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**Good Practice Report on Access Under the
Hague Convention of 25 October 1980 on the
Civil Aspects of International Child Abduction**



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a report by

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Executive Summary

I. Introduction

The U.S.-based National Center for Missing & Exploited Children funded this research into good practice in handling access applications under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter ‘1980 Hague Convention’). This report draws from previous investigations into the procedures and systems in 13 Contracting States to the 1980 Hague Convention — Australia, Canada, France, Germany, Ireland, Israel, Italy, Mexico, the Netherlands, New Zealand, Spain, the United Kingdom and the United States of America — and also from additional reports specifically on enforcement in the following 8 Contracting States: Australia, England and Wales, France, Germany, the Netherlands, Romania, Slovakia and Sweden. We also have regard to the Report on Trans-frontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter ‘the Duncan Report’)¹ and to selected individual Contracting States’ responses to the Questionnaire on the Enforcement of Return Orders under the 1980 Hague Convention and of Access/Contact Orders issued by the Permanent Bureau of the Hague Conference on Private International Law (hereafter ‘Permanent Bureau’). This report aims to make suggestions for reform to improve the practice of handling access applications in Contracting States.

II. General Principles

1. **Communication** — There is a need for clear and effective communication between Central Authorities,² especially in individual cases.
2. **Co-operation** — Pursuant to the requirement of co-operation under Article 7, Central Authorities should meet to exchange ideas about good practices.
3. **Transparency** — Contracting States should make available information on their legal and administrative procedures, which should easily be accessible to Central Authorities as well as to the parties to the legal proceedings.
4. **Speed (Expeditious Procedures)** — Since lengthy discontinuity of contact may result in a child’s disaffection for the non-custodial parent, there is a pressing need to resolve contact disputes quickly.

III. Central Authorities’ Obligations

Article 7(f) should be revised to make it clear that, where appropriate, Central Authorities should be obligated to institute proceedings, either themselves or through an authorised intermediary, to secure rights of access before a judicial or administrative authority.

IV. Article 21

Ideally, Article 21 should be reformed to make it clear that:

1. The obligation to secure rights of access lies with the courts as well as with the Central Authorities.
2. ‘Rights of custody’ should be understood to include ‘rights of access’.
3. Applicants with open-ended rights of access should be able to use Article 21 to establish and secure defined access.

In any event, where an access application is dealt with under domestic law, it is recommended that:

- 1 Final Report, Preliminary Document No. 5 of July 2002 for the Special Commission of September/October 2002. This report was presented to the Special Commission of the Hague Conference on Private International Law held in September/October 2002 in which the author reviewed the position of access under the 1980 Hague Convention throughout the Contracting States.
- 2 Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice, p. 11 (hereafter ‘Central Authority Guide to Good Practice’).

- Where there is concentrated jurisdiction for hearing 1980 Hague Convention cases, access applications should also be handled by these courts.
- Where there is no concentrated jurisdiction in the Contracting State, access applications should be handled by a court familiar with the 1980 Hague Convention, which will better be able to deal with family law cases with a foreign element.
- Access applications should be handled expeditiously and prioritised over domestic cases.

Where access is dealt with as a 1980 Hague Convention application:

- The applicant should be able to benefit from generous provision of legal aid.
- Court hearings should be kept to a minimum as costs involved in proceedings with a foreign element are considerable especially for the respondent, who may have to travel long distances to attend hearings.
- The access application should be handled expeditiously, meaning between three and six months.

V. Initial Processing of Applications

- Applications should be processed with maximum speed.
- Central Authorities should reply promptly to all communications and should rapidly acknowledge receipt of an application.
- Central Authorities should use model forms to assist them to process applications more quickly.³
- Where relevant, copies of the domestic access legislation of the requesting Contracting State should be provided. Where appropriate this legislation should be translated into the language of the requested Contracting State.
- Agreed solutions to access disputes should be encouraged through mechanisms such as mediation. The negotiations should be time-limited (one month) to prevent the respondent from prolonging the proceedings.

VI. Judicial Processing of Applications

- Contracting States should use the most expeditious court procedures available.
- Central Authorities should have a monitoring system to track the speed and outcome of each case.
- A limited number of suitably trained legal practitioners should be involved in handling 1980 Hague Convention access cases in order that expertise can develop. Central Authorities should maintain a list of such lawyers.
- Judges at both trial and appellate levels should firmly manage the progress of access proceedings.
- Where desirable (e.g. where there is a significant geographical distance between the requesting and the requested Contracting States and/or where the parties have limited financial resources), the possibility of access by telephone or E-mail should also be considered.
- Where the child's safety is concerned, the court should have discretion to order preventive measures such as supervised access or surrender of the passport of the child and the respondent.
- Where the safety of the child is not an issue and it appears to be practicable, the court should have discretion to allow contact to be exercised abroad.
- Where possible, legal advice and representation should be free to applicants and, in any event, no court fee should be charged.

³ Ibid at 19.

- In the absence of a legal aid system, the Contracting State should establish a network of lawyers willing to offer free or reduced fee representation and advice to applicants and respondents.
- Courts at trial, appellate and, if different, at enforcement levels should set and adhere to timetables that ensure the speedy determination of access applications.
- National systems should ensure that appeals cannot be used to delay enforcement of access orders.
- Contracting States should have an effective mechanism for the expeditious enforcement of access orders.
- The use of physical force against the child to enforce an access order should be avoided where possible. Instead, initial recourse should normally be had to more sensitive techniques such as psychological counselling for the child before the exercise of access rights.
- Counselling services both for the child and the respondent should be available to overcome, where possible, disputes over access.
- Courts should be empowered, especially in the case of older children, to ask for a report by a child psychologist/counsellor, so that the judge can properly consider the child's wishes and feelings.

1. The Meaning of Access

The 1989 United Nations Convention on the Rights of the Child guarantees the right of the child to maintain contact with both parents. Article 9(3) provides:

“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”.

The counterpart of the right of the child separated from one parent to keep in contact with him/her is the rights of access vested in the non-custodial parent. The 1980 Hague Convention defines ‘rights of access’ as “the right to take a child for a limited period of time to a place other than the child’s habitual residence”.⁴ Rights of access include the right of a non-custodial parent to maintain communication with the child regardless of the wishes of the other parent. The communication usually takes the form of physical contact with the child either in the requesting Contracting State or the requested Contracting State. The frequency and duration of the meetings vary depending on individual arrangements (e.g. once a week, once a month, for a holiday period, etc.). The communication is, however, not limited to physical contact. It may take other forms (e.g. contact via telephone, video telephone, E-mail or text messages).

4 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Article 5.

2. Background to the Issues

Because of the uncertain language of the 1980 Hague Convention, there are unacceptably wide divergences in Contracting State practices in the context of rights of access. The problems with the 1980 Hague Convention have been summarised by the Duncan Report⁵ as falling within the following broad areas:

1. The failure to have uniform rules determining the jurisdiction of authorities to make or modify contact orders or adequate provisions for the recognition and enforcement of foreign access orders.
2. The absence of agreement amongst Contracting States on the nature and level of the support which should be made available to persons seeking to secure access rights in a foreign country. This refers *inter alia* to information and advice, including legal advice, assistance in gaining access to the legal system, facilities to promote agreed outcomes and the physical or financial support, which are sometimes necessary to enable access which has been agreed or has been ordered to take place.
3. The operation in some Contracting States of procedures, both at the pre-trial and enforcement stages, which are not sufficiently sensitive to the special features and needs of international cases, and which are the cause of unnecessary delays and expense.
4. An inadequate level of international co-operation at both the administrative and judicial levels. Given the uncertainty of the substantive law one may well question how the 1980 Hague Convention works in practice.

