IAFL Introduction to European Family Law Conference, Thessaloniki, Greece

Thursday 18 April
13:00 - 14:45

Session 4: Crossborder families in times of trouble (war, refugee issue etc)
Speakers and Papers

IAFL INTRODUCTION TO EUROPEAN FAMILY LAW CONFERENCE IN COLLABORATION WITH THE LAW SCHOOL OF ARISTOTLE UNIVERSITY, THESSALONIKI
EDUCATION PROGRAM

Thursday 18 April

13:30-14:45 **Session 4:** Crossborder families in times of trouble (war, refugee issue etc)

Speakers:
1. Ed Freeman, Israel
2. Dimitrios Kourtis, Greece
3. Oksana Voinarovska. Ukraine
4. Brikena Kasmi, Albania

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***מוסמך בניו יורק ובישראל**

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Edwin Freedman Curriculum Vitae

Edwin Freedman is an attorney licensed to practice in the State of New York and in Israel. He received his B.A. from Boston University in 1970 and a J.D. degree from Rutgers - Newark School of Law in 1973. He was an Assistant Corporation Counsel for the City of New York, Family Court Division, for three years. He has been practicing law in Israel since 1980. The primary focus of his practice is in the area of family law. He is also a board member of the International Academy of Family Lawyers and serves as chair of the Amicus Brief Committee of that organization. As committee chair,he was responsible for filing amicus briefs in the Supreme Court of the United States, the Supreme Court of England and Wales and the Cour de Cassation in France. He is one of the correspondents of the journal International Family Law published in England.

He authored the chapter on Israel for the book Family Law - Jurisdictional Comparison, 5nd ed., edited by James Stewart, published in 2013 by Thomson Reuters. He alsowrote the article "Rights of Custody: State Law or Hague Law", for the book, The 1980Hague Convention: Comparative Aspects, edited by Robert Rains, Wildy Simmonds & Hill Publishing, 2014. He authored the chapter on Israel for the book International Relocation of Children, edited by Anna Worwood, Thomson Reuters, 2016.

He was the Israel Bar Association representative to the Israeli Knesset from 1999-2011 for all legislative matters and participated in all aspects of legislative committee deliberations.

He served as an observer on behalf of the International Academy of Family Lawyers at the 2nd through the 7th Special Commissions to review the implementation of the Hague Convention on Child Abduction held at the Permanent Bureau in the Hague.

He has lectured on Israeli law before the International Academy of Family Lawyers and on the implementation of the 1980 Hague Abduction Convention in various Israeli and international forums.

He has submitted legal opinions and testified in courts in the United States, England and Wales, Australia and other jurisdictions regarding the law in Israel.

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Dr. Dimitrios A. Kourtis holds a PhD from the Aristotle University of Thessaloniki. He is currently a Post-doctoral Researcher and Teaching Fellow at the School of Law of the Aristotle University of Thessaloniki and an Adjunct Lecturer at the Supreme Joint War College of the Hellenic Armed Forces. He holds an LL.M in Public International Law from the School of Law of the Aristotle University. His research interests focus on international law, public policy, and human rights law. He is an accredited public policy disputes mediator and a national expert on international law and reparative justice, providing specialist services to the Inter-Party Parliamentary Committee on WWII Reparations of the Greek Parliament. He speaks English, French, and Spanish while possessing a functional understanding of Portuguese and Hebrew. He is currently a reparations expert collaborating with CoE's Register of Damage Caused by the Aggression of the Russian Federation against Ukraine and the Ukrainian Government focusing on the interaction between public and private international law vis-à-vis the various available reparative pathways.

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Oksana Voinarovska has been practicing law since 2001, after graduating from Ivan Franko National University of L'viv (Ukraine).

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Oksana is a member in various professional associations in Ukraine and abroad:International Academy of Family Lawyers (IAFL), International Bar Association (IBA), TerraLex, Ukrainian Bar Association. She is a mediator accredited by the Centre for Effective Dispute Resolution (CEDR), London, UK.

Oksana has been top ranked by Chambers, The Legal 500, Best Lawyers as the leading professional adviser in Private Client sphere in Ukraine.

Bio

Ms. Kasmi has been an attorney – at – law from 2001 and on and is specialized in media law and international private law. She is currently the managing and funding partner of AFortiori-legal-counsels law studio. Her experience includes civil society and project management; public administration and private law firm.

In addition, Ms. Kasmi has more than 12 years of experience as a professor and lector in the university and is author of more than 38 articles on human rights in national and international journals. Ms.Kasmi holds PhD in media law and has doctorated under the thesis of "*commercial activity of media companies*" from 2016. She is the author of academic books "Media law – General part (i) and Particular part (ii). She is co-author of mediation law *commentary*, co-author of the prevention of the conflict of interest law *manual* and *commentary* and has participated in the drafting of more than 98 *legal acts* including (i) the law on registration of real estate with the focus of women property rights; (ii) the criminal and civil code with the focus of libel and defamation; (iii) the mediation and arbitration law with the focus of establishing procedures on lawyer appointment; (iv) the criminal procedures code with the focus of reform of preliminary procedures, etc.

