THE LAW REFORM COMMISSION

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REPORT ON THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND SOME RELATED MATTERS

IRELAND

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282

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CHAPTER 1 INTRODUCTION

In October 1980, at its fourteenth session, the Hague Conference on Private International Law adopted a Convention on the Civil Aspects of International Child Abduction. This was designed to deal with situations where children are removed from their country of residence against the will of one of their parents or whoever has custody of them. This problem has become more acute in recent years as a result of the greater incidence of marriage breakdown, more ease of travel and the larger number of marriages between persons of different nationality. The most common case is where one parent takes a child to his or her country of origin in defiance of the wishes of the other parent. A person abducting a child may gain advantage from so doing if the question of the custody of a child can be reopened before the courts of the country to which the child has been brought. Even where no legal sanction is obtained for the situation brought about by an abduction, the costs of righting it may impose an intolerable burden on the person deprived of custody. The purpose of the Convention is to ensure that the child is returned to the country where he or she was habitually resident prior to the abduction. To this end the judicial or administrative authorities in the country to which the child is removed are required to order its return to its country of habitual residence if legal proceedings are instituted. In addition the Convention establishes a system of administrative

co-operation between Central Authorities in each country to facilitate and expedite the process of repatriation. The Convention is already in force in Canada, France, Portugal and Switzerland. It has been signed by five other countries including the United States and the United Kingdom. Legislation has been introduced in the British Parliament to give effect to it.

Ireland was represented at the fourteenth session of the Hague Conference at which the Convention was adopted by the President of the Law Reform Commission, Mr Justice Walsh. Accordingly the Commission has deemed it appropriate to issue this Report in which the possible adherence of Ireland to the Convention is considered together with some related matters.

CHAPTER 2 THE PRESENT LAW ON CIVIL ASPECTS OF CHILD ABDUCTION

According to established common law principles, the Irish courts would have jurisdiction to make a custody order in respect of a minor where at the commencement of the proceedings the minor is an Irish citizen or is present in Ireland.[1] The fact that a custody order has been made by a foreign court would not prevent the issue being re-opened before an Irish court which would be bound to determine the issue anew in accordance with Irish law. In W. v W.,[2] an application by a father for custody of his children, the mother objected to the jurisdiction of the High Court to deal with the matter. It was claimed that as both parents, although born in Ireland, were domiciled in England as were the children, all questions of law affecting the rights of the family inter se were justiciable only by the English courts. In the High Court, Doyle, J. found that the father had never abandoned his Irish domicile of origin or Irish citizenship and that accordingly his rights of recourse to the High Court remained unimpaired and that he was entitled to seek to vindicate and defend in the Irish courts his natural right of guardianship as a parent In fact the High Court of Justice in England had made the children wards of court and had made an order, interim in character, giving care of the children to the mother. But Doyle, J. did not consider that the father was "closed out by this interim order in default of appearance from seeking from this Court the relief which he now asks". Then, having had regard to the welfare of the children as the first and paramount consideration, as required by the Guardianship of Infants Act 1964, he awarded custody to the mother.

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[1] Dicey and Morris, The Conflict of Laws, p. 399 (7th ed., 1973). As to guardianship generally see Re O'Brien [1938] I.R. 323.

[2] Unreported; High Court (Doyle, J.) 5 July 1978.

However, in recent years the common law principle has been disregarded in a number of cases where children have been abducted into the jurisdiction. In Re H.[3] the English High Court declined to go into the merits of a custody dispute where a child had been kidnapped by one parent from the custody of the other in New York and brought to England. Instead, a summary order was made that the infant should be returned to New York and the question of his custody determined by the New York courts. It was held that this peremptory order was appropriate in such a case unless the court was satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. This judgment was relied upon by Hamilton, J. in O'D v O'D[4] when deciding on the custody of three children who had been kidnapped by their father in Alberta where they were living with their mother who had custody under a separation agreement. No written judgment was delivered in the case. But the judge was reported[5] as having held that the proper forum to decide questions concerning the custody of the children was the Supreme Court of Alberta and that, providing the Irish court was assured that no direct harm would come to the children thereby, they should be returned to the custody of the mother in Alberta. He ordered a psychiatric examination of the children to determine the question of harm to them. Subsequent to this, but before final judgment, a settlement was reached between the parties. In its order noting the settlement the court noted that the Courts of Alberta, Canada, were the forum to decide any future dispute on the custody of the children.

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[3] [1966] 1 W.L.R. 381.

[4] Unreported High Court, 22 June 1979.

[5] Gazette of Incorporated Law Society of Ireland, vol. 73, No. 6.

In Northampton County Council v A.B.F. and M.B.F.[6] the plaintiffs sought an order for the return of a child whom a Juvenile Court in England had placed in their care but who had subsequently been removed from the jurisdiction of the English Courts and brought to Ireland by his father. In his written judgment, Hamilton, J. stated the general legal position thus:

> "Having regard to the orders made by the Kettering Juvenile Court, placing the infant child in the care of the applicants and the degree of comity which exists between the Courts of these relevant jurisdictions, I would in the ordinary course have granted the application made on behalf of the applicants herein, both parents being English citizens who married in England, were domiciled in England and whose only child, the infant herein, was born in England and having regard to the fact that the infant had been unlawfully removed from the jurisdiction of the English Courts, without considering the merits of the case."[7]

However, he felt constrained to refuse the application for the immediate return of the infant to England to the custody of the Northampton County Council "because the effect of granting the order sought .... would have been that the infant child would have been adopted without the consent and in spite of the opposition of his lawful father, a development which is not permissible under the Irish law of adoption". Having referred to Article 41 of the Constitution,[8] he concluded:

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[6] [1982] I.L.R.M. 164.

[7] Ibid., at p. 165.

[8] Article 41 of the Constitution provides:

> 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2° The State, therefore, guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensible to the welfare of the Nation and the State.

> ".... in my opinion it would be inconceivable that the father of the infant child would not be entitled to rely on the recognition of the Family contained in Article 41 for the purpose of enforcing his rights as the lawful father of the infant the subject matter of the proceeding herein or that he should lose such entitlement merely because he removed the child to this jurisdiction for the purpose of enforcing his said rights."[9]

Accordingly he held that it would be necessary to have a full plenary hearing of the application for the purpose of ascertaining whether the child's rights were being protected before any final order could be made. There is no record that any such plenary hearing ever took place.

In Kent County Council v C.S.[10] the question of the possible adoption of the child was also raised. In that case an English Divorce Court had made an order placing the infant in the care of the Kent County Council. The father, who was an Irish citizen long resident in England, took the child from the person to whom the Council had entrusted it and brought it to Ireland. On a habeas corpus application, Finlay, P. in the High Court, found on the facts that adoption was not contemplated by the authorities in England; they were, on the contrary, hoping or expecting that it might be possible to place the child in the long-term care of its mother with appropriate access to its father. Accordingly he concluded:

> "Having regard to my view of the facts of this case and the fundamental importance of the appropriate forum for the determination of the future welfare of this child being the courts in the country in which it was born and intended to be brought up, I am satisfied that there is no question of a deprivation of any of the Constitutional rights relied upon by the respondent which should prevent

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[9] [1982] I.L.R.M. 164, at p.166.

[10] [1984] I.L.R.M. 292.

> me from applying the principle which I understand to be appropriate in relation to the comity between courts and making an order for the return of the child to the care of the Kent County Council who must only deal with it in accordance with the determination of the English courts to which the respondent who has originally invoked their jurisdiction has full access."[11]

These judgments, although indicative, have not provided a definitive statement of the circumstances in which an Irish court will order the return of a child to the jurisdiction whence it came without examination of the merits of the case. Uncertainty remains as to when a child abducted into the jurisdiction will be considered to have sufficient links with Ireland for the Irish court to conduct its own examination as to who should have custody. Factors such as birth and citizenship have been mentioned in this context as well as domicile and residence but their relative importance remains unclear. It is also unclear whether similar principles would be applied in cases where there is no question of abduction but a person who had lawful custody of a child in Ireland, as for a period of access, refuses to return it to another jurisdiction. The suggestion in the judgment of Hamilton, J. in Northampton County Council v A.B.F. and M.B.F. that the principles applicable may be affected by the degree of comity with a particular jurisdiction needs clarification. The effect of the constitutional guarantees, canvassed in the same judgment, have yet to be worked out.

It should be noted that subsequent English cases have modified the approach taken in Re H.[12] upon which Hamilton, J. relied in O'D v O'D. In Re C. (Minors)[13] the Court of Appeal held

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[11] Ibid., at p. 297.

[12] [1966] 1 W.L.R. 381 at p. 399.

