

INTERNATIONAL CHILD ABDUCTION

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Today's world is globalized, people travel all over the world for tourism and for work. They stay abroad for long time and not only business relationships grow up. From the beginning of the 90th of the last century is visible huge growth of number of children borned from international relationships in the Czech Republic. This phenomenon brings increase of the incidence of international child abduction.

Why people kidnap a child? Almost every child kidnapper is his or her parent and an escape from problems to another country is a way how to solve problems in partnership. The child can often act as some kind of a weapon or a manner to extort the other parent.

When the relationship splits, partners can settle some agreement about future rights of custody of the child and rights of access or this question can be established by judicial or administrative authorities of a country. But sometimes parents do not wait and act their own way and wrongfully remove the child to another state different from the state of habitual residence of the child.

This contribution will put mind only on child abduction at EU territory. The Convention on civil aspects of international child abduction drawn up by the Haag Conference on Private International Law on 25. 10. 1980 is the main enactment, which regulates child abduction („the Haag Convention“).¹ In EU, we have to respect the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The Haag Convention is applicable only on children younger than 16 years.

¹ More than 80 contracting states.

The Council Regulation has priority to Haag Convention in those question, which are both regulated by regulation and convention. The Council Regulation, however, supports application of Haag Convention as an important instrument of reparation of the illegal case.

Both enactments give supremaci to the voluntary return of the child or parent reconciliation. EU established special office of The European Parliament Mediator for International Parental Child Abduction.²

The most important term is „the international abduction“, which is defined in article 3 of Haag Convention and in the article 2 sub. 11 of Council Regulation. They both specify it as a wrongful removal or the retention of a child outside of the state of habitual residence. Simultaneously, the removal must be the breach of rights of custody and at the time of removal or retention those rights were actually exercised.

When there is not possible any agreement, the cause must be sued.³ Contracting states of Haag Convention had to extabished/ designate any Central Authority to discharge the duties which are imposed by the Convention upon such authorities.⁴ One of these duties is to assist in securing the return of the child to the person (institution or other body) claiming that a child has been removed or retained in breach of custody rights.

In cases of international abduction is jurisdiction of courts of the state of actual residence of the child. They have to act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. The judgment should be issued no later than six weeks after the application is lodged.⁵

The court must order the return of the child forthwith when these conditions are accomplished: a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention. This rule has these exceptions:

1/ alhtoung the period of one year has expired, the court can order the return of a child unless it is demonstrated that the child is now settled in its new environment.

the person, institution or other body which opposes the childs return establishes that

2/ the applying person, institution or other body was not actually exercising the

² The European Parliament mediator is from 2004 Mrs. Evelyne Gebhardt from Germany.

³ Haag Convention permit to sue at judicial or administrative authority, Council regulation only at court.

⁴ The Central Authority in the Czech republic is Úřad pro mezinárodněprávní ochranu dětí, residence in Brno

Benešova 22, CZ. (Office for International Legal Protection of Children)

⁵ See art. 11 sub. 3 last sentence of teh Council Regulation.

custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention, or

3/ there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation

4/ the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views,

e/ the return of the child in breach with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.⁶

It is very important to realize, that the proceedings and the decision under Haag Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. The court can order the return of the child or not (in specific, duly justified cases⁷ - as it has been described) If the child has been wrongfully removed or retained and the return has not been ordered, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. That judgment should entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgement in the Member State to or in which the child has been removed or retained.

The mentioned regulation is also pointed out in art. 16 of the Haag Convention, which bars to decide on the merits of rights of custody to the judicial or administrative authorities of the Contracting State to which the child has been removed from the time of receiving notice of a wrongful removal until the decision under Haag Convention

Another very important term is the „habitual residence“ of a child. It is not defined anywhere, but the emphasis is put on acquire a certain grade of continuity of the residence.⁸

In the foregoing text introduced the proceedings by Haag Convention. The Council Regulation is a kind of „lex specialis“ to the Convention and it has some special provisions which modify it. The most considerable deflection is in art. 11 sub. 4 of the Council regulation, which says: *„A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention (see up No 3/) if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.“*

⁶ See art. 12, 13 a 20 of Haag Convention.

⁷ See Council Regulation No 2201/2003, preambule sub. 17.

⁸ You can find wide scale of practice of the courts at www.incadat.com .

The Council Regulation has another procedural conditions, which are not required by Haag Convention, e.g. art. 11 sub. 2, 5, 6, 7.

Presently, a new updating of Czech civil proceedings of international child abduction is in Parliament. It reacts to the requirement of mentioned international documents and practical problems.

The best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, it includes upbringing of the child too. It is sad, that the only victim, who suffer the most, of the whole cycle of the abduction and returning, is the child.

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