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International Terrorism and the Hague Convention on Child Abduction

Edwin Freedman – 2002

The widespread use of random acts of terror in Israel which accompany the present Palestinian uprising, or intifada, have dramatically increased the use of the grave risk of physical harm defense provided by Article 13B of the Hague Convention on the Civil Aspects of International Child Abduction. Until now, the physical harm defense has been primarily raised where there exists specific risks of physical harm due to a violent member of the immediate family, or where the child's surroundings place him in an intolerable situation from which the requesting state is unable or unwilling to protect him.

Apart from petitions in which Israel is the state of habitual residence. The defense has not been used to claim that the general security situation in a requesting state constitutes a grave risk of physical harm. Fortunately, since the implementation of the Convention, none of the contracting countries have been in a declared state of war. Although random acts of terror have occurred in a number of Hague Convention signatories, it is rare to find a Hague state where sustained acts of terror exist on a wide scale. Recent events in Israel have made it the subject of the most widespread use of the grave physical harm defense. This article will analyze recent case law in which the return to Israel was opposed based on the Article 13b grave risk of physical harm defense.

Nature of the Harm

Article 13B states that the risk of harm must be grave, but there is no definition of the gravity of the risk. Harm is not defined as severe or even as serious. However, the courts have read the conclusion of subparagraph "b", "or otherwise place the child in an intolerable situation", into the degree of the physical or psychological harm allegedly awaiting the child.

1. The phrase "or otherwise" demands that the agree of the physical or psychological harm also be intolerable.

In conjunction with the general approach of applying a narrow interpretation to defenses under the Convention, the physical harm defense has rarely been successfully argued.

2. The rare instances where the physical harm defense has prevailed involved the use of violence in the immediate environment or sexual exploitation where the courts in the state of habitual residence failed to adequately protect the minor. (see Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999).

The difficulty in proving the physical danger defense is a result of the tension between the need to prove the likelihood of danger to the individual child and the randomness of terror. Two different tests can be applied to the physical danger defense. One test would assess the security situation in the country as a whole. The other would be to determine whether the there is a grave risk posed by the immediate surroundings of the specific child in question. The burden of proof is a particularly onus one. While all defenses under the Convention are to be narrowly interpreted, both Israel and the United States have adopted regulations requiring clear and convincing evidence to prove an Article 13b defense.

The threat of random physical violence exists in varying degrees in many urban areas in the United States, but it is not this type of physical danger, which was intended to constitute a defense under Art. 13b. The test was best described in the United States Federal Court case of Friedrich v. Friedrich (Friedrich II), 78 F.3d 1060(6th Cir. 1996). The court stated that for purposes of the Convention, grave risk of harm could exist in only two situations. The first situation deals with the risk of intolerable physical harm. The court defined it as "returning the child to a zone of war, famine or disease". The second situation exists where there is serious abuse or neglect and the country of habitual residence is incapable or unwilling to adequately provide protection to the child.

If the courts were to focus on the specific circumstances of the individual child as opposed to the level of danger in the country as a whole, it could be held that in post-September 11 New York City a child who is to live in a skyscraper may be at grave risk of intolerable physical danger. By the same token, it could be argued that returning a child to a neighborhood with a very high crime rate meets the physical harm defense.

The problems with this test are twofold. First, it requires the court to hear extensive evidence as to the relative levels of violence in particular areas or neighborhoods of the requesting state. It further requires courts to apply culturally biased criteria that are highly subjective. The risk of random violence in certain areas of Washington D.C. or Los Angeles may be considered intolerable to a judge in a small Scandinavian town.

Second, there is no provision in the Convention, which requires the return of a child to a specific location. In fact, there is no mention, apart from the introduction, of return to the state of habitual residence. Thus, the requesting parent could have changed his or her place of residence between the commencement of the action and its conclusion. It would therefore be an elusive and futile task to determine whether a particular location within a country presents an intolerable physical danger.

The use of the Article 13B physical danger defense involving Israel has been on the rise since the present intifada, which began in September, 2000. Terrorist attacks against civilian targets by the Palestinians have become more commonplace in their conflict with Israel. The last six months have seen a dramatic increase in the use of this defense whenever Israel has been the requesting state. It is safe to say that a physical danger defense is now almost de rigueur in any Hague Convention case in which Israel is the state of habitual residence.

The risk of physical danger argument was first used following the disturbances that broke out in Israel in 1996 after the opening of a tunnel under the Old City of Jerusalem located near the Al Aksa Mosque. A mother left her home in Israel with the couple's four year old daughter for an alleged visit to the United States. The mother notified the father while in the U.S. that she wasn't returning. In response to the father's Hague petition, the mother argued that Israel had become a war zone as defined in Friedrich. She submitted maps and other documents to show the close proximity between the fighting and the marital home. She also referred to the use of random violence consisting of car bombings.

