

Civil meanings of child abduction. Analysis of a real case with two parties: Spain (European Union) and Russia Federation

Aspectos civiles de la sustracción de menores. Análisis de un caso real entre dos partes: España (Unión Europea) y la Federación Rusa

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Abstract: There are not many occasions, neither from the investigative point of view nor from forensic practice, much less, as is the case, from both jointly, in which the jurist can study and try to resolve a case of child abduction.

The male parent has British nationality; the mother is a national of the Russia Federation. However, it can be said that this history of doctrine and jurisprudence lacked the necessary investigative interest if there had not been a minor, born in Spain, and whom her mother, without the knowledge or consent of her father, transferred to Russia.

Thus begins a case that took us to the Court of Justice of the European Union. And, of course, to this research article than shows that between the formulation of a law or rules and its execution, there is always a pervasive chasm that not everybody is able to cross or knows how to do so.

Law is more a science of problems than of solutions, and it usually responds poorly -it cannot be otherwise- to facts with a markedly surprising nature.

Keywords: Civil abduction, minor protection, Family Law, rights family, conflict international law.

Resumen: No son muchas las ocasiones, ni desde el punto de vista investigador ni desde la práctica forense, y mucho menos, como es el caso, desde ambos de forma conjunta, en las que el jurista pueda estudiar e intentar resolver un caso de sustracción internacional de menores.

El padre varón tenía nacionalidad británica; la madre, nacional de la Federación de Rusia. Sin embargo, puede decirse que esta historia de doctrina y jurisprudencia carecería del necesario interés dogmático si no hubiera existido una menor, nacida en España, y a quien su madre, sin conocimiento ni consentimiento de su padre, trasladó a Rusia.

Así comienza un caso que nos llevó hasta el Tribunal de Justicia de la Unión Europea. Y, por supuesto, este artículo de investigación muestra que entre la formulación de una ley o las reglas jurídicas y su ejecución, siempre hay un espacio que requiere la aplicación de criterios de justicia material.

El Derecho es más una ciencia de problemas que de soluciones, y suele responder mal -no puede ser de otra manera- ante hechos de carácter marcadamente sorprendente.

Palabras clave: Sustracción civil, protección menores, Derecho familia, derechos de familia, conflicto Derecho internacional.

Sumario: I. Brief introduction: factual and legal background. II. Proven facts in the case judged by the court of the judicial district of Dzerzhinsky. III. Incorrect implementation of the exception written in the article 13.b of the Hague Convention (1980). IV. The difficulties of jurisprudential dialogue. V. Concluding notes.

I. Brief introduction: factual and legal background.

1. To delve deeper into the ideas outlined in the abstract, since I began my training as a lawyer, I have had occasion to settle some notions that only appeared at first as vague lawful possibilities: first, is that law –*Ius*–, generally conceived as a discipline of study, is more a problem’s science than a science of solutions; and second, facts are the most powerful legal arguments that exist. Whoever tried them knows¹.

2. On the other hand, we understand that it is not necessary to clarify, at this point, that we are faced with a situation with important effects in both the criminal and civil spheres.

3. PALAO MORENO says, in a recent monograph² that “international child abduction is a phenomenon that continues to increasingly affect modern societies. The technological revolution is especially reflected in the changes that have occurred in the world of transport and that favors the consolidation of a globalized and multicultural world has a direct impact on the very configuration of the family, favoring, as in many other areas of today’s society, its internationality. International families thus constitute a constantly growing reality”. In this context, international child abduction is a phenomenon that is constantly present, which, far from being reduced, continues, and foreseeably will continue, to increase.

4. In a context of increasing cross-border personal and family mobility, family disputes with a cross-border element are increasing. One of the most common conflicts in this area refers to the illegal transfer or retention of a minor in a State other than the State of their previous habitual residence -hereinafter illegal removal-. The illegality is characterized by the infringement of the custody rights³ of the other parent; the graphically named parent left behind or left-behind parent. These conducts, which are contrary to the law, are also considered highly detrimental to the minor involved, as well as, obviously, to the parent whose custody rights are violated.

5. The basic idea on which any response to the phenomenon is articulated is that international child abduction should be discouraged. Different have been the responses provided at various geographical levels, endowed in many cases with material scopes and differentiated approaches. Thus, as a way of dealing with this complex reality, let us remember, existing since ancient times and which, as we say, has seen its importance increase in recent times, since the Hague Conference on Private International

¹ This article is a transfer of result of investigation derived from the Project 16/15 APP, UPO, “Deudor hipotecario vulnerable: desahucio y Menores” (“*Vulnerable mortgager: dispossession and minors*”).

² G. PALAO MORENO. *La sustracción internacional de menores en el espacio jurídico europeo*, ed. Tirant Lo Blanch, Valencia, 2022, p.33; also, G. PALAO MORENO y (dir.), M. GONZÁLEZ MARIMÓN (ed. lit.). *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores: Comentarios al Reglamento (UE) n° 2019/1111*, ed. Tirant Lo Blanch, Valencia, 2022.

