

In Practice

When a Foreign Child Comes into Care, Ask: *Has the Consul Been Notified?*

by Pamela Kemp Parker

The Vienna Convention on Consular Relations (“VCCR”)¹ has been in force in the United States for more than 30 years. Until creative attorneys seized on treaty compliance as an appellate issue, the VCCR was virtually unheard of, even among seasoned child welfare advocates and judges.

Article 37 (b) of the VCCR requires, among other things, that the responsible parties give notice to the consular post when child protective services takes a foreign national child into custody. Child welfare professionals in *every* state need to be prepared to comply with consular notification.

Traditionally the highest concentrations of foreign national residents have been in New York, Florida, New Jersey, Texas, California, Arizona and Illinois. However, with an estimated five million undocumented foreign nationals in the United States as of 1996² and more than 660,000 people immigrating legally in a single year,³ no state can ignore the issue of consular notification. Compliance with this treaty provision not only satisfies an important legal obligation and eliminates a potential appellate issue, but also maximizes the resources available for a child and promotes permanency.

The Consul as a Resource

When a foreign-born child is taken into an agency’s custody, notifying the consular officer from the child’s home country taps into what can be an invaluable resource. A consular officer speaks the family’s native language and can explain applicable child protection laws in the context of the customs and laws of the family’s home country. The rapport that consular staff can often establish with citizens from the home country can alter the outcome of a case. A consular officer can also contact social services in the home country, help search for relatives, request expedited home studies, obtain official documents, make travel arrangements, issue travel documents for a child being placed abroad, and even arrange for someone to accompany a child on a flight to the home country.

The resources of individual consular posts vary greatly. In some cases notifying the consular post will not yield a response. Even consular offices that do not routinely respond to notification in child welfare cases may respond if extraordinary circumstances exist or a specific need is identified. For that reason, it is sometimes worthwhile to contact a consular officer even after formal notice is sent, if significant information about the case later comes to light or a specific need is identified.

International Treaty Obligation

When originally negotiated, the VCCR codified customary international law governing the conduct of consular relations.⁴ The treaty entered into force for the United States in 1969 and most countries of the world are now parties.⁵ The VCCR contains a series of provisions designed to permit a consular officer to protect the interests of citizens from the home country who are living in or visiting the “host country” where a consular officer is stationed. For example, Article 37 requires that the consul be notified (among other circumstances) in the event of a foreign national’s death, arrest, detention, or, in the

case of a minor or incapacitated person, if a guardianship appears appropriate (*See Vienna Convention on Consular Relations*, p. 182).

Relevant to child welfare litigation, Article 37(b), requires that “[i]f the relevant information is available,” the authorities have the duty to “inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor...who is a national of the sending State.” For purposes of the VCCR, the “sending State” is the consular officer’s home country.

While the term “guardian” or “trustee” connotes a more permanent legal status than a child protective services agency typically seeks when a child is first taken into custody, the best practice is to give notice as soon as a child is removed from the home, even if no permanent, guardian-type orders are contemplated. The later notice is given, the more likely that any placement or resources the consular officer may offer could delay the case or result in disruption for a child.

As a self-executing treaty, the VCCR is binding on state and local government authorities without implementing legislation.⁷ While the treaty does not specify the identity of the “competent authorities” responsible for giving notice, State Department instructions indicate the officials responsible for the legal action impacting a foreign national should normally give notice.⁸ For children taken into custody as a result of abuse, neglect, or abandonment, the primary responsibility probably rests with the agency or entity acting to remove the child or the attorneys representing the agency. Judges and child advocates can also promote compliance by asking if the consular post has been notified whenever a foreign-born child is before the court.

Who is a Foreign National?

Identifying the nationality of every child taken into custody to find out which are foreign nationals is probably the most difficult aspect of consular notification. For this purpose, a foreign national is any child who is not a U.S. citizen, regardless of the child’s immigration status in the United States.⁹ In other words, whether a child is a lawful permanent resident (holder of a “green card”), a visitor on a temporary visa, or an undocumented person, the duty to notify the consular post applies. Only in the case of a dual national (a citizen of two countries), where a foreign-born child is also a U.S. citizen, is notice not required.¹⁰

For consular notification purposes, a child reported to be born in a foreign country should be assumed to be a foreign national. As soon as possible, however, a child’s nationality should be verified with documentation. A child’s birth certificate, passport, or other national identity record is the best proof of nationality. Baptismal records or hospital records referencing the date and place of birth can also be used. Consular staff can often help locate records in the home country.

