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UK-Pakistan Protocol on Children Matters

Report Summary

Dr Marilyn Freeman
for
The **reunite** Research Unit

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P.O. Box 7124, Leicester LE1 7XX

Advice Line: +44 (0) 116 2556 234

Tel: +44 (0) 116 2555 345

Fax: +44 (0) 116 2556 370

E-mail: reunite@dircon.co.uk

www.reunite.org

International Child Abduction Centre

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UK-Pakistan Protocol on Children Matters

Report Summary

1. INTRODUCTION AND BACKGROUND

Pakistan is not a party to the international legal machinery (primarily the 1980 Hague Convention on the Civil Aspects of International Child Abduction) which has been put in place in order to deal with international child abduction. The UK-Pakistan Protocol on Children Matters 2003 (hereafter the Protocol¹) was the culmination of a process which emanated from the deep concern of those who witnessed the increasing number of cases involving wrongful removals or retentions of children between the United Kingdom and Pakistan, and the difficulties experienced in securing return of the children involved². **reunite** strongly supports the initiative, having assisted a significant number of left-behind parents in such cases who report having experienced severe difficulties in securing the return of their children from Pakistan, including locating reliable lawyers in that country who are willing to assist them in that aim. Some left-behind parents have lost their homes, their health, and their jobs in their quests to secure the return of their children. In recognising both the problems that existed and the exceptional relationship between the two countries, the judiciaries of the UK and Pakistan resolved to address these issues in an effort to assist the families in these cases.

2. THE PROJECT

2.1 Outline: The project was conducted by the **reunite** Research Unit, led by Dr. Marilyn Freeman, and was funded by the Foreign and Commonwealth Office (FCO). The limited remit project was commenced in late 2007 to enquire into the way in which the Protocol is working in both jurisdictions. The findings were to be made available at a conference to be held in Islamabad in February 2008 where they would contribute to the scheduled debate on the future direction of the Protocol. That conference did not take place due to the political difficulties which occurred in Pakistan at that time. This has meant that a greater amount of time has been available to investigate the issues and to obtain materials, which has been very useful. It has been decided to finalise the project through the preparation of both a report for internal use, and a public summary.

2.2 Remit of project: We planned to consider several aspects of the use of the Protocol through a sample of Protocol-related cases in both jurisdictions. We were, however, hampered by the difficulties in obtaining the relevant materials, and by the current method of recording, as explained below.

¹ See Appendix 1

² The **reunite** statistics indicate that there were 34 cases between 1998 and 2003 when the Protocol was introduced. This figure is, however, purely indicative as, by definition, the statistics only relate to those cases with which **reunite** had a working connection. It may be anticipated that there would be other cases where the left-behind parents undertook negotiations for return of the children through family or local community members, or used other methods, which would account for the non-appearance of their cases within the **reunite** statistics. **reunite** reports that there have been 67 cases from the introduction of the Protocol to the present, therefore the number of cases has doubled in the 5 years following the introduction of the Protocol as compared with the 5 years preceding its introduction, indicating a rising trend of cases between the two jurisdictions and a growing need for effective resolution. An example of the division of these cases may be seen in the **reunite** statistics for 2007 during which there were 7 cases of children abducted from Pakistan to the UK, involving 13 children. During the same period **reunite** dealt with 18 cases of abductions from the United Kingdom to Pakistan, involving 35 children.

2.3 Methodology:

2.3.1 Statistics are compiled jointly by the Office of the Head of International Family Justice acting as the Liaison Judge for the Protocol (hereafter The United Kingdom Liaison Judge), and the FCO. We initially had the benefit of seeing the May 2007 statistics provided by the FCO (“Pakistan Protocol Statistical Summary, May 2007, Child Abduction Section”) and subsequently the statistics of May and November 2008. The President’s Guidance to Judges on the Implementation of the UK-Pakistan Judicial Protocol on Child Contact and Abduction, 21 May 2004 (hereafter the President’s Guidance) paragraph 10³ requires copies of Orders in Protocol-related cases to be forwarded to both the FCO and the Liaison Judge. In theory, both the FCO and The United Kingdom Liaison Judge should have copies of the same cases, but this does not always occur. Additionally, there may be cases which, for a variety of reasons, simply do not get notified to either of them. This may be because there is currently no set procedure under which Protocol cases are brought so that the FCO/The United Kingdom Liaison Judge must therefore rely on recognition of the case by the solicitor and the courts as being Protocol related. Failure to notify in cases which are recognised as Protocol-related may also occur, this time as a result of oversight or shortness of time on behalf of the solicitors involved. Therefore, the statistics can only contain the total number of cases notified, which may not necessarily represent the total number of cases brought, under the Protocol.

