

ÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ ENLÈVEMENT D'ENFANTS
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CHILD ABDUCTION

QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE CONVENTION
AND VIEWS ON POSSIBLE RECOMMENDATIONS

introduction to the questionnaire

The questionnaire which appears below is addressed in the first place to States Parties to the 1980 Convention. It has three broad objectives:

- a
to seek information concerning significant developments since 1997 in law or practice surrounding the Convention in the different Contracting States;
- b
to identify current difficulties experienced in the practical operation of the Convention; and
- c
to test opinion in respect of certain possible recommendations.

With respect to a and b above, it should be emphasised that respondents are also invited to identify and comment upon matters concerning the practical operation of the Convention which are not addressed specifically in the Questionnaire.

With respect to c above, the Special Commission on general affairs in May 2000 broadly supported the idea that the Special Commission of March 2001 should, subject to the necessary consensus, attempt to arrive at recommendations to improve the practical operation of the Convention. With this in view, and in order to begin to determine in what areas a consensus may exist, the Questionnaire seeks the initial reaction of respondents to a number of possible draft recommendations. It is recognised that some States may not be in a position to comment on all of the recommendations at this stage. Also the right of delegations, alone or in combination, to make alternative or additional recommendations, should be emphasised. In this regard, it would add to the efficiency of proceedings if States could as far as possible give advance notification to the Permanent Bureau of any proposed recommendations, preferably in conjunction with their responses to the Questionnaire.

The Questionnaire is also being sent to non-Party Member States invited to attend the Special Commission, as well as intergovernmental organisations and non-governmental international organisations invited to attend. All of these are invited to make such submissions in response to the Questionnaire as they deem to be appropriate. In addition, this document will be posted on the Hague Conference website (www.hcch.net).

The Permanent Bureau would be grateful if responses to the Questionnaire could be sent to the Permanent Bureau, if possible in electronic form, by 19 January 2001.

Questionnaire concerning the practical operation of the Convention
and views on possible recommendations

(1)

The role and functioning of Central Authorities

- General questions:

1

Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.

Answer: No

2

Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

- Particular questions:

Answer:

A number of the duties of our Central Authority under Article 7 are carried out through an intermediary body: for example, the provision of legal aid to applicants which is provided by the Legal Aid Board; the discovery of the whereabouts of the child is undertaken by An Garda Síochána (national police) and measures to prevent harm to the child may involve the appropriate Health Board. The co-operation between the Central Authority and these other bodies in processing applications under the Hague Convention has worked very well.

Problems obviously continue to arise under Article 7 (a), where the applicant is unable to provide the address or whereabouts of the respondent. This, inevitably, delays location of the child. Cases where children remain to be located are reviewed as a matter of course by the Central Authority and the other agencies involved.

3

What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c)? Do these measures lead to delay?

Answer: On discovery of the whereabouts of a child by the Gardaí or the Health Board, attempts are made by those Authorities in suitable cases to secure a voluntary return or an amicable resolution of the issues. And where the Legal Aid Board becomes involved in making application to the High Court to seek an order for the return of a child, it is conscious of the requirement to seek a voluntary return or an amicable resolution. Family Law in Ireland expressly encourages, and the courts support, voluntary agreements or mediation between the parties to resolve their differences. Experience in child abduction cases is that these approaches do not delay matters because the overall requirement under the Convention is to secure expeditious return of the child.

4

What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 g)? Do these

measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?

Answer: The Civil Legal Aid Act 1995 established the Legal Aid Board on a statutory footing, it having been in existence since 1980 on an administrative basis. Its function is to deliver State-funded legal aid and advice to certain classes of persons in a range of civil proceedings through a network of Law Centres in the principal centres of population. Under section 28(5) of that Act, legal aid is granted to applicants under the Convention where the Central Authority is under an obligation to provide legal assistance. In effect, this means that in the case of incoming applications under the Hague Convention legal assistance is provided automatically to applicants regardless of means. On receipt of an incoming application under the Hague Convention the Central Authority contacts the Legal Aid Board with a request for the assignment of a solicitor to represent the applicant. Cases are dealt with on a priority basis. The Board arranges for the assignment of a barrister or senior counsel for the High Court proceedings. The High Court and the Supreme Court have expressed concern about the considerable delay in the processing of some applications. The policy of the Central Authority and other authorities (including the Legal Aid Board) is to review cases where delay has occurred. Notwithstanding the use of fast-track management systems, the experience is that delay is unavoidable in some cases. In outgoing cases where the requested country does not provide free legal aid there is potential for delay. However, the majority of outgoing cases are legally aided.

5

Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?

