

International child abduction: return proceedings and exceptions to return

A client approaches you claiming that his child was abducted by the mother of the child to another country.

He asks your advise how to have the child back.

What are the questions you will have to find out first?



- Was there abduction?
 - Does the client have “right of custody”?
 - Were the rights of custody actually exercised?
 - Where was the child’s habitual residence?
 - Is there a court order/clients consent allowing removal?
- When removal / non-return happened?
- To which country was the child brought?
 - defines the instrument to be applied
- Has the client already applied to some institution?
- (Why did the abduction happened?)

Legal instruments to be applied

Countries involved	Instruments to be applied
Both countries are EU Member States	1980 Hague Convention and Brussels Ila Regulation
One country is EU Member State, the other – not EU Member State but party to 1980 Hague Convention	1980 Hague Convention
One country is EU Member State, the other is not party to 1980 Hague Convention	Bilateral treaty on legal assistance (if signed) and national law apply

1980 Hague Convention (HC) and Regulation Brussels 2201/2003 (BIIa)

- BIIa builds upon 1980 HC, however, it strengthens 1980 HC rules amongs Member States
- Under Article 60 of BIIa, in relations between MS Regulation is to take precedence over the 1980 HC
- Convention's scope of application is not altered - see CJEU, 5.10.2010, C-400/10 PPU, *McB*

- Regulation BIIa provides additional rules on safeguards as regards:
 - expeditious proceedings
 - mandatory hearing of the child and a left-behind parent
 - non-possibility of refusal to return a child if **adequate protection measures** are ensured
 - Art 11(8) overruling procedure

Where to apply in case of abduction?

- Central authorities → important assisting institutions
- Police?
- Court of **State of refuge** → an application to return a child (starting return proceedings under the 1980 HC)
- In addition, sometimes the court of child's HR is approached → an application for parental responsibility and custody/access.



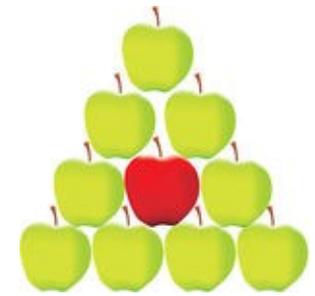
Court of State of refuge

- Verifies if there was an abduction
- Hearing of the child and of the left-behind parent (duty under Regulation BIIa)
- Has a general duty to issue a decision to return the abducted child
- Order a return within **6 weeks**
- Checks if there are no grounds to refuse return



The essence of the order to return the abducted child

- Procedure before courts of State of refuge is **not about the future of the child, but about the returning** of the child to his/her original home-State so that the custody questions be decided there
- Main questions to be covered: **was there abduction** and **is there ground to refuse return**



Exceptions to return

- Art. 12(2) HC – elapse of one year + settlement
- Art. 13 (1)(a) HC – acceptance or acquiescence
- Art. 13 (1)(a) HC – lack of exercise of custody rights
- Art. 13 (1)(b) HC – grave risk of physical or psychological harm
- Art. 13 (2) HC – child opposes return
- Art.20 HC– violation of fundamental rights in the State of refuge
- (also) Art. 3 HC – lack of habitual residence in the State of origin (no abduction)

Case study

Edina (Hungarian) and Nick (British) live in Brussels. They have 3 kids: John (16), Adam (6) and Eva (2). After separation in 2016, children mostly live with the mother, however, they sometimes stay with the father.

Edina decides to move to Budapest and informs Nick about this in August 2018.

On 1st September, John starts French school, Adam and Eva are placed in Hungarian pre-school. Edina begins working.

In March 2019, Nick decides to get children back.

- 1. Can Nick start abduction proceedings? How and where this should be done?
- 2. Do we have child abduction here? What importance should be attached to the fact that the couple was not married? Were the custody rights exercised properly by the father?
- 3. Would the situation change if Nick would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?

Question block 1: Father's consent?

Edina claims that she informed the father that she intends to leave with children and he did not object.

Almost 7 months passed since they moved to Hungary.

*4. Was there father's consent to removal?
How consent should be expressed?*

Acceptance or acquiescence to removal – Art 13a

- Only true and unequivocal consent counts
- This does not mean that it should necessarily be expressed in a formal written document (can be inferred from the circumstances)
- The burden of proving the consent/acquiescence rests on the party who asserts it



Question block 1: Children's integration?

