

**Implementation of the
1996 Hague Convention on Jurisdiction, Applicable Law, Recognition,
Enforcement and Co-operation in respect of Parental Responsibility and
Measures for the Protection of Children**

Introduction

1. The purpose of this letter is to consult key specialist interests on certain technical aspects of implementation of the 1996 Hague Protection of Children Convention (the Convention). Although the draft regulations attached deal primarily with the Convention, certain of the provisions do make further provision to facilitate administrative cooperation under Brussels IIa. Full public consultation was carried out in England and Wales from November 2000 to February 2001 on whether the United Kingdom should ratify the Convention. The Convention text and the Explanatory Report by Professor Paul LAGARDE are available on the Hague Conference website:

http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70 (text of Convention);

http://www.hcch.net/index_en.php?act=publications.details&pid=2943 (text of Explanatory Report).

2. The Convention will be implemented in England and Wales by means of regulations made by the Secretary of State for Justice under s.2(2) of the European Communities Act 1972.

3. As a matter of European law, the Convention is directly applicable in the UK, much as is Council Regulation No (EC) 2201/2003, known as Brussels IIa. For that reason, the s.2(2) regulations will not articulate the effect of the Convention in domestic law, nor purport to give the Convention the force of law (as was done, for example, under the Child Abduction and Custody Act 1985 (the 1985 Act) for the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention)).

4. The s.2(2) regulations will therefore be confined to specific provisions facilitating proper application of the Convention in domestic law, and any necessary amendments to primary legislation (powers under s.2(2) permit amendment to primary legislation). They will not therefore read as a complete code in the manner of the 1985 Act, for example.

5. In addition, it is clear that the interaction between Brussels IIa, the 1996 Convention and domestic law on jurisdiction in particular is very complex. New rules on applicable law will be applied for the first time. For this reason, a detailed practice guide will be made available to assist practitioners and court users in understanding and applying the Convention domestically. Annex 1 contains a flow chart devised by Professor Peter McElevay of Dundee University, academic adviser to the Ministry of Justice and the Scottish Government on this project, to demonstrate the combined effect of Brussels IIa, the Convention, and the Family Law Act 1986 on jurisdiction in the individual territorial units of the UK.

6. A draft of the proposed s.2(2) regulations is provided with this letter for your consideration. This draft will be finalised in the light of views submitted and answers to the questions in this letter. The draft regulations will extend to England and Wales and in certain respects to Northern Ireland. The Scottish Government will be legislating separately for implementation in Scotland. The views of respondents on the draft are requested in relation to England and Wales only. The Department for Children, Schools and Families (DCSF) will be conducting a separate consultation in England with local authorities and other agencies. In order to ensure that further drafts of the regulations take into account as far as possible and as early as possible views expressed on the questions raised in this letter, the Ministry of Justice (the Department) would be grateful to receive responses to the questions and comments on the draft regulations if possible well in advance of the closing date of **30 April 2010**.

The Convention

7. An analysis of the Convention is attached to this letter as Annex 2.

Questions

Applicable law provisions

8. The applicable law provisions are contained in chapter III of the Convention. As can be seen from Annex 2, it is not possible, under the Convention, directly to assimilate the parental responsibility of a person “importing” under Article 16(2) or Article 16(3) of the Convention with domestic parental responsibility. These persons will have the rights, duties and responsibilities ascribed to them by the parental responsibility they have brought with them, rather than those under domestic law (although in practice there will doubtless be considerable overlap in most cases). However, exercise of that parental responsibility will be subject to control under domestic law if the child is habitually resident here.

9. It is anticipated that the court will in most cases only be called upon to determine the extent of foreign parental responsibility when there is a dispute over its exercise, and so there will be an application before the court. This could be, for example, for a specific issue or prohibited steps order. However, it seems possible that there might be situations where there is no intention on the part of any person to bring a dispute before the court, but there is nevertheless a need to establish the existence, or extent, of a person’s parental responsibility under the Convention. To this end, provision has been made in the draft s.2(2) regulations at regulation 7 enabling an application to be made for a declaration as to the existence or extent of parental responsibility under Article 16 of the Convention. It is suggested that such an application should be made to the High Court, since they are likely to be unusual. Our initial view is that any provisions for transfer could be covered in rules of court.

