

APPENDIX 7

Family Division: Guidance to Judges on the Implementation of the UK–Pakistan Judicial Protocol on Child Contact and Abduction

[May 2004]

1. This Guidance is issued to all judges on the instruction, and with the approval, of the President of the Family Division.
2. The Judicial Protocol was agreed in January 2003 at a conference in London between judges of the UK and Pakistan. The conference was followed in September 2003 by a second judicial meeting in Islamabad, at which further Guidelines were agreed. Both documents are appended to this guidance.
3. The Protocol has been drawn to the attention of judges and practitioners in Pakistan and there is a commitment to its implementation.
4. Liaison judges have been appointed in both the UK and Pakistan. In the UK the liaison judge is Lord Justice Thorpe. In Pakistan the liaison judge is Justice Mian Muhammad Ajmal, a judge of the Supreme Court.
5. Use of the Protocol may arise in a number of contexts including applications for leave to take a child temporarily to Pakistan for a holiday and abductions to or from Pakistan. The precise nature of the application will determine which level of court is appropriate.
 - (a) Applications for temporary removal of a child from the jurisdiction (whether contested or not) may be heard by a High Court judge or, with the leave of a High Court judge, by a Deputy High Court judge or a Circuit Judge. [Note that this supersedes the decision of Thorpe LJ in *Re K (removal from jurisdiction: practice)* [1999] 2 FLR 1084.]
 - (b) Applications concerning abduction are likely to involve the inherent jurisdiction and/or wardship and should only be listed in the High Court before a Judge of the Division or, with the leave of a High Court judge, before a Deputy High Court judge.
6. The Protocol itself applies within the relatively narrow parameters set out in its paragraphs 2 and 3 i.e. where

- The ‘left behind’ parent has a residence order and has not consented to the child being removed to/retained in Pakistan, or
 - The removal/retention is in breach of section 13 of the Children Act 1989, or
 - The removal is in breach of a prohibited steps order/injunction, or
 - There is a care order and the removal/retention is in breach of section 33(7) of the Children Act 1989.
7. In analogous cases which do not fall within the strict terms of the Protocol, it would be consistent with the predominant approach of the Court of Appeal similarly to apply the presumption of return ‘in the spirit’ of the Protocol, provided it is not contrary to the best interests of the child. An example of such a case would be where there is no pre-existing court order and no breach of section 13/section 33 but the child is habitually resident in England and Wales and the removal/retention was unilateral and appears to be in breach of the Child Abduction Act 1984.
8. It is important when drawing orders to distinguish between cases to which the Protocol applies strictly and cases where the order is made in the spirit of the Protocol. The specimen orders appended to this Guidance are designed for the following situations:
- Orders granting leave for temporary removal to Pakistan where the Protocol will apply strictly if the order is breached
 - Private law cases between parents where the Protocol applies strictly
 - Public law cases where the Protocol applies strictly
 - Cases where the Protocol may be applied in spirit
- The specimen orders are for illustrative purposes only, and for use subject to adaptation to meet the circumstances and findings in each case.
9. Each specimen order is accompanied by notes setting out important features to which attention must be paid.
10. Where a judge makes an order to which the Protocol relates or may relate, including orders granting leave temporarily to remove a child from the jurisdiction, or makes an order in the spirit of the Protocol, a copy of the order must be sent to both:

Lord Justice Thorpe (liaison judge)
Royal Courts of Justice
DX 44450 Strand RCJ
Telephone: 020 7947 7432
Fax: 020 7947 6408

Head of Consular Division
Foreign and Commonwealth Office
Spring Gardens,
London SW1A 2PA
Telephone: 020 7008 0212
Fax: 020 7008 0152

The order will then be transmitted to the liaison judge in Pakistan. It would be helpful if the solicitors for the left behind (or at-risk) parent could send to both addresses a brief note concerning the effect of the Protocol on the case, once the outcome is known, to enable the collation of an overview of the Protocol's operation.

11. It is important to note that the Protocol differs from the Hague Convention in that there is no system of enforcement through a central authority. Furthermore, there is no automatic procedure for a mirror order to come into existence in Pakistan when a UK court order is made. Accordingly, if a child is wrongfully taken to or detained in Pakistan in contravention of a UK order, it will ordinarily be the responsibility of the aggrieved party to institute proceedings in the Pakistani courts to obtain compliance. Both the liaison judge in the UK and the FCO should be informed and the FCO can assist in providing a list of solicitors' firms in Pakistan but it is the enforcing party who has to instruct Pakistani lawyers and obtain an order from a Pakistani court.

