Revija za evropsko pravo: XVI (2014) 2-3.
©Udruženje za evropsko pravo, Kragujevac

Zoran Ponjavić*/Veljko Vlašković**

UDK: 347.91/.95:343.553

str. 45-67.

SPACE FOR THE CHILD'S BEST INTERESTS INSIDE THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION♣

Abstract

This paper analyses the relation between the Hague Convention on the Civil Aspects of International Child Abduction from 1980 and "the best interests of the child" as a fundamental principle of family law. Intention is to show the space that aforementioned Convention leaves for applying "the best interests of the child" inside its own mechanism of application. Although it has been enacted almost decade earlier then Convention on the rights of the child, the Hague Convention recognised the need to protect "the best interests of the child" in certain way. In that sense, the Hague Convention has established the legal assumption that it is in "the best interests of the child" to be returned promptly in country of her/his habitual residence. Individualisation of "the best interests of the child" is achieved through enumeration of exemptions from the duty of child's prompt return in the form of grounds for challenging the mentioned assumption. The authors show that national authorities that decide on the child's return interpret these exemptions mostly in a narrow and restrictive

* Full-time Professor at the Faculty of Law University of Kragujevac.

** Assistant at the Faculty of Law University of Kragujevac.

♣ Rad je nastao u okviru projekta "Zaštita ljudskih i manjinskih prava u okviru evropskog pravnog prostiora" (br. Projekta 179046), čiji je nosilac Pravni fakultet Univerziteta u Nišu.

fashion to avoid the disintegration of the basic mechanism of the Hague Convention. However, since the time when the Hague Convention has been enacted, the strenght of "the best interests of the child" formidably increased so the space has been given to national authorities to interpret the exemptions more flexibly and widely which can jeopardize procedural goals of the Hague Convention.

Keywords: The Hague Convention, child abduction, 'the best interests of the child', legal assumption, exemptions.

1. Introduction

The international child abduction is a complex problem, which represents a source of legal as well as political conflicts between countries. It can be said that almost no country or nation has been able to avoid this problem. Having in mind the emphasized international aspect of the problem, it has become clear that efficient solution to the international child abduction can only be reached as a consequence of mutual and coordinated activities of all countries in the international area. Such coordinated efforts led to the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), signed in the Hague on October 25, 1980, as the first and foremost international contract in the domain of international child abduction.[1]

The aforementioned Convention is different from all others in the international private law in that its aim is not producing uniform rules in cases of conflicts between different laws, nor setting rules regarding conflicts between different spheres of competences. Quite the contrary, it is an instrument of cooperation between countries aiming to accomplish momentary return of the child.[2] The Convention insists on establishing the previous state of affairs that had existed up to the moment of child's abduction, that is, its return to the place of habitual residence, and only after that follows solving the issues that are mostly

[1] According to the report by The Hague Conference on Private International Law until now there have been 89 signatories of this Convention. This information is available at: *www.hcch.net/index_en.php*, accessed on 14 December 2012.

[2] A. Fiorini, "Enlèvements internationaux d'enfants - solutions internationales et responsabilités étatiques", *McGill Law Journal*, Vol. 51, No. 2, 2006, pp. 279-326, at p. 283.

concerned with custody allocation.[3] At any rate, no other authority could solve the issue of custody, except for the one that is competent in the place of habitual residence of the child. In this way, by establishing the previous state of affairs, which is the primary aim of the Hague Convention, all those who would take children across the border are discouraged to do so by having to face practical and legal consequences.

According to all of this, the Hague Convention offers a mechanism to solve problems that arise as a consequence of the conflict between parents regarding custody issues and taking the child into another country. But where is the child in that conflict as more vulnerable, passive and unwilling participant? In that sense, there is every justification to ask the question whether the return of the child is always in "the best interests of the child", which is one of the basic principles of the Convention on the Rights of the Child (CRC),[4] and which always has to be applied in cases where decisions are made regarding rights of the child. If the return of the child to its place of habitual residence as basic goal of the Hague Convention is subordinated to "the best interests of the child", it can be rightfully asked whether such action could prevent accomplishing that basic goal, having in mind that quite often it would be better for the child to remain where it is. Hence there is genuine fear that interpreting such extremely vague and broad principle[5] might become mere excuse for the court not to apply the law,[6] that is, a handy justification for any court decision, especially such decision that refuses the return of the child into the country of "habitual residence".[7]

---

[3] Aside from this Convention there are other regional ones, with almost identical aims, such as in the cases of: Council of Europe, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, 20 May 1980, CETS 105; Organization of American States, Inter-American Convention on the International Return of Children, 15 July 1989, OAS Treaty Series 70.

[4] United Nations, Convention on the Rights of the Child, 20 November 1989, UNTS 1577.

[5] Especially if it is taken into consideration that the legal norm based on "the best interests of the child" is more like a social paradigm and not an exact legal norm. See E. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, para. 21. available at: *www.hcch.net/upload/expl28.pdf*, accessed on 11 December 2012.

[6] To paraphrase Professor Rubellin Devichi who long ago wrote "donner au juge le droit de se déterminer en fonction de l'intérêt de l'enfant, c'est lui donner le droit de ne pas appliquer le droit", J. Rubellin Devichi, "Le principe de l'intérêt de l'enfant dans la loi et la jurisprudence françaises", *Revue française des affaires sociales*, Vol. 48, No. 4, 1994, pp. 157-193, at p. 163.

[7] According to art. 3 para. 1 of the Draft of Law on Civil Law Protection of the Children from Wrongful International Removing and Retaining made by the Ministry of Justice of the

This paper will present arguments to support the aforementioned fear, which makes an issue of the system established by the Hague Convention. These are mostly based upon judgements of national courts of the States parties to the Hague Convention.

The arguments shall be laid out in three segments showing the mechanism of applying ″the best interests of the child″ within the Hague Convention. Hence, the discussion shall first turn to the need to establish space within the Hague Convention for the application of the principle of ″the best interest of the child″ and the way in which the aforementioned international treaty does this. Then the second part of the paper shall turn to analyzing manifestation of the mentioned principle in the general legal assumption on the return of the child into its country of habitual residence. The third part shall discuss grounds for challenging the legal assumption of the ″best interests of the child″ that the Hague Convention gives in form of exceptions from the obligation of returning the child.

