



Behind the Curtains of International Child Abduction
Proceedings

Hearing the Voice of the Child



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Chapter I. Introduction

“Family means no one gets left behind or forgotten.”

David Ogden Stiers

1. Raison d’être

Have you ever heard about parents abducting their own child to another country? A parent takes away his child from the other parent or he refuses to return the child. What about the child’s best interests? What does the child actually want? What is his/her perspective on the abduction? Is it important to hear the voice of the child? Should the judge give weight to his/her testimony?

As you can see, this problem raises a lot of questions, but one thing is for sure: following a case of international child abduction, the child deserves legal certainty, as his/her future is at stake.

This paper aims to answer these questions by overcoming the clash of interests which occurs in international child abduction proceedings. In a nutshell, the hypothesis discussed in the following lines concerns the procedure of returning the abducted child and the debate on parental responsibility regarding an abducted child, all from the perspective of the child’s best interests materialized in the hearing of the child.

In light of our analysis, several recommendations to better deal with cross-border parental child abduction and to improve the effectiveness of judicial remedies to child abductions.

2. The Legal Background of International Child Abduction

Legal responses to international family breakdown exist at European and international level. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction¹ (hereinafter the Hague Convention), ratified by all EU Member States, is applied together with the Council Regulation No. 2201/2003² (hereinafter the Regulation) if a case is

¹Signed on 25 October 1980 at the Hague Conference on Private International Law, entered into force on 1 December 1983.

² Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, entered into force on 1 March 2005. Published in OJ 2003, L 338, p. 1.

related to the wrongful removal or retention of a child within the European Union territory (except for Denmark to which the Regulation is not applied). The Regulation does not replace the Hague Convention, but supplements its scope³ and establishes the preference of the Regulation over the Hague Convention in cases where the Regulation has special provisions.

A Hague Convention⁴ case represents a provisional remedy, in order to determine if the child was wrongfully removed or kept away from his or her habitual residence. It provides a remedy consisting in the physical return of the child and seeks to restore the child's status quo that existed before the abduction.

On the other hand, the Regulation is intended to provide answers to legal difficulties experienced in the functioning of the Hague Convention, implementing a framework which complements its provisions. Among other aspects, in parental child abduction matters, the Regulation gives more emphasis on hearing the views of children, provided that this is appropriate for their age and maturity.

3. Methodology of the paper

From the vast area of international child abduction, we chose to focus on the procedure of returning the abducted child, pursuant the provisions of the Hague Convention and those of the Regulation, emphasizing that hearing the voice of the child is of paramount importance.

Within the bounds of the paper, we will outline the relation between the Hague Convention and the Regulation, in child abduction matters, establishing that a non-return order pursuant to article 13 of the Hague Convention does not prevent the left-behind parent to litigate the issue of residence/custody in his own country, in conformity with article 11(8) of the Regulation. Moreover, any subsequent judgment of this nature is recognized and automatically enforceable in the Member State of execution, Article 42 of the Regulation stipulates.

In order to give an overall picture of the legal tools available to the national judge when dealing with such cases, we will analyse the relevant articles of the instruments above-mentioned, as well as the European Court of Justice (hereinafter ECJ) and the European Court of Human Rights (hereinafter ECHR) case-law in this regard.

³ Recital 17 of the Regulation.

⁴ See also Explanatory Report on the 1980 Hague Child Abduction Convention.

Chapter II. The Big Decision

“Children aren't coloring books. You don't get to fill them with your favorite colors.”

Khaled Hosseini

In this chapter, we will briefly analyze the provisions of the Hague Convention and of the Regulation regarding the decision upon the return of the child and the competent Court in abduction cases, as well as the vulnerabilities of these provisions, as they have been revealed by the jurisprudence.

1. Competence, meaning of terms and exceptions

1.1. The competent Court to decide upon the return of the child – Article 8 and 10 Hague Convention

Once an application for the return of the child is lodged before a Court in the requested Member State, this Court applies the Hague Convention as complemented by Article 11(1) to (5) of the Regulation.

The Hague Convention does not determine the merits of an underlying custody claim, but rather provides a right of action for a party to seek the return of a child or children to a requesting State. Thus, Article 10 states that “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”. Also, under the provisions of Article 8, the application for assistance in securing the return of the child can be introduced at the Central Authority of any Contracting State of the Convention.

