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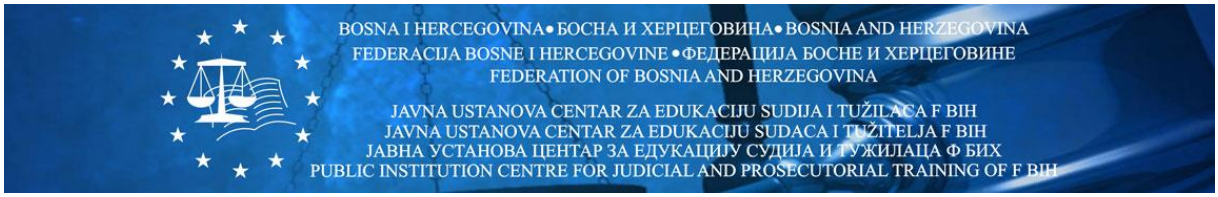

Challenges of the Application of 1980 Hague Convention in Bosnia and Herzegovina and the Question of the Habitual Residence of the Child

A written report

TEAM OF BOSNIA AND HERZEGOVINA

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INTRODUCTION

The issue of parent-to-child relationship, in the event of the disrupting of the mutual marital or extra-marital relations of the parents, is of great significance for the implementation of the international standards for the protection of the rights of the 1924 Geneva Declaration on the Rights of the Child and the Declaration on the Rights of the Child adopted by the United Nations on the 20th November 1959. These acts are based on the family as a natural and fundamental social unit that has the right to be protected by society and the state, as prescribed by the Universal Declaration of Human Rights, adopted and promulgated at the General Assembly of the United Nations by Resolution No.217 / III on the 10th December 1948.

That childhood needs special care and help provided mainly by families, with the aim of preparing a child for independent life in society, is also derived from the ideals proclaimed in the Charter of the United Nations, which is education/upbringing in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Of particular importance is the Convention on the Rights of the Child, which sets out the social and legal principles relating to the protection and well-being of children.

Respecting the Article 9 of the Convention on the Rights of the Child, states have obliged themselves that the child will not be to separated from the parents against their will, unless the competent authorities, under judicial supervision, decide in a different manner in accordance with applicable laws and procedures, and that separation is necessary for the well-being of the child. Such a decision may be particularly necessary in certain cases, such as the abuse of a parent's position or neglect of the child, or when the parents are living separately, and a decision must be made on the place of the child's place of permanent residence.

In any proceedings conducted in accordance with the preceding paragraph, all interested parties must be allowed to participate and pronounce, as well as the right of a child that is separated from one or both parents to maintain personal and direct relations with both parents on a regular basis, provided that this does not jeopardize the well-being of the child.

Without going into the criminal-legal aspect of child abduction, which is regulated by this special law in the field of criminal law[1], in this paper, we will look at the abduction of a child in a civil and legal sense according to the Convention on the Civil Aspects of International Child Abduction - Hague, October 25th, 1980 (further listed as the 1980 Hague Convention) and the dilemmas in the application of the same in the United Kingdom's judicial proceedings and the practices of national courts in Bosnia and Herzegovina.

1. 1980 Hague Convention

The protection of the rights and interests of the child is a primary objective established in the 1980 Hague Convention which focuses on a specific violation of the right to child care when one of the parents, without the consent of the other parent, takes a child from a permanent place of residence to a new temporary place of residence in another country, which according to this act constitutes an illegal removal or retention or abduction of a child.

Therefore, the 1980 Hague Convention aims to ensure the speedier return of illegally taken/removed or retained children in a Contracting State and to ensure that the rights to care and to meet a child are actually respected in the other Contracting State by the law of a Contracting State.

Illegal removal or retention of a child is as follows:

a) if it constitutes a violation of the rights to care provided to a person, institution or any other body, collective or individual, under the law of the country in which the child was habitually resident immediately before removal or retaining;

b) if these rights were exercised collectively or individually at the time of removal or retaining, or would have been exercised without the removal or retention.

The Convention, however, applies to a child that has had a *habitual (regular) residence* in a Contracting State immediately before any violation of the right to care or the right to meetings/access and associating and its application shall cease when the child reaches the age of 16.

The term of a *habitual residence* is not defined by the 1980 Hague Convention, so in the interpretation and application of this term in practice of the courts of the European Union and the courts of Bosnia and Herzegovina different application in judicial practice can be established.

