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SWEDEN

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter “the Hague Convention” or “the Convention”) was adopted on October 25, 1980, and entered into force on December 1, 1983. Sweden decided to ratify the Convention on February 2, 1988, and acceded to the Convention by signing and depositing a ratification instrument on March 22, 1989. Previously, Sweden lacked general regulations to effectively address foreign decisions related to child custody. The Swedish legislators acceded to the Convention, because of the increasing interaction across state borders and an expectation of that this tendency would continue to grow.¹ The Convention became effective in Sweden on June 1, 1989² and concurrently entered into force between Sweden and the United States. The Hague Convention is in force between Sweden and 58 other states.³

I. Domestic Laws and Regulations Implementing the Hague Convention

Sweden has implemented the provisions of the Convention through a domestic Act,⁴ “On Recognition and Enforcement of Foreign Decisions Concerning Custody, etc. and on the Return of Children”⁵ (hereinafter “the Implementation Act”). This Act addresses Sweden’s obligations to both the Hague Convention and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. Paragraphs 2 through 4, 13 through 21 and paragraph 23 of the Implementation Act are applicable vis-à-vis state parties to both documents. However, paragraphs 11, 12 and 22 specifically address the Hague Convention. It should be noted that for Swedish courts and Swedish authorities, only the Swedish Implementation Act, and not the Hague Convention, is binding.⁶

A. The Swedish Central Authority

The designated Central Authority for the purposes of the Convention is Sweden’s State Department for Foreign Affairs. The State Department is tasked to receive and transmit applications, cooperate with

¹ The motives, a source of law and used for interpretation, are published in the preparatory works; Governmental Bill, Proposition 1988/89:8, pp. 13-14.

² The Convention is published in Sweden’s Agreements with Foreign States (SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER), SÖ 1989:7; and in the preparatory works in the Swedish, English and French languages at *supra* note 1, at 95-123. Sweden has made a reservation with respect to the Hague Convention art. 26, § 2.

³ Governmental Announcement 2002:706 (Regeringens tillkännagivande (2002:706) i fråga om konventionen d. 25 oktober 1980 om de civila aspekterna på internationella bortföranden av barn (Haagkonventionen)). The Convention only applies to children abducted or retained after June 1, 1989. Sweden additionally has separate agreements on the topic of child abduction with the Nordic countries that are applicable in parallel with the Hague Convention (*supra* note 1, at 23).

⁴ In Sweden, transformation is the normal technique to make international treaties effective.

⁵ SFS 1989:14 (as amended by SFS 1993:212, SFS 1994:1447, SFS 2001:465 and SFS 2001:397).

⁶ The Convention can be used for interpretation purposes. For a reference to an outline in English of Swedish law and accepted legal sources, see generally Strömberg Stig (ed.), *An Introduction to Swedish Law* (2^d ed. 1991).

Central Authorities in other states, further cooperation with concerned authorities in Sweden and elsewhere, and fulfil other functions pursuant to the Convention.⁷

Upon receipt of an application, the State Department first attempts to locate the child by checking official records,⁸ and if necessary contacting the police for assistance in the search. To this date, there have been no failed attempts in locating an abducted child. After locating the child, the State Department will ask the applicant if he is willing to agree to an out-of-court settlement. If an out-of-court solution is not feasible, the applicant is put in contact with a Swedish lawyer to assist him with filing a judicial petition, and during subsequent court proceedings.

