

QUESTIONNAIRE ON THE ENFORCEMENT OF RETURN ORDERS UNDER THE 1980 HAGUE CONVENTION AND OF ACCESS / CONTACT ORDERS

At the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which was held at The Hague from 27 September to 1 October 2002 the following recommendations were made:

"The Permanent Bureau should continue to gather information on the practice of the enforcement of return orders in different Contracting States. The Permanent Bureau should prepare a report on this subject with a view to the development of a guide to Good Practice"

"Work should continue on a separate chapter of the Guide to Good Practice relating to transfrontier access/contact in the context of the 1980 Convention with the following objectives:

- a. to promote consistent and best practices in relation to those matters which it is agreed fall within the competence and obligations of States Parties under the Convention,
- b. to provide examples of practice even in relation to matters which fall within the disputed areas of interpretation.

Work should begin on the formulation of general principles and considerations. The idea is not to create a set of principles applying to access cases generally, but rather to draw attention to certain general considerations and special features, which need to be borne in mind by Contracting States and their authorities when formulating policies in respect of international access / contact cases. These general principles would not be binding; they would be advisory in nature. As well as offering general advice to States in formulating policy in this area, the general principles could be helpful to Central Authorities in informing their practice, they could possibly be helpful to the courts and other authorities, as well as to applicants as they present their cases."

Arising from these recommendations, the Permanent Bureau has entered into a joint initiative with Professor Nigel Lowe of Cardiff University, supported by the International Centre for Missing and Exploited Children in relation to the enforcement of return and access / contact orders. The role of Professor Lowe and the Cardiff Team (comprising of Samantha Patterson and Emily Atkinson) is to undertake extensive empirical research on the practice of enforcement of Hague Convention orders (including access orders) in a number of Contracting States. The research will also focus on identifying areas of good practice in the context of enforcement. Professor Lowe and the Cardiff team will then prepare a report on the empirical research.

At the same time, the Permanent Bureau will be undertaking comparative research on the internal law and practice with regard to enforcement in each Contracting State by way of the questionnaire which appears below. This will assist in identifying structural and practical problems with enforcement. The Permanent Bureau will then prepare a report on the enforcement of return orders which will also consider whether the development of a Good Practice Guide on enforcement would be useful. This report will be presented for the consideration of the next Special Commission meeting tentatively scheduled for autumn 2005. The Permanent Bureau is also preparing, for consideration at the same meeting, the general principles and

separate chapter of the Guide to Good Practice relating to transfrontier access / contact.

The questionnaire which appears below is addressed to States Parties to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. We would like to draw your attention to the fact that, while the questions in Chapters I–VII are specifically addressing the enforcement of return orders made under the 1980 Convention, Chapter VIII invites you to also indicate, for each reply, whether the same applies to the enforcement of contact orders. If this is not the case, please give details concerning the latter.

Respondents are also invited to identify and comment on matters concerning enforcement, which are not addressed specifically in the questionnaire. Where information is available on websites, please also provide the website address.

The Permanent Bureau requests responses to the questionnaire to be sent to with a copy to no later than **30 October 2004**, if possible in electronic form.

I. LEGAL BASES FOR THE ENFORCEMENT OF HAGUE RETURN ORDERS

1. Please give details of any *specific* legislative provisions which exist in your State concerning the enforcement of return orders under the 1980 Hague Convention. Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and short description of content.
There is no specific legislation regarding the enforcement of return orders under the 1980 Hague Convention
2. Please give details of any *general* legislative provisions which exist in your State concerning the enforcement of court orders in the area of family law and govern the enforcement of return orders under the 1980 Hague Convention (either in the absence of specific provisions under question 1.1 or in addition to any such specific provisions). Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and the content of the relevant provisions.
The general legislation regarding the enforcement of return orders under the 1980 Hague Convention is the Child Abduction and Custody Act, Chapter 410 of the Laws of Malta (Act XII of 1999)
3. Please give details of any judicial decisions, practice directives or guides concerning the enforcement of court orders in the area of family law that govern the enforcement of return orders under the 1980 Hague Convention (either in the absence of specific provisions under question 1.1 or in addition to any such specific provisions).
There are no practice directives or judicial decisions in Malta regarding the enforcement of return orders under the 1980 Hague Convention.
4. Do you have any other comments relating to the law governing enforcement of Hague return orders, including any comments on the effectiveness of these rules?
No

