

SHORT SPEECH, PRACTICAL CASE, BY FLORA CALVO

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I- Proceedings for the return of children

1.- Administrative stage

At the administrative stage the applications must be processed expeditiously and communication between the Central Authorities must be fluent. An increase in cases has sometimes led to these Authorities being collapsed and the translation of documents as well as the processing of the application being delayed. The existing resources must be increased so that the resolution of these cases is speeded up.

2.- Judicial stage

During the judicial stage the time limit of six weeks for return must be strictly fulfilled as set forth in article 11 of the 1980 Hague Convention as well as article 11, paragraph 3 of Regulation 2201/2003. The court processing of the proceedings for return may not be delayed or, otherwise, the return could cause irreversible harm to the children.

It is essential to determine what is understood by actual exercise of custody (art. 3 in relation to art. 13 both from the 1980 Hague Convention). In particular, it is essential to determine if leaving the family home by one of the parents owing to the crisis the couple is undergoing, for a short period (a week or fifteen days) entails renunciation by him/her of the actual custody that prevents him/her from applying for the return of the child (*Judgment of the Pau Grand Instance Court (France) 7 March 2006*).

The reason for non-return contained in article 13 b) of The Hague Convention must be used in exceptional cases. Physical or psychological harm to the child if he/she is returned must be carefully assessed by the competent psychological and social services (assigned to the Court or from the competent administration). Spanish courts have often used this reason to reject the return (*Judgment of the Provincial Court number 463/2007 of the Malaga Provincial Court of 11 September; court order 100/2006 of the Granada Provincial Court of 16 June; court order 20/2004 of the Almeria Provincial Court; Order of the Barcelona Provincial Court of 28 October 2002*).

Time is a factor to be taken into consideration in order to assess the risk to which the child could be exposed in the event of return. If the children have been examined by the official psychological and social services at a certain moment and, for whatever reason, a time limit of 6 months has been exceeded from this examination until a date is chosen for the return, the children must be examined again in order to verify if the return is possible without causing any irreversible psychological damage.

In any case, the time limit of one year as laid down in the 1980 Hague Convention in article 12 must be taken as reference for returns. The time limit of one year may not be strictly fulfilled if it is exceeded owing to the wilful misconduct of the abductor. However, children abducted three years ago or more are now being returned. The return

of very young children to their parents who they do not even know or do not remember, can cause irreversible psychological harm to the children, and in many cases this will prevent the return. It would be convenient to choose an absolute time limit which, if exceeded, will only allow the return in exceptional cases.

Under article 11, paragraph 4, of Regulation 2201/2003 the authorities of the State of residence of the child prior to his/her illegal move must give details of the measures to be taken for the child to be protected after his/her return. Said measures must be analysed by the authorities of the country of transfer of the child which may decide that they are not sufficient to guarantee actual protection.

When a return is ordered under article 42 of Regulation 2201/2003 the authorities which order the return must only do so if they consider that such a return is in the greater interest of the child. This rule must not be applied as punishment to the abductor unless the return of the child is the best thing for a certain child in his/her case.

II.- Changes in custody upon abduction

Compared case law has increasingly shown what has been called “sudden changes of custody” (for instance, Judgment of the Court of First Instance of 13 June 2005 in Turnhout, Belgium). This occurs in abduction cases in which the father unduly deprived of his children, and who was not the custodial parent (or not the only one) is given the custody or absolute parental authority only because the other parent had abducted the children. This attitude of the judicial authorities of the country of origin entails exemplary punishment for the abducting parent but it does not often take into consideration the greater interest of the child.

In this case the returned child’s trauma increases with the radical change of custody and often with almost no visitation rights for the abducting parent, the only parent with whom the child has had contact for a very long time.

Article 10 of Regulation 2201/2003 should be used with caution and, in any case, never to assign or change custody without having previously examined the children and taken into consideration the children’s wellbeing.

Both the 1980 Hague Convention as well as article 11 of Regulation 2201/2003 are instruments that do not resolve the merits of an abduction case but provide the system with means for the situation of the children to return to the point where it was before the illegal transfer or abduction. After the return the courts should calmly examine the returned children in order to decide on their custody. This assignment of custody shall depend on all the circumstances surrounding the case and not only the abduction.

In Spain, there has been one example in which for the application for change of custody all the aspects of the case and not only the abduction were examined. In a Judgment announced by the Barcelona Provincial Court on 6 September 2007, after the abduction of a child by the mother, the father requested a change of custody, to which the court replied: *“(…) and the change of custody given to the father does not seem at this moment to be the most beneficial option for the child, after two years of no contact with the father, even if this occurs as a result of the reproachable behaviour of the other*

parent for which reason, indeed, it is not considered appropriate to agree to the change of guardianship and custody claimed (...)".