

Practical case, workshop three: Enforcement of judgments for the return of children. Relations between the press and the judiciary in abduction cases with media exposure: Practical guide. Good practice guide: Central authorities, application measures, precautionary measures and cross-border visitation rights

Reporter: Carmen Parra Rodríguez. *Professor of International Private Law. University of Barcelona*

In 1997 a couple, Luis M, Spanish, and Hilda G, Hungarian, had a child who was born in Budapest (Hungary). After five years of living together, subsequent to the birth of their child, they decided to separate and, as they were not married, the arrangement on the custody of the child was expressed in a private agreement. The agreement contemplated the possibility of either parent to leave Hungary with the child for work reasons, in which case, the consent of the other partner was required.

In 2000 the father decided to go to Spain to work and notified the mother of the change of address, and the mother orally agreed but, later, once the child had left Hungary, she decided to apply for the child's return through the court, arguing that the father had not contacted her; she claimed, therefore, the guardianship and custody of the child that had been shared up until then.

Father and son returned to Hungary some months later to solve the legal matter and, after an open procedure in Hungary by which the father tried to prove that he had not failed to fulfil the private agreement, the judge changed part of it, in a procedure full of irregularities (lack of notifications, presentation of false witnesses, lack of translation of documents, etc.), so the father decided to flee to Spain with his son in 2001.

The mother invoked the 1980 Hague Convention on the civil aspects of international child abduction of 25 October 1980 to claim for the return of her child to Hungary and, meantime, father and son left Spain, the country to which the return of the child was claimed.

Father and son settled down in a South-American country and later on in another European country unknown to the mother. On the other hand, the mother left Hungary with her current partner and a new daughter and "de facto" settled down in Spain, although she kept her official address in Hungary.

In 2009 father and son returned to Hungary, while the criminal procedure was still open in Spain for the return of the child. There is also a civil procedure with an arrest warrant for the father, the Hungarian private agreement is still in force and the mother is still resident in Spain.

Matters:

- What impact would there have been if there had been provisional measures in the internal systems involved? What type of provisional measures would you propose?

- Was the Spanish Court competent in 2001 to decide on the return of the child? If the answer is 'yes', should it be a civil judge or a criminal judge?
- Can the enforcement of the return announced by the Spanish judge be requested? In this particular case, to which country should the child return? Where do you think his habitual residence is?
- Can Regulation 2201/2003 be invoked, as EU Member States are involved? Analyse pros and cons of the chosen solution.
- If the Spanish court considers in 2009 that it is not competent anymore, what procedure must be used to finish the case? What role does the central authority play?

Aspects to be taken into consideration for the resolution of the practical case

1.- Central authorities

The Central Authority must have human and material resources necessary to ensure the follow-up and review of the applicable precautionary measures in each case.

The Central Authorities must directly request the court to announce a judgment for the return of the child, act as the plaintiff in the case or represent the father who acts as plaintiff or, if appropriate, act as *Amicus curiae*. Furthermore, the Central Authority may give instructions to the Legal Representatives of the State to represent the applicant before the Court.

The Central Authority must protect the child of any harm, it must ensure that within a time limit of six months from notification, the applicant or the Central Authority of the requesting State, may request a statement on the reasons for the delay. Furthermore, social and police services may be required to provide any necessary assistance to the Central Authority to ensure the enforcement of the order for the return of the child or prevent moving the child to another country before the return.

2.- Procedural measures

Once the Convention applies in the States the internal systems must put in place the resources to ensure the proper application of the Convention as, for instance, measures to clarify the task of agencies and authorities (for instance, the liaison judge in each country acting as a query authority on internal formalities and the proper application of the Convention).

The national laws of the States must include provisions to ensure that applications for the return of a child as set forth in The Hague Convention are dealt with expeditiously and diligently taking the following into consideration:

- Preliminary proceedings to allow the judges and the authorities involved to obtain sufficient information to trace children.
- Provisional measures for the judge to act urgently.
- Establish expeditious procedures through which powers are granted to the courts to give priority to applications for the return of children.
- Promote the concentration of powers in a limited amount of courts.

a) Preliminary proceedings

To minimise the delay in the initial search for a child and therefore facilitate the commencement of a procedure for the return of a child, the initial applicable law may include provisions granting trial judges extensive powers to search for the child. Judges may also order third parties to provide information on how to find a child or issue an order for the authorities to make the necessary enquiries.

b) Provisional measures

Provisional measures may be key to ensure the success and speed in returning the child before a final decision is announced, as sometimes they may prevent parents from leaving with their child to another jurisdiction (for instance, withdrawing his/her passport if it is suspected that he/she may flee). Provisional measures may include the possibility for the judge to issue an order to prevent the child from travelling to avoid any application for the return of the child, or to order that the child be given in temporary custody as a protective measure if there is any risk of the child being moved to another jurisdiction or hidden in this jurisdiction before a judgment from the court.

c) Expeditious proceedings

Internal systems must deal with claims for the return of children diligently at all the instances, this being one of the key issues of the Convention. In this respect, courts must take measures to give priority to a claim for the return of a child, take the necessary provisional measures or put in place speedy procedures with specialised judges who know the content of the Convention.

In this respect experience shows that appeal proceedings may cause considerable delays that distort the speed at the first instance, for which reason this speed should also apply for the appeal.

