

THE NEW SWISS FEDERAL ACT ON INTERNATIONAL CHILD ABDUCTION

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Switzerland has always been, and still is, fully supportive of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. More recently, however, cases in which Swiss courts have applied the Convention have revealed that the operation of the Convention requires careful scrutiny and softer application when the abduction has been carried out by the primary carer, usually the mother, and when the return of the child entails a high risk that upon return, he or she may be separated from both parents or that there will be no reasonable outcome for mother and child upon their return to the country in which they were formerly habitually resident.

A. RECENT CASE LAW

A case at the centre of numerous debates and media coverage for many years involved family W. The mother abducted her two children from Australia in June 2001. She had married an Australian national in 1994 and subsequently separated from him in 2000. After years of proceedings before Swiss courts (on the return order and on its enforcement), it was finally decided that the order providing for the return of the children to Australia should be enforced.¹ In January 2005, the children were separated from their mother and forcibly placed on an aeroplane under conditions that were widely reported by the media and were the subject of much public criticism. Their mother had to stay in Switzerland. She was prevented from joining her children as she had committed an offence upon leaving Australia.² The children could not be cared for by their father as he was not able to house and care for them at his residence. The custody case began in December 2005 but it was not until June 2006 that the judgment was given allowing the children to join their mother in Switzerland. During this lengthy waiting period, the children were placed with three succes-

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¹ Arrêts du Tribunal Fédéral Suisse (ATF) 130 III 530 ss.

² Non-respect of an injunction prohibiting her from leaving the country with the children and falsification of their passports.

sive foster families before finally being able to return to their mother in Switzerland. Is there any doubt that these children, who have been returned to the *status quo ante*, the official slogan governing the application and the promotion of the Hague Convention, have suffered tremendously and may well be traumatised for many years to come?

The Bianchi case is another that has caused a stir in the media. A first abduction ended in an order being given to the mother to bring the child back to Italy which she subsequently did. The mother was not able to achieve a better result through a second abduction either because numerous decisions had, in the meantime, been given in Italy confirming that the father had custody. After being confronted with a second order to return the child to his father in October 2004, the mother disappeared with the child. The child's father brought the case before the European Court of Human Rights which condemned Switzerland for not having made sufficient efforts to locate the child and put him back in his father's care in Italy.³ In October 2007, the mother was detained at Maputo airport in Mozambique, together with the boy and two other young girls born on the islands of Sao Tomé and Príncipe, where they had been living. The family was quickly handed over to officials from Italy who took them to Rome where the mother was put in prison with the baby girls, while the boy was put in his father's care. The mother was later released by the Italian authorities and moved to Switzerland with her daughters from where she filed an application under Article 21 of the Hague Convention with the Swiss central authority to reach arrangements for organising and securing her rights of access to the boy in Italy.

An Argentine case of child abduction is no more encouraging. In this case, the Swiss mother complied with an order requiring her to bring the children back to Argentina⁴ notwithstanding the threat of imprisonment for her actions. This threat of imprisonment did not actually come to anything and the mother was granted custody by the Argentine courts with the added condition that she was not to leave Argentine territory with her children (*ne exeat* order). The father thus obtained what he wanted, that is to say, visiting rights without the need to go to another country. For the mother, the future is depressing: left alone with her children, her social and economic situation is difficult, despite the support that is still being given to her by the Swiss authorities. It is clear that this has profound effects on the situation of the children and their well-being. Thus, in this case, the Hague Convention did not result in a solution reflecting the best interests of the children, as it applies without taking care of the issue of relocation to the country where the mother has a family and social support network.

Recently, the Swiss Federal Tribunal decided that a mother had to return to

³ ECHR, *Bianchi v Switzerland*, Application No 7548/04, 22 June 2006, ss 91–100.

⁴ ATF of 31 January 2003, available at the Swiss Federal Tribunal's website: <http://www.bger.ch> and identified as: 5P.263/2002, further published in: (2003) 4 *Die Praxis des Familienrechts (FamPra.ch)* No 67, 476.

Israel with her son despite the fact that she was not willing to return to the country and wanted to remain in Switzerland, her country of origin.⁵ In this case, it had been established, and was not disputed by the father, that he was violent and therefore posed a danger to both the mother and the child. He was not permitted to visit the child without two care-persons being present and was not permitted to come within 100 meters of the mother. Nevertheless the Federal Tribunal ordered their return for the reason that it had not been established that there was no possible way for the mother and child to live in Israel without being exposed to the father's violence. The case has since been brought before the European Court of Human Rights. For the first time in a Swiss case, the Court ordered, as an interim measure, that the enforcement of the Swiss judgment should be stayed.⁶ This measure was implemented. The case is still pending.

In another recent case, the rigid application of the Convention did not produce substantial harm but it did produce an absurd result. A mother had moved with her two children, a 14-year-old girl and an 8-year-old boy, from the southern part of the Alsace region in France to a place near Basel in Switzerland, a distance of less than 10 kilometers. The children's parents had divorced before a French court. While they maintained joint custody, the residence of the children had been determined as the mother's place of residence. It was not disputed that in light of the short distances involved, the father was not exposed to any additional difficulty in the exercise of his part of the custody arrangement and of his visitation and contact rights; furthermore the children continued to visit him at his own residence nearby in France. Nevertheless, it was decided that the Convention applied and the children had to return and take residence on French territory.⁷ Return of the children was ordered for the end of January 2008, right in the middle of the school year. The girl objected to her return, but it was decided that her views had not been expressed and recorded in sufficiently explicit terms to have allowed the father's application for return to be rejected on the basis of Article 13(2) of the Convention.

Both of these two recent decisions reveal confusion on the part of the Swiss Federal Tribunal in respect of the concept of "rights of custody" as used in Article 3(1)(a) and Article 5(a) of the Convention. The Federal Tribunal exclusively referred to the "joint custody" that both parents indeed had in these cases. It did not take into account the fact that the custody rights within the meaning of the Hague Convention, which uses the expression "droits de garde" in the French version, had been withdrawn from the father in the case involving Israel, with the effect that the mother alone was entitled to determine the residence of the child. In the case where the mother moved across the border to Switzerland

⁵ ATF of 16 August 2007, 5A.285/2007, published in (2007) 17 *Aktuelle Juristische Praxis* 1585.

⁶ Art 39(1) of the ECHR's Rules of Court.

⁷ ATF 134 III 88 ss, also published in (2008) 18 *Aktuelle Juristische Praxis* 478.

from France, the Tribunal based the application of the Hague Convention on a violation of the joint custody held by the parents, despite noting that the mother alone had the right to act as the children's "guardian". The Tribunal was not aware that the concept of "droits de garde" no longer exists under French law, which provides that the judge specifies the parent with whom the child shall live in the event of divorce or other separation of the parents (Article 373-2 of the French Civil Code). According to the divorce decision given in France, the children were to share the residence of their mother. Therefore, in view of the definition of "rights of custody" given in Article 5(a) of the Convention, which relies "in particular" on the right to determine the child's place of residence, there were no grounds for applying the Convention. Moreover, even if the father had had some partial right of custody under this provision, no wrongful breach occurred because his relations with the children remained exactly the same as they were still living close by, albeit on the other side of the border.

