TRANS-BORDER ABDUCTIONS OF CHILDREN: THE SWEDISH LEGAL VIEW

BY

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I. INTRODUCTION

There is a general trend in today's industrial and post-industrial societies to abandon the traditional family pattern. More and more parents do not live with each other. Many marriages are dissolved by divorce, and many parents separate without ever having been married to each other. Consequently, the problems of custody and visitation rights arise more often than before. In addition, judgments concerning the custody of children are very difficult for the losing party to accept. To lose a lawsuit concerning money can be a very painful emotional experience, but the pain usually disappears fairly quickly. Conversely, the "loss" of a child or children is something many people refuse to accept, and their emotional involvement often increases as time goes by, although it is sometimes difficult to discern whether their ruling passion is their love for their child or their hatred of the other parent. They are willing to fight for their child regardless of cost and regardless of prospects, using such means as appeals, endless complaints and new court actions invoking changed circumstances.

The idea of kidnapping the child may seem attractive to the desperate parent who cannot reconcile himself/herself to the loss, or prospective loss, of custody. Such kidnapping will, of course, seldom succeed if the child is merely moved to another place within the same jurisdiction, for the abducted child will soon be found and returned and the abducting parent will face criminal charges.

Abduction to a foreign country is far more likely to succeed, especially if the abducting parent is a national of the country in question. In the present author's experience, in Sweden, most cases involving a trans-border child abduction concern a mixed marriage, where at least one of the parents is of foreign origin. The fact that the children in these cases usually possess foreign or double nationality may even give the abduction an appearance of legitimacy: the abducting parent may feel that he or she is taking the child "home" to its fatherland.

This last-mentioned view is, alas, sometimes shared by the courts and other authorities in the abducting parent's country. Further, the courts there may consider that their own country, with its excellent social system, superior culture and true religion, provides generally a better environ-

ment for the child than more-or-less suspect foreign countries do. It may even happen that the courts in the abductor's country are guilty of direct discrimination, preferring the parent who is a national there to the other parent (on the other hand, similar discrimination in the country of the child's habitual residence may be the very cause of the abduction).

It must be admitted that even Swedish courts, although not guilty of such direct discriminatory practices, are often reluctant to send the abducted child back to a foreign country. This attitude has various reasons, one of them probably being that a decision ordering the return of a child is much more final than the usual custody decrees. In most countries, including Sweden, custody decisions can be altered if circumstances change or if it turns out that the parent entrusted with custody is not a suitable custodian. Custody disputes are often delicate and tricky matters, and the courts probably appreciate that possibly wrong decisions can be corrected later on.

In this respect, a decision to send the child to a foreign country appears to be more difficult to take, since the child is then no longer within that court's jurisdiction.

Clearly, the problem can only be solved by international cooperation, based on mutual trust. The whole issue can, in fact, be summarized as a conflict between two legitimate interests: on the one hand, the wish to stop abductions of children *to* foreign countries and the desire to achieve their speedy restitution and, on the other hand, the reluctance to return children abducted *from* foreign countries without making sure that the return of the child would serve the child's best interests.

One way of approaching the problem is by means of international treaties (see section II below), but there is at present no hope that such treaties will be ratified by all or a majority of states. Many of those countries to which children have been abducted from Sweden, for instance some states in the Middle East and Northern Africa, will almost certainly stay outside international cooperation in this field. It is thus important to ask what the legal system of one single country such as Sweden does and can do on its own to combat trans-border child abductions, whether from abroad (see section III below) or to foreign countries (see section IV below).

