

**THE INTERNATIONAL CHILD ABDUCTION DATABASE (INCADAT)
CORRESPONDENT MEETING**

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**LA REUNION DES CORRESPONDANTS
DE LA BASE DE DONNÉES SUR L'ENLÈVEMENT INTERNATIONAL D'ENFANTS
(INCADAT)**

**REPORT AND RECOMMENDATIONS
RAPPORT ET RECOMMANDATIONS**

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PARTICIPANTS AND FOCUS OF THE CORRESPONDENT MEETING

1. Since the *Convention on the Civil Aspects of International Child Abduction* entered into effect, over 1500 decisions based upon, or referring to, the Convention have been reported. In a significant number of those decisions, the judge or authority applied the Convention with little access to important decisions from other parts of the world.
2. As with any private international law treaty it is essential that the Convention is subject to a consistent interpretation throughout its 70 Contracting States. As the geographical scope of the Convention expands to include States on every continent, including Africa, Central Asia and South America, such interpretation assumes a role of even greater importance.
3. To facilitate the goal of consistent interpretation, the Hague Conference has set up the International Child Abduction Database (INCADAT), a database of significant decisions concerning the Convention. The accessibility of international decisions is of value not only to judges and Central Authorities but to legal practitioners, researchers and others. It also provides a unique opportunity to promote mutual understanding and best practice, which is absolutely essential for the effective operation of this international instrument.
4. The INCADAT Correspondent Meeting was convened in order to strengthen the network of individuals contributing to the development of the database; to review the progress of INCADAT; to discuss any problems encountered; and to consider any possible improvements in the database. The overall objective of the meeting was to widen the coverage of INCADAT and to ensure consistency and quality in the reporting of cases.
5. The INCADAT Correspondent Meeting was made possible by a special grant from the Ministry of Justice of the Netherlands. The Permanent Bureau of the Hague Conference gratefully acknowledges the support and sponsorship of INCADAT by the Ministry of Justice.
6. The meeting was opened by Mr Hans van Loon, Secretary General of the Hague Conference on Private International Law. Professor William Duncan, Deputy Secretary General, discussed the role of INCADAT within the context of supporting the 1980 Convention. In this regard, INCADAT is seen as an affirmative step which will lend support to and improve the operation of the Convention. Ms Marion Ely, Legal Officer, provided a brief introduction and overview of INCADAT.

THE NEED FOR CONSISTENT INTERPRETATION: A JUDICIAL PERSPECTIVE

7. The Honourable Dr Peter Nygh (Australia) presented an exposé on the need for consistent interpretation of the 1980 Convention. He focused on several recent interesting cases which illustrate that courts within the same jurisdiction may not always interpret the Convention consistently.

COMMON LAW AND CIVIL LAW LEGAL TRADITIONS

8. Mlle Aude Fiorini (Official INCADAT Translator) presented 'Common Law and Civil Law Systems: The importance of preparing summaries understandable to lawyers from all legal traditions'. (See Annex 1). She emphasised the importance that summaries of judicial decisions be uniform in style, form and substance to facilitate their use and comprehension by all INCADAT users. To this end, she discussed the linguistic and analytical aspects of the summaries that currently pose difficulties for users from the civil law legal traditions.

DISCUSSION ON THE MODIFICATION AND PROMOTION OF INCADAT

9. There was general endorsement of the project and of the role it can play in furthering the consistent interpretation of the Convention. Many useful suggestions were made which will improve the accuracy of the summaries and ensure that the database reflects as best as possible the different legal traditions of the diverse range of Contracting States.
10. With regard to improvements or modifications of the database, various suggestions were made to promote the use of INCADAT at a judicial level. In this regard, it was suggested that it would be useful to identify the numerous decisions or statutes in the Contracting States holding that it is appropriate for a court to look to foreign case law.¹

Access to INCADAT

11. It was noted that in many States the courts with jurisdiction for Hague Convention applications did not have internet access. It was acknowledged that the Central Authorities in such States would have a role to play in providing relevant information from INCADAT to such courts.
12. For Central Authorities with internet access, an additional role could include providing a link on their web sites to the database as well as providing practical information with regard to Hague cases. It was further suggested that INCADAT be promoted at the law school level.
13. A debate ensued as to the possibility of the Permanent Bureau publishing the content of the database in hard copy or on a CD-ROM. Such mediums, however, would not provide the search capabilities that are central to INCADAT.

