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**INTERNATIONAL CHILD ABDUCTION:
LEGAL REGULATION AND PRACTICE OF
CZECH COURTS**

International Judicial Cooperation in Civil Matters

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INTRODUCTION

In the time of open borders and easy travel, many people from various countries all over the world decide to study, work, or live abroad. Some of these people find a foreign partner and some even enter into international marriage. Hardly anybody realizes that starting a family with a foreigner can bring serious problems including legal consequences in case of partnership troubles.

In recent years the number of cases of international child abduction has grown considerably. In these cases a parent removes a child from the country where it has been currently living to another one without the other parent's knowledge or consent. There can be various incentives leading parents to remove the child. Unfortunately, they are usually not aware that by the removal they might break the law and commit international child abduction.

In our paper, we will deal with international child abduction mainly from the perspective of Czech law. In the first part, we will focus on the international as well as Czech sources of legal regulation in this area. In the second part, we will discuss the relevant case law of the Czech courts. In the end, we would like to point out what the main problematic issues are in the Czech legal environment with regard to international child abduction and make a few recommendations to improve them.

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

I. General Characteristics of the Convention

The Hague Convention on the Civil Aspects of International Child Abduction¹ was adopted on 24 October 1980 by the fourteenth Session of the Hague Conference on private international law. The Convention entered into force for the signatory nations on 1 December 1983. The former Czech and Slovak Federative Republic signed the Convention in The Hague on 28 December 1992. The Convention entered into force in the Czech Republic on 1 March 1993.

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty which seeks “...to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for the rights of access.”²

The Convention is intended to prevent the removal of a child from his or her ‘habitual environment’ without the consent of the person or persons that have the rights of custody³ of the child (*wrongful removal*) and to prevent a retention of a child who was temporarily taken to another Convention country with the consent of the other parent, however, it has been retained in the country without parents’ agreement (*wrongful retention*). The Convention

¹ From now on referred to as the Convention.

² Preamble of the Convention.

³ In this paper for the sake of simplification the term “parents” will be used for all people that have rights of custody of a child.

should ensure that children who are abducted or wrongfully retained are returned promptly so that disputes about rights of custody and rights of access can be resolved by the courts or relevant authorities of the country of the child's habitual residence. Therefore, the Convention does not provide any substantive rights. It only says that the court with which a petition under the Convention is filed should not decide on merits of the child custody dispute, but should only determine in which country the custody dispute should be heard. It means that the Convention deals only with forum not with the custody or residence issues.

The Convention provides an administrative⁴ and judicial way for the left behind parents⁵ how they can seek for help. They can either initiate judicial proceedings in the country where the child is wrongfully held or apply to the designated Central Authority in the country of the child's habitual residence, or in any other country that is a party to the Convention for the return of the child. These two remedies do not exclude each other; the left behind parent may pursue one or both of them.

II. Meaning of Some of Controversial Provisions of the Convention

In every case brought under the Convention a few terms to which the Convention refers must be determined. Thanks to the various circumstances that can be combined in a particular case it is not possible to make a precise legal definition of these terms, nevertheless, it is necessary to understand their meaning, because for the practical application of the Convention, they are fundamental.

a) Habitual Residence

The interpretation of the term "habitual residence"⁶, which is not defined in the Convention, is one of the most problematic issues. It has caused considerable problems in recent years and different interpretations can be found in various jurisdictions. In some more complex cases, such as relocation of the family before the wrongful removal or retention, it could be questionable whether the habitual residence should be determined from the child's point of view or whether the emphasis should be on the intentions of the parents. One of the possible approaches says that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective but with reference equally paid to the parent's present shared

⁴ Article 6 of the Convention binds the contracting states to designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Article 7 of the Convention establishes the obligation of contracting states to co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention. This provision also contains a list of appropriate measures that shall be taken by the Central Authorities. In the Czech Republic, the tasks of the Central Authority are exercised by the Office for International Legal Protection of Children residing in Brno.

⁵ The term "left behind parent" defines the parent who was left in the state of the child's habitual residence and is applying for the return of the abducted child. This term is used also in official documents as for example The Commission services in consultation with the European Judicial Network in civil and commercial matters: *Practice Guide for the application of the new Brussels II Regulation*, up-dated version 1 June 2005. [http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf] (June 2008).

⁶ Preamble, Art. 3 and Art. 4 of the Convention.

intentions.⁷ Depending on the relevant circumstances it will always be crucial the history of the children's location and the settled nature of the family prior to the removal or retention. The court in determining the child's "habitual residence" for the purpose of the Convention must look back in time not forward. Neither the intention of the abducting parent after the removal or retention, nor the child's citizenship is relevant.

b) Rights of Custody – Rights of Access / Contact

Whether a parent has in fact custody rights is determined by the law of the country in which the child is habitually resident. There is a substantial difference in opinions of courts of various countries with regard to the position of a non-custodial parent and whether he or she retains the right to determine the child's place of residence. Article 5 of the Convention defines rights of custody and rights of access as follows:

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

These incomplete definitions have created several problems, especially in determining a precise dividing line between rights of custody and rights of access and in the issue of whether rights of custody include rights of access as well. In some legal systems, the access parent may in fact retain important responsibilities of decision making concerning the child which go beyond the mere right of access. This may, for example, be the case in legal systems where the access parent remains a joint "guardian" of the child. At the same time, reflecting the shift towards shared parenting, some systems have abandoned the language of custody and access and have accepted a general principle of joint parental responsibility, combined with residence or contact orders in the case of parental separation⁸. For Convention purposes the parent who has substantial joint parenting responsibilities will consequently be regarded as a parent having custody rights rather than access rights. Thus the Convention provides also protection to the left behind parent who is not the principal custodian in the sense that the child may have lived mainly together with the other parent.

