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SPAIN

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention) adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Spain¹ on May 28, 1987 and came into force on September 1, 1987.²

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Hague Convention in Spain is the *Direccion General de Politica Legislativa y Cooperacion Juridica Internacional* of the Ministry of Justice.³ It was not until 1996, when Organic Law 1/1996⁴ on the Legal Protection of Minors, which partially amends the Code of Civil Procedure,⁵ was passed that Spain had a specific implementing legislation for the Hague Convention.⁶ Before that time, the Hague Convention was applied, but with great difficulty, due mainly to the lack of implementing legislation, but also because the designated Central Authority also serves as the Central Authority for other international instruments. Therefore, its workload exceeds its capacity.⁷

Since the Hague Convention is a self-executing treaty, implementing legislation was not strictly necessary from the international legal point of view, but the lack of regulations on, for example, which was the competent court to make the return order or the procedure for the summary return mechanism proved to be one of the major obstacles in the Hague Convention application in Spain.⁸

A. Return Requested from Abroad

Under the rules established in 1996 by Organic Law 1/1996, which has been inserted in the Code of Civil Procedure,⁹ it has been determined that for Hague Convention applications the competent judge to return a child who was wrongfully removed or retained, is the lower courts of the place where the child

¹ BOLETIN OFICIAL DEL ESTADO (B.O.E.) AUGUST 24, 1987, JUNE 30, 1989 AND JAN. 24, 1996.

² *Id.* last ¶.

³ *Id.*

⁴ Organic Law 1/1996 of January 15, 1996 in B.O.E. Jan. 17, 1996.

⁵ ENJUICIAMIENTO CIVIL, LEY Y DISPOSICIONES COMPLEMENTARIAS, 4th Edition concordada y anotada, Tirant Lo Blanch, textos legales, Valencia, 2002.

⁶ C. Gonzalez Beilfuss, *International Child Abduction in Spain*, in INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, Vol. 15, No. 3, Dec. 2001, 330.

⁷ *Id.*

⁸ *Id.*

⁹ *Supra* note 5, arts. 1901-9.

is located or is retained.¹⁰ This means that it will not be possible to commence judicial proceedings in Spain until the child is located.¹¹

Under the provisions of the Hague Convention, the Central Authority must take all necessary measures to locate the child. The National Police will provide assistance thereto. Any information, as well as recent pictures of the abductor and the child, will be of great help for the police search. The judicial proceedings may be initiated by the individual, institution, or body holding custody rights over the child or by the Spanish Central Authority, entity, or individual representing the petitioner.¹² The Central Authority usually acts through the *Ministerio Fiscal* and *Abogados del Estado* (state's attorney),¹³ who represent the state in civil and administrative matters. Spain, therefore, assumes the expenses of the legal representation, even if the requesting state made the reservation under art. 26 of the Hague Convention. If, however, the applicant decides to name a private attorney, the Central Authority will provide assistance thereto, but with no responsibility as to the outcome of the case.¹⁴

In case the applicant decides to act through the Central Authority instead, a power of attorney will have to be given for his or her legal representation in case it is necessary to initiate judicial proceedings.¹⁵ Because Spain was not responsible for the creation of the reservation of art. 24 of the Hague Convention, the documentation required in these proceedings may be submitted in Spanish, French, or English. But, if the requesting country objects to the use of French or English, all documents need to be translated into Spanish.¹⁶ The judge must decide the case within 6 weeks from the date the judicial proceedings started.¹⁷ Considering that the Spanish courts suffer from an enormous overload of work, as well as a scarcity of resources, this deadline has not always been met.¹⁸

Proceedings start with a petition that must contain all the documents required by the Hague Convention. The judge will then summon the alleged abductor to a hearing which must take place during the following 3 days. In this hearing, the abductor will be asked whether or not he agrees with the return of the child.¹⁹ If the abductor agrees to return the child voluntarily, the judge will order his return to the custody holder and decide on which party will have to pay for the expenses of the proceeding.²⁰

¹⁰ *Id.* art. 1902, ¶ 1.

