



**The Voice of the Child**  
**in**  
**International Child Abduction Proceedings in Europe**

**Work Stream Two: Case Law Results**

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## **Part I: Executive Summary**

## **Executive Summary**

### **Introduction: The Research**

This summary report presents the research findings of the Voice project, co-funded by the European Union (JUST-AG-2016/JUST-AG-2016-02/764206). It contains the results of the legal research conducted by the Universities of Antwerp and Genoa. The research was aimed at investigating (i) whether and how judges consider the best interests of the child in judicial proceedings following an international child abduction, and (ii) whether judges hear the children in this regard.

In this light, Voice researchers collected case law on international abductions according to two criteria:

- 1) Only cases decided between 1 March 2005 and 31 December 2017 (being the date of the entry into force of the EC Regulation 2201/2003 (Brussels IIbis Regulation) and the start of the research project);
- 2) All cases concerning return proceedings following a wrongful removal or retention of a child, as understood by Brussels IIbis and/or the Hague Convention on Child Abduction of 1980 (HCCA).

The seventeen countries included in this research are Belgium, Bulgaria, the Czech Republic, Croatia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Malta, the Netherlands, Poland, Romania, Sweden and Spain. This selection was larger than intended in the initial research proposal. It was however not possible to include all EU Member States due to budgetary constraints. Case law of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) was also included to the extent it could enhance the understanding of the notion of the best interests of the child. The researchers of the Voice project collected case law from countries which they had language access to, while national country experts collected the case law from other countries.

### **1. Legislative Provisions**

The legislative provisions that courts have to consider in an international child abduction case are found in the Hague Convention on the Civil Aspects of International Child Abduction of 1980 (HCCA) - particularly Articles 12, 13 and 20, 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 (Brussels IIbis) - particularly Articles 11(2) and (4) and UN Convention on the Rights of the Child (UNCRC) - particularly Articles 3 and 12.

### **2. Hypotheses**

The researchers identified four hypotheses about how judges interpret the concept of the best interests of the child:

- 1) **Unnecessary** to interpret, because of the opinion that the HCCA includes this concept already.

- 2) **Strictly connected to the exceptions** of Article 12, Article 13(1)(a), Article 13(1)(b), Article 13(2) and Article 20 of the HCCA.
- 3) Connected to the aforementioned exceptions when these exceptions are read **expansively**.
- 4) To be interpreted **independently** from the HCCA and its aforementioned exceptions.

Furthermore, the researchers anticipated that the analysed case law might reveal some country-specific patterns, e.g. with regard to the best interests of the child and/or to the hearing of the child in light of finding these best interests. The researchers wanted to determine whether there has been a difference in the discussions, specifically with regard to the best interests, after the landmark case law of the ECtHR on this matter. Regarding the hearing of the child, the researchers analysed whether there are national patterns concerning (1) the minimum age from which children are considered old enough to be heard, and (2) when judges find children to be mature enough to be heard and to take their views into consideration.

To answer the research question and to confirm or to denounce the hypotheses, several steps were undertaken.

### **3. Research Design and Methodology**

The researchers and country experts filled in a survey for each case to guarantee a uniform analysis of the case law. The survey was designed in Qualtrics, an online research software programme. In total 1041 surveys were completed. After cleaning the data, 1000 cases remained for analysis (938 national judgments, 54 judgments of the ECtHR and 8 of the ECJ). The researchers used NVivo, a software programme for qualitative data analysis, to analyse this large quantity of information. One report per country was composed (using Excel and Word) after coding in NVivo.

A general analysis was conducted to formulate a comprehensive research report and to answer the research questions beyond the individual countries. Each Voice researcher was asked to analyse an assigned thematic part of the research (e.g. the hearing of the child). The Voice researchers performed the analysis based on a NVivo file that included the coded surveys of all countries to which the researchers added additional nodes that were deemed useful for the parts they analysed respectively.

## **4. The Best Interests of the Child**

### **4.1. Approaches of Courts to the Concept of the Best Interests of the Child**

Consideration for the best interests of the child varies greatly between national case law collected for this study. In some countries the concept recurs frequently – explicitly and implicitly – in the judges’ reasoning, while in others only a very low percentage of cases in which the best interests are considered have been registered. Among the 938 national case law decisions collected, 306 contain an explicit reference to the child’s best interests. The principle was also explicitly considered in 47 out of 54 decisions of the European Court of Human Rights. All eight relevant case law decisions of the European Court of Justice refer to the child’s best interests.

An explicit reference based on Article 3(1) UNCRC has been used in 62 of the above cases. In 184 cases, the courts based the explicit reference on the rationale of the HCCA, for which the best

interests of the child coincide with their immediate return to their place of habitual residence. Among these decisions, fifteen were delivered by the ECtHR. The explicit reference has been based on national and/or international legal instruments, other than Article 3(1) UNCRC and the HCCA in 50 decisions. Four of them are judgements delivered by the ECtHR, while eight were delivered by the ECJ.

Some courts do not expressly refer to the 'best interests' of the child, but the judgments contain other phrases, such as the child's 'wellbeing', 'development', 'growth', 'balance', 'equilibrium' or similar. These are considered to be implicit references to 'best interests'.

#### **4.2. Application by Courts of the Principle of the Best Interests of the Child**

The principle of the best interests of the child is applied in different ways:

- a) The courts of the State of habitual residence are considered the best authority to evaluate the best interests of the child in the specific situation.
- b) In some cases, courts have considered that it is in the child's best interests to be granted immediate return to the State of habitual residence, but this can only be effectively pursued if the decision (and subsequent enforcement) is delivered in a short period of time.
- c) The wellbeing of the child is more important than punishing the illicit behaviour of the abducting parent, especially when the aforementioned sanction could cause damage to the child.
- d) In many cases, the best interests of the child were decided on the basis of the necessity to maintain a stable relationship with both parents.
- e) Some courts considered the best interests of the child in light of the necessity to ensure that the child is not separated from one of their parents.
- f) Several courts considered that the situation in the State of origin would not be beneficial for the child, who could potentially face danger or in an intolerable situation. An evaluation of the best interests of the child has led some courts to order the return of the child to the State of habitual residence on the basis of considerations related to the situation in the State of origin.
- g) Several courts referred to Article 13(1)(b) HCCA, stressing the necessity to first assess the risk of serious danger when considering the best interests of the child.
- h) Some courts considered the best interests of the child with reference to Article 13(2) HCCA, taking the child's opinion into account.
- i) One court from Greece has held explicitly that the child's best interests consist in being considered as an individual with own rights, and not being removed in the name of the parents' rights of custody.
- j) According to some decisions the best interests of the child are served by the resolution of the conflict between the parents, instead of the imposition of external judicial decisions.
- k) In some decisions, mainly from Maltese courts, the best interests of the child have been considered with reference to the writings of commentators.

### **4.3. Judgements Linking the Best Interests to Specific Legislation**

The analysis revealed how the courts have linked the understanding of the best interests of the child to specific grounds for non-return provided by the HCCA.

#### **4.3.1. Article 12 HCCA: Child Settled After More than One Year**

The best interests of the child were linked to Article 12 HCCA in 56 cases.

According to Article 12, if the proceedings were commenced after one year from the removal/retention of the child, the court can refuse to order the return if the child is now settled in the new environment. A wide range of circumstances are considered to assess whether the child has settled in the new environment:

- The social contacts of the child;
- The adaptation, the emotional attachment to members of the family and friends;
- The physical and psychological health;
- The required therapy and assistance for children with special needs;
- Adequate day care for the child;
- The child living in the same apartment since arrival in the State of refuge;
- Integration in school;
- Knowledge of local language;
- Being in a critical stage in life (i.e. adolescence and education).

#### **4.3.2. Article 13(1)(a) HCCA: no custody or consent**

The research has also considered how judges interpret the notion of the best interests of the child when directly linking it to Article 13(1)(a), which refers to situations in which the left-behind parent did not exercise rights of custody at the time of removal or retention, as well as to the hypothesis of consent or acquiescence to the removal or retention of the child.

Judgments analysed by the research team show that return is usually ordered in cases where the left-behind parent has consistently exercised rights of contact, whilst, conversely, it may be refused on the ground that visitation rights have not been exercised.

#### **4.3.3. Article 13(1)(b) HCCA: Grave risk**

Article 13(1)(b) refers to the grave risk or intolerable situation the child could face in the country of origin in case of a return decision. Article 13(1)(b) is the legal provision with by far the highest number of references to the concept of the best interests of the child in the analysed case law. Courts explain how they understand the notion of the child's best interests by examining the particular factors that can lead to the applicability of the grave risk exception. It is important to underline that in the majority of the analysed case law; these factors rarely stand on their own. Courts tend to take all the facts into account, which are often intertwined.

- a) **Decent living conditions in country of origin:** Return is generally considered in the best interests of the child when they can enjoy decent living conditions in the country of origin. According to the decided cases, less favourable conditions (socio-economic

conditions, standard of living, political situation, special care provisions and education system) in the State of former habitual residence do not expose the child to grave risk. Cases highlight that return to the country of origin must be ordered when children can move back to a well-known environment where they have stayed for several years, do not have language difficulties, and where housing, school and living conditions are secure. On the other hand, where it has been proven that the child will experience intolerable living conditions (emotionally, psychologically, hygienically, socio-economically), judges apply the exception of Article 13 (1)(b). Italian case law clarifies that the lack of adequate living conditions for children prevents a stable and well-balanced growth, and constitutes an intolerable situation according to Article 13(1)(b) HCCA.

- b) **Relationship with both parents:** A crucial element is the kind of relationship the child enjoys with the left-behind parent. Courts usually hold that the highly desirable relationship of the child with two separated parents is commonly realised by the right of visitation granted to the parent with whom the child does not usually reside, so that the child can construct and develop their personality in contact with each of them. In such cases, return is deemed better for the child's interests. The willingness of the left-behind parent to make contact arrangements with the other parent is considered important. Some judgments expressly state that the left-behind parent can sufficiently offer what the child needs. Where no evidence of a grave risk in the case of return exists, the child's best interests and their right to maintain personal relations with both parents require their return to the State of their former habitual residence.
- c) **Integration:** Courts maintain that a risk of stopping an initial settlement and integration in the country of refuge does not represent sufficient harm to the interests of the child to impede their return to the State of habitual residence. On the other hand, some courts considered return as a serious risk of psychological and emotional distress in the case where the child is well-settled in the State of refuge and has a new habitual residence.
- d) **Lack of evidence as to the existence of grave risk:** Return will be ordered if no clear proof is provided in case of grave allegations against the left-behind parent.
- e) **Criminal records or charges:** The mere existence of criminal charges and investigations against a person does not prove or necessarily entail a potential breach of the best interests in accordance with Article 13 (1)(b).
- f) **Violence or abuse against the child in the country of origin:** A grave risk exists in cases where the applicant is proven to be violent, alcohol or drug addicted, mentally ill, or not able or willing to take care of the child or to provide maintenance.
- g) **Separation from the primary caregiver in case of return:** A further crucial element in non-return decisions is the separation of the child from their primary caregivers or from persons who are crucial to their emotional and psychological stability (usually the abducting parent, sometimes brothers, sisters or grandparents). When such figures are not able to follow the child to the country of origin, return decisions will entail a significant and intolerable psychological and emotional stress for the child. Courts take the view that non-return is then preferable.

- h) **Merits already decided:** Where a judgment in the country of habitual residence of the child has already granted exclusive parental responsibility to the abducting parent, a return decision from the country of refuge would only expose the child to a double international crossing of borders, infringing their interests, since the abducting parent would be allowed to move the child back.
- i) **Special care needed:** In one Dutch case worth mentioning, the child was residing in an institution for youth care in the Netherlands. The court decided not to change this situation and thus not to return the child, mainly because both parents showed insufficient insight into the problematic scholastic development of the child.

#### 4.3.4. Article 13(2) HCCA: Child's objections (see also section 7 below on Hearing the Child)

Sixty-three cases linked the best interests of the child to Article 13(2) HCCA delivered by Belgian, Bulgarian, Croatian, Finnish, French, Greek, Italian, Latvian, Maltese, Dutch, Polish, German, Romanian and Spanish courts. In some cases, the objection of the child to return was decisive for the final outcome of the decision.

In most of the decisions considered, the child's objection to return was linked to the assessment of their best interests, but this element was considered by the court together with other factors. The decisions were frequently based on an overall assessment concerning the integration of the child in the new environment. The weight given to the child's objection in this context varies greatly, depending in particular on the degree of maturity that the court considered attributable to the child and on the firmness of the opinion expressed by the child.

In some decisions, the return of the child was ordered despite his or her objection to return. The court refused to give weight to the child's opinion for different reasons:

- Not mature enough;
- Declarations were equivocal, vague, confused;
- Their opinion should be taken into consideration only in the context of the proceedings on the merits.

#### 4.3.5. Article 20 HCCA: Fundamental Rights

Six decisions from Belgian, Bulgarian, Finnish, Dutch, and German courts linked the child's best interests to Article 20 HCCA. In almost all cases, Article 20 HCCA was not given autonomous consideration, but was mentioned in the context of a more general reference, namely the necessity to interpret the HCCA legal framework in light of the best interests of the child.

### 4.4. The Court's Assessment of the Best Interests

Courts have held that the best interests are decisive in some cases while in others, the best interests were merely one of the factors to be taken into account. Some courts have also held that the best interests should not be considered at the return stage, but only when the merits are finally decided. Other factors, listed below, are seen as more important for the decision in return proceedings.

#### **4.4.1. Best Interests are Decisive**

In several cases, the best interests are seen as an underlying principle of the HCCA and are the decisive consideration for a court.

The courts do not consider the principle of prompt return to be absolute. Most courts primarily consider the child's best interests, and this is deemed more important than strict application of the principle of prompt return. In only a few cases do the courts hold a strict view on the best interests and that the best interests of the child cannot be applied without reference to one of the exceptions incorporated in the HCCA.

Some courts mentioned in general that the grave risk exception has to be assessed in the best interests of the child so that the best interests were the overarching consideration in those cases. Further, there are sixteen cases in which the courts decided that returning the child would expose them to a grave risk and that ordering return was thus contrary to their best interests. In nine cases, Article 13(1)(b) was applied with consideration to the best interests of the child but the courts did not find any reason to refuse the return.

In eighteen cases, the courts found that separation of the child from the abducting parent and/or sibling(s) would be contrary to the child's best interests and would put the child in an intolerable situation. Thus, in these cases the courts decided not to return the child.

In four cases, the courts found it in the best interests of the child to maintain a relationship with both parents and decided to order the return based thereon.

In five cases, the court decided that it would not be in the child's best interests to order the return in light of the violent behaviour of the left-behind parent towards the child.

Courts have held that the hearing of the child constitutes a right of the child, through which their interests are fulfilled and that such hearing gives expression to the role of the child as a party to the proceedings.

In thirteen cases, the courts deemed it in the child's best interests not to return the child, based on the objection by the child.

In 21 cases, the courts found that it would be contrary to the best interests of the child to order return in light of the fact that the child is settled in their new environment.

#### **4.4.2. Best Interests Considered Together with other Factors**

German case law especially tends to find a balance between the HCCA's objective of restoring the status quo as before the abduction, which is considered to be in the child's best interests in general and the consideration that a return is inevitably associated with mental stress for the child, which is contrary to the child's best interests. Judges tend to give precedence to the Convention's objective in the absence of a grave risk which would make return contrary to the best interests of the child.

In five cases, the courts considered the best interests of the child in relation to one of the situations mentioned in Article 13(1)(a), namely that the left-behind parent was not



exercising the custody rights at the time of the abduction or had consented to or acquiesced in the abduction. In all five cases, the courts decided not to return the child to his or her former habitual residence. In three cases, the courts took into account the (im)possibility for the abducting parent to return together with the child to the child's former habitual residence.

In three cases, the best interests of the child were considered together with the views of the child. The views of the children in these cases are not necessarily considered in light of the objection provided for by Article 13(2) HCCA. Thus, they are seen more broadly than the refusal or objection to return by the child.

#### **4.4.3. Best Interests Considered but not Taken into Account**

There are cases in which reference is made to the best interests of the child, but this was not taken into account as an issue in the making of the decision. One reason for that view is that return proceedings are not the appropriate forum to decide upon the best interests of the child. In one case, the court gives clear expression to the idea that the best interests are strictly connected to the HCCA exceptions by stating that the Convention is based on the presumption that the best interests of the child is to return immediately to his or her State of habitual residence, unless one or more of the exceptions stated by Article 12, 13 or 20 apply.

### **5. Hearing the Child**

Some national courts have stressed the importance of hearing the child in order to determine their best interests. In two Italian cases the hearing was described as an indispensable tool to assess and pursue the best interests of the child.

Four hundred thirty-three cases were included in this part of the research based on available information about both the hearing and the best interests of the child. The child was heard during the proceedings in 194 cases. The court stated that it did not hear the child in 126 cases. In some cases, the child is heard in the presence of a social worker, psychologist or a parent.

The children are heard in 20% of 50 cases in which all of the involved children are between zero and three-years old. Hearing of children younger than four never took place in front of a judge. The children are heard in 68% of 207 cases all of which involved children between four and sixteen-years old,

The topics in the hearing covered and discussed whether the child wanted to return, the child's relationship with the left-behind parent, the other parent and with other family members, and inquired about the living conditions. Other topics included school, friends and how free time is spent. Courts have found that children are able to present emotions and desires during such discussion.

The hearing contributed to the assessment of the child's best interests in 109 cases out of the 194 cases in which the child was heard. In 35 cases, the child's views were the decisive factor for the final decision of the court. The court decided to reject the return of the child in 34 of these cases.

The views expressed by the child during the hearing proved that a return would expose the child to a grave risk according to Article 13(1)(b) in eleven cases. In six of the 26 cases in which the child's views were decisive but not the only factor considered, the courts decided to order the return of the child mainly based on the hearing of the child.

In a majority of cases in which the child was not heard, the courts point out that this was due to his or her low age, degree of maturity or both. In these cases, the children were between one and ten years old. In two cases, the courts stated that the child was too young to express his or her opinion on the return proceedings. In two cases, the courts stated that it would be inappropriate to hear the child given the young age and degree of maturity. In three cases, the courts decided not to hear the children because of (possible) influence or manipulation. In one case, the court found that a hearing would not be in the child's best interests due to the risk of anxiety.

### **Conclusion**

Research suggests that the principle of the child's best interests is given growing importance in international child abduction proceedings in Europe. Yet, it does not appear broadly and homogeneously spread among the selected countries: out of the 1000 cases considered, explicit or implicit references to the child's best interests were found only in less than half of those decisions (361 explicit and 134 implicit references). Furthermore, the utilization of the principle varies significantly on a national basis.

It emerges from the analysis that courts generally encounter difficulties in assessing the child's best interests. They obviously tend to respect the main goal of the HCCA, namely that abducted children should in principle return to the country of their former habitual residence. However, non-return decisions cannot follow mechanical patterns, but must take into account the situation of the specific child. The UNCRC requires the best interests of the individual child to be taken into consideration in all cases concerning the child. It is in this sense positive to see how courts manage to reconcile this principle with the different provisions of the HCCA.

In fact, the principle of the child's best interests is frequently used in connection with the HCCA's grounds for non-return, and it can determine an extensive interpretation of such grounds (namely, in the context of the application of Article 12(2) HCCA). In other cases, in particular the exception laid down by Article 13(1)(b), the child's best interests play a relevant role but do not have sufficient effect to expand the scope of application of the HCCA's grounds of non-return.

The outcome is less positive regarding hearing of children. It appears that courts are often cautious to hear children or are reluctant to trust them to be able to assess their own interests. However, when the courts do decide to hear the children, they mostly take the child's views into account to give substance to the child's best interests and to assess the possible need to use the grounds for refusing return.

## **Voice Research Team**

### **Academic Partners**

Laura Carpaneto

University of Genoa

Thalia Kruger

University of Antwerp

Wouter Vandenhole –

University of Antwerp

### **Researchers**

Francesca Maoli

University of Genoa

Giovanni Sciacaluga

University of Genoa

Sara Lembrechts

University of Antwerp

Tine Van Hof

University of Antwerp

### **Country Experts**

Anca Magda Voiculescu

Romania

Boriana Musseva

Bulgaria

Chrystafo Tsouka

Greece

Clement Mifsud Bonnici

Malta

Fanni Murányi

Hungary

Inese Druviete

Latvia

Kamila Kaczmarek and Karolina Sikorska

Poland

Katja Karjalainen

Finland

Lubomír Ptáček

Czech Republic

Mirela Župan

Croatia

Mónica Herranz

Spain

Tekla Kristiansson

Sweden

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## **Key International Legal Provisions**

### **Hague Convention on Child Abduction**

#### **Article 12(1) of the Hague Convention on Child Abduction:**

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

#### **Article 12(2) of the Hague Convention on Child Abduction:**

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

#### **Article 13(1)(a) of the Hague Convention on Child Abduction:**

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention

#### **Article 13(1)(b) of the Hague Convention on Child Abduction:**

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

b) 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

#### **Article 13(2) of the Hague Convention on Child Abduction:**

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

### **Brussels IIbis Regulation**

#### **Article 11(2) of the Brussels IIbis Regulation:**

When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

**Article 11(4) of the Brussels IIbis Regulation:**

A court cannot refuse to return a child on the basis of Article 13b of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

**United Nations Convention on the Rights of the Child**

**Article 3(1) of the United Nations Convention on the Rights of the Child:**

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 consideration.

## Research Design and Methodology

### 2.1. Unit of Analysis

The analysis includes accessible case law from the following seventeen countries: Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Malta, the Netherlands, Poland, Romania, Spain and Sweden. Also, the case law of the European Court on Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ) has been studied to the extent it could enhance the understanding of the notion of the best interests of the child.<sup>1</sup>



Figure (1) – The seventeen national jurisdictions included in the analysis

All judgments concern return proceedings following a wrongful removal or retention of a child as understood by the 1980 Hague Convention on Child Abduction (HCCA) and/or the Regulation EC No. 2201/2003 (Brussels IIbis Regulation).

Judgments of courts of first, second and third instance courts are included.

### 2.2. Time frame

The period covered by the Voice project is 1 March 2005 to 31 December 2017. This time frame coincides with the entry into force of the Brussels IIbis Regulation on 1 March 2005 and the start of the research project on 1 January 2018.

### 2.3. Research strategy

Case law collection was carried out in two distinct ways: by researchers of the Voice project for the case law of Belgium, France, Germany, Italy, the Netherlands, the ECtHR and the ECJ, and by national experts from all other countries engaged and included in this project. These two distinct ways will be further discussed below.

#### 2.3.1. Voice Researchers

The Voice researchers collected case law on international child abductions with the following two criteria: (i) all cases should be about a return procedure following a wrongful

<sup>1</sup> Consequently, only ECtHR and ECJ cases with explicit or implicit reference to the child's best interests were included in the analysis.

removal or retention of a child, as understood by the Brussels IIbis Regulation and/or the Hague Convention on Child Abduction and (ii) only cases that were decided between 1 March 2005 and 31 December 2017 should be included.

For Belgium, mostly online resources were consulted to collect the data. The online resources include *jura.be*, *juridat*, *stradalex*, *jurisquare*, *lex.be* and the **Court of Cassation** website. Also, non-full text references were used (e.g. summaries, notes or published work by legal scholars) since not all Belgian case law is published online. Lastly, some case law could be included thanks to lawyers and judges who provided anonymized, unpublished judgments.

To collect the French case law, the online databases *jurisclasseurs*, *Légifrance* and *Dalloz* were used. Also, here, not all case law is published online. In particular, judgments of first instance courts are rarely published.

For Germany, two online databases were used: **OpenJur** and **Juris**.

The Italian case law was collected via the online databases *Jusexplorer Dejure* and *Leggi d'Italia*.

In the Netherlands, all case law is systematically published on *rechtspraak.nl*. Thus, this was the only source of information used to collect Dutch case law.

