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REPUBLIC OF BELARUS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Belarus, which became an independent state in December 1991, is a non-member state of the Convention on the Civil Aspects of International Child Abduction, because it did not participate in the Hague Conference on Private International Law at the time of its 14th Session, as required by article 37 of the Convention. The Republic of Belarus acceded to the Convention in 1998. The National Assembly (the Parliament) of Belarus ratified the Convention on October 13, 1997, and entered into force on January 13, 1998.¹ The Convention has been entered into force between Belarus and the following countries: Argentina, Australia, Bosnia and Herzegovina, Canada, Chile, China (Macao Special Administrative Region), Colombia, the Czech Republic, Finland, Germany, Georgia, Greece, Hong Kong, Hungary, Ireland, Israel, Italy, The Netherlands, New Zealand, Norway, Poland, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Switzerland, and the United Kingdom (also for Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man and Montserrat).

According to article 38 of the Convention, Belarusian accession to the Convention is effective only in the relationship between Belarus and those contracting states that have declared their acceptance of the accession. Also, the Convention entered in force between the Republic of Belarus and the following states: Brazil, Costa Rica, Malta, Moldova, Paraguay, Fiji, Trinidad and Tobago, Uruguay, and Uzbekistan. The United States has not recognized Belarusian participation in the Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

Although the Republic of Belarus acceded to the Hague Convention with the purpose of international recognition and improvement of its image on international arena, Belarus's accession to the Convention did not influence the development of the national legal system. Unlike those in other newly independent states of the former Soviet Union, the Constitution of Belarus does not provide for the priority of international obligations over domestic regulations, and the conclusion of an international agreement by the Belarus authorities does not require automatic adoption of national implementing legislation.

The basic principles of Belarusian legislation in regard to family relations and child protection are determined by the Code of the Republic of Belarus on Marriage and Family, adopted by Belarus legislature on July 24, 1999. The Code declares protection of parenthood and child's rights, the main priority of family legislation. The Code establishes that family and marriage related rights are protected by the judiciary, state authorities of guardianship and curatorship, and civil registry authorities.

Although a member of the United Nations since the creation of this organization, the Republic of Belarus has very limited experience in independent participation in bilateral and multilateral treaties. The problem of parental child abduction, especially international abductions, is not an acute problem for Belarus because of its long years of continuing international isolation, the domination of conservative Soviet traditions in family relations, the strong state interference in family relations, the absence of new legislation, and the lack of resources for enforcement of already passed laws. As of January 2003 (latest

¹ VEDAMASTSI NATSYIANALNAGA SHODU RESPUBLIKI BELARUS [Bulletin of the National Assembly of the Republic of Belarus, official gazette] 1998, No. 18, Item 209.

data available), Belarus had no open abduction cases and received no incoming return applications. Also, the Permanent Bureau on the Guide to Good Practice of the Convention reported that it did not receive any submission or comment in regard to Georgia's participation in the Hague Convention.²

A major related legislative provision is included in the Constitution of Belarus; article 32 states that “marriage, the family, motherhood, fatherhood, and childhood will be under the defense of the state.” The Constitution establishes that parents or persons replacing them will have the right and will be obliged to nurture children, and be concerned for their health, development, and learning. A child must not be subjected to cruel treatment or humiliation, enlisted for work which may cause harm to his physical, intellectual, or moral development.” In regard to the separation of children from their families against the will of the parents and other persons replacing them, the Constitution permits such separation on the basis of a court ruling, if the parents or other persons replacing them do not fulfill their duties.³

The Law of the Republic of Belarus on Acceding to the Convention on Civil Aspects of International Child Abduction, adopted simultaneously with the instruments of ratification, assigns the Ministry of Justice of the Republic of Belarus to be a Central Authority, with the responsibilities prescribed in article 7 of the Convention.⁴ According to implementing legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. It appears that there is no cooperation between the Ministry of Justice and child welfare services. Belarus is a unitary state and the Ministry of Justice has jurisdiction over all the country, including all administrative provinces and regions; therefore, the Convention extends to all Belarusian territory as required by article 40. Despite the fact that Belarus established a state union with the Russian Federation in 1996, and the Union Treaty provides for equal rights of citizens of both countries and the unification of legislation as its ultimate goal,⁵ presently, Belarusian international obligations do not extend on Russian territory.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

According to the Criminal Code of the Republic of Belarus adopted on June 24, 1999, parental abduction is not recognized as a crime. The Law considers as an abduction the kidnapping of a child by a person who is not child's parent or legal guardian without the consent of parents or legal guardians if it was committed for a particular purpose. The Criminal Code prosecutes the abduction or exchange of a child for mercenary purposes, or for other vile motives, and punishes such crimes by up to 5 years in prison.⁶ The abduction may be open or hidden and may be the result of deceit, misuse of trust, or restraint of the child. Under the Law, a child is any person under 16 years of age. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Law determines “mercenary purposes,” as intending to receive

² HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Convention Status Report, at <http://www.hcch.net/e/conventions/menu28e.html>.