¹¹ *Supra* note 6.

¹² *Supra* note 5, art. 1902, ¶ 2.

¹³ *Id.* art. 1902, ¶ 3.

¹⁴ *Supra* note 6, at 331.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra* note 5, art. 1902, last ¶.

¹⁸ *Supra* note 6, at 331.

¹⁹ *Supra* note 5, art. 1904.

²⁰ *Id.* art. 1904 a).

If however, the abductor is opposed to the return of the child, his reasons will be examined in an oral hearing which must take place in the next 5 days.²¹ The judge may examine the child and request a psychological assessment or other reports that he deems necessary, but all evidence must be produced within the 6-day period following the hearing. After 3 days, the judge must decide whether or not to return the child. This decision may only be appealed once, and the appeal must be resolved within 20 days and does not suspend its enforcement.²²

B. Return requested from Spain

When the Spanish Central Authority is requesting the return of a child who has been taken to a country that is party to the Hague Convention, the return or visitation petition documents are translated as appropriate upon their receipt and sent to the competent Central Authority abroad.²³ The petition must include all the information available to locate the child, including identifying information concerning the child and the person who has taken the child, the child's date of birth, the reasons for claiming the return, and information on the presumptive domicile of the child. Once all documents have been submitted, the Central Authority will locate the child, either directly or through the competent authorities, and try for a friendly solution to the case. If this is not possible, judicial proceedings will be instituted to return the child to Spain or to reinstate the effective visitation schedule.²⁴

The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority and the procedural norms applied by the competent courts. This procedure is generally free. However, some countries do require the intervention of a private attorney, such as Argentina, Germany, and the United States.²⁵ If the petitioner cannot afford to pay, he may provide evidence to qualify for free legal advice and become eligible for such assistance abroad.²⁶

The Spanish Central Authority, as requesting authority, will follow up on the proceedings abroad and will keep the petitioner informed at all times about the case.²⁷

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The crime of "Child Abduction by Parents" was created and inserted in the Criminal Code by Organic Law 9/2002 of December 10, 2002.²⁸ Until the passage of this law, there was no criminal penalty

²¹ *Id.* art. 1907 a).

²² *Id.* art. 1908.

²³ See http://www.mju.es/cooperacion_juridica/g_sustmenores.htm at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ ORGANIC LAW 9/2002 of Dec. 10, 2002, in B.O.E. Dec. 11, 2002.

for parental child abduction as such. However, in a number of cases the courts applied different criminal charges, such as kidnapping and illegal detention in cases of parental abduction.²⁹

Under the new provisions of the Criminal Code,³⁰ any parent who, takes his minor child without justification will be punished with imprisonment for a term of 2 to 4 years and will be disqualified from having legal custody of his children for 4 to 10 years.³¹ The Criminal Code also provides for specific definitions and qualifiers for the crime of abduction,³² as:

1. the taking of a minor from the place of his residence without the consent of the parent with whom the child regularly resides, the institutions, or individuals with custody³³
2. the retention of a minor in serious violation of a judicial or administrative decision establishing such a right
3. the taking of a minor abroad when the minor's return depends on conditions requested by the abductor (In this case the punishment will be 3 to 4 years imprisonment.)

If the abductor communicates the location of the child within 24 hours, agrees to return the child immediately, and complies thereto, or if the absence of the minor is less than 24 hours, the abductor will be exempt from punishment.³⁴ If the return is performed without any communication, but within 15 days of the abduction, the punishment is imprisonment of 6 months to 2 years.³⁵

Punishment for this crime will be also applicable to the relatives of the minor or the abductor parent, up to the second grade of relationship of blood or marriage.³⁶

Law 9/2002³⁷ also added two provisions to the Civil Code³⁸ by providing that in cases of nullity, separation, or divorce proceedings, when there is a risk that children may be abducted by either of his parents or a third person, precautionary measures may be taken by the court if they are considered necessary, particularly:

- prohibiting the child's exit from the country without court authorization

²⁹A. Alonso Carvajal and N. Chamorro Alonso, El Secuestro Interparental de Menores en los Matrimonios Mixtos, available at <http://www.derecho-familia.com>.