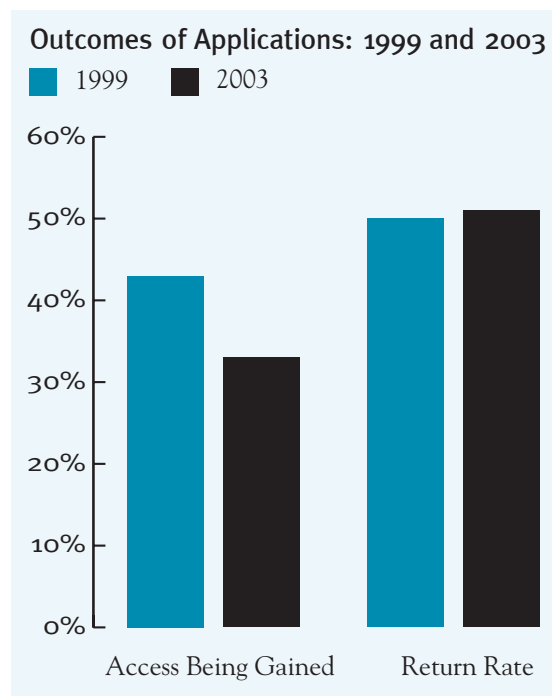
2.1. Proportion of Access Applications

The 1999 Statistical Survey⁶ and the 2003 Statistical Survey,⁷ both of which were undertaken by Cardiff Law School's Centre for International Family Law Studies in co-operation with the Permanent Bureau, show that only a small proportion of the applications made under the 1980 Hague Convention are for access. Indeed, in 1999 the proportion of access applications to return applications was 17% to 83% and in 2003 this proportion was even smaller, 16% to 84%. It was estimated that in 1999, globally a maximum of 220 applications for access were made under the 1980 Hague Convention. In 2003 it was estimated that there were up to 250 applications. Considering these figures, one may well agree that "the protection of access is the secondary objective of the 1980 Hague Convention".⁸ However, it must also be borne in mind that some return applications are really about gaining access and, indeed, according to the 2003 Statistical Survey, 3% of return applications resulted in access being agreed or judicially granted.

2.2. Outcomes of Access Applications

As Chart 1 shows, in 1999, 43% of access applications ended in access being gained as a result of a voluntary agreement or a court order. This compares with 50% of return applications resulting in a voluntary or judicial return. While these findings might suggest that access is working fairly well,

Chart 1



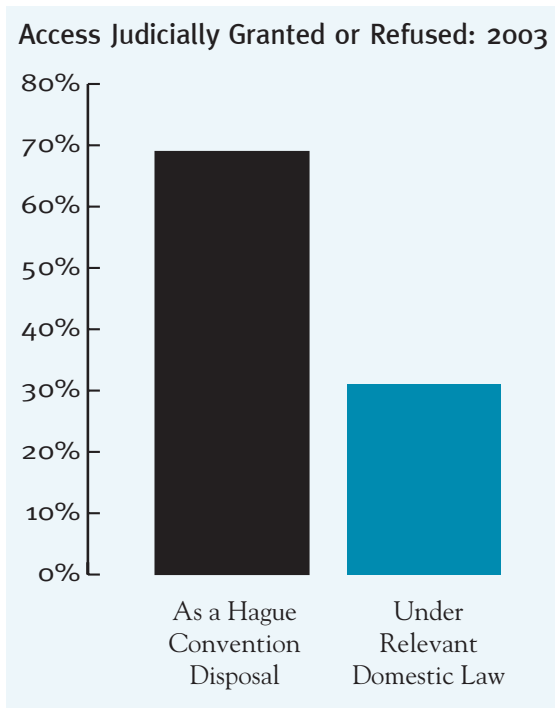
5 Op. cit., n 1.

6 Viz. Lowe, Armstrong and Mathias, "A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Preliminary Document No. 3 (Revised Version, November 2001), available at www.hcch.net.

7 Viz. Lowe, Atkinson, Horosova and Patterson, "A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Preliminary Document No. 3 (2006), available at www.hcch.net.

8 Lowe, "Regulating Cross-Border Access to Children", in *Perspektiven des Familienrechts – Festschrift für Dieter Schwab* (eds Hofer, Klippel and Walter, Gieseking 2005) 1153 at 1163.

Chart 2



the indicators in the 2003 survey are more disconcerting, with applicants gaining access, either voluntarily or by court order, in only 33% of applications as against 51% of return applications resulting in a voluntary or judicial return. In other words, the overall outcomes of access applications are getting worse.

One paradoxically interesting finding of the 1999 survey was that of the applications going to court, 74% ended with access being granted, which was the same proportion as for return applications. In the 2003 survey of the access applications determined by the courts, 87% ended with access being granted (though we cannot say whether there were any enforcement problems).

As Chart 2 illustrates, of the 55 final court orders⁹ recorded in the 2003 survey, 38 (69%) were determined as a 1980 Hague Convention disposal and 17 (31%) were determined under the relevant domestic law. This reflects the different interpretations of Article 21 (see further below).

2.3. Speed of Access Applications

As Chart 3 shows, the 1999 survey clearly demonstrated that access applications take considerably longer to resolve than return applications. 71% of access applications that were judicially determined took over 6 months to resolve¹⁰ as against 19% of return applications and 41% of access applications voluntarily settled took over 6 months to do so against 14% of return applications. The relative slowness of access applications is again highlighted by the 2003 survey with 66% of applications that were judicially determined and 71% of those voluntarily resolved taking over 6 months to do so compared respectively with only 33% and 14% of return applications. We also have some evidence that access applications take longer to resolve when determined by domestic law rather than under the 1980 Hague Convention (e.g. in 2003, in Austria, access applications which were dealt with under domestic law took on average 102 days whereas access applications which were determined under the 1980 Hague Convention were resolved in a mean average of 91 days).¹¹

2.4. Conclusions

- Only a small minority (16%) of applications are for access.
- A global maximum of approximately 250 access applications are made under the 1980 Hague Convention annually.
- Of these, less than 100 applications reach the courts.
- Of these, roughly two thirds are determined as a 1980 Hague Convention application and one third are resolved under relevant domestic law.
- Access applications take longer to resolve than return applications with generally over half of them taking longer than 6 months to resolve either judicially or voluntarily.

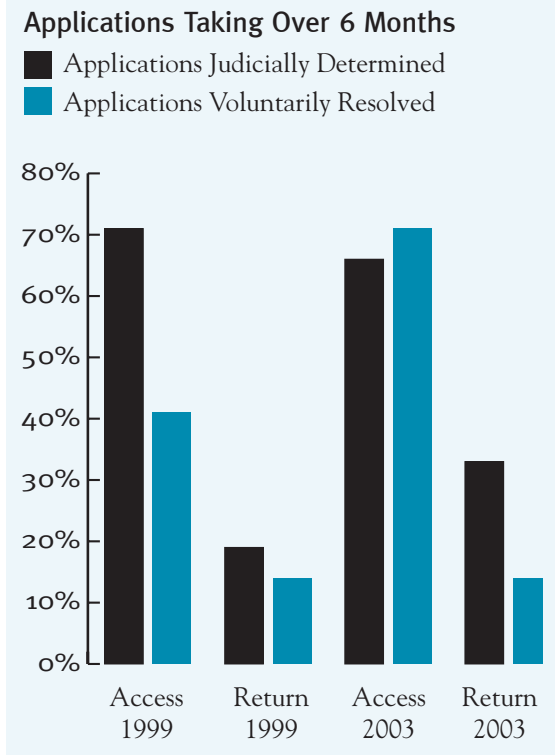


Chart 3

⁹ In a further five cases, access had been granted pending court hearing.

¹⁰ A further 13% of access applications were still pending at the cut-off date compared with 9% of return applications.

¹¹ However, this finding is not true in relation to Switzerland, where one access application which was dealt with under domestic law took 6 days to be resolved whereas access applications which were determined under the 1980 Hague Convention took on average 239 days.

3. General Principles

The key operating principles in the context of rights of access are communication, co-operation, transparency and speed.

3.1. Communication

Good communication can enhance co-operation. Therefore, there is a need for clear and effective communication between Central Authorities,¹² especially in individual cases. In this context, the ability to communicate with Central Authority personnel in their own language should not be underestimated as an aid to good co-operation.

3.2. Co-operation

Article 7 of the 1980 Hague Convention requires co-operation between Central Authorities to secure effective respect for rights of access. However, the 1980 Hague Convention is not clear about the forms and the extent of this co-operation. Therefore, to improve co-operation, meetings of Central Authorities to exchange ideas about good practices, international seminars and judicial conferences are highly recommended.¹³

3.3. Transparency

Information, support and services available to applicants differ broadly from State to State. Contracting States should, therefore, make available information on their legal and administrative procedures. This information should be easily accessible to the Central Authorities as well as to the parties to the legal proceedings. The best way to ensure unrestricted and easy access to the information is to publish it on the World Wide Web.

3.4. Speed (Expeditious Procedures)

Although speed is arguably less pressing for access than for return, lengthy discontinuity of contact may result in a child's disaffection with the non-custodial parent (applicant). There is, therefore, a pressing need to resolve contact disputes quickly.

¹² Op. cit., n. 2.

¹³ Ibid at 10.

