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A Guide to Consular Notification for Local Governments

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Prefatory Remarks

Is an international law treaty from 1963 important to local governments in Illinois?

Yes, as evidenced by a recent opinion of the U.S. Court of Appeals for the Seventh Circuit and action by the Illinois Supreme Court. The treaty at issue is the Vienna Convention on Consular Relations (“VCCR”)¹, which provides for various notification requirements of a foreign consulate office, including when a foreign national² is arrested or detained.³

First, the Seventh Circuit reversed and remanded a District Court’s dismissal of a private person’s action against law enforcement officers and the state’s attorney for the failure to give VCCR notice, stating that such failure does give rise to a judicially enforceable, self-executing right.⁴ Second, the Illinois Supreme Court Rules Committee is currently reviewing proposed Supreme Court Rule 404 (“Rule 404”), which would require state court judges to notify foreign nationals of certain VCCR rights.⁵ Clearly it is important for officials in federal agencies down to local police departments to be aware of the VCCR, which has stepped to the forefront in criminal and civil disciplines.

Introduction

This article will address: (a) what is the VCCR and is it enforceable in Illinois, (b) what is required of law enforcement officers and other officials under the VCCR, and (c) what steps should law enforcement officers and state officials take to comply with the VCCR.

The Vienna Convention on Consular Relations & Its Enforceability

Our justice system provides that an arrested or detained individual be afforded a chance to have appropriate representation and a chance to fully understand the nature of the

¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S 261, 21 U.S.T. 77, T.I.A.S. No. 6820 (1970). Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

² For the purposes of this topic, “foreign national” means any person who is not a U.S. citizen and does include resident aliens (i.e. person with a “green card”), illegal aliens and dual citizens of two or more nations other than the United States. U.S. citizens with dual citizenship are not included.

³ The Department of State does not consider brief routine detentions, such as for traffic stops or accident investigations, to be the type of situation contemplated by the VCCR.

⁴ *Jogi v. Voges*, 480 F.3d 822 (7th Cir., 2007).

⁵ As of writing this article, proposed Illinois Supreme Court Rule 404 was on the agenda for the annual public hearing scheduled for January 26, 2009 before the Illinois Supreme Court Rules Committee; Proposal No. 07-03 (PR 0158). Rule 404 was supported by the ISBA International and Immigration Law Section, but opposed by the ISBA Criminal Justice Section Counsel.

proceedings against him or her, whether that person is a United States citizen or a foreign national. An American arrested aboard would certainly want reciprocal treatment in a foreign land. The VCCR led the way for countries to define and protect such rights.

The VCCR was drafted at a diplomatic conference in Vienna in 1963 and included, among other topics, protecting foreign nationals who are arrested or detained in other nations. The United States was a participant in the conference and ratified the VCCR under President Nixon in 1969, making it the “supreme law of the land”⁶ and enforceable in Illinois. Also, the VCCR has been determined to be self-executing, therefore allowing it to be the basis of a private lawsuit without any required enabling legislation.⁷

An example of such a private lawsuit comes from the Seventh Circuit in *Jogi v. Voges*, which involved a foreign national from India (Jogi) who was arrested and plead guilty to aggravated battery with a firearm in Champaign County, Illinois.⁸ Mr. Jogi was removed from the United States and returned to India after serving six years of a twelve-year sentence.⁹ At no time did a law enforcement officer or other state official advise him of his rights under the VCCR, for which Mr. Jogi sought compensatory, nominal and punitive damages in Federal Court, claiming subject matter jurisdiction under the general jurisdiction statute¹⁰ and the Alien Tort Statute.¹¹ The Court concluded that the foreign national was entitled to pursue his claim under § 1983 against various Champaign County law enforcement officials including two investigators who questioned him after his arrest.¹²

However, two federal cases since *Jogi* have already questioned the Seventh Circuit’s ruling. On April 24, 2008, the Second Circuit in *Mora v. New York* held that there was no individual right of action for the violation of the VCCR.¹³ Similarly, on May 22, 2008, the Eleventh Circuit in *Gandara v. Bennett* ruled on whether or not individual rights are bestowed by the VCCR.¹⁴ The Court stated, “Although we find the issue a close one with strong arguments on both sides, we ultimately conclude the answer is ‘no.’”¹⁵

Notification Rights Under The VCCR

Among other things, the VCCR requires:

⁶ U.S. Constitution, Article VI, clause 2.

