Vladimir Ushakov v. Russia – The 1980 Hague Convention, the child’s best interests and gender biases

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On the 18th of June 2019, the European Court of Human Rights gave judgment in the case of Vladimir Ushakov v. Russia (application no. 15122/17). The Court held by six votes to one that there has been a violation of the applicant’s right to family life under Article 8 ECHR. The case concerns Mr Ushakov who sought the return of his daughter V. to Finland after the mother I.K. took her to Russia. The Russian court refused to order the return of the child and based this decision on Article 13(1)(b) of the Hague Convention on Child Abduction. The Court carefully applies the general principles that have emerged in its previous case law on international child abduction. In that respect, the case is not very noteworthy. However, the dissenting opinion of Judge Dedov, in which he is critical of the Hague Convention, invites for discussion. This post will in particular respond to what Judge Dedov has defined as “deficiencies” of the Hague Convention.

Facts

The applicant, Vladimir Ushakov, is a Finnish national who works and lives in Finland. In 2009, he married I.K., a Russian national and the couple settled in Finland. On the 24th of December 2012 the couple welcomed daughter V. of whom they have joint custody. One month after V.’s birth, I.K. suffered two strokes, which partially paralyzed her. In June 2013, she went to Russia for medical treatment. From January until June 2013, the applicant took parental leave to take care of V. However, in July he started working again and therefore he decided to take V. to his parents in Norway. After her return to Finland in August, I.K. instituted return proceedings under the Hague Convention on Child Abduction for the return of her daughter. At the same time, I.K. filed for a divorce and requested sole custody of the child. The proceedings based on the Hague Convention came to an end when the applicant brought the child back to Finland in October. In April 2014, the competent Finnish District
Court decided on the divorce and dissolved the marriage. The decision on the custody of V. was taken in December 2014 and entailed that the parents should have joint custody and the child should reside with her father. I.K. appealed the latter decision but the Court of Appeal upheld the decision of the District Court. I.K. then lodged an appeal to the Supreme Court, which was also unsuccessful.

Just after the decision of the District Court, in which it was decided that V. should reside with the applicant and before any decision on appeal, I.K. took the child to Russia and informed the applicant that she did not intend to come back. In August 2015, the applicant lodged an application in a Russian district court based on the Hague Convention for the return of his daughter to Finland. This application was granted; the court ordered the immediate return of V. This decision was, however, quashed by the City Court. The latter court refused the return of V. to Finland based on the argument that not Finland but Russia was V.’s State of habitual residence and the removal was therefore not unlawful within the meaning of Article 3 Hague Convention. Further, the City Court referred to medical documents confirming that V. suffers from allergic rhinitis, muscular hypertension, delayed speech, flat feel and iron deficiency. These medical conditions fell, according to the court, within the exception to return of Article 13(1)(b) of the Hague Convention. This Article provides that courts are not bound to order the return of the child if there is a grave risk that the child’s return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. The applicant’s attempts at cassation against this judgment were unsuccessful since both a judge of the City Court and a judge of the Supreme Court refused to refer the case for cassation review.

**Judgment**

The Court starts by setting out the general principles as emerged from its case law and especially from the *Neulinger and Shuruk v. Switzerland* (§§ 131-140) and the *X v. Latvia* (§§92-108) judgments.

The main obligation of domestic courts under Article 8 ECHR in cases of international child abduction is to strike a fair balance between the competing interests of the child, the parents and the public order. Domestic courts retain a certain margin of appreciation to determine whether a fair balance is struck. However, this obligation imposed by Article 8 ECHR should be interpreted in light of the requirements of the Hague Convention on Child abduction, the
requirements of the United Nations Convention on the Rights of the Child (UNCRC) and the relevant rules and principles of international law applicable between the Contracting Parties. In light of these instruments, domestic courts have to take into account, while balancing the interests, that the best interests of the child are a primary consideration and that the objectives of prevention and immediate return of the Hague Convention correspond to a specific conception of the best interests of the child.

For domestic courts to fulfil the obligation under Article 8 ECHR, two conditions have to be adhered to. First, the court must genuinely take into account the factors that could constitute an exception to return under the Hague Convention and must make a sufficiently reasoned decision on this point. At this stage, the courts must evaluate the concept of the best interests of the child in light of the exceptions of the Hague Convention. Second, the courts must evaluate the factors in light of Article 8 ECHR. Hereby, it is important to keep in mind that Article 8 ECHR has a two-limb interpretation of the best interests of the child; it is seen as in the child’s best interests to maintain ties with his or her family and to develop in a sound environment.

The Court, having applied these general principles to the present case, decided that Russia did not meet its positive obligation under Article 8 ECHR and therefore violated the applicant’s right to respect for his family life. The City Court concluded that the removal of V. by I.K. was not wrongful, while this contradicts the obvious meaning of Article 3 Hague Convention. Further, the City Court did not discuss any details on the medical conditions of V. to substantiate the conclusion that these conditions constitute an exception to return in the sense of Article 13(1)(b) Hague Convention. Lastly, the City Court did not examine any of the other factors that were raised by I.K. and that could possibly lead to an application of Article 13(1)(b) Hague Convention. Thus, the Russian court failed to adhere to the two conditions to fulfil its obligation under Article 8 ECHR. On the one hand, the court failed to genuinely take into account and give a sufficiently reasoned decision on whether the medical conditions of V. and the other factors raised by I.K. constituted an exception to return. On the other hand, the authorities had failed to evaluate these factors in light of Article 8 ECHR.