³ The Spanish Supreme Court, in the Sentence of February 2, 2012, and based on the provisions of international conventions, and the Hague Convention, reasoned that this crime “includes the right related to the care of the person of the minor and, in particular, to decide on his or her place of residence. There is no difference between custodial parents and those who are not - italics are ours. Hence, it is considered an illicit transfer - Article 3 a) of the Convention - that which occurs in violation of the right of custody attributed, separately or jointly, to a person. Thus, since the minor, in this case, has established residence in the United States with both parents, who jointly had the same right of custody, the mother could not, due to a unilateral decision and without consent of the other parent, who would have as much right to custody as she does, move the minor, modify his residence and deprive him of the company of his father. The alteration of the status quo of the minor, in the case of joint custody, can only be done by mutual agreement of both holders of the right. And in the absence of agreement, the authority decides in the interest of the minor. This is so for civil purposes, as the Spanish and American courts have agreed, and also for criminal purposes, because we do not see any element in article 225 bis of the Spanish Penal Code that allows us to deviate from the interpretation that literally follows from the Convention. International on the matter.”

Law (...) sought an instrument of cooperation that would discourage and provide a response to this type of phenomenon, concluding in its day the Hague Convention of October 25, 1980 on civil aspects of the international kidnapping of minors⁶ (hereinafter, THC)”.

6. Regarding the concept of habitual residence, the Judgment of CJEU⁴ 8 June 2017, in a case between an Italian national and a Greek mother who, after the birth of her child, remains in the mother’s home and does not return to Italy where the couple had established their habitual residence, says⁵:

7. “(22) That court considers that situations in which a child is born in a place unconnected to the place where the child’s parents are habitually resident — for example, fortuitously or due to force majeure, when the child’s parents are travelling abroad — and is thereafter wrongfully removed or retained by one of them, give rise to blatant infringements of parental rights and in fact the separation of the child from the place where, in the normal course of events, the child would have been habitually resident. Such situations should, for those reasons, fall within the scope of the return procedure laid down by the 1980 Hague Convention and Regulation No 2201/2003”.

8. “(23) The referring court considers that a child’s physical presence in a given place should not therefore be a prerequisite for the child being assessed as ‘habitually resident’ there, for the purposes of Article 11 of Regulation No 2201/2003⁶. As regards quite specifically newborn children and infants, the factors which ordinarily facilitate determination of habitual residence are, in the view of the referring court, of no relevance because young children are absolutely dependant on those who look after them. The Court has itself held that the condition as to the physical presence of a child is of less importance with respect to infants, since the Court held, in the judgment of December 2010, *Mercredi* (C497/10 PPU, EU:C:2010:829), that if such an infant was resident for a few days in a given place, that, allied to other factors, was sufficient ground to establish that the child was habitually resident there”.

9. As we will see in both cases, the psychological aspects involved in the case will acquire enormous importance in terms of its practical resolution.

10. “(24) According to the referring court, in order to determine the habitual residence of a newborn child or an infant, it would be more appropriate to use as the essential factor the joint intention of the responsible parents, which can be inferred from preparations made by them to welcome the child, such as registering the child’s birth at the registry of the place where they are habitually resident, the purchase of essential clothing or furnishings for the child, the preparation of the child’s room or even the renting of a larger house”.

11. (25) In those circumstances, the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

⁴ Judgment of the Court (Fifth Chamber), 8 June 2017; [Text rectified by order of 12 June 2017]; [Text rectified by order of 14 September 2017]; ECLI:EU:C:2017:436.

Explaining the facts, point 21 says: In that regard, that court is of the opinion that while the child has admittedly not been ‘removed’, within the meaning of Article 11(1) of Regulation No 2201/2003 or Article 3 of the 1980 Hague Convention, from one Member State to another, the child has nonetheless been wrongfully retained by her mother in Greece, when the father has not agreed to the child becoming habitually resident there, although the parents share parental responsibility with respect to the child.

⁵ See the sections 22, 23, 24 and 25.

⁶ Article 11 of Brussels IIR also refers to the return of the child and contains the following provisions:

“(2) When applying Articles 12 and 13 of the 1980 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.

(3) A court to which an application for return of a child is made as mentioned in paragraph (1) shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law without prejudice to the first sub-paragraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged”.

‘What is the appropriate interpretation of the concept of “habitual residence”, within the meaning of Article 11(1) of [Regulation No 2201/2003], in the case of an infant who fortuitously or due to force majeure has been born in a place other than that which her parents with joint parental responsibility for the child intended to be the place of her habitual residence, and was then unlawfully retained by one parent in the State where she was born, or removed to a third State. More specifically, is physical presence a necessary and self-evident prerequisite, in all circumstances, for establishing the habitual residence of a person, and in particular a newborn child?’⁷.

12. The surprising nature of the mother’s decision prevents the legal system - in this case, the Spanish one- from coming to the aid of the other parent by preventing or making the abduction illegal *ab initum*⁸. Something similar happens with the so-called preventive measures, which are only when, to use words from civil law, there is a rational and well-founded fear that one of the parents is going to carry out an action not protected by the legal system (Antón; oct., 2020)⁹.

13. In fact, the measures regulated by Spanish Civil Code (CC) go in this way.

14. In art. 158 of the CC, in section 3, provides that the judge, whether ex officio or at the request of the child himself, of any relative or of the Prosecutor’s Office, will adopt: “The necessary measures to prevent the abduction of minor children by one of the parents.” or by third parties and, in particular, the following:

- a) Prohibition of leaving the national territory, unless prior judicial authorization.
- b) Prohibition of issuing the passport to the minor or withdrawing it if it has already been issued.
- c) Submission to prior judicial authorization of any change of address of the minor”.

