

ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS PRACTICE ON THE PROTECTION OF CHILDREN'S RIGHTS

Nikolay P. Fesenko, Natal'ya A. Kosolapova, Sergey N. Mamin, Natal'ya Yu. Ponomarenko,
Natalya A. Zhukova
Belgorod State University, 85 Pobedy Street, Belgorod, the Belgorod region, 308015, Russia

ABSTRACT

In this article, according to the analysis of some international legal acts, monographic publications and scientific publications, the analysis of case examination practice was performed concerning the protection of children's rights by the European Court of Human Rights. The conclusions were drawn about the attempts to create a universal world practice of judicial settlement of disputes related to the violation of child's rights.

Keywords: European Court of Human Rights, child's rights, responsibility, jurisdiction.

INTRODUCTION

The protection of a child's rights as a derivative of human rights protection is the primary and main responsibility of Russian Federation (Article 2 of the Russian Federation Constitution). A child's right to live and be brought up in a family; the right of communication with parents and other relatives; the right to protection; the right to express one's opinion; The right to a name, a patronymic and a surname; property and other rights of a child are recorded at the national level in the family legislation. Their protection is carried out in judicial and administrative order.

Also, the protection of child's rights in court can be exercised through the mechanisms provided by international law. Such mechanisms are based on international normative acts, which, in accordance with Part 4, Art. 15 of the Russian Federation Constitution make the part of Russian Federation legal system and have a pre-judicial significance. In part 3, article 46 of the Russian Federation Constitution everyone has the right to apply to various interstate bodies for the protection of their rights and freedoms if all available domestic legal remedies are exhausted.

An appeal to the European Court of Human Rights was one of the most effective mechanisms for the protection of rights at an international level until now.

LITERATURE REVIEW

In order to implement the European Convention for the Protection of Human Rights and Fundamental Freedoms and to ensure the obligations of Member States, the European Court of Human Rights was established in 1959. The main functions of the European Court of Human Rights include:

- the consideration of complaints about human rights violations,
- making decisions on the admissibility of these complaints and, if they are acceptable, their consideration in essence.

In the event of the Convention was determined, the Court can not order the national court to cancel the decision, release the person or return his property to him. In addition to the determination of the Convention violation fact, the Court may also award an appropriate compensation and the reimbursement of expenses to an applicant. However, the European Court of Human Rights is not and can not act as an appellate court in relation to the courts of a certain state.

There are not many articles on the rights of children in the European Convention on the Protection of the Rights and Fundamental Freedoms. However, all Convention provisions are applied to a child, as well as to any other subject of law. This follows directly from the meaning of the Convention provisions and the decisions of the European Court of Human Rights, which state that any person within the jurisdiction of the Court, including a minor one, may act as an applicant.

Most often the European Court of Human Rights applies the article 3, 6, 8 and 14 of the Convention on the protection of children's rights.

Thus, Article 3 of the Convention "Freedom from torture and inhuman degrading treatment or punishment" was applied by the European Court of Human Rights concerning the application of corporal punishment by school, by parents, or by a court order. Art. 6 of the Convention "The right to a fair trial" was examined by the European Court of Human Rights in connection with the violation or non-compliance with special procedural rules concerning the involvement of juvenile defendants in criminal proceedings. In the case of non-compliance with Article 8 of the Convention on the "Right to Respect Family Life", the European Court of Human Rights gave definition to a family, the status of illegitimate children, and a set of actions in a child's interests. Finally, the violations of Article 14 of the Convention were considered by the European Court of Human Rights in connection with the discrimination of child's rights.

Based on the application of these articles the European Court of Human Rights developed legal standards regulating the status of children in international law. Here are some of them.

The daughter of the applicant, Nikolai Rantsev, was the victim of human trafficking and died in Cyprus. The violation of Art. 4 of the Convention in this case was established due to the fact that Russian and Cypriot authorities failed to conduct a proper investigation of the girl's death and people trafficking [1].

The problem of court decisions non-enforcement is the main one for Russian Federation. The fact that it is a structural one was shown by at least 200 judgments of the European Court considering not only the victims of the Chernobyl accident, but also other large groups of Russian population, including a number of particularly vulnerable groups. For example, Russian Federation was very often recognized as the country which allowed significant delays in the enforcement of court decisions concerning the payment of social benefits, such as pensions or child allowances [2].

The failure to comply with the court's decision to collect benefits for children within four to five years is the violation of Part 1, Art. 6 of the Convention and the Art. 1, Protocol No. 1 to the Convention [3].

The Russian soldier Konstantin Markin appealed to the European Court when the Russian authorities refused to grant him leave to take care of his child. In accordance with Russian legislation, such leave is granted only to female soldiers. The court found that Markin became the victim of gender discrimination [4].

