

Practising Family Law in Europe
Brussels II *bis* and The Hague Convention (illegal removal of children)
Practical cases

Child Abduction Cases in Estonia

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Estonia acceded to the Hague Convention on the Civil Aspects of International Child Abduction on the 1. July 2001. Estonia became a member of the European Union on the 1. May 2004. Since then there has been in child abduction cases applicable also the Brussels II regulation, which was a year later replaced by the Brussels II *bis* regulation.

As the aforementioned cross-border instruments have been applicable in Estonia for a quite short period of time, there have not been very many child abduction cases before the Estonian courts yet. The other reason for that is probably the relatively small number of inhabitants in Estonia.

According to the statistics compiled by the Ministry of Justice (the central authority of Estonia in terms of the Hague Convention) there have been initiated approximately 1-3 court proceedings due to the child abduction a year. Many of the incoming applications do not give a rise to the court proceedings and will be solved by an agreement and the child will be voluntarily returned before the official negotiations. The same happens often also during the court proceedings.

Thus, the Estonian judges and lawyers are not very familiar with child abduction cases. Nevertheless, the number of cases pending in Estonian courts increases steadily and the child return applications are to be solved as quickly and as good as possible. Unfortunately in Estonia there has not been arranged a special professional training for the lawyers on child abduction matters but there has been some training for the judges who have to solve the family law cases. However, the level of knowledge is not very high on the matters of child abduction as it appears in practise.

The Supreme Court of Estonia has also lately reviewed two child abduction cases and one was not accepted for hearing. Reviewing the decisions on child abduction matters the Supreme Court has held that the court of appeal and the court of first instance have in both of the two cases applied the provisions of the Hague Convention incorrectly. Also the third case that reached the Supreme Court was not solved quite correctly but it was not accepted for hearing for procedural reasons.

As regards the decisions the courts of lower instance have made on child abduction cases there can be seen a tendency that the judges are reluctant to return the children.

The predominant ground for not returning the children seems to be the paramount importance of the best interest of the child. The courts are tending to overestimate the principle of the best interests of the child in child abduction cases. They are trying to overcome the strict rules of the Hague Convention which stipulate that the child may be not returned only in very rare cases named in the Hague Convention by applying the principle of the best interests of the child and thus making it possible not to return the child actually in almost every case if the return of the child would not be in best interest of the child.

The other problem that has occurred in court practise is that the judges are reluctant to return the child if the applicant appears to be not reliable. There seems to be a low degree of trust to the other member states of the Hague Convention. It seems to be more safe for the child not to be returned, although the aim of the Hague Convention is to return the child and only in exceptional cases may court refuse to order the return.

The courts are also eager to take into account the opinion of the child as a ground for not returning the child. According to the Estonian Code of Civil Procedure the court has to hear the child who is at least seven years of age and has sufficient capacity to exercise discretion and will if the child's wishes, relations or will are relevant to the adjudication of the matter or if this is clearly necessary for clarification of circumstances. The court may hear also the child younger than seven years and take into account his or her opinion. There have been cases where the court has not returned the child because the child wanted to stay, although there has not been ascertained that the child really objects the return which would make the return impossible.

From the procedural point of view the court has (because of the public interest in such kind of proceedings) quite active role on child abduction cases. According to the Code of Civil Procedure the court itself shall ascertain the facts and take the necessary evidence to guarantee that the case is solved according to the best interests of the child and that all the circumstances are taken into account. So the evidence shall not be necessarily submitted by the participants in the proceedings. This makes the child return proceedings for the participants in the proceedings as uncomplicated as possible.

The weakest point in child abduction proceedings seems to be today the possibility of "re-abduction" of the child. Recently there was a case where the applicant was not satisfied with the not return judgement and notwithstanding the court decision he abducted the abducted child once more. After that there have occurred some difficulties with enforcement of the judgement, although not with foreign but our own judgement, in situation where the other member state has already begun the proceedings on custodial matters.

As regards the foreign return orders that have to be enforced in Estonia there have been reported no complications.