2. Space for "the best interests of the child" within the Hague Convention

The Hague Convention is often emphasized as a successful example of international cooperation,[8] with its basic value coming from the simplicity of duties that it prescribes.[9] Namely, as was already mentioned, the entire construction of this international treaty rests on the assumption that detrimental consequences of the international child abduction can most efficiently be mitigated by the prompt return of illegally removed or retained child to the country of its habitual residence.[10] Thereat, judicial or administrative body making the decision on the return of the child cannot interfere with custody issues, because the decision on that is left to the legal system of the country to which the child and its family are most directly related, that is, the country of

Republic of Serbia "by the habitual residence of the child, in the sense of this law, is implied place where child has been integrated in social and family enviroment".

[8] J. Herring, *Family Law,* Pearson Education Limited, Harlow, 2007, at p. 537.

[9] N. Lowe, G. Douglas, *Bromley's Family Law,* Oxford University Press, Oxford/New York, 2007, at p. 631.

[10] J. Murphy, *International dimensions in family law,* Manchester University Press, Manchester, 2005, at p. 213.

habitual residence.[11] However, regardless of the great operational power of the Hague Convention, the mentioned international treaty should not be assessed exclusively on the account of the number of children who were returned to their countries of habitual residence and the speed of their return.[12] In other words, what cannot be allowed is to treat the child as a legal object so that it becomes invisible inside the mechanism of the Hague Convention. Namely, the basic purpose of the mentioned Convention is fulfilled inevitably as a backdrop to another goal, which is the protection of "the best interests of the child".

In the context of the principle of "the best interest of the child", the speed and pragmatic value of the Hague Convention are faced with a serious test, having in mind that the mentioned principle forces adjusting or even subordinating interests of other legal subjects to the interests of the child.[13] On the other hand, there is an inevitable impression that primary concerns of the Hague Convention are rights and interests of the parents,[14] while there is a tendency to – often quite artificially – fit the interests of the child into the mechanism of application of the mentioned international treaty. Therefore it is necessary to achieve balance between two goals: the first one is to secure prompt return of the wrongfully removed child and the second one is to prevent child's interest from being overridden by the interests of other legal subjects. The balance is necessary in order to achieve some sort of a compromise between the aims of the Hague Convention and the principle of "the best interests of the child" as the principle which has been used to being master and not servant in legal relationships concerning children.

The makers of the Hague Convention have left certain space within the mechanism for the prompt return of the child for consideration of "the best interests of the child". However, even if they had not done such thing, the mentioned space could still have been found, for otherwise the Hague

---

[11] See arts. 1 and 2 of The Hague Convention. In this sense see: *Roszkowski v. Roszkowska*, 274 N.J. Super. 620, 644 A.2d 1150 (Ch. Div. 1993), HC/E/USs 238; *W.(V.) v. S.(D.)*, (1996) 2 SCR 108, (1996) 134 DLR 4th 481, HC/E/CA 17; *Supreme Court of Finland: KKO:2004:76*, HC/E/FI 839.

[12] R. Schuz, "The Hague Child Abduction Convention: Family Law and Private International Law", *International and Comparative Law Quarterly,* Vol. 44, No. 4, 1995, pp. 771-802, at p. 771.

[13] Depending whether the legislation of the country of habitual residence applies the conception of "primary" or "paramount consideration" of the best interests of the child when deciding on the issues in the area of custody.

[14] J. Caldwell, "Child welfare defences in child abduction cases - some recent developments", *Child and Family Law Quarterly,* Vol. 13, No. 2, 2001, pp. 121-136, at p. 121.

Convention itself could hardly have survived on the legal stage. Regardless of the efficiency of the Convention in the area of international private law, it is not possible to evade ″the best interests of the child″ as a basic principle of family law into whose domain this international treaty inevitably intrudes.[15] For that reason, the next part of this paper will consider what is that the Hague Convention offers to the principle of ″the best interests of the child″ and what the mentioned principle seeks from the Hague Convention itself.

At the time when The Hague Convention was being adopted, the principle of ″the best interests of the child″ was already present in the text of one international treaty of global significance, Convention on the Elimination of All Forms of Discrimination against Women,[16] although this international treaty was not still enter into force. However, the most important formulation of the mentioned principle is to be found in the CRC. Hence this Convention proclaims that in ″all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration″.[17] In this way, the principle of ″the best interests of the child″ has become much stronger compared to the time when the Hague Convention was being adopted. Firstly, the reach of the mentioned principles has been extended from somewhat narrow area of custody allocation to all legal relationships which are of direct or indirect significance for the child. Furthermore, the principle of ″the best interests of the child″ has now begun to be achieved in a special context, characterized by the rights of the child as a special category within human rights. In this way the child has become a central element in the family law relationships, and the parental right has been transformed into parental responsibility.

3. The return of the child into the country of habitual residence as the basis of the legal assumption on "the best interests" of the child

Because of doubtless values of the Hague Convention, it was necessary to find space for the application of the principle of "the best interests of the child" within boundaries of the aforementioned Convention. Thus, the first and the only clearly stated trace of the presence of "the best interests of the child" has been

[15] R. Schuz, *loc. cit.,* at p. 772.

[16] Art. 16. para. 1. (f). United Nations, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, UNTS 1249.

[17] Art. 3. para. 1. CRC.

recognized in the preamble of the Hague Convention. However, in this preamble the gist is on representing "the interests of the child" as specific social group and not as an individual legal subject.[18] However, indeterminacy of the contents of "the best interests of the child" does in fact follow from such circumstances that the mentioned principle is individual in its character and whose contents are shaped by each individual case. For that reason the discretionary power of bodies applying the principle of `the best interests of the child' is so huge.

In order to solve the mentioned problem, one part of literature,[19] and judicial practice of States parties[20] as well, speaks about the notion of "the best interests of the children", representing the frame for the principle of "the best interests of the child". Hence it is thought that the "the best interests of children" completely reflect the fundamental aim of the Hague Convention to return the children to the country of habitual residence as urgently as possible.[21] In such way are the harmful consequences of child abduction mitigated and parents thinking of doing such things are being discouraged against it.[22] Therefore, the interests of each particular child are in certain sense sacrificed to the interests of the children as a group.[23]

Arguments for the thesis on the existence of the notion of "the best interests of the children" is seemingly offered by the basic formulation of the principle of "the best interests of the child" from the CRC which, among other things, states that legislative bodies are obliged to respect the mentioned principle.[24] As legislative bodies usually enact legal acts containing general legal norms, it is clear that their activity can only be directed to children as a social group, and not to each

---

[18] See preamble of The Hague Convention.

