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PORTUGAL

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction adopted on October 25, 1980, during the XIV Session of the Hague Conference on Private International Law,¹ was ratified by Portugal² on September 29, 1983, effective December 1, 1983. The Convention applies to all countries Portugal recognizes as parties thereto.³

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Portugal is the *Instituto de Reinserção Social – Unidade Funcional de Convenções Internacionais* (IRS) of the Ministry of Justice.⁴ The Organic Law on the IRS⁵ provides for its competence and powers.

A. Return requested from abroad

The Central Authority has only administrative and informational competence, as established by Organic Law.⁶ Courts decide the cases of parental kidnapping and the return and visitation schedules for abducted children.

The application for the return of an abducted minor to Portugal must be directed to the Portuguese Central Authority, which will, upon receipt of the return application, analyze and verify all the information and decide whether it complies with the requirements provided for under the Convention.

In order to apply for a child's return or parental visitation, the requesting parent must authorize

¹ Portugal became a Member of the Hague Conference on July 15, 1955; see http://www.hcch.net/e/members/signat_pt.html.

² Decree No. 33/83, in *Diário da República* [D.R.], No. 108, Série I, of May 11, 1983.

³Countries where the Agreement is effective with Portugal as of January 12, 2004: Argentina, Australia, Austria, Bahamas, Belarus, Belize, Belgium, Bermuda, Bosnia And Herzegovina, Brazil, Burkina Faso, Canada, Cayman Island, Colombia, Costa Rica, Croatia, Chile, China (Hong Kong Special Administrative Region only), China (Macau Special Administrative Region only), Cyprus, Czech Republic, Denmark (except the Faroe Island and Greenland), Ecuador, El Salvador, Estonia, Falkland Island, Finland, Fiji, Former Yugoslav Republic of Macedonia, France, Greece, Germany, Georgia, Guatemala, Honduras, Hungary, Iceland, Ireland, Isle of Man, Israel, Italy, Luxembourg, Malta, Mauritius, Mexico, Monaco, Montserrat, Netherlands (for the Kingdom in Europe), New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Republic of Moldova, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkmenistan, Turkey, United States of America, United Kingdom of Great and Northern Ireland, Uruguay, Uzbekistan, and Zimbabwe. Available at <http://www.hcch.net/e/status/abdshte.html>.

⁴ Caveat No. 302/95 in *Diário da República* [D.R.], No. 241, Série I-A, of Oct. 18, 1995, and Order No. 12 019/2002, 2^a Série, of May 14, 2002, effective April 6, 2002, determines the competency of the Minister of Justice, Dr^a Maria Celeste Lopes Cardona for the *Instituto de Reinserção Social [IRS] – Unidade Funcional de Convenções Internacionais*, Ministry of Justice, located at Avenida do Almirante Reis, 101, 1150-013 Lisboa, Portugal, UE, Tel: (+ 351) 213 176 100, Fax: (+ 351) 213 176 171, E-mail: irs@irsocial.mj.pt, and web site www.mj.gov.pt.

⁵ Decree-Law No. 204-A/2001 (*Lei Orgânica do Instituto de Reinserção Social*) in *Diário da República* [D.R.], No. 172, Série I-A, 1^o Suplemento, of July 26, 2001.

⁶ Organic Law, art. 3.1.b.

the Central Authority to take action, as it cannot act without prior approval of the requesting parent. Because the activities of the Central Authority are informational and administrative, a lawyer will be necessary for the judicial request, although the Central Authority may continue to provide its administrative assistance during the court proceedings. Those who cannot afford to hire a private lawyer and who qualify to obtain public funded assistance may obtain such legal aid.⁷

According to the official information submitted by the Central Authority, it received a total of 15 incoming applications in 1999.⁸ Of these, 11 were incoming return applications, and 4 were incoming visitation applications.

At the national level, the Judiciary Police (*Polícia Judiciária - PJ*) is responsible for locating an abducted minor. When a child's domicile has not been located, the Central Authority will inform Interpol, the agency internationally charged with locating the abducted minor.

