

# International Child Abduction Cases in Hungary

## A Comprehensive Summary of Statistics, Legal Framework and Important Case Law

BY TAMÁS DEZSÓ ZIEGLER\*

**Abstract.** This article summarizes the background of child abduction cases related to Hungary, giving a comprehensive analysis of such cases between the period of 2000 and 2014. In the first section, the reader finds a statistical analysis and the second part deals with the legal and practical background. The final conclusions give some recommendations for the European and domestic legislators. The essay was created as part of a report published by the European Parliament, collected by the Swiss Institute of Comparative Law on the actual situation of child abduction in Europe.

**Keywords:** child abduction, 1980 Hague Convention on International Child Abduction, Brussels IIa Regulation, European Court of Human Rights, case law

### 1. INTRODUCTION

Hungary became part of the European Union in 2004, and since then, there has been a continuous, linear increase in the number of child abduction cases in the country, clearly shows the increasingly importance of the problem. The increased internationalization of Hungary and its citizens has resulted in increased international relations between citizens and foreigners. In 1999, a report by the Hague Conference on Private International Law found<sup>1</sup> that there had only been a couple of cases (only eight incoming return applications) related to Hungary, while currently the number of such cases has increased to over one hundred per year. Interestingly, the assessment highlighted two important facts which would appear not to have changed over time.

First, the typical case of child abduction involve a family situation in which a woman who possesses Hungarian citizenship married a man from Western-Europe or Canada. They subsequently file for divorce, the woman takes the child to Hungary and the man starts a procedure for the return of the child. In most of these cases, especially the most important ones, it was the man who wanted the child to be returned to a Western-European country. Unfortunately, however, there is no way in Hungary to obtain proper statistics regarding gender balance on such questions as no authority keeps a record of the gender background of such cases. This can only be confirmed by checking reports of the most important cases and by talking to practitioners.

Secondly, in most of the cases, the other State concerned, i.e., the place from which the child was removed, is not typically a Central- or Eastern-European country (with the exception of Austria). However, there is a possibility that this will change in the future. In 2011, the Hungarian State allowed those who had Hungarian roots and live in a foreign country to obtain Hungarian citizenship via a simplified (nearly automatically) process

\* Research fellow, Institute for Legal Studies CSS Hungarian Academy of Sciences, Research fellow (Frame Fp7 project). E-mail:

<sup>1</sup> See <[http://www.hcch.net/upload/stats\\_hu.pdf](http://www.hcch.net/upload/stats_hu.pdf)> accessed 1 July 2014.

upon application.<sup>2</sup> As a result, according to vice-prime minister Zsolt Semjén, there may be nearly 550,000 new Hungarian citizens who live outside Hungary and received citizenship in recent years. Most of them live in Romania, Slovakia and Ukraine.<sup>3</sup> Also, 350-600,000 Hungarians (at least 350,000 people permanently according to the Central Statistical Authority,)<sup>4</sup> left Hungary to live abroad and according to press releases, more people leave the country to make a living.<sup>5</sup> However, the absolute number of this latter group is uncertain, even among scholars, as the majority does not inform Hungarian authorities that they no longer live in Hungary. Combining these two groups leads to approximately 850,000-1,200,000 Hungarians could be living abroad, compared to the relatively low mobility rate in the 1990s. Consequently, it is likely that the number of cross border child abduction cases will also grow in the future.

Before a deep analysis of the current situation, it must also be highlighted that a number of cases have received serious media attention. Probably the most well-known case involves a boy, Karoly (Karcsi) Mehmet whose mother was Hungarian and father Turkish. The father kept the child illegally in Turkey but the boy was returned to Hungary after 2.5 years following a successful investigation by Turkish authorities in 2009. During that time, former Hungarian Prime Minister Gyurcsány and Turkish Prime Minister Erdogan discussed the case in their meetings. The case received a high level of media attention when border control officers found illegal drugs in the mother's car when she wanted to leave the country to Serbia resulting in the mother being held in police custody for some time. Police officers later received proof, however, that the drugs were placed in the car by the boy, who had received them from his father, who had masterminded the whole situation in order to ensure the mother's arrest. As the child wanted to leave Hungary and return to his father in Turkey, the parents agreed on the mother's right to maintain contact, following her subsequent release and he was allowed to return to Turkey to his father.

Another case also entered into the terrain of EU politics. A Hungarian woman moved to Bora Bora with her husband then subsequently claimed that the husband prevented her and her child from returning to Hungary by withholding their passports. She also claimed that the French national husband asked her to move to Bora Bora with the intention of preventing her from returning to Hungary with the child. In this case, former Hungarian Minister of Justice Navracsics had a dispute with Commissioner Reding.<sup>6</sup> EU-skeptical MEP, Krisztina Morvai also asked<sup>7</sup> for the return of the child while a Hungarian court

<sup>2</sup> Nick Thorpe, 'Hungary Creating New Mass of EU Citizens. BBC News', <<http://www.bbc.com/news/world-europe-24848361>> accessed 1 July 2014.

<sup>3</sup> For a long time, concrete numbers were kept as secret, and details are even now not available for the public in order to protect new citizens from their domestic governments. On the other hand, the government also announced that more than 600.000 people asked for a citizenship. <[http://hvg.hu/itthon/20140313\\_600\\_ezren\\_kerelmek\\_a\\_magyar\\_allampolga.](http://hvg.hu/itthon/20140313_600_ezren_kerelmek_a_magyar_allampolga.)> accessed 5 July 2014.

<sup>4</sup> A SEEMIG – Managing Migration in South East Europe, <[http://www.ksh.hu/docs/szolgalatasok/sajtoszoba/seemig\\_sajto\\_reszletes.pdf](http://www.ksh.hu/docs/szolgalatasok/sajtoszoba/seemig_sajto_reszletes.pdf)> accessed 5 July 2014.

<sup>5</sup> More Hungarians moving abroad. <http://www.politics.hu/20150408/more-hungarians-moving-abroad/>

<sup>6</sup> Reding–Navracsics, 'Tug Of War – Brussels Considers Tobin Case Closed, Budapest Telegraph. <[http://bptelegraph.idg.hu/news/304/reding%E2%80%93navracsics\\_tug\\_of\\_war\\_%E2%80%93brussels\\_considers\\_tobin\\_case\\_closed](http://bptelegraph.idg.hu/news/304/reding%E2%80%93navracsics_tug_of_war_%E2%80%93brussels_considers_tobin_case_closed)> accessed 1 July 2014.

<sup>7</sup> For her complete speech in the European Parliament see 'Morvai segélykiáltása az EP-ben a Bora Borán rekedt magyar nő ügyében' [Morvai's call for help in the case of the woman kept in Bora Bora] <<https://www.youtube.com/watch?v=n2vyQTMZxMo>> accessed 1 July 2014.

decided, in February 2014, that it did not have jurisdiction because the habitual residence of the child was not in Hungary.

In another case, a Russian woman wanted to take her child from France to Russia and was caught at the Hungarian border to Ukraine. The question was raised what Hungarian authorities should do in such cases as the French authorities had issued a European arrest award in conjunction with other committed crimes. The woman was taken to France for further investigation.

Before Christmas 2014, a father of three protested in front of the National Assembly because the mother of his children (former wife) took the kids to Mongolia despite a Hungarian court deciding earlier for the children to remain with the father. Currently, he is still unable to bring them back.

The continuous growth of the number of cases; the intensity of media discussions and the political relevance also show that the public impact of child abduction cases makes the area an increasingly important legal field in Hungary.

## 2. STATISTICAL ASSESSMENT

Generally, statistical data on international marriages in Hungary are collected by at several institutions. The first is the Hungarian Central Statistical Office (KSH, hereinafter referred to as the “Statistical Office”),<sup>8</sup> which is the central office collecting statistics on Hungarian society and economics. This office is a government agency, tasked to provide information for the public on general issues. One of its most well-known publications is the bilingual (Hungarian-English) Hungarian Statistical Yearbook.<sup>9</sup> The Yearbook is useful for obtaining a broader perspective on local child related cases but is not helpful for more special, international cases.

Information is also kept at the National Office of Judiciary,<sup>10</sup> which is responsible for heading the courts of the country. The statistical department within the office provides the government/judges/public with court procedures data. Unfortunately, the stored data is not useful in connection with international child abduction cases and they do not have statistics or any further details or information on such cases. The authority does not have statistics on the number of family law (especially child abduction or divorce) cases in which one of the parties was foreign national. They only store data on the general number of divorce cases and in 2013, this was approximately 11,000 cases in the country. However, this data cannot help us with further investigation.