[19] See R. Schuz, "The Hague Abduction Convention and Children's Rights", *Transnational Law & Contemporary Problems,* vol. 12, no. 2, 2002., pp. 393-452, at p. 397; Herring, *op. cit*., at pp. 533-534; N. Lowe, G. Douglas, *op. cit.,* at pp. 631-632.

[20] Preamble speaks about "the interests of the children" in general, and not about "the best interests" of the specific child before court. *Thomson v. Thomson* [1994] 3 SCR 551, 6 RFL (4th) 290, HC/E/CA 11.

[21] See Schuz (2002), *loc. cit*., p. 398.

[22] Schuz (1995), *loc. cit., p.* 775-776. German jurist Kurt Siehr points out that this general policy has nothing in common with "the best interests of the child" in a specific case; K. Siehr, "The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in German Practice", *International Law and Politics,* Vol. 33, No. 1, 2000, pp. 207-220, at p. 218.

[23] *Ibid.* at p. 776.

[24] See art. 3 para. 1 of CRC.

individual child. However, activities of legislative bodies do not aim to determine the contents of "the best interests of the child", but to provide guideliness to those legal subjects that directly shape the contents of the mentioned principle (courts, administrative authorities). More correctly, legislator cannot determine what "the best interests of the child" would be in each specific case, but he can, using general legal rules, establish appropriate assumptions that would be relevant for the benefit of "the best interests of the child". The aim of the mentioned assumptions, as already stated, is to make easier the application of the principle of "the best interests of the child" but also to narrow the discretion of legal subjects applying the mentioned principle.[25] According to that, it cannot be discussed about "the best interests of the children", but of the ways in which to manifest "the best interests of the child" through appropriate assumptions. Therefore, the preamble of the Hague Convention establishes legal assumption that it in case of international abduction it is in "the best interests of the child" to be returned to the country of habitual residence. Exceptions from this general obligation to return the child are nothing more than grounds for challenging this assumption. Having in mind that stating "the best interests of the child" by virtue of assumptions narrows the discretionary space of legal subjects that apply the mentioned principle, the mentioned exceptions represent the remaining discretionary space for individual, that is, true application of the principle of the "best interests of the child". For that reason the realization of the concept of "the best interests of the child" within the Hague Convention can only be considered through the relationship between the general assumption on the obligation to return the child, and the grounds for challenging the mentioned assumption, that is, the exceptions from the obligation to return the child as soon as possible to the country of habitual residence.

[25] Manifesting "the best interests of the child" through appropriate assumptions represents the oldest approach to the problem of the contents of the aforementioned principles. For example, at the time when the concept of "the best interests of the child" emerges, there was an assumption that father knows best what is in the interests of the child. See R. Van Krieken, "The Best Interests of the Child and Parental Separation: On the 'Civilizing of Parents'", *The Modern Law Review*, Vol. 68, No. 1, 2005, pp. 25-48, at p. 28. We can follow the development of the principle of "the best interests of the child" through evolution of certain assumptions. However, the greatest drawback of the mentioned approach to the issue of contents of "the best interests of the child" is the absence of elasticity that is necessary to follow turbulent and ceaseless changes in legal relationships concerning children.

4. Grounds for challenging the assumption on "the best interests of the child" from the Hague Convention

4.1. Placing the child in an "intolerable situation"

There has been a long-standing practice to restrictively apply all mentioned exceptions from the obligation to urgently return the child.[26] There is, not without reason, fear that a loose application of the stated rules would represent a sort of "Trojan Horse" within the Hague Convention, which could topple and render meaningless the entire mechanism of the international treaty. Of all stated exceptions, what some theorists fear the most is exactly "the intolerable situation" reasoning that such exception opens "Pandora's Box".[27]

The legal assumption that it is in "the best interests of the child" to be returned to the, the stated reason is only a cause that leads to a consequence, that is, to the "intolerable situation" for the child. In other words, in situations when a "grave risk of exposing the child to physical or psychological harm" is determined, it is not necessary to prove that there is country of habitual residence is most often challenged in practice exactly because of assessment that the child would be place in an "intolerable situation" by its return.[28] It should be stated that instead of the stated exception, the literature usually mentions existence of "grave risk that return would expose the child to physical or psychological harm" as a ground for the decision to refuse the return to the country of habitual residence.[29] Howeveran "intolerable situation" for the child. The creators of the Hague Convention have explicitly determined the existence of cause-and-effect relationship between the grave risk of harming the child and "the intolerable situation" into which the child would be put in such circumstances. This is also indicated by the mentioned rule from the Hague Convention which states that the country into which the child was taken is not obliged to return the child if

---

[26] Thus one old, yet influential decision estimated that only in rarest cases will the separation of the child from the parent who abducted him and its new enviroment reach the level of harm prescribed by the Hague Convention. See *Thomson v. Thomson* [1994] 3 SCR 551, 6 RFL (4th) 290, HC/E/CA 11. Another decision, the context of placing the child in "an intolerable situation" it is stated that the word "intolerable" is so strong in its sense and meaning that it sets the bar for the application of the exception rather high. See *Re S. (A Child) (Abduction: Grave Risk of Harm)* [2002] EWCA Civ 908, HC/E/UKe 469.

[27] See K. Siehr, *loc. cit.,* at pp. 215-216.

[28] Art. 13 para. 1 (b). the Hague Convention.

[29] See Caldwell, *loc. cit.*, at p. 124.

"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".[30]

Terms such as "grave risk" and "intolerable situation" suggest that the way to challenge the assumption on "the best interests of the child" from the Hague Convention is not easy at all, and that the threshold for proving it is set rather high. Most often, when defending the action of abduction the parent tries to present the other parent (who request the return) as unfit for the child. The parent seeking the return of the child speaks of "kidnapping", to which the other replies that life with that parent represents "grave risk", and that the return would put the child into an "intolerable situation". The parent challenging the return often wants to represent the child as a serious victim of violence whose situation is "intolerable", for which the other parent is accused.

