KOSOVO DEMAND FOR JUSTICE PROGRAM

Helping Students Develop Critical Thinking Skills Through Interactive Instruction

November 2019
Pristina, Kosovo

PARTICIPANT INTERNATIONAL CUSTODY CLASS MATERIALS

These materials will be used in three different sessions during the workshop. The first day you will be the students in a class taught by a professor emeritus from Ohio Northern University College of Law. *Please read the assignment for day one and be prepared to participate!*

The materials for the second day have been provided to the students for the model classes. The first class will be taught by one of the ONU professors and will be focused on two international custody cases. The cases and case briefs (In English and Albanian) are provided here for you. The second class will be taught by the Kosovo faculty participants and will address two international custody problems, including the problem from the first day that you were taught.

As will be discussed throughout the workshop, student preparation is the key to an effective interactive classroom experience. Please read the assignments and be prepared to participate.

Day One Assignment for Participants Pages 3-29

Read and Prepare Before Workshop

1. International Child Custody Problem (English)

2. International Child Custody Problem (Albanian)

3. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1980) (English)

4. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1980) (Albanian)

5. International Child Abduction in Civil Matters Pursuant to Kosovo Legislation (2016)

Day Two Assignments for Student Participants

Model Class Number One: ONU Faculty Pages 30-44

1. *In re the Application of Felix Blondin v. Dubois,* U.S. Federal District Court, Southern District of New York, (2000)
    a. English case brief
    b. Albanian case brief

2. *Ermini v. Vittori,* U.S. Court of Appeals, 2nd Circuit 2014
    a. English case brief
    b. Albanian case brief

Model Class Number Two: Kosovo Faculty Pages 45-46

1. Class Problem One (International Child Custody Problem, pages 3–4 above)

2. Class Problem Two (English)

3. Class Problem Two (Albanian)

International Child Custody Problem (English)[1]

The applicant (A.B.) was born in 1964 and lives in Caralevë, in the municipality of Shtime, Kosovo. On 28 April 2003 the applicant married F.M., an Albanian national, at her family's home in Vlora, Albania. The couple had a child, I.B., who was born on 20 January 2007. At the time of the child's birth, the couple resided in Kosovo. In July of 2008, the applicant and F.M. separated. F.M., together with her daughter, moved to her parents' house in Albania.

On 6 May 2009, F.M. married H.I., an Albanian national who resided in Greece, without being divorced from the applicant. She lived with him in Greece. Her daughter stayed with her parents several weeks at a time during the year and with her and H.I. at other times. It appears that on 15 September 2009 the Vlora District Court annulled F.M.'s marriage to H.I. but she continued to live with him until February 2010 when she moved in to her own apartment and claimed economic refugee status, bringing her daughter to Greece for one or two week stays. The daughter lived with her mother's parents when she was not with her in Greece.

F.M. and her parents prohibited the applicant from having contact with his daughter. Since his separation from F.M., the applicant has been permitted to see his daughter only twice in September 2009 at the parents' home in Albania.

On 24 June 2010, the applicant brought divorce proceedings before the Vlora District Court and sought custody of his daughter. The applicant's wife was not present at the hearings. The latter's father testified before the court that his grandchild was in Greece with her mother, who was residing there as an economic refugee.

On 4 February 2011, the Vlora District Court decreed the parties' divorce. The court granted custody of the child to the applicant, due to the wife's lack of interest in the child's life, the instability of her residential arrangements, her long periods of separation from the child, and his established long-standing residence in Kosovo.

A.B. has now applied to the Greek Central Authority, Ministry of Justice, Transparency and Human Rights under the Hague Convention on the Civil Aspects of International Child Abduction for the return of the child to Kosovo. Both Greece and Albania are signatories to the Convention.

The child's mother has raised two defenses:

1. That Greece is the habitual residence of the child.
2. That A.B. delayed too long before bringing his action.

Resolve the issues before the Greek authorities.

[1] This problem will be used tomorrow for the Kosovo faculty teaching exercise with the students.

International Child Custody Problem (Albanian)

Rasti I kujdestarisë ndërkombëtare të fëmijëve

Kërkuesi (A.B.) ka lindur në vitin 1964 dhe jeton në Carralevë, në komunën e Shtimes, Kosovë. Më 28 prill 2003, Kërkuesi u martua me F.M., një shtetase shqiptare, në shtëpinë e familjes së saj në Vlorë, Shqipëri. Çifti kishte një fëmijë, I.B., i cili ka lindur më 20 janar 2007. Në kohën e lindjes së fëmijës, çifti ka banuar në Kosovë. Në korrik të vitit 2008, Kërkuesi dhe F.M. ndahën. F.M., së bashku me vajzën e saj, zhvendoset në shtëpinë e prindërve të saj në Shqipëri.

Më 6 maj 2009, F.M. u martua me H.I., një shtetas shqiptar që jetonte në Greqi, pa u divorcuar nga kërkuesi. Ajo jetoi me të në Greqi. Vajza e saj qëndroi me prindërit e saj disa javë për një kohë dhe kohën tjeter me të dhe H.I.

Me 15 shtator 2009, Gjykata e Rrethit Vlorë anuloi martesën e F.M. me H.I. por ajo vazhdoi të jetonte me të deri në shkurt të vitit 2010, kur ajo vendosë të jetoj ndaras në banesën e saj dhe merr statusin e refugjatit ekonomik, dhe duke e mbajtur vajzën e saj në Greqi për një ose dy javë qëndrimi. Vajza u vendos me prindërit e FM kur nuk ishte me të në Greqi.

F.M. dhe prindërit e saj ja ndaluan kërkuesit që të ketë kontakt me vajzën e tij. Që nga ndarja e tij nga F.M., Kërkuesit i është lejuar të shohë vajzën e tij vetëm dy herë në shtator 2009 në shtëpinë e prindërve në Shqipëri.

Më 24 qershor 2010, Kërkuesi filloj procedurë e shkurorzimit pranë Gjykatës së Rrethit Vlorë dhe kërkoi kujdestarinë e vajzës së tij. Gruaja e kërkuesit nuk ishte e pranishme në seancat dëgjimore. Babai i F.M dëshmoi para gjykatës se mbesa i tij ishte në Greqi me nënën e saj, e cila ishte duke jetuar atje si një refugjat ekonomik.

Më 4 shkurt 2011, Gjykata e Rrethit Vlorë vendos për shkurorëzimin e palëve. Gjykata i dha kujdestarinë e fëmijës ndaj kërkuesit, për shkak të mungesës së interesit të gruas në jetën e fëmijës, paqëndrueshmërisë së marrëveshjeve të saj të banimit, periudhave të gjata të ndarjes nga fëmija dhe vendbanimit të tij të qëndrueshëm në Kosovë.

A.B. tani ka aplikuar në Autoritetin Qendror Grek, Ministrinë e Drejtësisë, Transparencën dhe të Drejtat e Njeriut sipas Konventës së Hagës mbi Aspektet Civile të Rrëmbimit Ndërkombëtar të Fëmijëve për kthimin e fëmijës në Kosovë. Greqia dhe Shqipëria janë nënshkruese të Konventës.

Nëna e fëmijës ka ngritur dy mbrojtje:

1. Që Greqia është vendbanimi i zakonshëm i fëmijës.

2. A.B. është vonuar shumë përpara se të fillonte procedurën për kthimin e fëmijës.

Zgjidh çështjet para autoriteteve greke.

HCCH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[2]

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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[2] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the
Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

KONVENTA E HAGËS

PËR ASPEKTET CIVILE TË RRËMBIMIT NDËRKOMBËTAR TË FËMIJËS

(lidhur në 25 tetor 1980)

Vendet nënshkruese të kësaj Konvente,

tërësisht të bindura se interesat e fëmijëve janë të një rëndësie të veçantë në çështjet që

lidhen me kujdestarinë e tyre, *duke dëshiruar* mbrojtjen ndërkombëtare të fëmijëve nga pasojat e dëmshme të largimit ose mbajtjes së tyre të padrejtë dhe për të krijuar procedura që sigurojnë kthimin e tyre të menjëhershëm në shtetin e banesës së tyre të përhershme, si dhe për të siguruar mbrojtje për të drejtat e kontaktit, kanë vendosur të lidhin një Konventë për këtë qëllim dhe kanë rënë dakord për dispozitat e mëposhtme.

KAPITULLI I

FUSHA E VEPRIMIT TË KONVENTËS

Neni 1

Qëllimet e kësaj Konvente janë:

a) të sigurojë kthimin e shpejtë të fëmijëve që largohen apo mbahen pa të drejtë në Shtetin Kontraktues;

b) të sigurojë që të drejtat e kujdestarisë dhe të kontaktit sipas ligjit të një Shteti Kontraktues të respektohen efektivisht në Shtetet e tjera Kontraktuese.

Neni 2

Shtetet Kontraktuese duhet të marrin të gjitha masat e duhura për të siguruar brenda territoreve të tyre përmbushjen e qëllimeve të Konventës. Për këtë qëllim, ato duhet të përdorin procedurat më të shpejta të mundshme.

Neni 3

Largimi ose mbajtja e një fëmije konsiderohet i padrejtë në rastet kur:

a) konsiston në shkeljen e të drejtave të kujdestarisë dhënë një personi, një institucioni apo organi tjetër, qoftë kolektivisht apo individualisht, sipas ligjit të shtetit në të cilin fëmija ka qenë banor i përhershëm para largimit apo mbajtjes;

b) në kohën e largimit apo mbajtjes këto të drejta janë ushtruar, qoftë kolektivisht apo

individualisht, ose që mund të kenë qenë ushtruar me përjashtim të largimit apo mbajtjes.

Të drejtat e kujdestarisë, të përmendura në nënparagrafin (a) më sipër, mund të lindin

veçanërisht nga funksionimi i ligjit ose për shkak të një vendimi gjyqësor apo administrativ ose për shkak të një marrëveshjeje që ka efekt ligjor sipas ligjit të shtetit.

Neni 4

Konventa do të zbatohet për çdo fëmijë që ka qenë banor i përhershëm i Shtetit Kontraktues menjëherë para rastit të ndonjë shkeljeje kujdestarie apo të të drejtave të kontaktit. Konventa do të pushojë së zbatuari kur fëmija arrin moshën 16 vjeç.

Neni 5

Për qëllime të kësaj Konvente:

a) “të drejtat e kujdestarisë” do të përfshijnë të drejtat që lidhen me kujdesin e fëmijës dhe në veçanti, e drejta për të përcaktuar vendbanimin e fëmijës;

b) “të drejtat e hyrjes” do të përfshijnë të drejtën për ta marrë fëmijën për një periudhë të kufizuar në një vend tjetër nga vendbanimi i tij i përhershëm.

KAPITULLI II

AUTORITETET QENDRORE

Neni 6

Një Shtet Kontraktues do të autorizojë një autoritet qendror të përmbushë detyrat që Konventa u ka dhënë këtyre autoriteteve. Shtetet federale, shtetet me më shumë se një sistem ligjor ose shtetet që kanë organizime territoriale autonome, do të jenë të lira të caktojnë më shumë se një autoritet qendror dhe të përcaktojnë shtrirjen territoriale të kompetencave të tyre. Kur shteti ka caktuar më shumë se një autoritet qendror, do të autorizojë autoritetin qendror, tek i cili mund të dërgohen aplikimet për t’u përcjellë tek autoriteti i duhur qendror brenda këtij shteti.