³ CONSTITUTION OF THE REPUBLIC OF BELARUS. Adopted March 15, 1994, with the changes and additions enacted by referendum on Nov. 24, 1996.

⁴ *Supra* note 1.

⁵ *Supra* note 1, 1999, No. 32, Item 863.

⁶ CRIMINAL CODE OF THE REPUBLIC OF BELARUS, art. 123.

material profits from the abduction, *i. e.*, ransom or taking a child's clothes. Base motives are those that contradict moral principles, for example, taking revenge on a child's parents. If a childless woman abducts a child with the purpose of educating him and creating a good family environment for him, such an abduction does not qualify as an abduction from vile motives.⁷ However, the Criminal Code states that such action will be considered as an abduction committed under softening circumstances.⁸

Parental kidnapping is not considered a criminal offense in Belarus. Only those who abduct somebody else's child may bear criminal responsibility for a child's abduction. Hence biological and/or adoptive parents may not be prosecuted as kidnappers or child abductors. If divorced or separated parents disagree in regard to who will keep the child, the abduction of one's own child from the other parent or from an orphanage or another special institution is not considered to be an abduction under Belarusian criminal legislation. The Law also prohibits prosecuting close relatives of a child (for example, grandparents) for abduction, if they acted for the sake of the child, even if the interests of the child were misunderstood. It should be noted that the criminal legislation of Belarus does not impose punishment for removal of a child from the country or for retaining a child outside Belarus with intent to obstruct the lawful exercise of parental rights. Retainment is not considered as a separate felony.

Criminal acts such as parental child abduction occur very seldom in Belarus. If a foreigner whose home country recognizes the participation of Belarus in the Convention commits such a crime, the child is subject to return. All other cases fall under the laws of the respective state. In such cases, the Ministry of Justice of the Republic of Belarus, which was designated as a National Central Authority to discharge the duties imposed by the Convention, must cooperate with foreign authorities in order to discover the child, to prevent possible harm to the child, and to secure the child's return. Abilities of the Ministry of Justice to locate an abducted child are limited, because under Belarusian law only children who are staying without parental supervision are subject to mandatory registration with local social service agencies.⁹

B. Parental Visitation

Family legislation in Belarus is based on the 1999 Code of the Republic of Belarus on Marriage and Family. The major principle of Belarusian family law is that decisions relating to a minor should be based on his best interests; however, no specific act regulates issues related to parental visitation.

According to the Code, all children under 16 years of age are considered minors and both parents have equal rights and duties with regard to their offspring, even after divorce. In case of a dispute, a court-awarded custody is allowed to one of them. Unresolved disputes may be taken to the court. The Constitutional Court of Belarus ruled that no other institutions or authorities except the courts are eligible to decide issues related to granting custody.¹⁰ Parents may recover custody of their children unless the court decides that this would harm the child. In accordance with tradition, custody almost always is awarded to the mother of the child; the father sometimes receives the right of access as determined by the court. However, there is no means of enforcing court decisions, and as stories in local newspapers reflect,

⁷ BULLETIN OF THE USSR SUPREME COURT, No. 2 (1974) at 10.

⁸ A. LUKASHOV, COMMENTARIES TO THE CRIMINAL CODE OF THE REPUBLIC OF BELARUS, Minsk, 2000, at 365.

⁹ Instruction of the Ministry of Education No. 17/03 of July 27, 2000, SBOR UKAZAU PRESIDENTA I URIADU RESPUBLIKI BELARUS [Collection of Regulations Issued by the President and Government of the Republic of Belarus], 2000, No. 51, Item 2648.