The State Department reports that it received a total of 72 Hague Convention applications during 2002, and 14 applications between January 1, 2000 and March 1, 2004, regarding children abducted from the United States to Sweden. Out of the latter 14 applications, 6 applications were withdrawn; 6 children were returned; and in one case the child was not in Sweden. In another case, the first level administrative court refused a petition for return based on the fact that several years had passed since the abduction. The applicant did not exercise his custody rights at the time of the abduction and had for a number of years not attempted to establish any contact with the children.⁹

B. Return Requested From Abroad

The main content of the Hague Convention is included in paragraphs 11 and 12 of the Implementation Act. The paragraph 11 provides that a child who has been brought illegally to Sweden, or who is illegally retained in Sweden, will be returned, upon request, to the person from whom the child was abducted, if the child was a habitual resident, immediately before the abduction or the retention, in a state that is party to the Hague Convention. The subsequent section of the paragraph provides that an abduction or retention is wrongful if it was carried out in defiance of the guardian's right to care for the child, according to the laws of the state where the child was a habitual resident immediately. The guardian must have exercised this right at the time the child was abducted, or should have exercised this right had the child not been abducted or retained, and additionally did not accept that the child was taken away.¹⁰

Pursuant to article 4 of the Hague Convention, although not explicitly provided for in the Implementation Law,¹¹ the abduction or the retention of a child is not illegal if the child was a habitual resident in Sweden before the abduction or the retention.¹² Hence, in each particular case, a court of law first needs to determine the state of the child's habitual residence in order to determine if paragraph 11

⁷ Decree on the Recognition and Enforcement of Foreign Decisions Concerning Custody, etc. and on the Return of Children, SFS 1989:177. Within the State Department, it is the Department for Consular Affairs and Civil Law that deals with cases relating to the Hague Convention. They can be reached around the clock at + 46-(0)8- 405 1000, or via their e-mail address registrator@foreign.ministry.se.

⁸ Sweden has a well developed system with "personal numbers," (similar to social security numbers). These personal numbers are commonly documented in matters regarding schools, medical care, employment, etc.

⁹ Communications with officials at the State Department, on file with author.

¹⁰ See also *supra* note 1, at 42.

¹¹ *Supra* note 5, ¶ 11, § 2, interpreted *e contrario*.

¹² See, e.g., *supra* note, at 40; and for case law the Supreme Administrative Courts rulings in case nos RÅ 1995 ref 99 (In a case involving an American father and Swedish mother, the court found that the child had taken habitual residence in Sweden); RÅ 1996 ref 52 (same); and RÅ 2001 ref 53 (In a case involving a Swedish father and a British mother, the court found that the child, retained in Sweden, had its habitual residence in Sweden).

is applicable. To this effect, a Swedish court of law will make an independent examination of the objective and the subjective circumstances surrounding the case. Objective circumstances include the time spent in Sweden, as well as social and other personal or professional relations to Sweden, and as compared to other countries. Due consideration is given to the intent to stay in the country, and for a child, the habitual residence of his guardian is given significant consideration.¹³ The habitual residence of a parent who only is entitled to parental visitation is, however, of less significance.¹⁴ The fact that the child may have been abducted and forced to change habitual residence does not necessarily impede the court from finding that the child has acquired a new habitual residence.¹⁵

If the court finds that paragraph 11 is applicable in a particular case, a judicial petition could still be denied on four alternative grounds, as defined in paragraph 12. According to the first ground, a petition for the return of a child can be refused in a case where more than 1 year has passed since the time of the illegal abduction or retention *and* the child has settled in his new environment. This corresponds with article 12, section 2 of the Hague Convention. Secondly, if there is a grave risk that the child would be physically harmed or psychologically damaged, or if the child otherwise would be placed in an intolerable situation, a petition can be denied. This provision is consistent with article 13 b, section 1 of the Convention. Third, and in accordance with article 13 b, section 2 of the Convention, a petition can be refused if the child opposes being returned *and* the child has reached such an age and maturity that his views should be taken into consideration. In case law this age has been set at 12, but even when the child has reached the age of 12, the court will, with the assistance of the social authorities, make an independent evaluation of the child's level of maturity.¹⁶ This section corresponds with general Swedish regulations on the return of abducted children.¹⁷ Finally, in conjunction with article 20 of the Hague Convention, a petition can be refused if an order for the return of a child would be incompatible with domestic fundamental principles for the protection of human rights and fundamental freedoms. In Sweden, the pertinent rights and freedoms are primarily found in chapter 2 of the Constitutional Act.¹⁸

