

Ensuring the child's interests in implementing the requirements of the Hague Convention on the Civil Aspects of Child Abduction

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ОБЕСПЕЧЕНИЕ ИНТЕРЕСОВ РЕБЕНКА ПРИ РЕАЛИЗАЦИИ ТРЕБОВАНИЙ ГААГСКОЙ КОНВЕНЦИИ О ГРАЖДАНСКО-ПРАВОВЫХ АСПЕКТАХ ПОХИЩЕНИЯ ДЕТЕЙ

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Аннотация: Положенные в основу Гаагской конвенции о гражданско-правовых аспектах похищения детей 1980 года идеи о необходимости обеспечения незамедлительного возврата незаконно вывезенных или оставленных детей в государство их обычного проживания в целях снижения пагубных последствий односторонних действий родителей были подвергнуты существенной ревизии, поскольку до неузнаваемости изменилась не только природа похищения детей, но и правовой ландшафт, определяющий принятие судебных решений. Авторами был сделан вывод о том, что предметом анализа со стороны судов становятся различные обстоятельства, которые могут свидетельствовать о наличии «серьезного риска» причинения ребенку «физического или психологического вреда» либо создания для него «невыносимых условий». Это позволило констатировать, что судебная практика по данной категории дел постепенно становится более универсальной, чему призвана способствовать разработка Руководства по надлежащей практике в соответствии с Конвенцией НСЧН от 25 октября 1980 года.

Ключевые слова: интересы ребенка, похищение и удержание ребенка, возвращение ребенка, серьезный риск причинения вреда

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ENSURING THE CHILD'S INTERESTS IN IMPLEMENTING THE REQUIREMENTS OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF CHILD ABDUCTION

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Abstract: There has been a revision of the 1980 Hague Convention on the Civil Aspects of Child Abduction to ensure the immediate return of illegally removed or abandoned children to their state of habitual residence to reduce the detrimental effects of unilateral parental action. In recent years, the methods of child abduction and the legal landscape associated with judicial decision-making have changed dramatically.

The authors conclude that on the part of the courts, various circumstances may indicate a “grave risk” of causing “physical or psychological harm” or creating “intolerable conditions” for the child.

After analyzing the information received, the authors conclude that jurisprudence in this direction is becoming more and more universal. This is also facilitated by the development of the Guide to Good Practice under the HCCH Convention of October 25, 1980.

Keywords: child's interests, child abduction and retention, return of the child, grave risk of harm

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Introduction

The conflicting relationships between parents inevitably affect the child's life. The situation will become more complicated if the parents cannot agree on the child's place of residence and will try to resolve this issue unlawfully, including the abduction or retention of the child. The situation becomes especially problematic when one of the parents tries to take the child across the border. At the same time, it remains undeniable that the adoption of the 1980 Hague Convention on the Civil Aspects of Child Abduction and its ratification by the states does not solve all the problems that arise.

Determining child's interests and risks

In terms of jurisprudence, the most problematic issue is determining the balance between the interests of children and parents. Article 3 of the 1989 UN Convention on the Rights of the Child states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration"¹. The same sense is embedded in the Hague Convention, which links it to the restoration of the status quo by deciding on the immediate return of a child to his or her state of habitual residence in cases of abduction or illegal detention; sometimes, non-return may be justified for objective reasons consistent with the interests of the child and described in certain exceptions to standard practice².

However, international documents do not reveal the entire meaning of this category. The documents of the UN Committee on the Rights of the Child also lack a detailed description of the interests of the child. All of this has given rise to a broad interpretation of the child's interests by the courts, which have begun to address such cases more frequently. As a result, the 1980 Hague Convention, adopted more than 40 years ago, has undergone a significant revision. Initially, it was thought that returning the child to his or her state of habitual residence was the best solution in most cases, but then the ideas of what was in the best interest of the child started to blur, giving rise to contradictory judicial decisions. The problem is that not only the nature of child abduction has changed significantly, but also the legal landscape governing such decisions, whether the obligations imposed on member states of the Council of Europe as a result of the interpretation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 or the recognition of children's rights under the UN Convention on the

Rights of the Child of 1989³. As a result, the search for a balance of competing concerns has led to difficult questions about how child's interests should be determined and whether the focus should be on the short, medium, or long term. In particular, when we speak of a short-term perspective, it is relatively difficult to decide for a newborn or young child who is abducted and held by the mother. Long-term perspective refers to the ability to ensure the child's well-being over an extended period, which changes the criteria for assessing the appropriateness of returning to his or her previous place of residence. In this regard, many have questioned whether the provided by the Convention child return cases can be invoked if returning the child would be detrimental to the child's economic or educational prospects. The Explanatory Commentary to the Hague Convention states that it is inadmissible to formulate a contrario conclusion regarding the return of the child if it could harm his or her economic or educational prospects⁴. There are concerns that national law enforcement agencies will interpret this provision through the prism of specific cultural, social, and other values that have evolved in the respective society. For example, in Russian jurisprudence, it is believed that it is in the best interests of the child to be raised by a mother⁵, which has also been the subject of discussion at the ECHR⁶.