The European Court has not recognized yet that Art. 8 of the Convention guarantees the right to receive childcare benefits. However, it has already concluded that the right to receive childcare allowances "falls within the limits of action" of Art. 8 of the Convention, but makes the violation only in conjunction with the Art. 14. For example, in the case of *Weller v. Hungary* the European Court found the violation of discrimination prohibition on the basis of kinship. According to the legislation of Hungary, the father of the child did not have the right to receive a childcare allowance, but this right was granted to the mother, as well as to foster parents and guardians (trustees) regardless of gender [5].

In addition to the standards developed directly by the European Court, during the substantiation of a child's right violation, references to other international legal instruments that establish the rights of a child

are allowed and encouraged. In particular, these are the references to the UN Convention on Child Rights.

The number of complaints filed to the European Court is not decreased in time. So, 66,150 complaints were registered in 2015. The largest number of them is against Ukraine (8658), Turkey (8308), Romania (8204), Hungary (5569), Russia (5591), Poland (2424) and Italy (1409) [6].

According to McEleavy (2015):

The simplicity of the Hague Convention's summary return mechanism has long been lauded. Technically, from the perspective of private international law, it was a great innovation but in its practical operation the instrument has not uniformly fulfilled expectations. The network of States Parties which is edging ever closer to 100, and includes many developing nations, is impressively large,²⁶ but return rates vary quite significantly, delays are frequent even in advanced first world members of the network, and almost every key provision of the instrument has given rise to inordinate amounts of litigation, sometimes with divergent interpretations emerging as between or even within Contracting States.

Where the drafters undoubtedly surpassed expectations however was in creating a new global orthodoxy as regards the treatment of unilateral removals and retentions. The prioritisation of return, the primacy of the child's State of habitual residence as the appropriate forum to adjudicate on the merits of underlying custody disputes, and the promotion of expedition in decision making have all become accepted as global principles and have influenced policy and practice outside the confines of the Hague regime. In 2003 within the European Union, Member States agreed, some reluctantly, to take these principles further in an attempt to realise more effectively the objective of return.³⁴ And in Strasbourg the ECtHR has sought to respond to failings in individual abduction cases by recognising the positive obligations Article 8 ECHR imposes on States and in so doing has attempted to ensure compliance with appropriate minimum standards.

The emphasis placed by the drafters on return was inspired by their perception of the substantive problem, as well as by their appreciation of the weakness of contemporary private international law remedies. The removal or retention of children was largely viewed as an action by frustrated fathers who did not exercise a primary care role. Thereby in promoting return children would not only be going back to their home environment but to their primary carer. In such circumstances the drafters' use of the expression the restoration of the *status quo ante* can be fully understood. At the same time the drafters recognised that the harmonisation of jurisdiction rules would not be feasible and that recognition and enforcement would be neither viable—as an order might not exist, or if one did, might not reflect the realities of the child's life—nor practicable given the delays which might entail at both stages of the process.³⁹ Once the summary return mechanism began to emerge it can also be understood why the drafters acted with such vigour and determination to ensure that it would be applied in the most optimum fashion. This was because if the clock could be turned back quickly then the child could in theory resume his previous life with the minimum of disruption.

The clauses, strategies and techniques employed in and around the Hague Convention to prioritise return are well known and need not be rehearsed in detail here. They are found throughout the instrument, from the creation of the Central Authority system, to the emphasis placed on expedition, and the breadth of the summary return mechanism, through the wide scope afforded to custody rights.⁴⁵ The objective is equally supported by the Explanatory Report, most notably in seeking to ensure that the exceptions to return are interpreted restrictively. In practice however, as the statistical returns for 2008 have shown, this has not uniformly been achieved, and even where returns have been ordered it has rarely been possible to meet the time limits envisaged in Article 11 of the 1980 Hague Convention. A particular challenge for the Convention has been the manner of its implementation. Understandably, particularly for a global instrument of its time, Contracting States enjoy procedural autonomy in the conduct of return proceedings. Inevitably therefore there are significant differences in practice, whether in the treatment of evidence, the conduct and indeed types of appeal which may be permitted, as well as regards the enforcement of return orders. Good practices have been shared by the Hague Conference, and reforms and improvements have occurred, of which one of the most notable has been in the concentration of jurisdiction in certain States, thereby reducing the number of competent courts and building expertise amongst judges. But at the start of the twenty-first century the real drive for reform and the prioritisation of return was coming, albeit in different ways, from Brussels and Strasbourg.