³⁰ E. Gimberant Ordeig y otros, CODIGO PENAL con Concordancias y Jurisprudencia, Tecnos, Madrid, 2003.

³¹ *Id.* art. 225, *bis. 1.*

³² *Supra* note 28, art. 225, *bis. 2.*

³³ *Id.* art. 225, *bis. 2.1.*

³⁴ *Id.* art. 225, *bis. 4.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* arts. 5 and 6.

³⁸ X. O'Callagan Munoz, CODIGO CIVIL, 3rd Edition, La Ley, Madrid, 2003, arts. 103.1 & 158.3.

- prohibiting the issuance of a passport to the minor, or if already issued, prohibition of its handling by the parents
- submitting to prior judicial authorization to any change in the minor's domicile³⁹

However, it is not clear how efficient some of these measures will be. For example, within the European Union, individuals may travel with their DNI (National Identification Document), and there is no need to have a passport. Also the law fails to establish the punishment for violation of these measures.⁴⁰ The same measures may be taken by the courts *ex-officio*, upon a request of the *Ministerio Fiscal*, a relative of the child, or the child.⁴¹

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

When Spain is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the lower courts where the child is located or where he is being retained.⁴² The case may be appealed only once to the respective Court of Appeals and must be decided within a maximum of 20 days and does not suspend its enforcement.⁴³

Court decisions have evolved since the Hague Convention was adopted in 1987, especially after the passage of Law 1/1996, which provided for a specific procedure applicable to Hague Convention cases. In an early decision of March 28, 1994,⁴⁴ the *Audiencia Provincial de Zaragoza* decided that the removal of the child from his habitual place of residence in the United States was not wrongful, because there was no breach of custody rights. This decision was based on the U.S. court decision assigning the custody of the child to the father only after the removal of the child. This decision has been considered by some authors, as a wrong application of the Hague Convention, because the decision did not address the situation of the minor at the time of the wrongful removal of the child.⁴⁵ Following a trend shared by other countries, there are some cases in which the fact that a person or entity had the right to object the change of residence, it has been interpreted as a right of custody under the Hague Convention terms.⁴⁶

In another decision⁴⁷ the judge decided that, since Norwegian law requires both parents to consent to any change of residence, there had been a breach of the father's custody rights. Despite this decision,

³⁹ *Id.* art. 103.1, last ¶.

⁴⁰ *Supra* note 38 at 178.

⁴¹ *Id.* art. 158.3.

⁴² *Supra* note 10.

⁴³ *Supra* note 22.

⁴⁴ Auto de la Audiencia Provincial de Zaragoza (Seccion 2da) of March 28, 1994, in REVISTA ESPANOLA DE DERECHO INTERNACIONAL, 1995, 1, comments by C. Gonzalez Beilfuss, in *supra* note 6, at 333.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ JUZGADO DE PRIMERA INSTANCIA NO. 5 LAS PALMAS OF GRAN CANARIA of October 27, 1999 in *Supra* note 6 at 333.

during the custody judicial proceedings, the mother was assigned the care of the children and afterwards took them to Spain.⁴⁸

In another case,⁴⁹ which caused a great uproar in the requesting country (Israel), a 1-year old girl, was taken by her mother, a Spanish citizen, from Israel to Spain. The mother was always the primary care giver of the child. The parents were separated before the child was born, and therefore, the relationship with her father was very limited. The lower court decided that, since the mother had always been the care giver and when the removal took place, she was not prevented from doing so, the removal was not wrongful. This decision, however, was reversed on appeal, based on the fact that according to Israeli law, the parents shared the custody of the child, and as such, both had the right to determine the child's permanent residence. This case is an example of the way the return mechanism under the Hague Convention operates, since many applicants do not pursue the custody of the child, but only wish to protect their rights of access by securing the child's place of residence in the requesting state.⁵⁰

Concern over access rights in cases of children born out of wedlock is especially widespread in Spain. Under Spanish Law both parents, even unmarried, have custody rights over their children. In some countries these rights are not assigned automatically. In a 1999 Spanish decision⁵¹ the judge decided that the removal of a child was wrongful, because Italian law attributes joint custody to unmarried parents, provided they cohabited.