II. THE TWO CONVENTIONS OF 1980

In 1980, two international instruments dealing with this problem were adopted. The European Convention on Recognition and Enforcement of

Decisions Concerning Custody of Children and on Restoration of Custody of Children was adopted in Luxemburg on May 20, 1980, under the auspices of the Council of Europe.[1] It came into force on Sept. 1, 1983, after having been ratified by France, Luxemburg and Portugal. It was later also ratified by Austria, Belgium, Cyprus, Denmark, Germany, Ireland, The Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom; as far as Sweden is concerned it became binding on July 1, 1989.[2] Five months after the European Convention, on Oct. 25, 1980, the Convention on the Civil Aspects of International Child Abduction was adopted in the Hague.[3] This latter instrument came into force on Dec. 1, 1983, after ratification by Canada, France and Portugal; later it became binding for Argentina, Australia, Austria, Belize, Denmark, Germany, Hungary, Ireland, Israel, Luxemburg, Mexico, The Netherlands, New Zealand, Norway, Sweden (on June 1, 1989), Switzerland, the United Kingdom, the United States and Yugoslavia as well.[4]

Since international conventions are not generally directly applicable in Sweden, the substantive contents of the two instruments were in 1989 transformed into Swedish law by an Act of Parliament, which was in 1993 amended in order to make the Swedish procedure for returning children to other contracting states more efficient.[5] The following summary description is, however, limited to the Conventions as such.

The European Convention constitutes a compromise between two groups of West European states, where one group was more willing than the other to return abducted children summarily, *i.e.* with no examination of the merits of the custody issue. The Nordic countries belonged to the more conservative group, which felt that the authorities of the country to which the child has been abducted should have the right to refuse to return the child if such restitution would not, in their view, contribute to the child's welfare. The compromise achieved can be described broadly as follows.

Art. 7 of the European Convention declares that a decision relating to custody given in a contracting state shall be recognized and enforced in

[1] *European Treaty Series*, no. 105.

[2] See "Tillkännagivande om kungörande m.m. i fråga om konventionen den 20 maj 1980 om erkännande och verkställighet av avgöranden rörande vårdnad om barn samt om återställande av vård av barn", SFS 1991:1238.

[3] See *Actes et documents de la Quatorzième Session (1980) de la Conférence de la Haye de droit international privé.*

[4] See "Tillkännagivande om kungörande m.m. i fråga om konventionen den 25 oktober 1980 om de civila aspekterna på internationella bortföranden av barn", SFS 1992:977.

[5] See "Lag om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn", SFS 1989:14, as amended by SFS 1993:212.

every other contracting state. If, at the time of the kidnapping, there is no decision relating to custody, the Convention will apply to any subsequent decision declaring the abduction to be unlawful (Art. 12). However, Arts. 8–10 restrict the main principle substantially. These Articles distinguish between three types of situation.

First, Art. 8 deals with those cases where the sole nationality of the child and his parents is the nationality of the state where the custody decision was given, and where the child also habitually resided. If these conditions are fulfilled, and if the request for the restoration of the child is made within six months of the date of the abduction, the requested state shall forthwith and with no examination of formal or substantive conditions restore custody of the child, *i.e.* return him to the country from where he has been abducted.

Second, there are those cases where the conditions imposed by Art. 8 as to nationality and residence are not fulfilled. In these cases, which are covered by Art. 9, the child is also to be returned, provided the restoration has been requested within six months of the date of the abduction. However, the authorities of the requested state may refuse enforcement on certain formal grounds, for instance if the custody decision has been rendered in the absence of the defendant who had not been duly served with the document instituting the proceedings, or if the competence of the deciding authority was not founded on the habitual residence of the defendant or the child, or on the last common habitual residence of the parents, one parent being still habitually resident there. But not even in the cases dealt with by Art. 9 may the foreign decision be reviewed as to its substance (Art. 9, para. 3). Nor can execution be refused on the grounds of public policy (*ordre public*).

The third and last group of cases comprises those situations where the return of the child was requested later than six months after the abduction. In these cases restoration can, according to Art. 10, also be refused on some substantive grounds, such as if the foreign decision is contrary to public policy ("manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed"), or if the decision manifestly no longer accords with the welfare of the child. The same applies, for example, if the child was a national or habitual resident of the requested state when the proceedings started and no such connection existed with the state of origin.

