îãéðú éùøàì
îùøã äîùôèéí
ôø÷ìéèåú äîãéðä
äîçì÷ä ìòðééðéí
áéðìàåîééí

State of Israel
Ministry of Justice
Office of The State Attorney
Department of International Affairs

Questionnaire Concerning the Practical Operation of the Convention and Views on Possible Recommendations

(1) The role and functioning of the Central Authorities

General questions:

1. In most cases we have enjoyed full cooperation with other Central Authorities within the meaning of Article 7. In certain cases we have had difficulties. When we receive a request from another country, we immediately write to their Central Authority acknowledging receipt of the request and informing them of the procedure for securing legal counsel. We also keep the other countries informed of the progress of the cases- when the hearing date is set and the results of the hearings. Not every country does this, which can cause delays. In a case we had with the Republic of Georgia, we had great difficulty in getting them to acknowledge receipt of the request. We kept writing and calling. Often, we could not get through by telephone or by fax. It got to the point that we had to write to the Permanent Bureau in the Hague to find out if there were any changes in the fax and phone numbers. Throughout the matter we had difficulty in getting responses from the Georgian Central Authority, to the point that we had to contact the Georgian Embassy in Israel and ask for their assistance. In another matter involving a request for access we wrote several times to the Central Authority in Mexico but never received a response.

One reason for possible misunderstandings with respect to cases is the fact that each Member State's internal law dictates the ambit of the Central Authority's competence. (One example of this is the fact that some Central Authorities (such as Israel) include attorneys who can make legal determinations, while others are not staffed by personnel possessing a legal background.)

øç' öìàç à-ãéï 29, ú"ã 1087, éøåùìéí, 91010 29 Salah A-Din St. P.O.B 1087, Jerusalem,
èì: 8797 670 / 0328 670 02Tel:
ô÷ñ: 7668 628 02 Fax:
e-mail: jleum@trendline.co.il

2. One of the duties that raises problems in practice concerns the obtaining of counsel through legal aid. This is due to the different approaches in different countries in accordance with their internal law. The standards are not decided by the Central Authorities. Difficulties lie in the lack of uniformity between Member States with respect to the criteria for eligibility for legal aid. Some countries do not provide legal aid in Hague cases at all.

Particular Questions:

3. The Central Authority for Israel sends voluntary return letters at the request of the left-behind parent, whose consent is necessary due to the possibility that the abducting parent presents a flight risk. In cases where we are approached by the abducting parent we often explain over the telephone that it is worthwhile for them to return to their country of residence and settle matters amicably, rather than exposing all parties involved to unnecessary and costly legal proceedings. In the voluntary return letter, we allow the abducting parent two weeks in which to respond before initiating proceedings. We feel that this small delay is necessary as it may save a great deal of time, effort and expense later on. We have even attempted to mediate such matters and feel that this can be a valuable tool to secure voluntary returns.

4. Israel has made the reservation to Article 26 of the Convention. Therefore, a parent must secure his own counsel in Israel. We provide the left-behind parent with a list of counsel that have experience in Hague cases, and it is up to the parent to communicate with the counsel of his choice and to retain counsel. If an applicant cannot afford private counsel, he may request legal aid. As long as the requesting parent has proof of eligibility in the country of residence, he/she may be eligible for legal aid in Israel. As soon as we receive proof of eligibility, we pass it on to the Legal Aid office in the relevant area who then appoints an attorney within a very short period of time. (We recently had a case in which the legal aid office appointed an attorney the same day that we requested one, due to the fact that the Hague hearing was to take place three days later.)

Unfortunately, we experience delays in other jurisdictions in securing legal aid. The biggest problem is in the United States, where most states do not have a legal aid system and it is necessary to secure *pro bono* counsel. We have had cases where the

delay has been several months, which clearly has a significant impact on the applicant's chances.

5) The Central Authority does not give legal counsel and does not represent any of the parties in court. There are very few delays with our system. We have been asked by the Supreme Court of Israel, in more complex cases, for legal opinions on issues arising from the application of the Convention.