1.2. When is a removal or retention “wrongful”?

The judge shall first determine whether a “wrongful removal or retention” has occurred. The definition in Article 3 of the Hague Convention is akin to that in Article 2(11) of the Regulation and covers a removal or retention of a child in breach of the custody rights under the law of the Member State where the child was habitually resident immediately before the abduction. The Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child’s place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person is considered child abduction, according to the Regulation.

1.3. Where is the “habitual residence”?

The Hague Convention does not define the term “habitual residence”, thus it is not intended to be a technical term. However, according to the ECJ’s judgment in *case A*⁵, the concept of “habitual residence” must correspond to the place which reflects some degree of integration of the child in a social and family environment, to show that his presence there is not in any way temporary or intermittent. For that purpose, the next criteria should usually be taken into consideration: the duration, regularity, conditions and reasons for the stay on the territory of a Member State; the child’s nationality; the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.

It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case. Because the determination of “habitual residence” is primarily a fact-based determination and not one which is restricted by legal technicalities, the court must look at those facts, in order to ensure that this concept would always convey the actual center of life of the child concerned⁶. That is why, in *case Mercredi*⁷, the ECJ stressed that one should examine the integration of the child’s primary carer, in addition to the criteria listed in *case A*, looking, for example, at the mother’s reasons to move to her home Member State, the languages known to her or her geographic family origins⁸.

1.4. Exceptions to the return of the child

There are situations in which it is not in the best interests of the child involved to return to the State where he or she was taken from, so the Convention provides a series of exceptions. Thus, Article 12 states that the return can be refused if the child is settled in his or her new environment, provided that a period of more than one year has elapsed from the date of the removal. This term is also found in the provisions of Article 10(b) of the Regulation, regarding the exceptions from the general rule of competence in custodial matters.

The first paragraph of Article 13 of the Hague Convention provides three grounds for refusal: the non-exercise of rights of custody, which means that the person or institution having the care of the child was not actually exercising the custody rights at the time of the removal; the

⁵ ECJ, Case C-523/07, A, Judgment of 2 April 2009, ECLI:EU:C:2009:225, par. 44.

⁶ Koen Lenaerts, *The best interest of the child always come first: The Brussels II bis Regulation and the ECJ*, www.mruni.eu (accessed 9 April 2015), p. 6.

⁷ ECJ, Case C-497/10 PPU, Mercredi, Judgment of 22 December 2010, ECLI:EU:C:2010:829.

⁸ *Idem*, par. 51.

consent of the parent to the removal of the child and the acquiescence of the parent in the child's removal.

The second paragraph of Article 13 contains two more exceptions. These provisions concentrate more on the well-being of the child involved: the situation where the return would expose him or her to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, and the hypothesis when the mature child objects to being returned.

Article 20 of Hague Convention states that the return of the child would “not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”.

2. Discretion of the Court to decide upon the return – is the habitual residence the best place to be?

The exceptions in Articles 12, 13 and 20 of the Hague Convention do not apply automatically. They do not impose a duty to refuse the return of the child, but give the judge discretion to decide. The exceptions should be narrowly interpreted due to the Hague Convention's strong presumption favouring the return of the wrongfully removed child.

2.1. Domestic violence

In some instances, the abductor may be the victim of abuse and may intent to protect the child by fleeing domestic violence. The child may be closer to the abductor than the left-behind parent⁹. The automatic return mechanism was effective in the stereotypical situation where the father abducted the child to his country of origin, but today it is much harder to apply this principle in what has become the new typical situation where the mother abducts the child.¹⁰

That is why the judge should ascertain the child's view of whether there was domestic violence or abuse in the home prior to the abduction. He should inquire as to the child's life before and after the abduction to determine how the act of abduction has changed the child's perceptions of and emotional dependency upon each parent.

In relation to this, Article 11 paragraph 4 of the Regulation states that “a court cannot refuse to return a child on the basis of Article 13(b) of the Hague Convention if it is established

⁹ Linda D. Elrod, *Hearing the voice of the child in Hague abduction cases*, <http://washburnlaw.edu> (accessed 9 April 2015), p. 12.