In any case, the courts face a difficult choice because a broad interpretation of the exceptions will reduce the effectiveness of the mechanisms inherent in the Convention, while strict adherence to them may violate the interests of children. It is becoming clear that "such different approaches do not protect child's interests but weaken it because they confuse the national courts"⁷.

Part VI of the Guide to Good Practice under the Hague Convention notes that each of the terms used to define exceptions to the practice of child return refers to the very high risk that the return of a child would put him or her in a state of physical or psychological harm or otherwise put the child in intolerable conditions (Article 13(b) of the Convention), which is the result of a

1 See: Collection of international treaties of the USSR. 1993. Issue XLVI.

2 See: Bulletin of the European Court of Human Rights. Russian edition No. 1/2016

3 See: *McElevay, P.* The European Court of Human Rights and the Hague Child Abduction Convention: prioritizing return or reflection? *Netherlands International Law Review*. 2015. No. 62. P. 365-405.

4 See: *Perez-Vera E.* Explanatory Report on Convention on the civil aspects of international child abduction. <http://www.euromed-justice-iii.eu/document/hcch-1981-explanatory-report-elisa-perez-vera-hague-conference-permanent-bureau>

5 See: Decision of the Pyatigorsk City Court of the Stavropol Territory in case No. 2-360/2017. sudact.ru/regular/doc/ntj04fM6j9/; Appeal ruling of the St. Petersburg City Court in case No. 2-741/2018

6 See: Case of Thompson v. Russia (European Court of Human Rights) Application no. 36048/17. P. 43. <https://laweuro.com/?p=14308>

7 *Kravchuk N.V.* The Hague Convention on International Child Abduction: protecting or neglecting child's interests? *Semeynoye i zhilishchnoye pravo*. 2020. No. 6. P. 18-21.

В ИНТЕРЕСАХ ГОСУДАРСТВА

compromise reached in the deliberations of the Special Commission. In general, the exceptions provided by the Convention serve a legitimate purpose because it does not provide for an automatic return mechanism. And if there is a high risk of violating child's interests, the court should immediately consider all the necessary nuances. The ECHR pointed to the fact that there is a consensus in international law to support the idea that the best interests of the child must be paramount in all decisions concerning children and noted that the interests of the child encompass two aspects. On the one hand, it is necessary to preserve the child's connection with the family, except in cases where the family proves to be particularly unsuitable for the child. Family relationships can only be terminated in exceptional cases, and every effort must be made to preserve personal relationships, and if necessary, to "restore" the family. On the other hand, it remains in the child's interest to ensure his or her development in a healthy environment, and Article 8 of the 1950 Convention does not give the parent the right to take those actions that might harm the child's health and development⁸.

However, the problem remains that the provisions of the Hague Convention do not define the exact nature of "grave risk", which may involve not only "physical or psychological harm" but also "intolerable conditions". Article 13 of the Convention does not require a child to be directly harmed physically, but if there is strong evidence that harm may be done to the taking parent, there is a possibility of violence against the child since the harm done to a parent, whether physical or psychological, in some circumstances creates a risk that the return of the child will subject him or her to physical or psychological harm as well or otherwise create an intolerable situation⁹.

At the same time, the term "grave" qualifies the risk, not the child's physical or psychological harm. It must be objective and reach a level where it can be characterized. In the same way, the level of harm should correlate with the "intolerable situation" that the individual child must not tolerate. The level of risk may vary, depending on the nature and severity of the potential harm to the child. According to the ECHR, such a risk cannot be interpreted under Article 8 of the 1950 Convention as covering all the inconveniences inevitably associated with the return of a child. This risk also cannot be caused solely by separation from a parent who is responsible for the unlawful removal or retention of a child. The exception under Article 13(b) of the Hague Convention applies only to

situations that are beyond what a child can reasonably be expected to endure¹⁰.