Official languages of INCADAT

14. The database provides information in English and French. It was noted that the translation of the contents of the database into Spanish would be an extremely valuable way in which to increase the global use of INCADAT. Subject to additional funding for the project, Spanish translation is indeed a desired next step in the development of INCADAT.

¹ It was noted that a decision of the United States Supreme Court held that considerable weight should be given to the well reasoned opinions of other Contracting States. *Air France v. Saks*, 470 U.S. 392, 84 L. ED 2d 289, 105 S. Ct. 1338 (1985).

- Need for comprehensiveness*
15. The usefulness of INCADAT as a resource to illustrate how the Convention operates in the various Contracting States was emphasised. It is important that case law from all States be represented on INCADAT to show how the Convention is being interpreted in each State and to help develop mutual confidence among the judges in all Contracting States. If judges in each country can see their own judgments on INCADAT, they will be more willing to look at case law from other jurisdictions.
- Quality control*
16. With regard to the issue of the 'quality control' of summaries, it was reiterated that the Permanent Bureau would retain editorial control of the content of the database. Due to language constraints, the INCADAT Team will not be able to read each summary against the full text of the decision in its original language. Consequently it will be necessary to have an INCADAT Correspondent to rely upon in each country. While useful, it is not imperative that a translated version (into English or French) of the decision be sent with each summary when an experienced INCADAT Correspondent has constructed the summary.

A PRACTICAL GUIDE TO PREPARING CASE SUMMARIES

17. Mr Peter McElevy (Legal Consultant to INCADAT) presented 'A Practical Guide to Preparing Case Summaries'. (See Annex 2).

Selecting cases

18. With regard to the issue of judgments which are out-of-line with general trends, concern was expressed that their inclusion might give rise to distortion. Consensus emerged that such cases should be included on INCADAT if they came from an appellate court. An explanation could be made in the comments section of the summary that other courts have applied a contrasting view. Indeed this has already been done in a number of cases.
19. Professor Duncan (Deputy Secretary General) stated that the purpose of INCADAT is not to indicate a general trend but rather legal developments in particular jurisdictions. The upcoming statistical database on the Child Abduction Convention (INCASTAT) would provide annual statistics and an accurate picture as to the number and percentage of returns made on a country-by-country basis.

Constructing the summary

- Articles considered / relied on*
20. The different concerns of the civil law and the common law legal traditions were apparent in the debate concerning the fields 'articles considered' and 'articles relied on'. It was stated that in common law systems, the *obiter dicta* surrounding the 'articles considered' field provided important legal reasoning. In civil law systems, however, this field is not necessary. It was concluded that as both common and civil law systems are represented on INCADAT, the distinction represented by the two fields would remain. It was suggested that an explanation could be included on the database to clarify the distinction.

Order

21. A brief explanation was given as to the system of undertakings in various jurisdictions. Several changes were suggested with regard to the database 'order' fields (return ordered with undertakings *given*; return ordered with *conditions* imposed).

Facts

22. The summaries are a gateway mechanism to enable users of INCADAT to decide if they would like to access the full version of the judicial decision. To this end, it was reiterated that the 'facts' section should be short and include only relevant objective facts. Such a scheme would alleviate the concern that this section could be used to justify the final decision. It was agreed that the nationality of the parents may be identified if it were deemed to be relevant.