The court rejected the mother's grave risk defense after hearing evidence regarding the conduct of daily life in Israel. "The court would agree that at this time Israel is experiencing some unrest and that this unrest may be in relative proximity to the family's residence. However, the court does not find sufficient evidence in this record for Israel to be the "zone of war" contemplated by the Sixth Circuit or the Hague Convention. No schools are closed, businesses are open and Petitioner was able to leave the country. It appears that fighting is limited to certain areas and does not directly involve the city where the child resides." Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996, at 446).

It cannot be said that the events of last September 11 have had a direct impact on the assessment of grave risk by the various courts. It can be inferred that the need for stricter security measures, previously common to Israel, is better understood now in other contracting states. The vulnerability of countries once considered beyond the reach of terrorist acts of mass destruction has internationalized the issue of exposure to physical danger.

Courts examining the physical safety defense since Freier for the most part have not done an in depth legal analysis regarding the degree of danger which must be proven to establish the defense. The issue of local or neighborhood security versus risk of danger in general has also not been fully explored.

Most significant in the discussions of the physical danger defense is the refusal of courts to deviate from the general principle that all defenses are to be interpreted restrictively.

The Relativity of Violence

One theme that appears in many of the cases is the lack of good faith in raising the issue. The abducting parent is usually actively involved in making the decision to move to Israel. In some cases, the abducting parent was the side that initiated the move. In other cases, the parties had been living in Israel for many years; all their children were born and raised there. The sudden concern over the security situation only seemed to develop after the abducting parent was required to defend against a Hague Convention petition.

The case of Cornfeld v. Cornfeld (Superior Court of Justice-Ontario,File No. 01-FA-10575, November 30, 2001) is instructive. The parents had lived for over 20 years in Israel and had five children born and raised there. After the divorce, physical custody of the three minor children was granted to the mother. The mother unlawfully retained the two youngest children in Canada while there on a visit. The third minor child, 16 years old, remained in Israel in the family's former residence.

The mother raised the 13B physical danger defense to the father's petition under the Hague Convention. Her acute concern for the physical safety of her two youngest children was not very convincing in light of the total disregard she displayed regarding the physical safety of her sixteen year old. Despite the submission of testimony by alleged experts on the dangerous security situation in Israel, the court in Ontario had no trouble rejecting her defense. The case introduces what my be coined the voluntary risk test. A parent who knowingly and freely chooses to raise children in Israel cannot suddenly claim that the situation is intolerably dangerous to justify abduction. The court stated, "In my view it is important to consider the environment to which a parent or the parents voluntarily exposed the children previously. In my view, it is fair to conclude on the

evidence that living in Israel at any time over the past 25 years had risks of harm associated with it. The parents did not seek to remove their children from that environment" (par. 14, p.2 id).

The court of Appeals For Ontario upheld the findings of the lower court in its rejection of a motion to stay (Docket M28020 of December 4, 2001). Regarding the nature of the test imposed by Article 13b, the mother claimed that the court had laid down a more onerous test than that required by the Convention.

The appellate court relied on the benchmark case of the Canadian Supreme Court, Thomson v. Thomson, (1994) 3 S.C.R.551 which analyzed the psychological harm defense under Article 13(b). The court held that the physical harm defense also requires proof "on a balance of probabilities that there is a very strong likelihood that harm will occur". (par. 7, page 4). The importance of the analysis is the application by the court of the standard, which the case law has established in proving the psychological harm test under Art.13b.

The knowing commitment criteria was adopted by the District Court of Zweibruecken, Germany in the matter of Watkins v. Watkins, docket no.1F 3709/00, January 25, 2001.

The Watkins case is of particular importance as both parents are American born and raised. The father, who served in the U.S. military, had agreed to a special contract whereby he was assigned to a post in Israel for a minimum period of two years. His wife, an officer in the U.S. Air Force reserves, agreed to move to Israel for the duration of the assignment. The family arrived in Israel in June, 2000.

Four months later, the mother went to Germany, their previous station, to fulfill her reserve duty. She took their young son as well. At the completion of her reserve assignment, the mother announced that she is returning to the U.S.

The father filed a Hague convention petition for the return of his son to Israel. After finding that the child's habitual residence was in Israel, the court addressed the risk of physical harm defense raised by the mother. The court succinctly states: "in particular, the respondent needs to be alerted to the fact that the violent disturbances in the Near East have occurred not only since October, 200 but already at a point in time when it was in accordance with their life plan to live in Israel". (page 4, Watkins).

The court found significance in the mother's prior agreement to relocate. The mother knew when she agreed to move to Israel that there were risks regarding terrorist attacks. What makes this of particular significance is the dates. When the Watkins moved to Israel in June, 2000, the Camp David negotiations still a month away. Terror attacks were a rare occurrence. The current intifada began in September, 2000. The unlawful retention occurred at the end of November, 2000. By the time of the courts decision in January, 2001, terrorism had increased significantly. The mother could claim that she would not have agreed to relocate to Israel had the level of violence in June been as great as it was in November. By rejecting the mother's defense, the court in Watkins sent a clear message that the parent's choice of habitual residence cannot be unilaterally altered even in states that are subject to increased acts of terror. The mother filed an appeal, but withdrew it voluntarily.