⁷ Restatement (Third) of the Foreign Relations Law of the United States § 111(4) (1987); *Jogi*, 480 F.3d at 825.

⁸ *Jogi*, 480 F.3d at 825.

⁹ *Id.*

¹⁰ 28 U.S.C. § 1331.

¹¹ 28 U.S.C. § 1350.

¹² *Jogi*, 480 F.3d at 836. The Seventh Circuit reversed and remanded the decision to proceed with a § 1983 action, but the case was later dismissed on February 6, 2008 by stipulation of the parties.

¹³ 524 F.3d 183 (2d Cir., 2008).

¹⁴ 528 F.3d 823 (11th Cir., 2008).

¹⁵ *Id.* at 825.

- (1) when foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.¹⁶ In some cases, the nearest consular officials must be notified of the arrest or detention of a foreign national, regardless of the person's wishes;¹⁷
- (2) consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance;¹⁸
- (3) when a government official becomes aware of the death or serious injury of a foreign national, consular officials must be notified;¹⁹ and
- (4) when a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.²⁰

Procedures To Comply With The VCCR

This article focuses primarily on the arrest or detention scenario. In all cases, an arrested or detained foreign national must be informed of his or her right to consular notification, and such notice and access to the detainee must occur “without delay.” “Without delay” should be interpreted to mean to occur as soon as reasonably possible under the circumstances. A typical arrestee who ends up facing detention²¹ should find consular notification by the time the he or she is processed through booking. If delay has occurred, for one reason or another, an officer still should proceed with the VCCR requirements as soon as possible so the proper consulate office may provide assistance if necessary.

Furthermore, it is prudent for the members of the bar and bench to inquire as to whether a foreign national has been provided with consular notification at the time of arraignment or other initial appearances. This policy has led to the drafting and submission of the proposed Rule 404 to direct the courts to advise a foreign national charged with a felony in Illinois of his or her VCCR rights. The committee comments to the proposed Rule 404 note that such notice should be giving to all detained persons (regardless of offense level) by the initial arresting or detaining officer, and that notice given by the judge is not intended to substitute for the initial notice, rather it is to ensure compliance with the VCCR and further document such notification.²²

In most cases, once the foreign national is given the notice of his or her right, the person then has the option to decide whether to have consular representatives notified of the arrest or detention. There may be reasons why a person would not want to

¹⁶ VCCR, Art. 36(1)(b).

¹⁷ Approximately 60 countries or jurisdictions have bilateral treaties with the United States that make consular notification mandatory. For a current list see: http://travel.state.gov/law/consular/consular_737.html.

¹⁸ VCCR, Art. 36(1)(a), (1)(c).

¹⁹ *Id.*, Art. 37(a). Serious injuries most often result to admission into a hospital, likely in an unconscious condition, which may be considered detention for notice purposes under the VCCR.

²⁰ *Id.*, Art. 37(b).

²¹ As opposed to an arrestee being released without delay, e.g. on a Notice to Appear or traffic citation.

²² The original Rule 404, drafted by Southern Illinois University Law Prof. Cindy G. Buys applied to all criminal defendants, felony or otherwise. However, this “back end” notice Rule was amended later to apply only to felony defendants. How Rule 404 will be accepted, if at all, by the Illinois Supreme Court Rules Committee is yet to be seen.