[13] [1978] 2 All E.R. 230.

that a High Court judge had seriously misdirected himself in stating that he must make a peremptory order for the return of children brought to England in defiance of a custody order in their home state in America unless he was satisfied that there was some obvious moral or physical danger involved in making such an order. In the words of Ormrod, L.J.

> ".... all decisions relating to the welfare and future of the children have to be decided on the 'best interests' of the children principle and no other glosses are to be put on that text. The judge, in thinking that he had to find some obvious moral or physical danger was clearly in my opinion putting on the judgment of Buckley L.J. [in Re L (Minors)][14] a gloss which was unwarranted."[15]

The children concerned had been living in California with their mother who had been granted custody by consent when their parents had been divorced. After the mother's death her then husband and several of her relatives obtained an interim custody order from a Californian court. In breach of this order the father removed the children to England. The late mother's husband applied for leave to take the children back to California. His application was refused and the court granted the father custody having heard evidence that a Californian court would probably do this:

> "The importance of this consideration is this, that if this court decides that the proper order is to send these children back to California for their future to be decided by the Californian court, judging by the welfare officer's report and doing the best we can in a necessarily amateur way, it seems highly likely that the American court will conclude that the plaintiff is unable to demonstrate that it would be 'detrimental' to the interests of these children to be placed in the custody of their father, in which case the Californian court

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[14] [1974] 1 W.L.R. 250.

[15] [1978] 2 All E.R. 230.

> would have to make an order for custody in the father's favour, which would mean that the children would be returned, or have to be returned, to this country once more. It cannot possibly be in the best interests of children to expose them to a real risk, call it balance of probabilities or whatever, but I would prefer to speak of it as a real risk, of being taken back to California by the plaintiff, only to be sent back again here to be placed in the care of their natural father. It is only for that reason that, in my judgment, this court should assume jurisdiction, and it is for that reason that I agree that the order which the learned judge made was a right order, although I cannot agree with the grounds on which he made it. It is only in such a way that this court could justify this interference (as it were) with the court in California, and the justification for it is that this court is coming to a decision which, so far as it can judge, the Californian court would be likely to reach itself."[16]

The Irish courts are also bound to have regard to the interests of the children in such cases for section 3 of the Guardianship of Infants Act 1964 states that the welfare of the infant must be the first and paramount consideration in taking decisions on custody. If the matter is fully argued in the future it is possible that the Irish courts will adopt a similar approach to that in Re C. (Minors) when dealing with custody cases relating to children who have been abducted into the jurisdiction. In many cases the consequence of this approach may differ little from that tentatively approved by Hamilton, J. in O'D v O'D and Northampton County Council v A.B.F. and M.B.F. But the conceptual framework of considering the welfare of the children untrammelled by any binding guideline necessarily gives more scope for a judge, who is so minded, to assume jurisdiction to examine the merits of the case.

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[16] Ibid.

CHAPTER 3 THE PROVISIONS OF THE CONVENTION AND THE LEGISLATION REQUIRED TO GIVE EFFECT TO IT

The Convention on the Civil Aspects of International Child Abduction applies only to children who have not attained the age of sixteen and who are habitually resident in a Contracting State immediately before any breach of custody or access rights. It is likely that questions of age will arise occasionally in proceedings under it. At present a foreign register is admissible as evidence of the date of birth when shown by expert legal evidence to have been kept under the sanction of public authority and to have been recognised by the tribunals of its own country.[1] Such registers may be proved by an examined copy, i.e. a copy sworn to be a true copy by a witness who has examined it line by line with the original. However, in proceedings under the Convention, by virtue of Article 30, a statement as to date of birth in an application by a person claiming that a child has been removed or retained in breach of custody rights would be admissible in evidence.

The central provisions of the Convention are to be found in Articles 3, 12, 13 and 20. Article 3 defines the crucial concept of "wrongful removal of retention":

> "The removal or the retention of a child is to be considered wrongful where:
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> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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[1] Lyell v Kennedy (1899) 14 App. Cas. 437; Perth Peerage Case (1846-8) 2 H.L.C. 865; Abbott v Abbott (1866) 29 L.J.P.M. 57.

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Rights of custody are defined in Article 5 to include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

Article 12 is the main operative paragraph; it provides:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Article 13 permits a number of exceptions to the rules prescribed in Article 12; it provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would

> expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained the age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The exceptions allowed in this Article and that in Article 12 relating to children who have settled in a new environment are permissive, not mandatory. Even if the party opposing the return of the child establishes that the case comes within one of these exceptions, the Convention in Article 18 allows that the judicial or administrative authority of the requested State may still be permitted to order that the child be returned. The Convention would also seem to allow a Contracting State to return a child even when its judicial and administrative authorities have declined to do so pursuant to the Convention. Thus, for example, the power to deport aliens need not be affected by adherence to the Convention.

A further exception to the obligation to return a child to the country of habitual residence is to be found in Article 20 which was, incidentally, largely the result of an Irish initiative at the Conference. It provides:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Accordingly it would be possible for a court to refuse to return a child where its return would be contrary to the guarantees relating to the protection of human rights in the

Constitution. This might be important, for example, in a case such as Northampton County Council v A.B.F. and M.B.F. where a parent is resisting the return of the child to its habitual residence on the ground that it would be placed in the care of a non-parent in circumstances which would conflict with the inalienable and imprescriptible rights of the Family guaranteed under Article 41 of the Constitution.

The net effect of these central provisions of the Convention would be to deprive the Irish courts of jurisdiction to consider on its merits a custody application in most cases where a child was abducted into the State from another country where it was habitually resident. But, as has been noted, the Irish courts have shown some disinclination to exercise such jurisdiction. The Convention gives scope for the courts to refuse to order the return of a child where this would be unconstitutional or otherwise clearly undesirable. As a result of its provisions there will be the positive advantage that children abducted from their place of habitual residence in Ireland into another Convention country will be returned promptly in most cases. To achieve this the Commission consider it is worthwhile to sacrifice some jurisdiction in respect of the custody of children who are not habitually resident in Ireland and have, therefore, less real connection with this country. Moreover, by making the abduction of children less effective as a device for gaining custody, the Convention will discourage a practice which inflicts suffering on innocent and defenceless children. For this reason it is a desirable form of international co-operation irrespective of any nice calculation of national advantage.

Under the Convention the conditions which must be satisfied if an application to return a child to its habitual residence is to be refused place a heavier onus on the person opposing the return than would be the case if it were a simple matter of

showing that it would be contrary to the child's welfare. The position under the Convention is closer to that taken by the English Court of Appeal in Re H.[2] and accepted in O'D. v O'D.[3] and subsequent Irish cases than it is to the more recent English cases. However, on the basis of the existing decisions it cannot be said with certainty that the law in Ireland accords totally with the central Articles of the Convention here quoted. While Article 20 would be covered by the Constitution, statutory provision giving effect to Articles 3, 12 and 13 would be required if Ireland is to become party to the Convention. Any such statutory provision would have to specify the judicial and administrative authority in Ireland competent to decide on an application to return a child under the Convention. The Commission recommends that this jurisdiction to order the return of a child under the Convention should be vested solely in the High Court. It has considered whether the Circuit Court should also be given jurisdiction in cases under the Convention in view of the fact that under the Guardianship of Infants Act 1964 jurisdiction in guardianship and custody matters is vested in the Circuit Court as well as the High Court. It has decided not to recommend this. There are likely to be relatively few cases under the Convention. It is not improbable that complex legal issues will arise especially if the respondent relies on the Constitution to resist the return of the abducted child to its habitual residence. It is considered that the High Court which has a unique jurisdiction in constitutional matters and habeas corpus applications is the most appropriate forum to hear such cases. Concentration in the High Court is, moreover, likely to result in speedier hearings where time is of the essence.

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[2] [1966] 1 W.L.R. 381. See supra, p. 4.

[3] See supra, p. 4.

The other provisions in the Convention regulating proceedings before the judicial and administrative authorities of the State to which the child is abducted should be noted. Under Article 11 these authorities are obliged to act expeditiously in reaching a decision in proceedings for the return of children and they may be asked for a statement of the reasons for the delay if a decision is not reached within six weeks from the date of the commencement of the proceedings. There is no existing legislative provision which would give effect to this Article.

In considering whether there are circumstances justifying a refusal of an order to return a child, the judicial and administrative authorities must take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.[4] Under the existing law such evidence would be inadmissible under the rule against hearsay unless given orally by somebody with personal knowledge of the facts stated.

It is not anticipated that any difficulty would arise where the judicial or administrative authorities in another State require information relating to the social background of a child habitually resident in Ireland in cases under the Convention. Such information would be made available voluntarily in so far as it is in the possession of a governmental agency. Where the information is not

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[4] Article 13.

forthcoming it could be sought under the Foreign Tribunals Evidence Act 1856. No special statutory provision would be required.

