

## Sri Lanka's Answers to the Questionnaire for newly-acceding States

### **I** **Implementing legislation**

(a) ***Is implementing legislation necessary to bring the Convention into force in domestic law?***

Yes.

(b) ***If so, has the necessary legislation been enacted, and is it in force? (Please provide a copy or indicate where copies of the legislation may be obtained)***

Yes, the Convention on the Civil Aspects of International Child Abduction Act, No. 10 of 2001 (the 'Act') has been enacted and came into operation on 1<sup>st</sup> March 2002 (Gazette Extraordinary No. 1225/29 dated 1<sup>st</sup> March 2002, which also specifies the countries in respect of which the provisions of the Act apply).

Copies of the Act and of the Gazette may be obtained from the Government Publications Bureau, No. 32, Transworks House, Lotus Road, Colombo 12, Sri Lanka.

### **II** **Locating children**

***Please indicate the agencies involved and the processes available for the location of missing children in your country.***

▪ **Police**

An investigation may be commenced when, from information received or otherwise, an officer in charge of a police station or inquirer has reason to suspect the commission of the offence of kidnapping from lawful guardianship, an offence under section 354 of the Penal Code (section 108(5) of the Code of Criminal Procedure Act, No. 15 of 1979). This offence encompasses the taking or enticing of any minor under fourteen years of age if a male, or under sixteen years of age if a female, out of the keeping of the lawful guardian of such minor (Penal Code, section 352)

▪ **Courts**

The Court of Appeal has jurisdiction to grant and issue orders in the nature of writs of habeas corpus to bring up before such Court the body of any person illegally or improperly detained in private custody. The High Courts of the Provinces have jurisdiction to issue, according to law, orders in the nature of habeas corpus in respect of persons illegally detained within the Province.

A Magistrate's Court may issue a search warrant if it has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence (section 72 of the Code of Criminal Procedure Act, No. 15 of 1979).

### **III Central Authority**

**(a) *The designation and contact details of the Central Authority***

Secretary, Ministry of Justice  
Address - Ministry of Justice, Law Reform and National Integration  
PO Box 555  
Superior Courts Complex  
Hulftsdorp  
Colombo 12  
Sri Lanka  
Telephone - 0094 1 323979  
Fax - 0094 1 445447  
E-mail - secmoj@sri.lanka.net

**(b) *Contact persons within the Central Authority, languages spoken, contact details for each***

Mrs Dhara Wijayatilake  
Secretary, Ministry of Justice, Law Reform and National Integration  
Languages spoken - English, Sinhala  
Contact details - as in (a) above

**(c) *Please indicate measures taken to ensure that the Central Authority is in a position to carry out the functions set out in Article 7 of the Convention?***

The existing infrastructure and official machinery at the disposal of the Secretary, Ministry of Justice is available for the carrying out of requests under the Convention. In addition the Act makes provision for the Central Authority, on receiving an application, to obtain judicial orders for the return of a child wrongfully removed to, or retained in Sri Lanka or for securing the effective exercise of rights of access to a child who is in Sri Lanka.

### **IV Judicial procedures**

**(a) *Which courts/administrative bodies within your system have been given jurisdiction to consider applications for return orders (and questions of access) under the Convention?***

The Central Authority considers applications, and may institute judicial proceedings in the High Court of the Western Province for an Order for the return of a child or for access to a child. The Central Authority may refuse to accept any application for assistance in securing the return of a child if satisfied that there are no grounds for such application (section 7 of the Act).

**(b) *What measures exist to ensure that return applications will be dealt with expeditiously at first instance and on appeal?***

The Act provides that Court proceedings are to be by way of summary procedure, which is a more expeditious procedure than the regular procedure. It is further provided that the Central Authority may, in a proceeding instituted for the return of a child, require the High Court to provide its reasons where the High Court fails to dispose of the application within six weeks (section 12 of the Act).

**(c) *What facilities are available to foreign applicants to assist them in bringing their applications before the courts, and in particular is legal aid available and, if so, on what conditions?***

The appropriate authority of the foreign country, or a person, institution or other body of such country, may by application made in the required Form invoke the assistance of the Central Authority. The Central Authority may in suitable cases institute judicial proceedings, which will be conducted at no cost to the applicant

of the foreign country. In other cases the Central Authority is authorized to take measures to facilitate the provision of legal aid or advice (section 5 (g) of the Act).

## V Enforcement procedures

### ***What procedures and measures exist for the enforcement of***

#### ***(a) a return order?***

Where the High Court makes an order for the return of a child to the country in which such child had his or her habitual residence prior to its removal to Sri Lanka, the Central Authority is required by the Act to cause such arrangements as are necessary to be made in accordance with such order, for the return of such child to such specified country (section 21 of the Act).