Thirdly, statistics can be obtained from the Central Authority in child abduction cases, the Ministry of Justice in Hungary.<sup>11</sup> The Ministry of Justice has a special department on

<sup>8</sup> Hungarian Central Statistical Office <<http://www.ksh.hu/?lang=en>> accessed 1 July 2014.

<sup>9</sup> For an older version see *Magyar statisztikai évkönyv 2010* [*Statistical Yearbook of Hungary 2010*] (KSH Budapest) also available at <[http://www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/stat2010\\_nograf.pdf](http://www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/stat2010_nograf.pdf)> accessed 1 July 2014. The new ones can be ordered on the website of the Statistical Office (see above).

<sup>10</sup> See National Office for Judiciary contact details at <<http://www.birosag.hu/en/noj/cobtact-details>> accessed 1 July 2014.

<sup>11</sup> Hungarian Government official website <http://www.kormany.hu/en/contacts> accessed 1 July 2014. Please note that the Ministry of Justice had several official names in recent times, between 2010 and 2014 it was called Ministry of Public Administration and Justice. As of 6 June 2014 it is called Ministry of Justice again.

private international law issues which is responsible for the solution and administration of child abduction cases in Hungary. This department keeps statistics on international child abductions.

As a result, it is relatively complicated to gain data from institutions, or to find the necessary information. For example, the Hungarian Central Statistical Office only keeps general statistics on virtually every aspect of Hungarian life, including economic and social issues. However, this office does not necessarily keep data that can be found at ministries and its statistics are relatively hidden among other statistics. Furthermore, the National Office of Judiciary only keeps data on court proceedings and none of the authorities keep data on gender balance.

Beside these traditional statistics sources, it is highly important to mention that the Supreme Court of Hungary, (*Kúria*, hereinafter referred to as “Supreme Court”) created a “Research group on legal practice”, which published, amongst others, a handy useful 40-page report in 2013 on international child abduction cases in Hungarian courts.<sup>12</sup> The research group consisted four judges, a law professor, an attorney and a responsible person from the Foreign Ministry. One of the judges also functions as mediator at the court. This report also contained statistical data, based on the collection and analysis of one of the judges, and in-depth analysis of international child abduction cases.<sup>13</sup> However, it is important to stress that the report was a one-time report despite being extremely useful in this topic and that there will be no plans for a similar report by the Supreme Court in the near future.

### 2.1. International Marriages Celebrated in Hungary Data

Data regarding international marriages celebrated in Hungary are held by the Central Statistical Office, and can be found in the “Demographic Yearbook series” with<sup>14</sup> the most recent statistics released from 2013 c.<sup>15</sup>

The long term general trend is that less marriages are being conducted e.g. in 1980 there were approximately 80,000 marriages while 36,986 marriages were conducted in 2013. The same trend is also true for mixed citizenship marriages.

<sup>12</sup> A jogellenesen Magyarországra hozott gyermekek visszavitelével kapcsolatos eljárások vizsgálatára létrehozott joggyakorlat elemző csoport összefoglaló véleménye [Concluding Opinion of the Legal Practice Analyzing Group on the Return Processes of Children Illegally Brought to Hungary] <[http://www.lb.hu/sites/default/files/joggyak/osszefoglalo\\_velemeney\\_2013\\_el\\_ii\\_g\\_1\\_14.pdf](http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemeney_2013_el_ii_g_1_14.pdf)> accessed 5 July 2014.

<sup>13</sup> When using or citing the findings of the report of the Supreme Court, a balanced view of cases is maintained by reading background materials and/or consulted with other scholars and professionals. Statistics and the functioning of the system analysis has also involved academic and professional consultations including the officers of the government agency for child protection (TEGYESZ, official Hungarian site: <http://www.tegyesz.hu/>) and the responsible person at the ministry on private international law questions.

<sup>14</sup> Demográfiai évkönyv [Demographic Yearbook] (KSH 2012).

<sup>15</sup> For a historical perspective see Dóczi (2008).

**Number of marriages-intermarriages per year**

Year	2008	2009	2010	2011	2012	2013
Overall number of marriages	40,105	36,730	35,520	35,812	36,161	36,986
Number of international marriages	1685*	1653*	1501	1274	1083	1049
Ratio of international marriages	4,2%*	4,5%*	4,2%	3,5%	2,99%	2,83%

\* The chart was based on official information provided by the Central statistical Authority through Demographic Yearbooks mentioned above. However, the years of 2008 and 2009 contain by data previously collected by the European Commission

Contrary to the changes to the reduction in the number of marriages, the number of international child related disputes is continuously growing. This could be due to the relatively low mobility rates of the country before 1990 and during 1990 – 2000, when compared to other countries.

Altogether, there were 36,986 marriages concluded in 2013 which includes 1049 marriages in which one of the parties, or both parties was/were foreign citizen. There were 345 marriages in which the man was Hungarian and the woman had a foreign citizenship; 662 cases in which the man had foreign citizenship and the woman was Hungarian and 42 marriages in which both parties were foreign citizens. Thus, in about two-thirds of international marriages concluded in Hungary, the woman had Hungarian nationality, which is twice as much as men being in possession of Hungarian nationality. Out of the 1,007 marriages with Hungarian relevance, most typical was the marriage concluded between a Hungarian and a Slovak citizen (107), Hungarian and Romanian citizen (86) and Hungarian and German citizen (84). The highest number of dual foreign citizen wedding involved Slovak parties (8).

It is very important to highlight that these are only the Hungarian statistics as the government offices do not necessary store data on Hungarian citizens marry outside the country.<sup>16</sup>

**2.2. Data regarding International Dissolutions of Marriages**

The overall number of marriage dissolution follows the trend in marriage statistics with fewer marriages and marriage dissolutions takes place. The number of international divorces show a slow growth for a longer term (compared to the nineties), but it has decreased in the last couple of years. This is also in connection with Hungary's situation in the EU.

<sup>16</sup> For complete charts see *Demográfiai évkönyv 2013, online Annex.*

### Number of marriage dissolutions per year

Year	2008	2009	2010	2011	2012	2013
Number of marriage dissolutions	25,155	23,820	23,873	23,335	21,830	20,209
Number of marriage dissolutions (at least one foreign party concerned)	579*	524*	496	541	509	430
Ratio of marriage dissolutions (at least one foreign party concerned)	2.30%*	2.20%*	2.07%	2.31%	2.33%	2.13%

\* The chart was based on official information provided by the Central Statistical Authority through Demographic Yearbooks mentioned above. However, for the years 2008 and 2009 the rates mentioned by the Lanzieri paper had to be used

As mentioned before, data on international dissolutions of marriages that involve children is not available in Hungary. The Judicial Office can only provide public with data on the overall number of marriage dissolutions and can also provide information on domestic and international criminal cases in the country. However, this second set of data seems relatively unrelated to the topic of this paper.

The Statistical Office stores data on the dissolution of international marriages which can be found in the Demographic Yearbook. There were altogether 20,209 marriage dissolutions in the country in 2013 and 430 marriage dissolutions involved one or more parties who were foreign citizens. There were 127 marriage dissolutions in which the man was Hungarian and the woman had another citizenship, and 278 cases in which the woman was Hungarian and the man had a foreign citizenship. Altogether there were 405 marriage dissolutions in which one party was Hungarian and the other party a foreign citizen. There were 25 divorces in which neither party had Hungarian citizenship.<sup>17</sup>

## 2.3. Data on Registered Parental Child Abduction

### 2.3.1. Cases At the Central Authority

Registered international child abduction data is available in Hungary. However, two data are handled separately: cases before the courts and cases that belong to the Central Authority (Ministry of Justice). The Central Authority cases assists in cases when a parent wrongfully brings a child to Hungary but also assists in cases in which someone commences an action because a child was unlawfully removed from Hungary.

The Central Authority has a Department on Private International Law of approximately ten people who work on child abduction cases. However, this department does not solely deals with family law cases and also has other responsibilities. The department collects data regarding all international child abduction cases i.e. data recorded by the Central authority

<sup>17</sup> Source *Demográfiai évkönyv 2013* online Annex.

is not retained on the same basis as INCASTAT data.<sup>18</sup> According to the good practice of central authorities guidelines<sup>19</sup>, mediation by the central authority is not a requirement, but can be useful in such cases, The authority usually asks both parties to use mediation and informs them on the available opportunities. However, it neither acts as an official mediator, nor has the authority to enforce mediation. Compulsory mediation can only be used by courts. However, the Central authority has no right to start such a court procedure, especially in child abduction cases, in which the child must get returned. In court procedures, mediation is absolutely at the discretion of judges. If a court procedure had already been started, the Central Authority does not have the right to ask for a mediator. Even though it is not institutionalized, the authority will still try mediation between parties in order to have a better outcome in the majority of the cases (apart from cases where either parties refuse such help). The authority does not deal with the criminal law background. If other authorities, especially police, ask for information, it provides them with the necessary data. However, it is not itself a crime in Hungary for a parent takes the child to another country

The activity and output of the Authority can be stated that it performs relatively well, and most of the cases in which a delay occurred were in connection with the activities of other, lower level authorities.