This elaborate system is, however, substantially weakened by Art. 17, which permits contracting states to make a reservation that restoration may be refused on the grounds provided under Art. 10 even in situations covered by Arts. 8 and 9. This is regrettable, but probably necessary. Some

states, among them Sweden, would hardly have ratified the Convention without such a reservation.[6] The possibility of refusing to return the abducted child because of its "welfare" means, in reality, a re-examination on the merits of the foreign custody decision, *i.e.* the foreign decision is not recognized in the traditional sense of the term "recognition".

The European Convention also prescribes that each contracting state shall appoint a central authority to implement the Convention (Art. 2), and that the central authorities of the contracting states shall cooperate with one another over the transmission of requests and information, finding a child, *etc.* (Arts. 3–6).

The Hague Convention is in certain respects similar to the European one, for instance regarding the appointment and functions of a central authority in each contracting state (Art. 6–7). With regard to the most central issue, *i.e.* the return of abducted children, the Hague Convention might, att least on the surface, appear to be less ambitious, since it does not prescribe any recognition of foreign custody decisions. On the other hand, the abducted child is to be returned without any determination on the merits of the custody issue (Art. 19). When a child has been wrongfully removed from a foreign country which is a party to the Convention, and the proceedings under the Convention have been initiated within one year after such removal, the authority concerned shall order the return of the child forthwith. If the proceedings have been initiated later than one year after the removal, the return of the child shall also be ordered, unless it can be demonstrated that the child is settled in his new environment (Art. 12). The restoration may, however, always be refused if there is a grave risk that the return would harm the child physically or psychologically (Art. 13), or if it "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" (Art. 20).

The Hague Convention does not permit any reservations as regards its substantive provisions. The present author therefore submits that this Convention is actually more far-reaching and more efficient than the more ambitious European Convention. The recognition of foreign custody decrees, stipulated in the European Convention, may be of great value beyond the issue of child abductions, but the latter issue appears to be better dealt with by summary restitution according to the Hague Convention.

[6] Austria, Belgium, Cyprus, France, Luxemburg, The Netherlands and Portugal have ratified the European Convention without such reservations, while Denmark, Germany, Ireland, Norway, Spain, Sweden, Switzerland and the United Kingdom have made reservations according to Art. 17.

In addition to the two Conventions of 1980, Sweden has entered into international agreements leading to the recognition and enforcement of, *inter alia*, some custody decisions rendered in the other Nordic countries (Denmark, Finland, Iceland and Norway) and Switzerland. These instruments are not discussed in this paper, since they purport to cover civil judgments in general. The following sections deal with the contents and effects of Swedish law regarding those situations that are not covered by any relevant international convention.

III. CHILD ABDUCTIONS TO SWEDEN

A typical child abductor in cases concerning kidnappings to Sweden is a Swedish woman, married to a foreigner and residing in her husband's country. Facing divorce and/or custody proceedings there, or having lost the custody already, she takes the child and moves with it to Sweden, thus violating the laws of the country of the child's habitual residence.

The first legal issue arising in these cases is often the matter of recognition and enforcement in Sweden of the custody judgment rendered or expected in the country of the habitual residence of the child. Such recognition and enforcement will of course be granted if there is a treaty obligation to that effect between Sweden and the foreign country in question (see above), but the situation is different if there is no relevant convention. The problem is at present not regulated by any Swedish statutory provision, but there are two leading cases,[7] both of which were decided by the Swedish Supreme Court on November 20, 1974.[8]

In the case of *Klemmt* v. *Klemmt*, a German husband and his Swedish wife lived in West Berlin. Their son Olov, born in 1968, was a German national. The mother moved in 1972 to Sweden, taking Olov with her. The father visited them in Sweden and obtained the mother's permission to take Olov to Germany for a fortnight. He refused, however, to return Olov to his mother and commenced divorce and custody proceedings in a German court. The mother agreed that Olov should stay under the custody of his father until the German courts reach a final decision. In view of this, the father agreed to Olov's visiting his mother in Sweden for a period of twenty days. She did not keep her promise to return Olov and applied to a

[7] Judicial precedents are, strictly speaking, not a binding source of law in the Swedish legal system. However, decisions of the Supreme Court and the Supreme Administrative Court are generally followed, especially when dealing with issues that are not regulated by statutory provisions.