4. Central Authorities' Obligations

Central Authorities are bound by the general obligations of co-operation to “promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject”.¹⁴ They are particularly enjoined “either directly or through any intermediary” to take steps “to initiate or facilitate the institution of judicial or administrative proceedings with a view to making arrangements for organising or securing the effective exercise of rights of access”.¹⁵

As can be seen, the extent of the obligations of Central Authorities is not stipulated and the 1980 Hague Convention, in particular Article 7(f), leaves a great deal of discretion to Contracting States. Consequently practices in this area vary widely.

Different views are taken on the extent of the Central Authority's obligation under Article 7 *inter alia* to initiate court proceedings. Perhaps the most restrictive view is taken in England and Wales, where it has been held¹⁶ that the Central Authority only has a duty to make appropriate arrangements to provide solicitors to act on the applicant's behalf and that it is not incumbent upon it to issue a court summons. Similar practice can be found in other common law jurisdictions such as Israel,¹⁷ the USA¹⁸ and most Canadian Provinces¹⁹, where the role of the Central Authority in access applications is only to provide information about legal representation. But this is by no means the universally held view even among common law countries. In Australia and New Zealand, for example, Central Authorities can and do institute access proceedings.²⁰ The approach of civil law systems is similarly varied with Central Authorities in Germany,²¹ Italy,²² Mexico,²³ the Netherlands,²⁴ Romania,²⁵ Slovakia²⁶ and Spain,²⁷ for example, initiating proceedings but with others, for example, France²⁸ and Sweden,²⁹ stopping short of this.

Recommendation of Good Practice:

Article 7(f) should be revised to make it clear that, where appropriate, Central Authorities should be obligated to institute proceedings, either themselves or through an authorised intermediary, to secure rights of access before a judicial or administrative authority.

Central authorities also have obligations under Article 21, which we discuss in a broader context in the next section.

¹⁴ Article 21(2).

¹⁵ Article 7(f).

¹⁶ See *Re T (Minors) (Hague Convention: Access)* [1993] 2 FLR 617. But in upholding the complaint made by Lady Meyer, the Parliamentary Commissioner criticised the English Child Abduction Unit for failing to advise her that it was open to her to make an Article 21 application to Germany. This ruling implies that the Central Authority has proactive duties under Article 7. See the Report by the Parliamentary Commissioner for Administration (the Ombudsman) to the Rt Hon Sir John Stanley MP of the results of an investigation into a complaint made by Lady Catherine Meyer (2005, C 280/04).

¹⁷ See Lowe and Schuz, “Country Report: Israel”, (NCMEC 2005) 4.1/4.2.

¹⁸ See Lowe, Armstrong and Mathias, “Country Report: United States”, (NCMEC 2002) 4.1.

¹⁹ See Lowe, Armstrong and Mathias, “Country Report: Canada”, (NCMEC 2002) 4.1. The only Canadian Province where the Central Authority assists in the institution of legal proceedings is New Brunswick.

²⁰ See respectively, Lowe, Armstrong and Mathias, “Country Report: Australia”, (NCMEC 2002) 4.1. (hereafter ‘Australia Country Report’) and Lowe and Hollingsworth, “Country Report: New Zealand”, (NCMEC 2005) 4.1 (hereafter ‘New Zealand Country Report’).

²¹ See Dutta and Scherpe, “The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Germany”.

²² See Lowe and Di Dachsenhausen, “Country Report: Italy”, (NCMEC 2005) 4.1/4.2.

²³ See Lowe, Armstrong and Mathias, “Country Report: Mexico”, (NCMEC 2002) 4.

²⁴ See Lowe and Ruitenbergh, “Country Report: Netherlands”, (NCMEC 2005) 4.2.

²⁵ See Ciurtin and Brasoveanu, “The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Romania”.

²⁶ See Horosova, “The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Slovakia”.

²⁷ See Lowe and Gonzales-Beilfuss, “Country Report: Spain”, (NCMEC 2005) 4.1/4.2.

²⁸ See Lowe, Armstrong, Mathias and Navarro, “Country Report: France”, (NCMEC 2002) 4.1/4.2.

²⁹ See Nilsson, “The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Sweden”.

5. Article 21

One of the key provisions governing access is Article 21 of the 1980 Hague Convention. This Article provides that:

“An application to make arrangements for organising 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 the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject”.

Whilst Article 21 provides a basic structure, its lack of precision and detail has, in practice, reduced its effectiveness and led to widely differing interpretations. In particular, there are no uniform views on the following questions:

1. Does Article 21 provide a basis for petitioning a court to secure access rights?
2. If it does provide a basis for legal proceedings, what are the limits and what procedures are available?
3. What substantive criteria should apply in resolving applications concerning access under Article 21 and should they be the same as in domestic access applications?

However, whether or not Article 21 provides the basis for court proceedings, it clearly does not give rise to any obligation to recognise in the strict sense, or to enforce, a foreign access order.

5.1. The Various Interpretations of Article 21

5.1.1. COMMON LAW JURISDICTIONS

(i) The Narrow Approach

a. *England and Wales*

In the leading case of *Re G (A Minor) (Enforcement of Access Abroad)*,³⁰ it was held that Article 21 confers no jurisdiction on the courts to determine matters relating to access or to recognise and enforce foreign access orders. Article 21 was seen to be directed not to the courts but to the Central Authority which may assist an applicant by introducing him/her to a lawyer. Applications for access then proceed under domestic law.

In *Hunter v Murrow (Abduction: Rights of Custody)*,³¹ Thorpe LJ signalled that the decision in *Re G* may have to be revisited. His reasoning was that the 1980 Hague Convention is a living instrument but, as revisions of the text are “simply impracticable...”, evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction”. He maintains that this is permissible by reason of Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969, allowing a construction that reflects “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. According to Thorpe LJ, in the 12 years since *Re G*, “the majority of the common law Contracting States have adopted a more positive position and thus one that extends the utility of the 1980 Hague Convention. Plainly, in my judgment, when the point returns

³⁰ [1993] Fam 216.

³¹ [2005] EWCA Civ 976, [2005] 2 FLR 1119 at paras [30 – 31].

for consideration to this court, it is open to the court to reconsider the issue in the light of international jurisprudence. Since the question is to be decided according to the 1980 Hague Convention law, this court is not eternally bound by the decision properly taken over 12 years ago reflecting international jurisprudence as it then was”.

However, it remains a matter of conjecture as to whether a future Court of Appeal would feel free of the *Re G* precedent in any event, though Thorpe LJ’s comments seem to have since been supported by Baroness Hale who, in *Re D (A Child) (Abduction: Rights to Custody)*,³² commented, after referring to *Hunter and Murrow*, that it would “not be beyond the wit of man to devise a procedure whereby the facilitation of rights of access in this country under Article 21 were in contemplation at the same time as the return of the child under Article 12”. But quite apart from the question of whether a common law court can, when interpreting Conventions, abandon previous decisions, Thorpe LJ’s assertion that the majority of common law jurisdictions interpret Article 21 as imposing duties on the court is questionable.

b. *Israel*

The approach taken by Israeli courts³³ is in line with case-law in England and Wales. It is established that Article 21 of the 1980 Hague Convention in combination with relevant provisions of the Israeli Civil Procedure Regulations affords the applicant procedural benefits in seeking to enforce a foreign access judgment, but they do not themselves provide any right to enforcement of the judgment. The application will, for example, benefit from the exemption from providing security for costs, the time deadlines and the relaxation of the rules for proving foreign law and recognising foreign judgments. However, as it has been pointed out,³⁴ the Israeli Civil Procedure Regulations do not contain any mechanism for making or enforcing access orders.

c. *United States of America*

In *Bromley v Bromley*,³⁵ a federal district court held that it had no jurisdiction under Article 21 to consider a claim for breach of access rights. Article 21 just provides for applications to be made to the Central Authority for assistance. The 1980 Hague Convention establishes no judicial remedy for breach of access. Similarly, in *Tejeiro Fernandez v Yeagar*,³⁶ it was held that Article 21 does not give the courts any independent authority to enforce rights of access in respect of children. This approach was followed in the *Cantor v. Cohen*³⁷ decision, in which a federal district court dismissed the applicant’s petition for the effective exercise of her rights of access, concluding that federal courts do not have jurisdiction to adjudicate such a claim because the 1980 Hague Convention “provides for no... recourse to judicial authority” for claims involving access rights. Under Article 21, the non-custodial parent’s only recourse for an alleged breach of access rights is to file an application with the Central Authority of the Contracting State in which the child is located.

d. *Ireland*

32 [2006] UKHL 51, [2006] 3 WLR 989 at para [67].

33 See *op. cit.*, n. 17. It is to be noted that 1980 Hague Convention access cases have reached Israeli courts only on a few occasions (Family Application 89790/00, M.R.B v A.R – not reported and Family Application 39216/97 A.B. v A.B. – not reported).