Most of the cases that have been decided by the courts deal at least with one of the exceptions to the return of the child provided for by articles 12, 13, and 20 of the Hague Convention. The most frequently used are the exceptions of article 12, if more than 1 year has passed from the date of the wrongful removal or retention, and article 13 b, which provides that the return of the child may be refused if the individual or entity who opposes the return establishes that there is a serious risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This basis for refusal may very easily tempt the court to slip into considering the dispute on its merits. This is the reason for its frequent use by legal counsel and is the reason why it is argued in most cases that reach the courts. There are, however, an increasing number of cases in which Spanish courts correctly interpret the provision in a restrictive way.⁵²

In a 1999 decision⁵³ the court decided that the fact that because the child's illness (neuro dermatitis) improved with the weather in Lanzarote (Spain) did not mean that the girl would suffer a serious risk if returned to her habitual residence in Germany.

Spanish courts have also had to deal with the issue of how to separate the child from the abducting parent. The courts have been inclined to be too technical instead of focusing on the post-return period.

⁴⁸ *Supra* note 6, at 333.

⁴⁹ AUTO AUDIENCIA PROVINCIAL DE BARCELONA OF APR. 21, 1997, SECCION 1, REVISTA GENERAL DEL DERECHO, 1998, 3116-3119 in *supra* note 6, at 333.

⁵⁰ *Id.* at 334.

⁵¹ JUZGADO DE PRIMERA INSTANCIA NO. 5 MALAGA OF DEC. 30, 1999 in *supra* note 6 at 335.

⁵² *Supra* note 6, at 337.

⁵³ JUZGADO NACIONAL DE PRIMERA INSTANCIA OF LAS PALMAS DE GRAN CANARIA OF NOV. 27, 1999, in *supra* note 6 at 337.

In a 1998 decision⁵⁴ the court reversed a lower court decision, which refused to order the return of a 4-year old girl to the United States, because a court appointed psychologist concluded that the child would suffer if separated from the abducting mother. The appellate court held that the mother did not prove that the degree of suffering was going to be intolerable.

The exception to the return based on article 20 of the Hague Convention allows the refusal of the return if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. Article 20 was used in the case mentioned earlier, in which the abducting mother had always been the sole care giver and, since the parents were separated before her birth, the father only visited the child while they were still in Israel. The Appellate Court did, however, find that father and mother shared custody in Hague Convention terms, when the removal took place, and therefore, the removal was wrongful. However, it refused to order the return, because this was against Spanish *public order* as defined in article 20. After the removal, the father obtained a divorce decision declaring the mother a “rebellious wife.” The Spanish court interpreted that this declaration would result in the severing of all contact between mother and child if the child were returned to Israel. It decided that, since the decision was not based on the best interest of the child, but on the desire to punish the mother, a return would be against the fundamental principles of Spanish Law. This decision was appealed before the Spanish Constitutional Court, and it was rejected.⁵⁵

The post-return period is another particularly difficult issue if, as happens quite often, the left-behind parent obtains a decision granting him custody of the child from the courts in the requesting state after the wrongful removal or retention occurred. In such cases, the enforcement of a return order does not serve to restore the situation, unilaterally altered by the abductor, but rather the contrary.⁵⁶

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the police and Interpol to locate children and secure the enforcement of authorities’ orders. According to the Spanish Central Authority, during 1999, Spain received 36 incoming return and 6 incoming access applications, for a total of 42 incoming applications. Spain made 27 outgoing return and 9 outgoing access applications in that year, for a total of 36 outgoing applications. Altogether, therefore, the Central Authority for Spain handled 78 new applications in 1999.⁵⁷