B. Return requested from Portugal

The requester must fill out an application for the child's return or parental visitation, which will contain all the essential information for the location of the taken minor, including the name of the child and the child's date of birth. The requester must submit the application to the Central Authority, which will analyze and decide whether the case meets all the requirements established under the Convention, so that it may take action.

If the Central Authority finds that an application meets all the requirements under the Convention, it will send the return or visitation petition to the Central Authority of the requested country, which will act under its own procedural norms. Under the Convention, the judicial tribunals of the requested country must order the immediate return of the minor to his country of origin. However, in cases when the Convention is not in effect between Portugal and the requested countries, Portugal can do nothing to facilitate or solve the problem. In fact, the only thing the requesting parent can do is to hire a private attorney in the foreign country to attempt to resolve the situation under its domestic law, with no assistance from the Central Authority of Portugal.⁹

The Central Authority¹⁰ handled 27 new return applications in 1999, 19 of which were return applications, and 8 were visitation applications.

In 2001, the Central Authority was involved in 26 petitions, both for return and visitation schedule petitions. Three of these children were returned to the United States, five to England, another five to Switzerland, two to Germany, two to Venezuela, and another two to Mexico. Other children were returned to Spain, Greece, Canada, Denmark, Italy, the Netherlands, and Australia. From all of the requests, 14 were return petitions, and all the others were visitation schedule petitions. Four of these return requests were admitted; the other four were denied, and one of them, a visitation schedule, was arranged. Unfortunately, many of these requests have not been solved. Usually, the children's mothers

⁷ See topic "V. Legal Assistance Programs" of this Report.

⁸ See ftp://ftp.hcch.net/doc/stats_pt.doc.

⁹ Ana Margarida Carvalho, *Em busca dos filhos raptados*, *Visão Magazine*, No. 507, of Nov. 21, 2002, available at <http://www.visaonline.pt/paginas/Conteudo.asp?CdConteudo=29868>.

¹⁰ *Supra* note 8.

are the responsible for taking them from their domicile in Portugal into a foreign country, and the majority of these children are under 10 years of age.¹¹

i. Additional Multinational Efforts

Portugal is also a Member of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, adopted in Luxembourg,¹² on May 20, 1980, and ratified by Portugal¹³ on March 18, 1983, effective September 1, 1983. The European Convention protects custody and access rights in international situations and provides prompt, non-bureaucratic assistance from Central Authorities designed by each Member State¹⁴ in discovering the whereabouts and returning custody of a child improperly removed. Applications for the return of custody of a child may be made directly either to a court or to the Central Authorities of any Member State concerned.

Neither the Hague Convention, nor the European Custody Convention, precludes the application of the other, as it is clearly stated, respectively, in article 34 of the Hague Convention, and in article 19 of the European Convention. The two Conventions, therefore, complement each other in an effort to provide a multinational effective legal framework on the subject.

In addition, the Hague Convention concerning the Powers of Authorities and the Law Applicable in Respect to the Protection of Minors,¹⁵ of October 5, 1961, was ratified by Portugal¹⁶ on December 6, 1968, effective February 4, 1969.

ii. Additional Bilateral Efforts

Portugal has become a member of the Convention of Judicial Cooperation concerning the Protection of Minors between the governments of Portugal and France, approved by Portugal through Resolution No. 1/84,¹⁷ effective October 1, 1984.

Also, Portugal approved through Resolution No. 6/94,¹⁸ effective June 1, 1995, the Convention on Matters of Guardian and Visiting Rights between the governments of Portugal and Luxembourg.

¹¹ *Supra* note 9.

¹² See <http://conventions.coe.int/Treaty/en/Treaties/Html/105.htm>.

¹³ Decree No. 136/82, of Dec. 21, 1982, in *Diário da República* [D.R.], No. 293, Série - I, of Dec. 21, 1982.

¹⁴ Member countries are, as of July 26, 2002: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey and United Kingdom.
Available at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=105&CM=8&DF=26/07/02>.