[8] See *Klemmt* v. *Klemmt* and *Lakouras* v. *Björkman-Lakouras*, both reported in 1974 NJA 629 (Supreme Court 1974).

Swedish court for a decree awarding custody to her. A few days after her application, a Berlin court granted interim custody to the father and ordered the mother to return Olov. Proceedings in Germany went on and the Swedish court faced the question of whether they hindered a parallel custody lawsuit in Sweden. The answer depended on whether the final German judgment could be expected to be recognized here. The District Court and the Court of Appeal concluded that the forthcoming German judgment would be recognized, and they dismissed the mother's petition. The Supreme Court arrived, however, at the opposite result. Foreign custody awards cannot, in its view, be recognized in Sweden if based on other considerations than the best interests of the child. This means that it is necessary to re-examine, in each particular case, the merits of the dispute. In the absence of statutory provisions, foreign custody awards are not, according to the Supreme Court, given other effect than as mere evidence about facts whose value depends upon the circumstances *in casu*. It follows, the Court added, that foreign proceedings and judgments do not constitute procedural hindrances in Sweden.

The case of *Lakouras* v. *Björkman-Lakouras* was similar, although in this case the foreign court had already passed a final custody decision regarding two children, born in 1965, disputed by a Greek father and his Swedish ex-wife. The family lived in Greece until 1968, when the mother, acting without the knowledge of the father, moved to Sweden with the children, who were at that time Greek citizens. The father obtained in Greek courts a divorce and a final award giving him the custody of the children. The mother petitioned a Swedish court to give the custody to her and the father objected, invoking the Greek award. In the meantime, the children acquired Swedish citizenship. The District Court held that the Greek judgment was valid in Sweden and dismissed the mother's petition. The Court of Appeal was basically of the same view, but it reversed the decision of the District Court on the ground that the Greek award, in the same way as Swedish custody awards, did not hinder reconsideration due to changed circumstances; the case was thus remanded to the District Court. The Supreme Court affirmed the decision of the Court of Appeal, but used the same grounds as in the *Klemmt* case.

It must be concluded that since 1974 foreign custody awards (the same applies undoubtedly to decisions on visitation rights as well) are generally not recognized in Sweden, except in those cases where there is a statutory provision to the contrary (such provisions are, in turn, based on international treaties). This negative attitude means that the parent who abducts a child to Sweden succeeds in avoiding the custody judgment made or expected in the country of the child's habitual residence, which is hardly a

satisfactory situation.

An official investigation committee proposed in 1989 that decisions regarding custody or visitation rights made or valid in the child's country of habitual residence be recognized and enforced in Sweden, at least in principle.[9] One of the suggested exceptions to this proposed main rule shall, however, hinder the recognition and enforcement if the foreign decision is manifestly incompatible with the child's best interests. This exception will make it necessary to examine, albeit summarily, the merits of the custody issue before the child can be returned to its country of habitual residence. It remains to be seen whether and when the proposals of the committee will be adopted, and how they will be interpreted and applied by the courts.