Answer: The Legal Aid Board represents applicants on behalf of the Central Authority. No difficulties or conflicts have arisen. The Board has an arrangement in place which avoids possible conflicts of interest where the Board also represents the abductor. The arrangement is that separate law centres of the Board represent the Central Authority and the abductor.

6

What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives appropriate protection, especially where issues of (alleged) abuse or violence have arisen? In particular, does your Central Authority:
(a) ensure that appropriate child protection bodies are alerted;

Answer: Under Irish child care legislation, each one of a network of Regional Health Boards has primary responsibility for the care, safety, welfare and protection of children in its functional area. Children who are already the subject of court orders in Ireland under child care legislation or other relevant legislation and who are returned to Ireland will in the normal course fall to be dealt with under such legislation which may include supervisory orders. Where the child is not already the subject of appropriate court orders and the child is returned to Ireland, the Central Authority will in appropriate cases on request bring matters to the attention of the relevant Health Boards.

(b)

provide information to either parent in respect of legal, financial, protection and other resources in your State;

Answer: This function may be carried out by the Legal Aid Board and Health Boards. It would be normal for a Legal Aid Board solicitor to provide this type

of information when requested.

(c)

facilitate contact with bodies providing such resources;

Answer: yes - normally with Health Boards.

(d)

assist in providing any necessary care for the child pending custody proceedings;

Answer: yes - through Health Boards.

(e)

provide any other support, advice or information to a parent who accompanies the child on return;

Answer : Support, advice, information, funding of the return, as may be necessary is given or arranged by the Central Authority.

(f)

provide any assistance in ensuring that undertakings attached to a return order are respected.

Answer: Where the Central Authority is informed about undertakings attached to a return order it will arrange for those undertakings to be respected in so far as that is possible. In *P. v B.* [1995] ILRM 201 the Irish Central Authority was requested by the Supreme Court to transmit the judgment and the undertakings in that case to the Spanish Central Authority, with the request that it be brought to the attention of the appropriate court in Spain.

The Authority transmitted the Court Order inclusive of the undertakings to the Central Authority in Spain. (see answer to question 1 in part 3 of the Questionnaire).

Where the Irish Central Authority is informed about undertakings by another Central Authority it will inform the parent generally of the legal options available and of the possibility of obtaining legal aid and advice from the Legal Aid Board if the parent satisfies the requirements of the Civil Legal Aid Act, 1995 (principally, their means must be below a certain limit).

7

What arrangements does your Central Authority make for organising or securing the effective exercise of rights of access (Article 7 f)?

In particular, in the case of an applicant from abroad, does your Central Authority:

(a)

provide information or advice;

Answer: Applicants are advised that applications under Article 21 of the Hague Convention do not qualify for automatic legal aid and are advised of alternative options under domestic legislation and, where appropriate, under the Luxembourg Convention which has the force of law in Ireland. The scope of that Convention includes rights of access.

(b)

facilitate the provision of legal aid or advice;

Answer: Legal aid is not automatically available in respect of applications under Article 21 of the Convention. In the normal course applicants are advised that they may institute access proceedings under domestic legislation (the Guardianship of Infants Act, 1964) and that they may qualify for legal aid if they meet the requirements of the Civil Legal Aid Act, 1995 (principally, their means must be below a certain limit). The Central Authority will direct the applicant to the Legal Aid Board in such cases. It will also explore the possibility of dealing with access applications under the Luxembourg Convention, if appropriate. Legal Aid is automatically available for Luxembourg Convention access cases.

(c)

initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;

Answer: See answer to questions 7(a) and (b)

(d)

assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;

Answer: See answer to questions 7(a) and (b)

(e)

assist in cases where modification of existing access provisions is being sought.

Answer: See answer to questions 7(a) and (b)

8

Please comment on any developments in relation to the maintenance of statistics concerning the operations of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?

Answer: Statistics are compiled annually and the numbers of applications for the period are broken down between incoming and outgoing applications and contracting States. The Central Authority has returned statistics to the Permanent Bureau for some but not all the years. There is no difficulty in doing so on a more regular basis.

Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?

Answer: Yes, the Irish authorities support the conclusions of each of the first, second and third Special Commissions.

10

Would you support any other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?

Answer: Ireland supports the conclusion reached in relation to Central Authorities, the courts and access orders by the Common Law Judicial Conference on International Child Custody held at Washington D.C. in September, 2000. Ireland has enacted legislation (the Protection of Children (Hague Convention) Act, 2000) giving the force of law to the 1996 Hague Convention as being the way to strengthen international law in relation to co-operation among central authorities for the protection of children and in relation to access orders. Ireland intends to ratify the Convention as soon as possible.

(2)

Judicial proceedings, including appeals and enforcement issues, and questions of interpretation

1

How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and

judges for each level.