15. It would not be difficult to reflect what are the subjective rights involved from the civilian point of view when we are faced with a case of child abduction by one of their parents. Perhaps the most difficult thing is to enumerate them accurately:

- a) Rights inherent to parental: visits, communication, right to alimony in a broad sense, relationship with the minor, affective rights of parents (including moral rights).
- b) Rights of the child: free development of personality (all-encompassing cultural, social and educational background; (including moral rights), right to be heard, affection, right to interact with both parents.
- c) Rights of other relatives: alimony, affective and, in some laws like the Spanish, to visit and communicate with the child.

⁷ Cfr. [2020] JMSC Civ 230, CLAIM NO. SU 2020 CV03807. In the case of A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, Lady Hale at paragraphs 54 and 55 of the Judgment sought to draw together the different definitions of habitual residence. She stated that: “i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes (‘sic’) the domicile of his parents (...). iii) The test adopted by the European Court is “the place which reflects some degree of integration by the child in a social and family environment” in the country concerned. This depends upon numerous factors, including the reasons for the family’s stay in the country in question (...). vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from which the factual inquiry would produce. viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings by A, it is possible that a child may have no country of habitual residence at a particular point in time.

⁸ It should not be forgotten that the abduction of minors may originate from a lawful cause; vgr., the custodial parent’s vacation in her country of origin.

⁹ I. ANTÓN: <https://www.isabelanton.es/post/protección-internacional-del-adulto-y-apoderamiento-preventivo-una-combinación-efectiva>, accessed 12.12.2022.

16. Things this way, we are going to study a real case where a Russian mother takes her daughter with her, who was born in Seville -Spain¹⁰-, separating her from her father, who, in fact, was recognized by a judicial court order as the minor's custodian.

17. Although it has been incorporated into this dogmatic work, it must be considered that this matter was addressed without the Council Regulation (EU) 2019/1111 of 25 June 2019¹¹, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction having yet been published¹².

18. Before getting into the matter, it should be taken into consideration that this type of assumptions can give rise to different areas of responsibility.

19. There is, at least, a necessary analysis on constitutional responsibility or derived from human rights; criminal liability¹³ based on the national classification made by each country on this type of assumption; and, on which we will focus, civil liability for rights and duties inherent to the family or family law.

20. For this reason, not only the effectiveness of judicial decisions that may have been established in the field of civil family law and the family status quo created by said decisions are protected, but also the right of parents to relate to their children and of these with their parents, a right enshrined in article 39.4 of the Spanish Constitution, stating that "children will enjoy the protection provided for in international agreements that ensure their rights", as well as article 5 of the Hague Convention of 25 October 1980 on Civil Aspects of International Child Abduction, stating that "for the purposes of this Convention:

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

¹⁰ We will use, as a general bibliography, the work of E. PÉREZ VERA, (2002, *passim*). Also, A. L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, online ed.; *Sustracción Internacional de Menores: Una visión general*, D.O.I: <http://ifc.dpz.es/recursos/publicaciones/31/41/10calvocarrascosa.pdf>, accessed 13.12.2022. Also one has dedicated to the topic, from the most administrative point of view, the work of C. GARCÍA REVUELTA: "Aplicación práctica del Convenio de la Haya y el Reglamento 2201/2003. El papel de la Autoridad Central", *Consejo General del Poder Judicial*, 2017.

¹¹ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction. It should be kept in mind that, when the facts of this matter were developing, the aforementioned Resolution was not yet in force.

¹² One could gauge the timing of applying Regulation (EC) No 2201/2003, known as the 'Brussels II bis Regulation', but this is a unique legal instrument whose aim is to help international couples resolve divorce and custody disputes of children in which more than one country is involved.

Establishes the rules determining which court is responsible for matrimonial and parental responsibility matters in disputes involving more than one country; the rules that make it easier for court decisions handed down in one Member State of the European Union (EU) to be recognized and enforced in another; a procedure to resolve cases where one of the parents abducts a child from one Member State and transfers it to another.

It does not deal with matters of positive family law. These issues are the responsibility of each EU Member State.

Therefore, it is difficult, except for the purposes of soft law, to apply this Regulation.

Vid. an interesting study on A. MORENO SÁNCHEZ-MORALEDA, dir. by A. MONGE FERNÁNDEZ (2019: 129, ss).

¹³ A. A. MARTÍN MOLINA, 2022; 3. Aslo, O. GARCÍA PÉREZ, 2010; *passim*. In order for the correlation between the civil and criminal spheres to be appreciated, it is sufficient to present that the Spanish Supreme Court, in the Order of February 2, 2012, and based on the provisions of the aforementioned international conventions, argued that "includes the right related to the care of the person of the minor and, in particular, the right to decide on their place of residence. There is no difference between custodial parents and those who are not. Hence, it is considered illegal transfer -article 3 a) of the Convention- that which occurs with infringement of the right of custody attributed, separately or jointly, to a person. Thus, since the minor, in the case at hand, established his residence in the United States with both parents, who apparently had the same right of custody jointly attributed to him, the mother could not, by a unilateral decision and without the consent of the another parent, who would have as much right to custody as her, transfer the minor, change his residence and deprive him of the father's company. The alteration of the status quo of the minor, in the case of joint custody, can only be done by mutual agreement of both holders of the right. And in the absence of agreement, the authority decides in the interest of the minor. This is so for civil purposes, as the Spanish and US courts have concordantly declared, and also for criminal purposes, because we do not appreciate any element in article 225 bis of the Spanish Penal Code that allows us to depart from the interpretation that literally follows from the Convention International in the matter".

