

Transnational child protection: The role of Judges, Social Services & CAs

**Direct Judicial Communications within
the International Hague Network of Judges
in the context of the Hague 1980 & 1996
Conventions and Brussels IIa**

Riga, Latvia, 25 November 2014

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ORGANIC APPROACH

Direct Judicial Communications

First case of Direct Judicial Communications – DJC (1996)

D. v. B., 17 May 1996, Superior Court of Quebec (first instance);
Terrebonne, Family Division (Canada)
< www.incadat.com > Ref. HC/E/CA 369

A Judge from Quebec contacts a Judge in California to ask:

- 1) Whether it is possible to withdraw criminal charges against the abducting mother with a view to avoid imprisonment upon return to the United States of America
- 2) Whether it is possible to guarantee an hearing without delay upon the return of the child to the United States of America

ORGANIC APPROACH

International Hague Network of Judges

International Hague Network of judge – 1998

“Designation of one or more members of the judiciary to act as a channel of communication and liaison with their National Central Authorities, with other judges within their jurisdictions and judges in other Contracting States to deal with *1980 Hague Abduction Convention cases*”

Since 1998

- Collection of case law (1998–[...])
- Identification of practice (2001–2012)
- Development of Safeguards for DJC (2001)
- Development of Guidance for the designation of judges (2008-2012)
 - In consultation with States and the Judiciary
- Development of Principles for DJC (2008-2012)
 - Drawn-up with the assistance of a group of judges
 - In consultation with Members of the IHNJ and States

EMERGING GUIDANCE

International Hague Network of Judges

The 2012 Emerging Guidance regarding the development of the International Hague Network of Judges

Principle No 1

1.2 Judges designated to the Network with responsibility for international child protection matters should be sitting judges with authority and present experience in that area.

1.3 The process for the designation of Network Judges should respect the independence of the judiciary.

1.6 Where possible, designations should be for as long a period as possible in order to provide stability to the Network while recognising the need to have new members join the Network on a regular basis. It is established practice that judges who are no longer active should resign from the Network to be replaced by sitting judges with authority and present experience in that area.

GENERAL PRINCIPLES FOR DJC Safeguards

Respect for the rule of law

Principle No 6.1

“6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.”

Judicial independence

Principles Nos 6.2 and 6.3

“6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.”

“6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.”

GENERAL PRINCIPLES FOR DJC Safeguards

Due process safeguards

Principle No 6.4

“6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:

- *except in special circumstances*, parties are to be notified of the nature of the proposed communication;
- a record is to be kept of communications and it is to be made available to the parties;
- any conclusions reached should be in writing;
- Parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.”

Principle No 6.5

“6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices *which allow greater latitude.*”

DIRECT JUDICIAL COMMUNICATIONS

Examples

Current scope – 1980 & 1996 Conventions & Brussels IIa

- a) scheduling the case in the foreign jurisdiction:
 - i) to make interim orders, *e.g.*, support, measure of protection;
 - ii) to ensure the availability of expedited hearings;
- b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
- c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- d) ascertaining whether the foreign court can issue a mirror order (*i.e.*, same order in both jurisdictions);
- e) confirming whether orders were made by the foreign court;

DIRECT JUDICIAL COMMUNICATIONS

Exemples (cont.)

Current scope – 1980 & 1996 Conventions & Brussels IIa (cont.)

- f) verifying whether findings about domestic violence were made by the foreign court;
- g) verifying whether a transfer of jurisdiction is appropriate;
- h) ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful;
- i) ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (*e.g.*, where necessary, access to free legal representation, etc.);
- j) ascertaining whether a parent will be subject to civil / criminal sanctions when returning with a child to the State of habitual residence;
- k) resolving issues of parallel proceedings and the taking of jurisdiction.

CURRENT WORK PROGRAMME

- Encourage the designation of judges to the IHNJ
- Disseminate widely the Emerging Guidelines and General Principles (EG & GP) for DJC
- Raise awareness and promote the EG & GP for DJC vis-à-vis the judiciary and practitioners (develop an information document on DJC)
- Integrate the General Principles for DJC into domestic law
- Ensure that a legal basis for DJC exist either at the domestic or international level

(see C&R Cumberland Lodge Conference 2013)