

International Child Abduction in Civil Matters Pursuant to Kosovo Legislation

Ma. Sc. Nehat Idrizi - PhD

Judge at the Court of Appeals in Pristina and Doctoral Candidate at the UET in Tirana.

Abstract

Migration and settlement of Kosovo citizens, whether on individual basis or family groups in other countries, amongst others, have also caused the problem of international child abduction. This abduction was done by one of the parents or a temporary guardian. Although cases involving international child abuse have practically occurred, children have not been protected lacking legal provisions. For the first time in Kosovo, this matter was regulated by promulgation of UNMIK Regulation no. 2004/29 on Protection against International Child Abduction dated 05 August 2004. Pursuant to Kosovo legislation the child abduction shall mean removal or retention of a child which constitutes breach of rights of custody attributed to a person or any other body, under the law of the State in which the child was habitually resident immediately before the removal or retention. Hereby it is intended to recon in aspects of international child abduction and their prompt return from Kosovo to the Requesting State, the child return procedures and cases from the court practice. The court authorities having jurisdiction set forth by law, shall implement the child return procedures once the legal conditions are met, and for the purpose of such implementation, they may issue different measures. The Basic Court of Pristina shall have exclusive first instance jurisdiction in Kosovo. The Ministry of Justice being the central authority shall carry out the administrative procedure for a voluntary return of the child to the Requesting State.

Keywords: Child abduction, child return, procedure, law, measures.

Introduction

Children are the most important members in every society, in particular to every family and its future. Migration and settlement of Kosovo citizens as individuals or as family groups in foreign European and world countries due to various reasons, new marriages entered and dissolutions as a result of deterioration of marital relations in the countries out of Kosovo, have resulted in international abductions of children by one parent or temporary guardian. In this paper will be discussed aspects of international child abduction as well as their more rapid return from Kosovo to the requesting state. Therefore, cases of international child abduction have a significant impact on international relations of Kosovo with other states and much more rapid return of those children to such countries is of particular importance. Provision of international legal assistance in Kosovo is regulated by the Law on Contested Procedure.

Basic courts are competent to provide international legal assistance and to decide on the recognition of foreign court decisions. In order to protect the rights of children, some protective measures are foreseen for children in all judicial procedures. All state bodies, in particular the courts, are obliged to engage maximally and to ensure the protection of children's rights, even in cases of their international abduction by the temporary custodian, an obligation that results from provisions of the Convention on the Civil Aspects of International Child Abduction. Although cases of international child abduction have practically occurred earlier, the children have not been protected because of the lack of legal regulations. This issue has been regulated in Kosovo for the first time by UNMIK Regulation No. 2004/29 on Protection against International Child Abduction dated 05 August 2004, whereas in 2010 the Assembly of Kosovo adopted the Law on the Civil Aspects of International Child Abduction. State bodies and courts, during the proceedings on issues dealing with children, are required to protect the best interests of children. Convention and the law, on one hand, are intended to protect children from the harmful actions of unjust removal to another state and, on the other hand, to prevent their unjust removal or retention and their return to the requesting state. Judicial bodies, as competent bodies, apply the procedure for return of

the child and for the purpose of carrying out this procedure, they may issue different measures. After the entry into force of the Law on Courts, the Basic Court in Prishtina has the exclusive competence of first instance, and The Ministry of Justice conducts administrative procedure for the voluntary return of the child to the requesting state.

1. International and National Legal Framework

International Legal Framework

Changes made in the social system in Kosovo have also caused the changes in the legal system in order to harmonize it with international standards in the field of human rights and especially the rights of children. In order to implement international standards in the field of protection of children's rights, in the Constitution of Kosovo is foreseen direct implementation of Convention on the Rights of the Child. This convention is included in the Constitution and applies as part of positive law in Kosovo.

The Convention binds all state bodies and private institutions that in their activity the primary interest should be the children's interest. The convention provides that "[...] States shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status¹. States shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. Furthermore, this convention provides 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 consideration². States shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Every child has the inherent right to life and to the maximum extent possible, the survival and development of the child shall be ensured. State undertakes to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law. Children have the right to give their opinion or even to be heard. Authorities are obliged to "provide the child capable of forming views of its own, the right to express those views freely in all matters relating to the child, giving views of the child due weight in accordance with the age and maturity of the child. The essential part of this right is that children have the right to be heard and their views should be taken seriously in matters that affect their interests. The Convention provides that children should not be separated from their parents, except in cases stipulated by the law by the authorities on their behalf. The Hague Convention on the Civil Aspects of International Child Abduction regulates the issue of child abduction. The aim of the Convention is to protect children from the harmful effects of international abduction ensuring a prompt and effective return of the child in the country of last residence thereafter. According to Article 3 of this Convention removal or the retention of a child is to be considered wrongful where: it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised, either jointly or alone. The return of the child is aimed at restoring the situation that existed earlier prior to removal and not allow the parent to have any advantage from the child abduction.

