to make clear to the relevant State of Origin that notwithstanding that only a simple adoption may be granted by that state, the UK will always convert it to a full adoption with the effects stated in Annex A.

The second situation is where a simple adoption is made by the State of Origin upon the application of parents habitually resident in a Contracting State other than the UK which also recognises it as a simple adoption and the family subsequently becomes habitually resident in a part of the UK. This is the situation which the Group has dubbed the Guatemala - France - UK situation.

The third situation is in fact a variation of this scenario, where the simple adoption is made by the Receiving State (say France) and the family subsequently come to the UK. It is really these last two situations that cause all the difficulty. In particular it raises two questions, namely: can the UK simply 'convert' all such adoptions into full adoptions; if not, what form must the recognition take?

It certainly was an assumption of the Department of Health consultation document *Adoption - A Service for Children* (paragraph 4.33) that it was open to the UK effectively to so convert since Option 4 ('the preferred option') was to recognise a simple adoption as a full adoption but give parents the right to apply for a contact order. This view seemed predicated upon Article 26(3) which states that the provisions on recognition:

'shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.'

However, it is by no means clear that this is how the Convention should be interpreted. On one interpretation, conversion is a separate procedure which takes place following the recognition of a simple adoption.

This view is supported by the reference in Article 27(1) to conversion taking place in the Receiving State '...which recognises the adoption under the Convention', taken together with Article 26(1)(c), which provides for recognition to include recognition of the termination of the relationship between the child and his or her natural parents '...if the adoption has this effect in the Contracting State where it was made'. It is further reinforced by the reference in Article 27(2) to '...the decision converting the adoption', which does not fit comfortably with the concept of automatic conversion as part of the process of recognition.

On the other hand it is understood that during the discussions at The Hague no clear view was reached as to how the process of conversion should operate; certainly the Convention contains no express embargo upon conversion as part of the recognition process.

Assuming, therefore, that it is open to a Receiving State to convert in this manner that is not the end of the difficulties. Article 27 (1) seems to confine the power of conversion to the 'Receiving State' which is (admittedly loosely) defined in Article 2 (1) as the State to which the child:

'...is being, or is to be moved either after his or her adoption in the State of Origin by spouses or a person habitually resident in the Receiving State, or for the purposes of such an adoption in the Receiving State or in the State of Origin.'

Sensibly interpreted, this confines the Receiving State to that which was a party to the Convention Adoption order and not therefore the State to which the adoptive family subsequently move. Moreover, this interpretation is bolstered by Article 27(2) which applies Article 23 to a decision converting the adoption which can only be sensibly interpreted as obligating non-receiving Contracting States to recognise converted adoptions. If therefore, Article 27 does not permit a non-Receiving State to convert a simple Convention Adoption we must fall back on Article 23(1) under which:

'An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States.'

Prima facie that would seem to demand recognition of the simple adoption as it was understood to have effect in the country that made it - in this scenario, the State of Origin (or Guatemala in our stock example).

However, even this is not straightforward since under Article 26(1) (a) and (b) recognition as a minimum seems to demand recognition of the legal parent-child relationship between the child and his or her parents and parental responsibility for the adoptive parents of the child. Presumably this means that adoptive parents have the same rights and liabilities as under a full adoption order. Crucially, however, the birth parents' legal relationships cannot be deemed to have ended [see Article 26(1)(c)]. Also it would seem that they must be regarded as having whatever continuing rights and liabilities they have under the law of the State in which the simple adoption order was made. This therefore presumes that the child (since he or she ought not to be prejudiced) would enjoy succession rights to both sets of parents, if such rights are available under the law of the State of Origin.

A more difficult question is whether the birth parents would have a right to succeed to the child's estate in the event of the child dying intestate without issue. The matter would become particularly acute if the adoptive parents also survived the child. An analogous problem has been considered in the context of claims to succeed made by polygamous spouses following their husband's death: the better view is that all spouses can succeed (see Dicey & Morris, 'Conflict of Laws', 12th ed. (1993), p.707). Similarly, it is suggested that in the case under consideration, both sets of parents will be entitled to succeed and that in practical terms the court would have to resolve the problem by dividing the estate equally between them, if each set of parents would otherwise be entitled to succeed to the entire estate.

If the birth parents have a right to contact under the law of the State of Origin, there would seem to be little practical difficulty in according them the right to apply for contact in the UK, without having to seek leave of the court to do so. If the court were to take the view that contact would not be for the child's benefit, it would, applying the welfare test, refuse the application. Conversely, were the court to consider that it would be beneficial for the child to maintain a link with his or her birth family, the case for a contact order might well be stronger than in the case of an open adoption under English domestic law, since the Convention adoption would not have the legal effect of putting to an end the relationship between the child and the birth parents.

If this analysis is correct then there will obviously be a degree of uncertainty since the effects of adoption orders vary from state to state. However this could be 'eased' by the UK asking each State that makes and recognises 'simple adoptions' for an authoritative statement (along the lines of Annex E) of exactly what are the effects of adoption in their country, though such a statement would only reflect the law at the time of the statement and it might be hard to obtain such an 'authoritative statement'.

If this analysis is 'fair' it follows that there is a basic obligation to inform the birth family and child of the effects of the adoption order as made. Subsequent unilateral 'conversions' of simple adoptions would be contrary to this obligation. Nevertheless, it does add complication and might be thought to create a 'second class adoption' - though in truth the adoptive parents are no worse off than if they had stayed in the Receiving State. It would in any case remain open to them to apply for a full adoption order under UK domestic law.

Approaches by Other Contracting States

Australia

On 30 July 1998, the Governor General of Australia made the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998. These Regulations were made under the Family Law Act 1975 and enable Australia to carry out its obligations under the 1993 Hague Convention which it ratified on 1 August 1978. In the Explanatory Memorandum to the Regulations, provision is made for:

'...an adoption of a child by a person habitually resident in Australia and granted in accordance with the laws of another Convention country is recognised and effective for the purpose of Australian law'. (Regulation 16.)