Answer: The Child Abduction and Enforcement of Custody Orders Act, 1991 which gives the force of Law in Ireland to the 1980 Convention, confines jurisdiction in Hague Convention matters to the High Court. This is the only level of jurisdiction at first instance for Hague cases. The statutory maximum number of judges in the High Court is 26. In practice, only a limited number of High Court judges deal with Hague cases on a regular basis. Appeals from the decisions of the High Court in Hague Convention cases lie to the Supreme Court. There are a total of eight judges in the Supreme Court.

2

Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?

Answer Irish Law already strictly confines jurisdiction to a limited number of courts. See answer to question 1 above.

3

What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)? In particular:

(a)

is it possible for the application to be determined on the basis of documentary evidence alone?

Answer: Yes - in general only affidavit evidence is permitted in Hague Convention applications

(b)

what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?

Answer: Oral evidence is rarely permitted although it may occasionally be heard where there is an unresolvable clash in affidavit evidence on a crucial point. Oral evidence is discouraged largely because it unduly prolongs a procedure in which time is of the essence. As far as affidavit evidence is concerned, this is governed by Order 40 Rule 4 of the Rules of the Superior Courts:

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

Since the initial application in a Hague Convention case is made ex parte (without notice to the other side) and is by way of an interlocutory motion, statements of belief as above are permitted. Where Article 13 defences are claimed, they must be set out fully in the Respondent's replying affidavit. Other affidavit evidence in support may also be filed.

Rules of evidence which apply to Hague Convention cases heard before the High Court in Ireland are the same, broadly, as those applying in any other type of proceedings, except for the specific rules (e.g. in regard to "foreign law" evidence) which are contained in the Convention itself. However, it is generally accepted that in these cases, as in other family law cases, the court has a discretion to apply the rules of evidence rather less strictly than would be the case in, say, a criminal prosecution. This applies, for instance, to the rule against hearsay; but the Court would nevertheless always bear in mind that hearsay is inherently a questionable form of evidence. Specific statutory

provision is made in the Children Act 1997 for the hearing of indirect evidence of children, and for the taking in evidence of reports, in civil proceedings concerning the welfare of a child, as exceptions to the rule against hearsay; built in to these provisions are safeguards to ensure that the Court will attach appropriate weight to such hearsay evidence.

On a general point, section 38(2) of the Child Abduction and Enforcement of Custody Orders Act, 1989 (which gives force of law in Ireland to the Hague and Luxembourg Conventions) provides that Rules of Court may be made for the expeditious hearing of an application made under the Hague or Luxembourg Convention. Such rules are expected to be made shortly in the light of experience of the operation of the Convention.

(c)

who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?

Answer: This is a matter for the solicitor assigned by the Legal Aid Board to deal with the case who is in turn instructed by the Central Authority. Such cases are treated with priority. Solicitors are officers of the Courts and are required to proceed in line with the applicable rules of court and appropriate court procedures. Progress on individual cases is monitored by the Central Authority.

(d)

what appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?

Answer: Appeals lie to the Supreme Court. These are based on the affidavit evidence which was before the High Court, together with a transcript of any oral evidence which was given, and legal argument. Occasionally, additional evidence which was not available at the time of the High Court hearing may be allowed on affidavit. This is, however, extremely rare. In terms of time limits the onus is on the appellant to bring the appeal with all reasonable dispatch. On an application being made to the Supreme Court for a date for the hearing of a Hague Convention case appeal, arrangements are made by the Court to give special priority to the case. As an example, the hearing of the most recent Hague Convention case appeal was held within one week of the first application for listing being made to the Court.

4

In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?

Answer: In these matters the deliberations of the Court are subject to the principle that the welfare of the child is paramount. The Court has the discretion to consider any objections which may be raised in relation to the return of the child. The evidence of the child may be heard and the Court may consider reports on the child's position, for example, welfare reports (see answer to question 3(b) above).

This matter was considered by the Irish Supreme Court in the case of *RMM v MD*, Denham J No. 162/99M of 9 December, 1999. The judgment quoted with approval certain passages from the explanatory report on the Convention on the Civil Aspects of International Child Abduction by Elisa Perez-Vera including paragraph 30 which states:-

"In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of

maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities".