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

21. It is also appropriate, and opportune that, before going into the merits of the matter, we make a brief recap of what were the facts and the background of the case, for a proper understanding of the solutions that were proposed and accepted in the case.

A) Factual background

22. On July 15th, 2013, was born in Seville (Spain), X. (from now on: “the daughter”) from the marriage between Mr. E. (from now on: “the father”) and Mrs. J. (from now on: “the mother”). Seville has been the habitual residence of the family, therefore, the habitual residence of the daughter.

23. On April 27th, 2016, the mother moved to Russia Federation¹⁴, taking the daughter with her, without the father’s knowledge and consent¹⁵, who decided to claim her return with a judicial claim reported in the Court of the Judicial district of Dzerzhinsky (Russia Federation).

B) Rights record

24. On 27th October 2016 the Court of the Judicial district of Dzerzhinsky (Russia Federation) dictated a resolution dismissing the judicial claim submitted by the father.

25. The regulatory framework of this issue is the Convention on the civil aspects of international child abduction (concluded 25 October 1980), being Spain a state signatory of that Convention since September 1987 and the Russian Federation since October 2011¹⁶.

26. It is very important to be clear that Russia’s accession to the Hague Convention had already occurred, by legislative resolution European Parliament of 11 February 2015 on the proposal for a Council decision on the declaration of acceptance by the Member States, in the interest of the European Union, of the accession of the Russian Federation to the 1980 Hague Convention on the Civil Aspects of International Child Abduction¹⁷.

27. The object of that Convention is (Article 1): a) to secure the prompt return of children wrongfully removed to or retained in any contracting State and b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. To secure within their territories the implementation of the objects of that convention; the article 2 establishes that contracting states shall take all appropriate measures, in our case it is an obligation for both: Spanish and Russian authorities.

28. The resolution of the court of the Judicial district of Dzerzhinsky (Russia Federation) concluded October 27th, 2016, has been appealed by the father at the San Petersburg Court.

¹⁴ M. D. ADAM MUÑOZ. “El Convenio entre España y la Unión de Repúblicas Socialistas Soviéticas sobre asistencia judicial”, Poder Judicial, nº 51, 1998, pp. 377-407.

¹⁵ S. ÁLVAREZ GONZÁLEZ. “El Convenio Internacional de la Haya sobre los aspectos civiles de la sustracción internacional de menores ante el Tribunal Supremo”, en *Revista Jurídica española La Ley*, núm. 4685, 3 de diciembre, 1998, *passim*. At the international level, ANTÓN, E.A., “The Hague Convention on International Child Abduction.” *The International and Comparative Law Quarterly*, vol. 30, no. 3, 1981, pp. 537–67. JSTOR, <http://www.jstor.org/stable/759286>, accessed 6.12.2023.

¹⁶ The conclusions of the Special Committee on the practical operation of the Hague Conventions of 1980 and 1996 (1-10 June 2011) should not be lost sight of.

¹⁷ (COM(2011)0911 – C8-0266/2014 – 2011/0447(NLE)).

29. It remains to add that we are dealing with a very complex case, as can be seen. This is fundamentally due to the fact that, while there is a notable doctrine, legislation and jurisprudence¹⁸ for a case that occurs internally between EU countries, the same does not happen when we are faced with, as in this case, a matter that takes place between a Member State of the EU and a foreign State, such as Russia.

II. Proven facts in the case judged by the Court of the judicial district of Dzerzhinsky

30. First proven fact: the daughter has her habitual residence in Seville (Spain), this aspect is also accredited by the resolution of the Court of the Judicial district of Dzerzhinsky (Russia Federation) concluded October 27th, 2016. The concept of habitual residence¹⁹ of a person is identified by the international doctrine, law and jurisprudence with the center of interests of his life, therefore, with the place where that person develops his existence in a linked and permanent way, being a real concept, which needs to be specified by all the elements in the situation. In this case, there is no doubt about the daughter's habitual residence being Seville (Spain): in fact, the minor has resided in Seville with her parents since she was born and she has roots only in Spain because is the country where she goes to school (in an Infant and Primary education center), where she has guaranteed the universal health coverage through a permanent medical insurance, where she has her friends acquaintances, where she lives with her paternal grandparents, where she has her family house, etc²⁰.

31. In this way, the jurisprudence of the European Court of Justice has pronounced, for example with judgments like the one issued on April 2nd, 2009, in the 523/07 case and the one issued on December 22nd, 2010, in the C-497/10 PPU. In both resolutions, this Court has indicated that the minor habitual residence needs to be determined considering all the facts circumstances which are specifics in each case and must be able to demonstrate the minor's integration in a family and social environment: specially, we need to take into consideration, the duration, the regularity, the conditions and the reasons to stay in a state's territory, the minor's nationality, the place and conditions of the school's education, the knowledge of languages and the family and social relationships of the minor in that State. In this particular case, all of the above-mentioned points to Spain and no to Russia Federation where the minor has been only temporarily and passingly.

32. Second proven fact: the removal of the daughter by her mother to Russia Federation is illicit. In fact, the case known by the court of the Judicial district of Dzerzhinsky which ended up with the October 27th 2016 resolution is included in the course of the article 3 of The Hague Convention of 1980 which was mentioned above, so the contracting states' authorities (Spain and Russia Federation) should cooperate and guarantee the prompt return of the minor to the country where she has her family home (Spain), where she has the center of gravity in her life and her personal and family roots.

