

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: 1996 Hague Protection of Children Convention

Paper No: 109/10

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Report of: Senior Crown Counsel

1.0 Purpose

To consider whether the 1996 Hague Protection of Children Convention should be extended to the Falkland Islands.

2.0 Recommendation

It is recommended that Honourable Members ask the Governor to inform the British Government that the 1996 Hague Protection of Children Convention should be extended to the Falkland Islands, subject to the British Government advising and assisting with any legislation required to extend the Convention to the Falkland Islands.

3.0 Summary of Financial Implications

None

4.0 Background : The 1980 Conventions

4.1 The purpose of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the 1980 Hague Convention”) is to enforce rights of custody over a child who has been taken or kept overseas in breach of those rights, and to secure the return of a child to the country where they are habitually resident. It also secures access rights. The purpose of the 1980 European Convention on Child Custody Decisions (“the 1980 European Convention”) is to enforce court orders relating to custody where a child has been taken or kept overseas in breach of those orders, and to enforce orders relating to access. These two conventions seek, by different routes, to provide an international solution to the problem of international child kidnapping.

4.2 The United Kingdom enacted the Child Abduction and Custody Act 1985 (“the 1985 Act”) which enabled the United Kingdom to ratify and implement both conventions. The Act came into force on 1 August 1986, and was intended to assist parents and others having rights of custody to obtain the return of an

abducted child or the enforcement of a custody decision which has been made in their favour.

- 4.3 In 1994 the United Kingdom asked each Overseas Territories whether it wanted one or both of the 1980 conventions extended to them, and if so whether they wished the 1985 Act to be extended or whether they would enact local legislation to meet the obligations of the relevant convention(s).
- 4.4 The Falkland Islands agreed that both conventions should be extended to the Falkland Islands, and that this should be done by enacting local legislation modelled on the 1985 Act. In the event, the United Kingdom enacted the Child Abduction and Custody (Falkland Islands) Order 1996 (“the 1996 Order”), which applied the 1985 Act as law in the Falkland Islands with effect from 1 March 1997 subject to certain modifications.
- 4.5 The Governor of the Falkland Islands is the ‘central authority’ through which any applications under either the 1980 Hague Convention for the enforcement of custody or access rights or the 1980 European Convention for the enforcement of custody or access court orders should be made. Jurisdiction rests with the Supreme Court.
- 4.6 If the Governor (as central authority) receives an application for the return of a child either directly from a person or institution concerned or from another central authority, he must take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child. If an amicable settlement cannot be reached the Governor must initiate, or facilitate the institution of, court proceedings with a view to obtaining an order for the return of the child. The court proceedings must be expeditious, and where there has been a wrongful removal or retention must order the return of the child forthwith, unless certain grounds for refusal are made out.

5.0 Background: The 1996 Hague Protection of Children Convention

- 5.1 The 1996 Hague Protection of Children Convention (“the 1996 Convention”) strengthens the 1980 Hague Convention by establishing uniform rules on jurisdiction, choice of law and the recognition and enforcement of judgements in relation to measures for the protection of children and their property.
- 5.2 These measures include custody and access orders, orders on the grant and exercise of parental responsibility (although the exercise of parental responsibility is subject to the law of the country of the child’s habitual residence) and certain public law orders. It is intended to remove the need to re-litigate these decisions in the jurisdiction of recognition and enforcement and to avoid conflicting decisions. Measures for the protection of the child’s property are included and relate to the right to represent the child.
- 5.3 The 1996 Convention is founded on the principle that decisions concerning the child should be taken in the country in which the child habitually resides, except when emergency protection measures need to be taken in the country where the child is present. The main basis for jurisdiction is the child’s habitual residence.

- 5.4 Jurisdiction can be transferred to another country if the other country is better placed to take decisions concerning the child, although there are restrictions on the transfer of jurisdiction where a change of habitual residence is brought about through a wrongful removal or retention of the child.
- 5.5 If a non-resident parent wants to gain access to their child, then the non-resident parent may ask the authorities in the country in which the parent resides to gather information or evidence and make a finding on the suitability of that parent for access, and on the conditions of that access. This finding must be taken into account by the court in the child's country of habitual residence when making a decision on whether to grant the non-resident parent access to the child, and on what conditions. This can be of great practical value to a non-resident parent living in another country who wants to retain contact with their child.
- 5.6 The 1996 Convention increases the effectiveness of any temporary measures ordered by a judge under the 1980 Hague Convention returning a child to the country from which the child was wrongfully taken or retained, by making those orders enforceable until such time as the authorities in the country to which the child is returned are able to put in place necessary measures of protection. This should provide better continuity of protection for the child across international borders.