Judges

23. Participants questioned the appropriateness of the field indicating the name of the judge hearing the case. In some States it is accepted practice for judges to be identified, while in other States it is not. Consensus emerged that this field would remain optional.

Legal basis

24. Attention was drawn to the importance of referring to subsequent case commentaries when compiling summaries of decisions from certain Contracting States of the civil law legal tradition. It was suggested that a separate heading under the 'legal basis' section could be created for such doctrine. While the 'comments' section could be extended for civil law decisions, concern was expressed that the importance of the doctrine might be diminished if it were added under the comments section. It was emphasised that such doctrine often has the same standing in the civil law tradition as a judgment holds in common law.
25. It was concluded that summaries would be done on a country-by-country basis and a case-by-case basis. Some doctrine is clear enough to be summarised and it was suggested that in such cases summaries could be created of both the decision and the doctrine. At the minimum, the summary should reference the doctrine.

Cases and authorities referred to

26. It was suggested that it may be useful to include a glossary of terms and legal journals (utilised in the official cite of the case) for each jurisdiction.

Updating

27. Attention was drawn to the importance of the hierarchy of decisions and the necessity of updating existing summaries with subsequent legal developments. Such updates may be made in the comments section and will include further developments in the case in question as well as reference to recent decisions in respect of a similar legal issue.

28. The importance of posting recent decisions on INCADAT as soon as possible was underscored. It was suggested that a link on the introductory homepage of INCADAT be created, highlighting new summaries on INCADAT uploaded, for instance, in the last 60 days.

FUTURE STEPS AND THE ROLE OF THE INCADAT CORRESPONDENTS

29. It was noted that the Central Authorities assumed very diverse roles in the allocation of responsibilities throughout the different Contracting States. Several Central Authorities were not in attendance at the meeting due to various reasons including large travelling distances, religious holidays and their extensive workload. Where academics assumed the role of national INCADAT Correspondent, it was stressed that co-operation should be promoted between the Central Authority and the INCADAT Correspondent in the exchange of cases and information. It was suggested that if a Central Authority was unable to provide the Permanent Bureau with summaries, it would be valuable if they could provide the Permanent Bureau with the full judicial decisions.
30. In light of the substantial number of suggestions, modification of the database will proceed to more adequately encompass case law from jurisdictions of the civil law legal tradition. Following such changes, it will be possible for new summaries to be added directly onto the database by Correspondents. Until further notice, however, summaries should be sent by e-mail attachment to Ms Marion Ely at the Permanent Bureau. Inquiries will be made as to the possibility of establishing a Correspondent list serve/message board. Absent requests to the contrary, the names of INCADAT Correspondents and contributors will be added to the homepage of the database.

**COMMON LAW AND CIVIL LAW SYSTEMS: THE IMPORTANCE OF PREPARING SUMMARIES
UNDERSTANDABLE TO LAWYERS FROM ALL LEGAL TRADITIONS:**

In the absence of international jurisdiction or a supra-national court to lay down on a regular basis authoritative rulings binding on State courts, international instruments like the *Convention on the Civil Aspects of International Child Abduction* pose considerable challenges in terms of their consistent interpretation. A reasonably consistent interpretation is essential if the instrument is to operate effectively throughout its 70 Contracting States.

In this context, INCADAT has been seen as an important source of information contributing to greater consistency in the interpretation of the Convention and to the improvement of practices under this instrument. It is equally important that the summaries themselves be uniform in style, form and substance, so that they can be accessible and immediately understandable to all users.

a. Linguistic aspects of the summaries

In the promotion of INCADAT, it is important to bear in mind that the INCADAT summaries will be read and used by lawyers from all legal traditions and by people whose mother tongue will not necessarily be one of the two official languages of the database. In order for the summaries to be understandable for all potential users of INCADAT, the summaries should be constructed in the same manner. The framework used for the presentation of the fields (especially the fields 'facts', 'order' and 'ruling') should always be followed. This will not only facilitate the linguistic understanding of the summaries, but will also enable the quick identification of the substantial differences of each case.

