



ORIGINAL PAPER

Child Abduction by a Parent or Exercising Parental Authority: Balancing European and National Regulations

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Abstract

The study aims to achieve normative distinction between the kidnapping of a child and exercise parental authority through the legal conditions in which such an act requires state intervention. This also led to the creation of an international instrument which must be applicable when the situation goes beyond the borders of a state. The 1980 Hague Convention is applicable legislative act in case one of the parents resorts to the taking away or refusing to return the child to the child's habitual residence when it involves a move from one contracting state to another. Nonetheless, we should keep in mind the fact that the perpetrator, in this case, is one of the child's parents, and restoring the legal situation is done through civil law, without involving the criminal law if there is a complaint in this regard. Established jurisprudence shows us the real applicability of the Convention, the conditions for determining the classification of the deed make it necessary to analyze it from one case to another. This main focus of this paper is an analysis of the conditions that the removal or refusal to return the child must meet in order to fall under the text of the Convention. The exceptions to the obligation to return the child to his/her habitual residence immediately leads to some discussions that we want to emphasize through the analysis of several decisions in this regard.

Keywords: *international abduction, travel, the best interests of the child, parents, parental authority*

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Introductory notions

Civil aspects of international child abduction find their international legal framework in the Hague International Convention of October 25, 1980, completed by provisions from the Explanatory Report on the Convention by Pérez-Vera (Perez-Vera, 1980: 426), and in the Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters, repealing the Regulation (EC) no. 1347/2000. In our country the arrangements described above have been transposed by Law no. 100/1992 (Official Gazette, 1992: 243), with the implementation of the Convention at a national level being achieved through Law no. 63/2014 (Official Gazette, 2014: 352) on the application of the Convention on the Civil Aspects of International Child Abduction.

It was often found in practice (Brița, 2006: 118-127) that the Convention text was incorrectly interpreted. Thus, there have been many discussions about the impossibility of perpetrating an international kidnapping of minors by one parent, given the parent's right to the underage child. For this reason, many people are confused, using such means - travel, refusing to return the child to the habitual residence – in order to have their own children close to them and whose residence was decided by the other parent, respectively, most often, by the former spouse. However, the Hague Convention finds its application precisely in the abusive exercise of parental rights by one parent, with the main objective being the best interests of the child. This provision primarily seeks to combat the idea that, despite a natural right, parents can “appropriate” the children wherever and in however way they want, regardless of the consequences such actions have on the minor, thus troubled. Provisions of the Convention must be completed by the national law, it is quite difficult to have a uniform language in all contracting countries. Thus, we find discrepancies between certain expressions used in the Convention, namely the Regulations and legal texts at national level. Just from this point of view we consider it important to make some terminological clarifications before actually develop the analysis that we have proposed.

Even in the title of the Convention we find the term “abduction” (Dexonline), which is then played back in it by one of the actions: displacement or retention (non-return). This discrepancy between the title and the text act is considered as intentional given the limited and acknowledged applicability of the Convention due to the type of relationship it standardizes, as regards the civil aspects of international child abduction and what in common terms we could understand by “abduction” (known in different legislations by the terms: “răpire” (Ro.), “enlèvement” (Fr.) or “secuestro” (Sp.)).

Also, through the new Civil Code coming into force, the notion of “custody” of the child loses the “power” that we used to and one of the parents was sworn in as he was concerned about the rights and duties towards the underage child in care. Under article 496 New Civil Code (Official Gazette, 2011: 505) the residence of the minor is set at the home of one of the parents in case of divorce, parental authority is recognized, in accordance with article 483 of the New Civil Code equally to both parents. However, we find the terms “custody of the minor” or “child custody” (Lupașcu, 2005: 180) both in the Convention and in the EC Regulation 2201/2003 which we will understand to mean what the new Civil Code describes, namely the parent in whose home the child lives. We must emphasize that for the parent in whose house the juvenile's home (Avram, 2013: 321) has been established, there are a series of correlative rights and duties towards the child that result from this coexistence.