Article 21 of the Hague Convention on access rights appears not to have been incorporated into Swedish law, and disputes over enforcement of such issues will be tried according to general Swedish family law.¹⁹

¹³ See reasoning by the Supreme Administrative Court in case no RÅ 2001 ref 53. The court stated herein that in general, a small child must be considered to have the same habitual residence as his guardian. If the guardian however acquires a new habitual residence, the habitual residence of the child does not automatically change if the move was carried out against the will of the other parent, not later ratified by the opposing parent or considerable time has passed since the abduction.

¹⁴ See reasoning by the Appellate Administrative Court in case no. RÅ 1996 ref. 52.

¹⁵ Compare *supra* note, at 36 and 40 with the Governmental Bill, Proposition 1973:158, at 78 ff. See also judgement by the Supreme Administrative Court in case no RÅ 2001 ref 53.

¹⁶ Cf judgement by the Supreme Administrative Court, case no RÅ 2002 ref 1, where a 12 year old boy communicated that he did not want to return to his mother in Great Britain, and instead remained in Sweden with his father, with whom he previously had not lived for any great length. The court asked the social authorities to evaluate the sincerity and seriousness of the boy's will. The social authorities came to the conclusion that the child was old and mature enough to make a considered expression of will. Nonetheless, the Supreme Administrative Court found that the child did not possess the insights necessary to make a deliberated decision and ordered that the child be returned to his mother in Great Britain.

¹⁷ Parents and Children Code SFS 1949:381 (as amended), ch. 21, ¶ 5; and below.

¹⁸ KK 1974:152, reprinted in SFS 2003: 593.

¹⁹ According to the legislature, a foreign court order on parental access does not fall under ¶ 11. *Supra* note 1, at 40. The reason to not incorporate art. 21 of the Hague Convention remains unknown. Suggestively, Sweden did not want to uphold and enforce visitation schedules that otherwise would be considered unacceptable and as not in the best interest of the child.

C. Return Requested from Sweden

If a parent has abducted a child who was permanently residing in Sweden to a foreign country, a civil district court can on the request that the legal custodian of the child issue a declaration that the child has been illegally abducted or retained.²⁰ If both parents have custody of the child, and if one of the parents has abducted the child or is retaining the child abroad, the court may also declare that this act is illegal. However, it is not necessary that the act be illegal according to Swedish Criminal Law.²¹

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Sweden is essentially a civil law, statute-driven country with one single applicable body of law for the entire country. Central provisions regarding children are found in the Parents and Children Code, and for all purposes with respect to custody, living arrangements, and parental access it is paramount that all orders or measures are taken and executed “in the best interest of the child.”²²

Married couples have joint custody of a child from birth until the child reaches the age of 18. An unmarried mother is given sole custody of the child. If the parents marry later, both of them obtain custody of the child from that point in time, unless a court previously entrusted custody to one or two specially appointed custodians. If only one of the parents has custody of the child and the parents wish to have joint custody, the court will, on their application, make an order in accordance with their request, unless joint custody is manifestly incompatible with the best interest of the child. Alternatively, the parents may obtain joint custody by filing a request with the tax authority. If parents who share custody divorce, there is a presumption that they will continue to exercise joint custody of the child; however, the question of with whom the child will be living often gathers overriding attention. Moreover, joint custody entails that all major decisions regarding the child will be made collaboratively, for example, one parent needs the consent of the other parent to travel abroad with the child, and both parents will have access to information from schools and the authorities. Joint custody additionally entails that parents can decide, out-of-court, on visitation rights and where the child will be residing as long as the arrangements are compatible with the best interest of the child. In contrast, a parent granted sole custody independently decides on all matters regarding the child, including living arrangements.