The Supreme Court went on to state that this aspect of Article 13 is a separate ground and that the child's views alone are sufficient basis to refuse a return. The court expressed agreement with the approach in the English case of *S. v. S. (Child's views)* [1992] 2 F.L.R. 492 where it was determined that the part of Article 13 which related to the child's objection to being returned is completely separate from paragraph (b) which referred to the grave risk of physical or psychological harm and that there is no reason to interpret that part of the article as importing a requirement to satisfy paragraph (b) or to interpret the word 'object' to mean something stronger than its literal meaning. The court emphasised, however, that this is an area where the discretion of the judge must be exercised with great care. The Supreme Court also cited with agreement the approach of Balcombe LJ, in *S. v S. (Child Abduction) (Child's Views)* where that judgement stated -

"(2) The establishment of the facts necessary to 'open the door' under Article 13

(a) The question whether:

(i) a child objects to being returned; and

(ii) has attained an age and degree of maturity at which it is appropriate to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge. Miss Scotland submitted that the child's views should not be sought, either by the court welfare officer or the judge, until the evidence of the parents has been completed. We know of no justification for this submission. She also asked us to lay down guidelines for the procedure to be adopted in ascertaining the child's views and degree of maturity. We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Convention is primarily designed to secure a speedy return of the child to the country from which it has been abducted.

(b) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abduction parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

(c) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we. In this connection it is material to note

that Art 12 of the UN Convention on the Rights of the Child provides as follows.

1. State 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.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and 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.

(d) In our judgment, no criticism can be made of the decision by Ewbank J, to ascertain C's views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that C objected to being returned to France and that she had attained an age and degree of maturity at which it was appropriate to take account of her views. Those are findings with which this court should not interfere."

The Supreme Court, in this case, went on to state that the Hague Convention is quite clear on its face that a child who objects to being returned and who has attained an age and a degree of maturity is entitled to have his or her view taken into account and that the trial judge was entitled to rely on the child's view in such a way as to make it quite clear that the child's view accorded with other determinations which the trial judge had made in the case so as to protect the child's long term psychology. The Supreme Court decision made it clear that it must always be the case that a decision not to return a child to its habitual residence is a decision of the court and that care should be taken that it is not, nor does it appear to be, the decision of the child.

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

Answer: There are no specific statutory rules governing decisions of this type; it is in the discretion of the Court to decide such case based on the individual circumstances. (See operation of the law as indicated in reply above).

5

Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?

Answer: Generally, no differences in procedures arise - the affidavit procedure is invoked in all cases and oral evidence is rarely invoked unless it is necessary to resolve differences in affidavit evidence. It is a matter for the Court to decide the merit of any defences raised. The obligation of establishing that the defence is a valid one would generally rest on the person invoking the particular defence. The normal standard of proof in civil proceedings is that the burden of proof is satisfied on the balance of probabilities.

The experience of the Courts, in particular in relation to Article 13 defences, is that delays have not occurred in practice where these defences have been raised.

6

Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?

Answer: The Court has a wide jurisdiction either to direct immediate execution of an order or, if it is so minded, to set terms for deferred execution; it may also make interim orders in appropriate cases.

High Court orders are in general enforced if necessary through contempt proceedings whereby a party disobeying an order may be attached and brought before the Court and if necessary committed to prison. The main enforcement agency is the Garda Síochána (police). In Ireland there is not a large problem of contempt of court orders in these cases and we are not aware of anyone to date having been committed to prison for this type of contempt in a Hague Convention case.

Appeals lie to the Supreme Court and Supreme Court orders are enforced in the same way as High Court orders.

In dealing with penalties for non-compliance with High Court orders and Supreme Court orders, judges have a wide area of discretion.

7

Would you support any of the following recommendations?

Answer: Ireland supports recommendations (a) to (g), and adheres to the principle of each in practice. In addition to giving the force of law to provisions in the Convention (including those that require the most expeditious procedures to be invoked), our legislation requires -

- (a) that the proceedings be commenced in the High Court,
- (b) that proceedings be commenced in a summary manner and
- (c) that rules of court may make provision for the expeditious hearing of an application under the Convention.

Experience is that our courts operate in abduction cases with particular expedition at all stages and enforce orders on a similar basis. The grave risk defence is narrowly construed, the Irish Supreme Court giving a strict interpretation to Article 13 (b). A number of cases have established this approach, in particular, *CK v CK* [1994] 1 IR 250, *P v B* (No. 1) [1995] ILRM 201 and *AS v PS* [1998] 2 IR 224.

In so far as recommendation (g) is concerned Ireland would recommend adoption of Best Practice Guidelines by Contracting states as recommended at the Common Law Judicial Conference held at Washington in September, 2000.

a

calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.

b

underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.

c

calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.

d

calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.

e

calling upon States Parties to enforce return orders promptly and effectively.

f

recommending that the "grave risk" defence under Article 13 should be narrowly construed.

g

proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.