For all jurisdictions, the International Child Abduction Database (INCADAT) was consulted as well. This database makes leading decisions concerning the Hague Convention on Child Abduction accessible.

The case law of the ECtHR was collected via the **Hudoc** search engine and the case law of the ECJ via the online search form on the **Curia** website.

### **2.3.2. National Country Experts**

The country experts were selected from the professional networks of professors Thalia Kruger and Laura Carpaneto on the basis of their expertise in international family law and their proficiency in the language of the specific country.

The country experts were asked to collect case law on international child abductions with the same two criteria as those that apply for the Voice researchers (see para. 2.3.1). The country experts were free to use their own method of case law collection. Therefore, it is unknown which specific online databases and other sources of information were used by the experts.

On a general note, it should be said that the big difference in the amount of cases that could be collected for each country is due to the differences in the country's publishing traditions.

## **2.4. Data Analysis and Research Questions**

The main research question that this study aimed to answer is if and how judges give substance to the notion of the best interests of the child in judicial proceedings following an international child abduction.

We constructed four hypotheses about how judges interpret the concept of the best interests of the child:



- 1) Unnecessary, because they are of the opinion that the concept is fully integrated in the substantive provisions of the HCCA, so no additional 'best interests' assessment is needed;
- 2) Strictly connected to the exceptions of Article 12, Article 13(1)(a), Article 13(1)(b), Article 13(2) and Article 20 of the HCCA;
- 3) Connected to the aforementioned exceptions when these exceptions are read expansively;
- 4) To be interpreted independently from the HCCA and its aforementioned exceptions.

Furthermore, the analysed case law may reveal some country-specific patterns, e.g. with regard to the best interests of the child and/or with regard to the hearing of the child in light of identifying the best interests. The case law might show, *inter alia*, whether there is a difference in the court's approach regarding the hearing of the child and in considering the child's best interests depending on the application of the Brussels IIbis Regulation or the HCCA. Specifically, with regard to the best interests, the case law may show whether there has been a difference in the discussions after the landmark case law of the ECtHR on this matter. Regarding the hearing of the child, the case law may show whether there are national patterns concerning (1) the minimum age from which children are considered old enough to be heard, and (2) when judges find children to be mature enough to be heard and to take their views into consideration.

To answer the research question and to confirm or to disprove the hypotheses, several steps were undertaken.

#### **2.4.1. First Step: Qualtrics Survey**

Not only the collection but also the analysis of the case law was done to a certain extent by both the Voice researchers and the national country experts. Thus, to be able to guarantee a uniform analysis of the case law, a survey had to be filled out for each case. The survey was designed in Qualtrics, an online research software programme. The outline of this survey can be found in Annex A.

The Qualtrics survey is divided into three main parts: general information, information on the best interests of the child and information on the hearing of the child.

In the part concerning the general information, the first step is to give the case a sequence number starting with the country code. No exact method was imposed to number the cases. In general, two methods were used: a chronological numbering and a numbering per case (in which the second instance judgment is given the number directly after the first instance judgment of the same case). Other information gathered for each case includes: the case reference, first, second or third instance, the date, potential connection with another case included in the research, countries involved, age of the child involved, abducting parent, final decision and the legal basis considered.

The second part starts with the question 'Does the case discuss the best interests of the child?' The answer possibilities are: yes explicitly, yes implicitly or no. The answer option chosen is determinative for the further course of the survey. If the option 'no' is chosen, the survey will come to an end. This has important implications for the statistical data since for the questions after this one no further information is collected. This also has important implications for the third part about the hearing of the child. Where the correspondent indicated that no explicit or implicit reference is made to the best interests of the child, the

questions concerning the hearing of the child are also not displayed. This was a deliberate choice since the main focus of this research project is the best interests' concept and not the hearing of the child in itself.

Also, the choice for 'yes, explicitly' or 'yes, implicitly' results in a different second question. When 'yes, explicitly' is chosen, it is asked on what this explicit reference is based. If the option 'yes, implicitly' is chosen, the person completing the survey will have to quote the relevant wording in the judgment in the original language and provide a translation in English. It should be noted that all translations, also concerning subsequent questions, were made by the country experts themselves and are as such incorporated in the report.

There are two more questions in the part that specifically deals with the best interests of the child. These questions are the same regardless of the answer 'yes, explicitly' or 'yes, implicitly' to the previous question. First, it is asked whether the court links any of the grounds to decide on the (non-)return to the best interests of the child. The following Articles of the Hague Convention on Child Abduction are displayed as answer possibilities: 12, 13(1)(a), 13(1)(b), 13(2) and 20. If one of these grounds is chosen, it is asked to give some specification on how the best interests are defined in relation to the specific Article and which elements are taken into consideration. Second, it is asked to what extent the child's best interests had an impact on the final outcome of the decision.

The third part, concerning the hearing of the child, starts with the question: 'Is the child heard during the legal procedure?' The answer possibilities are: yes, no or unknown. Also, here, the answer option chosen is determinative for the further course of the survey. If the answer to the question is 'unknown' the survey comes to an end. Again, this is important to keep in mind for the statistical data: the questions that come after this one will not generate further data if the answer 'unknown' is chosen.

The answer options 'yes' and 'no' also lead to different questions. If 'no' is chosen, it is asked which arguments the court used to argue against the hearing. After this question, the survey ends.

If 'yes' is chosen, the subsequent questions are about who performed the hearing of the child and whether the hearing contributed to the determination of the best interests of the child. Then, the course of the survey is again dependent on the answer chosen to the questions related to whether the hearing of the child contributed to the best interests' determination. If one of the options 'no' or 'unknown' is chosen, the open question 'Does the court give any information on the content of the hearing?' is displayed and after answering this question, the survey comes to an end. If the option 'yes' is chosen, the next questions are about who made the best interest's assessment, whether the court gave information about the hearing and the impact of the child's views on the final outcome of the (non-)return decision.

After each country expert filled out the Qualtrics surveys for his or her entire collection of case law, the reports were converted to PDF files so that they could be imported into NVivo. Here the second step of the data analysis began.

#### **2.4.2. Second Step: NVivo**

In total 1041 surveys were completed in Qualtrics. In a process to clean the data and remove cases that did not meet the criteria, 41 cases were deleted. Thus, ultimately 1000

judgments were included in the study. To analyse this large quantity of information, NVivo was used. This is a software programme for qualitative data analysis.

First, the Voice researchers agreed on a codebook. The codebook followed the logic of the Qualtrics survey with one section on the general information, one on the child's best interests and another on the hearing of the child.

The general information of each case was collected via 'Source Classifications'. This provides 'a way to record descriptive information about the sources [...] in your project'.<sup>2</sup> We made the Source classification 'Case law' and connected the following attributes to it: court, date of judgment, reference number of connected case, State of habitual residence, State of refuge, age of the children, abducting parent, decision, legal basis considered, child heard, child heard by and hearing contributed to the best interests's assessment

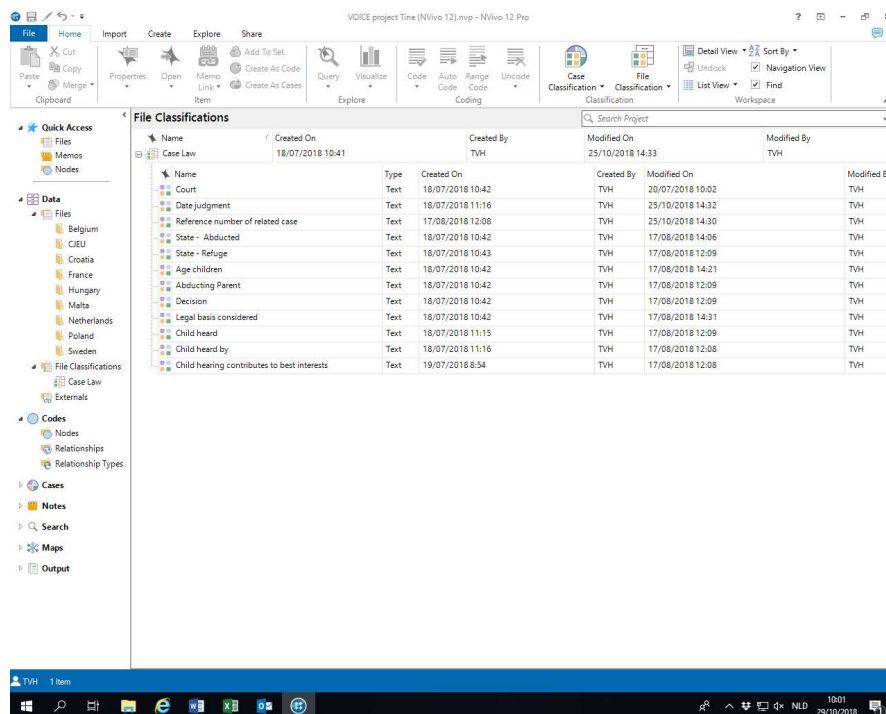


Figure (2) - Example of the Source classification 'Case law' with the attached attributes

<sup>2</sup>'About Classifications' (NVivo 10 for Windows Help) <[http://help-nv11.qsrinternational.com/desktop/concepts/about\\_classifications.htm](http://help-nv11.qsrinternational.com/desktop/concepts/about_classifications.htm)> accessed 26 October 2018.

For each attribute, we created accompanying values: e.g. for the attribute 'court' we created the values 'first instance', 'second instance' and 'third instance'.

	A Court	B Date judgment	C Reference number of	D State - Abducted	E State - Refuge	F Age children	
254	NE01	Third instance	22/12/2006	Unassigned	Germany	The Netherlands	4 and 2
255	NE02	Second instance	15/11/2006	Unassigned	Italy	The Netherlands	Unknown
256	NE03	First instance	18/09/2007	Unassigned	Norway	The Netherlands	6 and 5
257	NE04	Third instance	28/09/2007	Unassigned	Italy	The Netherlands	Unknown
258	NE06	Third instance	28/09/2007	Unassigned	Hawaii	The Netherlands	Unknown
259	NE06	First instance	11/12/2007	Unassigned	Ghana	The Netherlands	6
260	NE07	First instance	23/04/2008	Unassigned	Canada	The Netherlands	5
261	NE08	First instance	26/06/2008	Unassigned	Great Britain	The Netherlands	6
262	NE09	Second instance	03/07/2008	Unassigned	Australia	The Netherlands	9
263	NE10	First instance	07/02/2008	NE011	South Africa	The Netherlands	11
264	NE11	Second instance	26/11/2008	NE010	South Africa	The Netherlands	11
265	NE12	First instance	27/11/2008	NE013	Spain	The Netherlands	9
266	NE13	Second instance	07/01/2009	NE012	Spain	The Netherlands	9 & 10
267	NE14	First instance	10/04/2009	Unassigned	Unknown	The Netherlands	8
268	NE15	First instance	23/04/2009	Unassigned	Belgium	The Netherlands	2
269	NE16	First instance	23/04/2009	Unassigned	Romania	The Netherlands	12 and 10
270	NE17	First instance	24/07/2009	Unassigned	Poland	The Netherlands	8
271	NE18	First instance	10/09/2009	NE020	Suriname	The Netherlands	10
272	NE19	First instance	17/09/2009	Unassigned	Belgium	The Netherlands	15 and 12
273	NE20	Second instance	17/11/2009	NE018	Suriname	The Netherlands	10
274	NE21	First instance	07/01/2010	NE024	Slovakia	The Netherlands	5
275	NE22	First instance	07/01/2010	NE026	Guatemala	The Netherlands	9
276	NE23	First instance	11/01/2010	Unassigned	Canada	The Netherlands	Unknown
277	NE24	Second instance	03/02/2010	NE021	Slovakia	The Netherlands	5
278	NE25	First instance	11/02/2010	Unassigned	Great Britain	The Netherlands	10
279	NE26	Second instance	19/02/2010	NE022	Guatemala	The Netherlands	9
280	NE27	First instance	25/03/2010	NE029	Poland	The Netherlands	12
281	NE28	First instance	15/04/2010	Unassigned	Slovakia	The Netherlands	6
282	NE29	Second instance	23/04/2010	NE027	Poland	The Netherlands	12
283	NE30	First instance	29/04/2010	Unassigned	Poland	The Netherlands	12
284	NE31	First instance	18/05/2010	Unassigned	Germany	The Netherlands	1
285	NE32	First instance	03/08/2010	Unassigned	Croatia	The Netherlands	15 and 13
286	NE33	First instance	13/06/2010	NE034	USA	The Netherlands	13 and 11
287	NE34	Second instance	22/09/2010	NE033	USA	The Netherlands	13 and 11
288	NE35	First instance	23/09/2010	NE036	Poland	The Netherlands	7
289	NE36	Second instance	10/11/2010	NE035	Poland	The Netherlands	7
290	NE37	First instance	10/12/2010	Unassigned	Guatemala	The Netherlands	9
291	NE38	First instance	14/12/2010	Unassigned	Australia	The Netherlands	6
292	NE39	First instance	16/12/2010	Unassigned	Belgium	The Netherlands	11

Figure (3) Example of source classification 'Case law' where values to attributes are filled in for number of Dutch cases

Further, the codebook includes all the nodes: 'A node is a collection of references about a specific theme, place, person or other area of interest'.<sup>3</sup> One node was created for the information on the best interests and one for the information on the hearing. Further, each question of the survey got its own sub-node and under these sub-nodes, other sub-nodes were provided for each answer possibility.

<sup>3</sup>'About Nodes' (NVivo 10 for Windows Help) <[http://help-nv10.qsrinternational.com/desktop/concepts/about\\_nodes.htm](http://help-nv10.qsrinternational.com/desktop/concepts/about_nodes.htm)> accessed 25 October 2018.

Name	Files	References	Created On	Created By	Modified On	Modified By
Best interests	0	0	18/07/2018 11:55	TVH	18/07/2018 11:55	TVH
Explicit reference	0	0	18/07/2018 11:56	TVH	19/07/2018 9:27	TVH
Art. 3(1) CRC	34	35	19/07/2018 8:57	TVH	17/08/2018 9:12	TVH
ECHR case law	11	11	19/07/2018 8:58	TVH	25/10/2018 14:27	TVH
Other	137	137	19/07/2018 8:58	TVH	25/10/2018 14:21	TVH
Other (inter)national cas	21	21	19/07/2018 8:58	TVH	25/10/2018 14:27	TVH
Other (inter)national inst	28	28	19/07/2018 8:57	TVH	25/10/2018 14:27	TVH
Rationale HC	77	77	19/07/2018 8:57	TVH	25/10/2018 14:27	TVH
Impact best interests	0	0	18/07/2018 11:57	TVH	19/07/2018 9:34	TVH
Considered equally with	41	41	19/07/2018 9:59	TVH	17/08/2018 14:12	TVH
Decisive	82	83	19/07/2018 9:59	TVH	25/10/2018 14:34	TVH
Decisive but other factor	9	9	19/07/2018 9:59	TVH	17/08/2018 9:54	TVH
Discussed but not taken i	12	12	19/07/2018 9:00	TVH	17/08/2018 14:35	TVH
Not clear	103	103	19/07/2018 9:00	TVH	17/08/2018 10:13	TVH
Implicit reference	48	48	18/07/2018 11:56	TVH	25/10/2018 14:34	TVH
Link grounds for (non-)retur	0	0	18/07/2018 22:04	SL	19/07/2018 9:34	TVH
Art. 12 HC	21	21	18/07/2018 22:05	SL	25/10/2018 14:27	TVH
Art. 13(1)(a) HC	9	9	18/07/2018 22:05	SL	25/10/2018 14:28	TVH
Art. 13(1)(b) HC	158	159	18/07/2018 22:05	SL	25/10/2018 14:32	TVH
Art. 13(2) HC	20	20	18/07/2018 22:06	SL	17/08/2018 10:10	TVH
Art. 20 HC	3	3	18/07/2018 22:05	SL	16/08/2018 12:03	TVH
Extra information	22	24	18/07/2018 11:58	TVH	25/10/2018 14:34	TVH
ECHR no violation Art. 8	0	0	17/08/2018 10:46	TVH	17/08/2018 10:46	TVH
ECHR violation Art. 8	0	0	17/08/2018 10:46	TVH	17/08/2018 10:46	TVH
Hearing	0	0	18/07/2018 11:57	TVH	18/07/2018 11:57	TVH

Figure (4) - The node 'Best interests' with accompanying sub-nodes

Name	Files	References	Created On	Created By	Modified On	Modified By
Best interests	0	0	18/07/2018 11:55	TVH	18/07/2018 11:55	TVH
Extra information	22	24	18/07/2018 11:58	TVH	25/10/2018 14:34	TVH
Hearing	0	0	18/07/2018 11:57	TVH	18/07/2018 11:57	TVH
Arguments against hearing	0	0	18/07/2018 11:57	TVH	18/07/2018 11:57	TVH
Age	28	28	19/07/2018 9:02	TVH	17/08/2018 14:32	TVH
Hearing is not in the best	0	0	19/07/2018 9:03	TVH	19/07/2018 9:03	TVH
Influence or manipulation	1	1	19/07/2018 9:03	TVH	20/07/2018 11:06	TVH
Maturity	15	15	19/07/2018 9:03	TVH	16/08/2018 14:58	TVH
Other	17	17	19/07/2018 9:03	TVH	17/08/2018 9:17	TVH
Impact child's views	0	0	18/07/2018 11:57	TVH	18/07/2018 11:57	TVH
Considered equally with	6	6	19/07/2018 9:02	TVH	22/08/2018 15:40	TVH
Decisive	7	7	19/07/2018 9:01	TVH	14/08/2018 16:42	TVH
Decisive but other factor	2	2	19/07/2018 9:01	TVH	17/08/2018 8:39	TVH
Discussed but not taken i	3	3	19/07/2018 9:01	TVH	22/08/2018 15:40	TVH
Not clear	0	0	19/07/2018 9:02	TVH	19/07/2018 9:02	TVH
Information on hearing	79	121	18/07/2018 11:57	TVH	25/10/2018 14:28	TVH

Figure (5) - The node 'Hearing' with accompanying sub-nodes

After the codebook was made, each Voice researcher was assigned a number of countries and started the coding. Thus, for each case, the general information was coded by choosing the right value for each attribute. The information on the best interests and the hearing was read and coded based on the nodes and sub-nodes.

### **2.4.3. Third Step: Country Report**

After coding all information in NVivo, a report per country was composed. This was done by using one Excel document and one Word document per country.

In the Excel document we collected the quantitative data (such as the amount of cases, number of children), calculated the percentages and made graphs out of these percentages. As previously mentioned, the choices made in the Qualtrics survey to display or not display certain questions have important implications on the statistical data. Indeed, the basis to calculate the percentages was not always the total amount of collected cases.

The total amount of cases of the specific country that are included in the research was taken as a basis to calculate the percentages of:

- The taking / retaining parent (mother / father / other);
- The decision (return / non-return / other);
- The legal basis (HCCA / Brussels IIbis Regulation/HCCA and Brussels IIbis Regulation/ECHR/ other);
- The reference to the best interests of the child (explicit/implicit/none);
- The hearing of the child (yes/no/unknown).

All other percentages were calculated using a different basis:

- The percentage of the age of the children is based on the total amount of children;
- The percentage of the basis for the explicit reference is based on the total amount of cases in which the best interests were discussed explicitly;
- The percentage of the grounds to decide on the (non-)return that are linked to the best interests and the percentage of the impact of the best interest's assessment are based on the total amount of cases in which the best interests were discussed either explicitly or implicitly;
- The percentage of the reasons for not hearing the child is based on the total amount of cases in which the child was not heard;
- The percentage of cases in which the hearing contributed to the best interest's assessment and the percentage of the professional hearing of the child are based on the total amount of cases in which the child is heard;
- The percentage of the impact of the child's views is based on the total amount of cases in which the hearing contributed to the best interests' assessment.

The Word document, on the other hand, was used to make a coherent analysis of the qualitative data. In the end, we inserted the graphs made in Excel into the Word document so that we have one file per country.

The country reports already offer some insights on how judges of a specific country give substance to the best interests of the child. Further, some country reports show that there are specific patterns relevant to that country.

However, to analyse the approach of the judges with regard to the interpretation of the best interests of the child on a more general, transnational level a fourth step was necessary.

#### **2.4.4. Fourth Step: Comprehensive Research Report**

To be able to answer the research question on a level beyond the individual countries, a general analysis had to be done. To do this, each VOICE researcher was assigned a thematic part of the research (e.g. the hearing of the child) that he or she had to analyse. The Voice researchers performed the analysis based on an NVivo file that included the coded surveys of all countries. Starting from this file, the researchers added additional nodes useful for the specific parts they analysed; e.g. when analysing the link between the best interests and Article 13(1)(b) Hague Convention on Child Abduction it may be useful to create the additional node 'violence/abuse' to see how the courts deal with these situations.

## **Part II: Detailed Report**



## **Case Law Analysis**

### **1. Best Interests of the Child**

#### **1.1. General**

Consideration for the best interests of the child varies greatly between national case law collected for this study. In some countries the concept recurs frequently – explicitly and implicitly – in the judges’ reasoning, while in others only a very low percentage of cases in which the best interests are considered have been registered.

The aim of the case law collection and analysis was to distinguish between decisions in which the best interests of the child are mentioned explicitly by the court and decisions in which the reference was only implicit.

The explicit reference recurs where the phrase ‘best interests of the child’ is to be found in the text of the decision. Implicit references exist when a case does not directly refer to the wording ‘best interests’, but more generally refers to the child’s ‘wellbeing’, ‘development’, ‘growth’, ‘balance’, ‘equilibrium’ or similar.

The highest rate of references has been found in Malta (19 decisions out of 22, among which 17 are explicit references and 2 are implicit references), followed by Bulgaria (49 decisions out of 59, with 29 explicit references and 20 implicit references), Czech Republic (9 decisions out of 11, with 4 explicit references and 5 implicit references), Germany (38 decisions out of 49, with 32 explicit references and 6 implicit references) and Croatia (21 decisions out of 27 with 4 explicit references and 17 implicit references).

The country with the lowest percentage of decisions referring to the best interests of the child is Sweden (4 decisions out of 110 made an explicit reference), but low rates are to be found also in Romania (13 decisions out of 51, among which 4 are explicit references and 9 are implicit references), Latvia (14 decisions out of 51, with 9 explicit references and 5 implicit references), Finland (19 decisions out of 69, with 12 explicit references and 7 implicit references) and Italy (24 decisions out of 69, with 15 explicit references and 9 implicit references).

Belgium, France, Greece, Hungary, the Netherlands and Spain attest on average values between 47% and 54% of decisions referring explicitly or implicitly to the best interests of the child.

The survey also addressed the case law of the European Court of Justice and the European Court of Human Rights on international child abduction. All ECJ decisions on the matter referred, either explicitly or implicitly, to the best interests of the child. Among the 54 ECtHR decisions, all of them contain an explicit or implicit reference to the aforementioned principle.

