

Ukraine's Fulfilment of its Obligations to Protect the Rights of Children Victims of International Abduction

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Abstract

The article analyses the problems of Ukraine fulfilling its obligations under the Convention on the Civil Aspects of International Child Abduction in the context of the COVID-19 pandemic. It was found out that the Convention on the Civil Aspects of International Child Abduction is an important international tool that imposes clear requirements on the state that has joined it, to protect the rights and interests of the child, guarantee his safety and prevent illegal movement. The article examines the procedure for Ukraine to perform tasks within the framework of the Convention on the Civil Aspects of International Child Abduction, in particular by the Ministry of Justice of Ukraine. The article analyses the approaches of the European Court of human rights to protect rights in cases of international child abduction and their application by the Supreme Court and other courts in Ukraine.

Keywords: Court, Illegal Movement, Right of Access, Risks, Child's Interests.

Introduction

Domestic violence remains one of the most pressing problems in states with different economic developments in the Twenty-First Century, and one of its forms is child abduction (Baruffi, 2018; Kvisber, 2019). Even if one of the parents or relatives moves the child with his consent, the violation of the rights of the parent or the person who legally exercises custody of the child is sufficient grounds for declaring such transfer illegal from the position of the Convention on the Civil Aspects of International Child Abduction (1980). Experts note that about 1,300 children are victims of international abduction in the European Union (EU) every year and some recommendations were proposed in the study of their needs to attract attention and address the problem to ensure children's participation and take their interests into account (Supporting child participation..., 2020; Agbaje,

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2022; Varyvoda, 2022). In the context of the COVID-19 pandemic (Corona Virus Disease, 2019) and restrictions on freedom of movement, the problem of international child abduction has become even more acute. After all, if a child stays with one of the parents during a certain time (for example, holidays) due to the closure of borders, the child may not return to the legal guardian, or vice versa, the parent who lives separately may be restricted in contact with the child. The situation with the pandemic remains difficult, new strains of the virus emerges, and the number of deaths grows. As of July 27, 2021, according to the World Health Organization (WHO), the number of infected people in the world reached almost 194 million, and the number of deaths is more than 4 million (Nguyen et al., 2022).

According to who forecasts, these indicators will continue to grow in the future. In such circumstances, it is quite important to study Ukraine's fulfilment of its obligations under the Convention on the Civil Aspects of International Child Abduction (1980) in the context of the COVID-19 pandemic, to find out new risks and threats to protect the best interests and rights of the child. Ukraine joined the Convention on the Civil Aspects of International Child Abduction (1980) on January 11, 2006. Ukraine, like other states that have joined the Convention on the Civil Aspects of International Child Abduction (1980), is obliged to ensure the immediate return of the child; take all necessary and appropriate measures to identify the location of children who have been illegally displaced; prevent harm to the child or interested persons, including by applying temporary measures; guarantee the exchange of information if necessary regarding the social origin of the child; initiate judicial (or administrative) procedures for the return of the child; guarantee access to legal assistance and advice; implement organizational measures that are necessary for remove any obstacles to the application of Convention on the Civil Aspects of International Child Abduction (1980) (Patel et al., 2021).

To fulfil its obligations, Ukraine has adopted Resolution of the Cabinet of Ministers of Ukraine No. 952 “On implementation in Ukraine of the Convention on the Civil Aspects of International Child Abduction” (2006), which approved the procedure for implementing the provisions of the Convention on the Civil Aspects of International Child Abduction (1980). The Ministry of Justice of Ukraine has been designated as the responsible body. Important guarantees for the protection of the rights and interests of the child and interested persons are the provision Convention on the Civil Aspects of International Child Abduction (1980): in Article 11, a fairly short period for considering the issue of returning the child (six weeks); in Article 12, the obligation to decide on the immediate return of the child, if more than one year has passed from the date of his illegal movement (or retention); in Article 12, establishing the possibility of deciding on

the return of the child, even if more than one year has passed from the date of his illegal movement, but with mandatory taking into account information about whether the child is used to a new place of residence; establishing in Article 13 an exhaustive list of grounds that allow not to decide on the return of a child.