Many child welfare agencies will be able to identify foreign-born children in foster care without significant additional work. For children receiving federal foster care benefits under Title IV-E,¹¹ documenting U.S. citizenship or a foreign child’s immigration status is required to comply with citizenship and immigration status verification requirements imposed as part of welfare reform.¹² As a result, the same procedures used to verify eligibility for federal foster care funding can also be used to identify foreign-born children for purposes of consular notification.

The Mechanics of Notice

Once a child is identified as a foreign national, notice can be mailed (certified, return receipt requested) or preferably faxed to the consular post. Consular officers typically rely on fax machines for routine communications, making this an ideal method for giving notice. Whatever method used, it is essential to enter the notice and *proof that it was received by the consular post*, into the record of the

court proceedings. Either the fax confirmation record or the return receipt for certified mail, with a copy of the notice sent, can be used.

The notice should identify the nature of the legal proceeding, the child involved, the time and place of the next hearing (if known), and the agency representative who can be contacted for more information about the case or to arrange a meeting with the child. A sample notice (see Sample Notice to Foreign Consul, p. 183) and contact information for foreign consuls and embassies in the United States (see Resources For Consular Notification, p. 184) are provided.

Article 37(b) does not specify what constitutes adequate notice. As long as the court record contains clear proof that the consular officer received actual notice of the proceedings and had an opportunity to appear, a single notice should be sufficient. The only indication to the contrary is one court's characterization of 10 telephone calls and a letter sent to the consul by a caseworker as the "bare minimum of acceptable notice."¹³ Although that decision does not clarify this point, the court's emphasis on the need for a "definite documentary record" suggests the court's criticism may have been prompted by a lack of proof that the consular post actually received notice, not the number of contacts made.

The VCCR does not address this issue, but the ongoing nature of child welfare proceedings makes it good practice to add any consular officer who responds to notice under Article 37(b) to the proof of service for future hearings. If a consular officer does not respond to the notice, no further action is required once the notice and proof that it was sent to the consular post is entered into the court record.

The Consul's Role

Notice under Article 37(b) is "without prejudice to the laws and regulations of the receiving State." In other words, while a consular officer may appear in court, the nature and extent of the officer's participation in the court proceedings is governed by state law. Article 36 of the VCCR (the "consular access" provision), however, does authorize contact between consular officers and foreign nationals who are in prison, custody, or detention. In any of these circumstances, consular officers have the right to converse and correspond with a foreign national, and to arrange for legal representation.

Many times consular staff will work directly with the social worker and never meet the child. If a consular officer asks to meet with a child in agency custody, however, the social worker should advise the guardian ad litem and the child's attorney. In most instances, any concerns about such a meeting can be adequately addressed by alerting the consular officer to any issues that someone unfamiliar with the case (or possibly, child welfare cases generally) may not be aware of. In most circumstances a consular officer's involvement in a case benefits the child tremendously and is welcomed by all concerned.

The VCCR does not address the confidentiality rules that govern child welfare proceedings. Giving notice of the proceeding satisfies the treaty, but in most cases a consular officer will not be able to help without detailed information about the case. Depending on state law, agency attorneys may conclude the same type of information staff routinely share with sister agencies across state lines can be shared with a consular officer. If an assessment of a potential placement in the child's home country is requested, for example, the consular staff will likely need reports reflecting the child's needs and background to share with the evaluator in the home country.

International Golden Rule

Elizabeth Swope, the U.S. State Department's Senior Coordinator for Consular Notification, cites the concept of reciprocity underlying the VCCR, which has sometimes been called the "international golden rule," as another reason consular notification is important.¹⁴

A career Senior Foreign Service Officer who has been stationed in Cairo, Paris, Mexico City, and Belgrade, Swope stresses that when notice or access provisions of the VCCR are violated in this country, U.S. consular staff stationed in foreign countries find it harder to request compliance with the VCCR from

foreign governments. As a result, failing to notify the consular officer not only affects children in the United States, but can also harm U.S. citizens overseas.