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Mechanism for Restoring the Legal Situation in the case of International Child Abduction

In outlining the objective of the Convention we should consider those situations where, in order to obtain custody of a child (Tomescu, 2005: 227) (or establishing the child's home, to use the terms sanctioned in the New Civil Code) force was used in establishing certain artificial relationships at an international level between a parent and a child. From the variety of situations we can extract some elements that characterize the object of the international abduction of minors: the child is taken from the social environment in which he/she had lived and developed, with this detachment from his/her family occurring by displacement from his/her ordinary living environment of the child, or by refusing to return the child to the natural person or legal entity in whose care the child is. Moreover, the persons unlawfully moving or retaining the child want, most often, the authorities in the country where the child was taken to establish the legal domicile. In most cases, the situation places one of the child's parents as the illegal displacer or detainer of the child, but we consider that we should examine the conditions in which this movement changes from an absolutely normal one, as in the exercise of a right and obligation that parents have towards their children to an abusive, unlawful one.

According to article 1, the main objectives of the Convention are to "to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States". We distinguish a temporary measure for the return of the juvenile as ordered by court of the state on whose territory the child can be found at the time of judgment (Dobozi, 2011: 318). Often, civil aspects relating to international child abduction provided by the Hague Convention and transposed into national legislations of the Contracting States (as we have seen and concerning our legislation) are confused with criminal aspects regulated by the domestic laws in each State. In the case of our legal system, from a criminal point of view, article 379 from the New Criminal Code regulates child custody measures, a legal text that is placed in the Special Part of the Criminal Code, Title VIII, Chapter II - Offences against the family (articles 367-375). Nonetheless, most often when a parent abuses their legal rights towards the child, the other parent commits an error and not knowing which the competent authorities in solving such a particular case are and the law applicable, use the solution provided by the Criminal Code but this carries no effect at a civil level.

The parent whose rights have been breached by unfair measures notifies the police filing a complaint (Toader, Michinici, Crișu-Ciocîntă, Raducanu, Dunea, 2014: 202) under article 379 paragraph (3) of the New Criminal Code. This text provides in paragraph (1) that "detention by a parent to the underage child without the consent of the other parent or legal guardian, shall be punished with imprisonment from one to three months or with a fine" and in paragraph (2) provides that the parent will receive the same punishment, "a person entrusted with the child by court order in order to be cared for and educated to prevent repeatedly either parent from having personal contact with a minor, under the terms established by the parties or by the competent body".

From the legal text we can observe the penalties that are applied to the parent exhibiting such an attitude towards the child, but not criminal law may stipulate the legal situation for the purposes of returning the child to the child's habitual residence. It is in fact the object of the Hague Convention.

The Unlawful Nature of Removal or Retention

Considering the provisions of the Hague Convention, in each particular case, the court must examine the elements exceeding the normal exercise of parental rights over establishing the child's residence. According to article 2 point 7 of the EC Regulation no. 2201/2003 "parental responsibility" is determined by all rights and obligations conferred upon a natural person or a legal entity based on a court ruling, by full right, and includes the right of custody, namely and currently, to establish the home of juvenile (according to point 9 of the Regulation). In a decision (Brița, 2006: 118-127) by the Court of Bucharest, it granted the request made by the Ministry of Justice and ordered the return of the minor, BD to the child's habitual residence in the Republic of Hungary, within 2 weeks of the judgment under penalty paying a civil fine by the lady defendant in the amount of 10 million ROL to the Romanian state. In fact, the common-law marriage between the plaintiff, BG, and the defendant, LCS, produced one child, BD, born on 03.08.1999, who in June 2001 lived with his father in Hungary. On December 24, 2003, the paternal grandmother came to Romania with the minor that was entrusted to the defendant was left for a day, but she did not return the child. The Ministry of Justice as Central Authority requested the emergency return of the minor to the habitual residence in the Republic of Hungary. In her defense, the lady defendant argued that because of the violent behavior of the plaintiff she had to return to Romania, leaving the child in the care of the plaintiff, a situation which lasted until December 2003, when the paternal grandmother entrusted minor to the mother.