More complicated situations are the ones in which one parent has the exclusive custody right and the other one has the mere right of access but he or she still retains a right of veto to the removal of the child from a country's jurisdiction. The right of veto may be granted by law, by court order or by an agreement between parents. In this case there is a division of judicial opinion as to whether such access right combined with the right of veto may be regarded as the custody right for Convention purposes. The majority of case

⁷ Judgment of the United States Court of Appeals, (3d Cir. 1995), *Feder v. Evans-Feder* (63 F.3d 217, 222).

⁸ Duncan William: *Transfrontier Access / Contact – General Principles and Good Practice*, Prel. Doc. No 4 of October 2006. [http://hcch.e-vision.nl/upload/wop/abd_pd04e2006.pdf] (June 2008), p. 34. This was a preliminary document for the attention of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (The Hague, 30 October – 9 November 2006).

law supports the view that even this may be regarded as the custody right.⁹ It means that a left behind parent may, because of the right of veto, initiate a judicial proceeding under the Convention and ask the return of the child to the country of his or her habitual residence.¹⁰ The opposite view says that this constitutes an improper use of the return order, which was not intended as a mechanism for supporting access rights.¹¹

III. Duty to Return the Child

As already mentioned, the essential aim of the Convention is to return the wrongfully removed or retained child. This obligation is expressed in the Art.12 of the Convention. The Convention accepts, that circumstances may arise, under which the return of a child who had been abducted from a contracting state could be refused. The interpretation of these exceptions is one of the most serious problems of the Convention. The exceptions may restrict practical application of the Convention and they are often used by the abducting parent who refuses to return the child, as the last attempt to avoid it. The Explanatory Report of the Hague Convention says that a restrictive interpretation of the exceptions is necessary to avoid a collapse of the entire structure of the Convention.¹²

The obligation to return wrongfully removed or retained children is expressed as an obligation of judicial or administrative authorities of the contracting state where the child is located, to order immediately a return of a wrongfully removed or retained child, when at the date of the beginning of the proceedings has not elapsed a period longer than one year from the date of the wrongful removal or retention. Where the proceedings have not been commenced until the expiration of that period, the child shall also be returned unless it is demonstrated that the child is now settled in its new environment. When the child has already been settled a decision whether to order the return or not is at the discretion of the concerned authorities. The burden of proof whether the child is or is not settled rests upon the parent who opposes the return.

The time limit of one year is crucial since the return of the child should be always ordered in its interest. It is evident, that after a child has become settled in a new environment, it would not usually be in its interest to order its return. Similar, but much more complicated are the situations, when the left behind parent has initiated the judicial proceeding under the Convention immediately after the abduction of the child, but the case has been pending for a very long time, or when the court orders the return of the child in a quite appropriate time, but does not manage to enforce the order promptly. It is not

⁹ Judgment of the English Court of Appeal, 1988, C. v. C. [1989] 2 All E.R. 465; Judgment of the High Court of Israel, 1992, Foxman v. Foxman, c.a. 5271/92.

This broad approach was also accepted by the delegates at the Second Meeting of the Special Commission to Review the Operation of the Convention held at The Hague in 1993.

¹⁰ This trend is confirmed by a number of decisions, for example: Judgment of the Federal Constitutional Court of Germany of 18 July 1997: 2 BvR 1126/97; Judgment of the Civil Court of the Sarine district, Switzerland of 17 May 1999, TR 132/1999.

¹¹ Judgment of the United States Court of Appeals (2d Cir. 2000), Croll v. Croll (229 F3d 133); Judgment of the Supreme Court of Canada, Thomson v. Thomson of 20 October 1994, 119 D.L.R. (4th 253).

¹² Pérez –Vera, Elisa: *Explanatory Report of the Convention on the Civil Aspect of Internatinal Cild Abduction*. [<http://hcch.e-vision.nl/upload/expl28.pdf>] (June 2008), Paragraph 34.

so rare that a return of an abducted child is carried out several years after the wrongful removal or retention and also several years after the parent petitioned for the return. In this context, the European Court of Human Rights has consistently ruled that once the authorities of a contracting state realized that a child has been wrongfully removed, they have a duty to make adequate and effective efforts to secure the return of the child. A failure to make such efforts constitutes a violation of Article 8¹³ and Article 6¹⁴ of the European Convention on Human Rights¹⁵. Each contracting State must equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the European Convention.¹⁶ The European Court of Human Rights has also emphasized that proceedings relating to parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for the relations between the child and the parent with whom it does not live. The adequacy of a measure is therefore to be judged by the swiftness of its implementation.¹⁷

IV. Exceptions to the Mandatory Return of a Child

The judicial or administrative authority of the requested state is not bound to order the return of the child without exception. The most discussed exception is the *grave risk of harm*.¹⁸ Frequently, abducting parents invoke the exception to avoid the return of the child with reference to sexual abuse, domestic violence or regional conflict. The grave risk exception has to be interpreted quite narrow. The requested courts are not expected to assess where the best living conditions are for the child. This decision is a custody matter reserved to the court in the state of the child's habitual residence. Various jurisdictions use different approaches to the issue of the grave risk of harm.

An example of a very narrow interpretation is the recent approach of the United States courts. In *Friedrich v Friedrich* case¹⁹ the U.S. court ruled that a grave risk can only exist when the return puts the child in imminent danger prior to the resolution of a custody dispute, e.g. return of the child to a war zone or famine area; or, in cases where there is serious abuse or neglect or extraordinary emotional dependence and the court in the place of habitual residence is unable or unwilling to give the child adequate protection.²⁰ The opposite example is the decision of the Canadian Supreme Court which says that the risk of harm need not come from a cause related to the return of the child to the other parent, it may also arise from the removal of the child from his present caregiver: from the child centered perspective, harm is harm. If the harm is serious enough, it is irrelevant where it arises from. However, it would only be in the rarest cases that the removal of the child from the abductor and its new environment would constitute the level of harm contemplated by the

¹³ Right to respect for family life.

¹⁴ Right to a fair trial.

¹⁵ European Convention on Human Rights, Council of Europe, Rome 1950.