¹⁰ Ruling of the Constitutional Court of the Republic of Belarus on the Conformity Between Part Two of Article 116 of the Code of Marriage and Family of the Republic of Belarus and the Constitution of the Republic of Belarus No. J68/98 of June 26, 1998, in JUDGEMENTS AND SEPARATE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS, 1997-1998, Minsk, 1999, at 181-183.

a father's right to visitation is often violated by mothers and other relatives who have been awarded custody of the child.¹¹

Usually, in the case of the dissolution of a marriage the courts decide which of the parents should get custody of the child. If parents are absent, the issue of custody for minors will be resolved by the guardianship agencies of local public education departments. These agencies decide disputes about the exercise of family rights; have the power to deprive access to parents living at a distance depending on the interests of the child; are party to custody suits; and may commence actions that would deprive a parent or parents of their parental rights.

III. Court System and Structure – Courts Handling the Hague Convention

The structure of the judicial system in Belarus is determined by the Law on Court Organization. In Belarus, the courts consist of the Supreme Court and regional, city, and district courts of general jurisdiction. Justice is administered by a trial of civil disputes and criminal cases. All cases are tried by a panel that consists of a professional judge and two lay assessors. A number of minor administrative infractions, as well as the majority of family matters are tried by a single judge and not by a collegiate court. The judges in Belarus are appointed by the President of the Republic, and the President may relieve them of their office.

Except for economic courts, which have exclusive jurisdiction in commercial disputes, no other special courts exist in Belarus. All cases related to the implementation of international obligations, as well as civil and family related matters, are handled by regular courts of law. As the Chief Justice of Belarus stated in his interview with the national newspaper *VO SLAVU RODINY*, the nation's "judicial system has not been brought nearer to the realities of contemporary life. The system has proved cumbersome, conservative, and costly."¹² The autocratic regime established by President Lukashenko completely undermined independence and further diminished the authority and significance of judicial institutions in the country. Judicial reform programs drafted in the mid 1990s foresaw the creation of specialized courts, including courts for family, juvenile, and other cases, were not implemented.

Cases of domestic child abduction occasionally are brought to the court; however, because of national traditions, such cases are usually resolved inside the families. No cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. Law Enforcement System

The absence of international parental abduction cases in Belarus may be attributed in large part to the influence of cultural and ideological traditions that have determined the features of Belarusian society and have prevented international marriages. Other reasons include the international isolation of Belarus and bureaucratic difficulties related to acquiring a valid travel passport for children.

International observers conclude that the enforcement of the Convention might be associated with some difficulties because of the Ministry of Justice's lack of experience in dealing with family related

¹¹ A. Miasnikau, *Deti Razdora*, BELORUSSKAIA DELOVAIA GAZETA [Belarusian Business Newspaper], Mar. 17, 1999, available at <http://www.site.securities.com>.

¹² *Belarus: Supreme Court Head Views Judiciary*, via FBIS, Document ID: FTS 19971230000387.

issues.¹³ Because both the Ministry of Justice and the Ministry of Education, which supervises local guardianship and curatorship agencies and whose personnel is more familiar with the related work, are empowered with the administrative authority to order the return of an abducted child, close interagency cooperation may be required.

Although the Convention is a direct implementing document, it requires the adoption of special laws by the Belarusian Parliament because the Constitution of the Republic of Belarus does not provide priority for and direct application of international legal norms. Belarusian courts have relatively little experience in dealing with the application of international legal norms and may have problems with their enforcement.

V. Legal Assistance Programs

Legal assistance in Belarus could be obtained through the attorneys licensed to practice law in this country. *Pro bono* work is also practiced by attorneys, although not widely. The best source of assistance and information are the officers of the guardianship agencies. Belarus's authorities do not accept any costs related to the implementation or enforcing of the Convention. In signing the document, Belarus made a reservation regarding the instrument of accession and declared that the state will not assume any costs resulting from the participation of legal counsel or court proceedings.

VI. Conclusion

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution of disputes in regard to the parental abduction of children. Unlike in other participating states, in Belarus these principles did not become the basis for national legislation, and the Belarusian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to reject foreign decisions and international legal acts in favor of traditional domestic laws. The cooperation of Central Authorities of the Member States with the Ministry of Justice of the Republic of Belarus is minimal, because of the political isolation which the country has imposed upon itself. At the same time, the Convention is of great significance for Belarus, whose citizens have the right and possibility of using an internationally recognized mechanism for the return of a child in case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the countries that recognize Belarusian accession to the Convention.

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¹³ Human Rights Watch, *ABANDONED TO THE STATE*, Report, Brussels, 1999, at 119.