The fact that there is no foreign custody decision, or that the existing foreign custody decision is not valid in Sweden, does not mean that the child, in the Swedish view, has no custodian at all. The lack of judicial decision means simply that the custody is deemed to be vested in that person or those persons who became custodians directly on the basis of the applicable law, such as both parents or, in the case of children born out of wedlock, the mother alone. According to a Swedish conflict rule, which is somewhat uncertain on this point, this matter is normally to be decided by the law of the country of the child's habitual residence (*lex domicilii*), provided it does not violate Swedish public policy.[10]

If the applicable law considers the deprived parent to be the sole custodian, he can petition the Swedish administrative courts for a summary restitution of the child in accordance with Ch. 21, sec. 7, of the Swedish Parental Code, which provides that the custodian of a child can demand such restitution if the child is held by someone else. According to Ch. 21, sec. 8, the same applies if a child, which is in the legal custody of both parents, is arbitrarily and without due reason taken by one of the parents and kept from the other parent; this is a rather common situation in child abduction cases. These provisions can also be used for restituting children from Sweden to a parent domiciled in a foreign country.[11] The administrative court may, however, refuse to order summary restitution if the best interests of the child require a review of the custody issue by a general

[9] See SOU 1989:100.

[10] See Michael Bogdan, *Svensk internationell privat- och processrätt*, 4th. ed., Stockholm 1992, pp. 194–197.

[11] See, *e.g.*, the case of *Natasa*, 1970 RÅ no. 31 (Supreme Administrative Court 1970).

court.[12] Such refusal is rather probable if the child has been sojourning in Sweden for some time, which makes it advisable for the deprived parent not to delay action hoping for a friendly settlement. The refusal of summary restitution must not be misunderstood: it does not mean that the administrative tribunal is of the opinion that the child should remain in Sweden in the custody of the abducting parent, but only that it has its doubts and wants a general court to have a closer look.

A deprived parent whose petition for summary restitution has been rejected is left with only one alternative if he still wishes to recover the child: he must initiate full custody proceedings in Swedish general courts. Swedish courts will almost always apply Swedish substantive law in custody disputes regarding children sojourning in Sweden.[13] Swedish law in this field is based practically exclusively on the best interests of the child (*barnets bästa*), which have to be ascertained in each particular case (Ch. 6, secs. 5–6, of the Parental Code). The emotional suffering of the deprived parent and the illegal and unethical nature of the abducting parent's behaviour are, as such, not relevant for the evaluation of the best interests of the child. The child's need of close and good contacts with both parents is to be given special weight (Ch. 6, sec. 6 (a), of the Parental Code), but it is far from certain that this factor strengthens the position of the deprived parent: depending on the circumstances, the court may, for example, find that the chances of close and good contacts with both parents are better if the child stays in Sweden where the custodian can be forced to respect the other parent's visitation rights. The custody proceedings, sometimes including expert examinations by child psychologists and almost always involving appeals, may take considerable time, which works undoubtedly in favour of the abducting parent, since the child, especially if it is very young, adapts very quickly to the new environment (relatives, playmates, school, language, etc.). Regardless of how much Swedish courts disapprove of child abductions, they may in such cases quite objectively find the best interests of the child require that it be left where it is.

[12] Furthermore, the restitution will not normally be ordered against the will of the child if it is aged twelve years or more, or if there is a significant risk that the order will expose the child to physical or mental harm (see Ch. 21, secs. 5 and 6, of the Parental Code). These restrictions apply to enforcement of Swedish custody awards, too.

[13] See Bogdan, *op.cit.*, pp. 196–197. The above-mentioned investigation committee proposed, as the main rule, the application of the law of the country of the child's habitual residence, but Swedish law is to be applied whenever it serves the best interests of the child. See SOU 1989:100.

IV. CHILD ABDUCTIONS FROM SWEDEN

Imagine a married couple living in Sweden, the husband being an Egyptian national whereas the wife is Swedish. The marriage is dissolved by a Swedish divorce and a Swedish court awards the custody of the child to the mother and grants the father certain visitation rights. One day, the father picks up the child, ostensibly for the weekend only, and takes it to Egypt. He refuses to return the child to its mother. What can Swedish law and legal machinery do in order to help the mother in this situation? Very little.