6) a) The Central Authority is the go-between with respect to the various institutions involved in the welfare of the child. We ensure that the appropriate child protection bodies are alerted such as the Social Welfare Authority and the police authorities.

b) We provide the necessary information. Concerning a parent whose child was abducted to Israel, we would inform them of the possibility of legal aid, should they qualify financially. A parent who abducted a child to Israel and wanted legal aid could also apply on their own to a legal aid office. Where a child is being returned to Israel and there are protection issues, we would refer the parent to the appropriate welfare authorities- we would likely have already made a referral prior to the return, and would then follow it up upon the child's return.

c) We facilitate contact between these bodies. However, lately some judges have been conditioning the return of children upon the meeting of certain undertakings, usually to ensure the protection of the mother and child, both financially and from possible physical or emotional harm. The Central Authority is not involved in the enforcement of these undertakings. That is something that the courts must enforce.

d) We would contact the Ministry of Social Welfare and request that they make the necessary arrangements for the child.

e) We could make the necessary inquiries in order to assist in obtaining such information.

f) The Court is the body responsible for ensuring undertakings either through a mirror order or by enforcing an agreement signed by the parties and given the validity of a judgment. The Central Authority does not have the statutory jurisdiction to take steps such as court action. The attorneys representing the parties initiate this process. If undertakings are not being complied with, we could assist the parent in securing legal counsel, if necessary.

7) If the Central Authority receives a Request for Access we act in the same way as we do with Requests for Return, i.e., arranging for representation for the interested party, monitoring the case and providing any information necessary for the facilitation of the case.

If the parent is not given the opportunity to exercise his/her rights of access as provided by a court, the only possible way of enforcing these rights is through the courts. The Central Authority can only assist the requesting parent in securing an attorney and in monitoring the case, it cannot actively secure these rights.

a) The Central Authority provides information with respect to all stages where access is requested.

b) We assist the requesting parent in retaining legal counsel either through legal aid or privately.

c) The Central Authority does not initiate or assist in proceedings. This is done by private attorneys or attorneys obtained through Legal Aid.

d) The attorney for the requesting party must apply to court in order to ensure that the terms of the order or agreement are respected.

e) We wish to emphasize that the Central Authority is not a party to the proceedings. Any modification must be sought by the attorney of the requesting party, who would apply to the court that issued the existing order to begin with. Modification of existing access provisions is a point that has given rise to debate. Some countries view this as an internal procedure, and one that is not covered by the Convention. This seems to be the general view among the Israeli judges handling these cases, where, although they may view an application for access under the Convention as a proceeding that should be handled expeditiously, they may rule in accordance with Israel's Capacity and Guardianship Law and not based upon the foreign order that the parent is requesting to enforce.

8) According to our records, the last statistics sent to the Permanent Bureau was in 1997, prior to the last Special Commission. Since then we have no record of receiving Hague standard forms. We do maintain our own statistics and feel that it is important to see what is happening in other member countries.

9) Yes, we reaffirm support of these conclusions.

10) Under Israel's internal law, the Central Authority's ambit of jurisdiction is limited in scope. We therefore do not have the authority to obligate the parties or institutions involved in a case to act in one way or another. With respect to the matters raised in questions 6 and 7 above, the relevant bodies given the authority to carry out both child protection and enforcement of access are the courts and the Ministry of Labor and Social Welfare.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation

1) There are three levels of jurisdiction. The Family Court handles abduction cases at the first instance (its jurisdiction is equivalent to that of the Magistrate's Court). One judge hears the case at this instance. A decision of this court may be appealed by right to the District Court and is heard before three judges. An appeal of this decision is heard before the Supreme Court only if permission is requested and granted. The appeal is heard before three Supreme Court Justices. There are 8 Family Courts with approximately 30 judges; 5 District Courts with approximately 100 judges; and one Supreme Court with 14 judges.

2) In practice, the applications are filed in a Family court in one of the four major cities and may be heard by one of approximately 10 judges. An appeal to the District Court would also be heard in one of the four major cities and usually before a set panel of 3 judges who specialize in this field. As mentioned above, an appeal before the Supreme Court is heard before a panel of 3 Supreme Court Justices.