In 2020, with the adoption of the Guides to Good Practice under the HCCH Convention of October 25, 1980, on the Civil Aspects of International Child Abduction Part VI Article 13 (1) (b)¹¹, progress has been made in solving this problem, in particular, the courts, assessing the nature of the risk, should not be limited to analyzing the circumstances that existed before or during the unlawful abduction or detention of a child. It is also necessary to be future-oriented, assessing the availability of adequate and effective protective measures in the state of habitual residence. The issue of counting cases of domestic or family violence, which, depending on the specific circumstances, can serve as evidence of grave risk to a child; experts note that a significant number of cases of child return are brought by men against women, many of whom claim to escape with their children from domestic violence¹².

The drafters of the Guides to Good Practice are concerned with several circumstances that children may face, such as problems with the child's economic situation or development upon return, risks associated with various cases in the state of habitual residence, health risks to the child, separation of the child from the taking parent when the parent is unable or unwilling to return to the state of habitual residence, and separation from siblings.

As an argument in their favor, parties often cite the opportunity to provide the child with a more favorable living condition, and the Guides (paragraph 60) state that when there are allegations of grave risk based on unfavorable economic conditions or developmental disabilities upon return, the court should not compare the living conditions that each parent (or each state) has to offer. The analysis should examine whether the state of habitual residence can meet the child's basic needs. It follows that modest living conditions and/or more limited developmental support in the state of habitual residence are not sufficient to deny a claim for the return of a child. This also includes cases where the taking parent claims that he/she cannot return with the child to

¹⁰ Ibid. P. 97.

¹¹ See: Guide to Good Practice under the HCCH Convention of October 25, 1980 on the Civil Aspects of International Child Abduction Part VI Article 13(1)(b). <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>

¹² See: *Shani M. King*. The Hague Convention and domestic violence: proposals for balancing the policies of discouraging child abduction and protecting children from domestic violence. *Family Law Quarterly*. 2013. No. 47. P. 299–310; *Freeman M., Taylor N.* Domestic violence and child participation: contemporary challenges for the 1980 Hague child abduction convention. *Journal of Social Welfare and Family Law*. 2020. Vol. 42. Issue 2. P. 154–175; *Doronina N.G., Marysheva N.I.* The Hague Conference on private international law and protection of a person from violence (Ensuring the safety of women and children). *Zhurnal rossiyskogo prava*. 2014. No. 7. P. 76–82.

⁸ See: ECHR Resolution of 18.06.2019 "Vladimir Ushakov v. Russian Federation" (application No. 15122/17). *Byulleten Yevropeyskogo suda po pravam cheloveka. Rossiyskoye izdaniye*. 2020. No. 6.

⁹ *Kravchuk N.* Provision on the immediate return of the child to the country of habitual residence and exceptions in the law of the Hague Convention on International Child Abduction and the practice of the European Court of Human Rights. *Byulleten Yevropeyskogo suda po pravam cheloveka. Rossiyskoye izdaniye*. 2016. No. 1. P. 139.

the state of habitual residence because his/her standard of living would be lower or he/she cannot find work in that country. The possibility of losing government benefits or other institutional support does not qualify as a grave risk.

The political, economic, or security situation in the country is however considered a grave risk to a child's well-being. For example, returning to a war zone, mass starvation, or an epidemic may pose a grave risk to a child. However, this circumstance is not considered as an unconditional basis for the application of the Hague Convention exceptions to the claim for the child's return. Occasional violent incidents in an unsettled political environment are generally not seen as a source of grave risk. In cases where there are concerns about the child's fate, the court must determine whether the protection mechanisms in the state of habitual residence can address these risks and if so, the court will be required to order the child's return (paragraph 61 of the Guides).

Risks related to the child's health are also part of the discussion concerning the child's return. According to the authors of the Guides, the subject of the analysis should be the availability of treatment in the child's state of habitual residence, rather than comparing the relative quality of medical care in each State. Generally, a grave risk will typically be established only in situations where treatment is or would be needed urgently, and it is not available or accessible in the state of habitual residence, or where the child's health does not allow for travel back to this state at all. The mere fact that the state of habitual residence may have a different standard of health care or distinct climatic conditions will typically not be sufficient to establish the Article 13(1)(b) of the Hague Convention exception for the return of the child. The court may consider, for example, measures of protection to mitigate the grave risk upon return, such as the provision of financial support, health insurance, and/or for the preparation of medical support for the child upon return.

Court practice

There is no unified approach to solving this problem, including at the level of the ECHR. For example, the subject of the ECHR assessment in the case of "Vladimir Ushakov v. Russian Federation" (application No. 15122/17) was the validity of the court's qualification of the child's state of health as an exception to the requirement to return her under paragraph "b" of Article 13 of the Hague Convention. It is said that the appellate court simply referred to "V.'s numerous illnesses", which could have caused her physical harm if she had been returned to Finland. The ECHR found that the court's decision did not contain any detailed information about the child's state of health, the treatment she needed, or the availability of equal treatment in Finland, which, in the absence of an assessment of the mother's other objections to her daughter's return to Finland, made it impossible to determine what was in the best interests of the girl.