34 Family Application 39216/97 A.B. v A.B (not reported).

35 30 F Supp 2d 857 (ED Pa 1998), US District Ct for the Eastern District of Pennsylvania. Note: in the United States, 1980 Hague Convention cases can be heard either at the Federal or State level. But in this context, nothing turns on this point of parallel jurisdiction.

36 121 F Supp 2d 1118 (WD Mich 2000), US District Ct for the Western District of Michigan.

37 442 F.3d 196 (4th Cir. 2006).

Ireland, too, deals with access under its domestic legislation.³⁸

(ii) **The Midway Approach**

a. *New Zealand*

It was held in *Secretary for Justice v Sigg*,³⁹ that although the relevant legislation implementing the 1980 Hague Convention (then Section 20 of the Guardianship Amendment Act 1991, now Section 105 of the Care of Children Act 2004) which provides, in similar terms to Article 7(f) that the Central Authority “shall make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant’s rights of access”, did not of itself specify a right to apply to the court, there was nevertheless no provision which prevented a court application. Judge Bremner held that the Act must clearly remove the right of application for access to a court before it can be inferred that there is no such right. *Sigg* has since been followed by *Gumbrell v Jones*⁴⁰, which reiterated that the implementing legislation should be construed so as to authorise the Central Authority to apply for an access order either in its own name or that of the applicant.

b. *Scotland*

Article 21 can be used as the basis to petition the courts and expedited procedures apply. In light of *Donofrio v Burrell*⁴¹ and the amended Rule 70.5(2) of the Rules of the Court of Session, applications to enforce “rights of access granted by any court of a Contracting party to the 1980 Hague Convention” can be made to the court “under the Convention”. But as in England and Wales, it is accepted that Article 21 does not confer upon individuals private rights or remedies attributable to the 1980 Hague Convention nor does it place any obligation on the judicial authorities of the requested Contracting State.

(iii) **The Wide Approach: Australia**

In Australia, courts deal with access cases under the Regulations implementing the 1980 Hague Convention,⁴² rather than under normal domestic law provisions.

At one time, *Police Commissioner of South Africa v Castell*⁴³ limited the assistance that could be provided by the Central Authority as it interpreted rights of access as those ‘rights already established in another Convention country either by operation of law, or as a consequence of a judicial or administrative decision or by reason of an appropriate agreement having legal effect’. This had the effect of preventing parents from making an application if they did not have an existing foreign access order, agreement or access rights by operation of law – the 1980 Hague Convention could not be used to establish a right of access but rather to ensure that foreign access rights are respected. This still enabled the Central Authority to initiate judicial proceedings in appropriate cases.

Recent changes to Australian law are designed to overcome the restrictive approach to ‘rights of access’ set out in *Castell* through amendments to both the Family Law Act in 2000 (through the Family Law Amendment Act 2000) and to the implementing regulations (through the Family Law Amendment Regulations 2004). The new regulations enable the court to make an order pursuant to an application to establish, secure or organise the effective exercise of rights of access ‘whether an order or determination has been made under the law in force in another Conven-

38 See Lowe and Armstrong, “Country Report: Ireland (NCMEC 2002) 4.2.

39 [1992] 10 FRNZ 164.

40 [2001] NZ FLR 593.

41 [2000] SLT 1051.

42 The Family Law (Child Abduction Convention) Regulations 1986.

43 (1997) 138 FLR 437, (1997) 21 Fam LR 643.

tion country about rights of access to the child concerned' (Regulation 25 (8)).

There are several points of good practice in the current Australian approach. First, access cases are not dealt with under domestic legislation but rather under the 1980 Hague Convention. Moreover, proceedings are initiated by the Central Authority which bears the costs. Note is taken of the need to expedite proceedings. Finally, the broad interpretation of 'rights of access' also allows the applicants whose rights of access have not been established by a court order to benefit from 1980 Hague Convention proceedings.

5.1.2. CIVIL LAW JURISDICTIONS

The position in civil law jurisdictions is equally varied.

i. *France*

In France,⁴⁴ court proceedings are not instituted pursuant to Article 21. Cross-border access cases are, therefore, dealt with under domestic legislation.

ii. *Norway*

In Norway,⁴⁵ Article 21 is not regarded as binding upon courts and court proceedings are, therefore, not instituted pursuant to it. Article 21 only applies to the Central Authority imposing on it a duty to assist with practical questions such as providing information regarding lawyers, free legal aid, etc.

iii. *The Netherlands*

In the Netherlands,⁴⁶ the Central Authority is empowered to bring a court action pursuant to Article 21 but in practice access cases are determined according to their merits with the courts applying the relevant rules of domestic legislation.

iv. *Switzerland*

In Switzerland,⁴⁷ the Central Authority acts on behalf of applicants only in cases where the rights of access have already been established in another Contracting State by court order or statute. In the Swiss view, the purpose of the 1980 Hague Convention is to ensure that foreign access rights are respected.

v. *Germany*

In Germany, Article 21 is regarded as binding upon courts and "proceedings are possible in any case where the applicant is pursuing a substantive right".⁴⁸ Access cases are dealt with under *Internationales Familienrechtsverfahrensgesetz*⁴⁹, which implemented the 1980 Hague Convention.⁵⁰

vi. *Italy, Mexico and Spain*

In Italy,⁵¹ Mexico⁵² and Spain,⁵³ Article 21 is regarded as binding upon courts.

vii. *Slovakia*

In Slovakia,⁵⁴ Article 21 is regarded as binding upon courts when there is a court order establishing rights of access. If access rights have not been established by a court decision, the case is dealt with under domestic legislation.

viii. *Sweden*

44 See op. cit., n. 28.

45 Hague Conference on Private International Law, "Questionnaire on the Enforcement of Return Orders under the 1980 Hague Convention and of Access/Contact Orders: Response by Norway", p. 12, available online at http://www.hcch.net/upload/abd_return_no.pdf.

46 See op. cit., n. 24.

47 Letter of the Swiss Central Authority to the Slovakian Central Authority, 23 January 2003.

48 See op. cit., n. 1, p. 15.

49 BGBl (2005) I 162.

50 See op. cit., n. 21.

51 See op. cit., n. 22.

52 See op. cit., n. 23.

53 See op. cit., n. 27.

54 See op. cit., n. 26.

In Sweden,⁵⁵ Article 21 is not incorporated into the domestic legislation and access applications are dealt with under the relevant domestic law provisions.

5.2. The Significance of the Differing Interpretations

Quite apart from the undesirability of not having a uniform approach to 1980 Hague Convention obligations, the different interpretations of Article 21 are significant for the following reasons:

- It can act as a deterrent to would-be applicants in view of both the complexity and potential costs of bringing proceedings.
- In jurisdictions where access applications have to be determined according to domestic law, 1980 Hague Convention cases have to compete with domestic cases and it is by no means agreed that international cases should have priority. (As has already been said, the 2003 survey has some evidence that access applications take longer to resolve when determined by domestic law than under the 1980 Hague Convention). This has been articulated by Lord Macfadyen at first instance and Lord Prosser on appeal in the Scottish decision, *Donofrio v Burrell*,⁵⁶ neither of whom were convinced of the need to expedite international access applications at the expense of domestic ones. While arguments can be made to counter this, namely, the difficulty of prosecuting cases internationally and the arguably greater disruption to families caught up in international disputes, it would be easier for all concerned if it was internationally agreed to be a 1980 Hague Convention obligation to hear access applications quickly. That can only be done if Article 21 extends to court applications.
- It is easier to persuade legislators to make generous provisions for legal aid and/or representation (akin to that for return applications) if the access application is being dealt with under the 1980 Hague Convention.
- It makes it difficult, if not impossible, to devise overall Good Practice guidelines while there is a fundamentally different approach under Article 21.

5.3. The Way Forward – The Options

5.3.1. DO NOTHING

One option is to leave the position as it is – a position effectively taken at previous four meetings of the Special Commission, particularly the second.⁵⁷ The arguments in favour of leaving things as they are may be summarised as follows:

1. There are relatively few applications, so reform, which is potentially expensive in time and effort, is simply not worth it.
2. It is, in any event, too problematic to reform Article 21, especially since it will involve re-drawing the delicate boundaries with other existing international instruments, not least the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereafter ‘1996 Hague Convention’).
3. It may be that in any event the current difference of approach can be “cured” by the judiciary themselves as suggested by Thorpe LJ in *Hunter v Murrow* (see above).
4. Reform should not be attempted until the current attempts to devise good practice have been tried and tested.