In addition to this difficulty in understanding the objective and operation of the 1980 Hague Convention, three main defects can be identified in recent Swiss practice.

Firstly, even though case law accepts that the return of a child must not result in the child being put in the care of a parent who is violent or could have a harmful influence on the child, it is in practice sufficient that the child be returned to the state he or she comes from in a different way so as to avoid being exposed to the danger presented by the parent. The case law works on the assumption that, under the Convention, it is enough to ensure that the child can be taken back to his or her previous country of residence without examining the questions of how the child will go back and where he or she will go back to. An order for return is no more specific than instructing the mother to return the child to the designated country. The living conditions that the child will be put in upon return are not examined and it is normally not taken into consideration whether the abducting parent accompanies or can accompany the child for the return. The child's interests are only examined in a general manner without taking individual circumstances into account. Not enough attention is given to the harm that could be caused to the child's development or even the mental trauma that could be caused by the return.

Secondly, it is rare for the Swiss authorities to take advantage of the possibility to work with the authorities of the state where the child was habitually resident before the abduction. In practice, co-operation with foreign authorities has only been sought in isolated cases. The Swiss central authority is available to give all appropriate help but this offer has not been taken up by the courts very often. However, the Convention requires that the safe return of the child be guaranteed (Article 7(h)).

Thirdly, Swiss case law has settled on the principle that the author of the abduction cannot, within the meaning of Article 13(1)(b), argue that it would not

be possible for him or her to accompany the child for the return journey because such an argument would have as the ultimate consequence that the abducting parent would be benefiting from his or her own illegal behaviour. A single exception is made for mothers with newborn babies. In all other cases the abducting parent's arguments are rejected outright without looking at whether there might be objective reasons in support of their position. If the abducting parent refuses to go back, it must be assumed that he or she is putting his or her own interests before those of the child. This is why the fact that returning might prove to be subjectively unbearable for the mother (eg, because she has married someone in Switzerland or because she has to take care of an elderly or sick relative in this country) should not be taken into account either. It is frequently stated that the mother should not be permitted to take advantage of her own illegal behaviour. Such a strict view leaves no room for taking account of the child's interests, a situation which is made even worse by the fact that the child is only accepted as a party to the proceedings in exceptional cases.

B. NEED FOR REFORM

In response to this case law and the practical consequences of it, the federal authorities have been faced with a whole series of speeches made in Parliament requesting an application of the Convention that is better adapted to the needs of the child. The cases in question involved, above all, children who had been abducted by their mothers. All but one of the cases recently decided by the Swiss Federal Tribunal involved abductions by the child's mother. This is higher than the world average of 70%.

Work on reforming the law was begun by a Commission of Experts nominated by the Federal Council. This commission submitted proposals for new legislation on 6 December 2005.⁸ The Department of Justice and Police prepared a bill based on these proposals. This bill underwent the usual consultation procedure with all the interested parties before being the object of what is called a "dispatch" (in French, a "message") from the Federal Council which was submitted to the Federal Parliament on 28 February 2007.⁹ The Federal Parliament adopted the law on 21 December 2007 after making some minor changes.

⁸ The Commission's Final Report of 6 December 2005 can be found on the website of the Federal Department of Justice and Police: http://www.ejpd.admin.ch/ejpd/fr/home/themen/gesellschaft/ref_gesetzgebung/ref_internationale_kindesentfuehrungen.htm. See also: A Bucher, "Internationale Kindesentführungen heute", in: *Dritte Familienrechtstage Basel 2006* (Bern, 2006), 103–37; A Bucher, "L'enfant du couple désuni en droit international privé" (2006) 128 *Semaine judiciaire* II 239, 247–68. The Report and these contributions contain full documentation of the case law.

⁹ Cf 2007 *Feuille fédérale* 2433, available on the Federal Administration's website: <http://www.admin.ch>

After that, the text was published in case a referendum was sought.¹⁰ This was not the case. Consequently, the Federal Council will decide to enact the law and will set a date for its entry into force.

The federal authorities took advantage of the submission of numerous measures to the Federal Parliament by adding in a measure for the ratification of 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 and of the Hague Convention of 13 January 2000 on the International Protection of Adults. This proposal has been approved by Parliament together with the new Act and both Conventions will be ratified by Switzerland in the near future.

Article 1 of the Act designates the Federal Office of Justice as the federal central authority in charge of implementing the Hague Conventions and the 1980 European Convention. In addition, under Article 2, central authorities are to be set up in each canton to assist in the operation of the 1996 and 2000 Hague Protection Conventions. Article 1(3) and Article 2(2) determine the respective scopes of competence of the authorities at the federal and the cantonal level. Article 15 provides for an amendment of Article 85 of the Federal Act on Private International Law, including an express reference to the 1996 and 2000 Hague Conventions. It also contains a rule providing for the jurisdiction of Swiss authorities in residual cases (paragraph 3) and a provision on the recognition of measures taken in the state where a child or adult has his or her habitual residence, if this state is not party to the relevant Hague Convention (paragraph 4). Although this latter provision does not expressly address enforcement, it should be interpreted as including it.

The rules contained in section 2 of the Act were originally prepared to provide solutions for child abduction cases governed by the 1980 Hague Convention involving children retained in Switzerland. However, the Act, as voted by the legislator, appears to be more complex. The provisions relating to the central authority or to court proceedings initiated by an application for return can also apply to an application for return based on the 1980 European Convention (with the exception of Article 5). On the other hand, Article 3, on the network of experts, is not limited to the framework of these Conventions.

When preparing the new legislation, the Commission of Experts and the Swiss authorities were well aware that the natural place for complementary rules and solutions for the efficient application of the Hague Convention would be the Convention itself. That is why the Swiss delegation submitted proposals for amendments to the Convention at the meeting of the Commission on General Affairs of the Hague Conference in early April 2006. It was decided that the matter should be dealt with at the fifth session of the Special Commission on

¹⁰ Cf 2008 *Feuille fédérale* 33.

Child Abduction in November 2006.¹¹ At that meeting, it was decided not to support the Swiss proposal for a Protocol to the Convention, but rather just to include a statement recognising the “strength of arguments” in favour of such a Protocol and its “potential value”, although not considered an immediate priority, in the “Conclusions and Recommendations”.¹²

However, the Swiss initiative did produce one significant result. Indeed, whereas the idea of a Protocol was dropped, in November 2006, the Special Commission approved a declaration that is included in its “Conclusions and Recommendations” as an Appendix,¹³ whereby the Hague Conference states that a number of measures comply with and support the proper application of the 1980 Convention. This document is not drafted in the form of rules that are legally binding upon Contracting States. However, the statement has the unanimous approval of delegates of the Contracting States who all agree that the solutions provided for in the rules contained therein are appropriate measures that all Contracting States can take in order to secure the implementation of the objects of the Convention within their territories, as required by Article 2 of the Convention. For Switzerland, this was further support to move ahead with its own draft for a law on the implementation of the Hague Convention.