II. ENFORCEABILITY AND LEGAL REMEDIES

1. a) Is a Hague return order subject to appeal or other forms of challenge? Please give details (number and character of legal remedies, possible time-limit for them, possible time-limit for appellate court or court of appeals to decide etc.).
Return orders are subject to challenge in the Court of Appeal. These appeals are usually appointed for hearing without delay.
- b) Please specify whether any such challenge may only be made once, and which court or body has jurisdiction to hear the appeal.
No further appeal may be made according to Maltese law.
2. a) Please give details of any authorisation or other decision required for the actual enforcement of the Hague return order (*e.g.* registration for enforcement, declaration of enforceability, order of a specific enforcement measure or other).
The enforcement order needs to be registered in the registry of the Court of Appeal
- b) Which is the competent organ for these decisions?
The Court of Appeal
3. Does the Hague return order have to be final and no longer subject to ordinary appeal before any authorisation for enforcement or other measure specified under II.2 may be ordered?
The enforcement is not subject to appeal.
4. a) Are any of the decisions specified under II.2.a) (authorisation to enforce or other decision) subject to appeal independent of any appeal against the merits of the return order? Please give details (number and character of legal remedies, possible time limit to lodge them, possible time-limit for appellate court or court of appeals to decide etc.).
An interested person may present an application in the Court of Appeal, in order to state why there should not be recognition of the enforcement order. The Court of Appeal will decide the matter as expeditiously as possible.
- b) Please specify whether any such challenge may only be made once, whether it suspends the enforceability / enforcement of the order and which is the court or body to decide the appeal.
The appeal may only be made once, in the Court of Appeal, and such appeal would suspend the enforcement of the order.
5. If in your State both types of legal remedy as specified under II.1 and II.4 (*i.e.* against the order on the merits and against any decision taken at or required for the enforcement stage) exist, can they be lodged simultaneously? Is it the same court that deals with them if they are lodged (a) simultaneously, and (b) at different times?
Both applications will be made to the Court of Appeal, which will decide on both issues

6. Do you have any other comments relating to legal remedies and the enforcement of Hague return orders?
No

III. ENFORCEMENT PROCEDURE

A. The order to be enforced and the aims of enforcement

1. If an application for return of a child under the 1980 Hague Convention is successful, what is normally ordered:
- a) the surrender of the child to the applicant (if necessary, "for the purposes of returning the child to his / her State of habitual residence")
 - b) the return of the child to State X
 - c) other?

It is in the discretion of the Court, according to the circumstances of the case, whether to surrender the child to the applicant or to return him/her to his state of habitual residence.

2. If such order has to be enforced, please specify which of the following is / are normally the aim of enforcing a return order:
- a) to remove the child from the abductor or any other person
 - b) to hand the child over to the applicant or a person designated by him or her in the State where enforcement takes place
 - c) to ensure the child's return to his or her State of habitual residence
 - d) other.

To hand over of the child to the applicant and to ensure the child's return to his or her State of habitual residence

3. Whose responsibility is it to organise the repatriation of the child?
The Maltese Central Authority together with the Central Authority of the State of Origin

B. Actors involved in enforcement

1. Once a return order is made, is a specific request for enforcement necessary?
No, the return order has an executive title

2. Please specify who initiates enforcement of the court's return order:

- a) the applicant (in person or through his or her lawyer)
- b) the Central Authority
- c) the court
- d) the enforcement organ itself
- e) other.

The Maltese Central Authority

Where the law leaves choices or discretion, please give details concerning actual practice.

N/A

3. a) Please give details of the persons, organs and institutions (*e.g.* enforcement organs, court, parties, psychologists, social workers, Central Authorities, other) involved in the enforcement of return orders under the 1980 Hague Convention
Although it is not mandatory, the Central Authority is usually involved. Other persons may be called upon to give their input according to the circumstances of the case

- i) according to the law
- ii) in practice.

Please describe their respective roles and functions in enforcement, and whether their participation is mandatory. If this is not the case for some or all of the actors mentioned, please specify who decides about their respective participation and to what extent they are normally involved in Hague return cases (regularly or exceptionally and, in the latter case, depending on which conditions).

- b) In particular, are any social or psychological services available in order to prepare the child and / or the defendant for the return in order to de-escalate or even avoid enforcement by coercive measures?

Such help may be requested, but it is not given automatically.

- d) Please specify also whether presence of the applicant (or a person designated by him or her) is required and, if this is the case, at which stage of the enforcement proceedings and for what purpose.

The presence of the applicant is not required.

4. a) Is there any supervision / control of the enforcement procedure by a court, the Central Authority or any other State authority? If a court is supervising / controlling the enforcement procedure, which court is it? The court that made the order or other (*e.g.* a specific enforcement court)?

There is no direct supervision, however the ultimate authority to control the procedure, would be the Central Authority.

- b) What if the court of first instance refused return, and the appellate court or court of appeals ordered return? Would the court of first instance, the appellate court or court of appeals which ordered return, or any other court be the court supervising / controlling enforcement in such a case?