In ascertaining whether a child has been wrongfully removed or retained, the judicial or administrative authorities of the requested State may take notice directly of the law in the State of the habitual residence of the child without recourse to the specific procedures for the proof of that law which would otherwise be applicable.[5] At present, in proceedings before the courts in Ireland, foreign law is proved by the expert evidence of a person familiar with that law. Under the Convention, the judicial and administrative authorities of the requested State may also take notice directly of judicial and administrative decisions, formally recognised or not, in the State of the habitual residence of the child without recourse to the specific procedures for the recognition of foreign decisions which would otherwise be applicable.[6] At present, by virtue of section 7 of the Evidence Act 1851 judgments, decrees and orders of a foreign court may be proved either by examined copies, or copies purporting to be sealed with the seal of the court to which the originals belong, or where there is no seal, purporting to be signed by a judge of such court, who must certify that there is no seal.

Under Article 15 of the Convention the judicial or administrative authorities of a Contracting State may request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention was wrongful where such a decision may be obtained in that State. At present if the position under

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[5] Article 14.

[6] Ibid.

foreign law is relevant in proceedings before an Irish court it would itself ascertain the facts and hear expert evidence on the relevant foreign law so as to determine the matter. In the converse situation of proceedings before a court in another country, it would be possible to apply to an Irish court for a declaration that a child had been wrongfully retained or removed at Irish law.

Article 16 prohibits the judicial or administrative authorities of the country to which the child has been removed from deciding on the merits of a custody dispute while proceedings are pending under the Convention.

Article 17 states that a previous decision in the requested State shall not be made a ground for refusing to return a child under the Convention. Under the existing law all orders in custody cases are interlocutory; and the doctrine of res judicata does not apply to them.

Article 18 makes it clear that the power of a judicial or administrative authority to order the return of a child is not limited or restricted in any way by the provisions just considered. Thus a child may be returned under the existing law even if this is not required under the Convention and legislation may be passed in the future providing for the return of children in such circumstances.

Article 19 makes explicit the fact that a decision about the return of a child is not to be taken as a determination on the merits of any custody issue. Thus if a court refuses to return a child under Article 12 or 13, a separate decision, though not necessarily another hearing, must be given on the question of custody.

Article 22 provides that no security, bond or deposit shall be

required to guarantee the payment of costs and expenses in proceedings under the Convention. Under Rules of Court both the High Court and the Circuit Court may require security for costs from parties in proceedings before it.[7] An order for such security is often granted against a plaintiff resident out of the jurisdiction.

Article 26 makes provision by which the judicial and administrative authorities may direct the person who removed or retained the child to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, costs of tracing the child and of legal representation. At present the courts have power to order parties in proceedings before them to pay the costs of an incidental to those proceedings.[8]

Article 29 makes clear that the provisions in the Convention setting up Central Authorities to aid its enforcement shall not preclude any person who claims there has been a breach of custody or access rights from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of the Convention.

Article 30 makes admissible in the courts or administrative authorities of the Contracting States any application for return of a child submitted in accordance with the Convention together with documents and any other information appended thereto. This would appear to preclude objections based on the law of evidence relating to hearsay evidence or the proof of documents.

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[7] Rules of the Superior Courts 1962, Order 29; Rules of the Circuit Court 1950, Order 13.

[8] Rules of the Superior Courts 1962, Order 99; Rules of the Circuit Court 1950, Order 58.

Provision is made in Articles 31, 32 and 33 for States with two or more systems of law whether applicable in different territorial units or to different categories of persons.

Article 35 states that the Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. It enters into force for a State on the first day of the third calendar month after the deposit of its instrument of acceptance, approval or accession.[9] It may be denounced after five years.

The Commission does not consider that any of these articles or the legislation which would be necessary to give effect to them should constitute a barrier to Ireland's adherence to the Convention.

It is opportune to consider at this stage the form of legislation which would be required in Ireland to give effect to these articles regulating proceedings before the judicial and administrative authorities of the State to which the child is abducted. The Commission is of the view that this can be best done by giving the force of law to the relevant Articles all of which are in a form substantially suitable for direct application by our courts. There is precedent for giving effect to treaty obligations in this way in the Air Navigation and Transport Acts 1936, 1959 and 1965 and the Diplomatic Relations and Immunities Act 1967. However, it must be said that it is the exception rather than the rule for Ireland to give domestic effect to international agreements in this way. Usually when Ireland becomes party to a treaty, domestic legislation is enacted which is considered sufficient to

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[9] Article 44.

comply with the State's obligations under it. This is necessary where a treaty is drafted in terms which are unsuitable for direct application as part of Irish law. It may be desirable so as to adopt a particular interpretation of obligations imposed by a treaty. Neither consideration is applicable to the articles in this Convention just considered. The adoption of the exact words of the Convention in Irish law would ensure that full effect is given to it. Accordingly the Commission recommends that the force of law be given to the articles regulating proceedings before the judicial and administrative authorities of the State to which the child is abducted.

Most of the other articles of the Convention deal not with the law to be applied in proceedings before the courts but with administrative co-operation relative to abduction cases. Article 6 provides that "a Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities". The functions of the Central Authority are stated in Article 7, which provides as follows:

> "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
>
> In particular, either directly or through any intermediary, they shall take all appropriate measures -
>
> *a* to discover the whereabouts of a child who has been wrongfully removed or retained;
>
> *b* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
>
> *c* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
>
> *d* to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

The other provisions relating to the Central Authority are essentially an elaboration of this Article. Articles 8 and 9 provide that an aggrieved person may make an application containing certain particulars to the Central Authority in any Contracting State whose responsibility it is to pass on the application to the Central Authority of the State where the child is to be found. The application may be accompanied by a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence or from a qualified person concerning the law of that State.[10] The Central Authority of the State where the child is must try to obtain the voluntary return of the child.[11] If, in proceedings taken before the judicial and administrative authorities in a State, a decision is not reached within six weeks of their commencement, the Central Authority in that State has the right to request a statement

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[10] See Article 8.

[11] See Article 10.

of the reasons for the delay. If a reply is received by that Authority, it must be transmitted to the Central Authority in the requesting State or the applicant.[12] In reaching a decision on the return of a child, the judicial or administrative authorities are bound to take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.[13] If, pursuant to Article 15, the judicial or administrative authorities in a State request that the applicant obtain from the authorities of the State of the habitual residence of the child a determination that the retention was wrongful, the Central Authorities of the States concerned are bound, so far as practicable, to assist the applicant to obtain such a determination.[14]

Chapter V of the Convention contains some general provisions. A Central Authority is not bound to accept an application if the requirements of the Convention are not fulfilled or it is otherwise not well-founded.[15] A Central Authority may require written authorization before acting or designating a representative to act on behalf of an applicant.[16] Any application, communication or other document sent to the Central Authority of the requested State must be in the original language and must be accompanied by a translation into the official language or one of the official languages of the requested State or, where this is not feasible, a translation into French or English.[17] However, a Contracting

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[12] Article 11.

[13] Article 13.

[14] Article 15.

[15] Article 27.

[16] Article 28.

[17] Article 24.

State may make a reservation objecting to the use of French or English, but not both. It is considered that it would be more convenient if documents received by an Irish Central Authority were in English or accompanied by an English translation and it is recommended that Ireland should make the appropriate reservation. This can be withdrawn at any time if this is deemed appropriate.[18]

Each Central Authority must bear its own costs in applying the Convention.[19] Accordingly where legal proceedings are instituted to secure the return of a child the general rule is that a Central Authority may not require the applicant to make any payment towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, it may require the payment of the expenses incurred or to be incurred in implementing the return of the child. Article 26 also permits a Contracting State to make a reservation declaring that it shall not be bound to assume any costs resulting from the participating of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. In this context it should be noted that the Convention requires that in matters concerned with the application of the Convention nationals or habitual residents of one Contracting State are to have the same right to legal aid or advice as the nationals or habitual residents of the State granting it.[20] A reservation made under Article 26 cannot, therefore, have the effect that a Contracting State may refuse to assume costs in proceedings under the Convention which are covered by the system of legal aid and advice in that State.

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[18] Article 42. The French Government made a reservation under this Article.

[19] Article 26.

[20] Article 25.

The Commission has considered whether Ireland should make a reservation, in accordance with Article 42, declaring that it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. Of the countries which have ratified the Convention, France and Canada have made such a reservation while Switzerland and Portugal have not done so. If Ireland makes a reservation an Irish applicant in proceedings under the Convention in a foreign jurisdiction will be liable to meet the costs of counsel and advisers and of court proceedings, even where that country has itself made no reservation. This could have serious consequences if such a country has high legal costs or an inadequate system of legal aid for litigants of small means. Despite this the Commission hesitates to recommend that public funds should be expended so that litigants in proceedings under the Convention should be accorded special treatment in respect of legal costs not enjoyed by the generality of litigants in this country. It is of the opinion that this must be a matter for the Government to decide in the light of its financial priorities.