The child being in a foreign country, it is naturally out of question to send Swedish enforcement officials, such as bailiffs or police officers, to fetch it back to Sweden. As it was stated by the Permanent Court of International Justice in the *Lotus* Case in 1927, "a State must not exercise its power in any form in the territory of another State".[14] Swedish authorities, in particular the Swedish Embassy or Consulate in the country to which the child was taken, try to support the deprived parent's efforts through diplomatic channels and assist him in finding a suitable local lawyer. Some Swedish mothers, whose children have been abducted by foreign fathers, in despair accuse, in the media, the Swedish government of not caring enough about their predicament. Yet such accusations are largely unfair, since they assume that the Swedish authorities could get the children back if they only tried hard enough. This is not the case. The efforts and hopes of the deprived parent should instead be focused on initiating legal proceedings for the restitution of the child in the foreign country in question. The prospects of success in such proceedings depend, of course, almost totally on the position taken by local law and the attitudes of local courts. Before criticizing foreign countries for their reluctance to return abducted children forthwith to Sweden, one should remember that not even Sweden is willing to return abducted children to foreign countries without an examination of the merits and that far from all such children are ultimately restituted to the country of their original habitual residence.

What has been said does not mean that Swedish legal machinery is totally helpless regarding children that have been kidnapped to foreign countries. According to Swedish law, the administrative tribunals charged with enforcement of general-court judgments on custody and visitation rights and with summary restitution of children (see section III above) may, instead of ordering the fetching of the child, use the threat of a pecuniary fine (*vitesföreläggande*) to compel the reluctant party to fulfil his

[14] P.C.I.J. Ser.A, No. 10, pp. 18–19.

obligations. In fact, such indirect enforcement is generally to be preferred to the fetching, which may cause emotional damage to the child and, maybe, to the parents as well. International Law, which stands in the way of direct enforcement when the child is abroad, does not seem to forbid indirect enforcement by putting financial pressure on the abducting parent. Such pressure may be very efficient even if the abductor is no longer present in Sweden, for example if he owns sequestrable property or receives sequestrable income from a source here. Nevertheless, the question is whether Swedish administrative courts are willing to make use of this possibility. The following two cases illustrate the point.

The case of *von Knoop* was decided by the Supreme Administrative Court in 1968.[15] A Swedish court had separated Mr. and Mrs. von Knoop and granted the custody of their two children to the mother, whereas the father was given some visitation rights. The mother moved with the children to Spain, where she was employed by a Swedish tour operator (her income was thus within the reach of Swedish authorities). The father petitioned in Sweden for the enforcement of the said judgment insofar as his visitation rights were concerned, asserting that the mother did not respect them. The mother objected that there was no Swedish enforcement jurisdiction, since she and the children were living in Spain. The first instance held in favour of the father and ordered the mother, under the threat of a fine of one thousand Swedish kronor for each child, to respect the father's visitation rights. The Supreme Administrative Court reversed the decision. The majority, composed of three judges, pointed out that the mother and the children sojourned permanently in Spain and that the father's petition thus aimed at execution by measures to be taken in that country. There was no Swedish jurisdiction to order such execution. The dissenting minority of two judges admitted that execution by fetching the children in Spain was inadmissible, but held that execution by threatening the mother with pecuniary fine was possible and that, consequently, the father's petition should be tried on its merits.

The second decision on this point, *Jokic* v. *Goda*, was decided by the Supreme Administrative Court in 1979.[16] A Swedish court awarded the custody of the child, which was of Egyptian nationality but lived in Sweden, to the mother. The Egyptian father, who had previously been the custodian of the child, abducted it to Egypt, where he left it with its paternal grandmother, and returned to Sweden. The mother applied for the enforcement of the custody judgment. The administrative court of

[15] See 1968 RÅ no. 74.
[16] See 1979 RÅ no. Ab 209.

first instance ordered the father to give up the child under the threat of pecuniary fine of 3,000 Swedish kronor. The appellate administrative court reversed that decision, but only for reasons that are irrelevant for the question under scrutiny here. The Supreme Administrative Court reinstated the decision of the court of first instance, *i.e.* the order and the fine. One judge dissented, but on grounds that are of no interest here.

