2004-92

LAW LIBRARY OF CONGRESS

SWITZERLAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

With a ratification date of October 11, 1983,[1] Switzerland was among the first countries to adopt the Hague Convention on the Civil Aspects of International Child Abduction[2] (hereinafter the Hague Convention), and it appears that Switzerland has applied the Convention with the same directness of purpose with which it was adopted. The Swiss practice has been characterized by a relative large number of outgoing and incoming requests,[3] and the latter have led to a predictable case law[4] and a consistent legal literature[5] that interprets the Convention according to its primary purpose of effecting a speedy return of the child. Recently, however, a few "hardship cases" in which the courts ordered the return of children to potentially troublesome environments have caused the Swiss government to work toward a modification of the Hague Convention that would permit the courts to place more emphasis on the best interest of the child when deciding on a return request.[6]

I. Domestic Laws and Regulations Implementing the Hague Convention

A. Statutory Law – Implementation in General

There is no implementing act at the federal level and there appear to be none in the 26 cantons. The only federal provision is contained in the organizational regulation of the Federal Cabinet, and it

---

[1] Bundesbeschluss, June 21, 1983, AMTLICHE SAMMLUNG DES BUNDESRECHTS [AS] 1694, art. 1, lit. (b). Effective date: January 1, 1984 [Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] no. 0.211.230.02].

[2] The Hague, Oct. 25, 1980, TIAS 11670.

[3] In 1997, it was stated that Switzerland received a total of between 60 and 80 incoming and outgoing requests per year [H. Kuhn, *"Ihr Kinderlein bleibet, so bleibet doch all,"* 6 [ARCHIV FÜR JURISTISCHE PRAXIS (AJP) 1093 (1997)] and in 2002, it was stated that the number of received requests had risen to 113 requests in 1998, 103 requests in 1999 and again in 2000, and 102 in 2001. About half of these requests were from other countries, and it appears that in more than one half of these incoming requests the return of the child was effected [C. Schmid, *Neuere Entwicklungen im Bereich der internationalen Kindesentführungen*, 11 AJP 1325 (2002)]. In 2002, according to the Federal Department of Justice, 46 requests were received, most of them from European neighbouring countries; 6 of these were for visitation rights. Of the 53 outgoing requests (21 of them for visitaiton right), 8 went to the United States [*Mütter entführen Kinder eher als Väter,* SDA – BASISDIENST DEUTSCH, May 27, 2003, LEXIS/NEWS].

[4] *Infra* notes 12, 13, 44, and 45, and the accompanying text.

[5] Kuhn *supra* note 3; Schmid *supra* note 3. N. Rusca-Clerc, *La Convention de La Haye sur les aspects civils de l'èvement international d'enfants du 25 octobre 1980*, 6 AJP 1072 (1997); F. Abt, *Der Ordre-Public Vorbehalt des Haager Übereinkommens über die zivilrechtlichen Aspekte internationaler Kindesentführung,* 6 AJP 1079 (1997); Bernard Deschenaux, L'ENLÈVENEMENT INTERNATIONAL D'ENFANTS PAR UN PARENT (Berne, 1995).

[6] Several parliamentary motions [among them, Nationalrat 03.3235 Motion Leuthard – Kindeswohl und Haager Abkommen, May 8, 2003, *available at* http://www.ofj.admin.ch (last accessed April 2, 2004)] caused the Federal Cabinet to promise that it would work toward a modification of the Hague Convention that would allow more consideration for the best interest of the child in hardship cases [Eidgenössisches Justiz- und Polizeidepartement, Medienmitteilung, Sept. 19, 2003, *available at* http://www.ejpd.admin.ch, (last accessed Mar. 30, 2004)].

lodges the Central Authority within the Federal Justice and Police Department.[7] It can be deduced from the statistical figures on requests and on their resolution that the Central Authority has shown some vigor in the exercise of its responsibilities. Moreover, its representatives appear to have consistently worked toward educating the legal professions, in particular, judiciary in the cantons, about the dominant purpose of the Hague Convention, which in Switzerland is viewed as the speedy return of the child.[8]

According to Central Authority representatives, one third of the Hague Convention return requests can be resolved easily, and another third after some concerted efforts on all parts. The remainder of the cases are likely to generate multiple court decisions.[9] Moreover, it appears from the Swiss perspective that visitation rights are not easily enforced under the Convention.[10]

B. Implementation by the Courts

In the years 2002 and 2003, it appears that the Federal Court decided a total of four Hague Convention cases in which the return of the child had been requested,[11] and the outcome in all these cases was in favor of the return. In two of the decisions,[12] a constitutional complaint against a judicial return order was dismissed, thus upholding the lower court's return orders. In the two other cases[13] the refusal of the lower courts was rescinded, and the cases remanded.