Potential for confusion was identified in the current categorisation and keeping of statistics by the FCO in the light of both paragraphs 2 and 3 of the Protocol, and paragraph 6 of the President’s Guidance, which meant that the FCO’s “strict” classification is somewhat narrower than that which is set out in the Protocol and the President’s Guidance. These concerns were communicated to, and discussed with, the FCO. The FCO has stressed that it does not make judgements on whether a court order should be classed “strict” or “spirit” when it receives court orders. This is a matter for the lawyers and courts concerned. The statistics list the total number of returned/resolved cases since 2003 and the total number of ongoing cases. However, it may be that where the notifying solicitor has lost contact with his or her client, the case which was originally notified to the FCO/The United Kingdom Liaison Judge, and which forms part of the statistics, is still listed as an ongoing case because no further information has been provided about it. This lends weight to the need for a greater provision of feedback so that meaningful monitoring of the Protocol can be undertaken. The statistics also list the number of cases where legal proceedings have taken place in Pakistan. Even allowing for the difficulty in obtaining the required information, the number of returns ordered by a Pakistani court appears to be disappointingly low and, most importantly, these statistics do not reveal the basis upon which the Pakistani court Order for return was made, i.e. whether the return of the child was ordered under the Protocol, or in some other way, perhaps as a result of a writ of habeas corpus. This is crucial information, required to assist in the task of monitoring the implementation and effectiveness of the Protocol and, once again, demonstrates the need for a requirement of defined feedback from the courts and lawyers dealing with these cases.

2.3.2. In February 2008, questionnaires were sent to 86 firms of lawyers in the UK and to 33 firms of lawyers in Pakistan, seeking practical information concerning the way in which the Protocol is currently working within both jurisdictions. A second questionnaire was sent by

³ 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) ... Head of Consular Division, Foreign and Commonwealth Office. For President’s Guidance in full, see further appendix 3.

email and/or post at the beginning of November 2008 to 6 Pakistani lawyers whom we understood to have dealt with cases of abduction between the two countries. The quantity of responses to the questionnaires was extremely disappointing, and is a matter of some concern. From 119 original questionnaires sent, we received 4 responses, 3 of which were from the United Kingdom. The reasons for the poor response are unclear but extremely important, not just in terms of the current project, but also regarding our recommendations for future monitoring⁴. If the lawyers have been reluctant to provide information for the purposes of the project, it may be that such reluctance will extend to the obligations we are seeking to routinely provide information relating to their cases⁵. Whatever the reason, it was not possible to draw any significant data from this exercise but it appears, from those responses that we have received, and the anecdotal observations of Pakistani lawyers that have been made to us during this project, that Pakistani courts do not use the Protocol and that returns from Pakistan were likely to be made under “other national law”.⁶

2.3.3 We attended various meetings in the course of this project and, from the information provided, we believe it is possible that there are many court applications resulting in Orders that are not reported to The United Kingdom Liaison Judge, so that the papers which are currently held by his office may well not represent the full picture. It is also our understanding that The United Kingdom Liaison Judge is not currently notified about cases involving abductions or holiday Orders into this jurisdiction, although it may be possible to introduce a system in which this could take place. In this way, a system could be developed which would bring the case before a judge of the Family Division. **reunite** supports this suggestion as it would ensure the familiarity of the judge dealing with the case with the Protocol and its requirements, in the same way as in Hague Convention cases, and will provide for ease of monitoring in these cases, and would allow effective aid to be provided to Pakistani left-behind parents. However, the system that would provide for this change in approach would need further discussion and planning.