In Bosnia and Herzegovina, as in other EU Member States, the notion of the permanent residence and temporary residence is regulated and defined in such a way that the permanent residence is the municipality or district where the citizen is established with the intention to live there permanently, while the temporary residence is the municipality or district where the person intends to live (stay) only temporarily.[1]

[1] Article 3 paragraph (10) of the Law on Permanent Residence and Temporary Residence of Citizens of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 32/01, 56/08 and 58/15). Note: Instead of giving list of literature at the end of this paper, we will keep the refernece list in footnotes.

2. Practice of the Supreme Court of the United Kingdom

In the decision of the Supreme Court of the United Kingdom in case A versus A (Children) (Habitual Residence), which for the purposes of this paper will be abbreviated to the Harun case (as the Supreme Court called this boy in the decision)[2], a position that could cause danger for the Brussels Regulations in the field of international private law in family relations, and also the 1980 Hague Convention (op. c., still a member of the EU!), because, although not directly related to its application, the Harun case has the significance of determining the habitual residence of a child in the sense of the 1980 Hague Convention.

Namely, the practice of English courts is one of the most influential and most frequently cited in the decisions of the courts of other Contracting States. Since the determination of the habitual residence of a child proved to be problematic due to various interpretations, monitoring of comparative case law is, for the time being, perhaps the only way to improve the functioning of the 1980 Hague Convention.

Given that the judges in the decision on the case of Harun refer to a judgment given ten years earlier, in very similar circumstances, (the English High Court, the Family Division), this judgment must be taken into account. This is a decision in case B versus H (Habitual Residence: Wardship)[2]. This decision may be an introduction to a future decision of the Court of Justice of the European Union.

2.a) Case B versus H

The B versus H (The Habitual Residence: Wardship) case referred to a request of a mother, a Bangladeshi national, to return her four children from Bangladesh, Bangladeshi and UK nationals. This meant that the habitual residence of children was previously established, since the English court would be responsible for deciding on the exercise of the right to care only if children have a habitual residence in England.

The factual situation was very interesting given that the youngest (fourth) child was born in Bangladesh and never visited England. In particular, it was that the mother (wife), together with (then) three children and their father (husband) came from England to Bangladesh in a visit that, according to her belief, should last 4-5 weeks. The parents were married. However, the father (her husband) (Bangladesh and UK national), a month after arriving in Bangladesh, told her that he had not bought return tickets and that the family would not return to England. He also took away passports from her and the children. He himself, on several occasions,

went to England and stayed there for about four to eight weeks and the mother (his wife) would know it only when he contacted her by telephone. As she was already pregnant when they left England, the fourth child was born in Bangladesh. After the birth of the child, the father (husband) on several occasions asked the mother (wife) to go to England and to take three older children, but to leave the youngest in Bangladesh, with the explanation that this child still does not have a passport. The mother (wife) refused. When the youngest child did get the passport of the United Kingdom, she again requested that all four children (with her) return to England, but the father (husband) did not even allow the youngest child to leave and took away the passport of the child. After another scene of domestic violence she was previously exposed, the mother (wife) reported her husband to the police in Bangladesh. After that, the marriage was ended under Sharia law, and the father of children then returned her passport (but not the passport of the children). The mother travelled to England and filed a lawsuit requesting care (entrust) of the children. The court made the decision that all children, including the youngest (born in Bangladesh), will have a habitual residence in England. In his decision, the judge stated that the youngest child did not acquire a habitual residence in Bangladesh because the habitual residence of the child follows the habitual residence of family members:

"The newborn had, and still has a habitual residence in England, although it was never there. A child cannot acquire a habitual residence until it is born and becomes an independent being; by birth, the habitual residence of the child is the same as the habitual residence of persons with parental rights ... a newborn has a habitual residence if the parents have one."[2]

The three older children, however, did not conceive the new habitual residence in Bangladesh because the intention of the parents was one-sided - only the father (husband) considered the arrival to Bangladesh as a relocation of the family, but had only announced his intention to the mother (wife) after arriving in this country. On the contrary, she did not want to change her habitual residence but traveled from England convinced that it was a temporary visit. Therefore, the mother (wife), just like the three older children, retained a habitual residence in England.

Although it was made over a decade ago, this decision is still a theme of interest in the doctrine. *The basic critique (also referred in the later Harun case) refers to parallels which, according to the prevailing interpretation of English judges, were withdrawn from the place*

[2] From decision made on the case B verus H (The Habitual Residence: Wardship), rationale.

of permanent residence.[3] *The problem is that the habitual residence is a factual concept and the place of permanent residence is a legal concept and therefore cannot be determined in the same way*. Moreover, the habitual residence and permanent residence do not necessarily coincide. However, the question is whether the B versus H case (The Habitual Residence: Wardship) judge actually established the habitual residence of the youngest child on the basis of a parallel with the permanent residence of the child, or whether it is an assessment of all the circumstances surrounding the birth and the stay in Bangladesh. This does not mean that there is a parallel with the permanent residence, but that such a court decision is the consequence of the factual circumstances of the case, since it is a baby that does not have the will and depends on the family members, that is, in this situation, on the parents who already have a habitual residence in the moment of the birth of the child.

