

Hague Conference Update: Permanent Bureau of the Hague Conference on Private International Law

Introduction

An early summer in The Hague caused the sun to shine warmly on the approximately 260 experts who met from 1 to 10 June 2011 at the Peace Palace in The Hague for Part I of the Sixth Meeting of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Convention) and 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* (the 1996 Convention). This Hague Conference Update focuses exclusively on this important meeting. It provides a very brief summary of some of the topics discussed at the meeting before annexing the 75 Conclusions and Recommendations which the participants adopted. These Conclusions and Recommendations strive to improve the practical operation of both Conventions in all Contracting States and also recommend that efforts continue to encourage other States to ratify/accede to the Conventions. A full report of the meeting will be produced by the Permanent Bureau of the Hague Conference on Private International Law in due course and will be published on the Hague Conference website when available (www.hcch.net).

Part II of this Special Commission meeting is scheduled to take place from 24 January to 1 February 2012. Part II of the meeting will focus on the feasibility and desirability of a protocol to the 1980 Convention, international family relocation, the future of the 'Malta Process' and the role of the Permanent Bureau in monitoring and supporting the 1980 and 1996 Conventions. As usual, please visit our website for further information on Hague Conference related matters.

Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

The full agenda of Part I of the Special Commission meeting can be found on the Hague Conference website, along with the Preliminary Documents and Information Documents prepared for this meeting and the responses of Contracting States to the documentation, where applicable (under 'Work in Progress' then 'Child Abduction'). The following paragraphs provide only a very brief summary of some of the topics discussed:

(1) Statistical survey of applications made in 2008 under the 1980 Convention

The Special Commission opened with a presentation of the third statistical survey on the operation of the 1980 Convention, conducted by the Centre of International Family Law Studies at Cardiff University Law School (under the Directorship of Professor Nigel Lowe), in collaboration with the Permanent Bureau of the Hague Conference on Private International Law. This survey concerned applications made under the 1980 Convention in 2008. Previous surveys concerned applications made in 1999 and 2003.

Professor Lowe outlined some of the key findings of the statistical survey for the meeting. He explained that 39 States had responded to the statistical survey in 1999 (954 return applications and 197 access applications were examined), 58 States in 2003 (1,259 return and 238 access applications) and 60 States in 2008 (1,965 return and 361 access applications). He explained that the data showed a sharp increase in the number of applications since the last statistical survey of 2003 cases, with a 45% increase in return applications and a 41% increase in access applications (to gain a direct comparison, only the data from States which responded to both the 2003 and 2008 survey was used).

In relation to return applications, Professor Lowe stated that 69% of the taking persons were the mother, a figure that has remained constant over the past two surveys. Where the information was available (in 17% of the cases, which constituted a sample size of 355 cases), 40% of taking persons were the sole primary carer and 33% were the joint primary carer of the child. Professor Lowe also explained that the overall return rate fell in 2008 to 46%, from 51% in 2003 and 50% in 1999. Similar to previous surveys, 44% of cases were decided in court, but the number of cases resulting in judicial return continued to fall, to 61% from 66% in 2003 and 74% in 1999. The number of cases resulting in a voluntary return remained fairly constant (18% in 1999, 22% in 2003 and 19% in 2008; with an additional 9% of cases in 2003, and 7% of cases in 2008 resulting in a judicial return by consent). The most frequently cited reason for a judicial refusal was Art 13(1)(b) (grave risk of harm) (27%), followed by the child's objections (17%), lack of habitual residence in the requesting State (15%) and Art 12 (more than a year since removal and child settled in new environment) (13%). The amount of time taken to conclude cases increased to 166 days, from 125 days in 2003 and 107 days in 1999.

In relation to access applications, Professor Lowe stated that under Art 21 of the 1980 Convention, the mother was the respondent in 79% of cases, again consistent with the previous surveys. Access was agreed or ordered in only 22% of cases, down from 33% in 2003 and 43% in 1999. Access applications took longer than return applications to conclude, taking an average of 357 days in cases where access was judicially ordered, and 309 days in cases where there was a voluntary agreement for access.

For further details, including regional and specific country reports, see Preliminary Documents Nos 8A, 8B and 8C. See also paras 21–23 of the Conclusions and Recommendations below.