The terminology utilised in the summaries is an important issue. The summaries should be written in precise terms to enable the summary to be useful and understood by jurists from the requested country as well as foreign lawyers. It does not follow, for example, that the summaries should mention the exact names of all administrative or social bodies taking measures for the child. These will, if necessary, be found in the full text of the case. The use of generic terms should always prevail. The summaries should not be the mere transcription of the text of the judgment, but rather should have an explanatory component. For instance, one should refrain from naming the Central Authority involved in the case.

For example, instead of referring to the 'Lord Chancellor's Department', it would be more readily comprehensible if one merely said 'the English Central Authority'.

The same applies to the procedural aspects of a case. As comparative lawyers have indicated, the general assumption that, in all legal systems similar needs are met in ways that are equivalent, is hard to maintain when one turns to procedural law. Common law and

civil law traditions have developed quite differently: the preparation and progress of a claim, the way witnesses and experts are selected and examined, the manner in which the different tasks and functions are allocated to the court, the parties and the lawyers in different phases vary greatly from a system to another. These differences are certainly more accurate if we compare the Continental and the Anglo-American systems, but can be found at a different level of the scale even in procedural orders of the same tradition.

These differences cannot be overlooked in the construction of the summaries. The peculiarities of a given system should not be emphasised in the summaries; the procedure should be formulated so as to be accessible to all users of INCADAT. Here again the use of generic concepts should prevail. The characteristics can then, if necessary, be mentioned in brackets.

For example, when courts are referred to in the summaries, it should be specified if they are a court of first instance or a court of appeal. An extreme illustration of this need is given by the 'Supreme Court of New York' which is indeed a court of first instance. The name may be confusing for foreign readers, and this confusion may be magnified through the translation.

If more precision or information is needed to explain the case, it is suggested to give more details in the 'Comments' or 'Procedural matters' fields.

An example for this is the summary of *Re Burns* (INCADAT cite: HC/E/USf 136) where the operation of the full faith and credit clause in the United States not only has been identified but also explained in respect of federal and state court judgments under the Convention.

The same explanation should be given when the case reveals that some substantial concepts have been used that have no equivalent in other systems. Here again, clarification should be given in the text of the summary.

Example: In *Re S.*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a,¹ reference was made to the rabbinical concept of 'Moredet'. Such a concept requires some explanation. 'Moredet' is a status under Jewish religious law indicating that someone is a 'rebellious wife', which results in the absolute negation of her rights, not only in relation to the child, but also within the Israeli community. This clarification has been rightly inserted in the summary of the decision.

In constructing the summaries, attention should be given to the languages in which the summaries will be made available. Whichever language the summary will be formulated in, it will have to be translated into the second official language of the database. To date, the large majority of summaries have been written in English and subsequently translated into French.

¹ INCADAT cite: HC/E/ES 244 [21/04/1997; Audiencia Provincial Barcelona, Sección 1a (Spain); Appellate Court].

When a foreign judgment has not been translated from its original language before the construction of the summary in English, it seems important and useful to keep the original terms, in brackets, before inserting an English translation. This will avoid mistakes or inaccuracies in the later translation into French.

b. Analytical aspects

Given the extensive amount of case law on the database, INCADAT currently seems more adapted to decisions emanating from the common law systems. This results from the type and the form of the decisions as well as the role played by courts and the impact of judge-made law in these jurisdictions.

INCADAT and consistent interpretation

The need for consistent interpretation of the 1980 Convention is certainly general. Foreign case law can appear as an aid to interpretation. The consultation of foreign case law remains easier and better accepted in systems allowing the courts a power to create the law. INCADAT can greatly contribute to this welcomed tendency. Even if some jurisdictions, in the common law world, have been reluctant to engage in an analysis of foreign decisions, it is remarkable that other jurisdictions of common law systems such as Australia, New Zealand, the United States and Ireland have from the outset made extensive use of foreign case law. This situation is in marked contrast to the position of continental systems.