Question 1 Do you consider there should be a separate court process to provide for declarations as to the existence and/or extent of parental responsibility under Article 16 which arise outside the context of proceedings already before the court?

Question 2 If so, at what level of court should these be heard? Should they be restricted to the High Court?

Recognition and enforcement

10. Article 14 deals with the duration of a measure where there has been a change of jurisdiction. Where an order has been modified, varied or terminated by whichever authority has jurisdiction under Convention rules, it may well be that the original measure is no longer enforceable in the state in which it was taken, which affects its enforceability here (see Article 26(1)). The 1985 Act makes provision for the effect of variation and revocation of a registered decision at s.17.

Question 3 Do you consider that the s.2(2) regulations (or rules of court?) should make provision requiring the person on whose behalf an order is registered here to notify the registering court of any variation or revocation?

Question 4 Should the court automatically vary or cancel the registration (as appropriate) upon such notification?

11. Provision has been made at regulation 7 requiring applications for recognition and enforcement to be made to the High Court, in line with the procedure for Brussels Ila cases. However, it is likely that there will, on occasion, be cases proceeding in the lower courts in which an issue of recognition under the Convention becomes relevant as an incidental question. This is the situation envisaged by A.21(4) of Brussels Ila in cases where that Regulation applies. Transfer to the High Court for a decision on the incidental point would seem to be expensive for all concerned and liable to cause delay. In addition, the Department is strongly of the view that it would not be appropriate to make different provision from Brussels Ila on this point.

Question 5 Do you agree that applications for recognition and enforcement should be heard in the High Court?

Question 6 Do you agree that, where recognition arises as an incidental question in proceedings in the lower courts, it is appropriate to permit those courts to deal with it?

12. Section 22 of the 1985 Act makes provision for proof of documents in proceedings for recognition and enforcement under the European Convention, the 1980 European (Council of Europe) Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (otherwise known as the Luxembourg Convention). Documents caught by section 22 are then given particular

treatment under s.22(3), such that they, or a certified copy of the document, are sufficient evidence of anything stated in it.

13. The Convention does not specify what documentation or evidence is required on an application for recognition and enforcement, in contrast with Brussels IIa in which a certificate is available under Article 39 and Annex II. Clearly, the court will have to consider whatever evidence is put before it. However, it seems appropriate to give certain documents equivalent treatment to that accorded by s.22 of the 1985 Act, in order to encourage the production of such documents and facilitate the court's task. It is proposed that the documents which will benefit from such a rule will be:

- (a) a duly authenticated copy of the decision ("duly authenticated" meaning that it bears the seal, or is signed by a judge or officer, of the authority in question, as is the case under s.22(2) of the 1985 Act);
- (b) a document which establishes that the person or body with parental responsibility was duly served with the document instituting the original proceedings, where it is alleged in proceedings under Article 24 (application for recognition or non-recognition) that he or she did not have the opportunity to be heard in the original proceedings (see Article 23(3)(c));
- (c) a document which demonstrates that the measure in respect of which recognition or enforcement is sought under Chapter IV is enforceable in the Contracting State in which the decision was made;
- (d) a certified copy of a document referred to in (b) or (c) above.

The duly authenticated copy of the decision at (a) could be treated as a true copy unless the contrary is shown; all the documents at (a) to (d) above could each be considered sufficient evidence of anything stated in that document.

Question 7 Do you consider that specific provision needs to be made in s.2(2) regulations (or in rules of court?) for proof of documents and evidence?

Question 8 Are the categories defined in paragraph 13 appropriate, and sufficient?

Jurisdiction

14. Articles 8 and 9 of the Convention address the possibility of transfer from an authority with jurisdiction (under Article 5 (habitual residence) and 6 (presence), although Article 9 refers only to Article 5), to one without, provided that the appropriate connection exists between the child and the Contracting State to which transfer is contemplated. Article 9 in particular raises an issue on international comity.