When "grave risk" is being discussed, what should be stressed first is physical threat for the child, who shall not be returned into a country engulfed in a civil war or in which there is constant danger of violence. Besides, the existence of physical or psychological danger must be specifically related to the child whose return is requested, and not generally to the context in which a specific population is living.[31] In this case the interest of the child not to be taken away from its habitual residence without guaranteed stability in new situation must yield before the primary interest of every person not to be exposed to physical or psychological threat or to be brought into adverse conditions.[32] However, beside those external risky events that are "objective", the adverse conditions can also be subjective. In this sense, the parent requesting the return can represent a threat, if he or she had been violent towards the child. In judicial practice this exception is interpreted rather narrowly so that it does not remain "dead letter", that is, one isolated act of violence is not enough, but a continuity of violence in the past and the danger of repeating it in the future are necessary to refuse the request to return the child on this ground.[33]

---

[30] Art. 13 para. 1 (b). the Hague Convention.

[31] *N° 03/3585/A, Tribunal de première instance de Bruxelles*, HC/E/BE 547, at p. 516.

[32] In this sense see: E. Pérez-Vera, Explanatory Report on The Hague Convention on the Civil Aspects of International Child Abduction; United Nations Convention on the Rights of the Child, at p. 433.

[33] See Domestic and family violence and the article 13 "grave risk" exception in the operation of the Hague Convention of 25 October 1980 on the civil aspects of the international child abduction: A Reflection Paper, (drawn up by the Permanent Bureau), at p. 18; available at: *www.hcch.net/upload/wop/abduct2011pd09f.pdf*, accessed on 20 December 2012.

Hence, the standard of proving the "intolerable situation" is on the whole quite high. Courts in Great Britain,[34] Austria,[35] Australia,[36] Canada,[37] New Zealand,[38] Germany[39] and the USA[40] hesitate to refuse the return of the child in case of family violence. Case-law in the USA asks that the claims from article 13 paragraph 1b be proven in "clear and convincing"[41] way that is consistent with legal rules. Furthermore, courts either ignore the term "intolerable situation" from article 13 paragraph 1b and base their decisions mostly on proving the existence of "grave risk of physical and psychological harm", or they list it under the term "grave risk of physical or psychological harm".[42] Courts in England and Wales are very restrictive in their interpretations of the exception from article 13 paragraph 1b. Like American courts, they too demand that the proofs be

---

[34] Decision of the Court of Appeal in case *Re S. (A Child) (Abduction: Grave Risk of Harm)* [2002] EWCA Civ 908, HC/E/UKe 469.

[35] Decision of the Supreme Court of Austria in case *4Ob1523/96, Oberster Gerichtshof*, HC/E/AT 561.

[36] Director-General Department of Families, Youth and Community Care and Hobbs, 24 September 1999, Family Court of Australia (Brisbane), HC/E/AU 294. Although, it can be said that attitudes of courts in this country vary to a certain degree. Thus in one case the court refused to order the return of the child holding that conditions demanded by article 13 paragraph 1b were met. The court stated that the return of the child (which was two years old) into the USA would represent grave risk. The fact that the mother was denied entry into the United States constituted a grave risk that the child would be placed in an intolerable situation if sent back alone. See *State Central Authority of Victoria v. Ardito*, 29 October 1997, Family Court of Australia (Melbourne), HC/E/AU 283.

[37] Decision of the Quebec Court of Appeal in case *M.G. v. R.F.*, [2002] R.J.Q. 2132, HC/E/CA 762.

[38] Decision of High Court (Auckland), *K.S. v. L.S.* [2003] 3 NZLR 837, HC/E/NZ 770. In this case one of the judges stresses that the exception from article 13 paragraph 1b relates to the child and is interested in special situations or any other situations of other persons, including there the parent who took the child, except if that does not affect the child. In this case the mother took the child from Australia to New Zealand, where she was then diagnosed with cancer. Justifying it by the need to continue the treatment of disease in this country she refused to return the child.

[39] Decision of *Oberlandesgericht Dresden* (Higher Regional Court), *10 UF 753/01, Oberlandesgericht Dresden*, HC/E/DE 486. Although, courts in Germany were previously leaning towards more liberal interpretation of the exception from article 13 paragraph 1b. See: 17 UF 260/98, Oberlandesgericht Stuttgart, HC/E/DE 323.

[40] *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997), HC/E/USs 97.

[41] *Caro v. Sher*, 296 N.J. Super. 594, 687 A.2d 354 (Ch. Div. 1996), HC/E/USs 100.

[42] Cited according to: M. H. Weiner, "Intolerable situations and counsel for children: Following Switzerland's example in Hague abduction cases", *American University Law Review*, Vol. 58, No. 2, pp. 334-403, at p. 345.

"substantial, not trivial".[43] The Federal Constitutional Court of Germany did a similar thing when it pointed out that "only unusually severe endangerment of a child's welfare, which appears to be substantial, specific and current, precludes a child's return. Hardship for the abducting parent generally does not constitute such prejudice".[44] Courts in Serbia are on the same track, and one decision by the High Court of Valjevo leads into conclusion that the assessment of the fulfillment of conditions for the deviation from the duty of returning the child is of exceptional value and that it "must be based on unambiguous and hard evidence".[45]

The basic goal of the stated approach is that the one who took the child does not get any benefit from their wrongful act and that they cannot count on the consequence of such abduction be creating "grave risk" or "intolerable situation" in case of return. It is obvious that some countries employ high standards of proving the "intolerable situation" striving towards the most restrictive possible application of article. Thereby they believe that "the best interests" of the child are protected exactly by its return into the country of habitual residence. Besides, some of them, as in the case of Australian courts, justify such attitude claiming that they have "conceptualized the return as being to the country of habitual residence rather than to a particular person or area".[46] At the same time, courts in New Zealand believe that the order to return a child into a country is not an

---

[43] *Re C. (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, Fam Law 371, HC/E/UKe 269.

[44] *2 BvR 1206/98, Bundesverfassungsgericht*, 29.10.1998, HC/E/DE 233.