It should be noted that the system of civil legal aid and advice in Ireland has not been placed on a statutory basis but the scheme under which it is administered allows the Legal Aid Board to grant a civil legal aid certificate where it is satisfied that the applicant is concerned with a matter in respect of which the State has a duty to provide civil legal aid under an international instrument which specifically states that the State is obliged to provide such aid. The requirements, if any, to be satisfied by such an applicant in connection with the grant of a certificate will be determined on the basis of the requirements of the international instrument.[21]

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[21] Scheme of Civil Legal Aid and Advice, December 1979, para. 3.2.6.

In this case the only requirement of the international instrument is that in matters concerned with the Convention, nationals or habitual residents of another Contracting State are to have the same right to legal aid or advice as Irish citizens or habitual residents of Ireland.[22]

The obligations relating to the Central Authority must be assessed both from the point of view of the effectiveness of the Convention and of the burden placed on a Contracting State which has to provide such a Central Authority. Under Article 7(2)(a), which has been set out, a Central Authority is obliged to take all appropriate measures, either directly or through any intermediary, to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of a child. If a Central Authority defines its role in terms of merely facilitating the institution of proceedings, it may decline to take proceedings on behalf of applicants for the return of children abducted into its jurisdiction. Such an applicant would then have to employ his or her own lawyers for that purpose. In that event, the Convention would undoubtedly be rendered less effective for securing the return of abducted children. However, even if States restrict the role of their Central Authorities to the minimum permissible under the Convention, that Authority will still be obliged to trace a child and attempt to secure its voluntary return or other amicable resolution of the issues. This will achieve some improvement in the machinery for securing the return of abducted children. By virtue of Article 29 it will still be possible for an aggrieved individual to proceed on his own without making an application to any Central Authority.

In the event that Ireland becomes party to the Convention it

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[22] Article 25.

will be necessary to designate a Central Authority and to decide whether it should be empowered to initiate proceedings on behalf of applicants seeking the return of children abducted into the jurisdiction. To some extent these questions are intertwined. If the Central Authority is to initiate legal proceedings on behalf of applicants in what are essentially private disputes, it might be considered inappropriate to designate an agency of government as the Central Authority. The Commission takes the view that, initially, Ireland should take a more restrictive role of the functions of the Central Authority so that it does not initiate proceedings on behalf of applicants for the return of abducted children. In these circumstances there is no reason why an agency of government, such as the Department of Justice or the Attorney General, should not be designated as Ireland's Central Authority. Clearly the role of the Irish Central Authority should be kept under review in the light of the policy of other States party to the Convention.

The question remains how, in these circumstances, effect should be given to the provisions in the Convention relating to the Central Authority and legal aid on a domestic level. Where obligations are imposed by international agreements which can be fulfilled by the Executive or persons or bodies under its control it is often considered unnecessary to pass domestic legislation compelling the relevant executive body to fulfil those obligations. The reason for this is that the government can be relied upon to fulfil its international obligations without being compelled to do so by domestic legislation. However, in this case it is doubtful if it is within the power of any Minister or the Attorney General to act in the ways specified in the Convention on behalf of one party to a custody dispute. Accordingly the Commission recommends that legislation should designate or provide for the designation of a Central Authority and give it the powers required by the

Convention by giving the force of law to the relevant articles. There would then be statutory authority for the expenditure of public money without the necessity for an estimate followed by a provision in the Appropriation Act each year. For the same reason the Commission recommends that the force of law should be given to Article 25 which guarantees legal aid to habitual residents and nationals of Contracting States.

Rights of access are defined in Article 5 which states that they "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence". The authors of the Convention felt that abduction often results in situations where one parent is denied reasonable rights of access; in turn the denial of such rights may be the result of fears that access will lead to abduction. To break this vicious circle the Convention endeavours to promote and encourage the granting of rights of access while affording safeguards against their abuse. The relevant Article, Article 21, provides:

> "An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
>
> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
>
> The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

The first two paragraphs involve no more than acting as an intermediary to secure voluntary agreement between interested

parties relating to the grant of rights of access and intervening to persuade persons who have been granted access to observe any conditions attached to it. However, paragraph 3 gives the Central Authority a right to initiate or assist in the institution of legal proceedings. Under this paragraph, where a child is habitually resident in its mother's custody in Ireland, the Irish Central Authority would be empowered to apply to the Irish courts to order the mother to comply with an agreement allowing the father to take the child to its home in England for a period each year. Moreover, as the Central Authority may initiate proceedings with a view to organizing rights of access, it seems that in such a case the Irish Central Authority would be entitled to apply to the Irish courts to grant rights of access to the English father. When the child is taken to England to enable the father to exercise his rights of access, the English Central Authority would be able to make application to the English courts to compel the father to respect the conditions of his access. The powers given to the Central Authorities under this Article are far-reaching but it must be emphasised that in so far as they relate to the institution of proceedings there is no obligation upon any Central Authority to act. Therefore, any costs involved can be contained. If it is decided that the Central Authority should not initiate proceedings on behalf of applicants under the Covenant it would clearly be inappropriate for it to initiate proceedings under this Article. However, to ensure flexibility, it is recommended that the Central Authority should be given powers to institute proceedings under Article 21 on behalf of the individuals concerned. Accordingly the Commission recommends that the force of law should be given to the provisions in the Convention relating to rights of access.

While it is strictly necessary to give the force of law only to those Articles in the Convention regulating proceedings before our courts and the capacity of the Central Authority,

the Commission is of the opinion that it would be undesirable to distinguish between Articles in an instrument which was conceived as a unit. It recommends that the force of law should be given to the Convention as a whole.

Accordingly the Commission recommends that Ireland should become party to the Convention on the Civil Aspects of International Child Abduction subject to the reservation provided for in Article 24 objecting to the use of French in any application, communication, or other document sent to its Central Authority.

The Commission further recommends that before Ireland becomes party to the Convention legislation should be enacted giving the force of law to the Convention in Ireland, such legislation to contain provisions

(a) providing for the designation of a Central Authority in accordance with Article 6 of the Convention;

(b) naming the High Court as the judicial or administrative authority of Ireland for the purposes of the Convention;

(c) making a certificate purporting to be under the seal of the Minister for Foreign Affairs evidence of the fact that a State is party to the Convention and of any declaration or reservation made by a State party to the Convention.

In other cases where treaties have been enacted into Irish law, the Government or a designated Minister has been empowered to make orders to give effect to the provisions of the treaty.[23] In exercising such powers, it is necessary to have regard to the fact that the Oireachtas may not delegate its exclusive

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[23] See Diplomatic Relations and Immunities Act, 1967, sections 5, 6.

power of making or changing the law, so as to empower the delegated authority to amend that legislation.[24] Accordingly the Commission recommends that the proposed legislation should contain provisions empowering the Government or a designated Minister to make such orders as appear to him necessary or expedient for carrying out the Convention on Civil Aspects of Child Abduction or for giving effect to any of the provisions thereof.

In framing legislation to give effect to the Convention it would be opportune to consider whether provision should be made for a court to order the return of a child in cases where it is not compelled to do so by the Convention. The Convention itself is explicit that it does "not limit the power of a judicial or administrative authority to order the return of the child at any time".[25] But the Commission recommends that the legislation should state that nothing in it shall prevent a child from being returned to another State merely because that return is not required by the Convention. It should also provide that in deciding on an application for the return of children to another jurisdiction in a case where that return is not required by the Convention, the court shall have regard to the welfare of the child as the first and paramount consideration.

This will cover abduction cases outside the Convention and also cases where the abducted child was not habitually resident in a Contracting State. Such provision is considered appropriate as the Commission does not believe that our courts should ever decide abduction cases other than on the basis of

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[24] Cityview Press v An Comhairle Oiliuna [1980] I.R. 381; Cooke v Walsh [1984] I.L.R.M. 208.

[25] Article 18.

their view of the welfare of the child except in cases covered by the Convention where reciprocal advantages are obtained for persons resident in Ireland. The re-statement in the legislation of the principle already contained in the Guardianship of Infants Act 1964 should be effective to remove doubts created by recent case-law on this matter.