These decisions rely on earlier Swiss and German case law in their interpretation of the purposes of the Hague Convention, yet these legal principles are applied in a manner that shows much respect for treaty law. A common thread found in the Court's reasoning is that exemptions from the governance of the Convention must be interpreted narrowly. Thus, the Court held that financial hardship or lack of familiarity with the language or the environment in the country of return are not a grave risks within the meaning of article 13 paragraph 1, letter (b) of the Convention; it also held that children can be expected to return to a jurisdiction even if violence of the father has been alleged, on the strength of the thought that the child need not live with the father until the custody issue has been decided.

Other recurring themes in the Court's reasoning are that the risk of grave harm to the child must be proven, not merely alleged, in order for the exemption to be applicable, and that the abducting mother should not benefit from her lawless conduct. The exercise of custody within the meaning of the Convention has also been found to exist in the case of a claiming father who merely had visitation rights.

---

[7] Organisationsverordnung für das Eidgenössische Justiz- und Polizeidepartement, Nov. 17, 1999, SR no. 172.213.1, as amended, art. 7 ¶ 7. The address of the Central Authority is: Zentralbehörde zur Behandlung internationaler Entführungen, Bundesamt für Justic, Bern 3003 Switzerland. Telephone: 43 .31.322.4139 Fax: 43.31.322.7864.

[8] Schmid *supra* note 3; Kuhn *supra* note 3.

[9] Between 1998 and 2002, 60 court decisions were issued in 36 cases dealing with the return of the child. Of these, 54 were issued by cantonal authorities, and six of these were issued by the Federal Court. During the same period, only one decision dealt with visitation rights [Schmid *supra* note 3].

[10] *Id.*

[11] This, at least, is the result of a search on the Federal Court's website [www.bger.ch (last accessed Mar. 30, 2004)]. This number is not necessarily complete because the Federal Court appears to be under no obligation to publish all decisions.

[12] Bundesgericht [BGer, Federal Court] decision, Apr. 23, 2003, docket no. 5P. 128/2003/min; BGer decision, April 11, 2002, docket no. 5P. 65/2002/bnm.

[13] BGer decision, March 27, 2003, docket no. 5P. 71/2003 /min; BGer decision, Nov. 18, 2002, docket no. 5P. 310/2002 /zga.

In favor of a speedy return are also statements of the Court that limit the necessity for psychological testimony and for the interrogation of children of a tender age. According to the Court, no benefit can be gained from questioning children below the age of 6.

These most recent decisions of the Federal Court appear to be in keeping with the previous practice of the Swiss courts, which have denied the "grave harm" exception when: the depressive mood of the claiming parent may have been caused by a fight between the parents; the child had to be cared for in child care facility in the country of return; the claimant was in financial distress; an unfavorable custody decision (from the viewpoint of the abductor) can be expected after the return of the child; the return would deprive the child of a familiar environment or the company of the mother; the abducting parent submitted expert testimony on the best interest of the child; the requesting parent had been violent against the abducting parent; and other similar situations arise. Conversely, the risk of grave harm was found to exist when the father had a serious drug problem and the authorities of the country of residence had not ordered protective measures for the child, and when the health of the child did not allow him to be moved.[14]

By the year 2003, however, the "toughness" of the Swiss courts, particularly the Federal Court, in brushing aside arguments of the abducting parent, led to a fair amount of public opinion against the Hague Convention, which in turn caused the Parliament to urge the Federal Cabinet to work toward a change in the Convention.[15]

II. Domestic Laws regarding Child abduction and Parental Visitation

A. Child Abduction

1. Civil Provisions

There appear to be no specific provisions in federal law on the consequences of child abduction within Switzerland. If a divorce is pending, the Swiss Civil Code gives the family courts the power to order provisional custodial measures, upon request of one of the parents, to take care of the situation until a custody decision is made in the divorce proceeding.[16] Provisional decisions on custody and visitation must be guided by the best interest of the child, taking into account, in particular, the desirability of continuity in the child's environment.[17]

---

[14] All described by Schmid, *supra* note 3, in reliance on cantonal decisions.

[15] *Supra* note 6 and accompanying text; *infra* note 46.

[16] Schweizerisches Zivilgesetzbuch [ZGB, Swiss Civil Code], Dec. 10, 1907, SR no. 210, as amended, art. 137.

[17] I. Schwenzer, PRAXIS KOMMENTAR SCHEIDUNGSRECHT 416 (Basel, 2000).

