

CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
(INTERNATIONAL COOPERATION IN CIVIL MATTERS)

Bulgaria

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§ 1. Introduction

International parental child abduction is a global problem affecting several thousand children each year. There are two scenarios of international child abduction:

- 1) a child is unlawfully removed from a country in which the child and the person who has the legal right to custody normally live or
- 2) a child is unlawfully retained in a country which it is visiting.

Generally European legal systems contain provisions guiding the very interest of the child. The provisions can be found consequently in two international documents - The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter, "*The Convention*" or "*The 1980 Hague Convention*") and The Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter, "*The Regulation*" or "*Brussels II Revised*").

The 1980 Hague Convention is supplemented by certain provisions of the Regulation, which applies in cases of child abduction between Member States. The Convention and the Regulation are generally similar in scope and some provisions can be found at The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (*The Luxembourg Convention*). It was signed in 1980 and applies to a number of European countries in cases where the EU Regulation does not apply. It is now of limited relevance because the EU Regulation and the Hague Convention cover the relevant countries. Hague Convention (1996) on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures ("*The 1996 Hague Convention*") is the third of the modern Hague Conventions on international family law. It covers a wide range of civil measures related to the protection of children including: orders concerning parental responsibility and contact, public measures of protection or care, matters of legal representation and the protection of children's property.

Both Hague and Luxembourg Conventions deal with children under the age of 16 and provide that the *paramountcy* principle applies – that means that the welfare of the child is of paramount importance.

Because of the pointed limited relevance of the Luxembourg Convention and Hague Convention (1996), our work points at The 1980 Hague Convention and the Regulation, which are gathering the most important provisions.

§ 2. The Hague Convention on the Civil Aspects of International Child Abduction

The 1980 Hague Convention is developed by the Hague Conference on Private International Law and it is the main international treaty that can assist parents whose children have been abducted to another country. As of January 2012, approximately 87 countries have adopted the Convention.

The Convention provides a return mechanism that does not seek to resolve custody issues or any additional disputes concerning the child's status. It results in a quick return of a child to his or her habitual country, where custody and other disputed issues may be resolved.

The Convention mandates return of any child who was a “habitual resident” in a contracting state immediately before an action that constitutes a breach of custody or access rights. The Convention provides that all Contracting States, as well as any judicial and administrative bodies of those Contracting States, “shall act expeditiously in all proceedings seeking the return of children”¹ and that those institutions shall use the most expeditious procedures available to the end that final decision shall be made within six weeks from the date of commencement of the proceedings.

§ 3. The Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

The Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility applies to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility. The Regulation covers all judgments on parental responsibility, including measures to protect the child, independently of any matrimonial proceedings. It came into effect in March 2005.

The Regulation does not apply to civil proceedings relating to maintenance, which are covered by Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It does not set an age limit – this is for the individual country to decide.

The rules of the Regulation prevail over the rules of the Convention in relations between Member States in matters covered by the Regulation.

¹ See Article 11 of The 1980 Hague Convention

In order to deter parental child abduction between Member States, Article 10 of the Regulation ensures that the courts of the Member State where the child was habitually resident before the abduction (“Member State of origin”) remain competent to decide on the question of custody also after the abduction. Jurisdiction may be attributed to the courts of the new Member State (“the requested Member State”) only under rigorous conditions.

The Regulation allows for the attribution of jurisdiction to the courts of the requested Member State in two situations only:

1. The child has acquired habitual residence in the requested Member State and all those with rights of custody have acquiesced in the abduction, or

2. The child has acquired habitual residence in the requested Member State and has resided in that Member State for at least one year after those with rights of custody learned or should have learned of the whereabouts of the child **and** the child has settled in the new environment **and, additionally, at least one of the following conditions is met:**

2.1. no request for the return of the child has been lodged within the year after the leftbehind parent knew or should have known the whereabouts of the child;

2.2. request for return was made but has been withdrawn and no new request has been lodged within that year;

2.3. decision on non-return has been issued in the requested State and the courts of both Member States have taken the requisite steps under Article 11(6), but the case has been closed pursuant to Article 11(7) because the parties have not made submissions within 3 months of notification;

2.4. the competent court of origin has issued a judgment on custody which does not entail the return of the child.