¹⁰ Farah Coppola, *The legal context of international child abduction: the best interests of the child in international law?*, www.hh.surfsharekit.nl (accessed 9 April 2015), p. 24.

that adequate arrangements have been made to secure the protection of the child after his or her return". This means that Article 13 (b) of the Hague Convention established an exception to the automatic return procedure, but Article 11(4) of the Regulation restricts this exception.

The court must examine this on the basis of the facts of the case. It is not sufficient that proceedings exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question¹¹. For example, in the *case of M.A. v. Austria*¹², the Leoben District Court dismissed the applicant's request for enforcement of the Italian Court's order for the child's return, on the grounds that he had failed to submit proof that appropriate accommodation would be made available for the child and her mother upon their return.

2.2. The lapse of time – consequences of judicial delay

In countries where courts delay proceedings and are particularly slow to hear Hague Convention cases, judges may use their discretion to retain children in a foreign jurisdiction. Judges, applying the principle of child's best interests, may find that children have become attached to their new environment and should, as a result, remain there for the duration of the custodial hearings¹³. In *case of M.A. v. Austria*, the ECHR noted that the passage of time can have irremediable consequences for relations between the child and the non-resident parent, and that there has been a lack of expedition in the Austrian courts's handling of the case, violating the rights set out in Article 8 of the European Convention on Human Rights¹⁴ (hereinafter the European Convention)¹⁵. Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any failure to act for more than six weeks may give rise to a request for a statement of reasons for the delay.

2.3. The objection of the child regarding the return

In these cases, the court is required to carefully weigh competing considerations before

¹¹ European Commission, *Practice Guide for the application of the Brussels II a Regulation*, www.ec.europa.eu (accessed 9 April 2015), p. 55.

¹² ECHR, Case of M.A. v. Austria, Application no. 4097/13, Judgment of 15 January 2015, par. 93.

¹³ Marisa Leto, *Whose Best Interest? International Child Abduction Under the Hague Convention*, www.chicagounbound.uchicago.edu (accessed 9 April 2015), p. 6.

¹⁴ ECHR, Judgment, Case of M.A. v. Austria, par. 130.

¹⁵ The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted by Council of Europe in 1950, entered into force on 3 September 1953.

determining whether or not the child shall be returned. An area of contention in Article 13 cases is the extent to which a court is required to hear directly from the child before making a determination as to whether or not an Article 13 defense has been made out and whether the court should exercise its discretion to order a return. In the context of the European Convention, the objection must be to returning to the country of habitual residence, and not an expression of a preference to the custodial parent.¹⁶

Regarding the importance the judge gives to the child's objection, in the recent English case *Re J*¹⁷, the High Court ordered the return of the children to Poland, despite the strong objections of the older brother who was 15, and who stated that he would "fight" and not get on a plane and that he could seek his own legal representation and be considered competent to give instructions if he was ordered to return.¹⁸

Also, from the child's answers, a judge may be able to gauge whether there is evidence of psychological control of the abducting parent over the child. For example, in a recent French case¹⁹, the Court of Appeal ordered the children to return to their father in Mexico. The Court emphasized that the children had been in the care of their mother for many months, without regular contact with their father, and that it was clear that the mother had influenced the views that the children had expressed.²⁰

Chapter III. Automatic Recognition and Mutual Trust in the Return of the Abducted Child

"Trust takes years to build, seconds to destroy and forever to repair."

Unknown

1. The context

In the context of mutual trust and automatic recognition of a decision on the basis of the Regulation, a fundamental condition is hearing the voice of the abducted child. Although this

¹⁶ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *A Veto not a Vote- Ascertaining the "Voice" of the Child in the International Context – The 'Objection Exception' under Article 13 of the Hague Convention*, www.lawrights.asn.au (accessed 10 April 2015), p. 4.

¹⁷ United Kingdom – England and Wales Court of Appeal, Case of *Re J*, Judgment of 2 December 2011, published in [2012] 1 F.L.R. 457.

¹⁸ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *op. cit.*, p. 13.

¹⁹ France Courtof Cassation, Case Civ 1ère, Judgement of 12 April 2012.