Provisions aiming at promoting speed at appeal proceedings may include a limitation of the time limit for filing an appeal against a judgment dismissing the application, requirement of an authorisation to file an appeal and may also indicate the court or restrict the amount of courts before which an appeal may be filed.

Furthermore, application measures for the provisional enforcement of a decision to return a child should be contemplated even if the appeal was filed under reservation of enforcement withholding, which measure could be a deterrent to the abusive use of resources that may delay the return of the child. (For instance, in countries such as Germany, Finland and Italy, a judgment is enforceable immediately and an appeal may be filed with the Court of Cassation). Filing an appeal does not stop the enforcement of the judgment.

3.- Enforcement of the return of a child

Delays or non-enforcement of judgments on the return of a child often take place for various reasons (the abductor flees with the child, resources that allow this delay, etc.) Difficulties often take place when a judgment on the return of a child is announced, if the judgment does not contemplate how to carry out the return of the child, or if it is insufficiently contemplated.

Simple and efficient mechanisms should be found for the enforcement of judgments on the return of children, therefore for the return to actually take place, not only to be ordered. For this purpose, some procedures to ensure the actual enforcement of the judgments for the return of children must be established after the judgment is final (in other words, when no appeal may be filed or when the time limit to file an appeal has expired) or if the court has ordered the immediate enforcement of the court order.

To ensure the fulfilment of the return of the child, courts must indicate in detail how the return must take place (for instance, the court must specify the time and date, the place where the child will be returned, etc.). Courts often examine the commitments agreed by the plaintiff to minimise possible repercussions on children. They may also establish provisions to ensure that the abductor will not disappear with the child between the date of the judgment and the date of return. Other punitive measures to prevent the non-fulfilment of a judgment for the return of a child may consist of establishing punishment for contempt of court, fines or even imprisonment.

The Public Prosecutor fulfils in certain legal systems the responsibility of arranging the coordination with other authorities or the authorisation of the commencement of procedures to find children or attaining the return of children. Other authorities, such as Interpol, private agencies, etc. may be sought for help.

Enforcement may also be possible by threatening to apply coercive punishment, an arrest warrant or authorisation for the use of force, even that the Court may order the issuance of an arrest warrant or the detention of the child.

It is possible to find systems in which the applicant must act for the enforcement of the decision, by commencing a court procedure for the enforcement of the order, in which case the internal systems must ensure that the applicant is informed of these additional requirements. (For instance, the applicant must take the judgment to a court clerk or to an enforcement agent).

4.- Precautionary measures

Precautionary measures aim at preventing abductions. For this purpose, there are several measures that must be taken into consideration:

a) Travelling documentation

The following may be considered as precautionary measures:

- Children to have travelling documentation different from their parents
- For the consent of both parents for children to travel to be required, which consent must be proven. For this purpose, the advice is for the existence of a standard consent form to facilitate the verification of the fulfilment of this requirement.
- To verify if there are no orders or agreements if visas must be obtained.
- To verify travelling documentation at cross-border controls and for detention and interrogation to be possible if an abduction is suspected.

b) Criminal legislation

Criminal law provisions established by the States in which illegal travelling is considered an offence.

c) Civil legislation

- Promotion of voluntary agreements as well as medicines to prevent subsequent abduction.
- The establishment of a firm legislative basis to avoid or prevent abduction in case of separation of couples.

5.- Cross-border visitation rights

When a parent with custodial rights (a parent with whom the child regularly lives) settles down in another State with the child, the other parent may request that measures be taken to ensure his/her visitation rights. Likewise, if a parent with visitation rights settles down abroad, the parent with custodial rights may request that measures be taken to prevent any illegal retention of the child by the parent with visitation rights when the child must make the visit to another country.

To ensure this protection there must be consent from all the people with custodial rights before approving an order to allow the child to settle down in another country, which may be as follows:

- Requirement of the consent from the parent with visitation rights
- Decision by the courts on matters related to settling down abroad
- Decision by the parents on matters related to settling down abroad, notifying the other parent of the change of place of residence.

To give more transparency to these situations, the courts could include conditions to the orders including the need to guarantee that the orders related to visitation rights of the other parent be recognised in another State. Courts may also require a certain notification time limit for the intended settlement in another country to give the parent that does not change his/her place of residence the opportunity to oppose to the application, if he/she so wishes, as when the parents are not happy with the change of residence to another country, there may be a high risk of abduction.

The parent with custodial rights may receive additional protection against abduction when the child is visiting the other parent abroad which may prevent the other parent from abducting the child. Thus, for instance, the court may issue a conditional visitation order or an order subject to the fulfilment of the following requirements:

- Supervision of the visit by a professional or a member of the family
- Deposit of a financial guarantee by the person with visitation rights
- The parent with visitation rights must regularly contact the police or another authority during the visitation period

The court may also require the parent who enjoys visitation rights to provide the following details:

- Contact data abroad
- Passport number
- Credit card details
- Information related to work colleagues and his/her family members
- Photocopy of the airline tickets and itinerary of the trip.

Provisions to guarantee the recognition and enforcement of orders on custody and visitation rights are useful to prevent abduction.

Carmen Parra Rodríguez
cparra@uao.es

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