The arguments against doing nothing are:

1. It cannot be satisfactory that such a key provision is subject to such fundamentally differ-

⁵⁵ See *op. cit.*, n. 29.

⁵⁶ 2000 SLT 1051.

⁵⁷ But note the Conclusions and Recommendations of the Fifth Special Commission, at para 1.7.3., discussed below.

ent interpretations.

2. Notwithstanding Thorpe LJ's entreaties in *Hunter v Murrow* that the courts revisit their interpretation of Article 21, it seems highly unlikely that homogeneity can be achieved judicially and certainly not speedily.

In any event it is by no means clear that the restrictive interpretation of Article 21 is neither justified nor intended. In this latter respect one could point to Professor Anton's (who was Chairman of the Conference which drafted the 1980 Hague Convention) comments:⁵⁸

"The 1980 Hague Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible. It was felt not only that mandatory rules in the fluid field of access rights would be difficult to devise but, perhaps more importantly, that the effective exercise of access rights depends in the long run more upon the goodwill or at least the restraint, of the parties than upon the existence of formal rules".

3. The difference in interpretation cannot be "cured" by good practice. On the contrary, the current differences will impair the devising of any comprehensive practice guides.

5.3.2. REMOVE THE ACCESS PROVISIONS ALTOGETHER

Given the relative weakness of the provisions and the relatively low number of applications, it is tempting to suggest that the access provisions should be scrapped and reliance placed instead on the 1996 Hague Convention. One advantage of adopting this strategy is that it would reduce the number of international instruments governing access.

There are, however, some formidable arguments against this option:

1. It assumes that the 1980 Hague Convention has no useful role to play and that the 1996 Hague Convention can simply replace it. Neither assumption is right. Unlike the 1996 Hague Convention, which is mainly concerned with jurisdiction, recognition and enforcement of orders, the 1980 Hague Convention is concerned with "rights of access", which is a wider concept. Indeed the 1980 Hague Convention is the only international instrument dealing with such a wide concept. The revised Brussels II Regulation⁵⁹ only covers orders and formally binding agreements and the 2003 European Convention on Contact Concerning Children only governs, in the international context, transfrontier contact orders. It would also be a mistake to think that the access provisions under the 1980 Hague Convention are a total failure. After all, both the 1999 and 2003 surveys show that a not insignificant proportion (43% and 33% respectively) of applications ends in either voluntary agreements or judicial orders for access.
2. Even if the 1996 Hague Convention could adequately take over the role of the 1980 Hague Convention, there are very few Contracting States to the 1996 Hague Convention compared with the current 77 Contracting States to the 1980 Hague Convention.

Abandoning the access provisions would still involve having to reach a full-scale international agreement to denounce the provisions, which effort might more profitably be devoted to improving the provisions.

5.3.3. REFORM ARTICLE 21

Ignoring the practical difficulties, in principle there seems to be an overwhelming case for

58 "The Hague Convention on International Child Abduction" (1981) 30 ICLQ 537, 554-555. See also Pérez-Vera *Explanatory Report on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at para 125.

59 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No. 1347/2000.

reforming Article 21.⁶⁰ However, the question still remains as to how it should be reformed. In broad terms what is minimally required is to make it clear that the obligation to secure access rights lies with the courts as well as with the Central Authorities. Achieving that objective will require careful drafting, but one simple approach would be merely to add a short Protocol to the 1980 Hague Convention which provides for an additional sentence at the end of Article 21 to the effect that “Any proceedings so instituted should be regarded by the judicial or administrative authorities as proceedings under the 1980 Hague Convention”.⁶¹

Although no doubt this wording can be improved, it is to be emphasised that the suggested reform is deliberately limited to rectifying the major problem of Article 21 in the simplest way. It intentionally leaves open issues of jurisdiction and the principles upon which any dispute should be solved. Those Contracting States that already treat Article 21 as providing for access applications to be made to a court do not seem to worry about jurisdiction issues and in these States the lack of stated principles upon which applications should be determined has not caused particular problems. There is every reason to think those (mainly common law) jurisdictions that do not regard Article 21 as imposing a duty/obligation on the courts would be similarly inventive.

Once one goes beyond this simple reform, one will get involved in major discussion about what the jurisdictional rules should be and what powers the court should have and, on top of that, how the 1980 Hague Convention should relate to the 1996 Hague Convention. Some might think that these issues should be openly faced but it could be argued that strictly limited reform is more likely to be agreed by the Hague Conference on Private International Law.

Another aspect of Article 21 that needs to be addressed is the meaning of the phrase ‘organising or securing the effective rights of access’. There are two aspects to this, namely, the meaning of ‘rights of access’ for these purposes and the meaning of ‘organising or securing’.

‘Rights of access’ indisputably include those conferred by operation of law or by a judicial or administrative decision under the law of the relevant Contracting State. It probably also includes that conferred by a legally enforceable agreement but it would be better if this was expressly spelt out in the Article. But one problem that has been encountered is whether, in the absence of an order or agreement over access, rights of custody should automatically be taken to include rights of access. We recommend that it should.

However, open-ended rights of access deriving from operation of law raise the second problem inherent in Article 21, namely, the meaning of ‘organising or securing’ rights of access. Does this phrase include ‘establishing’ such rights in the sense of being able to use Article 21 to obtain an enforceable defined access order? We recommend that it be made clear that Article 21 can be so used.

The authors of this report take some comfort from the Recommendations and Conclusions of the Fifth Special Commission held at The Hague in October/November 2006 insofar as they state, at 1.7.3., that

“The Special Commission recognises the strength of arguments in favour of a Protocol to the 1980 Convention which might in particular clarify the obligations of States Parties under Article 21 and make clearer the distinction between ‘rights of custody’ and ‘access rights’”.

The paragraph, however, concludes

“However, it is agreed that priority should at this time be given to efforts in relation to the implementation of the 1996 Convention [on the Protection of Children]”.

While the authors understand that position, as already pointed out the 1996 Hague Convention does not in fact wholly replicate the role of the 1980 Hague Convention.

60 See also the arguments by Silberman “Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA” (2003) 38 Texas Int LJ 41 at 48-50.

61 Although adding a Protocol would require the agreement of the Contracting States in the first place, States would only be bound by it if they independently ratify or accede to it.

5.4. Recommended Good Practice for Each of the Different Interpretations of Article 21

In the absence of any reform of Article 21, the following points are suggested as Recommendations of Good Practice for each of the different interpretations.

5.4.1. 1980 HAGUE CONVENTION ACCESS APPLICATION DEALT WITH UNDER DOMESTIC LAW

If a 1980 Hague Convention access application is to be dealt with under domestic law, it is recommended:

- Where there is concentrated jurisdiction for hearing 1980 Hague Convention cases, access applications should also be handled by these courts.
- Where there is no concentrated jurisdiction in the Contracting State, access applications should be handled by a court familiar with the 1980 Hague Convention which will be able to better deal with family law cases with a foreign element.
- Access applications should be handled expeditiously and prioritised over domestic cases.

The main reasons why the 1980 Hague Convention access application should have priority over domestic cases are that:

1. Applicants often face unfamiliar legal, cultural and linguistic barriers.
2. Their emotional and financial resources are frequently stretched to the limit.
3. Abducted children are often led to believe that the victim parent has abandoned them.

In any event, applications should be dealt with expeditiously, meaning between three and six months (see below).

One objection to prioritising 1980 Hague Convention access cases over domestic cases is that it conflicts with the concept that all children are equally important. Although this argument is to some extent justified, given the small number of 1980 Hague Convention access applications (though numbers might well increase if the 1980 Hague Convention is improved) it does not appear that the need to expedite international access applications at the expense of domestic access cases will significantly prejudice the overall disposal of domestic applications.

5.4.2. 1980 HAGUE CONVENTION ACCESS APPLICATION DEALT WITH AS A HAGUE APPLICATION

Where an access application is dealt with as a Hague application, then:

- The applicant should be able to benefit from generous provisions on legal aid and/or representation (comparable to that granted for return proceedings).
- Access applications should be handled expeditiously, meaning in a period between three and six months (see below).

5.5. Recommendations of Overall Good Practice

- There should be an agreed timescale for disposing access applications. The period of six weeks indicated by the 1980 Hague Convention appears to be too short in the context of access proceedings. The suggested target for access cases is three to six months.
- In the context of speed, it is important to keep court hearings to a minimum as the costs involved in the proceedings with a foreign element are considerably higher (especially for the respondent, who may have to travel long distances to attend hearings) than in proceedings without a foreign element.