²⁰ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *op. cit.*, p. 22.

condition is important in all proceedings concerning a child, in international abduction cases it becomes paramount.

Mutual recognition is not a new principle in the field of civil justice cooperation. It has formed the basis of public international law conventions in the field and has been further developed by European Union law instruments. While the Hague Convention has nothing to do with unification of substantive or procedural law, its only aim being to restore the factual *status quo ante* after a child has been abducted, the Regulation has introduced maximum automaticity as regards decisions concerning rights to access to children and decisions ordering the return of a child following wrongful removal.

The key nature of enforcement is embodied in Article 81 of Treaty on the functioning of the European Union²¹ (hereinafter TFEU) which outlines that the judicial cooperation in civil matters having cross-border implications is based on the principle of mutual recognition²². In light of that definition of the principle of mutual trust, the ECJ inferred that the Member States, when implementing EU law, are required to presume that fundamental rights have been observed by the other Member States. That presumption imposes two negative obligations on the Member States: not to demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law and, “save in exceptional cases”, to prevent Member States from checking whether other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

In the field of decisions ordering the return of a wrongfully removed child, the grounds for non-recognition should be kept to the minimum required²³. In a departure from the Hague Convention, where the presumption in favour of the return of the child is not absolute, the Regulation reinforces such a presumption when a judgment ordering the return of the child has been issued in the Member State of habitual residence of the child prior to the wrongful removal or retention.

Furthermore, any subsequent judgment of the court with jurisdiction in the Member State where the child was habitually resident immediately before the wrongful removal which requires the return of the child, notwithstanding a judgment of non-return pursuant to Article 13 of the

²¹ Signed in 1958 by EU Member States. Published in OJ 2012, C 326, p. 47.

²² It reiterates that instruments to be adopted under this heading include those aimed at ensuring the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases.

²³ Preamble, Recital 21 of the Regulation.

Hague Convention, must be enforceable automatically in order to secure the return of the child.

Here, the Regulation introduces maximum speed: according to Article 42(1), the return of a child entailed by an enforceable judgement given in this Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin, in accordance with Article 42(2)²⁴. This latter article stipulates that the judge of origin shall issue the certificate only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; (b) the parties were given an opportunity to be heard; and (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention. Therefore, the special exequatur proceeding for the recognition and enforcement of a judgment entailing the return of a child which is issued pursuant to Article 11(8) thereof has been eliminated.

2. Different approaches of the Luxembourg Court and the Strasbourg Court in relation to mutual trust in child abduction

In three leading cases, ECJ had the opportunity to establish the basic principles of the application of the provisions of the Regulation regarding child abduction.

First of all, in the *case Rinau*²⁵, ECJ affirmed the procedural autonomy of the enforceability of a judgment requiring the return of a child following a judgment of non-return, so as not to delay the return of a child who has been wrongfully removed to, or retained in, a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention. ECJ further confirmed the objective of the Regulation, which is the immediate return of the child to the Member State of origin, that is linked with the examination of the substance of non-return decisions by courts in the Member State of origin and not of enforcement.

Secondly, in the *case Povse*²⁶, a case that also formed the object of two rulings of the ECHR, that we will analyse afterwards, the relevant facts of the case involved the wrongful removal from Italy of Sofia, a four-year old born to an Italian father, Mr Alpago, and an Austrian

²⁴ Article 42(2) contains provisions inter alia on the opportunity of the child and the parties involved to be heard.

²⁵ ECJ, Case C-195/08 PPU, *Rinau*, Judgment of 11 July 2008, ECLI:EU:C:2008:406, par. 63.

²⁶ ECJ, Case C-211/10 PPU, *Povse*, Decision of 1 July 2010, ECLI:EU:C:2010:400.

mother, Ms Povse. The wrongful removal took place in February 2008, when Ms Povse and her daughter left Italy, the Member State where the child was habitually resident immediately before the wrongful removal, to stay permanently in Austria. In order to put an end to that wrongful removal, the Italian courts ordered the return of the child. However, the Austrian courts called into question the jurisdiction of their Italian counterparts. Related to this, the ECJ held that Italian courts had retained jurisdiction under the Regulation and could thus order the return of the child. Under the Regulation, it is for the courts of the Member State in which the child had its habitual residence prior to the wrongful removal to decide whether the return of the child is in her best interest. Consequently, the Austrian courts had no choice but to enforce the Italian decision.²⁷