(2) Co-operation among Central Authorities under the 1980 Convention and the processing of applications for return by Central Authorities

The Special Commission discussed a wide range of issues under these agenda items, many of which had been identified by Contracting States in their responses to Preliminary Document No 1 (the ‘Questionnaire concerning the practical operation of the 1980 and 1996 Conventions’). The issues discussed included the importance of communication and co-operation between Central Authorities (including the utility of the new Country Profile for the 1980 Convention in this regard: see www.hcch.net, then ‘Child Abduction Section’, then ‘Country Profiles’); the difficulties encountered by Central Authorities when attempting to locate a child; the role of the Central Authorities in promoting an amicable resolution of the issues, including through mediation; the role of Central Authorities in facilitating judicial communications; the role of Central Authorities in facilitating the safe return of the child; and immigration issues such as difficulties faced in obtaining visas, for example when left-behind parents wish to attend court proceedings or when taking parents wish to return with the child to the State of his/her habitual residence.

The Special Commission made a number of recommendations to improve the carrying out of Central Authority functions, including: encouraging the use of information technology to improve communication and networking, encouraging Central Authorities to act as a focal point for the provision of services, and requesting that Central Authorities be provided with sufficient powers to request information from other governmental agencies and authorities to assist with locating children. See further paras 3–16, 30–31, 39–43 of the Conclusions and Recommendations below.

(3) Applications concerning access/contact under the 1980 and 1996 Conventions

The Permanent Bureau referred to the information received from States on this topic in their responses to Preliminary Document No 1 and in the completed Country Profiles. From this information, it is clear

that applications concerning access/contact continue to be an area of difficulty in the application of the Conventions. Some of the challenges regarding Article 21 of the 1980 Convention were explained by the Permanent Bureau. It was noted that the assistance provided by Central Authorities in international access cases still varies widely between Contracting States. The Permanent Bureau explained that whilst there were no specific provisions regarding jurisdiction and recognition and enforcement in relation to access in the 1980 Convention, the 1996 Convention significantly improves matters in this regard by providing uniform rules. However, despite the fact that there are important co-operation provisions on access in the 1996 Convention (for example Art 35), the 1996 Convention is not much more specific regarding the precise services Central Authorities should provide in these cases. Elements of uncertainty therefore remain, which were reflected in States’ responses to Preliminary Document No 1. The Permanent Bureau referred to the guidance provided in relation to international access in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (published by the Hague Conference in 2008 and available to download from the ‘Child Abduction Section’ of the Hague Conference website).

Several experts at the meeting expressed concern at the different levels of assistance provided by Contracting States in international access cases. The problem of access in the context of return proceedings was also discussed. Experts described difficulties when attempting to obtain access during return proceedings and uncertainty over what should be done when access is granted but enforcement is denied by the taking person. The Special Commission encouraged Central Authorities to take a proactive approach in carrying out their respective functions in international access cases and recognised that, under the 1980 Convention, a requested Contracting State may provide for an applicant in return proceedings to have contact with the subject child(ren) in an appropriate case. See further paras 17–20 of the Conclusions and Recommendations below.

(4) Domestic violence allegations and return proceedings

The Permanent Bureau presented Preliminary Document No 9, ‘Domestic and family violence and the Art 13 “grave risk” exception in the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A reflection paper’ to the meeting. It was explained that this issue was identified as a subject for discussion by a number of Contracting States in their responses to Preliminary Document No 1.

The Special Commission meeting discussed a number of difficult evidential issues which may arise where domestic violence is alleged in the context of 1980 Convention return proceedings. The strict timelines for Hague Convention proceedings was mentioned as one aspect that needs to be taken into

account when such evidential issues are considered. Some experts noted that the Art 13(1)(b) exception should not stand in the way of speedy resolution of cases. Others distinguished between speed and haste, and explained that the integrity of the proceedings should not give way to expedience. Many experts offered examples of good practices and practical solutions whereby the goals of expedition and appropriate investigation into allegations of domestic violence were balanced.

Experts also noted issues in relation to the nature of the evidence required to prove allegations of domestic violence, such as the difficulty of producing proof in the requested State, the costs and delays of expert evidence, and the role that could be played by direct judicial communications and the exchange of information between the Central Authorities in such cases. A number of delegates affirmed that the courts of the State of the habitual residence of the child are generally in the best position to evaluate the circumstances and evidence, and hence the most competent to take long-term decisions concerning the protection of the child and the primary care-giver. However, in this respect, ensuring the safe return of the child and, where relevant, the primary care-giver, is vitally important. Several experts raised the issue of the need for proper legal frameworks for the recognition and enforcement of protective measures in cross-border situations. A number of experts noted that the 1996 Convention may provide useful tools in this respect. The Special Commission recognised the importance of obtaining information on the measures of protection available in the requesting State, and also noted that the recognition of foreign civil protection orders has been added to the Hague Conference's work programme for preliminary consideration by the Council on General Affairs and Policy of the Hague Conference at its next meeting in April 2012. See further Preliminary Document No 9 and paras 35–43 of the Conclusions and Recommendations below.

