INTERNATIONAL CHILD ABDUCTION

THE CURRENT PROCEDURE OF INCOMING APPLICATIONS IN THE NETHERLANDS, ENGLAND & WALES, SWEDEN AND SWITZERLAND.

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SUMMARY

Aim of the research

This research evaluates the current procedure in incoming applications of international child abduction in the Netherlands and places it in a comparative perspective. International child abduction occurs when, in violation of the custody laws of the country of habitual residence, a child is removed to or detained in another country. The research focuses on incoming cases (an abduction from abroad to the Netherlands) and not on outgoing cases (an abduction from the Netherlands to another country).

In the Netherlands there are annually approximately 50 incoming applications for return and 100 outgoing applications for return.[1] In light of (inter)national laws, the Netherlands is obliged to act with urgency in incoming cases. Since 2009 important legislative amendments and policy changes have taken place with respect to the procedure in incoming cases of international child abduction.

Legislative amendments:

- Abolition of the legal representation competence of the Central Authority (January 2012).
- Expediting the return procedure (January 2012).
    - Concentration of jurisdiction to the Court of First Instance and the Court of Appeal in The Hague.
    - Right to appeal limited to cassation on a point of law.
- Suspension of the enforcement of the court's decision for the child's return when an appeal has been lodged, unless the court decides otherwise in the interest of the child.

Policy changes:

- Establishment of the Mediation Bureau as part of the International Child Abduction Centre (*Centrum IKO*) and introduction of additional legal aid for mediation in incoming cases of international child abduction (November 2009).
- Implementation of an expeditious procedure, the so-called abbreviated procedure, in three phases which each may last no longer than six weeks (January 2011).

The aim of this research is to evaluate the current practices in incoming cases of international child abduction. The research question reads: *Have the recent legislative changes in the Netherlands been implemented in accordance with the aims and how do Dutch procedures compare to other jurisdictions with similar systems?* The research focuses on the current practices and on how the procedure is experienced by the parties involved. Further, it will be examined to what extent there are problems. In addition to a national evaluation, a legal comparison will be made with England & Wales, Sweden and Switzerland to see how the Dutch current procedure compares to the current procedure in these countries.

[1] See for example the Annual Report 2013, *Central Authority international children's issues of the Ministry of Security and Justice*, publication number j-24104, The Hague, June 2014. The incoming requests for visitation rights and outgoing requests for visitation rights are disregarded here.

Methods

The research consists of two parts: a national process analysis and a comparative legal study. The results of the research are based on literature study, a dossier examination (registrations by the Dutch Central Authority, the International Child Abduction Centre (*Centrum IKO*), the Mediation Bureau, the Legal Aid Board, the Court of First Instance and the Court of Appeal), interviews with involved parties in the Netherlands and abroad and a survey among parents. In the Netherlands the interviews were conducted with the following parties (in brackets the amount of persons): Central Authority (5), lawyers (6), District Court of The Hague (3), Court of Appeal The Hague (1), Public Prosecution Service (2), the International Child Abduction Centre (*Centrum IKO*) (3), Mediation Bureau (2), police (2), Legal Aid Board (1) and the Child Care and Protection Board (2). In England & Wales interviews were conducted with: Central Authority (3), lawyers (3), Court of First Instance (High Court) (1), Reunite (1) and a mediator (1). In Sweden interviews were held with the Central Authority (2), lawyers (2), Court of First Instance (*Stockholms Tingsrätt*) (2) and the Court of Appeal (*Svea Hovrätt*) (2). In Switzerland interviews were conducted with: Central Authority (2), lawyers (1), Court of First Instance (*Obergericht*) (1) and a mediator (*International Social Services*) (1). The survey among parents was answered by 19 parents.

For the national process analysis aiming to answer the research question; whether the recent changes have been carried out as aimed for, emphasis was put on the research period of 1 year (July 2013 to July 2014). In order to properly assess the reasons behind the possible problems experienced in the current period the preceding period has also been taken into account.

