

**SECOND INTERNATIONAL FORUM ON PARENTAL CHILD  
ABDUCTION, ALEXANDRIA, VA., 1-2 NOVEMBER 2000**

*Identifying Best Practice in Hague Convention cases.*

**PROVISION OF LEGAL  
REPRESENTATION IN HAGUE CASES**

Jennifer Degeling, Australian Central Authority

**Introduction**

It is useful to note at the outset which countries have not made a reservation under Article 26:

**COUNTRIES WHICH DID NOT MAKE A RESERVATION UNDER ARTICLE 26**

Argentina	Cyprus	Portugal
Australia	Ecuador	Romania
Austria	Fiji	Serbia and Montenegro
Bahamas	Georgia	Slovenia
Bosnia and Herzegovina	Hungry	Spain
Brazil	Ireland	Switzerland
Burkina Faso	Italy	Trinidad and Tobago
Chile	Macau	Turkmenistan
Colombia	Republic of Macedonia	Uruguay
Costa Rica	Malta	
Croatia	Mexico	

Note: Great Britain and New Zealand did make reservations under Art 26 but nevertheless provide free legal representation for Hague applicants.

Central Authorities are well aware that the level of assistance in obtaining legal representation, and the quality of that representation, is extremely variable in Hague cases. At one end of the spectrum is the USA where the only assistance available is through pro bono lawyers who register with NCMEC to do this work for no fee or reduced fees. At the other end of the spectrum is England and Wales where all

applicants are automatically provided with experienced legal representation at no cost. It is probably fair to say that the English system of legal representation is admired by other Convention countries and sets the benchmark to which others aspire.

I should quickly add that the New Zealand system is identical to that in England. Australia's largest number of Hague cases is with New Zealand. The Australian system of legal representation is also comprehensive, free and unrestricted to foreign applicants, but differs in some significant respects from England and New Zealand. I will describe the Australian system shortly.

## **ENGLAND AND WALES**

First it would be useful to outline the English system, against which others might be compared.

### ***Cost of an application in England and Wales***

The United Kingdom made a reservation under Article 26 paragraph 3 declaring that it is not bound to assume any legal costs other than those covered by its system of legal aid and advice. Despite this reservation, the United Kingdom does provide free legal representation in Hague abduction cases and absorbs all legal costs for requests from abroad.

### ***Procedure in the England and Wales***

Cases are referred from the Central Authority for England and Wales to a private lawyer paid for by the State. The lawyer's name and address is notified to the Australian Central Authority, usually within 24 hours of receipt of the application. The UK Central Authority has developed a panel of experienced private lawyers to whom Convention requests are sent. It has been possible to develop local expertise as domestic legislation has restricted the venue for requests received from other countries to the courts of London where the Central Authority is located.

## **USA**

By comparison, we understand the arrangements with the United States of America to be as follows:

### ***Cost of an application to USA***

The cost of a successful application to the US Courts for an order for return can be significant. Attorneys' fees in the US vary from US\$150 - US\$400 per hour. A standard case may cost US\$10,000 – US\$15,000. One which goes on appeal could cost US\$25,000 or more. The US government made a reservation under Article 26 paragraph 3 of the Convention declaring that it is not bound to assume any legal costs. Thus overseas applicants must meet their own legal costs. However, US authorities do make efforts to locate pro bono attorneys for overseas applicants who cannot afford representation but this may take time and be unsuccessful.

The US Department of Justice's Office of Victims of Crime, which has been funding domestic returns of abducted children, determined in 1999 that it could fund international travel of left-behind parents to recover their children and, when necessary, fund the return travel of the abducted child(ren). Several cases have already been funded through this mechanism. The money for this program comes from fines levied by the US federal Courts. Please note that since the program assists "victims" of crime, it is available only to left-behind parents and abducted children - not the abductor.

### ***Procedure in the United States of America***

The National Center for Missing and Exploited Children as the US Central Authority for incoming (to US) applications, does not obtain orders for the return of a child from the US in Hague Convention cases. Its role is limited to seeking to promote co-operation among the relevant parties and acting as a source of information about proper procedures under the Convention and the contents and status of applications for assistance. On request it will send a letter to the abducting parent requesting a voluntary return. Whenever the National Center becomes aware of an initial court

hearing in the US on a pending Hague case, it will, at the request of the applicant or his/her attorney, immediately forward a letter to the court explaining the operation of the Convention. The Center can try to find a pro bono lawyer for those applicants unable to pay. The National Center has compiled lists of experienced attorneys able to take on new applications.

The National Center refers cases to the applicant's private lawyer in the US. Applications may be filed in a State court or a Federal court. The lawyer for the applicant will usually decide which will be more advantageous for the case.

## **AUSTRALIA**

The Australian system is quite different to both the English and US systems.

### ***Costs of applications to Australia***

As Australia did not make a reservation under Article 26 of the Convention, applicants seeking the return of a child from Australia under the Convention will not incur any legal costs if the Central Authority conducts the legal proceedings on behalf of the applicant. Furthermore, there are no eligibility requirements for legal representation or assistance for applicants (usually left behind parents, but occasionally an institution).