Ananda Hall
Family Division Lawyer
21 May 2004

APPENDIX ONE: SPECIMEN PREAMBLES/DIRECTIONS/ORDERS

A. HOLIDAY LEAVE ORDERS

(protocol will apply strictly if order is breached)

Note: The order should expressly recite:

- (a) *The fact that a retention of the child beyond the period of leave would constitute a breach of the order*
- (b) *The existence of the Protocol and the fact that the parties have been made aware of and consent to its operation and understand its consequences.*

The order should also state on its face the full terms on which leave is granted, including the contact name and exact address of the child for the duration of the child's stay in Pakistan. The purpose of doing so is to enable the Pakistani authorities most effectively to take appropriate steps to return the child if improperly detained after the conclusion of the holiday; and to notify the local judge in advance of the child's arrival, so that if problems arise they can be dealt with promptly by the local judge.

UPON hearing

AND WHEREAS this court has on [date] ordered that [child's] residence be with [parent]

AND WHEREAS [child] is habitually resident in the United Kingdom

AND WHEREAS this Honourable Court is anxious to ensure that [child] is returned to England and Wales and is not retained outside the jurisdiction beyond the period of leave granted herein

AND UPON the Applicant [parent] having informed this Honourable Court that during the period of leave granted herein the child will be located at [address] in the Islamic Republic of Pakistan

AND UPON the Protocol made on the 17th January 2003 in London and signed by the Honourable Chief Justice of the Supreme Court of Pakistan and the Right Honourable The President of the Family Division of the High Court of Justice of England and Wales (‘the Protocol’) having been drawn to the attention of the parties

AND (the consequences of the Protocol having been explained to [him/her]) UPON the Applicant [parent] consenting to the application of the Protocol in the event that the child is not returned to the jurisdiction of England and Wales before the period of leave granted in this order expires

IT IS ORDERED that:

1. The Applicant [parent] is permitted, for the purpose only of a holiday visit to the Islamic Republic of Pakistan, to remove the child [child] out of the jurisdiction between [time] on [date], and [time] on [date].
2. In the event that [child] is not returned to the jurisdiction of England and Wales before [time] on [date], then every person within the jurisdiction of this Honourable Court in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of [child].
3. In the event that [child] is not returned to the jurisdiction of England and Wales before [time] on [date], then every person not within the jurisdiction of this Court who is in a position to do so is respectfully requested to co-operate in assisting and securing the immediate return to England and Wales of [child].
4. In the event that [child] is not returned to the jurisdiction of England and Wales before [time] on [date], then all judicial, administrative and law enforcement authorities of the Islamic Republic of Pakistan are respectfully requested to use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in locating, safeguarding and facilitating the return to England and Wales of the said minor child pursuant to the laws of the Islamic Republic of Pakistan and in accordance with the Protocol made on the 17th January 2003 in London and signed by the Honourable Chief Justice of the Supreme Court of Pakistan and by the Right Honourable The President of the Family Division of the High Court of Justice of England and Wales.

5. The Applicant [parent]'s solicitors shall fax copies of this order to the Clerk to the Right Honourable Lord Justice Thorpe at the Royal Courts of Justice, The Strand, London WC2A 2LL (DX 44450 Strand RCJ; Fax 020 7947 6408); and to the Head of the Consular Division, Foreign and Commonwealth Office, Spring Gardens, London SW1A 2PA, tel. 020 7008 0212, fax 020 7008 0152.

B. PRIVATE LAW – PROTOCOL APPLIES STRICTLY

UPON hearing

AND UPON the Applicant [parent]'s solicitor undertaking to file within [] days an originating summons in wardship in respect of the said child

AND WHEREAS [child] is a Ward of this Honourable Court and is a British citizen born in and domiciled in the United Kingdom and currently [believed to be] travelling outside England and Wales with a United Kingdom passport

AND WHEREAS in consequence of the fact that this Court has ordered that the said child remain a Ward of Court whilst he remains a minor, this Court is empowered and required to exercise its custodial jurisdiction over him and to ascertain his best interests and to facilitate and protect those best interests

AND WHEREAS it appears from an order made in [details of proceedings] on [date] (of which a copy is attached) that [child] was habitually resident in England and Wales on [date]/at the time when he was removed from this jurisdiction and should not have been removed from the jurisdiction/retained outside the jurisdiction beyond [date when s 13 period/period of leave re holiday ends]

AND WHEREAS this Honourable Court is satisfied that

[where CAFCASS represents the child] all interested parties are before the Court including CAFCASS (the Child and Family Court Advisory and Support Services) appointed by the Court to represent the Ward

[or where no guardian for child but where both parents are present/represented] both parents are before the Court

AND WHEREAS this Honourable Court has in the interests of [child] determined that he should so soon as practicable return/be returned to England and Wales

IT IS ORDERED that:

1. [Child] is and shall remain a Ward of this Honourable Court during his minority or until further order [if wardship not already confirmed].
2. The said child shall be returned to England and Wales by [parent] forthwith [or insert whatever arrangement for return is sought].