2.3.4 Consideration of Orders: We considered 86 cases which were kindly provided by The United Kingdom Liaison Judge (in which there were very few Scottish cases. We were not able to identify any cases relating to the Protocol and Northern Ireland) as well as the documents in 9 Pakistani cases, provided by the British High Commission in Islamabad and one of the lawyers on the **reunite** Listing. The marked imbalance between the two jurisdictions was of immediate concern although we recognise that it may be argued that this demonstrates only the number of cases we were able to harvest and not, necessarily, the success or otherwise of the Protocol. However, we believe that there is likely to be a correlation between the two issues. Our findings in relation to the Orders are as follows:

- ❖ It is difficult to identify the cases which are Protocol-related. Often we have only had sight of the Order made, as it appears that it is usually only a bare Order which is sent to The United Kingdom Liaison Judge, which does not provide any of the information that is needed for monitoring purposes. There is nothing in the current Guidance to guide solicitors on what to send in addition to the bare Order. This makes record keeping difficult and inconsistent.

⁴ See 4.1. below

⁵ See recommendation regarding information sheets contained within 4.1 below

⁶ see fn 12 below and accompanying text

- ❖ Currently there is no way of identifying that the case is Protocol-related from the face of the Order. The body of the Order may contain full reference to the Protocol, or it may contain no reference to the Protocol whatsoever. In the latter case, we are unable to know whether the Protocol played any part in the proceedings, but we have nonetheless included it within our sample of Protocol-related cases as it involves circumstances which are clearly covered by the Protocol, and the Order has been provided to us as being Protocol-related. However, this clearly does not amount to a scientific method of research which can produce reliable data.
- ❖ Other Orders include words in the body which indicate the Order to be either a Protocol or a “spirit of the Protocol” Order, but there is no method of checking the correctness of the description in those cases because information relating to the existence of custody/residence/restraint/interdict Orders has not been included. Where documentation has been provided it appears that some cases have been incorrectly described.
- ❖ Where more extensive documentation, including statements and affidavits, was provided, this has enabled us to determine more clearly the question of whether the case is Protocol-related, and in which category the case falls. However, it is not an efficient method of communication and monitoring, as it cannot be expected that those charged with the task of record keeping and monitoring should read through copious amounts of paperwork in order to determine the facts which need to be established for those purposes. It requires both a high level of familiarity with legal terminology and principles, and a significant time implication, both of which are unrealistic in terms of the task involved. What is required is a standard form of identifying the cases as being Protocol-related, and a standard form of communicating the case to those charged with record keeping and monitoring, such form to provide a minimum of information, again in a standard form.
- ❖ It appears that holiday Orders, and some other types of Orders, are not currently forwarded to the Pakistani Liaison Judge. This does not accord with the practice set out in the President’s Guidance⁷ where it is anticipated that such Orders will be transmitted to the Liaison Judge in Pakistan. Information in these cases is only forwarded following the non-return of a child from the absence granted in the holiday Order. Additionally, there is no subsequent feedback regarding such cases in accordance with the direction in paragraph 10 of the President’s Guidance which states:

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.

- ❖ After examining the Pakistan Protocol Case Log and the Pakistan Protocol Case-File contents, maintained by The United Kingdom Liaison Judge, it is clear that the Pakistan Protocol is not being used in Pakistan by left-behind parents. One reason for this may be the high costs involved in its pursuit requiring, as it does, the left-behind parent to instruct lawyers to institute proceedings in the abducted-to State.⁸

⁷ President’s Guidance, appendix one: Specimen Preambles/Directions/Orders, A. HOLIDAY LEAVE ORDERS, see Appendix 3.

⁸ See S11 President’s Guidance, Appendix 3.

3. CONCLUSIONS:

reunite supports the Protocol and recognises the help that it has provided in holiday agreements where it focuses the applicant parent's mind on the need to return the child on the agreed date to the jurisdiction granting the Order. However, there are severe weaknesses in the current application of the Protocol relating to the transmission and enforceability of the Order which, it is possible, are not recognised by those applicant parents. The Protocol may therefore be acting as a deterrent by default, as it appears that nothing actually happens with the Order in terms of registration or enforcement. The cases where parents are prepared to return their children may not be the cases where the Protocol is most required. It is the cases where parents are not prepared to do so where the most effective remedies are necessary and this is where the current application of the Protocol is lacking.