CHAPTER 4 EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN AND ON RESTORATION OF CUSTODY OF CHILDREN

Shortly before the Hague Convention on the Civil Aspects of Child Abduction was adopted, the Council of Europe adopted a Convention of its own to deal with the same problem entitled the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. It was signed, subject to ratification, on behalf of Ireland on 20 May 1980. The conceptual framework of the two Conventions differ from one another. Whereas the Hague Convention provides for the immediate return of children abducted in breach of rights of custody under the law of its habitual residence, the European Convention is directed to the recognition and enforcement of custody decisions made in other jurisdictions. However, the practical effects are likely to be similar in many cases. Under the Council of European Convention recognition and enforcement may be refused only on specified grounds. Broadly speaking, these are:

(i) that the defendant was unrepresented, not having been served with the document which instituted the relevant proceedings in sufficient time to enable him to arrange his defence;[1]

(ii) that the decision was given in the absence of the defendant or his legal representative and the competence of the authority giving the decision was not founded on the habitual residence of the defendant or the child or on the last common habitual residence of the child's parents;

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[1] Article 9.1.a.

[2] Article 9.1.b.

(iii) that the decision is incompatible with a decision relating to custody in the State addressed;[3]

(iv) that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;[4]

(v) that by reason of a change in circumstances since the original decision its effects are no longer in accordance with the welfare of the child;[5]

(vi) that the child is a national of the State addressed or was habitually resident there and no such connection existed with the State where the decision was given;[6]

(vii) that the child, being a national of the State of origin and of the State addressed, was habitually resident in the State addressed.[7]

The Convention provides that in certain cases of improper removal the grounds of refusal may be more limited. Improper removal is defined to mean the removal of a child across an international frontier in breach of a decision relating to its custody given in a Contracting State or a failure to return a child at the end of a period of access.[8] In such a case if the child and his parents have as their sole nationality the nationality of the State where the custody decision is given and the child has its habitual residence in that State, the

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[3] Articles 9.1.c; 10.2.d.

[4] Article 10.1.a.

[5] Article 10.1.b.

[6] Article 10.1.c.

[7] Ibid.

[8] Article 1.d.i.

State addressed must restore custody of that child provided the request is made within six months.[9] In other cases of improper removal recogition may be refused only on the grounds (i), (ii) and (iii) listed above. However, the Convention allows any Contracting State to make a reservation exempting itself from this limitation on the grounds on which it may refuse to recognise and enforce a decision taken in another Contracting State.

It is not proposed to embark on a detailed consideration of the Council of Europe Convention in this Report because to do so would duplicate work being undertaken within the Department of Justice whose officials represented Ireland at the meetings at which the Convention was prepared and adopted. What must be said is that cases may arise where there is some inconsistency between the obligations accepted under the two Conventions. It is conceivable that one would be bound under the Council of Europe Convention to enforce a custody decision given in the country of the child's nationality where the Hague Convention requires the return of the child in accordance with the law of its habitual residence. While the possibility of conflict is reduced by Article 20 of the Council of Europe Convention which provides that it "shall not affect any obligations which a Contracting State may have towards a non-contracting State under an international instrument dealing with matters governed by this Convention", conflict may still arise where the States concerned are party to both the Council of Europe Convention and the Hague Convention.

While the Council of Europe Convention would have similar effects to the Hague Convention in many cases, it goes further in certain respects. It would secure the enforcement of

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[9] See Article 8.

rights of access as well as rights of custody. In cases of improper removal, as between States which make no reservations, it allows of fewer exceptions to the obligation to act on the decision or law of the State where the abducted child was resident. Under it the Central Authority is obliged to take proceedings or cause proceedings to be taken to secure the recognition and enforcement of the decision of the other Contracting State whereas under the Hague Convention the Central Authority need only facilitate the institution of proceedings with a view to obtaining the return of the child. Under the Council of Europe Convention each Contracting State undertakes not to claim any payment from an applicant in respect of any measures taken by its Central Authority except the cost of repatriation, whereas under the Hague Convention, States may reserve the right not to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings. Accordingly it seems that under the Council of Europe Convention more expense is likely to fall on the Central Authority and less on the individual applicant than under the Hague Convention, especially if reservations are made under Article 26 of the latter.

If a choice fell to be made between the Hague Convention and the Council of Europe Convention it might be preferable to adhere to the former if only because countries such as the United States and Canada with which Ireland has extensive contacts may become party. However, the Commission does not believe that such a choice need be made despite some possible inconsistencies between the two Conventions and it notes that a Bill has been introduced into the United Kingdom Parliament giving effect to both of them. It recommends that the Department of Justice should continue its consideration of the Council of Europe Convention with a view to its ratification by Ireland but this process should not be allowed to delay adherence to the Hague Convention and the introduction of the legislation recommended in the Report.

CHAPTER 5 OTHER PROPOSED AMENDMENTS TO THE LAW RELATING TO CHILD ABDUCTION

When enacting legislation to give the force of law to the Convention the opportunity should be taken to amend our law so as to make it more difficult to remove children wrongfully from the jurisdiction.

1. Criminal Law

At present the only statutory prohibition against the removal of an infant out of the jurisdiction is to be found in section 40 of the Adoption Act 1952 which, as originally enacted, read as follows:

> "(1) No person shall remove out of the State a child under seven years of age who is an Irish citizen or cause or permit such removal.
>
> (2) Subsection (1) shall not apply to the removal of an illegitimate child under one year of age by or with the approval of the mother or, if the mother is dead, of a relative for the purpose of residing with the mother or a relative outside the State.
>
> (3) Subsection (1) shall not apply to the removal of a child (not being an illegitimate child under one year of age) by or with the approval of a parent, guardian or relative of the child."

This legislation was enacted to prevent the traffic of illegitimate children for adoption abroad. It was challenged constitutionally in The State (M) v The Attorney General[1] where the Minister for Foreign Affairs refused to grant a passport to an illegitimate child whom it was proposed to send to Nigeria to be reared by its father's family. It was held by

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[1] [1979] I.R. 73

Finlay, P. that the child had a right to a passport at its mother's request pursuant to "the right to travel with the approval or consent of its mother provided that such travelling, and the purpose of it, do not appear to conflict with the welfare of the child". Section 40(2) of the Adoption Act 1952 prohibited absolutely the removal of an illegitimate child under one year of age out of the jurisdiction except for the purpose of residing with the mother or a relative outside the State; it made no provision for granting exceptions in cases where removal would be in the child's interests. Finlay, P. concluded:

> "Having regard to these considerations I take the view that by reason of the absence of any discretion vested in a court or otherwise for exceptional cases so as to permit the removal out of the State of an illegitimate child within the first year of its birth (otherwise than for the purpose of residing with its mother or a relative, as defined), the provisions of S. 40 of the Act of 1952 are unconstitutional because they fail to defend and vindicate the personal right of the child to travel in the manner in which I have defined it. To expand the definition of the right to travel which I am satisfied this child has, I am satisfied that such a child has a right to travel outside the State at the choice of its mother or legal guardian, subject to the power of the Courts to intervene in order to ensure the child's welfare."

Accordingly he declared that subsection (2) and the bracketed phrase in subsection (3) were unconstitutional.

The effect of the surviving parts of section 40 is to prohibit a stranger from taking a child under seven years of age out of the jurisdiction without the permission of a parent, guardian or relative.[2] As the permission of one such person would

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[2] Relative is defined to mean grandparent, brother, sister, uncle or aunt, whether of the whole blood, of the half-blood or by affinity, relationship to an illegitimate child being traced through the mother only.

suffice, the prohibition would have no application in the case where a parent or other "relative" takes a child out of the jurisdiction in defiance of the wishes of the other parent or where a "relative" does so in defiance of the wishes of one or both parents. The taking of a child abroad in breach of the section is a summary offence punishable by six months imprisonment and/or a fine of £100.

Other statutes prohibit the abduction of children. The Offences against the Person Act 1861, section 56, makes child stealing a felony punishable with seven years imprisonment. It provides:

> "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child or the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained, as in this section before mentioned shall be guilty of a felony."

However, the section goes on to provide that "no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted .... on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof". Consequently the section is not applicable in cases where there is any bona fide dispute as to custody. In cases where it is applicable, as the offence is a felony, a member of the Garda Siochana has power to arrest any person whom he or she reasonably suspects of committing it.

Under Section 55 of the Offences against the Person Act 1861:

> "whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour ...."

However, while the section by its terms would appear to be applicable to any abduction it is, in fact, invoked almost entirely in seduction cases with sexual overtones. As the offence is a misdemeanour no arrest can be made of a person committing it unless a warrant is obtained.