6. Initial Processing of Applications

6.1. Receipt of the Application

On receiving an application for access, the Central Authority examines it to ensure that it is complete and that minimum legal conditions are fulfilled. In some jurisdictions (e.g. Romania⁶²) the application must be accompanied by a document establishing the rights of access of the applicant (i.e. decision of a competent judicial or administrative authority).

6.2. Negotiations with the Respondent

As a next step in some Contracting States (e.g. Australia,⁶³ Germany,⁶⁴ Italy,⁶⁵ the Netherlands,⁶⁶ Sweden⁶⁷ and the USA⁶⁸) the Central Authority contacts the respondent, informs him/her about the application for access and asks whether he/she is willing to co-operate. The Central Authority tries to achieve an amicable solution. This stage, when the Central Authority acts as an “intermediary” between the parents, can take a few weeks. The negotiations between the Central Authority and the respondent are conducted either by telephone or by letter. An interesting practice has been introduced by the Slovakian Central Authority, where a personal meeting between a representative of the Central Authority and the respondent is preferred.⁶⁹

In other Contracting States, the Central Authority itself does not act as the “intermediary” but entrusts this duty to another authority. In Romania⁷⁰ for example, the intermediary can be a specialist mediator. In New Zealand,⁷¹ the Central Authority appoints counsel who may try to help resolve the case voluntarily. In Canada,⁷² the practice varies from Province to Province. In Manitoba, for example, mediation and conciliation counselling services are provided by the Family Conciliation Services within the Department of Family Services. In France,⁷³ the Central Authority refers the case to the public prosecutor, who locates the child (if necessary) and contacts the respondent in order to ask him/her to comply with the applicant’s right of access voluntarily. At this stage the role of social workers and bodies such as *Mission d’Aide à la Médiation Internationale pour les Familles* (MAMIF) is very important as they can be entrusted with the negotiations with the respondent. In Germany,⁷⁴ the Central Authority requests a local youth welfare authority to support mediation proceedings.

However, in some Contracting States (e.g. Israel,⁷⁵ Mexico,⁷⁶ and Spain⁷⁷) attempts to achieve an amicable solution are made neither by the Central Authority nor by another authority. In England and Wales, the negotiations are left to private practitioners, though for all domestic child cases there is now what is called a first hearing resolution appointment⁷⁸ through which attempts to persuade the parties to reach an agreed solution will be made.

62 See op. cit., n. 25.

63 See Australia Country Report, op. cit., n. 20, at 4.1.

64 See Lowe, Armstrong and Mathias, “Country Report: Germany”, (NCMEC 2002) 4.1/4.2.

65 See op. cit., n. 22.

66 See op. cit., n. 24, at 4.1.

67 See op. cit., n. 29.

68 See op. cit., n. 18.

69 See op. cit., n. 26.

70 See op. cit., n. 25.

71 See New Zealand Country Report, op. cit., n. 20, at 4.1.

72 See op. cit., n. 19.

73 See Richez-Ponz, “The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on France”.

74 See op. cit., n. 21.

75 See op. cit., n. 17.

76 See op. cit., n. 23.

77 See op. cit., n. 27.

78 See the President’s “Private Law Programme” (issued in November 2004 and published in 2005).

6.3. Examples of Good Practice

6.3.1. GERMANY⁷⁹ AND SPAIN⁸⁰

The Central Authorities work with sample forms which can be found on their web sites. The aim of this practice is to speed up the proceedings especially at the initial stage.

6.3.2. ITALY⁸¹

The Central Authority itself offers mediation, conciliation, counselling and assistance to the applicant trying to reach a settlement between the parties.

6.3.3. SLOVAKIA⁸²

Based on the belief that an agreed outcome has a greater chance of success, the first step of the Central Authority after the receipt of the access application is to arrange a personal meeting with the respondent in order to consult the case and to negotiate access issues based on the applicant's proposal.

6.4. Recommendations of Good Practice

- It is vital that applications be processed with maximum speed.
- Central Authorities should reply promptly to all communications and should rapidly acknowledge receipt of an application.
- Central Authorities should use model forms. This will assist them in the faster processing of applications and will help to ensure that essential information is not omitted and make it easier to check the application for compliance with the 1980 Hague Convention.⁸³
- Where relevant, copies of domestic access legislation of the requesting Contracting State should be provided. Where appropriate, this legislation should be translated into the language of the requested Contracting State.
- Agreed solutions to access disputes should be encouraged through mechanisms such as mediation using specialist mediators. To ensure enforceability of the final outcome, any agreement drawn up in mediation should be made into a consent order and registered or mirrored in the requesting Contracting State.
- Mechanisms should be available to facilitate a personal meeting with the respondent with a view to discuss the issue and reach an amicable solution.
- Negotiations should be time-limited to prevent the respondent from prolonging the proceedings. A period of one month is recommended.

79 See the web site of the German Central Authority, available at http://www.bundeszentralregister.de/hkue_esue/008.html.

80 See *op. cit.*, n. 27.

81 See *op. cit.*, n. 22.

82 See *op. cit.*, n. 26.

83 See *op. cit.*, n. 2, p. 19.

7. Judicial Processing of Applications

7.1. Legal Proceedings

When negotiations for an amicable solution fail, legal proceedings are usually initiated. In some Contracting States, the proceedings are initiated by the Central Authority applying in its own name as an applicant (e.g. Australia⁸⁴) or applying as a legal representative of the applicant (e.g. Mexico⁸⁵) or both applying in its own name as well as a representative of the applicant (e.g. the Netherlands⁸⁶ and Slovakia⁸⁷). In Germany,⁸⁸ the Central Authority generally initiates the court proceedings; it submits the application for access, but then delegates the case to local counsel for further proceedings. Nevertheless, the Central Authority regularly monitors the activities of counsel, who is required to submit regular reports on the state of affairs. In exceptional cases, officers of the Central Authority can personally appear in court proceedings or send briefs to the court.

In other Contracting States, the legal proceedings are not initiated by the Central Authority. In the USA⁸⁹ for example, the National Center for Missing & Exploited Children⁹⁰ identifies attorneys who are willing to handle the case on a paid, pro bono or reduced fee basis. This practice, however, carries a risk of delay, as it may be difficult to find an attorney willing to handle the case. In England and Wales,⁹¹ the Central Authority initially refers the applicant to one of the lawyers from the panel used for return applications who may recommend a local solicitor if the applicant is not from London. In Italy,⁹² the Central Authority forwards the case to the Prosecutor sitting in the Juvenile Court of the district where the child is located who will bring the case before the Juvenile Court. In Spain,⁹³ the Central Authority assigns an *Abogado del Estado*⁹⁴ to represent the Central Authority in the judicial access procedure. This Spanish practice, has, however, been criticised on several grounds: first, representatives of this body are generally not familiar with family law disputes; second, the applicant does not have direct contact with the *Abogado del Estado*; and third, it takes a long time for legal proceedings to be initiated by the *Abogado del Estado*. In France,⁹⁵ the Central Authority only provides information regarding services or facilities available to assist the applicant. The applicant is represented by the *Procureur*, who either represents the applicant or refers him/her to a lawyer (if the applicant is eligible for legal aid). If the applicant is not eligible for legal aid, the *Procureur* provides him/her with the names of three or four lawyers. In New Zealand,⁹⁶ counsel appointed by the Central Authority is required to file an application for access if necessary. In Sweden,⁹⁷ the Central Authority assists the applicant in finding a solicitor who will initiate court proceedings on behalf of the applicant.

7.1.1. EXAMPLES OF GOOD PRACTICE

i. Ireland⁹⁸

The courts have wide discretion to help guarantee access. When there is a danger

84 See Australia Country Report, op. cit., n. 20, at 4.2.

85 See op. cit., n. 23, at 3.3/4.

86 See Ruitenbergh, "The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Netherlands".

87 See op. cit., n. 26.

88 See op. cit., n. 21.

89 See op. cit., n. 18.

90 The US-based National Centre for Missing & Exploited Children handles incoming 1980 Hague Convention cases on behalf of the US Department of State's Office of Children's Issues under a tri-party agreement with the Department of State which is the US Central Authority.

91 See Lowe, Armstrong and Mathias, "Country Report: United Kingdom", (NCMEC 2002) 4.1/4.2.

92 See op. cit., n. 22.

93 See op. cit., n. 27.

94 *Abogado del Estado* is a civil servant who represents the State and defends its interests when the State is a party to a judicial procedure.

