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[13/09/2001; Bundesgericht, II. Zivilabteilung (Federal Supreme Court, 2nd Civil Chamber) (Switzerland); Superior Appellate Court]
Bundesgericht, II. Zivilabteilung (Federal Supreme Court, 2nd Civil Chamber)
Decision of 13 September 2001, 5P.160/2001/min

The full text of this decision is available at http://www.bger.ch

The following is a commentary on the case by Prof. ANDREAS BUCHER, Geneva.

The original commentary was published in "Aktuelle Juristische Praxis" 11 (2002) at 471-479; and (with amendments) in "Schweizerische Zeitschrift fuer internationales und europaeisches Recht" 12 (2002) at 299-316.

International Civil and Procedural Law

International Law of Civil Procedure

(3) Child Abduction. Denial of enforcement of decision to return [the child]. The Hague Convention not applicable in the enforcement phase. The best interests of the child take precedence.

Federal Court, Second Civil Division, Decision of September 13, 2001, re M. G. vs. S. P. – 5P.160/2001.

Commentary by Prof. ANDREAS BUCHER, Geneva

Summary of facts:

A.- Swiss citizen S. P., who is now married to A. P., was formerly married to US citizen M.G. The marriage resulted in the birth of their daughter K.G. on February 25, 1992. In late October 1995, the parents were divorced in the United States, and K.G. was placed in their joint custody. Amending this divorce decree, the competent American court placed the child in the sole custody of her father in November 1996.

On September 4, 1996, K.G. traveled to Switzerland in the company of her mother and has since been living in the P. family whose place of residence has been in the Canton of Aargau since May 1998. In late October 1997, the mother filed a criminal complaint against K.G.'s father for sexual abuse of the child. The investigation initiated by the district attorney's office of the Canton of Zurich has not been concluded at this time.

B. – On September 5, 1996, S.P. filed a petition with the district court of Z. to amend the US divorce decree and grant her sole custody of her daughter K.G. The president of the district court ordered K.G. to be placed for the duration of the proceeding in the sole custody of her mother.

On September 26, 1996, M.G. filed an application with the US Central Authority for the return of the child under the Hague Convention of October 25, 1980, on the Civil Aspects of International Child Abductions. In a decision dated November 15, 1996, the judge in the summary proceeding of the District Court of Z. denied the petition for the return of K.G. to the United States of America. In its decision of March 6, 1997, the Higher Court of the Canton of Zurich agreed with the father's appeal of that decision and ordered the mother on pain of contempt of court to return the child to the father's place of residence in the United States of America within ten days from being informed of the decision. An appeal against this decision on constitutional grounds was rejected by the Federal Court of Justice on August 6, 1997 (5P.127/1997 = BGE [Decisions of the Federal Court of Justice] 123 II 419).

After two attempts had failed in October 1997 to effect K.G.'s return, S.P. requested the Higher Court of the Canton of Zurich to withdraw its decision of March 6, 1997 on appeal (revision), to deny the return of K.G., and to temporarily suspend the enforcement of the return order. In a decision dated December 19, 1997, the Higher Court rejected the appeal. On April 25, 1998, the Court of Cassation of the Canton of Zurich rejected a nullity appeal directed against the Higher Court decision. Both the Higher Court decision and that of the Court of Cassation were unsuccessfully appealed to the Federal Court of Justice on constitutional grounds (5P.496/1997 and 5P.216/1998).

The Higher Court of the Canton of Zurich refused to hear any further appeals by S.P. and K.G. in decisions of October 16, 2000, and November 6, 2000. The appeals for nullity against these decisions were rejected by the Court of Cassation of the Canton of Zurich. The mother as well as the daughter filed constitutional appeals with the Federal Court of Justice against the decisions to refuse to hear the case (5P.454/2000 and 5P.477/2000). These appeals are still pending at this time.

When the father sued for the enforcement of the Higher Court of the Canton of Zurich decision of March 6, 1997, the competent District Court of Y. rejected his petition. An appeal by the father against this decision was rejected by the Higher Court of the Canton of Aargau in its decision of March 26, 2001.

C.- M.G. challenges the decision by the Higher Court of the Canton of Aargau on constitutional grounds. He petitions the Federal Court of Justice to annul the decision of the lower court and to refer the case back to the lower court for review on the basis of the grounds given for the appeal.

Excerpt from the Arguments:

1.- (proceeding re the constitutional appeal).

2.- (The fact that the president of the Higher Court of Aargau publicly backed the appellee's father-in-law in a political election campaign does not represent behavior suggesting that the former's objectivity must be doubted).

