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Migration, abduction and children's rights: the relevance of children's rights and the European supranational system to child abduction cases with immigration components

Florescu, A.S.

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Summary

MIGRATION, ABDUCTION AND CHILDREN'S RIGHTS

The relevance of children's rights and the European supranational system to child abduction cases with immigration components

The term *international child abduction* was coined by the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the 'Child Abduction Convention'). It refers to a situation where a child is taken away from one country (country of habitual residence) to another country, in breach of custody rights. Parental child abduction also occurs when a child leaves legally, but they are retained in breach of custody rights. The Child Abduction Convention requires that domestic authorities in the country where the child is located order the child's return to the country of habitual residence so that the latter authorities decide fairly on custody and contact rights.

The Child Abduction Convention was adopted 9 years before the United Nations Convention on the Rights of the Child (the 'CRC'), which is the most comprehensive instrument concerning children's rights. In the 44 years since its adoption the legal sociological context in which the Child Abduction Convention operates has significantly changed.

This dissertation assesses how children's rights could inform the interpretation of the Child Abduction Convention, taking into account some of the contemporary changes and challenges within which this Convention operates. The changes and challenges envisaged here are the expansion of the Convention's reach through a broad understanding of custody, coupled with a change in the profile of the abductor and the issue of domestic violence as a defence to return. For example, the Convention now functions against a shift in approaches to the separation of parents, away from a focus on the mother as the centre of children's lives after divorce towards an emphasis of continuity of contact between the child and both parents after parental separation. The interpretation of 'custody rights' under the Child Abduction Convention has also changed and it is now widely accepted that the return mechanism will be triggered whenever one parent can veto a child's relocation with the other parent. This will apply irrespective of the living arrangements of the child. Further, available data indicates that the abductors are mainly mothers who are at the same time the primary carers of their children. Many of them argue that domestic violence from the other parent prompted them to flee with their children to a safe space.

Subsequently, this dissertation analyses how immigration-based defences have been brought before child abduction courts, and the role children's rights could play in analysing such defences, considering the contemporary changes and challenges mentioned above. The focus on immigration has been chosen given that the Abduction Convention only applies in an international context, whenever a child has crossed national borders. Also, the immigration considerations brought as defences to return challenge the policy objectives of the Child Abduction Convention and its underlying assumptions. Moreover, some of the dynamics present in child abduction cases reflect migratory trends. For example, 50 years ago, migration was seen as a once in a lifetime event whereas nowadays people relocate internationally multiple times over the course of their lifetimes. These dynamics are also reflected in the child abduction context where people wish to return home or have resided for short periods in the country deemed the child's country of habitual residence. Indeed, from the perspective of private international law, it has been considered that a child's habitual residence can change in a day, provided that the child's parents jointly choose to move to another country. Consequently, the expansion of the reach of the Child Abduction Convention in the name of children's rights can be contrasted with the more rigid approach in immigration law where children's rights are assessed more narrowly.

Against the background outlined above, this dissertation has reviewed the relevance of the two European supranational Courts in adopting a child rights-based approach to child abduction cases in general, and child abduction cases with immigration components, in particular. To date these European supranational Courts offer the most robust human rights protection of international courts and are considered the constitutional pillars of Europe. They function within different frameworks and have different adjudicatory powers, however they have competence in cross border cases related to parental responsibilities and child abduction on the one hand and families and migration on the other hand. They are both bound to observe the human rights of children. Consequently, this dissertation has reviewed whether they can offset some of the tensions posed due to the interaction between child abduction and children's rights in general and the interaction between child abduction, children's rights and immigration in particular.

The dissertation has 9 substantive chapters divided in three parts as follows:

Part I – The Children's Rights Framework

Chapters 2 and 3 develop the children's rights framework. Here, it is shown that the CRC attempts to reconcile two seemingly opposing views of children: one focusing on their autonomy and another grounded on children's need for protection. The parents and the state are central to both views as they can be seen either as inhibitors or as enhancers of children's rights. Children's rights are understood from a developmental perspective within

the CRC: the balance shifts from protection to autonomy as the child grows in age and maturity.

The rights-based approach to children's rights builds on existing academic literature and the General Comments of the United Nations Committee on the Rights of the Child. Chapter 2 proposes that a rights-based approach entails consideration of the following: (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (iv) any available empirical evidence which may be of relevance. Decision-making should (i) identify how rights have been conceptualised; (ii) the procedures used; (iii) the meaning given to the rights in question and (iv) how children's rights were balanced against other potentially competing rights. While this approach is primarily procedural, Chapter 3 further focuses on the interpretation under the CRC of three rights of children which always play a role in parental separation cases: the best interests of the child, the right to be heard and the right to have contact with both parents. These rights are analysed first separately and then together so as to show both their specific features as well as their interconnectedness.