To pronounce judgment, the court remained within the legal provisions of the Romanian and Hungarian state on the promotion and safeguarding of children's rights through this point of view exercising parental rights by both parents, the existence of an agreement in this regard and the unlawful nature of the movement. Based on the evidences, the court found the detention of the child in Romania was unlawful, according to article 3 of the 1980 Hague Convention, which determines the father's deprivation of the right to have contact with the child and exercising his rights and duties towards the child.

According to article 2 point 9 of Council Regulation (EC) no. 2201/2003, the exercise of parental authority shall be made jointly by both parents and regarding the place where the child live his/her everyday life (Albăstroiu, 2014: 292). Thus, the rights and duties whereby the parental authority is determined primarily include the right to decide on the place of the child's habitual residence. However, pertaining the authority, according to article 2 point 11 letter b of the Brussels Regulation II bis (2201/2003) "*will be considered to be exercised jointly when, following a court order or operation of law, one holder of parental responsibility cannot decide the child's place of residence without the consent of the other holder of parental responsibility*".

In the case we have just analyzed, parents have joint rights and obligations towards their child minor, which means that the defendant is not entitled to decide on the child's residence, so retaining the child in Romania without the agreement of the father is unlawful under article 3 of the Hague Convention. According to article 3 paragraph 1 of the Convention, the removal or retention of a child is considered unlawful when it is in breach of rights of custody attributed to a person, an institution or any other body either separately or together, by virtue of the law of the State in which the child was habitually a resident, immediately before the removal or retention, and at the time of removal or retention those rights were actually exercised, either jointly or alone taking action or they

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would have been exercised thus, if such circumstances would not have occurred (Ghiță O., 2014: 54-64; Ghiță D., 2014: 148-160).

The court found, in relation to the facts presented, they met the requirements of the Hague Convention of 1980, being an unlawful refusal to return of the child's habitual residence in Hungary, the child was legally moved by the paternal grandmother to Romania for the minor to have personal contact with his mother, who subsequently detained him in Romania without the father's *agreement*, thus violating the mother's right effectively exercise the duties relating to the child including rights relating to the care *required by the child* and in particular, the right to determine the place of residence. Given the child's *habitual residence* prior to the movement to Hungary, and given that until the present the father's consent on changing the child's residence was not involved and not more than *one year* elapsed without father having initiated the return of the child to their habitually resident immediately before the removal and retention, which was in Hungary.

It should be noted that, according to article 12 of the Convention, the authority has notified the immediate return of the child after an elapsed period of less than one year with effect from the moment of non-return travel or when the application was made before the judicial or administrative authority of the Contracting State where the child is. Even after the expiration of the one-year period, the judicial or administrative authority, is also expected to order the return of the child, unless it is determined that the child was integrated wholly in his/her new environment (Gavrilescu, 2011: 69). In this sense, the Sector 1 Court of Bucharest (Civil sentence no. 4604/21 June 2006) also upheld in its ruling the mother's (VIC) request, and the father (VM) was forced to return the minor to his mother, in order to the fulfill the conditions stipulated by article 3 of the Convention. In fact, the parents V.M. and V.I.C. were married on 23.9.1992 in Austria and minor VAM was born on 06.08.2001, in Bucharest.

In April 2004, the defendant took the child, with the consent of the mother, who was on vacation in Romania for about 6 weeks, provided the father returned the child to Baden, an obligation which did not respect. The evidence showed that the parents held, in accordance with Austrian law, joint custody, since their divorce. According to its decision of 19.11.2003 issued by it, the District Court of Baden was willing to grant exclusive parental care to the mother, withdrawing the defendant's right to custody on a provisional basis pending finalization of the divorce.