A further regulation proposes that:

'...the effect of recognition in Australian law of an adoption is to establish the relationship of parent and child between the adoptive parents and the child, to confer parental responsibility on the adoptive parents, to terminate the relationship between the child and the child's birth parents (if that is the effect of the laws of the Convention country in which the adoption is granted) and to confer on the child rights equivalent to the rights conferred by State laws on an adopted child'. (Regulation 18.)

It would appear that the drafters of these regulations have decided that the issue of what precisely is to be recognised is best left to each State to decide what rights are to be conferred.

Canada

Although Canada has ratified the Convention, not all 12 provinces have enacted the necessary legislation to implement its articles. It is understood that each province will make their own provisions about how certain procedures are to be determined. For example, British Columbia has made a detailed provision for the conversion of adoptions under Article 27 of the Convention.

Section 55 of the British Columbia Adoption Act 1995 provides that:

'(1) On application by a person resident in British Columbia, the court may make an order converting an adoption referred to in Article 27 of the Convention to have the effect of an adoption under this Act.

(2) An application for an order under this Section must be accompanied by proof that the consents required under Article 27 of the Convention have been given.'

Section 33 of Adoption Regulations made in 1996 under the 1995 Act provides that an adoption cannot be converted unless the court in British Columbia has proof that:

- (a) the required consents have been obtained;
- (b) a Certificate of Conformity has been issued by the State of Origin;
- (c) a certified copy of the adoption order made in the State of Origin;
- (d) a Convention letter of approval issued by the British Columbia Central Authority (Ministry of Children and Families);
- (e) the child's registration of birth; and,
- (f) where applicable, details of any access orders or orders dispensing with consents.

It will be for each of the 12 provinces to determine how it is to deal with the question of recognition within their provincial legislation.

Ireland

In its report published in June 1998 on the implementation of the 1993 Hague Convention, the Law Reform Commission of the Republic of Ireland recognised that there will be simple adoptions made under the Convention where Ireland would not be the Receiving State. The report quotes Article 23 of the Convention to point out that Ireland is obliged to recognise not only intercountry adoptions between Ireland and another Contracting State, but also adoptions effected under the Convention between two third Contracting States. In these latter cases it is not possible to convert the adoption.

The report goes on to provide an example: where a child is adopted by way of a simple adoption in Portugal, and brought to reside in France, where the adoption is recognised as a simple adoption under the Convention. If, some years later, the adoptive family

came to reside in Ireland, the Irish authorities have no power to convert the adoption but must recognise it as having the effects of a simple adoption.

The Law Commission suggests that this could be achieved by recognising the adoption as having the effects which it had in Portugal, as the State of Origin, or by recognising the adoption as having the effects which it had in France, as the Receiving State. Alternatively, suggest the Law Commission, the 'minimum consequences' approach outlined above could be followed, so that the effects of the adoption recognised in Irish law would be the creation of a new parent-child relationship and the parental responsibility of the adoptive parents. The Law Commission also recognised as a further solution Option 4 of the options put forward for the UK and set out in paragraphs 4.31 to 4.34 of the 1996 consultative document *Adoption - A Service for Children*.

The conclusion of the Law Commission was that where Ireland is neither the Receiving State nor the State of Origin in an adoption between two Contracting States, they recommended that the adoption should be recognised as having the effects which it has in the Receiving State.

New Zealand

Section 11 of the Adoption (Intercountry) Act 1997 makes provision for an adoption to be recognised under the Convention as having the same effect as if the adoption order was made in a New Zealand court – i.e. a full adoption. Simple adoptions are not recognised under the 1997 Act. Section 12 of the 1997 Act makes provision for the Family Court to convert an adoption order made in a State of Origin if that order does not have the effect of a full adoption. In such cases the Court must be satisfied that the necessary consents described in Article 27 to convert the adoption order have been given.

Sweden

There are no provisions in Swedish law for the recognition of simple adoptions. The description of a full adoption in Sweden's 'Code of Parenthood and Guardianship' is essentially the same as applied in the UK. Section 5 of the Hague Convention Act 1997 provides for an adoption order made in a State of Origin which has the effects of a simple adoption may be converted to a full adoption by the court.

As applied in other countries already studied, a necessary condition for a conversion in Sweden is that consents are required under Article 27(1)(b) of the Convention. In addition, a further condition is made by the application of Chapter 4, Section 5 of the Code of Parenthood and Guardianship which provides that an adoption order may not be made where a child is at least 12 years old unless the child has given consent. This same Section provides that children under 16 years of age may be adopted without their consent if it is considered that obtaining their consent would be to their detriment or if they are incapable of giving consent.

In the case of Australia, Canada, New Zealand and Sweden, it would appear that they have avoided directly addressing the issue of the recognition of simple adoption orders where they are a third Contracting State. This is perhaps understandable given its difficulty and the fact that there are unlikely to be many cases. However, conversion

will present particular difficulties in these cases, not least because consent was originally obtained in connection with a simple adoption.

Conclusion

One of the prime motives of the Hague Conference in drafting Article 27 was that the degree of protection for a child adopted from overseas should be at least equivalent to that conferred on children adopted in a Receiving State. This level of protection was to be effected by the Receiving State recognising the effects of an adoption made in a Contracting State. Where the adoption laws of the Receiving State did not allow for recognition of a particular type of adoption order, that State was to take the necessary steps by operation of law to convert the status of the adoption order made in the State of Origin so that the effects of the adoption order could equate with an order made in the Receiving State.

The following paragraphs canvass the implications for the UK in dealing with those occasions where the effects of adoption orders, where the adoption was a 'simple adoption', made in a State of Origin and which comply with the articles of the 1993 Convention, cannot be recognised by the UK without certain measures being taken by operation of law.