15. Under the Convention, it should be remembered that an authority with jurisdiction to take measures for the protection of a child does not refer only to a court. It would include a Local Authority taking action to protect a child which does not involve court intervention, for example voluntary accommodation of that child under s.20 of the Children Act 1989.

16. Draft regulation 5 has been inserted at the request of DCSF to allow local authorities to make applications for interim care and supervision orders on the emergency basis provided in Brussels IIa and the Convention despite the fact that the court would not have full jurisdiction under these instruments. This is considered necessary as an emergency protection order lasts only 15 days and longer protection might be required.

17. As a separate issue, it seems unlikely, but not impossible, that a Local Authority would want to request an authority (possibly a judicial authority) in another Contracting State to transfer full jurisdiction under the Convention to the Local Authority itself to deal with a child habitually resident in that other state. Where that Local Authority was not contemplating measures requiring court intervention (such as voluntary accommodation) it would seem quite an extreme step to take given that, if court intervention is not contemplated, the child would not appear to be at significant risk. Equally, if the child is present here, it would be possible for the child to be protected under Articles 11 and 12 of the Convention, whether by the court or by Local Authority measures alone. However, given that the possibility exists, DCSF considers that the possibility of Local Authorities asking non-judicial authorities of another Contracting State for agreement to assume jurisdiction where intervention not requiring an application to the court is needed can be dealt with in guidance.

18. However, Counsel has been asked to make provision for Local Authorities to be required to apply to court for the *court* to make a request to authorities of another Contracting State where it is anticipated that a measure requiring court intervention, such as a care order, will be required for the child. It does not seem appropriate for a Local Authority to approach the authorities of another Contracting State to request jurisdiction which must be exercised by a court. This particular issue does not arise in respect of other types of application because private individuals are not “authorities” which can make Article 9 requests under the Convention, so would of necessity have to ask a court to make the request. The draft s.2(2) regulations address this point at regulation 4.

19. Although private individuals would not be “authorities” capable of making a request under Article 9, it may nevertheless be the case that a person might wish to ask the court to request jurisdiction under Article 9 in a “private law” type matter (for example, determination of residence or contact) where the child is habitually resident in another Contracting State. There would not be proceedings here in which such an application could be made because (unless there were Article 10 jurisdiction) the UK would lack jurisdiction under the Convention in such a scenario (save for jurisdiction taken on the limited basis under Articles 11 or 12). There would therefore appear to be a need to make provision for a free standing application to be made in order for the court to be asked to make the Article 9 request (although presumably this would only occur in exceptional cases). It is not envisaged that making an Article 9 application in the High Court would mean that the proceedings must be heard in the High Court. It is proposed that rules of court would provide for proof of the making and acceptance of the Article 9 request for the purpose of

commencement of the substantive proceedings on this matter in a lower court.

Question 9 Do you agree that provision needs to be made for applications to court by any person requesting the court to make an Article 9 request of another authority where the transferred jurisdiction would be such that only a court can exercise it here?

Question 10 To which level of court should such an application be made?

Question 11 Do you agree that Local Authorities (which would be “competent authorities” under the Convention for some purposes and therefore in theory entitled to make direct requests under Article 9) should in particular be restricted from making requests under Article 9 to authorities of other Contracting States where the proposal to protect the child would require court intervention here?

General

20. Chapter V of the Convention provides for administrative co-operation between Contracting States for the protection of children. Implementation of much of these provisions will be a question of administration rather than legislation. However, certain aspects do require legislation, and ensuring that data can be easily and legally shared for Chapter V purposes has been a key principle of the approach to implementation in England and Wales. The opportunity has also been taken to make further provision for the implementation of the Brussels IIa Regulation in order to facilitate administrative cooperation under that instrument (see draft regulations 10 and 12).