3.- (Explanations concerning the fact that the lower court did not violate the constitutional rule forbidding arbitrariness [Art. 9 of the Constitution] in being guided by the principle of the child's welfare. The fact that the expert opinion obtained by the lower court was taken into account cannot be challenged on constitutional grounds. The experts were not required to ask the appellant; his right to a legal hearing was not violated anyway, since he was given the opportunity in the proceeding in the lower court to comment on the expert opinion. The appellant does not provide substantiation on why the child's rejecting attitude should be in obvious contradiction to the actual situation, and in what way this objection should be of importance for making a decision on the enforcement of the return. Nor does he explain why the assumption of the lower court that the child would be separated from her mother if she returned with her to the United States should be considered untenable and wrong).

4.- The appellant also claims that there was a violation of Art. 13, par. 1, letter b and Art. 13, par. 3 of the Convention on the Civil Aspects of International Child Abductions of October 25, 1980 (SR 0.211.230.02, hereinafter HCCAICA). The appellant alleges that there was a violation of international treaty law (Art. 84, par. 1, letter c OG [Federal Judicature Act]. In a case of a constitutional appeal involving a violation of an international treaty, the Federal Court of Justice examines the legal questions in free cognition within the framework of the accusations raised (Decisions of the Federal Court of Justice 119 II 380 grounds 3b, 382 f.; 126 III 438 grounds 3, 439; unpublished decision of the Federal Court of Justice of March 29, 1999, in re S. grounds Id [5P.1/1999]) and can take new facts into account (Decisions of the Federal Court of Justice 115 Ib 197 grounds 4a, 198; 119 II 380 grounds 3b in fine 383; unpublished decision by the Federal Court of Justice of January 23, 1991 in re G., grounds 1a [5P.340/1990]).

The appellant charges that the lower court, based on its own explanations of the scope of Art. 13, par. 1, letter b of the HCCAICA, should not have refused to enforce the return. He alleges that the lower court refused K.G.'s return in spite of being aware that the risk of causing harm to the child inherent at present in a return is primarily due to the behavior of the appellee. He claims that the lower court's opinion that Art. 13 HCCAICA is intended to ensure the best interests of the child independently of the behavior of the parents is totally unfounded. This makes it possible to sabotage the HCCAICA by means

of frivolous lawsuits. In particular, that the separation of the child from the appellee does not suffice for not effecting the return of the child. Furthermore, [he argues], no proof has been furnished that the return would expose the child to an extraordinarily serious endangerment of her welfare. He further accuses the lower court of having overlooked the fact that after the failure of the attempt to return the child in October 1997, the appellant was not able to file his petition for enforcing the return decision before November 1998 due to various appeals filed by the appellee. The fact that a year passed between the failed petition for enforcement in October 1997 and the filing of the one filed in November 1998, cannot be used to justify a denial within the meaning of Art. 13, 1, letter b of the HCCAICA.

The Higher Court took into consideration that the Zurich Higher Court decision to be enforced was issued about four years ago. Since the subject of the decision was a child, the enforcement of the decision petitioned for four years later can no longer be ordered without a renewed evaluation of the best interests of the child. In this examination of whether the enforcement of the court decision is in keeping with the best interests of the child, it is not important for what reasons the decision of the Higher Court of the Canton of Zurich could not be enforced up to now. The return of the child must not be based on the pending criminal case against the appellant, especially since the Zurich Higher Court declined to hear an appeal in the matter, and held that the criminal case did not constitute sufficient grounds for refusing the return of the child.

Instead, it was held to be decisive that the psychiatric expert opinion F./E. obtained by the lower court shows that a forcible return of the child and a separation from her mother would most probably lead to long-term psychological harm to the child. For that reason, the lower court had refused the child's return under Art. 13, par. 1, letter b of the HCCAICA in view of the risk of serious harm to the child.

aa. The HCCAICA is intended to ensure the immediate return of children wrongfully removed to or retained in a Contracting State (Art. 1, letter a of the HCCAICA; Decisions of the Federal Court of Justice 125 III 301 grounds 2b/cc, 303). In implementation of this purpose, the Zurich Higher Court ordered the return of the child to the United States in March 1997 and thus conclusively decided the matter of the return of the child (Art. 12, par. 1 of the HCCAICA). However, the HCCAICA does not provide for the enforcement of a return order based on the HCCAICA (GERHARD KEGEL/KLAUS SCHURIG, Internationales Privatrecht [International Civil Law], 8th edition, Munich 2000, 810; see ALBERT BACH/BIRGIT GILDENAST, Internationale Kindesentführung [International Child Abduction], Bielefeld 1999, No. 176 ff.); which means that national law applies in this respect.