Although the question of Swedish enforcement jurisdiction was not openly discussed in the *Jokic* case, it might be argued that the two decisions are mutually incompatible and that the *Jokic* judgment, at least to some extent, overruled the principle established in *von Knoop*. It can be objected against this interpretation that the *Jokic* case was reported in the official reports in a summary form only, while the *von Knoop* judgment was published in full; a conscious overruling would hardly have the form of a summarized report. Two other conceivable explanations of the difference between the outcomes in the two cases are that *von Knoop* dealt merely with the enforcement of visitation rights, which do not deserve the same enforcement efforts as custody judgments, and that the issue of enforcement jurisdiction was simply not noticed in the *Jokic* case. It is, however, more probable that the different outcomes are due to the fact that in the *Jokic* case the parent against whom the enforcement petition was directed was a resident of Sweden, whereas the mother in *von Knoop* resided permanently in a foreign country (Spain). Be this as it may, the present author submits that *Jokic* was correctly decided and that the view of the majority in *von Knoop* was wrong and does not deserve to be followed. It is difficult to understand why Swedish authorities have to refrain from one efficient method of execution (threat of fine) only because the other conceivable method (the fetching of the child) is not possible (however, the fine must not be used to force the parent having control of the child to commit an act that is illegal and forbidden under the laws of the country where it is to be performed).[17] Besides, the value of *von Knoop* as a precedent is weakened by the division of votes in the Supreme Administrative Court.

Of course, the best thing is to stop kidnappings from happening. The most far-reaching provision to that effect in Swedish law is Ch. 21, sec. 10, of the Parental Code, which enables the authorities to take physical custody of the child if there is an imminent danger of its being abducted to a foreign country. There are, however, some less drastic precautions that can and should be taken.

Regarding those children that are Swedish citizens, sec. 7(2) of the

[17] See Michael Bogdan, "Om svensk exekutionsbehörighet", 1981 *SvJT*, pp. 401–426, on pp. 407–412.

Swedish Passport Act of 1978[18] generally prohibits the issuing of a passport to a child (*i.e.* a person under 18 years of age) without the consent of the child's custodian. If both parents have joint custody, the consent of both of them is required. If the child, whether instead of or in addition to Swedish citizenship, possesses the nationality of a foreign country, this provision is of no avail since the child can be taken abroad using its foreign passport. It must be added that the passport control in Sweden of persons *leaving* the Kingdom is not very strict.

The opportunity for kidnapping is often provided by the abducting parent's visitation rights. The Parental Code stresses, in Ch. 6, secs. 6 (a) and 15, the importance of the child having close and good contacts with both parents. The parent without custody will thus be refused visitation rights in extreme and exceptional cases only. Nevertheless, if there is a well-founded suspicion that the child risks being abducted by that parent, the court may deny visitation rights or restrict the exercise of visitation rights in various respects, for example by limiting them to Swedish territory,[19] ordering the parent in question to deposit his passport before picking up the child[20] or even requiring that a third person (a "neutral" relative or a social worker) be present at all times. But even if no conditions of this type have been imposed by the general courts when granting the visitation rights, the administrative courts, which are charged with the enforcement procedure, may refuse to enforce the judgment if the situation has changed and the risk of kidnapping has increased since the trial, for example if the parent claiming visitation rights has moved from Sweden to a foreign country (or from a foreign country recognizing Swedish custody awards to a foreign country where they are not recognized).[21] Such refusal means that the parent in question will have to initiate new proceedings in the general courts in order to have his visitation rights reconfirmed or reexamined.

If, in spite of all precautions, the child has been abducted to a foreign country, the time works in favour of the abducting parent. After a few years, even the Swedish courts may take the position that the best interests of the child require that it stay where it is.[22] The fact that this rewards the abducting parent is, as such, not relevant, since the interests of the child are the only criterion to be considered.

[18] See SFS 1978:302.

[19] See, *e.g.*, *Bentata* v. *Grüting*, 1969 NJA 455 (Supreme Court 1969).