3) a) It is possible for the application to be determined on the basis of documentary evidence alone if the parties agree to waive their right to bring witnesses , however, the judge may ask to hear testimony from the left-behind parent, including cross-examination of his/her affidavit. According to the Israeli Regulations to the Hague Convention Law (Regulation 295.i(2)), judges must have special reasons for requesting that the left-behind parent appear in court. These reasons must be given in

writing. For the purpose of proving defenses in accordance with the Convention the judge will always allow witnesses. In the appeal stage, the judge relies on the documentary evidence established by the Family Court as well as protocols.

b) There are no special measures that exist to control or limit the evidence which may be admitted in Hague proceedings. This is all according to judicial discretion.

c) In the Family Court, it is the Vice-President of the court who exercises control over the procedures at this stage. On appeal to the District Court, it is the Presiding Judge of the panel, and on appeal to the Supreme Court it is the Secretary of the Supreme Court.

d) As stated above, an appeal must be filed within 7 days to the District Court. A request for leave to appeal must be filed within 7 days to the Supreme Court. The basis for an appeal must be matters of law and not of fact.

4) As is stated in Article 13(b) of the Convention and in accordance with Israel's Law, if a child is old enough to have his/her views taken into account, the court can make a determination based upon a child's wishes. At the moment there is a case pending before the Supreme Court in which a 10 year old abducted by the mother has threatened suicide if he is returned to the father. The Vice-President of the Tel-Aviv District Court ordered not to return the child based on Article 13 (b). In such cases the judge may ask for an expert opinion from a social worker and/or psychologist or psychiatrist before making the determination. The judge may also interview the child based upon Section 12 of the U.N. Convention on the Rights of the Child. In order to take the child's refusal to return into consideration, there must be a connection between this refusal and the damage that would be caused to the child upon his return, in accordance with Article 13(b) of the Hague Convention.

5) A claim under Article 13(b) requires an expert opinion of a psychologist or psychiatrist. There is a strong burden of proof on the defendant which has been adopted from the American system, requiring clear and convincing evidence. Raising these defenses does lead to delays. It is very difficult to reduce delays as the defendant may take time proving the defenses and the left-behind parent will want to disprove these

claims. Only the judge's discretion can reduce delays to a minimum. In our experience the Israeli judges make a great attempt to do so.

6) Court orders for return are executable upon being pronounced and can be enforced by the Police and social welfare authorities without the necessity of any other proceedings. In a situation where the return is conditional upon undertakings and the left-behind parent does not comply with these undertakings, the execution of a return order may be delayed until full compliance is met. In a case where a stay of execution is granted by the court pending an appeal, the stay may be conditional upon the child being transferred to the requesting parent in Israel until the appeal is heard.

We have had problems with other countries in cases where orders are not enforceable without additional proceedings. In such cases the aim of the Convention, prompt return, is defeated due to the lengthy delays caused by the requirement for additional proceedings.

7) a) Yes, we would support this idea so that cases would be limited to certain Family Court judges who have a great deal of experience in the Hague Convention.

b) We would support this obligation.

c) We have, on several occasions, addressed the court with the request to speed up proceedings based upon Article 11 of the Convention.

d) If this is possible we would support this, including regular contact, if necessary, between the judiciary and Central Authorities.

e) We support this.

f) In Israel this defence is being narrowly contrued and we would support this with respect to the other member states.

g) A decision under Article 15 of the Convention from the Requesting party stating that there was a wrongful removal or retention could speed up the process. Also, regular contact between Central Authorities from the time the application is received and up until there is a final decision and execution of this decision, would serve to improve the efficiency with which these cases are handled.

8)

-Habitual residence- Since 1996 we have seen case law defining habitual residence. Due to the extensive immigration of Jews from all over the world to Israel, and the rights and subsidies provided to these immigrants to assist in their absorption, the courts have interpreted even a short period of residence of a new immigrant in Israel as establishing habitual residence within the meaning of the Convention. The many active steps necessary for immigration are viewed as establishing the intent to make Israel the place of habitual residence.