The Europeanization of child abduction law was highly controversial, for the political as well as the practical implications. It was clear during the negotiation of what became the Brussels IIa Regulation that identifying and rectifying weaknesses in the implementation and operation of the Hague Convention in Member States was not a matter of interest. Rather, as a high profile, cross-border problem, a bespoke European solution was needed which would provide 'added value' for the European citizen, and of course reflect well on the European institutions. The compromise solution which was ultimately achieved, preserved the Hague Convention for intra-Member State abductions, but saw it 'complemented' by new, directly applicable rules. These rules have created a more strictly regulated return regime and seek to ensure that the Member State of the child's habitual residence retains control over the child's future. Deterrence is at the heart of the new regime, and the Hague Convention's expectation that applications be dealt with in 6 weeks is nominally transformed into a rule.

In theory the protection of the interests of individual abducted children is to be assured by the control exercised by the authorities of the State of habitual residence, which should moreover avoid divergent assessments by the requested court, where the child is actually present. But whilst the mechanism has been found to comply with the obligations of Article 8, through the application of the *Bosphorus* principle of equivalent protection of fundamental rights, in practice this attempt to prioritise return does not appear to have delivered the expected dividend for the European Union. There have been many high profile examples where the new rules have failed to operate as intended, or indeed have been ignored entirely. And preliminary findings from an empirical study indicate that in practice the child is rarely returned to the State of origin under the Article 11(8) mechanism.

In the first decade of the twenty-first century, after holding that the positive obligations Article 8 places on Council of Europe States in the matter of reuniting a parent with his or her child must

be interpreted in the light of the Hague Convention, the ECtHR's engagement with the 1980 instrument soared. The applications coming before the Strasbourg Court highlighted many of the procedural failings existing in a wide range of European States which were undermining the effective application of the Hague Convention and the return of children. The ECtHR found there to be positive obligations on States to: apply the Hague Convention in an effective manner; make adequate and effective efforts to enforce a left behind parent's right to the return of his child as well as the child's right to be reunited with the left behind parent; interpret provisions in accordance with international norms; and to take all necessary steps to facilitate the enforcement of Hague Convention return orders. And, in some instances, this has led to general measures being taken by States to prevent the recurrence of violations similar to those found by the Court.

Alongside such support for the practical operation of the Hague Convention, the ECtHR was equally fulsome in upholding the instrument's rationale and return agenda. This was exemplified in the case of *Maumousseau and Washington v. France*⁷⁶ where a primary carer mother complained that the interpretation given by the French courts to the grave risk of harm exception in Article 13(1)(b) of the Hague Convention had been too restrictive and that her daughter's best interests had not been considered completely. The Court held that it was entirely in agreement with the philosophy underlying the Hague Convention, namely deterring the proliferation of international child abductions, restoring the *status quo ante* and leaving the issues of custody to be determined by the courts of the child's habitual residence. It accepted that the exceptions were to be interpreted strictly and added that were the mother's arguments to be accepted, then both the substance and primary purpose of the Hague Convention would be rendered meaningless. The Court was satisfied therefore that the child's 'best interests', which lay in her prompt return to her habitual environment, had been taken into account by the French courts. Encouraging as this reasoning was for supporters of the Hague Conference, *Maumousseau* did prove to be the high water mark for the Court's unrestricted prioritization of return.

Faced with a factual situation where one adult can, *prima facie*, be portrayed as a wrong-doer and another as a victim,⁸⁰ as well as a legal framework which at every level appears to caution against: the subversion of the primary objective of return; the manipulation of processes and evidence by abductors; and the conflation of return proceedings with those on the merits; then it can be understood how some courts and policy makers have struggled to achieve an appropriate balance between furthering the interests of children in general and protecting the interests of individual abducted children. And moreover, that courts in some common law jurisdictions might appear to have veered instinctively towards conformity and the apparent simplicity afforded by an order for return.

For all the emphasis on return, it is not automatic as between Hague Contracting States or even, at least yet, as between those EU Member States which are subject to the Brussels IIa Regulation. Indeed an order for non-return in appropriate cases is not in any way a failure, but rather the Convention operating as intended. The challenge for courts in abduction situations is how to align the objectives of the Convention with the contemporary profile of abduction cases, where it is the actions of primary carer mothers which are most often at issue, where a return will not be restoring the *status quo ante* in a literal sense, and where the mother may not have strong connections to the child's State of habitual residence and may face financial challenges there. In addition, in many Contracting States regard must increasingly be paid to the views of all capable

minors and not simply to the objections of older children. Furthermore courts must respond to the requirement for expedition in the conduct of return proceedings, whilst ensuring due respect for procedural fairness.