¹⁶ Judgment of the ECHR of 26 June 2003, *Maire v. Portugal*, appl.no. 48206/99.

¹⁷ Judgments of the ECHR: *Ignaccolo-Zenide v. Romania* (25 January 2000), appl.no. 31679/96; *Maire v. Portugal* (26 June 2003), appl.no. 48206/99; *Couderc contre la République tchèque* (30 January 2001). appl.no. 54429/00.

¹⁸ Art.13(b) of the Convention defines the "grave risk" as follows: "a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

¹⁹ Judgment of the United States Court of Appeals (6th Cir. 1996), *Friedrich v Friedrich* (78 F.3d 1060).

²⁰ That is exactly the approach used in the Regulation – for more details see footnote 24.

Convention.²¹ Of course the parent who opposes the return must prove that there is a real and serious danger for the particular child.

The Convention provides also other possibilities, when the requested State is not bound to order the return of the child. These are:

- Human Rights Issue (Article 20)
- The other parent or institution was not exercising the custody rights (Article 13(a))
- The other parent or institution had consented to or subsequently acquiesced in the removal or retention. (Article 13(a))
- The child refuses the return and has attained an age and degree of maturity at which it is appropriate to take account of its views. (Article 13)

V. International co-operation under the Convention

The effective functioning of the Convention depends on coordinated efforts of all parties concerned in matters of international child abduction, including judges and Central Authorities. The international cooperation may help substantially to ensure that the return will be carried out under safe and secure conditions for the child (and sometimes also for the accompanying custodial parent). For example, some judge may refuse an application for the return pursuant to Article 13(b) because the abducting mother is not allowed to enter the requesting country. The concerned judge can ensure through direct communication (in writing or by telephone), that arrangements for the immediate return of the child, accompanied by the abducting mother, will be accepted.

These arrangements may have the form of “undertakings”. They may include: a requirement that the petitioner pays travel costs (return journey) and living expenses for the respondent and the child, a requirement that he makes appropriate housing arrangements, an order that the petitioner will have no contact with the respondent after the return or even an order that the petitioner will have no contact or limited (e.g. supervised) contact with the child once the child returns. Failure to follow the undertakings under the Anglo-American law may be punished with a fine or even a criminal penalty. However, their effectiveness is territorially limited for the jurisdiction where they have been ordered. Thus before ordering them the judge should first ensure their enforceability in the requesting state. This might happen via “mirror orders”, which means that the requesting state issues the same interim order as was issued in the requested state, and this interim order will be valid until the case is decided on merits. For this purpose the courts communicate either direct or through the Central Authorities. For the sake of speeding of the process some states have accepted the institute of liaison judge. The role and function of the liaison judge is not defined on international level, it depends on every jurisdiction what powers it gives to the liaison judge. For example, his or her activities may be:

- giving advice to judges from his or her country on the Convention in general and on its application in practice,

²¹ Judgment of the Supreme Court of Canada, Thomson v. Thomson of 20 October 1994, 119 D.L.R. (4th 253).

- answering enquiries from foreign judges and Central Authorities about general matters concerning legislation on child abduction and authorities in his or her country,
- representing his or her country in relevant international conferences and communication with Central Authorities²²

The liaison judge in the Czech Republic in the matters of family law is JUDr. Lubomír Ptáček, Ph.D., the judge of the Regional Court in Ústí nad Labem. He was appointed by the Minister of Justice on 8 December 2006.

The Special Commission to review the operation of the Convention has adopted conclusions and recommendations focusing on international judicial communication between judges or between judges and other authorities. It has decided that in direct judicial communications the following, commonly accepted safeguards should be respected²³:

- Communications should be limited to logistical issues and the exchange of information;
- Parties should be notified in advance of the nature of proposed communication
- Record should be kept of communications;
- Confirmation of any agreement should be reached in writing;
- Parties or their representatives should have the possibility to be present in certain cases, for example via conference call facilities.

VI. Application of the Convention for child abduction within EU

Since 1 March 2005, in child abduction cases within EC Member States it is necessary to apply not only the Convention but also adequate provisions of the Council Regulation (EC) No. 2201/2003 of 27 November of 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.²⁴ The Regulation supplements and reinforces the Convention by imposing stricter obligations to ensure the prompt return of a child. In relations between Member States, this Regulation shall take precedence over the Convention in so far as they concern matters governed by this Regulation.²⁵ The main difference introduced by the Regulation is that the courts of the Member State of the child's habitual residence have the final say in deciding where the child shall stay. Article 11 of the Regulation requires that the court of the requested state shall order the immediate return of the child within a six week period and the exceptions provided in Article 13(b) of the Convention are restricted to a minimum. Generally, according to the Regulation, the child shall always be returned if it can be protected in the Member State of its origin. If a court exceptionally issues the order of non-return pursuant to Article 13 of the Convention, it must immediately within one month transmit a copy of the decision to the court having jurisdiction in the Member State of the child's

²² Lortie, Philippe: *Report On Judicial Communications In Relation To International Child Protection*, Prel. Doc. No 8 of October 2006. [http://hcch.e-vision.nl/upload/wop/abd_pd08e2006.pdf] (June 2008).

²³ *Ibid.*

²⁴ From now on referred to as the Regulation.

²⁵ Art. 60 of the Regulation. The Regulation shall also take precedence over several others conventions listed in this provision one of them being the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

habitual residence.²⁶ It must also notify the parties of the dispute and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Notwithstanding a judgment of non-return under the Convention, any later judgment which requires the return of the child, issued by a court having jurisdiction, shall be enforceable in accordance with the Regulation in order to secure the return of the child. The court deciding in such case in the state of habitual residence, shall apply following procedural rules:

- all parties are given the opportunity to be heard
- the child is given an opportunity to be heard, unless it is inappropriate with regard to the age and maturity of the child
- the judgment takes into account the reasons for and evidence underlying the decision on non-return

Compliance with these rules will later allow the judge to deliver the certificate that is necessary for enforcement of the judgment in the state, where the child is living.²⁷ Pursuant article 42 of the Regulation an enforceable judgment imposing the return of a child, issued in a Member State of the habitual residence of the child, shall be recognized and is enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin. However, for this to be possible, the already mentioned procedural rules must have been followed in the original proceeding.