[45] The High Court of Valjevo, in decision 23/11, did not take into consideration violence done to the parent who took the child, even though significant research in social sciences indicate that "there is a great connection between partner's violence and the problems of the children, even when they are not direct victims". In that sense, see: D. A. Wolfe, C. V. Crooks, V. Lee, A. McIntyre-Smith, P. G. Jaffe, "The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique", *Clinical Child and Family Psychology Review,* Vol. 6, No. 3, 2003, pp. 171-187, at p. 182; J. L. Edleson, "Children's Witnessing of Adult Domestic Violence", *Journal of Interpersonal Violence,* Vol. 14, No. 8, pp. 839-870, at. pp. 860-861; J. L. Edleson, "The Overlap Between Child Maltreatment and Woman Battering", *Violence Against Women*, Vol. 5, No. 2, 1999, pp. 134-154, at p. 145.

[46] Cited according to: J. Gillen, "The Hague Convention and domestic violence –friend or foe? - A common law perspective of interpretations of article 13(1) b) of the Hague Convention in the context of domestic violence", in: *The Judges' Newsletter: Special Focus The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - 25 years on*!, 2006, pp. 34-35.

order to return the child to its parent, and that the child remains a responsibility of the Central Authority in the other country.[47]

However, some other countries, like France, are more prone to a broader interpretation of the stated exceptions from article 13 paragraph 1b.[48] This attitude mostly originates from the fact that courts, as has been stated, interpret the mentioned exceptions from article 13 paragraph 1b from the perspective of "the best interests of the child".[49]

The Convention does not define "intolerable situation". However, the term "grave risk" suggests that the area of application is rather narrow, and that it mostly resembles subjective feeling that for the child the return would be intolerable.[50] Because of the difficulties with interpreting the term "intolerable situation", Switzerland suggested to the international community an adoption of a special legal act.[51] After it had not succeeded in that endeavour, Switzerland was left to adjust its federal legislation on international child abduction to the principle of "the best interests of the child". Hence on 21 December 2007, it adopted a law on international child abduction and the Hague Conventions on protection of children and adults by which some of the notions from the Hague Convention were specified.[52] According to it, article 5 of this law gives a precise definition of

---

[47] *Ibid.*

[48] The Court of Cassation, Cass Civ 1ère 25 janvier 2005 (N° de pourvoi: 02-17411), HC/E/FR 708.

[49] See B. Vassallo, Présentation des instruments internationaux de coopération concernant l'enfance: conventions de la Haye sur les déplacements illicites d'enfants et sur l'adoption internationale, Bruxelles II bis, available at: *www.ahjucaf.org/Presentation-des-instruments.html*, accessed on 3 January 2013.

[50] Weiner, *loc. cit.*, at p. 375.

[51] The immediate cause was "the Wood case". In this case the mother took two of her children from Australia to Switzerland. When the case was discovered, her children were taken from her and put into an institution for a year until their return to Australia. When the time for return came the children were forced into the plane. After arriving to Australia the children were again put into a foster family because their father could not take care of them. The mother did not come back to Australia in order not to be legally persecuted for the child abduction. In the meantime the children changed several foster families. Finally the Australian court decided to give the mother the right to custody and the children were returned to Switzerland. In short the children were with their mother as before the case to return them was opened, but they had undergone great stress during the whole procedure.

[52] The Law is available at: *www.admin.ch/ch/f/ff/2008/33.pdf*, accessed on 10 January 2013. During the meeting of the fifth session of the Special Committee of The Hague Convention the Swiss delegation suggested this text as an addition to the art. 13 para. 1b. By great majority of votes this suggestion was rejected for using the term "the best interests of the child". It was

the "intolerable" from article 13 paragraph 1b, where it is said that this condition exists under following circumstances: a) when staying with the parent requesting the return of the child is obviously not in the interests of the child, b) when the parent requesting the return of the child is obviously and having in mind circumstances of the case not able to take care of the child in the country of its habitual residence (or for justified reason the parent cannot be asked to do so), or c) when staying with a third person is not in the best interests of the child.[53]

It is a special issue how to deal with the situation when the person in danger is not the child but the parent who took the child. Besides, how can it be possible to differentiate between physical threat and psychological trauma afflicted to the child from one afflicted to the parent? Is not there psychological violence afflicted to the child if every day it witnesses physical abuse of one parent by the other?

As far as comparative law is concerned, the situation is quite different and there is not always the same attitude, even within the same country. Hence in case Parsons c. Styger,[54] a decision was made to return the child from Canada to California (the USA) because the husband's violence was directed towards his wife and not the child. At the same time, the mother did not provide convincing evidence of the violence against her. However, in another very familiar case Pollastro c. Pollastro the same court refused the return of the child, because the mother, who took the child away, managed to prove that she was a victim of violence by her husband.[55] According to this decision, violence of one parent towards the other can put the child into a situation of physical or psychological threat, even when violence is not committed directly against the child. Starting from this decision, in Canada there has been much greater acceptance of the idea that a grave risk for physical and psychological state of the parent also represents a grave risk for the child, which justifies the application of the exception from article 13 paragraph 1b.[56]

---

interpreted as a first step towards a broad interpretation of the mentioned exception from the art. 13. The United States of America considered that it was through its return that `the best interests of the child' are fulfilled. See Weiner, *loc. cit.*, at pp. 339-340.

[53] It was this law that Swiss Federal Court referred to in one of its most basic decisions concerning the return of the child. See *5A_479/2012, IIe Cour de droit civil, arrêt du TF 13 juillet 2012*, HC/E/CH 1179.

[54] This refers to the decision of the Supreme Court of Ontario: *Parsons v. Styger* (1989), 67 O.R. (2d) 1 (L.J.S.C.), aff'd (1989) 67 O.R. (2d) 11 (C.A.), HC/E/CA 16.

[55] *Pollastro v. Pollastro* [1999] 45 R.F.L. (4th) 404 (Ont. C.A.), HC/E/CA 373.

[56] See: Decision of Quebec Court of Appeal (Canada), *N.P. v. A.B.P.*, [1999] R.D.F. 38 (Que. C.A.), HC/E/CA 764.

4. 2. Child objections to return into the country of habitual residence

When child objections to return is considered, what should be said is that this exception is frequently combined with the second one.[57] The CRC guarantees that "the shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".[58] Child's views, as in other cases, shall be taken into consideration under the condition that the child is capable of forming his or her own views. In addition to that, it depends upon "the best interests of the child" what significance will be given to child's views, that is, whether the expressed views will be accepted.