The particular difficulty lies in providing for the recognition of the effects of simple adoption orders where the UK is not the Receiving State but the third country. In such circumstances it must be recognised that there were likely to be occasions at some time in the future when the UK would be asked by adoptive parents to recognise their Convention adoption orders where the orders had the effects of 'simple adoption' in the State of Origin.

Article 27 of the Convention is only to be applied where the adoption does not bring about the termination of the pre-existing legal relationship between the child and his or her birth parents. If such termination is an effect of the adoption in the State where it was made, it has to be recognised according to Article 26(1)(c).

It is clear from consideration of the issue by a number of other countries, whose laws do not allow for simple adoptions to be recognised, that there is no straightforward solution to a third country making provision for the recognition of simple adoption orders by the UK where it is the third country. Even within a number of Receiving States, such as Australia and Canada, provision is made for each state or province to be able to determine how conversion under Article 27 is to be resolved. What is also clear, however, is that the process of conversion of simple adoption orders in a Receiving State is a judicial process, achieved only after a court has been satisfied that the conditions of Article 27 have been met, taking account of any other conditions required by the Receiving State. However, the requirements of consent under Article 27 would be difficult to comply with in the case of Convention orders of simple adoption as in the case of the Guatemala-France example (cited above) when the family moves to a third State.

The Explanatory Report on the 1993 Hague Conference is unequivocal in its view that Article 27 was drafted to regulate the most frequent cases of conversion of adoption. This infers, therefore, that the Conference was aware that not all cases of adoptions made

in States of origin would or could lend themselves to be converted in the Receiving State under the Convention. Unfortunately, the Explanatory Report does not provide possible solutions for how recognition of those cases that do not constitute the most frequent cases might be resolved.

Advice contained in the Report was confined to the general principle that where cases cannot be resolved by application of the Convention, recognition of an adoption made in any other Contracting State, even in the State of Origin, is to be decided according to the conflict rules of the Contracting State where the conversion takes place and does not benefit from the articles of the Convention, in particular Article 23.

So far as the UK and many other Receiving States are concerned, a major consideration of conversion affecting the parties in the State of Origin is their realisation that a full adoption is permanent and irrevocable. Simple adoptions are frequently neither (see the overview of substantive laws relating to the adoption of children - Annex B).

It is important therefore for a State of Origin to be made aware by a Receiving State of the full effects of conversion and how it will change forever the relationship between the birth parent or guardian and the child.

The purpose of the authoritative statement (see 'Notice to the court in the State of Origin' - Annex E) is to point out the effects of conversion to the courts and competent authorities in the State of Origin so that they may take the necessary steps to ensure that the birth parent or guardian is also made aware of the consequences of the child being adopted by a family living overseas. An additional benefit of the authoritative statement is that it provides support for a Receiving State in the rare event of a birth relative from the State of Origin making claims on the child at a later date believing that he or she had retained rights because of the effects of the adoption order made in the State of Origin.

In summary, the conclusion is that there is no simple answer to the difficulties presented by simple adoptions and their recognition and conversion. Without conflicting with the underlying principles of the Convention or its Articles, it would seem that the Hague Conference is content for each Contracting State to decide how, within its own substantive laws, it is to deal with the issue of recognition, particularly where a Contracting State is the third country. When consideration is given by each Receiving State to the legal mechanism to be applied for converting adoption orders, the underlying principle which the Hague Conference would expect to be applied is that the protection of the child continues to be assured.

Post Script

Adoption (Intercountry Aspects) Act 1999

During the time of preparing this paper, an intercountry adoption Bill was prepared by the Department of Health and subsequently made available by the Government as a handout for Members of Parliament successful in the ballot for Private Members' Bills. The ballot of Members took place in December 1998. Mark Oaten, Member of Parliament for Winchester, was successful in the ballot and declared his intention to take up the Bill. It had its First Reading in the House of Commons on 13 January 1999. The Adoption (Intercountry Aspects) Bill contained a number of clauses for regulating

intercountry adoption and included provision for the UK to give effect to the 1993 Convention. It also amended certain sections of the Adoption Act 1976 and introduced sanctions prohibiting a person from bringing a child into the UK for the purposes of adoption without authority.

The conclusions of the Sub Group did not include a definitive solution about how to resolve the dilemma of simple adoptions. However, it was necessary for the Department of Health to prepare instructions for Parliamentary Counsel on the provisions of the Bill, including the issue of simple adoptions.

The Bill addressed the question of simple adoption as follows:

Clause 4 dealt with the effects of Convention adoptions in England and Wales. Under this clause it was proposed that a new subsection (3A) should be inserted to Section 39 of the 1976 Act (status conferred by adoption) to provide that where a child has been adopted according to the Convention and the High Court is satisfied, on an application under this subsection:

- (a) that under the law of the country in which the adoption was effected the adoption was not a full adoption;
- (b) that the consents referred to in Article 4(c) and (d) of the Convention have not been given for a full adoption, or that the UK is not the Receiving State (within the meaning of Article 2 of the Convention); and
- (c) that it would be more favourable to the adopted child for a direction to be given under this subsection,

the Court may direct that subsection (2) shall not apply, or shall not apply to such an extent as may be specified in the direction.

Subsection 39(2) of the 1976 Act provides that:

‘An adopted child shall, subject to subsection (3), be treated in law as if he were not the child of any other person other than the adopters or adopter’.

Subsection (3) provides that:

‘In the case of a child adopted by one of its natural parents as sole adoptive parent, subsection (2) has no effect as respects entitlement to property depending on relationship to that parent, or as respects anything else depending on that relationship’.

Therefore, although the adoption of a child effected under the Convention would be recognised as a full adoption in the UK, the provision of new Subsection 3A would make it possible for the High Court to direct that subsection (2) shall not apply. This would have the effect, for example, of enabling an adopted child to inherit from his or her birth parents. The new clause would enable an adopted child or adopted person over the age of 18 years to make an application to the High Court.