3. Every person within the jurisdiction of this Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of [child], a Ward of this Honourable Court.
4. The Applicant [parent]’s solicitors shall fax copies of this order to the Clerk to the Right Honourable Lord Justice Thorpe at the Royal Courts of Justice, The Strand, London WC2A 2LL (DX 44450 Strand RCJ; Fax 020 7947 6408); and to the Head of the Consular Division, Foreign and Commonwealth Office, Spring Gardens, London SW1A 2PA, tel. 020 7008 0212, fax 020 7008 0152.
5. [if necessary] The matter shall be listed for directions within 7 days of the return of the children to England and Wales [or whatever arrangement responds to the urgency of the situation appropriately].
6. Costs reserved.

AND THE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward [child].
8. All judicial, administrative and law enforcement authorities of the Islamic Republic of Pakistan to use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in locating, safeguarding and facilitating the return to England and Wales of the said minor child pursuant to the laws of the Islamic Republic of Pakistan and in accordance with the Protocol made on the 17th January 2003 in London and signed by the Honourable Chief Justice of the Supreme Court of Pakistan and by the Right Honourable The President of the Family Division of the High Court of Justice of England and Wales.

AND THE COURT RECORDS THAT the Applicant [parent] has given undertakings in the terms recorded on the general form of undertaking signed by him and filed with the court [note: e.g. undertakings that once children are returned to UK, not to remove them from care and control of other parent save for agreed contact/not to molest parent/not to institute any criminal complaint, or as appropriate] (of which a copy is attached).

C. PUBLIC LAW – PROTOCOL APPLIES STRICTLY

(because the removal/retention in Pakistan of a child subject to a care/interim care order contravenes Children Act 1989, s 33(7)(b))

Note: Since wardship and a care order cannot co-exist, it is necessary in local authority cases to make a choice between the extra persuasion that a wardship order may provide to the foreign court and the benefits of maintaining the care order e.g. immediate protection for the child under the care order upon his return to this country without the need to apply for a new ICO or an EPO. Where

wardship is chosen, the various recitals and orders relating to wardship should be inserted into the order. Where the care route is preferred, the LA will need to be given leave under s 100 to seek the assistance of the court under its inherent jurisdiction in securing the return of the child.

UPON hearing

AND WHEREAS [child] is a British citizen born in and domiciled in the United Kingdom and currently [believed to be] travelling outside England and Wales with a United Kingdom passport

AND WHEREAS the said child is the subject of a care order/interim care order made on [date] (a copy of which is attached) in favour of the [LA], which order operates (pursuant to Children Act 1989, s.33(7)(b)) to prohibit the removal of the child from England and Wales by any person without the requisite prior written consents or the leave of the court

AND WHEREAS in consequence of the fact that the assistance of this Court has been sought by the said LA on the child's behalf, this Court is empowered and required to exercise its inherent jurisdiction over him and to ascertain his best interests and to facilitate and protect those best interests

AND WHEREAS it appears that the said child was habitually resident in England and Wales on [date]/at the time when he was wrongfully removed from this jurisdiction without the requisite consents or leave

AND WHEREAS this Honourable Court is satisfied that all interested parties are before the Court including CAF/CASS (the Child and Family Court Advisory and Support Services) appointed by the Court to represent the Ward [amend as appropriate, or omit, depending on whether it has been possible to serve absent parent]

AND WHEREAS this Honourable Court has in the interests of [child] determined that he should so soon as practicable return/be returned to England and Wales

IT IS ORDERED that:

1. [Wardship/leave under s.100 – see above]
2. [Child] shall be returned to England and Wales by [parent] forthwith [or insert whatever arrangement for return is sought].
3. Every person within the jurisdiction of this Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of [child] who is subject to the inherent jurisdiction of the High Court.