The new Federal Act has now been drafted but Switzerland will continue to pursue the goal of adding amendments to the Hague Convention which could be adopted at a multilateral level. In September 2007, Switzerland submitted an updated draft for a future Protocol to the Convention. The matter was discussed at the meeting of the Council on General Affairs and Policy in April 2008. The Council decided to reserve for future consideration the feasibility of a Protocol containing auxiliary rules designed to improve the operation of the Convention. All involved in these matters know that the framework of the 1980 Hague Convention is no longer adapted to the typical pattern of child abductions today. The growing number of abductions undertaken by the child’s primary carer needs consideration, as does the focus to be put on the best interests of the child. These alone are sufficient reasons for undertaking and supporting initiatives for reform. The new Swiss rules may pave the way for progress and reform on a multilateral level. As long as such an initiative is not actively supported by the Hague Conference and its Permanent Bureau, the Swiss rules may serve as model rules for other Contracting States willing to improve their own practice in the handling of child abduction cases.

¹¹ See A Bucher, “The Convention Should Be Revised!” (2006) 11 *The Judges’ Newsletter* 41.

¹² See No 1.7.3 and 1.8.3 of the “Conclusions and Recommendations”, to be found on the website of the Hague Conference: www.hcch.net, as a document relating to the Child Abduction Convention, further published in (2007) 12 *The Judges’ Newsletter* 10.

¹³ See (2007) 12 *The Judges’ Newsletter* 26.

C. NEW RULES ON PROCEDURE

1. A Network of Experts

One major lesson to be learnt from the past is that applications for the return of abducted children should not be put into the hands of lawyers and the courts too readily. When a family situation appears to be tense and the source of conflict, the central authority is often not in a position to provide counselling to assist the persons involved to deal with the problem without resorting to fighting and harassment. Instead of immediately submitting an application for return to the courts, requiring the parties to hire lawyers who will often look exclusively to the interests of their client, families should be offered counselling from other professionals.

Moreover, assessing whether it is possible to return an abducted child to his or her country of origin necessarily includes weighing up a multitude of relevant factors relating to the child's personal and family situation. The central authority and the judicial authority are often not able to analyse all the decisive psychological and social elements and are therefore not in a position to correctly assess the family situation themselves. Using specialist, multidisciplinary knowledge has the advantage that the number of procedures resulting in an amicable resolution increases and that the child's interests can be better taken into consideration. However, access to specialists in a position to intervene in abduction cases is, in practice, difficult given that they are spread all over the country and are not organised by a central body.

It is for this reason that Article 3(1) of the Act makes provision for the central authority, in co-operation with the cantons, to establish a network of experts capable of acting expeditiously. It is also possible to integrate institutions that take charge of children (such as the International Social Service). As stated in Article 3(2), the central authority may entrust all or part of the tasks to be carried out by the network to such an institution and, in such a case, provide for the necessary financial support.

In each case, the use of experts is preferably arranged in such a way that a plan of how to resolve the abduction is established as soon as possible and the different proceedings are co-ordinated accordingly. The ad hoc care team set up by the central authority¹⁴ would be responsible for the planning and carrying out of the various steps on the understanding that the parent, the appointed lawyers and the child's guardian would also be involved. It would also be possible to establish contact with the court competent to deal with an application for return. Grouping together the interested parties aims to avoid transferring responsibility to a large number of different people which might confuse the parents and lead to a more intense conflict situation.

¹⁴ Acting on the basis of Article 7(2)(b)-(d) and (h) and Art 10 of the Convention.

This first assessment may then lead to an attempt to resolve the case on a voluntary basis. The network is to provide services for conciliation and mediation, or alternatively it may designate other specialists available in a particular case. It will also assist in the search for counsel who will represent the child in court.

As stated above, the provisions of Article 3 do not contain limitations as to their scope of application. The network will therefore be available for abductions involving non-contracting states as well as for those relating to children removed to or retained in a foreign state and involving parents left behind in Switzerland. Moreover, the federal central authority also has the duty, under Article 1(3)(e) of the Act, to promote co-operation with the network referred to in Article 3 for the application of the Hague Protection Conventions of 1996 and 2000.

2. The Search for an Amicable Resolution of the Issues

The Convention works on the assumption that the return of the child will take place, wherever possible, on a voluntary basis. As a result, the procedure must be set up in such a way that it aims, first and foremost, at reaching an amicable resolution. This task must be seen as a priority by the central authority.¹⁵ An amicable resolution of the case does not necessarily imply the return of the child. A resolution granting visiting and contact rights may be enough for the left-behind parent.

In order to ensure that every effort is made to attempt conciliation before the dispute moves to the courts, Article 4(1) provides that the central authority can initiate a conciliation or mediation procedure. For such purposes, it will rely on the experts and institutions forming the network referred to in Article 3. The use of “may” instead of “shall” leaves a certain margin and does not declare such a procedure compulsory. One reason for this is that the central authority will rely on the advice from the network of experts as to what is the most appropriate way of proceeding in each individual case. The other reason is that a great number of cases that reach the central authority do not need to go so far as conciliation or mediation as they can be resolved through a simple exchange of correspondence or other contact making the abducting parent aware of the possible application and efficiency of the Hague return mechanism.

Mediation presents the big advantage that it can situate the question of the abducted child’s return in its global context, ie, the child’s relationship with his or her parents including the regulation of custody rights and adjustment of family life for the future. Experience shows that the return of the child does not solve the underlying family conflict and that, in the way that it is dealt with in the Convention, it cannot solve it. Only a single aspect is settled and even though the

¹⁵ Art 7(2)(c) and Art 10 of the Convention.

question of custody rights will be decided later, the emotional burden will still remain.

3. Continuity of Family Ties

Practical experience of child abduction cases shows that it is particularly important to maintain and protect the contact between the two parents and the child even during the critical period following the abduction. It is often possible to reduce the tension and even to find amicable solutions through personal contact. That is why Article 4(2) provides that in the first stage, led by the central authority, the authority is to encourage all the people concerned to participate in a conciliation or mediation procedure. This involves not only the abductor of the child but more importantly the left-behind parent. The left-behind parent will be asked to come to Switzerland in order to help with such an attempt. If necessary, this parent may be provided with assistance such as a contribution towards travel expenses.

The judge dealing with the application for return will also, under Article 6(1), be competent to decide on the child's personal relations with his or her parents. He or she can take all measures necessary for the protection of the child. This competence includes being able to regulate the family situation during the procedure. It also includes taking measures aimed at protecting the child after the decision has been given and, in particular, the appropriate measures for ensuring the safe return of the child.

When support is needed before the application for return is submitted to the competent court, it may be sought by the central authority, parties or the court itself under Article 6(2). All preliminary steps for protection are thus centrally dealt with by a single judge from the moment the application for return is received by the central authority. From then on, this judge can settle the access and visitation rights of the left-behind parent as well as the abductor and child's situation. He can designate a representative for the child or a guardian who assists the mother before the process relating to the application for return has even begun.