Neni 7

Autoritetet qendrore do të bashkëpunojnë me njëri-tjetrin dhe do të nxisin bashkëpunimin midis autoriteteve kompetente në shtetin e tyre përkatës, për të siguruar kthimin e shpejtë të fëmijëve dhe për të arritur objektivat e tjera të kësaj marrëveshjeje. Në veçanti, qoftë në mënyrë direkte apo me anë të një ndërmjetësi, do të marrin të gjitha masat e duhura:

a) për të zbuluar vendndodhjen e një fëmije, i cili është larguar apo mbajtur pa të drejtë;

b) për të parandaluar dëmtimin e mëtejshëm ndaj fëmijës ose paragjykimin te palët e interesuara duke marrë ose bërë që të merren masa të përkohshme;

c) për të siguruar kthimin e vullnetshëm të fëmijës ose për të arritur një zgjidhje paqësore të çështjeve;

d) për të shkëmbyer, aty ku duhet, informacion në lidhje me *bekgraundin* social të fëmijës;

e) për të siguruar informacion të karakterit të përgjithshëm sipas ligjit të shtetit të tyre, në lidhje me zbatimin e Konventës;

f) për të filluar apo lehtësuar procedimin gjyqësor ose administrativ, me qëllim kthimin e fëmijës dhe në rastin e duhur, të bëjnë përgatitje për organizimin ose sigurimin e ushtrimit efektiv të të drejtave të kontaktit;

g) siç e kërkojnë rrethanat, të sigurojnë ose lehtësojnë sigurimin e konsulencës dhe asistencës ligjore, duke përfshirë pjesëmarrjen e konsulentëve ligjorë;

h) të marrin masat e nevojshme administrative, për të siguruar kthimin e sigurt të fëmijës;

i) të informojnë njëri-tjetrin në lidhje me funksionimin e kësaj Konvente dhe sa të jetë e mundur, të eliminojnë pengesat ndaj zbatimit të saj.

KAPITULLI III

KTHIMI I FËMIJËVE

Neni 8

Çdo person, institucion apo organ tjetër që pretendon se një fëmijë është larguar apo mbajtur në shkelje të të drejtave të kujdestarisë, mund t'i drejtohet autoritetit qendror të vendbanimit të përhershëm të fëmijës ose autoritetit qendror të ndonjë Shteti tjetër Kontraktues për asistencë në sigurimin e kthimit të fëmijës. Aplikimi do të përmbajë:

a) informacion në lidhje me identitetin e aplikantit, të fëmijës dhe të personit që pretendon se ka larguar apo mbajtur fëmijën;

b) kur kërkohet, data e lindjes së fëmijës;

c) shkaqet mbi të cilat bazohet pretendimi i aplikantit për kthimin e fëmijës;

d) një informacion të nevojshëm në lidhje me vendndodhjen e fëmijës dhe identitetin e

personit me të cilin supozohet të jetë fëmija. Aplikimi duhet të shoqërohet ose shtohet nga:

e) një kopje e vërtetuar e ndonjë vendimi apo marrëveshjeje përkatëse;

f) një certifikatë apo aktbetim që vjen nga autoriteti qendror ose ndonjë autoritet tjetër

kompetent i shtetit të vendbanimit të përhershëm të fëmijës ose nga një person i kualifikuar, në lidhje me ligjin përkatës të këtij shteti;

g) çdo dokument tjetër në interes të çështjes.

Neni 9

Nëse autoriteti qendror, i cili merr aplikimin e parashikuar në nenin 8, ka arsye të besojë se fëmija është në një Shtet tjetër Kontraktues, do t'ia transmetojë në mënyrë të drejtpërdrejtë dhe pa vonesë aplikimin autoritetit qendror të këtij Shteti Kontraktues dhe do të informojë autoritetin qendror kërkues ose aplikantin, në vartësi të çështjes.

Neni 10

Autoriteti qendror i shtetit ku është fëmija do të marrë apo do të nxisë marrjen e masave të nevojshme, me qëllim sigurimin e kthimit të vullnetshëm të fëmijës.

Neni 11

Autoritetet gjyqësore apo administrative të Shteteve Kontraktuese do të shpejtojnë procedurat për kthimin e fëmijëve. Nëse autoriteti përkatës administrativ apo gjyqësor nuk ka arritur një vendim brenda një periudhe gjashtë javore nga data e fillimit të procedimit, aplikanti ose autoriteti qendror i shtetit të kërkuar, me iniciativën e vet ose nëse i kërkohet nga autoriteti qendror i shtetit kërkues, do të ketë të drejtën të kërkojë një deklaratë për shkaqet e vonesës. Nëse merret një përgjigje nga autoriteti qendror i shtetit të kërkuar, ky autoritet do t'ia transmetojë, sipas rastit, përgjigjen autoritetit qendror të shtetit kërkues ose aplikantit.

Neni 12

Kur fëmija është larguar apo mbahet padrejtësisht, siç është parashikuar në nenin 3, dhe kur në datën e fillimit të procedimit para autoritetit gjyqësor apo administrativ të Shtetit Kontraktues ku është fëmija ka kaluar më pak se një vit nga data e largimit apo mbajtjes së padrejtë, autoriteti i interesuar do të urdhërojë kthimin e menjëhershëm të fëmijës. Edhe kur procedimet kanë filluar pas mbarimit të periudhës së një viti, siç referohet në

paragrafin e mësipërm, autoriteti gjyqësor apo administrativ do të urdhërojë kthimin e fëmijës, për sa kohë që nuk është provuar se fëmija tashmë është vendosur në një mjedis të ri të tij. Nëse autoriteti gjyqësor apo administrativ në shtetin e kërkuar ka arsye të besojë se fëmija është çuar në një shtet tjetër, mund të shtyjë procedimet ose të pushojë aplikimin për kthimin e fëmijës.

Neni 13

Pavarësisht nga dispozitat e nenit të mësipërm, autoriteti gjyqësor apo administrativ i shtetit të kërkuar nuk është i detyruar të urdhërojë kthimin e fëmijës, nëse personi, institucioni apo organi tjetër që e kundërshton kthimin ose mbajtjen e tij, vendos që:

a) personi, institucioni apo organi tjetër që kujdeset për fëmijën nuk po ushtronin të drejtat e kujdestarisë në kohën e largimit apo mbajtjes ose kanë rënë dakord, ose si rrjedhojë të kenë pranuar në heshtje largimin apo mbajtjen;

b) ekziston rrezik serioz që kthimi i tij ose i saj ta ekspozojë fëmijën ndaj dëmit fizik ose

psikologjik ose ta vërë fëmijën para një situate të patolerueshme.

Autoriteti gjyqësor ose administrativ mund të refuzojë të urdhërojë kthimin e fëmijës, nëse zbulon se fëmija kundërshton të kthehet dhe ka arritur një moshë dhe një shkallë pjekurie, sipas së cilës është në gjendje të vendosë vetë për jetën e vet. Në marrjen parasysh të rrethanave që i referohen këtij neni, autoritetet gjyqësore dhe administrative do të marrin në konsideratë informacionin në lidhje me bekgraundin social të fëmijës, të siguruar nga autoriteti qendror ose ndonjë autoritet tjetër kompetent i vendbanimit të përhershëmtë fëmijës.

Neni 14

Në përcaktimin nëse largimi apo mbajtja ka qenë e padrejtë brenda kuptimit të nenit 3,

autoritetet gjyqësore ose administrative të shtetit të kërkuar, mund të marrin në considerate drejtpërsëdrejti ligjin dhe vendimet gjyqësore ose administrative, që njihen apo nuk njihen formalisht në shtetin e vendbanimit të përhershëm të fëmijës, pa rekurs ndaj procedurave specifike për provën e këtij ligji ose për njohjen e vendimeve të huaja, që do të zbatoheshin ndryshe.

Neni l5

Autoritetet gjyqësore ose administrative të një Shteti Kontraktues mund të kërkojnë para

nxjerrjes së një urdhri për kthimin e fëmijës, që aplikanti të marrë nga autoritetet e shtetit të vendbanimit të përhershëm të fëmijës një vendim se largimi apo mbajtja ishte e padrejtë Brenda kuptimit të nenit 3 të Konventës, kur një vendim i tillë mund të merret në këtë shtet. Autoritetet qendrore të Shteteve Kontraktuese do t'i ndihmojnë aplikantët të marrin praktikisht një vendim të tillë.

Neni 16

Pas marrjes së njoftimit për një largim apo mbajtje të padrejtë të fëmijës në kuptimin e nenit 3, autoritetet gjyqësore ose administrative të Shtetit Kontraktues, nga i cili fëmija është larguar apo mbajtur, nuk do të vendosin mbi thelbin e të drejtave të kujdestarisë, derisa të vendoset se fëmija nuk do të kthehet sipas kësaj Konvente ose nëse nuk bëhet një aplikim sipas kësaj Konvente, Brenda një kohe të arsyeshme pas marrjes së njoftimit.

Neni l7

Fakti i vetëm që një vendim në lidhje me kujdestarinë është dhënë ose ka të drejtën e njohjes në shtetin e kërkuar, nuk do të përbëjë shkak për refuzimin e kthimit të fëmijës sipas kësaj Konvente, por autoritetet gjyqësore ose administrative të shtetit të kërkuar do të marrin parasysh shkaqet për këtë vendim në zbatimin e kësaj Konvente.

Neni 18

Dispozitat e këtij kapitulli nuk do t'i kufizojnë kompetencat e një autoriteti gjyqësor ose administrativ për të urdhëruar kthimin e fëmijës në çdo kohë.

Neni l9

Një vendim sipas kësaj Konvente në lidhje me kthimin e fëmijës, nuk do të merret si vendim për thelbin e një çështjeje kujdestarie.

Neni 20

Kthimi i fëmijës, sipas dispozitave të nenit 12, mund të refuzohet nëse nuk do lejohej nga

parimet themelore të shtetit të kërkuar në lidhje me mbrojtjen e të drejtave të njeriut dhe lirive themelore.

KAPITULLI IV

TË DREJTAT E KONTAKTIT

Neni 2l

Një aplikim për të marrë masa për organizimin ose sigurimin e ushtrimit efektiv të të

drejtave të kontaktit, mund t'u paraqitet autoriteteve qendrore të Shteteve Kontraktuese, në të njëjtën mënyrë siç bëhet aplikimi për kthimin e fëmijës.

Autoritetet qendrore janë të detyruara nga detyrimet e bashkëpunimit, të cilat përcaktohen në nenin 7, të nxisin gëzimin paqësor të të drejtave të kontaktit dhe plotësimin e kushteve në të cilat mund të jetë objekt ushtrimi i këtyre të drejtave. Autoritetet qendrore do të ndërmarrin hapa për të shmangur, sa më shumë që të jetë e mundur, pengesat ndaj ushtrimit të këtyre të drejtave.

Autoritetet qendrore, qoftë në mënyrë të drejtpërdrejtë, qoftë me anë të ndërmjetësve, mund të iniciojnë ose ndihmojnë në fillimin e procedimit, me qëllim organizimin ose mbrojtjen e këtyre të drejtave dhe sigurimin e respektimit të kushteve ndaj të cilave mund të jetë objekt ushtrimi i këtyre të drejtave.

KAPITULLI V

DISPOZITA TË PËRGJITHSHME

Neni 22

Asnjë siguracion, obligacion apo depozitë, sido që të përshkruhen, nuk do të kërkojë garanci pagese kostosh dhe shpenzimesh në procedimin gjyqësor ose administrativ që janë Brenda kompetencave të kësaj Konvente.

Neni 23

Asnjë legalizim apo formalitet i ngjashëm nuk do të kërkohet në kuptimin e kësaj Konvente.