8 Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

rights of custody (Article 3 a and Article 5 a);

habitual residence (Article 3 a and Article 4);

rights of access (Article 5 b);

the actual exercise (of rights of custody) (Article 3 b and Article 13 a);

the settlement of the child in its new environment (Article 12);

consent or acquiescence to the removal or retention of the child (Article 13a);

grave risk (Article 13 b);

exposure to physical or psychological harm (Article 13 b);

intolerable situation (Article 13 b);

fundamental principles relating to the protection of human rights and

fundamental freedoms (Article 20).

Answer:

Rights of Custody (Article 3a and Article 5a).

the actual exercise (of rights of custody) (Article 3 b and Article 13 a);

The Irish Supreme Court has given consideration to the meaning of the expression "rights of custody" in Article 3 of the Convention, (*H.I. v M. G.* [1999] 2 ILRM 22).

The Court has held that "Even where the parents, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, in the absence of any legally excusing circumstances, be wrongful in terms of the Convention ... giving the Convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be 'wrongful' within the meaning of Article 3 because it is breach of rights of custody, not vested in either of the parents but in the court itself".

habitual residence (Article 3 a and Article 4);

The expression "habitual residence" is interpreted by the Irish Courts as to be equated with ordinary residence.

consent or acquiescence to the removal or retention of the child (Article 13a);

The Irish Courts have adopted the approach taken in the U.K. case of *W. v W.*

[1993] 2 FLR 211 in respect of acquiescence which states that

"Acquiescence means acceptance. It may be active arising from express words or conduct, or passive, arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.

A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the Courts will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice. If the acceptance is active, it must be in clear and unequivocal words or conduct and the other party must believe that there has been an acceptance."

grave risk (Article 13 b);

In the Hague Convention cases which have come before the Irish Courts since the enactment of the Child Abduction and Enforcement of Custody Orders Act 1991 (which brought the Convention into Irish domestic law), the most frequent defence put forward by the abducting or retaining parent has been that to return the child to the habitual residence would be to expose the child to a grave risk of harm or an otherwise intolerable situation. It is however, a defence which has relatively rarely succeeded. The Irish Supreme Court has given a strict interpretation to Article 13(b). In the leading case of *AS v PS* [1998] 2 IR 244 the Supreme Court on appeal stated that the exception to the requirement to return children to their habitual residence in Article 13 should be construed strictly. It was necessary under the Convention that the situation be one of grave risk or an intolerable situation. Denham J. stated:

"The exception to this fundamental concept carries a heavy burden, the test is a high one... It is a question of enforcing the Hague Convention which has at its core the paramount interest of the child that it should not be wrongfully removed or returned across State borders.

Where the return of the child was refused it was in situations where the court determined that there was indeed a serious cause for concern and a grave risk of harm to the child."

exposure to physical or psychological harm (Article 13 b);

The Irish Courts have interpreted this as covering only serious psychological harm. The Courts may consider undertakings by the parties concerned as a means to removing the risk of damage to the child.

fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).

The Irish Courts *A.C.W. and N.C.W. v Ireland and the Attorney General* [1994] 1 ILRM 126) have held that the "human rights and fundamental freedoms" which are to be protected if Article 20 is invoked include those set out, expressly or by implication, in Articles 40-44 of the Irish Constitution (which concerns fundamental rights).

(3)

Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)

1

To what extent are your courts, when considering a return application, entitled and prepared to employ "undertakings" (i.e. promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?

Answer: Irish Courts have wide discretion to employ undertakings when considering the return of a child. The question of undertakings may be raised by either party or the High Court itself. And when the evidence in the affidavits and any social reports in being taken into account by the Judge it would be a matter for consideration as to whether in all the circumstances there were reasonable grounds for holding that the situation could be met by undertakings and that undertakings were applicable (TMM and MD, Supreme Court [1999]). The Irish Supreme Court has held (P. v B. [1995] ILRM 201) that undertakings may be given by a party to a proceeding under the Child Abduction and Enforcement of Custody Orders Act, 1991 (which gives effect in Irish law to the Hague and Luxembourg Conventions) and accepted by the court.

The Supreme Court held that such undertakings were entirely consistent with the 1991 Act and the Hague Convention. The Supreme Court saw such undertakings as, in particular, being for the welfare of the child during the transition from one jurisdiction to another but also protecting a parent in his or her role under the Irish Constitution. The Supreme Court also held that undertakings when sought and given must be clear and certain, and that it is essential that the matters be clearly and specifically determined by the court for the parties. An example of undertakings given arose in a case before the High Court in 1997 where the plaintiff (the father) sought return to Italy of the child who had been brought to Ireland by her mother. An Order was made for the return of the child to Italy in light of certain undertakings given by the father and the mother.

On behalf of the father these were:

The mother and the child were to be provided with accommodation at an apartment at a given address until the matter of the family and the accommodation of the parties was decided by the Italian Court.