VII. Other possibilities to ensure the return of the child

The left behind parent is in his or her endeavour after the return of the child not entirely dependent on the proceedings under the Convention. Under certain circumstances a parent may also initiate judicial proceedings in the state, where the child is located, by means of recognition and enforcement of the custody order issued in the country of the child's habitual residence. There are two international sources of law enabling the return of the wrongfully removed or retained child in this way. The first one is the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children*, which was adopted by the Council of Europe on 20 May 1980 in Luxembourg. The aim of this Convention is to simplify the cross-border enforcement of custody orders. In relations between the EC Member States this Convention is substituted by the above mentioned Regulation, in so far as the Regulation governs the same matters.

The second source of law is the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* adopted on 19 October 1996 within the framework of the Hague Conference of Private International Law. It entered into force on 1 January 2002. It contains rules on

²⁶ The court having jurisdiction in the other Member State may be found with the help of the European Judicial Atlas in Civil Matters.

²⁷ The Commission services in consultation with the European Judicial Network in civil and commercial matters: *Practice Guide for the application of the new Brussels II Regulation*, up-dated version 1 June 2005. [http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf] (June 2008), p. 39.

jurisdiction, applicable law, recognition and enforcement of measures on parental responsibility and protection of children.

Subject matters of these two conventions and problems related with their application reach over the scope and possibilities of this paper and were not the focus of our attention.

CZECH LAW APPLICABLE IN CASES OF INTERNATIONAL CHILD ABDUCTION

The current legal regulation of international child abduction applicable in the Czech Republic can be found in the national procedural law, in the Regulation and in the above mentioned international conventions. In Czech national law there is no special proceeding applied when hearing the cases of international child abduction. The cases under the Convention are nowadays heard as all other cases in the matter of care of minors pursuant to the Civil Procedure Code.²⁸

The substantive law

Matters concerning parental responsibility are regulated in the Family Law Act.²⁹ In case of parents living apart the Czech law uses the terms of rights of custody and rights of contact. The parental responsibility belongs to both parents.³⁰ If one of the parents is no longer alive, is unknown or does not possess the full capacity to carry out legal acts, the whole parental responsibility goes to the other parent. The court may suspend, limit or divest the parental responsibility only under circumstances provided by law. The right to upbringing and care for a child is only one of several rights and responsibilities, which fall under the parental responsibility. If the parental responsibility of the parent who is not the caregiver of the child has been neither withdrawn nor limited, the parent is further entitled to make decisions on the fundamental matters concerning the child.

The procedural law

District courts are the ones having general jurisdiction in cases concerning parental responsibility. Therefore, in cases under the Convention a district court in the area of child's residence will have jurisdiction. Prior to issuing the final decision, the court may by means of a preliminary ruling order the defendant to give the child in the care of the other parent or another individual determined by the court.³¹ It is possible to appeal the district court's decision on parental responsibility within fifteen days after the delivery of the written decision. Appellate courts are regional courts (or the Municipal Court in Prague). Furthermore, the district court may also order that its decision is preliminarily enforceable. It means that the decision can be enforced even though it has not yet come into legal force because of the filed appeal. The regional court's decision can also be appealed if the regional court has changed

²⁸ § 176-180 of the Act. No. 99/1963 Coll., Civil Procedure Code (from now on referred to as the Civil Procedure Code).

²⁹ Act. No. 94/1963 Coll., Family Law Act (from now on referred to as the Family Law Act).

³⁰ § 34 of the Family Law Act.

³¹ § 76 of the Civil Procedure Code.

a decision of the district court, or if there is a question of fundamental legal interest involved.

In the Czech Republic, it is necessary to file a petition for the enforcement of a decision on parental responsibility to the court. The enforcement procedure is regulated by the Civil Procedure Code.³² The court having jurisdiction to decide on the petition for the enforcement is again the district court according to the minor's residence. Prior to ordering the enforcement of the decision, the court will request the concerned party to follow the decision voluntarily. If the requested party refuses to do so, the court may warn the party and point out the consequences of the failure to fulfill the obligations imposed by the decision. If the obliged party still refuses to follow the decision, the court issues the enforcement order and it can also impose a fine, up to 50,000 CZK. The enforcement is carried out via withdrawal of the child. If it is evident from the very beginning that the obliged parent will not follow the decision voluntarily, the court may order the enforcement immediately. However, it is possible to appeal the enforcement order to a regional court. The enforcement order does not specify, how exactly the child's handover shall be carried out and within what time limit.

Amendment of the Civil Procedure Code³³

Currently, there has been an amendment of the Civil Procedure Code in process in the Czech Republic. This amendment deals also with international child abduction issues and introduces several crucial changes to the Czech family law:

- The jurisdiction for child abduction cases will be concentrated in the specialized senate of the district court having jurisdiction in the area of the Central authorities' residence. The concentration is established also for enforcement proceedings.
- There will be a new special proceeding for the international child abduction cases in the Civil Procedure Code.³⁴
- Under certain circumstances, the court may decide without an oral hearing.
- It is not possible to stay the special proceeding or excuse a default of a delay
- Extraordinary means of appeal are not allowed.
- There are tight time limits for the proceeding. The court must apply the promptest and most effective procedures and issue a decision on the merits within six weeks. This time limit may be exceeded only if exceptional circumstances occur.
- In the decision the court may speed up the return of the child by performance of adequate undertakings.

These changes were proposed, with the aim to speed up the proceedings in cases under the Convention. They are in conformity with recommendations made at the Special Commission concerning the Hague Convention held at The Hague from 27 September to 1 October 2002.

³² § 272 - 273 of the Civil Procedure Code.

³³ Both chambers of the Czech Parliament have already accepted the bill amending the Civil Procedure Code.