Country	References to the best interests of the child	Explicit references	Implicit references
Belgium	19 cases out of 36 (53%)	17 cases (47%)	2 cases (6%)
Bulgaria	49 cases out of 59 (83%)	29 cases (49%)	20 cases (34%)
Croatia	21 cases out of 27 (78%)	4 cases (15%)	17 cases (63%)
Czech Republic	9 cases out of 11 (82%)	4 cases (36%)	5 cases (45%)
Finland	19 cases out of 69 (28%)	12 cases (17%)	7 cases (10%)
France	67 cases out of 130 (52%)	58 cases (45%)	9 cases (7%)
Germany	38 cases out of 49 (78%)	32 cases (65%)	6 cases (12%)
Greece	10 cases out of 19 (53%)	2 cases (11%)	8 cases (42%)
Hungary	14 cases out of 26 (54%)	8 cases (31%)	6 cases (23%)
Italy	24 cases out of 69 (35%)	15 cases (22%)	9 cases (18%)
Latvia	14 cases out of 51 (27%)	9 cases (18%)	5 cases (10%)
Malta	19 cases out of 22 (86%)	17 cases (77%)	2 cases (9%)
Netherlands	91 cases out of 168 (54%)	79 cases (47%)	12 cases (7%)
Poland	5 cases out of 5 (100%)	2 cases (40%)	3 cases (60%)
Romania	13 cases out of 51 (25%)	4 cases (8%)	9 cases (18%)
Spain	17 cases out of 36 (47%)	10 cases (28%)	7 cases (19%)
Sweden	4 cases out of 110 (4%)	4 cases (4%)	0 cases (0%)
ECJ	8 cases out of 8 (100%)	8 cases (100%)	0 cases (0%)
ECtHR	54 cases out of 54 (100%)	47 cases (87%)	7 cases (13%)

Table (1) – References to the best interests of the child in general

## 1.2. Explicit Reference

Among the 1000 decisions collected, 361 decisions explicitly refer to the best interests of the child. Three hundred and six decisions are from national case law, but the principle was also explicitly considered in 47 out of 54 decisions of the European Court of Human Rights. With reference to the case law of the European Court of Justice, all eight relevant decisions refer to the best interests of the child.

<b>Country</b>	<b>Explicit references</b>
Netherlands	79 cases
France	58 cases
ECtHR	47 cases
Germany	32 cases
Bulgaria	29 cases
Belgium	17 cases
Malta	17 cases
Italy	15 cases
Finland	12 cases
Spain	10 cases
Latvia	9 cases
Hungary	8 cases
ECJ	8 cases
Croatia	4 cases
Czech Republic	4 cases
Romania	4 cases
Sweden	4 cases
Greece	2 cases
Poland	2 cases

Table (2) – Explicit references to the best interests of the child

The explicit references have been collected and analysed in order to obtain understanding about the legal basis on which the courts considered the best interests of the child. Therefore, the data has been classified on the following legal bases:

- a) Article 3(1) of the UN Convention on the Rights of the Child (UNCRC);
- b) The rationale of the 1980 Hague Convention on Child Abduction (HCCA);
- c) Other (inter)national legal instruments;
- d) The case law of the European Court of Human Rights (ECtHR);
- e) Other (inter)national case law;
- f) Other basis.

It is necessary to underline that some decisions refer to more than one of these categories, linking the best interests of the child to more than one legal basis. Therefore, even if the total number of decisions making an explicit reference is 361, the total number of references may be higher.

### **Article 3(1) UNCRC**

In 62 cases, the explicit reference has been based on Article 3(1) of the UNCRC, according to which:

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 consideration.

The decisions have been delivered by Belgian, Croatian, Czech, French, Latvian, Maltese, Dutch, Romanian and Spanish courts. Twelve of the judgments have been delivered by the European Court of Human Rights.

## **Rationale Hague Convention on Child Abduction**

In 182 cases, the courts based the explicit reference on the rationale of the 1980 Hague Convention on Child Abduction, for which the best interests of the child coincide with his/her immediate return to the place of habitual residence. Among these decisions, fifteen judgements were delivered by the ECtHR.

In this regard, courts have considered that the legal framework provided by the HCCA was inspired by the principle of the best interests of the child, and therefore a correct application of the HCCA would be in line with respect for that principle. In other words, the Convention sets the premise that international child abduction is generally in conflict with the best interests of the child. A rapid return of the child to the State of his or her former habitual residence limits the harmful effects of the abduction and is thus seen as being in the best interests of the child. However, this premise can be deviated from in exceptional circumstances, namely when one of the grounds for refusal provided for in the Convention applies.

The decisions have been delivered by Belgian, Bulgarian, Croatian, Dutch, French, Finnish, German, Greek, Hungarian, Italian, Latvian, Maltese, Polish, Romanian and Spanish courts.

## **Other (Inter)national Legal Instruments**

In 50 decisions, the explicit reference is based on national and/or international legal instruments, other than Article 3(1) UNCRC and the HCCA. Four of them are judgements delivered by the ECtHR, while eight were delivered by the ECJ.

## **Courts either Considered National Legal Instruments, International Conventions or EU Law.**

With regard to national law, reference has been found to provisions of family law or concerning the protection of children, or to constitutional law. In Latvia, Article 6(1) of the Child Protection Law establishes that 'any binding instruments concerning children shall take the interests and rights of the child as a priority'; in application of the provision, the court stated in one decision that the return of the child to the UK was in the child's best interests, since in that country the minor would have been in the custody and care of both parents.<sup>4</sup> In a Romanian decision, the court applied Domestic Law no. 272/2004 concerning protection and promotion of children's rights and Domestic Law no. 100/1992 concerning the application of the HCCA. The court considered with respect to the principle of the best interests of the child, that settlement of the two children in the new environment and risks exposed to after the return to Israel are arguments leading to the conclusion that the court can refuse return.<sup>5</sup> In Germany, the Bundesverfassungsgericht (Federal Constitutional Court) reasoned as follows:

The constitutional anchoring of the best interests of the child in Article 6(2) and Article 2(1) of the Grundgesetz in conjunction with the right to be heard (Article 103(1) of the Grundgesetz), may result in the duty to ensure the child's wellbeing in procedural terms by providing for a legal guardian in order to safeguard the interests of the child. A return decision is of considerable importance to the child's wellbeing because it determines his social environment and can separate him/her from one of the parents.<sup>6</sup>

<sup>4</sup> LV035 [19 November 2014] C20 2745 14.

<sup>5</sup> RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

<sup>6</sup> GE035 [18 July 2006] BVerfG.1 BvR 1465/05.

In Spain, six decisions referred to the Spanish Organic Law 8/2015 of July 22 on the modification of the protection system for children and adolescents;<sup>7</sup> the Law on the Protection of Children No 1/1996,<sup>8</sup> as well as to international legal instruments such as Article 24 of the Charter of Fundamental Rights of the European Union<sup>9</sup> and the 1959 UN Declaration on the rights of the child.<sup>10</sup>

International legal instruments have also been considered in Italy, where in one decision,<sup>11</sup> the court referred to Article 12 UNCRC and to Articles 3 and 6 of the 1996 Strasbourg Convention on the Exercise of Children's rights, with particular reference to the opportunity to hear the child in order to assess his or her best interests. In the Czech Republic and in Hungary, courts have based the explicit reference on the Brussels *Ibis* Regulation, on the basis that the principle of the best interests of the child is immanently present in EU rules providing court's international jurisdiction.<sup>12</sup> In a Hungarian decision, the court stated the following:

The Regulation – as the Hague Convention on Child Abduction – presumes that the immediate return of the child to their former habitual residence ensures the best interests of the child and this presumption can be rebutted only in exceptional cases (Article 13 of the 1980 Hague Convention on Child Abduction).<sup>13</sup>

In the Netherlands, in fifteen cases the explicit reference to the best interests of the child was based on another (inter)national legal instrument namely Article 8 ECHR.<sup>14</sup>

Lastly, in one decision a Maltese court referred to the following quote from the Explanatory Report of E. Perez-Vera on the HCCA:

A systematic invocation of these exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.<sup>15</sup>

## **Case law of the European Court of Human Rights**

### **Twenty-six National Decisions Based the Explicit Reference on the ECtHR Case Law.**

The majority of decisions (sixteen, from Belgium, Croatia, Czech Republic, Finland, Germany, Italy, Latvia, Malta and Poland) evoked the principles stated by the ECtHR in *Neulinger and Shuruk v Switzerland*, in *X v Latvia* and in *Maumousseau and Washington v France*. Other cited ECtHR

<sup>7</sup> SP013 [4 May 2016] ECLI:ES:APPO:2016:760; SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478; SP017 [21 April 2017] Audiencia Provincial de Granada (Sección 5ª) ECLI:APGR:2017:486; SP032 [11 November 2007] Audiencia Provincial de Málaga 463/2007.

<sup>8</sup> SP009 [27 October 2016] Audiencia Provincial de Valencia (Sección 10ª) ECLI: ES:APV:2016: 3706.

<sup>9</sup> SP032 [11 November 2007] Audiencia Provincial de Málaga 463/2007.

<sup>10</sup> SP024 [21 March 2012] Audiencia Provincial de Madrid (Sección 24ª) ECLI:ES:APM:2012:4853A.

<sup>11</sup> IT006 [27 July 2017] Cassazione civile 18649/2017.

<sup>12</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ006 [19 March 2015] Supreme Court of the Czech Republic 4909/2014; HUN25 [16 March 2016] Pk.500360/2016.

<sup>13</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>14</sup> See the country analysis for the Netherlands, *infra*, Annex B.

<sup>15</sup> MA015 *Direttur tad-Dipartiment għall-standards fil-Harsien Soċjali vs. Sharon Rose Roche Nee Bellamy* [30 October 2015] Qorti ta' L-Appell 10/15 PC.

judgments are *Macready v Czech Republic*,<sup>16</sup> *Lombardo v Italy*,<sup>17</sup> *Johansen v Norway*,<sup>18</sup> *Bronda v Italy*,<sup>19</sup> *Ciliz v the Netherlands*.<sup>20</sup>

In seven decisions, courts did not refer to any specific case, but to the case law of the ECtHR on Article 8 ECHR in general. In one decision,<sup>21</sup> the Brussels' Court of Appeal stated the following:

Even if the interests of the child should guide any decision [*footnote in original*: 'See the case law of the ECtHR on Article 8 of the European Convention on Human Rights concerning parental abduction'] the procedure for the return of the child should lead to a relatively 'technical' assessment allowing, in the interests of the child, to restore the situation to its state before the parental abduction and then consider the question of custody before the competent judge at the international level.

In France, in three cases the courts mentioned the following:<sup>22</sup>

It follows from the decisions of the ECtHR that – for the interpretation and application of the Hague Convention on Child Abduction – national courts must, in consideration of the best interests of the child, and in compliance with the requirements of Article 8 of the European Convention on Human Rights, carry out a thorough/careful<sup>23</sup> examination of the concrete implications of the return on the child's situation in order to assess the conditions for such a return and the exceptions laid down by the Hague Convention on Child Abduction.

In another French case, the court stated 'the ECtHR has laid down the principle that the best interests of the child must be the determining factor in the proceedings of the Hague Convention on Child Abduction'.<sup>24</sup> Two of these references to the case law of the ECtHR were made after the ECtHR's judgment in the *Neulinger and Shuruk v Switzerland* case<sup>25</sup> but before the *X v Latvia* case. The two other cases were decided after the judgment in the *X v Latvia* case.<sup>26</sup> This shows that French courts did not see substantial differences in the principles laid down by the ECtHR in *Neulinger and X v Latvia*.

This is particularly relevant since the *Neulinger* case on the one hand 'may and has (...) been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors'<sup>27</sup>, which is difficult to reconcile with the HCCA's principle of prompt return.<sup>28</sup> On the other hand, in the *X v Latvia* case, the ECtHR clarified

<sup>16</sup> CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>17</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015.

<sup>18</sup> SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478; SP017 [21 April 2017] Audiencia Provincial de Granada (Sección 5ª) ECLI:APGR:2017:486.

<sup>19</sup> SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478; SP017 [21 April 2017] Audiencia Provincial de Granada (Sección 5ª) ECLI:APGR:2017:486.

<sup>20</sup> SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478; SP017 [21 April 2017] Audiencia Provincial de Granada (Sección 5ª) ECLI:APGR:2017:486.

<sup>21</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>22</sup> FR079 [17 June 2013] Cour d'appel Limoges 13/00223; FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>23</sup> In one case the word 'thorough' was used (FR079 [17 June 2013] Cour d'appel Limoges 13/00223) and in the two other cases the courts used the word 'careful' (FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761).

<sup>24</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>25</sup> FR079 [17 June 2013] Cour d'appel Limoges 13/00223; FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>26</sup> FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>27</sup> ECHR031 ECtHR *X v. Latvia* [26 November 2013] Application no. 27853/09, para 104.

<sup>28</sup> Paul Beaumont and others 'Child abduction: Recent jurisprudence of the European Court of Human Rights' [2015] 64 *International and Comparative Law Quarterly* (39) 40.

its ruling in the Neulinger case.<sup>29</sup> The ECtHR shifts the obligation on national courts from an in-depth analysis of the entire family situation to an effective examination of the exceptions of the HCCA and hereby reaffirms the idea that the HCCA's principle of prompt return is in the best interests of the child unless one of the exceptions applies.<sup>30</sup>

### Other (Inter)national Case Law

Thirty-two decisions based the explicit reference on national or international case law, other than the ECtHR judgments.

In three decisions, the courts referred to the ECJ's case law, mostly concerning the notion of habitual residence of the child: an Italian decision<sup>31</sup> referred to the ECJ decision in the case *OL v PQ*, according to which 'the concept of "habitual residence", within the meaning of Regulation No 2201/2003, must be interpreted according to the best interests of the child';<sup>32</sup> a similar position has been adopted by a Greek decision,<sup>33</sup> which referred to the ECJ decisions *A*<sup>34</sup> and *Mercredi v Chaffe*,<sup>35</sup> in the Czech Republic, in three decisions<sup>36</sup> extensive reference to the case law of the ECJ,<sup>37</sup> as well as to national case law,<sup>38</sup> was provided.

As concerns the Czech Republic, it is worth mentioning that the court mainly referred to foreign case law (from Germany, UK, United States, Austria and Canada). Similarly, several Maltese decisions referred to foreign case law in which the concept of the best interests was mentioned: in two cases, the court referred to 'English court – Judge Johnson' and to 'Re F (1991) 1 FLR – Lord Justice Neill' in stating the following:

The general principle is that any decision relating to the custody of the children is best decided in the jurisdiction in which they have normally resided. This is an application of the wider and basic principle that the child's welfare should be taken in first and paramount consideration.<sup>39</sup>

In other cases, the court invoked national case law of its own country, as happened in Hungary, Poland, Spain and Germany. In particular, Hungarian, Polish and Spanish decisions referred to previous judicial statements in which the principle of the best interests of the child pervades the entire system of the 1980 Hague Convention on Child Abduction. According to Hungarian case

<sup>29</sup> ECHR031 ECtHR X. v. Latvia [26 November 2013] Application no. 27853/09, para 105.

<sup>30</sup> Paul Beaumont and others 'Child abduction: Recent jurisprudence of the European Court of Human Rights' [2015] 64 International and Comparative Law Quarterly (39) 40; Peter McEleavy 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' [2015] Netherlands International Law Review (365) 395.

<sup>31</sup> IT001 [14 December 2017] Cassazione civile 30123/2017.

<sup>32</sup> ECJ Case 111/17 *OL v PQ* [2017] ECLI:EU:C:2017:436, para 66.

<sup>33</sup> GR003 [19 December 2016] Court of First Instance of Volos 609/2015.

<sup>34</sup> ECJ Case 523/07 A [2009] ECLI:EU:C:2009:225.

<sup>35</sup> ECJ Case 497/10 *Barbara Mercredi v Richard Chaffe* [2010] ECLI:EU:C:2010:829.

<sup>36</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007; CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>37</sup> ECJ004 Case C-376/14 *C v M* [9 October 2014] ECLI:EU:C:2014:2268; ECJ Case 523/07 A [2009] ECLI:EU:C:2009:225; ECJ Case 497/10 *Barbara Mercredi v Richard Chaffe* [2010] ECLI:EU:C:2010:829.

<sup>38</sup> [5 April 2002] Østre Landsret, afdeling, B-409-02 [INCADAT cite: HC/E/DK 520]; [17 February 2000] High Court – England and Wales, *Re H.* (Abduction: Habitual Residence: Consent) 2 FLR 294 [INCADAT cite: HC/E/UKe 478]; [30 August 1999] United States District Court for the District of Colorado, *Morris v. Morris* 55 F. Supp. 2d 1156 [INCADAT cite: HC/E/USf 306]; [9 January 2001] United States Court of Appeals for the Ninth Circuit, *Mozes v. Mozes* 239 F.3d 1067 [INCADAT cite: HC/E/USf 301]; [11 May 2005] Oberstes Gerichtshof (Austria) 3 Ob 89/05; [20 October 1994] Supreme Court of Canada, *Thompson v Thompson* 3 SCR 551, 6 RFL (4th) 290 [INCADAT cite: HC/E/CA 11].

<sup>39</sup> In MA002 the court referred to 'English court – Judge Johnson' (MA002 *Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X* [15 July 2007] 53/2007/1.), in MA020 to 'Re F (1991) 1 FLR – Lord Justice Neill' (MA020 *Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C* [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM).

law, 'the legal interest protected by the Convention is to provide the integrity of parental responsibilities in accordance with the best interests of the child'.<sup>40</sup> In Poland, two distinct judgments of the Polish Supreme Court were referred to, stating the following:

Speaking of the interpretation and application of the provisions of the Hague Convention on Child Abduction, taking into account the provisions of the Convention on the Rights of the Child, it is necessary to consider the provisions of the second of the aforementioned Conventions [...] which show that 'the interests of the child' is a principle primary and superior in every action regarding the child. [...] The notion 'the interests of the child' corresponds to the phrase 'wellbeing of the child' present in the Polish law.<sup>41</sup>

In Spain, one decision<sup>42</sup> referred to the notion of best interests evoking the statements of the Constitutional Court,<sup>43</sup> according to which

When the resolution of a case affects a child, the constitutional decision has to take into account the best interests of the child, adopted by the Convention on the Rights of the Child (Article 3(1)) In Spanish law the best interests of the child is the guiding and inspiring principle of all the decisions adopted by the public powers, judicial and administrative authorities.<sup>44</sup>

The same decisions also cited a Spanish Supreme Court decision,<sup>45</sup> according to which

The concept of the best interests of the child developed by the Organic Law 8/2015, of 22 July on the modification of the protection system for children and adolescents, implies according to this law that it will be compulsory to maintain the family relationships.

In Germany, five decisions referred to the notion of the best interests of the child through the interpretation given by the Bundesgerichtshof (Federal Court of Justice) and by the Bundesverfassungsgericht (German Constitutional Court). In one case, the court referred to a statement of the Bundesgerichtshof according to which:

The court cannot prohibit departure to the parent. However, the family court may and must examine how emigration affects the child's wellbeing. The parent's decision to emigrate is not readily enforceable against the other parent's parental rights. Rather, what matters is which alternative better suits the best interests of the child and how the rights of both parents can be exercised in accordance with the best interests of the child. It may be best for the interests of the child to stay in the Country of origin with the one parent.<sup>46</sup>

Other decisions referred to previous German case law interpreting the exception of Article 13(1)(b) HCCA in light of its main scope, pursuing the wellbeing of the child.<sup>47</sup> For instance, the courts invoked the Bundesverfassungsgericht's reasoning according to which:

<sup>40</sup> HUN27 [17 June 2016] 9.Pk.500124/2016/28; HUN29 [24 January 2017] Curia Pfv.II.22.448/2016/6; HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27. In all cases, the court recalled the position of the Curia (the highest judicial authority in Sweden), decisions No. 2004.239, 2004.634 and 2003.950.

<sup>41</sup> PLO02 [15 April 2016] Sad Okregowy Bialystok II Wydział Cywilny Odwoławczy II Ca 217 / 16, citing judgment III CZP 48/92 of 12 June 1992 and judgment II KKN 855/97 of 16 October 1998 of the Polish Supreme Court.

<sup>42</sup> SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4<sup>a</sup>) ECLI:ES:APC:2017:478.

<sup>43</sup> Decision number 16/2016, 1 February 2016 (ECLI:TC:2016:16).

<sup>44</sup> Decision number 16/2016, 1 February 2016 (ECLI:TC:2016:16).

<sup>45</sup> Supreme Court, decision of 29 of March 2016, (Civil Section). This case was not included in the VOICE project and thus not further analysed, because it did not deal with an international child abduction.

<sup>46</sup> GE023 [22 June 2011] OLG Stuttgart 17 UF 150/11, citing BGH, FamRZ 2010, 1060 ff.

<sup>47</sup> GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16; GE018 [28 June 2012] OLG Hamm II-11 UF 85/12; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12.



Only unusually serious impairments to the child's wellbeing, which are particularly significant, concrete and actual, and which go beyond the difficulties usually associated with repatriation, are reasons to refuse the return.<sup>48</sup>

A return can be refused if it is proved that the child was abused or maltreated and this is to be feared again, if the applicant parent is highly addicted, if returning to a war zone is inevitable, or if as a result of the return an acute suicide risk of the child exists.<sup>49</sup>

On this basis, the court in one case concluded that the difficulties allegedly faced by the abducting parent, in returning with the child to the country of origin, could not lead to the invocation of the exception of Article 13(1)(b):<sup>50</sup> the best interests were discussed in relation to the possibility for the child to be returned with the abducting parent, with whom she had the stronger and tighter relationship. In this case, the court stated that, if the return with the abducting (and closer) parent is possible, then the best interests are not violated excessively, and the return has to be executed under Article 12 of the 1980 Hague Convention on Child Abduction.<sup>51</sup>

The interpretation of Article 13(1)(b) in the light of the best interests of the child on the basis of references to national case law, can be found also in Maltese and Swedish decisions. In one case, the Maltese Qorti Civili (civil tribunal) referred to the English case *C v B [Abduction: grave risk] [2005][EWHC 2988]* per Potter J, and quoted: 'The threshold for an Article 13 defence is not to be decided on the basis of straightforward welfare considerations, but according to the higher standard of serious risk of harm'.<sup>52</sup> In Sweden, in three out of the four cases in which reference is made to the best interests of the child this reference was explicit and based on Swedish national case law: in all three cases,<sup>53</sup> the courts cited the following phrase:

The refusal grounds in the Hague Convention on Child Abduction manifest the assessment of the best interests of the child which must be made in situations of this kind. As the Council on Legislation<sup>54</sup> stated during its examination of the proposed 1989 Act, which incorporated the Hague Convention on Child Abduction in Swedish law, it is possible in assessing if the child by being returned would be placed in an intolerable situation to consider if an enforcement clearly would be against the best interests of the child [...] (this was stated by the Swedish Supreme Court).<sup>55</sup>

## Other

In a great number of cases (143 decisions), the explicit reference to the best interests of the child was not based on one of the mentioned grounds but on other considerations. These references

<sup>48</sup> BVerfG NJW 1996, 1402, 1403; FamRZ 1999, 85, 87; OLG Karlsruhe FamRZ 2010, 1577, 1578.

<sup>49</sup> BVerfG FamRZ 2005, 1657.

<sup>50</sup> GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16.

<sup>51</sup> Reference was made to German case law: Bundesverfassungsgericht FamRZ 1999, 641, OLG Koblenz FamRZ 1993, 97, OLG Hamm vom 21.08.1998, 5 UF 300/98 - juris, OLG Düsseldorf vom 02.02.2011, 1 UF 110/10 - juris.

<sup>52</sup> MA008 Direttur tad-Dipartiment Għal Standards fil-Harsien Soċjali vs. RR [28 June 2012] Qorti Civili 15/2012.

<sup>53</sup> SE074 [2 February 2016] Stockholms tingsrätt Å 15498-15; SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17; SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

<sup>54</sup> The Council on Legislation is a Swedish Government agency made up by judges from the Supreme Court and the Supreme Administrative Court. Its task is to check whether a proposed law does not conflict with existing legislation or might cause other problems of legal nature (e.g. when the proposed law goes against the rule of law ('Swedish Legislation – How Laws are Made' (Government Offices of Sweden, 3 April 2018) <<https://www.government.se/how-sweden-is-governed/swedish-legislation---how-laws-are-made/>> accessed 24 October 2018; 'Makes Laws' (Sveriges Riksdag, 2 March 2018) <<http://www.riksdagen.se/en/how-the-riksdag-works/what-does-the-riksdag-do/makes-laws/>> accessed 24 October 2018).

<sup>55</sup> NJA 2013 s 1143 Högsta domstolen.

were found in Belgian, Bulgarian, Dutch, French, Greek, Hungarian, Italian, Latvian, Maltese, Polish and Romanian case law.