¹⁵ See <http://www.hcch.net/e/conventions/menu10e.html>.

¹⁶ Decree-Law No. 48.494/68, in D.G., No. 172, Série I, of July 22, 1968.

¹⁷ In *Diário da República* [D.R.], No. 29/84, Série I, 3º Suplemento, of Feb. 3, 1984.

¹⁸ In *Diário da República* [D.R.], No. 30, Série I-A, of Feb. 5, 1994.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Article 122 of the Portuguese Civil Code¹⁹ defines a minor, as the one who has not yet reached 18 years of age. In article 124, the Code states that paternal power or guardianship concludes the minority incapacity. Additionally, article 85 of the same Code states that the minor's residence is the same as his parents, guardian, or the institution responsible for him.

Article 1887 of the Portuguese Civil Code establishes that a minor can neither abandon his parents' residence (or the one that his parents designate), nor can he be taken away from it. If one of these situations occurs, either one of the parents, or the person in charge of the minor, may appeal to the tribunal or to the competent authority for the child's return.

Article 249 of the Criminal Code of Portugal²⁰ punishes child abduction with imprisonment for up to 2 years, or a fine of up to 240 days, when the child is abducted by violent or coercive means. The same punishment is applied when the abductor refuses to return the minor to the custody of his parents, guardian, or other person with custody of the minor. The criminal procedure in these cases depends upon a complaint.

Article 179 of the Criminal Code establishes that if the parent or guardian of a minor is convicted of the crimes under articles 163 to 176 (which include sexual exploitation and trafficking of children), he may lose parental power or guardianship for a period of 2 to 15 years.

The paternal control over children is established under the Civil Code, articles 1885 to 1887. Portuguese domestic family law understands paternal control as an advantage for children's protection, not an advantage for the parents. The legislation, doctrine, and jurisprudence aim for both parents to always exercise equal paternal control, and to focus on the welfare of the minor. In fact, in the event of conflict between the parents, the decision of who will exercise the paternal control must be driven by the necessities of the minor, as well as his well being and harmonious development, as emphasized by the collected jurisprudences.²¹ Yet, paternal power is irrevocable, as stated in article 1882 of the Civil Code.

Decree-Law 314/78,²² created the Organization of Minors' Guardianship (*Organização Tutelar de Menores - OTM*), where a minor's guardianship rights, parental visitation and other minors' rights and procedures are established. The local framework also protects children by means of Complementary Law No. 147/99²³ (*Lei de Protecção de Crianças e Jovens em Perigo*), which provides for the protection of children and young people that are at risk; this legislation is regulated by Decree-Law No. 332-B/2000.²⁴

¹⁹ *Código Civil*, Almeida e Leitão, Porto, Portugal, 1998. Also, *Código Civil Português*, available at <http://www.mreis.pt/docs/cc.htm>.

²⁰ *Código Penal e legislação complementar*, 10ª edição (revista e aumentada), Quid Juris Sociedade Editora, Lisboa, Portugal, 2002.

²¹ *Ac. Rel. Porto of Nov. 11, 1999, Col. de Jur., V, 191*; and *Ac. Rel. Porto of Oct. 10, 1997, Col. De Jur., IV, 221*; in Ramião, Tomé d'Almeida, *Organização Tutelar de Menores – Anotada e Comentada – Jurisprudência e Legislação Conexa*, Quid Juris Sociedade Editora, Lisboa, Portugal, 2002, pp. 89/90.

²² *In* Diário da República [D.R.], No. 248, Série I, of Oct. 27, 1978, with its respective posterior rectifications. Also see *supra* note 21, pp. 11-315.

²³ *In* Diário da República [D.R.] No. 204, of Sept. 1, 1999.

²⁴ *In* Diário da República [D.R.] No. 300, 1º Suplemento, of Dec. 30, 2000.

