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RIGHTS OF THE CHILD

Written statement* submitted by Jammu and Kashmir Council for Human Rights (JKCHR), a
non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[3 February 2003]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

The world has never before seen a greater need to protect the rights of the child, with the focus being on international protection that is afforded to them. The Convention on the Rights of the Child is regarded as a huge milestone for the protection of children's rights, containing vast potential and can no doubt be considered as an encouraging development. However despite the efforts made on an international level, there is a concern that the progress made is simply not far reaching enough. Furthermore in order for success to be achieved at an international level, greater co-operation and commitment is needed on a regional level.

A fundamental concept for any legislation, convention or protocol is to ensure that the 'best interests of the child' are at the forefront, which therefore transcends beyond frontiers and boundaries. At the same time due importance needs to be given to take 'account of traditions and cultural values of each people in order for children to grow and develop in a harmonious environment'.

These principles have been highlighted in a recent UK- Pakistan Judicial Conference On child and Family Law, in particular addressing three key issues facing people of Pakistani and Kashmiri origin, these being 'Enabling Cross jurisdictional contact of children, responding to child abduction, and marriages formed under Duress and forced marriages'.

This conference convened by the Royal Court of Justice and attended by Chief Justice of Pakistan Sheikh Riaz Ahmed, Supreme Court judges, Justice Munir A Sheikh, Justice Nazim Hussain Siddiqui and Justice Mian Muhammad Ajmal, Justice Sabih uddin Ahmad of Sindh High Court, Justice Tassaduq Hussain Shah Jilani of Lahore High Court and Chief Justice of Azad Kashmir High Court Justice Manzoor Hussain Gilani as well as Dame Elizabeth Butler-Sloss DBE president of the Family Division of the High Court (England and Wales) is the first of its kind.

It is an encouraging step towards co-operation between the two countries, concerning children. This is particularly significant, as the numerical presence of people of Pakistan and Kashmiri origin remains a domineering influence in many major cities in the United Kingdom and unlike many other societies the role of parents, children and the state in the UK, Pakistan, and Azad Kashmir meet on many commonalities. Therefore the approach of the judiciary in these countries has a common and indisputable approach to ensure the 'best interest of the child'. Again there is a universal common concern stipulated in the preamble of the Convention on the Rights of the Child 1989, which in practice needs to be interwoven with regional efforts.

The conference in the UK sought to achieve this objective by exchanging a range of perspectives and ideas between the two judiciaries on the facilitation of child contact between UK and Pakistan based parents, with the ultimate aim being to agreeing an informal protocol enabling cross-jurisdictional contact for the children.

As acknowledged in today's societies, children's entitlements from their parents and the responsibilities of parents towards their children do not terminate upon the dissolution of marriage.

Accordingly children are entitled to have 'provisions' made for them when a marriage is dissolved. Further any such provisions extend beyond financial interests and include the crucial parental bond. Therefore during such an emotional and highly charged situation, a compromise on the grounds of reason and balance should be directed in securing 'the best interest and welfare of the child'. Consequently there is an emerging role for the Pakistan and UK judiciary to encourage and facilitate contact between UK and Pakistan based parents, with an informal contact providing for such contact for the benefit of the children. In order for any such protocol to work it needs to be framed by incorporating two essential principles, 'the best interest and welfare of the child' as well as incorporating the 'traditional and cultural values of the person for their protection and harmonious development of the child.

In this ever changing society with advanced technology, it is essential that this be reflected in the methods used to facilitate cross-jurisdictional contact. A second issue of concern, which is of particular concern to the UK, Pakistani and other Commonwealth countries, is that of responding to child abduction. It has been suggested that a common wealth approach should be taken to tackle such issues both speedily and effectively, given the similarity in culture, custom and history. This is primarily to minimise the psychological damage that can occur when a child is displaced from its normal environment and surroundings.

Accordingly it is preventative measures which should take precedence, such as maximum contact between parent, as well as reassuring the contesting parents of their common free access to the child, and a need to inculcate in them the desire to keep the child's best interest and welfare as a common interest, thus leaving the possibility of such action as a last resort.

It is also vital to understand that children born to Parents of Pakistani or Kashmiri origin in the United Kingdom should not suffer for the lack of understanding of both the English law and the Shariah [Islamic Law]. It also needs to be highlighted that Islamic Law provides for a commonwealth approach in the form of seeking 'Ijma' on an issue and on judicial progress. According to the Quran 'Justice is a command of Allah and whosoever violates it faces grievous punishment', the emphasis being therefore to judge justly and to give priority to human welfare. This includes maintaining respect for persons through various social arrangements that are in the common interest of all members.

An essential ingredient in child abduction cases is the need for a sensitive approach to traditional and various religious beliefs, requiring consultation, co-operation and mediation between all parties. The courts should agree on a set of guidelines incorporating a body of international research on the effect of separation of a child from its biological parent and what distress signals to look out for in very young children who cannot express their wishes.

It is crucial that in our changing society where traditional norms are slowly being departed from, with the increase in cross cultural marriages, cross jurisdictional legal issues will arise with greater frequency and need to be tackled with greater if not equal speed.

A third challenge facing the Pakistani and Kashmiri community is that of tackling with the issue of marriages formed under duress, and forced marriages. This issue also poses complex problems, with the UK Pakistani community and Kashmiri community having to balance between an innate sense of obligation to maintain their cultures, languages and traditions with an equally more important sense of obligation to develop as a natural family unit. It is quiet often the spoken threat of western influence on our children and the application of 'home cooked' measures of protection, very often harm our children more than awarding any benefit.

Forced marriages are one example, which are conducted without the valid consent of both parties, where duress is a factor and consequently a violation of internationally recognised human rights standards and cannot therefore be justified on religious or cultural grounds.

In Shariah a marriage in reality is a 'Mithaq' meaning a solemn covenant or agreement - which must be reduced to writing. They should agree in a lawful manner. As there can be no agreement, unless both parties give their consent to it. Marriage in Islam can only be contracted with the free consent of the two parties. And comprises of two very important ingredients- (1) Ijab (proposal) and (ii) Qubul (acceptance). It has to be witnessed by independent witnesses of both parties and each party has to stand as witness for the other during proposal and acceptance.

We have therefore a moral obligation to ensure that any child under the age of 18 to ensure that their rights are not violated in such a manner, with the governments playing a critical role in ensuring information is available to young persons at key places such as airports.

Arranged marriages in contrast involve the welfare of the parties being at the core of negotiations conducted on their behalf. It is an assurance to balance the welfare of the parties and make marriage an enduring unit of civil society. It has an inbuilt mechanism of consultation, mediation and reconciliation. Whilst exercising such an arrangement it is important that communities do not err in ignorance and do not use force as well as clearly recognise the distinction between 'arranged' and 'forced'

Any protocol between countries such as the UK and Pakistan needs to be framed around the profile of the various communities, incorporating the needs and perceptions of individuals. An important factor in this includes the task of undertaking qualitative research to ascertain the views, concerns, and proposals for reform of the Pakistani and Kashmiri community, as well as frequent interaction between the judiciaries to ensure these objectives are achieved.

The UK- Pakistan Judicial Conference on Child and Family Law organized by Foreign and Commonwealth Office and the Lord Chancellor's Department in partnership with the Family Division of the High Court can be considered a stepping stone towards ensuring that children's rights are fully protected. This conference has produced a judicial protocol on the abduction of children and agreed on the appointment of one special judge from each country to liaise between the judiciaries of the two countries. This can indeed be considered an achievement given that this is the first judicial conference to take place between the two countries. More importantly

this should be taken as a juridical model to other countries in particular other commonwealth countries.

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