4. Court Proceedings

Experience shows that cases of abduction become more markedly criticised when the proceedings drag on. An uncertain state of affairs that lasts a long time is a heavy burden for a child and his family. A child handles being returned to his country of origin much better if the length of time he was away for was relatively short and if he has not really become integrated in the state he was taken to. The situation is similar for the abducting parent.

An analysis of recent Federal Tribunal judgments has shown that proceedings in a child abduction case that is heard by two instances in the cantonal courts

and the Federal Tribunal takes an average of 10 months, the minimum being 3 months and the maximum being 14 months. Generally, the Federal Tribunal gives its judgment within 6 weeks. The problem of excessively long court proceedings is therefore exclusively cantonal in nature. This is why Article 7(1) provides that applications for the return of abducted children must be heard by the supreme court of each canton. In addition, the cantons must, under Article 12(1), designate a single authority responsible for executing decisions on the return of a child.

The cantonal tribunal dealing with the case may wish to transfer the proceedings to the competent tribunal in another canton. Article 7(2) offers such a possibility, which is new in Swiss procedural law. It is thought that this will apply in two types of cases. One would be a situation in which the child changes his residence, in particular moving from one language region to another, after the application has been lodged with the court in the canton of his former residence. The second situation would be where an application is lodged before a court in a canton where no experience in matters of child abduction is available, whereas the court in a neighbouring canton is in a much more favourable position in this respect. In order to avoid procedural objections and losing time, the consent of the parties and the tribunal in the other canton is required for all transfers.

It should be pointed out that the length of proceedings does not depend solely on the courts. It can be explained to a not insignificant extent by the fact that time limits for appeals are relatively long and that cases are sometimes sent back to the lower courts. With effect from 1 January 2007, the time limit for bringing an appeal before the Federal Tribunal in abduction matters was reduced from 30 to 10 days.

The first task for the cantonal tribunal dealing with the application will be to set up a procedure for conciliation or mediation either for ensuring the voluntary return of the child or for bringing about any other amicable resolution of the conflict, pursuant to Article 8(1). However, such an attempt is only to be made if it has not yet been done by the central authority or if the judge is of the view that a second chance might be fruitful. The court is not required to proceed with such an attempt by itself; it can defer the matter to specialists available in its jurisdiction or call for the assistance of the network set up under Article 3. If any such attempt fails and, consequently, the application for return is not withdrawn, the tribunal has to give its ruling, as stated in Article 8(2). The rules on summary proceedings apply in such a case. They are set out in cantonal law and will be codified by a new Federal Act on Civil Procedure in the near future. Once the application has been submitted through the channel of the central authority to the local court, very little feedback on the court proceedings and the outcome is actually available. Article 8(3) intends to change this practice, requiring the tribunal to inform the central authority of the main steps taken in the proceedings, including the final decision. This shall also apply, by analogy, to the Federal

Tribunal when dealing with an appeal. The same duty to inform must be observed when an application has been filed directly with the competent cantonal court, missing out the central authority.

The new legislation introduces some additional measures for the conduct of the court proceedings, which are different from the rules contained in cantonal law or, on some points, in the Civil Code. A summary procedure is based, in most cases, on documentary evidence. This is not appropriate for matters of child abduction. That is why Article 9(1) provides that the tribunal shall hear the parties in person “as far as possible”. The latter statement refers to the presence of the left-behind parent. It reinforces the need for the judge to receive a complete picture of the family situation, in particular when a defence based on Article 13(1)(b) of the Hague Convention has been raised or when the return of the child requires measures to be taken for his safety. It is understood that the procedure shall be organised in such a way that the left-behind parent would only have to travel to Switzerland once. Therefore, when he or she is attending a meeting devoted to mediation that subsequently proves unsuccessful, the hearing before the judge dealing with the application should be arranged for immediately afterwards.

Article 9(2) adds a distinct rule on how the child will be heard, which is comparable to Article 144(2) of the Civil Code that applies in relation to children in divorce cases. Although the practical application of this right of the child is far from satisfactory,¹⁶ there was no reason to introduce a different and more compulsive provision for child abduction proceedings, as this might have caused various objections to be raised during the consultation phase and later in Parliament.

Article 9(3), on the other hand, is very innovative. It makes it compulsory for the judge to designate a representative who acts as custodian for the child. Such a custodian can already appear in divorce proceedings. However, as such a representative is only to be designated if there is a significant need for one, judges only accept such a designation in extremely rare cases. It was crucial to avoid the same result in child abduction cases, where the questions to be resolved are delicate and complex in nature and the child involved is in an extremely vulnerable position. Judges have to provide for the child to be represented by a custodian with the requisite professional skills as soon as he or she receives an application for return. However, such action is not required if, at an earlier stage, the central authority or one of the parties successfully applied for such a measure before the same court, as provided for in Article 6(2).

¹⁶ Swiss courts take a broad discretion when considering whether and how the child may be heard, despite the fact that the child is entitled to give its views and opinion to the court (Art 12 of the New York Convention on the Rights of the Child). Children below the age of 12 years are heard upon a parent's request only. Little initiative is undertaken to encourage children to appear before the court. It is common practice that judges do not hear the child themselves and request social services or other experts to do so.

In light of the extreme reluctance on the part of the Swiss courts to consider how to ensure the safe return of the child to the country in which he was habitually resident before the abduction, legislation was needed. The court's attitude needed to be changed as it risked resulting in situations detrimental to the child's health and safety which would go against the spirit and the provisions of the Convention, in particular Article 7(2)(h).¹⁷ The new rules also apply before the Federal Tribunal dealing with an appeal.¹⁸

Pursuant to Article 10(1), the court dealing with the application or, at least, informed that such application has been filed with the central authority, shall co-operate "as required" with the authorities of the state in which the child had his habitual residence before abduction. While one would have preferred to see such a provision drafted in more explicit terms, it provides the court with a large incentive to seek the assistance of the authorities of the child's former country of residence in ensuring the child's safety and well-being upon his return. Such co-operation may be requested from the central authority or from any other competent authority in this country. Swiss courts are thus invested with a large scope of co-operation involving the authorities of the former home country. This includes safe harbour as well as mirror orders. Swiss judges are thus encouraged to establish direct contact with judges who deal with the matter in the country to which the child is to be returned. Such a task also includes securing the visitation and contact rights of the abducting parent upon the child's return. The principal goal of Article 10(1) is to provide the Swiss courts with appropriate information about the child's situation in the former country of residence, whether he may return or not, and about the measures that may be taken in order to ensure the child's protection after his return. On the basis of this information, the court will then be able to make a fully informed decision. Such an evaluation of the situation allows an adequate judgment about the crucial defence based on Article 13(1)(b) of the Convention to be made. However, if the co-operation of the local authorities in the country where the child should be returning to is lacking, inefficient or otherwise unreliable, this might shift the likelihood of a tolerable return under Article 13(1)(b) in the opposite direction.

Article 10(2) adds that the court has to examine whether, and if so in what way, the decision to return the child can possibly be carried out in the country of return. This provision overlaps in part with the first paragraph. In addition, it directs the court to examine the conditions of return even when a consultation

¹⁷ The changes in attitude and proceedings will have an immediate impact. Indeed, Art 16 of the Act provides, as a transitional measure, that the provisions relating to international child abduction shall be of immediate application in all cases pending before courts at the cantonal level on the day the Act enters into force.