Creators of the Hague Convention were aware of the significance of child's views when making the decision on return in cases of international abduction.[59] Hence, according to the mentioned international treaty, "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".[60]

It should be noted that, in difference to Brussels II bis,[61] the Hague Convention does not recognize explicit right of the child to be heard. Still, even though the

---

[57] Most often it is considered that clearly stated objection of the child can mean that the child would be place in an "intolerable situation" if it were to return to the country of habitual residence. See, for example: *The Ontario Court v. M. and M. (Abduction: Children's Objections)* [1997] 1 FLR 475, [1997] Fam Law 227, HC/E/UKe 33; *Re T. (Abduction: Child's Objections to Return)* [2000] 2 FCR 159, HC/E/UKe 270.

[58] See Art. 12. CRC.

[59] See, for example, case *W. v. W.* 2003 SCLR 478, HC/E/UKs 508, in which Scottish court, in the context of objections of nine-year-old child, states that if the conclusion expressed by the child is quite definite and strongly felt, that is an important factor in the court's exercise of its discretion. The reasons for which the child could not return to Australia were: father's behavior towards her and her twin sister while they were living in Australia, fear that they would be separated from their mother, and the desire to continue their education in Scotland.

[60] Art. 13. the Hague Convention.

[61] These rules were adopted by the Council of the European Union. In the Council Regulation (EC) No 2201/2003 (Brussels II bis) in Art. 11. para. 2. a possibility is provided that the child be heard when applying provisions in Art. 12 and 13. of the Hague Convention, except when it is not concordant with its age and maturity. The right of the child to freely express its views has been also provided in the Charter of Fundamental Rights of the European Union (2000/C 364/01) in Art. 24. para. 1.

Hague Convention does not allude to the need to directly hear the child, it can be said that these exceptions are the ones actually inspired by the need to protect "the best interests of the child".[62] Determining these interests without child's views is hardly possible. Regardless of the urgency of the case, which needs to be validly terminated in six weeks, in cases in which one of the reasons to refuse the return is being stated, presenting of the evidence needs to be done. In this sense, within the case the child too needs to be heard, regardless of the fact that the court is not solving meritorious issue of custody.[63]

Besides, in this manner a possibility is accepted that the views of the child on its return or non-return can be a deciding factor in a situation in which the opinion of the court is that the child is old and mature enough. The child is thus given possibility to interpret its own interests. This provision could become dangerous if the child would be asked a direct question about its return.[64] The child can certainly have a clear view of the situation, but it can also be under great psychological pressure if she/he thinks it has to choose between two parents.[65]

---

[62] Further confirmation of this is judicial practice. Hence, in his explanation of the decision in the case *Director General, Department of Community Services v. De Lewinski* (1996) FLC 92-674, judge Nicholson CJ states that "the policy of the Convention is not compromised by hearing what children have to say and by taking, a literal view of the term 'objection'. That is because it remains for the Court to make the critical further assessment as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised". [[1996] FLC 92-674 at 83,017].

[63] Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011) in its Conclusions and Recommendations too commends efforts to give chance to children to be heard according to their age and maturity in the case opened for their return acording to the Hague Convention. This is not affected by the fact whether child's return is refuted based on Art. 13. para. 2. of the Hague Convention (50). Special Committee also emphasizes the significance of the need that the person talking to child, whether it is a judge, and independent expert or some other person, be trained for this task as much as it is possible. Special Committee also recognizes the need to inform the child, according to its age and maturity, of the case that is conducted and its possible consequences.

[64] Elisa Pérez-Vera, *loc. cit.*, at p. 433.

[65] In this respect what cannot be neglected is the influence of the parent who took the child, that is the parent with whom the child is living, and this must be counted on. As was stated in a court's decision in Liege: "it was illusory to think that a child could be completely impermeable to what the parent he was living with was experiencing, thinking or saying [...] That does not mean that the attitudes of the child are automatically formed by suggestion of the parent when it holds the same opinion." *N° de rôle: 02/7742/A, Tribunal de première instance de Bruxelles*, 27/5/2003, HC/E/BE 546.

As stated, courts are obliged to take into consideration child's views when the child objects to return and has reached age or degree of maturity in which it is capable of forming its own views.[66] The court deciding on the return of the child is not in this case bound by the child's expressed views. Although child's views represents an important element of the decision, it cannot, however, turn into a right to absolute veto.[67] Such opinion can also be found in the case-law in Serbia,[68] as well as in the practice of the ECtHR.[69] The court can, but does not have to, accept the views of the child in relation to other elements based on which the court decides on the return of the child.[70] Objections of the child to the

---

[66] According to the Family law of the Republic of Serbia, the child has a right to veto the decision on return only if it is 15 years old and ability to reason. This follows from provision of art. 60 para. 2 of the Family law of RS under which "the child who has turned 15 years of life and who is capable to reason can decide with which parent to live".

[67] In the case of *Cass Civ 1ère 8 Juillet 2010, N° de pourvoi 09-66406,* HC/E/FR 1073, French Court of Cassation pointed out that even though the child was mature enough (14 years old) and is opposed to return, the very fact of opposition is not enough to prevent the return.

[68] Hence in one of its decision the Supreme Court of Serbia did not accept the formed opinion of a nine-year-old child that it did not want to see its father thinking that it was not in its "best interests". Judgement, Review 930/09 of 16th April 2009, published in *Case-law Bulletin*, 2/2009, at pp. 44-46.

[69] As has been stated in the decision of the Court in Strasbourg, ECtHR, *C. v. Finland,* 9 May 2006 (Appl. no. 18249/02) at para. 58. In this case the applicant, Swiss resident, had two children (ten and 11-years old) in marriage with Finnish resident, and these two children were after the divorce entrusted to their mother. After that, the mother moved with her children to Finland where she formed non-marital community. The applicant remained in Switzerland, but still kept in touch with his children. After the death of the mother, the court of first instance in Finland made a decision to entrust the children to the father, but the Supreme Court changed this decision justifying it by the wish of the children to remain in Finland and live with their mother's partner. The applicant filed a violation of the art. 8 of the Convention, thinking that he had advantage concerning taking care of the children and the more so because he stayed in touch with them. The Court in Strasbourg considered that the decision of the Supreme Court was motivated only by the desire of the children to remain in Finland without considering other factors, above all the rights of the applicant as the father, giving in this way the importance of an unconditional veto to the opinion of the child. Based on all this, the Court concluded that the rights of all participants in the case were not respected enough, and unanimously concluded that there was a violation of the rights from the art. 8 of the Convention. See also F. Krenc, M. Puechavy, *Le droit de la famille à l'épreuve de la Convention européenne des droits de l'Homme*, Bruylant, Bruxelles, 2008, at p. 86.