The proceeding initiated by the appellant before the Aargau authorities is aimed at enforcing the binding decision by the Zurich Higher Court. The Aargau authority, acting as enforcing judge [Vollstreckungsrichter], is not authorized to amend or question the decision by the Zurich Higher Court concerning the facts of the case. Its function as enforcing judge is limited to ordering the enforcement so long as there are no impediments to the enforcement (see Decisions of the Federal Court of Justice 107 II 301 grounds 7, 305; 120 Ia 369 grounds 2, 373). It is the competent court judging the merits of the case [Sachgericht] which has the right to adjust, if necessary, the March 1997 decision regarding the return of the child to any subsequent changes in the situation.

If the matter at hand concerns the enforcement of a decision regarding the place of residence of a child, the enforcing judge does not have the right to order the enforcement of the judgment on the merits regardless of any possible effects on the best interests of the child. This is due to the fact that the subject of the enforcement is a child, whose welfare must be respected and furthered by all government authorities in all proceedings (Art. 3, par. 1 of the Convention on the Rights of the Child of November 20, 1989 [SR 0.107, following: UN Children's Rights Convention]; representative of many: HEGNAUER, Grundriss des Kindesrechts [Basics of Children's Rights Law], 5.A., Bern 1999, N 26.04a). Thus the Federal Court of Justice did not consider it arbitrary that the enforcement judge ordered an expert opinion by a child psychologist in order to determine the consequences of a forcible surrender of a child to the parent having custody. A surrender of the child to the custodial parent ordered by the enforcement judge might possibly have been liable to cause harm to the child under the specific circumstances of this case; therefore the enforcing judge acted fully in the interests of the child when he ordered such an expert opinion (Decisions of the Federal Court of Justice 111 II 313 grounds 5 p. 316 f.).

These principles also apply to the case at hand, especially since, as mentioned above, the HCCAICA does not provide for the actual enforcement of a return order. At any rate, its basic tenets agree with

what has been explained above to the extent that it repeatedly gives precedence to the best interests of the child over the purpose of returning an abducted child (see, for instance, Art. 12, par. 2, Art. 13, par. 1, letter b, and par. 2 of the HCCAICA; unpublished decision of the Federal Court of Justice of July 30, 1990, in the matter of V., grounds 4a [5P.151/1990]; DOMINIQUE PONCET/ALESSANDRA CAMBI FAVRE-BULLE, La Convention de La Haye [October 25, 1980] sur les aspects civils de l'enlèvement international d'enfants: quel est l'intérêt protégé? [HCCAICA: what is the interest that it protects?], in: MÉLANGES SCHUPBACH, Basel 2000, 313 ff. and 321).

bb. To the extent that the appellant alleges a violation of Art. 13, par. 1, letter b of the HCCAICA, his criticism misses the point in as much as this substantive provision was not even applicable in the proceeding before the lower court. The fact that the lower court referred to this provision in its arguments is not a problem since the decisive reason for denying the enforcement is the welfare of the child, which must be taken into account anyway in the enforcement phase.

He does not substantiate his objections that it was not proven that the forcible repatriation could involve a danger to her welfare and he does not specifically show how, in view of the expert opinion, one could come to the opposite conclusion. The criticism is unfounded.

The lower court denied the child's return, citing the threat of harm to her psychological welfare as noted in the expert opinion. It is therefore irrelevant for which reasons the child has now been living in Switzerland for several years. Nor can the appellant use the fact that he was only able to file his enforcement action in November 1998 in his favor.

c.aa. Furthermore, the appellant claims, with reference to the decision of the Zurich Higher Court of December 19, 1997, that K.G. should not have been questioned in person, since in view of her present situation, she naturally objected to being returned to the United States. At the same time, he criticizes the lower court for not having made sure that the child had not been influenced by the appellee. He further claims that the lower court, by taking the faulty expert opinion into account, violated Art. 13, par. 3 of the HCCAICA. The appellant insists that K.G.'s wish to remain in Switzerland is unimportant because it is the main purpose of the HCCAICA to ensure the return of abducted children to the competent custody judge and to make sure that child abductions do not ultimately benefit the abductor.

bb. These accusations cannot be admitted. The appellant disregards the fact that the lower court denied the return in the well-understood interest of the child in question. The expert evaluation of the child was ordered for the purpose of determining what would best serve the child's well-being. Within the framework of the expert evaluation, the child naturally had to be questioned. As the lower court rightly explained, this is in accordance with Art. 12, par. 1 of the UN Convention on the Rights of the Child (Decisions of the Federal Court of Justice 124 III 90 grounds 3b, 93; 126 III 497 grounds 4b, 498). Furthermore, the lower court considered that the experts were quite aware that the child is living in the mother's environment and is therefore exposed to her influence. The appellant has not presented anything to counter this.

