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**CIVIL DISPUTES ON INTERNATIONAL CHILD ABDUCTION  
FROM THE POSITION OF RUSSIAN LAW**

Kamil Arslanov (a)\*, Zamira Akhmetyanova (b), Olga Nizamieva (c), Elena Opykhtina (d)

\*Corresponding author

(a) \*Kremlyovskaya Str., 18, Kazan, kamil.arslanov@gmail.com

(b) Kremlyovskaya Str., 18, Kazan, zamira9@yandex.ru

(c) Kremlyovskaya Str., 18, Kazan, olganizamieva@mail.ru

(d) Kremlyovskaya Str., 18, Kazan, sarambaev@yandex.ru

*Abstract*

The article is devoted to the analysis of disputes about the international abduction of children from the position of Russian law and to the identification of factors that reduce the effectiveness of legal mechanisms for protecting the rights of illegally displaced or detained children. As a result of the research, the circumstances preventing the effective application of the Convention on the International Child Abduction in Russia were revealed. 1) The problem of understanding certain terms that have different meanings in Russian law and in the Convention. 2) The existing mechanism for the recognition of new parties to the Convention allows the Russian courts to refuse to meet the demands for the return of the child. 3) Different directions of vectors laid down in the Convention. The main objective of the Convention is to ensure the prompt return of the child to his or her country of usual residence. The use of conditions, in the presence of which a refusal to return a child is possible, causes significant difficulties. 4) The problem of approval by the court of a settlement agreement. The court cannot approve an agreement, which includes issues that are not the subject of a dispute. The authors concluded that it is necessary to develop and adopt an appropriate resolution of the Plenum of the Supreme Court of the Russian Federation with a view to uniform interpretation and application of the provisions of the Convention, taking into account the existing practice of the ECtHR.

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**Keywords:** Defense of children, Convention on the abduction of children, international abduction of children, illegal movement of the child, custody, access.



## **1. Introduction**

Illegal movement of a child by one of parents or other relative abroad is one of acute problems today. Cases of the international child abduction, including also with participation of the Russian citizens, are not so rare.

The main instrument of regulation of such phenomenon, providing the mechanism of overcoming its negative consequences, along with the national legal legislation, is The Convention on the civil aspects of international child abduction (Hague,2011). Accession to the Convention has to undoubtedly contribute to the implementation by Russia of the obligations undertaken in accordance with the provisions of article 11 of the Convention on the Rights of the Child of 1989, according to which «States parties shall take measures to combat the illicit transfer and non-return of children abroad». However even in those countries where the mechanism, provided by the Convention, has operated for a long time (Beaumont, McEleavy, 1999), the authorities make incorrect decisions, as evidenced by the practice of the ECHR.

## **2. Problem Statement**

The purposes of the research are identification of the factors that reduce the effectiveness of international and national mechanisms for protecting the rights of illegally displaced or detained children, and elaboration of suggestions for improvement of such mechanism for operational permission of conflict situations.

## **3. Research Questions**

Some circumstances that prevent the effective application of measures to protect the rights of illegally displaced or detained children have to be identified:

- The problem of understanding certain terms, used in the Convention of 1980
- A special mechanism for States to recognize new members of the Convention
- Different directions of vectors laid down in the Convention
- The problem of the court's approval of the settlement agreement

## **4. Purpose of the Study**

The due analysis is demanded by a question of reduction in compliance with the Convention of the domestic legislation and on formation of uniform court practice, first of all, for the purpose of due ensuring interests of children (O'Gorman, Kevin; Olivares, Efen , 2010).

## **5. Research Methods**

The research is based on a comparative legal method: comparison and analysis of the current Russian legislation and law enforcement practice and existing European (world) standards for legal unification. The methods of legal modeling and forecasting allow us to determine the need to make changes in the current Russian regulations, as well as the need of correction of judicial practice. Due to

the use of modeling and forecasting methods, the consequences of such changes and adjustments can be established with sufficient confidence, and it is also revealed, how, finally, Russian law-enforcement practice will be brought closer to the available European (world) standards. The legal-sociological method allows an assessment of social problems from a legal position, from a position of the legislator and law enforcement official. The method of interpretation supplements the comparative and legal analysis in a research, allowing understanding and comparing the Russian and European (world) legal standards.

## 6. Findings

Some circumstances that prevent the effective application of measures to protect the rights of illegally displaced or detained children have been identified.

- The problem of understanding certain terms, used in the Convention of 1980 (Kruger, 2011). The concepts "right of custody" and "right of access" of that treatment which is provided by the Convention and the right of some foreign countries are unknown to Russian law (Voevodina, 2013; Pato, Rostovceva, 2014; Chashkova, 2012; Murphy, 2003). The right of custody, defined in article 5 of the Convention, has other semantic value in comparison by the Russian legislation. It includes the rights relating to care of the identity of the child, and, in particular, the right to define the residence of a child. This right can be allocated to parents (parental care), other persons, including institutions and organizations. The institution of parental custody exists in many foreign countries. It is used for differentiation of the volume of the rights of parents in relation to the child in case of a divorce or a separate residence. Parental custody can be joint (with an equal capacity of rights of both parents) and individual (in this case the volume of the rights of one parent can exceed considerably the volume of the rights of another who does not live together with a child).