European Experience in Fulfilling the Convention on the Civil Aspects of International Child Abduction Obligations

Convention on the Civil Aspects of International Child Abduction (1980) guarantees the "right of access", which is interpreted as the right to contact and communicate with the child, including the ability to temporarily move the child (for example, time-limited trips with the child on weekends or during holidays outside the place of residence). In other words, the Convention on the Civil Aspects of International Child Abduction (1980) provides for two protection tools: filing an application for the return of a child and submitting an application for providing access to a child. It is the provisions of Article 13 Convention on the Civil Aspects of International Child Abduction (1980) that should be discussed in more detail. In particular, a judicial (or administrative) authority may decide to refuse to return a child if the person caring for the child has not exercised such care or has given consent, including tacit consent, to move (or retain) the child; there are reasonable risks of causing physical (or mental) harm to the child or creating an unbearable environment for him; the child does not want to return and has already reached such an age and maturity that his opinion should be taken into account. Within the European Union, the provisions and standards defined by the Convention on the Civil Aspects of International Child Abduction (1980) are supplemented by Matrimonial and parental judgments: Jurisdiction, recognition and enforcement (Brussels IIa) (2003). In addition, there are some proposals to amend the specified Matrimonial and parental judgments: Jurisdiction, recognition and enforcement (Brussels IIa) (2003) to guarantee clear and fairly short deadlines at all stages of the procedure for the return of illegally displaced children, as well as to ensure the child's right to be heard when deciding on his return, improving the mechanisms of cooperation between the central authorities of the EU member states (Yaroshenko et al., 2018; Hegedűs, 2022).

The European Court of Human Rights (ECHR) has considered several cases of human rights violations due to the state's failure to fulfil its obligations under the Convention on the Civil Aspects of International Child Abduction (1980). At the same time, the position of the European Court of human rights is consistent: in disputes between parents, the right to protect the interests of the child is granted to the parent who is granted custody (Case of *Moog v. Germany*, 2016, Paragraph 41). In addition, the European Court of human rights considers that in the field of international child abduction, the state's obligations in the light

of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) should be interpreted in conjunction with the provisions of the Convention on the Civil Aspects of International Child Abduction (1980), which also give priority to the best interests of the child (case of *Neulinger & Shuruk v. Switzerland*, 2010, paragraphs 132 and 135; case of *X. v. Latvia*, 2011, Paragraphs 93 and 96). The ECHR has repeatedly stressed when considering this category of cases, the importance of prompt execution of a final decision since the passage of time can have irreparable consequences for the relationship between a child and one of the parents with whom he does not live (Case of *Maire v. Portugal*, 2003, paragraph 74; case of *Ferrari v. Romania*, 2015, Paragraph 49). Let's focus on Case of *M.R. & D.R. v. Ukraine* (2018), in which a dispute arose between the father (a citizen of the Czech Republic), who demanded the return of the child, and the mother (a citizen of Ukraine), who illegally took the child from the territory of the Czech Republic to Ukraine.

The ECtHR, when justifying the decision, noted that the Convention on the Civil Aspects of International Child Abduction (1980) in Article 11 establishes a clear requirement of efficiency in such cases and failure to comply with the decision on return for more than six weeks is the basis for providing appropriate explanations (paragraph 59) (Case of *M.R. & D.R. v. Ukraine*, 2018). The consideration of the case on the return of the child lasted more than a year, which is too long and objectively unfounded. Living with the mother for a long time led to the child getting used to the new way of life of the child, the emergence of new social connections. Although the ECHR concluded that the rights of the father guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) were violated, the return of the child to the applicant was considered inappropriate. Also, in the practice of the ECHR, there is an approach to recommending voluntary enforcement of decisions on the return of a child (Case of *Kacper Nowakowski v. Poland*, 2017, Paragraph 87), however, the immutability of the position of parents may lead to the necessity and application of coercive measures, which must be proportionate. 8 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) in combination with the provisions of Convention on the Civil Aspects of International Child Abduction (1980), namely: the right to protect the interests of a child is granted to one of the parents who is granted custody, according to the decision of the competent jurisdictional authority; when considering disputes about the illegal movement (or retention) of a child, the priority is to the best interests of the child are important; in such cases, the promptness of execution of the final decision on the return of the child is important; first of all, voluntary execution of decisions on The Return of the child is recommended, only in cases