exercise this right as not to alert his or her home country of his or her whereabouts or possible illegal activity. Therefore, you may not create a broad policy to simply notify every foreign national's consulate automatically. However, in some cases, the foreign national's consular officials must be notified of an arrest or detention regardless of the person's wishes if a bilateral agreement between the United States and the other country requires it.²³ Therefore, the first step for the detaining officer should be to determine whether consular notification is at the option of the foreign national or whether it is mandatory. The U.S. Department of State has a wealth of resources, including a pocket card that includes instructions, a list of the mandatory contact jurisdictions and contact information for questions, including a 24-hour hotline number to the State Department Operations Center at (202) 647-1512.²⁴

If the foreign national's country is not on the mandatory notification list, then the officer must offer, without delay, to notify the person's nearest consular office of the arrest or detention, and notify if asked to do so. If the foreign national's country is on the mandatory notification list, then the officer must notify, without delay, the nearest consular office of the arrest or detention, and inform the foreign national that such notification has been made. It is not uncommon for language differences to create communication problems during this process, including even determining the proper consulate to notify, i.e. a person's nationality, if no passport is available. To alleviate this problem, a large poster may be download or ordered from the State Department for display in detention or booking areas that contains a paragraph in English and twenty other languages explaining the person's rights under the VCCR and asking, "Do you want us to notify your country's consular officials?"²⁵

The best method to provide the notice to a consulate office is by facsimile. Each law enforcement agency may wish to draft its own fax template modeled off the sample from the State Department.²⁶ In matters of death or serious injury of a foreign national, a sample separate fax sample is available.²⁷ The appropriate fax numbers may be determined by calling the Operations Center at the telephone number above or by checking online.²⁸

Law enforcement agencies should keep written records sufficient to show compliance with the above notification requirements. A confirmed fax transmission page and/or a note in a written report will document the official's compliance with the VCCR. Such compliance can be compared to the documentation of providing *Miranda* rights to an individual, including notations as to the time, date and location of notification along with a signature by the foreign national as to the events that occurred.²⁹ Proper

²³ *Supra*, footnote 17.

²⁴ Pocket card may be downloaded from: <http://travel.state.gov/pdf/CNApocketcard.pdf>.

²⁵ <http://travel.state.gov/publisher/consularnotification.pub>.

²⁶ Sample detention fax: http://travel.state.gov/docs/notification_faxsheet2.doc.

²⁷ Sample death/injury fax: http://travel.state.gov/docs/notification_faxsheet_injury.doc.

²⁸ Fax number listings: http://travel.state.gov/law/consular/consular_745.html.

²⁹ As to optional notification, that the person was given notice and whether or not the foreign national requested that consular officials be notified, or, as to mandatory notification, that notice was given to the consulate and the foreign national was told of the consulate's notification.

recordkeeping will not only improve conformity with the VCCR, it will make inquiries from the Department of State easier to address and document compliance for possible litigation.

Lastly, if a consulate official requests visitation or communications with a detained national, it must be allowed.³⁰ While consular visitors must abide by the standard regulations implemented by the law enforcement authorities and detention facilities, it is recommended that liberal access be granted to the foreign national as not to thwart the purpose of the VCCR rights or risk liability for noncompliance.

Conclusion

While Courts have consistently held that suppression of evidence is not a remedy for a VCCR violation³¹, the authority remains split on the possible application of a § 1983 action or other private remedy.³² Remember, the VCCR is a multilateral treaty implemented around the world, and its obligations are mutual. An American citizen would want the same prompt, courteous notification for consular assistance if he or she were aboard and detained. Proper training of how and when to comply with the VCCR requirements not only satisfies the legal requirements under the treaty, it may protect local governments and law enforcement officers from violating an individual's rights.

Visit the U.S. Department of State's website for more information, including downloads of materials, training resources, contact information, FAQs and a model standard operating procedure: http://travel.state.gov/law/consular/consular_753.html.

Order materials for your agency: http://travel.state.gov/law/consular/consular_726.html.

³⁰ VCCR, Art. 36(1)(a), (1)(c).

³¹ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) [denied suppression of evidence due to failure of VCCR notification]; *Gomez v. Quarterman*, 529 F.3d 322 (5th Cir., 2008) [denied suppression of triple murder confession due to failure of VCCR notification].

³² *Supra*, footnotes 4, 13 & 14.