2. Custody

In January 2000, a reform of the Civil Code[18] went into effect that has introduced the possibility of joint custody after a divorce and also for unmarried parents. Although the court, without further prompting, still awards custody to the better-suited parent, joint custody can be awarded when both parents petition for it and are in agreement on the division of child care and financial support and when the court finds this agreement reconcilable with the best interests of the child.[19] According to these principles, parents are qualified to exercise joint custody if each of them qualifies for sole custody.[20]

Joint custody decisions are made by the courts, and they spell out in great detail the amount of care that each parent gives to the child and the amount of financial support for which each parent is responsible. In custody decisions, the parents, the child, and the youth protection agencies have hearing rights, but the decision is made by the court acting *ex officio*.[21] Custody decisions at time of divorce must be made by the divorce court, and this court retains jurisdiction over changes in custody. However, guardianship authorities, which can be considered as quasi-judicial or administrative agencies, still retain some rights of intervention, although one of the purposes of the 2000 family law reform was to centralize decisions on guardianship in the courts.[22]

Swiss case law indicates that the Swiss courts live up to the prohibition of article 16 of the Hague Convention by refusing to issue custody decisions in unresolved requests for the return of the child.[23]

3. Criminal Provisions

According to article 220 of the Swiss Criminal Code,[24] it is a criminal offense to take a child away from someone with custody rights or to refuse to return the child to the person who has custody, yet the offense is prosecuted only upon request of the person whose custodial rights were breached. The offense is punishable with imprisonment of between 3 days and 3 years or a fine of up to 40,000 Swiss Franks (US$31,318). The courts have refused to apply the provision to minor transgressions, such as an abuse of visitation rights,[25] and penalties tend to be mild.[26]

---

[18] Schweizerisches Zivilgesetzbuch, Änderung, Jun. 26, 1998, AS 1999 at 1118.

[19] ZGB, as amended art.133.

[20] Schwenzer, *supra* note 17, at 358.

[21] *Id.*

[22] *Id.* at 381.

[23] *Infra* note 42, and accompanying text.

[24] Schweizerisches Strafgesetzbuch [Swiss Criminal Code], Dec. 21, 1937, SR no. 311.0, as amended.

[25] S. Trechsel, SCHWEIZERISCHES STRAFGESETZBUCH 757 (Zürich, 1997).

[26] In one recent case, the Federal Court upheld a decision of the Appellate Court of Zürich in which a mother was convicted of taking the child away in breach of the custody rights of the father, for which she was sentenced to 27 days in prison, suspended by a two year probationary period. [BGer decision, July 2, 2002, docket number 6S. 681/2001 /pai].

B. Parental Visitation

The family law reform of the year 2000 replaced the term "visitation rights" with the term "rights of personal contact" in order to emphasize that children, as well as parents, are the beneficiary of these rights. If there is joint custody, visitation is regulated as described above (sub-chapter on custody). If one parent has sole custody, then the other parent may petition the guardianship authority[27] to determine the extent and the circumstances of personal contact, and this determination is entirely dependent on the circumstances. Parents owe each other a duty of good conduct, and they are not allowed to influence the child against the other parent.[28]

In the Swiss practice, visitation rights are rarely enforced by coercive means, even though theoretically enforcement would be possible. According to Swiss legal doctrines, coercive enforcement of visitation rights would not be in the best interest of the child.[29]

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

The Swiss court system is still remarkable for its decentralization, even though the federal influence has been increasing in recent years. Each of the 26 Swiss cantons organizes its own court system and enacts its own procedural laws.[30] The cantonal courts apply federal law, which includes the bulk of criminal and civil law, and legal uniformity is achieved to some extent through the Federal Court, which is available for most actions as the court of last resort, either as the ultimate appellate instance or by adjudicating constitutional complaints. [31]

The Federation has a long tradition of encroaching upon the procedural independence of the cantons by scattering jurisdictional, procedural, and evidentiary provisions throughout various acts and codes dealing with substantive laws.[32] A good example of this practice are the jurisdictional provisions on custody and visitation that are included in the 2000 reform of family law.[33] It appears that these provisions have increased the role of the courts of ordinary jurisdiction in matters relating to the law of parent and child, while still leaving much room for the role of guardianship offices and related quasi judicial bodies.

An even more organized approach toward unifying procedural law has been the drafting of a Swiss Code of Civil Procedure that has entered the lengthy and cumbersome Swiss legislative process[34] and the

---

[27] The determination is to be made by the court if the decision is to be made during a custody proceeding [ZBG, art. 275].

[28] ZGB, arts. 273 and 274.

[29] T. Sutter and D. Freiburghaus, KOMMENTAR ZUM NEUEN SCHEIDUNGSRECHT 385 (Zürich 1999).