The extent of automaticity in mutual recognition and the limits of mutual trust were however really tested in the *case Aguirre v Pelz*, concerning the non-return of a child from Germany to Spain. The German Court asked, in essence, whether the certificate provided for by Article 42 of the Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement in circumstances where its issue amounted to a serious violation of fundamental rights or whether it could oppose the enforcement of a judgment ordering the return of a child where – contrary to Article 42(2)(a) of the Regulation – the child had not been given the opportunity to be heard. After recalling its previous judgements in *Rinau* and *Povse*, the ECJ held that the court of the Member State of enforcement lacks the power to review a certified judgment adopted in accordance with Article 42(2), but that does not mean that the fundamental rights of the child concerned, notably his or her right to be heard, are deprived of judicial protection.

On the other side, the ECHR has been asked to analyse the balance between mutual trust and fundamental rights. The rulings in *Povse v. Austria*²⁸ and *M.A. v. Austria*²⁹ illustrate this point.

In the *case of Povse v. Austria*, Ms Povse brought an action against Austria before the ECHR arguing that, as a result of deciding to enforce the Italian decision, based on the Regulation's provisions, Austria had violated her fundamental rights and those of her daughter.

²⁷ Koen Lenaerts, *The principle of mutual recognition in the area of freedom, security and justice*, www.intranet.law.ox.ac.uk (accessed 8 April 2015), p. 7.

²⁸ ECHR, *Case of Povse v. Austria*, Application no. 3890/11, Decision of 18 June 2013.

²⁹ ECHR, *Case of M.A. v. Austria*, Application no. 4097/13, Judgment of 15 January 2015.

However, the ECHR held that Austria had done no more than to fulfil the strict obligations stemming from its membership of the European Union. To conclude, Austria had violated neither the fundamental rights of the child nor those of her mother.

Pursuing the same logic, in the *case of M.A. v. Austria*, which concerned the fundamental rights of the father of Sofia, Mr Alpago, the ECHR held that by failing to act expeditiously and to take sufficient steps to ensure the enforcement of his daughter's return to Italy, Austria had violated his rights under Article 8 of the European Convention.

Although the rulings in *Povse v. Austria* and *M.A. v. Austria* contain different solutions relating to the respect of Article 8 of the European Convention, they both represent two welcome developments that contribute to defining the principle of mutual trust. In this regard, the ECHR reiterates that the Regulation cannot be interpreted in a way that favours the parent responsible for the wrongful removal or retention.

3. Is mutual trust synonym with blind trust?

Undoubtedly, mutual recognition comes at a high price, as it presupposes admitting the equal status of other States, as well as the outspoken trust in the correctness and legitimacy of their internal decision-making processes. The central element of the mechanism of mutual recognition is that an individual national standard, judgment or order – and not a negotiated general standard – must be recognized by other Member States.

In recognizing these standards in specific cases, national authorities implicitly accept as legitimate the national legal system which has produced them in the first place. In that sense, mutual recognition represents a “journey into the unknown”, where national authorities are in principle obliged to recognize standards emanating from the national system of any Member State on the basis of mutual trust, with a minimum of formality. This procedure raises a number of concerns in areas like the sensitive field of civil law, where most often the best interest of the child is at stake.

Consequently, mutual trust must not be confused with blind trust. The principle of mutual recognition must be applied in compliance with the principle of proportionality, must respect the margin of discretion left by the EU legislator to national authorities and must take into account national and European public-policy considerations.

In the context of automatic recognition of decisions and mutual trust within the European

Union, we must keep in mind that the principle of child's best interests always comes first.

Chapter IV. Following Child's Best Interests

“Children must be taught how to think, not what to think.”

Margaret Mead

1. “A Primary Consideration”

The principle of “best interests of the child” is an important rule of law emphasized in European family law. This notion can be found in several European and international legal instruments.

To begin with, Article 24 paragraph 2 of the Charter of Fundamental Rights of European Union³⁰ (hereinafter the Charter), entitled *The rights of the child*, provides that “In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration”. This provision plays an important role in handling child abduction cases, because it creates a framework for all the other relevant rules of law. In this regard, Recital 33 of the Regulation states that this European regulation “seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter.”