The comparative legal study forms an important part of the research. The study describes the current procedure in England & Wales, Sweden and Switzerland. The choice for these countries was based on an overview provided by the Hague Conference which includes the organizational structures of all the countries that have ratified the Hague Abduction Convention. The main selection criterion was that the Central Authorities, like the Dutch Central Authority, do not act as the legal representative for the left-behind parent. The second criterion that determined the choice of countries for this research was the centralisation of jurisdiction.

This research is framed within the obligations derived from The Hague Convention on the Civil Aspects of International Child Abduction. The Convention offers three important points of departure: the facilitation of the immediate return, the application of an adequate procedure and the search for an amicable solution. In this research the emphasis is placed on four themes: the abbreviated procedure, mediation, the role of the Central Authority and the procedure in general.

Findings

Abbreviated procedure

Although the Hague Convention provides for a time limit of six weeks for the duration of the procedure it is not clear for which phases in the process this time limit is meant. It is generally assumed that it refers to the phase of the proceedings at the court of first instance. This is evident from the Brussel IIbis Regulation. The Protocol to the Dutch Child Abduction Scheme (*Handreiking Stelsel Internationale Kinderontvoering*), in which the abbreviated procedure is described, indicates the Dutch policy consisting of 3 phases: a phase for the intake by the Central Authority, the transfer to a lawyer and the submission of an application to court, a phase in the court of first instance and a phase in appeal. Each phase of the procedure should not last longer than six weeks. The research shows that these time limits are not always met. While the procedure in first instance at the District Court of The Hague and in appeal at the Court of Appeal of The Hague do not deviate much, and thus fulfil the obligations of the Hague Convention, problems are observed

in the first phase of the procedure (intake Central Authority, transfer to a lawyer and the submission of an application to the court).

The intake by the Central Authority and locating the abducting parent do not seem to cause major difficulties. When delay occurs in this phase, it often has to do with the absence of documents attached to the application form. Only sporadically, a parent cannot be located. Generally, the delays in the first phase appear to result from waiting for a response from the abducting parent (after the sending of a notification letter) and the transfer of the case to a lawyer.

When the application form and the required documents have been received and the abducting parent has been located, the Dutch Central Authority sends a notification letter to the abducting parent. The letter informs the parent of the application and asks the abducting parent to submit evidence which might prove that an abduction did not take place. The abducting parent is given two weeks to respond. If the Dutch Central Authority is of the opinion that there is a risk of (further) flight based on information received from the left-behind parent, a notification letter will not be sent. The research shows that compared to the other examined countries, the Dutch Central Authority has a special position in this regard. In the first place because a notification letter is not sent in the other countries, or is only sent with the consent of the left-behind parent. Secondly, because a reaction of the abducting parent is only awaited for in the Netherlands (with a maximum response time of two weeks, thereafter child abduction is assumed). While the response of the abducting parent forms part of the assessment by the Central Authority of whether there has been an abduction, this is not the case in the other countries. This can lead to a delay of the procedure.

Due to the changed role of the Central Authority, it no longer represents the left-behind parent but instead transfers the file to a lawyer. In practice the Central Authority redirects parents to the International Child Abduction Centre (*Centrum IKO)* and the associations of specialized child abduction or specialized family law lawyers (*Vereniging van kinderontvoeringsadvocaten* and the *vFAS)*, who then refer parents to a specific lawyer. From the comparative law study it appeared that the Central Authorities of the studied countries each maintained their own list of experienced lawyers. In line with this, it is suggested that the Dutch Central Authority could also provide a list of lawyers to the parents. In principle, each lawyer could submit a request to be placed on the list. However, requirements for placement on the list could be imposed as is the case for the legal aid cases. Parents could then subsequently choose a lawyer from the list.

Mediation

According to the Hague Abduction Convention an amicable settlement should be encouraged. The Netherlands does so by facilitating and partially subsidizing special cross-border mediation procedures in international child abduction cases. The research shows that the vast majority of mediations occurs after the pre-trial review by the court and not in the preliminary phase. In order to prevent that mediation delays the procedure, the planning of pre-trial reviews is aimed to be scheduled on Thursdays, so that parents follow a mediation procedure in the weekend – with sessions of three times three hours. In practice it appears that mediation sometimes causes a not too serious delay of up to a week in the full-bench panel hearing. In the one year research period half of the pre-trial case reviews were referred to mediation. In almost half of these cases an agreement was reached. Data from the Mediation Bureau for the period of late 2009-2013 indicated that in 60% of the mediations a form of agreement was reached.