In many civil law countries, an extreme doctrine of the separation of powers has been followed. This separation has restricted to a minimum the judges' scope for creativity and allowed for the resolution of disputes by mere acts of subsumption. The binding force of precedent is not recognised and civil law judges will not necessarily refer to previous decisions. In these States, the influence of national case law is purely indirect. The influence of foreign case law will be even less explicit. In that regard, the role of the database on consistent interpretation can only be indirect in continental countries.

Conversely, it might be difficult for common law jurisdictions to refer to civil law decisions because of the form and the traditional content of the latter.

The form of the summaries

The fields of the summaries are certainly well adapted to the type of decisions rendered in jurisdictions of the common law world. At the moment, civil law decisions have to be forced into a scheme which is rather inadequate for them. An extreme example can be found in the French supreme court decisions. These judgments are traditionally formulated in a very succinct way and their motivation is almost entirely formal. The understanding of the decisions is very difficult because of their brevity. The lack of details in the case leads the reader who wants to understand the substantial part of the case to make use of the conclusions and reports written during the preparation of the judgments, or to the text of the decisions of the previous instances which yet are not always available or published.

As a result, the legal basis for the decision is always very short. The corresponding field in the summaries is often rather vague. The 'Comments' field appears to be the more useful section for the reader and the user of the database, which in turn should oblige the person responsible for the construction of the summary not to concentrate as much on the decision itself as on the articles or comments made in the literature, the conclusions and reports or the decisions of the inferior courts having dealt with the case.

The lack of information in the text of the decision is reinforced by the fact that the French supreme court – like the Italian or Belgian and, to a smaller extent, the German court – is a mere judge of the law and as such is not allowed to deal with the factual aspects of the case. Consequently, the French court of cassation never gives a definite solution to the case, which is always remitted to a court of appeal if the appeal is allowed. Under these circumstances, the contribution of the French supreme court to the interpretation and the understanding of the dispositions of the Convention can hardly be revealed by the decision itself: the summary of the latter has to be read in connection with the summary of the subsequent judgment of the court of appeal (in case of allowance of the appeal) or of the judgment of the appellate jurisdiction which was challenged (in case of dismissal of the appeal). In those cases, some information has, once again, to be added to the 'Comments' section.

Mlle Aude Fiorini
Official INCADAT Translator

**THE INCADAT CORRESPONDENT MEETING
A PRACTICAL GUIDE TO PREPARING CASE SUMMARIES**

A *Selecting Cases*

Which cases should be submitted for inclusion onto INCADAT and which should not?

Global Coverage

It is of great importance that INCADAT include case law from as many Contracting States as possible. Generally if the jurisprudence of a State has not previously featured on INCADAT, summaries / full cases from that jurisdiction will be added.

?? INCADAT has also been designed to leave open the possibility of including relevant non-convention cases. This would primarily be abduction case law from non-Contracting States, (e.g. *C.W. v. H.R.*, 19/02/1997, transcript, Supreme Court of Western Samoa at Apia; INCADAT cite: HC/E/WS 332), but, could also be extended to include particularly important cases dealing with associated issues which impact upon the Convention (leave to remove cases following a Convention return, e.g. *Payne v. Payne* [2001] EWCA Civ 166; INCADAT cite: HC/E/UKe 344).

Appellate Cases

Once a body of case law from a particular State has been included on INCADAT our approach is generally to concentrate on and add subsequent appellate decisions as quickly as possible. However, if new cases are merely repeating points that have previously been made by courts in the same jurisdiction they will not necessarily be added.

First Instance Decisions of Particular Importance

Notwithstanding the focus on appellate level decisions, first instance decisions of particular importance, or with unusual factual situations, will be included.