When comparing the number of cases, there are some discrepancies between the overall statistics of the Hague Conference<sup>20</sup> and the numbers of the Central Authority. Consequently, in the rest of this publication, the data received directly from the Authority will be added.

#### Number of requests received from abroad\*

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	5	5	12	11	27	48	59	54	69

\* The chart was based on information received from the Central Authority.

The overall number of cases at the Central Authority in which people requested help accounts approximately 110 per year. According to the Ministry's announcements, this seems twice as much as the period before 2010. The ministry opinion is that a higher number of Hungarians have recently moved back from foreign countries and subsequently there are more child-related disputes. There are far less court judgments than this reported number, i.e., cases in which a foreign party wants to the return of a child and the court decided to return the child (approximately 15-20 cases per year). This low number indicates that in a high number of cases the parties or mediators solve the cases without reaching the final phase of procedures. The numbers of foreign requests to return a child increased from 5 (2005) to 69 (2013).

<sup>18</sup> Launch of INCASTAT, 28 September 2007, <[http://www.hcch.net/index\\_en.php?act=events.details&year=2007&varevent=138](http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=138)> accessed 5 July 2014.

<sup>19</sup> *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (2003) <[http://www.hcch.net/upload/abdguide\\_e.pdf](http://www.hcch.net/upload/abdguide_e.pdf)> accessed 5 July 2014.

<sup>20</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Statistics <[http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=32&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=24)> accessed 5 July 2014.

**Outgoing requests\***

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	5	6	9	16	14	18	27	25	39

\* *The chart was based on information given from the Central Authority.*

The Ministry also maintains data on the number of outgoing requests i.e., requests started by a Hungarian party to have a child returned from abroad. There were 5 requests in 2005 and 38 in 2013. Consequently, the handling of such cases has become a priority within the ministry.

The growth in the number of cases is evident, especially, if the two tables above are combined.

**Overall number of cases (requests received + outgoing requests)\***

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	13	11	21	27	41	66	86	79	107

\* *The chart was based on information received from the Central Authority.*

In 2005 there were only 13 cases (including incoming and outgoing requests), 11 in 2006 and 107 in 2013. If Hungary follows this path, it is likely that the observed growth in of cases will continue, especially, if the higher mobility rate is consider. Internationalisation of marriages and partnerships is a relatively new phenomenon in Hungary, even though in some early years there were more cases, like the 23 Hague Convention related cases in 1999.<sup>21</sup> The chart shows that there is a boom in the number of cases in the country that is likely to continue for the future as well.

However, it can be stated that the Central Authority has the background routine in handling such cases. Between 2010 and 2013, Hungary received 228 requests to return a child to a foreign country. The highest number of requests received came from the United Kingdom (69) Austria (36) and Canada (31). Countries with a moderate number of cases include the Netherlands (19), Ireland (18), France (13) and Belgium (12). There were countries from which the Hungarian authorities occasionally received requests such as Israel (6), Greece (4), Denmark (3), Argentina (2), Australia (2) Bulgaria (2) Kazakhstan (2), Poland (2) Jordan (1), South-Africa (1).

By examining the number of filed requests to the Ministry by a Hungarian party to have a child returned to Hungary, it is clear that between 2010 and 2013 the Ministry received a total of 42 requests. However, according to international standards, they are not responsible in such questions, but instead forward such claims to the responsible Central Authority of the foreign country. The applicant's intention was to have the child returned from the United Kingdom (15), Austria (4) France, (4) Canada (3), Denmark (3) and Poland (3), while 2 requests received regarding Australia, Belgium, Bulgaria and Israel.

<sup>21</sup> On detailed statistics for the year 1999 see the national report in the INCASTAT database, <[http://www.hcch.net/upload/stats\\_hu.pdf](http://www.hcch.net/upload/stats_hu.pdf)> accessed 5 July 2014.

**Number of cases based on the 1980 Hague Convention from HCCH reports**

Year	1999	2003 <sup>1</sup>	2008
Overall number of cases	23	32	16
Requests received	8	13	8 <sup>2</sup>

In these such cases, it can be highlighted that EU Regulation 2201/2003 takes precedence over the Hague Convention, and just like in other EU member state countries, the majority of requests are received from EU states. However, the detailed statistics of the Central Authority are more important if for a precise view on changes. Furthermore, there were serious changes in the number of cases in the last 4-6 years, and the HCCH statistics do not include them.

**2.4. Cases in the Hungarian Court System**

The aforementioned Report on the Legal Practice analysing group<sup>24</sup> checked all decided cases before Hungarian courts and found a total of 32 cases which were finished at the first instance, and 21 at the second instance. The majority of these cases involved the same cases, i.e., cases received from the first instance *between 1 January 2010 and 31 December 2012, namely during two years*. 6 cases reached the Supreme Court – such cases are not part of the normal appeal procedure because the Supreme Court only checks cases if the claimant claims there were serious breaches of law or procedural rules (extraordinary review of cases). Other cases could get resolved without issuing a judgment, e.g., the parties made an agreement in the process, or the child was returned relatively quickly.

It is important to highlight that in Hungary *only* the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) has jurisdiction and necessary competency to decide in such cases. Out of these 32 judgments, 28 cases were related to the abduction of a child/children from a foreign country, and 4 were intended to return a child/children back to Hungary. In these four cases courts did not have jurisdiction and refused to proceed.

<sup>22</sup> A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – National Reports, Hungary, 235. <[http://www.hcch.net/upload/wop/abd\\_pd03ef2007.pdf](http://www.hcch.net/upload/wop/abd_pd03ef2007.pdf)> accessed 10 July 2014.

<sup>23</sup> Hungary was not included in the detailed national reports in 2008, see A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – National Reports, <<http://www.hcch.net/upload/wop/abduct2011pd08c.pdf>> accessed 10 July 2014. However, some statistics still could be found in the related reports (A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Regional Report, <<http://www.hcch.net/upload/wop/abduct2011pd08be.pdf>> and also in A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Global Report, <<http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>> both accessed in 10 July 2014.

<sup>24</sup> Concluding opinion of the legal practice analysing group on the return processes of children illegally brought to Hungary, 32.

### 3. SOURCES OF THE NATIONAL REGULATORY FRAMEWORK

#### 3.1. General Questions – Recent Changes In the Family Law Regime

Before going into legal details, it must get highlighted that Hungary adopted a new civil code applicable from the 15 March 2014.<sup>25</sup> Before this, the law was regulated by a separate civil code (Act IV of 1959 on the Civil Code of Hungary) and an independent code on family law (Act IV. of 1952 on Marriage, Family and Custody),<sup>26</sup> which separated these areas. However, family law was integrated into the new Civil Code, and currently forms the fourth book of the Civil Code (Sections 4:1-4:244). It is not expected that such a dramatic change will happen again in the near future as the preliminary work on the Civil Code took about a decade. The change has several serious consequences.

First of all, a major part of old case law can no longer be used in legal procedures and different decisions will need to be brought. This is particularly true in cases in which the old law had significantly different content to the new one. Since the re-formulation of the text was relatively deep and several basic concepts were changed, there is a chance in several important cases, the former practice cannot (or may not) be followed. For such cases, as a result, Hungary law is currently in an interim period; old laws and related interpretations cannot be applied, but alternatively there is far less new case law available. Furthermore, the Supreme Court issued several general opinions on different areas of law. Such opinions were not officially binding for lower level courts, but in most of the cases courts accepted and followed them. One such opinion is Nr. 284 of the Civil Chamber of the Supreme Court on international child abduction, which, as a result of these changes, was repealed by the Supreme Court itself in Uniformity Decision Nr. 1/2014.<sup>27</sup> Opinion Nr. 284 served as a guideline for practice for a long time, even though it was harshly criticised by scholars and practitioners. All of the formerly adopted lower level laws and judgments must be interpreted in conformity with new Civil Code in the upcoming cases.