III. Court System and Structure – Courts Handling the Hague Convention

Portugal is a parliamentary democracy with legal system based on civil law. The Portuguese court structure is composed of the Supreme Court and the judicial courts, with the Supreme Court being the highest level on the structure and the judicial courts are of first and second instance. Courts of Appeal are, as a rule, courts of second instance, and District Courts, as a rule, of first instance. There are Courts of Appeal in the jurisdictions of Lisbon, O Porto, Coimbra, Évora, and Guimarães. There are also courts of first instance for specialized matters, as follows.

Decree-Law No. 246-A/2001,²⁵ in article 2, determines the Tribunals of Family and Minors (*Tribunais de Família e de Menores*) as the competent courts in Portugal for the effects of the execution of international conventions in which the IRS is the Central Authority. Therefore, cases where Portugal is the requested country and there is no voluntary return of the child may be appealed to the respective Court of Appeals, and, if admissible, to the Supreme Court after the decision is reached by one of the Tribunals of Family and Minors of Portugal.²⁶

In 1999, the Central Authority released data,²⁷ which stated that only two Convention applications went to court, one of which was judicially refused, and the other was a return order. Portuguese courts handle the judicial cases involving the Hague Convention when Portugal is the requested state. In one judicial decision²⁸ involving the return of a minor to Canada under the Convention, the Portuguese judge decided to immediately return the child to Canada, with the respective judicial delivery of the child. On the appellate level, the Court of Appeals of Lisbon granted the right to appeal to the Portuguese parent in that return request, confirming the language of the Convention, which states that the local legislation of the requested state must regulate such issues.

Judges have all agreed that the best interest of the minors will prevail in each and all circumstances. For instance, a 1999 decision²⁹ established that it was in the best interests of a minor, who was 5 years old, to live with his father in Portugal, where both his father and mothers' family resided, rather than with the mother (and one uncle) in a foreign country, where the minor had only spent 8 months at the age of 2. In this case, the important facts were that the father would be the one who could provide for the best physical, intellectual, and emotional needs for the minor, and most of his family was in close proximity.

A. Case in Point

In 2003, the Supreme Court of Justice (*Supremo Tribunal de Justiça*) decided an interesting return case.³⁰ The case involved a child born in 1994 in Portugal, with habitual residence in Germany with the

²⁵ Decree-Law No. 246-A/2001 in Diário da República [D.R.] of Sept. 14, 2001.

²⁶ *Id.* art. 1.

²⁷ *Supra* note 8.

²⁸ *Ac. Rel. Lisboa of May 02, 1989*, No. 0002087, Rel. Herlander Martins; available at www.trl.pt.

²⁹ *Ac. Rel. Lisboa of Jan. 14, 1999*, *Col. de Jur.*, I, 78, *supra* note 21, at 89.

³⁰ *Supremo Tribunal de Justiça - STJ, NO.03B2507, Rel. Oliveira Barros, of Oct. 09, 2003*; available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/7be54c19b9d5a8dc80256dea0047319d?OpenDocument&Highlight=0,rapt o,internacional,menores>.

mother. The parents were not married. The child went to Portugal for vacation to spend time with the father and grandmother (on the father's side), and did not return to Germany, as planned at the end of the vacation period. The child's father retained the minor in Portugal and informed the mother by telephone. The minor did not want to return to Germany and always expressed such desire. In April of 2002, the Public Prosecutor's Office filed a lawsuit for the regulation of paternal power in favor of the rights of the minor, as well as a judicial return of the child to Germany. In January 2002, the father had filed a lawsuit for the regulation of the paternal power in favor of the minor.

The lower court decision considered articles 1, 3, 4, 12 and 13 of the Convention and based its decision on article 13.b.2. The decision was made to not return the child, since the return, under the lower court understanding, would cause physical or psychological harm to the child. Additional factors in the decision were that his mother was in a drug therapy treatment in November of 2001 and that many of the people who testified expressed concerns about his life in Germany, where food was sometimes scant and there was usually no hot water available at home, etc. In addition, the minor demonstrated a well-integrated attitude with the family members in Portugal and was already enrolled in school there.