33. Third proven fact: the removal of the daughter by her mother to Russia Federation does not count with the father's approval, neither express or tacit. Following the indications written in article 3 and 5 of The Hague Convention (1980), in the letter b), it can affirm that the father's right of custody, which was exercising effectively in Spain, together with the mother, has been violated, after the illicit transfer of the child to Russia Federation. This means a flagrant attempt against the father's right relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5.a of the Convention). Situation which is even more aggravated because the mother never informed the father about their daughter's move, which is a very serious fact.

¹⁸ Although sometimes it is conflictive, as is the case with the doctrine established by the Court of Justice of the European Union -CJEU- and the European Court of Human Rights -ECHR-.

¹⁹ Vid. *supra*, int.

²⁰ Vid. also, M. MONTÓN GARCÍA: *The abduction of minors by their own parents*, Valencia, ed. Tirant Lo Blanch, 2003, *passim*.

34. Fourth proven fact: the father has been correctly meeting his custody's obligations²¹. This is confirmed by the resolution of the Court of the Judicial district of Dzerzhinsky, concluded October 27th, 2016:

“The defendant claims that the father, ..., did not exercise his custody's right at the moment of the removal, but this argument has not been demonstrated by the defendant neither proven at court. Aside from the defendant's verbal explanations, who is interested in obtaining the most advantageous result for her, no other objection or evidence have been submitted. Not only that, but the defendant also argument has been rejected by the evidence, which were submitted by the plaintiff. These evidence prove the right compliance of his custody's obligations with the minor, including materials as videos and pictures.”

35. Fifth proven fact: the best interest of the minor demands her immediate return to Spain, the country where she has her habitual residence. The Hague Convention of 1980, which links to Spain and the Russia Federation²², makes concrete the best interest of the minors (supreme guide of action of the States authorities) with the immediate return of the minors who are victims of an illicit abduction of the habitual residence²³.

36. For all the arguments mentioned above and bearing in mind that from the moment the mother moved, illicitly, to Russia Federation with the minor, less than a year has gone by, it is appropriate the immediate return of the child to Spain²⁴. In this way, article 12 of The Hague Convention (1980) in the first paragraph:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith”²⁵.

III. Incorrect implementation of the exception written in the Article 13.B of the hague convention (1980)

37. The previous juridical consequence only could be demurred if some of the suppositions indicated in the article 13 and 20 of The Hague Convention are fulfilled. From among them, the court of the Judicial district of Dzerzhinsky, in its resolution concluded October 27th, 2016, has used the supposition

²¹ S. ÁLVAREZ GONZÁLEZ: *Visiting Rights and Hague Convention on the Civil Aspects of International Abduction of Minors: The Spanish practice*, http://dspace.usc.es/bitstream/10347/7842/1/pg_257-278_dereito14-2.pdf, 2005. Accessed on 30.01.2019.

Is also available: GONZÁLEZ VICENTE: “Sustracción internacional de menores: interpretación del derecho de custodia en el sistema jurídico español: En relación con el Convenio de la Haya de 25 de octubre de 1980”, en *Revista Jurídica de Castilla y León*, nº 11, 2007; C. HAMILTON and M. EVERALL, *International Child Abduction*, Londres, 1994.

²² I. F. FLETCHER, *Conflict of Laws and European Community Law; with especial reference to the Community Conventions on Private International Law*, Amsterdam, 1982, pp. 22 ss.

²³ The illicit removal of the child to the Russia Federation, not only violates the right of custody of the father, but what is more serious, also violates the normal emotional, familiar, psychological, affective and educational development of the minor: in effect, the mother has moved her illicitly interrupting the school year (April 2016), she has removed her from her social and familiar environment (her paternal grandparents also live in Seville), she has separated her from her father, with whom she has an excellent relationship, and she tries to force *de facto* her rooting in the Russia Federation, by winning time fraudulently which should not be admitted by that country's authorities.

²⁴ S. GARCÍA CANO: *International cooperation between authorities in the framework of the protection of minors in Spanish private international law*, 2002, accessed on 02.02.2017: <http://helvia.uco.es/xmlui/bitstream/handle/10396/405/13208299.pdf?sequence=1>. Córdoba University, Faculty of Law.

²⁵ A. L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ: «Problemas del secuestro internacional de menores», *Actualidad Civil*, nº 21, 1998, pp. 481-527; M. CALVO GARCÍA: «La protección del menor y sus Derechos», *Derechos y Libertades. Revista del Instituto de Bartolomé de las Casas*, oct. 1993-marzo 1994, pp. 177-199; or J. MASSON, R. BALLELY-HARRYS, R. PROBERT: *Principles of Family Law*, Sweet & Maxwell, 6th ed., Londres, 1997, *passim*.

established in the article 13.b to declare the unadmission of the complaint presented by the father. Notwithstanding the provisions of the Article, the authority of the requested State (Russia Federation) is not bound to order the return of the child (the daughter) if the person who opposes the return establishes that²⁶:

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

38. Well then, in the following lines it will be proved that this rule cannot be applied to our case, therefore, the immediate return of the child to Spain, continues being obligatory. There are several reasons for what not to apply the exception established in the article 13.b of The Hague Convention.