-Rights of access- The general view is that the court cannot enforce this in accordance with Article 21 of the Convention, rather only through Israel's internal law.

-Grave risk- Although the courts have narrowed the interpretation with respect to the possibility of grave risk to the mother, they have been prepared to add, in some cases, undertakings to ensure that the mother and children are safe and provided for during the custody proceedings in the place of habitual residence.

In a recent case where the child was threatening to commit suicide if he were returned to his father, since the judges saw that his threat was a serious one, they ruled against his return. However, this decision is now on appeal to the Supreme Court, since it was also shown that it was the mother's influence that brought the child to the negative psychological state that he is in today.

- Fundamental principles relating to the protection of human rights and fundamental freedoms- We wish to emphasize that we were astonished by a decision of the Spanish Court that decided not to return a child to Israel in accordance with Article 20 on the basis of false information. In light of a petition to the Supreme Court in Israel (sitting as the High Court of Justice), the Supreme Court Justices rendered a decision in which they addressed the Spanish Court requesting that they dismiss their decision not to return the child to Israel, based upon this false information. This decision was sent to all of the Member States, however no steps have been taken to correct this injustice.

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

1) The Israeli courts have used undertakings in the past and continue to use undertakings. In our experience, the judges are not comfortable with the idea of returning children and primary caretakers when it is suspected that they will not have a roof over their heads or a means of support until custody proceedings are over in the country of habitual residence. These undertakings may include: housing; deposit of money to ensure support during the relevant period after the return; tickets for the children and sometimes the caretaker; assurance of obtaining a visa for the period of the custody proceedings.

Depending on how experienced the judge is it can be initiated by him/her. Otherwise, the attorney for the abducting parent usually raises the issue of undertakings. In one Supreme Court case in Israel when the Central Authority was asked to file an opinion on the interpretation of Article 13(b) by the Supreme Court Justices, we presented examples of case law from other member states in which undertakings were used.

2) We do not have experience with cases such as these. However, judges would tend to enforce these undertakings since they would want their undertakings enforced in other member states. In cases where undertakings are made by agreement between the parties it would have to be shown that the agreement was not made under duress. Each judge might have a different interpretation as to what constitutes duress. Should the judge find that there was no duress demonstrated, there should be no difference in the enforcement of such private undertakings than would be the case in court-ordered undertakings.

3) Safe harbor orders have not been granted by the court and mirror orders have rarely been granted. Both may only be granted at the discretion of the judge. In reference to safe harbor orders, the abduction of a child is a criminal offense under Israel's Penal Code. However, there is a directive from the State Prosecutor not to prosecute abducting parents unless the abduction involves extraordinary circumstances (such as violence, moving the child surreptitiously through a variety of countries, etc.). The Israeli Central Authority has, at the request of the foreign court, given a guarantee to the court and/or the abducting parent that he/she will not be prosecuted for the abduction upon return to Israel. This guarantee is in

conjunction with a directive to the police by the Central Authority to close the criminal file against the parent. However, if the abducting parent has a criminal file unrelated to the abduction, our law does not give the court or the Central Authority the jurisdiction to give a safe harbor order.

4) Israel is not a party to this Convention and it is not well known here.

5) Yes, we have had such experience. The cases involved the United States where the abducting parent or child were not citizens and could not re-enter the United States without a visa. As a result of this problem, we addressed the U.S. Embassy in Tel-Aviv who arrived at a solution whereby a special visa (H-4) would be issued so that the parent and child could return to the U.S. for the purpose of the litigation of custody. The court in the U.S. would then take into account the legal status (as aliens) of the parent/child in its custody decision.

6) See answer (3)3 above. We have had a serious problem with France in this regard. Although the positions of the French Minister of Justice and of the Central Authority are not to prosecute in cases of parental abductions, the Prosecution Office, (which is separate from the Ministry of Justice) is unwilling to cancel criminal proceedings in such cases. In one case, we are faced with a situation in which children have been returned to France from Israel and the mother is unable to see them in France due to the warrant of arrest in force against her. The mother has applied for a pardon but has not been able to receive any information regarding her case. Israel's Minister of Justice has made a plea to France on behalf of the mother to expedite a pardon and in the meantime to at least allow the mother the ability to visit her children in France without being arrested . To date neither the Minister nor the mother have received a response.