§ 4. How Does The Return Mechanism Work

Regarding the strict conditions set out in Article 13 of the 1980 Hague Convention and Article 11(2) to (5) of the Regulation, the courts are likely to decide that the child shall return in the vast majority of cases.

4.1. Interpretation of Article 13(b) from the 1980 Hague Convention

The principal purpose of the Convention is to cause the prompt return of a child to his or her "habitual residence." The duty to return a child is not abrogated by a finding under Article 13(b) but merely changes from mandatory to discretionary. Since the general intent of the Convention is to cause the return of a child to his or her "habitual residence," unless there

are some powerful and compelling reasons otherwise the court should normally and routinely exercise its discretion and return the child to his or her "habitual residence".

What is “habitual residence”?

The Convention requires any child who was “habitually resident” to be returned in a contracting nation immediately before an action that constitutes a breach of custody or access rights. The Convention does not define the term “habitual residence” thus it is not intended to be a technical term. Courts should broadly read the term in the context of the Convention’s purpose to discourage unilateral removal of a child from its “ordinary residence” – the place where the child lived when removed or retained. The child’s “habitual residence” is not determined after the incident alleged to constitute a wrongful removal or retention. A parent cannot unilaterally create a new habitual residence by wrongfully removing or retaining of a child. Because the determination of “habitual residence” is primarily a fact-based determination and not one which is restricted by legal technicalities, the court must look at those facts, the shared intentions of the parties, the history of the children’s location and the settlement of the family prior to the facts giving rise to the request for return.

In certain exceptional cases under Article 13(b), the court's mandatory return obligation is changed to a discretionary obligation, specifically, "the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The Convention has uniform rules determining which country's authorities are competent to take the necessary measures of protection. The Convention also determines which country's laws are to be applied and provides for the recognition and enforcement of measures taken in one Contracting State in all the other Contracting States. The co-operation provisions of the Convention provide the basic framework for the exchange of information and the necessary degree of collaboration between administrative authorities in the Contracting States. Reflecting an ever increasing emphasis on the need for international cooperation as an essential element in the success of these measures the Convention has a full chapter on cooperation consisting of eleven articles.

4.2. Interpretation of Article 11 (1) – (5) from the Regulation

The court shall assess whether an abduction has taken place under the terms of the Regulation Article 11. The judge shall first determine whether a “wrongful removal or retention” has taken place in the sense of the Regulation. The definition in Article 11 is to a significant extend similar to the definition of the 1980 Hague Convention (Article 13).

What is “wrongful removal or retention”?

The Convention provides that the removal or retention of a child is “wrongful” whenever: "a. It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention” **and** "b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."² These rights of custody may arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the country of habitual residence. The Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child’s place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person is considered according to the Regulation child abduction.

The court shall always order the return of the child if he or she can be protected in the Member State of origin - Article 11(4). The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(b) of the 1980 Hague Convention to a strict minimum. The principle claims that the child shall always be returned in case he/she can be protected in the Member State of origin. Article 13(b) of the Convention specifies that the court is not obliged to order the return if that would expose the child to a physical or psychological harm or put him/her in an intolerable situation. The Regulation extends the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that the authorities in the Member State of origin are prepared to make adequate arrangements to secure the protection of the child after the return. The court must examine this based on the facts of the case. It is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child.

The court must apply the most expeditious procedures available under national law and issue a decision within six weeks after requested. This time limit may only be exceeded in case of exceptional circumstances. With regard to decisions ordering the return of the child, Article 11(3) does not specify that such decisions, which are to be given within six weeks,

² See Article 13 of The 1980 Hague Convention

shall be applied within the same period. However, this is the only interpretation which would effectively guarantee the prompt return of the child within the strict time-limit. This objective could be undermined if national law allows appealing of a return order and meanwhile suspends the enforceability of that decision, without imposing any time-limit on the appeal procedure. In respect to that, national law should seek to ensure that a return order issued within the prescribed six week time-limit is “enforceable”. The way to achieve this goal is a matter of national law. Different procedures may be intended to this end, e.g.:

1) National law may preclude the possibility of an appeal against a decision entailing the return of the child, or

2) National law may allow the possibility for appeal, but provide that a decision entailing the return of the child is enforceable pending any appeal.