The main problems are:

- (i) those cases where parents wrongfully remove or retain their children in Pakistan, where an Order for return is made under the Protocol in this jurisdiction, and where the left-behind parents are left to seek the return of their children under local law in Pakistan, as the Protocol does not have legal effect. These parents have to fund their cases in Pakistan in whichever way is possible as legal aid is not available to them in that country. **reunite** reports that, since the signing of the Protocol, all the returns from Pakistan to the UK on its database, with the limited exception of the Misbah Rana case⁹, were either voluntary returns or, where ordered by Pakistani courts, without mention of the Protocol. It appears that Protocol Orders are not made in Pakistan, due largely to the Protocol not being a part of Pakistani law.¹⁰
- (ii) those cases where children have been wrongfully removed or retained from their habitual residence in Pakistan. Orders under the Protocol are not sought in such situations as they are generally not available for the reasons already explained. It is thus left to the left-behind Pakistani parents to institute proceedings in the courts of this jurisdiction which is beyond the financial capability of many parents.

In order to operate as a meaningful deterrent, a return under the Protocol must be the usual outcome. It would appear that this is not currently the case. Where an Order under the Protocol has been made in this jurisdiction, it is then incumbent upon the parent seeking to enforce the Order to make and finance an application in Pakistan. This requires that parent to seek a local lawyer who is reliable and trustworthy in order to pursue the case, and to be able to finance the case. Orders within this jurisdiction are often made in wardship, for which public funding may have been made available. However, in order to enforce that Order in Pakistan, the seeking party will need to finance the application, for which no legal aid is apparently available. Once that has been achieved, it is then a question of whether the court in Pakistan will recognise and enforce the Order made under the Protocol in this jurisdiction. As the Protocol does not have the status of legislation in Pakistan, numerous Pakistani

⁹ See fn 12 below

¹⁰ This matter was discussed at the Panel Session Meeting between the UK and Pakistan Judiciary at the Royal Courts of Justice on 13th February 2006 where the need to secure the future of the Protocol was noted, and where the issue of incorporation into the law of both jurisdictions was addressed. It is our understanding, that it is not considered necessary to incorporate the Protocol into the law of this jurisdiction, there being no conflict between domestic law and the provisions of the Protocol. This, however, is not the position in Pakistan which, operating under Sharia law, creates specific challenges for the implementation of the Protocol which, therefore, requires support through the introduction of statute.

lawyers have told us that Pakistani judges want to use the Protocol but the most that they can do is to “have it in mind” because, if they did more, it would amount to executing an English Order¹¹. The Order would then be susceptible to challenge as the Protocol is not legislation. For this reason, the Protocol, although possibly persuasive in the courts of Pakistan, is rarely mentioned in the judgements that we have seen¹² and applications for return are usually made under some other form of local law.¹³ Similarly, the cost of pursuing legal proceedings in this jurisdiction is prohibitive for left-behind Pakistani parents. These shortcomings seriously undermine the potential effectiveness of the Protocol. Additionally, for the reasons already stated, it is impossible to assess the number of Protocol-related cases which have taken place in each of the jurisdictions, and improvements must be urgently made to the recording and monitoring of the Protocol in order to assist in achieving a more efficient structure in which the Protocol may operate, in spite of the very real difficulties in effectiveness outlined above.

Lawyers in Pakistan are disappointed that the scheduled conference in Pakistan has been postponed again. They have asked for increased awareness of the Protocol for both judiciary and practitioners. We have found that the general lack of awareness that exists in both jurisdictions represents a major problem with the Protocol. In order to fulfil the aims of the Agreed Guidelines of the UK-Pakistan Second Judicial Conference, held in Islamabad on 22nd and 23rd September 2003¹⁴, the first of which concerns:

“[r]aising public awareness of protocol, maintaining awareness and providing continuing education to judiciary and practitioners involved in family-child cases”,

this research has identified the need for the introduction of a campaign to increase public awareness of the Protocol. **reunite’s** Director, Denise Carter, is due to make a follow-up trip to Pakistan in February 2009 with the aim of consolidating practitioner contacts in Pakistan, and developing new contacts, to assist in the development of the Protocol in the light of the findings of this project, including those relating to the provision of information to facilitate good record keeping and the compilation of statistics, and the raising of awareness.