21. One of the particular concerns has been to ensure that the Central Authority has meaningful powers to obtain information on the location of a child present in the state and who appears to require protection, when requested to assist in discovering the child’s whereabouts under Article 31(c). Arrangements are therefore being made to ensure that the Central Authorities of England and Wales (there will be a separate Welsh Assembly Government central authority for Chapter V matters) can make requests of specified bodies which would be likely to have access to appropriate databases, and that such requests must be complied with. It should be noted that the powers will relate to specific bodies and will not extend to “any unspecified public authority which may have information on the whereabouts of the child”. The bodies in question are listed at regulation 9 (for the Convention) and 10 (for Brussels IIa). It should be noted that the Welsh Assembly Government is a Central Authority for the Convention only. The powers are exercisable on request from the competent authority of another Contracting State only. They are not for use by domestic authorities.

22. Where a court is seised under the Convention (whether by way of the main jurisdictional rules or the powers to give provisional protection under Articles 11 and 12), it is thought that there are sufficient powers in all courts to

ensure that a child can be located if necessary. Counsel has therefore not been requested to make similar provision to s.24A of the 1985 Act. It should be remembered that under the two Conventions implemented by the 1985 Act, domestic courts were not given jurisdiction to deal with a child in any substantive way – by contrast with the 1996 Convention, in particular Articles 11 and 12.

23. The courts currently have powers to make orders under s.33 of the Family Law Act 1986 (relating to Part I orders, so Children Act 1989 s.8 orders, including on an interim basis; inherent jurisdiction cases involving care, contact with or education of a child; and special guardianship cases). There are powers under s.48 and s.50 of the 1989 Act to locate and obtain production of a child relating to emergency protection orders, police protection and where the child is in care. There are also the inherent jurisdiction powers of the High Court to locate children.

24. Under the current proposals, and subject to the responses to consultation, almost all recognition cases will be heard in the High Court, and therefore the inherent jurisdiction would appear to be available. Where a lower court is dealing with a recognition issue, it will almost certainly be in the context of proceedings in which s.8 or public law orders are in issue. Powers to assist in location of children as described above would therefore appear to be available.

Question 12 Do you agree that there are sufficient existing powers in the courts to address situations where there is insufficient evidence about the location of the child subject to proceedings?

Question 13 Are there any situations raised by implementation of the Convention which appear to require the courts to have additional powers to locate? If so please describe that situation.

25. Regulation 11 of the draft s.2(2) regulations deals with provision of reports under Article 32(a) of the Convention, addressing the situation of a child within the relevant territory of the UK where a request has been made by another Contracting State with a substantial connection to the child. The CA is not obliged to respond to the request, and guidance will be provided to CAs on the basis of discussion between the Department, DCSF and CAs regarding when it is likely to be appropriate to respond to such a request. Powers are given to CAs to request reports from local authorities or Cafcass (or in the case of Wales, CAFCASS CYMRU), although guidance will be given to CAs to the effect that local authority children's services should be approached first when a report is required. Where a request is made, there is an obligation to comply with it (see regulation 11(5)). Those consulted will notice that at regulation 11(2)(b) and 11(3)(b), the CA can request a court to provide a copy of any written report which has been provided to it regarding a child, where that is the case. By regulation 11(5) as currently drafted, the court must comply with that request. Evidently, there will be many cases (perhaps the majority) where the court has had no involvement with the child in question, but where it has, it seems appropriate that the information contained in that

report should be available to the CA when responding to the request (and indeed might be shown to the social worker or officer of Cafcass or Welsh family proceedings officer preparing a report). There is a precedent for this situation in the 1985 Act at s.6. The report, or information in that report, may be shared with the overseas authority making the request, although at Article 37 no such transmission made be made if it were likely to endanger the child or his or her family, and by Articles 41 and 42 specific protections are given to the information transmitted. The court would equally be bound by Article 37 in responding to the CA in the first place.

Question 14 Do you agree that it should be possible for the CA to require a court, to which a written report has been made concerning a child, to provide a copy of the report for Article 32(a) purposes? If not, please explain your view.

Question 15 If you agree that a court should provide reports as envisaged in the draft s.2(2) regulations at regulations 10 and 11, are any particular safeguards required?

Summary of Questions

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Consultation responses should be sent, preferably in a Word document by e-mail, to

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