The new clause would also apply to Scotland whose adoption legislation where relevant is to be amended by the Bill.

This new clause was considered to offer a most effective way of dealing with the dilemma of the difficulties presented by simple adoption and recognition in a way which was of benefit to the child or adopted adult and which complied with the spirit of the 1993 Hague Convention.

Since the work of the Sub Group was completed, the Bill received Royal assent on 27 July 1999, becoming the Adoption (Intercountry Aspects) Act 1999. Consequent regulations and guidance will be prepared during the year 2000 and it is hoped that the 1993 Hague Convention will be ratified by the UK early in 2001.

Annex A: The Effects of Adoption under English Law

Complete and permanent transfer of legal parentage

As is well known the main effect of an adoption order is to effect a complete and permanent transfer of legal parentage. This is provided for by Section 12 of the Adoption Act 1976. Section 12 (1) provides that an adoption order gives parental responsibility for the child to the adopters, while Section 12(3)(a) provides that the making of such an order operates to 'extinguish' parental responsibility which any person had for the child immediately before the making of the order.

Revocation

Notwithstanding the so-called extinguishment of parental responsibility it is not true to say that an adoption order can never be revoked. Under Section 52 where a person who has been adopted by his or her mother or father alone subsequently becomes legitimated by the marriage of the parents, application can be made by any of the parties concerned to revoke the adoption.

Setting aside

Case-law establishes that in truly exceptional cases leave to appeal to set aside an adoption order can be granted out of time: see *Re M (A Minor) (Adoption)* [1991] 2 FLR 458, CA - father agreeing to adoption by his former wife and second husband in ignorance that his wife was terminally ill; *Re K (Adoption and Wardship)* [1997] 2 FLR 221, CA - court granting an adoption of a Bosnian orphan not knowing that the child's grandfather and aunt had been (as the applicants knew) traced and wanted the child back. However, this is a strictly limited power which cannot be exercised many years after the order: see *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239, CA - court refused to set aside an adoption upon the application of the adoptee, now aged in his 30's, who complained that being of Arabic origin he should not have been adopted by a Jewish couple.

Adoptions have also been set aside in the case of joint adoptions where it is subsequently discovered that the applicants were not in fact married: see *Re F (Infants) (Adoption Order: Validity)* [1997] Fam 165, CA and *Re RA* (1974) 4 Fam Law 182. In these circumstances the better view is that the adoption order is voidable and not void.

An adoption order can subsequently be ended by a second adoption order in favour of someone else, that is, as Section 12(7) makes clear, an adoption order may be made notwithstanding that the child is already an adopted child.

The child's change of status

The corollary of transferring parental responsibility is that the child's status is also changed and this is provided for by Section 39 of the 1976 Act which states:

- (1) An adopted child shall be treated in law-
 - (a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was

solemnised);

(b) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

(2) An adopted child shall ...be treated in law as if he were not the child of any other person other than the adopters or adopter.

(4) It is hereby declared that this paragraph prevents an adopted child from being illegitimate.'

Consequences of the change of status

Citizenship

Consistent with the change of status, the adopted child becomes a British citizen if one of the adopters is a British citizen: British Nationality Act 1981, Section 1(5). On the other hand adoption cannot deprive a child of British nationality if he or she already has it: Adoption Act 1976, Section 47(2).

Change of name

Although normally the child's surname is changed to that of the adopters on the making of the adoption order (the application form expressly provides for the new names to be identified: see Adoption Rules 1984, Schedule 1, Form 6, Paragraph 15) technically the power to change becomes vested in the adopters who can therefore choose not to change the name. In the case of joint adoption, however, once registered, the child's name cannot subsequently be changed unilaterally by one of the adopters: cf *Re P C (Change of Surname)* [1997] 2 FLR 730.

Prohibited degrees and incest

The adopted child and his or her adoptive parents are deemed to come within the prohibited degrees of consanguinity and cannot therefore inter-marry: Marriage Act 1949, Schedule 1, Part 1. This prohibition continues to apply if a subsequent adoption order is made, i.e. a child may not marry a former adoptive parent: Adoption Act 1976 Section 47 (1).

It will be noted that this prohibition does not prevent a marriage between the child and any other adoptive relative, including an adoptive sibling. On the other hand the child remains within the prohibited degrees of relationship with his or her birth family: Section 47(1) applying the Marriage Act 1949, Sch 1, Part 1. For the purposes of incest the crime continues to relate to the child's birth relationships: Section 47(1) and the Sexual Offences Act 1956, Sections 10 and 11. Curiously, the crime of incest does *not* apply to adoptive relatives.

Maintenance

Any duty to make payments for the child's maintenance by virtue of an order or agreement ceases upon the making of an adoption order unless the agreement constitutes

a trust or expressly provides to the contrary: Adoption Act 1976 Section 12(3)(b), (4) and (5). These provisions do not affect liability for arrears existing at the time of the adoption order. After the adoption no application can therefore be made against the child's, unmarried birth father even if the adoption is by the mother alone. Liability for maintenance of an adopted child lies exclusively upon the adoptive parents: Child Support Act 1991, Sections 1 and 54 and Social Security Administration Act 1992, Sections 78(6) and 105(3).

Claims under the Inheritance (Provision for Family and Dependents) Act 1975 and Fatal Accidents Act 1976

A child who was formerly qualified to claim reasonable financial provision as a 'child of the deceased' under the Inheritance (Provision for Family and Dependents) Act 1975 ceases to be so qualified if he or she is adopted before any application has been made under the Act: *Re Collins (Decsd)* [1990] Fam 56. Similarly, for the purposes of the Fatal Accidents Act 1976, an adopted child must be considered a 'dependant' of the adoptive parent: *Watson v Wilmott* [1991] 1 QB 140.