The Hague Convention sets in the Preamble that “The States signatory to the present Convention are firmly convinced that the interests of children are of paramount importance in matters relating to their custody...”. This Convention gives mostly procedural guidance and is not designed to rule on custody issues³¹. Related to the principle of “the child's best interests”³², the Hague Convention contains several phrases which highlight the role of this notion in this kind of proceedings, such as “the prompt return of children” [Article 7(1)], “act expeditiously” (Article 11), “child objects to being returned” [Article 13(2)] and so on.

Both the Hague Convention as a whole and several of its provisions are expressions of a heart-felt concern for the child's best interests. It is based on an objective or international

³⁰ Proclaimed on 6 December 2000 by the European Parliament, the Council of Ministers and the European Commission. Published in OJ 2012, C 326, p. 391.

³¹ Gökhan Sertöz, *Parental child abduction in European Union in the light of the European Court of Justice's Judgments*, Law & Justice Review, Volume IV, Issue 1, June 2013, www.taa.gov.tr (accessed 10 April 2015) p. 325.

³² See also Explanatory Report on the 1980 Hague Child Abduction Convention, par. 20.

standard as adopted by all Contracting States: it is definitely not in the child's interest to be removed from its habitual environment.³³

Regarding the most important European act in this field, the Regulation contains several provisions which offer a big picture of this important principle. Expressions like "return without delay" (Recital 17), "hearing the child plays an important role" (Recital 19), "respect for the fundamental rights of the child" (Recital 33) and so on, are meant to lead the judicial authorities to caution and care in their actions relating to abducted children.

The objective of the Regulation, in particular that which is apparent from Recital 12 in the preamble, is to establish the grounds of jurisdiction in the light of the best interests of the child, in particular on the criterion of proximity.³⁴

The relation between the Regulation and the Hague Convention is set out in the Article 60 of the former, entitled *Relations with certain multilateral conventions*, which provides that "In relations between Member States, this Regulation shall take precedence over [...] (e) the Hague Convention". Also, pursuant to Recital 17 of the same act, "... the Hague Convention would continue to apply as complemented by the provisions of this Regulation, in particular Article 11".

Last, but not least, the European Convention states in Article 8(1), *Right to respect for private and family life*, that "Everyone has the right to respect for his private and family life, his home and his correspondence". This provision is relevant for the scope of the above-mentioned legal instruments, because of Article 52 (3) of the Charter, *Scope and interpretation of rights and principles*, which sets out that "In so far as this Charter contains rights which correspond to rights guaranteed by the European Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

Taking into consideration that Article 7, *Respect for private and family life*, of the Charter states that "Everyone has the right to respect for his or her private and family life, home and communications", it is clear that the said Article 7 must be given the same meaning and the same scope as Article 8(1) of the European Convention, as interpreted by the case-law of the ECHR.³⁵

³³ Th.M. de Boer, *The Hague Convention on Child Abduction: how about the best interests of the child?*, www.dare.uva.nl (accessed 10 April 2015), p. 5.

³⁴ ECJ, Judgment, Case A, p. 35.

³⁵ ECJ, Case C-400/10 PPU, J McB, Judgment of 5 October 2010, ECLI:EU:C:2010:582, p. 53.

So, the interests of the child are paramount in abduction cases³⁶. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. For that reason, those best interests must be assessed in each individual case³⁷.

2. The Big Hearing

In civil proceedings regarding the return of a child on the basis of the Hague Convention or matters of parental responsibility over the abducted child on the basis of the Regulation, the hearing of the child plays a paramount role, because of the significance of the facts reported by the child. In this regard, Recital 19 of the Regulation states that "The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable".

Also, the Charter provides in Article 24 paragraph 1 that "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." So, a child's voice should be heard when judges are making decisions about with whom a child should live, including whether the child should be returned to the country from which he or she was abducted.³⁸

Therefore, national courts must provide the child the opportunity to be heard. Judges have the task to make special efforts to hear the child using the methods provided by national procedures, but the courts do not have a duty to hear the child.