In addition to these statutory offences, there are the common law misdemeanours of false imprisonment and kidnapping. False imprisonment is committed where a person unlawfully and intentionally or recklessly restrains the freedom of movement of another from a particular place. Kidnapping is the stealing and carrying away, or secreting of another by force or fraud against that person's will without lawful excuse.[3] Kidnapping where the object is a child was considered by the former Supreme Court in The People (Attorney General) v Edge.[4] There, a boy of 14½ was taken away from his school by the accused without the consent of the headmaster or his parents. As the boy, being of sufficient age and intelligence to give a real consent, had agreed to go, it was held by the Supreme Court, Murnaghan, J. dissenting, that no offence had been committed. However, it is clear from the judgments that if the boy had been below the age of discretion, namely 14 years, he would have been regarded as incapable of giving consent and the crime of false imprisonment would have been committed.[5] In a recent English case the House of Lords decided that a parent could be convicted

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[3] The People (Attorney General) v Edge [1943] I.R. 115; R. v D. [1984] 3 W.L.R. 186.

[4] [1943] I.R. 115.

[5] See Ibid., at pp. 138, 148, 164.

of kidnapping his own child.[6] In the particular case the father had acted in contravention of a court order restricting his parental rights and the child was too young to give consent. However, the majority in the House of Lords indicated their view that the offence might be committed even where there was no court order.

It is not within the scope of this Report to consider whether the law relating to the abduction of children or kidnapping or false imprisonment generally should be amended. What must be decided is whether special provision needs to be made for the removal of children out of the jurisdiction. This was attempted in Great Britain in the Child Abduction Act 1984, which also included a provision similar to section 56 of the Offences against the Person Act 1861 dealing with abduction generally and applicable to children under sixteen. Because abduction by strangers was covered by this latter provision the offence of abduction out of the United Kingdom was restricted to abduction by a parent, guardian or person having custody. The relevant section, section 1, reads:

> "(1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.
>
> (2) A person is connected with a child for the purposes of this section if -
>
> (a) he is a parent or guardian of the child; or
>
> (b) there is in force an order of a court in England or Wales awarding custody of the child to him, whether solely or jointly with any other person; or
>
> (c) in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child.
>
> (3) In this section "the appropriate consent", in relation to a child, means -

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[6] R. v D. [1984] 3 W.L.R. 186.

(a) the consent of each person -

(i) who is a parent or guardian of the child; or

(ii) to whom custody of the child has been awarded (whether solely or jointly with any other person) by an order of a court in England or Wales; or

(b) if the child is the subject of such a custody order, the leave of the court which made the order; or

(c) the leave of the court granted on an application for a direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

(4) ....

(5) A person does not commit an offence under this section by doing anything without the consent of another person whose consent is required under the foregoing provisions if -

(a) he does it in the belief that the other person -

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

(c) the other person has unreasonably refused to consent,

but paragraph (c) of this subsection does not apply where what is done relates to a child who is the subject of a custody order made by a court in England or Wales, or where the person who does it acts in breach of any direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

(6) Where, in proceedings for an offence under this section, there is sufficient evidence to raise an issue as to the application of subsection (5) above, it shall be for the prosecution to prove that that subsection does not apply.

(7) In this section -

(a) "guardian" means a person appointed by deed or will or by order of a court of competent jurisdiction to be the guardian of a child; and

(b) a reference to a custody order or an order awarding custody includes a reference to an order

awarding legal custody and a reference to an order awarding care and control.

(8) This section shall have effect subject to the provisions of the Schedule to this Act in relation to a child who is in the care of a local authority or voluntary organisation or who is committed to a place of safety or who is the subject of custodianship proceedings or proceedings for an order relating to adoption."

The effect of a later section of the Act is that a parent who employs someone else to take the child is as guilty as if he had taken the child himself.

The advantage of legislation along these lines is that, as regards the abduction of children out of the jurisdiction by a parent, it would remove the uncertainty surrounding the law pending a decision of the Irish courts as to how far they will follow the formulation of the crime of kidnapping by the House of Lords in R. v D. It would, moreover, provide a more precise definition for such cases than is contained in the speeches in the House of Lords in that case. In so far as it extends the area of criminal responsibility for the abduction of children out of the jurisdiction it would act as a deterrent and a member of the Garda Siochana could be empowered to arrest without warrant those perpetrating the abduction. If the abductor escapes from the country, the fact that he has committed a crime may result in his being extradited back to Ireland.

A disadvantage of making abduction out of the country a crime is that it may put an unnecessary barrier in the way of a parent who removes a child wrongfully but is later minded to return it. However, it would be possible to guard against this contingency by making provision that no prosecution should be brought without the consent of the person in breach of whose custody rights the child was abducted out of the jurisdiction.

In defining the offence of abduction out of the jurisdiction it is difficult to arrive at a satisfactory formulation to cover cases where there has been no court order. It would put too great an onus on a person having care of a child (including a parent) to require that person, under pain of serious breach of the criminal law, to get the approval of all the guardians of the child every time it is taken out of the jurisdiction. This could cause serious inconvenience for those living in border areas. To meet this difficulty, a provision was inserted in the British Child Abudction Act 1984 that no offence was committed by a person who believed that the requisite consent would have been forthcoming if the person who had to give it was aware of the relevant circumstances. Whether such a belief should suffice where the person taking the child out of the jurisdiction could easily have communicated with the persons whose consent was necessary and did not do so is questionable. The British legislation would also permit a person who is unable to communicate with the parents to take their child out of the jurisdiction even if he knows that the parents would object on reasonable grounds. The defence that the person whose consent is required "has unreasonably refused to consent" in the British Child Abduction Act 1984 introduces a test which it is felt is too imprecise for a serious crime. It might also be noted that the age limit of sixteen was adopted in that legislation despite the fact that the Criminal Law Revision Committee had recommended an upper age limit of fourteen for abduction without parental consent on the ground that parental control after that age may be difficult or non-existent.[7]

The Commission believes that the offence of abducting a child out of the jurisdiction should apply where the child abducted is under sixteen. It believes that it is important to

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[7] Criminal Law Revision Committee, Fourteenth Report, (Offences against the Person (March 1984), para. 239).

formulate a precise definition of the offence which, at the same time, does not place unrealistic restrictions on those having charge of children. In the case of parents, guardians or others having custody of a child, the offence should not be committed unless there is an intention to deprive others having guardianship or custody rights in relation to the child of those rights. The Commission is also of opinion that the proposed offence should cover cases where a person decides to keep a child out of the jurisdiction in defiance of a court order or without the approval of its guardians. The offence should be confined to children habitually resident in the State as it is doubtful if we should be concerned to secure the presence in the State of those not so habitually resident.

Accordingly the Commission recommends the creation of an offence of abduction of a child under sixteen out of the jurisdiction. This offence would be committed by anyone who takes or sends or keeps a child (being a child habitually resident in the State) out of the State in defiance of a court order or without the consent of each person who is a parent or guardian or to whom custody has been granted unless the leave of the court is obtained; it should be a defence that the accused (i) honestly believed the child was over sixteen; (ii) obtained the consent of the requisite persons or of the court; (iii) has been unable to communicate with the requisite persons, having taken all reasonable steps, but believes that they would all consent if they were aware of all the relevant circumstances; or (iv) being a parent, guardian or person having custody of the child had no intention to deprive others having rights of guardianship or custody in relation to the child of those rights; it should be provided that no prosecution should be brought without the consent of the person in breach of whose rights in relation to the child that child was abducted out of the jurisdiction.

Section 40 of the Adoption Act 1952 serves little useful purpose

in its present form as the removal of a child under seven out of the jurisdiction without the approval of a parent or guardian of the child is covered by section 56 of the Offences against the Person Act 1861. It is a matter for consideration whether some measure should be enacted to replace the sub-section declared unconstitutional so as to prevent the traffic of young children out of the country for adoption even in cases where there is parental consent. As a result of the decision of Finlay, P. in The State (M) v The Attorney General, there is nothing to prevent a young child being taken out of the jurisdiction with the consent of a parent, guardian or relative unless the Minister for Foreign Affairs, upon being asked for a passport, brings wardship proceedings before the court with a view to a declaration that it is not in the child's interest to leave the jurisdiction. It does not appear that the Department of Foreign Affairs monitors applications for passport facilities for children so as to enable it to assess whether the child's interests are likely to be well served by leaving the country. Moreover, it is possible to travel to certain countries, notably the United Kingdom, without a passport. In The State (M) v The Attorney General Finlay, P. seemed to accept that a prohibition on the removal of illegitimate children under one year out of the jurisdiction would be constitutional if coupled with a discretion vested in a court to permit such removal in cases where it is in the interests of the child.

On the basis that it is still desired to prevent the removal of Irish children for adoption abroad, the Commission recommends that section 40 of the Adoption Act 1952 should be repealed and a provision enacted in its place prohibiting the removal of a child under one year of age out of the State unless the removal is made with the approval of the parents or guardians for the purpose of residing with a parent or relative outside the State or unless the removal is approved by the Court on the ground that it would be in the best interests of the child.