Although the experience of those involved with mediation are positive and mediation is recommended to parents by various involved parties (e.g. the Central Authority, the International Child Abduction Centre (*Centrum IKO*), the lawyers and the court), there currently appears to be a problem. Uncertainty exists about the covering of costs related to the mediation and the conversation with the child (prior to the mediation between parents). Since the introduction of the IKO-case number (a case registration number allocated by the Central Authority), not all cases will be eligible for subsidized cross-border mediation. In

fact only those cases which have been notified to the Central Authority and have received a IKO-case number are covered. It is possible, however, that incoming child abduction cases do not follow the envisaged procedure. This means that a case is not notified to the Central Authority, but goes directly to a lawyer. The lawyer has, on the basis of the Hague Convention, the choice to notify the case to the Central Authority, but it is explicitly stated that a case can also be directly initiated with an application to the court. Some lawyers choose to do so given the urgency of the case. As noted above, most mediations take place following the pre-trial review. It is perceived of as a problem that cases which have been filed directly in court will then not be eligible for subsidized mediation.

Role of the Central Authority

An important legislative amendment concerns the role of the Central Authority. The Central Authority no longer acts as the legal representative of the left-behind parent. The rationale behind this amendment was that it would strengthen "the equality of arms" between the parents since the abducting parent would no longer have to litigate against the state providing both parents to be represented by a lawyer.

While the involved parties were generally positive about this amendment, it is also stressed that "the equality of arms" is not always achieved in practice. The main problem noted by respondents is that the threshold for left-behind parents to litigate seems to have become more problematic, because they now have to bear more costs themselves and have to find their own way in a country foreign to them. In addition, inequality can occur if parents are not both represented by specialized lawyers.

One of the legislative amendments has led to a change in the tasks of the Central Authority. The research shows that this has had major consequences and has led to various obstacles. The main obstacle is the uncertainty about the (completion of) the tasks and responsibilities of the Central Authority. It concerns the following questions:

- Which tasks and responsibilities are related to the role as coordinator of the system?
    - How is the progress of cases in the procedure tracked/registered? Which purpose does the IKO-case number serve?
    - Which steering possibilities does the Central Authority have?
- Which obligations and responsibilities does the Central Authority have?
    - Regarding the sending of a notification letter, assessing the flight risk and waiting for a response?
    - Who is responsible for the costs of translation?
    - How is the procedure of referring parents to lawyers working?
    - In which cases is an IKO-case number assigned?

Another obstacle that emerged is the lack of clarity about the relationship between the Central Authority and the International Child Abduction Centre (*Centrum IKO*). Certain responsibilities of the Central Authority are (also) carried out by this Centre. While the Central Authority is a government agency, the Centre (*Centrum IKO*) is an independent foundation which is partially subsidized by government funds. It is important to outline the different tasks and responsibilities to create clarity with regard to the final responsibilities. It is proposed by the respondents to index the funding that is granted to the Central Authority and the Centre. The intention is to preserve the quality and performance of both. To this end, it is also essential that good coordination exists between the tasks of the two parties.

Procedure in general

All involved parties positively appreciate the abbreviated procedure and consider it an improvement compared to the previous procedure. It is an advantage that the current procedure is clearly divided into

three phases. It is also positive that time limits have been set within which there must be clarity about the whereabouts of the child.

Although, from the perspective of the left-behind parent it is good that the time limits are short, the (representative of the) abducted parent can be confronted with a court date at very short notice. The disadvantages of the abbreviated procedure is that it can be difficult for both parties to deliver (translations of) required documents in time, that it sometimes will be in the best interest of the child to have a longer preliminary investigation and that there is little time or room for the involved professionals to consult and coordinate.

Furthermore, it appears that none of the involved professionals have insight in the whole process and the problems that may occur. Each party is solely responsible for the phase(s) in which it is involved. A standard feedback moment at case level is lacking. The Central Authority could play a role in this as the coordinator.