Related to this, Article 11 paragraph 2 of the Regulation sets out that "When applying Articles 12 and 13 of the Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity".

The court which has to rule on the return of a child has to assess whether such a hearing is appropriate. Sometimes, a hearing may prove to be inappropriate, and even harmful to the

³⁶ ECHR, Case of Monory v. Romania and Hungary, Judgment of 5 April 2005, par. 83.

³⁷ Rosaling English, *Abduction and the child's "best interests" – analysis*, www.ukhumanrightsblog.com (accessed 10 April 2015), p. 3.

³⁸ Linda D. Elrod, *op. cit.*, p. 1.

psychological health of the child, who is often exposed to tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but it must be assessed having in regard that which is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter³⁹. In some cases, the expert instructed by the court concluded, following the hearing, that the child's opinion should be taken into account in light of both her age and maturity.⁴⁰

On the other hand, if the children's opinions must be taken into account, their opposition is not necessarily an obstacle to their return⁴¹. It is true that, under Article 24(3) of the Charter, an exception may be made to the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child.⁴²

In this regard, Article 13 of the Hague Convention provides that the judicial authority may 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.

A judge is not required to accede automatically to the child's wishes even if he finds the child has attained a degree of maturity. In this way, the Hague Convention recognizes that the objecting child should have a voice, but not a veto in the process of deciding whether he or she will be returned. A child's objection is important but not presumptive or determinative⁴³.

3. Vulnerabilities of Hearing the Child

In the emotionally charged circumstances of child abduction cases, it is very important that children's rights are acknowledged and observed.⁴⁴

Sometimes, the child is used as a weapon in a relentless battle for revenge between two people whose affectionate relationship has irretrievably broken down. Even though both parties will vow that they are only motivated by the best interests of the child, righteous anger, wounded

³⁹ ECJ, Case C-491/10 PPU, Aguirre Zarraga, Judgment of 22 December 2010, ECLI:EU:C:2010:828, par. 64.

⁴⁰ *Idem*, par. 28. Similarly, ECHR, Case of Blaga v. Romania, Application no. 54443/2010, Judgment of 1 July 2014, par. 15.

⁴¹ ECHR, Judgment, Case of Blaga v. Romania, par. 66.

⁴² ECJ, Case C-403/09 PPU, Jasna Deticek, Judgment of 23 Decembr 2009, ECLI:EU:C:2009:810, par. 58.

⁴³ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *op. cit.*, p. 3.

⁴⁴ Freshfields Bruckhaus Deringer, *Review of the implementation of Brussels II Regulation in relation to parental abduction of children*, 2006, www.jugendamt-wesel.com (accessed 10 April 2015), p. 3.

pride and an acute sense of loss may lead to a compulsion to hurt the former partner where it hurts most: being severed from his or her offspring.⁴⁵

A child's objection often should not be given great weight when there is concern that the objection has been strongly influenced by the abducting parent, and by the circumstances arising from the abduction itself and may not be the expression of the child's own free will. A judge must always assess how independent the objection is and the degree to which it appears to be influenced by the abducting parent and the circumstances surrounding the case. In deciding how much weight to give to the objection, the judge has to consider the whole context in which it came to be expressed.⁴⁶

Courts will consider the extent to which the child's views have been influenced by the abductor or if the objection is simply that the child wishes to remain with the abductor. There is a recognized tendency for a child to be influenced by the preferences of the parent with whom he or she lives. In this regard, courts do not want to reward a parent for wrongfully retaining the child for an extensive period of time. If the child's objection appears to be the result of parental indoctrination or undue influence, the court may order the return over the child's objections.⁴⁷

4. The Necessity of Training on Interviewing the Child

One of the reasons for talking to a child, even a very young child, is to try to understand the child's perspective on the situation. The judge may find out much from discovering the child's self-perception of his or her interests and the reasons given for the objection. The judge must have enough evidence to see if the child's objection is rooted in reality based on good information or fantasy.⁴⁸

Within the scope of Article 24 of the Charter, the courts have to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions and to offer to the child a genuine and effective opportunity to express his or her views.⁴⁹

⁴⁵ Th.M. de Boer, *op. cit.*, p. 2.

⁴⁶ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *op. cit.*, p. 9.