Judicial Warnings

Four courts have published opinions addressing the VCCR's consular notice requirement in the context of child welfare litigation. While none of the decisions resulted in a reversal on this ground, these cases raise the specter of a reversal if a foreign consular post does not get actual notice when a child is taken into custody.¹⁵

Most recently, the Indiana Court of Appeals in *E.R. v. Marion County Office of Family & Children*,¹⁶ noted "significant concerns" about treaty compliance and called for improved efforts to notify foreign consuls in child protection cases. Citing *Arteaga v. Texas Dep't of Protective & Regulatory Services*,¹⁷ the *E.R.* court reiterated that court's admonition "[urging] the State, in circumstances such as these, to provide a definite documentary record demonstrating that the Mexican Consulate received adequate notice affording it the opportunity for intervention if desired."¹⁸ Advocates who heed these warnings can improve a foreign-born child's prospects for permanency immeasurably.

Watchword for Advocates

The simple act of giving the consular post notice when a child is taken into custody increases resources for a child and family, satisfies a treaty obligation, promotes reciprocal protections for U.S. citizens abroad, eliminates a potential ground for appeal, and enhances a child's chance for a successful, permanent placement. With greater awareness among advocates of this issue and a systematic approach to ensuring notice is given, every foreign-born child in the child welfare system will enjoy the protections the VCCR provides.

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Endnotes

1. Vienna Convention on Consular Relations, 21 United States Treaties and Other International Agreements 77; 596 United Nations Treaty Series 261.
2. A consular post can be part of a foreign country's embassy in Washington, D.C. or a consular office located in any of the 50 states. A consular officer is an employee of a foreign country who is authorized to exercise consular functions.
3. *INS Releases Updated Estimates of U.S. Illegal Population*. Office of Public Affairs, Immigration & Naturalization Service. February 7, 1997 <<http://www.ins.usdoj.gov>> (See Public Affairs, "Statistics" under Subject List).
4. *INS Announces Legal Immigration Figures for Fiscal Year 1998*. Office of Public Affairs, Immigration & Naturalization Service. August 11, 1999 <<http://www.ins.usdoj.gov>> (See Public Affairs, "Statistics" under Subject List).
5. *Consular Notification and Access, January 1998 Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them*. U.S. Department of State, 1998 <<http://www.state.gov>> (See "Consular" in Site Index, 42).
6. *Ibid.*
7. *Ibid.*, p. 44.
8. *Ibid.*, p. 18.
9. *Ibid.*
10. *Ibid.*
11. 42 U.S.C. § 672 (2000).
12. 8 U.S.C. § 1642 (2000).
13. 924 S.W.2d 756, 761, n.6 (Tex. App. 1996).
14. Telephone interview with Elizabeth Swope, Senior Coordinator for Consular Notification, U.S. State Department, November 22, 2000.

Date of birth:
Place of birth:
Passport # (if available):
Mother's name:
Father's name:

We welcome any assistance your office can provide to this child and/or family, including identifying family members or other resources that might benefit this child.

If the child's parent(s) are unwilling or unable to provide the child with a safe environment, this agency may seek further court orders restricting or terminating parental or custodial rights of this child.

The pending legal case is:
Petition or Cause #:
Court:
Address:
Date and time of next hearing:

To obtain more information about the case, or to arrange for consular access, contact:

Name & Title:
Alternate Contact Person:
Agency/Organization:
Phone Number:
Fax Number:
Address:

*This notice is designed for use in child protection litigation, but could also be tailored for use by adult protective services staff in those cases where a foreign born client lacks capacity and is in need of a guardian or trustee.

Resources

Consular Notification and Access, January 1998 Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them

Published by the U.S. Department of State, January 1998.

This booklet contains detailed instructions on consular notification, historical information, answers to frequently asked questions, legal background material, and a directory of foreign embassies and consuls in the U.S. It is available on the U.S. State Department's website at www.state.gov, under "Consular" in the Site Index.

State Department Directory of Foreign Consuls

Published by the U.S. Department of State Spring/Summer 2000.

This directory is available on the State Department's website, www.state.gov under "Consular" in the Site Index, or can be ordered for \$12 from the Government Printing Office, 202/512-1800. Although the consular notification booklet (above) includes contact information for foreign consular posts, this directory is updated more frequently.

For questions not answered on the State Department's website, write or call:

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