Pensions

Adoption does *not* affect entitlement to a pension which is payable to or for the child's benefit and is in payment at the time of adoption: Section 48.

Insurance

In the case of an insurance policy taken out by the birth parents for payment of funeral expenses upon the child's death, Section 49 provides that the rights and liabilities are transferred to the adoptive parents who are to be treated as having taken out the policy.

Peerages, dignities and titles

An adoption does *not* affect the descent of any peerage or dignity, or title of honour: Section 44(1). Similarly, it does not, in the absence of any contrary indication, affect the devolution of any property: '...limited (expressly or not) to devolve (as nearly as law permits) along with any peerage or dignity or title of honour': Section 44 (2) and (3).

Property

As regards interests in property, the general principle is that from the date of the adoption order an adopted child is deemed to be the child of the adopter or adopters and ceases to be regarded as the child of the natural parents. Where he or she has been previously adopted, the child ceases to be deemed the child of the former adopters, and therefore is no longer considered as related to any other person through the natural or former adoptive parents.

In the case of instruments made on or after 1 January 1976, or wills of testators dying on or after that date, and subject to any contrary indication, an adopted child may claim in such cases whether the disposition takes effect before or after the adoption. A disposition (which includes a power of appointment and the creation of an entailed interest: Section 46(1) - (3), (5)) depending on the date of birth of a child of the adoptive

parent or parents is to be construed as though the adopted child was born on the date of his or her adoption and two or more children adopted on the same day rank *inter se* in the order of their actual births: Section 42(2)(a) and (b). This provision, however, does not affect the operation of any condition depending on the child's reaching an actual age.

Thus, if there is a bequest to K's eldest child at 18 and K adopts a child A and subsequently has a natural child B, A can claim when he reaches the age of 18 whether his adoption preceded or followed the testator's death: Section 42(2).

Section 42(4) expressly provides that an adoption:

'...does not prejudice any interest vested in the adopted child before the adoption, or any interest expectant (whether vested or not) upon an interest so vested'.

The ambit of the provision, however, has been open to speculation. Suppose for example that there is a gift to X with remainder to his eldest son and that X's eldest son is S. If S has been adopted by someone other than X before the instrument creating the settlement takes effect, he can obviously claim nothing because he is no longer regarded as X's son at all. If X has died before S's adoption, so that S's interest has vested in possession, it is expressly preserved by Section 42(4) notwithstanding the adoption. But what is the position if S is adopted after the disposition takes effect but before the interest vests in possession?

In *Staffordshire County Council v B* [1998] 1 FLR 261 it was held that in such circumstances the child was still entitled to the interest notwithstanding his adoption since, properly interpreted, Section 42(4) did not require the interest of the child to be vested in possession, it being sufficient that the child's contingent interest arose out of an interest vested in possession.

Trustees and personal representatives are not liable if they distribute property in ignorance of the making or revocation of an adoption order but beneficiaries may trace property into the hands of anyone other than a purchaser: Section 45.

Appendix B: Overview of Substantive Laws Relating to the Adoption of Children

Update: November 1998

Note that:

- provisions which are only applicable to adults are not included;
- most systems providing for a complete cutting off of all ties with the biological family as a result of adoption maintain pre-existing prohibitions to marriage; in such cases, nevertheless, a 'yes' appears.

Country	(Principal) statutory source	Adoption by court order	Relationship child/ biological family cut off	Relationship child/ adopters as if child born in lawful wedlock	Revocability
Albania	Family Code 1982; Law no 7650/92	Yes	Yes	Yes	No
Argentina	Civil Code 1971, Law 19134 A. Simple Adoption B. Full Adoption	Yes			
Belarus	Family Code	Yes	Yes	Yes	No
Bolivia	Código de menores; ley no1403/1992	Yes	Yes (for children less than 6 years' old)	Yes	No
Brazil	Law 8069 of 13/7/90 concerning the Statute of the child and adolescent	Yes	Yes	Yes	No

Bulgaria	Family Code 1985 art. 49-67; Decree no09-531/1996				
	A. Simple Adoption	Yes	Yes	Yes	Yes
	B.Full adoption	Yes	Yes	Yes	No
Burkina Faso	Kiti An VII.0319 Family and People code 1990				
	A.Simple adoption	Yes	Yes, but inheritance rights and maintenance obligations preserved	Yes	Yes when the child is more than 15 years
	B.Full adoption	Yes	Yes	Yes	No
Cabo Verde	Family code 1981 art. 68-75 Minors code 1997	Yes	Yes	Yes	Yes
Cameroon	Civil code 1956 art. 343-370				
	A. Simple adoption	No: contract but Court confirmation required	No	Yes	Yes
	B.Full adoption	Yes	Yes	Yes	No
Chile	Ley 18703 de 1988 sobre adopción de menores	Yes	No	No: adopters have duty of care towards children	Yes

China					
Colombia	Código de los menores 1989 art. 88-128	Yes	Yes	Yes	No
Costa Rica	Código de Familia 1973 reformado en 1995 art. 100-126	Yes	Yes	Yes	No
Czech Republic	Family code, 1963 amended 1982				
	A. Simple adoption	Yes	Yes	Yes	No
	B. Full adoption	Yes	Yes	Yes	No
Ecuador	Código civil 1976 art. 332-348	Yes	Yes	Yes	No
	Código de menores art. 103-129				
Eire	Adoption Act 1964, amended 1976, 1988, 1991 and Adoption Bill 1996	Yes	Yes	Yes	No
Ethiopia	Civil code 1960 art. 556-559 and 796-806.	No: contract but Court confirmation required	No	Yes	No
Guatemala	Civil code 1975 art. 228-251, 435	Juridical or by contract	No	Yes	Yes
Haiti	Law of 25/2/1966 and Decree of 4/4/1974	Yes	No	Yes	Yes