Thus, all these circumstances indicate that the habitual residence of the child at birth is followed by the habitual residence of the parents. The problem is the residence as an objective element, which does not exist because it was prevented by the second parent by force in the above example.

2. b) Case A versus A

The factual situation of the Harun case (A versus A (Children) (The Habitual Residence) is very reminiscent to the circumstances under which the events took place in the previous example. In particular, this was about the proceedings initiated by the mother in order to return her children from Pakistan to England because the children were retained there against her will.[4] Namely, the mother (a Pakistani national), along with three children (UK and Pakistani nationals), who were born in England, came to Pakistan to visit her father not knowing that her husband (father of children, also a national of both countries) was already there.[5] The marriage between them was not the happiest and often there was physical violence.[6] However, after arriving in Pakistan, she was pressured to reconcile with her

[3] In the case B versus H (The Habitual Residence: Wardship), judge Charles J, in determining the habitual residence of the youngest child, conducted a dependency test. Lowe, International Movement, p. 61.

[4] The case relates to the exercise of parental rights (although it is stated in the heading of the judgment that it is a return) based on EU Regulation 2201/2003 on jurisdiction, recognition and enforcement of decisions in marital affairs and matters of parental responsibility (Council Regulation (EC) No 2201 / 2003 of 27 November 2003, repealing Regulation (EC) No 1347/2000), hereinafter referred to as Brussels IIbis. The decision made by the Supreme Court is also important for determining the habitual residence of a child.

[5] Mother and children traveled on October 13th 2009 and had return tickets for the beginning of November of the same year.

[6] During 2008, the mother, together with children, was living in a safe house because of domestic violence. In early 2009, the four of them moved to an apartment owned by her father's brother and the mother paid the rent.

husband. The husband and his relatives were physically attacking her, and the passports of children (and her passport) were seized. After her husband persuaded her to return to England if she agreed to reconcile with him, she did it, considering it as stated in the first-instance decision, "that the pressure on her was so severe that she had no other choice, especially because she did not want to leave her children and was afraid of the consequences."[7] In the meantime, she became pregnant and Harun was born on October 20th 2010. The three older children were, against her will, enrolled in Pakistani schools, since the father (husband) had no intention of fulfilling his promise of returning to England. After numerous difficulties, in May 2011, with the help of her father and several relatives, she managed to get a passport (but only her) and traveled to England with the excuse that she would stay for a couple of days to visit her relatives. In England, then, she starts a process requesting the care (entrust), upbringing and return of the children. The procedure was initiated in June 2011 and a decision was made that all children (four of them) were placed under the custody of the court, and the father was ordered to allow the return of children.[8] Subsequently, in October 2011, a measure was imposed to secure the funds on the property of the father (husband) in England (a freezing order) in order to exert pressure on him to act on a previous decision or at least provide the mother with funds for the conduct of the proceedings in Pakistan.[9] The High Court, and then the Court of Appeals and the Supreme Court, decided further on this case. On February 20th 2012, the High Court decided to return the children to England, considering that it was precisely on the basis of B versus H (Habitual Residence: Wardship) case decision from 2001 that they have a habitual residence in England. The father complained and the Court of Appeal in a proceeding that lasted from July 2012 to January 2013 came to a different conclusion.

Considering that the habitual residence of a child cannot be based on a non-resident status in a particular country, the Trial Chamber has made the decision that the three older children actually have a habitual residence in England because "a habitual residence cannot be changed by a unilateral decision of one parent".[10] By contrast, the youngest child born in

[7] Decision made by the High Court and Judge Parker J. Referred to by the Supreme Court's decision.

[8] Also, the authorities of the Islamic Republic of Pakistan have been requested, based on the Judicial Protocol on Children Matters between the United Kingdom and Pakistan from 2003, to help take the necessary measures, in particular with the aim of locating children, securing their safety and facilitating their return to England (UK-Pakistan Judicial Protocol on Children Matters signed by the Chief Justice of Pakistan and the President of the Family Division of the High Court of England and Wales on 17 January 2003).

[9] Then the father's (husband's) brother is included in the judicial proceedings as co-owner of one of the things that the security measure referred to. The father (husband) did not participate in the proceedings (although the judge tried to contact him via telephone), but his two brothers did.