⁴⁷ Linda D. Elrod, *op. cit.*, p. 13.

⁴⁸ *Idem*, p. 11.

⁴⁹ ECJ, Judgment, Case Agguire Zarraga, par. 66.

There are certain questions that a court should ask in order to determine whether it should give weight to the child's objections. This questions may be: Does the child object to his/her return to the country of habitual residence? Is the child more mature, less mature or as mature as his/her chronological age? Is it appropriate to take into account the child's views? What is the child's own perspective of what are in his/her interests in the short, medium and long-term? To what extent, if any, are the reasons for the objection rooted in reality or might reasonably appear to the child to be so grounded? To what extent have those views been shaped by undue influence and pressure, directly or indirectly by the abducting parent?⁵⁰

Judges dealing with family law cases should hear directly from a child. If a decision is made that the judge should hear directly from the child about his or her wishes in a family law case, it is often preferable for this to happen in the less intimidating setting of the judge's office, without the parents or their counsel present.⁵¹

It is generally accepted that a child should never be forced to meet with a judge. While some children will want to express their views about parenting arrangements and they should be permitted to do so, judges who interview children should be cautious not to directly ask children to "choose" between their parents. The purpose of the meeting should be to allow the judge to meet the child and get a better sense of the child's interests and needs, as well as to allow the child to ask any questions that the child may have. More research and educational training of judges in interviewing children should form the necessary next steps about children's participation in international child abduction proceedings.⁵²

Chapter V. *De lege ferenda*

"One sees clearly only with the heart. Anything essential is invisible to the eyes."

Antoine de Saint-Exupéry

We, in the light of the above research, consider that is necessary to establish a basic methodology on hearing the abducted child. All Member States should ensure the protection of child's best interests, following a minimum common standard. In order to do that, the institutions

⁵⁰ Phyllis Brodtkin, Michael Stangarone, Cristina Siviero, *op. cit.*, p. 6.

⁵¹ Rachel Birnbaum, Tamar Morag, Francine Cyr, *The Twists and Turns of Children's Participation in Family Disputes: What a Tangled Web Professionals Weave*, www.lawrights.asn.au (accessed 10 April 2015), p. 14.

⁵² *Idem*, p. 18.

of the European Union can adopt an instrument to establish basic rules on interviewing a child.

In this respect, a family law judge should: hear the child in the judge's chambers → record the meeting → ensure the presence of a specialised counselor → ensure the absence of the parents → descend from the bench → welcome the child → remove their robe → sit next to the child at his level → introduce themselves to the child → present the reasons why the child is there → give the child, according to their age, toys or coloring books → lower the voice → interact with the child in a friendly way → let the child know that the hearing does not mean a choice, but a voice⁵³.

In regard to this latter aspect, abducted children must know that the judge's decision will not worsen their situation and will not alienate them from their parents. Their opinion is very important for the judge's view on the case, but won't be decisive.

Also, a judge trained in child interviewing, having knowledge about developmental differences in cognitive, language and emotional capacities of the child, must choose his words wisely in order not to influence the child, suggest or lead the answers. According to this, questions must be asked in an indirect way, for the judge to receive a complete image and complex answer, so he will deduct the child's opinion from his words.

Taking into consideration the fact that the child is, in most of the cases, a foreigner and he probably doesn't speak the same language as the judge, it must be ensured the presence of an interpreter, for the procedure to be effective.

Beyond the above minimum common standard, the judge must be given the discretion to adapt his approach in interviewing the child, taking into account the cultural differences that might exist between different Member States, in order to ensure a unity in diversity.

Undoubtedly, the application of the Regulation and the Hague Convention requires a lot of complex legal skills and practice. Judges who apply these legal instruments must always take into account the case law of the ECJ and ECHR. Additionally, in order to achieve full employment of mutual recognition, judicial training is an essential instrument to this end, as it enhances legal confidence between Member States, practitioners and citizens.

For the above-mentioned reasons, we firmly believe that, at EU level, it should, at least, exist a body of recommendations for the national judges to follow when dealing with international child abduction proceedings and, especially, hearing the voice of the child.

⁵³ See also Rachel Birnbaum, Tamar Morag, Francine Cyr, *op. cit.*, p. 14-15.

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