To the extent that he accuses the lower court of a violation of Art. 13, par. 3 of the HCCAICA, he is wide off the mark from the start, since the HCCAICA is not applicable in the enforcement stage (grounds 4b/aa).

5.- His other accusations, that the lower court decision violated Arts. 26 and 27 of the Vienna Convention on the Law of Treaties of May 23, 1969, (VKR,SR 0.111) and Art. 122, par. 3 of the Federal Constitution (BV), cannot be considered, especially since he does not prove his accusations in a manner consistent with Art. 90, par. 1, letter b of the Federal Judicature Act (OG) (grounds 1c). It can therefore be left undecided whether the appellant could legitimately base his arguments on Arts. 26 and 27 of the Vienna Convention on the Law of Treaties (Art. 88 of the Judicature Act).

6.- It turns out that the appeal must be denied to the extent that it can be considered. Consequently, the appellant is obliged to pay the costs of the proceeding (Art. 156, pars. 1 and 2 of the OG).

Remarks:

In decisions concerning the protection of minors in the enforcement stage, Swiss legal practice allows, as an exception, a determination whether it is advisable in the interest of the child's well-being to forcibly execute the substantive decision (see Decisions of the Federal Court of Justice 107 II 301 ff., 305; 111 II

313 ff., 315-317; 120 Ia 369 ff., 373 f.). In the decision quoted here in excerpt, the Federal Court of Justice decides for the first time that this is possible also in abduction cases if it is a matter of the enforcement of a decision under the Hague Convention of 1980 (HCCAICA) for the return of a child abducted to Switzerland. The decision is convincing in the case at hand, which is rather atypical as abduction cases go.

The return of the child to the United States, ordered in 1997 by the Zurich Higher Court, could not be effected either directly following the decision or later. The enforcement failed due to the opposition of the mother and the child. After the passing of several years, the Aargau enforcement authorities took the new situation that had developed meanwhile into account in refusing the enforcement of the Zurich decision to return the child. In judging the interest of the child, the latter cannot be made to suffer for the mother's behavior who initiated a great number of legal maneuvers. It is quite clear, even without reading the expert opinion, that the child, now nine years old, after living in Switzerland for five years, being totally integrated in her mother's family, and without contact with her father (whose language she no longer speaks), would have suffered a severe trauma in case of a forced return to the United States while a custody decision was pending, especially since she would almost certainly be separated from her mother.

1. The Convention is not Applicable in the Enforcement Phase?

However, the decision is extremely dubious in its argument contained in item No. 4 of the grounds, in which the Federal Court of Justice declares the best interests of the child to be the decisive factor without restriction and does not recognize the 1980 Hague Convention at all. The case at hand surprisingly causes the Federal Court of Justice to note that the enforcement of a return order based on the Convention "is not governed by the HCCAICA" and that such a matter must be implemented "in accordance with national law" (grounds 4b/aa, first sentence). In another place, it repeats that "the HCCAICA does not provide for the actual enforcement of the return order" (grounds 4 b/aa, last par.), and that "the HCCAICA is not applicable in the enforcement phase" (grounds 4 c/bb, in fine). Any observer who is reasonably familiar with the problems of child abductions understands that an international treaty for fighting and preventing child abductions must be ineffectual without enforcement provisions. Why did the Second Civil Division slip up on this sidetrack?

When seeking to understand this better, it is useful to first examine the literature cited. Both quotations turn out to be incorrect. KEGEL/SCHURIG (810-812) limit themselves to a summary overview of the Convention without specifically addressing the enforcement of return orders. It is true that the authors correctly note that the Convention does not address "the always cumbersome recognition and enforcement of decisions," and that it therefore achieves speedier results than the European Convention of 1980 (810); but this refers to the enforcement of foreign custody decisions rather than the forcible return of abducted children. BACH/GILDENAST explain in the chapter quoted (No. 176-181) Article 33 of the German Law on Non-Contentious Litigation and find that return orders must be effected in accordance with that provision (No. 176). This concerns, however, only the possibility of ordering a coercive fine or coercive detention for the purpose of ensuring the enforcement of a court order. There is not the least mention here that the Convention did not cover enforcement. The literature, including Swiss authors, does not provide any mention corresponding to the decision of the Federal Court of Justice, although it should also be mentioned that no contrary reference can be found. This is due to the fact that the Convention does not mention the term "enforcement" and instead uses other terms which leave no doubt about the actual meaning of the Convention.