If the parents do not agree, for instance on the issue of where the child will be living, or in case one parent wants to change the current accords on custody against the other parent’s will, he must file a judicial petition with a court of law, which must then decide whether the custody henceforth will be joint or solely granted to either party. Since 1998, it has been possible for the court to decide on joint custody against the wishes of one of the parents. Frequently the courts task the social authorities to conduct mediation talks between the parents before rendering a decision in cases in which the parents do not agree on custody, visitations rights, or the residence of the child.

With respect to access rights, a child is entitled to visitation with both parents.²³ There is no contrasting right for parental access to a child. If the parents do not live together, the parent with whom the child is residing has a responsibility to facilitate access to both parents, including sharing costs that

²⁰ *Supra* note 5, ¶ 23.

²¹ Concerning child abduction as a criminal offense, *see infra* ¶¶ IV.

²² *Supra* note 17. *See* in particular ch. 6: “On custody, living arrangements and parental access”.

²³ *Id.* ¶¶ 15-15b. Despite this legal-technical construction, it is the parent and not the child that possesses the right to file a petition for parental visitation.

might arise in this connection. The willingness to facilitate access to both parents can be taken into account by a court of law when deciding the issue of custody. If there is an indication that a parent might abduct a child while exercising parental visitation, the court may proscribe that the parent is only allowed to meet with the child in the presence of another person or only in Sweden.²⁴

Whereas the Hague Convention only deals with the civil aspects of child abduction, abducting a child can constitute a crime in Sweden.²⁵ The Swedish Penal Code, chapter 7, On Crimes against the Family, paragraph 4, states that the separation of a child under the age of 15 from his legal guardian constitutes a criminal act, referred to as “arbitrary conduct concerning a child.” The objective is to counter the misuse of custody and visitation rights and,²⁶ in the best interest of the child, to guarantee the child contact with both parents. Hence, the scope of the provision further encompasses cases where the parents share joint custody and cases where a parent, who has been granted certain custody or visitation rights, imposes these rights in a matter not provided by law. Remedies range from fines and up to 1 year in prison, or in the case of gross crimes, imprisonment from 6 months up to 4 years.²⁷

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

A. The Swedish Court System

A peculiar feature of the Swedish court system is that Sweden has two parallel court systems, one general or civil system and one so-called administrative system. Each system has a first level court, an appellate or review level court, and a Supreme Court, as last resort.²⁸ The general courts decide questions of custody, parental visitation, divorces, and similar matters. Petitions for a declaration of illegally abducted or retained children, paragraph 23 of the Implementation Act, are heard by the civil courts. Indictments for child abduction as a criminal offense are also tried within the general system. In contrast, cases according to chapter 21 of the aforementioned Parents and Child Code are handled by the administrative court system, and petitions based on the Implementation Act, paragraph 11, are likewise tried within the administrative court system. Hence, the competent court to hear a petition for the return of a child is the first level court in the district where the child is residing. An alternative forum is the first level administrative court in the district where the child is temporarily staying, or if the whereabouts of the child or the abductor is not known, the first level administrative court in Stockholm.

An application must be made in writing, duly signed; include contact details of the parties and their legal representatives; and must set forth the applicant’s request and the legal basis for the request. It must also include a certified copy of the decision or judgment that is the basis for a judicial petition in accordance to the Hague Convention. The application also must contain the name of the concerned child, the date of birth, and present whereabouts of that child.²⁹

²⁴ Governmental Bill, Proposition 1992/93:139, 26-29.

²⁵ Abducting a child can also fall under the general provision on kidnapping and confinement as regulated in ch. 4 of the Penal Code, and this provision prevails over the provision on arbitrary conduct concerning a child. With respect to the latter crime, the prosecutor may only indict in cases in which prosecution is called for in the public interest.

²⁶ See the unofficial comment of the Swedish penal law, Lena Holmqvist *et al.*, *Brottsbalken – En kommentar* (supplement 10, 2003).