An appeal was brought before the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*), which confirmed the lower court's decision, emphasizing that the minor, who was only 7 years old, but demonstrated high level of maturity, refused to return to Germany, where the mother would sometimes leave him alone at night, as well as physically abuse him. The final decision also ordered the notification of the Portugal Central Authority of such a verdict, since it was the designated administrative authority.

The main intention of the Hague Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to ensure their safe and prompt return to their habitual states of residence. The rationale behind the Portuguese court's final decision was to guard the child's physical and psychological welfare and protect the best interest of the child. In this manner, the decision invoked the exception of article 13.b of the Convention, where the judicial or administrative authority of the requested state is not bound to order the return of the child upon a risk or threat to the child's safety.

IV. Law Enforcement System

To locate children and to secure and enforce authorities' orders, the Central Authority, as well as the Judicial Courts, have requested the assistance of the Portugal Judiciary Police, as well as Interpol. They both have played an important role in the prevention and protection of children's rights.

The Central Authority reported in a 1999 Hague Country Report³¹ that of the incoming return applications received in that year, 3 of them were voluntary returns, which, in percentage, signified 27% compared with a global norm of 18%. On the contrary, only 1 application resulted in a judicial return order. And overall, the return rate was low, only 36%, in comparison with the global norm of 50%. In that same year, and yet in accordance with the data released in such report, the Central Authority handled 42 new incoming and outgoing return and access applications in total.

More recently, according to the information submitted upon request by the Central Authority, the requests statistics are as follows:³²

³¹ *Supra* note 8.

³² Information directly gathered from the Portugal Central Authority for the Convention as of Jan. 2004.

Return Requests (outgoing)
Total 44

Return Requests (incoming)
Total 54

Visitation Requests (outgoing)
Total 17

Visitation Requests (incoming)
Total 17

In an effort to prevent international child abduction, the government of Portugal may require that parents or legal guardians traveling with minors show documentary evidence of their relationship to the minor and permission for the child's travel at any point when they are entering or leaving the country.³³ This is an important precautionary measure, because the majority of the international child abductions occur when one parent takes a minor without the consent of the other parent.³⁴

Also, when a court orders a prohibition to leave the country, all cross-border authorities are advised of such a measure.

V. Legal Assistance Programs

Article 20 of the Constitution of Portugal³⁵ firmly states that the access to justice and to tribunals for the defense of one's legally protected rights and interests is assured to all, and that justice cannot be denied for insufficiency of funds.

The Portuguese Bar Association³⁶ and the state of Portugal provide legal assistance in the country. A legal aid petitioner must prove that he lacks the basic financial conditions to pay for private lawyers' fees or for the normal expenses of a judicial process and, thus, may benefit from legal assistance in accordance with Law 30-E/2000.³⁷

The legal aid may be provided for any type of legal question or judicial battle, and it does not depend on the facts of the case, or the complexity of it. In accordance with the information received from the Central Authority, there is no difference in the application and benefit system of legal aid in the cases of international child abduction and parental visitation under the Convention. The benefit will be granted as long as the usual requirements of the above-mentioned legislation are met.

In fact, to benefit from legal aid available in Portugal, an application form must be filed, either digitally or in hard copy, and submitted to any public service attendance of the Services of the Social Security. The beneficiaries of legal aid in Portugal may be: (i) nationals and habitual residents of Portugal; (ii) citizens of any European Union Member State; (iii) foreigners that do not have habitual

³³ See <http://travel.state.gov/portugal.html>.

³⁴ *Supra* note 9.

³⁵ De Sousa, Marcelo Rebelo and José de Melo Alexandrino, *Constituição da República Portuguesa Comentada*, Lex Editora, Lisboa, Portugal, 2000.

³⁶ *Ordem dos Advogados Portuguesa, Guia de Acesso ao Direito*, available at <http://www.oa.pt/servicos/faqs.asp?idc= 8&scid= 159>.