[10] ZA versus NA [2012] EWCA Civ 1396, [2012] 3 F.C.R. 421, INCADAT HC/E/UKe 1192.

Pakistan has no habitual residence in England, since "one of the (S.M.) essential elements is ... that the person was/stayed at one time in that state. If there is no residence/stay, there is no habitual residence."[11] However, the decision was not unanimous, and Judge Lord Justice Thorp stated in a separate opinion that, in exceptional circumstances, the habitual residence of a child could be acquired without the physical presence, convinced that the approach to the problem in case B versus H (The Habitual Residence: Wardship) from 2001 was established in this case too. After the Court of Appeals, the case gets to be a subject, upon the appeal of the mother, at the Supreme Court.

The decision made by the Supreme Court (September 9th 2013) did not concern the habitual residence, but rather the possibility of establishing the jurisdiction of the English court through residual (auxiliary) jurisdiction.[12] Despite this, the judges also expressed their views on how to determine the habitual residence of the child. The opinion of the majority supported the thesis that children cannot have a habitual residence in a country they have never lived in.[13] On this occasion, attention was paid to the fact that the English courts tend to replace the factual concept of habitual residence with legal ones, and if parents jointly exercise the right to care (which was exactly the case), the habitual residence cannot be changed by a unilateral decision of one of them. Out of this rule, the courts created another one, according to which a child necessarily shares the habitual residence of a person who is directly taking care about it (primary caretaker).

2. c) Separate opinion of the judge

Judge Lord Hughes, in his separate opinion, considered that in this case an adequate approach would be similar to that applied in the case B versus H (The Habitual Residence: Wardship). In his opinion, in none of these two cases there is a matter of the child acquiring its habitual residence (S.M.) from the habitual residence of the parents *ex lege*.[14]

On the contrary, the actual concept of a habitual residence implies precisely the assessment of the integrity into a particular family environment to which the child belongs, from which follows that it actually shares the (S.M) habitual residence of the family, even if it was never

[11] Judge Lord Justice Rimjer, who gave a reasoning on behalf of the majority.

[12] The case concerned the application of Article 14 of the Brussels IIbis Regulation which permits the establishment of jurisdiction over parental rights law based on national norms of international jurisdiction, provided that no EU Court would be competent under the other provisions of this Regulation. In the case of Harun, the issue of establishing the jurisdiction of the English court over the citizenship or habitual residence of children was raised.

[13] This position was taken by Judges Lady Hale, Lord Wilson, Lord Reed and Lord Toulson.

[14] Supreme Court Decision, Separate Opinion, Lord Hughes ad 90.

in a particular country.[15] In a situation where one parent is prevented from leaving the country and returning to the one in which he/she has a habitual residence, it is very dangerous to consider that a new-born child does not have a habitual residence at all.[16] Observed wider, in the context of the 1980 Hague Convention, the removal or retention of a child could not then be considered unlawful/illegal. Judge Hughes considered that this case is precisely the example of what would have been classified under the 1980 Hague Convention as an unlawful/illegal retention, in respect of all children, including the child Harun.

Taking into account the above arguments of the judges of the Supreme Court, the impression is that a separate opinion deserves special attention. Namely, the factual concept of habitual residence implies that it is appreciated *in concreto*, depending on the circumstances of the case.

In addition, in the reasoning of most of the judges of the Supreme Court (and also the Court of Appeals), the habitual residence implies a physical presence in a particular state and intent of stay. However, this concept, known as the Shah formula,[17] which is completely applicable to adult persons, becomes problematic when it comes to children. Namely, deviation from it already exists when it comes to the intent of stay.

The existence of a place of residence as a condition for acquiring the habitual residence of a child, even in cases that are not as specific as the Harun case, is not absolutely the most important element, but its importance depends on other circumstances of the case. In fact, in no decision to which the Supreme Court summonses, an answer to the question is not whether the presence is always necessary. This issue, as Lord Hughes points out, has not been dealt with by the European Court of Justice so far. The only difference between Harun and his sisters and brother is that he was not present in England and was not present because he was illegally retained by force.