Neni 24

Aplikimi, komunikimi apo ndonjë dokument tjetër i dërguar autoritetit qendror të shtetit të kërkuar do të jetë në gjuhën origjinale dhe do të shoqërohet nga një përkthim në gjuhën zyrtare ose në një nga gjuhët zyrtare të shtetit të kërkuar ose, kur kjo nuk është e mundur, nga një përkthim në frëngjisht ose anglisht. Megjithatë, një Shtet Kontraktues mundet, duke bërë një rezervë në përputhje me nenin 42, të kundërshtojë përdorimin e frëngjishtes apo të anglishtes, por jo të të dyjave, në ndonjë aplikim, komunikim apo dokument tjetër dërguar autoritetit të saj qendror.

Neni 25

Shtetasit e Shteteve Kontraktuese dhe personat që janë banorë të përhershëm të këtyre

shteteve do t'u jepet e drejta për çështje që lidhen me zbatimin e kësaj Konvente për ndihmë dhe konsulencë ligjore në ndonjë Shtet tjetër Kontraktues në të njëjtat kushte sikur ata të ishin vetë shtetas dhe banorë të përhershëm të atij shteti.

Neni 26

Secili autoritet qendror do t'i përballojë vetë kostot për zbatimin e kësaj Konvente. Autoritetet qendrore dhe shërbimet e tjera publike të Shteteve Kontraktuese nuk do të vënë tarifa në lidhje me aplikimet e dorëzuara sipas kësaj Konvente.

Në veçanti, ato nuk mund të kërkojnë ndonjë pagesë nga aplikanti përkundrejt kostove dhe shpenzimeve të procedimit ose, kur është e zbatueshme, ato që rrjedhin nga pjesëmarrja e konsulentit ligjor.

Megjithatë, ato mund të kërkojnë pagesën e shpenzimeve të rrjedhura ose që rrjedhin nga mundësimi i kthimit të fëmijës. Megjithatë, një Shtet Kontraktues mundet të deklarojë, duke bërë një rezervë në përputhje me nenin 42, se nuk do të jetë i detyruar të marrë përsipër ndonjë kosto që parashikohet në paragrafin e mësipënn, si rezultat i pjesëmarrjes së konsulentit apo konsulentëve ligjorë ose nga procesi gjyqësor, vetëm deri në atë shkallë që këto kosto të mund të mbulohen nga sistemi i tij i asistencës apo konsulencës ligjore.

Pas urdhërimit të kthimit të fëmijës ose daljes së urdhrit në lidhje me të drejtat e kontaktit sipas kësaj Konvente, autoritetet gjyqësore ose administrative munden, kur të jetë nevoja, të urdhërojnë personin që largoi apo mbajti fëmijën ose që pengoi ushtrimin e të drejtave të kontaktit, të paguajë shpenzimet e nevojshme që rrjedhin nga ose në emër të aplikantit, duke përfshirë shpenzimet e udhëtimit, ndonjë kosto rrjedhëse ose pagesa të bëra për vendosjen e fëmijës, kostot e përfaqësimit ligjor të aplikantit dhe ato të kthimit të fëmijës.

Neni 27

Kur provohet që kërkesat e kësaj Konvente nuk përmbushen ose që aplikimi nuk është i

mirëbazuar, një autoritet qendror nuk është i detyruar të pranojë aplikimin. Në këtë rast, autoriteti qendror do ta informojë menjëherë, sipas rastit, aplikantin ose autoritetin qendror me anë të të cilit u dorëzua aplikimi, lidhur me shkaqet e tij.

Neni 28

Një autoritet qendror mund të kërkojë që aplikimi të shoqërohet nga një autorizim me

shkrim duke e autorizuar atë të veprojë në emër të aplikantit ose duke caktuar një përfaqësues për të vepruar.

Neni 29

Kjo Konventë nuk do të pengojë asnjë person, institucion apo organ që pretendon se ka

pasur shkelje të kujdestarisë apo të të drejtave të kontaktit brenda kuptimit të neneve 3 ose 21, të aplikojë në mënyrë të drejtpërdrejtë tek autoritetet gjyqësore ose administrative të një Shteti Kontraktues, sipas apo në kundërshtim me dispozitat e kësaj Konvente.

Neni 30

Aplikimi i dorëzuar autoriteteve qendrore ose drejtpërdrejt autoriteteve gjyqësore ose administrative të një Shteti Kontraktues, në përputhje me kushtet e kësaj Konvente, së bashku me dokumentet dhe ndonjë informacion tjetër të bashkëngjitur ose të siguruar nga një autoritet qendror, do të ketë akses në gjykata ose tek autoritetet administrative të Shteteve Kontraktuese.

Neni 3l

Përsa i përket një shteti, i cili në çështjet e kujdestarisë së fëmijëve ka dy ose më shumë

sisteme të ligjit të zbatueshëm në njësi të ndryshme territoriale:

a) ndonjë referim ndaj banesës së përhershme në këtë shtet do të interpretohet sikur t'i

referohej banesës së përhershme në një njësi territoriale të këtij shteti;

b) ndonjë referim ndaj ligjit të shtetit të banesës së përhershme do të interpretohet sikur t'i referohej ligjit të njësisë territoriale në atë shtet ku fëmija banon.

Neni 32

Përsa i përket një shteti, i cili në çështjet e kujdestarisë së fëmijëve ka dy ose më shumë

sisteme të ligjit të zbatueshëm në kategori të ndryshme personash, ndonjë referim ndaj ligjit të këtij shteti do të interpretohet sikur t'i referohej sistemit ligjor të përcaktuar nga ligji i atij shteti.

Neni 33

Një shtet, brenda të cilit, njësi të ndryshme territoriale kanë legjislacionin e tyre në lidhje

me kujdestarinë e fëmijëve, nuk do të jetë i detyruar të zbatojë këtë Konventë, kur një shtet me sistem të unifikuar ligjor nuk do të ishte i detyruar ta bënte një gjë të tillë.

Neni 34

Kjo Konventë do t'u japë përparësi çështjeve brenda fushës së saj sipas konventës së 5 tetorit 1961, në lidhje me kompetencat e autoriteteve dhe ligjit të zbatueshëm mbi mbrojtjen e minorenëve, si ndërmjet palëve të të dyja konventave. Në rast të kundërt, kjo Konventë nuk do të kufizojë zbatimin e një instrumenti ndërkombëtar në fuqi midis shtetit të origjinës dhe shtetit të adresuar ose ligjit tjetër të shtetit të adresuar për qëllimet e sigurimit të kthimit të fëmijës që është larguar apo mbajtur pa të drejtë ose të organizimit të të drejtave të kontaktit.

Neni 35

Kjo Konventë do të zbatohet midis Shteteve Kontraktuese vetëm në rast largimesh apo

mbajtjeve të padrejta që ndodhin pas hyrjes së saj në fuqi në ato shtete.

Kur një deklarim është bërë sipas neneve 39 ose 40, referimi ndaj një shteti kontraktues në paragrafin e mësipërm do t'i referohet njësisë ose njësive territoriale ndaj të cilave zbatohet kjo Konventë.

Neni 36

Asgjë në këtë Konventë nuk do të pengojë dy ose më shumë Shtete Kontraktuese, me qëllim ngushtimin e kufizimeve ndaj të cilave mund të jetë objekt kthimi i fëmijës, nga marrëveshja ndërmjet tyre për të hequr ndonjë dispozitë të kësaj Konvente, e cila mund të nënkuptojë një kufizim të tillë.

KAPITULLI VI

DISPOZITAT E FUNDIT

Neni 37

Kjo Konventë është e hapur për nënshkrim për shtetet e përfaqësuara në sesionin e katërmbëdhjetë të Konferencës së Hagës mbi të Drejtën Ndërkombëtare Private. Kjo Konventë i nënshtrohet ratifikimit, pranimit ose miratimit dhe instrumentet përkatëse të ratifikimit, pranimit ose miratimit depozitohen pranë Ministrisë së Punëve të Jashtme të Holandës.

Neni 38

Çdo shtet tjetër mund të aderojë në këtë Konventë. Instrumenti i aderimit depozitohet pranë Ministrisë së Punëve të Jashtme të Holandës.

Konventa do të hyjë në fuqi për një shtet që e ka miratuar ditën e parë të muajit të tretë kalendarik pas depozitimit të instrumentit të saj të hyrjes.

Ky aderim do të ketë efekt vetëm në lidhje me marrëdhëniet midis shtetit aderues dhe shteteve palë që do të kenë deklaruar pranimin e tyre në lidhje me këtë hyrje.

Një deklaratë e tillë duhet të bëhet edhe nga çdo shtet anëtar që ratifikon, pranon apo miraton Konventën pas aderimit.

Kjo deklaratë do të depozitohet në Ministrinë e Punëve të Jashtme të Mbretërisë së Holandës. Kjo ministri do t'i dorëzojë secilit prej Shteteve Kontraktuese një kopje të vërtetuar nëpërmjet kanaleve diplomatike.

Konventa do të hyjë në fuqi midis shtetit aderues dhe shtetit që ka deklaruar pranimin e

aderimit të saj ditën e parë të muajit të tretë kalendarik pas depozitimit të deklaratës së pranimit.

Neni 39

Çdo shtet deklaron shtrirjen e efekteve të kësaj Konvente, në të gjithë territorin që ai

përfaqëson në nivel ndërkombëtar, apo në një ose disa prej tyre. Kjo deklaratë bëhet efektive në momentin e hyrjes në fuqi të Konventës në atë shtet.

Çdo deklaratë, si dhe çdo shtrirje tjetër e mëvonshme, i njoftohet Ministrisë së Punëve të

Jashtme të Holandës.

Neni 40

Nëse një shtet ka dy ose më shumë njësi territoriale në të cilat zbatohen sisteme të ndryshme ligjore në lidhje me çështjet e trajtuara në këtë Konventë, ai mund të deklarojë në kohën e nënshkrimit, ratifikimit, miratimit ose aderimit se Konventa do të shtrihet në të gjitha njësitë territoriale ose vetëm në një ose më shumë prej tyre. Ky shtet mund ta modifikojë këtë deklaratë duke dorëzuar një deklaratë tjetër në çdo kohë.

Çdo deklaratë e tillë do t'i njoftohet Ministrisë së Punëve të Jashtme të Holandës, duke

deklaruar shprehimisht njësitë territoriale në të cilat zbatohet kjo Konventë.

Neni 41

Kur Shteti Kontraktues ka një sistem qeverisës, sipas të cilit, pushtetet ekzekutive, gjyqësore dhe legjislative shpërndahen midis autoriteteve qendrore dhe atyre të tjera brenda këtij shteti, nënshkrimi i tij, ratifikimi, pranimi, miratimi, hyrja në këtë Konventë ose bërja e ndonjë deklarate në lidhje me nenin 40, nuk do të sjellë ndërlikime në shpërndarjen e brendshme të pushteteve brenda këtij shteti.

Neni 42

Çdo shtet mundet, në çastin e ratifikimit, pranimit, miratimit ose aderimit në këtë Konventë, ose në kohën e paraqitjes së një deklarate në lidhje me nenet 39 ose 40, të paraqesë një ose të dyja rezervat e parashikuara në nenin 24 dhe nenin 26, paragrafi i tretë. Asnjë rezervë tjetër nuk mund të bëhet.

Çdo shtet palë mundet në çdo kohë ta tërheqë këtë rezervë me një njoftim të drejtuar Ministrisë së Punëve të Jashtme të Holandës.