95 See op. cit., n. 28.

96 See New Zealand Country Report, op. cit., n. 20, at 4.1.

97 See op. cit., n. 29.

98 See op. cit., n. 38, at 4.3.

of abduction, they frequently order passports to be surrendered. This practice may contribute to the safe exercise of the rights of access and at the same time decrease the anxiety of the respondent.

ii. **Mexico**⁹⁹

The judge can order access by telephone and E-mail. This practice may be useful in cases where there is a significant geographical distance between the requesting and the requested Contracting States. Similarly, contact by telephone and E-mail may be helpful if the rights of access are to be exercised at the expense of the applicant (usual practice) where the applicant does not have sufficient financial resources.

iii. **Spain**¹⁰⁰

Sometimes judges allow contact to be exercised abroad if the State to which the child is to be taken is a Contracting State or if the Spanish custody order is recognised by that State. This practice may be helpful in cases where the applicant does not have sufficient financial resources to exercise his/her access rights in the requested Contracting State.

7.1.2. RECOMMENDATIONS OF GOOD PRACTICE

- Contracting States should use the most expeditious court procedures available.
- Central Authorities should have a monitoring system to track the speed and outcome of each case.
- A limited number of suitably trained legal practitioners should be involved in handling 1980 Hague Convention access cases in order that expertise can develop. Central Authorities should maintain a list of such lawyers.
- Judges at both trial and appellate levels should firmly manage the progress of access proceedings.
- Where desirable (e.g. where there is a significant geographical distance between the requesting and the requested Contracting States and/or where the parties have limited financial resources), the possibility of access by telephone or E-mail should also be considered.
- Where the child's safety is concerned, the court should have discretion to order preventive measures such as supervised access or surrender of the passport of the child and the respondent.
- Where the safety of the child is not an issue and it appears to be practicable, the court should have discretion to allow contact to be exercised abroad.

7.2. Legal Aid

The extent to which legal aid or assistance is provided to an applicant differs widely. In some countries legal aid is available on the same basis as in return applications; in other countries applicants must secure (and pay for) private representation. An example of the good practice is Australia¹⁰¹, where the Central Authority applies to the court in its own name, as the applicant, and bears any legal costs.

⁹⁹ See *op. cit.*, n. 23.

¹⁰⁰ See *op. cit.*, n. 27.

¹⁰¹ See Australia Country Report, *op. cit.*, n. 20, at 4.2.

7.2.2. RECOMMENDATIONS OF GOOD PRACTICE

- Where possible, legal advice and representation should be free to applicants and in any event, no court fee should be charged.
- Where there is no comprehensive system of legal aid in a Contracting State, attempts should be made to establish a network of lawyers willing to offer free or reduced fee representation and advice to applicants and respondents.

7.3. Enforcement of Access Orders

Enforcement of access orders is generally more complicated than enforcement of return orders. The mechanisms available vary from one Contracting State to another.

In Italy,¹⁰² for example, the Prosecutor sitting in the Juvenile Court has the responsibility of enforcing access orders. He/she can request the assistance of the competent police headquarters and has to give notice of the enforcement to the Central Authority.

In New Zealand,¹⁰³ the court which made an access order can issue a warrant under Section 119 of the Care of Children Act 2004, either on application by the party to the proceedings or on its own initiative, authorising the police or a social worker or any other person named in the warrant to take possession of the child and deliver him/her to a person or authority named in the warrant.

In England and Wales,¹⁰⁴ the courts are able to fine or imprison the respondent who does not comply with an access order. Imprisonment of the respondent is not common as it is considered to be against a child's interests. It is not unknown in abduction cases to make directions for electronic tagging and to provide for indirect contact (i.e. telephone calls or E-mails).¹⁰⁵ Under The Child and Adoption Act 2006 (not in force at the time of writing) there are provisions to introduce contact activity directions or conditions and where access orders have been not complied with, to add the sanction of community (unpaid) work and to pay financial compensation for any breach.

In Scotland¹⁰⁶ and Northern Ireland,¹⁰⁷ the courts can impose civil remedies for contempt of court, including fines and imprisonment. In Scotland, theoretically, it is possible to enforce the access order physically. In practice, however, this rarely happens. In all jurisdictions of the UK, conditions such as supervised access or surrendering of the applicant's passport may be added to access arrangements in order to offset the possibility of abduction.

In Ireland,¹⁰⁸ similar remedies as in the UK jurisdictions are available.

In the Netherlands,¹⁰⁹ in most cases an access order is immediately enforceable even if an appeal is lodged. If the respondent does not comply with an access order, measures according to civil law may be imposed (e.g. *Dwangsom*) which is a punitive sum payable to the applicant on a daily basis until the order is complied with. The respondent can also be committed to prison for a maximum of one year for a failure to comply with a judicial order (*Lijfswang*).

In Germany,¹¹⁰ if the respondent does not comply with an access order, the payment of an *Ordnungsgeld* (fine) up to 25.000 Euros or *Ordnungshaft* (imprisonment) of the respondent can be ordered. The use of coercive force against the child to enforce the court order is possible for the enforcement of return orders, but not for the enforcement of access orders. It is also possible to use force against the respondent. However, some practitioners have said that the enforcement of access is, in practice, actually impossible.

102 See op. cit., n. 22, at 3.7/4.3.

103 See New Zealand Country Report, op. cit., n. 20, at 3.7/4.3.

104 See op. cit., n. 90, at 4.3.

105 See *Re C (Abduction: Interim Directions: Accommodation of Local Authority)* (2003) EWHC 3065 (Fam), (2004) 1 FLR 653.

106 Ibid.

107 Ibid.

108 See op. cit., n. 38, at 4.3.

109 See op. cit., n. 24, at 4.3.

110 See op. cit., n. 21.

In the USA,¹¹¹ the mechanisms available to enforce an access order vary from one State jurisdiction to another. Possible enforcement mechanisms include: imposing fines and/or imprisonment, imposing a monetary bond, ordering injunctive and equitable relief, assuming the court has jurisdiction, modifying existing custody orders, including giving custody to the other parent, assessing monetary damages and using criminal penalties in accordance with State and Federal law.

In France,¹¹² applicants are entitled to bring criminal proceedings if they have had access rights denied or violated. Where family mediation fails, the *Procureur* can require judicial mediation.

In Australia,¹¹³ where the applicant has made an access application under the 1980 Hague Convention, the governing regulations enable the court to make any orders they think are necessary to give effect to the Convention. If there is an obvious risk of non-compliance with an access order, the Central Authority will try to ensure that the risk is covered by the terms of the order. If there is a risk of abduction of the child, the court can order, for example, that contact should only occur in Australia, that it should be supervised, that the child be prohibited from leaving Australia and that the child's name be added to the airport watch list. If a breach of the order then occurs, the applicant may request the assistance of the Central Authority to enforce it. The court can also make an order for the issue of a warrant which means that the police can then take steps to locate and recover the child.

In Spain,¹¹⁴ the *Abogado del Estado* files an execution petition based on an access order. The respondent will be notified of execution and he/she will be ordered to comply with the access decision. However, it is to be noted that the enforcement of access orders is generally fairly difficult.

In Israel,¹¹⁵ if an access order is not complied with, there are in theory a number of possible remedies available. The first possible remedy is related to civil contempt of court.¹¹⁶ If the court is satisfied that there has been a breach of an access order, it may issue a further order requiring the breach to be remedied and specifying the sanction for failure to remedy. The purpose of the sanction, which will be a fine and/or imprisonment, is to cause compliance with the court order and is not intended to be punitive. However, in practice, most judges are reluctant to use such sanctions and will simply warn the offending party. Second, the court may decide on the execution of the access order.¹¹⁷ Following this decision, the order providing for a parent to have access to a child will be enforced by the Execution of Judgments Agency. However, where the court officer charged with executing the order decides that the order can only be executed by the use of force against the child and the child is capable of understanding the matter, or there are other difficulties in executing the order, the case may be referred back to the court for further instructions. Case-law goes further and requires the Head of the Execution of Judgments Agency not to enforce the judgment against the wishes of the child unless he/she is convinced, or the court has specifically held, that the child's welfare requires forcible execution of the judgment.¹¹⁸ No case has been found where a court has authorised execution against the child's wishes. Third, there is a possibility of criminal proceedings against the respondent who is in breach of an order given by a court.¹¹⁹ If he/she is found guilty, he/she may be sentenced to up to two years of imprisonment. However, criminal prosecutions may only be instituted by the State and this rarely happens *inter alia* because in many cases prosecution may be harmful to the child. Finally, where the welfare officer is of the opinion that the denial of access is causing serious irreparable harm to the child, he/she

111 See *op. cit.*, n. 18, at 4.3.

112 See *op. cit.*, n. 28, at 4.2.

113 See Patterson, "The Hague Convention on Civil Aspects of International Child Abduction and its Enforcement – National Enforcement Report on Australia".