[30] F. Desmontet, INTRODUCTION TO SWISS LAW 268 (Zürich, 1995).

[31] Bundesgesetz über die Organisation der Bundesrechtspflege [OG, Federal Administration of Justice Act], Dec. 16, 1943, SR 173.110, as amended.

[32] R. Frank *et al.*, KOMMENTAR ZUR ZÜRCHER PROZESSORDNUNG 15 (Zürich, 1997).

[33] *Supra* note 18.

[34] Vernehmlassungsverfahren, Vereinheitlichung des Zivilprozessrechts, July 8, 2003, BUNDESBLATT at 4843.

enactment of a Federal Act on Jurisdiction in the year 2000.[35] The latter became effective in January 2001, and it provides a federal framework of rules for local jurisdiction in civil cases. However, not all proceedings involving children fall under this federal act. Whereas custody decisions resulting from a divorce may be governed by its article 15, giving jurisdiction to the local court of the spouses' residence, proceedings dealing with the protection for children and with guardianship are exempt from the Act and remain governed by cantonal provisions.

Hague Convention proceedings also appear to be exempt from the governance of the Federal Local Jurisdiction Act, because Hague Convention proceedings are not perceived as being civil proceedings by Swiss authorities and case law. Instead, they are considered to be acts of mutual assistance of an administrative nature.[36]

In Switzerland, Hague Convention requests are handled by a wide variety of judicial and quasi-judicial institutions in the first instance. These include justices of the peace, guardianship offices, and even local administrative authorities in a few cantons, while in the majority of the cantons president of the local court or a single judge at such a court handles first instance Hague Convention proceedings. Given the divergence in adjudicating authority, it is not surprising that the type of proceeding employed also varies, with some of the cantons using summary proceedings for the first instance adjudication of a contested request.[37]

There is more uniformity at the appellate level. The cantons have one or several appellate courts and these decide Hague Convention requests in the second instance.

The court of last resort is the Federal Court [Bundesgericht]. However, due to the allegedly administrative nature of the Hague Convention requests, the Federal Court does not decide Hague Convention appeals in a regular third instance proceeding that would be available for a civil judgment. Instead, the Federal Court reviews Hague Convention decisions only in response to a constitutional complaint, that is, either a complaint that a constitutional principle has been violated, or that a treaty has been violated. According to the latest practice of the Federal Court, facts are not reviewed in a constitutional complaint.[38] This is a change from the practice a few years ago when new facts could be reviewed in a complaint that alleged treaty violations.[39] The Court's refusal to review the facts or consider new pleadings may be one of the reasons why constitutional complaints about Hague Convention requests often are dismissed by the Court.[40]

---

[35] Gerichtsstandsgesetz, [GestG, Act on Local Jurisdiction in Civil Matter] March 24, 2000, SR 272, as amended, effective date Jan. 1, 2001.

[36] BGer decision Apr. 23, 2003, docket no. 5P. 128/2003/min.

[37] Deschenaux, *supra* note 5, at 30.

[38] BGer decision, Apr. 23, 2003, docket no. 5P. 128/2003/min and earlier cases cited therein.

[39] H. Walder-Richli, ZIVILPROZESSRECHT 469 (Zürich, 1996); OG art. 84.

[40] *Supra* note 38.

IV. Law Enforcement

Enforcement of an order to return a child may be hindered by a court decision holding that such a course of action would not be in the best interest of the child.[41] This happened in a case that occupied the Swiss courts for at least 5 years. The father, a U.S. citizen, requested the return of the child in September 1996, and this request resulted in a final decision of the Federal Court of August 6, 1997, that upheld the return order.[42] Two attempts at execution failed in October 1997. The father petitioned again for execution in November 1998, and this time he was rejected in all three instances, with the Federal Court holding that the lower courts were justified in denying execution due to the changed circumstances caused by the lapse of time.[43] In the meantime the mother petitioned the Zürich appellate court to revise its judgment and to deny the return of the child, so that the mother could file for a custody decision. Two Zürich instances rejected this appeal, and the Federal Court denied a constitutional complaint in October, 2001,[44] thus leaving the parties in limbo, with the mother not being able to obtain a proper custody decision and the father not being able to effect the return of the child.

The case shows that Hague Convention proceedings that are carried through three instances take a certain amount of time, and that enforcement decisions again give opportunity for court decisions through several instances. Ultimately, enforcement may be denied, even if a return order was valid and had become final.