Almost 7 months passed since they moved to Hungary. Edina claims that time children settled in the new environment.

Kids go to school / day care. All children considerably improved their Hungarian, have many friends and relatives here.

5. Can return be refused due to children's integration?

Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?

Article 12(2) HC

Two cumulative conditions:

- Return procedure was initiated after a period of 1 year from the date the abduction took place
- Child is now settled in its new environment



Question block 1: Child objections?

6. Should the kids' opinion as to their return be heard?

- What if John and Adam oppose return?*

Art. 13 (2) HC – child opposes return

- Hearing of the child is the duty of the court
- Age from which the child is heard varies in MS
- Child is heard, objections are considered, but they are not decisive in court's judgement

Child's opinion should be linked to the return to the State of prior residence itself, and not to the question of custody or with whom of the parents he/she prefers to stay



Question block 2: Grave risk exception?

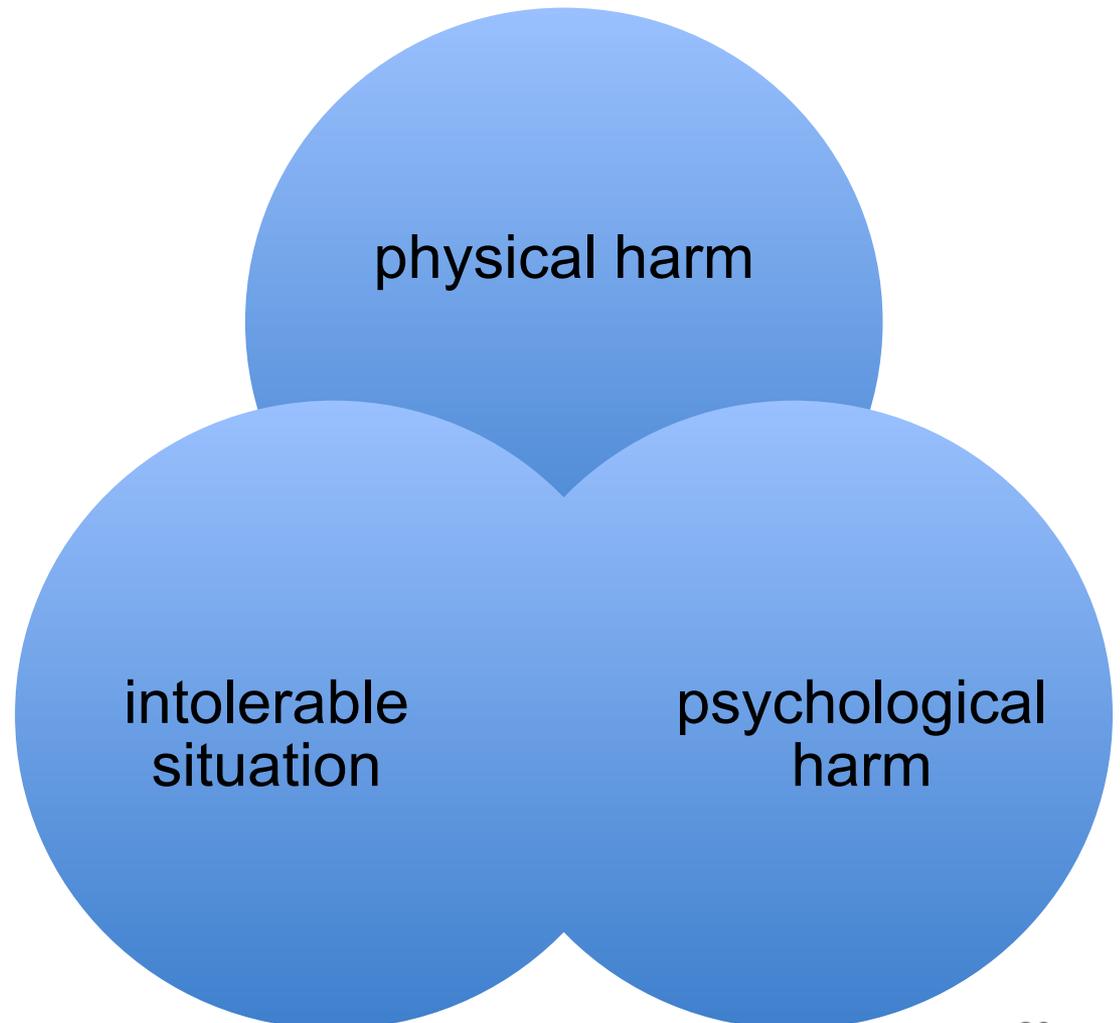
Edina claims they separated due to the fact that the father became mean, aggressive and started abusing her. She worries that he might also be aggressive towards children. In addition, he started drinking beer in big quantities and often.