39. The first reason, from a procedural law point of view, the article 13 of the Convention requires that the person who is opposed to the restitution of the minor *demonstrates* the serious risk in which this one would remain exposed if the minor returns to the country of his or her habitual residence. The resolution of the court of the Judicial district of Dzerzhinsky (Russia Federation) concluded October 27th, 2016, is clear in this aspect: “The obligation to prove the existence of circumstances that prevent the return of the minor relapses on the person who is opposed to the return of the minor”

40. In Spain, country of the habitual residence of the minor, the jurisprudence is also conclusive in this point²⁷. In the case that occupies us, not proof has been demonstrated or given to accredit the above-mentioned serious risk. They are not enough to apply the exception provided in the article 13.b of The Hague Convention. They are just vague, generic and imprecise affirmations. It is required a real and concrete proven activities to generate the definitive conviction of the judge and the parts of the trial. The resolution of the court of the Judicial district of Dzerzhinsky (Russia Federation) concluded October 27th, 2016, doesn't indicate that any evidential procedure has been carried out, and doesn't indicate neither the proofs that have been requested, given or put into practice, in this matter.

41. The second reason, from a substantial perspective, the resolution concluded October 27th, 2016, limits itself to indicate in a vague and imprecise way the following considerations:

42. a) “The daughter's age make her depends on her mother not only psychologically but also physiologically”. From the juridical and scientific point of view, this affirmation is debatable, just because the psychological dependence of the daughter with her mother has not been accredited in any way. This has been pointed in Spain, the daughter's country of residence, by the Circular 6/2015 de la Fiscalía General del Estado: with these allegations, the general rule should be to deny the application of this exception, otherwise, we would be allowing to the one who commits the illicit action and who dominates the situation and can avoid the damage, to success under that situation.

²⁶ The full content states:

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

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

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

²⁷ Order of Audiencia Provincial de Baleares (section 4^a) n° 229/1999 concluded on June 6th, and order of Audiencia Provincial de Santa Cruz de Tenerife (section 1^a) n° 415/2007, concluded in November 27th.

43. b) Quite the opposite happens in this case: The resolution of the Court of the Judicial district of Dzerzhinsky demonstrates as a proven fact (4, *supra*) that the daughter has a closer relationship with her father, who is exercising his custody's right correctly which can be materially proven with the pictures and videos submitted in the claim.

44. c) There is also no explanations or proof about why the daughter depends on her mother physiologically, considering the international jurisprudence (for example, Judgement Court of Justice of the European Union of December 22nd, 2010, above mentioned), the mother's physiologically dependence can only exist in the case the minor was still nursing, which is not happening in our actual case. WHO/OMS has established as recommendation to breast-feed exclusively during six months, and after that, the introduction of suitable food, keeping the nursing up to two years in general²⁸. In our actual case, the minor X- stopped nursing months ago, therefore, the physiologically dependence of the daughter with her mother has not been accredited; this leads to the conclusion that the dependence exists of any of the progenitors, -father or mother- for example, in everything related with garment, education, nutrition, leisure, rest time, personal care, medical care, etc. To claim that all of these obligations can only be done by the mother, is a clear sex discrimination against the father which it is prohibited in The Universal Declaration of Human Rights (article 2) adopted by General Assembly of the United Nations on 10 December 1948, and in the International Covenant on Civil and Political Right adopted by the General Assembly of the United Nations on 19 December 1966.

45. d) Finally, the Court of the Judicial district of Dzerzhinsky, in its resolution concluded October 27th, 2016, refers to the Declaration of the Rights of the Child (1959)- principle VI- to establishes that a child of tender years shall not be separated from his mother. But this reference cannot be admitted, first because that principle admits exceptions. Secondly because these exceptions need to be defined in legislative texts, like The Hague Convention of 1980 which contemplates custody only for one of the progenitors (in this case the father). Third, in case of conflict between both normative instruments, The Hague Convention of 1980 is legally binding for the contracting states, however, the Declaration of 1959 is just a general policy statement. Also, the Convention is later in date than the declaration, therefore takes precedence over that one. (Vienna Convention on the law of treaties signed at Vienna 23 May 1969 – article 30.3, being States parties Spain and Russia Federation).

46. From a finalist perspective, as three reason, at no time it has there been an accreditation about the grave risk that the return would expose the daughter to physical or psychological harm or otherwise place the child in an intolerable situation. (The Hague convention of 1980- article 13.b). These are situations to apply only at exceptional cases and following strict guidelines of interpretation. (Ex.: order of the Audiencia Provincial de Barcelona [Sección 18^a], n° 91/2006, de 4 de abril, y n° 54/2012, de 13 de marzo; and order of the Audiencia Provincial de Guipúzcoa [Sección 2^a] n° 2086/2005, de 14 de septiembre). The order of the Audiencia Provincial de Las Palmas (Section 3^a) n° 69/2009, de 10 de marzo, declares that it would be necessary to accredit that, in the case the return is authorized, the minors are in a grave risk situation, for example because they may be treated roughly or they may be subjected to sexual abuse, or they may be at mercy of an irresponsible person or with a person who gives the child a bad example (delinquency, alcoholism, drugs...). In this actual case of conflict, this situation it not happening, in fact, it has been accredited that the father is an exemplary father.

47. In addition, the situation of risk must be objetivable, (Order Audiencia Provincial de Tarragona n° 82/2005, de 3 de mayo) y *and the risk must be high or serious* (Auto de la Audiencia Provincial de Lugo [Section 1^a], n° 272/2005, July 18th). In conclusion, it is necessary the existence of serious evidence of that possible contingency (Auto Audiencia Provincial de Lérida [Section 2^a] n° 10/2012, January 27th). In our case, we do not have those signs²⁹.