The courts are unwilling to use random acts of terror, even when they have become a common occurrence, as a defense under the Convention.

Specific Versus General Risk

The issue of a general risk of physical harm due to terrorist attacks versus specific harm to the child in question was discussed by the Paris District Court of Family Affairs in Azoulay v. Benatouil, RG no. 0143442 decided on December 21, 2001. The child was unlawfully retained the mother while visiting by France from his habitual residence in Israel. The abducting mother raised, inter alia, the physical harm defense due to the security situation in Israel.

No specific documents were submitted by the mother to show the exact situation in Israel and the risk that the child in question would be exposed to physical harm. "Consequently, this general risk of a terror attack, while it is in no way proven that Tal's home or her neighborhood, or the location of her school are particularly exposed, cannot nullify international regulations. It should be noted that the mother has clearly never raised anxiety on this subject with her relatives, several of whose declarations have been filed". (Benatouil p.5).

The court's brief discussion of the grave risk of physical harm defense sets two different criteria for weighing the evidence. First, the court is supporting the requirement that the defense must prove specific grave risk to the child in question. Implicit to this argument is that if the school or neighborhood of the abducted child were repeatedly subject to terrorist attacks, grave risk may be proven. As mentioned above, this line of analysis is problematic and appears to be beyond the confines of a Hague Convention proceeding. Since no case has used this analysis to reject a Hague petition for return, I surmise that courts use the analysis as it is a convenient basis for rejecting the defense, I

is unclear whether courts would be prepared to make judgments regarding the number and extent of terrorist acts in a specific neighborhood as a basis for accepting the defense.

The second criteria relied on by the court is not Convention based. This is rather the general principle of clean hands, most familiar to proceedings in equity. A parent, who lived in Israel without ever having raised concerns regarding the risk of physical harm, will not be permitted to exploit the security situation by arguing that it constitutes a defense under the Convention. It would be interesting to see to what extent the courts would use this reasoning when the abducting parent raises the physical harm defense against an abusive left behind parent who displayed act of violence over an a period of years. Perhaps there is an unspoken element of blame, which the courts are considering in their analysis. A physically abusive parent has no one to blame but himself, while neither parent has control over acts of terror.

A case which did differentiate between the levels of anticipated harm between various locations within Israel involved the two minor children of an Australian mother and an Israeli father (Director General, Department of Community Services v Genish-Grant. Family Court of Australia, Sydney Docket No.SY4998 of 2001, December 10, 2001). The parties had moved back and forth between Australia and Israel several times commencing in 1995. They eventually settled on a moshav, a cooperative community, in a rural area in the north of Israel, where they ran a hotel-restaurant complex.

The mother traveled to Australia with the children for a family visit and subsequently refused to return. Her primary defense was the grave risk of physical harm should the children be returned. The mother testified about the anxiety she suffered while they lived in Tel Aviv when a terrorist act occurred there in 1995. There was ample proof that the moshav was far removed from any area struck by terrorists. The court found that "The unrest that is experienced in Israel is not in relative proximity to the family residence." The court then refers to a statement by the Central Authority counsel "about the need for caution in certain parts of Israel for example in Jerusalem. However, I accept the evidence of the father and his witnesses as to the situation in the area where the father lives."(p. 21, Genish-Grant).

It cannot be inferred that the court would have ruled otherwise had the family resided in Jerusalem. Nonetheless, this is a potentially dangerous analysis of the grave risk defense. Courts should avoid as much as possible analyzing the relative safety of one area over another within the same country. Return orders always specify a country and not a specific city or region. The authority of the requested state ceases once there has been a return to the state of habitual residence. Whether the abducted child is returned to his prior home or moves to a different area cannot be a concern of the requested state. Should the courts in the requested state differentiate between different areas within the requesting state, we are liable to see return orders being made conditional upon the child not living within towns or neighborhoods designated as posing a grave risk. Such an order could drag the courts into extensive deliberations involving specifics of terrorist attacks and the review of local maps. This is the kind of deliberation, which should be avoided under the Hague Convention. Additionally, such an order would not be enforceable once the return had taken place. The focus must be on the risk of physical harm in general in the state of habitual residence.

The court in Genish-Grant also made reference to the relativity test. "Israel has had a security issue since 1948 and it continues to experience security issues. The gravity of the security issues has varied." (Par. 114, p.21, Genish-Grant). The court adopted the theme, which is common to all of the cases where Israel's security situation is raised as an Art. 13b defense. If you chose to live in Israel, you had to take into account the security concerns. The use of Article 13b will not be permitted to justify an otherwise unlawful removal. Thc Australian court concluded the issue by stating "I am not satisfied that the mother has established by clear and convincing proof that there is a grave risk of physical harm to the children because of unrest in Israel." (Par. 114, p.21, ibid).