[20] See, *e.g.*, the case of *Lakouras*, 1971 RÅ no. S 247 (Supreme Administrative Court 1971).

[21] See, *e.g.*, *Madsen* v. *Bondesson*, 1970 RÅ no. S 255 and *Schlöss* v. *Wåhlander*, 1970 RÅ no. S 306 (both decided by the Supreme Administrative Court in 1970).

[22] See *Angelika M.* v. *Abdelkarim A.*, 1992 NJA 93 (Supreme Court 1992).

V. CRIMINAL JURISDICTION

According to Ch. 7, sec. 4, of the Swedish Penal Code of 1962, a person who, without authorization, separates a child under fifteen years of age from its custodian, commits the crime of "dealing arbitrarily with a child" (*egenmäktighet med barn*) and shall be sentenced to pay a fine or to imprisonment for at most six months (in grave cases two years). The same applies if one parent without due reason arbitrarily takes away a child under fifteen years of age who is under the joint custody of both parents. If the abducting parent has deprived the child of his liberty "by carrying him away, confining him or otherwise", the abduction can constitute an even more serious crime of "unlawful deprivation of liberty" (*olaga frihetsberövande*), punishable with imprisonment for at most ten years under Ch. 4, sec. 2, of the Penal Code. The Supreme Court held recently that an abducting parent, who had been punished for the abduction but went on refusing to return the child, could be subjected to repeated criminal proceedings, since the withholding of the child constituted a new crime.[23]

The fact that a child abduction is punishable under Swedish penal law suffices for Swedish criminal jurisdiction only if the abduction has been committed in Sweden. The principle of territoriality is embodied in Ch. 2, sec. 1, of the Penal Code, stipulating that a crime committed within Sweden shall be judged according to Swedish law and by a Swedish court. Swedish courts may also have jurisdiction when the crime was committed abroad, but this usually requires the fulfilment of additional conditions, such as the punishability of the act under both Swedish law and the law of the country where the act was perpetrated (Ch. 2, sec. 2, of the Penal Code). This requirement may cause problems in cases concerning child abductions, since the diverging views in various countries in matters of custody can easily create a situation where an act considered in Sweden to be a criminal kidnapping is deemed legitimate in the country to which the child was taken by the abducting parent.

The last-mentioned problem is, however, almost eliminated by the Swedish rules concerning the localization of crimes, since they make it practically impossible to abduct a child to or from Sweden without committing a crime localized in Sweden. This follows from Ch. 2, sec. 4, of the Penal Code, providing that a crime is deemed to have been committed not only where the criminal act occurred but also where the crime was completed. Furthermore, it suffices for Swedish jurisdiction that only a part of the criminal conduct or of its effect took place in Sweden. Even if a child was

[23] *Prosecutor* v. *Mahmoud I.*, 1992 NJA 566 (Supreme Court 1992).

sent to a foreign country in order to visit a parent living there and this parent refuses to return the child to Sweden, it can be argued that the refusing parent commits the crime of "dealing arbitrarily with a child" in Sweden, although he may never have been here, since the stipulated effect, *i.e.* the separation of the child from the other parent, takes place in Sweden.

An accomplice to a crime committed in Sweden (an accomplice is defined as anyone who furthered the crime by deed or advice) is deemed to have acted in Sweden, too. Thus, a parent residing abroad who sends a person to Sweden with instructions to abduct a child can, for jurisdictional purposes, be treated as if he had acted in this country. In fact, the instructing parent can under such circumstances be considered to be the principal perpetrator rather than an accomplice, the actual abductor being a mere instrumentality. On the other hand, a parent in Sweden who sends an agent to a foreign country with instructions to kidnap a child there, is deemed to act in Sweden as well, since his criminal act, or at least a part of it, took place here.

Finally, it must be stressed that there are usually no reasons to treat abductions of children to Sweden more leniently than similar kidnappings of children from Sweden to a foreign country.