The Court of Appeal who ordered the return.

C. The enforcement procedure proper

1. Is there a timeline for enforcement?

Maltese law does not give any timelines with regard to enforcement of return orders, however proceedings with respect to enforcement will be taken according to the general powers of the Court of Appeal.

2. Is it normal to allow a period of time for voluntary compliance with a return order or to allow appropriate practical arrangements for the return of the child to be made?

Time for voluntary compliance would be allowed according to the circumstances of the case.

3. Are any measures available in order to prevent the abductor from taking the child into hiding after the return order is made and before it can be enforced? In the affirmative, please give details.

The Court can issue an order to stay departure. In such a case there would be notification of such an order to the Commissioner of Police, Immigration Department, Customs Department, Passport Control and Airport Authorities. The order would remain in force until the return order is enforced.

4. What happens if the child is taken into hiding after the order was made and before it can be enforced? Which actors would be involved (*e.g.* Central Authority, police, public prosecutor, other) and which measures can they take to locate the child? What is the effect of the hiding on a possible timeline for enforcement?

The actors involved would be the Central Authority, the Police and the Prosecutor, and they would adopt the customary procedures for missing persons.

5. When enforcement is initiated, what are the required steps (*e.g.* measures by the applicant, the court or any other supervisory authority, and the enforcement organs)?

The Court of Appeal would be the authority who would take the measures for enforcement as if it had delivered the judgement.

6. Which coercive measures are available and under what conditions (*e.g.* pecuniary fines, physical force [against whom? the child? the defendant? others?], detention)? Which of these are normally used in practice?

Coercive measures against any of the parties involved are used as a last resort. Customary procedure is to engage the services of a social worker to facilitate the process.

7. a) Do they have to be ordered specifically (*i.e.* either "fine", "physical force", "detention")? If so, when and by whom?

If the defendant is violent, physical force is to be used according to circumstances

- b) If problems occur during enforcement, may the enforcement organs unilaterally "upgrade" the intensity of coercive measures, or do they have to obtain authorisation from any particular higher authority (*e.g.* an enforcement court or other)? Please specify.

If the defendant does not comply with the orders given by the enforcement organs, the Executive Police will have the power of detention.

8. Please give details of any court orders which can be obtained in emergency situations. Can these orders be obtained after hours and *ex parte*?

The Court may, at any time before the application is determined, give those interim directions which it may deem fit for the purpose of securing the welfare of the child or of preventing changes in the circumstances relevant to the determination of the application.

D. Costs

1. Are costs incurred for the enforcement? If so, are they part of the costs of the court proceedings as a whole? How are they calculated? For which services are they charged?

The cost incurred for the filing of the application for registration of decision, which is part of the general court proceedings.

2. Who has to pay the costs for enforcement? To whom? Is a reduction or exemption possible, *e.g.* under a Legal Aid Scheme? Under which conditions? In particular, is advance payment required in order for the enforcement organs to act? If legal aid was granted for the proceedings leading to the return order, would it cover the enforcement stage or would the application for legal aid have to be renewed?

The Maltese Government is not bound to assume any costs related to participation of legal counsel/advisers or court proceedings, except when such costs may be covered by legal aid. The provision of legal aid would be applicable if the requirements of the Code of Organisation and Civil Procedure are met with.

3. Are the costs of the actual repatriation of the child (*e.g.* airfare for child and possible accompanying person) considered as part of the enforcement costs? Who has to pay for the repatriation? Is advance payment a condition for enforcement?

The costs of repatriation would be borne by the applicant or by the person who removed the child from the habitual place of residence. However no such costs will be borne by the Minister or the Maltese Government.

4. Please specify how foreign applicants are provided with information about enforcement costs to be borne by them.

Such information is given by the Central Authority, upon a request by the applicant.

5. Please provide details regarding the enforcement organs' specific duties as they relate to the enforcement of Hague return orders concerning children.

N/A

6. Do you have any other comments relating to the enforcement procedure?

No.

IV. STATISTICAL INFORMATION

1. How many Hague return orders that you are aware of were made per year in your country in 2001, 2002 and 2003? How many of them had to be enforced in each of these years because the abductor did not comply voluntarily with the order? Please give the figures for each year separately.

- **2001 none**
- **2002 none**
- **2003 one**

None had to be enforced

2. How many Hague return proceedings were pending in your country that you are aware of for 2001, 2002 and 2003? Please give figures per year. In how many of these cases was a legal challenge made in order to avoid enforcement (by

challenging either the order on the merits, the declaration of enforceability, a particular enforcement measure or other)? If possible, please specify the type of challenge (on the merits or against an enforcement measure).