¹¹ We have been informed by a Pakistani lawyer on the **reunite** Listing that that the Civil Procedure Court only permits money judgements to be executed in Pakistan, not those relating to private family matters.

¹² However, in the Misbah Rana case, the Protocol was, unusually, referred to by the judge in summing up as having been raised by the mother’s counsel . However, the Protocol was not directly commented upon by the judge. The application was not made under the Protocol as the respondent father filed a petition in Lahore under S7 Guardian and Wards Act 1980 in order to be declared the legal guardian of the child. The petitioner mother applied under Art 199 Constitution/S491 Criminal Procedure Code. The Protocol was referred to in the judgement of Mian Saquib Nisar J., Louise Anne Fairley versus Sajjad Ahmed Rana, Writ Petition No 9730 of 2006, decided on 29th November 2006, PLD 2007 Lahore 300 at paragraph 7, p308, when he stated: “[I]earned counsel for the petitioner has also submitted that the judiciary of Pakistan, at the highest level and also the UK and the Scotland Judiciary, have entered into a protocol to return the minor in the case of child abduction by the parents, to the jurisdiction wherefrom the child has been removed”.

¹³ One remedy for child abduction that has been used with some success in Pakistan is the writ of habeas corpus. A writ of habeas corpus is a petition filed with a court by a person who objects to his own or another's detention or imprisonment and is commonly filed by persons serving prison sentences. However, they can also be used in family law, for example a parent who has been denied custody of his other children by a trial court or whose child has been illegally removed may file a habeas corpus petition. This petition would have previously been made directly to the High Court under Section 491 of the Criminal Procedures Code and Article 199 of the Constitution of Pakistan, however a habeas corpus petition is now normally made to a Court of District or Sessions Judges. A petition could still be heard by a High Court, however this depends on the discretion of the judge. An application for Habeas Corpus does not determine who should have the ultimate custody of the child and the application must be attached to a substantive application. See Child Abduction and Custody Laws in the Muslim World <http://www.reunite.org/edit/files/Islamic%20Resource/Pakistan%20text.pdf>

¹⁴ see appendix 2

There is a continuing issue of concern regarding the extent of recognition of the Protocol in Pakistan in relation to Azad Kashmir (known also as Azad Jammu and Kashmir or AJK). The clear differences in the understanding of the position in this region need to be clarified and, if necessary, resolved.

We are extremely concerned at the number of parents who have reported anecdotally to us that they have found the Protocol to be of no assistance to them whatsoever in their quests to have their children returned from Pakistan. They have told us that they have spent significant amounts of money, which they can ill afford, in funding cases in Pakistan where they have tried to enforce return Orders made under the Protocol by the courts of England and Wales. They report being told by their Pakistani lawyers that “nobody is interested in the Protocol here”. They have been advised that they must use other national laws in order to have a chance of securing the return of their children. Where parents have succeeded in obtaining the return of their children, we have not found one case where that was achieved through an Order made under the Protocol. Even where the Protocol has been mentioned in pleadings by lawyers familiar with its terms, it has not been commented upon by the judge, nor has it formed part of the return Order. The most that can be said is that the Protocol may have been in the mind of the judge hearing the case. In view of the difficulties experienced by parents in obtaining support from the police in some cases of feared abduction in this jurisdiction, the ease with which alternative passports have been obtained, the current lack of emigration checks on those leaving the country, and the serious effects of abduction evidenced in previous **reunite** research, it is imperative that effective mechanisms exist for the return of abducted children. Those that currently exist between the UK and Pakistan do not achieve this aim. As it currently stands, the Protocol is a good idea and one which, in principle, **reunite** supports. However, it is misleading to parents who presume that it will currently provide for the return of their children between the two jurisdictions.