The father was not to attend at or enter or otherwise watch or beset the apartment in which Mrs P was residing and he was not to approach the mother or interfere with her in any way.

The father was to pay the mother for herself and her child in a sum equivalent to £400 per month, the first payment to be made in advance to the mother's Solicitor on a specified date.

The father was to pay the airfares from Ireland to Italy to enable the mother and the child to return to Italy on a specified date.

The father was to permit his wife to collect her personal effects and those of the child from the family home by appointment on a specified date.

On behalf of the mother these were:

The mother was to hand in the child's passport to the Italian Court for the period of transition until the Italian Court took up the case.

The father was to have access to the child on three evenings each week and also at the weekends at times which were specified in the undertaking. The access was to take place in the presence of, and under the supervision of

either or both of the mother's parents at their home.

Both parties also undertook to co-operate in ensuring the prompt disposal of the proceedings in the Italian Courts.

In addition, at the request of the Judge as to the admissibility of the purported Affidavit evidence, the husband undertook to arrange for the notarisation of the un-notarised Affidavits which had been filed in the proceedings.

However, it appears that on return the father failed to honour the undertakings and a motion was served by the mother in the Irish High Court seeking enforcement of the husband's undertakings.

The High Court found that it could make no order in this case. The judgment considered the difficulties arising in recognition of a common law concept of undertakings in non-common law jurisdictions, and quoted with approval authorities which proposed that Central Authorities may have a role in explaining approaches by their courts to particular cases under the Convention.

2

Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?

Answer: Such undertakings, whether by agreement or at the request of the court, while not binding on the Irish Court would be fully respected.

3

To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?

Answer: If the circumstances are appropriate the Court will grant, on request, mirror orders.

4

Is consideration being given to the possible advantages of the Hague 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, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?

Answer: Ireland enacted legislation on 16 December, 2000 (the Protection of Children (Hague Convention) Act, 2000) which gives the force of law to the 1996 Convention and enables the State to ratify the Convention. Clearance at EU level is being sought by the State to proceed with signature and ratification of the Convention.

5

Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues

been resolved?

Answer: No

6

Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.

Answer: Cases where criminal charges are pending against the abducting parent in the country to which the child is to be returned arise in only a limited number of applications in Ireland. Where the abductor is arrested on foot of an extradition warrant for the particular offence, the child must be put in care (if the applicant parent is abroad). If the criminal charges are of a kind as to raise issues under 13(b) of the Hague Convention then the High Court could take such matters into account in deciding on custody of the child while the child is in the State.

7

Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?

Answer: In a recent appeal case in the UK (Re H) concerning a child abducted from Ireland to the United Kingdom, there was dispute among the parties as to Irish law and practice. In relation to one aspect of the earlier proceedings before the Irish courts, the judge in the UK proceedings contacted a judge of the Irish High Court to query whether a term used in the Irish orders had the same meaning as the term "liberty to apply" used in the UK. The Irish judge was able to confirm that the terms used in Ireland ("liberty to re-enter") and the UK carried the same meaning. The point, although not decisive to the appeal, did have a material bearing on the outcome.

In an earlier case, where two children had been abducted to the United Kingdom by the father during the course of custody and access proceedings in the Irish Circuit Court, the English High Court judge contacted the Irish Circuit Court judge directly by telephone to check the legal situation obtaining in the Irish proceedings. Both contacts mentioned above were relatively informal: they were assisted by the fact that the judges in both cases would have known each other personally.

8

Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?

Answer: Under active consideration.

9

Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?

Answer: The parent has the possibility of obtaining legal aid and advice from the Legal Aid Board if he or she satisfies the requirements of the Civil Legal Aid Act, 1995 (principally, their means must be below a certain limit).

10

Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?

Answer: The Irish Courts have jurisdiction to vary or discharge any custody order previously made by the Court. Any such variation or discharge will be on the basis of the interests of the child and to, for example, any change in circumstances.

11

Would you support any of the following recommendations?

Answer: We would support, in principle recommendations (a to (c) and (e) and (f). As regards (a), Ireland has already enacted the legislation giving the force of law to the 1996 Convention and intends to arrange for ratification of the Convention as soon as possible. As regards (d), Ireland will consider it further in the light of elaboration in the Commission of what is involved/envisaged regarding the specifics. (Abduction by a parent is a recent statutory offence in Irish law and, so far as is known, it has yet to be used. The prosecution of an offence is a function of the police authorities in minor offences and of the Director of Public Prosecutions in serious cases. Both these authorities are independent in the exercise of their functions and the Central Authority has no function in relation to criminal matters).

a

that Contracting States should consider ratification of or accession to the Hague 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, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.

b

that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.

c

that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.

d

that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.

e

that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.

f

that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.