1. 2. National Legislation

Cases of international child abduction have significant influence on international relations of Kosovo with other states. Processing and prompt resolution of these cases is influential and is of great importance in relation to included parties and the requesting state. The issue of international child abduction for the first time was regulated in Kosovo by Regulation No. 2004/29 dated 5th August 2004 and the provisions of Article 2 foresee the implementation of the Hague Convention on the Civil Aspects of International Child Abduction, and the competent court to decide on claims for return of the children had been former District Courts of Kosovo on the territory where the child was found. On 28 October 2010, the Assembly of Kosovo for the first time adopted the Law on the Civil Aspects of International Child Abduction. The provisions of Article 3

¹ See Convention on the Rights of the Child, Article 2 ,parag.1

² Ibid, Article 3 parag.1

of this Law provide that when a case is regarded as international child abduction, the law stipulates that: "The removal or the retention of a child is wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised with an exemption of the removal or retention¹. The law aims to ensure the prompt return of the abducted child to his country of origin (repatriation of) and to ensure respect for the right of custody or contact with the child who is resident of Kosovo or the Requesting State. In order to be considered as a case of international child abduction, certain criteria must be met as:

The requestor must prove that the child was domiciled in that country (the Requesting State),

The removal or retention of the child was wrongful and in breach of rights of custody provided for in the law of the country of residence and that the requestor actually exercised these rights at the moment or time of removal of the child,

Removal of the child must be outside the resident state border,

The child may not be more than 16 years old.

2. Procedures of Child Return

The Law on the Civil Aspects of International Child Abduction defines the procedure which should take place to ensure the return of the child to the requesting state, where the child is removed or retained wrongfully to another country. Initiation of the procedure that has to do with the civil aspects of international child abduction aims to ensure fast return of the child to the requesting state and to ensure respect for the right of custody and contact with the child. The procedure begins with a request that the custodian or any institution claims that the child is removed or retained in violation of custody rights. The procedure of child return to the country of origin is urgent and fast. Initially, an administrative procedure is conducted by the Ministry of Justice. The Requesting State through its Ministry of Justice sends the request together with supporting documentation to the Ministry of Justice of our country. If this Ministry fails to return the child, the case is forwarded to the Basic Court in Pristina which conducts the proceedings regarding the return of the child to the Requesting State. Central Authority (Ministry of Justice) and the court, taking into account the primary interest that this child may have from the settlement of the issue by agreement, from the beginning and throughout the entire procedure should engage with the parties to the procedure that the return of the child is voluntary or by agreement, by engaging experts in the social field, psychologists and mediators.

2. 1. Types of procedures for the return of the child

Child return procedure has some specifics that distinguish it from other procedures. Law on Civil Aspects of International Child Abduction provides two types of procedures for the return of the child:

Administrative or voluntary return procedure of the child, and

Judicial Procedure

2. 1. 1. Administrative Procedure

The foreign state submits the request for return of the child to the Ministry of Justice which after receiving the request verifies the legal requirements are met, i. e. that it is accompanied by all documents necessary to assess whether the case has to do with international child abduction. Before proceeding of the case to the court, Ministry of Justice addresses a request to the temporary guardian to return voluntarily the child to the requesting state. The Ministry informs by notification the temporary guardian on the request and proposes the voluntary return of the child to the requesting state within seven days or to reach agreement on the return of the child. If the temporary guardian does not comply within seven days from

¹ See Convention on the Civil Aspects of International Child Abduction, Article 3, parag.1

the receipt of the letter, the Ministry of Justice shall initiate court proceedings and transmit the application to the Basic Court of Pristina.

Kosovo Ministry of Justice has played an important role in particular in the activities of international cooperation on legal issues in cases of international child abduction. Within the Ministry of Justice operates Department for International Legal Cooperation (DILC). All requests for International Legal Assistance originating from foreign countries should be directed primarily to the Ministry of Justice or to the Department for International Legal Cooperation. The Court works closely with the Ministry of Justice, respectively DILC, on all matters dealing with the civil aspects of international child abduction, and complies with the Convention and the Law on the Civil Aspects of International Child Abduction. Procedure of the international legal assistance in civil matters is regulated by the Administrative Instruction issued by the Ministry of Justice. According to the Law on the Civil Aspects of International Child Abduction, the Kosovo Ministry of Justice is the Central Authority in Kosovo, to implement the request for return of the child¹. The request for return of the child is submitted to the Ministry of Justice, but can also be submitted to the Basic Court in Pristina. Upon receiving a request from the Ministry of a foreign state, it determines whether it meets the requirements set by law. It cooperates with the central authorities of other countries to provide as soon as possible the return of the child to the Requesting State.