²⁷ The Swedish Penal Code SFS 1962: 700 (as amended), ch. 7, ¶ 4.

²⁸ The right to appeal is in certain cases restricted, and petitions for appeal need normally to be filed within 3 weeks.

²⁹ *Supra* note 5, ¶ 14 and Regulation on the Recognition and Enforcement of Foreign Custody Decisions, etc. and the Return of Children SFS 1989:177, ¶ 6. For general requirements, see Law on Procedural Matters in Administrative Courts SFS 1971:291 (as amended).

B. Court Proceedings in Return Cases

A petition based on paragraph 11 of the Implementation Act is heard by a panel consisting of one professional judge and non-legally trained judges, “lay-judges” (normally local politicians), each with one vote. As a point of departure, cases before civil courts are usually tried based on information presented at an oral hearing, whereas cases in the administrative court system are often decided without any oral hearing. The Implementation Act, however, states that the administrative court will hold oral hearings before rendering a judgment. The hearings are conducted in Swedish, and if considered necessary, with the assistance of certified interpreters provided by the court. The Central Authority can help translate documents to be presented in court.

Courts have a responsibility to make sure that the cases they hear are thoroughly examined and, although it rarely happens, courts are empowered to seek evidence *ex officio*, and independently of the evidence the parties have presented. As part of the courts’ responsibility to thoroughly examine their cases, the Implementation Act prescribes that there is a presumption that the court will hear the child and his wishes before deciding a case. This can be done either at an oral hearing or the court can order the social authorities to ask the child his wishes out of court (i.e. usually before a hearing and often in an informal and relaxed setting, such as at the child’s home, and without either parent present to ensure that the child is not pressured). The court may also request that the social authorities assist in investigating other matters, as the court deems necessary.³⁰

The court may, before it decides a case on its merits, assign a member of the local social authorities’ board, a civil servant with the social authorities, or any other person the court deems fit for the assignment, to mediate between the parties for the purpose of reaching an out-of-court settlement of the dispute. The assigned person is obliged to report back to the court on the outcome within no more than 2 weeks.³¹

Pursuant to articles 2 and 11 of the Hague Convention, and as stated in paragraph 15 of the Implementation Act, return cases should be handled speedily. If a case had not been decided within 6 weeks from the time a petition was filed, the court must on the request of the applicant, or a representative of the applicant, state the reasons for this delay. In order to ensure a speedy handling, if the court finds that assigning a mediator would prolong the process unnecessarily and mediation attempts will likely be unsuccessful, the court is not obligated to appoint a mediator.

IV. Law Enforcement System

The enforcement mechanism provided for in the Implementation Act is influenced by, and concurs to great extent with, those available in a purely domestic setting.³² If the abducting parent does not respect a court order to hand over of the child, courts are provided with two enforcement mechanisms, the imposition of monetary fines and the assistance of the police. Courts are given great leverage to independently decide when to act and what course of action to take, including proscribing both in conjunction.

³⁰ Such matters could, *e.g.*, be the objective and subjective circumstances surrounding the habitual residence of the child. In general, the social authorities are responsible for the welfare of all persons, including children, residing within their area of authority. Even in cases where the persons are not permanently living in the area and only passing by, the social authorities are required to care for their welfare.

³¹ *Supra* note 5, ¶ 16, § 2. The court may in exceptional cases prolong the time assigned. The paragraph corresponds with domestic regulations in the Parents and Children Code; *supra* note 17, ch. 21.

³² The Implementation Act and Parents and Children Code, ch. 21 should regarding international child abductions be read together.