The distinction between a state in which there are terrorist attacks and a country which is in a state of war, was made in a Danish case. In the matter of Shapira v. Bersa, (case no. FS 2627/2001, Court of Vejle, decided December 7, 2001), the Danish born mother unlawfully removed the couple's son from Israel on October 13, 2001. The mother claimed that the security situation in Israel frightens her. She argued that after September 11 the situation deteriorated and she could no longer remain in Israel. The plaintiff father argued that while Israel is not as peaceful as Denmark, no significant change in the situation had occurred since their son's birth in 1994, despite the events of September 11.

In analyzing the mother's argument, the court held that "The situation in a state in which there are terrorist attacks or where there is a danger of a future terrorist attack does not in itself constitute a real and serious danger to the mental and physical health of a child as described in …. Article 13 of the Hague Convention.

On the other hand, the situation in a country that is in a state of war or combat that is likely to constitute a real and serious danger as described in Article 13b of the Hague Convention and in section 11 number 2 of the Danish Law can prevent the return of the child", (p.8, Shapira).

The reasoning in Watkins and Shapira is in line with the stated purposes of the Convention. A parent may feel unsafe in his or her surroundings due to numerous factors. However, it is not the subjective fears of the abducting parent which are at issue. It is not hard to imagine, for instance, the spread of anthrax in a particular state as future grounds for an Article 13B defense.

The physical harm defense has been used in the past to justify some very unusual arguments. One of the more creative claims raised as a 13B defense came in a petition to return a child abducted to France from his habitual residence in Los Angeles. It was argued that the high levels of smog in Los Angeles placed the child in grave risk of physical danger. Another concerned the reasoning of an Irish mother who abducted her three children from Western Australia. She presented evidence that all three boys were at risk of harm from exposure to sunlight in their habitual residence, as they suffered from sensitivity to the sun.(F.v.F.,High Court, {Northern Ireland}Family Division, May 24, 1993). Both of those arguments were correctly dismissed.

9.11 and 13b

The case on which the terrorist attacks of September 11 had the most direct impact is an Argentinean decision, Altheim v. Altheim, decided on October 5, 2001 by the court in Buenos Aires. The respondent father abducted his son from Israel in June of 2001. The father claimed that ever since the 1995 assassination of Prime Minister Rabin, the level of conflict between Israel and its Palestinian neighbors has risen. He argued that returning the child would place him at serious risk of physical harm, at least until such time as there is a significant improvement in the high risk conditions which he alleged currently exist in Israel. The father used a very politically oriented argument, stating that not only had the peace process been derailed by the assassination, it led to deterioration of the entire socio-economic situation in Israel.

The court pointed out that the entire family moved to Israel in 1997, two years subsequent to Rabin's assassination. The timing of his move to Israel undermined the sincerity of his allegations regarding the deteriorating security situation. More importantly, the court addressed the issue of terrorism as a relative phenomenon, to which no country is immune. "Unfortunately, acts of terrorism due to political, racial and religious intolerance occur all over the world. As the Prosecutor for minors points out in her judgment on pages 129/131, in the city of Buenos Aires, where Sebastian currently makes his habitual residence, terrorist acts were perpetrated in 1992 and 1994, which, due to their grievous nature, caused outrage around the world".

Using the relativity analysis of violence, the court describes the situation in Israel in the following terms: "That country has lived under war-like conditions for many years with its Palestinian neighbors, with alternating periods of relative peace mixed with escalating confrontation. Despite this fact, its inhabitants, who have always lived in this manner, continue to carry out their daily activities, as I have stated, even under these particular circumstances in which the country is experiencing." (Altheim, p.11).

This is the criterion first laid out in Freier. A country where all of the normal activities of daily life continue as usual; schools, commerce, travel and even entertainment, cannot be said to be in a state of civil strife. The fact that there is a higher risk of exposure to terrorist acts in a particular area or country does not meet the narrow interpretation given to the grave risk of physical danger defense.

The Altheim court, however was ruling in the shadow of the terrorist strikes of September 11. The uncertainty which existed in the aftermath of those attacks made the court hesitate. "This fact has indeed put the entire world in a state of alert, especially countries in the Middle East and those in which a traditional conflict has existed with the Arab world, such as Israel. In this country, there have been escalating and repeated terrorist attacks that have cost the lives of many innocent people. And, although terrorism knows no borders, the reality is that, given the situation today in the world, there is the possibility that, within a short period of time, the events in Israel could worsen and become a serious threat to the safety of a child that is taken to this country, although this might not occur" (Altheim , pages. 11-12).

Although the court concluded by saying that "…there is no doubt in my mind that the minor should be returned Israel…", it took the cautious route by suspending implementation of the order for two months. It ordered that the child must immediately be returned to Israel on December 5 "should the situation continue to stabilize". The court did not state what the indices of stability might be. Certainly the security situation in Israel worsened between October and December 5. Yet the child was ordered back to Israel on the appointed date without any further elaboration by the court and did in fact safely arrive home.
The security issue in Israel has also been raised in non-Hague Convention cases. One case in particular, Korn v. Korn, (10th Judicial Circuit of Alabama, Civil Action No. DR 01 1348 RAF, January 24, 2002), received wide press coverage, claiming that the Alabama court had reused the return of a child to Israel due to the dangerous security situation.. Unfortunately, there was little similarity between the press reports and the court's ruling.