The wording of the Convention is quite clear and absolutely sufficient for answering the question about its basic purpose in the enforcement phase. In the beginning, the decision states correctly (grounds 4 b/aa), that its purpose is "to secure the prompt return of children wrongfully removed to or retained in a Contracting State" (Art. 1 letter a). How can this be accomplished without enforcement? The Central Authority applied to must not limit itself to initiate a proceeding aimed at the return [of the child]. Its support serves the purpose "of securing the safe return of the child (Art. 7, par. 2, letter f; Art. 8, par. 1). The proceedings mentioned in the Convention are "proceedings for the return of children" (Art. 11, par. 1); it is not a matter of proceedings leading merely to determine the obligation to return [the child], while the subsequent enforcement actions would be left to the national laws of each Contracting State. If Art. 12, par. 1 provides that the competent court "orders the prompt return of the child" ("l'autorité saisie ordonne son retour immédiat"), it cannot be left as if the return only needs to be ordered, but not actually implemented. It is therefore a matter of course for the Swiss Central Authority that after a

positive decision on the return of a child, it must take measures under the Convention to "secure the safe return of the child" (Art. 7, par. 2, letter h; see NICOLETTE RUSCA-CLERC, The Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980, AJP/PJA 1997, 1072-1078 [1076]). This includes the obligation to arrange, if necessary, for the enforcement of a return order, including all necessary accompanying measures (STAUDINGER/PIRRUNG, introductory remarks to Art. 19 of the Introductory Law to the Civil Code, marginal note 664).

It should also be recalled that one of the essential reasons that led to the conclusion of the Hague Convention was that Art. 7 of the Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors of 1961 (SR 0.211.231.01) excludes enforcement measures from the scope [of the Convention] (see BERNARD DESCHENAUX, L'enlèvement international d'enfants par un parent [International Parental Child Abduction], Bern 1995, 12).

The Federal Court of Justice already laid out the true objective of the Convention in its decision in the same case published on August 6, 1997 (Decisions of the Federal Court of Justice 123 II 419 ff.). This states that "the purpose of the Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States" (Decisions of the Federal Court of Justice 123 II 423 f.). What should the parties [in such a case] and their attorneys think if they are notified at one time that the Convention serves the purpose "to reinstate the 'status quo ante' that existed before the abduction of the child" (Decisions of the Federal Court of Justice 123 II 424), and then they find out four years later that the Convention is not applicable to the enforcement phase in the same case and is therefore meaningless with regard to the last step before the "status quo ante?"

It could have been expected that the Federal Court of Justice let itself be influenced by an earlier decision which reads: "However, the Convention clearly does not serve the purpose of enforcement" (Decisions of the Federal Court of Justice 114 Ia 200 ff., 203). However, the Federal Court of Justice did not make reference to this decision. Furthermore, the passage quoted had only the restricted purpose of explaining that the Convention was not applicable with regard to a constitutional challenge of Art. 84, par. 1, letter c of the Federal Judicature Act, since a proceeding on the return of a child is a civil proceeding. Whether this latter statement is still valid is no longer certain, since the Federal Court of Justice later decided that this is not a dispute under civil law, but a kind of "administrative legal assistance" (Decisions of the Federal Court of Justice 120 II 222 ff., 224; 123 II 421). The latest decision does not concern a reevaluation of the meaning of Art. 84, par. 1, letter c of the Federal Judicature Act, apparently because the appellant based his appeal only on Arts. 9 and 30 of the Federal Constitution. This does not answer the question (as ALEXANDER R. MARKUS, points out in Beschleunigungsgebot und Berufungsfähigkeit bei Kinder-Rückgabeentscheiden nach Haager Übereinkommen [Need for Expedited Proceedings and Appealability under the Hague Convention, AJP/PJA 1997, 1085-1092 [1088, annotation 43]).

Unfortunately, the Federal Court of Justice's misinterpretation could have undesirable effects in other abduction cases beyond the case at hand (which was ultimately decided correctly). The pronouncement of the Federal Court of Justice must appear almost like directions for frustrating any return decisions by preventing the actual surrender, at least for some time, with the intent of securing the success of the abduction, after changing residence to another canton, in a subsequent enforcement proceeding with considerations regarding the best interests of the child (including expert opinions) outside the scope of the Hague Convention.

This must also be cause for concern for the Federal Central Authority, which is responsible for the appropriate accompanying measures in order to achieve or secure the return (Art. 7, par. 2, letter f; Art. 8, par. 1). If the Central Authority wants to work towards the surrender of a child which is to be returned by order of a court, how can it oppose the argument of an abductor that according to the latest decision of the Federal Court of Justice, the Convention is no longer applicable in this phase, which also does away with the jurisdiction of the Central Authority? Negative effects must also be expected in the relations with other Contracting States. In the case at hand, for instance, the US Central Authority will have learned to its surprise that in Switzerland, the enforcement of return decisions under the Hague Convention is no longer ensured by that Convention. This will undoubtedly have repercussions on the attitude of the US authorities in cases of children abducted from Switzerland to the United States of America. Has the Federal Court of Justice considered [what this decision will do to] the image of

Switzerland as a dependable contracting partner in the exceedingly delicate area of child abductions? Did the Second Civil Division not remember that (or read up on) "a painstaking application of the Hague Child Abduction Convention is generally in the public interest of Switzerland in view of about 100 cases of child abduction which the Swiss Central Authority has to deal with annually – either as requested or requesting authority" (Decisions of the Federal Court of Justice 123 II 424)?