Furthermore, in deciding this issue one might ask, where does the court of first instance feature in the judicial hierarchy of the jurisdiction in question? Is it a minor local court or, as is the case with Finland, Scotland, Australia, or England for example, is it a court of some standing?

Rogue Judgments

A delicate issue, particularly given the aim of INCADAT to serve as a tool for uniform interpretation, is how to deal with judgments which may appear to be at odds with the majority of case law and / or the intentions of the drafters. The approach adopted until now

has been to include such judgments where they have emanated from appellate courts, but in the comments section it has been noted that the interpretation given differs to that of other courts in the same jurisdiction or in other Contracting States.

B Constructing the Summary

Name of case Use the citation that would be employed in the jurisdiction in question.

If there is merely a reference to the court seised, the citation might be followed by an approximate translation into English of the name of the court.

Date of decision This should use the formula: day, month, year.

States The relevant State / jurisdiction should be selected from the list provided. It should be noted that each of the United Kingdom’s three component jurisdictions have been included. Also a distinction, for the purposes of incoming cases, has been drawn between the United States federal and state court jurisdictions. The former is USf, the latter USs.

Care should also be exercised since the scroll list of States is very sensitive and it is easy to inadvertently move up or down the list even after a selection has seemingly been made.

Name of court Actual name, English translation (if needed), with name of State in brackets.

Status of case 3 choices are open here: ‘final’, ‘subject to appeal’ and an open field.

‘Subject to appeal’ should only be used where a judgment has recently been delivered and is in fact liable to be appealed.

‘Final’ should be used where it clear the judgment has not been appealed /will not be appealed.

The open field can be used to give a little more information where the summary does not fall neatly into either of the above categories. For example where a summary relates to a first instance decision and there has been an appeal, it would be more accurate to indicate whether the first instance decision has in fact been: ‘Upheld on appeal’ or ‘Reversed on appeal’ as the case may be.

Additional information about appeals can also be detailed in the ‘Comments / Subsequent History’ section.

Level of Court Some uncertainty may exist as regards this field where there is only 1 court with jurisdiction to hear appeals in Convention cases and that is the highest court in that State (for example, Ireland, Israel, Finland).

Notwithstanding that the 'supreme court' in these instances is acting as a court of 'first' appeal the approach employed is to designate such courts as 'superior appellate courts,' thereby reflecting the status they enjoy in their State of origin.

*Published /
where available*

The original intention here was to indicate where a judgment could be obtained if it had not been officially reported. If the case was reported then this field would not be used.

However, the development of government and court web-sites and databases means that many decisions can be found on-line within hours of being handed down. For the sake of convenience wherever a case is available on such a web-site, reported or not, the web address should be included here.

Articles considered

These provisions are merely for the sake of guidance and should not be considered to be authoritative. In terms of 'articles considered' the approach adopted has been to refer to articles of the Convention that have been considered in a meaningful way. If an article has been mentioned in passing and not discussed it should not be included here.

If national or international law provisions have been referred to these can also be identified in general terms.

Articles relied on

Means exactly that, the article(s) that the court based its decision on. Normally will be Article 3/5, or one of the sections of Article 13.

Order

Here there are several alternatives and also an open field which allows scope for a different order to be included. The most likely orders to select or to put in the open field are:

Application dismissed = no wrongful removal / retention

Return ordered = there has been a wrongful removal / retention, but none of the exceptions has been established.

Return ordered with undertakings given.

Return ordered with conditions imposed.

Return refused = there has been a wrongful removal / retention, but at least one of the exceptions has been established.

Article 15 declaration granted / refused.

Appeal allowed and... (*one of the above*).

Appeal dismissed and... (*one of the above*).

Facts

The aim of the 'facts' section is to tell the story of the case as succinctly as possible, and to provide the reader with all the key information, up until the moment when the trial / appeal is heard. Sometimes the section will be very short, where it deals with a very straightforward removal or retention, on other occasions greater detail will be required.