7. Could abuse of the mother and father drinking result in grave risk exception?

Also consider possible use of adequate arrangements (Article 11(4) of Regulation 2201/2003).

Grave risk exception – Art 13b

“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 “



NB!

In the EU context, the use of this exception is restricted by Article 11(4) of the Regulation BIIa, which prohibits refusal on this ground where **adequate arrangements** have been made to secure the protection of the child after the return.

“adequate arrangements”

- measures guaranteeing safe temporary return
- make return (nearly) **always** possible
- focuses on how to minimize/avoid harm
- adds additional question to court’s evaluation

Examples of adequate measures

- providing secure accommodation for the mother and/or for the child
- ensuring that the left-behind parent keeps away from the mother and the child
- requiring the left-behind parent to bear the costs associated with the return (or share them)
- suspending/withdrawing criminal proceedings for abduction of minor

Question block 2: Grave risk exception?

Edina also considers that due to Brexit there are almost no chances that Nick's employment with the EU will continue. As a result, neither she, nor him will have job in Brussels. She and kids are financially better in Hungary.

8. Could economic situation be linked with 'grave risk' exception?

Example: Court of Appeal of Lyon, 19 September 2011, No de RG 11/02919

Question block 3: Separation from the mother /siblings as ‘intolerable situation’?

For John this will be the last year at school thus he should stay in Hungary.

Edina has to stay due to her business here and no job in Brussels.

9-11. Returning Adam and Eva would place children in ‘intolerable situation’ as they would need to be separated from the mother and siblings?

See, as examples:

- Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014 (INCADAT reference HC/E/DE 1410)
- *Court of Appeal of Paris, 5 July 2013, No de RG 13-11509*).
- *High Court of England and Wales, In WA (A Child) (Abduction) (Consent; Acquiescence; Grave Risk of Harm or Intolerability) [2015] EWHC 3410 (Fam)*

Summarising conclusions

Return proceedings:

BIIa + Hague Convention

- exceptions
- adequate arrangements

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Case study**

FACTS

Edina is Hungarian national. Her partner William is British. The couple met in Brussels where they both worked for the EU Commission. In 2002, their first son John was born and in 2013 they welcomed their second son Adam. In 2016, the couple started living apart. However, in January 2017 their daughter Eva was born.

After separation, children mostly lived with the mother, however, they would often stay with the father over the weekends or when the mother travelled because of her work. In summer 2018, Edina's contract with the EU Commission ended, at the same time she found out that she inherited small family business in Budapest.

On 30th August 2018, Edina called William informing that she is leaving Brussels. She took all three children and all her belongings and moved to Budapest. On 1st September, John started French school there, Adam and Eva were placed in Hungarian pre-school. Edina began working with the family business and with her active personality the business blossomed.

In the beginning, the father hesitated to start abduction proceedings. But in March 2019, William turned 50 and this was a breaking point for him. William understood that children are all he has and he decided to get them back. William hires you as his lawyer. Edina opposes return.

Related questions

- 1) Can William start abduction proceedings? How and where this should be done?
- 2) Do we have child abduction here? What importance should be attached to the fact that the couple was not married? Were the custody rights exercised properly by the father?
- 3) Would the situation change if William would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?

VARIATION No. 1

Question block 1: Father's consent? Integration of children? Child's objections?

Edina claims that she informed the father that she intends to leave with children, and he did not object.

Moreover, almost 7 months passed since they moved to Hungary. In that time children settled in the new environment. John goes to school, Adam and Eva attend day care, moreover, Adam was already accepted to school which he will start in September. All children considerably improved their Hungarian (in fact Eva speaks only Hungarian),

have many friends here. In addition, they have many extended family members in Budapest who have regular contacts with children.