Part II – The Child Abduction Framework

Chapters 4 and 5 focus on child abduction and children's rights. Chapter 4 analyses the Child Abduction Convention and juxtaposes this analysis with the rights-based framework developed in Part I. Subsequently, Chapter 5 introduces two of the most important criticisms to the Child Abduction Convention from the perspective of human rights: one focuses on domestic violence and the other on the topic of primary carer abductions. This chapter examines the discussions surrounding domestic violence and parental responsibilities in national contexts and how these debates have permeated the child abduction field. For contextualising immigration, Chapter 5 looks into academic studies analysing the impact of immigration on families and family law proceedings. These studies discuss the intersection between immigration and domestic violence and highlight the power imbalance caused by immigration on family dynamics. Then, on the basis of domestic case law available on the international child abduction database (INCA-DAT), responses to questionnaires submitted by the Hague Conference for International Law (HCCH) and academic literature, Chapter 5 identifies the types of immigration considerations brought as defences to return in child abduction proceedings. On the basis of these materials, immigration considerations are divided into two main categories: (i) restrictions on entry or stay in a country and (ii) (concurrent) asylum claims. The Chapter concludes that immigration considerations have received much less dedicated attention in academic works focused on child abduction compared to domestic violence and primary carer abductions. This has happened despite existing works showing the intersection between domestic violence and immigration on the one hand and the ensuing power imbalances it creates. Also, available case law suggests that the immigration, domestic

violence and primary carer abductions are different factors which are often brought together as defences to return in child abduction proceedings. The preliminary conclusions discuss the overall findings of Parts I and II. These conclusions focus on how children's rights can permeate child abduction proceedings, and the relevance of children's rights for child abduction cases with immigration considerations.

Part III – The European supranational Framework

The analysis in Parts I and II informs the research into the case law of the two European supranational Courts. Chapters 7 and 8 present an exhaustive overview of the child abduction case law of the Court of Justice of the European Union (the CJEU) and the European Court of Human Rights (the ECtHR). The case law is analysed in the context of the jurisdiction of each Court and considering the limitations of their mandate. In so far as children's rights are concerned, in addition to the three core rights identified in Chapter 3, the case law is analysed by reference to the right of the child to be free from violence, separation from their primary carers and immigration considerations: the three areas discussed in Chapter 5. For each of the Courts, the chapters address the extent to which they have adopted a rights-based approach to children's rights in their case law, along the criteria identified in Chapter 2.

Chapter 9 compares the jurisdiction of the two Courts and offers some reflections on how they interact in this field.

Subsequently, Chapter 10 looks at the broader perspective and it discusses the jurisdiction of the two Courts in family immigration matters identified in Chapter 5. The scope of the analysis is informed by the type of immigration proceedings which have been brought before domestic courts and identified earlier in Chapter 5. Further, the analysis is undertaken on the basis of the emerging consensus in the field of child abduction that children should be returned to their country of habitual residence even if a grave risk of harm has been determined, provided that the system has the capacity to protect the child upon return. Chapter 10 investigates the standards that the two Courts have set in immigration law when it comes to the capacity of system to protect the child. The same Chapter discusses the relevance of pending asylum claims to child abduction cases from the perspective of EU and ECtHR law. The migration case law of the two Courts also indicates the approach of domestic family courts to parental separation cases whenever one of the parents had a precarious immigration status. The interventions of many countries in the case of *Chavez Vilchez* pending at the time before the CJEU, indicates that in a national context, domestic authorities tend to instrumentalise children's rights by arguing that the mere presence of one of the parents in the territory of one state meant that the child's right to have contact with both parents had been observed. Also, the case law of the ECtHR exposed situations where family courts allocated parental responsibilities on the basis of the immigration status of a parent. The analysis carried out in Chapter 10 reveals that both the CJEU

and the ECtHR have rejected these types of approaches. These Courts have analysed the best interests of the child and the child's right to have contact with both parents in migration cases, in light of the principle of effectiveness. Furthermore, Chapter 10 analysed the supranational Courts' case law on international protection in light of the issues which have been brought before domestic family courts deciding on child abduction cases. The analysis of the supranational Courts' case law addresses the relevance for child abduction courts of pending or favourable domestic decisions granting a child or a parent asylum or subsidiary protection. The wider discussion on the relevance of the principle of non-refoulement for child abduction proceedings, even outside a formal application for international protection, was not addressed in this chapter as it can be seen as overlapping with the scope of Article 13 or 20 of the Child Abduction Convention.

Chapter 10 concluded that the case law of the two Courts has the capacity to harmonise approaches of domestic courts while also ensuring adequate protection for children's rights. From the perspective of immigration law, implementation of EU and ECtHR law would ensure that separated parents have the right to reside in the child's country of habitual residence in order to be able to effectively exercise their family life with their child. This in turn means that the EU Member States have in principle the capacity to protect the child upon return from the perspective of immigration laws. This conclusion is subject to the Member States actual implementation of relevant EU law and CJEU and ECtHR case law. Also, a stricter scrutiny is required whenever the country of habitual residence is a third state. Further, Chapter 10 argues that pending or decided asylum cases should result in a finding of child abduction courts that the state of habitual residence cannot offer adequate protection to the child upon return.

Conclusions

The conclusions set out in Chapter 11 outline the main findings of the dissertation. Chapter 11 also proposes a decision-making framework to child abduction cases focusing on the role children's rights and immigration considerations may play. The decision-making framework follows a procedural approach; it does not focus on the outcome, nor does it discuss the substance of rights. It does however outline the areas of the Child Abduction Convention where children's rights may play a role and how immigration considerations could be weighed when raised as exceptions to return in child abduction proceedings. The decision-making framework proposes that the closer the parent child bond the closer should courts pay attention to the immigration considerations brought as defences to return. This proposition is based on the argument that the child's right to have contact with both parents deserves particular attention especially when it comes to immigration which poses a real risk of separation of the child from their carer.