Comments

While the majority opinion does not add new insights on the Court’s way of reviewing cases on the violation of Article 8 ECHR in situations of international child abduction, the
Dissenting opinion of Judge Dedov is worth reading in detail. He is of the opinion that the Hague Convention has the following “systemic deficiencies”: (1) the Hague Convention does not take into account the young age of the child, his or her close relationship with the mother after birth, or the vulnerability of the mother; (2) the Hague Convention focuses on the determination of custody rather than on the best interests of the child; and (3) the Hague Convention does not regulate situations where the parents were granted joint custody.

It is not the first time that Judge Dedov expresses criticism regarding the Hague Convention; I would like to refer to his dissenting opinion in the Adžić v. Croatia judgment and to the blog post by Thalia Kruger on that case.

I cannot agree with Judge Dedov’s opinion on the “deficiencies” of the Hague Convention and will discuss them one by one, starting with the third. The situation of parents with joint custody is inaccurately defined by Judge Dedov as a “deficiency” of the Hague Convention. However, from Article 3 Hague Convention follows that this Convention applies where a removal or retention is in breach of rights of custody attributed to a person, either jointly or alone and where those rights were actually exercised, either jointly or alone. No doubt therefore can arise about the application of the Hague Convention to situations where parents have joint custody.

The second “deficiency” is either incorrectly phrased or is based on an interpretation of the Hague Convention with which I cannot agree. In my view, the Hague Convention does not focus on the determination of custody, as Judge Dedov puts it, but on the prompt return of the child with the aim inter alia to allow the State of habitual residence to determine the custody rights. As such, the Hague Convention focuses on the prompt return of the child – as seen to be in the collective interests of children since it mitigates the detrimental effects of abduction – rather than on the best interests of the individual child. This specific focus can be explained by the reason for which the Hague Convention was drafted in the first place. Before the Hague Convention entered into force, decisions concerning child abduction were based on a case-by-case analysis of the best interests of the child similar to custody proceedings. This resulted in an extreme difficulty to recover a child after international child abduction, since domestic judges were inclined to let the decision depend on their subjective beliefs formed by the culture, community and country they lived in. Since international child abduction became a growing problem, a tailored solution was required. To combat the problem, it was deemed necessary to make a strict division between decisions concerning the abduction and thus the
return of the child – to be made by the courts of the State of refuge – and decisions concerning
the custody and thus what is best for the child – to be made by the courts of the child’s State
of habitual residence. Consequently, the whole raison d’être of the Hague Convention was to
enable a shift in focus from an assessment similar to custody proceedings to a strict division
between proceedings concerning the return of the child and those concerning the custody.

Since the entry into force of the UNCRC about ten years after the Hague Convention, it
cannot be denied that also courts dealing with international child abduction are obliged to
assess the best interests of the individual child. However, rather than denying the value of the
Hague Convention in solving international child abduction cases in the way that Judge Dedov
does, the Court sought and – in my view – found a way to reconcile the UNCRC’s best
interests requirement with the functioning of the Hague Convention. This reconciliation is
reached by reading the child’s individual best interests in the exceptions of the Hague
Convention (X v. Latvia, §101). In this regard, reference can be made to what Judge Dedov
defined as a first “deficiency”. Indeed, the factors that he listed cannot be taken into account
for deciding on the (non-)return of a child since they lean on to an examination on the
individual child’s best interests. However, they could be taken into account together with
other factors when examining the grave risk exception under Article 13(1)(b) Hague
Convention.

To return to the situation pre Hague Convention, as Judge Dedov seems to prefer, would
make the return of the child again dependent on a full-fledged best interests assessment and
thus on the beliefs of the judge as to what is best for the child. An example of these beliefs are
the stereotypical expectations on the roles that mothers and fathers play. These gender biases
are mostly in disfavour of fathers when it concerns questions of custody. Some judges are still
convinced that mothers can better look after the children, especially when they are young (See
Browne). This belief still lives for a part in the mind of Russian judges. Numbers of 2005
show that in 90% of the cases after divorce or separation of the parents, the Russian court
preferred to accord residence of the child to the mother (See Khazova). Also in the dissenting
opinion of Judge Dedov, this gender bias simmers through. He refers to the close relationship
that a child has with the mother after birth, he depicts mothers as vulnerable and completely
dependent on their husband in the foreign State, and he praises legal literature that would give
more protection to vulnerable women and that takes into consideration all conditions in which
the child is placed in the woman’s home country. His opinion demonstrates a very traditional
worldview in which a specific parental role is reserved for the mother and another for the father. Such perception is, however, incompatible with the notion of equality between women and men as parents. International child abduction and custody are unfortunately not the only aspects of life in which Judge Dedov demonstrates a worldview incompatible with notions underlying a democratic society such as equality, pluralism and tolerance (see the blogpost on his dissenting opinion in Bayev and others v. Russia).

**Conclusion**

The Court refers in its judgment to the principles that have to be taken into account when reviewing international child abduction cases in light of Article 8 ECHR. These principles, and in particular the requirement to read the child’s individual best interests in the exceptions of the Hague Convention, are in my view first good steps on the way to the harmonised application of the Hague Convention together with the ECHR and the UNCRC. Judge Dedov’s dissenting opinion, in which he makes clear his preference for a – gender biased – full best interests assessment instead of the Hague Convention’s method, would be a step back in solving international child abduction cases.

To my mind, assessing the best interests of the child based on beliefs and gender biases that exist in the State of refuge to a child that has his or her habitual residence elsewhere, seems not to be in his or her best interests.