Related questions

- 4) Was there father's consent to removal? How consent should be expressed?
- 5) Can return be refused due to children's integration? Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?
- 6) Should the kids' opinion as to their return be heard? What if John and Adam oppose return?

VARIATION No. 2

Question block 2: Grave risk exception?

Edina claims they separated due to the fact that the father became mean, aggressive and started abusing her. She is psychologically distressed and worries that the father might also be aggressive towards the children. In addition, he started drinking beer in big quantities and often.

Edina also considers that due to Brexit there are almost no chances that William's employment with the EU will continue. As a result, neither she, nor him will have job in Brussels. In Budapest, on the other hand, family's economic situation is much better. She owns wonderful large apartment in the city centre and can afford much better extra-curriculum activities for children.

Related questions

- 7) Could abuse of the mother and father drinking result in grave risk exception?
- 8) Could economic situation be linked with 'grave risk' exception?

VARIATION No. 3

Question block 3: Grave risk exception? Separation from the mother and separation of siblings as 'intolerable situation'?

Edina argues that for John this will be the last year at school thus he should stay in Hungary. Changing school again would be very bad for his results. She also has to stay due to her business here and no job in Brussels. And returning small Adam and little Eva (she is still being breastfeed) would place children in 'intolerable situation' as they would need to be separated from her and siblings.

Related questions

9) Article 13(b) exception to be invoked?

10) How important is the possible separation from the mother?

11) How important is the possible separation of siblings here? Could this mean the application of grave risk exception?

LEGAL INSTRUMENT(S) TO BE APPLIED
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Regulation No 2201/2003

1980 Hague Convention on Child Abduction

Questions with guidelines

1) Can William start abduction proceedings? How and where this should be done?

Yes. In Hungary.

2) Do we have child abduction here?

Pursuant to Article 4, the Convention ceases to apply once the child reaches age 16. This is true regardless of when return proceedings were commenced and irrespective of their status at the time of the child's sixteenth birthday. John is over 16, the others are younger. Child abduction proceeding may only be started in respect of the two younger children.

What importance should be attached to the fact that the couple was not married?

None.

Were the custody rights exercised properly by the father?

Yes. The father had indeed exercised his rights of custody, and there was long-term contact between father and children on a regular basis.

Possible issues to be discussed:

in what situations could we claim that rights of custody were not exercised properly?

3) Would the situation change if William would not start abduction proceedings until 1 September 2019? Under what conditions return could then be refused?

Yes, the situation would change. Under Article 12 of the 1980 Hague Convention, the request for the return of the child may be refused if: (i) from the day of abduction to the date of the commencement of the return proceedings in the State of refuge more than **one year** has passed and (ii) it is demonstrated that the child is now **settled** in its new environment.

4) Was there father's consent to removal? How consent should be expressed?

Under the 1980 Hague Convention, return may be refused if the left-behind parent had consented to or subsequently acquiesced in the child's removal or retention.

The fact that the father was informed is not enough. For a child to be deemed to have been taken abroad illegally, there is no requirement that this must have been done in secret (see, e.g. Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014).

In this situation, there was no evidence of the father having consented to the removal. There are strict conditions to be met to prove consent, and it is the abducting parent who bears the burden of proof for this.

In a case before the French court the question arose whether certain steps taken by the father could be seen as his acquiescence. The case concerned a Greek father and a French mother who lived in Belgium with their two children. At some point the mother decided to move to France with the kids. When she returned to Belgium to pick up some belongings, she entrusted one child to his father for one night. The next day the father returned the child to the mother at the French-Belgian border. However, he then applied to the Belgian central authorities seeking the return of both children. In the proceedings, the mother alleged that the father had acquiesced in the removal. The French court disagreed with the arguments of the mother and ordered immediate return of the children to Belgium. The court considered that the father had not acquiesced in the removal of the children. The fact that he had brought the son to the French-Belgian border in order to return him to his mother should only be seen as acting for the children's interest. (Tribunal de grande instance Lille (Lille Court of Appeal), 31 January 2008).

5) Can return be refused due to children's integration? Would Edina have more chances to persuade the court in non-return if return proceedings would be started in October 2019?