Hungary	Law 1/74 on Minors adoption and law 4/86 on Family rights	No: municipal office	Yes	Yes	Yes
India	The Guardian and Wards Act 1890 + Union of India decision of 6/2/84. The Hindu Adoption and Maintenance Act 1956 (as amended 1962 - for Hindus only)	No: contract	No	No	Yes
Ivory Coast	Law 802/1983 A. Simply adoption B. Full adoption	Yes Yes	No Yes	Yes Yes but it is a foster care ordinance during the first six months before the final decision	Yes (if children more than 13) No
Japan	Civil code as amended 1988; 1989 amendments to Horei (Private International Law Provisions) A. Simple adoption B. Full adoption	No: registration at civil status office in City Hall Yes	Yes Yes	Yes Yes	Yes Yes

Latvia	Civil code 1992 art. 162-176	Yes	Yes	Yes	Yes
Lebanon	No national law but personal religious laws: codes on personal status of Catholic, Orthodox and Protestant Communities	Yes (religious court)	No	No but status of legitimate child of adopters	Yes (catholic code)
Lithuania	Family and marriage code 1970 changed by laws 1-275/1993 and 1-1966/1995	Yes	Yes	Yes	Yes
Madagascar	Filiation Act 1963 A. Simple adoption B. Full adoption	No: contract Yes	No Yes	No Yes	Yes No
Mauritius	Civil code 1963 art. 343-370 A. Simple adoption B. Full adoption	Yes Yes	No Yes	No but status of legitimate child of adopters Yes	Yes No

Mexico	Código civil 1928 changed 1998; codes of respective states				
	A. Simple adoption	No: Contract but court confirmation required	Yes	Yes	No
	B. Full adoption Compulsory for intercountry adoption	Yes	Yes	Yes	No
Nepal	Chapter 12 Ka of Kingdom law (Muluki Ain) on adoption	No: contract	No	Yes	Yes
Niger	Civil code 1958	Yes			
	A. Adoption		No	Yes	Not mentioned
	B. Adoptive recognition		Yes	Yes	No
Peru	Child and adolescent code 1992; civil code 1986 art. 377-385 and 2087	Yes	Yes	Yes	No
Philippines	Family code; Republic Act 8043/1995 and 8552/1998	No: contract	No	No	Yes

Poland	Family and wardship code art. 114-127 and 131. A. Simple adoption B. Full adoption	Yes	Yes Yes	Yes Yes	Yes No
Romania	Law of April 28 1998 confirming the Emergency Ordinance of June 12, 1997 (art. 21, 22)	Yes	Yes	Yes	Yes
Russia	Marriage and Family code 1989 amended	Yes	Yes but in case of adoption by a single, the opposite biological parent can ask to keep relationship with the child	Yes	Yes
Senegal	Family code 1979 amended A. Limited adoption B. Full adoption	No: contract but Court confirmation required Yes	No Yes	No but status of legitimate child of adopters Yes	Yes No

South Korea	Civil code 1958 Special Adoption Act 1976 (for children below 18 in children's institutes)	No: contract but adoption must be registered in order to have effect. Idem	No No	Yes Yes	Yes (court order) Yes (but limited after one year, art. 5)
Sri Lanka	Adoption of Children Ordinance 1944 as amended by Adoption of children (Amendment) Act 1977 (amended 1979, 1991 and 1992)	Yes	Yes but the child retains certain inheritance rights	Yes except for certain inheritance rights	No
Thailand	Civil and commercial code 1925 as amended by law 1598/37, art. 1598/19	No: contract	No	No	Yes
Togo	Family code art. 208-232	Yes	Yes	Yes	No
Tunisia	Child welfare code 1995	Yes	Non mentioned in the law	Yes	Yes
Ukraine	Marriage and Family code art. 112, 199 and 203	Yes	Yes but in case of adoption by a single, the opposite biological parent can ask to keep relationship with the child	Yes	Yes

USA	Varies	according to	the law of	each state.	
Vietnam	Marriage and Family code 1986; governmental decree 184/CP of 30/11/94 completed by the inter-ministerial instruction no503/TT/LB of 1/5/95	No: contract	No	Yes	Yes

Annex C

**OVERSEAS ADOPTIONS
UK**

Number of adoption applications (Home Study Reports) received by the Department of Health

Country	1993	1994	1995	1996	1997	1998	TOTAL 1993-1998
Albania	1	1	1	1	0	0	4
Argentina	0	0	0	0	0	0	0
Armenia	0	0	1	0	0	0	1
Belarus	0	0	0	0	1	1	2
Bolivia	1	0	1	0	0	0	2
Brazil	3	3	7	4	4	3	24
Bulgaria	2	3	0	2	0	4	11
Burundi	0	0	0	0	1	0	1
Canada	0	0	0	0	0	0	0
Cambodia	0	0	0	0	0	2	2
Chile	1	1	1	0	4	4	11
China	3	17	59	206	110	123	518
Colombia	3	1	1	4	4	7	20
Czech Republic	0	0	0	0	1	0	1
Egypt	0	0	0	1	0	0	1
Eire	0	0	0	0	0	1	1
El Salvador	1	3	1	0	0	0	5
Estonia	0	0	0	0	3	0	3
Ethiopia	1	0	0	0	0	0	1
Greece	0	0	0	0	1	0	1
Guatemala	2	3	12	16	26	20	79
Honduras	0	1	0	0	0	0	1
Hong Kong	1	0	0	1	0	0	2
Hungary	1	1	1	0	1	0	4
India	16	20	22	29	21	22	130
Indonesia	1	0	0	0	0	0	1
Iran	0	0	0	1	0	0	1
Israel	1	0	0	0	0	0	1
Jamaica	2	0	0	0	1	0	3
Japan	0	0	0	0	0	1	1
Jordan	0	0	0	0	1	0	1

Country	1993	1994	1995	1996	1997	1998	TOTAL 1993-1998
Latvia	1	0	0	0	0	0	1
Lebanon	0	2	0	0	1	0	3