³⁴ § 193a -193e that will be inserted into the Civil Procedure Code by the amendment.

CASE LAW OF CZECH COURTS ON INTERNATIONAL CHILD ABDUCTION

I. Constitutional Court case law

The Constitutional Court of the Czech Republic as the body ensuring protection of constitutional principles in the Czech Republic has been called to decide on cases dealing with international child abductions ten times since 1999. In all ten cases the Court dealt with constitutional complaints of individuals claiming that their basic rights and freedoms protected by the Czech Charter of Fundamental Rights and Basic Freedoms³⁵ were violated by lower courts judgments. In only one case the Court found a violation of basic rights and fundamental freedoms. The rest of the constitutional complaints were denied. Complaints were brought to the Court not only by parents who were ordered to return the child to the requesting state or parents who asked for the return unsuccessfully, but also, in a few cases, even by local social authorities representing children in the court proceedings.

In most of their complaints, the complainants claimed that their family rights and parents' rights protected by the Charter were violated by lower courts judgments.³⁶ Family rights and parents' rights mostly referred to were the parents' right to care for and raise children, the right of children to be brought up and to be taken care of by their parents, the special protection of parenthood and family under the Czech law and the parents' right to obtain assistance from the state with regard to raising children. Many complainants also claimed that their right to judicial protection was violated, for example, through the disproportionate length of the court proceedings.³⁷ Others pointed out, that through the court order to return the child to the requesting state the child was removed from the jurisdiction of his or her lawful judge.³⁸ In some cases the principle that 'judges are bound by statutes and treaties which form a part of the Czech legal order' was claimed to be violated.³⁹ This violation was usually brought together with the alleged violation of some of the international conventions by which the Czech Republic is bound. In a few cases a violation of the constitutional principle of 'amending Constitution only by constitutional acts' was alleged.⁴⁰

With a closer look on the Czech Constitutional Court case law on child abduction, one important aspect becomes apparent. Even though the Czech Constitutional Court is not a part of the Czech system of ordinary courts and is supposed to deal only with issues of constitutionality and protection of basic rights and freedoms, many complainants challenging child abduction judgments do not seek the review of the judgment's constitutionality, but the review of the judgment itself. It means that they use constitutional complaint as the last appeal hoping that the Constitutional Court will overrule the

³⁵ Act No. 2/1993 Coll., Charter of Fundamental Rights and Basic Freedoms (from now on referred to as the Charter).

³⁶ Family rights and parents' rights are protected in article 32(1) - (4) of the Charter.

³⁷ Art. 36(1) of the Charter.

³⁸ Art. 38(1) of the Charter.

³⁹ Art. 95(1) of the Constitution of the Czech Republic (Act No. 1/1993 Coll., Constitution of the Czech Republic, from now on referred to as the Constitution) .

⁴⁰ Art. 9(1) of the Constitution.

unacceptable judgment of another court. This aspect of constitutional complaints dealing with child abductions makes it clear why the Constitutional Court has so far denied 90% of the complaints. It is not for the Constitutional Court to be a general supra appellate court in the system of ordinary courts. This is the task for the Supreme Court of the Czech Republic. The Constitutional Court reviews only very specific issues that have been presented in only one constitutional complaint, so far.

Daoud case⁴¹

The only case that the Constitutional Court has decided on merits so far is the Daoud case from 2000 dealing with the alleged wrongful retention from Israel to the Czech Republic. The child, a girl, was eight years old at the date of the retention. She had lived in Israel for the majority of her life. Her father was Israeli and her mother was Czech. The parents were married, lived together and had joint rights of custody. In 1999 the mother went to the Czech Republic, her state of origin, with the child and did not return. The father petitioned for a return order under the Convention. The court of first instance as well as the appellate court has ordered the return of the child.

Then the mother filed a complaint with the Constitutional Court. She claimed that by the judgments of ordinary courts her family and parent's rights were violated. She also alleged violation of free competition among political forces in a democratic society. The mother argued that by the judgments of ordinary courts she would be basically forced to unwillingly leave the Czech Republic and live in Israel if she wanted to take part in her daughter's further upbringing. Another constitutional complaint was filed by the local social authority which had been appointed to represent the child's interests in the ordinary courts' proceedings. Nevertheless, this complaint was not allowed to proceed, because of the complaint filed by the mother.

The Constitutional Court ruled that since children are protected not only on statutory level, but also on constitutional level, when applying the Convention (especially Art.13) courts must examine the facts and the legal basis of each case with the biggest diligence possible.⁴² Reasons to refuse the issue of the return order must be examined and clarified in detail, so that the actual risk of physical or psychological harm or other intolerable situation, to which the child could be exposed, would be excluded as much as possible. Ordinary courts must also carefully review the real attitude of the child's father to her current stay in the Czech Republic.

In the particular case, the Constitutional Court refused the mother's reasoning and found the removal wrongful; however, it still held that the complaint was well-grounded. During ordinary court hearings, the mother presented evidence that neither the court of first instance, nor the appellate court took into consideration (especially letters written by the father). The Constitutional Court ruled that more evidence should have been presented to address whether or not a return could place the child at a grave risk of harm and whether or not the child was mature enough to voice her views and wishes. Therefore, the case was remitted to the court of first instance.

⁴¹ Judgment of the Constitutional Court of the Czech Republic of 7 December 2000, ref. no. III. ÚS 440/2000.

⁴² The Daoud case was decided in 2000 before the Czech Republic joined the EC and the Regulation came into force. Therefore, ordinary courts as well as the Constitutional Court took in consideration only legal basis provided by the Convention.