3) In the event that national law allows the possibility of appeal and suspends the enforceability of the decision, the Member States should put in place procedures to ensure an accelerated hearing of the appeal so as to ensure the respect of the six-week dead-line.

4.3. Hearing the child

The Regulation emphasises the importance of the children to express their views in proceedings which concern them. Hearing the child is one of the requirements for the abolition of the *exequatur* procedure for access rights and decisions implicating the return of the children. It is also possible to oppose the recognition and enforcement of a judgment in respect to parental responsibility on the basis that the concerned child was not given the opportunity to express their point of view. The Regulation sets out the main principle that a child shall be heard in proceedings that concern them. As an exception, a child may not be heard if this would be inappropriate regarding child’s age and immaturity. This exception should be interpreted restrictively. The Regulation does not modify the applicable national procedures concerning this question. In general, child’s age and maturity needs to be taken account of listening to the child needs while listening to the child’s needs. Minimum age for the child to be questioned is not presumed.

4.4. Hearing the abducting custody holder and the child when they stay in the other Member State

The fact that the abducting custody holder and the abducted child are in most cases unlikely to travel to the Member State of origin to attend the proceeding requires that their evidence can be given from the Member State where they find themselves. One possibility is to use the arrangements laid down in Regulation (EC) No 1206/2001. This Regulation, which applies as of 1 January 2004, facilitates the cooperation between courts of Member States in

the taking of evidence e.g. family law matters. A court may either request the competent court of another Member State to take evidence or take evidence directly in that other Member State. The Regulation proposes the taking of evidence by means of video-conference and tele-conference. The fact that child abduction constitutes a criminal offence in certain Member States should also be taken into consideration. Those Member States should ensure that the abducting custody holder is able to participate in the court proceeding in the Member State of origin without risking criminal sanctions. Again a solution could be found in the arrangements laid down in the Evidence Regulation. Another solution could be to put in place special arrangements to ensure free passage for the individual who abducted the child to and from the Member State of origin to facilitate the personal participation in the procedure before the court of the requested Member State. If the court of origin takes a decision on custody that does not entail the return of the child, the case shall be closed. Jurisdiction to decide on the question of substance is then attributed to the courts of the Member State to which the child has been abducted.

4.5. Possible exceptions to the return of the child

The nature of the exceptions in Articles 13 and 20 of the Convention do not apply automatically and gives the judge a discretion and does not impose them a duty to refuse to return the child in certain circumstances. The exceptions should be narrowly construed due to the Convention`s strong presumption favouring return of wrongfully removed child.

The solutions of Article 13 of the Convention gives the right to the person (a physical person, an institution or an organization, not necessarily the abductor) who opposes the return of the child to prove the claimed facts or rights. The Convention intended to put the dispossessed person in as good position, as the abductor.

There can be situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Convention includes no definition of “actual exercise” but there is no doubt that it refers to actual care of the child. Custody rights also includes the right to determine child`s place of residence. It should be compared to the definition of custody rights given in Article 5 and can be concluded that the custody is exercised effectively when the custodian is concerned with the “care of child`s person”³, for example due to illness, education, being in jail, etc. in particular case, the child and its guardian do not live together. The actual exercise of custody rights should be determined by the judge according to the law of habitual residence of the child,

³ P`erez-Vera Report

without the need of recognizing this law or resourcing to a specific procedure for the proof of that law. And this law should be viewed in the widest possible sense to decide which party had custody rights. The proof that custody was not actually exercised, does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights especially because of the action of the abductor. Surely, in cases where the guardian agreed to the removal, a delay is allowed. For example the court could delay the return, for the reason that the guardian was aware of the purpose of bringing the child here and it was the medical treatment of the left-behind parent.

If the person who opposes the return of the child proves actual exercise of custody rights the respondent must demonstrate by convincing evidence that the child have been in the new country for a period of over a year, measured from the date the child is removed from the country of habitual residence to the date of filing of the Petition, and the child is now settled in his/hers new environment. This is an exception for refusing to return the child.