Lithuania	0	0	0	0	0	1	1
Nepal	1	1	1	1	1	2	7
Nicaragua	0	0	0	1	0	0	1
Nigeria	0	0	0	0	0	0	0
Pakistan	1	2	3	1	3	2	12
Panama	1	0	0	0	0	0	1
Paraguay	8	16	6	1	1	0	32
Peru	1	0	0	0	1	1	3
Philippines	7	2	1	5	4	4	23
Poland	2	1	2	1	1	2	9
Romania	22	14	9	10	5	17	77
Russia	1	4	4	3	3	13	28
Serbia, Republic of	0	1	0	0	0	0	1
Sierra Leone	0	0	1	0	0	0	1
Singapore	0	0	0	1	1	0	2
Sri Lanka	4	6	3	2	3	0	18
Taiwan	0	0	0	0	0	1	1
Tanzania	1	0	0	0	0	0	1
Thailand	4	10	5	10	10	13	52
Trinidad	0	0	0	0	0	0	0
Turkey	1	1	1	0	0	0	3
Ukraine	2	0	1	0	0	2	5
USA	4	0	8	4	5	8	29
Vietnam	0	1	1	1	3	2	8
Venezuela	0	0	0	0	0	0	0
Yugoslavia	0	0	0	2	0	0	2
TOTAL	101	115	154	308	223	258	1159

Annex D: Intercountry Adoption - Hague Convention Countries

The following lists show the position as regards the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (The Hague, 29 May 1993):

The following 11 States have signed but not yet ratified the Convention:

Contracting State	Date of signing
Belarus	10 December 1997
Belgium	27 January 1999
Germany	7 November 1997
Ireland	19 June 1996
Italy	11 December 1995
Luxembourg	6 June 1995
Slovakia	1 June 1999
Switzerland	16 January 1995
UK	12 January 1994
United States	31 March 1994
Uruguay	1 September 1993

The following States have ratified the Convention

Country	Date of ratification	Entered into force
Australia	25 August 1998	1 December 1998
Austria	3 June 1999	1 September 1999
Brazil	10 March 1999	1 July 1999
Burkina Faso	11 January 1996	1 May 1996
Canada	19 December 1996	1 April 1997
Chile	13 July 1999	1 November 1999
Colombia	13 July 1998	1 November 1998
Costa Rica	30 October 1995	1 February 1996
Cyprus	20 February 1995	1 June 1995
Denmark	2 July 1997	1 November 1997
Ecuador	7 September 1995	1 January 1996

El Salvador	17 November 1998	1 March 1999
Finland	27 March 1997	1 July 1997
France	30 June 1998	1 October 1998
Israel	3 February 1999	1 June 1999
Mexico	14 September 1994	1 May 1995
Netherlands	26 June 1998	1 October 1998
Norway	25 September 1997	1 January 1998
Peru	14 September 1995	1 January 1996
Philippines	2 July 1996	1 November 1996
Poland	12 June 1995	1 October 1995
Romania	28 December 1994	1 May 1995
Spain	11 July 1995	1 November 1995
Sri Lanka	23 January 1995	1 May 1995
Sweden	28 May 1997	1 September 1997
Venezuela	10 January 1997	1 May 1997

Total number of signatories - 26

The following States have acceded to the Convention:

Contracting State	Date of accession	Entry into force	Expiry date under Art 44(3)1
Andorra	3 January 1997	1 May 1997	1 August 1997
Burundi	15 October 1998	1 February 1999	15 May 1999
Georgia	9 April 1999	1 August 1999	1 November 1999
Lithuania	29 April 1998	1 August 1998	1 December 1998
Mauritius	28 September 1998	1 January 1999	15 April 1999
Moldova	10 April 1998	1 August 1998	1 November 1998
Monaco	5 July 1999	1 October 1999	15 January 2000
New Zealand	18 September 1998	1 January 1999	15 April 1999
Paraguay	13 May 1998	1 September 1998	1 December 1998

Total number of accessions – 9

In accordance with Article 44(3) of the Convention, the accession has effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months following the date on which the depositary gave notice of the accession. The date specified here is the expiry date of that six-month period.

The Convention entered into force on 1 May 1995

Source - Permanent Bureau listing as at 26 August 1999.

¹In accordance with Art44(3) of the Convention, the accession has effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the 6 months following the date on which the depositary gave notice of the accession. The date specified here is the expiry of that 6-months period.

Annex E: Notice to the Court in the State of Origin

A notice will accompany or form part of the Certificate of Approval to be issued by each Central Authority in the UK for each application prepared under the Convention. The notice, addressed to the appropriate court in the child's State of Origin, will be drafted along the following lines:

The court is advised that where an adoption order is made in that State and does not have as one of its effects the termination of the pre-existing legal relationship between the child and the child's birth mother, birth father or legal guardian, transferring full parental rights to the adoptive parent, that same adoption order will be converted to an adoption order by process of law in the UK which will have that effect. The conversion will be carried out under Article 27 of the 1993 Hague Convention.

Before making the adoption order, the court will wish to be satisfied that the birth mother, birth father or legal guardian has been advised and received counselling (ideally from an informed person not connected with the proposed adoption). The counsellor should explain that the adoption order to be made by the court will be converted in the UK and will have the effect of terminating the pre-existing legal relationship between the child and his or her birth mother, birth father or legal guardian. The birth mother, birth father or legal guardian should understand the full implications of conversion and consent to the adoption on that basis and in a manner that meets the requirements of the court.

The court in the UK will take the consent of the birth mother, birth father or legal guardian as consent to the conversion of the adoption order, having the effects of a full adoption. In this connection, the court in the UK would be greatly assisted if the court making the adoption order identified for the Central Authority in the UK the precise effects which follow the making of the adoption order.