(5) Discussion of case-law under the 1980 Convention – interpretation of key concepts

One subject of discussion in this agenda item was the case of *Abbott v Abbott* (2010) 130 S Ct 1983, the first decision of the US Supreme Court to consider the interpretation of the 1980 Convention. The court held that a *ne exeat* right, that is, a right to consent to (and therefore also veto) a child's removal from the jurisdiction, was a right of custody for the purposes of Arts 3 and 5 of the 1980 Convention. This case led to a broader discussion at the meeting regarding the meaning of the term 'rights of custody'. The Special Commission emphasised the importance of an autonomous interpretation of the term 'rights of custody' in the Convention context.

The Commission also discussed two significant cases decided by the European Court of Human Rights in Strasbourg, namely, *Neulinger and Shuruk v Switzerland* (App No 416154/07) [2011] 1 FLR 122 (Grand Chamber) and *Raban v Romania* (App

No 25437/08) [2011] 1 FLR 1130 (Chamber). In this regard, readers are referred to paras 47–49 of the Conclusions and Recommendations below.

(6) Judicial Networking and Direct Judicial Communications

The Permanent Bureau presented this topic and explained that one of the key developments in the operation of the 1980 Convention has been the use of direct judicial communications and the development of the International Hague Network of Judges, which now includes more than 65 judges from 45 States. Experts shared developments in their states in relation to judicial networking including the development of a number of national judicial networks. Many noted the benefits of judicial networks and direct judicial communications including in exchanging information, assisting in the safe return of children, and resolving applications more quickly. However, some experts also voiced concerns regarding the independence of judges and the confidentiality of the information exchanged between judges concerning specific cases. A few experts also discussed the support and resources needed for liaison judges.

The Commission reviewed the 'Emerging Rules Regarding the Development of the International Hague Network of Judges and Draft General Principles for Judicial Communications' (see Preliminary Documents Nos 3A, 3B and 3C), which include safeguards to protect judicial independence and impartiality. The Commission generally endorsed the Rules and Draft General Principles, subject to further changes to be made by the Permanent Bureau in light of the discussion at the Commission.

Finally, the Commission also discussed the issue of whether a formal legal basis for direct judicial communications was required, with judges in some States unable to engage in direct judicial communications in the absence of a law providing for such communication. Where necessary, States were invited to take necessary steps to ensure that such a legal basis exists. The question of the desirability and feasibility of binding rules in this area, including a legal basis, will be considered during Part II of the Special Commission in early 2012.

See further paras 64–72 of the Conclusions and Recommendations below.

(7) Consideration of the revised Draft Practical Handbook on the operation of the 1996 Convention (Preliminary Document No 4)

The Permanent Bureau introduced the revised Draft Practical Handbook on the operation of the 1996 Convention and explained the process which had already been undertaken in the drafting of this document. It was explained that in the absence of established good practice at this early stage of the Convention's operation, the Draft Handbook has a different emphasis to the Guides to Good Practice: it

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aims to be an accessible, practical guide for all users of the 1996 Convention, including States, judges and practitioners.

The Special Commission welcomed the Draft Handbook as a useful tool to assist with the implementation and operation of the 1996 Convention. Following a detailed chapter-by-chapter review of the text at the meeting, the Draft Handbook will be further revised by the Permanent Bureau in light of the comments received and further consultation will also take place with experts before the Handbook is published.

See paras 53–55 of the Conclusions and Recommendations below.

(8) Consideration of the Draft Guide to Good Practice on Mediation under the 1980 Convention (Preliminary Document No 5)

The Permanent Bureau introduced the Draft Guide to Good Practice on Mediation and explained that the

areas covered by the Draft Guide include mediator training, access to mediation and mediation principles/models/methods, having regard to specific challenges that arise in the context of 1980 Convention proceedings, such as the need for expeditious procedures, involvement of multiple legal systems, and cultural, religious and language differences. The Special Commission welcomed the Draft Guide. The Draft Guide will be further revised by the Permanent Bureau in light of discussions and comments at the Special Commission and circulated to Members of the Hague Conference and Contracting States for final comments. When published, the Guide will complement the existing Guides to Good Practice on Central Authority Practice, Implementing Measures, Preventive Measures, Enforcement, and Transfrontier Contact Concerning Children.

See paras 58–59 of the Conclusions and Recommendations below.