It is necessary to reiterate here that some decisions refer to more than one category and are thus also discussed in more than one of the categories. It is possible that reference is made to the best interests in one and the same case on a legal basis as discussed above (e.g. Article 3(1) UNCRC) and also on the basis of another consideration.

Other considerations in relation to which the best interests of the child are explicitly mentioned, vary greatly. These different considerations will be set out below.

- a) The best interests of the child are based on the jurisdiction of the country of habitual residence as concerns the merits of parental responsibility.

In most of the 143 cases, courts have considered that it is in the best interests of the child to have the courts in the State of habitual residence to decide on parental authority and the rights to personal contact with the child, giving due respect to the best interests of the child.

The courts of the State of habitual residence are therefore considered the best authority to evaluate the best interests of the child in the specific situation.<sup>56</sup> As a consequence, it is in the best interests of the child that the court of the State of habitual residence decides on the exercise of parental authority and the right to personal contact,<sup>57</sup> as it is in a better position to balance the interests considering the question of where the minor should ultimately have his or her main residence.<sup>58</sup> According to a French decision, the aforementioned court 'offer[s] the best guarantees for a balanced examination of the rights of each of the parents and the interests of the child'.<sup>59</sup>

Accordingly, one Belgian decision stated that it is in the interests of the child that they do not become victim of the consolidation of an unlawful situation.<sup>60</sup>

- b) The best interests of the child consist of their prompt return to the State of habitual residence

In some cases, courts have considered that the best interests of the child consist of their immediate return to the place of habitual residence, but it can be effectively pursued only if the return decision (and subsequent enforcement) is delivered in a short period of time. In this context, it has been affirmed that 'the purpose of this interest is [...] to ensure that the child is reunited with his or her parents as soon as possible so that one parent will not take unfair advantage of time'.<sup>61</sup>

In this context, Belgian courts also considered the hypotheses of procedural delays, stating that, although the malfunction in the judicial system should not justify any excessive passage of time. It is also true that in these cases the best interests of the child should be taken in consideration above all other aspects. For this reason, it has been said that

<sup>56</sup> FRO56 [17 February 2011] Cour d'appel Paris 11/00507.

<sup>57</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65; NE111 [15 October 2014] Gerechtshof Den Haag 200.155.629/01; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008.

<sup>58</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE094 [3 January 2014] Rechtbank Den Haag C/09/449170 FA RK 13-6486; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628/ FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784/ FA RK 16-2675.

<sup>59</sup> FRO48 [17 June 2010] Cour d'appel Dijon 10/00967.

<sup>60</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>61</sup> NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01.

Malfunctions prior to the decision to be taken by the judicial authority cannot justify an order sacrificing the interests and welfare of the children on the grounds that the time elapsed since their wrongful removal could not be taken into account<sup>62</sup>

Also, in the case law of the ECtHR, the swiftness of implementation is linked to the best interests of the child. The Court referred to the passage of time, which can have irremediable consequences for the relations between the children and the parent who does not live with them,<sup>63</sup> and to the relationship between parents and children, which should not be determined by the mere effluxion of time.<sup>64</sup>

However, it should be underlined that, in one case, the prompt return to the State of origin was not considered to be in the best interests of the child. In a French decision,<sup>65</sup> the court considered that an immediate return, without adequate preparation, would be traumatic for the child and therefore ordered the return to Portugal within six months from the notification date of the judgment. The decision was delivered in July 2009 and the child (who was three years old at the time of proceedings) had been in France since September 2007. In that situation, the court believed that the best interests of the child would be better served allowing a period of preparation, to ensure that the child was not distressed by the return.

- c) The best interests of the child prevail over the aim of punishing the abducting parent for his or her behaviour

Among the 143 cases considered, the concept of the best interests of the child has also been mentioned in the light of assessing the primary scope of the HCCA legal framework, which is to protect the best interests of the child and not to punish the abducting parent.<sup>66</sup> The wellbeing of the child prevails over sanctioning the illicit behaviour of the abducting parent, especially when the sanction could cause harm to the child.

- d) The notion of the best interests of the child is based on the right of the child to maintain a stable relationship with both parents.

In many of the 143 cases, the best interests of the child were based on the necessity to maintain a stable relationship with both parents. A Belgian decision stated, for instance, that

Any decision concerning a child must take into consideration the best interests of the child and, in particular, be concerned with guaranteeing their fundamental right to build a fulfilling relationship with each of their parents, regardless of the vagaries of the love life of the parents.<sup>67</sup>

For this reason, the court affirmed the necessity to 'entrust the custody of the child to the parent who will be able to respect the right of A [the child] of maintaining contact with both parents'.<sup>68</sup> In that case, the court did not decide on the merits of the rights of custody, but

<sup>62</sup> BE018 [11 February 2010] Cour d'appel Bruxelles.

<sup>63</sup> ECHR004 ECtHR Lafargue v. Romania [13 July 2006] Application no. 37284/02; ECHR005 ECtHR Iosub Caras v. Romania [27 July 2006] Application no. 7198/04; ECHR014 ECtHR MacReady v. Czech Republic [22 April 2010] Application nos. 4824/06 and 15512/08.

<sup>64</sup> ECHR008 ECtHR P.P. v. Poland [8 January 2008] Application no. 8677/03.

<sup>65</sup> FR044 [7 July 2009] Cour d'appel Chambéry.

<sup>66</sup> BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A.

<sup>67</sup> BE035 [20 February 2015] Cour d'appel Bruxelles 2014/JR/73 and 2014/FA/113.

<sup>68</sup> BE035 [20 February 2015] Cour d'appel Bruxelles 2014/JR/73 and 2014/FA/113.

expressed this principle in the hope that the courts of the State of origin would consider this aspect. The same view has been expressed in other decisions, where it has been found that the parents did not seem to understand that it was essential to find a solution which would permit both of them to maintain contact with the child.<sup>69</sup>

However, the above considerations did not prevent the courts from ordering return in cases where the abducting parents expressed their refusal to go back with the child to the country of origin. In two Dutch decisions, the court stated the following:

The purpose of this interests is to preserve the child's links with his or her family and to ensure that the child's development takes place in a safe environment. In the case in question, the first aspect does not play a role since the mother, questioned by the court, stated at the hearing that, if the court decided on the return of the minors, in all probability she would not go back with the minors to [country]. The court sees this as the mother's own (voluntary) choice. Now that the father will take care of the minors when they return to [country], this aspect of the best interests of the child has been given sufficient weight.<sup>70</sup>

In several decisions, the right of the child to maintain a stable relationship with both their parents has persuaded the courts to order the return, holding that it was in the best interests of the child to restore the relationship with the left-behind parent.<sup>71</sup>

- e) A separation between parent and child, as well as from other family members, is not in the best interests of the child.

In some other cases, the court attached great weight to the relationship between the child and one of their parents, either the left-behind parent or the abductor. In particular, the court justified the need to take into account the best interests of the child in light of the need to ensure that the child is not separated from one of the parents.

In five decisions the court refused to order the return of the child, because this would have caused a separation between the child and the abducting parent (the mother).<sup>72</sup> However, it should be noted that in three cases the child was of young age (respectively: three years, one year and a-half, and one year old).<sup>73</sup> In the third case the child was seven years old, and in the fourth case the children were five and four years old. In this latter case, the mother was the primary caregiver.<sup>74</sup>

In other cases, the court considered the relationship between the child and the left-behind parent. In two cases, the court appreciated that the abduction had resulted in a severe

<sup>69</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180; NE041 [17 February 2011] Rechtbank 's-Gravenhage 383332 - FA RK 10-10269; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01.

<sup>70</sup> NE066 [27 June 2012] Gerechtshof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechtshof 's-Gravenhage 200.110.609-01.

<sup>71</sup> BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A; BE028 [15 May 2012] Cour d'appel Bruxelles; BG001 [23 February 2009] РЕШЕНИЕ ОТ 23.02.2009 Г. ПО ГР. Д. № 508/2008 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; FR051 [22 July 2010] Cour d'appel de Fort de France; FR067 [31 May 2012] Cour d'appel Paris 12/05844; FR079 [17 June 2013] Cour d'appel Limoges 13/00223; FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>72</sup> BE030 [4 March 2013] Cour de Cassation C.11.0675.F; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; HUN10 [21 June 2013] Central District Court of Pest Pk.500205/2017; FR108 [30 July 2015] Cour d'appel Rouen 15/01974.

<sup>73</sup> BE030 [4 March 2013] Cour de Cassation C.11.0675.F; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932.

<sup>74</sup> NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; FR108 [30 July 2015] Cour d'appel Rouen 15/01974.

break of the relationship between the child and the left-behind father, which was contrary to their best interests, and therefore ordered the return.<sup>75</sup>

In three decisions, the relationship between the child and other family members was also considered in the overall assessment of the best interests of the child. Courts have considered, in particular, the bond with siblings.<sup>76</sup>

f) The situation in the State of habitual residence and in the State of refuge.

The situations in the State of former habitual residence and in the State of refuge have constituted the basis of the best interests' assessment in a relevant number of decisions among the 143 cases under examination.

In several decisions from Belgium, France and the Netherlands, the court considered that the situation in the State of origin would not have been beneficial for the child, who could risk being placed in an intolerable situation.<sup>77</sup> In these cases, the court refused to order the return of the child on the basis of their best interests. In some decisions, however, the best interest's assessment and the decision of non-return have been mainly based on the premise that the child was settled in the new environment.<sup>78</sup>

From another perspective, the best interests of the child have also led courts, in several cases, to order the return of the child on the basis of considerations related to the situation in the State of origin. In one Belgian decision, the court assessed that the environment in the latter country was good for the wellbeing and development of the child.<sup>79</sup> The court based this conclusion on a report of the Social Services that stated the following:

The child attended a school that offers special education for children with learning disabilities. The child feels good and safe at this school and she is loved by her classmates and teacher. The social worker of the school is an advisor for her, who also gives her advice on 'private' problems, including the difficulties with contact.<sup>80</sup>

However, it should be pointed out that, in the large majority of decisions, the evaluation of the environment in the State of origin did not result in an assessment on the merits of parental responsibility: the courts considered these elements only in order to assess the ground for refusal of return under Article 13(1)(b) HCCA.<sup>81</sup>

g) The best interests of the child should be taken in primary consideration in examining the circumstances characterizing the grave risk of harm or the intolerable situation (Article 13(1)(b)).

In several decisions from French courts, the explicit references to the best interests of the child were based on Article 13(1)(b) HCCA. In fact, the courts stressed the necessity to assess

<sup>75</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR108 [30 July 2015] Cour d'appel Rouen 15/01974; NE167 [3 October 2017] Gerechtshof Den Haag 200222.224/01.

<sup>76</sup> FR077 [2 April 2013] Cour d'appel Paris 13/03926; LV018 [11 January 2017] C32344616; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932.

<sup>77</sup> BE011 [19 December 2008] Voorzitter Rechtbank van eerste aanleg Antwerpen 08/3793/B; FR018 [10 January 2007] Cour d'appel de Nîmes 06/00443; FR034 [4 November 2008] Cour d'appel Versailles 07/02093; FR071 [6 December 2012] Cour d'appel Versailles 12/06508; FR128 [25 October 2017] Cour de Cassation 17-20.063; NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>78</sup> FR017 [12 December 2006] Cour de Cassation 06-13177; FR031 [8 August 2008] Cour d'appel de Paris 08/05791 and 08/07826; FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726; NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>79</sup> BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A.

<sup>80</sup> BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A.

<sup>81</sup> NE066 [27 June 2012] Gerechtshof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechtshof 's-Gravenhage 200.110.609-01; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01.

the risk of serious danger in the primary consideration of the best interests of the child.<sup>82</sup> A similar position is to be found in two decisions from Bulgaria and Romania.<sup>83</sup>

- h) The best interests of the child imply taking into account their opinion.

Two French court decisions based the explicit reference on the best interests of the child on Article 13(2) HCCA, stating that 'it would seem appropriate to take account of the child's opinion in accordance with the provisions of Article 13 of the Convention; the best interests of the child require to make an exception to the principle of return to the habitual residence'.<sup>84</sup>

- i) The best interests of the child consist of a child being considered as an individual with their own rights.

It is worth mentioning the approach adopted by a Greek court, which explicitly referred to the best interests of the child stating that 'the return of the child would violate her interests consisting in this case in being considered as an individual with her own needs and rights and not being removed in the name of the parents' rights of custody'.<sup>85</sup>

- j) The best interests of the child are pursued through the resolution of the conflict between the parents and with their cooperation.

An explicit reference to the best interests of the child is also present within the assessment, by national courts, on the correct approach to be adopted in order to address the conflictual situation. More specifically, according to some decisions among the 143 cases considered, the best interests of the child are pursued by the resolution of the conflict between the parents. In this sense, the best interests consist in the decision being made with the agreement of both parents, instead of the imposition of an external and compulsory judicial decision.

According to an Italian decision,

It is the duty of the court to make an accurate investigation of the concrete possibility to pursue the best interests of the child (i.e., the right to live with both their parents) also, and mainly, through a self-regulation of family life instead of an external judicial imposition. This investigation has to be done in practice and not in abstracto, firstly by the juvenile court itself which, after having illustrated the scope, must tell the parties that they could consider the path of family mediation.<sup>86</sup>

In other words, mediation was considered the path that corresponded best with the interests of the child.

In the same vein, another decision given by an Italian Juvenile Court stated the following:

<sup>82</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526; FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR074 [20 December 2012] Cour d'appel Agen 12/01694; FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540; FR082 [5 July 2013] Cour d'appel Paris 13/11740; FR083 [10 July 2013] Cour de Cassation 13-14562; FR085 [25 September 2013] Cour de Cassation 12-25.864; FR093 [3 July 2014] Cour d'appel Paris 14/09386; FR096 [19 November 2014] Cour de Cassation 14-17493; FR099 [29 January 2015] Cour d'appel 14/04135; FR104 [28 May 2015] Cour d'appel Caen 15/01495; FR111 [10 February 2016] Cour de Cassation 15-19.565; FR118 [7 December 2016] Cour de Cassation; FR125 [18 May 2017] Cour d'appel Dijon 16/02039; FR129 [16 November 2017] Cour de Cassation 17-20.635

<sup>83</sup> BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПОГР.Д. № 8614/2011 Г.НАСОФИЙСКИГРАДСКИСЪД; RO041 [22 June 2006] Bucharest Tribunal 10835/2006.

<sup>84</sup> FR112 [1 March 2016] Cour d'appel Paris 15/11722; see also FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>85</sup> GR002 [2016] Court of First Instance of Thessaloniki 242/2016.

<sup>86</sup> IT007 [23 May 2017] Tribunale minorenni Bologna 23.5.2017.

It is evident that a decision on the merits of the international abduction will imply the order to immediately return the children to the U.S. (if this would correspond to their best interests, as repeatedly underlined by the Corte di Cassazione) or, on the contrary, a decision of non-return which will not solve the conflict between the parents, a conflict that will negatively affect the children. The decision would define the dispute but would not solve the conflict. Such conclusions, even if compliant with the law, will risk violating one of the immanent principles of our legal systems, the beacon that guides the juvenile judge in making his or her decisions, which is the principle of the best interests of the child - provided that the parents declared their availability in attempting mediation. [...].<sup>87</sup>

A similar approach has been found in some decisions from Dutch courts, which recommended the parents to cooperate in order to find a solution in agreement with the best interests of the child:

The court points out to the parents that they both have the key in their hands to bring the threatening situation for the children to a successful conclusion. Both parents may therefore be required to cooperate in the provision of care in the best interests of the children in order to put an end to the serious threatening situation in which the children currently find themselves.<sup>88</sup>

Similarly, in other decisions the court encouraged the parents to try to resolve the issues between them through mediation or other system therapy, or to work on improving their mutual understanding.<sup>89</sup>

k) The best interests of the child based on legal literature.

In several decisions among the 143 cases considered, mainly from Maltese courts, the best interests of the child have been based on legal literature. In particular, reference has been made to:

- P. Beaumont, P. Mceleavy, *The Hague Convention on International Child Abduction* (one decision, the court did not specify the edition).<sup>90</sup>
- N. Lowe, G. Douglas, *Bromley's Family Law*, (four decisions, the court did not specify the edition). In these cases, the courts quoted the passage of the doctrinal work which analyses the compatibility of the HCCA with Article 3 UNCRC:

The fact that an individual child's interests are not the paramount consideration when determining a return application prompts the question as to the 1980 Convention's compatibility with the requirement under Article 3 of the UN Convention on the Rights of the Child 1989 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 consideration".

A reference to the legal doctrine has also been found in a Belgian decision,<sup>91</sup> which

<sup>87</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015.

<sup>88</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01; similarly, NE142 [10 August 2016] Gerechtshof Den Haag 200.194.171/01.

<sup>89</sup> NE124 [3 June 2015] Gerechtshof Den Haag 200.169.291/01; NE145 [12 October 2016] Gerechtshof Den Haag 200.199.457/01.

<sup>90</sup> MA003 [27 July 2007] 53/2007/1; MA009 *Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Michael Caruana* [3 August 2012] Qorti ta' L-Appell 15/2012/1.

<sup>91</sup> BE018 [11 February 2010] Cour d'appel Bruxelles.

referred to M. Fallon, O. Lhoest, La Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants. Entré en vigueur d'un instrument éprouvé, in Revue Trimestrielle de Droit Familial, 1999, p. 7 ss.:

According to M. Fallon and O. Lhoest (supra, p. 40), the jurisdictional priority of the State of the habitual residence of the child "is primarily justified by the proximity that must exist between the judge and the child, and to allow the first to identify the best interests of the second". These authors include the possibility of hearing the child on a regular basis, the possibility of talking with psychologists who have followed the child under the control of the court, the knowledge of the living environment of the child, the possibility to have contact with relatives, teachers, to be aware of any facts likely to enlighten the judge on the upholding of the best interests of the child.

### 1.3. Implicit Reference

This section focuses on the implicit references to the notion of the best interests of the child found in the analysed countries' case law. As stated, implicit references exist when a case does not directly refer to the wording 'best interests', but more generally refers to the child's 'wellbeing', 'development', 'growth', 'balance', 'equilibrium' or similar.

Implicit references provide useful information concerning the notion of best interests without directly mentioning it. It is important to underline that researchers identified such references on the basis of the analyses provided by national experts. Consequently, as researchers were themselves not able to verify all such references in the original language, there is risk that the numbers might be distorted by different interpretations.

Out of 1000 cases, 134 (13%) made an implicit reference to the best interests of the child.

Country	Implicit references
Bulgaria	20 cases
Croatia	17 cases
Netherlands	12 cases
France	9 cases
Italy	9 cases
Romania	9 cases
Greece	8 cases
Finland	7 cases
Spain	7 cases
ECtHR	7 cases
Germany	6 cases
Hungary	6 cases
Czech Republic	5 cases
Latvia	5 cases
Poland	3 cases
Belgium	2 cases
Malta	2 cases
Sweden	0 cases
ECJ	0 cases

Table (3) – Implicit references to the best interests of the child



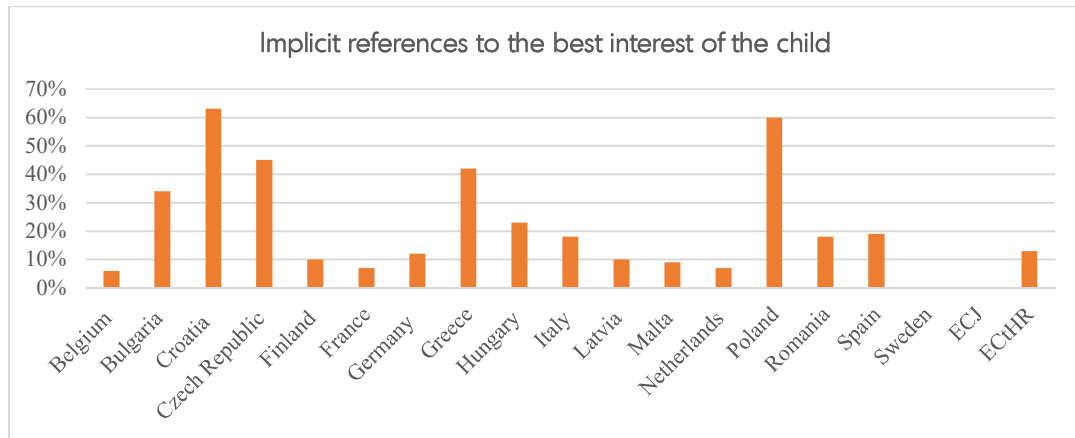


Figure (1) – Implicit references to the best interests of the child

Thanks to the overall analysis, some important elements concerning the notion of the best interests of the child and its definition emerged.

In general terms, three main issues or factors heavily influence the child's interests (or healthy development or wellbeing):

- a) Change of residence: i.e. change or interruption of the child's education, or affective/familial/social integration in one State (either of origin or of refuge).
- b) Living conditions: i.e. the conditions and the environment in which the child lives both in the country of refuge and of origin.
- c) Relationship with the parents.

### Change of Residence

According to case law, it is not in the interests of a child to repeatedly interrupt/change their education or development by excessively moving from one country to another. When a certain degree of educational/familial/social/affective integration exists in the State of refuge, it is not appropriate to interrupt the development of the child a second time<sup>92</sup> (see for instance: 'repeated change of the family environment and dynamics at a time when a child expresses satisfaction with the current situation, could represent a risk for a child's development in the sense of mistrust towards the people who are caring for him and insecurity regarding personal identity',<sup>93</sup> or 'it is not appropriate to again interrupt the children's education, which has now started here',<sup>94</sup> or 'the child has found in France with her mother the material and moral conditions necessary for her development',<sup>95</sup> 'return would place the child (who lived in France for more than two years with her biological parents who abducted her from her foster parents and her sister) in an intolerable and dangerous situation for her balance',<sup>96</sup> and 'to avoid any risk of disruption of the equilibrium of this little girl and to prevent her from being placed, on her return, in an intolerable situation the consequences of which would be difficult to restore, given her age').<sup>97</sup>

<sup>92</sup> See for instance FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; GR018 [2016] Court of Appeal of Thessaloniki 101/2006 (strong settlement of the child in the country of refuge and clear objection to a return option).

<sup>93</sup> See for instance CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>94</sup> BE015 [16 September 2009] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/903/B.

<sup>95</sup> FR071 [6 December 2012] Cour d'appel Versailles 12/06508.

<sup>96</sup> FR026 [17 October 2007] Cour de Cassation 07-11.449.

<sup>97</sup> FR097 [12 January 2015] Cour d'appel Colmar 14/02378.

Still with regard to the excessive relocation of children, some cases highlight that where the abducting parent could at any time legally have taken the child back to the country of abduction after having been repatriated to the country of origin, such a back and forth movement of the child cannot be justified; the child would be treated as a mere object of controversy, regardless of their needs. Non-return is therefore preferable.<sup>98</sup>

### Living Conditions

It is in the best interests of the child to refuse a return to the country of origin when that would subject them to domestic violence, and no sufficient protection is put in place to avoid similar threats. One interesting Croatian case deals with the issue of existing evidence concerning feared violence. In the first instance proceeding, the court ordered the non-return of the child even though the expert of the Child Welfare Home expressed doubts concerning the authenticity of the alleged violence committed by the left-behind parent.<sup>99</sup> However, the court of second instance sent the case back to the first instance court, which eventually ordered the return, relying on the opinion of the Child Welfare Home expert and on the statement by the child to his guardian *ad litem* that he was joking when he had told her that his left-behind parent had beaten him.<sup>100</sup>

In a Dutch case, non-return was considered preferable for the child's interests since in the country of origin he/she could have witnessed frequent and serious mistreatment of his/her mother by the applicant.<sup>101</sup>

According to some of the case law, the child's interests are not served in case of return when the applicant is proved to be alcohol or drug addicted, or psychologically unstable.<sup>102</sup>

In one case, it emerges that return is not in the best interests when the child is terrified by the left-behind parent and shows aversion towards him/her.<sup>103</sup>

With regard to living conditions, it is in the best interests of the child to avoid a return to conditions that are not compatible with his or her acceptable socio-economic and psychological standards. Living conditions in the country of origin must therefore provide a satisfactory psychological and educational environment in order to allow a return.<sup>104</sup> In an Italian case, for instance, the fact that return would have exposed the child to an intolerable situation (irregular attendance at school, neglectful care by the left-behind parent, personal care, homework, food) led the court to the conclusion that the environment in the country of origin was inadequate for the stable and well-balanced growth of the child.<sup>105</sup>

The following results indicate the differences in living conditions existing between the country of origin and the country of refuge: in a Bulgarian case, the court concluded that in the State of refuge a particularly good financial and social situation was offered ('very good care of the defendant in the State of abduction, the good living conditions, the adaptation of the child in the new environment and the excellent conditions under which he/she is raised and educated') which only bears significance in the hypothesis of a non-return decision when the situation in the State of

<sup>98</sup> GE031 [18 March 2016] OLG Stuttgart 17 UF 44/15; GE039 [27 February 2003] OLG Stuttgart 17 UF 277/02.