An obstacle along the same lines concerns the use of the IKO-case number. The IKO-case number was implemented to keep an eye on the case progress throughout the entire procedure. When the Central Authority receives a return application, the file is given a unique ascending case number. The involved parties have been asked to use this in their own registration. Practice shows that it is not always used to review the progress of the case. The case number is not known to the District Court and the Court of Appeal in all cases. Additionally, lawyers can submit an application to the court without notifying the Central Authority – and thus start court proceedings without the IKO-case number. The IKO-case number is further used for another purpose, namely as a condition for the covering of costs related to translations, for the intake and the subsidizing of costs related to mediation and the conversation with the child before the mediation sessions. Only cases with an IKO-case number qualify for these reimbursements. The question is whether this situation is desirable or whether it possibly encourages "legal inequality"?

Parties are positive about the concentration of jurisdiction. It results in the building up of expertise, the procedure is efficient and the case law is unambiguous. This leads to greater legal certainty, but is not always beneficial for the development of the law. This is reinforced by the fact that the judges in The Hague apply a strict interpretation of the Hague Convention according to the lawyers and an appeal by cassation on a point of law hardly occurs.

One of the problems concerns the enforcement of decisions in international child abduction cases. If a court issues a return order the child should return to the country of habitual residence. In most cases this return takes place on a voluntary basis. It is up to the parents to agree on how the return takes place. It should be noted that in such cases no authority is directly responsible for the supervision of the child's return, while it has been indicated as desirable.

If the abducting parent does not want to cooperate in the return, an involuntary return must take place. This means that the judgement of the court is enforced with the help of the police and the Ministry of Justice. In such cases, the Coordination Protocol Enforced Execution Return in Decisions in International Child Abduction Cases (*Samenwerkingsprotocol gedwongen tenuitvoerlegging teruggeleidingsbeschikkingen in international kinderontvoeringszaken*) applies. In this protocol the procedure is determined in very general terms. The research shows that the involuntary return rarely occurs, thus the involved authorities have limited experience. Moreover, the parties responsible for the enforcement of the tasks are organized locally and/or regionally. As a result there is no build-up of knowledge on involuntary returns. Better coordination between the involved parties with involuntary returns is therefore advisable.

Half of the parents are positive about the abbreviated procedure. The responses from parents must be put into perspective. For parents it is primarily a procedure that takes place around a decision that has a huge impact on their lives. As a point of improvement, a clearer distinction and description of the tasks and responsibilities of the Central Authority and the International Child Abduction Centre (*Centrum IKO*) is mentioned by the parents. In any case, parents are still unclear about the scope of the procedure (the actual decision follows in the country of origin at return) and the scope of mediation (mediation on the main points, not about alimony, etc.). The role of the lawyer can also be improved. Some lawyers are perhaps less qualified in this field and consequently not able to advise the parents properly. The costs of the procedure are perceived by parents to be high and, according to them, play a role in their consideration whether to pursue a procedure. The extent to which parents are actually deterred by the costs to start a procedure cannot be answered on the basis of this research. However it is known that some end up in debt due to the procedure.

Concluding remarks

The research shows that all parties strive for the quick settlement of incoming child abduction cases. There is a strong will to offer the best possible service to the parties (both parents and the child). This requires good coordination between the involved parties and that they are facilitated by the state.

The main points of attention are:

- Providing clarity about the obligations and responsibilities of the Central Authority, including the responsibilities of the Central Authority as coordinator, the responsibilities when sending a notification letter, the responsibilities for translations, the responsibility for assigning an IKO-case number.
- Increasing transparency, both internally (particularly the Central Authority) and throughout the case process; on how the case is progressing and the detection of reasons for problems encountered.
- Providing clarity about the (financial) consequences for parents and professionals when an IKO-case number is missing. How do potential financial consequences relate to article 29 of the Hague Convention and the implementing legislation (*uitvoeringswet internationale kinderontvoering)* (article 4 para. 2) confirming the Hague Convention principle.
- Providing clarity about the relationship between the Central Authority and International Child Abduction Centre (*Centrum IKO*).
- More supervision and guidance with respect to (involuntary) return.