#### 3.2. Hungary as a Party of the Hague Convention on Child Abduction

Hungary joined the Hague Convention in 1986 by virtue of Law Decree 14 of 1986,<sup>28</sup> which entered into force on 11 September 1986. The Decree itself contains the translation of the Convention itself, and a couple of extra sentences.

Its Section 1 expresses that Hungary joined the 1980 Hague Convention, Section 2 contains the official translation of the Convention and Section 3 mentions very briefly a number of details related to the entry into force of the Convention and the appointment of the Central authority.

<sup>25</sup> Act V of 2013 on the Civil Code of Hungary. You find the English version of the law on the following link: [https://tdziegler.files.wordpress.com/2014/06/civil\\_code.pdf](https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf). For background materials see Vékás (2014). For the latest commentary on family matters see also Kőrös (2013), the new edition is published in August 2014. See also Osztovits (2014).

<sup>26</sup> For the provisions of this former law see Boele-Woelki et al. (2005).

<sup>27</sup> Available in Hungarian at <http://www.lb.hu/hu/joghat/12014-szamu-pje-hatarozat> accessed 1 July 2014. Please also note that the earlier opinion was harshly criticized in Hungarian legal literature as being discriminatory and too rigid in certain cases. Consequently, the change was of use for the Supreme Court as well to repeal it.

<sup>28</sup> A Hungarian version of the law is available here: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=8207.11308](http://njt.hu/cgi_bin/njt_doc.cgi?docid=8207.11308) accessed 1 July 2014.

Thus, there are no special rules attached to the Convention in the law. Another decree, Minister of Justice Decree 7 of 1988 on the Enforcement of the 1980 Convention contains some special rules,<sup>29</sup> especially on the role of the Central Authority and the right of the parent to keep contact with the child.

### 3.3. Hungary as a Party of the 1996 Hague Convention

Hungary joined the 1996 Hague Convention through “Act CXL of 2005 on the promulgation of the 1996 Hague Convention”.<sup>30</sup> The act entered into force on 16 December 2005. Section 1 expresses that Hungary joins the Convention, Section 2 says that Hungary officially promulgates the mandatory text of the Convention. Section 3 contains the official text of the Convention.

Regarding the topic of this article, Section 4 contains some important provisions on reservations.<sup>31</sup>

Concerning Section 34(2) of the Hague Child Protection Convention 1996, the Act states that international inquiries may only be dealt with through the Central Authority. Concerning Section 54(2) of the Hague Child Protection Convention 1996, the Act emphasises that the Hungarian Republic maintains the right only to accept official documents from foreign Central Authorities or other authorities which were written in Hungarian, or, if this would be very complicated to achieve, with an English translation.

Concerning Section 55(1) it expresses that the Hungarian Republic maintains jurisdiction for its authorities in connection with the protection of the child’s assets which can be found in Hungary. Moreover, Hungary also maintains its right not to recognize foreign parental responsibility or actions, which would be incompatible with the measures taken by its authorities concerning the asset (of course, unless Brussels Iia applies concerning EU MSs).

Section 5 stresses that the Parliament promulgates the Convention with the abovementioned reservations. Finally, Section 6 sets out the date of entry into force, and also talks shortly about the obligations of the minister in connection with the Convention.

### 3.4. Other Important Rules

Hungary joined the 1989 UN Convention on the Right of the Child through Act LXIV of 1991.<sup>32</sup> The law was applied after 6 November 1991. Brussels II-a Regulation<sup>33</sup> are also important for Hungary, an EU Member State. The country must also respect Council of

<sup>29</sup> For a Hungarian version see <[http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=9697.260983](http://njt.hu/cgi_bin/njt_doc.cgi?docid=9697.260983)> accessed 1 July 2014.

<sup>30</sup> A Hungarian version of the law is available here: <[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A0500140.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500140.TV)> accessed 1 July 2014.

<sup>31</sup> For a proper English translation of the reservations see <[http://www.hcch.net/index\\_en.php?act=status.comment&csid=948&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=948&disp=resdn)> accessed 1 July 2014.

<sup>32</sup> For a Hungarian version see <[http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=15579.23642](http://njt.hu/cgi_bin/njt_doc.cgi?docid=15579.23642)> accessed 1 July 2014.

<sup>33</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. OJ L 338, 23.12.2003, 1–29.

Europe Guidelines on child friendly justice<sup>34</sup> and the EU Commission Communication on the rights of the Child.<sup>35</sup> As a result, there are some recent developments in the treatment of children in the court proceedings (see later under the subtitle “Reforms”).

Beside these hard and soft laws, the Supreme Court also adopted several judgments, which were intended to serve as guidelines for the court procedures. However, in a number of these cases, this “guideline feature” of the judgments has been later revoked because of the changes in the legal system.

### 3.5. Existing criminal sanctions

Regarding criminal sanctions, it is important to stress that besides the new Civil Code, Hungary has a relatively new Criminal Code,<sup>36</sup> namely Act C of 2012. The Criminal Code entered into force on 1 July 2013 and several of its provisions are of importance.<sup>37</sup>

#### 3.5.1. *Altering Family Status*

Section 213 Criminal Code expresses that “any person who alters or terminates the family status of another person is guilty of a felony punishable by imprisonment not exceeding three years” (see Annex). A crime can be committed by changing the child’s family status, i.e. their physical situation and documents or by putting the child into a new family (this could be done by a nurse). This could also be the case if a person (parent or someone else) takes the child abroad into a completely new family, i.e., they cuts the child out their family and purchases new, fake documents for the child. The same could happen if parents of two families knowingly swap their children. The second way of committing this crime is by the termination of the family law status of a child. In such cases there is no new family relationship, but the former is removed e.g., the child is left in a foreign country without any reference to their parents.

These cases apply to an abduction committed by a parent with or without parental responsibility and also to other outsiders.

#### 3.5.2. *Changing the Custody of a Minor*

This crime can be committed by any person who takes away a minor from the person who has been granted custody by the decision of a competent authority, with the purpose of changing custody permanently or by someone who keeps a minor hidden or in secret.

<sup>34</sup> Guidelines on child friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, available at [http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable\\_en.asp](http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable_en.asp) accessed 1 July 2014.

<sup>35</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An EU Agenda for the Rights of the Child. COM (2011) 60. Online available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0060> accessed 1 July 2014.

<sup>36</sup> For a Hungarian Version see [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=152383.262832](http://njt.hu/cgi_bin/njt_doc.cgi?docid=152383.262832) accessed 10 July 2014. For the relevant provision in English see Annex.

<sup>37</sup> For commentaries see Polt (2013); Kónya (2013); Karsai (2013).

If someone commits these crimes, they are guilty of a misdemeanour punishable by imprisonment not exceeding one year. The perpetrator is punishable by imprisonment up to three years, if the offence is committed by use of force or threats against life or bodily integrity.

### *3.5.3. Preventing the Exercise of Visitation Rights*

Where a person has been granted custody over a minor by virtue of an administrative decision and this person prevents someone holding rights of access, they are guilty of a misdemeanour punishable by imprisonment not exceeding one year (see Annex).

### *3.5.4. Abuse of a Minor*

There is another crime that can be committed concerning the abduction of a child. The abuse of a minor as set in Section 208 Criminal Code (see Annex) can be applied if a parent removes the child. However, compared to the former crimes, in such cases some extra elements are necessary i.e., a person must seriously violate their parental obligation and thereby endanger the child. In such cases, courts check the circumstances and if they regard that maintaining contact with the other parent is essential in the development of the child (as is usually the case with children), they may sanction the parent who removes the child. The code states:

“a person who is given custody of a minor to maintain and care for the person in his charge... and who seriously violates the obligations arising from such duty and thereby endangers the physical, intellectual, moral or mental development of the minor, is guilty of a felony punishable by imprisonment between one to five years. “

### *3.5.5. Imposing a Fine: Criminal Law and Civil Law Application*

In the case that the abovementioned crimes are committed, the court orders the regular sanctions as described in the Criminal Code. However, beside courts, Guardianship Authorities have the right to issue a fine in case a party violates the rules of parental responsibility.