Integration is only relevant when more than one year since the removal passes. Under Article 12 of the 1980 Hague Convention, the request for the return of the child can also be refused if: (i) from the day of abduction to the date of the commencement of the return proceedings in the State of refuge more than **one year** has passed and (ii) it is demonstrated that the child is now **settled** in its new environment. In other words, in such a situation, acting in the interests of the child, the court in the State of refuge has a **discretionary right** to determine whether return should be granted.

6) Should the kids' opinion as to their return be heard? What if John and Adam oppose return?

Hearing of the child is the duty of the court. Age from which the child is heard varies in EU Member States. As John is 17, the 1980 Hague Convention does not apply to him, abduction should only be considered in respect of younger children.

If the child is heard, his/her objections are considered, but they are not decisive in court's judgement.

Possible issues to be discussed:

rules and practices of hearing of the child in different jurisdictions.

7) Could abuse of the mother and father drinking result in grave risk exception?

The 'grave risk' defence provided for in Article 13(b) of the 1980 Hague Convention is the most commonly invoked exception for objecting to the return of the child in many countries. It should, however, be **narrowly construed** by linking the evaluation of grave risk to the seriousness of the harm that the child could confront upon return. It is thus not enough that the risk be 'real'. It must have reached such a level of seriousness as to be characterized as 'grave'.

As the UK Supreme Court noted in the context of 1980 Hague Convention proceedings, although 'grave' characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or of really serious injury might properly be qualified as 'grave', while a higher level of risk might be required for other less serious forms of harm (Re E (Children) [2011] UKSC 27 (UK Supreme Court)).

In this case, there is no risk of physical harm to children, however, we should consider potential risk of psychological harm. Psychological harm could be found, for example, in situations where the aggressiveness of the left behind parent is observed not towards the child itself, but towards the mother or siblings.

We should also take into account that the father regularly looked after his children alone for several hours a day/days, showing that the mother did not previously consider there to be a serious risk and making it improbable that the children were in danger in his presence.

See: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

Also, it is necessary to consider possible use of **adequate arrangements** (Article 11(4) of Regulation 2201/2003).

In the EU context, the use of grave risk exception is restricted by Article 11(4) of the Regulation, which prohibits refusal on this ground where adequate arrangements have been made to secure the protection of the child after the return. If the court in the State of refuge contemplates denying return of the child due to a grave risk of danger, it is a prior requirement in intra-EU cases to ascertain the existence of adequate arrangements. Thus, a two-step approach should be taken. Namely, the court of refuge should (i) identify the risks associated with the return and, if the risk exists, (ii) consider whether arrangements that have been made to secure the protection of the child after the return are adequate.

8) Could economic situation be linked with 'grave risk' exception?

In principle, the existence of more favourable living conditions in the State of refuge could not be taken into consideration when evaluating the 'grave risk' exception.

The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis.

See: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

9) Article 13(b) exception to be invoked?

10) How important is the possible separation from the mother?

A typical situation when abducting parents seek to invoke the psychological harm exception is where the separation from the primary care-giver, especially in regard of babies or very small children, could arise from the return. If the child is small, the abducting mother will often declare she will not return herself and then claim that returning the child without her would expose him/her to physical or psychological harm or otherwise place him in an intolerable situation.

However, courts need to be extremely cautious when appraising such defence. Clearly to follow such line of reasoning would give a powerful weapon in the hands of the mother and imply that a small child or a baby abducted by his/her mother will never be returned. This approach would undermine the rationale of 1980 HC on Abduction and the Regulation.

See *a/so*: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

11) How important is the possible separation of siblings here? Could this mean the application of grave risk exception?

In some cases, a separation of siblings may be difficult and disruptive for each child. The focus of the Article 13(1)(b) analysis, however, is whether the separation would affect the child in a way and to such an extent as to constitute a grave risk upon return. This analysis must be made for each child individually, without turning into a “best interests” analysis. Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not automatically result in a grave risk determination for the other child. In assessing the grave risk for each child, courts may also consider the broader factual circumstances of the case, and the strength and / or meaning of the sibling relationship.

See *a/so*: HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

In this case separation from the oldest brother, aged over 17, is not likely to constitute a risk to the younger children wellbeing. It has to be expected that a sibling of this age might move away from other siblings (e.g. in order to spend time in a foreign country or study at university). (See e.g. Schleswig Holsteinisches Oberlandesgericht, 12 UF 169/13, 08 January 2014)