Rezerva nuk do të ketë më efekt ditën e parë të muajit të tretë kalendarik, pas njoftimit të

referuar në paragrafin paraardhës.

Neni 43

Kjo Konventë do të hyjë në fuqi ditën e parë të muajit të tretë kalendarik, pas datës së

depozitimit të instrumentit të tretë të ratifikimit, të pranimit, të miratimit ose të aderimit, referuar në nenet 37 dhe 38. Më pas ajo do të hyjë në fuqi:

1. Për çdo shtet tjetër palë në proces ratifikimi, pranimi, miratimi ose aderimi ditën e parë të muajit të tretë kalendarik pas datës së depozitimit të instrumentit të ratifikimit, të pranimit, të miratimit ose të aderimit.

2. Për një territor në të cilin Konventa është shtrirë në përputhje me nenet 39 dhe 40, ditën e parë të muajit të tretë kalendarik, pas njoftimit të referuar në të njëjtin nen.

Neni 44

Kjo Konventë ka një kohëzgjatje 5-vjeçare nga dita e hyrjes në fuqi, në përputhje me

paragrafin e parë të nenit 43, përfshi edhe shtetet që e kanë ratifikuar, pranuar, miratuar ose aderuar në të në një datë të mëvonshme.

Nëse nuk ka denoncime, Konventa rinovohet në mënyrë të heshtur çdo pesë vjet.

Çdo denoncim i njoftohet Ministrisë së Punëve të Jashtme të Holandës të paktën 6 muaj

përpara përfundimit të periudhës prej 5 vjetësh. Ai mund të kufizohet për disa ose për të tëra territoret në të cilat zbatohet Konventa. Denoncimi ka efekt vetëm për shtetin që e paraqet. Konventa mbetet në fuqi për shtetet e tjera palë.

Neni 45

Ministria e Punëve të Jashtme të Mbretërisë së Holandës u njofton shteteve palë të Konferencës së Hagës mbi të Drejtën Ndërkombëtare Private, si dhe shteteve që kanë aderuar në përputhje me nenin 38, sa më poshtë:

a) nënshkrimet, ratifikimet, pranimet dhe miratimet e parashikuara në nenin 37;

b) aderimet e parashikuara në nenin 38;

c) datën në të cilën kjo Konventë hyn në fuqi në përputhje me nenin 43;

d) shtrirjet e parashikuara në nenin 39;

e) deklarimet e parashikuara në nenin 38 dhe nenin 40;

f) rezervat e parashikuara në nenin 24 dhe nenin 26, paragrafi i tretë, si dhe tërheqjet e tyre të referuara në nenin 42;

g) denoncimet e referuara në nenin 44.

Në dëshmi të kësaj, personat e autorizuar posaçërisht nënshkruajnë këtë Konventë. Bërë në Hagë, më 25.10.1980, në frëngjisht dhe anglisht, të dyja tekstet njëlloj të vlefshme, në një kopje të vetme, e cila do të depozitohet në arkivat e Qeverisë Holandeze, prej së cilës një kopje e vërtetuar i dërgohet nëpërmjet kanaleve diplomatike çdo shteti të përfaqësuar në Sesionin e Katërmbëdhjetë të Konferencës së Hagës mbi të Drejtën Ndërkombëtare Private.

International Child Abduction in Civil Matters Pursuant to Kosovo Legislation

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Abstract

Migration and settlement of Kosovo citizens, whether on individual basis or family groups in other countries, amongst others, have also caused the problem of international child abduction. This abduction was done by one of the parents or a temporary guardian. Although cases involving international child abuse have practically occurred, children have not been protected lacking legal provisions. For the first time in Kosovo, this matter was regulated by promulgation of UNMIK Regulation no. 2004/29 on Protection against International Child Abduction dated 05 August 2004. Pursuant to Kosovo legislation the child abduction shall mean removal or retention of a child which constitutes breach of rights of custody attributed to a person or any other body, under the law of the State in which the child was habitually resident immediately before the removal or retention. Hereby it is intended to recon in aspects of international child abduction and their prompt return from Kosovo to the Requesting State, the child return procedures and cases from the court practice. The court authorities having jurisdiction set forth by law, shall implement the child return procedures once the legal conditions are met, and for the purpose of such implementation, they may issue different measures. The Basic Court of Pristina shall have exclusive first instance jurisdiction in Kosovo. The Ministry of Justice being the central authority shall carry out the administrative procedure for a voluntary return of the child to the Requesting State.

Keywords: Child abduction, child return, procedure, law, measures.

Introduction

Children are the most important members in every society, in particular to every family and its future. Migration and settlement of Kosovo citizens as individuals or as family groups in foreign European and world countries due to various reasons, new marriages entered and dissolutions as a result of deterioration of marital relations in the countries out of Kosovo, have resulted in international abductions of children by one parent or temporary guardian. In this paper will be discussed aspects of international child abduction as well as their more rapid return from Kosovo to the requesting state. Therefore, cases of international child abduction have a significant impact on international relations of Kosovo with other states and much more rapid return of those children to such countries is of particular importance. Provision of international legal assistance in Kosovo is regulated by the Law on Contested Procedure.

Basic courts are competent to provide international legal assistance and to decide on the recognition of foreign court decisions. In order to protect the rights of children, some protective measures are foreseen for children in all judicial procedures. All state bodies, in particular the courts, are obliged to engage maximally and to ensure the protection of children's rights, even in cases of their international abduction by the temporary custodian, an obligation that results from provisions of the Convention on the Civil Aspects of International Child Abduction. Although cases of international child abduction have practically occurred earlier, the children have not been protected because of the lack of legal regulations. This issue has been regulated in Kosovo for the first time by UNMIK Regulation No. 2004/29 on Protection against
International Child Abduction dated 05 August 2004, whereas in 2010 the Assembly of Kosovo adopted the Law on the Civil Aspects of International Child Abduction. State bodies and courts, during the proceedings on issues dealing with children, are required to protect the best interests of children. Convention and the law, on one hand, are intended to protect children from the harmful actions of unjust removal to another state and, on the other hand, to prevent their unjust removal or retention and their return to the requesting state. Judicial bodies, as competent bodies, apply the procedure for return of the child and for the purpose of carrying out this procedure, they may issue different measures. After the entry into force of the Law on Courts, the Basic Court in Prishtina has the exclusive competence of first instance, and The Ministry of Justice conducts administrative procedure for the voluntary return of the child to the requesting state.

1. International and National Legal Framework

International Legal Framework

Changes made in the social system in Kosovo have also caused the changes in the legal system in order to harmonize it with international standards in the field of human rights and especially the rights of children. In order to implement international standards in the field of protection of children's rights, in the Constitution of Kosovo is foreseen direct implementation of Convention on the Rights of the Child. This convention is included in the Constitution and applies as part of positive law in Kosovo.

The Convention binds all state bodies and private institutions that in their activity the primary interest should be the children's interest. The convention provides that "[…] States shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status[3]. States shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. Furthermore, this convention provides that: "[…]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[2]. States shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Every child has the inherent right to life and to the maximum extent possible, the survival and development of the child shall be ensured. State undertakes to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law. Children have the right to give their opinion or even to be heard. Authorities are obliged to "provide the child capable of forming views of its own, the right to express those views freely in all matters relating to the child, giving views of the child due weight in accordance with the age and maturity of the child. The essential part of this right is that children have the right to be heard and their views should be taken seriously in matters that affect their interests. The Convention provides that children should not be separated from their parents, except in cases stipulated by the law by the authorities on their behalf. The Hague Convention on the Civil Aspects of International Child Abduction regulates the issue of child abduction. The aim of the Convention is to protect children from the harmful effects of international abduction ensuring a prompt and effective return of the child in the country of last residence thereafter. According to Article 3 of this Convention removal or the retention of a child is to be considered wrongful where: it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised, either jointly or alone. The return of the child is aimed at restoring the situation that existed earlier prior to removal and not allow the parent to have any advantage from the child abduction.

1. 2. National Legislation

Cases of international child abduction have significant influence on international relations of Kosovo with other states. Processing and prompt resolution of these cases is influential and is of great importance in relation to included parties and the requesting state. The issue of international child abduction for the first time was regulated in Kosovo by Regulation No. 2004/29 dated 5th August 2004 and the provisions of Article 2 foresee the implementation of the Hague Convention on the Civil Aspects of International Child Abduction, and the competent court to decide on claims for return of the children had been former District Courts of Kosovo on the territory where the child was found. On 28 October 2010, the Assembly of
Kosovo for the first time adopted the Law on the Civil Aspects of International Child Abduction. The provisions of Article 3 of this Law provide that when a case is regarded as international child abduction, the law stipulates that: "The removal or the retention of a child is wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised with an exemption of the removal or retention[4]. The law aims to ensure the prompt return of the abducted child to his country of origin (repatriation of) and to ensure respect for the right of custody or contact with the child who is resident of Kosovo or the Requesting State. In order to be considered as a case of international child abduction, certain criteria must be met as:

The requestor must prove that the child was domiciled in that country (the Requesting State),

The removal or retention of the child was wrongful and in breach of rights of custody provided for in the law of the country of residence and that the requestor actually exercised these rights at the moment or time of removal of the child, Removal of the child must be outside the resident state border,

The child may not be more than 16 years old.

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[3] See Convention on the Rights of the Child, Article 2 ,parag.1 [2] Ibid, Article 3 parag.1

[4] See Convention on the Civil Aspects of International Child Abduction, Article 3, parag.1

2. Procedures of Child Return

The Law on the Civil Aspects of International Child Abduction defines the procedure which should take place to ensure the return of the child to the requesting state, where the child is removed or retained wrongfully to another country. Initiation of the procedure that has to do with the civil aspects of international child abduction aims to ensure fast return of the child to the requesting state and to ensure respect for the right of custody and contact with the child. The procedure begins with a request that the custodian or any institution claims that the child is removed or retained in violation of custody rights. The procedure of child return to the country of origin is urgent and fast. Initially, an administrative procedure is conducted by the Ministry of Justice. The Requesting State through its Ministry of Justice sends the request together with supporting documentation to the Ministry of Justice of our country. If this Ministry fails to return the child, the case is forwarded to the Basic Court in Pristina which conducts the proceedings regarding the return of the child to the Requesting State. Central Authority (Ministry of Justice) and the court, taking into account the primary interest that this child may have from the settlement of the issue by agreement, from the beginning and throughout the entire procedure should engage with the parties to the procedure that the return of the child is voluntary or by agreement, by engaging experts in the social field, psychologists and mediators.

2. 1. Types of procedures for the return of the child

Child return procedure has some specifics that distinguish it from other procedures. Law on Civil Aspects of International Child Abduction provides two types of procedures for the return of the child:

Administrative or voluntary return procedure of the child, and

Judicial Procedure

2. 1. 1. Administrative Procedure

The foreign state submits the request for return of the child to the Ministry of Justice which after receiving the request verifies the legal requirements are met, i. e. that it is accompanied by all documents necessary to assess whether the case has to do with international child abduction. Before proceeding of the case to the court, Ministry of Justice addresses a request to the temporary guardian to return voluntarily the child to the requesting state. The Ministry informs by notification the temporary guardian on the request and proposes the voluntary return of the child to the requesting state within seven days or to reach agreement on the return of the child. If the temporary guardian does not comply within seven days from the receipt of the letter, the Ministry of Justice shall initiate court proceedings and transmit the application to the Basic Court of Pristina.