4. The Applicant [LA]’s solicitors shall fax copies of this order to the Clerk to the Right Honourable Lord Justice Thorpe at the Royal Courts of Justice, The Strand, London WC2A 2LL (DX 44450 Strand RCJ; Fax 020 7947 6408); and to the Head of the Consular Division, Foreign and Commonwealth Office, Spring Gardens, London SW1A 2PA, tel. 020 7008 0212, fax 020 7008 0152.
5. [if necessary] The matter shall be listed for directions within 7 days of the return of the child to England and Wales [or whatever arrangement responds to the urgency of the situation appropriately].
6. Costs reserved.

AND THE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward [child].
8. All judicial, administrative and law enforcement authorities of the Islamic Republic of Pakistan to use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in locating, safeguarding and facilitating the return to England and Wales of the said minor child pursuant to the laws of the Islamic Republic of Pakistan and in furtherance of the Protocol made on the 17th January 2003 in London and signed by the Honourable Chief Justice of the Supreme Court of Pakistan and by the Right Honourable The President of the Family Division of the High Court of Justice of England and Wales.

D. SITUATIONS WHERE THE ENGLISH COURT CONSIDERS THAT THE PROTOCOL APPLIES IN SPIRIT

(for instance, in circumstances analogous to those described in paragraph 7 of this Guidance)

UPON hearing

AND UPON the Applicant [parent]’s solicitor undertaking to file within [] days an originating summons in wardship in respect of the said child

AND UPON the court declaring that the child [] is habitually resident in England and Wales

AND UPON the court declaring that it appears that the said child was wrongfully removed by the Respondent [parent – but modify where removal by relative or other third party] from the jurisdiction of the court on [date] in contravention of section 1 of the Child Abduction Act 1984

AND WHEREAS the said child is a Ward of this Honourable Court and is a British citizen, born in and domiciled in the United Kingdom and currently believed to be travelling outside England and Wales with a United Kingdom passport

AND WHEREAS in consequence of the fact that this court has ordered that the said child remain a Ward of this court while he remains a minor, this court is empowered and required to exercise its custodial jurisdiction over him and to ascertain his best interests and to facilitate and protect those best interests and is anxious to do so

AND WHEREAS this Honourable Court is satisfied that both parents are represented before the court

AND WHEREAS this Honourable Court has in the interests of the said child determined that he should so soon as practicable be returned to England and Wales

THE COURT ORDERS THAT:

1. The child [name] is and shall remain a Ward of this Honourable Court during his minority or until further order.
2. The said child shall be returned to England and Wales by the Respondent [parent] forthwith [or insert whatever arrangement for return is sought].
3. Every person within the jurisdiction of this Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of the said child.
4. The Applicant [parent]'s solicitors shall fax copies of this order to the Clerk to the Right Honourable Lord Justice Thorpe at the Royal Courts of Justice, The Strand, London WC2A 2LL (DX 44450 Strand RCJ; Fax 020 7947 6408); and to the Head of Consular Division, Foreign and Commonwealth Office, Spring Gardens, London SW1A 2PA, tel. 020 7008 0212, fax 020 7008 0152.
5. The Applicant [parent]'s application for residence [or as appropriate e.g. care and control in wardship] shall be listed for directions within 7 days of the return of the child to England and Wales by the Respondent [parent] [or whatever arrangement responds to the urgency of the situation appropriately].
6. Costs reserved.

AND THE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward [child].

8. All judicial, administrative and law enforcement authorities of the Islamic Republic of Pakistan to use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in locating, safeguarding and facilitating the return to England and Wales of the said minor child[ren] pursuant to the laws of the Islamic Republic of Pakistan and in accordance with the spirit of the Protocol made on the 17th January 2003 in London and signed by the Honourable Chief Justice of the Supreme Court of Pakistan and by the Right Honourable The President of the Family Division of the High Court of Justice of England and Wales.

AND THE COURT RECORDS THAT the Applicant [parent] has given undertakings in the terms recorded on the general form of undertaking signed by him and filed with the court [note: e.g. undertakings that once children are returned to UK, not to remove them from care and control of other parent save for agreed contact/not to molest parent/not to institute any criminal complaint, or as appropriate] (of which a copy is attached).