We believe that the operation of the Protocol can be improved so that it is better able to achieve its laudable aims, to protect the children of the UK and Pakistan from the harmful effects of wrongful removal or retention from one country to the other. We are mindful of the acute need for effective co-operation between States which are not signatories to the 1980 Hague Convention and the crucial role which the Protocol has to play in the encouragement and achievement of such instruments. However, the example set by the Protocol must be of an effective instrument, otherwise it will be counter-productive. We make the following recommendations in support of those ambitions.

4. **RECOMMENDATIONS**

4.1 *Recording and monitoring*: Although we would enthusiastically support the introduction of the following systems, we are concerned about the burden this may place on solicitors who may not be funded for this exercise under their Legal Aid certificates. Additionally, in view of the disappointing lack of response from law firms in terms of the current project, a cautionary note needs to be sounded as to still further expectations.

- ❖ A standardised method of recording and monitoring should be established whereby the agreed definitions of Protocol categories are utilised by those parties charged with the task of using and monitoring the Protocol. Possible improvements to the recording may include a special reference code which will identify it as a Protocol case and the jurisdiction of origin, e.g. PPE (for Orders made in England), PPP (for Orders made in Pakistan).

- ❖ It may be helpful to include a sub-reference code to indicate the type of Protocol case involved, e.g. that these “may relate” to the Protocol because they concern the threat of forced marriage “PPE, threat forced marriage”, or where a prohibited steps Order is granted to prevent the removal of a child from the jurisdiction of England and Wales to Pakistan, “PPE, PSO”. Such changes would facilitate and allow the identification of training and information needs by providing data on how many cases were being brought under the Protocol, in respect of which issues, and in which courts. It would also facilitate the tracing of the progress of the cases through the Pakistan or UK courts.
- ❖ Currently, we only have the bare Orders in most cases. In order to have the necessary information to support the monitoring process, an information sheet should be provided by the lawyer involved in the case, along with the Orders which lawyers are currently obliged to send to The United Kingdom Liaison Judge, and the FCO. The information sheet should include a note of whether the case is a Strict or a Spirit Protocol case, and a brief summary of the case, including the names of the parties and their relationships, the existence of any Orders and, where possible, the names of the Pakistani lawyers dealing with the case so that the Pakistani Liaison Judge can be informed at the earliest opportunity about relevant cases¹⁵. Where that information is not available at the time that the Order and information sheet are sent, solicitors should be required to inform The United Kingdom Liaison Judge as soon as that information becomes available, as the Pakistani Liaison Judge will not be able to do anything until this information is relayed to him. Where the applicant is acting in person, (s)he must be informed by the court of the requirement to complete an information form¹⁶.
- ❖ A system should also be introduced which would provide for feedback from Pakistan relating to cases which have been referred by The United Kingdom Liaison Judge to the Pakistani Liaison Judge. This includes holiday cases where the child was not returned on the due date and where the Pakistani Liaison Judge has been informed, and cases where an Order has been made for the return of the child under the Protocol and where the Order has been transmitted to the Pakistani Liaison Judge.
- ❖ A system for Protocol cases should be introduced under which copies of all court Orders should be maintained by one organisation/body in each jurisdiction for the purposes of consistent monitoring. Consideration should be given to the way in which this may be achieved. **reunite** would be willing to undertake this task in conjunction with a non-governmental organisation (NGO) in Pakistan. **reunite** believes that further development of the links with SACH, an NGO whose work is known to **reunite** and the UK government, should be considered for this purpose.

4.2 *Awareness*: It would seem likely that many Protocol cases (e.g. an application for temporary removal of a child from the jurisdiction of England and Wales to Pakistan) are not currently recognised, and dealt with, as such. To improve this situation, an increase in awareness is required in those lawyers and judges dealing with these cases. This could be achieved through a targeted programme of awareness-raising at regional conferences undertaken by **reunite** for members of the local legal profession, advice centres and community organisations. A similar undertaking would need to take place in Pakistan, to be achieved through participation at various bar association conferences, discussions in law

¹⁵ We would naturally welcome the introduction of similar systems in Pakistan which would provide for information to be made available to the courts of this jurisdiction relating to cases occurring in Pakistan.

