

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

I. Legal Bases For The Enforcement Of Hague Return Orders

1. The Child Abduction and Custody Act 1985 contains specific provisions on the enforcement of returns under the Convention. This is an Act of the UK Parliament. Section 5 provides that the court may, at any time before a return application is determined, give such interim directions as it thinks fit for the purpose of ensuring the child's welfare or preventing changes in circumstances pending a decision on return. Section 24A states that if in proceedings for the return of a child there is not available to the court adequate information about where the child is, the court may order any person it believes to have relevant information to disclose it. Wilful failure to do so could be punished as a contempt of court.

2. General legislative provisions which would apply to enforcement of returns are contained in the Family Law Act 1986, also an Act of the UK Parliament. Section 36 provides that where a court in part of the UK makes an order prohibiting or restricting removal of a child from the UK, that order is enforceable throughout the UK. This could for example be relevant where an order is made keeping the child in the UK pending a decision on return under the Convention. Section 37 provides for the surrender of the child's passport where required by a UK court in order to enforce a prohibition on removal from the UK.

3. N/A. The Scottish experience has been that return orders are almost always complied with. There are funds to meet reasonable costs of return, and enforcement is very rarely an issue. Once a decision has been made to return a child, the Central Authority becomes involved in providing whatever administrative assistance is necessary.

4. It has been shown in the past that if a child is ordered to return to their country of habitual residence against their wishes, then there is little that can be done to ensure the child complies with the order. Neither the police nor court officers would be in a position to physically force a child onto a 'plane or ferry and neither an airline nor a ferry operator would allow a child to travel against their will in a distressed state.

II. Enforceability And Legal Remedies

1. (a) In Scotland there are few appeals against judicial decisions as grounds for appeal are limited to matters such as significant change in circumstance or the Judge having misdirected himself. An appeal may be lodged within 21 days of the date of decision. Appeals are fast tracked and are often heard within days of the first instance decision. Further appeals to the House of Lords are very rare.

1. (b) An appeal can be made once to the Inner House of the Court of Session in Edinburgh and then once to the House of Lords.

2. (a) N/A. A return order has immediate effect. However, it might be that if faced with great difficulties in enforcement, a warrant might be sought from the court for officers of court to search for and seize the child. In reality, when a child IS old enough to express a view physically declines to return, this would be unlikely to be of any real assistance.

2. (b) The court makes the decision on return and may make orders which regulate the manner of return or preserve the status quo pending return. If actual enforcement was required, this would be performed by officers of the court. However, in practice return has only been known to fail because the child cannot be found after attempts at tracing, or is utterly determined not to return. In those circumstances there is little which officers of court can do.

3. No- an order for return is immediately effective without any further authorisation and even although appeal may be possible. However, if an appeal was actually lodged then it is likely that the return order would be stayed until it was concluded.

4. (a) N/A

4. (b) N/A

5. N/A

6. No

III. Enforcement Procedure

A. The Order To Be Enforced And The Aims Of Enforcement

1. (a) Yes, on occasion

1. (b) Yes

1. (c) No.

2. (a) No.

2. (b) No.

2. (c) Yes

2. (d) No.

On occasion the child is removed from the abductor and handed over to the applicant as part of the return process ordered by the court. This might for example be because the parties have agreed that the applicant will return with the child, because of concerns about the child's welfare or because of fears that the abducting parent may abscond with the child. However, these situations are ancillary to the main aim of ensuring that the child returns to the former habitual residence.

3. In Scotland no one party is charged with ensuring that the child is returned as per the court order. Normally the solicitor representing the applicant will do all that is practical to ensure that the child returns. The Central Authority will provide administrative assistance to all parties to ensure that the child returns to his or her country of habitual residence.

B. Actors involved In Enforcement

1. No

2. See question III A 3

3. (a) (i) Solicitors, parties, Central Authority, court officers.

3. (a) (ii) See question III A 3. Normally once a decision is made in principle to order return, the parties will be invited to negotiate the terms of the return through their solicitors. The outcome will then be embodied in the court's order and the Central Authority will provide administrative assistance. Court officers would be involved only very rarely, if enforcement difficulties were experienced. If the parties cannot agree then the court will make its own decision about the details of return and incorporate these in its order.

3. (b) No

3. (c) No- there are no specific enforcement proceedings, as the return order is immediately effective.

4. (a) No. The details of how the return is to take place will be incorporated in the court's order, but it does not exercise any further supervision, although there is a check after the event that return has occurred by both the Central Authority and the court. A further hearing is normally set to see if the order has been complied with and the child has returned. Often this case does not call as clerks of the court make enquiries and inform the judge. The Central Authority will assist with the mechanics of return where required, but does not supervise.

4. (b) N/A.

C. The Enforcement Procedure Proper

1. . The child or children are returned as soon as is practicably possible in accordance with the court order. Normally once a decision to return the child has been made there will be a further hearing where the specifics will be worked out, usually following negotiation between the parties. These will include time of return. There will then be a further hearing to ensure that the child has been returned according to plan. Often this hearing will not take place as the clerks can simply update the judge after speaking with solicitors.

2. The court order will normally specify a date by which the child or children are to be returned. This date is normally reached after consultation with the parties solicitors. Once a decision is made to return the child, parties are normally given an opportunity to negotiate the terms, however these are normally then embodied in the court's order.

3. A solicitor can request the surrender of passports. This can either be done on a voluntary basis or by court order. If an interim interdict has been granted under S35 of the Family Law Act 1986 then the court can order the surrender of UK passports (s37). In addition the Court of Session has the ability to order the surrender of both UK and non-UK passports where appropriate. However, a parent could remove the child to England and Wales or Northern Ireland without the need of a passport.