The Court of Bucharest rejected the appeal as unfounded on the ground that the purpose of regulating article 3 of the Convention is to protect relationships already protected by the law of the State where they were previously going on prior to refusal to return, and the best interests of children aged 3½ years, is to live together with the mother, all the more since there is no evidence showing danger or intolerable situations that does not allow the parent to properly exercise his/her parental rights. It should be emphasized that article 1 paragraph. (2) of Law no. 369/2004 (which came into force on December 29, 2004), the higher Court became the competent authority to resolve requests on the application of the Hague Convention. According to article 12 paragraph. (2) thereof the judgment is subject to appeal before the Court of Appeal, Section for juveniles and family, within 10 days from notice. Thus, from 29 December 2004 the means of appeal were eliminated. The emergency return of the child in the country where the child has his habitual residence is motivated by the need for the child no longer to be considered the property of the parents and thus transformed into an instrument of chicanery and blackmail between the two. The real victim of abduction is the child who risks suddenly losing the balance in his/her life and suffer the trauma at being separated from the parent to whom

he was always felt uncertainty and frustration related to adaptation to a foreign language, cultural and conditions which are not familiar to him/her, such as unknown teachers and family (Recommandation, 1979: 874).

In line with the purpose of the Convention, as explained in the Pérez-Vera report, when it is found that the removal from a Contracting State was made illegal, the court must give way to a return procedure as governed by the Hague Convention of 1980, which does not question the custody rights of the child by a parent or another person, but in the reintegration to their ordinary life environment, from which he has been moved and it is in his interest not to be removed or retained under certain more or less questionable rights to the person (Perez-Vera, 1980: 426).

Exceptions to the Immediate Non-return of the Child

Most often in practice, discussions about exceptions are raised out of an obligation to return the child under the stipulations of the Convention, precisely in order to circumvent its objective and abusive exercise of the right to establish the child's home with one of the parents. From this perspective, we consider it necessary to bring those exceptions into question without attempting an analysis of them, but to present them in terms of deriving principles, and especially in the way in which they can be perceived by the application in these cases.

Failure to fulfill obligations resulting from establishing of the child's home with one of the parents/the existence of an agreement to move or retain the child

Article 13 of the Convention provides that the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person requesting the return does not actually hold the right to custody, before the allegedly illegal removal of the child, namely that person *does not exercise the rights and obligations arising from the establishment the minor's home* - in countries where the term "child custody" is no longer used for as in our legislation - which the person now seeks to invoke, or *if subsequently that person had consented to the act that now they are trying to attack*. Therefore, the situations referred to in this paragraph shall apply on the one hand to damage the child's best interest arising from not exercising the rights and obligations pertaining to the establishing custody/home with one of the parents, and, on the other hand they concern the consent of the parent that took care of the child, about the removal of the minor, consent which may be given before or after the journey. In this respect, the decision (Raban vs Romania) of the European Court of Human Rights on the basis of which the Court reiterates that "the principle that the interests of the child should be fundamental in proceedings started under the Hague Convention". In this case, the evidence presented it was recorded that the children had left Israel and remained in Romania, with their mother with the father's consent, motivated by his worsening financial situation. According to the parents' agreement, the children were to stay in Romania until the financial situation of the applicant, the father of the children, would improve – thus, even the fact that they bought roundtrip tickets, which were cheaper than one way tickets emphasized the financial difficulties facing the family; however, with time, the evidence showed that this situation has continued to deteriorate since the applicant sold the house in which the family had been living after the departure of his former wife with children, and he went to live with his mother (Otovescu-Frăsie, 2007: 297).

Also, the applicant has provided no evidence to support his statement that he sent money to his children. In addition, the court decided that the plaintiff has not shown that he kept contact with his children; in the case file there is one single record of a visit made

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by the applicant to his children on 3 October 2007; telephone conversations which he claimed that he had with his children in Romania were made from his mother's house, being interpreted as conversations between children and paternal grandmother. Therefore, the agreement between spouses concerning keeping the children in Romania proved to be real, and such an agreement cannot be construed as a violation of article 3 of the Hague Convention.