In appropriate cases, other costs associated with the legal proceedings, such as separate legal representation for the child, psychologists' reports, translations, will be met by the Central Authority or the federal legal aid system.

Legal costs will not be paid for applicants who seek the return of a child from Australia under the Convention without the involvement of the Central Authority. Australian legislation permits a private application, and it may occur if the Central Authority rejects an application and the left behind parent decides to proceed privately. It has also occurred when the Central Authority has declined to appeal against a court decision for the non-return of a child and the left behind parent wishes to appeal.

The Australian system is also unusual in offering government funded financial assistance to parents in Australia whose children have been removed from Australia. This financial assistance is means tested, and may cover the cost of legal representation in other countries, travel costs for a child ordered to return to Australia by a foreign court, and travel and related costs for a left behind parent to travel to the requested country to bring an abducted child back to Australia. The scheme does not cover the return travel costs of children wrongfully brought to Australia.

### *Procedure in Australia*

In Australia, legal proceedings are conducted by the Central Authority, and it is the Central Authority which is the applicant to the proceedings in court, and not the left behind parent. The Central Authority lawyers do not take instructions directly from the left behind parent in relation to the conduct of the case, but the views and wishes of the left behind parent will naturally be taken into account. The first duty of the Central Authority lawyers is to the courts and then to the Central Authority (the client). This occasionally causes problems for the left behind parent, especially when their case is weak or they want to withhold evidence. However, in most cases, the system works very well, as the aims of the Central Authority and the left behind parent are identical, ie. to have the child in Australia returned to the requesting country.

The Australian scheme differs from the English and New Zealand schemes in that while there is also no cost for legal representation in those countries, the applicant is directly represented by private lawyers.

Applications are usually filed in the Family Court of Australia, a federal court, by State Central Authority lawyers. Hague matters are given priority by the Family Court, but if a decision is appealed (either by the abducting parent or the Central Authority), then considerable delays can be expected. In the Family Court system, an appeal from a first instance decision of a Judicial Registrar is to a Single judge. This is a hearing de novo. A single judge decision is appealed to the Full court of the

Family Court. A Full Court decision may be appealed to the High Court of Australia, the final court of appeal, but only if the High Court grants leave to appeal.

## **PRACTICE IN OTHER COUNTRIES**

The Australian Central Authority has compiled information about costs and procedures in other Convention countries with which we deal. That document is attached.

### ***France, Greece, the Netherlands and Denmark***

France, Greece, the Netherlands and Denmark have also made reservations under Art 26. However, in these countries, free legal representation for Hague applicants is provided by the Public Prosecutor in the region where the child is living. The Public Prosecutors do not appear to have special expertise in Hague matters. It is our experience that if the matter proceeds to an appeal, free legal representation is not readily available from the French or Greek governments, and applicants are encouraged to retain private representation.

### ***Canada, Israel, Sweden, and South Africa***

Although Canada and Israel have made a reservation under Art 26, free legal representation is provided to those applicants who qualify for legal aid in Australia. In addition, both Sweden and South Africa will permit Hague applicants to complete their legal aid forms for consideration.

### ***Hong Kong***

Hong Kong will also consider legal aid applications to that country. If Hong Kong legal aid is granted, a firm of solicitors will be assigned to handle the application subject to the payment of a contribution as assessed by the Hong Kong legal aid authority.

### ***Germany and Poland***

Germany requires Hague applicants to retain private representation following initial acceptance of the application by the Central Authority and receipt of the DM2000 deposit. However, it appears that the German Central Authority continues to monitor proceedings closely. Applications to Poland cannot proceed until a Polish lawyer is retained by the applicant as the Polish Central Authority does not have an active role to play proceedings.

### ***Spain and Chile***

Spain and Chile have not made a reservation under Art 26, and our earlier applications to these countries were dealt with (or not dealt with) by government lawyers. These applications received so little action and attention from the respective Central Authorities and their lawyers, especially in Chile, that the applications were doomed to failure. Because of the perceived ineffectiveness of the Central Authorities in Spain and Chile, Australian applicants are now advised to retain the services of private attorneys in those countries to commence proceedings and this means that the Central Authority is bypassed completely.

### **BEST PRACTICE REGARDING LEGAL REPRESENTATION**

It is suggested that the criteria for best practice in legal representation may be:

1. Free legal representation for Hague applicants.
2. Legal representation by experienced Hague lawyers.
3. A centralised court system with a small number of specialist judges hearing Hague cases.
4. Interpreters provided free if the applicant does not speak the language of the requested country and the applicant is required to travel to the requested country for the legal proceedings or to pick up the child.
5. Each country should provide a clear description of its procedures, both legal and administrative, as well as its legal aid arrangements and eligibility criteria.
6. Each country should, if necessary, pay the cost of repatriating its own children, once a return order has been made.