The 'facts' section should **not** be used to give a summary of the judgment under consideration.

Obviously the information that can be included depends on the original judgment, but a set format has been developed and includes the following details:

How many children involved,

Sex of children,

Age at date of alleged wrongful removal / retention,

States where children have lived for significant periods,

Relationship of parents,

The nationality of parents may be identified if this is deemed to be relevant,

Situation in respect of rights of custody,

Date of removal / retention.

Thereafter relevant information should be included in chronological order. This might include steps taken to facilitate the return of the child and, if possible, the date on which return proceedings were initiated. If the summary is dealing with an appellate decision, the date of the trial should be given, along with details of the ruling of that court.

Below are 2 examples, the first a relatively simple factual situation where little detail is required, the second a very complicated case where significant detail was needed.

EXAMPLE I

Re B. (Abduction: Acquiescence) [1999] 2 FLR 818; [INCADAT cite: HC/E/UKe 264]

The child, a girl, was 5 at the date of the alleged wrongful removal. She had lived in both England and the United States. Her parents were married and had joint rights of custody. On 4/5 October 1997 the mother went to England, her State of origin, with the child.

On 11 February 1998 the father came to England. On 27 February he issued an application for contact. Interim orders for contact were made on 20 March and 9 July.

On 18 July the father visited the United States embassy in London. While there he was informed of the Hague Convention. In late August / early September 1998 the father issued proceedings for the return of his daughter.

In December 1998 the father returned to the United States.

EXAMPLE II

Re L. (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433; [INCADAT cite: HC/E/UKe 358]

The children, a boy and girl, were twins, aged 9 months at the date of the alleged wrongful removal. They had until then lived all of their lives in the United States. The parents, an American father and Danish mother, were married and had joint rights of custody. In July 1996 the mother took the children to Denmark.

On 13 January 1997 the circuit court in Palm Beach, Florida found that the removal had been wrongful. Around March 1997 the father initiated return proceedings in Denmark.

On 17 September a court of first instance in Esbjerg, Denmark dismissed the father's return application, finding, *inter alia*, that the father had acquiesced in the removal and that a return would amount to a grave risk of harm to the children.

On 12 November the western division of the High Court allowed the father's appeal and ordered the return of the children.

On 1 December, 4 days before a directions hearing to arrange the modalities of the return of the children, the mother disappeared taking the twins with her.

On 9 June 1998 a grand jury in Florida charged the mother with the criminal offence of international parental kidnapping and a warrant was issued for her arrest.

On 2 July the circuit court in Palm Beach awarded the father full custody of the children.

On 11 August the mother's lawyer petitioned in Denmark for the return proceedings to be re-opened.

In the autumn of 1998 the mother was discovered in England and the US government commenced extradition proceedings.

On 15 October family proceedings were issued in the Family Division of the High Court in London for the return of the children to the United States.

On 4 November a Danish court refused the mother's application for the return proceedings to be re-opened. The mother immediately issued an appeal against this decision.

Ruling

This is in essence an expanded version of the 'order' section. It will explain the basis of the judgment, for example:

Application dismissed; the removal did not breach any rights of custody.

Return ordered; the retention was wrongful and none of the exceptions had been proved to the standard required under the Convention.

Return refused; the removal was wrongful but the standard of harm required under Article 13(1)(b) had been proved.

Judges

This is an optional field. In some States it is accepted practice for judges to be identified, in others it is not.

Where judges are identified they should be given the title they would have in the jurisdiction in question.

If a judge has dissented that can be noted in brackets after their name.

Legal Basis

The legal basis section is without doubt the most important.