The question of whether she would be able to see her mother after her return to Finland (whether the mother would be able to visit Finland, whether she would be subject to any sanctions upon her return to Finland, whether the applicant could deprive her of custody or prevent her from communicating with her child, and so on) was not addressed. The ECHR concluded that the court's interpretation and application of the provisions of the Hague Convention failed to ensure the guarantees provided by Article 8 of the 1950 Convention, that interference with the applicant's right to respect for his family life was not "necessary in a democratic society" as prescribed in paragraph 2 of Article 8 of the Convention, and that the authorities of the Russian Federation had failed to comply with their obligations under Article 8 of the Convention to ensure the applicant's right to respect for his family life.

In cases involving the return of a child, the counterargument is often that there is a grave risk of psychological harm to the child or that the child may be placed in an intolerable situation as a result of separation from the taking parent when that parent is unable or unwilling to return. We should note that this is an influential argument for the Russian courts. In Proceedings No. 2-4542/2018, the Kanavinsky District Court of Nizhny Novgorod considered that the separation of a child from his mother and an abrupt, unwilling transition to new living conditions could lead to the formation of pathological character traits in a child, as it is the most severe factor leading to a stressful condition. Due to a child's young age, abrupt and significant changes in life, including moving to another country, can lead to a loss of acquired skills, cognitive activity, speech development and reduce the child's rate of development¹³.

At the same time, we cannot speak about the formation of a consistent position in the ECHR on this issue. This is evidenced by the decision of Judge D.I. Dedov in the case "Vladimir Ushakov v. Russian Federation" (application No. 15122/17). The judge pointed out that the circumstances of the case were similar to the materials of the case "X v. Latvia"¹⁴, in which, however, the ECHR analysis led to the opposite results. In that case, the court considered a psychologist's certificate provided by the mother about the risk of psychological trauma to the child in the event of immediate separation from the mother, given the child's age and their close emotional ties. The documents contained in the case file of the complaint No. 15122/17, but not included in the proceedings, were ignored by the ECHR.

In these cases, the focus is on the possible separation of the child from the parent in the event of return or abandonment decision and whether that decision is consistent with the exclusion of grave risk. The circumstanc-

¹³ See: <http://судебныерешения.рф/35839412/extended>

¹⁴ See: ECHR Resolution of 11/26/2013 in the case «X v. Latvia» (application no. 27853/09). *Pretsedenty Yevropeyskogo Suda po pravam cheloveka*. 2016. No. 1(25).

В ИНТЕРЕСАХ ГОСУДАРСТВА

es or reasons for the taking parent's inability to return to the child's state of habitual residence are different from assessing the impact of a possible separation on the child, although they may be part of the assessment. It is necessary to consider what measures can be taken in the state of habitual residence to protect the child's interests (for example, the possibility for the left-behind parent or other person to care for the child upon his or her return to the state of habitual residence until a court in that state can make a custody decision), whether obstacles to the return of the taking parent due to the risk of criminal prosecution for child abduction, immigration issues, etc. can be resolved.

One of the most common obstacles to the return of the taking parent to the child's state of habitual residence is the risk of criminal prosecution for child abduction or unlawful retention. This raises the question of a preliminary solution with guarantees that the authorities in the child's country of habitual residence will not initiate criminal or other proceedings, or at least not arrest the taking parent if the existing channels of cooperation between law enforcement agencies and courts between the states allow for this. If this issue is having a positive result, obstacles to the return of the parent cannot be considered a threat to the psychological condition of the child, which would constitute an obstacle to his or her return to the country of habitual residence. However, the inability to withdraw a charge or arrest warrant is usually insufficient to apply the exception provided for in Article 13 of the Hague Convention. An additional factor is the ability to provide custody for the child during the separation (paragraphs 66-67 of the Guides).

We should mention the case of the Pyatigorsk City Court of Stavropol Territory No. 2-360/2017, which considered the information provided through the Ministry of Science and Higher Education of the Russian Federation from the Ministry of Justice of the State of Israel, which stated that according to Israeli law, a person's complaint to the police involves forwarding it to the Central Authority of the State of Israel under the 1980 Convention. According to the Guides of the State Prosecutor, criminal proceedings may be initiated only in exceptional cases. As a rule, even in such cases, criminal proceedings are not taken against the parent who returned the child, provided that the return takes place immediately after the abduction or the court decision regarding the return of the child is instantly enforced. Moreover, if the parent does not commit further acts of abduction of the same child in the future, the police close the case¹⁵.