In a more recent case, however, it appears that the Swiss authorities enforced a return order in August 2003, following a Federal Court decision in November of 2002.[45] This, in turn, contributed to a grassroots movement for an amendment of the Hague Convention, so the courts could take the best interest of the child into consideration.[46]

V. Legal Assistance Programs

Not having made a reservation according to article 42 of the Hague Convention, Switzerland lives up to the Convention's article 26 by not charging any court fees for contested Hague Convention requests and also by providing free attorney services. In the Swiss view, the granting of legal assistance to all requesters speeds up the process and frees the Swiss judge from determining the poverty levels of the foreign countries. However, on the principle of reciprocity, Switzerland limits this free service to indigent requesters, if they come from a country that has made a reservation to article 26 of the Convention. In

---

[41] BGer decision, Sept. 13, 2001, docket no. 5P. 160/2001.

[42] The Federal court dismissed the constitutional complaint against the decision of the Zürich appellate court [BGer decision, docket no. 5 P. 127/1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS II 419.]

[43] *Supra* note 41.

[44] BGer decision Oct. 16, 2001, docket no. 5P. 477/2000/ZBE/bnm.

[45] BG decision, Nov. 18, 2002, *supra* note 123 and accompanying text. In this case, the return of the children to New Zealand was enforced four years after the children had left New Zealand. The mother had originally abducted the children to her native Germany. When the German courts ruled for the return of the children, she fled to Switzerland where the courts again ruled for the return. Public opinion was upset about the case because the New Zealand court had, for some time limited the fathers' visitation rights due to propensity for violent conduct [*infra,* note 46].

[46] R. Eigenmann, *Zwei Kinder müssen zurück ins Ungewisse*, TAGES-ANZEIGER 12 (August 29, 2003).

these cases, Switzerland provides free services only to those qualifying for legal assistance, and this determination is made according to the applicable cantonal provisions.[47]

The cantonal legal assistance provisions usually specify that the court will grant legal assistance for the court costs and for the services of an attorney, for any procedural steps of the party that are not obviously futile or inadmissible,[48] to the extent that the poverty of the party necessitates assistance. Income levels are set through cantonal regulations. In the canton of Bern, the income threshold currently appears to be a monthly gross income of 1,430 Swiss Francs (US$1,096), which, however, may be subject to judicial adjustments.[49] There appears to be, however, much variance in the cantonal provisions and the cantonal practice, and it has been suggested that the Swiss courts frequently deny legal assistance retroactively, in the judgment, by stating that the complaint was spurious.[50]

The Federal provisions for legal assistance are similar to the cantonal ones,[51] and it appears that the Federal court also applies stringent criteria in granting legal assistance and, when these are not met, readily denies legal aid when dismissing a case with costs.[52]

VI. Conclusion

It appears that Switzerland has been applying the Hague Convention frequently and consistently and that the Swiss practice has stressed the return of the child as the primary purpose of the Convention, while establishing some case law principles on the circumstances that justify a refusal. Considering the rich diversity of legal and ethnic cultures found in Switzerland, the straightforwardness of the Swiss legal practice is even more remarkable. Much of the credit for this model approach toward administering and adjudicating Hague Conventions requests goes to the Central Authority and the Federal Court. However, the admittedly weak points within this system of implementation appear to be enforcement of returns by coercive means, which appears to be accomplished in some but not all the cases, and the enforcement of visitation rights, for which the Convention is not specific enough, according to Swiss authorities.

The Swiss approach in ruling for the return of the child in cases that may impose some hardship on the child or the returning parent appears to be influenced by two factors. One of these is the dislike of lawlessness, specifically the consideration that a kidnapper should not benefit from his (or, in most

---

[47] Schmid, *supra* note 3, at 1336.

[48] For the Canton of Bern, Zivilprozessordnung für den Kanton Bern, July 7, 1918, BERNISCHE SYSTEMATISCHE GESETZESSAMMLUNG no. 271.1, as amended, Arts. 77 - 82 (a); for the Canton of Zürich, H. Walder-Richli, *supra* note 39, at 385.

[49] Kanton Bern, Appellationshof, Kreisschreiben No. 18 (Jan. 21, 2002).

[50] V. Bueller, *Recht bekommen ist oft eine Frage des Portmonnaies, available at* www.selezione.ch/justiz, (last accessed Mar. 26, 2004).

[51] OG art. 152.

[52] *Supra* note 44.

cases, her) actions. The other appears to be a certain rectitude and willingness to honor agreements, even if it is difficult to do so. It may be typical of the Swiss understanding of treaty obligations that the return of children in a difficult case calls for attempts to change the treaty,[53] rather than subterfuge in expansive treaty interpretations in adjudicating the individual case.

Prepared by Edith Palmer
Senior Legal Specialist
April 2004

[53] *Supra* note 6.