¹⁸ Therefore, when the Federal Tribunal is inclined to overrule a cantonal decision refusing the return of the child, it may, on its own initiative and with the assistance of the central authority, have to take measures of co-operation that are required in the particular case. The file should not be sent back to the court of first instance to deal with such matters.

of the local authorities of the country of return is not possible or not appropriate. The court should take advantage of the knowledge and the services available at the Swiss central authority.

Both provisions of Article 10 may be compared to Article 11(4) of the Brussels *Ibis* Regulation of 27 November 2003.¹⁹ Indeed, one of the main objectives of the co-operation with the authorities of the former country of residence is to establish adequate arrangements that secure the protection of the child after his or her return. Such arrangements may have the effect of lifting any objection based on Article 13(1)(b) of the Convention. However, the Swiss rule provides for some flexibility. Security upon return is not the only objective that matters. If the child would have to be put in foster care because he cannot live at his father's residence and the mother is unable to return, the situation, if adequately prepared, might offer "security" but nevertheless place the child in an intolerable situation as he would be separated from both of his parents. As a matter of practice, the results might turn out to be the same in such a case under both provisions. Indeed, under the European rule, the court dealing with the application for return will not seek an arrangement that might secure the return of the child, in order to avoid an approach that would no longer allow the use of the Article 13(1)(b) defence.²⁰

5. The Enforcement of Return Orders

In recent years, the strong resistance of the mother and the child has, on several occasions, caused tremendous difficulties and serious delays in proceedings for the return of the child. In some cases, it was possible to start new court proceedings on the limited but nevertheless very contentious issue of the way to proceed with the return despite the hostile attitude of mother and child. One reason for this procedural delay was the fact that the decision ordering return did not provide for instructions on the date and the other practical details relating to the return.

In order to avoid this problem, which is found in most return orders, Article 11 provides that the judge who orders the return of a child must include the practical details relating to execution in the decision ordering return, to the extent that these questions can be settled by the court (paragraph 1). The decision ordering the return of a child and the measures relating to its enforcement are effective throughout the country (paragraph 2).

In some dramatic cases, the enforcement of the return order was not possible or it took place under conditions that were questionable in light of the limits on

¹⁹ Reg 2201/2003 OJ 2003 L338/1.

²⁰ However, Art 11(6)–(8), of the Brussels Regulation means that European courts should be conscious that if they do not return children in cases where adequate arrangements for the security of the child could have been made, the country of origin may overrule the decision of the country of refuge and the child will then have to be returned.

the conduct of officials in exercising such a task, in particular when it involves a child. Carrying out execution can involve resorting to force. If the execution of decisions was regularly to fail because of the resistance of the people concerned, decisions ordering return would have no effect and the Convention would become meaningless.

Nevertheless, the authorities responsible for execution must respect, as a limit upon what they can do, the fact that they must not inflict upon the child suffering that seriously endangers his or her physical and mental state. The principle set out in Article 13(1)(b) of the Hague Convention, according to which a child must not be exposed to physical or psychological harm or otherwise placed in an intolerable situation, is also applicable here. Traumatic execution measures that would affect the child long-term must not be taken. This relates to, for example, the use of physical force on the child (physical violence, other corporal punishment, detention, use of drugs that impair consciousness and willpower), refusing to let the child say goodbye to the parent staying in Switzerland, the child not being taken charge of and accompanied by personnel trained in child psychology in order to take care of the child in such extreme and difficult circumstances. A child's best interests are also disproportionately jeopardised when he or she is uprooted in a way that is not based on any real interest, eg, when a child is taken out of school shortly before the end of the school year or when a child is denied contact with his or her mother for a long period of time when it would have been possible for the two to live together under the supervision of an authority. The child's best interests must act as a guideline even in these extremely difficult situations.

These observations are based on experience with recent cases in Switzerland. After the entry into force of the Act, all institutions and forces involved will have to comply with the new Article 12(2) which provides for the child's best interests to be taken into account at the enforcement stage as well. For that purpose, the authority in charge of such enforcement has to make a (final) attempt to reach a solution on a voluntary basis. Experience has shown that attempts for reconciliation may fail at the trial stage but that they may suddenly be successful when the matter moves towards enforcement. Usually, the debate surrounds agreeing upon the appropriate measures to be taken for returning the child as smoothly as possible, which is very often by aeroplane. While this is not contained in the rule itself, it is implied that the authority in charge may also open a debate on the question of whether the parents would be willing to agree on a settlement in which the return order would not be enforced.

6. Change of Circumstances

A decision ordering the return of a child is not definitive in nature. Such a decision is comparable, in many respects, to child protection measures. If execution (voluntary or forced) is not immediate, a situation necessitating the re-examina-

tion of the issues surrounding the return and the associated reasons for the refusal could arise over time. A re-examination must take place where the child has, in the meantime, reached an age and level of maturity which makes it compulsory that his refusal to return be taken into account under Article 13(2) of the Convention. Swiss practice has shown that it may be that the situation of the left-behind parent suddenly changes after the return order is granted, and does so to such an extent that the situation of the child upon his return has to be looked at in a completely different light which may include seriously considering objections based on Article 13(1)(b) of the Convention. It may also be the case that the competent authority of the country to where the child is to be returned orders that the child be placed under the sole custody of the abducting parent and gives him or her the right to relocate, with the effect that the return order, although still in force, no longer makes any sense.

The European Court of Human Rights has established, in relation to Article 8 of the European Convention of Human Rights, that contracting states are obliged to ensure the protection of family relations as well as accepting and supporting the execution of return orders.²¹ However, the Court has also stated that a re-examination may be necessary if the essential elements of the factual situation change in a significant manner in relation to the child's best interests.²²

Such cases are addressed by Article 13. Under this article, the court in each canton that is competent in child abduction proceedings may, upon request, amend the decision ordering the return of the child if the circumstances precluding such return have changed significantly (paragraph 1). In such a case, enforcement is discontinued (paragraph 2). The wording of the provision is slightly elliptical because it includes two requirements in a very short phrase. The change in the situation must affect the "circumstances precluding return". This means that the focus will be solely on circumstances relevant to coming to a different decision that would still comply with the requirements and the limited scope of possible objections under the Hague Convention. Furthermore, the change of circumstances should be significant. There will be no possibility to relitigate the return order unless the situation has, in its relevant parts, changed dramatically. In most cases, such a change will end in a refusal of the initially ordered return. However, other situations may arise in which changed circumstances require a modification of a particular provision relating to the enforcement of the return order, such as the postponement of the departure.

It should be added, however, that this provision was drafted to appease those who have been involved in some recent cases or who were shocked after learning

²¹ See ECHR, *Ignaccolo-Zenide v Romania*, Application No 31679/96, 25 January 2000, ECHR 2000-I 241, s 106; *Sylvester v Austria*, Application Nos 36812/97 and 40104/98, 24 April 2003, ss 58, 68–72; *HN v Poland*, Application No 77710/01, 13 September 2005, ss 72–5, 80–83.