In view of the categorical formulations used in the decision, the Swiss Central Authority will find it difficult to justify its role in the enforcement with the argument that the decision in question was actually only an obiter dictum, since the Federal Court of Justice's decision in this case concerned only the non-applicability of Art. 13 in the enforcement phase, but not the role of the central authorities.

2. Precedence of the Best Interests of the Child?

After brushing aside Art. 13, par. 1, letter b as a basis for a legal decision, the Federal Court of Justice refers the enforcement authority to the criterion of the best interests of the child, which is to be taken into consideration in all proceedings in accordance with Art. 3, par. 1 of the UN Convention on the Rights of the Child. The Federal Court of Justice obviously overlooked Art. 11 of the Convention, which expressly mentions the measures to be taken by the Contracting States in the fight against child abductions and the existing conventions as a special area of the law. An evaluation oriented exclusively on the best interests of the child does not suffice here.

The choice of the best interests of the child within the meaning of Art. 3, par. 1 of the Children's Rights Convention as the criterion for a decision is all the more surprising since the facts of the case and the appellant's obviously not convincing challenges to the decision of the Aargau Higher Court would also have permitted a decision on the basis of Art. 13, par. 1, letter b of the Hague Convention.

The decision contains (obiter) a reference in this direction by noting that the Convention, although not providing for the "actual enforcement" of the decision to return a child, nevertheless corresponds "in its basic values" to the explanations given by the Federal Court of Justice to the extent "that it repeatedly gives priority to the best interests of the child vis-à-vis the interest of returning an abducted child" [to its habitual place of residence] (grounds 4 b/aa, last paragraph). This remark, too, is imprecise and misleading. In practice, it could have undesirable effects as a precedent, since it suggests to the abductor that he/she should object that Art. 12, par. 2 and Art. 13, par. 1, letter b give "priority to the best interests of the child over the objective of returning the child."

Opposing "the best interests of the child" and "the return of the child" misses the essential core of the Convention. The Convention is also an instrument for general prevention [of child abductions], and it is intended to ensure that child abductions do not yield the hoped-for advantages (see the message by the Federal Council, Federal Gazette 1983 I, 101 ff., 105). Therefore the return of the child is the primary goal, while the best interests of the child takes precedence only within the restricted limits of Arts. 12, par. 2, and 13 and 20 and can prevent a return. It can also be said, in other words, that an immediate return to the habitual place of residence best conforms to the best interests of the child on principle (see the accompanying report by E. PÉREZ-VERA, Actes et doc. 14/III [1980] 426 ff., 431 f., No. 24 f.). Not every hardship is sufficient to prevent the return under Art. 13, par. 1, letter b. This requires an exceptionally serious detriment to the best interests of the child (see German Federal Constitutional Court, Oct. 29, 1998, German Federal Constitutional Court Decisions 99, 145, IPRax [Journal on the Practice of International Civil and Procedural Law] 2000, 216 ff., 219). Taking the hardships necessarily involved for the child in any return into account would contradict the purpose of the Convention, i.e. to deter the parties from wrongfully removing the child to another country, and it could furthermore lead to a situation where the faits accomplis created by the abductor would a priori be accorded greater importance (German Federal Consitutional Court, 15.2.1996, IPRax 1997, 123 ff., 124).

The primary orientation of the Federal Court of Justice towards the best interests of the children strangely contrasts with the decision issued in the same case in 1997, in which it rejected a reference to Art. 8 of the EHRC within the framework of Art. 20 of the Convention, which could only offer a considerably more restricted protection of the best interests of the child. However, even this constitutional protection for the child could lead too far, since "if a return of a child abducted from or wrongfully retained in a Contracting State were to automatically be frustrated by Art. 8 of the EHRC if the child were living in a family group with the abducted parent, Art. 20 of the HCCAICA would be interpreted in a manner that fundamentally places the meaning and purpose of the Hague Child

Abduction Convention in doubt…" (Decisions of the Federal Court of Justice 123 II 424). And four years later, it is said (about the same case) that it is among the basic tenets of the Convention that the best interests of the child take precedence over the return!