## **4. CHARACTERISATION OF PARENTAL CHILD ABDUCTION**

### **4.1. General Questions**

The Hungarian courts expressed in several decisions how they interpret the best interests of the child. One of these, EBH 2002.634 of the Supreme Court,<sup>38</sup> a Legal principle decision which also may serve as guideline for courts, expressed that the courts must enforce the best interests of the child, and that the best interests of a child are the immediate reconstruction of parental responsibility rights of the child. Thus, according to the main rule, the child must returned as quickly as possible. The Supreme Court, in its judgments, stresses that lower level courts may not examine all aspects of the case, only those decisions regarding the return of the child i.e., they may not examine other merits of the case. However, in a number of cases, the courts that started to examine the merits of a case, did not know there was an ongoing procedure started to return a child another country thus

<sup>38</sup> See <<http://lb.hu/hu/elvhat/6342002-szamu-polgari-elvi-hatarozat>> accessed 1 July 2014.

causing confusion in jurisdiction. Normally, if such a process is started at the Central Authority, the Central Authority informs the courts about the procedure. It is also important to stress that in several child abduction related cases, courts introduced interim measures to allow the other parent contact with the child until a final decision.

Regarding unlawfulness, the concept of habitual residence is regularly disputed by the parties before the courts. In Hungary, courts use the autonomous interpretation of habitual residence as set in EU law<sup>39</sup> which is very much different from the provisions of the local PIL Code, namely of Decree No 13 of 1979 on Private International Law.<sup>40</sup> In this regard, based on the guidelines provided by some relatively recent European Law cases,<sup>41</sup> the Supreme Court stressed that Hungary will not be the habitual residence of a child if the parents consider their work in Hungary as transitory and thus can retain their habitual residence in another EU member state<sup>42</sup>. The return of the child cannot be refused only because the child likes their parent who lives in Hungary more than the other parent.<sup>43</sup>

The return of the child was refused in a number of cases. At the first instance of the court system, 24 of 28 “incoming” requests of child abduction related procedures resulted in final decisions adopted between 2010 and 2012. Out of these 24 cases, 13 cases resulted in the court ordering that the child to be returned; 11 resulted in the court refusing to return the child to the other parent or country; in 3 cases the procedure was terminated and in the remaining case, the parties reached an agreement. At the second (appeal) level, out of 21 cases, the court ordered the return of the child in 10 cases, whilst the court refused the return in 11.<sup>44</sup> At both levels, the number of refusals seems to be relatively high. However, a careful reading of the cases thoroughly, it seems, in most of cases, the courts had a relatively valid reason to refuse the return.

#### 4.2. Main Reasons for Refusal

There were several, diverse reasons why courts refused to grant the return of the child.

If more than 12 months had passed since the unlawful removal, the courts nearly always checked whether the child was now settled in their new environment. If less than 12 months has passed, the courts do not refuse the return solely based on this argument. Even after 12 months, the time factor itself does not give enough ground for the refusal of return

<sup>39</sup> Stone (2010) 431.

<sup>40</sup> Which only requires longer physical in a country and does not take other factors into consideration. The text is as follows: Section 12 (1) a place of residence is a place where a person resides permanently or with the intention of settling; (2) a usual place of abode is a place where a person stays for a longer period of time without the intention of settling.

<sup>41</sup> Case C-497/10 PPU, Judgment of the Court (First Chamber) of 22 December 2010 (reference for a preliminary ruling from the Court of Appeal of England and Wales (Civil Division) OJ C 55, 19/02/2011, 17.

<sup>42</sup> See <<http://www.lb.hu/hu/elvhat/23182011-szamu-polgari-elvi-hatarozat>> accessed 1 July 2014.

<sup>43</sup> See <<http://www.lb.hu/hu/elvhat/23182011-szamu-polgari-elvi-hatarozat>> accessed 1 July 2014.

<sup>44</sup> Statistical data was taken from the Concluding Opinion of the Legal Practice Analyzing Group on the Return Processes of Children Illegally Brought to Hungary. [http://www.lb.hu/sites/default/files/joggyak/osszefoglalo\\_velemenye\\_2013\\_el\\_ii\\_g\\_1\\_14.pdf](http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemenye_2013_el_ii_g_1_14.pdf) accessed 8 July 2014.

e.g. in a case, the mother's claim that the children were "better off with her" were dismissed and the order was enforced, even though at least three years passed since the abduction.<sup>45</sup>

On the other hand, courts also take into consideration if a party gave permission for the other party to bring the child to Hungary and stay there for longer with them. This practice is based on Section 13(1)(a) Hague Child Abduction Convention 1980.

In a number of cases, the parent's situation was dubious. In one such case, it was assumed that the father could physically attack the mother and the mother did not have permission to stay in the foreign country so could not see the child. This seems to be a rather poor argument as the case was connected with Canada, so the mother had the right to visit her child relatively often as Hungarians are not required to ask for a visa concerning their travel to Canada (however, we cannot decide whether the father was really violent in this article).

In some other cases, the child needed special care, e.g., a 3-year old child having an hearing impairment and was blind. Consequently, they needed the care of the mother.

In a number of cases, the courts also took into consideration whether there is a chance that the foreign country would punish the party who unlawfully removed the child and by returning the child, the other parent could not keep contact with them. The author is very sceptical about this method and will expand the opinion later.

### **4.3. Moving to a Foreign Country – No More Doubt Between Legal And Illegal Actions**

The changes in the New Hungarian Civil Code resulted in a shift in the procedure necessary for moving abroad with children. Before 15 March 2014, according to several rules later repealed (Section 72/B of the former Code of Family Law, Section 33 of Ministry of Justice Decree 4 of 1987 and Section 22 of Government Decree 149 of 1997), there were two periods regarding the relocation of a child. If the stay was intended to be less than a year, parents only needed to agree upon the method of keeping contact with the child. The Public Guardianship Authority decided the case if parents could not agree. However, if the stay was intended to be for more than one year, the permission of the Public Guardianship Authority (the *gyámhatóság*) was necessary to take the child abroad. The Authority checked the new environment of the child based on the documents presented by the parents. This situation resulted in a high number of cases when the parents unintentionally but wrongfully took the child abroad because they simply did not think they needed permission to move abroad with their own child. However, Public Guardian Authorities did not start cases against the parents, because they were also concerned the absurd situation. Furthermore, this system was contrary to EU law, especially with respect to the free movement of persons.

As of 15 March 2014, with the introduction of the new Civil Code, the system has completely changed. Now, for a short period e.g., for holiday or a trip, a parent may take remove the child without the consent of the other party. If the child stays abroad for a longer period of time e.g., educational programmes, the agreement of both parents is necessary, similarly to the previous system. Parents who want to move abroad together with the child can do so as no permission is necessary from the Guardianship authority.

<sup>45</sup> Mezei v. Biró 23.P.500023/98/5 (27. 03. 1998, Central District Court of Budapest; First Instance); 50.Pkf.23.732/1998/2. 16. 06. 1998 (Capital Court as Appellate Court).

However, they must notify some authorities on their decision, including local notary (an official at the municipalities) that the child shall perform the obligatory schooling outside the country as well as the authorities about the change of their current address.

#### **4.4. Compensation for the Parent Left Behind and Other Civil Law Sanctions Including the Possibility Of Claiming Damages**

In a court procedure, the court decides the fees related to the process, including the fees of attorneys and/or the travel fees of the claimant. If the application is successful, the abductor is usually ordered to pay these fees, beside the fees of the procedure. Furthermore, in a guideline case, the Supreme Court found that the parent who prohibits the other parent to see their child must compensate the other parent for all extra costs.<sup>46</sup> In this case, the court emphasized damages must be compensated according to the general rules of private law (esp. Section 339 of the former Civil Code).

Claiming other damages can be more complex. The general rules on damages can be found in the Civil Code (see in Annex). Section 6:518 of the Civil Code states that all torts are prohibited by law. According to Section 6:519, any person who causes damage to another person wrongfully shall be liable for such damage. Thus, there are no special rules for this group of expenses. This could be the case, for example, in compensating for the psychological damage of the child/parent. Moreover, the new Civil Code amended the former rules in this regard as well (see Annex). In the future, non-pecuniary damages must only be compensated if rights relating to personality were breached e.g., in case of defamation.

It must also be mentioned that in the Hungarian legal system there is a chance to combine a criminal procedure and civil law claims. According to Section 54 of the Criminal Procedure Code,<sup>47</sup> someone may claim damages which occurred in connection with the crime committed.<sup>48</sup>

## **5. JUDICIAL AND NON-JUDICIAL TOOLS AVAILABLE TO THE PARTIES, INCLUDING MEDIATION**

### **5.1. Voluntary Mediation (Esp. In Court Procedures)**

Mediation is a relatively new institution in Hungary; it has only existed since 2003. Act III of 1952 on the civil procedure (hereinafter referred to as: “Code on Civil procedure”)<sup>49</sup> provides the right for judges to transmit a case to mediation if they believe it could be useful (see Annex).<sup>50</sup>

The main, independent legal source on mediation is Act CXVII of 2012 on mediation activity. Furthermore, an institutional background has also been created, with a list of mediators and an official mediator education. However, as the report of the Supreme Court

<sup>46</sup> Case 320/2000 of the Supreme Court, <<http://www.lb.hu/hu/elvhat/3202000-szamu-polgari-elvi-hatarozat>> accessed 8 July 2014.