APPENDIX TWO: JUDICIAL PROTOCOL, JANUARY 2003

The President of the Family Division and the Hon. Chief Justice of Pakistan in consultation with senior members of the family judiciary of the United Kingdom ('the UK') and the Islamic Republic of Pakistan ('Pakistan'), having met on 15th to 17th January 2003 in the Royal Courts of Justice in London, reach the following consensus:

WHEREAS:

- (a) Desiring to protect the children of the UK and Pakistan from the harmful effects of wrongful removal or retention from one country to the other;
- (b) Mindful that the UK and Pakistan share a common heritage of law and a commitment to the welfare of children;
- (c) Desirous of promoting judicial cooperation, enhanced relations and the free flow of information between the judiciaries of the UK and Pakistan; and
- (d) Recognising the importance of negotiation, mediation and conciliation in the resolution of family disputes;

IT IS AGREED THAT:

1. In normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence.
2. If a child is removed from the UK to Pakistan, or from Pakistan to the UK, without the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence, the judge of the court of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.

3. If a child is taken from the UK to Pakistan, or from Pakistan to the UK, by a parent with visitation/access/contact rights with the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence or in consequence of an order from that court permitting the visit, and the child is retained in that country after the end of the visit without consent or in breach of the court order, the judge of the court of the country in which the child has been retained shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.
4. The above principles shall apply without regard to the nationality, culture or religion of the parents or either parent and shall apply to children of mixed marriages.
5. In cases where the habitual/ordinary residence of the child is in dispute the court to which an application is made should decide the issue of habitual/ordinary residence before making any decision on the return or on the general welfare of the child, and upon determination of the preliminary issue as to habitual/ordinary residence should then apply the general principles set out above.
6. These applications should be lodged by the applicant, listed by the court and decided expeditiously.
7. It is recommended that the respective governments of the UK and Pakistan give urgent consideration to identifying or establishing an administrative service to facilitate or oversee the resolution of child abduction cases (not covered by the 1980 Hague Convention on the Civil Aspects of International Child Abduction).
8. It is further recommended that the judiciaries, the legal practitioners and the non-governmental organisations in the UK and Pakistan use their best endeavours to advance the objects of this protocol.
9. It is agreed that the UK and Pakistan shall each nominate a judge of the superior court to work in liaison with each other to advance the objects of this Protocol.

[SIGNED BY] Dame Elizabeth Butler-Sloss, DBE
President of the Family Division of the High Court of England and Wales

The Hon. Mr Justice Sh. Riaz Ahmad
Chief Justice of the Supreme Court of Pakistan

APPENDIX THREE: AGREED GUIDELINES

UK–PAKISTAN SECOND JUDICIAL CONFERENCE HELD AT ISLAMABAD ON 22ND AND 23RD SEPTEMBER, 2003

Agreed Guidelines

1. Raising public awareness of Protocol, maintaining awareness and providing continuing education to judiciary and practitioners involved in family–child cases.
2. Securing access to justice to ‘left behind’ parents including knowledge of their rights and the opportunity to assert them.
3. To that end, instituting a system whereby the Judge in each Province of Pakistan is tasked with over-seeing the formation of a Committee to provide legal assistance to such parents.
4. Recognition of the importance of mediation within the extended family.
5. Recognition of the importance of liaison between Pakistan and the United Kingdom and, in particular, the importance of using the liaison Judges who need to know about all relevant cases which are pending or determined. The role of liaison Judge is to exchange orders by the Courts of respective countries in relation to the cases covered by the Protocol for information. In case of breach of any such orders, further information is to be exchanged about those cases for appropriate steps to be taken by them in their respective functions. This role of the liaison Judge shall be given proper publicity.
6. Recognition of the importance of retaining judicial links between Pakistan and the United Kingdom, suggesting that Judges of both the countries should meet from time to time to discuss the working/implementation of the Protocol, possibly through at least two Judges from each country meeting every two years. Also keeping in regular contact using, if appropriate, video link.
7. Recognition of the need to address the problems that arise upon relocation after the return of a child to the country of his habitual residence. In particular, recognition of the need to afford respect to any undertakings given to the Judge who ordered return or retention of a child.
8. Recommending the establishment of a Body in each country open to approach by an aggrieved person in United Kingdom–Pakistan seeking legal assistance in cases relating to wrongful and illegal removal of children.

[SIGNED BY]

Dame Elizabeth Butler-Sloss, DBE
*President of the Family Division
Of the High Court of England and Wales*

The Hon. Mr Justice Sh. Riaz Ahmad
*Chief Justice of Pakistan
Supreme Court of Pakistan*

The Hon. Lady Anne Smith
Supreme Court of Scotland

The Hon. Mr. Justice Gillen
Family Division of the High Court of Northern Ireland

Islamabad
23rd September 2003