2. Civil Remedies for Child Abduction

Where it is apprehended that a child may be removed from the jurisdiction in violation of existing custody or guardianship rights, application may be made to the High Court or the Circuit Court for an injunction prohibiting the taking of the child out of the jurisdiction. Any person in breach of this injunction may be committed to prison for contempt of court. Also any person who, with knowledge of the injunction, assists in its breach is guilty of contempt.[8] The shortcoming in this procedure is the fact that the Garda Siochana have no power to enforce the injunction. While they may arrest a person who has been committed for contempt of court, the person abducting the child is likely to have fled the jurisdiction with the child before the committal order is obtained. While a copy of the injunction may be served on travel companies, they can be made liable in contempt only if their officers who issue the ticket are aware of the order and recognise the child. They are under no legal obligation to investigate the identity of persons to or for whom they issue travel tickets.

Another, but apparently less used, procedure is to apply to have the child made a ward of court.[9] A child becomes a ward of court as from the making of the wardship application. To take it out of the country thereafter without the permission of the court is a contempt of court. However, an application must be made to the court to commit a person for contempt of court before a Garda may arrest that person. By that time the child may have been taken out of the jurisdiction.

Another possibility is to apply for an order of habeas corpus This is governed by Article 40.4.2 of the Constitution of

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[8] Seaward v Paterson [1897] 1 Ch. 545.

[9] Shatter, Family Law in the Republic of Ireland (2nd ed. 1981) p. 243.

Ireland which provides:

> "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

The procedure of a habeas corpus application is that the party complaining that the child is illegally in the custody of another applies ex parte for and as a rule automatically gets a conditional order directed to the person having physical custody and calling on that person to appear and justify the detention. On that appearance the lawfulness of the custody will be determined; if the child is under fourteen an order may be made to deliver it to the applicant. If the person to whom the order is directed fails to appear in response to the conditional order or fails to comply with a further order, the court may order his arrest and this will be carried out by a member of the Garda Siochana. This procedure shares with the interim injunction and ward of court procedures the disadvantage that the Garda Siochana have no function until the person with custody of the child fails to obey the order of the court which must then make an order for arrest. By that time the child may have been removed from the jurisdiction.

To overcome this difficulty it is recommended that legislation should be enacted conferring on members of the Garda Siochana a power to detain a ward of court or other child whom they reasonably suspect is being removed from the jurisdiction in breach of an order of a court.

3. The Right to a Passport

The law relating to the grant of passports is worthy of consideration in this context. At present passports are required for travel to almost all countries, although not to the United Kingdom. This is a requirement of the receiving country so it could be argued that the denial of a passport does not deprive a citizen of the right to leave this country. However, this is not the reality of the matter and in The State (M) v The Attorney General the High Court treated the denial of a passport as a prohibition of travel abroad. In the course of his judgment Finlay, P. examined the status of the right to travel as a constitutional right:

> "Without entering into and enforcing binding agreements with other sovereign States, the State can neither by its laws nor by the acts of its Executive guarantee its citizens freedom of movement outside the State as a personal right. It does not seem to me that the Constitution can or should be construed as imposing upon the State in any event or upon any terms an obligation to enter into or enforce such agreements.
>
> However, where such agreements already exist in terms, and subject to conditions, acceptable to the State, it appears to me that the citizens of the State may have a right (arising from the Christian and democratic nature of the State - though not enumerated in the Constitution) to avail of such facilities without arbitrary or unjustified interference by the State. To put the matter more simply and more bluntly, it appears to me that, subject to the obvious conditions which may be required by public order and the common good of the State, a citizen has the right to a passport permitting him or her to avail of such facilities as international agreements existing at any given time afford to the holder of such a passport. To that right there are obvious and justified restrictions, the most common of which being the existence of some undischarged obligation to the State by the person seeking a passport or seeking to use his passport - such as the fact that he has entered into a recognisance to appear before a criminal court for the trial of an offence. Such a right to travel, which is inextricably intertwined with the right to obtain a passport, has been recognised by the constitutional law of the United States of America in such cases as Kent v Dulles. Furthermore, one of the

> hallmarks which is commonly accepted as dividing States which are categorised as authoritarian from those which are categorised as free and democratic is the inability of the citizens of, or residents in, the former to travel outside their country except at what is usually considered to be the whim of the executive powers. Therefore, I have no doubt that a right to travel outside the State in the limited form in which I have already defined it (that is to say, a right to avail of such facilities as apply to the holder of an Irish passport at any given time) is a personal right of each citizen which, on the authority of the decisions to which I have referred, must be considered as being subject to the guarantees provided by Article 40 although not enumerated.
>
> In the instant case, where I am dealing with a child who is under the age of one year and is, therefore, under the age of reason, such a personal right must be construed, in my view, in the same way as the Courts have consistently construed the right of liberty of such a child, that is to say, as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the Courts by appropriate proceedings to deny that choice in the dominant interest of the welfare of the child."[10]

The other reported case where the right to a passport was examined was Cosgrove v Ireland and Ors.[11] Here the Department of Foreign Affairs issued passports to two infant children at the request of their mother although it was notified by the father that he objected. It was held by McWilliam, J. in the High Court that the rights of the father as joint guardian of the children under the Guardianship of Infants Act 1964 had been infringed by the Department:

> "Here the Passport Office was notified by the Plaintiff that he was objecting to the issue of the passports after forms had been issued which the Plaintiff had failed to sign. Under these circumstances the Department was put on notice that the Plaintiff was exercising his right as joint guardian under the Guardianship of Infants Act 1964.

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[10] [1979] I.R. 73 at pp. 80-81.

[11] [1982] I.L.R.M. 48.

> I am of opinion that the passports should not have been issued without an application to the Court being made by the wife and that this should have been told to the wife.[12]

These cases leave some questions unanswered. While the traditional view that the Minister for Foreign Affairs has an absolute discretion to grant or to refuse a passport cannot now be supported, it is not clear what limits exist to the discretion of the Minister in the matter. If an application is made on behalf of a young child by its guardians it would appear that he is entitled to be granted a passport unless the Minister for Foreign Affairs gets a declaration from a court that it would not be in the child's interest or unless it is otherwise contrary to public order or the common good to grant the passport. The right of the Minister to refuse a passport on grounds related to public order or the common good has not been explored beyond a passing reference by Finlay, P. in The State (M) v The Attorney General. As a result, it is unsettled when the Minister may refuse an application for a passport on such grounds. As no law prohibits the grant of a passport it may not be possible for an unsuccessful applicant to rely on Article 40.3.1. As was stated on behalf of the majority of the Supreme Court in Crowley v Ireland:[13]

> "The obligation imposed on the State by both sub-sections of Article 40.3 is as far as practicable by its laws to defend and vindicate the personal rights of the citizen. It is not a general obligation to defend and vindicate the personal rights of the citizen. It is a duty to do so by its laws, for it is through laws and by-laws that the State expresses the will of the People who are the ultimate authority."[14]

Whatever the position under the Constitution it is clear that

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[12] [1982] ILRM 48 at p. 52.

[13] [1980] I.R. 102.

[14] [1980] I.R. 102 at p. 130.

statutory authority will be required for a ministerial decision to refuse a passport if Ireland is not to find itself in breach of Protocol No. 4 to the European Convention on Human Rights, Article 2 of which provides:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Decisions of the European Court of Human Rights on comparable provisions in the Convention have made clear that the law envisaged is statute law which should set out with reasonable clarity the criteria to be applied in exercising the relevant discretion conferred on public authorities.[15] Accordingly the Commission recommends that legislation compatible with Protocol No. 4 should be enacted stating the grounds upon which the Minister for Foreign Affairs may refuse to issue a passport to an applicant.

In Cosgrove v Ireland, as noted, a restriction on the duty or power of the Minister to issue a passport to a child in defiance of the wishes of a parent was held to arise from the fact that the parent was joint guardian of the child under the

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[15] See the judgment of the European Court of Human Rights in the Malone Case (2 August 1984) and the cases cited therein. In that case the legality of interception of telephone communications was held "not in accordance with law" because "the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities."

Guardianship of Infants Act 1964. This restriction is subject to section 10 of that Act which provides:

> "Every person being guardian of an infant may apply to the Court for its direction on any question affecting the welfare of the infant and the Court may make such order as it thinks proper."