<sup>99</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>100</sup> CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16.

<sup>101</sup> NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>102</sup> GR004 [2015] Court of First Instance of Athens 15/03/2015.

<sup>103</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01.

<sup>104</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173.

<sup>105</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010.

origin is capable of negatively and badly affecting the child's wellbeing.<sup>106</sup> Similarly but not equally, a French court, while reasoning on the opportunity to return the child, concluded that no evidence exists that the child would be exposed to 'significantly less favourable' living conditions in the country of origin; return can then be ordered.<sup>107</sup>

### Relationship with the Parents

A strong bond with both parents is crucial for the child. Return is permissible and preferable in the light of the child's interests if the left-behind parent has a good relationship with the child. When the abducting parent is in a position to move back with the child, it is in the latter's interests to move back to the country of habitual residence, where he/she has the possibility of enjoying a sound and stable relationship with both parents, so as to 'structure and develop his/her personality in contact with both of them'.<sup>108</sup>

When a child enjoys a particularly strong bond with one single parent (and the bond with the other parent is particularly weak), it is in the best interests of the child to avoid the separation from his/her primary caregiver(s).<sup>109</sup> Interestingly, all cases in which this consideration was found, it was the mother who was the abducting parent and primary caregiver. See for instance the following quotations:

- An essential condition for the quality and the optimisation of the child's welfare was considered the inherent presence of his mother, who is the only person from whom the child can receive an upbringing;<sup>110</sup>
- A separation [from the mother] would make the child suffer psychological harm related to the feeling of abandonment that he would experience, because of his young age and lack of current emotional ties with the father; the taking away of the child out of his French home where he enjoys the intimacy of a mother and a brother he has never left before, would expose him to psychological harm;<sup>111</sup>
- An abrupt return of the child to the father, of which she has necessarily only a distant memory, in a country and with conditions of life totally different from those which she has had for four years, would be all the more traumatic if this return were accompanied by a separation from the mother. It is evident that the child would suffer from being separated from his mother with whom he has a close connection. For the child, safety means the closeness of his caring parent, regardless of the child's residence.<sup>112</sup>

When it comes to very young children or new-borns, the relationship with the mother is usually considered of predominant importance in the child's sound and stable development.<sup>113</sup> One Croatian case explicitly sustains this opinion, for instance, by affirming that it is generally

<sup>106</sup> BG029 [22 October 2014] РЕШЕНИЕ № 1925 ОТ 22.10.2014 Г. ПОГР.Д. № 2776/2014 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ.

<sup>107</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>108</sup> FR042 [6 May 2009] Cour d'appel Poitiers 09/00305; see also FR120 [20 December 2016] Cour d'appel Colmar 16/04362.

<sup>109</sup> See also NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE091 [19 December 2013] Rechtbank Den Haag C/09/453796; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>110</sup> CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006.

<sup>111</sup> FR022 [24 May 2007] Cour d'appel de Douai 06/03280.

<sup>112</sup> HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016.

<sup>113</sup> See for instance BG040 [30 November 2015] РЕШЕНИЕ № 2357 ОТ 30.11.2015 Г. ПОГР. Д. № 3787/2015 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22; CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

acknowledged 'that the mother represents the basis of the child's safety and comfort in his or her first years of life'.<sup>114</sup> There is however no clear tendency concerning the child's age in this regard: from the case-law, it appears that the bond with the mother has been considered crucial for the interests of children spanning from the age of 0 up to 7 years.

German case law particularly stresses the fact that the disadvantages associated with a separation of the child from the abductor in case of return can be avoided when the abducting parent returns with the child.<sup>115</sup>

### Extra Information

In a few cases, the court attached importance to the preparation of the child's return in order to avoid the inevitable and associated mental stress. The parents should prepare the child to live in another country and explain to them why the return is necessary.<sup>116</sup>

## 1.4. Interpretation of Grounds for Non-Return in Relation to the Best Interests

The analysis of the case law is aimed at showing the interrelationship existing between the 1980 Hague Convention on Child Abduction and the principle of the best interests of the child. In particular, the analysis revealed whether and how the courts have linked the understanding of the best interests of the child to specific grounds for non-return provided by the HCCA.

It is essential to understand the interrelationship between the HCCA and the principle of the best interests of the child in order to understand how courts decide upon the best interests of the child in judicial proceedings following an international child abduction. In a high number of cases, the concept has been interpreted as connected to the grounds for non-return in the HCCA and varies according to a strict or broad interpretation of such grounds.

In general, the courts have linked the best interests of the child to one or more than one ground of non-return. A first overarching interpretation is drawn from a Belgian decision<sup>117</sup> that focuses on the need to integrate the notion of best interests as determined in Article 3(1) of the Convention on the Rights of the Child in any decision concerning Articles 12, 13(1)(a), 13(1)(b), 13(2) and 20 of the Hague Convention on Child Abduction.

The principle of the best interests of the child has been used as the main parameter for the interpretation of the HCCA legal framework. This is in line with the Explanatory Report on the HCCA,<sup>118</sup> according to which the objectives of the convention are inspired by the overall idea of the best interests of the child and the exceptions to the immediate return rule are also an expression of this principle.

### Article 12 Hague Convention on Child Abduction

The concept of best interests of the child was based on Article 12 HCCA in 56 cases, delivered by Bulgarian, Croatian, Dutch, French, Finnish, German, Italian, Latvian, Maltese, Polish, Romanian and Spanish courts.

<sup>114</sup> CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13.

<sup>115</sup> See for instance GE012 [4 March 2008] OLG Düsseldorf II-UF 18/08.

<sup>116</sup> See GE017 [12 October 2007] OLG Stuttgart 17 UF 214/07; HUN20 [14 September 2015] Central District Court of Pest 2Pk.500.188/2015.11.

<sup>117</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>118</sup> Elisa Pérez Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (Hague Conference on Private International Law, 1982) paras 25, 113.

The following table shows the number and percentage of decisions which made reference to the best interests of the child and, among them, the number and percentage of decisions which linked the best interests to Article 12 HCCA.

Table (4) – Link to Article 12 HCCA 1

In this context, different scenarios can be outlined, depending on whether the courts:

<b>Country</b>	<b>Link to Article 12 HCCA</b>
Belgium	1 cases out of 19 (5%)
Bulgaria	6 cases out of 49 (12%)
Croatia	4 cases out of 21 (19%)
Czech Republic	0 cases out of 9 (0%)
Finland	7 cases out of 19 (37%)
France	4 cases out of 67 (6%)
Germany	5 cases out of 38 (13%)
Greece	0 cases out of 10 (0%)
Hungary	0 cases out of 14 (0%)
Italy	2 cases out of 24 (8%)
Latvia	6 cases out of 14 (43%)
Malta	5 cases out of 19 (26%)
Netherlands	3 cases out of 91 (3%)
Poland	0 cases out of 5 (0%)
Romania	6 cases out of 13 (46%)
Spain	2 cases out of 17 (12%)
Sweden	0 cases out of 4 (0%)
ECJ	0 cases out of 8 (0%)
ECtHR	5 cases out of 54 (9%)

- a) applied the ground of non-return as the request for return was submitted a year after the wrongful removal and retention, and the child is now settled in the new environment (Article 12(2));
- b) refused to order the return on the basis of the settlement of the child in the new environment, invoking the principle of the best interests, even if the proceedings had commenced within a year from the wrongful removal or retention;
- c) refused to order the return because the removal or retention was not wrongful under Article 12 HCCA.

Regarding point a), in their reasoning the courts have interpreted and applied the ground of non-return provided by Article 12(2) HCCA in the light of the principle of the best interests of the child.

According to Article 12 HCCA, if the proceedings were commenced after one year from the removal/retention, the court can refuse to order the return of the child if it appears that the latter is now settled in the new environment.

Article 12(2) HCCA, similarly to the other grounds of non-return, confers on the court a margin of discretion in deciding whether to order the return of the child.

The courts gave weight to a wide range of circumstances when assessing the child's settlement in the new environment including:

- Social contacts of the child<sup>119</sup>
- Adaptation, the emotional attachment to members of the family and friends<sup>120</sup>
- Physical and psychological health<sup>121</sup>
- Therapies and assistance for children with special needs<sup>122</sup>
- Adequate day care for the child<sup>123</sup>
- Living in the same apartment since his/her arrival in the State of refuge<sup>124</sup>
- Integration in school<sup>125</sup>
- Knowledge of local language<sup>126</sup>
- Being in a critical stage of life (i.e. adolescence and education)<sup>127</sup>

In this context, a decision given by a court of second instance in the Netherlands refused the return in the interests of the child, on the basis of an assessment of 'the bond of the child with the State of former habitual residence compared to the bond of the child with the State of refuge'.<sup>128</sup> To assess the bond with the country of refuge, 'both the physical and emotional bond that the minor has now acquired with his or her place of residence should be considered. It is not only about the new family relationship, but also about more external relationships, such as other family, friends, sports and school'.<sup>129</sup> Factors considered by the court in this specific case were the following: the minor was three years old, he lived with his mother and the grandparents, he was going to kindergarten, he was speaking Dutch well, he played with children from the neighbourhood, the child had contact with almost all family members, and the mother was the primary attachment figure. On the other hand, to assess the bond with the country of former habitual residence, it was considered important 'to what extent the minor is (still) rooted in that country'.<sup>130</sup> Here, the court considered the following in relation to the country of habitual residence: there was no safety net of trusted people who could take care of the minor if the mother would be (temporarily) unavailable due to illness, the father did not attempt to visit the child and there was no certainty about whether the father would have been sufficiently present after the child's return.

A more moderate approach was adopted by German courts, which considered that the return may still be the best solution for guaranteeing the best interests of the child even when the child was integrated in the new environment. In particular, difficulties linked to the return of the child after their initial integration in the country of refuge (language course, schooling, possible separation from the abducting parent) may not be sufficiently serious so as to impede a return,

<sup>119</sup> BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG055 [21 February 2017] РЕШЕНИЕ № 1132 ОТ 21.02.2017 Г. ПО ГР. Д. № 5038/2016 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>120</sup> BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; F036 [23 December 2009] Helsingin hovioikeus päätös 3455/2009; F068 [3 March 2010] Korkein oikeus päätös 0433/2010; MA014 Directeur tad-Dipartiment għall-Instandards fil-Harsien Socjali vs. Sharon Rose Roche nee Bellamy [24 July 2015] Court of Magistrates (Gozo) 10/2015; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006.

<sup>121</sup> BG055 [21 February 2017] РЕШЕНИЕ № 1132 ОТ 21.02.2017 Г. ПО ГР. Д. № 5038/2016 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>122</sup> F021 [7 April 2006] Korkein oikeus päätös 0774/2006.

<sup>123</sup> F021 [7 April 2006] Korkein oikeus päätös 0774/2006; F025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; F068 [3 March 2010] Korkein oikeus päätös 0433/2010; RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006.

<sup>124</sup> F021 [7 April 2006] Korkein oikeus päätös 0774/2006.

<sup>125</sup> FR017 [12 December 2006] Cour de Cassation 06-13177; FR127 [13 July 2017] Cour de Cassation, 17-11.927; MA014 Directeur tad-Dipartiment għall-Instandards fil-Harsien Socjali vs. Sharon Rose Roche nee Bellamy [24 July 2015] Court of Magistrates (Gozo) 10/2015; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>126</sup> FR127 [13 July 2017] Cour de Cassation 17-11.927; LV037 [23 October 2017] CA-3925-17/24; LV041 [14 August 2015] C-2354-15/11; LV048 [28 August 2015] C32303415; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>127</sup> MA001 Directeur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004; LV037 [23 October 2017] CA-3925-17/24; LV041 [14 August 2015] C-2354-15/11; LV048 [28 August 2015] C32303415.

<sup>128</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>129</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>130</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

when the child may enjoy the relationship with the other parent, the grandparents, former school and former social relationships in the country of origin.<sup>131</sup> On the contrary, when the child has already built a strong and stable family, cultural, linguistic, and social networks, it should be assumed that their centre of interests is in the State of refuge and it is therefore in their best interests to stay in that country.<sup>132</sup>

However, and with regard to point b), it must be underlined that some decisions referred to the best interests of the child by interpreting Article 12 HCCA as a whole, without referring exclusively to the ground of non-return provided by paragraph 2 of the disposition. In two Croatian decisions,<sup>133</sup> the court took into account the circumstance showing that the children were adapted and settled in Croatia and refused to order the return. However, in that case the time that had elapsed since the wrongful removal was less than one year and both parents were holders of parental responsibility. Therefore, it can be said that the court linked Article 12 HCCA to the best interests of the child in terms of an extensive explanation of the integration in the new environment.

In one Finnish case,<sup>134</sup> the court acknowledged that the petition for return was made in time (a month after the abduction) and that the delay was caused by Central Authorities involved. Nevertheless, the court considered that for the child to return would be against her interests because she had strong family ties in her new environment, spoke the language, attended school and had hobbies. Also social authorities recommended that she continues living in Finland. She also had expressed her desire to the social authorities that she wanted to stay in Finland.

A similar reasoning has been adopted by Dutch courts,<sup>135</sup> according to which it is possible to order the return of the child even when the one-year period of Article 12 of the Convention has been exceeded and the child has now been integrated into the new environment. In fact, 'the best interests of the child remain the guiding principle when taking a decision on the return and it will be possible to order the return of the child if the best interests of the child so require'.<sup>136</sup>

In another Finnish decision,<sup>137</sup> the court considered it important to contemplate what kind of consequences the return would have caused for the further development of children and what kind of circumstances the children would have faced after return. The court decided that when weighing the child's circumstances and their interests, the child's relationship with their parents and other next of kin must be particularly noted.

In an Italian decision, the order of return was based – among others – on the finding that the child was well integrated in the State from which he/she was abducted.<sup>138</sup> In a Maltese decision, the abduction of the child by the mother was considered not in the best interests of the child. Therefore, return had to be ordered based on Article 12 HCCA.<sup>139</sup> In a Romanian decision,<sup>140</sup> the court considered that the settlement of the child in the State of refuge, although proven, could not result in non-return to the state of origin, as such line of reasoning may legalize an unlawful situation,

<sup>131</sup> GE013 [31 May 2007] OLG Zweibruecken 6 UF 76/07; GE023 [22 June 2011] OLG Stuttgart 17 UF 150/11.

<sup>132</sup> GE016 [23 April 2012] OLG Stuttgart 17 UF 35/12; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12; GE036 [7 August 2008] OLG Hamm 11 UF 135/08.

<sup>133</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>134</sup> FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006.

<sup>135</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

<sup>136</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

<sup>137</sup> FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016.

<sup>138</sup> IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011.

<sup>139</sup> MA011 The Director of Social Welfare Standards Department vs. A B [18 September 2004] Civil Court (Family Section) 583/2013.

<sup>140</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

namely wrongful retention of the child in Romania, in breach of custody rights attributed to the father.

### Article 13(1)(a) Hague Convention on Child Abduction

This section focuses on the link between the notion of the best interests of the child and the application of Article 13(1)(a) HCCA which refers to situations in which the left-behind parent did not actually exercise their rights of custody at the time of removal or retention, as well as to the hypothesis of consent or acquiescence to the removal or retention of the child. The interpretation of the notion of best interests in the application of Article 13(1)(a) was found in 43 decisions.

Table (5) – Link to Article 13(1)(a) HCC 1

The results concerning the notion's interpretation can be divided according to whether they are linked to the issues of consent/acquiescence or exercise of custody rights and duties.

#### a) Consent and acquiescence

No illegal abduction takes place when the left-behind parent has given their consent to the child's removal from or retention in another country. A French court has stated, for instance: 'When the child has been settled for more than one year in a new environment, and his other parent has expressly or tacitly acquiesced to this non-return, his or her interests is not necessarily to return to the country of origin.'<sup>141</sup>

It may therefore be assumed that where the left-behind parent has agreed to the removal

Country	Link to Article 13(1)(a) HCCA
Belgium	1 case out of 19 (5%)
Bulgaria	17 cases out of 49 (35%)
Croatia	1 case out of 21 (5%)
Czech Republic	1 case out of 9 (11%)
Finland	0 cases out of 19 (0%)
France	1 case out of 67 (1%)
Germany	4 cases out of 38 (11%)
Greece	1 case out of 10 (10%)
Hungary	0 cases out of 14 (0%)
Italy	2 cases out of 24 (8%)
Latvia	4 cases out of 14 (29%)
Malta	4 cases out of 19 (21%)
Netherlands	0 cases out of 91 (0%)
Poland	0 cases out of 5 (0%)
Romania	3 cases out of 13 (23%)
Spain	1 case out of 17 (6%)
Sweden	0 cases out of 4 (0%)
ECJ	0 cases out of 8 (0%)
ECtHR	3 cases out of 54 (6%)

or retention of the child in the first place, it is not necessarily in the latter's interests to move back to the country of previous habitual residence.

<sup>141</sup> FR055 [17 January 2011] Cour d'appel de Lyon 09/05813.



It appears from the case law that difficulties concerning the application of Article 13(1)(a) are linked with the assessment of the left-behind parent's consent when this is not explicit. Several cases deal, for instance, with disputes concerning implicit or dubious consents at the time of removal that courts have to analyse thoroughly. The left-behind parent's consent can, for instance, be inferred from their behaviour, when they have actively participated in the child's change of residence or when they have not raised any objection to the moving of goods that are necessary for the child's prolonged stay abroad (for example the furniture of the latter's bedroom).<sup>142</sup>

b) Exercise of custody

Return of the child is considered admissible in light of their interests when it is proved that the left-behind parent had exercised their parental rights and duties by staying in constant and regular contact with the child.<sup>143</sup>

c) Lack of exercise of custody

On the other hand, when it is proved that the left-behind parent is not able or willing to sufficiently exercise their parental rights and duties, non-return decisions may be permissible or even preferable in order to protect the child's interests. For instance, if it is clear that the left-behind parent exercised their parental duties poorly (i.e.: lack of maintenance or of contact with the child, violent behaviour, lack of financial resources,<sup>144</sup> etc.), a return decision would potentially put the child in an intolerable situation,<sup>145</sup> especially in case of separation from the primary caregiver.

### Article 13(1)(b) Hague Convention on Child Abduction

This section focuses on the link between the notion of the best interests of the child and the application of Article 13(1)(b). The aim is to understand how courts have interpreted the notion of the best interests of the child when directly linking it to Article 13(1)(b) HCCA, which refers to the grave risk or intolerable situation the child could face in the country of origin in case of a return decision.

Cases in which Article 13(1)(b) is raised have by far the highest number of references related to the notion of the best interests of the child (280 references in national case law, 13 references in the case law of the ECtHR).

<sup>142</sup> GE007 [12 November 2009] OLG Zweibrücken 6 UF 118/09.

<sup>143</sup> GE005 [28 December 2007] AG Düsseldorf 266 F 381/07.

<sup>144</sup> RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006.

<sup>145</sup> GE011 [5 May 2008] AG Nürnberg 110 F 1027/08.

<b>Country</b>	<b>Link to Article 13(1)(b) HCCA</b>
Belgium	6 cases out of 19 (32%)
Bulgaria	41 cases out of 49 (84%)
Croatia	19 cases out of 21 (90%)
Czech Republic	4 cases out of 9 (44%)
Finland	6 cases out of 19 (32%)
France	42 cases out of 67 (63%)
Germany	28 cases out of 38 (74%)
Greece	10 cases out of 10 (100%)
Hungary	6 cases out of 14 (43%)
Italy	15 cases out of 24 (63%)
Latvia	3 cases out of 14 (21%)
Malta	14 cases out of 19 (74%)
Netherlands	63 cases out of 91 (69%)
Poland	2 cases out of 5 (40%)
Romania	5 cases out of 13 (38%)
Spain	12 cases out of 17 (71%)
Sweden	4 cases out of 4 (100%)
ECJ	0 cases out of 8 (0%)
ECtHR	13 cases out of 54 (24%)

Table (6) – Link to Article 13(1)(b) HCCA

In general and theoretical terms, the courts start from the fact that the basic principle of the Hague Convention on Child Abduction is that return is in the best interests of the child and that return will only be refused in exceptional circumstances.<sup>146</sup> One of these exceptional circumstances is the

<sup>146</sup> See for instance in Dutch case law: NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

grave risk exception of Article 13(1)(b), that must be interpreted restrictively<sup>147</sup> and applies only in extreme situations.<sup>148</sup>

Courts explain their understanding of the best interests of the child by examining the particular factors that can lead to the applicability of the grave risk exception.

With regard to Article 13(1)(b), particular importance has to be attached to Article 11(4) of the Brussels IIbis Regulation, which states that a court cannot refuse to return a child on the basis of Article 13(1)(b) of the HCCA if it is established that **adequate arrangements** have been made to secure the protection of the child after his or her return.

For purposes of clarity, the conclusions reached are divided into two broad categories:

- (a) The situation does not amount to a grave risk and return is ordered;
- (b) The situation does constitute a grave risk and return is not in the child's interests.

For each category the factors that are crucial to reach the outcome will be analysed in detail.

- (a) No grave risk and return is ordered

### Decent/Satisfactory Living Conditions in the Country of Origin

The living conditions in the country of origin constitute the first element of consideration for deciding whether return under the HCCA should be ordered or not. In general terms, return is considered in the child's interests when they can enjoy decent living conditions in the country of origin (see below for detailed information).

First of all, case-law illustrates a crucial consideration concerning the interpretation of Article 13(1)(b).

- The court in the requested State may not decide that the strict conditions laid down in this Article have already been met solely on the ground that it considers that the best

<sup>147</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE022 [7 Januari 2010] Rechtbank Utrecht FA RK 09-9511 - 352593; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE043 [3 March 2011] Rechtbank 's-Gravenhage 382368 FA RK 10-9903; NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>148</sup> NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

interests of the child are less well served in the country of origin than in the country of the court seized.<sup>149</sup>

In this sense, the fact that certain things such as socio-economic conditions,<sup>150</sup> standard of living,<sup>151</sup> the political situation,<sup>152</sup> special care provisions,<sup>153</sup> and the education system<sup>154</sup> are possibly less favourable in the State of former habitual residence does not lead to a grave risk for the child.

In application of Article 11(4) of the Brussels IIbis Regulation, in four Finnish decisions the courts state that the child should be returned if sufficient safeguards exist to protect him or her after the return, even in the presence of evidence that could show the existence of a certain risk of harm.<sup>155</sup>

Where it is proved that the left-behind parent is neither an alcoholic nor a drug addict (as alleged by the abducting parent), that the psychological state of the child is satisfactory, and that the left-behind parent offered the child favourable living conditions in the country of origin, with the assistance of a professional nurse, return can be ordered.<sup>156</sup>

In one case, return was ordered because the abducting parent admitted before the competent public authorities (the Brussels Police Service, for instance) that the children were not in danger at the left-behind parent's house.<sup>157</sup>

In a French case concerning an abduction from the U.S., the court ascertained that in the United States of America in general, and in the State of California in particular, there is judicial protection of youth comparable to that of which children are likely to benefit from in France, and that furthermore it had not been demonstrated how the potential living conditions of children in

<sup>149</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE022 [7 January 2010] Rechtbank Utrecht FA RK 09-9511 - 352593; NE029 [28 April 2010] Gerechtshof 's-Gravenhage 200.062.009-01; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE043 [3 March 2011] Rechtbank 's-Gravenhage 382368 FA RK 10-9903; NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>150</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008.