The exceptions contained in sub-article b (Article 13 of the Convention) deals with situations where there is an abduction, but the return of the child would be contrary to its interests. The respondent should give convincing evidence, that there is a “grave risk” that returning of the child would expose him or her to physical or psychological harm or would otherwise place the child in an intolerable situation. Such a “grave” risk would exist if the child was to be return to a zone of war, diseases or there was documented evidence that the child was abused or neglected by the parent seeking the return. A grave risk or an intolerable situation does not exist merely because the child is used to living in the country and may have the adjustment problems upon return, or that money was in short supply in their home country, or that educational or other opportunities were limited. The court should consider all circumstances, for example the age of the child, and the interest of the child would be kept by staying with the abductor unless he/she would otherwise place the child in an intolerable situation. This could be the case of an abducted baby and some proof that the separation with the abductor would put the baby into a psychological shock or would be a hidden risk for his/hers normal behaviours. The court should use some specialists’ opinion, including the conclusions of social workers to establish this facts and this eventual conditions and should not forget “the voice of the child”.

The court should summon the exceptions due to the information of the social position of the child in the country of habitual residence, and the left-behind parent should prove that the conditions of child future living would be as good as in the country of residence.

The final exception is rarely utilized. Under this exception, the court does not need to return the child, if return would not be permitted by the fundamental principles relating to the protection of human rights and fundamental freedoms. This should also be proved by the respondent.

The decision of the court not to return is obliged to send the case to the Member State of the last habitual residence of the child and to notify the parties that within three-months of being informed, they could take submissions ‘so that the court can examine the question of custody of the child’ (Article 11 of the Regulation). If there is such a petition in the court of habitual residence, the court shall decide all the circumstances to the complex of custody rights, including the question of the future place of residence of the child within the measures of exercising custody. This is the only exception to the rules that the decision of the court based pursuant to Article 13 of The Convention is final. The reason for this solution is that the two procedures are completely autonomic and imply to different issues. That is why that judgment of the court with jurisdiction ordering the return of the child falls within the scope of the provision of Article 11(8) of Regulation even if it is not preceded by a final judgment of that court relating to rights of custody of the child.

4.6. The competent court shall transmit a copy of the decision on non-return to the competent court in the Member State of origin.

In those exceptional cases where a court nevertheless decides that a child shall not return as per Article 13 of the 1980 Hague Convention, the Regulation foresees a special procedure in Article 11(6) and (7).

This requires a court which has issued a decision on non-return to provide a copy of the decision as well as relevant documents to the competent court in the Member State of origin. This transmission can take place either directly from one court to another, or via the central authorities in the two Member States. The court in the Member State of origin is to receive the documents within a month of the decision. The court of origin shall notify the parties and invite them to make submissions, in accordance with national law, within three months of the date of notification, to indicate whether they wish that the court of origin examines the question of custody of the child. If the parties do not submit comments within the three month time-limit, the court of origin shall close the case. If at least one of the parties submits comments the court of origin shall examine the question of custody. Although the Regulation does not impose any time-limit on this, the objective should ensure that a decision is taken as quickly as possible.

A court that is seised with a request for the return of a child pursuant to the Convention shall apply the rules of the Convention as complemented by Article 11 of the Regulation. If the requested court decides that the child shall not return, the court of origin will have the final say. If the court of origin takes a decision that entails the return of the child, it is important to ensure that this can be enforced quickly in the other Member State. For this reason, the Regulation provides that such judgments are directly recognised and enforceable in the other Member State provided they are accompanied by a certificate. The consequence of this new rule results in two conclusions: (a) it is no longer necessary to apply for an “*exequatur*” and (b) it is not possible to oppose the recognition of the judgment.

The judge of origin shall issue the certificate by using the standard form in Annex IV in the language of the judgment. The judge shall also fill in the other information requested in the Annex, including whether the judgment is enforceable in the Member State of origin at the time it is issued. The court of origin shall in principle deliver the certificate once the judgment becomes “enforceable”, implying that the time for appeal shall, in principle, have elapsed. However, this rule is not absolute and the court of origin may, if considered necessary, declare that the judgment shall be enforceable, notwithstanding any appeal. The Regulation confers this right on the judge, even if this is not foreseen under national law. The aim is to prevent late appeals from unduly delaying the enforcement of a decision.