Korn began as a Hague Convention case, with the mother unlawfully removing the child from the United States to Israel. The court in Israel ordered the child's return. A custody proceeding was then conducted by the Alabama court. Along with the mother's claim for custody, she requested permission to relocate to Israel. Both sides addressed the security issue in the proceedings. The mother's custody petition was granted, but her request for relocation was denied. The court ruled that it is in the best interest of the child to remain in the U.S., close to both parents. The court added the proviso that should the mother remove the child from the U.S. without court authority, custody would be transferred to the father. Such removal was not limited to any particular country even though the mother had specifically requested relocation to Israel.

The court's ruling in Korn is not unusual under the circumstances of that case. The sole reference in the court's judgment to the security situation in Israel is one non-conclusive sentence. The court simply states that both sides presented arguments regarding the security situation in Israel. There is no basis whatsoever for the conclusion reported in the press that the court found that it is too dangerous to send a minor child to live in Israel.

A recent California decision also addressed the argument that Israel is a war zone. The child in Rubin v. Rubin resides in Israel by court ratified agreement. The mother sent the child to visit with the father in California. Under the terms of the agreement, the mother is to return the child to California in the event that "active warfare" should break out in Israel. During a winter recess visit by the child, the father filed for a court order forbidding the return of the minor to Israel due to the security situation. The court issued a temporary ne exit order and set the matter down for a hearing. Although the child was subsequently returned voluntarily, the Superior Court in Los Angeles (case no. BD 053249) issued a ruling on January 30, 2002 rejecting the claim that Israel was a war zone and vacating the ne exit order.

The only case where a risk of physical harm defense was successfully raised under the Convention involved a Spanish mother and an Israeli father,(Menachem v. Menachem Ramirez-Orduna, Trial Court No.2 of L'Hospitalet de Llobregat, No. 369/01, January 27, 2002). The mother unlawfully retained the child Spain while on a visit from their habitual residence in Israel. In addition to her other defenses of acquiescence and non-exercise of custodial rights, the mother claimed that the return of the minor to Israel would place her in grave physical danger due to the armed attacks against civilians. The mother further stated that the danger is increased due to the father being a career soldier.

The mother submitted news articles to show that Israel is living in a state of constant terror attacks. Although the state attorney acting on behalf of the Spanish Central Authority represented the father, there was unfortunately no attempt by the Spanish Authorities to seek rebuttal evidence from the Israeli Central Authority. The court held that the documentation provided by the respondent "are considered proven by their absolute and general notoriety". CNN. The court reached the conclusion that the evidence manifested "a grave situation of tension and armed conflict … with the increase in indiscriminate attacks causing civilian victims, including children and which is even more serious because of the military profession of the plaintiff…" . Apparently the court was under the impression that children accompany their parents while they perform their military duties in Israel.

The court addressed the issue of the relativity of terror but reached a conclusion contrary to that of all other courts that have dealt with this defense. The court concluded that the danger of physical risk to the minor is not comparable to the possible risks of attack to which she might be exposed "in Spain, or countries like the United States". The court ruled that the return to Israel is incompatible with the principle of protection of the interests of the minor, which is imbedded in Spanish legislation.

The judgment has been appealed by the father and the case is still pending before the appellate court. It should be noted, however, that the history of Spanish Hague Convention decisions where Israel is the requesting state does not offer encouragement for the success of the appeal.

Conclusion

The grave risk of physical harm defense under Article 13b of the Hague Convention on Child Abduction must meet the same stringent standards applied to all other defenses under the Convention. It would be a grievous error for courts to undertake an analysis of the risks in particular areas of member states. The courts must determine whether the citizens of the requesting state continue to carry out the usual functions of a civil society; continued commerce, open schools, unfettered channels of communication and freedom of travel are key indices of the level of actual risk. A country such as Iraq during the Persian Gulf War or Bosnia during the height of civil warfare which occurred prior to the intervention of UN forces are states that would constitute a grave risk of physical harm under the Article 13b defense.

Parents who have chosen to live and raise their children in a particular state with a past history of security problems will not be able to use the security situation as a justification for an unlawful removal. There is a

high standard for the burden of proof under Article 13b. Both Israel and the United States have adopted the clear and convincing evidence standard. Newspaper reports alone should not constitute the basis for such a determination. The use of terrorism against civilian populations has become an international phenomena and contracting states should proceed with extreme caution before ruling that the return of a minor to another contracting state poses a grave risk of physical harm due to that country's security situation.

European family in Thessaloniki on 17 and 18 April 2024

A round table discussion: cross border families in times of trouble (war, refugee issues, migration, etc)

Times of trouble create cross-border families

Introduction

Since the beginning of Russia's full-scale invasion of Ukraine, about 6.5 million Ukrainian citizens have become refugees in different parts of the world. Almost every one of these people has a family: husband, wife, parents, children, siblings, etc. Due to the fact that since the first days of Russia's full-scale invasion of Ukraine, men between the ages of 18 and 60 have been prohibited from leaving the country, the majority of Ukrainian refugees are women and children.