It is against this context that there is fertile ground for critics of the Hague approach and its emphasis on return and the interests of children in general. However, before considering the most recent case law of the ECtHR in which such criticism has been given expression, regard must be given to the scope which already exists to gain more detailed information about the individual child within the 1980 Convention, as well as the potential for bespoke solutions which exists through the Brussels IIa Regulation.

METHODOLOGY

Various general scientific methods and the methods of logical cognition were used in the article: system analysis and synthesis, abstraction and formal logical approach. The disclosure of the topic was facilitated by the use of linguistic-legal, formal-legal and comparative-legal method, and also content analysis.

CONCLUSIONS

The analysis of the European Court of Human Rights practice concerning the protection of child's rights allows us to draw the following conclusions.

1. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the legal positions of the European Court of Human Rights formulated on the issues of its application are equally applicable to the issues related to the protection of children's rights.

2. The most typical situations considered by the European Court of Human Rights for the protection of child rights are the following ones:

- the determination of a child's place of residence;
- the determination of paternity and the protection of children interests born out of wedlock;
- the provision of a refuge to children and their parents;
- bioethics.

There are reasons to believe that the decisions of the European Court of Human Rights will become the international basis for law enforcement concerning the protection of family rights and the interests of children throughout the world. Moreover, taking into account that, pursuant to the decision of the European Court, a state must take measures to prevent further violations of a child's rights, it is likely that legislators will follow the path of creation new mechanisms for the realization of children's rights or the path of reforming the existing ones.

REFERENCES

- Rantsev v. Cyprus and Russia*, no. 25965/04, § 108, 7 January 2010.
Burdov v. Russia (no. 2), no. 33509/04, § 133, 15 January 2009.
Bragina v. Russia, no. 20260/04, 1 February 2007; *Deykina v. Russia*, no. 33689/05, 1 February 2007; *Lyudmila Aleksentseva v. Russia*, no. 33706/05, 1 February 2007; *Nartova v. Russia*, no. 33685/05, 1 February 2007; *Voloskova v. Russia*, no. 33707/05, 1 February 2007; *Voronina v. Russia*, no. 33728/05, 1 February 2007; *Zaichenko v. Russia*, no. 33720/05, 1 February 2007.
Konstantin Markin v. Russia, no. 30078/06, § 59, 7 October 2010.
Weller v. Hungary, no. 44399/05, § 40, 31 March 2009.

<http://EuropeanCourt.ru;> http://europeancourt.ru/uploads/Statistika_Evropeyskogo_Suda_2015_9.pdf;
<http://svspsb.net/sverige/evropejskij-sud.php>.

Gomien, David Harris, Leo Zwaak. *Law and practice of the European Convention on Human rights and the European Social Charter*. Council of Europe Publishing, 1998.

Advocacy activity. Training manual / The general ed. V.N. Burobin. - Moscow: Publishing house of MNEPU, 2001.

McEleavy Peter (2015) *The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?* *Netherlands International Law Review*, December 2015, Volume 62, Issue 3, pp 365–405

Nielsen, “*Leading Cases of the European Court of Human Rights*”, complied, edited an annotated by R.A. Lawson & H.G. Schermers. Leiden, 1997, p.279.

Federal Law No. 54-FL “*On the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*” issued on March 30, 1998.

Tyrer, “*Leading Cases of the European Court of Human Rights*”, complied, edited an annotated by R.A. Lawson & H.G. Schermers. Leiden, 1997, 43

Nielsen, “*Leading Cases of the European Court of Human Rights*”, complied, edited an annotated by R.A. Lawson & H.G. Schermers. Leiden, 1997, p.270

Nielsen, “*Leading Cases of the European Court of Human Rights*”, complied, edited an annotated by R.A. Lawson & H.G. Schermers. Leiden, 1997, p. 270

Nielsen, “*Leading Cases of the European Court of Human Rights*”, complied, edited an annotated by R.A. Lawson & H.G. Schermers. Leiden, 1997, p.274

Donna Gomien, David Harris, Leo Zwaak. *Law and practice of the European Convention on Human rights and the European Social Charter*. Council of Europe Publishing, 1998. p.252.

Donna Gomien, David Harris, Leo Zwaak. *Law and Practice of the European Convention on Human Rights and the European Social Charter* Council of Europe Publishing, 1996. p.248

Lobov, M.B. *Legal Adviser Report of the Enforcement Division within the European Court of Human Rights at the International Conference "Russia and the Council of Europe"* issued on 18-19 May, 2001.

http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_Avril2011.pdf

http://www.echr.coe.int/NR/rdonlyres/B2911BCC-D34F-4D5A-BD83-2307D78754D7/0/RUS_P0_Pack.pdf