<sup>151</sup> NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008.

<sup>152</sup> NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446.

<sup>153</sup> NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>154</sup> NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469.

<sup>155</sup> FI028 [13 March 2007] Helsingin hovioikeus päätös 866/2007; FI034 [29 September 2009] Helsingin hovioikeus päätös 2509/2009; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI072 [15 December 2014] Korkein oikeus päätös 2621/2014.

<sup>156</sup> FR001 [14 June 2005] Cour de Cassation Y 04-16.942.

<sup>157</sup> FR002 [13 July 2005] Cour de Cassation 05-10519 and 05-10521.

California would be significantly less favourable than those enjoyed at their paternal grandparents' in France.<sup>158</sup>

In another French case, the court found that the father had never used any violence against his children and none of the evidence made it possible to say that they would at any time experience any physical or psychological harm in his presence. Further, the abrupt break of the relationship with their father was contrary to their interests. Therefore, the court concluded that even if the children have adapted perfectly in France, the evidence did not show that their living conditions in Italy are contrary to their wellbeing and interests, and even if the return to their country of origin will require them to readapt, there is not a serious risk that the return will expose the children to psychological harm or place them in an intolerable situation.<sup>159</sup>

Further cases highlight that return is to be ordered when the child moves back to a well-known environment where they have spent several years, when the child does not have language difficulties or difficulties in understanding, and when the child's housing, school and living conditions are secured in the country of origin.<sup>160</sup>

Where the competent authorities of the State of former habitual residence can sufficiently offer protection,<sup>161</sup> medical care and assistance,<sup>162</sup> and general care<sup>163</sup> to the child, return is ordered.

#### **Constant (and Good) Relationship with Both Parents and, in Particular, with the Left-Behind One**

A second crucial element is the kind of relationship the child enjoys with the left-behind parent. When a sound relationship exists, it is in the best interests of the child to return to the country of origin, where they can continue enjoying a stable and continued relationship with the left-behind parent (see below for detailed information).

Courts usually hold that the indispensable relationship of the child with two separated parents is commonly realized by the right of visitation granted to the parent with whom the child does not usually reside, so that the child can construct and develop their personality in contact with each of them.<sup>164</sup> In similar cases, return is deemed better for the child's interests.

Some case law expressly points to the fact that the left-behind parent can sufficiently offer what the child needs. See, for detailed information, the following quotations:

- The father has a strong bond with his family and can therefore count on their availability, if necessary;<sup>165</sup>
- [The father] was prepared to be extra vigilant and, if necessary, to offer protection on this point [mother made statements about sexual games];<sup>166</sup>
- The father would keep his promise to seek help for both minors;<sup>167</sup>

<sup>158</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>159</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779.

<sup>160</sup> HUN22 [22 November 2016] Curia Pfv.II.21.836/2016/6.

<sup>161</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.

<sup>162</sup> NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774/ FA RK 17-1453.

<sup>163</sup> NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734.

<sup>164</sup> FR042 [6 May 2009] Cour d'appel Poitiers 09/00305; FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664.

<sup>165</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853.

<sup>166</sup> NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104.

<sup>167</sup> NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446.

- The mother now has sufficient insight into the specific (medical) problems of the minor and the extra care he needs in this regard;<sup>168</sup>
- The father would keep his promise and for this reason the minor would also receive the necessary help in the United States of America.<sup>169</sup>

A French court concluded, for instance, that since the father had regularly exercised his parental rights and in the light of the fact that the child was totally cut off from him, the return was in the best interests of the child.<sup>170</sup>

The willingness of the left-behind parent to make a contact arrangement with the other parent is considered an important element.<sup>171</sup> Also the willingness of the left-behind parent to pay for or provide accommodation and other (financial) support for the abducting parent and child are factors that lead the courts to decide that the child must return.<sup>172</sup>

One case interestingly highlights that the child would necessarily be placed in an intolerable situation if parties were unable to get closer and agree on the framework that would allow the child to grow up for the best by assuring them on-going relations with both parents. In the specific case, the child had already suffered from radical separation from his mother despite his very young age and would suffer again if deprived of his father.<sup>173</sup>

Where no evidence of a grave risk in case of return exists, the best interests of the child and their right to maintain personal relations with both parents require their return to the State of their former habitual residence.<sup>174</sup>

### **Settlement of the Child in the State of Refuge**

The abducting parent contended, in several cases, that a return decision would severely harm the child's interests because social integration had already started in the country of refuge. Courts however maintain that the mere risk of stopping an initial settlement and integration in the country of refuge does not represent a sufficient harm to the interests of the child capable of impeding return.<sup>175</sup> In this sense, courts tend to apply the ratio of Article 12 HCCA: when children reside less than one year and are not clearly well-settled in the country of origin, their return remains preferable.

### **Lack of Evidence as to the Existence of Grave Risk**

Return is considered permissible when no clear evidence is provided to the courts with regard to grave allegations against the left-behind parent (violence against the child, sex-abuse, drug or alcohol addiction, complete lack of care and maintenance, humiliation and mistreatment of the child, abuse, poor hygiene and neglect, risk of honour killing, physical and psychological abuse of

<sup>168</sup> NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01.

<sup>169</sup> NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122.

<sup>170</sup> FR048 [17 June 2010] Cour d'appel Dijon 10/00967.

<sup>171</sup> NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303/ FA RK 17-4555.

<sup>172</sup> NE142 [10 August 2016] Gerechtshof Den Haag 200.194.171/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364/ FA RK 16-5719; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942.

<sup>173</sup> FR120 [20 December 2016] Cour d'appel Colmar 16/04362.

<sup>174</sup> FR126 [12 July 2017] Cour de Cassation 17-11.840.

<sup>175</sup> GE005 [22 June 2011] AG Düsseldorf 266 F 381/07; GE023 [22 June 2011] OLG Stuttgart 17 UF 150/11; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

the child, abandonment or neglect, domestic violence witnessed by the children). See below for more detailed information.<sup>176</sup>

A Czech case reports that reasons for non-return cannot be limited to 'unambiguous medical diagnosis', and other circumstances should be taken into account.<sup>177</sup> In another case the Supreme Court annulled the first instance decision of return, because there was insufficient evidence that the return would expose the child to a grave risk of harm, for instance a 'psychodiagnostic ratio of influence of return not surrounded by mother'.<sup>178</sup>

### **The Role of Existing Criminal Records or Charges Against the Left-Behind Parent**

Few cases deal with the issue of criminal charges. In one case a father's criminal record dating back more than twenty years, and allegations that he abused his children from a first marriage were not found sufficient to constitute a danger for the abducted child in case of return.<sup>179</sup> The mere existence of criminal charges and investigations against a person does not prove or necessarily entail a potential breach of the best interests in accordance with Article 13 (1)(b).<sup>180</sup>

#### **(b) Grave risk exists and return is ordered**

Several factors appear decisive in proceedings that result in non-return decisions, for instance, violence or abuse against the child in the country of origin, separation from the primary caregiver in case of return, and intolerable living conditions in the country of origin. It is, however, important to underline that these factors rarely stand on their own in the majority of the analysed case-law. Courts tend to take different elements into account which are therefore often intertwined.

### **Violence/Abuse**

The first crucial element in non-return decisions is the risk of violence or abuse against the child in the country of former habitual residence. Violence or abuse can have many forms, i.e. sexual, physical, or psychological violence, and can be performed either by the left-behind parent or by other figures who are close to the child in the country of origin. When the risk of violence or abuse in the country of origin is clearly proved during the proceedings and no form of protection can be put in place in case of return, Article 13(1)(b) applies and non-return orders are issued (see below for detailed information).

Grave risk arises in case of proved danger of sexual abuse in the country of origin<sup>181</sup>; where the applicant is proven to be violent, alcohol or drug addicted, mentally ill, or not able or willing to take care of the child or to provide maintenance.<sup>182</sup>

<sup>176</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01; NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01; NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

<sup>177</sup> CZ001 [9 May 2017] Constitutional Court 378/17.

<sup>178</sup> CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006.

<sup>179</sup> FR039 [25 February 2009] Cour de Cassation 08-18126.

<sup>180</sup> LV039 [3 October 2014] C31407414.

<sup>181</sup> BG23 [29 November 2013] РЕШЕНИЕ № 8019 ОТ 29.11.2013 Г. ПОГР.Д. № 6111/2013 Г.НАСОФИЙСКИГРАДСКИСЪД; FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025.

<sup>182</sup> BG32 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПОГР.Д. № 14888/2013 Г.НАСОФИЙСКИГРАДСКИСЪД; BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР.Д. № 1665/2015 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ; BG061 [19 April 2017]

## Particular Cases

In one case, it was not the left-behind parent who was violent towards the child, rather an elder brother present at the left-behind parent's house. This, together with the fact that the house had only two rooms, brought the court to the conclusion that the left-behind parent's home could not provide a satisfactory psychological and educational environment for the abducted child.<sup>183</sup>

In another case, the child was not the direct victim of domestic violence, but he was a witness of it. The child had a very strong bond with his mother. The father was unable to exercise his responsibilities for the child's upbringing under conditions guaranteeing health and safety.<sup>184</sup>

In a different case, physical abuse was not considered as a factor sufficient enough to impede the return because it was a one-off event.<sup>185</sup>

In one Belgian case, the court stated that it was not appropriate to return the child because it was shown that the mother threatened to circumcise the child, something to be considered as a physical or psychological danger for the child. According to the court, circumcising the child would go directly against the interests of the child as foreseen in Article 3 UNCRC. Furthermore, the court found that the mother was unable to offer the child adequate stability and security.<sup>186</sup>

In one Romanian case, return was refused because the child had developed psychogenic mutism.<sup>187</sup>

## Living Conditions in the State of Origin

A second crucial element in non-return decisions is the conditions the child would face upon return to the country of origin in. Courts apply the exception of Article 13 (1)(b) where it is proved that the child would experience intolerable living conditions (emotionally, psychologically, hygienically, socio-economically). See below for detailed information.

Serious risk exists in case of a return when the parent or child's caregiver does not have a job, house, and family in the country of origin. In such a case, it is preferable for the child not to return to the country of origin, where they would suffer intolerably from a socio-economic point of view.<sup>188</sup> Italian case law, for instance, clarifies that the lack of adequate living conditions for children *de facto* prevents a stable and well-balanced growth, and constitutes an intolerable situation according to Article 13(1)(b) of the HCCA.<sup>189</sup> Intolerable situations also exist where the parent, from whom the child was abducted, showed extremely poor willingness to provide for the child (poor hygienic conditions, lack of care).<sup>190</sup>

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РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПОГР. Д. № 14820/2015 Г. НАСОФИЙСКИГРАДСКИСЪД; GR010 [2010] Supreme Court of Greece 916/2010; BE021 [26 April 2010] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/8332/A; FR128 [25 October 2017] Cour de Cassation 17-20.063.

<sup>183</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173.

<sup>184</sup> FR082 [5 July 2013] Cour d'appel Paris 13/11740. For a similar case, see NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>185</sup> HUN31 [17 May 2017] Budapest-Capital Regional Court 50.Pkf.633.413/2017/5.

<sup>186</sup> BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A.

<sup>187</sup> RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>188</sup> SP008 [14 April 2016] Audiencia Provincial de Tenerife (Sección 1ª) ECLI:ES:APTF:2016:1389.

<sup>189</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009.

<sup>190</sup> GE007 [12 November 2009] OLG Zweibruecken 6 UF 118/09.



Non-return is preferable where the living conditions are inadequate and no arrangements to secure the protection of the child after return to the State of origin can be made.<sup>191</sup>

According to one Bulgarian case, a grave risk also exists when return would lead to the child being placed in a community shelter without the mother and grandparents, and without maintenance and attention from the father.<sup>192</sup>

In one French case, factors concerning violence, abuse and living conditions are considered together. This presents interesting elements with regard to the issue of protection measures that can be taken in the country of origin. The left-behind parent was proven to be violent, also towards the child. The authorities of the State of origin (Hungary) provided a certificate in which they referred to legislation to protect children in the country. However, the court says:

The general reference to the existing legislation does not prove that concrete provisions in line with the actual situation of the child have been taken to counter the risk of physical and psychological danger that the return to Hungary would actually impose on this two-year-old child. This general certificate does not contain any precise, concrete provisions that are adequate for the child's protection in case of return.<sup>193</sup>

In another case, the court focuses on the early age of the child (three years old). It then states that the abilities of the father to meet the basic needs of the child are not established; a return would mean a break with the primary caregiver and the loss, in particular, of the school environment. Thus, a return would expose the child to physical and psychological harm, contrary to her interests.<sup>194</sup> In this case the mother could not return with the child because of the domestic violence that the father used against her.

### **Separation from the Primary Caregiver in Case of Return**

A further crucial element in non-return decisions relates to the separation of the child from their primary caregivers (usually the abducting parent, more rarely brothers, sisters<sup>195</sup> or grandparents). Return decisions will entail significant and intolerable psychological and emotional stress for the child when such persons are not able to follow the child to the country of origin. Non-return is therefore preferable (see below).

A serious risk exists when the child cannot return to the country of origin in the company of the abducting parent, if the latter represents the central and pivotal person (primary caregiver) for the development and wellbeing of the child, and if the relationship with the other parent is weak or has deteriorated. A rupture of the bond with the closest parent would not only harm the children's possibility to build future sound relationships, but also (and more importantly) their own self-image, spiritual health and adaptability.<sup>196</sup>

<sup>191</sup> GE004 [22 March 2016] OLG Muenchen Senat fuer Familiensachen 12 UF 1175/15.

<sup>192</sup> BG33 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПОГР. Д. № 2445/2014 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>193</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526.

<sup>194</sup> FR071 [6 December 2012] Cour d'appel Versailles 12/06508.

<sup>195</sup> NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912.

<sup>196</sup> GE001 [22 December 2016] Oberlandesgericht Hamm 11 UF 194/16; GE011 [5 May 2008] AG Nürnberg 110 F 1027/08; GE015 [12 June 2013] KG 16 UF 122/13; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12; GE048 [5 July 2017] OLG Nürnberg 7 UF 660/17; SP028 [23 May 2016] ECLI:ES:APL:2006:256A; SP032 [11 November 2007] Audiencia Provincial de Málaga 463/2007; SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17; BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПОГР. Д. № 8240/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG013 [29 June 2012] РЕШЕНИЕ ОТ 29.06.2012 Г. ПОГР. Д. № 17219/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG014 [8 February 2013] РЕШЕНИЕ № 230 ОТ 08.02.2013 Г. ПОГР. Д. № 4529/2012 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG017 [1 January 2013] РЕШЕНИЕ № 2417 ОТ 01.04.2013 Г. ПОГРАЖДАНСКОДЕЛО № 13970/2012 Г. НАСОФИЙСКИГРАДСКИСЪД; BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР. Д. № 5581/2013

Detail: the impossibility to accompany the child to the country of origin is usually linked to the violent behaviour of one parent against the other. Some cases highlight that a return decision is allowed when the possibility for the abducting and mistreated parent to have a secure and safe accommodation alongside the child exists in the country of origin.<sup>197</sup> On the other hand non-return is preferable for the child when such a possibility is not at hand.<sup>198</sup>

One Croatian case presents an interesting and apparently contradictory situation. In the first instance decision, the separation from the mother (abducting parent) was considered as a crucial factor to reject return.<sup>199</sup> However, the second instance court disagreed and stated that

The child has already suffered from the trauma when separated from the other parent. Therefore, the separation from the mother cannot be used as a reason to apply Article 13(1)(b).<sup>200</sup>

### Merits Already Decided

Where a judgment in the country of habitual residence of the child has already given the abducting parent the exclusive parental responsibility, then a return decision from the country of refuge would only expose the child to a double international crossing of borders, infringing their interests, since the abducting parent would be allowed to move the child back once again.<sup>201</sup>

### Settlement of the Child in the State of Refuge

Serious risk arises in case of return when the child is well-settled in the State of refuge and has their new habitual residence there. A return would expose them to serious psychological and emotional distress.<sup>202</sup>

### Other

In one Dutch case, the child was residing in a Dutch organisation for youth-care and the court decided not to change this situation. Thus, the child did not return mainly because 'both parents show insufficient pedagogical insight into the worrying development of the minor'.<sup>203</sup>

Г.НАСОФИЙСКИГРАДСКИСЪД; BG020 [2 August 2013] РЕШЕНИЕ № 6019 ОТ 02.08.2013 Г. ПОГР. Д. № 4848/2013  
Г.НАСОФИЙСКИГРАДСКИСЪД; BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПОГР. Д. № 13131/2013  
Г.НАСОФИЙСКИГРАДСКИСЪД; BG031 [19 May 2014] РЕШЕНИЕ № 3533 ОТ 19.05.2014 Г. ПОГР. Д. № 17289/2013  
Г.НАСОФИЙСКИГРАДСКИСЪД; BG036 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014  
Г.НАСОФИЙСКИГРАДСКИСЪД; BG040 [30 November 2015] РЕШЕНИЕ № 2357 ОТ 30.11.2015 Г. ПОГР. Д. № 3787/2015 Г.  
НААПЕЛАТИВЕНСЪД – СОФИЯ; BG042 [28 December 2015] РЕШЕНИЕ № 2572 ОТ 28.12.2015 Г. ПОГР. Д. № 4615/2015  
Г.НААПЕЛАТИВЕНСЪД – СОФИЯ; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г.  
НАСОФИЙСКИГРАДСКИСЪД; FR006 [9 March 2006] Cour d'appel de Rouen 05/04340; FR097 [12 January 2015] Cour d'appel  
Colmar 14/02378; FR022 [24 May 2007] Cour d'appel de Douai 06/03280; FR108 [30 July 2015] Cour d'appel Rouen 15/01974;  
FR110 [8 January 2016] Cour d'appel Besancon 15/01502; FR114 [28 April 2016] Cour d'appel Rouen 16/00635; FR006 [9 March  
2006] Cour d'appel de Rouen 05/04340; FR097 [12 January 2015] Cour d'appel Colmar 14/02378; FR022 [24 May 2007] Cour d'appel  
de Douai 06/03280; FR108 [30 July 2015] Cour d'appel Rouen 15/01974; FR110 [8 January 2016] Cour d'appel Besancon 15/01502;  
FR114 [28 April 2016] Cour d'appel Rouen 16/00635; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE091 [19  
December 2013] Rechtbank Den Haag C/09/453796.

<sup>197</sup> GE033 [4 November 2010] AG Hamm 3 F 512/10; GE038 [15 December 2011] OLG Hamm II-11 UF 240/11; GE047 [18 March  
2010] OLG Karlsruhe 2 UF 179/09.

<sup>198</sup> GE022 [16 December 2014] OLG Karlsruhe 2 UF 266/14; GE037 [2 February 2011] OLG Düsseldorf II-1 UF 110/10.

<sup>199</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-  
223/17-22.

<sup>200</sup> CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017.

<sup>201</sup> GE039 [27 February 2003] OLG Stuttgart 17 UF 277/02.

<sup>202</sup> SP009 [27 October 2016] Audiencia Provincial de Valencia (Sección 10<sup>a</sup>) ECLI: ES:APV:2016: 3706; SP024 [21 March 2012]  
Audiencia Provincial de Madrid (Sección 24<sup>a</sup>) ECLI:ES:APM:2012:4853A; FR026 [17 October 2007] Cour de Cassation 07-11.44; FR034  
[4 November 2008] Cour d'appel Versailles 07/02093; FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726.

<sup>203</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

In one Italian case, the court states that return would be contrary to the best interests of the child, because the child, who had arrived in Italy with bed wetting problems and growth deficit, had experienced an exponential improvement in her physical development in four months.<sup>204</sup> Therefore, a forced return would have led to anxiety, anguish and destabilization.

Serious risk arises when the child is ready to commit suicide in case of return (one reported case with a twelve-year-old child).<sup>205</sup>

In one case the return was rejected based on Article 13(1)(b) because 'during the procedure, the applicant could not be located, his residence was not confirmed. The execution of this request does not serve the best interests of the child'.<sup>206</sup>

Two Finnish decisions of 2016 deal with a peculiar and delicate case concerning political persecutions in the country of origin. The father, who had unlawfully taken the child from Belarus, was politically active there. He and the child were granted an asylum visa, and the Finnish Court of Appeal refused the return of the child, holding that:

In this case it is obvious that the father cannot return to Belarus. He claimed that he had been threatened in Belarus and that the child would be harmed in case of return. As the asylum status was granted to both, the court has no reason to doubt the claim. Since the father cannot return to his country, he has no way of preventing that the child will not face a grave risk. Moreover, if the child is returned to Belarus there is a risk that the child will be used as a way to put pressure on the father to return to Belarus. Thus, exceptional reasons exist not to return the child.<sup>207</sup>

The Finnish Supreme Court however reversed the judgment and ordered the return of the child, stating in the end of its reasoning that there was no sufficient reason to suspect that the child would face grave risk in Belarus.<sup>208</sup>

In a French case the court was of the opinion that the particular behaviour of the abducting parent had to stop and therefore the child had to be sent back. The court stated that the repeated violation by the mother of judicial decisions fixing the habitual residence of the child in Italy is not in the interests of the child and that these events are traumatic as demonstrated by the agitated behaviour of the child to the social services.<sup>209</sup>

### **Interaction between the HCCA and the UNCRC**

One Belgian case presents an interesting reasoning with regard to the relationship between the Hague Convention on Child Abduction and the Convention on the Rights of the Child. The court used the best interests to decide on the scope of Article 13(1)(b) and more specifically to define the scope of the phrase 'grave risk'. According to the court:

The question is which treaty [the Hague Convention on Child Abduction or the Convention on the Rights of the Child] should take precedence, or else whether the interests of one parent is more important than the interests of the child.<sup>210</sup>

<sup>204</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>205</sup> BG047 [30 November 2016] РЕШЕНИЕ № 2261 ОТ 30.11.2016 Г. ПОВ. ГРД. № 4904/2016 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ.

<sup>206</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>207</sup> FI064 [29 July 2016] Helsingin hovioikeuden päätös 1142/2016.

<sup>208</sup> FI065 [14 October 2016] Korkein oikeus 2097/2016.

<sup>209</sup> FR027 [22 May 2008] Cour d'appel de Paris 07144064.

<sup>210</sup> BE020 [8 March 2010] Rechtbank van eerste aanleg Gent 09/37791A.

This question is answered by the court in the following way:

Where the interpretation of the Hague Convention on Child Abduction deals with the content of a provision, more specifically what is the scope of 'risk', the Convention on the Rights of the Child is in itself much more formal: the interests of the child must always be taken into account and they can be opposed to the interests of one parent. The statement that 'grave risk' needs to be interpreted strictly so that it only includes war or famine, does not take into account the provisions and purpose of the Convention on the Rights of the Child. Now that the latter convention is more recent, it is logical that this treaty prevails over the Hague Convention on Child Abduction. In addition, this treaty currently provides the greatest legal protection for a child.<sup>211</sup>

However, the Court of Appeal did not follow this reasoning and stated:

The court does not follow the reasoning of the first judge that the Convention on the Rights of the Child would take precedence over the Hague Convention on Child Abduction, simply because it is more recent. [...] The Court of Appeal assumes an interpretation of the grounds for refusal to return within the boundaries outlined by the Hague Convention on Child Abduction, which also has the interests of the child in mind. A great caution in the discretion of the judge is necessary in order to prevent the Hague Convention on Child Abduction from being a dead letter.<sup>212</sup>

### Extra Information

It is apparent from the Croatian case law that the courts pay serious attention to the reports written by the Centre of Social Welfare<sup>213</sup> and the Child's Welfare Home<sup>214</sup> when applying Article 13(1)(b) of the HCCA. The reports of these instances mention several elements, such as: whether the return of the child would pose a risk to their further development,<sup>215</sup> whether the left-behind parent was violent towards the child,<sup>216</sup> the child's adaptation to the new environment,<sup>217</sup> how the child feels in the new environment,<sup>218</sup> the living conditions in Croatia (thus in the state of refuge),<sup>219</sup> the relationship between the child and the abducting parent,<sup>220</sup> and the working conditions of the abducting parent.<sup>221</sup>

<sup>211</sup> BE020 [8 March 2010] Rechtbank van eerste aanleg Gent 09/3779/A.