4. Solicitors could involve court officers to locate the child. It may also be possible to involve the police, for instance if a criminal offence has been committed. The Central Authority may also take an administrative role. It may be possible to use the abducting parent's employment or social security records to trace the child. Inevitably enforcement might be delayed or might simply not take place if the child could not be found.

5. The applicant might seek a warrant from the court for court officers to search for and seize the child. Otherwise a return order is immediately enforceable, and there are no procedural steps required. The issue would be finding the child. If the child, independently of the abducting parent, refused to co-operate with the return then ultimately enforcement might not be possible.

6. Where the abducting parent wilfully refuses to comply with the terms of the return order, that would be a contempt of court and could be dealt with by imposing a fine or even ultimately through imprisonment. There would be no sanctions against the child. There are obvious difficulties in imprisoning one of the child's parents (especially the parent with care) or imposing a fine which might impoverish the family. In international cases, the parent in breach may not even be within the jurisdiction of the court.

7. (a) Yes, proceedings would have to be brought by one party to have the other declared in contempt. Any sanctions would need to be specifically ordered by the court.

7. (b) As any penalties for contempt are ordered by the court, they could only be altered by the court.

8. All orders should already be in place and be very specific. The return order contains the details of return and is immediately effective. This problem should therefore not arise.

D. Costs

1. All incoming child abduction cases in Scotland are given full legal aid . The applicant is entitled to non-means and non-merits tested legal aid. This greatly speeds up the process and ensures that cases are dealt with as quickly as possible. Any further costs that were incurred when enforcing an order for return would be covered under the legal aid scheme. Central Authority services are provided free of charge.

2. See question 1.

3. The costs of repatriating the child are covered by the legal aid scheme.

4. N/A

5. N/A

6. No

IV. Statistical Information

1. 2001 – 5 cases
 2002 – 4 cases
 2003 – 5 cases

2. These figures are not available.

3. None

4. On average the child is returned to the country of habitual residence within 7-10 days.

V. Co-Operation

1. None
2. Scotland's Hague liaison Judge is Lady Smith. However, there are no agreements with other States in relation to enforcement of return orders.
3. The Central Authority for Scotland plays an administrative role.

The Central Authority for Scotland
The Scottish Executive
Justice Department
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Tel: 0044 131 244 4827

Fax: 0044 131 244 4848

E-mail: Marcus.houston@scotland.gsi.gov.uk

www.scotland.gov.uk/childabduction

Officers of court are also organised via the Court of Session. They will normally be required to search for a child or deliver them to a court. 11 Alva Street Edinburgh EH2 4PH. Tel: 0044 131 225 9110. Fax: 0044 131 220 2468. www.ednet.co.uk/~smaso/.

There is a list of specialised solicitors who deal with child abduction cases in Scotland. Contact Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh EH3 7YR. Tel: 0044 131 226 7411. Fax: 0044 131 225 2934. www.lawscot.org.uk.

4. No.

VI Training And Education For Professionals

1. The Central Authority for Scotland together with the police produced practical police guidelines on the unlawful removal of children abroad in October 2001. These were made available to all police forces in Scotland as a point of reference for officers who are faced with situations where children have been abducted. The Central Authority has also previously organised a special conference on child abduction in conjunction with the Law Society of Scotland, to which stakeholders from across Scotland were invited. Various materials are available from the UK's leading child abduction charity reunite, through their helpline. The Law Society of Scotland offers regular training on family law matters more generally. The National Ports Authority runs training courses at which police officers are made aware of the guidelines.

2. See above.

3. See above. It is not possible without research to estimate accurately how often and at what intervals all these forms of training take place. Training tends to occur separately for the different professions, though there will be some coming together at one-off conferences. Hague cases in general constitute a very small proportion of family business, and enforcement difficulties in particular have only very rarely arisen.

4. No

VII. Other Information

1. None. The Central Authority for Scotland has a web-site (www.scotland.gov.uk/childabduction) which covers abduction in general however there is no particular section on the enforcement of return orders. A flyer was also recently produced (copy enclosed) in line with the recommendation of the Good Practice Guide for Central Authorities. The flyer aims to make members of the public and solicitors aware of the 1980 Hague Convention and the role of the Central Authority.

2. The Central Authority for Scotland provides the information. The website is routinely updated. The flyer was distributed in July 2004. Anything on the website can alternatively be sent out in hard copy. The material is only routinely available in English, however the Central Authority would probably be able to fund translations if needed.

3. No

4. None.

5. None, other than those whose details have already been included in this response.

6. Generally speaking, the Central Authority for Scotland has not encountered any problems when enforcing return orders.

7. No

VII Orders Granting Rights Of Contact / Access / Visitation

The Central Authority for Scotland can only accept an application for access where it is accompanied by an existing access order which requires little or no modification. This follows a decision in *D'onofrio v Burrell* which should be available on Incadat.

Given this decision the Central Authority for Scotland receives very few applications to enforce rights of access. The applications that are accepted are given full legal aid and are enforced by solicitors who will ensure that periods of existing agreed access are arranged for the applicant. Theoretically, it would be possible for breach of an order for access made by the Court of Session under the Hague Convention to be treated as a contempt of court, and it would not matter whether or not the contact period had already expired. The issue would be whether the parent in breach had deliberately refused to comply with the order. However, in reality there are considerable problems in enforcing even domestic contact arrangements

when one parent is determined not to comply. There are obvious difficulties in imprisoning one of the child's parents (especially the parent with care) or imposing a fine which might impoverish the family. In international cases, the parent in breach may not even be within the jurisdiction of the court.