(4)

Procedures for securing cross-frontier access/contact between parent and child

1

What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?

Answer: The applicant has the possibility of obtaining legal aid and advice from the Legal Aid Board if they satisfy the requirements of the Civil Legal Aid Act, 1995 (principally, their means must be below a certain limit).

2

On what basis do your courts at present exercise jurisdiction to:

a

grant and

b

modify access/contact orders?

Answer: Section 39 of the Family Law (Divorce) Act, 1996 provides that Irish courts may exercise jurisdiction in divorce proceedings where either of the spouses is domiciled in the State or has been ordinarily resident in the State throughout one year prior to the institution of proceedings. The Act allows the court to make a variety of preliminary and ancillary orders, including orders relating to the custody of or access to children, in or after proceedings for divorce.

Section 31 of the Judicial Separation and Family Law Reform Act 1989 gives jurisdiction to the Irish courts to grant decrees of judicial separation where either of the spouses is domiciled in the State or is ordinarily resident in the State throughout the period of one year prior to the institution of the proceedings. Section 10 of the Family Law Act 1995 provides that, on granting a decree of judicial separation, the court may make a range of ancillary orders including custody/access orders in respect of children.

Section 23 of the Family Law Act, 1995 provides that Irish courts may exercise jurisdiction to make relief orders, including custody or access orders, following the granting of a foreign decree of judicial separation or divorce. Jurisdiction may be exercised where either of the spouses is domiciled in the State at the time proceedings are instituted or was so domiciled on the date on which the foreign decree took effect or has been ordinarily resident in the State throughout the one year period prior to either of these dates.

The above provisions concern custody/access orders that are made in the course of divorce and judicial separation proceedings. There do not appear to be any other statutory provisions governing when an Irish court might assume jurisdiction to make access or custody orders. However, there are some judicial decisions on the matter. Though many clear conclusions cannot be drawn from these decisions, it appears that, at common law, it is well established that

jurisdiction will lie where the child is Irish and resides in Ireland. There may be other grounds on which an Irish court would assume jurisdiction including Irish nationality (though the child is living abroad) and even the mere presence of the child in the State where there is no supplementary connecting factor such as domicile or nationality. (See Binchy: Irish Conflicts of Law, 1988.)

It should be noted that EU Council Regulation No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, which comes into force in March of this year, contains rules as to jurisdiction in matters of parental responsibility for joint children in the context of matrimonial proceedings.

3

What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of the Hague 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?

Answer: Ireland has ratified the Luxembourg Convention which provides for the recognition and enforcement of foreign access orders. Ireland also enacted legislation on 16 December, 2000 (the Protection of Children (Hague Convention) Act 2000) which (when commenced on ratification of the Convention) will give the force of law to the 1996 Convention.

4

What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?

Answer: The normal rules of court apply. These allow for expedition of proceedings in suitable cases.

5

What facilities/procedures are in place to promote agreement between parents in international access/contact cases?

Answer: There are no specific provisions apart from those in the Hague and Luxembourg Conventions in relation to cases of an international dimension. However, the Children Act, 1997 provides generally in cases before our courts for the use of alternative dispute resolution methods and imposes an obligation on the solicitors for the applicant and the respondent to discuss with the client the possibility of engaging in counselling, mediation and negotiating a settlement by deed or agreement in writing. A custody or access agreement may be made a rule of court and have the effect of a court order. To be made a rule of court the agreement must be in written form and contain a specific clause in relation to the access provisions, and the court must be satisfied that the agreement is fair and reasonable. Making such agreements equivalent to a court order should enhance the possibility of recognition and enforcement of them by a foreign court.

6

Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?

Answer: The Courts will normally give access to the non-custodial parent, which may be subject to certain conditions, to allow a child maintain a full and

meaningful relationship with the non-custodial parent. The court makes all such orders on the basis of what is in the child's best interests. (The Children Act, 1997 Act provides that the court, in settling disputes in the area of custody, access or guardianship, must have regard to whether the child's best interests would be served by maintaining personal relations and direct contact with both his or her father and mother on a regular basis).

7

What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?

Answer: This depends on the circumstances of the case. The welfare of the child is the first and paramount consideration. Such conditions might include the right to have a child reside with and go on holidays with the non-custodial parent for a period of the school holidays. In the past where a non-custodial parent was living in a relationship with another person, a condition of access was sometimes made that the other person must not be present when the non-custodial parent had access to a child. However, such a condition is now rarely made by the Courts. In cases where allegations of domestic violence or child sexual abuse have been made and have not yet been established as well founded supervised access is likely to be directed.

8

What information concerning services and what other facilities are available to overseas applicants for access/contact orders?