³⁷ Law No. 30-E/2000 in Diário da República [D.R.], No.292, Série I-A, 3º Suplemento, of Dec. 20, 2000. Also, additional legislation on the subject matter is: Ordinance No.150/2002 in Diário da República [D.R.], Série I-B, of Feb. 19, 2002, which establishes the legal fees for the professional acting under the legal assistance services, and Decree-Law No. 391/88 in Diário da República [D.R.], No. 248/88, Série I, of Oct. 26, 1988, which regulates the system of legal aid (called *apoio judiciário* in Portugal).

residence in Portugal, but reside in countries where the same legal aid is available to Portuguese residents (reciprocity principle).³⁸

Also, under the Guide to Legal Access³⁹ of the Portuguese Bar Association, the legal aid may be required by: (i) the interested person; (ii) the Public Prosecution Service in favor of the interested person; (iii) the lawyer, representing the interested person; (iv) the patron named by the Bar Association or by the Solicitors Chamber, after request of the interested person.

A document from the Ministry of Justice of Portugal entitled “Questionnaire Concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance,”⁴⁰ addressed that:

legal aid includes the exemption from courts costs and other expenses related to the proceedings, the postponement of the payment of the legal costs and the payment of the legal costs and the payment of lawyers’ fees. This form of legal aid can be required at any stage of the proceedings, remaining in possible appeals and attached proceedings, with no regard to the merit of the initial process. Every habitual resident and any citizen of a European Union Member State with residence outside Portugal can benefit from legal aid and advice in the same conditions as Portuguese nationals. Citizens from outside the European Union with residence outside Portugal have the same rights regarding legal aid as do Portuguese nationals in their respective countries. In international cases the central authority provides information and assistance.

The Central Authority also informed that, as of January 2004, there is no current partnership or agreement available between the Central Authority and any other institution in Portugal with regard to legal assistance programs. However, under its administrative and informative roles, the Central Authority may promptly direct the interested persons to the available sources in the country.

A. Information Resources

There are not many detailed and substantial information resources on the subject matter available to the public in Portugal. Although the majority of the materials are in Portuguese only, it is important to point out the following:

The Library of the Central Authority has compiled some materials at <http://www.gde.mj.pt/birs/birs.nsf?OpenDatabase> on the matter of international child abduction and parental visitation, and the Office of Attorney General of Portugal, through the Secretary of Documentation and Comparative Law at <http://www.gddc.pt/siii/tratados.html>, provides for consultation on the texts of the International Treaties that Portugal has celebrated, from the year 1970 to 2004.

³⁸ http://europa.eu.int/comm/justice_home/ejn/legal_aid/legal_aid_por_pt.htm. And for more information: *Direcção - Geral da Administração Extrajudicial* – Rua de Alcolena n.º 1, P - 1400-004 Lisboa. Tel.: (+ 351) 21-304-1340 and Fax: (+ 351) 21-304-1349. E-mail: correio@dgae.mj.pt and web site: www.dgae.mj.pt.

³⁹ *Supra* note 36.

⁴⁰ ftp://ftp.hcch.net/doc/maint_pt.pdf.

The Association for the Defense of Children and Separated Parents: Parents Forever,⁴¹ at <http://www.geocities.com/paisefilhos/index2.html>, is one of the NGOs with regard for the protection of children's rights. Its website contains information on parental abduction, international conventions, and local legislation. Founded in 1983, the Institute of Children's Protection⁴² at <http://www.iacrianca.pt>, contributes to the development of children, acts in children's defense and promotes children's rights.

VI. Conclusion

It appears that the main concern for authorities in Portugal, when deciding a case on international child abduction, has been the welfare of the child. As a result, judicial decisions have applied the exception of article 13 of the Convention in the best interest of the child. By entering into additional multilateral and bilateral agreements to battle international child abduction, Portugal has shown its support of children's civil rights.

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⁴² *Instituto de Apoio à Criança*, located at Largo da Memória, 14, 1349-045, Lisboa, Tel. (+ 351) 21-361-7889.