In order to be considered a completed application shall contain:

information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child wrongfully;

the date of birth of the child;

- the grounds on which the applicant's claim for return of the child is based; and
- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Besides this information, the request for the return of the child must be attached other required documents such as: an authenticated copy of any relevant decision or agreement, a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence or from a qualified person, concerning the relevant law of that State, and any other document relevant for the case.

Ministry of Justice, as the central authority, shall take several measures that are in the interest of the prompt return of the child such as:

- to discover the whereabouts of a child who has been wrongfully removed from requesting state,
- to prevent harm to the child by taking interim measures,
- to ensure the voluntary child return or to bring an amicable resolution on child return,
- in case of failure of voluntary return, to proceed the request to the court,
- to provide consultants and legal assistance,
- to undertake the necessary measures to ensure the safe return of the child,
- to exchange information with central authorities of the requesting states to eliminate barriers to the implementation of this law.

¹ See Law on the Civil Aspects of International Child Abduction, Article 4, parag.1

Ministry is not a party to the procedure but it may interfere in the interest of the applicant or child through written documents which the Court should take into account when deciding on the request.

2. 1. 2. Judicial Procedure

According to provisions of Article 8 of the Law on the Civil Aspects of International Child Abduction, former District Court of Pristina had had exclusive jurisdiction in the first instance to hear and determine requests for return of the child. After the entry into force of the Law on Courts, the exclusive competence of first instance has the Basic Court in Pristina¹. The Court, when considering an application for return of the child, issuing orders and decisions, proceeds in accordance with the provisions of the Law on Non-Contentious Procedure. In accordance with the provisions of this law, a child is considered a person under the age of sixteen (16)². After the court receives the request for return of the child, all other proceedings that have to do with determining of child custody in any other court in the territory of Kosovo shall be suspended to the conclusion of the procedure for return of the child.

Before the initiation of the court proceedings, Ministry of Justice addresses a request to the temporary guardian to voluntarily return the child. As soon as the request is received, the Court verifies that it meets formal requirements set out in Articles 4 and 6 of the law. This verification of formal requirements must be done in a short time as soon as possible in order to ensure prompt return of the child. If application is not complete, the court shall ask the applicant to complete it. The court is bound to decide on an application within a period of 42 days from the date of request received. This timeframe is important since if the requirements are met, the child is promptly returned to the requesting state. Procedure to return the child has precedence over other procedures. In cases where the child has reached the age of maturity, the Court hears the child. According to provisions of Article 6 of the European Convention "On relations with children", children have the right to be informed, consulted and to express their opinions. Regarding the assessment that a child has reached the age of maturity, the law has not defined any age limit. Upon completion of the proceedings, the court may: order the return of the child to the requesting state or reject the request for return of the child in cases where the requirements provided for in Article 12 of the Law have been met. The Court, in the proceedings of the return of the child, proves only the fact that the wrongful removal or retention of the child is: a violation of the provisions of the Convention and the Law relating to custody of the other parent and if it determines that a violation exists, the child should be returned to the Requesting State.

Basic Court in Pristina, in cases of international child abduction has authority:

- to order the return of the child to the requesting State if the child is wrongfully removed or retained in Kosovo,
- to issue a statement that the removal or retention of a child outside the territory of the Republic of Kosovo has been wrongful,
- to issue an order or decision, as appropriate, in order to decide on wrongful removal of the child or to enforce the return order,
- to issue orders to temporary guardian in order to ensure much faster return of the child.

In cases when the Court orders the return of the child, all other orders that have to do with the rights of guardian over the child and which have been issued by any other court in Kosovo have no effect.

Parties have the right to appeal to the Court of Appeals in Pristina against the decision issued in the first instance court.

2. 1. 3. Execution Procedure

Basic Court of Pristina has jurisdiction for implementing the order to return the child to the requesting state. Execution procedure aims through enforcement to realize the request of the party which won the right by court decision. Execution procedure is the last stage of judicial proceedings. Without execution procedure, the parties are deprived of the right

¹ See Law on Courts of Kosovo, Article 22

² See Law on the Civil Aspects of International Child Abduction, Article 2, item 1.1

acquired by the decision of the competent judicial body. If the temporary guardian fails to comply with the court order to return the child, in such case in terms of the provisions of Article 10. 2 of the law, the temporary guardian may be punished by a fine of up to 10,000 euros.

In this procedure also applies the principle of disposition of the parties, since the initiation of the execution procedure depends on the will of the party. In cases where the child's temporary guardian does not return the child voluntarily after the decision of the court, the court undertakes all actions by the enforcement proceedings of that court decision. In such cases, the court closely cooperates and coordinates with the Centre for Social Work where the child is and the Kosovo Police, namely the Department for International Cooperation of the Ministry of Justice.