where the position of the parents remains unchanged is it possible to apply proportional coercive measures (Studinski, 2022).

In addition, there are already cases considered by the courts of European states on the fulfilment of obligations under the Convention on the Civil Aspects of International Child Abduction (1980) during the COVID-19 pandemic. Scientists give examples of two court decisions in which the child's non-return was motivated by a difficult epidemiological situation and the rapid spread of the virus, which could pose a threat to the child. To consider the case and take into account the opinion of both parties, the hearings were held using the Zoom platform. In one case (the decision was made on May 1, 2020), Greek citizens, the parents of a 12-year-old boy, have lived in London since 2017. In March, the mother and the boy went to the island of Paros in Greece, where they stayed. The father demanded that the boy be returned to his place of residence, and the mother claimed that the infection and death rate in Greece is significantly lower than in the United Kingdom. At the same time, the court noted that the COVID-19 pandemic cannot be a justification for the illegal movement of a child (Mr Justice Mostyn, 2020).

In another case, the parents of a Spanish girl divorced in 2012 and custody of the child was awarded to the mother. The father had the right to contact his daughter on weekends and holidays. In February 2020, the mother and daughter went to London, the father filed a lawsuit for the return of the child. When considering this case, the child's desire to return to his usual place of residence was taken into account. Among other things, the court noted that "infection rates are constantly changing, so comparative risks may become less noticeable over time" (Wolfreys, 2020). Furthermore, important are the court's findings that "there is no evidence from which to conclude that any state is more or less safe than another" and that "while travel is likely to increase the risk of contracting coronavirus, this risk does not equal the 'serious risk' of causing physical harm as required by Article 13(b) of the convention" (Akhundova & Cornwell, 2020; Stojarová & Felbermayr, 2022). When Ukrainian courts consider cases on the return of an illegally displaced child, first, the approach of mandatory consideration of the child's opinion and ensuring his best interests is traced, and the COVID-19 pandemic is not considered as an insurmountable barrier to the implementation of decisions on the return of illegally displaced children (Mol & Kruger, 2018).

COVID-19 Pandemic and Ukraine's Fulfilment of the Convention on the Civil Aspects of International Child Abduction Obligations

The provisions of the Convention on the Civil Aspects of International Child Abduction (1980) do not specify insurmountable or force majeure

circumstances that allow not to comply with its provisions. That is, even in the context of the COVID-19 pandemic, Ukraine, like any other state that has ratified the Convention on the Civil Aspects of International Child Abduction (1980), must apply its provisions. Non-return of a child is possible only on the grounds specified in Article 13 Convention on the Civil Aspects of International Child Abduction (1980). In the context of a pandemic, there is no doubt that a person who does not return a child can refer to the epidemiological situation in the state where the child should be returned, as well as to the presence of real threats to the child's health. However, in such cases, there should be sufficient evidence to prove the existence of real and serious threats to the child's health. In Ukraine, the duty to perform tasks within the framework of the Convention on the Civil Aspects of International Child Abduction (1980) is assigned to the Ministry of Justice of Ukraine, which, in the case of filing an application for the return of a child who is in Ukraine, can involve the competent authorities to identify the child's place of residence, and must also take measures to ensure that the parties come to an agreement on voluntary return. In case of refusal of voluntary return of the child, the dispute is referred to the court for consideration, and the interests of the applicant are represented by employees of the justice authorities. Before the COVID-19 pandemic, Ukraine already had a judicial practice on fulfilling obligations under the Convention on the Civil Aspects of International Child Abduction (1980). The resolution of the Civil Court of Cassation of the Grand Chamber is quite well known in case no 2-4237 / 12 (2018), which is also used by other Ukrainian courts.