<sup>47</sup> Act XIX of 1998 on Criminal Proceedings.

<sup>48</sup> Tahy-Kiss (2011) 160–163.

<sup>49</sup> For a Hungarian version of the law see <[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=95200003.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV)> accessed 6 July 2014. For the relevant provisions in English see Annex.

<sup>50</sup> For a proper Hungarian material on the background see Béky (2013) 15-30, also available at <<http://jesz.ajk.elte.hu/beky53.pdf>> accessed 12 July 2014.

states, at the time of writing, there is only one mediator with an international mediator degree working in Hungary, the others have received their education from Hungary, which is mainly focused on local matters. Nevertheless, a majority of mediators can speak foreign languages, which can be useful in the process.

Alongside the official list of mediators, one can also become a mediator by virtue of a different route; a number of judges or court clerks have been appointed as mediators.

Other laws also contain rules on mediators, e.g., the Guardianship Authorities may also start such a procedure, if there is a dispute between the parties/parents on the rules of interrelation with the child.

## 5.2. Compulsory Mediation: A Major Shift in Hungarian Law

As one of the most important rules in Hungarian family law, the new Civil Code introduced the concept of compulsory mediation. Two such proceedings are available.

Firstly, the court can order mediation. Section 4:172 of the Civil Code says that, in justified cases, the court may order the parents to submit to mediation in the interest of properly exercising parental supervision and to ensure their cooperation.

Secondly, the Guardian Authority may also commence such proceedings. Section 4:177 of the Civil Code states that the guardian authority may order the parent to use mediation.

## 5.3. Sensitive issues brought to the ECHR

The next section describes very important cases decided by ECHR, which highlight problems in the Hungarian system.

### *a) The Shaw Case (Case 6457/09)*<sup>51</sup>

Mr Shaw, an Irish citizen started a procedure in 2006 to have his daughter returned. His former wife came to Hungary with the girl and hid her for five years. Authorities repeatedly failed to assure the rights of the claimant. The mother refused to return the child because she claimed she was sexually harassed; a claim that was later found to be unfounded. In 2011, ECHR found that there has been a violation of Article 8 of the European Convention of Human Rights,<sup>52</sup> and Mr Shaw could not get proper access to justice as was necessary for him. As a result, the Hungarian state also had to pay EUR 20,000 in respect of non-pecuniary damage and EUR 12,000 for costs and expenses for Mr Shaw.

<sup>51</sup> See <[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["shaw"\],"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-105758"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)> accessed 12 July 2014.

<sup>52</sup> *European Convention of Human Rights, Article 8, Right to respect for private and family life*  
 1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*b) Németh Zoltán Case (Case 29436/05)*<sup>53</sup>

In a very similar local case, both parents were Hungarians who resided in Hungary. Even though there was no international element, the case shows unacceptable delays in legal processes and clearly shows the problems of enforcing judgments/decisions effectively and in a timely manner.

In the case, after a divorce, the parties agreed that the father may regularly visit his 7 year old son. However, later on, the mother refused the father's contact right and authorities were unable to grant him his rights. In the procedure, mother was fined several times for her actions but that was not a useful measure to enforce the father's rights. As a result, the father could not see his son between 1998 and 2005. In the case, the ECHR found that "notwithstanding the margin of appreciation enjoyed by the competent authorities, the non-enforcement of the applicant's right of access constituted a breach of his right to respect for his family life under Article 8 of the Convention", and ordered the Hungarian state to pay EUR 20,000 for non-pecuniary damage.

*c) Prizzia Case (Case 20255/12)*<sup>54</sup>

The ECHR found again in a case related to access rights that Hungarian authorities failed to enforce the law quickly and effectively; the foreign citizen father could not contact his child properly between 2004 and 2009. The mother returned the son to Hungary and the parties made an arrangement that she will allow the husband to keep contact with the child. However, later she hid the child from the father.

It is important to note that there were complex reasons for the delays in all of the abovementioned cases. In all of the cases there were several authorities/courts who did not strictly enforce the law; partly enforced it and/or did not have the right to take effective measures. Allowing the parent to hide the child and not performing a thorough search for the parent was a regular malfunction. Because of similar problems, in this case the Hungarian state was ordered to pay again EUR 12,500 in respect of non-pecuniary damage; and EUR 10,000 in respect of costs and expenses.

## 6. COMMENTARY ON THE NATIONAL SYSTEM

### 6.1. Main Criticism

Before starting a detailed criticism, it must be mentioned that most cases fortunately end without an enforcement procedure. Consequently, in most cases, the parties return the child or agree otherwise subsequent to the final judgment and do not start the enforcement procedure. There were only four exceptions before the courts during 2010-2012. The biggest problems are delays and the lack of proper enforcement during the processes e.g., the lack of enforcing someone's right to meet their child. Such problems may also occur because of the lack of authorities' power to properly enforce the rules.

<sup>53</sup> See <[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["németh"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-105104"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)> accessed 12 July 2014.

<sup>54</sup> See <[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["prizzia"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-120951"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)> accessed 12 July 2014.

## 6.2. Delays

As shown previously, there are delays in court procedures/enforcement within the Hungarian system. The Report of the Supreme Court shows that most of the courts were delayed with the holding of the first public hearing. Between 2010 and 2012, 6 out of 24 cases at the first instance level were decided with a delay i.e., not within the six week period laid down by the international rules in the Brussels II-bis Regulation and the Hague Child Abduction Convention 1980. In a number of cases, the regular summer holiday of judges was the reason for the delay. This problem was resolved after 2011 and now judges at the responsible court (PKKB) are always on duty to ensure conformity with the strict deadlines.

The problems are more severe at the level of second instance cases. In such cases, the Code on Civil procedure does not contain special procedural rules, which automatically results into a delay of judgments. The reason is that in case of an appeal, applicants have 15 days to file the necessary documents. Thus, the courts at this level cannot adhere to the 6-week deadline, because the time remaining is too short for courts to adopt judgments.

Furthermore, in a number of cases, the courts found they had no jurisdiction to decide in access rights in abduction cases; a practice which was subsequently found to be unfounded and also highly problematic regarding the country's international obligations (the Shaw case).

## 6.3. Enforcement Problems

The report of the Supreme Court highlights that there are some recurring problems in the system of handling child abduction cases in Hungary, and especially in enforcing rights of parties/children.

According to the earlier law, Guardianship Authorities had to make a home study before allowing the foreign authorities access to the child even if this study was unnecessary. As of 2012, this has now been amended

The return of the child falls within the jurisdiction of the authority of the Guardianship Authority responsible at the child's habitual residence. The choice of the responsible Authority delayed the procedure and has subsequently been changed.

The authorities including the police (which helps to enforce the claimant's rights and child support organizations do not like to use coercive force in order to ensure the return of a child. These bodies do not believe child abduction cases are not criminal issues and they state that they do not have the necessary power to force the woman to stay, e.g., in a city or village. This resulted into situations in which judgments cannot be enforced properly because all the authorities were afraid to proceed and introduce into cases strongly and effectively.

In certain instances the applicable rules are contradictory. For example, in theory, in certain cases the police could issue an international arrest warrant. However, in a majority of cases, the police do not have the right to detain the child or their parent in a child abduction case; the domestic rules on enforcement do not grant the police enough power.

In several instances, the abducting parent moved from Hungary to another country. However, Hungarian authorities could not issue a European arrest warrant, because removal of a minor is generally subject to a prison sentence of less than one year, and a European arrest warrant can only be issued for more serious crimes.

Lower-level authorities were also highly unsatisfied with the system of returning the child from abroad. They claim other, richer European countries do not return children

because they check the financial background of the parent who lives in their country, and if they earn substantially more than the other party in Hungary (a typical scenario in Europe), several Western-European authorities claim the child has better circumstances in their country.

Lower level authorities felt that most of the related authorities and police are not really active in enforcing the law but only in maintaining a defensive approach, i.e., attempting not to make mistakes. However, in several instances this attitude is not proactive enough to enforce the letter of the law.