With respect to monetary fines, when delivering a judgment for the return of a child, the court can oblige the taking parent to hand the child over within a specific time period or at a certain date and time, failing which the parent is to pay a monetary penalty (an administrative fine). The court will set a sum that it deems appropriate considering the circumstances in the case. Monetary penalties can, however, be a less suitable enforcement mechanism, as they allow the parties to prolong the judicial proceedings considerably. A court injunction of monetary penalties can be appealed independently of the judgment on the material issue. After the petition for appeal has been settled, the court imposes the fine by delivering a separate decision, and that decision, in turn, can be separately appealed. Additionally, a court injunction, as generally any court order, needs to “gain legal force,” which normally takes three weeks, before a court can hand down a decision to impose the court order. In summary, monetary penalties are not a reliable means to ensure the prompt enforcement of court orders.³³

In cases in which the court assumes that a monetary penalty will not have the desired effect, the court may decide that the child will be handed over with the assistance of the police. As a practical matter, a pediatrician, child psychiatrist, or child psychologist should be present during the hand over, and the police have a general obligation to carry out their assignments as mildly and as compassionately as possible with due regard to the best interest of the child.³⁴

If there is an imminent risk that the child will be abducted abroad or that a forthcoming court order for the return of the child will be obstructed, the court may order that the child be taken into custody immediately and placed with the applicant or other relatives for example. In practice, the hand over will normally be carried out with the assistance of the social authorities, and the court can issue further instructions on access rights in conjunction with the decision.³⁵

If court proceedings have not been initiated, or if an imminent abduction of a child is brought to the attention of the police, the police are empowered to interlocutory take charge of the child. In this instance, the child could be placed under the care of the social authorities or placed at a children’s hospital. It is not recommended that the child be placed with the petitioning parent. Further, the police will consult the social authorities and a medical doctor if possible, and promptly inform the administrative court, which will establish if the measure will be endorsed or lifted. As an alternative and less intrusive measure to taking the child into custody, the police may request that the child’s passport be surrendered.³⁶

Neither courts, nor the police can order that a non-cooperating parent be arrested or imprisoned.

V. Legal Assistance Programs

There is no administrative or other fee for filing an application with State Department for Foreign Affairs. However, in its decision or judgment the court may oblige one party to assume the other party’s

³³ A few years after the adoption of the Implementation Act, a review was made, which highlighted this problem and proposed increased leverage for courts to request the assistance of the police, *see* the preparatory works; Departementserien 1992:39, and in particular 22-23.

³⁴ For example, the police should avoid drawing unnecessary attention to the operation, and therefore, not wear police uniforms or use marked police cars.

³⁵ *Supra* note 5, ¶ 19.

³⁶ *Supra* note 24, at 36.

expenses incurred in connection with the case.³⁷ Included herein are lawyers' fees, expenses with respect to witnesses and translation of documents, and travels expenses to attend hearings. There is a public program for legal aid, which can cover, upon request, expenses for such fees as legal counsel and expenses that the court has obliged the party to pay. It is possible for a non-Swedish citizen, not residing in Sweden, to request be included in the program. The program also covers legal expenses for Swedish citizens abroad.³⁸

VI. Conclusion

Sweden has been a participant to the Hague Convention for some 15 years and now has in place detailed regulations, a fair amount of guiding case law and administrative routines. The material content of the Hague Convention is indeed integrated into Swedish family law, and its application is influenced by family law principals such as “in the best interest of the child,” a preference for parental cooperation, and an inclination for voluntary and out-of-court settlement of family disputes. In this respect, Sweden's potentially biggest problem is the forced return of a child when the taking parent is not willing to comply with a court order. Swedish family law does not provide for an institutional equivalent to a contempt of court sanction; however, considering the statistics of settlements in return cases between the United States and Sweden and an otherwise functioning and effective family law, the practical entailments of this absence appear to be of less magnitude.

Prepared by Mikaela Neijd
Contract Legal Specialist
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³⁷ See decision by the Supreme Administrative Court, case no. 8516-1999, decided on Sept. 9, 2002.

³⁸ The Legal Aid and Advice Act SFS 1996:1619 (as amended).