When women and children escaped the country because of the war and became refugees abroad, and men could not leave with their relatives, cross-border families eventually emerged. According to sociological studies, at the beginning of the full-scale invasion, in March 2022 44 % of Ukrainians had to be temporarily separated from their families, while in 2023 this number was 21%.

The forced separation has created difficulties in many aspects of Ukrainian family life, including complicating the marriage and divorce process, causing many new custody and child abduction cases, and generating a large number of disputes over the jurisdiction of family dispute resolution.

Marriage/Divorce

The involuntary separation of many thousands of couples has become a trigger for divorce.

According to the Family Code of Ukraine, if the spouses do not have children under the age of 18, they may divorce by joint application out of court through the civil registry authorities. The joint application must be submitted in person, but if one of the spouses cannot personally apply for divorce to the civil registry authorities for a valid reason, the other spouse may submit such a notarized application on his or her behalf.

If the spouses have joint children who haven't reached the age of 18, then divorce is possible only in court. If a person resides abroad, he/she can sign a statement of claim with attachments in the country of residence and send it by mail to a Ukrainian court or file an application online through the Electronic Court system with an electronic digital signature.

One of the important issues is the possibility of divorce between Ukrainian citizens in foreign jurisdictions if one of the spouses permanently resides abroad. In such a situation, the fact that one of the spouses is a Ukrainian citizen residing abroad imposes a foreign element on the divorce case (or other family law case).

In order to determine the jurisdiction of a family dispute, it is first necessary to find out whether there is a bilateral treaty between Ukraine and the foreign country where one of the Ukrainian spouses resides that regulates this issue. If there is no such treaty, the Law of Ukraine «On Private International Law» should be applied (hereinafter also referred to as the «***Law***»).

The Law provides that *the parties may choose the jurisdiction unless the rules of exclusive jurisdiction apply.*

According to part 1 of Article 75 of the Law: «*the jurisdiction of the courts of Ukraine over cases with a foreign element shall be determined at the time of opening the proceedings, notwithstanding that the grounds for such jurisdiction have disappeared or changed in the course of the proceedings*».

The Law does not refer the cases of divorce between Ukrainian citizens where one of the spouses resides abroad to the exclusive jurisdiction of Ukrainian courts. Therefore, a residing abroad spouse may file a claim for divorce in the country of actual residence, if this does not contradict the domestic law of that country.

Meanwhile, since Russia's full-scale invasion of Ukraine, the number of registered marriages has increased within the country. This is primarily due to the fact that a significant number of people have joined the military and started receiving high salaries. As a result, the improved financial situation of soldiers combined with the increasing risk to their lives has led to a higher number of marriages.

However, a problem arose when people who joined the military were unable to appear at civil registry offices to register their marriages. Nevertheless, on 07 March 2022, the Cabinet of Ministers of Ukraine issued a resolution according to which persons who joined the Ukrainian defense forces can get married without personal presence. In such a case, a man or woman serving in the defense forces submits a written application for consent to enter into a marriage to their commander, and the commander certifies the authenticity of the signature on the application and ensures that the application is delivered to the civil registry authority.

In addition, the Ukrainian government plans to provide an opportunity to marry online. In February of this year, the Minister of Digital Transformation of Ukraine announced that the state online application "Diia" would launch the option to get married online, via video, with several stages of verification.

Children's matters (custody/abduction)

In the first days of the full-scale invasion of Ukraine, the legislation was amended to allow a child to travel abroad accompanied by one parent without the consent of the other parent. This was a justified decision as children were at risk. As of March 2024, 537 children were killed in Ukraine as a result of the war, and the total number of victims exceeded 1,806 children (and this is only official, recorded statistics). However, such amendments gave rise to a large number of disputes over child abduction and custody. Usually, mothers with children travel abroad without the father providing written, notarized permission for the child to leave. Subsequently, the borders for men were closed and many cases emerged when a father was deprived or restricted in exercising his parental rights and applied to the Ministry of Justice of Ukraine for the return of the child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter also referred to as the «***Convention***»).

In all these disputes, there is one cross-cutting question: «Is it safe to return the child to Ukraine?». There is no absolute answer as of now.

Under Article 13(b) of the Convention: «*notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State i****s not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that 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*».

According to part 1 of Article 162 of the Family Code of Ukraine: «*if one of the parents or another person unauthorisedly, without the consent of the other parent or other persons with whom the minor child lived on the basis of the law or a court decision, or of the children's institution (facility) where the child lived by decision of the guardianship and custody authority or court, changes the child's place of residence, including by abduction, the court, at the request of the person concerned, has the right to immediately order the child's removal and return to the previous place of residence. The* ***child may***

not be returned only if leaving him or her at the previous place of residence would pose a real danger to his or her life and health or the circumstances have changed so that the return is contrary to his or her interests».