In this decision, the following conclusions are important: according to the provisions of Convention on the Civil Aspects of International Child Abduction (1980), one of the parents does not have the right to make an independent decision on the place of residence of the child; international abduction takes place in a set of circumstances defined by Convention on the Civil Aspects of International Child Abduction (1980), the child had a place of residence in a state that joined the Convention on the Civil Aspects of International Child Abduction (1980); she is illegally moved (or held), with a violation of guardianship that was effective, a child under the age of 16; it is important to find out the place of permanent residence in order to restore the status quo; the citizenship of the child and parents is irrelevant in such disputes; in such disputes, the person who will have the right of guardianship in the future is not established in such disputes; the provision of Article 12, paragraph 2, convention on the civil aspects of International Child Abduction (1980) applies only when the return procedure began one year after the Abduction; consent a parent's temporary departure cannot be interpreted as tacit consent within the meaning of Clause A of Article 13 Convention on the Civil Aspects of International Child Abduction (1980) (Harno et al., 2021). At the same

time, in the context of the COVID-19 pandemic, the consideration of court cases on the return of children and the implementation of decisions in Ukraine has slowed down. During the period of quarantine restrictions, especially during 2020, the courts temporarily suspended work, did not consider cases, and postponed court proceedings for long periods (Yaroshenko et al., 2021). In 2021, the practice of considering cases by courts with the opportunity for the parties to join the consideration of the case in the video conference mode (using EASYCON online) has already become more widespread.

In Ukraine, for the period from March 25, 2020 (since the introduction of the emergency regime due to the COVID-19 pandemic) to August 1, 2021, the Supreme Court of Ukraine issued 22 decisions on cases of illegal movement of children. These decisions were adopted in cases against applicants from the following countries: Great Britain, Israel, Spain, Italy, Canada, China, Mexico, Poland, Portugal, the United States of America (USA), Turkey, France, the Czech Republic and Ukraine. Decisions were made in cases where disputes continue from: 2012 – 1; 2016 – 3; from 2017 – 2; from 2018 – 2; from 2019 – 12, from 2020 – 2. Thus, during the quarantine period, the Supreme Court of Ukraine issued decisions in 36% of cases in which disputes last more than three years and only in 9% of cases in disputes lasting more than a year. Undoubtedly, this situation is not acceptable, taking into account the interests of the child and the rights of the parent who lives separately. As for the result of the court proceedings, decisions were made with the obligation to return the child to the state at the previous place of residence in 5 cases. Despite the violation of the rights of one of the parents, the child was left in Ukraine due to the long consideration of the case and the child's habituation to new living conditions – in 4 cases, as well as on the grounds provided for in Article 13 Convention on the Civil Aspects of International Child Abduction (1980) – in 1 case. One order was issued to secure access rights. It is allowed to take a child abroad in one case. The execution of a court decision of another country on the return of a child in one case was refused.