²⁸ https://www.who.int/health-topics/breastfeeding#tab=tab_1, online 06.12.2023.

²⁹ Which have been masterfully treated by B. GÓMEZ BENGOCHEA: *Civil Aspects of International Child Abduction*:

48. Ultimately, no specific investigations have been done to demonstrate that the return of the daughter to Spain, country where she has her habitual residence, could cause a grave risk or an intolerable situation, even though the Russian Court could have used the opportune mechanisms to prove it. (Ordinanza de la Corte di Cassazione italiana de 5 2011, October 6th). Only indicates -the Russian Court- in a generic, abstract and vague way, that “the return may not guarantee the best interests of the child, neither the mother’s rights”. These types of allegations do not prove anything”. (Cour d’Appel de Paris, 2005, October 27th)³⁰.

49. a) In this particular case, the interest of the minor has not been specified. That interest cannot be the mother’s interest, who wrongly removed the child to the Russia Federation. The paragraph 29 of the explanatory report of The Hague Convention which insists on applying the exceptions (article 13) considering only the child’s interest, in this particular case, the daughter’s interest, not the mother’s interest or the father’s interest³¹. The interest of the minor is in Spain since she was born, she has roots only in Spain because is the country where she goes to school (in an Infant and primary education center), where she has guaranteed the universal health coverage through a permanent medical insurance, where she has her friends acquaintances, where she lives with her paternal grandparents, where she has her family home... The resolution of the Russian Court expressly recognizes “the wrongful removal of a child from the place of usual residence doesn’t meet the minor’s interests and it can be more traumatic”.

50. b) Among the arguments, it was argued that the resolution only protect the mother’s rights, because if so, we will be ignoring the father’s rights, and the need to be treated equally. It is about to protect the child’s rights³²; as demonstrated, the best guarantee for it is returning the child to Spain immediately.

51. Those are the three reasons for what not to apply the exception established in the article 13.b of The Hague Convention, the facts to apply this exception are not met from the procedural law point of view, neither from the material or teleological point of view. Therefore, the Russia Federation authorities shall order the immediate return of the child: the daughter X to her habitual residence country. Otherwise, the right of custody of the father would be infringed and even more seriously: also, the normal emotional, familiar, psychological, affective and educational development of the minor.

IV. The difficulties of jurisprudential dialogue

52. We thus arrive at the point where the jurisprudential debate remains open, because one of the most pressing difficulties was to safeguard the exception of art. 12 CLH. The Spanish Constitutional Court had just ruled on this content, we mean that the referenced matter was still *sub iudice*, in St. núm. 16/2016, February 1.

53. The Explanatory Memorandum of Convention responds to the desire “to protect the minor, at the international level, from the harmful effects that could be caused by an illicit transfer or retention and to establish procedures to ensure the immediate return of the child. minor to the State in which he has his habitual residence, as well as to ensure the protection of the right of access”. In line with this, art. 1 establishes that: “The purpose of this Convention shall be the following: a) To ensure the immediate return of minors unlawfully transferred or retained in any Contracting State. b) To ensure that the custody and access rights in force in one of the Contracting States are respected in the other Contracting States”³³.

Problems of Implementation of the Hague Convention of 25 October 1980, Madrid, ed. Dyckinson, 2002. And at France, M. SUMAMPOUW, *Les nouvelles Conventions de La Haye. Leur application par les juges nationaux*, t. V, T.M.C. Asser Institut., 1996.

³⁰ In the same way, Audiencia Provincial de Madrid, in its resolution (Section 22) n° 187/2005, September, 5.

³¹ E. PÉREZ VERA, cit., *supra*.

³² A.L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, last cit., p. 562.

³³ STC 16/2016.

54. We have been aware, throughout this case and this research work, that the main difficulties arise in relation to the different regulations and the radical and contrary position of the judicial interpreter in the Russian Federation. But we understood - and we think so now - that the guiding criteria of the Hague Convention, given that Russia had acceded in 2016, had to be applied rigorously.

55. Therefore, the judicial resolution of TC clarifies that the Convention “arbitrates a procedure whose duration should not exceed six weeks (art. 11), which seeks, simply, the return of the illegally transferred minor, but without the decision adopted in this procedure affecting the substance of the custody rights that the minor can be held (art. 19). It follows that we are faced with a process of urgent processing and of a summary or provisional nature, since the resolution issued does not prejudge the custody rights over the minor, which must be elucidated in another process and by the Court that is competent in each case” (STC 120/2002, of May 20 (LAW 5839/2002), FJ 4).

56. Also the European Court of Human Rights, in jurisprudence subsequent to the ECHR (Grand Chamber) of 6 July 2010 (case of Neulinger and Shuruk v. Switzerland), which required an in-depth examination of the entire family situation (paragraph 139; STEDH (Third Section) of December 6, 2007, case of Maumousseau and Washington v. France, paragraph 74), has considered that a harmonious interpretation of the 1980 Hague Convention and the right to respect for private life and family, art. 8 CEDH (LAW 16/1950), provided that the following two conditions are met. Firstly, that the factors that may constitute an exception to the immediate return of the child in application of arts. 12, 13 and 20 of the Hague Convention, particularly when invoked by one of the parties, are actually taken into account by the requested court. This court must adopt a sufficiently reasoned decision on this point, allowing the Court to verify that these issues have been examined effectively. Secondly, these factors must be evaluated in light of Article 8 of the European Convention, citing the S TEDH (Grand Chamber) of July 6, 2010, Neulinger and Shuruk v. Swiss; (Grand Chamber) of November 26, 2013, case c. Latvia, paragraph 106; July 1, 2014, Błaga v. Romania, paragraph 69 and April 28, 2015, Ferrari v. Romania, paragraph 47”.