²² See ECHR, *Sylvester v Austria*, s 63. Compare also *Pini and others v Romania*, Application Nos 78028/01 and 78030/01 22 June 2004, ECHR 2004-V 297, s 158, relating to the enforcement of an adoption order.

from the media exactly what children have to go through when being treated by officials using force purportedly “in the best interests of the child”. The new Act should provide for a practical decision-making process that will avoid the occurrence of such dramatic events, or at least significantly reduce their number and the intensity of harm. The enforcement of a return order should be done swiftly and therefore the number of cases in which there is time for any change of circumstances should be very small. An additional way to avoid causing harm to abducted children would be to apply the provisions of the Convention in such a way as to comply more fully with the main goal of protecting the best interests of the child.

D. THE BEST INTERESTS OF THE CHILD

1. The Focus under the Convention

The central norm laid down in Article 13(1)(b) does not expressly refer to the notion of the child’s interests. Assessment of the child’s interests is not undertaken by the court in the state to which the child has been taken so as not to allow the abducting parent to benefit from the abduction and so as not to disadvantage the parent who lives in the state in which the child is habitually resident and whose custody rights were breached. The decision on return must not be taken to be a decision on parental custody; such a decision falls exclusively to the court in the country from which the child has been removed (Article 16). A detailed assessment of the child’s interests is necessary to decide the question of parental custody but is not decisive for the Convention as it is based on the sole principle of returning the child (wherever possible).

However, that does not mean that the child’s interests are unimportant in the application of Article 13(1)(b). The question of knowing whether the return puts the child in an “intolerable situation” must necessarily be judged with reference to the child’s interests. The content of this provision also emphasises that it is the child’s situation and not the behaviour of third parties, including the parents, that is assessed. Interpretation of Article 13(1)(b) must also take into account the Convention’s preamble in which the signatory states express their conviction that “the interests of children are of paramount importance in matters relating to their custody”. However, referring to the best interests of the child can only prevent return where there is a grave risk of physical or psychological harm to the child or where the child would otherwise be put in an “intolerable situation”. A simple infringement of the child’s interests that cannot be qualified as intolerable is insufficient.

Article 13(1)(b) requires the weighing up of decisive elements that are based on the child’s interests without necessarily leading to the same solution: (1)

Abduction prejudices the child's interests because it takes the child away from the parent who has custody by attempting to get around this parent's lawful right to have the custody case settled at the place in which the child is habitually resident. In individual cases and from the point of view of general prevention, such an act requires the corrective measure of repatriating the child to the place where he or she is habitually resident to be taken. (2) Moreover, return can prejudice the child's interests if the effect of it is to expose the child to harm or if the child otherwise finds him/herself in a situation that conflicts with his or her fundamental interests.

As an exception clause, the role of Article 13(1)(b) is to find the balance between the decisive elements from the point of view of the child's interests. So, a return must not take place if it infringes the child's interests so seriously that it would be intolerable for him or her. As such, application of this provision in a way that is adapted to the individual child is recommended and also possible. The Explanatory Report of Elisa Pérez-Vera also mentions that the exceptions provided in Articles 12 and 13 of the Convention are "concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area",²³ and that Article 13(1)(b) is one of the exceptions "which clearly derive from the consideration of the interests of the child".²⁴ The child's interests in abduction cases are equally very important from the point of view of Article 8 of the European Convention on Human Rights, which can justify refusing to send a child back in exceptional cases such as in the case of a child who became settled with her mother in her new country after a stay of eight months.²⁵

In the case law from other countries, there is no shortage of signs that decisions not to return a child abducted by the primary carer should, from now on, be assessed according to the central criteria of the child's interests.²⁶ In a judgment from as early as 1999, the High Court of Austria ruled that when the return of the mother might dramatically exacerbate the marital conflict, it would be intolerable to expose the child to this as it would be intolerable to send him

²³ See Acts and Documents of the Fourteenth Session (1980), The Hague 1982, 425–73 (432 No 25).

²⁴ *Ibid* (433 No 29).

²⁵ ECHR, *Monory v Hungary and Romania*, Application No 71099/01, 5 April 2005, s 83, referring, *inter alia*, to *Sylvester v Austria*, Application Nos 36812/97 and 40104/98, 24 April 2003, ss 58ff.

²⁶ The Hague Conference, normally very vocal when it comes to practical advice, offers no interpretative assistance allowing this new tendency to be taken into account, contenting itself with stressing the exceptional nature of reasons for not applying the Convention. See the "Conclusions and Recommendations" of the Fifth Meeting to review the operation of the Hague Convention of 1980, referred to above, stating no more than that Article 13(1)(b) should be "narrowly construed" (No 1.4.2). Such lack of understanding and inspiration with regard to the operation of one of the key provisions of the Convention has been strongly and rightly criticised by S Fisher, "How Far Did the Conclusions and Recommendations of the Fifth Meeting of the Special Commission Advance the Interpretation of Article 13(1)(b), Grave risk Defence?" (2007) 12 *The Judges' Newsletter* 54.

back on his own.²⁷ In another decision, the High Court added that the child's interests must prevail over the objective of preventing abductions and that nothing stops the court taking into account the integration of the child resulting from a prolonged stay in his new host country.²⁸ In a decision from 4 July 2003, the Italian Corte Suprema di Cassazione refused to return children abducted by their mother and taken to Italy because the mother's refusal to go back to Israel would have caused intolerable psychological trauma to the children if they had been repatriated and because their interests in the sense of Article 3(1) of the Convention on the Rights of the Child (CRC) must be assessed exclusively on the basis of the effects on the children without taking the parent's behaviour into account.²⁹ The incentive effect of Article 3 CRC also led the French Cour de Cassation to henceforth place the child's interests at the heart of their analysis of Article 13(1)(b) of the Convention. On 18 May 2005, in a spectacular reversal of its jurisprudence, the Cour de Cassation held that Articles 3 and 12 CRC were, from then on, directly applicable in the French courts.³⁰ Consequently, in a decision of 14 June 2005, the Court held that, pursuant to Article 3(1) CRC, the circumstances mentioned in Article 13(1)(b) of the Hague Convention "must be assessed in view of the more important interests of the child".³¹ This approach has been approved and confirmed by the European Court of Human Rights.³²

2. The Swiss Rule on the Exception in Article 13(1)(b)

Article 5 of the new Swiss Law is of particular interest in this respect. While it sets out certain requirements to be observed by Swiss courts in the application of Article 13(1)(b), it does not and could not derogate from this provision in any way. Its objective is to identify one particular situation where the exception shall apply. By the use of the words "in particular", the provision indicates that other cases are to be dealt with on the basis of Article 13(1)(b). Article 5 directs the Swiss courts to focus specifically on the child's situation in cases where the abductor, usually the mother, cannot possibly or cannot reasonably be expected to return with the child, and where the child cannot be entrusted to the left-behind father and would therefore, upon return, have to be placed in care, separated from both of his or her parents. More and more frequently, these situ-

²⁷ Decision of 11 November 1999, (2000) 41 *Zeitschrift für Rechtsvergleichung (ZfRV)* 196.