It is not possible to appeal against the issuing of a certificate. If the judge of origin has committed an error in filling in the certificate and it does not correctly reflect the judgment, it is possible to require rectification to the court of origin. The national law of the Member State of origin shall apply in that case. A party who wishes to request the enforcement of the judgment entailing the return of the child shall produce a copy of the judgment and the certificate.

The central authorities of the Member State of origin and the requested Member State shall co-operate and assist the courts. As a general remark, it is appropriate to bring to mind that the complexity and nature of the issues addressed in the various international instruments in the field of child abduction request specialised or well-trained judges. Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the Convention in a limited number of courts or judges are positive and show an increase of quality and efficiency.

4.7. Enforcement

Although the enforcement procedure is not governed by the Regulation, but by national law, it is essential the national authorities to apply rules which secure efficient and

rapid enforcement of decisions issued under the Regulation so as not to undermine its objectives. This applies mostly with regard to access rights and the return of the child following an abduction for which the exequatur procedure has been abolished in order to speed up the procedure. In this context, the European Court of Human Rights⁴ has consistently claimed that once the authorities of a Contracting State to the Convention have found that a child has been wrongfully removed, they have a duty to make adequate and effective efforts to secure the return of the child. A failure to make such efforts constitutes a violation of Article 8 of the European Convention on Human Rights (right to respect for family life)⁵. Each contracting State must prepare adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention⁶. The European Court of Human Rights has also emphasised that proceedings related to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as passing of time can have irreversible consequences for the relationship of the child with the parent he or she does not live with. The adequacy of a measure is therefore to be judged by the swiftness of its implementation⁷.

4.8. Critical aspects of the Convention

Applying the 1980 Convention rises disputable questions concerning following issues: can we make a compromise with the standard of the national legal system in favour of the international obligations or agreements. Following the strict rules of the Convention very often leads to ignoring the rules of the national procedures. The Convention procedure is specific and requires swiftness and concentration of the arguments which shall be prepared in short terms. Therefore in most cases the opponent parent doesn't have adequate time and the facilities for the preparation of the defence. On the other hand, the applicant has on his/her disposal the cooperation of the central authorities, which provides him/her with prompt and easy way to supply with the necessary documents and free legal assistance while the opponent has to prepare a great amount of paper and to ensure defence on his/her own. All that contradicts with the interests of the opponent parent and breaches the main principles of the law – the principle for “Fair and public trial” and “Equality of Arms”.

⁴ See § 5.

⁵ See e.g. the Case of Iglesias Gil and A.U.I. v. Spain of 29 July 2003, paragraph 62

⁶ See e.g. the Cases of Maire v. Portugal of 26 June 2003, paragraph 76 and Ignaccolo-Zenide v. Romania of 25 January 2000, paragraph 108)

⁷ See e.g. the Cases of Ignaccolo-Zenidi v. Romania of 25 January 2000, paragraph 102 and Maire v. Portugal of 26 June 2003, paragraph 74

§ 5. Interaction between the European Convention on Human Rights (ECHR) and the Hague Child Abduction Convention

Interaction between the European Convention on Human Rights the 1980 Hague Convention is of particular importance at this point in time. All Member States of the Council of Europe and Parties to the European Convention on Human Rights, with a few exception, are also Parties to the Hague Convention. In addition, 41 other States around the world are Parties to the Child Abduction Convention, making up a total of 87 Contracting States. Consistent interpretation and application by all States Parties of each Convention is vital to its sound operation.

The ECHR is not an appellate forum for judgments regarding the 1980 Hague Convention. It is meant to proceed when there has been a violation of the ECHR during the procedures of the 1980 Abduction Convention. Where the courts of a member state deny a petition under the Convention for the return of abducted children, a claim is usually made that the denial constitutes a violation of either Article 8 or Article 6 of the European Convention.

Article 8 guarantees the right to respect for private and family life. The operative clause is paragraph 8(2), which prohibits the interference by a public authority with the exercise of this right. There is an exception to this provision based on the interests of public safety, the prevention of crime, the protection of health or morals or the protection of the rights and freedoms of others. Child abduction cases in which the ECHR has found that a state violated Article 8 of the EC results in improper interpretation of the Convention or failure of the state to implement the decisions of its courts. The case of *Monory v. Hungary & Romania*, Application no. 71099/01, (April 5th, 2005) is illustrative of the first category.