[15] Separate opinion, Lord Hughes, loc. Citation.
[16] Separate opinion, Lord Hughes ad 93.
[17] Akbarali vs. Brent London Borough Council: Abdullah vs. Ahropshire County Council; Shabpar vs. Barnet London Borough Council; Jitendra Shah vs. Barnet London Borough Council; Barnet London Borough Council versus Nilish Shah, (1983) 2 AC 309 [1983] 2 WLR 16, [1983] 1 All ER 226, HL. This was about the implementation of education regulations. Five foreign students submitted a request to local authorities to grant them a reward that was mandatory except for foreigners who do not have a place of residence in England in the past 3 years. The request of four students was denied both to the local authorities and to the appeal procedure filed with the District Court. In relation to the fifth student, the appeal was allowed. Then, the appeals of four students and local authorities (in the case of a fifth student) were decided at the Court of Appeals, that again rejected the appeal of the four students because they were considered as having no residence in England since education can not be a trigger for this acquisition (the duration of residence is predetermined), and the fifth student's appeal was allowed. New appeals were submitted to the House of Lords, which adopted all the complaints of students considering that education can be the basis for acquiring a place of residence.

3. The practice of courts in Bosnia and Herzegovina

Since neither the European Court of Human Rights nor the national courts in Bosnia and Herzegovina dealt specifically with the issue of a "regular" or "habitual" residence, they dealt with the 1980 Hague Convention application.

3. a) Family laws

In the field of protection of the rights and interests of the child according to the Family Law[18] in both the entities and the District, the Centre for Social Work plays a key role; when the child does not live in communion with both parents and when there is no agreement between parents - it decides on regulating (forbidding or limiting) the personal relations of parents and the child, taking measures for the protection of personal and property rights of the child, assisting parents in arranging their personal, property and other circumstances, or sending them to counselling centres, and may also order permanent supervision of the exercise of parental rights and obligations when there are reasons for that, it can take the child away from one parent and give it to another parent or institution, when there are legal reasons for this, it can require parents to account the management of the child's property, and so on. In the field of protection of the rights and interests of the child according to the Family Law in both the entities and the District, the Centre for Social Work plays a key role; when the child does not live in communion with both parents and when there is no agreement between parents - it decides on regulating (forbidding or limiting) the personal relations of parents and the child, taking measures for the protection of personal and property rights of the child, assisting parents in arranging their personal, property and other circumstances, or sending them to counselling centres, and may also order permanent supervision of the exercise of parental rights and obligations when there are reasons for that, it can take the child away from one parent and give it to another parent or institution, when there are legal reasons for this, it can require parents to account the management of the child's property, and so on.

On the other hand, when it comes to court proceedings according to the positive legal norms of the Family Law, the primary / municipal court has jurisdiction in the civil procedure to decide on the divorce and the entrust of minor children to one parent, determines the

[18] Official Gazette of the Federation of Bosnia and Herzegovina no. 35/15 and Official Gazette of Republic of Srpska No. 52/02, 48/08, 63/14;

obligation of the caretaker of a minor child, and the extrajudicial procedure decides on the extension, termination and confiscation of parental rights.

3. b) Law on Permanent Residence and Temporary Residence

The issue of permanent residence of a child, born abroad, according to Art. 9, 4 and 5 of The Law on Permanent Residence and Temporary Residence of Citizens of Bosnia and Herzegovina[19] has been solved in the following way:

„If a citizen, who permanently settles abroad or who resides for more than three months abroad, has a child born abroad, this child does not apply as a person residing in Bosnia and Herzegovina at the time of the birth.

A citizen who has been living abroad for more than three months and who does not intend to reside permanently in the country where he/she currently resides and maintains an effective relationship with Bosnia and Herzegovina (e.g. if he/she has a family or family members in Bosnia and Herzegovina or if he/she has a house, apartment or owned company in Bosnia and Herzegovina, etc.), is not obliged to unregister his/her permanent residence in Bosnia and Herzegovina, he/she will not have his/her ID card seized, but he/she is obliged to register his/her place of residence abroad with the competent diplomatic-consular representative office, in which he/she meets all consular and other services.“

However, the courts in Bosnia and Herzegovina did not specifically deal with this issue, and in the next section we will elaborate three cases being subjects to our national courts from which one can see the method of application of the 1980 Hague Convention and recognize that in the legal system of Bosnia and Herzegovina, regular place of residence actually refers to residence/home (permanent residence) which through free interpretation of the mentioned provision of Article 9 of the Law on Permanent Residence and Temporary Residence of Citizens of Bosnia and Herzegovina, shall be associated to the Permanent / Temporary Residence of the parents.

4. Decisions of the Constitutional Court of Bosnia and Herzegovina

The legal system in Bosnia and Herzegovina is a very complex constitutional structure, so, among other things, there are two Entity Supreme Courts that are the highest judicial instance

[19] Ibis 4.;

at the entity level, and at the state level there are the Constitutional Court of Bosnia and Herzegovina and the Court of Bosnia and Herzegovina, however this second court is *sui generis* and thus cannot be titled as the Supreme Court of the State.