Questions are also raised concerning the meaning of the quote from PONCET/CAMBI, since the authors are discussing an (unpublished) decision by the Federal Court of Justice in a case they are closely concerned with and in which the welfare of the child is said to have been interpreted too narrowly. In that case, the return was ordered although the abducting mother argued that in Israel, she could be granted custody only if she were to settle there with the child. Is this quote about a child's best interest supposed to mean that the Second Civil Division now adopts the authors' criticism of its own decision?

Nor does the reference to the unpublished decision of July 30, 1990 help much in coming to a clear interpretation. It also mentions the precedence of the best interests of the child for the interpretation and application of the Convention (grounds 4a). This was a case of a child who was abducted from the United States to Switzerland at the age of just two months. The High Court of Lucerne decided to refuse the return when the child was barely six months old and, according to the mother, was still being breast-fed (see also the reference by HANS KUHN, "Ihr Kinderlein bleibet, so bleibet doch all" ["Oh stay all you little children" – a take-off on a well-known German Christmas song], AJP/PJA 1997, 1093-1105 [1099]). The most important element in deciding this application was whether the child's mother could be expected to return to the United States. It was not clear whether this question had been examined by the Higher Court.

The Federal Court of Justice responds: "This has meanwhile been done; at any rate, the Higher Court of Lucerne did not act arbitrarily when it noted in this connection that the appellee could not legally be obliged to return to New York due to the pending divorce proceedings filed by both parties, and that in view of the obvious marital problems, she cannot be expected to do so. Due to these facts, it is certain that the circumstances in which the child spent the first two months of its life have been drastically altered. At least while the desire for divorce persists and the parties live apart from each other, the protective intent laid down in Art. 12 of the Convention cannot come into effect, and it is in no way clear in what way a return to New York to yet another environment could serve the best interests of the child. The fact that this significantly hinders any personal contact between the appellant and the child or makes them downright impossible must be regretfully accepted in the best interests of the child which do not permit the return to New York." (grounds 4 b, first paragraph).

The refusal of the return may have been correct in view of the overall circumstances of the case in question, but the reasons are not argued sufficiently. As a rule, child abductions take place only when the parents can or will no longer live together, and in case they are married, divorce proceedings have been or are about to be instituted. If every time that "the desire for divorce persists and the parties live apart from each other," the return of the child in the company of the mother should be intolerable due to a drastic change in the circumstances, it is not difficult to imagine that this would practically make the Convention ineffective in abductions of infants and toddlers.

3. Consequences of the Impossibility of Return

The decision unfortunately leaves the really central question in the dark, namely what is to happen if a return order turns out after some time as truly unenforceable? Such a decision is not definitive since it permits a new evaluation of the facts when the situation changes. Its legal force is limited (see MARKUS, loc. cit. AJP/PJA 1997, 1091). Since it is a decision based on the Hague Convention, any later reevaluation must also take place under the Convention. Thus the pertinent provisions of Arts. 12, 13, and 20 are applicable. Even though the Federal Court of Justice [seems to have] missed this, it is fairly obvious that the enforcement of a return or a subsequent reevaluation cannot allow the use of grounds for refusal which make the return more difficult than was the case in the first proceeding. A subsequent challenge based exclusively on the vague concept of the best interests of the child totally deprives the Hague Convention of its effectiveness. Such a basis for a decision also comes very close to a decision on the merits, which exceeds the competence of the authorities of the Contracting State to which the child has been removed as long as a return application is still pending (Art. 16).

If the enforcement of the return order is definitively refused, the question of how to proceed poses itself again. The unenforceable decision continues to exist as before. As a rule, there are no grounds for an

appeal under cantonal procedural law, since the unenforceability is a newly arisen fact which does not place the legal finding of the first decision into doubt. On the other hand, a new situation has arisen which demands a reevaluation of the facts.

The special nature of the return order, which is also known as a "decision of a preliminary nature" (MARKUS, loc. cit. AJP/PJA 1997, 1090), must permit a reevaluation regardless of its intrinsic (limited) validity, if the circumstances have changed significantly. Thus the decision being discussed notes that it must be left to the competent court judging the facts to amend the return order of March 1997 if necessary and adjust it to the new situation (grounds 4 b/aa, second paragraph). In this regard, the analogy to child protection measures offers itself.

It is also conceivable that a situation could arise in which [a court] in the country of origin could issue a decision after the departure of the child definitively granting the abductor custody and making a return senseless (Austrian Supreme Court, April 15, 1998, IPRax 2000, 141; STAUDINGER/PIRRUNG, introductory remark to Art. 19 of the Introductory Law to the Civil Code, marginal no. 664). However, it can also be assumed in such a case that the matter is definitively settled with the recognition of the custody decision, and the return order has become meaningless, so that there is no need to revisit this decision in a new proceeding. However, a reevaluation may become necessary if circumstances arise or become known after the fact which fulfill the requirements of Art. 13 (or 20) (STAUDINGER/PIRRUNG, op. cit., marginal no. 664). This would have to be the case if, for instance, it has been established that the enforcement of the return order would be intolerable for the child, which presupposes the existence of one of the reasons for refusal mentioned in Art. 13, par. 1, letter b, or par. 2 (as well as Art. 20).