Furthermore, in several instances the rules are unclear, even for lawyers and practitioners. The rules of the Criminal Code are poorly drafted and imprecise, even for practitioners. A good example for this is the provision on the changing of the family status. According to the letter of the text, the elements of this crime are not clear. Even local lawyers are unaware in certain instances what is to be considered as a crime and which legal action is regarded as proper.

Practical guidelines cannot be used for the new Civil Code leaving several questions unanswered. For example, it is not currently known what is a “long term” when a parent must ask for the other’s consent to take the child abroad? Is half a year considered to be long enough? What about three months? There is no yet a definite court decisions on this field.

#### **6.4. On-going reforms: the Constitutional Complaint in Family Matters**

Beside the abovementioned Strasburg decisions, the practice of the Hungarian Constitutional Court also needs some attention. Beside a new Civil and Penal Code, a new Constitution (the Fundamental Law, hereinafter referred to as “Constitution”)<sup>55</sup> was adopted in Hungary. The new Constitution abolished the former available *actio popularis* in Hungary. According to the former rules, everybody had the right to turn to the Constitutional Court if they found an existing constitutional problem in the legal system.

In the new system, only a certain group including the Government, Ombudsman, President of the Supreme Court, may turn to the Constitutional Court after the adoption of a new law by the Hungarian Parliament. However a new institution, the constitutional complaint, was introduced, which can be used in an individual case basis. This complaint was widely discussed (both in terms of negative criticism and positive reinforcement) in Hungary.<sup>56</sup> The change from *actio popularis* to constitutional complaint was a great mistake and a serious back-step in democratic rights. It resulted in a situation in which the Constitutional Court does not adjudicate upon the majority of questions, because it states that these complaints either do not contain constitutional issues or the applicants are not personally affected, even though in certain cases any reasonable person could tell these statements are invalidated.

<sup>55</sup> The law has no number, unlike other laws adopted by the Parliament. The Constitution was harshly criticized in domestic and international literature for using partly or completely antidemocratic solutions. Moreover, the Government also added provisions of laws into the constitution which were earlier abolished by the Constitutional Court because they were found to be unconstitutional. For its background see Jakab-Sonnevend (2013), Tóth (2012) Majtényi (2012), Csink-Schanda-Varga Zs. (2011) and Blokker (2014).

<sup>56</sup> Only to mention a few of the articles, see Köblös (2012), Naszladi (2012), Tordai (2012), Somody-Vissy (2012), Vissy (2012), and Gárdos-Orosz (2013).

The same problem also appears to be present in family matters. In theory, a constitutional complaint could be thought of as a useful and effective tool to protect someone's right to their child, especially if other courts/authorities do not fulfil their duties or violate fundamental rights. However, A PKKB court judge (PKKB decides child abduction cases) acting as an author<sup>57</sup>, highlights the unsteadiness of this institution can also be seen in family matters, so this institution seems to work in a highly problematic way in defending family rights. Thus, complaints are rejected because of dubious grounds, while similar ones are accepted and investigated.

#### **6.5. When Removal of a Child is not considered to be Abduction but the exercise of Rights of Free Movement and to Family Life**

The basic assumption in Hungary, in line with international rules, is that if someone removes a child from the country of their residual residence, the act is considered to be child abduction. There are no exceptions in this case; no law grants a parent the right to act neither against international rules nor against Brussels II-bis Regulation. The Hungarian laws neither permit staying abroad for a long period of time without the consent of the other parent, nor do they allow to move to another country without the permission of the other parent (for the general background see 3.6.3. Moving to a Foreign Country). According to Section 4:152 (5) of the new Civil Code, "the agreement of both parents is required for the child's residence abroad for any extended period of time for the purpose of studies or work, or other similar reason, either by themselves or together with one of the parents." The Act also expresses that "parental authorization is required for the child's moving to another country" (subsection (6) thereof).

Thus, the clue of such questions is not the legal background, but in practice, courts and authorities may find excuses why they are not forced to return the child especially when the child has been out of the country for twelve months. However, even in most of such cases, courts/authorities accept that parental child abduction did occur. However, they refuse to return the child due to certain circumstances.

#### **6.6. Justifications for refusing to return a child relocated to Hungary: Effectiveness of the Return Mechanism vs. "Best Interests of the Child"**

Generally, Hungarian courts including the Supreme Court which has openly expressed this view,<sup>58</sup> accept that the best interest of the child is to recover the parental responsibility as quickly as possible. In this framework, it is the child's best interest to return them to the country of their habitual residence.

As mentioned before, the question whether courts should check the child's broader circumstances is only considered once twelve months have passed as the child is in a new country of residence. Prior to the completion of twelve months, courts rarely examine merits and accept the return as the main interest. There were several factors that are taken into consideration but the refusal to return is generally considered as an exception even if its rate is relatively high. All of these factors are more-or-less related to the interests of the

<sup>57</sup> Kozák (2013) 274.

<sup>58</sup> EBH 2002.634, for a Hungarian version see <<http://www.kuria-birosag.hu/hu/elvhat/6342002-zsamu-polgari-elvi-hatarozat>> accessed 1 July 2014.

child. On the other hand, they are not the typical factors raised in proceedings dealing with the determination of the place of residence of the child; the courts did not move into that direction. The following points are these factors.

#### *6.6.1. The child is already settled in their new environment*

In some cases, the return was refused because the child was already settled in their new environment. In such cases, the environment must be investigated and a psychological report must be obtained, in conformity with Article 12 of Hague Convention on Child Abduction). However, the simple fact that a child is already settled in their new environment will not automatically be sufficient for the courts to refuse the return even if the change in the environment may cause complications for the child. Thus, this reason is never used solely as a ground for denial of return.

#### *6.6.2. One parent had no earlier contact with the child*

In one case, the parent who seeking the return of the child had previously not maintained contact with the child and did not even have parental responsibility. On the other hand, theoretically speaking, if the other parent prohibited them to contact the child e.g. the location of child was unknown to him, the Hungarian authorities will return the child if is necessary, because not maintaining contact was not their fault.

#### *6.6.3. The interpretation of permission to leave the jurisdiction*

If a parent is granted permission to travel abroad, the fact that an approval was received for a shorter or a longer period of time is in and of itself not considered to be permission to emigrate. If a parent did not grant permission to move somewhere, allowing a simple trip cannot be considered as a permission to move away and leave a country permanently.

#### *6.6.4. Endangering the child*

In a number of cases, the return would cause the child damage or would be otherwise unbearable. However, interestingly, Hungarian courts rarely use this exception. Their main point is that they are unable to check whether the issues raised by a party are valid. In a majority of cases, parents tell courts that the other parent endangers the child with their attitude. In some of the cases, parents even state that the other parent has sexually harassed or even abused the child. However, especially if the other party is in another country, courts neither have the means nor the power to check the validity of such claims.

#### *6.6.5. Proper Foreign Measures Granted*

In connection with the danger a child must face, Brussels II-bis regulation does not allow the refusal of the return of the child if it is proven that foreign authorities could professionally maintain the protection of the child. In this regard, it is the policy of Hungarian authorities to ask foreign authorities what they would do if the child would be in danger; how they would manage to help them and what measures they would take if a parent would act against their interests. On the other hand, the existence of available proper measures is not accepted automatically, they are checked on a case-by-case basis, also in connection with EU Member States.

#### *6.6.6. Consideration of the child's intention to stay*

The court may support a request from the child to the judge to allow them to stay. This is in conformity with international standards. Even in such scenarios, all the relevant details must be verified in order to reach a proper judgment. In order to make such a statement, the child must be sufficiently mature in order to do so, which is obviously different in every situation.

#### *6.6.7. Criminal Procedures in a Foreign Country For Child Abduction*

The courts may also check whether a criminal procedure would be or was started against the parent conducting abduction abroad. In such cases, there is a high chance that the returned child would not keep contact with the parent who abducted them to Hungary. Consequently, if the foreign country has criminal sanctions against the parent who removed the child to Hungary, there is a chance that the child will not be returned because doing so would prohibit one parent from maintaining contact with the child.

The conformity of this interpretation to the rules laid down by domestic judges could be dubious with the Conventions or Brussesles II-bis. This is especially interesting because Hungary also has several harsh laws against those who commit child-related crimes.

#### *6.6.8. On-going projects of future legislation on children*

Beside the reforms mentioned above, it should also be highlighted that in order to align with Council of Europe guidelines<sup>59</sup> the Hungarian Government has started introduced a child friendly justice programme. In the framework of this programme, several special rooms were created at the courts and police stations that look like children's own rooms at home. At the courts, one room was suited for younger children and another for older children. The friendlier environment could make a process and especially an appearance at the court less harmful for children as they do not have to make their testimonies in a rigid court room.