From the point of view of the Russian legislation, "custody" and "guardianship" are family forms of the arrangement of children left without parental care, due to the death or illness of parents, deprivation or restriction of their parental rights, recognition of parents as incompetent and for other reasons. The concept of custody is not applied to parents; there is no differentiation between the volume of the rights that are assigned to the parent living with the child and the parent living separately. According to item 1 of Art. 61 of the Family code of the Russian Federation (further – the FC RF) parents have the equal rights and perform equal duties concerning the children. Therefore, "for the purposes of the Convention, each of them, irrespective of whether this parent lives with the child or not, should be considered as given the right of parental custody with all the ensuing consequences." (Hazova, 2016).

A significant difference in the understanding of terms often leads in law-enforcement activity to the substitution of concepts: the term "custody" is mistakenly used in the meaning of "place of residence". So, sometimes Russian courts are not entirely correct, but they are forced to use it when examining a dispute about the residence of a child, which is complicated by a foreign element, including a concept of parental custody that does not exist in Russian legislation. At the same time, "when the cross-border dispute on children in foreign court is considered, lawyers sometimes consciously, with the purpose to present position of their principal in light, more favorable for it, try to issue (and not always unsuccessfully) the decision of Russian court on the residence of the child, depending on a situation –

with mother or the father - as the decision recognizing the right of custody respectively for mother or the father, thereby, having limited a possibility of communication with the child of other parent. Thus, unfortunately, the foreign court considering this dispute is misled about the actual circumstances of the case and volume of the rights of each of parents concerning this child, that can influence the result of this case". (Hazova, 2016).

Article 5 of the Convention also establishes the concept of "right of access", which includes the right to take a child for a limited period of time to a place varying than his place of permanent residence. A certain analogue of the right of access under Russian family law is the right of the parent living apart from the child to communicate with the child and participate in his upbringing (Clause 1, Article 66 of the Family Code of the Russian Federation). The right of access, involving meetings, communication with the child and participation in his upbringing, as a general rule belongs to a parent who does not have custody of the child (Trigubovich, Semina, 2012). At the same time, in the legal literature the position was expressed that "although a parent who has only the right to meet with a child can not demand his return, the judicial practice of applying the Convention shows that much depends on the circumstances of the concrete case, and in some cases, the parent was also recognized as the right to demand the return of an illegally displaced child. In particular, such a situation can arise if the parent who has the right of access has the right also to impose a ban on the child's removal abroad (no exit right)." (Kravchuk, 2013). In general, the issue of the relationship between the rights of guardianship and trusteeship is considered very difficult.

The Russian version of the Convention does not correctly use the term "place of permanent residence", while the terms "habitual residence" and "résidence habituelle", used in the English and French texts of the international treaty, are translated into Russian as "place of usual residence". It is quite obvious that for all the similarity of these concepts, the meaning of the words "constant" and "ordinary" is different. Moreover, the "usual place of residence" is defined in the context of the Convention as a less defined concept than "a permanent place of residence". At the same time, when applying the Convention in practice, experts recommend remembering the autonomous (independent) interpretation of its provisions on Russian legislation. Therefore, it is believed that in resolving specific cases, determining the place of permanent / ordinary residence of a child in the understanding of the Convention, it is desirable to be guided by the criteria and approaches developed by the courts of foreign states. There are also other discrepancies between certain provisions of Russian legislation and the rules of the Convention. In particular, under the 1980 Convention, the movement of a child by one parent without the consent of the other parent can be considered illegal. Meanwhile, such actions from the standpoint of Russian law are recognized as legitimate. Namely, in accordance with Art. 20 of the Federal Law of August 15, 1996 "On the procedure for leaving the Russian Federation and entry into the Russian Federation" a minor has the right to leave the Russian Federation with one of the parents; the consent of the other parent to leave is not required (<https://www.loc.gov/law/help/child-rights/russia.php>). This circumstance also causes certain difficulties in judicial practice.

- A special mechanism for States to recognize new members of the Convention: it begins to operate from the moment when the States participating in it already declare their admission of the accession of a new State party. To date, not all countries have announced their recognition of

participation the Russian Federation in Convention. In a number of cases, this circumstance served as the basis for refusal by Russian courts to satisfy the demands for the return of the child to the state of permanent residence. The court decisions stated that if the state of the child's permanent residence did not declare its recognition of the accession of the Russian Federation to the Convention, it is not applicable (Tarasov, 2015). However, a similar situation may arise when the child is illegally transferred from Russia. Moreover, taking into account the rules of free movement of citizens of the European Union, the risk of impossibility of safeguarding the interests of the child substantially increases. Thus, "if a parent who is an EU citizen decides to kidnap a child contrary to the right of guardianship established under Russian law, the rules of free movement will be of great help to him and he will be allowed to settle in a country chosen at his discretion, in particular in the country EU, which is not bound by Russia's obligations under the 1980 Convention " (Pato, Rostovceva, 2014). To be fair, we note that the number of countries that recognize the participation in the Russian Convention is steadily growing (Statut de la Conférence de La Haye; Walker, 2015).