¹⁶ Information forms could be obtained from **reunite** as part of the support functions outlined below.

schools, input into judicial training, as well as through outreach programmes with a number of groups and centres. This would assist parents in Pakistan who were concerned about abduction, perhaps through a retention at the end of a period of agreed contact in the UK, to be advised regarding the prevention of abduction and the role of the Protocol in such matters. Consideration may be given to the introduction of a training component in professional and academic courses in both jurisdictions, as well as to methods of disseminating existing research into university and professional libraries, and UK and Pakistani legal journals. In particular, it may be helpful for the report of the **reunite** Research Unit into the effects of international child abduction to be more widely disseminated in Pakistan so that those involved may become familiar with the findings on the serious nature of the effects of abduction. In this way, it is hoped that they may be encouraged to do what can be done to prevent abductions taking place between the UK and Pakistan and to ensure that returns are effected. Similarly, many of the publications of the Hague Permanent Bureau would help to raise consciousness of these issues.

4.3 *Funding:* In this jurisdiction, legal aid would be granted on a means and merits basis to parents seeking the return of their children where an Order under the Protocol has been made. In Pakistan, legal aid is not available and parents need to fund cases privately. **reunite** and SACH can support parents in applications under the Protocol and maintain lists of suitable professionals to assist in these cases. Consideration should be given to the development of a specialist network of lawyers in Pakistan and the UK, willing to undertake cases involving the Protocol on a pro bono basis. This would also assist in understanding and meeting training needs.

4.4 *Reach of the Protocol:* The question of whether Azad Kashmir is included within the reach of the Protocol must be urgently addressed and resolved.

4.5 *Enforceability:* One of the most urgent considerations must be that of introducing legislation in Pakistan to give effect to the Protocol. Without legislation, it is doubtful whether the Protocol can achieve more than its current background, shadowy role in Pakistan.

4.6 *The Way Forward:* The Protocol has the potential to be an extremely useful instrument for the many parents in the UK and Pakistan who need a mechanism to ensure the swift return of children wrongfully removed or retained between the two jurisdictions. Much goodwill exists between the two countries as well as a demonstrated willingness to tackle the issue. However, it now also requires a willingness to address the acknowledged weaknesses in the current system to ensure that the opportunity to build on the strengths is not lost. Urgent consideration should also be given to the undertaking of scientific research into the Protocol once the suggested measures have been put in place.

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Asma Jahangir,
AGHS Law Associate
131-E1, Gulberg III, Lahore 54600

S. Zulfiqar Abbas Naqvi
Naqvi law Associates
Office 24-B-1, Haider Road, back side of Flashman's Hotel,
Saddar, Rawalpindi Cantt.

Mohammed Yasin Khan
Yasin Khan Associates
Law Chambers District Bar Association, Mirpur, Azad Kashmir

Naheda Mehboob Ellahi
Naheda & Khawaja Law Associates
Room 2, Floor 2, Old American Centre Building
Near G.P.O., Saddar, Rawalpindi

Azhar Iqbal
SACH
No 27, Main Park Road, I-8/3, Islamabad

Anne-Marie Hutchinson OBE
Dawson Cornwell
15 Red Lion Square, London, WC1R 4QT

Appendix 1

UK-Pakistan Judicial Protocol on Children Matters

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 the 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 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.

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 2

Supplemental Judicial Guidelines on UK-Pakistan Protocol

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.

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

The Hon. Lady Anne Smith
Supreme Court of Scotland

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

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

Appendix 3

President's Guidance to Judges on the Implementation of the UK-Pakistan Judicial Protocol on Child Contact and Abduction

21 May 2004

FROM: MS ANANDA HALL
FAMILY DIVISION LAWYER

PRESIDENT'S CHAMBERS
ROYAL COURTS OF JUSTICE
LONDON WC2A 2LL

GUIDANCE TO JUDGES ON THE IMPLEMENTATION OF THE UK-PAKISTAN JUDICIAL PROTOCOL ON CHILD CONTACT AND ABDUCTION

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 supercedes 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 CAFCASS (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 [names] 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 children 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).