Annex F

Final Act of the Seventh Session - 29 May 1993

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

The States signatory to the present Convention –

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding;

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin;

Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of Origin;

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, to prevent the abduction, the sale of, or traffic in children;

Desiring to establish common provision to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986);

Have agreed upon the following provisions –

Chapter 1 – Scope of the Convention

Article 1

The objects of the present Convention are –

- a. to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- b. to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

- c. to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

1. The Convention shall apply where a child habitually resident in one Contracting State ('the State of Origin') has been, is being, or is to be moved to another Contracting State ('the Receiving State') either after his or her adoption in the State of Origin by spouses or a person habitually resident in the Receiving State, or for the purposes of such an adoption in the Receiving State or in the State of Origin.
2. The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, subparagraph c, have not been given before the child attains the age of eighteen years.

Chapter II – Requirements for Intercountry Adoptions

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of Origin –

- a. have established that the child is adoptable;
- b. have determined, after possibilities for placement of the child within the State of Origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c. have ensured that
 - (i) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;
 - (ii) the persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing;
 - (iii) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - (iv) the consent of the mother, where required, has been given only after the birth of the child; and

- d. have ensured, having regard to the age and degree of maturity of the child, that
- (i) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required;
 - (ii) consideration has been given to the child's wishes and opinions;
 - (iii) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - (iv) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the Receiving State –

- a. have determined that the prospective adoptive parents are eligible and suited to adopt;
- b. have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c. have determined that the child is or will be authorised to enter and reside permanently in that State.

Chapter III – Central Authorities and Accredited Bodies

Article 6

1. A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
2. Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

1. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.
2. They shall take directly all appropriate means to –
 - a. provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
 - b. keep one another informed about the operation for the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

- a. collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b. facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c. promote the development of adoption counselling and post-adoption services in their State;
- d. provide each other with general evaluation reports about experience with intercountry adoption;
- e. reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall –

- a. pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation
- b. be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c. be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

Chapter IV – Procedural Requirements in Intercountry Adoption

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

1. If the Central Authority of the Receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption as well as the characteristics of the children for whom they would be qualified to care.
2. It shall transmit the report to the Central Authority of the State of Origin.

Article 16

1. If the Central Authority of the State of Origin is satisfied that the child is adoptable, it shall –
 - a. prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
 - b. give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
 - c. ensure that consents have been obtained in accordance with Article 4; and
 - d. determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.
2. It shall transmit to the Central Authority of the Receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of Origin, these identities may not be disclosed.

Article 17

Any decision in the State of Origin that a child should be entrusted to prospective adoptive parents may only be made if –

- a. the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b. the Central Authority of the Receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of Origin;
- c. the Central Authorities of both States have agreed that the adoption may proceed; and
- d. it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the Receiving State.

Article 18

The Central Authorities of both States shall take all the necessary steps to obtain permission for the child to leave the State of Origin and to enter and reside permanent in the Receiving State.

Article 19

1. The transfer of the child to the Receiving State may only be carried out if the requirements of Article 17 have been satisfied.
2. The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances, and, if possible, in the company of the prospective adoptive parents.
3. If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if the probationary period is required.

Article 21

1. Where the adoption is to take place after the transfer of the child to the Receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests such Central Authority shall take the measures necessary to protect the child, in particular –
 - a. to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
 - b. in consultation with the Central Authority of the State of Origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; and adoption shall not take place until the Central Authority of the State of Origin has been duly informed concerning the new prospective adoptive parents;
 - c. as a last resort, to arrange the return of the child, if his or her interests so require.
2. Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

1. The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.
2. Any Contracting State may declare to the depository of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –
 - a. meet the requirements of integrity, professional competence, experience and accountability of that State; and
 - b. are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.
1. A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.
2. Any Contracting State may declare to the depository of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.
3. Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

Chapter V – Recognition and Effects of The Adoption

Article 23

1. An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c, were given.
2. Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depository of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depository of any modifications in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depository of the Convention that it will not be bound under this Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

1. The recognition of an adoption includes recognition of –
 - a. the legal parent-child relationship between the child and his or her adoptive parents;
 - b. parental responsibility of the adoptive parents for the child;
 - c. the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
1. In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the Receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.
2. The preceding paragraphs shall not prejudice the application of any provision more favourable for the child in force in the Contracting State which recognises the adoption.

Article 27

1. Where an adoption granted in the State of Origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the Receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect –
 - a. if the law of the Receiving State so permits; and
 - b. if the consents referred to in Article 4, sub-paragraphs c and d, have been or are given for the purpose of such an adoption.
2. Article 23 applies to the decision converting the adoption.

Chapter VI – General Provisions

Article 28

The Convention does not affect any law of a State of Origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the Receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a to c, and Article 5, sub-paragraph a, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of Origin.

Article 30

1. The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.
2. They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

1. No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
2. Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
3. The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption 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 that State shall be construed as referred to the law in force in the relevant territorial unit;
- c. any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;
- d. any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption 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 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound so to do.

Article 39

1. The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depository of the Convention.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the Receiving State and the State of Origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

Chapter VII – Final Clauses

Article 43

1. 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 Seventeenth Session and by the other States which participated in that Session.
2. 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, depository of the Convention.

Article 44

1. Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.
2. The instrument of accession shall be deposited with the depository.
3. Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an

objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified in the depositary.

Article 45

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the 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.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

1. The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.
2. Thereafter the Convention shall enter into force:-
 - a. for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b. for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

1. A State Party to this Convention may denounce it by notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44 of the following:

the signatures, ratifications, acceptances and approvals referred to in Article 43;

the accessions and objections raised to accessions referred to in Article 44

the date on which the Convention enters into force in accordance with Article 46;

the declarations and designations referred to in Articles 22,23,25 and 45;

the agreements referred to in Article 39;

the denunciations referred to in Article 47.

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Annex H: Members of Family Law Working Group

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