- Different directions of vectors laid down in the Convention. The main objective of the Convention is to ensure the speedy return of the child to his country of usual residence ("the use of the fastest procedures"). To implement this goal, various measures are envisaged. Following the instruction of the Convention on the Adoption of Urgent Measures for the Return of Children by the Judicial and Administrative Bodies, the Russian legislator has established a system of courts that consider such disputes, reducing their number to eight (one in each federal district). This should ensure the uniformity and speed of legal proceedings, as well as the high quality of resolution of cases. The Russian legislation establishes a shortened time for consideration of an application for the return of a child or for the exercise of access rights, which can not exceed forty two days from the day the application was accepted by the court (Article 244.12 of the Code of Civil Procedure of the Russian Federation). Acceleration of the procedure should be facilitated by the assignment to the court of the obligation to declare a child's search if his location is unknown (Article 120 of the Code of Civil Procedure of the Russian Federation). Since cross-border disputes about children can be accompanied by a repeated change of the child's place of residence, in order to prevent the delay in the process in such cases, a rule is established that the application for the return of the child or the exercise of the right of access is subject to review by the court that accepted the application for its proceedings (paragraph 4 Item 244.11 ГПК the Russian Federation) (Nizamieva, Ksenofontova, 2016). In addition, Art. 23 of the Convention, the need to legalize the documents submitted to the court and to comply with similar procedures (apostille) is excluded.

However, the decision to return the child can not be taken automatically or mechanically. The main criterion used in making a decision should be the best interests of the child. The Convention provides for conditions under which the return of the child may be refused. These include: 1) the adaptation of the child to a new environment; 2) a person who claims a violation of his guardianship right did not actually carry out the child's transfer or retention at the time of his transfer or retention, or gave consent to the movement or retention of the child, or subsequently did not object to it; 3) there is a very serious risk that the return of the child will create a threat of physical or psychological harm to him, or otherwise put him in intolerable conditions; 4) the child objects to the return and has already reached the age and maturity in which his opinion should be taken into account; 5) the return of the child is contrary

to the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Articles 12, 13 and 20 of the Convention). However, at the same time, the application of such conditions in practice, the interpretation including the interpretation of the category "the best interests of the child", the development of criteria to judge the child's adaptation, the assessment of the circumstances of the threat to the physical or psychological safety of the child, and others, causes significant difficulties. Although the national judicial and administrative bodies of various countries, as well as the ECHR, are making serious efforts in this direction, the problem remains (Trimming, 2011).

- The problem of the court's approval of the settlement agreement.

According to Article 244.14 of the Code of Civil Procedure of the Russian Federation, during the consideration and resolution of the case on the return of the child on the basis of the Convention, it should not be allowed to mix it with other cases concerning disputes about the child. At the same time, the legislator takes into account the requirement of Article 19 of the Convention that, when considering the application for the return of the child to the state of his permanent residence, the court does not decide the question of which parent the child will live with.

Since the dispute about the return of the child or the exercise of the right of access is considered in the proceeding proceedings, his parties are entitled to conclude an amicable agreement on the basis of Article 39 of the Code of Civil Procedure of the Russian Federation, which is undoubtedly an effective way of resolving the family conflict.

If parents can not agree on everything independently and come to an amicable agreement, one can resort to mediation - negotiations with the participation of a third party. The Federal Law No. 193-FL, dated June 27, 2010, "On the Alternative Procedure for the Settlement of Disputes with the Participation of an Intermediary (Mediation)", allows the use of the mediation procedure for disputes on the return of children.

As a rule, the settlement agreement to which the disputing parents come, contains a set of questions including the definition of the child's place of residence, the procedure for the exercise of rights by his parents, etc. However, the Convention and Russian legislation, as already noted, do not allow consideration of a dispute about the return of the child at the same time as other questions. Therefore, verifying the legality of a settlement agreement, the court can not approve it, since it includes issues that are not the subject of a dispute. In this situation, parents are forced to conclude an extrajudicial agreement, which, unlike the judicial one, can not be turned to compulsory execution (Buck, T. *Mediating International Child Abduction Cases: The Hague Convention*. By SarahVigers. (Oxford and Portland, 2011. 121). *The Cambridge Law Journal*. 2013. 72(3). P. 787-791.).

## **7. Conclusion**

The need to develop and adopt a resolution of the Plenum of the Supreme Court of the Russian Federation on the application by courts of legislation to resolve disputes about children within the

framework of implementing the provisions of the Convention with a view to uniform interpretation and application of its provisions, taking into account the existing practice of the ECHR

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