Article 41 of the EC provides the relief which the Court may order if a violation is found. If necessary the Court shall "afford just satisfaction to the injured party", where domestic law does not allow complete reparation to be made. Satisfaction is defined by the Rules of Court as monetary compensation. Damages are awarded to compensate the wronged party for the actual harmful consequences of the violation, not to punish the offending state.

Applicants before the ECHR have claimed that the strict interpretation of Article 13(b) and the summary nature of the proceedings constitute a violation of Article 8 of the EC. The ECHR has generally rejected these claims⁸. The Court has held that it "is entirely in agreement with the philosophy underlying the Hague Convention". The case of *Maumousseau*⁹ entails a particularly extensive analysis regarding Article 13(b) of the Hague

⁸ *Paradis and others v. Germany* no. 4783/03, May 15th, 2003

⁹ *Maumousseau and Washington v. France*, Application no. 39388/05, December 6, 2007).

Convention and the 1989 UN Convention on the Rights of the child, according to which "the best interests of the child" is paramount in all matters which concern children. The ECHR adopted the view of the drafters of the Hague Convention - the concept that children should not be unilaterally removed from their habitual residence. The Court further stated that the "aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition by the passage of time, of a de facto situation that she or he unilaterally created".

§ 6. Luxembourg's Strict Approach

On 1 March 2005 a new regime entered into force for treatment of child abduction within the European Union. The 1980 Hague Convention on the Civil Aspects of International Child Abduction, remained operational but "complemented" by provisions found in the new Brussels II Revised Regulation.

The primary effect of this partnership between regional and international instruments is to allow the State of habitual residence ultimate control of a child's destiny where a wrongful removal or wrongful retention is established.

Below we illustrate a few Court of Justice of the European Communities judgments to show how this solution works.

6.1. The first Court of Justice of the European Communities' judgment clarifying the Relationship between the 1980 Hague Convention and Brussels II Revised

The Court of Justice of the European Communities gave its first interpretation of the Regulation in the light of the Abduction Convention in the *Rinau Case*¹⁰. The legal issues raised before the Court of Justice of the European Communities by the Supreme Court of Lithuania in this case focused on three main problems:

1) Whether a refusal to return a child issued on the grounds of Art 13 of the Hague Convention by the court of the State where the child is being retained shall be considered as final and not a subject to further ordinary challenge in order to trigger the procedure set out in Art 11(6)–(8) of Brussels II Revised, which might result in a return order made by the court of the (former) habitual residence of the child in custody proceedings and equipped with immediate cross-border enforceability due to the certificate under Art 42 of Brussels II Revised?

¹⁰ The Rinau Case, Case C-195/08 PPU, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0195:EN:NOT>.

2) Does the court of the EU Member State where enforcement of that latter order is sought have any power to review it if the court of the Member State of origin has issued a certificate under Art 42 of Brussels II Revised and, in the affirmative, how far does this power of review go?

3) Is the abducting parent entitled to apply for a declaration of non-recognition under Art 21(3) of Brussels II Revised concerning a judgment from another EU Member State the recognition and registration for enforcement of which has not (yet) been applied for?

The responses given by the Court of Justice of the European Communities:

1) Article 11(6) of the Regulation requires that within 1 month following the date of a non-return order under Art 13 of the Hague Convention, the court which has issued the order has to transmit a copy of it and other relevant documents to the competent court of the EU Member State where the child was habitually resident immediately before the wrongful removal or retention. However, the provision does not specify whether a first instance refusal to return the child under Art 13 of the Hague Convention which is still subject to legal challenge already triggers this obligation (and the subsequent procedure under Art 11(6)–(8) of The Regulation) or whether a final – negative – decision in the Hague Convention proceedings which is no longer subject to ordinary legal challenge is required.