Based on the data of the Ministry of Justice of Ukraine, from February 2022 to February 2024, there are eleven decisions of foreign courts on children's return to Ukraine.

In particular:

On 04 October 2022, a Polish court ordered the return of a child to Ukraine and the child was handed over to the applicant in the courtroom.

On 12 July 2022, a Swedish court ordered the return of a child from Sweden to Ukraine.

In Italy, the court closed the case when the applicant stated in court that he wished to return the child to Ukraine after the end of martial law, and the court confirmed the applicant's right to apply for return after the end of martial law.

At the same time, since 24 February 2022, 50 court decisions have been issued dismissing claims for child return to Ukraine under the 1980 Hague Convention.

Court decisions to dismiss the return of the child are mostly based on Articles 3, 12, and 13 1(b) of the Convention:

1. Expiry of the one-year period (Article 12 of the Convention), problem: lack of understanding by the courts of the period of the beginning of the illegal detention of a child abroad.

2. Threat to the child's life and health posed by the return (Article 13 of the Convention): failure of the courts to take into account the current security situation in the region to which the child's return is requested.

3. Groundlessness of the application (Article 3 of the Convention): the plaintiff has not proved that his or her right to care for the child has been violated.

The matter of the «safety» of Ukraine in the context of the possibility of a child's return remains unresolved. After all, depending on the region, the war threatens children's safety in different ways: on the one hand, there are cities like Kharkiv, where children have to go to school in the subway because of shelling every day, and on the other hand, there are cities in the west of Ukraine, where shelling is far less frequent and children live almost «normal» lives, although they still suffer from the war.

ТУТ можна додати Вашу думку про те, чи повертати дітей в Україну безпечно (мені важко сформувати думку. Я за те, щоб повертали, але не впевнений, що це відповідає всім критеріям безпечності).

Another important issue is the jurisdiction in the cases of child custody

In such cases, one of the key legal frameworks is the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter also referred to as the «*1996 Convention*»).

Under Article 5 of the 1996 Convention: *«(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. (2) Subject to Article 7, **in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction***».

Under Article 6 of the 1996 Convention: «***for refugee children and children who, due to disturbances occurring in their country, are internationally displaced,*** *the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5*».

Thus, the general rule has been established according to which cases on child custody, should be handled by the authorities of the state in which the child has habitual residence at the time of the opening of the proceedings.

However, Article 7 of the 1996 Convention states that ***in the case of unlawful removal of a child out of the country of habitual residence, jurisdiction is vested in the authorities of the state of habitual residence from which the child was unlawfully removed****. These authorities keep jurisdiction until the child has acquired a habitual residence in another State, and a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;* ***or*** *b) the child has resided in that other State for a period of at least one year after the person, institution, or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.*

Pursuant to Article 17 of the 1996 Convention: «***the exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence***».

Consequently, to determine the jurisdiction in child custody cases of cross-border families, it is important to determine, in particular, the lawfulness of the child's removal from the state of permanent residence and the issue of the child's acquisition of a new habitual residence in the state where the child is actually living.

Military mobilization as a factor forcing children to be separated from their parents

Pursuant to a decree of the President of Ukraine dated 24 February 2022, a state of martial law was implemented throughout Ukraine from 05.30 a.m. Under this decree, restrictions may be imposed on the constitutional rights and freedoms of citizens, including the right to freedom of mobility. Although martial law was initially introduced in Ukraine for 30 days, given that the war has not yet ended, the decree is constantly being extended.

An integral aspect of war and martial law is mobilization, as the professional Ukrainian army, which as of January 2022 numbered about 300,000 people, could not cope with a much more numerous enemy. Thus, as of April 2024, according to various estimates (exact information is hidden), the Ukrainian defense forces amounted to approximately 1 million people. Most of those currently defending Ukraine were mobilized into the army.

For Ukrainians, being mobilized means being obliged to become part of Ukraine's defense forces and fulfill their constitutional duty to defend the state; if they refuse to do so, they will be charged with criminal liability.

Thus, mobilization is another factor that creates cross-border families, as men cannot leave the country and women with children often seek refuge from the war abroad.

On the other hand, military mobilization also encourages migration. Today men in Ukraine are mobilized only from the age of 25, but to preserve the mobilization reserve, men are banned from traveling abroad from the age of 18. Given the above, a significant number of parents take their 17-year-old sons out of Ukraine to avoid their future mobilization.

Conclusion

Since the beginning of the Russian-Ukrainian war in 2014, a large number of families have been separated, with some people moving abroad, others moving to safer regions of the country, and others remaining under occupation. With the start of the full-scale invasion on 24 February 2024, the war affected every family in Ukraine, without exception. It caused queues at the borders that lasted for several days, and families gained «cross-border» status.

As of now, family matters have entered a completely new legal context. For cross-border families, the ways in which they interact, and even more so, the procedures for resolving disputes, have changed significantly. It is now more important than ever for Ukrainian lawyers to master the provisions of international law because, without its understanding, it is often impossible to provide quality support in family law cases for Ukrainian citizens.