For the future, it seems no more general reforms will take place but the Government plans to modify the laws on private procedure, which may also have some effect on the enforcement of judgments as well. However, at present time no deeper works are presented on the content of these changes, only a practice group was created to revise the present rules. The concept of the changes will be adopted by 2015. According to the plans, the proposal should be ready by 2016 and the Parliament would adopt the law in 2017.

## **7. CONCLUDING REMARKS**

### **7.1. Recommendations on Private International Law Issues**

Regarding the rules on private international law and international procedural law, it would be necessary for the EU legislature to create clear rules on the concept of habitual residence

<sup>59</sup> Guidelines on child friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. Council of Europe Publishing 2011. Available in different translations at <[http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable\\_en.asp](http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable_en.asp)> accessed 6 July 2014.

and to codify them in all of the related EU instruments. This approach could make it clear what the term habitual residence means; how it can be determined and what circumstances exclude its determination. At present time, apart from the aforementioned new cases, there are only several judicial decisions on this topic.<sup>60</sup> However, it is a mistake to force practitioners to check the complete case law in such an important question and it would be important to unify the application of this term in the Hague Conventions as well.

Furthermore, according to the present rules which are based on the practice as set by the Borrás report,<sup>61</sup> it is generally accepted that a person may only have one habitual residence. However, in a globalized world, this can be misleading as any person can have two “centres of life” and move between two countries.<sup>62</sup> EU law at present time does not give any help how to solve such problems.

In the field of child abduction, it is also possible that the one-year deadline for a quick return procedure as set in Brussels II-bis Regulation should be extended. During this deadline, courts may not check the deeper merits of the case, but have to act automatically in connection with the return of the child. However, one year passes relatively quickly and parents can very easily play for time. If they hide the child for one year, which is relatively easy, they can use different arguments later on to convince the court why they do not want the return of the child, and the process moves into a pseudo-child-allocation trial.

At the EU level, it would be important to highlight that no country’s authority should use the realistic, but it is still immoral argument that a parent in a wealthier country earns more as in a poorer country and as a result, the welfare of the child is better granted in the aforementioned country. As mentioned before, local authorities in Hungary regularly receive this claim from other European countries and it is complicated to reply to such statements.

## 7.2. Recommendations on Substantive Issues

Most of the relevant international and European laws can be found in conventions/laws on private international law or international procedural law. This causes some problems in substantive law because the countries do not concentrate on this field. For example, the rules concerning the travel of a child to a foreign country are different from country to country, and (as can be seen in the case of Hungary, they can be different even during the course of time. It would be easier for everybody to have unified rules on illegal removal and

<sup>60</sup> Case 13/73. *Anciens Etablissements D. Angenieux fils aîné et Caisse primaire centrale d’assurance maladie de la région parisienne v Willy Hakenberg*. ECR 1973, 00935; Case 76/76. *Silvana Di Paolo v Office national de l’emploi*. ECR 1977, 00315; Case 284/87. *Oskar Schäflein v Commission of the European Communities*. ECR 1988, 04475; Case C-216/89. *Reibold v Bundesanstalt für Arbeit*. ECR 1990, I-04163; Case C-297/89. *Rigsadvokaten v Nicolai Christian Ryborg*. ECR 1991 I-01943; Case C-102/91. *Doris Knoch v Bundesanstalt für Arbeit*. ECR 1992, I-04341; Case C-452/93. *Pedro Magdalena Fernández v az European Commission*. EBHT 1994, I-04295; Case C-90/97. *Robin Swaddling v Adjudication Officer*. ECR 1999, I-01075; Case C-262/99. *Paraskevas Louloudakis v Elliniko Dimosio*. EBHT 2001, I-05547. Cf. *Dilger* (2004)137-151; *Richez-Pons*, (2005) 355-360; *Rogerson* (2000) 86-107; *Kengyel et al.* (2006) 531-532.

<sup>61</sup> Habitual residence “*the place, where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence.*” Explanatory Report of the Convention on Jurisdiction and Recognition and Enforcement of Judgements in Matrimonial matters. OJ C 221, 1998.07.16, 27-65.

<sup>62</sup> See eg. *Marinos v Marinos* [2007] EWHC 2047 (Fam) from the UK.

parents' rights regarding such journeys and travels. Moreover, there is a chance it could be necessary to implement certain rules on such basic issues into existing laws/agreements as well.

The work of local authorities would be greatly enhanced by receiving clear guidelines: what rights they do have with regard to a parental child abductor? Are they within their rights to detain the child? Do they have any rights towards the parent? When is it necessary to use the force of police to enforce a decision?

It would also be necessary to clear the criminal law background of such issues e.g. what crime did the parent commit? It is somewhat strange that the same act is interpreted differently in different European countries, even though there are several Conventions for such problems. If this goal cannot be achieved, it would still be interesting to create a system such as the European arrest warrant for abducted children and abducting parents.

Interestingly, several authorities in Hungary and the Hungarian Supreme Court's report also highlighted that a performance could be improved if an independent actor, such as the police would have the power to strictly enforce the laws.

## LITERATURE

- Blokker, P., *New Democracies in Crisis?* (Rutledge 2014)
- Csink, L., B. Schanda and A. Zs.Varga (eds) *The Basic Law of Hungary: A First Commentary* (Clarus Press 2011)
- Dilger, J., *Die Regelungen zur internationalen Zuständigkeit in Ehesachen in der Verordnung (EG) Nr. 2201/2003* (Mohr Siebeck 2004)
- Dóczy, M., 'The Current Laws Regulating Marital and Quasi-Marital Relationships in Hungary' in Lynn D. Wardle and A. Scott Loveless (eds) *Marriage and Quasi-Marital Relationships in Central and Eastern Europe: From the 2006 Vienna Colloquium on Marriage* (BYU 2008), 117–131.
- Gárdos-Orosz, F., 'A bírói döntések ellen benyújtott alkotmányjogi panaszok befogadhatósága II. Az Abtv. 27. §-a' [The Acceptance of Constitutional Complaints Filed Against Court Decisions] (2013) 1 Alkotmánybírósági Szemle 82–89.
- Kengyel, M., Harsági, V., *Európai polgári eljárásjog* [European Civil Procedural Law] (Osiris 2006)
- Kozák, H., 'Utolsó remény?! Az alkotmányjogi panasz esetleges jövője a jogellenesen elvitt gyermek visszavitele iránti eljárásokban [The Last Hope: The Future of Constitutional Complaint in Processes on Returning of Abducted Children]' (2013) 3 THEMIS 255–277.
- Köblös, A., 'A „régí típusú” alkotmányjogi panasz az új Abtv.-ben [Old Style Constitutional Complaint in The New Constitution]' (2012) 1 Alkotmánybírósági Szemle 80–88.
- Majtényi, B., 'Legislative Stupidities in the New Hungarian Constitution' (2012) 1 Pace diritti umani – Peace Human Rights, 105–110.
- Naszladi, G., 'Az alkotmányjogi panasz első fél éve [The first half-year of constitutional complaint]' (2012) 4 Közjogi Szemle 38–44.
- Richez-Pons, A., 'Habitual Residence Considered as a European Harmonisation Factor in Family Law (Regarding Regulation Brussels II-bis)' in K Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia 2005) 353–361.
- Rogerson, P., 'Habitual Residence: The New Domicile?' (2000) 49 ICLQ 86–107.
- Somody, B. and Vissy, B., 'Citizens' Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint' (2012) *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica* 95–108.
- Stone, P., *Private International Law* (Edward Elgar Publishing 2010)
- Tahy-Kiss, K., 'Bírósági rendelkezés a – büntetőeljárásban érvényesített – polgári jogi igényről' [Court Decision on Private Claims in Criminal Procedures] (2011) 2 *Iustum Aequum Salutare* 159–180.

- Tordai, Cs., 'Az első év tapasztalatairól [On The Experience Of The First Year]' (2012) 2 Alkotmánybírósági Szemle 131–133.
- Tóth, G. A., (ed) *Constitution for a Disunited Nation – On Hungary's 2011 Fundamental Law* (CEU Press 2012)
- Vissy, B., 'Az individuális alapjogvédelem kilátásai az alkotmánybíráskodásban. Merre mutat az alkotmányjogi panasz iránytűje? [The Future Of Individual Defence Of Fundamental Rights. What Shall Be The Future Of Constitutional Complaint?]' (2012) 2 Magyar Közigazgatás 28–36.