Court of Justice of the European Communities held that a first instance refusal to return a child under the Hague Convention triggers the procedure set out in Art 11(6)–(8) of the Regulation, even if the Hague Convention proceedings are still pending. This interpretation is in line with the spirit of Regulation, the Hague Convention and, in particular, the best interests of the child. The Hague Convention is based on the assumption that the courts in the State of the (former) habitual residence of the child are best placed to make a custody order which reflects the child's best interest. Moreover, the return proceedings should possibly be fast-tracked summary proceedings in order to restore the previous factual situation and to prevent further harm to the child. The Regulation picks up on these aspects and elaborates further on them. On the one hand, it further accelerates the return proceedings (e.g. by making the 6-week deadline recommended in the Hague Convention mandatory). It also regulates the interplay between the custody proceedings which, in line with the spirit of the Hague Convention, supposedly take place in the State of the (former) habitual residence of the child following his or her return under the Hague Convention. While the Hague Convention contains provisions aimed at a quick clarification of the factual situation (return of the child), The Regulation is further aimed at a quick clarification of the legal situation (enabling a final custody decision to be taken by the courts of the State of the (former)

habitual residence of the child), even if the child is not being returned under the Hague Convention.

The Regulation accepts the parallel continuation of return and custody proceedings in two different Member States, regardless of the ultimate outcome of the Hague Convention return proceedings. The Regulation's rule on *lis alibi pendens* in Art 19(2) does not apply to the relation between Hague Convention return proceedings and substantive custody proceedings.

The judgment further clarifies that in cases where custody proceedings were pending before the custody court at the time of wrongful removal or retention or were brought later but still before the first instance order of non-return under the Hague Convention immediate enforceability prevails on the return order made by the custody court. According to the Court of Justice of the European Communities, Art 11(8) of the Regulation covers return orders made by courts in custody proceedings instituted under Art 11(6) and (7) of the Regulation and in custody proceedings that were drawn under the regime of these provisions later, at the time a Hague Convention non-return order from the other State was brought to the attention of the custody court.

2) According to the Court of Justice of the European Communities, the courts of the Member State where enforcement of the return order resulting from the custody proceedings in the other Member State is sought are not entitled to any review of the decision if a certificate pursuant to Arts 40(1)(b) and 42 was drawn up in accordance with the standard form set out in Annex IV to the Regulation. Furthermore, it is not for the requested court to review whether the court issuing the certificate was entitled to do so. The competence of the requested court is limited to declaring the enforceability of the certified decision and allowing the immediate return of the child.

3) In case a certificate under Arts 40–42 of the Regulation was issued, the enforcement creditor has a choice between: (a) proceedings for a declaration of enforceability or registration for enforcement under Arts 28 et seq; (b) proceedings aimed at a decision that recognition of the judgment be declared under Art 21(3); and (c) proceeding directly to enforcement, relying on the certificate. If the creditor chooses the latter, the judgment debtor may not bring proceedings for a declaration of non-recognition pursuant to Art 21(3) of Brussels II Revised. If no certificate pursuant to Arts 40–42 was issued, proceedings under Art 21(3) aimed at a decision that the judgment be not recognised remain possible and do not require an application for recognition already filed by the judgment creditor.

6.2. Joseba Andoni Aguirre Zarraga v Simone Pelz¹¹.

In Aguirre Zarraga vs Pelz case a custody order was made in favor of the Spanish father and a certificate was issued by the Spanish authorities under Article 42 of the Regulation. This is to force the return of the child even though the German appeal court had decided earlier in Hague return proceedings that the child should not be returned based on Article 13(2) of the Hague Convention, i.e. on the basis of the views of the child. The mother applied for non-recognition of the Spanish custody order before the German courts. The German court made a reference to the Court Of Justice Of The European Communities questioning whether:

“(1) Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Regulation No 2201/2003] in conformity with the Charter of Fundamental Rights?”

(2) Is the court of the Member State of enforcement obliged to enforce the judgment of the court of the Member State of origin notwithstanding the fact that according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Regulation No 2201/2003] contains a declaration which is manifestly inaccurate?”

The Court Of Justice Of The European Communities considered that there should be no derogation from Article 42 if the circumstances referred to by the German court arose. It stated that it is clear from Article 42 that a decision accompanied by a certificate “is to be recognized and is to be automatically enforceable in another Member State there being no possibility of opposing its recognition”. Therefore the Member State of enforcement can simply declare that “a judgment thus certified is enforceable”, no matter what the circumstances are. Any questions concerning the lawfulness of the judgment can only be “raised before the courts of the Member State of origin”.