Kosovo Ministry of Justice has played an important role in particular in the activities of international cooperation on legal issues in cases of international child abduction. Within the Ministry of Justice operates Department for International Legal Cooperation (DILC). All requests for International Legal Assistance originating from foreign countries should be directed primarily to the Ministry of Justice or to the Department for International Legal Cooperation. The Court works closely with the Ministry of Justice, respectively DILC, on all matters dealing with the civil aspects of international child abduction, and complies with the Convention and the Law on the Civil Aspects of International Child Abduction. Procedure of the international legal assistance in civil matters is regulated by the Administrative Instruction issued by the Ministry of Justice. According to the Law on the Civil Aspects of International Child Abduction, the Kosovo Ministry of Justice is the Central
Authority in Kosovo, to implement the request for return of the child[5]. The request for return of the child is submitted to the Ministry of Justice, but can also be submitted to the Basic Court in Pristina. Upon receiving a request from the Ministry of a foreign state, it determines whether it meets the requirements set by law. It cooperates with the central authorities of other countries to provide as soon as possible the return of the child to the Requesting State.

In order to be considered a completed application shall contain:

information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child wrongfully; the date of birth of the child;

- the grounds on which the applicant's claim for return of the child is based; and
- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Besides this information, the request for the return of the child must be attached other required documents such as: an authenticated copy of any relevant decision or agreement, a certificate or an affidavit emanating from a

[5] See Law on the Civil Aspects of International Child Abduction, Article 4, parag.1

Central Authority, or other competent authority of the State of the child's habitual residence or from a qualified person, concerning the relevant law of that State, and any other document relevant for the case.

Ministry of Justice, as the central authority, shall take several measures that are in the interest of the prompt return of the child such as:

- to discover the whereabouts of a child who has been wrongfully removed from requesting state,
- to prevent harm to the child by taking interim measures,
- to ensure the voluntary child return or to bring an amicable resolution on child return,
- in case of failure of voluntary return, to proceed the request to the court,
- to provide consultants and legal assistance,
- to undertake the necessary measures to ensure the safe return of the child,
- to exchange information with central authorities of the requesting states to eliminate barriers to the implementation of this law.

Ministry is not a party to the procedure but it may interfere in the interest of the applicant or child through written documents which the Court should take into account when deciding on the request.

2. 1. 2. Judicial Procedure

According to provisions of Article 8 of the Law on the Civil Aspects of International Child Abduction, former District Court of Pristina had had exclusive jurisdiction in the first instance to hear and determine requests for return of the child. After the entry into force of the Law on Courts, the exclusive competence of first instance has the Basic Court in Pristina[6]. The Court, when considering an application for return of the child, issuing orders and decisions, proceeds in accordance with the provisions of the Law on Non-Contentious Procedure. In accordance with the provisions of this law, a child is considered a person under the age of sixteen (16)[7]. After the court receives the request for return of the child, all other proceedings that have to do with determining of child custody in any other court in the territory of Kosovo shall be suspended to the conclusion of the procedure for return of the child.

Before the initiation of the court proceedings, Ministry of Justice addresses a request to the temporary guardian to voluntarily return the child. As soon as the request is received, the Court verifies that it meets formal requirements set out in Articles 4 and 6 of the law. This verification of formal requirements must be done in a short time as soon as possible in order to ensure prompt return of the child. If application is not complete, the court shall ask the applicant to complete it. The court is bound to decide on an application within a period of 42 days from the date of request received. This timeframe is important since if the requirements are met, the child is promptly returned to the requesting state. Procedure to return the child has precedence over other procedures. In cases where the child has reached the age of maturity, the Court hears the child. According to provisions of Article 6 of the European Convention "On relations with children", children have the right to be informed, consulted and to express their opinions. Regarding the assessment that a child has reached the age of maturity, the law has not defined any age limit. Upon completion of the proceedings, the court may: order the return of the child to the requesting state or reject the request for return of the child in cases where the requirements provided for in Article 12 of the Law have been met. The Court, in the proceedings of the return of the child, proves only the fact that the wrongful removal or retention of the child is: a violation of the provisions of the Convention and the Law relating to custody of the other parent and if it determines that a violation exists, the child should be returned to the Requesting State.

Basic Court in Pristina, in cases of international child abduction has authority:

- to order the return of the child to the requesting State if the child is wrongfully removed or retained in Kosovo,
- to issue a statement that the removal or retention of a child outside the territory of the Republic of Kosovo has been wrongful,
- to issue an order or decision, as appropriate, in order to decide on wrongful removal of the child or to enforce the return order,

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[6] See Law on Courts of Kosovo, Article 22

[7] See Law on the Civil Aspects of International Child Abduction, Article 2, item 1.1

- to issue orders to temporary guardian in order to ensure much faster return of the child.

In cases when the Court orders the return of the child, all other orders that have to do with the rights of guardian over the child and which have been issued by any other court in Kosovo have no effect.

Parties have the right to appeal to the Court of Appeals in Pristina against the decision issued in the first instance court.

2. 1. 3. Execution Procedure

Basic Court of Pristina has jurisdiction for implementing the order to return the child to the requesting state. Execution procedure aims through enforcement to realize the request of the party which won the right by court decision. Execution procedure is the last stage of judicial proceedings. Without execution procedure, the parties are deprived of the right acquired by the decision of the competent judicial body. If the temporary guardian fails to comply with the court order to return the child, in such case in terms of the provisions of Article 10. 2 of the law, the temporary guardian may be punished by a fine of up to 10,000 euros.

In this procedure also applies the principle of disposition of the parties, since the initiation of the execution procedure depends on the will of the party. In cases where the child's temporary guardian does not return the child voluntarily after the decision of the court, the court undertakes all actions by the enforcement proceedings of that court decision. In such cases, the court closely cooperates and coordinates with the Centre for Social Work where the child is and the Kosovo Police, namely the Department for International Cooperation of the Ministry of Justice.

3. Interim measures

The Court, as per request made by the Ministry of Justice, or ex officio, before the award decision may order interim measures in order to ensure the welfare of the child and to prevent the changes of the whereabouts and to prevent the circumvention of the return of the child[8]. As interim measures may be issued: the measure to prohibit border crossing namely to parents and any third person to prohibit them to change the place of residence of the child, in particular that the child be sent outside the state border without prior permission of the court. Border authorities are required to prevent any removal of the child from the territory of Kosovo, delivery of identity card or passport to the authorities (police or court), measure of contact with the child by the requesting parent. Throughout the proceedings, the court must consider whether there is a need for safeguards to prevent the concealment or removal of the child from the country.

4. Cases from Judicial Practice

Several cases have been taken and analysed in the process of this paper from former District Court of Pristina and now the Basic Court in Pristina. In these cases are presented some personal specifics of the requesting party and temporary guardian (the person who has abducted the child) such as: cases of initiated request by the husband or wife, the return of the child made in judicial or voluntary proceedings, how many of them returned to the requesting state, and age and gender of children.

Table: Initiated request for the return of children from husband or wife, return made in judicial or voluntary proceedings, how many judicial decisions are executed and the children's age and gender.

Requests filed		*State*						*Child gender*		*Age*		*Court Decision*		
Fathe	*Mothe*	*German*	*Austri*	*UK*	*Albani*	*Belgiu*	*Monte*	*Mal*	*Fema*	*M*	*M*	*Approv*	*Reject*	*Dismiss*
1	*7*	*2 r*	*2 r*	*1 r*	*1 r*	*1 r*	*1 r*	*7*	*5*	*4*	*18*	*6 r*	*1 r*	*1 r*

*r – request(s)

The study of eight court cases that have been analysed and studied features in these cases treated show that seven of them are initiated by the wife or mother while only one case by the father. This means that the abduction of children is made mostly by their fathers. All cases of the return of the children are made in judicial proceedings and no case by voluntary procedure. Only one request was submitted by the citizens of Kosovo for the return of the child, while the other cases were requests from foreign states. From the requests for return of children filed, only one case has not yet been executed by the court decision, that is, the children have not been returned to the requesting state even though there is a final decision of the court. Age of children involved in these cases had a minimum of four years while the maximum was 18 years old. Regarding gender, five of them were female while seven male. Regarding states, two requests were from Germany, two from Austria, one from Albania, one from Belgium, one from England and one from Montenegro. Of the eight cases reviewed, six requests were approved

[8] Ibid, Article 15

and ordered the return of the children to the requesting state, a request was dismissed because the children were aged over 16, and in one case, the request for the return of child, was rejected.

5. Conclusions

The issue of child abduction has a significant impact on relations with foreign states and rapid return of the children to the country of origin or where they had residence has a special significance. In this paper are presented findings about international child abduction which are regulated by the Hague Convention on the Civil Aspects of International Child Abduction and the Law on the Civil Aspects of International Child Abduction. There are also given explanations regarding the procedure for the return of children, such as administrative and judicial procedures. As the competent authorities for conducting the procedure of fast return of the child to the requesting state under the law are the Ministry of Justice, as the Central Authority, in the administrative procedure and the Basic Court of Pristina in the judicial proceedings. In the final part are treated interim measures which may be issued with the aim to provide the return of the child as well as cases from judicial practice from which there is no case of voluntary or mediated return of the children. From the requests submitted, it is verified that the majority of them are made by mothers meaning that fathers have been the persons who have abducted the children and only one court decision remained unexecuted.

Sources

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Case C. nr. 1903/13, date 19. 09. 2013 Basic Court in Pristina

In re the Application of Felix BLONDIN, Petitioner,

v.

Marthe DUBOIS, Respondent.

78 F.Supp.2d 283, S.D. N.Y. (2000)

Father, a French national, filed petition under Hague Convention on the Civil Aspects of International Child Abduction and International Child Abduction Remedies Act seeking return of his children, who had been brought to United States by their mother. After remand, 189 F.3d 240, the District Court, Chin, J., held that return of children to France would present grave risk of exposure to physical or psychological harm at hands of their father or otherwise place children in an intolerable situation.
Petition denied.

OPINION

CHIN, District Judge.

Petitioner Felix Blondin and respondent Merlyne Marthe Dubois are the parents of Marie-Eline, age 8, and Francois, age 4. In the course of their seven-year relationship, Blondin repeatedly beat and threatened to kill Dubois, often in the presence of their children. Blondin also frequently hit Marie-Eline, and threatened to kill her as well. As a result, in August 1997, Dubois removed the children from their home in France and brought them to the United States, without their father's knowledge or consent. Blondin, a French national, petitioned this Court for the return of his two children to France pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1980) (the "Convention"), and its implementing legislation in the United States, the International Child Abduction Remedies Act, 42 U.S.C. § 11601*et seq.*

By memorandum decision dated August 17, 1998, I denied Blondin's petition, finding by clear and convincing evidence that there was a "grave risk" that the return of the children to France would expose them to "physical or psychological harm or otherwise place [them] in an intolerable situation." *Blondin v. Dubois,* 19 F.Supp.2d 123, 127-29 (S.D.N.Y.1998) (*"Blondin I"*) (quoting Convention, Art. 13b).

Blondin appealed. While the Second Circuit did not disturb my finding that "returning Marie-Eline and Francois to Blondin's custody ... would expose them to a 'grave risk of harm,' " it concluded that the Convention required "a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they ... were wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody." *Blondin v. Dubois,* 189 F.3d 240, 242 (2d Cir.1999) (*"Blondin II"*). In light of this "clarified standard," the Court of Appeals vacated the judgment and remanded the case for further proceedings. The Court of Appeals directed me on remand to consider whether other options were available that would protect the children from the "grave risk" of harm while still honoring "the Convention's mandate to deliver abducted children to the jurisdiction of the courts of their home countr[y]." *Id.*

Upon remand, I met with the parties and contacted the appropriate French and American authorities to develop a thorough record to aid my analysis of the arrangements by which the children possibly could be returned to France. After receiving responses from the French Central Authority and other French officials, as well as the United States Department of State, I conducted a hearing on December 20, 1999. I heard testimony from a ***285** French lawyer with expertise in French family law and international law, an expert in child psychiatry and child psychology, and Dubois. In addition, I interviewed Marie-Eline and Francois.