²⁸ Decision of 29 May 2000, (2001) 42 *Zeitschrift für Rechtsvergleichung (ZfRV)* 30 (abstract).

²⁹ Judgment No 10577, (2004) 40 *Rivista di diritto internazionale privato e processuale (RDIPP)* 665.

³⁰ There are two decisions in this respect : (2005) 94 *Revue critique de droit international privé (Rev.crit.)* 679.

³¹ (2005) 94 *Revue critique de droit international privé (Rev.crit.)* 679, 683, (2005) 132 *Journal de droit international (Clunet)* 1131.

³² ECHR, *Maumousseau and Washington v France*, Application No 39388/05, 6 December 2007, ss 66–75. While adopting such an approach and considering the best interests of the child, the Court ultimately accepted that the decision to return the child did comply with these standards under the circumstances of the particular case.

ations involve, in practice, cases where the father's violent behaviour caused the mother to leave the family home with the child, often without any protection available from friends, social services and local authorities. These cases cannot be resolved by reeling off the usual slogan on the need to re-establish the *status quo ante*. They require a proactive approach on the part of all concerned with a focus on the best interests of the child instead of concentrating on apportioning blame on the mother.³³

Article 5 states three conditions, which apply cumulatively. Some distinctions therefore have to be made.

If, during the examination of the request for the return of the child, it proves to be the case that the parent making the request is at least temporarily capable of having the child, the argument that the return might place the child in an intolerable situation will generally not stand up. Consequently, the child should be able to endure separation from the abducting parent if they insist on not accompanying the child upon his or her return. In such a case, the requirement under Article 5(a) that placement with the parent who filed the application is manifestly not in the child's best interests is not fulfilled and Article 5 does not raise any objection to the application for return. To still refuse the return of the child, there would need to be special circumstances that make separation from the mother harmful to the child. A certain amount of strictness is imperative so as not to transform the dispute into a custody case, which is not allowed under the Convention (Article 16) and which would also deprive it of its practical effectiveness.

If, on the other hand, Article 5(a) applies and the child cannot be placed with the left-behind parent upon return, much depends on the answer to the question of whether the abducting parent, ie, in most cases the mother and the child's primary carer, is able to return or can reasonably be expected to return and to take care of the child upon their arrival in the country they had previously left. In the first type of case, the mother may have very serious reasons for not returning. She may refuse to return due to the fact, eg, that she fears criminal prosecution upon return; that she (and her child) would not be protected from the child's violent father; that she is obliged to stay in the country where she has arrived with the child, in particular for family reasons, such as the need to take care of a close relative or newborn baby or because of a new marriage. In such cases, depending on the exact circumstances, Article 5(b) may be applicable. It is simply not the case that an abducting mother is always to be blamed for the way she acted. However, in many cases, when separated from the father and living as a foreigner in an unfamiliar country where she lacks any significant personal, social or economic ties, it may not be reasonable for her to stay there any longer. The occurrence of such situations has already been noted in the Explanatory

³³ See CS Bruch, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" (2004) 38 *Family Law Quarterly* 529.

Report of Elisa Pérez-Vera.³⁴ This should be reconsidered in light of the dominant pattern of abductions conducted by mothers who are the child's primary carer.

If the court dealing with the application for return must work on the assumption that the abducting parent, in general the mother, cannot accompany the child or cannot be reasonably expected to return, it must ask the question of whether separation from both parents, including the mother, and placement in foster care would put the child in a harmful and intolerable situation. Separating a child from his or her mother should, as a rule, be considered as a serious infringement of the child's interests where the mother is the child's principal person of reference and also, where the child's relationship with the father is not such as to allow the father to take charge of the child upon his or her return. Placing the child in foster care, breaking his regular relationship with both parents, can only be considered in utterly exceptional circumstances, ie, as an *ultima ratio*. This has to be carefully examined by Swiss courts, taking account of any support and measures of co-operation that are offered from or accepted by the competent authorities of the requesting state. However, if, under such conditions, placement in foster care is manifestly not in the best interest of the child, the third condition of Article 5 of the Act, set out in letter (c), is fulfilled. Such a conclusion would then confirm that there is a grave risk of the child being placed in an intolerable situation. Article 13(1)(b) of the Convention would therefore apply and the return would be refused.

Another type of case relates to the situation of a mother who could be required to return, if necessary, when the return of the child is ordered even though she is obviously the person who is principally in charge of the child's care. The practical problem relating to the child's return to the country in which he or she was habitually resident often lies in the fact that the child and his/her parents must wait for the definitive outcome of the custody battle before being authorised to come back to Switzerland following custody, as expected, being given to the mother, and the additional settling of the father's visiting rights. Such coming and going serves little purpose for the people concerned and is based solely on the idea that the Hague Convention would insist upon the status quo being re-established.

The child's return to the state in which he or she was habitually resident should only really be ordered if the child can live there with the parent who is his or her principal guardian in conditions that are in accordance with his or her best interests and are also reasonably bearable for this parent. If the return takes place in such a way that the mother and child live separately from the father and

³⁴ “. . . it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected”, See 1980 *Acts and Documents of the Fourteenth Session*, The Hague 1982, 425 (432 No 25).

it is impossible to improve the social and economic environment, the situation would appear difficult to bear. There would be no sense in the father demanding the return of the child when he does not demand that he be given back custody and be allowed to accommodate the child or when he is obviously not in a position to exercise these rights. The fact that the problems and psychological burden felt by the abducting parent upon return also affect the child and endanger his or her personal well-being must also be taken into account.

In a recent decision concerning the execution of an order for return, the Federal Tribunal noted that there is no longer any point to repatriation if the authorities of the state where the child was previously resident have already decided that the abducting parent should be given custody.³⁵ The court should decide in the same way where the circumstances of the case show that the child cannot be placed in the care of the applicant in the state in which the child was habitually resident and where there is a very strong probability that the abducting mother will obtain full custody. If the Swiss court can, with the co-operation of the authorities in the state to which the child was removed or in which he or she has been retained, recognise that such a situation is highly likely, there is no sense in returning the child. Under such circumstances, the mother cannot be reasonably required to return and take care of the child in the country they have both just left, as staying at the father's residence and being put into foster care are manifestly not in the best interests of the child. All three requirements of Article 5 would be fulfilled, as well as the reasons for a refusal to order the child's return under Article 13(1)(b) of the Convention.

A further important group of cases are those in which the applicant, usually the father, is simply trying to protect his visitation rights and the right to have regular contact with the child and no other interests. In such a case, where it appears that there is no serious dispute about custody, but a need, mostly justified, to regulate access rights, the Convention and in particular the defence based on Article 13(1)(b) has to be applied in a manner that takes account of the applicant's objective. The mechanism for return under the Convention is primarily intended to protect custody rights or an expectation for a new custody order in favour of the left-behind parent. It is not designed to ensure return when there is no doubt that the abductor, and not the left-behind parent, will remain the primary carer who stays with the child. In some of these cases, the court may be faced with a situation where it would appear to be too much of a burden for the mother and the child to return. The child should not have to go through the return procedure where it would appear that there could be no outcome other than the mother keeping custody and where the interests of mother and child are predominantly in favour of family life in the country they have moved to, while the interests of the father can be adequately protected by providing for

³⁵ ATF 130 III 530 ss, 534.

appropriate opportunities to visit and have significant contact with the child. In such cases, more than in others, the court's position on whether or not it is reasonable to require the mother to return with the child may be difficult to determine. The requirement of Article 5(b) of the Act is crucial in this respect. However, this is the price to be paid for taking the interests of the child seriously.