The approach of the Court Of Justice Of The European Communities in this particular case is placing too much confidence in the principle of mutual trust and is starkly contrasting the ECHR’s recent approach, encouraging “an in depth-examination of the entire family situation in the abduction proceedings”. Both perspectives have the potential of harming the rights of the children and the family in cases of wrongful removal or retention.

¹¹ Case C-491/10 PPU available at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0491:EN:NOT>.

Uniform interpretation is essential for securing a working balance between international conventions and regional instruments. On the other hand common understanding and application of the Abduction Convention is particularly important in view of Art 6 (2) of the Consolidated Version of the Treaty on the European Union. It provides the competence of the EU to accede to the ECHR which means that all cases of the Court Of Justice Of The European Communities that deal with human rights issues would be subject to review by the ECHR. If the Court Of Justice Of The European Communities does not change the position it has taken in *Aguirre Zarraga*, it is likely that future decisions of the ECHR will question the enforceability of the decision accompanied by a certificate in the country of refuge if it was issued by the authorities in the court of origin without hearing the child.

§ 7. Is there a place for mediation?

Considering the sensitivity of the issues raised a mediation procedure would have serious advantages in cases of international child abduction. As an alternative way of resolving disputes it could protect children and parents from the emotional and psychological strain arising from legal proceedings. An agreement reached by the parties during a mediation procedure can avoid unnecessary relocation of the child. It is usually less time consuming and could be more cost efficient than court proceedings. Mediation empowers parents to actively and purposefully address the issues affecting the future of their family.

The 1980 Hague Convention encourages the amicable resolution of family disputes.¹² On the other hand, mediation and other means of alternative dispute resolution are also promoted by regional instruments.¹³

A post of the European Parliament Mediator for International Parental Child Abduction was created in 1987. On 21 May 2008, the European Parliament and the Council of the European Union concluded the “European Directive on certain aspects of mediation in civil and commercial matters”.

A research on the mediation procedure in case of international parental child abduction shows that the majority of parents did not consider that it was necessary to have

¹² See Article 7 of the 1980 Convention which states that Central Authorities “shall take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues”.

¹³ See Brussels IIa Regulation, Preamble, para. 25 and Article 55.

mediators of different gender¹⁴. It was noted that the parents looked beyond the issue of gender and placed more emphasis on the level of expertise, professionalism and neutrality.

However, mediation remains just one of many possibilities. Access to judicial proceedings for relocation should not be made conditional upon attendance of the parties in mediation sessions. Mediation would not be appropriate, or suitable, in every case, so it cannot resolve all cases where it is attempted, but is a facility that should be offered in all cases of international parental child abduction.

§ 8. Conclusion

International parental child abduction is one of the parent's worst fears and for a growing number of parents around the world, this fear is being realized and compounded by international custody disputes.

The commonly accepted view is that the rights of families suffering from unilateral removal should be protected through correct application of the 1980 Convention. The Convention seeks to ensure the prompt return of wrongfully removed or retained children to the country of the child's habitual residence immediately before the removal or retention. Where this happens effectively the best interests of the child and the rights of the left-behind parent are generally met.

A critical obstacle to the success of the Convention is the fact that the Convention has yet to be universally adopted. And this does not seem likely to happen in the foreseeable future. There are still many places around the world that take a different perception of what the 'best interests' of the child are. Places where custody disputes are determined based on the parent's gender or the degree to which the parent observes the religious laws of that country.

There has been created common legal framework applicable between EU Member States and third countries that may offer the best solution of sensitive cases of international child abduction, where diplomatic channels and mediation fail. The European Union has to encourage third States which have not ratified the 1980 Convention and support its correct implementation by participating, inter alia, to the Special Commissions organized on a regular basis by the Hague Conference on Private International Law. Meanwhile, countries which have ratified the United Nations Convention of the Rights of the Child have to observe the

¹⁴ See "Mediation In International Parental Child Abduction. The reunite Mediation Pilot Scheme" by Reunite International Child Abduction Centre, available at: <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf>

international obligations which they had declared, particularly to ensure non-custodial parent visitation in accordance with the Convention.

Apart from that, a serious challenge to the successful application of the Convention is that in reality there are areas where its provisions are being abused, and parents manage to benefit from their wrongful acts. Therefore, further work and more time needs to be dedicated in ensuring effective implementation and development of the Convention, in view of achieving its objectives and protecting the rights of families.

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