After due consideration of all the evidence and the arguments of the parties, I again find by clear and convincing evidence that there is a "grave risk" that the return of the children to France would expose them to "physical or psychological harm or otherwise place [them] in an intolerable situation." Convention, Art. 13b. Recognizing that the "grave risk" exception to the Convention is to be construed narrowly, I find that the extraordinary circumstances of this case require that I apply the Article 13b exception. I find that *any* repatriation arrangements, including even the return of the children in their mother's temporary custody with financial support by Blondin and French social services, would expose Marie-Eline and Francois to a "grave risk" of psychological harm. Accordingly, the petition is denied.

STATEMENT OF THE CASE

A. *The Facts*

Blondin and Dubois, both French citizens, met in 1990 and soon began living together in France. A daughter, Marie-Eline, was born in 1991. Throughout the course of their relationship, Blondin repeatedly abused Dubois, beating her with his hands and a belt, sometimes when she was holding Marie-Eline. In addition, he often threatened to kill Dubois. Blondin also beat Marie-Eline frequently and threatened her life as well; in 1992, Blondin twisted a piece of electrical cord around Marie-Eline's neck and threatened to kill her. *Blondin I,* 19 F.Supp.2d at 124.

To escape the abuse, Dubois twice left Blondin and moved into different battered women's shelters with Marie-Eline and Crispin, her son from a previous relationship. In 1992, Dubois and the children stayed in a shelter for approximately two weeks, returning home when Blondin came to get them. *Blondin I,* 19 F.Supp.2d at 124. In 1993, Dubois and the children left Blondin again, going to another shelter for battered women; Dubois and Marie-Eline eventually moved to a different shelter, where they stayed for approximately eight or nine months. *Id.* at 125.

At some point in 1993, Blondin commenced a proceeding in the French courts to obtain custody of Marie-Eline. In December 1993, the proceedings were resolved when Blondin and Dubois reconciled. The English translation of an October 7, 1997 order of a French court summarized the results of the 1993 proceedings as follows: "parental authority [over Marie-Eline] was granted to both parents jointly, the principal residence of the child being with the father, and the mother having visitation and sheltering rights." *Blondin I,* 19 F.Supp.2d at 125.

After the reconciliation, Dubois and Blondin resumed living together, and a son, Francois, was born in 1995.

Despite the reconciliation, Blondin continued to beat Dubois in front of the children. He often threatened to "kill everyone," and once threatened to throw Francois out of the window. In August 1997, Dubois left Blondin again, taking the children to the United States. She removed Marie-Eline and Francois from France without Blondin's knowledge or consent; indeed, she forged his signature to obtain passports for the children. *Blondin I,* 19 F.Supp.2d at 125. Dubois, Marie-Eline, and Francois moved in with Dubois' brother, Aureliou Ruyor, his wife, and their two children in the Bronx.

Within days of discovering that Dubois and the children had left, and apparently unaware that they had fled to the United States, Blondin obtained a preliminary order from a French court, directing that the children not leave the metropolitan area without his permission. Blondin eventually discovered that Dubois, Marie-Eline, and Francois were living in the United States, and on June 18, 1998, he filed a petition in this Court seeking the children's return to France under the Convention.

After careful consideration of all of the evidence and the parties' arguments, I found by clear and convincing evidence that there was a "grave risk" that returning the children to France would expose them to physical or psychological harm or otherwise place them in an intolerable situation. *Blondin I,* 19 F.Supp.2d at 124. I found that Blondin had repeatedly physically abused both Dubois and Marie-Eline and had threatened to kill them on numerous occasions, and thus the children would face a "grave risk" of physical and psychological harm at the hands of Blondin if they were repatriated.[FN1] *Id.* at 124-25. As a result, I held that Dubois had established a defense to Blondin's claim of wrongful removal, and I refused to return the children to France, pursuant to Article 13b of the Convention.

2. *The Second Circuit's Opinion*

Blondin appealed the denial of the petition to the Court of Appeals for the Second Circuit. In a decision dated August 17, 1999, the Second Circuit concluded that I should have performed "a more complete analysis of the full panoply of arrangements that might allow the children to be returned to [France]" to allow the French courts an opportunity to adjudicate custody,***287** before invoking the Article 13b "grave risk" exception.

3. *Proceedings on Remand*

I proceeded with dispatch after the Second Circuit's decision, discussing the case with the parties informally even before the mandate issued and holding another conference upon receiving the expedited mandate. (9/10/99 Tr. at 1). In addition, in accordance with the Second Circuit's advice to "make any appropriate or necessary inquiries of the government of France," I wrote to the French Ministry of Justice, which acts as the French Central Authority with regard to the Convention, as well as the United States Department of State,

seeking its assistance. (*See* 9/14/99 Court Letter to Agnes Bodard-Hermant, *et al.; see also* 10/21/99 Court Letter to Agnes Bodard-Hermant, *et al.*).

On December 20, 1999, I conducted an evidentiary hearing at which counsel for the parties and for the United States were present. The United States presented Veronique Chauveau, a French attorney and expert on French and international family law, as a witness. In addition, I heard testimony from Dr. Albert Solnit, Sterling Professor Emeritus of Pediatrics and Psychiatry and Senior Research Scientist at the Yale University Child Study Center, who had examined Marie-Eline and Francois at the respondent's request. Dubois testified about her family's relocation to New Jersey and her relatives in France. Finally, I spoke with Marie-Eline and Francois, on the record but in my chambers, outside the presence of their mother and the attorneys. At the conclusion of the hearing, I reserved decision.

In evaluating Marie-Eline's truthfulness, Dr. Solnit explained that Marie-Eline's view could be given "great weight" because her statements emerged spontaneously, in the course of a clinical play situation, rather than during direct questioning. (12/20/99 Tr. at 67). For example, Dr. Solnit testified that MarieEline spontaneously told him that her father "had put something around her neck and said he would kill her." (12/20/99 Tr. at 61). In Dr. Solnit's view, the spontaneity of such a statement indicates a "valid impression[ ] that can be given a great deal of weight" rather than a child's attempt to please an adult by giving the "correct" answer to a direct question.

Finally, I spoke with Marie-Eline in my chambers, outside the presence of her family***293** and the lawyers. Marie-Eline has continued to adjust well to the United States. She enjoys living in New Jersey with her cousins and aunt and uncle. She is in the third grade at the public school in her town, and reads books every day. (12/20/99 Tr. at 105-6, 112). She remembers "not nice things" about living in France, and explained that she did not want to live with her father "because he is not nice.... [H]e used to spit to my mommy." (*Id.* at 107, 113). She said that she saw her father hit her mother, once with the buckle of a belt. (*Id.* at 114). When asked if her father ever hit her, she answered, "Not really." (*Id.*).

Marie-Eline stated that she "never want[s] to go back to [her] daddy," to live with him or even just to visit him. (*Id.* at 109, 112-115). Even if she did not have to live with her father, she would still only like to visit Paris for one day; she would not want to stay in Paris for a long period of time, because she would miss her cousins and aunt and uncle. (*Id.* at 115).

DISCUSSION

A. ***The Convention***

The Convention was adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Convention, Preamble. The Convention is intended to address the situation where parents involved in custody disputes wrongfully take

their children across international borders in search of a more sympathetic court. The Convention seeks to do so by restoring the pre-abduction status quo.

Under the Convention, the court where the petition is brought has jurisdiction to decide the merits of the abduction claim, but not the merits of the underlying custody dispute. Convention, Art. 16, Art. 19. The "abducted to" court must first determine whether the child has been "wrongfully removed or retained"; the petitioner bears the burden of proof on this issue. If the petitioner establishes that the removal or retention of the child was wrongful, the child must be returned to the country of his or her habitual residence unless the respondent can establish that one of four narrow exceptions to the Convention applies. *See* Convention, Art. 12, 13, 20.

Dubois concedes that the requirements of the Convention have been met, but she relies on the exception contained in Article 13b, which provides that a court need not return a child to the country where the child normally resides if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention, Art. 13b. A respondent must establish an Art. 13b defense by clear and convincing evidence. *Id.*

B. *Application*

I again find, by clear and convincing evidence, that return of Marie-Eline and Francois to France, under any arrangement, would present a "grave risk" that they would be exposed to "physical or psychological harm" or that they would otherwise be placed in an "intolerable situation." I reach that conclusion for three reasons: first, removal of the children from their presently secure environment would interfere with their recovery from the trauma they suffered in France; second, returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm; and third, Marie-Eline objects to being returned to France. I will discuss each of these reasons in detail, and I will also address certain arguments
raised by Blondin, the United States, and France.

1. *Removal of the Children from their Present Environment*

I accept and give great weight to Dr. Solnit's expert opinion that removing the children from the secure environment in which they now live to return them to the scene of their original trauma would expose them to a "grave risk" of harm, in view of the history of the serious abuse they suffered at the hands of their father.

2. *Return of the Children to the Uncertainties of the Custody Proceedings*

I also agree with Dr. Solnit's conclusion that the insecurity of the transition to France and the uncertainties surrounding the custody proceedings there would exacerbate the trauma

suffered by Marie-Eline and Francois should they be returned. If I return the children to France, they will be uprooted from their stable, predictable family setting and thrown into a maelstrom of uncertainty and insecurity. The children would have only temporary living arrangements in a hotel upon their arrival in France; after three weeks, they would have to move out of the hotel, and it is unclear exactly where they will live after that. To some extent, they would essentially***296** become wards of the state, dependent on public assistance. It is also unclear how long the custody proceedings would last; Chauveau testified that they could take anywhere from one to three months. As Dr. Solnit explained, to children who do not "march along to an adult sense of time," three months could seem eternal.

3. *Marie-Eline's Views*

Although her views are by no means dispositive, Marie-Eline objects to being returned to France, and pursuant to Article 13 of the Convention, I am taking her views into account. *See* Convention, Art. 13 ("The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views."). Marie-Eline continues to impress me as a bright, poised, intelligent child who has an understanding of the purpose of these proceedings and who spoke thoughtfully and expressively about her views on being returned to France. Although she is only eight years old, the plain language of Article 13 requires me to consider her maturity as well as her age, and I find that MarieEline is a remarkably mature eight-year-old, probably in no small part due to the very adult proceedings and issues that she has been confronted with over the past two years.

****

I am concerned by what I perceive to be the attempted intimidation of Dubois and this Court by the French authorities. In a November 3, 1999 letter, the French Ministry of Justice notes that it is carefully watching "the way in which this application is handled and how it is ultimately resolved." (11/3/99 B. Biondi Letter to J. Penta). The French Central Authority then warns that it "might be forced to take action at the level of international mutual assistance in criminal matters" to restore the rights of MarieEline and Francois "if no acceptable solution can be found on the basis of the Hague Convention." (*Id.*). France appears to be threatening a criminal prosecution against Dubois to obtain an advantage in this civil dispute. In other words, the French Ministry of Justice is threatening to extradite Dubois from the United States to prosecute her for the abduction of the children if I do not grant Blondin's petition and return the children to France. I am troubled by these veiled threats. The courts, the parents, and the governments of both France and the United States should be motivated by the best interests of the children. Indeed, the drafters of the Convention undoubtedly sought to do what was in the best interests of children.