Therefore, the Constitutional Court of Bosnia and Herzegovina is given the appellate jurisdiction over all court decisions, as well as over the decisions of the Supreme Courts, which is why it is, in fact, a court that establishes a unified court practice in the whole of Bosnia and Herzegovina.

In the practice of the Constitutional Court of Bosnia and Herzegovina, there are three cases of child abduction by one parent, in which the 1980 Hague Convention was applied, because the same was adopted after the break-up of the SFRY by a validation of the succession of international treaties of SFRY, which is in accordance with the Family Law too - the law that treats the area of maintaining personal relationships with the child.

4.a) AP- 2784/15

Facts from the Decision of the Constitutional Court of Bosnia and Herzegovina no. AP-2784/15 dated 14th October 2005 are based on the change of the permanent residence of the child, where it was born, which was taken by the mother (wife) from a state (Hungary) with the awareness, but without the consent of the father (husband), to another state (Bosnia and Herzegovina, entity Republika Srpska) as a temporary residence, with the intention of staying in Bosnia and Herzegovina, and the father (husband) instituted proceedings at the Court of Bosnia and Herzegovina for the return of the child to the state of Hungary and the place of his former permanent residence. In the specific case, the procedure for divorce and the determination of child care was initiated only later, during the procedure for the return of the child.

The courts in Bosnia and Herzegovina (circuit, district and supreme) reject the claim, although they find that the respondent mother illegally took the child under Art. 3 of the 1980 Hague Convention, but conclude that judicial or administrative authorities are not obliged to order the return of a child if it is proved that the return would expose the child to physical or psychological trauma or otherwise put the child at a disadvantage (Article 13 p.1 of the 1980 Hague Convention). The courts then, when applying the principle of best interest of the child, in the sense of Art. 2 p.2, Art.7 p.2 of the Convention on the Rights of the Child, having in mind that the child is 3 years and 4 months old, continually lives with the mother, that the father frequently changed his place of residence for employment, that, according to the Centre

for Social Work, the child has adapted to the environment and shows attachment to the mother, that his psycho-physical development corresponds to age, that the relationship between mother and child is warm and mutually emotional, that the family works well and that the separation from the mother traumatically affects the psycho-physical development of the child, they conclude that it is primarily in the child's interest to live with the mother who can make daily contact with it, since the father in the process did not even challenge her parental values.

In its Decision analysing the complaints of violation of the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Freedoms, the Constitutional Court of Bosnia and Herzegovina analysed also the 1980 Hague Convention, by reference to the practice of the European Court X versus Latvia, application no. 27853/09 of 26th November 2013, which contains the Explanatory Report to the 1980 Hague Convention on the Abduction of Children prepared by Elsa Perez-Vera and it refers to an explanation of the principles underlying the 1980 Hague Convention. The first principle is that the authority to which the request is made is not obligated to impose the return of the child if the person requesting return has not really exercised the right to care or where the behavior of that person indicates the acceptance of this new situation. The second principle is the protection of the child's interests, i.e. not to be taken away from his permanent place of residence without the appropriate guarantee of stability in the new environment, gives priority to the primary interest of any person not to be exposed to physical danger or psychological trauma or putting them in an unbearable position. The third principle is that there is no obligation to return a child if that would not be allowed in accordance with the fundamental principles of the requested State, which relates to the protection of human rights and fundamental freedoms.

The amended 2003 report also contains the obligation of judicial and administrative authorities to request the processing as soon as possible, including enforcement, as well as in the appeal procedure (expedited procedures).

The decision of the Constitutional Court of Bosnia and Herzegovina was meritorious and the father's appeal was adopted, as well as the Supreme Court verdict abolished, which accepted the decision to reject the request for return of the child and the case was returned for retrial, and Republika Srpska entity is obliged to pay non-material damage, due to separated life from the son, to the appellant in the amount of 5.000,00 EUR.

The Constitutional Court emphasized that the procedure for the return of the child to the place of permanent residence in Hungary is a *sui generis* procedure aimed at preventing, first of all, the abduction of children and the removal of children from the country of permanent residence, and in the event if the abduction does happen, ensure their return to the country of permanent residence.

But the Constitutional Court also points out to cases where the child does not need to be returned under Art. 12. of the 1980 Hague Convention: if the father did not exercise the right to care at the time of the removal, or to agree, or subsequently agree to removal, that there is a serious risk that the return would expose the child to physical danger or psychological trauma or would put it in a disadvantage in some other way.