An obstacle to enter the state of habitual residence may be the expiration of the relevant visa or the lack of residence rights, which is often an artificial situation created by the host parent and can be resolved independently or with the assistance of the competent authorities. In such cases, the subject of the assessment is the ability of the parent to return to the requesting

state for at least the period necessary to participate in the custody proceedings or to enter the country under certain conditions (paragraph 68 of the Guides).

The taking parent may assert, for example, that he or she is unwilling to return to the state of habitual residence because he or she cannot afford legal representation, the courts in that State are biased, or that there are other barriers to access to a court for custody proceedings. However, such obstacles are considered avoidable. Moreover, the Guides note that since the Convention is based on mutual trust between the states, courts should not compare the relative quality of judicial systems in both states, for example, concerning the speed of proceedings (paragraph 69 of the Guides).

The assessment may also include the host parent's unwillingness to return to the child's state of habitual residence due to the inability to receive suitable medical treatment or education in the new family's requesting state. If available medical care is not sufficient to return to the taking parent, the court would have to assess the asserted grave risk to the child from the separation by considering available protective measures.

An ambiguous situation occurs when the inability to return is associated with the formation of a new family in the requested state. If it's a mother, you have to consider that she may be expecting or have a new baby that she's breastfeeding. However, the fact that the mother would be faced with an uncomfortable dilemma cannot be considered sufficient to conclude that the older child's return would place that child at grave risk (paragraph 71 of the Guides).

The refusal of the abducting parent to return to the child's state of habitual residence is considered unconstructive. In this regard, the ECHR noted that the circumstances disclosed before the domestic courts did not objectively preclude the return of the mother with the child (it was not implied that Yu.T. had no access to Spanish territory or that she would face criminal sanctions upon return), satisfied the applicant, considering that "if we allow automatic disabling of the return mechanism only based on the abducting parent's refusal to return, then the system developed under the Hague Convention would be subject to the unilateral will of that parent"¹⁶.

Particular attention is given in cases involving the separation of siblings when one of them opposes the return under Article 13(2) of the Hague Convention, and the court has to consider such a refusal. Given that sibling separation can be problematic and harm a child, the drafters of the Guides say that in such cases, courts should assess if the separation will affect the child and to what extent. This analysis should be made for each child individually and not turn into a "best interest" analysis. In each case, courts should also consider whether the requirement for possible separation of the siblings through the return of only one of them comes from the

15 See: <https://sudact.ru/regular/doc/ntj04fIMd6j9/>

16 See: Case of Thompson v. Russia (European Court of Human Rights) Application no. 36048/17. <https://laweuro.com/?p=14308>

taking parent. Courts need to be particularly careful when considering a claim of grave risk and not allow a parent to benefit from the situation resulting from his or her actions or behavior. In any case involving the possible separation of siblings, courts should be aware that a return order should not necessarily result in the termination of contact between siblings or their permanent separation; in such cases, the process should concern how to retain contact between them (paragraphs 74–76 of the Guides).

As literature states, all of these exceptions are designed to consider the interests of the particular abducted child, but the number of situations in which the return of a child may not be in his or her best interests is extremely small, but the exceptions remain exceptions and must be used with cautiousness¹⁷. In judicial practice, more and more attention is being paid to the totality of the circumstances indicating a grave risk to the child.

17 *Kravchuk N.* The provision on the immediate return of the child to the country of habitual residence and exceptions in the law of the Hague Convention on International Child Abduction and the practice of the European Court of Human Rights. *Byulleten' Yevropeyskogo suda po pravam cheloveka. Rossiyskoye izdaniye.* 2016. No. 1. P. 139–144.

Conclusion

Summarizing the above, we can draw several conclusions. Various circumstances that may indicate a “grave risk” of “physical or psychological harm” or “intolerable conditions” for the child are subject to analysis by the courts, such as domestic or family violence, problems with the child’s economic situation or development upon return, risks related to exceptional circumstances in the state of habitual residence, threats related to the health of the child, the effects of separation of a child with a taking parent, who do not want or unable to return to the state of habitual residence, as well as separation with brothers and sisters. Practice shows that the court may accept some of these circumstances only if it is impossible to eliminate them or provide the child with additional guarantees of protection of his or her rights.

It can be said that in this category of cases, court practice is gradually becoming more universal. This is facilitated by the development of the Guides to Good Practice under the HCCH Convention of October 25, 1980 on the Civil Aspects of International Child Abduction Part VI Article 13(1)(b), which, however, is not a guarantee of protection against contradictory decisions, including those made by the ECHR.

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