PFR PERSONEN- EN FAMILIERECHT UPDATES

ANNOTATIE

Rinau v. Lithuania (EHRM, nr. 10926/09) – The political dimension of parental child abduction

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1. The topic of parental child abduction has been a frequent occurrence before the ECtHR, with the Court having so far delivered over 80 judgments or inadmissibility decisions.

2. Even after such a rich jurisprudence, and presumably a well-established case-law with two Grand Chamber judgments,[1] child abduction remains a contentious field both before the ECtHR and outside this forum. The case of *Rinau* is a good opportunity to illustrate the existing debates in the field of international family law and to highlight the areas where judges may act as well as those which are outside the scope of (national) judicial control. Having these two considerations in mind, this case note will first briefly outline the relevant international instruments at play and reiterate the legal standards which have emerged under the ECtHR case law (and which the Court has applied in the case of *Rinau*). This is a useful exercise, since, as will be shown in the second part, there is a risk of the legal standards being overlooked due to the highly gendered and political debates on child abduction.

3. The core instrument regulating parental child abduction remains the 1980 Convention on the Civil Aspects of International Child Abduction ("The Hague Convention") adopted within the framework of the Hague Conference of Private International Law. In short, this instrument provides that whenever a child has been taken across international borders in breach of existing custody agreements, that child is to be returned to the country of habitual residence. The aim is to restore jurisdiction to these authorities which will decide on the attribution of

custody, access rights or any other substantive matters concerning the child. There are limited exceptions to this return mechanism. Relevant to the fact pattern in *Rinau* is Article 13 (b) of the Hague Convention which provides that a child shall not be returned if there is a grave risk that the return will expose her to psychological harm or otherwise place her in an intolerable situation.

4. In 2003, the EU passed the so called Brussels II *bis* Regulation[2] which maintained the Hague Convention mechanism set out above but 'reinforced' it in several respects. One of the additions was that within the European Union a non return order under Article 13 (b) of the Hague Convention could be overridden by the courts in the state of habitual residence. In other words, within the EU the rule that the child should return to the country of habitual residence is even stronger than it is under the Hague Convention.[3]

5. Even despite the aforementioned international instruments which essentially aim at simplifying the procedures so as to achieve the smooth return of children to their countries of habitual residence, the case of *Rinau* is a good, albeit unfortunate, example of a family having used all of the possibilities afforded to them and ultimately failing to secure the return of the child legally.

6. The fact pattern in *Rinau* shows a convoluted sequence of judgments from two countries as well as from the CJEU. Ms Rinau had retained the child in Lithuania. The father of the child, a German national, sought his daughter's return to Germany and applied for a return order under the Hague Convention. The authorities in Lithuania initially refused the return but subsequently found that there is no obstacle to the child going to her father in Germany. Meanwhile, litigation on custody was pending in Germany. The German courts also issued a certificate seeking to overrule the initial non-return order of the Lithuanian courts. The Lithuanian courts then filed the first preliminary reference on this topic to the Court of Justice of the European Union. Even after the final decisions of the Lithuanian courts ordering that the child should go back to her father in Germany and after numerous failed attempts to enforce such orders, the child did not return to Germany. This finally happened when the father took the child to Germany himself without waiting for the completion of the formal enforcement process. All in all, there had been more than 30 judgments rendered in the span of 2 years by courts in Lithuania and Germany.

7. The facts in *Rinau* show that the issue of the return of a child to her country of habitual residence is fraught with difficulties. Mechanisms such as the Hague Convention or the Brussels II *bis* which seek to simplify the proceedings are not always that straightforward. The question then is, what is the role of the ECtHR in this field? How and when can national judges use the ECtHR case-law in connection with child abduction proceedings? Is there an

overlap in jurisdiction between the ECtHR and CJEU? The aim of this case-note is not to provide an in-depth analysis of all these issues but rather to synthetize the position of the ECtHR as reiterated in the case of *Rinau*.

8. As mentioned in the introduction, highlighting the legal test applied by the ECtHR is important considering that cross border family cases are deeply emotional for all parties. The Hague Convention mechanism requires national judges to assess future or potential risk to the child, assessment which by its very nature is sensitive. The ECtHR case-law can then offer a good insight for national judges as to the procedural requirements of the 'grave risk of harm' exception.

9. From the perspective of the ECtHR, and as laid down in the *Rinau* case, Hague Convention applications for the return of children give rise to two obligations under Article 8 ECHR (the right to family life).