My decision to deny Blondin's petition does not reflect any lack of trust in the French judicial and administrative systems. Chauveau wondered if I view the French as "undercivilized monkeys or responsible partners to an international convention." (11/4/99 Chauveau Letter

to J. Penta). I assure her and the French Central Authority that I view them as the latter. I have every confidence in the ability of the French administrative and judicial systems to protect and support Marie-Eline and Francois pending the adjudication of the custody case. The United States, too, is a "responsible partner to an international convention."

The Convention sets up a framework for analyzing international child abduction cases, and we must work within that framework; I am endeavoring to do precisely that. The Convention provides that if I find that there is grave risk, I need not send the children back. If I decide, as I do, that the children should not be sent back under an exception to the Convention, it is not a matter of American chauvinism, or a lack of trust in the French court system, but a matter of working within the framework of the Convention.

CONCLUSION

For the foregoing reasons, the petition is dismissed, without costs or fees. The Clerk of the Court is directed to enter judgment accordingly. All memoranda and other materials considered by the court in ruling on this petition are hereby incorporated into and made a part of the record in this action.

SO ORDERED.

Case Brief

In re the Application of Felix Blondin v. Dubois

U.S. Federal District Court Southern District of New York (2000)

Facts: Petitioner Felix Blondin and respondent Merlyne Marthe Dubois are the parents of Marie-Eline, age 8, and Francois, age 4. In the course of their seven-year relationship, Blondin repeatedly beat and threatened to kill Dubois, often in the presence of their children. Blondin also frequently hit Marie-Eline, and threatened to kill her as well. As a result, in August 1997, Dubois removed the children from their home in France and brought them to the United States, without their father's knowledge or consent. Blondin, a French national, petitioned this Court for the return of his two children to France pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, (the "Convention"), and its implementing legislation in the United States, the International Child Abduction Remedies Act.

Prior court actions: District Court denied Petitioner's request to return the children to France finding that this would "expose them to grave risk of harm" including physical and psychological harm and placing them in an intolerable situation.

Petitioner appealed to the Second Circuit Court of Appeals which returned the case to the District Court, but did not disturb the finding of "grave risk of harm." Instead the appeals court said that the Convention required a more complete analysis of other arrangements that might allow the children to return to the country from which they were "wrongfully abducted" and to allow the French court to decide the custody issue as preferred by the Convention.

Decision: After additional hearings and other fact-finding the District Court reaffirmed its earlier decision and denied Blondin's petition to have the children returned to France for the custody determination.

Issues:

- Disruptive effect of removing children from present secure environment in the United States with Dubois' family for French custody proceeding.
- Desire of daughter Marie-Elaine not to return to France, veracity of her claims of abuse by father Blondin.
- Efforts of French government to threaten criminal proceedings against Dubois for abduction of children in secretly removing them from France.

Rasti

Felix Blondin v. Dubois
Gjykata Federale e Qarkut të SHBA-së
Distrikti Jugor të Nju Jorkut (2000)

Faktet: Paditësi Felix Blondin dhe e paditura Merlyne Marthe Dubois janë prindërit e Marie-Eline (8 vjeç) dhe Francois (4 vjeç). Gjatë lidhjes së tyre shtatëvjeçare, Blondini vazhdimisht rrahu dhe kërcënoi me vrasje Dubois, shpesh në prani të fëmijëve të tyre. Blondin gjithashtu rrahu shpesh Marie-Eline dhe kërcënoi të vriste atë gjithashtu. Si rezultat, në gusht të vitit 1997, Dubois i largoi fëmijët nga shtëpia e tyre që gjindej në Francë dhe i dërgoi ata në Shtetet e Bashkuara, pa dijeninë apo pëlqimin e babait të tyre. Blondin, një shtetas francez, parashtroi kërkesë para kësaj gjykate për kthimin e dy fëmijëve të tij në Francë, sipas Konventës së Hagës mbi Aspektet Civile të Rrëmbimit Ndërkombëtar të Fëmijëve ("Konventa") dhe legjislacionin e tij zbatues në Shtetet e Bashkuara, përkatësisht Aktin e Mjeteve Juridike për Rrëmbimin e Fëmijëve.

Veprimet paraprake të gjykatës: Gjykata e Qarkut mohoi kërkesën e paditësit për kthimin e fëmijëve në Francë duke gjetur se kjo do t'i "ekspozonte ata ndaj një rreziku të lartë të lëndimit" duke përfshirë lëndimin fizik dhe psikologjik dhe vendosjen e tyre në një situatë të patolerueshme.

Paditësi e ankimoi vendimin në Gjykatën e Apelit të Qarkut Gjyqësor të Dytë, i cili e ktheu çështjen në Gjykatën e Qarkut, por nuk e ndryshoi aspektin që kishte të bënte me “rrezikun e lartë të lëndimit”. Në vend të kësaj Gjykata e Apelit tha se Konventa kërkonte një analizë më të plotë të aranzhimeve të tjera që do të mund t’ia lejonte fëmijëve të kthehen në vendin nga i cili ata ishin "rrëmbyer ilegalisht/gabimisht" dhe ta lejonte gjykatën franceze të vendoste mbi çështjen e kujdestarisë siç preferohet me Konventa.

Vendimi: Pas disa seanca gjyqësore dhe shqyrtimit të provave, Gjykata e Qarkut vërtetoi vendimin e saj të mëparshëm dhe mohoi kërkesën e Blondin për t'i kthyer fëmijët në Francë për përcaktimin e kujdestarisë.

Çështjet e ngritura:

• Efekti dëmtues i largimit të fëmijëve nga mjedisi aktual i sigurtë në Shtetet e Bashkuara me familjen Dubois, për procedimin e kujdestarisë franceze
• Dëshira e vajzës Marie-Elaine që të mos kthehet në Francë, vërtetësia e pretendimeve të saj për abuzim nga babai Blondin
• Përpjekjet e qeverisë franceze që të kërcënojnë Dubois me inicimin e procedurave penale për rrëmbimin e fëmijëve në fshehtësi duke i larguar ata nga Franca.

Emiliano ERMINI, Petitioner-Appellant
v.
Viviana VITTORI, Respondent-Appellee

758 F.3d 153 (2014)

CALABRESI, Circuit Judge:

This case presents us with novel, and significant, issues under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"). While the Convention is designed, in part, to ensure the prompt return of children wrongfully removed or retained from their country of habitual residence by one parent, it also protects children who, though so removed or retained, face a real and grave risk of harm upon return. Here, we are confronted with forms of psychological and physical harm arising from separating a child from autism therapy. The question of whether the risk of such harms is sufficiently grave to trigger the Convention's exceptions has not been previously considered by our Court. We today hold that such risk can be sufficiently grave, and, on the facts found by the district court, that in this case it is. For this reason, and another, we affirm the district court's denial of the appellant's petition.

Emiliano Ermini and Viviana Vittori are Italian citizens. They began living together in Italy in 2001, and were married in 2011. The couple had two children: Emanuele, who is 10, and Daniele, who is 9. Daniele is autistic. In the midst of a custody dispute, Ermini petitioned the district court pursuant to the Hague Convention, a multilateral treaty to which the United States and Italy are signatories, seeking the return to Italy of his two sons, who were then, and today remain, in the United States.

The district court found several facts that are relevant to the matter before us. First, the court found that the family had moved to the United States in August of 2011 in connection with its longstanding efforts to find appropriate treatment for Daniele. Daniele had been diagnosed with autism in March of 2008, and the couple sought unsuccessfully to find adequate Applied Behavioral Analysis ("ABA") therapy for Daniele in Italy. Indeed, while there, Vittori herself provided the bulk of Daniele's therapy.

Dissatisfied with Daniele's development, the family sought other avenues of relief. Id. In Spring of 2010, in Italy, they met Dr. Giuseppina Feingold, an Italian-speaking doctor with a practice in Suffern, New York. In August of 2010, they traveled to New York so that Dr. Feingold could more fully assess and begin treating Daniele. Id. The parents were impressed with the treatment options presented by Dr. Feingold, and began to plan a move to Suffern, at first for a period of two-three years, but with the potential of a permanent relocation in mind, depending on the success of Daniele's treatment.

Things moved speedily thereafter. The family returned to New York in August of 2011, and promptly signed a one-year lease on a house. The children were enrolled in public schools, and Daniele's therapy began soon after. The parents put their home in Italy on the market, prepared to open a business in the United States, and made arrangements to send their belongings here.

In the meantime, Ermini, who had remained employed in Italy, traveled back and forth between the United States and Italy. Id. During a December of 2011 return to America, an apparently already contentious relationship between Ermini and Vittori came to a head when a "violent altercation" occurred, with Ermini physically abusing Vittori in the kitchen of their Suffern, New York home. Id. at *5. In its findings of fact, the district court found credible testimony that during this altercation Ermini had, among other acts, hit Vittori's head against a kitchen cabinet, and attempted to "suffocate" and "strangle" her.

The district court determined this incident was part of a history of physical violence by Ermini. Id. The court found that Ermini "expresses anger verbally and physically," had hit Vittori at least ten times during the course of their relationship, and was "in the habit of striking the children."

With this background in mind, the district court made several further findings of fact about the children and their experiences. Emanuele, who had testified before the court in camera, was found to have displayed "candor" and "maturity," as well as a strong command of the English language. Id. at *8. He was happy in America, and preferred living here, both because of the "fear" he had of his father and because he preferred the schooling he was receiving here.

Moreover, the district court found that Daniele had "significantly progressed" with his therapy in the United States. Id. He was engaged in a Comprehensive Application of Behavioral Analysis to Schooling ("CABAS") program in Stony Point, New York, which, according to Vittori's expert, Dr. Carole Fiorile, offered the best ABA curriculum then available to autistic children. Id. at *9. The program involved one-on-one instruction with an educational team, including a special educational teacher, an occupational therapist, a speech and language therapist, several classroom assistants, and a full-time one-on-one teaching assistant.

The district court noted that Dr. Fiorile had stated that Daniele required such a program to continue to make meaningful progress in, among other things, cognition, language, and social and emotional skills.. Dr. Fiorile had also testified that while the United States has over 4,000 board certified ABA practitioners, there were, to her knowledge, fewer than twenty in Italy.

As a threshold matter, the district court therefore held that Ermini had proved by a preponderance of the evidence: (1) that the children were habitual residents of Italy, and were being retained in the United States by Vittori; (2) that the retention was in breach of Ermini's custody rights under the law of Italy; and (3) that Ermini was exercising those rights at the time of the children's retention in the United States.

The district court explained that the burden then shifted back to Vittori to assert affirmative defenses against the return of the children to the country of habitual residence. On one of these defenses, the court ruled in Vittori's favor. Vittori had argued that return to Italy posed a "grave risk" of harm to Daniele, pursuant to Hague Convention, Article 13(b), which precludes repatriation of a child where there "is a grave risk that his or her return would

expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Ermini appeals the district court's decision, arguing that the court's conclusion that Daniele faced a "grave risk" of harm under Article 13(b) if separated from his therapy and returned to his habitual residence in Italy was erroneous. Vittori contends, to the contrary, that the district court's decision to deny the petition should be affirmed on this ground and others. She also cross-appeals, claiming, among other things, that the district court wrongly determined: (a) that the children's habitual residence was Italy; (b) that she had breached Ermini's custody rights; and (c) that the domestic abuse suffered by her and the children did not constitute a grave risk of harm under the Convention.