However, the Constitutional Court adopted the appeal because the right to a fair trial under Art. II / 3.e) of the Constitution of Bosnia and Herzegovina was violated, since the court arbitrarily applied the substantive law because it did not, according to paragraph (3) of Article 13 of the 1980 Hague Convention, when considering the circumstances relied on by the respondent, took into account data relating to the social origin of the child received from the central executive body or another competent authority in Hungary as this is the country where the child's permanent place of residence is located.

Therefore, according to the practice of our Constitutional Court of Bosnia and Herzegovina in the application of the 1980 Hague Convention, the question of the temporary residence of the child taken from a place of permanent residence depends on the fact whether the parent who took the child had the right of care/guardianship established by the competent judicial or administrative authority or not. If the parent who took the child to another state had the right to care/guardianship, then one cannot speak about the illegal/unlawful removal of a child.

However, if a parent who took a child from a permanent place of residence (residing in Hungary) to another country of temporary residence (in Bosnia and Herzegovina) without the consent of another parent, and had no established custody/care/guardianship rights, then the parent unlawfully/illegally removed or retained the child according to the 1980 Hague Convention and the other parent may ask the competent court to return the child to the country of permanent residence if he/she filed the application within 1 year of the abduction, or the return of the child after the period of one year, *but if the other party disputes the relationship of the parent in the country of permanent residence, then in the court procedure, among other things, the information related to the social origin of the child from the country of permanent residence must be obtained.*

4.b) AP- 386/15

In the Constitutional Court of Bosnia and Herzegovina case AP-386/15 of 24th April 2015, the Constitutional Court of Bosnia and Herzegovina considered the appeal of Z.M. a German national with a permanent residence in the Netherlands, father of a two-year child (German and Bosnian and Herzegovinian national) which was taken by the mother, a Bosnian national, to a holiday in T., Bosnia and Herzegovina to her parents. As a family, they had a permanent residence in the Netherlands where the appellant worked. When the opposer - mother with a minor child came to visit her parents, she informed the appellant that she will not return to the Netherlands with the minor child.

The appellant first initiated the procedure for the report of abduction to the competent authorities of the Netherlands, and the Dutch authorities officially contacted the authorities of Bosnia and Herzegovina, on the basis of which the Ministry of Justice of Bosnia and Herzegovina asked the Centre for Social Work to initiate the procedure for returning of the child. The Centre for Social Work established a team for monitoring the situation and giving opinions, and in the meantime, the father has launched a non-contentious procedure for the return of the child. In the procedure with the Centre for Social Work, the agreement on seeing a child at a fixed time was concluded. However, the father took over the child and abducted it, violating and abusing the Agreement and kept the child separate from the mother for almost two months. In the meantime, the mother initiated the divorce proceedings at the court in Bosnia and Herzegovina, entity of Republika Srpska, in which a provisional measure was taken to ensure that the minor child will be entrusted with protection, care and upbringing of the mother until the end of the divorce proceedings. This measure was enforced and the child was returned to the mother.

The Circuit Court rejected the proposal of the father for the return of the child and declared it as unfounded, since it was established that the proponent/applicant - father during the seeing of the child, abducted it and the same was, by the temporary measure, returned to the mother, the opposer - mother did not complain against him seeing the child, but she did complain about him taking/removing it, so the Center for Social Work in its procedure has ordered the child to be seen only two hours in the premises of the center, and such a decision was confirmed by the competent ministry as a second instance body. The Circuit Court therefore expresses the view that the conditions for the child to return to the Netherlands are not fulfilled because it is a two-year-old child who is biologically dependent on growing up with a mother, and how family relationships between the parties have been violated because the

proponent/applicant is ill, has an epilepsy and is an alcoholic which was confirmed by him. Therefore, in the best interest of the child, the Court concludes that separation from the opposer - mother would have drastic consequences for the further growth of the child and would negatively influence the psycho-physical development of the child, especially since the proponent/applicant did not even prove who would care for the minor child while he was at work.

The Constitutional Court rejects the proponent's petition because it finds established facts that the father (husband) was employed in the Netherlands, that the mother (wife) did not work even when she lived in the Netherlands, she was dedicated only to the minor child, that she is now in the family home of her parents, that The Center for Social Work confirmed that the child has good conditions for the development and growing up and the love of the mother who is adequately caring about it, that the child is given good life conditions in Bosnia and Herzegovina, it adapted to the new environment, and that there is no arbitrariness in the conclusion that by returning to the Netherlands, the child would be exposed to a psychological trauma.