The object is to give the reader sufficient indication and flavour of what is said in the judgment so he/she can decide whether to read the full version of the case. Crucial passages should be summarised or may indeed be quoted from selectively. Of course care must be used not to state or quote issues out of their context, see for example:

EXAMPLE III

Croll v. Croll, 229 F.3d 133 (2d Cir. September 20, 2000); [INCADAT cite: HC/E/USf 313]

Rights of Custody

Rights of custody refer to a bundle of rights of which a parent must possess a certain portion in order to be protected by the Convention. Possession of only one of those rights, in this case the right to determine the child's place of residence by exercising a veto power over the child's international relocation, was insufficient to confer custody on the party possessing that power.

The majority held that the father's right extended merely to a veto over the child's expatriation. It gave him no say over any other custodial issue, including the child's place of residence within Hong Kong, other than the child's geographical location in the broadest sense. The right of veto therefore fell short of conferring a joint right to determine the child's residence, particularly since the custody order also stated that custody care and control be awarded solely to the mother.

The majority also drew attention to the fact that the right was not one the father actually exercised. It rejected argument that the father would have exercised the right but for the removal because the right concerned nothing but the removal.

The majority further noted that the child risked being returned to a country in which no one had a right to care for it on a daily basis.

Sotomayor CJ dissented. He argued that the Convention's definition of rights of custody contemplated a bundle of rights to be protected regardless of whether a parent held one,

several, or all such custody rights, and, whether the right or rights were held singly or jointly with the other parent. He further argued that rights arising under a *ne exeat* clause included the right to determine the child's place of residence since the clause expressly provided a parent with decision making authority regarding a child's international relocation. Thus the instant *ne exeat* clause vested both the father and the Hong Kong court with rights of custody for the purposes of the Convention.

To some extent the legal basis section has to be able stand alone. Example III is rather a long passage which reflects the detailed analysis employed in this judgment. In the majority of cases passages will be much shorter, particularly in respect of subsidiary issues, see for example:

EXAMPLE IV

S. v. T., 4 December 2000, transcript, Constitutional Court of South Africa; [INCADAT cite: HC/E/ZA 309]

Undertakings

The Court exacted significant undertakings from the applicant father. These related not only to the dropping of criminal charges against the mother, but also custody, maintenance and other ancillary expenses the mother and child were likely to face upon their return. The father also had to obtain an order from the Supreme Court of British Columbia in the same terms as the undertakings he had given.

This example shows how it is possible to be very succinct and to get the key message across.

Attention must be given to not merely transcribing the text of the judgment. That is not the purpose of INCADAT.

Most of the legal basis sections are self explanatory, but some require clarification:

Habitual residence For ease of understanding this section will sometimes require the inclusion of additional factual information that was not included in the 'facts section'. It is also very helpful to work out and indicate the length of time spent in different States.

Procedural matters This section deals with a variety of possible issues: costs, was oral evidence allowed, was the application dealt with expeditiously, or were there delays, was contact facilitated pending the final determination of the case...

An issue that sometimes arises is that none of the legal bases corresponds with the issue in question.

In such a situation discretion has to be used to deal with the issue in the most appropriate legal basis.

Comments /

Subsequent History This is a field that will normally be filled out by the INCADAT team.

However, it will be particularly helpful if additional information about a case can be given. Similarly details may be forwarded of any publication where the case has been analysed.

C *Updating*

Accuracy and attention to detail is obviously essential if as INCADAT matures it is to acquire and maintain a good reputation. One aspect of this is ensuring that the summaries are kept up to date. For example if you become aware that a case has been officially reported after it has been added onto the database, it would be very helpful to forward the citation to us. Similarly if the case is the subject of academic analysis, it would be beneficial if we could add the reference of the article / case note to the summary.

D *Objectives for INCADAT*

- I Increase the number of correspondents submitting summaries to INCADAT.
- II Where summaries cannot be completed, encourage courts / Central Authorities to forward case law.
- III Increase awareness and use of INCADAT in Contracting States.
- IV Include leading appellate level judgments as quickly as possible.
- V Encourage the use of INCADAT citations where cases have been found through the database.

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