114 See *op. cit.*, n. 27, at 3.7/4.3.

115 See *op. cit.*, n. 17, at 4.3.

116 Section 6 of the Contempt of Court Ordinance.

117 Section 62 of the Execution Law (1967).

118 C.A. 653/72 *Yahalomi v Yahalomi* 27 P.D. (2) 434.

119 Section 287 of the Penal Code (1977).

may bring proceedings under the Youth Law (Care and Supervision) of 1960 requesting that the minor be declared “a minor in need of protection.” Where such a declaration is made, the court may issue a care order or a supervision order. The effect of a care order is to transfer the custody of the child to the welfare authorities who will determine where the child is to reside and what treatment he/she is to receive. However, removal of the child from the custodial parent in such circumstances is highly controversial.

In Sweden,¹²⁰ enforcement of access orders is regulated by Section 21 of the 1989 Act on Recognition and Enforcement of Foreign Decisions on Custody and Related Matters and on Return of Children. The enforcement cases are handled by administrative courts. Where the child has a particularly strong need for contact with the applicant and the access order would otherwise not be complied with, the court may order police-assisted enforcement.

7.3.1. EXAMPLE OF GOOD PRACTICE: GERMANY¹²¹

The approach to the exercise of access rights is sensitive and individual. If it is thought appropriate to grant supervised access or if it is thought appropriate for a child and parent cautiously to be brought closer together, support is given by the Youth Welfare Service (if necessary, such support is also offered by a psychological counselling service). Use of physical force against a child to enforce an access order is forbidden. Non-coercive means of enforcement are preferred such as the involvement of youth welfare authorities or mediation.

7.3.2. RECOMMENDATIONS OF GOOD PRACTICE

- Courts at trial, appellate and, if different, at enforcement levels should set and adhere to timetables that ensure the speedy determination of access applications.
- National systems should ensure that appeals cannot be used to delay enforcement of access orders.
- Contracting States should have an effective mechanism for the expeditious enforcement of access orders.
- The use of physical force against the child to enforce an access order should be avoided where possible. Instead, initial recourse should normally be had to more sensitive techniques such as psychological counselling for the child before the exercise of access rights.
- Counselling services both for the child and the respondent should be available to overcome, where possible, disputes over access.
- Courts should be empowered, especially in the case of older children, to ask for a report by a child psychologist/counsellor, so that the judge can properly consider the child’s wishes and feelings.

120 See *op. cit.*, n. 29.

121 See *op. cit.*, n. 64.

8. Summary of Overall Recommendations for Good Practice

8.1. Key Operating Principle: Speed

- It is vital that applications be processed with maximum speed.
- Central Authorities should reply promptly to all communication and should rapidly acknowledge receipt of an application. The use of unique model forms would help to achieve the quick processing of access applications.
- There should be an agreed timescale for the disposition of access applications. The period of six weeks indicated by the 1980 Hague Convention appears to be too short in the context of access proceedings. The suggested target for access cases is three to six months.
- Court hearings should be kept to a minimum.

8.2. Central Authorities' Obligations

It is recommended that Article 7(f) be reformed so as to make it clear that, where appropriate, Central Authorities should be obligated to institute proceedings, either themselves or through an authorised intermediary, to secure rights of access before a judicial or administrative authority.

8.3. Initial Processing of Applications

Where relevant, copies of domestic access legislation of the requesting Contracting State should be provided. Where appropriate, this legislation should be translated into the language of the requested Contracting State.

8.4. Mediation

- Given that an agreed access has the best chance of success, there is a need to encourage agreed solutions through mechanisms such as mediation. Mechanisms should, therefore, be made available to enable a personal meeting with the respondent to take place with a view to discussing the issue and reaching an amicable solution.
- The Central Authority or an intermediary acting on their behalf (such as a lawyer or mediator) should attempt to seek a voluntary resolution in all appropriate cases.
- The mediation should be time-restricted (meaning up to one month) in order to avoid undesirable prolongation of the proceedings.
- Mediation should be carried out by specialist mediators who have knowledge of the international conventions.
- The final outcome of mediation must be formally enforceable. Therefore, any agreement drawn up in mediation should be made into a consent order and registered or mirrored in the requesting Contracting State.

8.5. Judicial Processing of Applications

8.5.1. LEGAL PROCEEDINGS

- A limited number of suitably trained legal practitioners should be involved in handling 1980 Hague Convention access cases in order that expertise can develop. Central Authorities should maintain a list of such lawyers.
- Judges at both trial and appellate levels should firmly manage the progress of access proceedings.
- Where desirable (e.g. where there is a significant geographical distance between the requesting and the requested Contracting States and/or where the parties have limited financial resources), the possibility of access by telephone or E-mail should also be considered.

- Where the child's safety is concerned, the court should have discretion to order preventive measures such as supervised access or surrender of the passport of the child and the respondent.
- Where safety of the child is not an issue and it appears to be practicable, the court should have discretion to allow contact to be exercised abroad.
- Central Authorities should have a monitoring system to track the speed and outcome of each case.

8.5.2. LEGAL AID AND COSTS

- Where possible, legal advice and representation should be free of charge to the applicants.
- Where the applicants are not represented by the Central Authority but instead have to look for a private lawyer, a network of lawyers willing to offer free or reduced fee representation and advice to applicants and respondents should be available.
- Court hearings should be kept to a minimum as costs involved in proceedings with a foreign element are considerably higher than those without such an element.

8.5.3. ENFORCEMENT OF ACCESS ORDERS

- Courts at trial, appellate and, if different, at enforcement levels should set and adhere to timetables that ensure the speedy determination of access applications.
- National systems should ensure that appeals cannot be used to delay enforcement of access orders.
- Contracting States should have an effective mechanism for the expeditious enforcement of access orders.
- The use of physical force against the child to enforce an access order should be avoided where possible. Instead, initial recourse should normally be had to more sensitive techniques such as psychological counselling for the child before the exercise of access rights.
- Counselling services, both for the child and the respondent, should be available to overcome, where possible, disputes over access.
- Courts should be empowered, especially in the case of older children, to ask for a report by a child psychologist/counsellor, so that the judge can properly consider the child's wishes and feelings.

8.6. Article 21

8.6.1. REFORMATION OF ARTICLE 21

The different interpretations of Article 21 create uncertainty and widely diverging practice. It is, therefore, recommended that the provision be reformed as follows:

- The obligation to secure access rights should lie with the courts as well as the Central Authorities.
- 'Rights of access' should be defined as 'rights already established in another Contracting State, either by operation of law, or as a consequence of a judicial or administrative decision, or by means of an appropriate agreement having a legal effect'.
- 'Rights of custody' should be stated to include 'rights of access'.
- Applicants with open-ended rights of access should be able to use Article 21 to establish and secure defined access.
- The lack of enforcement powers also needs to be addressed and there ought to be provisions to allow both the court of origin and the enforcement court powers to modify access orders.
- Finally, the need for speedy disposal of access applications should be expressly incorporated into the 1980 Hague Convention.

8.6.2. UNIFORM INTERPRETATION OF ARTICLE 21

In the absence of reform, an improvement could be achieved by a uniform interpretation of Article 21.¹²² We recommend that as far as possible, Article 21 should be uniformly interpreted so as to:

- impose a clear duty/obligation on the courts to deal with access applications. ‘Rights of access’ should mean those established by a judicial or administrative decision, by an agreement having a legal effect or by operation of law;
- include ‘rights of access’ in ‘rights of custody’;
- allow applicants with open-ended rights of access to use Article 21 to establish and secure defined access.

It is expected that by the suggested uniform interpretation of Article 21, a practice ensuring an equal treatment of all 1980 Hague Convention access cases will be established. Among other advantages of the proposed approach are:

- Applicants will be able to benefit from generous provisions on legal aid and/or representation (comparable to that granted for return proceedings).
- It will help to ensure that 1980 Hague Convention access applications are handled expeditiously.
- It will help to avoid discrimination against applicants whose rights of access have not been established by a court order, but rather by an agreement having a legal effect or by operation of law.

¹²² An example of the jurisdiction where the suggested interpretation has already been implemented in practice is Australia (see Section 5 of this report). In this respect Australia has the best model for resolving access disputes. Article 21 is regarded as binding upon Australian courts and the 1980 Hague Convention access cases are dealt with not under domestic law but rather under implementing Regulations which note a need for expeditious procedures. The broad interpretation of ‘rights of access’ allows also the applicants whose rights of access have not been established by a court order to benefit from the 1980 Hague Convention proceedings.

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