This case points to the specificity of the situation when the procedure is leading to the return of an illegally removed child at the age of 2 years in applying the exceptions of Art. 13 p.1 b) of the Convention on the Civil Aspects of International Child Abduction, according to which *the child does not have to be returned if there is serious danger that the return of a child to the father, who remained to live in a permanent place of residence, exposes it to physical danger or psychological trauma due to biological attachment of a child with a mother during that age.*

4.c) AP-2866/09

In the Constitutional Court of Bosnia and Herzegovina case AP-2866/09 of 11th November 2009, on the appeal of A.F from Sweden against the decision of the District Court in T. dated July 10th 2009, and the decision of the Circuit Court in T. dated February 2nd 2009, by which decisions the final applicant's request was received in order to enforce a final judgment of the Circuit Court in S. Sweden dated November 16th 2007 which became final by the judgment of the Second Instance Court in Sweden of July 10th 2008, for the return of a minor child V.R., taken/removed by the father without the consent of the mother from Sweden to Bosnia and Herzegovina, entity Republika Srpska, the city of T., to permanently live there with it.

When making this decision, the courts in the Republika Srpska entity had in mind the judgment in Sweden, on the basis of which the minor son was entrusted to the care taking, upbringing and guardianship of the mother - proponent and appellant, but in the process the opinion of the Center for Social Work in T. was obtained and the minor child was interviewed, on the basis of which, in particular, the testimony of the minor child who stated that the mother locked him in the room and was stinging him because he said he wanted to live with his father, that the mother had lived with another man who spoke badly about his father, that he even attacked him physically, took him out of school, took him to some place, that he (child) fled from school and went to his father, so the court concluded that, according to the Article 13 p.1 of the 1980 Hague Convention, the court is not obliged to return the child if the person or body opposing return proves that there is a serious risk that the returning of the child would expose the child to physical danger or a psychological trauma or would otherwise put the child in disadvantage. The court also found that such a decision was based on the application of Article 2 p. 2, Article 3 and Article 7 p. 2 of the Convention on the Rights of the Child, i.e. that the decision was made primarily in the interests of the child, as well as the consequences that a child might suffer if it was forced to leave the father.

The Constitutional Court of Bosnia and Herzegovina, in its decision, assesses that there is no violation of the right to a fair trial referred to in Article II / 3.f) of the Constitution of Bosnia and Herzegovina and Art. 8 of the European Convention, as the courts took into account a number of facts and factors, including the facts established in the proceedings conducted in Sweden, and that the child's position was only one of the reasons for such a decision. In addition, the Constitutional Court finds that in the procedure it has not been proven that the appellant will be prevented to continue to nurture and maintain contacts with the child in an appropriate manner, thereby exercising the right to "family life", and thus there is no violation of Article 8 of the European Convention.

From this example, it can be seen that the courts in Bosnia and Herzegovina, when deciding on returning a child to a place of former permanent residence, in cases *where the minor child is over 10 years old, take into account the statements of the child* about with which parent it wishes to remain to live after the divorce, that is in which place of residence, provided that other facts have been established, such as obtaining the opinion of the competent body of the Center for Social Work, which has confirmed the existence of conditions that ensure the best interest of the child. The interest of this procedure is that it was conducted in the enforcement procedure on the proposal for the execution of a foreign court judgment as an executive act.

CONCLUSION

All of the above examples point to the importance of the 1980 Hague Convention and the unique basis for exercising the right to return children abducted by one of the parents, especially when the international element arises in resolving the issue. At the time of today's migration, as well as the weakening of the marriage as an institution, this matter should be given special attention from the aspect of unique jurisprudence too.

Determining what is a regular/permanent or habitual residence under the 1980 Hague Convention is undoubtedly a legal issue that should be resolved uniquely, in order to avoid dilemmas. In the case law of the United Kingdom, habitual residence is the key to determining the right to return a child, although the Harun case does not apply to the application of that convention (since Pakistan is not a Contracting State), its significance in determining the habitual residence of a child is undoubted.

Namely, in the INCADAT case of the 1980 Hague Convention, which is being conducted on the occasion of its application, this case has been officially marked as very important. Precisely because if the decision of the majority of Supreme Court judges was accepted that Harun does not have a habitual residence in England simply because he has never been in it, although this is a consequence of the unlawful conduct of the father, then given this, *en général*, the green light is given to parents to forcefully retain children without any consequences. In fact, in that way it would be allowed to legalize the behavior of parents that should otherwise be qualified as unlawful removal or, in this case, retention. That is why all the eyes are now turned to the European Court of Justice, which should set clear criteria in atypical situations, such as in the case Harun or in some other similar case.

In Bosnia and Herzegovina there has not yet been a case where the child was born outside of the permanent residence, so there was no case law on that matter, but the application of the 1980 Hague Convention was present and was mainly related to the application of permanent residence as the place of regular residence.