57. It is not strange that this led to some author, judge and investigator³⁴, and in the words of the most recent doctrine, “the best interest of the minor in its projection in the right of custody, is protected in the legal system both by civil and by criminal means, with civil means used preventively to avoid consequences as serious as the commission of a crime of child abduction, taking into account that the main person harmed by these behaviors will always be the minor, regardless of the fact that in the majority In these cases, one of the parents alleges that no custody regime is being violated, but rather that what is being done is to protect the minor from the other parent. It is not necessary to resort to such drastic decisions that in many cases also motivate non-compliance with judicial resolutions. Whenever it is observed that one of the parents could be committing acts that allegedly constitute crimes against one of the children, they can resort to the criminal jurisdiction in order to protect the minors, not as an instrument to evade compliance with a judicial resolution that is not in accordance with the wishes of a parent. It is necessary to remember that, although parental authority is configured as a right, it is also a duty, a duty that entails the protection of minors, avoiding harm to them, harm that is undoubtedly caused when they are deprived of their right to interact with the other parent. by changing place of residence. The analysis of all current regulations and jurisprudence makes the analysis of these issues easier, through a global vision, even in the matters that arise in the mixed bodies and courts of first instance that know this matter, in order to resolve with a complete knowledge of the consequences that the improper exercise of custody rights can entail and try to prevent the negative consequences that this has for minors from the beginning.

58. The most recent jurisprudence on art. 13 b) offers the essential elements that must be assessed in each case so that this exception can be applied. Only through these adjustment mechanisms can the application of the Convention, at this point, be brought closer to principles of material justice.

³⁴ M. E. SANCHO HERRERA. “Sustracción de menores. Aspectos civiles y penales (1)”, *Diario La Ley*, núm. 10391, Secc. Trib., 20.11.2023., p. 1/19.

59. The key judicial resolution³⁵, which in turn refers to *Re M (Abduction: Zimbabwe)* [2007] 3 WLR 975, is 10.07.2020, NIFam 9, from the High Court of Justice in Northern Ireland applying European jurisprudence, determines³⁶:

“[16] In this case the exception referred to in Article 13(b) of the Convention was the critical point at issue. All counsel accepted that this exception requires a high level of proof as articulated in the various authorities and that the burden lies on the person opposing return to substantiate the exception. I also bear in mind that there is a residual jurisdiction not to order return depending on the circumstances of a particular case. This flows from the House of Lords decision of *Re M (Abduction: Zimbabwe)* [2007] 3 WLR 975. [17] The test in relation to grave risk that was set out in the arguments emanates from the case of *Re E (Children)* [2011] EWLR from paragraphs [32] to [36] as follows:

60. “32. First, it is clear that the burden of proof lies with the person, institution or other body which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33. Second, the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk be real. It must have reached such a level of seriousness as to be characterized as grave. Although grave characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as grave while a higher level of risk might be required for other less serious forms of harm.

61. “34. Third, the words physical or psychological harm are not qualified. However, they do gain colour from the alternative or otherwise placed in an intolerable situation. As was said in *Re D* [2007] 1 AC 619 at para 52:

‘Intolerable is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate.’

62. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr X accepts that, if there is such a risk, the source of it is irrelevant, for example where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

63. “35. Fourth, Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr X accepts that if the risk is serious enough to fall within Article 13(b) the court is not only concerned with the child’s immediate future, because the need for effective protection may persist”.

³⁵ Case Law, Family Division, [2020] NIFam 9, KEE11284.

³⁶ Sects. 16 and 17.

64. “36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr X submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues”.

V. Concluding notes

65. Both the investigation and the forensic practice in the field of child abduction, regardless of its civil and criminal effects, allow us to elucidate that there are two components that are the ones that most emphatically act for the arguments of the judicial claim and its response: We refer to the concept of housing or habitual residence, on the one hand, and, on the other, to the exception of art. 13, which thus becomes the entry point for the protection of the States to the national person to legitimize that the immediate return of minors does not occur.

66. Habitual residence is specified in the place of the “social center of life” or “place where the interested party has voluntarily established his permanent center of interests on a stable basis.” The habitual residence of a person is the place where they have the permanent or habitual center in which their interests are located (STJUE November 25, 2021, C-289 / 20, IB vs. FA, FD 38. It is a matter of fact that represents a “real, objective, serious and effective link with the territory of the State...”. And it is, in short, made up of two elements: it is made up of two elements: (a) the will of the interested party to fix the habitual center of his interests in a certain place and (b) a presence that has a sufficient degree of stability in the territory of the Member State in question (STJEU November 25, 2021, C-289/20, IB vs. FA, FD 57).

67. Regarding art. 13 b., at first, it is clear that the burden of proof lies with the person, institution or other body which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities.

68. An important fact -as second- is that the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk be real. It must have reached such a level of seriousness as to be characterized as grave. Although grave characterizes the risk rather than the harm, there is in ordinary language a link between the two.

69. Third, the words physical or psychological harm are not qualified: “Intolerable is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate”, says CJUE.

70. So, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true.

71. But, and as we said at the beginning, Law is more a science of problems than of solutions. Therefore, its preventive scope is, certainly, scarce.