During the study period, only 22.7% of cases decided to return the child to the state at the previous place of residence. In addition, there is a fairly significant percentage of decisions (36%) that send cases for reconsideration, which further delays time and leads to the non-return of a child who gets used to a new place of residence for a long time. The Supreme Court of Ukraine emphasises that when considering the issue of ensuring the return of a child to his previous place of residence, it is necessary to carefully establish circumstances that would indicate the possibility or impossibility of observing the best interests of the child. In addition, if the child has reached the age and a certain level of maturity, his opinion should be taken into account (in particular, it was considered a violation not to count the opinion of a 10-year-old child) (Resolution of the Supreme Court

of Ukraine in case No. 766/7657/20, 2021). The Resolution of the Supreme Court of Ukraine in case No. 755/5133/20 (2021) notes that the postponement of the trial from January to May 2021 is due to the introduction of quarantine measures and does not contradict the law, as well as staying abroad and the inability to return to Ukraine through anti-epidemic measures to participate in court proceedings is recognised as a valid reason. In this case, it is also noted that the court of the first instance refused to participate in the video conference mode due to the lack of technical capabilities.

The Supreme Court of Ukraine also draws attention to the need for Ukrainian courts to take into account the court decisions of other states regarding the application of the Convention on the Civil Aspects of International Child Abduction (1980) and the determination of the usual place of residence (for example, the Court of Appeal did not take into account the decision of the higher court of Moscow). Montpellier of the French Republic dated December 21, 2017) (Resolution of the Supreme Court of Ukraine in case No. 642/3886/18, 2020). The Resolution of the Supreme Court of Ukraine in case No. 641/8309/19 (2021) stated that after receiving a notice of illegal displacement of a child under Article 3 Convention on the Civil Aspects of International Child Abduction (1980), the judicial or administrative authorities of the state to whose territory the child has been moved should not decide on the merits of the issue of guardianship until it is determined that the return of the child was not possible. In addition, the Supreme Court of Ukraine changed the reasoning part in the decisions of the first and appellate instances, since local courts applied the wrong part of Article 13 Convention on the Civil Aspects of International Child Abduction (1980) to refuse to return the child to his place of permanent residence, which should have been applied. According to the actual circumstances of the case, it was precisely the threat of psychological violence against the child in the event of his return (Resolution of the Supreme Court of Ukraine in case No. 524/3333/20, 2021). N. Rusinova (2020) believes that, first, the court should determine when considering this category of cases whether there are risks for the child in case of return in the context of a pandemic situation. In addition, he notes that there may be risks not only for physical health (infection) but also for psychological health (due to concerns about the possibility of infection and the rapid rate of spread of the virus). Undoubtedly, given the availability of information about the pandemic, including through the Internet for children, they may experience fear and some anxiety from a certain age.

Conclusions

The Convention on the Civil Aspects of International Child Abduction imposes on Ukraine some obligations that must be fulfilled even in the context of

the COVID-19 pandemic. Analysis of the practice of Ukraine's implementation of the provisions of the Convention on the Civil Aspects of International Child Abduction generally complies with European approaches, in particular: the right to apply to the court has the person (one of the parents) who is granted custody of the child, according to the decision of the Competent Authority; the best interests of the child are of paramount importance; the speed of execution of the final decision on the return of the child is important; advantages are given to voluntary execution of decisions on the return of the child, and if necessary, coercive measures are applied. The COVID-19 pandemic has slowed down the judicial review of cases of illegal movement of children in Ukraine. During the period of quarantine restrictions, especially during 2020, the courts temporarily suspended work, did not consider cases, postponed court proceedings for long periods, refused to consider cases in the video conference mode due to lack of technical capabilities.

The situation improved in 2021, with 22 decisions of the Supreme Court of Ukraine issued since the beginning of the pandemic in cases of illegal movement of children, only six were adopted in 2020. In addition, as judicial practice shows, 36% of disputes were considered for more than three years, which certainly does not contribute to the return of children to their place of residence. For such a fairly long period, the child gets used to a new place of residence, educational institution, new social connections, so the return of the child may already be contrary to his interests. In the context of the COVID-19 pandemic, when deciding whether to return a child, the epidemiological situation at the place of Return, threats of infection during relocation, risks of stressful situations associated with the pandemic, including the need for self-isolation when returning, separation from the parent with whom the child is currently staying, as well as whether the child will have the opportunity to continue training and have access to medical care in a new place of residence in a pandemic.

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