The district court found that the children's habitual residence was Italy, since the parents' last shared intention was to move the family to the United States only for a period of two-three years, and potentially to stay permanently if Daniele's therapy was successful.

On the assumption that Vittori wrongfully removed and retained the children, the analysis under the Convention would, nonetheless, not be finished. As we noted earlier, the Hague Convention establishes defenses to return, and we hold the "grave risk" of harm defense to be determinative in this case.

The district court found that the risk of harm Daniele faced if removed from his therapy and returned to Italy was grave enough to meet the Hague Convention's standards. We agree. We, however, also hold, contrary to the district court, that Ermini's history of domestic violence towards Vittori and the children was itself sufficient to establish the Hague Convention's "grave risk" of harm defense.

We believe that these findings by the district court manifestly establish that Ermini engaged in a "sustained pattern of physical abuse," directed at Vittori and the children: Vittori was repeatedly struck; as were the children, whom Ermini was "in the habit" of hitting; and Emanuele testified to being fearful of his father on the basis of this physical and verbal abuse. These findings evince a "propensity" for violence and physical abuse and a resulting fear in the children.. We therefore hold that the facts found by the district court were sufficient to meet the Hague Convention's requirement, by clear and convincing evidence, that the children faced a "grave risk" of harm because of Ermini's physical abuse.

The district court found that another "grave risk" of harm existed. The court held that Daniele faced a grave risk of harm if removed from his current therapy and returned to Italy. Ermini, 2013 WL 1703590, at *16-17. In light of its factual findings,[11] we hold that the district court's conclusion of law was correct.

The district court credited the testimony and report of Dr. Fiorile that, if Daniele were to be removed from his educational program and not provided promptly with an analogous program, he would face a severe loss of the skills that he had successfully developed since beginning his program — including his ability to develop cognitive, linguistic, social, and emotional skills. Id. at *16, *8-9. The court further credited Dr. Fiorile's conclusion that any "hope for [Daniele] to lead an independent and productive life" depended on his

participation in a program such as the CABAS program that he attended on a daily basis, and that this particular program was not available in Italy. Dr. Fiorile also stated that if Daniele were to be removed from this program, he would "cease to be able to learn to write or to talk and w[ould] most likely never learn to read."

This is the first occasion for this Court to consider this kind of psychological harm pursuant to Article 13(b). We note, however, that Article 13(b) explicitly lists "psychological" harm and "physical" harm as appropriate harms for triggering the Convention's affirmative defenses, both of which are implicated by a developmental disorder such as autism. And we hold that the facts as found by the district court lend themselves straightforwardly to the conclusion that the risk of harm was grave.

Considering the unrebutted testimony before the district court concerning the risk of harm Daniele faced if he were returned to Italy, we have no reason to disturb its factual findings. On the basis of those findings, we agree with the district court that the very real harms that Daniele likely would have faced if removed from his therapy and repatriated satisfy the "grave risk" of harm defense.

Moreover, in light of the children's close relationship to each other, and, significantly, the conclusion we reached with respect to abuse, we determine as well that it was not error for the district court to decline to separate the children.

Case Brief

Emiliano Ermini, Petitioner-Appellant v. Viviana Vittori, Respondent-Appellee

United States Court of Appeals, Second Circuit (2014)

Facts: Emiliano Ermini and Viviana Vittori are Italian citizens. They began living together in Italy in 2001, and were married in 2011. The couple had two children: Emanuele, who is 10, and Daniele, who is 9. Daniele is autistic. In the midst of a custody dispute, Ermini petitioned the district court pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention), a multilateral treaty to which the United States and Italy are signatories, seeking the return to Italy of his two sons, who were then, and today remain, in the United States, for purposes of establishing custody of the two children.

Prior court actions: Ermini filed his petition in August of 2012, and the district court conducted a bench trial in January of 2013. The district court produced an opinion, which contained its findings of fact and conclusions of law, determining that Ermini had satisfied the threshold requirements of the convention for return to Italy but that Vittori had established that returned posed a "grave rjisk" to the children. On that basis the court denied the petition without prejudice (permitting Ermini to refile the petition if certain circumstances changes). Petitioner Ermini appealed the denial of the petition to the Second Circuit Court of Appeals.

Decision: The Second Circuit affirmed the decision of the district court to deny the petition, but amended its judgment to deny the petition with prejudice.

Issues:

- Effect of Italian court order directing Vittoria to return with children to Italy and establishing shared parenting and visitation rights. Effect of Rome Court of Appeals decision vacating lower court order.
- Effect of U.S. court decision granting restraining order against Ermini and award of temporary custody to Vittori.
- Impact of treatment of son Daniele for autism in U.S.
- Meaning of court of appeals' questions regarding "habitual residence" and breach of petitioner's "custody rights."

Rasti

Emiliano Ermini v. Viviana Vittori

Gjykata e Apelit e Shteteve të Bashkuara, Qarku i Dytë (2014)

Faktet: Paditësi Emiliano Ermini dhe paditësja Viviana Vittori janë shtetas italianë. Ata filluan të jetojnë së bashku në Itali në vitin 2001 dhe u martuan në vitin 2011. Çifti kishte dy fëmijë: Emanuele (10 vjeç) dhe Daniele (9 vjeç). Daniele është autiste. Gjatë një mosmarrëveshjeje lidhur me kujdestarinë, Ermini parashtroi kërkesë në Gjykatën e Qarkut në bazë të Konventës së Hagës mbi Aspektet Civile të Rrëmbimit Ndërkombëtar të Fëmijëve (Konventa) - një traktat shumëpalësh në të cilin Shtetet e Bashkuara dhe Italia janë nënshkruese- për kthimin në Itali të dy bijëve të tij, të cilët ishin dhe ende qëndrojnë në Shtetet e Bashkuara, me qëllim të vendosjes së kujdestarisë për të dy fëmijët.

Veprimet e mëparshme gjyqësore: Ermini parashtroi kërkesën e tij në gusht të vitit 2012 dhe Gjykata e Qarkut shqyrtoi rastin në janar të vitit 2013. Gjykata e qarkut nxori një opinion, i cili përmbante përmbledhje të fakteve dhe të aspekteve të ligjit relevant, duke përcaktuar që Ermini kishte plotësuar kriteret që parashihen me Konventë për kthimin në Itali, por Vittori kishte dëshmuar që kthimi në Itali paraqet një "rrezik të lartë" për fëmijët. Mbi këtë bazë gjykata refuzoi kërkesën pa paragjykuar vendimin final (duke lejuar që Ermini të ketë mundësi për të bërë kërkesë të re nëse ndryshojnë rrethanat). Ermini ankimoi refuzimin e padisë në Gjykatën e Apelit të Rrethit të Dytë.

Vendimi: Gjykata e Apelit konfirmoi vendimin e gjykatës së rrethit për të refuzuar padinë, por ndryshoi vendimin e saj për refuzimin e kërkesës pa paragjykuar vendimin final.

Çështjet e ngrituara:

• Efekti i urdhrit të gjykatës italiane që urdhëron Vittoria për t'u kthyer me fëmijët në Itali dhe për të vendosur të drejta të përbashkëta prindërore dhe vizita. Efekti i vendimit të Gjykatës së Apelit të Romës për lirimin e urdhrit të gjykatës më të ulët.

• Efekti i vendimit të gjykatës së SHBA-së për dhënien e urdhrit kufizues kundër Erminit dhe dhënien e kujdestarisë së përkohshme Vittorit.

• Ndikimi i trajtimit të djalit Daniele për autizëm në SHBA.

• Kuptimi i pyetjeve të gjykatës së apelit lidhur me "vendbanimin e zakonshëm" dhe shkelja e "të drejtave të kujdestarisë" të paditësit.

Class Problems: Second Session
Kosovo Faculty

Problem 1 (Same as the demonstration problem yesterday, pages 3-4 above)

Problem 2

Iain and Norene Walker were married in Chicago in 1993. They lived in Seattle, Washington, until 1998 when they moved to Perth, in Western Australia. The couple's eldest child was born in the United States in 1997, but lived in this country only one year; the two younger children were born in Australia in 1999 and 2001. Although Norene stated that she and Iain initially intended to stay in Australia for only five years, they ended up spending 12 years there. Over this period, they and their children appeared to be well-settled: they owned a home, furniture, and a dog named Chubba; the children attended school, had friends, and participated in activities; and Iain worked as a software test engineer while Norene cared for the children. In June 2010 the Walkers traveled to the United States.

When they left Australia, both Iain and Norene expected that Norene and the children would remain in the United States for six months to one year, although both recalled that Norene and the children had concrete plans to return to Australia by June 2011 at the latest. Norene labeled this most likely a temporary visit to Australia but Iain understood it to be a permanent return. After spending several weeks with Norene and the children in the United States, Iain returned to Australia in late July 2010.

In August of 2011 Norene informed Iain that she and the children planned to stay in the United States permanently. He is seeking custody of the children and their return to Australia and wants the matter decided by Australian courts. How should a court establish the "habitual residence" of the family to determine where the custody question should be adjudicated?

If Norene were to present evidence that Iain was an alcoholic and abusive father, how would that affect the analysis?

Rasti 2

Iain dhe Norene u martuan në Çikago më 1993. Ata jetuan në Seattle, Uashington, deri në 1998, kur ata u zhvendosën në Perth, në Australinë Perëndimore.

Fëmija më i madh i çiftit ka lindur në Shtetet e Bashkuara në vitin 1997, por ka jetuar në SH.B.A vetëm një vit; dy fëmijët më të vegjël kanë lindur në Australi në vitin 1999 dhe 2001. Edhe pse Norene deklaroi se ajo dhe Iain fillimisht synonin të qëndronin në Australi vetëm për pesë vjet, ata përfunduan duke kaluar 12 vjet atje. Gjatë kësaj periudhe, ata dhe fëmijët e tyre dukeshin të vendosur mire atje: ata kishin në pronësi një shtëpi, mobilje dhe një qen me emrin Chubba; fëmijët ndiqnin shkollën, kishin miq dhe morën pjesë në aktivitete; dhe Iain kishte punuar si inxhinier për testimine softverëve, ndërsa Norene kujdesej për fëmijët. Në qershor 2010 Familja Walkers udhëtuan në Shtetet e Bashkuara.

Kur ata u larguan nga Australia, të dy Iain dhe Norene menduan që Norene dhe fëmijët të qëndrojnë në Shtetet e Bashkuara për gjashtë muaj deri në një vit, edhe pse të dy planifikuan se Norene dhe fëmijët kishin plane konkrete për t'u kthyer në Australi deri në qershor 2011 më së voni. Norene e quante këtë me gjasë një vizitë të përkohshme në Australi por Iain e kuptoi se ishte një kthim i përhershëm. Pasi kaloi disa javë me Norenën dhe fëmijët në Shtetet e Bashkuara, Iain u kthye në Australi në fund të korrikut të vitit 2010.

Në gusht të vitit 2011, Norene informoi Iain se ajo dhe fëmijët po planifikonin të qëndronin në Shtetet e Bashkuara përgjithmon. Ai po kërkon kujdestarinë e fëmijëve dhe kthimin e tyre në Australi dhe po kërkon që çështja të vendoset nga gjykatat australiane. Si duhet një gjykatë të vendosë "vendbanimin e zakonshëm" të familjes për të përcaktuar nëse çështja e kujdestarisë duhet të gjykohet?

Nëse Norene do të paraqiste dëshmi se Iain ishte një baba alkoolik dhe abuziv, si do të ndikonte kjo në analizën e rastit?