7) We are not aware of such cases. In Israel, the Central Authority is very active as an intermediary between the judges. The Central Authority files opinions on the Hague Convention to the courts, at their request.

8) No such appointment has been made.

9) As long as the parent can prove eligibility, he/she can be represented through Legal Aid. We would direct the parent to the relevant legal aid office or provide a list of private attorneys who are experienced in abduction and custody cases.

10) Since the left behind parent would have obtained the custody order ex parte, after the removal of the child, it would be subject to review once the child is returned. In general, custody orders are always open to review upon application to the court.

11. a)Yes

b)Yes

c)Yes

d)Yes- see answer 3(3).

e)Yes. We think that this is extremely important in preventing misinterpretations of legal opinions or of law. We are prepared to bring this idea to the attention of the Director of Courts in Israel.

f)Yes

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

1. The same provisions exist as in the case of applications of return.

2. a. The Israeli court may grant access pending return proceedings through the Hague Convention. Following a refusal to return a child, access may be granted through Israel's internal law-the Capacity and Guardianship Law.

b. The Israeli court can only modify a local custody order. It does not have the jurisdiction to modify foreign orders.

3. Provisions exist in Israel's Enforcement of Foreign Judgments Law, 1959, for the enforcement of foreign access orders. The Hague Convention of 1996 is not in force in Israel, as mentioned above.

4. We do not have such a provision. However, in accordance with the Hague Convention, the Central Authority can request that proceedings be expedited.

5. There are no such facilities available. It is up to the court to order the parties to mediate the matter, however, this does not obligate the parties in any way.

6. Yes. Under Israeli law the right to visitation is part of guardianship rights that every parent has, unless these rights have been rescinded by the court.

7. It is possible that the non-custodial parent's access will be monitored by the Social Welfare authorities. Stop orders may be issued by the court at the request of the custodial parent's attorney. Monetary securities may have to be deposited with the court in order to insure compliance.

8. Other than the Central Authority we do not have other facilities available to assist applicants.

9. We have had very few access cases overall and we have not experienced many problems once the request has gone to court. As mentioned above, the general policy of the judges is to handle access cases initiating from foreign countries, within the framework of Israel's internal law. We have had cases in which the Israel police have been unable to locate the parent and child/ren living in Israel so that access could not be attained.

10. Pending return proceedings, the court may order the surrender of passports or stop orders to prevent the parent seeking temporary access from abducting the children. The court may also appoint a social worker to monitor the visitation. Once return proceedings have concluded, should the abducting parent deny access rights given by the court to the other parent, access may be enforced through contempt of court proceedings or the appointment of a guardian ad litem.

11. If a parent does not comply with a court order for access, he/she would be in contempt of court and liable to sanctions under the law. In conjunction with the

contempt of court proceedings, the court would involve the Social Welfare Services who would attempt to facilitate the contact between parent and child through social and psychological treatment (mainly in cases where the child refuses to see the parent seeking access)

12. We feel that the procedure for access governed by Israel's internal law is the best way to ensure access. The access itself is a complicated matter that the Family Court with its rich experience in such matters, should decide upon.

(5) Securing State compliance with Convention obligations

1. Unfortunately, we have had several cases where courts in various countries have not complied with the Convention. The first case that stands out concerns Spain, in which we sent the decision of our Supreme Court which strongly criticized the decision of the appellate court in Spain, to all Member States, including to the Permanent Bureau (as the facts of the case were detailed in this decision, we will not elaborate).

We have also had trouble with Sweden in which the court treated an abduction cases as a custody case and ruled on the basis of the best interests of the child, rather than sending the children back to their habitual residence to determine their best interests. Also, rather than interpreting the Article 13(b) defense narrowly, as is the accepted interpretation, the Swedish court accepted the defense without concrete proof and without requesting a psychologist's report from the country of habitual residence. The father has lost all contact with his children and is now involved in custody litigation in Sweden.