FEDERAL ACT ON INTERNATIONAL CHILD ABDUCTION AND THE HAGUE CONVENTIONS ON THE PROTECTION OF CHILDREN AND ADULTS

of 21 December 2007

The Federal Assembly of the Swiss Confederation,

based on Article 122 of the Constitution,

in implementation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Hague Convention) and of the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980 European Convention),

in implementation of 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 (1996 Hague Convention) and the Hague Convention of 13 January 2000 on the International Protection of Adults (2000 Hague Convention),

and having considered the Federal Council's Dispatch of 28 February 2007,

decrees:

Section 1 General Provisions

Art 1 Federal central authority

- 1 The Federal Office of Justice ("the Office") is the federal central authority in charge of implementing the conventions listed in the preamble.
- 2 The Office shall perform the tasks set out in the 1980 Hague Convention and the 1980 European Convention.
- 3 Under the 1996 and 2000 Hague Conventions, the Office's tasks shall be:
 - a. to transmit communications from abroad to the cantonal central authority;
 - b. to provide information on Swiss law and child protection services in Switzerland to foreign authorities;
 - c. to represent Switzerland before central authorities in other countries;

- d. to advise the cantonal central authorities on these conventions and to ensure their application;
- e. to promote cooperation between cantonal central authorities, cooperation with experts and institutions under Article 3 and with the central authorities of Contracting States.

Art 2 Cantonal central authorities

- 1 Each canton shall designate a central authority responsible for the implementation of the 1996 and 2000 Hague Conventions.
- 2 Unless Article 1 paragraph 3 stipulates otherwise, the cantonal central authorities are responsible for the tasks given to central authorities by the Conventions.
- 3 The cantonal central authorities or other authorities designated by the cantons shall, upon request, issue the certificates provided for in Article 40 paragraph 3 of the 1996 Hague Convention and in Article 38 paragraph 3 of the 2000 Hague Convention.

Section 2 International Child Abduction**Art 3** Experts and institutions

- 1 The federal central authority shall, in cooperation with the cantons, see to the establishment of a network of experts and institutions that are in a position to give advice, to carry out conciliation or mediation, to represent individual children and that are capable of acting expeditiously.
- 2 The federal central authority may entrust the tasks mentioned in paragraph 1 to a private body, which it may pay by either reimbursing the expenses incurred or at a fixed rate.

Art 4 Conciliation or mediation procedures

- 1 The central authority may initiate a conciliation or mediation procedure in order to obtain the voluntary return of the child or to facilitate an amicable resolution.
- 2 The central authority shall, in an appropriate manner, encourage the persons concerned to participate in such a conciliation or mediation procedure.

Art 5 Return and best interests of the child

Under Article 13 paragraph 1 letter b of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:

- a. placement with the parent who filed the application is manifestly not in the child's best interests;

- b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent; and
- c. placement in foster care is manifestly not in the child's best interests.

Art 6 Protective measures

- 1 The court dealing with the application for the return of the child shall decide, as required, on the child's personal relations with his or her parents and order the measures necessary to ensure his or her protection.
- 2 Where the application for return has been received by the central authority, the competent court may, at the request of the central authority or any of the parties, order the appointment of a representative for the child, the appointment of a guardian, or other protective measures even if the application for return has not yet been received by the court.

Art 7 Competent court

- 1 The supreme court of the canton where a child is resident at the moment when the application for return is lodged is the sole court competent to deal with applications for return, including protective measures.
- 2 The court may transfer the case to the supreme court of another canton if the parties and the court in question consent.

Art 8 Court procedure

- 1 The court shall initiate conciliation or mediation procedures with a view to obtaining the voluntary return of the child or to achieving an amicable resolution if the central authority has not already done so.
- 2 When conciliation or mediation does not result in an agreement leading to the withdrawal of the application for return, the court shall decide using a summary procedure.
- 3 The court shall inform the central authority of the essential steps in the procedure.

Art 9 Hearing and representation of the child

- 1 As far as possible, the court shall hear the parties in person.
- 2 The court shall hear the child in an appropriate manner or appoint an expert to carry out this hearing unless the age of the child or another valid reason prevents this.
- 3 The court shall order that the child be represented and designate as a repre-

sentative a person experienced in welfare and legal matters. This person may file applications and lodge appeals.

Art 10 International cooperation

- 1 The court shall cooperate as required with the authorities of the state in which the child had his or her habitual residence before abduction.
- 2 The court, if necessary with the cooperation of the central authority, shall satisfy itself whether and in what way it is possible to execute the decision ordering the return of the child to the State in which he or she was habitually resident before abduction.

Art 11 Decision ordering the return of a child

- 1 A decision ordering the return of a child must include instructions for its execution and be communicated to the authority responsible for its execution and to the central authority.
- 2 A decision ordering the return of a child and the instructions for execution apply throughout Swiss territory.

Art 12 Execution of the decision

- 1 The cantons shall designate a single authority responsible for executing the decision.
- 2 The authority shall take account of the best interests of the child and endeavour to obtain the voluntary execution of the decision.

Art 13 Amending the decision

- 1 The court may, upon request, amend the decision ordering the return of a child if the circumstances precluding return change in a significant manner.
- 2 The court may also decide to discontinue execution proceedings.

Art 14 Costs

Article 26 of the 1980 Hague Convention and Article 5 paragraph 3 of the 1980 European Convention apply to the costs of the conciliation or mediation proceedings, the court proceedings and the procedure for the execution of the decision at the cantonal and federal levels.

Section 3 Final provisions**Art 15** Amendment of current law

The Federal Act of 18 December 1987 on Private International Law is amended as follows:

Art 85

- 1 In relation to the protection of minors, the jurisdiction of Swiss judicial and administrative authorities, the applicable law and the recognition and enforcement of foreign decisions or measures are governed by 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.
- 2 In relation to the protection of adults, the jurisdiction of Swiss judicial and administrative authorities, the applicable law and the recognition and enforcement of foreign decisions or measures are governed by the Hague Convention of 13 January 2000 on the International Protection of Adults.
- 3 Swiss judicial or administrative authorities also have jurisdiction where the protection of a person or of his or her property so requires.
- 4 Measures ordered in a State that is not party to the Conventions mentioned in paragraphs 1 and 2 shall be recognised if they were ordered or recognised in the State where the child or the adult in question has his or her habitual residence.

Art 16 Transitional provision

The provisions of this Act relating to international child abduction also apply to applications for the return of a child pending before the cantonal authorities at the time when this Act enters into force.