Answer: Applicants pursuing access under domestic legislation provisions may qualify for legal aid and advice from the Legal Aid Board if they satisfy the requirements of the Civil Legal Aid Act, 1995 (principally, their means must be below a certain limit). The Board has leaflets available for the information of applicants. The Central Authority for the Luxembourg Convention provides a range of information in connection with applications for the enforcement of an access order.

9

What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:

a

the effective exercise of rights of access in your/in the other jurisdiction;

b

the granting or maintaining of access rights to a parent residing abroad/in your jurisdiction;

c

the restriction or termination of access rights to a parent residing abroad/in your jurisdiction.

Answer: Ireland has ratified the Luxembourg Convention which deals expressly with recognition and enforcement of foreign access orders. The difficulty is with non Luxembourg Convention cases. There are no statutory arrangements and common law principles apply based on comity, if any, between Ireland and other

jurisdictions. That comity may exist between common law jurisdictions but is not so evident otherwise. If either parent are resident in Ireland proceedings may be instituted under domestic legislation (Guardianship of Infants Act, 1964). Ireland has in addition given the force of law to the 1996 Hague Convention in recent legislation and intends to ratify that Convention. When the child and abductor are merely present in the State (as distinct from being resident there) an application to the High Court may be made by way of habeas corpus to seek production of the child in Court.

10

What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (e.g. financial guarantees, surrender of passports)?

Answer: The Courts have wide discretion in the application of measures to help guarantee access when it arises. Where it is thought there is a danger of abduction surrender of passports is frequently ordered.

11

How in practice are access orders enforced?

Answer: The breach of an access order can be dealt with under the law of contempt of court if the order is made by the Circuit or High court or on the basis of a fine and/or imprisonment under section 5 of the Courts (No 2) Act, 1986 if made by the District Court. Contempt also involves a fine and/or imprisonment (see answer to question 6 in part (2) of the questionnaire).

12

Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify?

Answer: We would, in particular, support any recommendation which calls on States to sign and ratify the 1996 Hague Convention.

(5)

Securing State compliance with Convention obligations

1

Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.

Answer: We have no such experiences.

2

What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?

Answer: Acceptance by Ireland of accession of a state to the Convention is on the basis of a Government decision in each case. The Department of Foreign Affairs makes the arrangements and where doubt arises normal inquiries would be made. Experience to date is that no doubts arose in any such cases. The

inquiries that might be made would be done through normal diplomatic channels.

3

Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?

Answer: Yes, such a questionnaire would facilitate the assessment by Contracting States of acceptance of an acceding state. However, the questionnaire should not be framed in a way that would act as a disincentive to accession. Questions might include such matters as: the level of resources available; the structures in place to implement the Convention; the detail of the enabling legislation; the courts that have jurisdiction to hear cases; legal aid.

4

Are you in favour of an increase in the number of Special Commissions (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct communications between judges at the international level, or the enforcement of return orders by Contracting States)?

Answer: We can see merit in this suggestion, especially where particular problems arise in relation to the operation of the Convention. However, the criteria for such additional Special Commissions should be set out clearly bearing in mind the cost and additional burden that such extra special Commissions would have on the Bureau and Contracting States.

5

Are there any other measures or mechanisms which you would recommend:

a

to improve the monitoring of the operation of the Convention;

b

to assist States in meeting their Convention obligations;

c

to evaluate whether serious violations of Convention obligations have occurred?

Answer: No.

(6)

Miscellaneous and general

1

Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?

Answer: The Permanent Bureau has taken on many functions over the years in response to identified needs. There may be some merit now in formalising these

functions and in ensuring co-ordination across the range of activities of the Bureau. It is noted that an item on the role of the Permanent Bureau has been included on the agenda for the Special Commission in March, 2001.

2

Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

Answer: Yes. Such a list would assist debate on the role of the Permanent Bureau.

3

Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?

Answer: Yes

4

Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?

Answer: Yes - the Washington Conference (September, 2000), with the assistance of the Bureau, is a good example of what can be achieved.

5

Are there any particular measures which you would favour to promote further ratification's of and accessions to the Convention?

Answer: The Bureau together with similar type jurisdictions may have a role to play here in providing assistance and advice to potential accession States which would help them to meet the requirements of the Convention.

6

Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

Answer: We have no such arrangements at present.

7

Do you have any comments on the following proposition:

Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.

Answer: This proposition, which was part of the conclusions of the Washington Conference (September 2000), is supported by Ireland. The 1996 Hague Convention represents an advance on the 1980 Convention and is relevant here. Ireland as indicated earlier has enacted legislation to give the force of law to the 1996 Convention and intends to ratify the Convention as soon as possible. This is a step in the direction of relocation cases and Ireland would urge other states to ratify the 1996 Convention.