- **2001 none**
- **2002 none**
- **2003 four**
- **No legal challenge was made to avoid enforcement in either of these case.**

3. How many of the legal challenges at the enforcement level (*i.e.* not on the merits) were ultimately successful (*i.e.* the order was not enforced)?

N/A

4. What is the average length of enforcement proceedings from the moment the order is made until the moment the child is (a) removed from the abductor and (b) repatriated?

N/A

V. CO-OPERATION

1. Please give details of any co-operative agreements existing between different agencies within your State, either formally or informally, with regard to the enforcement of Hague return orders. How did this co-operation develop?

Up till now, no formal agreements between different agencies exist with regard to enforcement of Hague return orders. However, recent cases of abduction have aided in the development of informal cooperation between the local Central Authority, the Attorney General's Office, the Law Courts and the Executive Police.

2. Please give details of any co-operative agreements with other States, either formal or informal between different Central Authorities or agencies, or at the judicial level, with regard to the enforcement of Hague return orders. How did this co-operation develop?

No formal cooperative agreements with other states exist with regard to the enforcement of Hague return orders. However, until now, we have dealt with the Central Authorities of England & Wales, Australia, New Zealand, the Netherlands, Germany, Scotland and Denmark and, by and large, we are glad to say that cooperation with these states was satisfactory.

3. Please provide details (including contact details, websites etc.) of all agencies in your State which have a role to play in the enforcement of Hague return orders.

One can access the Website of the Malta Police Force on the Internet.

4. Do you have any other comments relating to co-operation, including any comments on the effectiveness of co-operative agreements?

From the cases dealt with so far by the Malta Central Authority, it can be safely stated that cooperation is the key ingredient for success when dealing with cases of abduction.

VI. TRAINING AND EDUCATION FOR PROFESSIONALS

1. Please give details of any training or education that is available in your State for professionals (including, judges, Central Authority personnel, lawyers, mediators, enforcement organs [e.g. bailiffs], police officers, and social workers) as a means of preparing them to enforce Hague return orders or decisions in family law matters in general.

Currently there exists no specific training for Central Authority personnel as a means of preparation for enforcement of Hague return orders or decisions in family law matters in general. However professionals attend seminars and international conferences on various areas in family law.

2. Who provides this training and education?

N/A

3. What form does this training take and how regularly does it occur? Does joint training of different professional groups which have to co-operate in the enforcement of Hague return orders (e.g. judges, bailiffs, police officers, social workers) also occur?

N/A

4. Do you have any other comments relating to training and education of professionals, including any comments on the effectiveness of this training and education as a means of facilitating the enforcement of Hague return orders?

N/A

VII. OTHER INFORMATION

1. Please give details of any web pages, and provide copies of any brochures, or information packs or similar materials which contain information or advice on the enforcement of Hague return orders in your State and which are available to parents, including applicants from abroad.

NONE

2. Who provides this information? When was it compiled? When was it last updated? How is the information made available and in which language(s)?

N/A

3. Do you have any other comments relating to information for parents, including any comments on whether such information is effective in assisting the left-behind parent in having his or her return order enforced?

N/A

4. Please provide any other information which may be relevant to the issue of the enforcement of Hague return orders.

N/A

5. Please provide details of any other bodies or authorities in your State who may have information useful to the research covered by this questionnaire.

N/A

6. Have you any general comments to make regarding the enforcement of Hague return orders?

To date no problems have been encountered in this regard.

7. Are there any changes envisaged in your legislation and / or practice? If this is the case, please give details in the answer to the respective question and indicate as of when such changes will take effect.

N/A

VIII. ORDERS GRANTING RIGHTS OF CONTACT / ACCESS / VISITATION

For each reply, please indicate whether the same applies to the enforcement of contact orders. If this is not the case, please give details concerning the latter.

Where the contact order refers to a specific period of time (*e.g.* where the child is to spend "the first part of the 2004 summer holidays from 1 to 20 July 2004" with the applicant) and is not complied with, please explain also whether coercive measures can be applied only as long as the period mentioned in the order contact has not yet expired (*i.e.* in order to implement the order), or also afterwards (*i.e.* as a sort of punishment although contact during this particular period can no longer be implemented). Please indicate also whether the same rules apply to the enforcement of domestic and foreign contact orders. If this is not the case, please specify the differences.

Following the New Brussels II Regulation, which came into force on the 1st March 2005, Malta will recognise judgements on parental responsibility, whether given locally or in another EU country, equally. All judgements will have to be complied with, and lack of compliance will lead to legal procedures being initiated against the parent who breaches the conditions of the order.

The Permanent Bureau would like to thank you for taking the time to consider this questionnaire. If you have any further questions or comments please do not hesitate to contact us at