We are currently involved in a case with the Czech Republic in which a judgment for the return of the child was issued in both the Courts of First Instance and the Court of Appeals. However, according to the information received from the Czech Central Authority, this judgment could only be executed with a special execution order as the mother did not return the child in compliance with the judgment. This execution order had to be requested by the Central Authority. The mother took advantage of the period of time between the final date for returning the child and the request by the Czech Central Authority for the execution order, to lodge an appeal to the Czech

Constitutional Court in Brno, claiming that the return of her daughter to Israel was an infringement of her human rights. The Czech Constitutional Court returned the case to the Court of First Instance claiming that the original decision of the court was made too hastily, without determining the child's preference in the matter (the child was 8 years old at the time of the unlawful retention, and is 10 years old today). The Court of First Instance will now be hearing the matter again. Meanwhile, the father can only have access to the child according to the whim of the mother and in her presence. It should be noted that no claims under Article 13 were raised during the entire proceedings. Nearly two years have passed since the unlawful retention and the father feels that the mother has been strongly influencing the child, as well as Czech public opinion, against him.

In general, without relating to specific countries, we tend to see decisions from judges who are not familiar with the Convention and tend to view the cases as custody cases. One of the factors that may ensure success in these cases is the speed with which these cases are to be handled (as is our experience with England and Holland). We see problems with the lengthy periods of time used by judges to decide these cases.

2.+3. Until today , no measures were taken before deciding whether or not to accept a new accession to the Convention. However, we think that the idea of a questionnaire to be submitted by Contracting States to each newly acceding State is a good one. The questions we would include would relate to the system of Family Law of the particular State in question, their Legal Aid system, and the way in which their courts would deal with such cases.

4. We do not think that one meeting in 4 years is sufficient. We would recommend a meeting once in 2 years. We would support the idea of special committees to deal with the individual issues that arise when implementing the Convention. We would also recommend more judges' seminars similar to the one held in De Ruwenberg in 1998.

5. We would support the suggestion made in 5c whereby there would be an evaluation of serious violations of Convention obligations. There are two possible approaches as we see it. From the point of view of changing the decision of a court in a

Member State, this could only be accomplished by an International Court that has the jurisdiction to change such a decision. The second approach would involve a committee which would include representatives from different Member States and would review court decisions brought to its attention by the injured party. Although this option would not result in changing the court's decision, the conclusions made by this committee could influence future decisions made by the court that was in violation of the Convention as well as other courts less familiar with the Convention.

We would also support the circulation of cases and important articles regarding the Hague Convention between the Member States.

(6) Miscellaneous and general

1. We have been pleased with the relations that we have had thus far with the Permanent Bureau and feel that the level of activities the Permanent Bureau engages in should be maintained.

2. The only additional assistance we can suggest would involve the appointing of a panel of experts who would handle particularly serious breaches of the Convention, as we described above. We would favor the preparation of a list of potential Permanent Bureau functions such as is described in this question.

3. We would favor the annual return of statistics on the standard forms, as well as their collation and publicizing on an annual basis.

4. We would favor holding more judicial and other seminars, both national and international on the subject matter of the Convention.

5. We would only favor further ratifications of and accessions to the Convention by countries that fully understand the goals of the Convention and whose internal law would allow for the efficient realization of these goals.

6. We have no such bi-lateral agreements.

7. It is logical that a highly restrictive approach to relocation may adversely affect the operation of the Hague Convention since it would encourage the custodial parent to 'take the law into his/her own hands' and simply remove the child to the desired location without the permission of the court. However, a liberal approach to relocation cases would serve to encourage 'legal abductions' in the sense that, in contravention of the goals of the Convention, custodial parents would be given a stamp of approval to remove their children from their place of habitual residence, thereby separating the children from the left-behind parents who would no longer have easy access to them.

Therefore, it is crucial in relocation cases that all factors be taken into account, especially the best interests of the child insofar as his/her right to access to both parents.