There is one important issue to be mentioned with regard to the Daoud case. It has been almost eight years since the case was decided and many things have changed. For example, the Czech Republic joined the EU and nowadays, there is not only the Convention but also the Community law, especially the Regulation, to be taken into consideration when deciding child abduction cases. Moreover since 2000, case law of the European Court of Human Rights on the issue has also evolved. There is the six week time limit within which a court must issue its judgment on application for return of a child and this obviously reduces court's possibilities of investigating the facts in great detail. Given all the difficulties and technical obstacles a court has to deal with when deciding a case with a foreign element, one can hardly imagine that within six weeks the court would manage to examine the facts with the biggest diligence possible as required by the Daoud judgment.⁴³

II. Supreme Court case law

The Supreme Court is the highest court in the system of ordinary courts. It has decided approximately dozen child abduction cases since 1999. In roughly one half of them, appellants have been successful, which practically means that the judgments of lower courts were abolished and the cases were returned to them for further proceedings. Compared to the Constitutional Court results, it is obvious that appeals in abduction cases are more successful by the Supreme Court than complaints by the Constitutional Court. This is because the Constitutional Court reviews only special issues mentioned in the previous chapter, however, the Supreme Court reviews the whole proceedings therefore it is more likely to find errors and shortcomings. Interestingly enough, one can see in the case law that the Supreme Court tends to abolish and return judgments in cases concerning children with health problems and disabled children.

It is also apparent from the case law of the Supreme Court that it follows closely the case law of the Constitutional Court. In its judgment ref. no. 30 Cdo 1931/2006, the Supreme Court made reference to the Daoud case and cited the ruling from it. Thereby, the Court made clear that it will apply the same test and requirements when reviewing child abduction cases as the Constitutional Court does. Moreover in this judgment, the Supreme Court expressly ruled that when deciding on the return of a child under the Convention, the rights and interests of the child must be protected to the most possible extent. Further, it cited the Convention saying that "a court may refuse to order the return of the child if it finds out that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."⁴⁴ Lastly, the Supreme Court ruled that examination of all decisive facts should be even more careful and detailed if the concerned child is a baby.

In the famous Santana case⁴⁵, the Supreme Court ruled that the required restrictive interpretation of Art.13 of the Convention does not limit courts in assessing reasons for refusal to return the child as established in Art.13(a)(b) of the Convention. Under this provision, when deciding the case, courts shall take

⁴³ Even a request for the performance of the taking of evidence in another EC country is usually not executed sooner than in five weeks.

⁴⁴ Art.13 of the Convention; Judgment of the Supreme Court of the Czech Republic of 28 November 2006, ref. no. 30 Cdo 1931/2006.

⁴⁵ Judgment of the Supreme Court of the Czech Republic of 20 June 2007, ref. no. 30 Cdo 474/2007.

into account the social background of the child in the country of its habitual residence. The Supreme Court interpreted this requirement in the Santana case as the duty of the Czech courts to examine overall social conditions of the child in its habitual residence covering issues like e.g. who is going to take care of the child and raise it, what the relationship is between these people and the child or what the relationship is between the child and its broader family in its habitual residence. Unfortunately, the Supreme Court remains silent on how an ordinary court is supposed to do all this within 6 weeks it usually has for deciding the case.

III. Case law of district and regional courts

In the Czech Republic, district courts as courts of first instance and regional courts as appellate courts are the first ones to deal with child abduction cases and to do the “hard work” of examination and clarification of the facts and legal basis. They are also the ones facing the majority of legal and practical problems that abduction cases raise, such as gathering as many facts and evidence in as short time as possible, communicating with foreign courts and authorities, ensuring all the translations in the case, requesting the performance of the taking of evidence in another countries or of course, deciding the case which is usually extremely emotional for all participants. Decision making of these courts shows the best the practical effect, shortcomings and disadvantages of the legislation on child abduction in the Czech Republic. We want to demonstrate these on the case of the Fiordalisi children as a model case, because it accumulated an extremely high number of problems one can typically find in courts’ decision making in the Czech Republic. We will deal only with situations when a child is abducted to the Czech Republic by one of the parents, because in these cases the Czech courts are supposed to decide on the child’s return.⁴⁶

Fiordalisi case

The children, a six-year old boy and a three-year old girl were removed from Buenos Aires, Argentina in 2002. They both were born in Argentina and had Czech and Argentinean citizenship. Their mother was Czech and father was Argentinean. The parents were married, lived together and had joint rights of custody. The children had lived in Argentina all their lives and occasionally visited the Czech Republic with their mother. In 2002 the mother went to the Czech Republic with the children and did not return. The father petitioned for a return order under the Convention on 23 April 2002.

On 21 June 2002, the district court as the court of first instance ordered the return of the children. However, the written judgment with the court’s reasoning was delivered to the father as late as 2,5 months later, on 2 September 2002.⁴⁷ We did not find any explanation why it took the judge so

⁴⁶ If a child is abducted from the Czech Republic to a foreign country, it is the foreign country’s courts that decide on the child’s return.

⁴⁷ The two-week time limit within which an appeal can be filed against a court’s judgment starts with the delivery of the written judgment to the participant. According to the Czech Civil Procedure Code, civil courts must distribute the written judgment to the participants no later than one month after it was promulgated. As late as the two-week time limit for filing the appeal passes, the judgment is in legal force and can be enforced.

long to write the reasoning of the already promulgated judgment.⁴⁸ The court's reasoning was three pages long and described the facts of the case in detail, nevertheless, the actual justification why the court applied Art. 12 of the Convention and decided to return the children took literally three lines of the reasoning. The mother as well as the social authority representing the children in the proceeding filed an appeal. The appellate court in its decision of 22 January 2003 upheld the judgment of the court of first instance. It found that the children were removed wrongfully and all conditions for ordering their return were fulfilled. As of 19 February 2003, both judgments have been in legal force.

On 3 April 2003, the father filed the petition for enforcement of the judgment, because the mother had not returned the children voluntarily. Throughout the enforcement procedure, the mother completely ignored court's orders and was fined for that twice. On 17 June 2003, the mother appealed to the Supreme Court of the Czech Republic and on 22 September 2004 her appeal was denied. On 18 September 2003, the mother filed a petition for reopening of the trial. After several appeals within the reopening procedure, the reopening was finally denied on 12 September 2005. The enforcement of the original judgment which ordered the return of the children was suspended from 10 January 2005 till 10 November 2005.

