

Child Abduction - New legislation in Spain

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Spanish family lawyers had an important addition to their summer reading list following the approval of the much anticipated and desired legislation in respect of Child Abduction cases.

Child Abduction proceedings in the jurisdiction of Spain are now specifically regulated by *Law 15/2015 de Jurisdicción Voluntaria* of 2nd July which entered into force on 23rd July 2015. Law 15/2015 has finally acknowledged the need of a special procedure to protect children in child abduction cases. Article 2 of the Convention does not require Signatory States to The Hague Convention 1980 to specifically legislate about these proceedings. In paragraph 63 of Professor Pérez-Vera's explanatory report she states:-

"Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law."

But those States that have opted for legislating and who have adopted a special procedure within their domestic law, have been shown to be more effective in the implementation of the international instrument.

Three of the most significant changes brought about by the legislation are:-

- judicial concentration and therefore judicial specialism;
- timing; and
- the appeal process.

Jurisdiction:-

Prior to 23rd July 2015, jurisdiction rested with the First Instance Civil Court where the child had been located. Such Court could be the Court of a small city within a province, not necessarily a Family Court and therefore more used to dealing with cases of a different nature such as insolvency and civil claims. Following Law 15/2015, child abduction cases will be heard only (in the First Instance at least), by Family Judges from the Court from the capital city of the province. For example, if a child is located in *Totana*, a beautiful city of the

Región of Murcia, the Court which would have jurisdiction would be the First Instance Court with Family Competence of the city of Murcia.

Concentration of jurisdiction is one of the aspects of English/Welsh system most applauded by the Hague community. The reality is that such concentration has led to judicial specialism and consequently better protection of children. Those are the hopes now for the Iberian Peninsula.

Timing:-

Law 15/2015 indicates the urgency and preferential nature of these proceedings within other family proceedings and directs the Court to deal with these proceedings, in both instances including the appeal, within the 6 week period stipulated in the Convention¹ and Regulation². Only in exceptional circumstances will those six weeks be extended. The time scale is very severe and rigorous as we will see from the examination of the procedure. In short, once the application is lodged, the Judge's Clerk, within 24 hours, has to issue or refuse it based on the examination of jurisdiction. If the Judge's Clerk has not accepted the application, it will be referred to the Court for the family Judge to declare whether the Court has jurisdiction within those 24 hours. At the same time, when issuing the application, the Judge's clerk will notify the Respondent to appear before the Court on a specific date which cannot be more than 3 days thereafter and to bring the subject child. At that appearance the Respondent will need to confirm if he or she will voluntarily return the child or contest the proceedings. If the Respondent contests the application, he would need to indicate the defence.

If the Respondent indicates that he or she will return the child voluntarily, the Judge's Clerk or the Judge on that appearance would make an order for the costs of the proceedings and the costs of the return.

The Respondent can decide to return the child voluntarily at any stage in the proceedings.

If the Respondent does not appear in Court, the Judge's Clerk will declare her or him in contempt of Court and list the application for a hearing within the next 5 days, serving notice on the Applicant and the *Ministerio Fiscal* (legal representative of the child's interests). The final order will be served on the Respondent. The Court of its own volition can order protective measures, including measures to guarantee communication and contact between the child and the left behind parent, pending the determination of the application.

If the Respondent appears and contests the application, all parties would be served with the notice of the final hearing which needs to be listed within the next 5 days. The hearing will not be adjourned if any of the parties do not attend. If the Respondent does not attend, it will be treated as if he has withdrawn the defence and the hearing will proceed. The Judge

¹ Art. Hague Convention 1980 of the Civil Aspect of Child Abduction

² Regulation (EC) 2201/2003

would hear the parties in that hearing. Any directions requested by the parties or made at the judge's own volition, would need to be complied with within the next 6 days. The judgment needs to be pronounced within 3 days of the directions being complied with.

The child would be always heard, the form depending on their age and maturity.

The judgment will be limited as to whether the removal or retention has been wrongful and should include all the necessary arrangements for the execution of the return, such as where and/or to whom the child should be returned, including costs of the proceedings and return costs.

Appeal:-

As child abduction proceedings were previously regulated within general contested family proceedings, any application to appeal did not suspend the effects of the 1st Instance order. Such order could be made enforceable pending an appeal application. From 23rd July 2015, an application to appeal in Child Abduction cases, would stay the return order, however the appeal will be dealt within a period of 20 days. The procedure for appeal is also strictly regulated. The application has to be issued within 3 days of the service of the return order. These appeals would take preference over other appeals.

Other significant issues to consider:-

The Spanish legislator has not forgotten the possibility that these cases can be resolved with effective mediation. But Mediation could only suspend proceedings for no longer than the 6 weeks period that the Court has to determine these applications. Mediation could be requested by the parties or suggested by the Court.

In respect of the enforcement of return orders, the legislator provides for the Central Authority to assist and for the Court to request the assistance of the police, social services or any other institution.

The legislator has clarified that this procedure will not apply to wrongful retentions or removals where the States are not European Members States or signatory countries of the Hague 1980 Convention or similar bilateral instrument with Spain.

In these proceedings the *Ministerio Fiscal* will always be a party and will protect the best interests of the children.

Criminal proceedings would not stay child abduction proceedings. It has been common to see child abduction proceedings stayed because of the existence of allegations of domestic violence and/or criminal proceedings on-going.

Additionally Law 15/2015 indicates the availability of the Central Authority and the office of the International Liaison Judge³ to assist in these cases which were not contemplated before but are available and provide a specific procedure for the request of Article 15 declarations.

Applicants would continue to be represented by the State Lawyer appointed by the Spanish Central Authority, but if the Applicant wishes to instruct a lawyer privately, the State Lawyer will not longer act. In practice the number of Applicants who instruct a private lawyer continues to increase due to significant delayed caused by a Central Authority which is overwhelmed with applications and without the required resources. For example the Spanish Central Authority only accepts applications of incoming cases by post, not by e-mail. An application from ICACU to their Madrid's offices could be delayed by weeks because of this requirement, particularly those cases where new information becomes available each week in relation to the whereabouts of the children. Probably specific legislation will be followed by improvements to the bureaucracy still in place.

The Hague community will surely welcome this specific legislation by the Kingdom of Spain and it is hopeful that these changes, and the special legislation about Child Abduction proceedings, will lead to the better and effective applicability of the Convention and the Regulation.



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³ Francisco Javier Forcada Miranda