The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective

by Dorothea van Iterson

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In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante****[3]***. There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the

merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable

by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce "automatically" a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child's habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ's ruling that article 11, para 8, Brussels II bis

applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: "..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State".

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.