If the return has become definitively impossible, the question arises whether parental custody and visitation rights must be newly determined. The precondition in such a case is that the jurisdiction barrier provided for in Article 16 has been overcome. Since a return application has been filed and no decision has been issued refusing the return of the child, this provision appears to deny the jurisdiction of the authorities of the child's new place of residence. In this case, interpretation must help with the next step. If the return of the child has not been refused and, on the contrary, has been granted, but if the enforcement of this decision is impossible and has been definitively denied, we have a situation which is tantamount to the direct refusal of the return. Thus the Austrian Supreme Court rightly decided on March 31, 1998 that in such a case, Article 16 is no obstacle to the jurisdiction of the authorities of the Contracting State to which the child was abducted (see Oesterreichische Juristenzeitung [Austrian Law Journal] 1998, 146, asbtract in Zeitschrift fur Rechtsvergleichung [Journal on Comparative Law] 1998, 206 f). Thus the authorities of the state of the child's habitual place of residence have jurisdiction under Art. 1 of the HCPM for newly determining custody and visitation rights. In the case at hand, there can be no doubt about the child's habitual place of residence in Switzerland (see Decisions of the Federal Court of Justice 125 III 301 ff.). Apparently the petition for amending the US divorce decree filed by the mother with the district court of Z. immediately after the abduction is still pending, which gives that court jurisdiction on the merits (Arts. 59, 64, and 79 IPRG [Federal Law on International Civil Law]).

4. Costs

A last word on the distribution of court costs. Here, too, the Federal Court of Justice does not take the Hague Convention over seriously. The appellant is the parent affected by the abduction whose rights have been violated. In accordance with Art. 26, par. 2, he should be exempted from all costs for the efforts of Swiss judicial and administrative authorities; the exemption from the costs of the proceeding is expressly mentioned. The proceeding before the Federal Court of Justice is no exception. Even though it is occasionally claimed abroad that an appeal is not part of the normal course of a return proceeding and should therefore involve expenses for the applicant, this would nevertheless amount to a clear violation of the Convention which does not contain any indications of such restrictions.

As the unpublished decision of July 30, 1990 shows, the Federal Court of Justice bases its decision on the consideration that the constitutional appeal under Art. 84, par. 1 letter a of the Judicature Act "is not a continuation of the cantonal proceeding, in which the application of the Convention could be freely reviewed, but is an independent extraordinary appeal suited to achieve the reexamination of a final and enforceable decision on constitutional grounds" (grounds 5). It is clear from the fact that the agreement of the Federal Court of Justice to hear the constitutional appeal led to the anullment of the canton-level decision that this is a continuation of the proceeding initiated in a cantonal court. The circumstance that

the cognition of the Federal Court of Justice is limited to appeals based on Art. 9 of the Federal Constitution does not change the fact that it is on principle a matter of the correct application (controlled within the framework of arbitrariness) of the Convention. [The grounds for appeal are limited to arbitrary]. Furthermore, the decision cited points to a decision that established that in the case of constitutional challenges in tax matters, it is only in exceptional cases that the effect is suspended, in spite of objections raised by the cantonal authority, until the matter has been decided (Decisions of the Federal Court of Justice 107 Ia 269 ff., 271); this question has nothing to do with the nature of proceedings for the return of a child in the phase of a constitutional challenge. The Federal Court of Justice would have had to rethink its practice in any case, since in the course of its more recent decisions (as has already been mentioned) it has come to the conclusion that decisions to return abducted children are not disputes under civil law, which means that Art. 84, par. 1, letter c of the Judicature Act also applies, and that allows the direct and free review of the correct application of the Convention. All these complications are, however, unnecessary if proper attention is paid to Art. 26, par. 2 of the Convention.

The Federal Court of Justice, however, could have followed the practice of the Swiss Central Authority, according to which the costs for applicants from countries, like the United States of America, which have declared the reservation mentioned in Art. 26, par. 3 of the Convention, are waived only within the framework of legal aid (see ADRIAN LOBSIGER, International Conventions in Family Law and Cost Guarantees, AJP/PJA 1994, 910-1017 [914]; RUSCA, loc. cit., AJP/PJA 1997, 1075). In the cases discussed, the decision regarding costs could have been correctly justified in this way. As far as countries like Switzerland are concerned, which have not declared the reservation, the waiver of costs must also be considered valid before the Federal Court of Justice.

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