It was stated in the judgment that the practice of the Department of Foreign Affairs was to require the consent of both parents for the issue of passports to children under the age of sixteen years.[16] Commenting on this McWilliam, J. said:

> "This is a very prudent practice to adopt, but there is no statutory provision requiring it, and I am not satisfied that there is any duty imposed on the State or the Department by the Constitution or otherwise to take any particular steps to protect rights which they have no reason to suppose are being infringed. That, however, is not the case here, and this point may be argued on another occasion."[17]

Meanwhile those responsible for the issue of passports have to operate in a legal vacuum in those situations where one parent has neither consented nor objected to the issue of a passport. If they issue a passport, they may be held to have infringed the non-consenting parent's guardianship rights; if they refuse a passport they may, on the reasoning of Finlay, P. in The State (M) v The Attorney General, be held to have infringed the child's constitutional right to travel and be made liable

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[16] It is understood that this consent is, in fact, required for all minors.

[17] [1982] ILRM 48 at p. 52.

in damages.[18] If the current practice were translated into law and the written consent of both parents required, much inconvenience would result in cases where one parent is not readily available. This may happen because of temporary absence or because a family has broken up. It is considered that it would be excessive to require an application to be made to the court under the Guardianship of Infants Act 1964 in every such case. This requirement would not even have the virtue of ensuring that minors never left the jurisdiction without the consent of both parents as it is not practicable to recall a passport once issued and it is possible to travel to the United Kingdom without a passport. Accordingly the Commission recommends that any legislation restricting the right to a passport should provide that a minor may obtain a

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[18] Cf. Dail Debates vol. 342 col. 1920 (24 May 1983):

> Mr Shatter asked the Minister for Foreign Affairs the conditions imposed in respect of the issue of a child's passport to its foster parents; and whether it is his intention to introduce any changes in these procedures.
>
> Minister for Foreign Affairs (Mr P. Barry): My Department always seek the consent of any legal guardian of a minor before issuing a passport. Where the Department are aware that a child, although not yet adopted, is in foster care, they also seek the consent of the body concerned with such placement, for example, a health board, adoption board or recognised adoption agency.
>
> As the purpose of this procedure is essentially to comply with family law (including the Guardianship of Infants Act, the Adoption Acts and the Children Acts) and of the relevant provisions of the Constitution, it is not proposed to change it. There may be exceptional cases where the Department can give sympathetic consideration to dispensing with one of these consents. After careful scrutiny of the facts of recent constitutional case-law in this area - and the existence or otherwise of a Fit Person Order under the Children Act - the Department may be able to conclude that a passport may issue without infringement of the legal rights of an individual.
>
> The question of the term of the passport and of the person or body to whom it is handed depends on the circumstances of the case in the light of the above circumstances.

passport on the application of any of its legal guardisns but no such passport should be issued upon such application without the approval of the court where any other legal guardian objects. To copper-fasten the situation, it should be provided that a passport may not be issued upon such application without the consent of all the legal guardians of a minor unless the other guardians have been notified or all reasonable efforts have been made to notify them. It would be a sound practice to limit the duration of passports to one year in such cases.

The position of older children in regard to the issue of passports merits special consideration. At Irish law, a person attains majority on his or her eighteenth birthday or the date of marriage where a person marries under eighteen.[19] Children who have not attained their majority are minors and remain under the guardianship of their parents or other guardians. A guardian has a general right to take decisions affecting the child's welfare, such as schooling and religion. One aspect of guardianship is a right to physical care and control, known as the right to custody. How far these rights affect third parties having dealings with a minor is not fully worked out in the law. A child may not marry without the consent of his guardians. A person who induces a minor to leave home may be guilty of the tort of enticement of a child.[20] Any minor may be made a ward of court in which case he may not leave the jurisdiction without the leave of the President of the High Court; presumably it would be a contempt of court to assist him to do so. In England it has been stated judicially that one facet of the right to custody is the right to refuse

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[19] Age of Majority Act, 1985, section 2.

[20] See Lough v Ward [1945] 2 All E.R. 338; Law Reform Commission Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child.

consent to the issue of a passport.[21] From these factors it might be deduced that a passport ought not to be issued to any minor without the consent of his legal guardians. An aggrieved minor can have himself made a ward of court if he can persuade any adult to make the requisite application to the President of the High Court.[22] In this way his constitutional right to travel would be protected by being able to apply to the President of the High Court for permission to obtain a passport where this is conducive to his welfare.

The Commission is of the opinion that the requirement of parental consent for the issue of a passport to a minor who has passed the age of discretion does not respect his right to an existence independent of his parents. In its Report on Domicile and Habitual Residence (LRC 7-1983) the recommendation that a child should be presumed to have the habitual residence of its parents was limited to children under sixteen. Accordingly the Commission recommends that a minor over sixteen should be entitled to apply for a passport without the consent of its parents or guardians. In order to enable the legal guardian to object, it should be provided that no such passport shall be issued until the legal guardians and persons having lawful custody of the minor have been notified or all reasonable efforts have been made to notify them.

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[21] Hewer v Bryant [1970] 1 Q.B. 357 at p. 373.

[22] Lowe and White, Wards of Court, p. 38. See also Rules of the Superior Courts, 1962, Order 15, rule 16; Order 65; Order 66, rule 9.

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

1. Ireland should sign and ratify the Convention on the Civil Aspects of International Child Abduction subject to the reservation provided for in Article 24 objecting to the use of French in any application, communication or other document sent to the Irish Central Authority: pp. 22, 23, 29.

2. Before Ireland becomes party to the Convention legislation should be enacted giving the force of law to the Convention in Ireland; [pp. 20, 26, 27, 28, 29]. Such legislation should also contain provisions

   (a) providing for the designation of a Central Authority in accordance with Article 6 of the Convention: pp. 26, 27, 29;

   (b) naming the High Court as the judicial or administrative authority of Ireland for the purposes of the Convention: pp. 14, 29;

   (c) making a certificate purporting to be under the seal of the Minister for Foreign Affairs evidence of the fact that a State is party to the Convention and of any declarations or reservations made by a State party to the Convention: p. 29;

   (d) empowering the Government or a designated Minister to make such orders as appears to him necessary or expedient for carrying out the Convention or for giving effect to any of the provisions thereof: pp. 29-30.

3. The legislation should state that nothing in it shall prevent a child from being returned to another State merely because that return is not required by the

Convention. It should also provide that in deciding on applications for the return of children to another jurisdiction in cases where that return is not required by the Convention, the court shall have regard to the welfare of the child as the first and paramount consideration: p. 30.

4. The Department of Justice should continue its consideration of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children with a view to its ratification by Ireland but this process should not be allowed to delay adherence to the Convention on the Civil Aspects of International Child Abduction and the introduction of the legislation recommended in this Report: p. 35.

5 The legislation should also contain provision for an offence of abduction of a child under sixteen out of the jurisdiction. This offence would be committed by anyone who takes or sends or keeps a child (being a child habitually resident in the State) out of the State in defiance of a court order or without the consent of each person who is a parent or guardian or to whom custody has been granted unless the leave of the court is obtained. It should be a defence that the accused either

(i) honestly believed the child was over sixteen; or

(ii) obtained the consent of the requisite persons or of the court; or

(iii) has been unable to communicate with the requisite persons, having taken all reasonable steps, but believes that they would all consent if they were aware of all the relevant circumstances; or

(iv) being a parent, guardian or person having custody of the child had no intention to deprive others having rights of guardianship or custody in relation to that child of those rights.

No prosecutions should be brought without the consent of the person in breach of whose rights in relation to the child that child was abducted out of the jurisdiction: p. 44.

6. Section 40 of the Adoption Act 1952 should be repealed and a provision enacted in its place prohibiting the removal of a child under one year of age out of the State unless the removal is made with the approval of the parents or guardians for the purpose of residing with a parent or relative outside the State or unless the removal is approved by the court on the ground that it would be in the best interests of the child: p. 45.

7. Legislation should be enacted conferring on members of the Garda Siochana a power to detain a ward of court or other child whom they reasonably suspect is being removed from the jurisdiction in breach of a court order: p. 47.

8. Legislation should be enacted compatible with Protocol No. 4 to the European Convention on Human Rights stating the grounds on which the Minister for Foreign Affairs may refuse to issue a passport to an applicant. Such legislation should provide that a minor may obtain a passport on the application of any of its legal guardians but no such passport should be issued upon such application without the approval of the court where any other legal guardian objects. It should also be provided that a passport may not be issued upon such application without the consent of all the legal guardians of a minor unless

the other guardians have been notified or all reasonable efforts have been made to notify them. The duration of such passports should be limited to one year: pp. 51-54.

9. A child over sixteen who has not attained its majority should be entitled to apply for a passport without the consent of its parents or guardians. It should be provided that no such passport shall be issued until the legal guardians and persons having lawful custody of the minor have been notified or all reasonable efforts have been made to notify them: p. 55.

APPENDIX CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are:

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have

been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention:

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II - CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of a Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V - GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the

scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph

resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information

appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40 the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI - FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instruments of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an

accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Auch declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State

which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following:-

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session and to each other State having participated in the preparation of this Convention at this Session.