10. First, states are under a positive obligation to secure the prompt return of children. Even though the Hague Convention sets out a term of 6 weeks, for the ECtHR longer periods for adjudication do not necessarily amount to a violation of Article 8 ECHR. For example, in the present case domestic courts took five months to issue the return order. The ECtHR did *not* consider this a breach of the state's positive obligation to act promptly. On the basis of previous case law it appears that the ECtHR considers periods exceeding one year to breach the length of proceedings requirement.[4]

11. Secondly, domestic authorities are under a procedural obligation to effectively examine allegations of grave risk of harm. Effective examination implies that domestic courts need to take seriously the allegations of harm brought by the abducting parent. In other words, automatic or quasi-automatic return orders may equally result in breaches of Article 8 ECHR. That being said, the claim that separation of a child from her mother amounts in and of itself to a grave risk of harm is not acceptable. The issue of separation between the abducting parent and the child will be taken into account under Article 8 ECHR, if there is an *objective impossibility* for the parent to return with the child to the country of habitual residence. In the *Rinau* case, there was not such an objective impossibility for several reasons. The criminal proceedings brought against the mother in Germany had been discontinued. The father showed that he was willing to cooperate to secure the safe return of the child, including by providing financial means for travelling and settling to both mother and child. Furthermore, there was no indication that the German authorities could not properly adjudicate the substance of the custody disputes. For all these reasons the ECtHR did not find a violation of Article 8 ECHR on these grounds.

12. The novelty in the *Rinau* case lies however in the level of political influence exerted in Lithuania. This is the first child abduction case where the ECtHR has expressly dealt with the issue of political pressure. The Court highlighted that it is not only the courts who must observe the standards of Article 8 ECHR, but the members of the executive and legislative as well.

13. While mobilization of press is not unusual for child abduction cases[5], *Rinau* is exceptional in the level of involvement of press and public authorities. This is perhaps to be attributed to the fact that the abducting mother was herself a politician. However, the pressure exerted on courts and bailiffs who should have enforced the return orders was tremendous. The lawfulness of the court judgments were openly questioned by politicians, the Ombudsman for Children's Rights, the director of the Child Care Authority, and the Chairman of the Parliamentary Committee on Human Rights. Moreover, the Law of Citizenship had been changed in direct relation to the child, and the Government passed a resolution covering the mother's costs for the legal proceedings. The justification for the mobilization against returning the child to Germany revolved around two main issues. One was the issue of motherhood and that children belong with their mothers. The gendered dimension of the case is visible also in the submissions before the ECtHR where the Lithuanian government claimed that the case involved 'a child's painful return to the father and thus her inevitable separation from the mother'. The second issue was that of protection of Lituania's nationals. Public authorities claimed on several occasions that their aim was to protect Lithuanian children from being taken away to foreign countries.

14. Considering the amount of pressure on the national courts and bailiffs it is hardly surprising that the ECtHR found a violation of Article 8 ECHR. More broadly however, it is worth recalling that these debates, and especially the gender dimension are common in child abduction cases.[6] It should also not be forgotten that gender does play a role, with an overwhelming proportion of abductors being mothers and many of them claiming to be victims of domestic violence.[7] The ECtHR rightly condemned the Lithuanian authorities for their attitude in the present case. Gender alone can never be a sufficient justification for not returning a child to her country of habitual residence, and for taking such a wide array of (extra)judicial actions to prevent the child from returning. These actions result in transforming cases from cases where the best interests of children should be central to cases about their parents' interests. That being said, national authorities should also keep in mind that under the ECHR they are required to carefully analyze allegations of grave risk of harm and provide reasoned decisions if return is refused. Combining expediency with careful balancing of interests may be easier said than done, nevertheless if the Hague Convention is to be truly about children such balance is worth seeking to achieve.

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[1] *X v Latvia,* ECtHR (GC) 26 November 2013, no 27853/09, ECLI:CE:ECHR:2013:1126JUD002785309, «EHRC» 2014/96 case comment Curry-Sumner; *Neulinger and Shuruk v. Switzerland,* ECtHR (GC) 6 July 2010, no 41615/07, ECLI:CE:ECHR:2010:0706JUD004161507, «EHRC» 2010/93 case comment Rutten.

[2] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *Official Journal L 338 , 23/12/2003 P. 0001 – 0029.*

[3] For a more detailed analysis of this mechanism see P.Beaumont , L. Walker, J Holliday, 'Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU', *Journal of Private International Law*, *12*(2), 2010, 211-260.

[4] *M.R. v Ukraine* 22 May 2018, 63551/13, ECLI:CE:ECHR:2018:0522JUD006355113, par. 60; *Karrer v Romania* 21 February 2012, no 16965/10, ECLI:CE:ECHR:2012:0221JUD001696510.

[5] B. de Hart, M. Altena, 'A multicultural family drama.' In: C. Rass, M. Ulz (eds) Migration ein Bild geben. Migrationsgesellschaften. Springer VS, Wiesbaden, 2018.

[6] Ibid.

[7] N. Lowe & V. Stephens, 'A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report', hcch.net.