Of the 36 incoming return applications, 7 were rejected; 10 resulted in a voluntary return; 8, judicial returns; 4, judicial refusals; 3 were withdrawn; and 4 are pending. From 6 incoming access applications, 1 access was voluntarily agreed upon; 3 were judicially granted; 1 is pending; and 1 was withdrawn. The reasons for rejection of return petitions were that in one case the child was located in another country and in four other cases the child was not located.⁵⁸

Spain has received applications for return from 14 contracting states, with the United Kingdom and Wales comprising one quarter of all applications. The United States made proportionally fewer

⁵⁴ AUDIENCIA PROVINCIAL DE MALAGA of October 28, 1999 in *MINORIDAD Y FAMILIA*, 4, No. 14, Delta Editora, ¶ na, 2000 at 119.

⁵⁵ *Supra* note 6 at 340.

⁵⁶ *Supra* note 6 at 341.

⁵⁷ See http://www.hcch.net/e/members/no_es.html.

⁵⁸ *Id.*

applications to Spain. Compared with other European states, Spain received more applications from Latin American States, 5 out of 36 applications.⁵⁹

Compared with other countries, Spain was slower in reaching judicial decisions, but faster to reach voluntary agreements. Voluntary returns occurred in an average of 69 days compared with the average of 84 days in other countries. Judicial returns and refusals took an average of 124 and 202 days compared with the averages of 107 and 147 days in other countries.⁶⁰

V. Legal Assistance Programs

The Spanish Central Authority provides *pro bono* legal assistance during Hague Convention proceedings before the courts in Spain through a body of attorneys called *Abogados del Estado*.⁶¹ The attorney will only represent the requesting parent for the Hague Convention proceeding purposes, but not in custody or divorce proceedings. This attorney is a staff of the Ministry of Justice.⁶²

VI. Conclusion

The following entities provide current information in their webpages:

The Central Authority, Ministerio de Justicia, Direccion General de Politica Legislativa y Cooperacion Juridica Internacional, Subdireccion General de Cooperacion Juridica Internacional, Servicio de Convenios.

C/ San Bernardo 62
Madrid 28071
Fax 913904457
http://www.mju.es/cooperacion_juridica/g_sustmenores.htm.

Asociacion para la Recuperacion de Ninos sacados de su Pais

<http://www.recuperacion-menores.org/>.

Derecho de Familia

<http://www.derecho-familia.com/prensa.html>.

The Hague Convention has proved to be one of the more successful instruments in force to deal with the complexities of parental child abduction. Even with its weaknesses, it has considerably improved the process to return internationally abducted children. The Hague Convention is working reasonably well in Spain. Spanish courts have finally understood the true nature and objectives of the Hague Convention.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Supra* note 13.

⁶² E. Perez Vera, *Algunas Consideraciones sobre la Aplicacion en Espana del Convenio de la Conferencia de la Haya sobre los Aspectos Civiles de la Sustraccion Internacional de Menores del 25 de Octubre de 1980* in REUNION DE EXPERTOS GUBERNAMENTALES SOBRE SUSTRACCION INTERNACIONAL DE MENORES POR PARTE DE UNO DE SUS PADRES, Instituto Interamericano del Nino, SIM/doc.9/02 August 12 and 13 of 2002, Montevideo, Uruguay.

There are more decisions that adopt a non-nationalist approach in addressing this issue. At present, Spanish courts have shifted their focus towards considering the opinion of the child and the psychological reports. There are an increasing number of decisions in which the interests of the child are prioritized, and the children are returned to their place of residence, while exceptions in the Hague Convention are interpreted in a more restrictive way.⁶³

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⁶³ A. L. Calvo and others, *DERECHO INTERNACIONAL PRIVADO*, VOL II, 2nd Edition, Editorial Comares, Granada, 2000, at 173.