<sup>212</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

<sup>213</sup> The Centre of Social Welfare is an institution set up by law. It is the most important institution of child protection in Croatia. They serve a court in investigating the circumstances important for determination of the child's protection, parental responsibility issues, protection measures in particular. The Centre of Social Welfare represent a kind of an expert assistance to the court. Its proposal and opinion is not automatically binding for the court, and the court has the right and authority to review and supplement the factual situation regarding the findings or opinions of the Center in case of need or objection. However, in practice, the Center's proposal and opinion on these issues are most often respected, and if the party is not satisfied, it may ask the court to order additional verifications and examining some of the decisive facts, and may also be advised of the circumstances of establishing eligibility for upbringing and custody child by some other court expert or institution. (Information provided by the Croatian country expert).

<sup>214</sup> The Child's Welfare Home is, like the Centre of Social Welfare, a state/county institution but with a function of foster care. They may be asked by a court to give a report. This report is then an evidence in the case as any other. (Information provided by the Croatian country expert).

<sup>215</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>216</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>217</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>218</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>219</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>220</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>221</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

## Article 13(2) Hague Convention on Child Abduction

The best interests of the child were linked to Article 13(2) HCCA in 63 national cases, delivered by Belgian, Bulgarian, Croatian, Dutch, Finnish, French, German, Greek, Italian, Latvian, Maltese, Polish, Romanian and Spanish courts.

Country	Link to Article 13(2) HCCA
Belgium	2 cases out of 19 (11%)
Bulgaria	13 cases out of 49 (27%)
Croatia	2 cases out of 21 (10%)
Czech Republic	0 cases out of 9 (0%)
Finland	5 cases out of 19 (26%)
France	3 cases out of 67 (4%)
Germany	6 cases out of 38 (16%)
Greece	3 cases out of 10 (30%)
Hungary	0 cases out of 14 (0%)
Italy	4 cases out of 24 (17%)
Latvia	4 cases out of 14 (29%)
Malta	8 cases out of 19 (42%)
Netherlands	5 cases out of 91 (5%)
Poland	0 cases out of 5 (0%)
Romania	3 cases out of 13 (23%)
Spain	5 cases out of 17 (29%)
Sweden	0 cases out of 4 (0%)
ECJ	0 cases out of 8 (0%)
ECtHR	4 cases out of 54 (7%)

Table (7) – Link to Article 13(2) HCCA

The connection between the best interests of the child and Article 13(2) HCCA was developed by national courts in heterogeneous ways.

In some cases, national courts stressed the importance of hearing the child in order to determine their best interests. In two Italian cases, the hearing has been qualified as an indispensable tool to assess and pursue the best interests of the child. In the first, the court stated the following:

The hearing of the child is not an end in itself aimed at fulfilling a legal obligation, but is based on a growing consideration of the child's dignity as a person able to express an autonomous will and is an instrument for the judge in order to evaluate whether the opposition to being returned is expression of a mature and aware sense of judgment. If the child with the capacity of discernment objects to being returned, the judge cannot make an alternative evaluation based on other factual circumstances, but he must conduct a prognostic judgement starting from the reasons of the objection. Otherwise, the judgement will not comply with the parameters of Article 13 HCCA, being conducted without any specific evaluation on the reasons of the objection.<sup>222</sup>

<sup>222</sup> IT006 [27 July 2017] Cassazione civile 18649/2017.

In the second decision, the court stated that the child (heard by the judge with the assistance of an expert psychologist) had repeatedly declared that she wanted to stay with her father and that she had demonstrated to have spontaneously developed her choice: therefore, a forced return would have exposed her to a serious risk from a psychological point of view.<sup>223</sup>

In other cases (of Latvian and Romanian courts) the courts considered the hearing of the child, and their objection to return, in order to assess their best interests.<sup>224</sup> However, while the opinion of the child was considered important for this purpose, the courts did not give any additional reasoning and thus, the impact of the child's views on the final determination is not clear.

In some cases, the return of the child was ordered despite his or her objection to return. In this, context, the courts refused to give weight to the child's opinion for different reasons:

- The child was not mature enough for their objection to be considered, or they were of a tender age. In some decisions, the lack of maturity of the child has brought the courts to affirm that they were not capable of knowing what is in their best interests.<sup>225</sup> In other cases, the reference to the best interests was not explicit, but the courts motivated the decision to disregard the opinion of the child with their lack of maturity.<sup>226</sup>
- The child had not expressed an unequivocal and clear objection to return. To the contrary, his declarations were equivocal, vague, and confused.<sup>227</sup> For instance, when the child had merely expressed that they 'liked' to stay in the State of refuge,<sup>228</sup> or when the child had declared that they had 'nothing against' living in the State of origin,<sup>229</sup> the courts concluded that the objection was not strong enough to justify a refusal to order the return. Accordingly, the courts refused to attach weight to the child's opinion when the latter clearly resulted from the influence of the abducting parent, or where the child was put under severe psychological pressure.<sup>230</sup>
- The child objected to return, but their opinion should only be taken into consideration in the context of custody proceedings on the merits.<sup>231</sup> Therefore, the objection does not prevent the return, since the competent court will assess the minor's interests taking into account the result of their hearing.<sup>232</sup> However, it should be noted here that the report of the child's hearing during the proceedings in the State of refuge is not sent to the court in the State of origin, so the child would have to tell the same story again.

<sup>223</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>224</sup> LV019 [7 March 2017] C32344616; LV021 [24 April 2015] C3143741; LV040 [5 November 2014] C31407414; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010; RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010.

<sup>225</sup> FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009; MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Soċjali vs. RR [28 June 2012] Qorti Civili 15/2012; MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1; MA010 Michael Caruana [14 August 2012] Qorti Civili Prim' Awla (Gurisdizzjoni Kostituzzjonali) 63/2012; SP036 [22 December 2010] Audiencia Provincial de Las Islas Baleares (Sección 4ª) 546/2010.

<sup>226</sup> BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; SP010 [8 March 2016] Audiencia Provincial de Barcelona (Sección 18ª) ECLI: ES:APB:2016:2563; SP013 [4 May 2016] ECLI:ES:APPO:2016:760.

<sup>227</sup> GE013 [31 May 2007] OLG Zweibruecken 6 UF 76/07; FI067 [29 August 2006] Korkein oikeus päätös 1903/2006; FR045 [6 August 2009] Cour d'appel Bourges 09/01061; GE029 [27 November 2012] OLG Hamm II-11 UF 250/12.

<sup>228</sup> GE013 [31 May 2007] OLG Zweibruecken 6 UF 76/07.

<sup>229</sup> FI067 [29 August 2006] Korkein oikeus päätös 1903/2006.

<sup>230</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; FR045 [6 August 2009] Cour d'appel Bourges 09/01061; GE029 [27 November 2012] OLG Hamm II-11 UF 250/12.

<sup>231</sup> FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; MA007 The Director of Social Welfare Standards Department vs. A B C [26 May 2011] Civil Court 197/2010; MA018 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Katya Vella Bamber [30 October 2016] 350/15 AL.

<sup>232</sup> NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104.

In other cases, the courts considered the opinion of the child relevant and applied the ground of non-return provided by Article 13(2) HCCA. In this context, the opinion of the child played different roles.

In some decisions, the objection of the child to return was decisive for assessing their best interests. Courts stated that, if the child is mature enough, their opinion should be taken into consideration in order to assess their best interests.<sup>233</sup> The court also stated that it felt 'obliged' to respect the minor's wishes<sup>234</sup> (the child was fourteen years old and she had declared that she was happy to live in Malta with her mother).

In the large majority of the decisions considered, the child's objection to return was linked to the assessment of their best interests, but this element was considered together with other factors. The court made an overall assessment of the entire situation and the opinion of the child was considered a supporting element in favour of a decision of non-return, although not decisive for this purpose. Frequently, the decisions were based on an overall assessment concerning the settlement of the child in the new environment – according to the approach illustrated in the context of Article 12 HCCA – which was supported by the child's objection to return.<sup>235</sup>

The weight given to the child's objection in this context varies greatly, depending in particular on the degree of maturity that the court considered attributable to the child and on the firmness of the opinion expressed by the child.<sup>236</sup>

Lastly, it is worth mentioning that in two cases the court ordered the return of the child giving weight to the opinion of the child, who had expressed the desire to return to the State of origin. In one decision,<sup>237</sup> the child's willingness to return was the main argument the court presented to justify the order of return; in the other decision,<sup>238</sup> the opinion of the child was considered equally with other factors (namely, the absence of a grave risk of harm in the State of origin).

<sup>233</sup> FR121 [24 January 2017] Cour d'appel Paris 16/23798; FR124 [4 May 2017] Cour de Cassation 17-11.031; GE033 [4 November 2010] AG Hamm 3 F 512/10; LVO48 [28 August 2015] C32303415; SP029 [22 June 2006] Audiencia Provincial de León (Sección 1ª) 131/2006; MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1; NE041 [17 February 2011] Rechtsbank 's-Gravenhage 383332 - FA RK 10-10269; NE103 [13 May 2014] Rechtsbank Den Haag C-09-461904 - FA RK 14-1838; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>234</sup> MA001 Directeur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>235</sup> BE008 CG v BS [30 October 2008] Hof van Cassatie C.06.0619.F; BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПОГР. Д. № 2445/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; FR112 [1 March 2016] Cour d'appel Paris 15/11722; GR013 [2009] Court of Appeal of Patras 268/2009.

<sup>236</sup> BE008 CG v BS [30 October 2008] Hof van Cassatie C.06.0619.F; BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПОГР. Д. № 2445/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG035 [29 April 2014] РЕШЕНИЕ № 2996 ОТ 29.04.2014 Г. ПОГР. Д. № 1063/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG038 [12 February 2015] РЕШЕНИЕ № 991 ОТ 12.02.2015 Г. ПО ГР. Д. № 8984/2014 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР. Д. № 1665/2015 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG041 [17 April 2015] РЕШЕНИЕ № 2552 ОТ 17.04.2015 Г. ПО ГР. Д. № 20052/2014 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; FI069 [27 October 2009] Korkein oikeus päätös 2130/2009; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12; SP028 [23 May 2016] ECLI:ES:APL:2006:256A.

<sup>237</sup> BG024 [2 August 2013] РЕШЕНИЕ № 6026 ОТ 02.08.2013 Г. ПО ГР. Д. № 2367/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>238</sup> GE003 [26 February 2010] OLG Nurnberg 7 UF 20/10.

## Article 20 Hague Convention on Child Abduction

Six decisions – from Belgian, Bulgarian, Dutch, Finnish, and German courts – linked the reference to the best interests of the child to Article 20 HCCA.<sup>239</sup> The same reference is also found in two ECtHR judgments.<sup>240</sup>

It is widely known that the ground of non-return in Article 20 HCCA is far from being frequently used by courts in rejecting return applications.<sup>241</sup> Indeed, also in the case law considered, Article 20 HCCA was not given autonomous consideration, but was mentioned in the context of a more general reference to the necessity to interpret the HCCA legal framework in light of the supreme principle of the best interests of the child.

The only decision in which Article 20 HCCA was applied on its own emanates from a court of second instance in the Netherlands.<sup>242</sup> The court sought a balance between the rights of the abducting parent (in this case, the father) and the rights of the child. The decision states the following:

In the present case, the assessment of Article 20 will have to take account of the extent to which a breach of the protection of the father's rights also constitutes a breach of the child's rights. If it is assumed that a violation of the protection of the father's rights also means a violation of the rights of the child, the application of Article 13(1)(b) will be considered (serious risk of an intolerable situation). This point of view is often used in the literature. If, although return would entail a violation of the protection of the father's rights, a refusal of return is in conflict with the rights and interests of the child and therefore constitutes a violation of the rights of the child, it seems plausible in the spirit of the HCCA to assert the best interests of the child as the primary factor in the weighing of these two conflicting interests.<sup>243</sup>

### 1.5. Impact of the Best Interests Assessment on the Final Decision

#### The Best Interests are Decisive

a) The best interests as a principle underlying the Hague Convention on Child Abduction

In nineteen cases, the best interests are considered to be an underlying principle of the Hague Convention on Child Abduction and are in this regard the decisive consideration for the decision of the court. However, this is not interpreted in the same manner in all cases.

In one Italian case, the court stated that 'the best interests of the child are an immanent and fundamental principle permeating the rationale and the discipline of the Hague Convention'

<sup>239</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПО ГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СУД; F1065 [14 October 2016] Korkein oikeus 2097/2016; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416; NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01; GE010 [31 October 2008] OLG Stuttgart 17 UF 234/08.

<sup>240</sup> ECHR041 ECtHR Phostira Efthymiou and Ribeira Fernandes v Portugal [5 February 2015] Application no. 66775/11; ECHR043 ECtHR Ferrari v Romania [25 April 2015] Application no. 1714/10.

<sup>241</sup> According to the statistical analysis conducted by 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, available at <www.hcch.net>, last access 15.11.2018, on the basis of the findings collected from 76 contracting States, in 2015 in only two cases the court refused to return the child according to Article 20 HCCA.

<sup>242</sup> NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01.

<sup>243</sup> NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01.



without making clear what exactly is in the best interests of the child.<sup>244</sup> Similar wording can be found in a Bulgarian case.<sup>245</sup> In two Belgian cases, the courts stated in their introductory remarks that the main goal of the proceedings is to seek the best interests of the child and take a decision based on this.<sup>246</sup> These similar considerations led, however, to different outcomes: in the Italian case and in one Belgian case the court decided not to order the return of the child.<sup>247</sup> In the Bulgarian case and the other Belgian case the court did order the return.<sup>248</sup>

In another case, the court made clear that it is in the best interests of the child not to be wrongfully removed or retained and that this is the general purpose of the HCCA.<sup>249</sup> In another case, a return and the consequent restoration of the *status quo ante* was seen as being in the best interests of the child; the court stated the following: 'The good of the child will be respected if the factual and legal situation before the abduction is restored.'<sup>250</sup>

The courts do not consider the principle of prompt return to be absolute, however. In one case in which this became clear, the court stated that the HCCA aims at assuring the best interests of the child but concludes that a return would go against that objective.<sup>251</sup> Thus, the decision of the court is based on the best interests of the child but does not follow the principle of prompt return. In another case, the court stated the following:

The objectives of the Hague Convention to discourage international child abduction attempts by ensuring their immediate return to their place of habitual residence can only be achieved if a quick decision can be made, otherwise the child's interests may have to be sacrificed by an almost automatic application of the return order.<sup>252</sup>

This shows that the courts are mostly concerned with the best interests of the child and that this is deemed more important than the strict application of the principle of prompt return. Another court stated that the presumption that the best interests of the child coincide with the prompt return of the child may be rebutted by specific circumstances and that 'in this context, the exceptions stated by Articles 12, 13 and 20 of the Convention cannot be interpreted restrictively: the best interests of the child may justify other limits to the application of the Convention'.<sup>253</sup> In these three cases, the best interests are interpreted as going further than a strict interpretation of the exceptions foreseen in the HCCA. However, there is a Spanish case in which the court takes a stricter view on the best interests:

The best interests of the child cannot be applied without relation to one of the exceptions incorporated in the Hague Convention. The best interests of the child have to be identified with one of the exceptions and only in this case the court can use the concept to determinate the non-return of the child.<sup>254</sup>

<sup>244</sup> IT001 [14 December 2017] Cassazione civile 30123/2017.

<sup>245</sup> BG012 [21 November 2012] РЕШЕНИЕ ОТГ. ПОГР. Д. Г. НАСОФИЙСКИГРАДСКИСЪД № 12501/2012.

<sup>246</sup> BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A.

<sup>247</sup> IT001 [14 December 2017] Cassazione civile 30123/2017; BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A.

<sup>248</sup> BG012 [21 November 2012] РЕШЕНИЕ ОТГ. ПОГР. Д. Г. НАСОФИЙСКИГРАДСКИСЪД № 12501/2012; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A.

<sup>249</sup> CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007.

<sup>250</sup> PL003 [20 April 2016] Okręgowy w Ostrołęce I Ca 82/16 Sad.

<sup>251</sup> GE022 [16 December 2014] OLG Karlsruhe 2 UF 266/14.

<sup>252</sup> BE018 [11 February 2010] Cour d'appel Bruxelles.

<sup>253</sup> IT056 [10 August 2007] Cassazione civile 17648 /2007.

<sup>254</sup> SP027 [4 April 2006] ECLI:ES:APB:2006:5294A.

In this latter case, the concept of the best interests of the child is interpreted as strictly connected to the exceptions of the HCCA. Also in one Italian case, the court relied on a strict interpretation of the legal framework provided by the HCCA.<sup>255</sup> The court avoided making an in-depth assessment on the merits of parental responsibility, believing in the necessity to limit its evaluation to the existence of the prerequisites stated by the HCCA, and to the absence of any ground for non-return stated by Articles 12 and 13. Further, the court stated that 'the HCCA is based on the presumption that the best interests of the child is to return immediately to his or her State of habitual residence, unless one or more of the exceptions provided by Articles 12, 13 or 20 apply'.<sup>256</sup>

Some courts found it to be in the best interests of the child that the courts of the State of former habitual residence decide on the custody dispute and the living arrangements since they are best positioned to get proof of what is in the best interests of the child.<sup>257</sup> The decision to return the child by these courts was thus based on their interpretation of the best interests of the child.

In two Bulgarian cases the courts stated that they 'shall consider the best interests of the child as a leading principle in the application of the HCCA by examining the whole family situation, including the material, emotional and psychological background as well as the age of the child'.<sup>258</sup> These considerations led to the decision to reject the return of the child in both cases.

Lastly, in one Romanian case, the decision to return the children was based on the general idea that it cannot be considered to be in the best interests of the child to legalize a situation based on injustice: wrongful retention of the child by the father, in breach of custody rights of the mother.<sup>259</sup>

#### b) Specific situations considered in light of the best interests of the child

#### General

In a number of cases, courts found the return to be contrary to the best interests of the child for several reasons:

- The mother threatened with circumcising the child and considered moving from one state to another while leaving the child behind;<sup>260</sup>
- The child had been granted asylum in Finland and if the child were to return, he could be used as a way to pressure the father to return to Belarus;<sup>261</sup>
- The father is unable to exercise his parental responsibilities in conditions that would guarantee the health and safety of the child;<sup>262</sup>
- A return might disrupt the equilibrium of the child and this would be difficult to restore given her age (five years old);<sup>263</sup>

<sup>255</sup> IT018 [3 October 2013] Tribunale Minorenni di Cagliari.

<sup>256</sup> IT018 [3 October 2013] Tribunale Minorenni di Cagliari.

<sup>257</sup> FI049 [20 December 2013] Helsingin hovioikeus päätös 3350/2013; FI072 [15 December 2014] Korkein oikeus päätös 2621/2014; MA006 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Anita Maria Hory nee Montebello [3 December 2010] Qorti ta' L-Appell 251/2010/1; MA010 Michael Caruana [14 August 2012] Qorti Civili Prim' Awla (Gurisdizzjoni Kostituzzjonali) 63/2012; MA018 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Katya Vella Bamber [30 October 2016] 350/15 AL.

<sup>258</sup> BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG059 [13 March 2017] РЕШЕНИЕ № 1665 ОТ 13.03.2017 Г. ПО ГР. Д. № 5889/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>259</sup> RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007.

<sup>260</sup> BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A.

<sup>261</sup> FI064 [29 July 2016] Helsingin hovioikeuden päätös 1142/2016.

<sup>262</sup> FR082 [5 July 2013] Cour d'appel Paris 13/11740.

<sup>263</sup> FR097 [12 January 2015] Cour d'appel Colmar 14/02378. Similar wording can be found in RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

- A cautious decision in the interests of the child is necessary given the remarks made by the left-behind father on radical Islam;<sup>264</sup>
- The left-behind mother has severe psychiatric and financial problems;<sup>265</sup>
- The customs, habits and unstable employment of the father would be dangerous for the healthy development of the child;<sup>266</sup>
- The child had experienced an exponential improvement in her physical development and a forced return would have caused anxiety, anguish and destabilization;<sup>267</sup>
- Both parents are unqualified to take care of the child;<sup>268</sup>
- The situation in Morocco would be threatening, and the mother did not succeed, within the means available to her, to avert the threatening situation;<sup>269</sup>
- The child would be harmed in his development;<sup>270</sup>
- A stable living environment is essential and this cannot be offered upon return;<sup>271</sup>
- Returning the child to the father would not be safe due to the mistreatment of the mother by the father;<sup>272</sup>
- The situation in the State of origin is really bad for the child since the parents do not have work, a house and family to help them there;<sup>273</sup> and
- The left-behind father did not want to have contact with the children upon return and he did not help the mother financially with the expenses of the children.<sup>274</sup>

In one case, the court decided to order the return of the child and based this decision on the court's idea of what would be in the best interests of the child, namely more and clear rules, structure and boundaries.<sup>275</sup> Also in another case, the court decided to return the child based on the best interests. The court considered the following:

The mere fact of abducting a two-year-old child from his environment, taking him away from his mother who has been bringing him up so far and bringing him to a country where they speak a different language is sufficient proof of inadequate behaviour towards the child.<sup>276</sup>

Thus, the court decided to order the return of the child to restore the situation in the interests of the child.

### Grave Risk Exception

Four courts mentioned in general that the grave risk exception has to be assessed in the best interests of the child. Thus, the best interests were the overarching consideration in those cases.<sup>277</sup> Further, there are seventeen cases in which the courts decided that returning the child would

<sup>264</sup> FR114 [28 April 2016] Cour d'appel Rouen 16/00635.

<sup>265</sup> GR013 [2009] Court of Appeal of Patras 268/2009.

<sup>266</sup> IT012 [8 February 2016] Cassazione civile 2417/2016.

<sup>267</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro.

<sup>268</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

<sup>269</sup> NE096 [11 February 2014] Rechtbank Den Haag C/09/457267 FA RK 13-10264.

<sup>270</sup> NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838.

<sup>271</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>272</sup> NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>273</sup> SP008 [14 April 2016] Audiencia Provincial de Tenerife (Sección 1ª) ECLI:ES:APTF:2016:1389.

<sup>274</sup> SP024 [21 March 2012] Audiencia Provincial de Madrid (Sección 24ª) ECLI:ES:APM:2012:4853A.

<sup>275</sup> NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241.

<sup>276</sup> PL005 [26 November 2015] Sad Okregowy w Gliwicach III Ca 1088/15.