Moreover, the evidence in the file showed that the two children have integrated very well in the Romanian community – had good results in kindergarten and positive psychological assessments – arguments that led to dismissing the applicant's action. The court also ruled that “the assessment of the children's situation conducted by the Directorate General of Social Assistance and Child Protection in the presence of legal counsel stated that an assessment of the potential effects of separation from their father could not be made, to the extent that there was insufficient information on the relationship between father and children”.

Given the evidence on record the Court considered that *the plaintiff had consented to the removal and retention of his children in Romania* until such time as his financial situation improved, which renders article 3 of the Hague Convention is moot in this case. The European Court held that there is no reason to disregard the decisions of national courts which were able to analyze and resolve the particular case *in concreto*.

The Serious Risk that the Child Is Exposed to Physical or Psychological Harm due to the Return to his/her Usual Home

Point b and paragraph (2) of the same article 13 of the Convention provides exceptions that are based on the principle of the child's best interests, but refers to the situation where there is a grave risk that the return exposes the child to physical or psychological harm. The best interests of the child (Drăghici, 2013: 97) to be moved from the habitual residence or not to return to it, must be supported by the existence of sufficient evidence that ensure his/her stability in the new environment, the interests of the parents to exercise their rights and obligations arising from parental authority being subsumed to the interest of the child. In this respect the text of Recommendation 874 of 1979 of the Parliamentary Assembly of the Council of Europe, whose main general principle states that “children should not be regarded as their parents' property, but must be recognized as individuals with their own rights and needs” (HCCH).

In the case *Raban vs. Romania*, not applying article 3 of the Hague Convention was not the only argument which led the national court to refuse the order to return of children. The other arguments presented before the national courts, based on the children's interests and evidence brought by the mother and the domestic social institutions in accordance with which *the children have integrated well into the new environment*, contrasted with existing evidence that they would be at serious risk or psychological danger if they return to Israel, a fact which resulted in applying the exception provided for in article 13 paragraph (1) of the Hague Convention.

Returning the child “would not be permitted by the fundamental principles of the petitioned State relating to the protection of human rights and fundamental freedoms”

According to article 20 of the Convention, the return of the child “*would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms*”. This provision seems extremely restrictive and is becoming, by its nature, unusual to the content that can normally be found in international treaties (Dănișor, 2014: 12-27). It is the result of a compromise between those delegations that have admitted and that have opposed the inclusion of a clause in the

agreement of “public policy”. Divergence started from excessive limitations and traditional cultural events that characterize the creation and existence of families in different countries. Initially, the reservation stipulated was formulated as follows: “The Contracting States may reserve the right not to proceed with the return of the child when the return would be manifestly incompatible with the fundamental principles of law relating to families and minors from the requested State” (Special Commission, 1979). The adoption of this text has caused a quite important gap in the context governing the procedures of the Convention up to that point.

In this situation, the adoption by a majority of states (the text was adopted by a majority of 14 votes, 6 opposed and 4 abstentions) of the provision in the version found in article 20 of the Convention represents a commendable attempt to reach a compromise between opposing points of view, so that the role entrusted to the domestic law of the state providing refuge was diminished considerably. On the one hand, the reference to the fundamental principles relating to the protection of fundamental human rights and liberties linked to a field of law in which there are numerous international agreements.

On the other hand, the provision contained in article 20 covers a wider area in comparison to the traditional formulation of rules of “public policy” in the degree of incompatibility between the claimed right and expected actions. In fact, for the authority to be able to refuse the order to return the child by based on the fundamental right which is reflected in that provision, it must demonstrate not only that such a contradiction exists, but that the principles protecting human rights prohibit the return required.

Conclusions

The importance of knowing the instruments guaranteeing the rights and obligations of the child even against those who ordinarily should provide the child with protection is as high as the very existence of the legal stipulations. The text of the Hague Convention, as it was designed in order to ensure the best interests of the child must be understood in the sense of its application against the parent who abuses the exercise of the rights conferred upon him/her by law. The analysis of provisions in the Convention is important to be made in order to honor the child's interest, providing in this regard emergency exceptions as well to the return the minor to the established home, where the actual situation requires it.

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Article Info

Received: March 1 2015

Accepted: May 20 2015