[70] In one decision by the Supreme Court of Serbia opinion of a 16-year-old child capable of forming its own opinion was not taken into consideration, because, as the court explained, "the child is apparently not able to realize what is in its best interests, for which it needs help". Judgement

return into the country of habitual residence is therefore not the deciding factor when passing judgement, but it is also necessary to determine the motivation for such attitude of the child.[71] It is unrealistic to expect of a parent not to exert any influence on the child. The question is only whether such influence is unusually great.[72] In that sense, if it is proven that the opposition of the child to the return into the country of habitual residence is the result of the influence of the parent who took the child, then the views of the child will not be accepted.

However, what should be had in mind is that the right of the child to express views represents one of the most important rights from the catalogue according to CRC.[73] Because of that, the objections of the child shall, as an exception from the obligation to return, probably exert ever greater pressure on the mechanism of The Hague Convention.

4.3. Child settlement in its new enviroment

The fact that assessing the best interests of the child is primarily done by the authority of the country of child's habitual residence does not mean that the same interests will not in some cases demand that the child should stay in the new surroundings into which it was brought. In case of child's integration into the new surroundings, the direct aim of the Hague Convention – the return into the country of habitual residence – cannot be achieved, and the assumption that that country is in the best position to solve the dispute no longer holds.[74] Therefore, aims of the Hague Convention have to be analyzed according to the circumstances of each case and in the interests of the child.

Therefore, to apply the exception from the article 12 paragraph 2 of the Convention it is necessary for the court to get an insight into the situation in which the child is put when it is in the new surroundings, and then to interpret

---

of the Supreme Court of Serbia, Rev. 1368/2008 from 28th May 2008, published at *Paragraf lex*, internet version.

[71] In Brussels II bis Regulation (Art. 11. para. 5) it is provided that the return of the child cannot be refused unless the person who requested the return of the child has been given an opportunity to be heard.

[72] In a case, the court was left with such impression because a 16-year-old child used term "settled" during the hearing. See: *Robinson v. Robinson*, 983 F. Supp. 1339 (D. Colo. 1997), HC/E/USf 128.

[73] See J. Fortin, *Children's Rights and Developing Law,* Cambridge University Press, Cambridge, 2009, at p. 42.

[74] This was pointed out by Baroness Hale in judgment *Re M. (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 55, [2008] 1 AC 1288, HC/E/UKe 937.

such insight in light of the its aims. Application of this exception is allowed only in such situation when from the moment of illegal abduction to the moment of making the demand for the return to an administrative of judicial authority of a country there has passed more than a year.[75] If the child is living in stable family surroundings, that is, if it has integrated into it, then from the point of view of its "best interests" in some cases it would be best if it remained there. However, this does not mean that the return of the child cannot be ordered even if the child has settled in the new enviroment because the opposite act of judicial or administrative authorities in some cases would be against "the best interests of the child". If such was the intention of the creators of the Convention, they would have stated it so explicitly.[76] In absence of such explicit provision in the Convention, it should be said that court holds discretionary right to order the return of the child in this case.[77]

Case-law rarely involves judgements according to which the decision not to allow the return of the child is based exclusively on Article 12 of the Hague Convention. In most cases, the settlement of the child in its new enviroment as a reason for refusal to return is emphasized in combination with other exceptions. One of the first such decisions was made by the American court in case Wojcik v. Wojcik back in 1997.[78] In this case 18 months had passed from the moment of the child abduction to the beginning of the court procedure to return the child.[79] In some cases the parent hides the child in its new surroundings, and sometimes even changes the child's identity. The fact does not lead to a halt in the deadline provided in the Article 12 of the Hague Convention, but it is important when

---

[75] Art 12. para 1. The Hague Convention.

[76] For Baroness Hail a pointer to this is formulation "shall ...unless" from art. 12 of the Hague Convention. See *Abduction: Rights of Custody* [2007] UKHL 55, [2008] 1 AC 1288, HC/E/UKe 937.

[77] However, in some court decisions we can find an attitude that the court does not have discretionary right in case of application of art. 12 para. 2, and that in such case the Hague Convention shall not be applied, that is, the child shall not be returned. See: *State Central Authority v. Ayob* (1997) FLC 92-746, 21 Fam. LR 567, HC/E/AU 232.

[78] *Wojcik v. Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997), HC/E/USf 105. Of the newer ones we should mention: *Kubera v. Kubera*, 2010 BCCA 118, HC/E/CA 1041.

[79] The court did not accept arguments of the father who demanded the return of the child that the procedure to return begins at the moment of submitting his demand to the Central Authority of the USA. The moment of commencement of the procedure was interpreted in the same manner in judgement of the Appelate Court in Canada in case *V.B.M. v. D.L.J.* [2004] N.J. No. 321; 2004 NLCA 56 , HC/E/CA 592 [26].

proving the settlement of the child in its new enviroment.[80] At any rate, based on the existing judicial practice of national courts, the shorter the time of the child's settlement into the new surroundings, the more solid the evidence for it need to be.[81] The notion of the settlement of the child is unevenly interpreted. Some interpret this notion exclusively in the linguistic sense of the word and on the top of that, besides settlement of the child in its new enviroment, also cite that it is not in the interests of the child to return the child.[82] Other countries interpret this notion according to the aims of the Hague Convention. These other countries are more numerous. In these cases the courts do not explicitly deal with the issue of protecting "the best interests of the child". The parent who took the child away has to prove not only that the child has adapted to the new surroundings but that it has been integrated into it. Integration presupposes not only physical relationship with the community and the surroundings, but also emotional security and stability of the child in the new surroundings, as wells as expectation that it will remain so in the future. An exception is decision House of Lords in *Re M. (Children) (Abduction: Rights of Custody)* which starts its interpretation of the notion of settlement with "the best interests of the child",[83] which shall be, as is pointed out in the decision, in accordance with the unlimited discretion of the court, in some cases be taken into consideration, and in some not. The interests of the child to remain in the enviroment into which it has been settled must be so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place.[84]

5. Conclusion

This paper deals with the applying of "the best interests of the child" principle inside the Hague Convention on the Civil Aspects of International Child

---

[80] *Re C. (Abduction: Settlement)* [2004] EWHC 1245, HC/E/UKe 596.