In November 2005, the Czech Office for International Legal Protection of Children representing the father notified the court of the first instance that the father needs approximately two months to prepare everything necessary for the arrival of the children to Argentina. Preparations took longer in the end and finally, on 2 May 2006 the children were removed from their mother and returned to the father. The situation on May 2 was very dramatic. The withdrawal of children was carried out at several places at the same time and during the return, the mother removed the girl again. However, in the end after almost four years since the judgment of the court of first instance ordered the return, the children were at last returned to Argentina.

During these four years, the case became well-known in the Czech Republic and it was very closely followed by the Czech media. The footage of the crying girl being removed from her mother was shown in the news on television. The media unanimously promoted the attitude typical for the Czech society in cases of international abduction: "A child born to a Czech parent, especially to a Czech mother, should stay with her in the Czech Republic and by returning the child, the Czech state, or more precisely Czech courts fail to protect Czech children." Interestingly enough, the social authority representing the children and their interests in the proceeding shared this opinion as it disagreed with the return of the children. It cooperated closely and almost exclusively with the mother. Even though the father was mostly quite active and willing to cooperate, his position was obviously disadvantaged because of the reluctant attitude of the social authority and disregarding of the mother.

⁴⁸ In the files of this case, we found a short note of the court addressed to the Czech Office for International Legal Protection of Children representing the father in the proceedings saying that the delivery of the written judgment took so long because the appointed judge had currently been on vacation. It is highly unlikely in the Czech circumstances that the judge would be on vacation for longer than two or three weeks.

IV. Most important problems of the Czech court proceedings in child abduction cases (Lessons learned from the Fiordalisi case)

As already mentioned, the Fiordalisi case revealed many crucial problems that can be typically found by child abduction cases. In this chapter, we would like to deal with these problems more in detail.

Probably the most striking and the most problematic issue of child abduction cases in Czech circumstances is the *length of the proceedings*, especially of the enforcement of the judgment. As seen in the Fiordalisi case, it took the court of first instance 3 months to decide the case and 5.5 months to deliver the written judgment. Even the time period of 3 months which is quite short for the Czech circumstances, does not conform to the requirements of prompt proceedings set in the Convention.⁴⁹ However, it is much more alarming that the court needed four more years to enforce the judgment. Such long enforcement is disproportionate from the point of view of both, Czech as well as international law. In this respect, all Czech courts involved in this case⁵⁰ failed to protect the interest of the children and family rights of all persons concerned.

Nevertheless, in the Fiordalisi case, it was not predominantly the courts and their inactivity that have caused the lengthy proceedings. There were various obstacles that prolonged it substantially. These obstacles are usually present in most similar cases before Czech courts. Fighting them, the courts are still supposed to examine the facts and the legal basis of each case with the biggest diligence possible (as required in case law of the Constitutional Court) and to keep the proceedings prompt and effective. It is evident that Czech courts do not have an easy task to keep both expectations in balance.

First obstacles is the *complexity of the case* which covers among others the need to communicate and deliver court papers to a foreign proceeding participant (typically, the requesting parent) and foreign authorities. All court papers delivered to a foreign participant must be officially translated. Usually, there is a psychological expertise that must be worked out. Cooperation between various state authorities is needed and of course, there is the issue to be decided, which is very sensitive and emotional to all participants.⁵¹

Another important aspect making international abduction cases longer and more complicated is the *obstructive behavior of the “unsuccessful” parent*. As one could clearly see in the Fiordalisi case, as soon as the mother was ordered to return the children to Argentina, she started to ignore the court and

⁴⁹ Not talking about the Regulation which sets the strict time limit of 6 weeks for the proceedings. However, at the time when the Fiordalisi case was decided, the Regulation has not yet been adopted, therefore the main source of law was the Convention.

⁵⁰ By saying “all Czech courts involved in this case” we mean not only the court of first instance and the appellate court, but also the Supreme Court of the Czech Republic. The Supreme Court alone took more than a year to decide on mother’s appeal.

⁵¹ If a Czech court wants to hear a foreign parent who is not able to come to the court proceeding in the Czech Republic and sends a request for the performance of the taking of evidence to another EC country, it usually takes at least five weeks until the hearing is performed and the request returned to the Czech court. And still this is within the EC, where the judicial cooperation is usually much better and easier due to the common legal grounds in the EC Regulation No. 1206/2001 and to the existence of simplifications like common forms, European judicial atlas...etc. It is evident that the same request will usually take even more time when performed in a country outside the EC. This makes it for the courts much more complicated to fulfill the requirements of prompt proceedings in child abduction cases. Improvement of the judicial cooperation of all countries in civil matters and making it faster would definitely contribute to better and faster decision making in international abduction cases.

its orders. She did not voluntarily follow the court orders and she was even fined twice for that. She completely counteracted the enforcement of the orders and abducted the daughter again during the actual enforcement. It was obvious that the mother did not see that by her behavior she harmed mainly the children that were returned to the father completely confused under highly dramatic and emotional circumstances. Unfortunately, this behavior is quite typical in child abduction cases in the Czech Republic, especially among the mothers.⁵² The mother was supported by her attorney who for example filed the appeal to the Supreme Court, despite the fact that the Czech Civil Procedure Code does not provide for appeals to the Supreme Court in this kind of cases.

Another problem is the *biased attitude of the local social authority* representing the child and its interests in the court proceedings. Not only is it often clearly on the side of the Czech parent (usually the mother) with whom it cooperates excluding the other parent, but also the staff of the social authority do not really understand the issue of the court proceedings in child abduction cases. As was evident in the Fiordalisi case, the staff did not differentiate the proceeding under the Convention from the proceeding on rights of custody. They did not understand that the court decided only on return of the child and that the court proceeding on rights of custody were still going to take place. Thus the social authority was not able to inform the mother properly and to coordinate her behavior. In this respect, it is important to mention that even the representative authorities of the Czech Republic abroad are sometimes not informed sufficiently about issues of child abduction and therefore, they do not give adequate advice to Czech citizens living abroad that seek out their help. For example, several times, it happened that the authorities advised the mother who was Czech to leave the foreign country, however did not tell her that if she leaves with children without notifying their father, she is likely to face problems for child abduction.