3. Interim measures

The Court, as per request made by the Ministry of Justice, or ex officio, before the award decision may order interim measures in order to ensure the welfare of the child and to prevent the changes of the whereabouts and to prevent the circumvention of the return of the child¹. As interim measures may be issued: the measure to prohibit border crossing namely to parents and any third person to prohibit them to change the place of residence of the child, in particular that the child be sent outside the state border without prior permission of the court. Border authorities are required to prevent any removal of the child from the territory of Kosovo, delivery of identity card or passport to the authorities (police or court), measure of contact with the child by the requesting parent. Throughout the proceedings, the court must consider whether there is a need for safeguards to prevent the concealment or removal of the child from the country.

4. Cases from Judicial Practice

Several cases have been taken and analysed in the process of this paper from former District Court of Pristina and now the Basic Court in Pristina. In these cases are presented some personal specifics of the requesting party and temporary guardian (the person who has abducted the child) such as: cases of initiated request by the husband or wife, the return of the child made in judicial or voluntary proceedings, how many of them returned to the requesting state, and age and gender of children.

Table: Initiated request for the return of children from husband or wife, return made in judicial or voluntary proceedings, how many judicial decisions are executed and the children's age and gender.

Requests filed		State						Child gender		Age		Court Decision		
Fathe	Mothe	German	Austri	UK	Albani	Belaiu	Monte	Mal	Fema	M	M	Approv	Reject	Dismiss
1	7	2r	2r	1r	1r	1r	1r	7	5	4	18	6r	1r	1r

*r – request(s)

The study of eight court cases that have been analysed and studied features in these cases treated show that seven of them are initiated by the wife or mother while only one case by the father. This means that the abduction of children is made mostly by their fathers. All cases of the return of the children are made in judicial proceedings and no case by voluntary procedure. Only one request was submitted by the citizens of Kosovo for the return of the child, while the other cases were requests from foreign states. From the requests for return of children filed, only one case has not yet been executed by the court decision, that is, the children have not been returned to the requesting state even though there is a final decision of the court. Age of children involved in these cases had a minimum of four years while the maximum was 18 years old. Regarding gender, five of them were female while seven male. Regarding states, two requests were from Germany, two from Austria, one from Albania, one from Belgium, one from England and one from Montenegro. Of the eight cases reviewed, six requests were approved and ordered the return of the children to the requesting state, a request was dismissed because the children were aged over 16, and in one case, the request for the return of child, was rejected.

¹ Ibid, Article 15

5. Conclusions

The issue of child abduction has a significant impact on relations with foreign states and rapid return of the children to the country of origin or where they had residence has a special significance. In this paper are presented findings about international child abduction which are regulated by the Hague Convention on the Civil Aspects of International Child Abduction and the Law on the Civil Aspects of International Child Abduction. There are also given explanations regarding the procedure for the return of children, such as administrative and judicial procedures. As the competent authorities for conducting the procedure of fast return of the child to the requesting state under the law are the Ministry of Justice, as the Central Authority, in the administrative procedure and the Basic Court of Pristina in the judicial proceedings. In the final part are treated interim measures which may be issued with the aim to provide the return of the child as well as cases from judicial practice from which there is no case of voluntary or mediated return of the children. From the requests submitted, it is verified that the majority of them are made by mothers meaning that fathers have been the persons who have abducted the children and only one court decision remained unexecuted.

Sources

Constitution of the Republic of Kosovo

Hague Convention on the Civil Aspects of International Child Abduction

Convention on the Rights of the Child

European Convention "On relations with children"

Law on the Civil Aspects of International Child Abduction of Kosovo

Law on Family of Kosovo

Law on Courts of Kosovo

Law on Social and Family Services of Kosovo

European Convention on the Exercise of Children's Rights

UNMIK Regulation, No. 2004/29 on Protection against International Child Abduction dated 05 August 2004

Dr. Hamdi Podvorica, E Drejta familjare (*Family Law*), Prishtina, 2011

Dr. Arta Mandro, E Drejta familjare (*Family Law*), Tirana, 2009

Court decisions

Decision of the District Court in Pristina, N. nj. C. nr. 1/2011, date 03. 03. 2011

Decision of the District Court in Pristina, N. nj. C. nr. 2/2011, date 29. 03. 2011

Decision of the District Court in Pristina, N. nj. C. nr. 4/2011, date 05. 10. 2011

Decision of the District Court in Pristina, C. nr. 1/2012, date 10. 02. 2012

Decision of the Basic Court in Pristina, C. nr. 259/2013, date 10. 04. 2013

Decision of the Basic Court in Pristina, C. nr. 503/2014, date 17. 03. 2014

Decision of the Basic Court in Pristina, C. nr. 2458/2014, date 24. 10. 2014

Decision of the Basic Court in Pristina, C. nr. 2955/2013, date 08. 01. 2014

Case C. nr. 1903/13, date 19. 09. 2013 Basic Court in Pristina