6.0 Background: The position of the British government

- 6.1 The Foreign & Commonwealth Office ("FCO") advise that the United Kingdom actively supported the negotiation and adoption of the 1996 Convention, and encourages Overseas Territories to give serious consideration to having the 1996 Convention extended to them.
- 6.2 The United Kingdom signed the 1996 Convention in 2003. Parliamentary procedures for ratification are under way and are expected to be completed by late May 2010, with the 1996 Convention coming into force on 5 September 2010 provided it is ratified simultaneously by all European Union member states.
- 6.3 The FCO state that improvements in access arrangements under the 1996 Convention should reduce the incidence of those parental child abductions which occur after the breakdown of a family relationship and when the non-resident parent finds contact with the child unsatisfactory, inadequate or non-existent. The 1996 Hague Convention should improve outcomes when orders are made for the better protection of children.
- 6.4 The FCO suggest that Overseas Territories should consider whether the increased mobility of children in international families and the increased incidence of family breakdown, and the extent to which these affect children habitually resident in their territories or the parent living in their territories of a child habitually resident elsewhere, indicate that it would be appropriate for them to participate in the 1996 Convention. Such participation will enable them

to avail themselves of the cooperation available from any country to which the 1996 Convention has been extended (including the United Kingdom itself).

7.0 Background: The views of officers

- 7.1 The Social Services Team Leader advises that to her knowledge the Social Services Department have never received any applications in respect of recovery of a child. During the past two years there was one child who was removed from the Falkland Islands by a parent in circumstances that might have amounted to child abduction; the Social Services department arranged for a welfare check to be carried out in the country to which the child had been taken to ensure that the child was being properly cared for. The other parent did not pursue civil or criminal court proceedings, and made contact privately with the absent parent and child.
- 7.2 The Chief Medical Officer has pointed out that, as the 1980 Hague Convention already applies to the Falkland Islands, it would seem perverse not to extend the 1996 Convention. The Director of Health and Education in principle supports the extension of the 1996 Convention to the Falkland Islands, provided we are able to implement it.
- 7.3 The Senior Magistrate confirms that there have been no applications to the Supreme Court under the 1980 Hague Convention, but nonetheless considers that in view of the mobility of the Falkland Islands population (both long-term and short-term resident) the 1996 Convention should be extended to the Falkland Islands.
- 7.4 The Attorney General concurs with the previous points. Notwithstanding the low number of incidents to date, the Attorney General considers that the highly mobile nature of the Falkland Islands population, coupled with the increase in family breakdown, makes it appropriate for the 1996 Convention to be extended to the Falkland Islands for the benefit of separated parents and children.
- 7.5 Under the 1980 Convention the Governor is already designated as the central authority for the purpose of dealing with any convention requests; if any requests were to be received by FIG, they would be forwarded by the Governor to Social Services or to the Supreme Court if Social Services could not help the parties involve reach agreement. The Supreme Court has been given jurisdiction to deal with court applications under the 1980 Convention. The Social Services Department has the professional expertise to deal with any requests for information or assessments, and in view of the very low number of purported abductions experienced to date should have the necessary capacity.
- 7.6 The Attorney General notes that, unlike in 1994, when FIG was asked to consider the extension of the 1980 Hague Convention, no British Act of Parliament appears to have yet been enacted to implement in the United Kingdom the provisions of the 1996 Convention. This makes it more difficult to identify what legislation is required in the Falkland Islands to implement the 1996 Convention.

7.7 The Attorney General therefore recommends that the 1996 Convention be extended to the Falkland Islands, provided the FCO assists with any legal procedures involved in the extension and implementation of the 1996 Convention, for example drafting an Order in Council or supplying model legislation.

8.0 Financial Implications

There are no financial implications.

9.0 Legal Implications

It is not clear what legislation is required to extend the 1996 Convention to the Falkland Islands, and further advice is required from the FCO on this point (paragraph 7.6 above refers).

10.0 Human Resources Implications

There are no human resources implications.