Hesitance of the Czech courts is also often a problem in child abduction cases. Czech judges, especially the ones that do not have much experience in this field of law, are often a bit reluctant to order the return of a child and even more in enforcing the judgment throughout controversial withdrawal of a child. Sometimes enforcement of the judgment is suspended for a period of time, which prolongs the whole return procedure considerably and goes against the objective of the Convention. Moreover, older judges who often lack the knowledge of foreign languages and have not dealt with many cross-border cases in general approach cases of child abduction with even more reluctance. Even though, the situation has improved significantly in last few years, still one can see that cooperation and exchange of experience among the Czech judges dealing with these issues is rather rare, not even mentioning the almost nonexistent cooperation with their foreign colleagues or with foreign liaison judges.

There is also a problem of the *length of the court proceedings in the Czech Republic in general*. There have been many legislative attempts to improve this issue and there are probably still more to come in the future. However, as one

⁵² In the Couderc case, the mother who was ordered to return her daughter to France even hid the child to avoid the enforcement of the court order and claimed that she would never let the girl be returned to the father. In the end, the girl was returned to France. The father even filed an application with the European Court of Human Rights (*Couderc contre la République tchèque* (30 January 2001), appl.no. 54429/00), however, no violation of the European Convention on Human Rights was found in the case.

can see for example in the Fiordalisi case, the procedure of the Supreme Court in which it took more than a year to decide on the mother's appeal, was definitely not in the interest of the children. Lately, the Czech legislators have come to the conclusion that there are too many means of appeal in the Czech law available in child abduction cases and that they should be limited. The already mentioned amendment of the Civil Procedure Code introduces improvements for the sake of the prompt proceedings. It establishes time limits for the proceedings in child abduction cases and makes extraordinary appeals unavailable.

Another crucial issue connected with the work of Czech courts is the *ineffective or inappropriate enforcement of the judgment*. The enforcement procedure or more precisely withdrawal of the child is definitely hard issue for all people involved. Generally, to suspend the enforcement of the judgment ordering the return of a child goes against objectives of the Convention. Thus courts should refrain from doing so unless really necessary. Once the return of the child is ordered, it is essential to enforce the judgment promptly otherwise it loses its effect. If the parent ordered to return the child apparently does not cooperate, it makes no sense to try to persuade them by official court notices or fines. In the past cases, one could sometimes see that the withdrawal of the child was carried out in an insensitive or even brutal way towards the child. The court enforcement officers were often unprepared and did not know how to react adequately to various situations that might occur during the withdrawal. Sometimes, it was the present family members that escalated the situation in a very dramatic manner forgetting that by this they harm the child the most.⁵³ However, it is important to note that many improvements have been done in the enforcement procedure during the last years.

The *insensitive and sensationalist approach* of the Czech media towards child abduction cases as well as the *xenophobic opinions of the Czech society* were already mentioned in the previous chapter. These can be found in many cases, however, fortunately, not in the courts decision making.

CONCLUSION – RECOMMENDATIONS FOR IMPROVEMENT

At the moment, the biggest legislative as well as practical challenge with regard to the child abduction cases in the Czech Republic is to speed up the lengthy court proceedings and thus ensure the protection of interests of children. Decision on return of a child under the Convention is not a decision on rights of custody. The objective of the Convention is to return the child promptly to its habitual residence and afterwards decide on rights of custody. The current high number of available appeals affects very negatively the length of the proceedings in the abduction cases. Lately, there has been an amendment of the Civil Procedure Code in progress which should introduce several important improvements in this area. In our opinion, the most significant changes it should bring are the time limits for the court proceedings and the abolishment of some means of appeal with regard to child abduction

⁵³ In one of the cases, during the withdrawal, the child's grandfather even threatened the court officers with a gun. After that he was criminally charged, because he held the gun illegally.

cases. It should be also taken into consideration if suspension of the enforcement of the return order should be allowed in case of appeal. The suspension delays the prompt return of the child considerably and makes the proceeding ineffective.

It is also evident that in cases dealing with child abduction the fast and effective cooperation between the courts and authorities of various countries deserves special attention. There is often a need to find out what the family law and legal practice are like in another country or to perform the taking of evidence abroad. Thus, a good judicial cooperation plays a crucial role for deciding the case within reasonable time and ensuring protection of the child's interest. In our opinion, more attention should be given to this by the courts, but especially by judges themselves.

The enforcement procedure should be carried out more promptly and in a more sensitive way. There is no point of sending official court notices or giving fines to the parent that apparently ignores the return order. The order should be rather enforced immediately in the presence of psychologists and other experts.

Another element that vitally needs improvement in the Czech Republic is awareness of all parties concerned. Representative authorities of the Czech Republic abroad should be well informed about the issue of international child abduction and its consequences so that they could give qualified advice to parents coming to them. Social authorities should be aware of the purpose of the court proceedings under the Convention, so that they could represent children's interests in court proceedings well and objectively. They should be also able to give good guidance to the parents and to behave in a less biased and xenophobic way.

Nevertheless, the most effort and information should be addressed to the Czech society and especially the families in general. Czech people still tend to think that children "belong" more to a mother than to a father and they are often quite xenophobic. To change these attitudes within the Czech society will be a difficult and time consuming task, however, not impossible. The Convention aims to protect the interests of children and is based on the principle of reciprocity. This means that in case of a child abducted from the Czech Republic to another state, the child should be promptly returned to the Czech Republic. Therefore, in the opposite situations, Czech authorities should act in compliance with the Convention and when assessing the child's interests they should not a priori prefer the Czech environment.