#### ***(b) a contact/access order?***

Where the High Court makes a contact/access order, the enforcement procedure applicable to orders of the High Court would be available.

## VI Substantive law

### ***(a) What are the legal criteria by which custody and contact determinations are made?***

Subject to section 11 of the Act (below), the High Court shall order the return of a child in proceedings instituted by the Central Authority under the Act, where it is satisfied that the child in respect of whom the application is made has been wrongfully removed to, or retained in, Sri Lanka within the meaning of section 3 of the Act, and a period of less than one year has elapsed between the date of the alleged removal or retention and the date of the application. The High Court may order the return of a child even after the lapse of the period of one year referred to, unless it is satisfied that the child is settled in his or her new environment. (Section 10 of the Act)

The above is qualified by section 11, which provides that the High Court may refuse to make a return order if –

- the Court is satisfied that the person, institution or other body having the care of the person of the child was not exercising such rights of custody at the time of removal or retention, or had consented to or subsequently acquiesced in such removal or retention, or  
  
there is a grave risk that the child's return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation (section 11 (1)); or
- the child objects to being returned and the Court is satisfied that the child has attained an age and a degree of maturity at which it is appropriate to take account of the child's views (section 11 (2)).

In exercising its powers under sections 11(1) and 11(2) the High Court is to have regard to any information relating to the social background of the child provided by the appropriate authority of the country in which the child had his or her habitual residence (section 11(3)). Section 11 (4) provides that the existence of a decision of, or a decision entitled to be recognized by, a Sri Lankan court relating to the custody of the child shall not of itself be a ground for refusal to make a return order by the High Court. The High Court should however take into account the reasons for such decision in making a return order.

**(b) Is there a difference in the legal status of mothers and fathers in custody or contact cases?**

*N.B.- The following account is of the position under the general law of the country. Different considerations may be applicable in cases arising from one or other of the systems of personal laws viz. Kandyan law, Muslim law and Tesawalamai.*

The general law of Sri Lanka is the Roman-Dutch law, which in the context of custody rights distinguished between legitimate and illegitimate children on the one hand, and in the case of legitimate children further according to whether the parents are or are not lawfully separated.

In the case of legitimate children whose parents are not lawfully separated, the Roman-Dutch law recognised the father as the natural guardian of minor children to the exclusion of the mother, and as such accorded to the father a preferential right to custody. However this preferential right to custody would not be applicable where the parents are divorced or judicially separated. In this situation, the welfare of the child would be the criterion for an order for custody.

In the case of illegitimate children, the general law (Roman-Dutch law) recognised the mother as the natural guardian of the child, with the attendant right to custody. The father was completely excluded from exercising any parental rights in respect of the child.

The foregoing is subject to the Courts' overriding jurisdiction as the upper guardians of minors. Thus the Courts have in reported cases made orders depriving the natural guardian of custody in the best interests of the child. However the onus of displacing the preferential right to custody accorded to the natural guardian would have to be discharged by the party seeking such an order from Court.

An illustrative decision is *Karunawathie v Wijesuriya and another* [1980] 2 SLR 14. In this case the mother applied for a writ of habeas corpus against her husband in respect of the custody of their daughter, who was aged four years and four months. The parents' marriage was subsisting. The child's mother (the petitioner) did not allege that her husband was not a fit and proper person to have the custody of the child. The Court of Appeal applying the Roman-Dutch principles held that where the bond of matrimony subsists the father has the preferential right to custody of the child, subject to the paramount consideration of the welfare of the child. It was held that the burden of satisfying the Court that such consideration arises would be on the mother, and as no such case had been made out by the petitioner, the father was held entitled to custody.

Regarding rights of access, the Courts recognise the right of the non-custodial parent to reasonable access to the child, subject to the consideration of the child's best interests. Even in the case of illegitimate children, where the father cannot claim access as of right because the Roman-Dutch law denies the father all parental rights, the Courts as upper guardians of minors may in the interests of the child grant the father a right of access.

**VII Social services and child protection services**

***Please describe the services which exist for the assessment, care and protection of children in the context of international child abduction.***

***Please indicate the services available for the protection (if necessary) of returning children, as well as the services available (including legal advice and representation) to a parent accompanying a child on return.***

Pending the determination of an application for the return of a child, the Court could make an order entrusting the child to the custody of the Department of Probation and Child Care.

Legal aid is available in suitable cases to a parent accompanying a child on return.

**VIII Information and training**

***What measures are being taken to ensure that persons responsible for implementing the Convention (e.g. judges and Central Authority personnel) have received appropriate information and training? (Note: the Permanent Bureau may be contacted for information in relation to forms of assistance which may be available for this purpose.)***

The Act has been provided to the concerned authorities, and awareness programs will be conducted in the future.