[81] As can be inferred from the decision *Perrin v. Perrin* 1994 SC 45, HC/E/UKs 108.

[82] *France, Cour de cassation, Chambre civile 1, 12 décembre 2006*, 06-13177; *Secretary, Attorney-General's Department v. T.S.* (2001) FLC 93-063, HC/E/AU 823; *7Ob573/90 Oberster Gerichtshof, 17/05/1990*, HC/E/AT 378; *Präsidium des Bezirksgerichts St. Gallen* (District Court of St. Gallen), decision of 8 September 1998, 4 PZ 98-0217/0532N, *décision du 8 Septembre 1998, 4 PZ 98-0217/0532N*, HC/E/CH 431.

[83] *Re M. (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, HC/E/UKe 937.

[84] *Soucie v. Soucie* 1995 SC 134, HC/E/UKs 107.

Abduction. This question raises the dilemma if the return of the child is always in her/his best interests. Indeterminacy of the "the best interests of the child" derives from the fact that the mentioned principle has individualistic character which content is shaped by every single case. That is why the discretionary power of the competent national authorities that apply this principle is so vast. Because of that, the authors express fear that calling upon one indeterminate and wide principle may become convenient justification for each court decision not to apply the law, especially in case of refusing to return the child into country of her/his habitual residence. In order to support their views, the authors give the arguments on seriousness of such fear which can lead to the reexamination of the system established by the Hague Convention. This arguments are based primarily upon the decisions of the national courts in Member-States.

It has been concluded that legislator cannot determine what "the best interests of the child" will be in each individual case, but it can establish certain legal assumptions which would correspond to "the best interests of the child". These assumptions should make the enforcement of "the best interests of the child" easier, but they can also reduce the discretion of the persons and authorities that apply the mentioned principle. Such general assumption can be found in the preamble of the Hague Convention where it is stressed that it is "the best interests of the child" to be returned in the country of her/his habitual residence in case of unlawful international child abduction.

The exemptions from the general duty to return formulated in the Hague Convention are nothing more then ground for challenging the mentioned legal assumption. That is why the application the "best interests of the child" concept can be considered only as a relation between general assumption on duty to return the child and the grounds for challenging that assumption, or exemptions from the duty to return the child promptly in the country of her/his habitual residence.

Having that in ming, it can be said that it would not be in "the best interests of the child" to be returned if such decision would mean a grave risk of placing child into intolerable situation, if child objects returning into the country of her/his habitual residence and if the child has adapted herself/himself in the new enviroment.

Zoran Ponjavić i Veljko Vlašković*

Prostor za najbolji interes deteta unutar Haške konvencije o građanskopravnim aspektima otmice deteta

U radu se razmatra primena principa "najboljeg interesa deteta" kao jednog od osnovnih iz Konvencije o pravima deteta unutar Haške Konvencije o građanskopravnim aspektima otmice dece. Postavlja se pitanje da li je povratak deteta uvek u njegovom "najboljem interesu".

Neodređenost sadržine "najboljeg interesa deteta" upravo proističe iz okolnosti da je navedeni princip individualističkog karaktera, čiju sadržinu oblikuje svaki pojedinačni slučaj. Iz tog razloga je moć diskrecije organa koji primenjuju princip "najboljeg interesa deteta" tako velika. Stoga se u radu iznosi bojazan da pozivanje na jedan ovakav krajnje neodređen i širok princip može postati za sud samo izgovor da ne primeni pravo, odnosno, zgodno opravdanje za svaku sudsku odluku, naročito onu kojom se odbija povratak deteta u zemlju u kojoj dete ima "uobičajeno boravište". U radu su izneti argumenti kojima se navedena bojazan potkrepljuje, čime se može dovesti u pitanje sistem ustanovljen Haškom konvencijom. Oni se uglavnom zasnivaju na odlukama nacionalnih sudova država potpisnica Haške konvencije

Konstatuje se da zakonodavac ne može odrediti kakav će biti "najbolji interes deteta" u svakom konkretnom slučaju, ali može kroz opšta pravna pravila ustanoviti odgovarajuće pretpostavke koje bi važile u korist "najboljeg interesa deteta". Pomenute pretpostavke, imaju za cilj olakšati primenu principa "najboljeg interesa deteta", ali i umanjiti diskreciju pravnih subjekata koje navedeni princip primenjuju. U Haškoj Konvenciji se upravo njenom preambulom uspostavlja pravna pretpostavka kako je u "najboljem interesu deteta" u slučaju nezakonitog prekograničnog odvođenja da bude vraćeno u državu uobičajenog boravišta.

* Zoran Ponjavić je redovni profesor Pravnog fakulteta Univerziteta u Kragujevcu, Srbija, čija oblast interesovanja su Porodično pravo i Medicinsko pravo. Veljko Vlašković je asistent na Pravnom fakultetu Univerziteta u Kragujevcu čija oblast interesovanja je Porodično pravo.

Izuzeci od navedene opšte obaveze povratka deteta formulisani u Haškoj konvenciji nisu ništa drugo nego osnovi za obaranje pomenute pretpostavke. Iz tog razloga se ostvarivanje koncepta "najboljeg interesa deteta" unutar Haške Konvencije može sagledati jedino kroz odnos između opšte pretpostavke o obavezi povratka deteta i osnova za obaranje pomenute pretpostavke, odnosno izuzetaka od obaveze da se dete što hitnije vrati u državu uobičajenog boravišta.

Imajući u vidu rečeno, neće biti u najboljem interesu deteta ako bi u slučaju njegovog povratka postojala ozbiljna opasnost da će dete biti dovedeno u nepodnošljivu situaciju, ako se dete protivi povratku u državu uobičajenog boravišta i ako se dete adaptiralo u novoj sredini.

Ključne reči: Haška Konvencija, otmica deteta, najbolji interes deteta, pravna pretpostavka, izuzeci.