<sup>277</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR039 [25 February 2009] Cour de Cassation 08-18126; IT011 [25 May 2016] Cassazione civile 10817/2016; IT014 [29 July 2015] Cassazione civile 16043/2015.

expose the child to a grave risk which is contrary to their best interests.<sup>278</sup> In nine cases, Article 13(1)(b) was applied with regard to the best interests of the child but the courts did not find any reason to refuse the return.<sup>279</sup>

In one case, return was ordered but postponed for six months in the best interests of the child:

An immediate return without preparation after such a period [two years] is not in the interest of the child. The return of the child is ordered to take place in six months from the notification date of the present judgment, such a period allowing the mother to organize herself and to ensure that the child is not disturbed by the situation she created.<sup>280</sup>

## Separation

In eighteen cases, the courts found that separation of the child from the abducting parent and/or sibling(s) is contrary to the best interests of the child or would put the child in an intolerable situation (which is implicitly contrary to the child's best interests) and decided therefore not to return the child.<sup>281</sup>

## Violence

In five cases, the courts decided that it would not be in the best interests of the child to order the return in light of the left-behind parent's violent behaviour towards the child.<sup>282</sup>

<sup>278</sup> BG013 [29 June 2012] РЕШЕНИЕ ОТ 29.06.2012 Г. ПОГР. Д. № 17219/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG014 [8 February 2013] РЕШЕНИЕ № 230 ОТ 08.02.2013 Г. ПОГР. Д. № 4529/2012 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG017 [1 January 2013] РЕШЕНИЕ № 2417 ОТ 01.04.2013 Г. ПОГРАЖДАНСКО ДЕЛО № 13970/2012 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG023 [29 November 2013] РЕШЕНИЕ № 8019 ОТ 29.11.2013 Г. ПО ГР. Д. № 6111/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG031 [19 May 2014] РЕШЕНИЕ № 3533 ОТ 19.05.2014 Г. ПОГР. Д. № 17289/2013 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG032 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПО ГР. Д. № 14888/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017; CR005 [24 March 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-198/16-13; CR014 [30 April 2015] Općinski građanski sud u Zagrebu 168 R1 Ob-62/15-22; CZ001 [9 May 2017] Constitutional Court 378/17; FR071 [6 December 2012] Cour d'appel Versailles 12/06508; GE011 [5 May 2008] AG Nuernberg 110 F 1027/08; GE039 [27 February 2003] OLG Stuttgart 17 UF 277/02; IT011 [25 May 2016] Cassazione civile 10817/2016; IT032 [5 October 2011] Cassazione civile 20365/2011; LV028 [21 July 2014] 39068314/C-0683-14/2; SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17.

<sup>279</sup> CR017 [3 November 2017] Županijski sud u Puli Gž Ob-275/2017-2; CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16; GE007 [12 November 2009] OLG Zweibruecken 6 UF 118/09; GE029 [27 November 2012] OLG Hamm II-11 UF 250/12; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007; SE074 [2 February 2016] Stockholms tingsrätt Å 15498-15; SE106 [16 October 2015] Svea hovrätt ÖA 7714-15; SE109 [15 June 2017] Svea hovrätt ÖA 3883-17.

<sup>280</sup> FR044 [7 July 2009] Cour d'appel Chambéry.

<sup>281</sup> BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР. Д. № 5581/2013 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG057 [8 June 2017] РЕШЕНИЕ № 1297 ОТ 08.06.2017 Г. ПО ГР. Д. № 2309/2017 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006; FR022 [24 May 2007] Cour d'appel de Douai 06/03280; FR023 [18 June 2007] Cour d'appel de Nancy 05/00474; FR108 [30 July 2015] Cour d'appel Rouen 15/01974; FR110 [8 January 2016] Cour d'appel Besancon 15/01502; GE001 [22 December 2016] Oberlandesgericht Hamm 11 UF 194/16; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12; NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE082 [24 July 2013] Gerechtshof Den Haag 200.128.978.01; NE091 [19 December 2013] Rechtbank Den Haag C/09/453796; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; PL004 [24 April 2017] Sad Okregowy z Suwalkach I Wydział Cywilny I Ca 119/17.

<sup>282</sup> BE011 [19 December 2008] Voorzitter Rechtbank van eerste aanleg Antwerpen 08/3793/B; BE021 [26 April 2010] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/8332/A; BG041 [17 April 2015] РЕШЕНИЕ № 2552 ОТ 17.04.2015 Г. ПОГР. Д. № 20052/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

## Objection of the Child

In eleven cases, the courts deemed it in the best interests of the child to decide not to return the child based on the objection of the child.<sup>283</sup>

In two cases, the child did not expressly object to the return but the court decided not to order the return based on the child's views anyway. In these two cases, the children said that they were happy in the State of refuge, Finland and Malta respectively.<sup>284</sup>

## Hearing of the Child

In two cases, the courts directly connected the best interests of the child to the hearing of the child. In one of these cases, the court decided to send back the case to the court below due to a violation of the duty to hear the child in the proceedings. The hearing of the child was considered of utmost importance since 'the hearing constitutes a right of the child, through which his or her best interests are fulfilled' and 'it gives expression to the role of the child as a party to the proceedings'.<sup>285</sup> In the other case, the court was of the opinion that the best interests of the child have to be taken into account through the hearing of the child by a psychologist. This was done but no psychological trauma could be established. Therefore, return was ordered.<sup>286</sup>

## Settlement

In 24 cases, the courts found that it would be contrary to the best interests of the child to order return in view of the settlement of the child in their new environment. In six cases the courts expressly based this consideration on Article 12(2)<sup>287</sup> and in ten cases, the settlement of the child was considered in relation to Article 13(1)(b).<sup>288</sup> In eight cases, it was not clear whether the argument of settlement of the child was linked to an exception of the Hague Convention on Child Abduction.<sup>289</sup>

<sup>283</sup> BE008 CG v BS [30 October 2008] Hof van Cassatie C.06.0619F; BG024 [2 August 2013] РЕШЕНИЕ № 6026 ОТ 02.08.2013 Г. ПО ГР. Д. № 2367/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG035 [29 April 2014] РЕШЕНИЕ № 2996 ОТ 29.04.2014 Г. ПОГР. Д. № 1063/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG038 [12 February 2015] РЕШЕНИЕ № 991 ОТ 12.02.2015 Г. ПОГР. Д. № 8984/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; FR112 [1 March 2016] Cour d'appel Paris 15/11722; FR121 [24 January 2017] Cour d'appel Paris 16/23798; MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1; NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01; RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010; SP029 [22 June 2006] Audiencia Provincial de León (Sección 1ª)131/2006.

<sup>284</sup> FI069 [27 October 2009] Korkein oikeus päätös 2130/2009; MA001 Directeur tad-Dipartiment ghall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>285</sup> IT006 [27 July 2017] Cassazione civile 18649/2017.

<sup>286</sup> LV039 [3 October 2014] C31407414.

<sup>287</sup> BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД - СОФИЯ; FI036 [23 December 2009] Helsingin hovioikeus päätös 3455/2009; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI068 [3 March 2010] Korkein oikeus päätös 0433/2010; FR017 [12 December 2006] Cour de Cassation 06-13177; FR055 [17 January 2011] Cour d'appel de Lyon 09/05813.

<sup>288</sup> BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД - СОФИЯ; CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016; FR026 [17 October 2007] Cour de Cassation 07-11.449; FR034 [4 November 2008] Cour d'appel Versailles 07/02093; FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726; GR016 [31 March 2009] Court of First Instance of Agrinio 340/2009; GR018 Court of Appeal of Thessaloniki 101/2006; GR019 [2005] Court of Appeal of Paras 206/2005.

<sup>289</sup> BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР. Д. № 5581/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; FI021 [7 April 2006] Korkein oikeus päätös 0774/2006; FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; GE024 [27 March 2012] OLG Hamm II-11 UF 17/12; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478.

## Relationship with Both Parents

In four cases, the courts found it in the best interests of the child to maintain a relationship with both parents and decided to order the return based thereon.<sup>290</sup> In one case, this is explained as follows: 'It is urgent and in the interests of the child to entrust the custody of the child to the parent who will be able to respect the right of the child to maintain contact with both parents.'<sup>291</sup> Based on this consideration the court decided to return the child to the father.

In one other case, the court stated that 'restricting access to the minor from his father is deemed to go against the best interests of the child'.<sup>292</sup> Here, the relationship with the mother was not discussed.

### c) The best interests as decisive check before ordering return

In four French cases, the courts said the following or used similar wording: 'Considering that in the absence of any circumstance which would detract from the best interests of the child and that would prevent return, it is advisable to order the return of the child.'<sup>293</sup> This shows that if there is something that is not in the best interests of the child, this will change the court's decision. Thus, the best interests of the child are referred to as an overall and decisive check before deciding on the return.

### d) The best interests as ground for annulment

The French Court of Cassation stated in one case that 'the court of appeal ruled in the best interests of the child, thus legally justifying the decision on that basis'.<sup>294</sup> The fact that the court of appeal ruled in the best interests of the child, renders the decision legally justified. The Belgian Court of Cassation used the same phrase.<sup>295</sup> In a Croatian case, the court of appeal decided that, considering the child's wellbeing and the best interests of the child, the first instance court had properly applied Article 13.<sup>296</sup>

In three cases, the courts of higher instance found that the courts of lower instance insufficiently took into account the best interests of the child. In a Croatian case, the second instance court sent back the case with the following instructions to the lower instance court:

Reconsider the conditions of Article 13, consider the child's separation from the mother, the child's adaptation to the new environment and the existence of domestic violence, and determine whether the removal of the child was illegal or in the child's interests.<sup>297</sup>

In one German case, the Constitutional Court sent the case back to the court of appeal to better ensure the assessment of the best interests of the child and added the following consideration: 'A special care-taker of the child during the proceedings will allow for a clearer assessment of the child's needs, which were not adequately and independently considered in the first and second

<sup>290</sup> BE035 [20 February 2015] Cour d'appel Bruxelles 2014/JR/73 and 2014/FA/113; FR067 [31 May 2012] Cour d'appel Paris 12/05844; FR120 [20 December 2016] Cour d'appel Colmar 16/04362; PLO02 [15 April 2016] Sad Okregowy Bialystok II Wydział Cywilny Odwolawczy II Ca 217 / 16.

<sup>291</sup> BE035 [20 February 2015] Cour d'appel Bruxelles 2014/JR/73 and 2014/FA/113.

<sup>292</sup> MA011 The Director of Social Welfare Standards Department vs. A B [18 September 2004] Civil Court (Family Section) 583/2013.

<sup>293</sup> FR069 [13 October 2012] Cour d'appel Paris 12/16322; FR093 [3 July 2014] Cour d'appel Paris 14/09386; FR099 [29 January 2015] Cour d'appel 14/04135; FR104 [28 May 2015] Cour d'appel Caen 15/01495.

<sup>294</sup> FR124 [4 May 2017] Cour de Cassation 17-11.031.

<sup>295</sup> BE030 [4 March 2013] Cour de Cassation C.11.0675.F.

<sup>296</sup> CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2.

<sup>297</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2.

instance.<sup>298</sup> The Italian Court of Cassation annulled the first instance decision because the latter did not adequately consider the risk for the child's development in case of return.<sup>299</sup>

e) Other

In six cases, the court merely stated that 'return has to be refused based on the best interests of the child'.<sup>300</sup> And in fourteen cases, the court merely concluded that return is in the best interests of the child.<sup>301</sup>

In a French case, the court referred to the case law of the ECtHR and said that 'according to this case law the best interests of the child have to be the determining factor'.<sup>302</sup> The court decided in the end to refuse the return of the child in his best interests.

In one case, the court considered that 'the best interests of the child are pursued mainly through a self-regulation of family life'.<sup>303</sup> For this reason, the court acknowledged that the parents had reached an agreement and decided not to proceed.

In one case, the court stated that 'mediation would have been the best solution in the specific case, in line with the best interests of the children, even if this would lead to a disapplication of the applicable law'.<sup>304</sup>

In one case, the court analysed whether the child was settled in his new environment and decided that it was indeed in light of Article 12(2) Hague Convention on Child Abduction.<sup>305</sup> However, the court did not stop its analysis here but instead referred to Article 18 of the HCCA, which states: 'The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time'. On the basis of this Article, the court examined whether it would be in the best interests of the child to be sent back, regardless of his settlement in the new environment. In the end, the court decided that the best interests of the child are served by his return 'in view of the fact that it cannot be guaranteed that the father, given his likely imprisonment, can continue to take care of the child himself and the fact that the mother possibly supported by the guardian can offer the child, a good parenting situation in Italy'.<sup>306</sup>

<sup>298</sup> GE035 [18 July 2006] BVerfG 1 BvR 1465/05.

<sup>299</sup> IT010 [26 September 2016] Cassazione civile 18846/2016. It may be noted here that Italian law foresees that an international child abduction case goes straight from the court of first instance to the Court of Cassation when the case is appealed.

<sup>300</sup> BG047 [30 November 2016] РЕШЕНИЕ № 2261 ОТ 30.11.2016 Г. ПОВ. ГР.Д. № 4904/2016 Г. НААПЕЛАТИВЕН СЪД – СОФИЯ; GE004 [22 March 2016] OLG Muenchen Senat fuer Familiensachen 12 UF 1175/15; GE018 [28 June 2012] OLG Hamm II-11 UF 85/12; MA014 Directeur tad-Dipartiment ghal-Instandards fil-Harsien Socjali vs. Sharon Rose Roche nee Bellamy [24 July 2015] Court of Magistrates (Gozo) 10/2015; NE099 [11 April 2014] Rechtbank Den Haag 460671 - FA RK 14-1301; NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>301</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A; BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A; BE028 [15 May 2012] Cour d'appel Bruxelles; BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180; BG006 [27 April 2011] РЕШЕНИЕ № 662 ОТ 27.04.2011 Г. ПО ГР. Д. № 388/2011 Г., Г. К, II С-В НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG007 [4 July 2011] РЕШЕНИЕ № 1129 ОТ 04.07.2011 Г. ПО Ч. ГР. Д. № 2056/2011 Г., Г. О., IV С-В НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG009 [9 January 2012] РЕШЕНИЕ ОТ 09.01.2012 Г. ПО ГР. Д. № 14566/2011 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16; GE038 [15 December 2011] OLG Hamm II-11 UF 240/11; LV035 [19 November 2014] C20 2745 14; MA019 Director of the Department for Social Welfare Standards vs. ABCDE [7 December 2016] Civil Court (Family Section) 179/16 RGM; MA020 Directeur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM; SP010 [8 March 2016] Audiencia Provincial de Barcelona (Sección 18ª) ECLI:ES:APB:2016:2563; SP013 [4 May 2016] ECLI:ES:APPO:2016:760.

<sup>302</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>303</sup> IT007 [23 May 2017] Trib. minorenni Bologna 23/05/2017.

<sup>304</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015. With 'applicable law' in this case is meant both the HCCA and Italian national law.

<sup>305</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

<sup>306</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

## f) ECtHR

In five cases, the best interests of the child have been decisive for the Court's reasoning. Both in *Maumousseau*<sup>307</sup> and in *Koons*,<sup>308</sup> the Court found no violation of Article 8 ECHR because domestic authorities had taken measures that were necessary to protect the best interests of the child. In *Carlson*, the Court specified that it would be in the best interests of the child to obtain a rapid decision for prompt return to his habitual environment. The Court linked this decision to the father's right to family life under Article 8 ECHR.<sup>309</sup> Similarly, in *Frisancho Perea*, a violation of Article 8 ECHR was found on the basis of the long duration of the case, which was also interpreted in light of the best interests of the child.<sup>310</sup> Finally, in *Sneersone and Kampanella*, the Court found that the decision to return the child to Italy constituted a violation of Article 8 ECHR on the basis of an insufficient consideration of the best interests of the child by the national authorities. In particular, the domestic authorities had failed to address the lack of effort by the child's father to seek contact with his child, the potential dangers to the child's psychological health, the inadequacy of the intended safeguards to ensure the child's wellbeing after separation from his mother, as well as the lack of alternative solutions to ensure contact between the child and his father.<sup>311</sup>

### The best interests are decisive but other factors are considered

- a) The best interests are considered together with the principle of the Hague Convention on Child Abduction

In four German cases the courts made a balancing exercise between the HCCA's objective of restoring the *status quo ante*, which is considered to be in the best interests of the child in general and that 'a return is inevitably associated with mental stress for the child', which is contrary to the best interests of the child.<sup>312</sup> A return was ordered in all cases, making the best interests of the child, as interpreted by the HCCA's objective, decisive.

- b) The best interests of the child are considered together with the parent's unlawful act

Some courts demonstrated the intention not to let the abducting parent get away with their violation of the custody rights and stated the following or similar: 'The [abducting parent] cannot unilaterally determine the habitual residence of the child and cannot gain advantages based on such unlawful behaviour'.<sup>313</sup> In all three cases, the courts decided to order the return of the child. In the end, these decisions were based more on the consideration that a return would not be contrary to the best interests of the child.

- c) The best interests are considered together with Article 13(1)(a)

In five cases, the courts considered the best interests of the child next to one of the situations that are mentioned in Article 13(1)(a), namely that the left-behind parent was not exercising the custody

<sup>307</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05.

<sup>308</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01.

<sup>309</sup> ECHR010 ECtHR *Carlson v. Switzerland* [6 November 2008] Application no. 49492/06, §§80-81.

<sup>310</sup> ECHR043 ECtHR *Frisancho Perea v. Slovakia* [21 July 2015] Application no. 383/13, §77.

<sup>311</sup> ECHR021 ECtHR *Sneersone and Kampanella v. Italy* [12 July 2011] Application no. 14737/09, §§98-93.

<sup>312</sup> GE017 [12 October 2007] OLG Stuttgart 17 UF 214/07; GE023 [22 June 2011] OLG Stuttgart 17 UF 150/11; GE030 [1 March 2005] AG Köln 308 F 27/05; GE041 [14 March 2017] OLG Stuttgart 17 UF 37/17.

<sup>313</sup> BG029 [22 October 2014] РЕШЕНИЕ № 1925 ОТ 22.10.2014 Г. ПОГР. Д. № 2776/2014 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG060 [23 November 2017] РЕШЕНИЕ № 2427 ОТ 23.11.2017 Г. ПОГР. Д. № 4676/2017 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; HUN22 [22 November 2016] Curia Pfv.II.21.836/2016/6.



rights at the time of the abduction<sup>314</sup> or had consented to or acquiesced in the abduction.<sup>315</sup> In all five cases, the courts decided not to return the child to his or her former habitual residence.

- d) The best interests are considered together with the possibility for the abducting parent to return

In three cases, the courts took into account the (im)possibility for the abducting parent to return together with the child to the child's former habitual residence.<sup>316</sup> In the two cases in which the court determined that the parent could return together with the child, the return was ordered.<sup>317</sup> In one of the three cases, the court determined that it would be impossible for the mother to return together with the child and this led the court to decide to reject the return.<sup>318</sup>

- e) The best interests are considered together with the hearing of the child

In three cases, the best interests of the child were considered together with the opinion of the child. In two cases, the courts based their decision to reject the return of the child on the child's objection to return.<sup>319</sup> In one case, however, the court stated that having the custody of the child decided by the court of the child's former habitual residence was in the best interests of the child and decided to return the child despite the view of the fourteen-year-old child that he is settled in Malta and is happy there.<sup>320</sup>

- f) Other factors

Next to the factors discussed above, the following factors that are considered together with the best interests of the child are found in the case law:

- The friendly environment for raising and educating the child;<sup>321</sup>
- The left-behind parent's capacity to care for the children;<sup>322</sup>
- Parental alienation;<sup>323</sup>
- The child's low age;<sup>324</sup>
- Limited contact with the father;<sup>325</sup>
- Whether the child and the mother could safely return;<sup>326</sup>
- The establishment of adequate arrangements;<sup>327</sup>

<sup>314</sup> BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПОГР. Д. № 8240/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПОГР. Д. № 2445/2014 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>315</sup> BG036 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG037 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; SPO09 [27 October 2016] Audiencia Provincial de Valencia (Sección 10ª) ECLI: ES:APV:2016: 3706.

<sup>316</sup> BG022 [14 August 2013] РЕШЕНИЕ № 6168 ОТ 14.08.2013 Г. ПОГР. Д. № 3043/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г. НАСОФИЙСКИГРАДСКИСЪД; GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16.

<sup>317</sup> BG022 [14 August 2013] РЕШЕНИЕ № 6168 ОТ 14.08.2013 Г. ПОГР. Д. № 3043/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16.

<sup>318</sup> BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>319</sup> LV019 [7 March 2017] C32344616.

<sup>320</sup> MA002 Drettur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1.

<sup>321</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПО ГР. Д. № 82/2010 Г., Г. О., VI С-В НА АПЕЛАТИВЕН СЪД - СОФИЯ; BG030 [1 April 2014] РЕШЕНИЕ № 2234 ОТ 01.04.2014 Г. ПОГР. Д. № 14610/2013 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>322</sup> BG022 [14 August 2013] РЕШЕНИЕ № 6168 ОТ 14.08.2013 Г. ПОГР. Д. № 3043/2013 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>323</sup> BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР. Д. № 1665/2015 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>324</sup> BG049 [27 December 2016] РЕШЕНИЕ № 9391 ОТ 27.12.2016 Г. ПОГР. Д. № 3731/2016 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>325</sup> BG061 [19 April 2017] РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПОГР. Д. № 14820/2015 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>326</sup> CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22.

<sup>327</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526.

- The unwillingness of the left-behind parent to participate in the proceedings in person, to contact the appointed attorney, and to provide evidence on wage and living conditions;<sup>328</sup>
- The custodial rights of the father and the fact that the abduction of the child by the mother without the father's consent was unlawful.<sup>329</sup>

g) ECtHR

In twenty judgments of the ECtHR, the best interests of the child were decisive, but other factors were considered as well. Such factors may relate to the circumstances of the applicant (usually one of the child's parents) whose rights under Article 8 ECHR had been violated but may also include implicit references to the best interests of the child. In *Bianchi*, for example, the Court found a violation of Article 8 ECHR because insufficient action by the national authorities resulted in parental alienation, which was, according to the Court, not only a violation of the father's right to family life, but also contrary to the best interests of the child.<sup>330</sup> The factor most often referred to in addition to the best interests of the child is the lapse of time caused by the authorities' own handling. This was mentioned in eleven cases.<sup>331</sup>

Other factors include:

- The failure to take, without delay, all measures that could reasonably be expected from the authorities;<sup>332</sup>
- The failure to consider whether the abducting parent could return with the child or to prevent unavoidable separation between the child and the primary caregiver;<sup>333</sup>
- The jeopardy of the present or future relations between the parents and their children;<sup>334</sup>
- The failure to respect the applicant's contact or visiting rights;<sup>335</sup>
- The failure to meet procedural requirements under Article 8 ECHR;<sup>336</sup>
- The failure to perform an in-depth review of the family situation or the risks linked to it<sup>337</sup> (note however that these judgments were issued before *X v Latvia*, which brought a nuance to this factor);
- The failure to strike a fair balance between conflicting interests;<sup>338</sup>

<sup>328</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>329</sup> MA013 *Direttur tad-Dipartiment Ghal Standards Fil-Harsien Soċjali vs. Jessica Farrugia* [5 December 2014] Qorti ta' L-Appell 14/2014/1.

<sup>330</sup> ECHR003 ECtHR *Bianchi v. Switzerland* [22 June 2006] Application no. 7548/04, §99.

<sup>331</sup> ECHR008 ECtHR P.P. v. Poland [8 January 2008] Application no. 8677/03; ECHR022 ECtHR *Shaw v. Hungary* [26 July 2011] Application no. 6457/09; ECHR039 ECtHR M.A. v. Austria [15 January 2015] Application no. 4097/13; ECHR040 ECtHR *Phostira Efthymiou and Ribeira Fernandes v. Portugal* [5 February 2015] Application no. 66775/11; ECHR045 ECtHR G.S. v. Georgia [21 July 2015] Application no. 2361/13; ECHR048 ECtHR K.J. v. Poland [1 March 2016] Application no. 30813/14; ECHR049 ECtHR E.S. v. Romania and Bulgaria [19 July 2016] Application no. 60281/11; ECHR050 ECtHR G.N. v. Poland [19 July 2016] Application no. 2171/14; ECHR052 ECtHR *Severe v. Austria* [21 September 2017] Application no. 53661/15; ECHR053 ECtHR *Vilenchik v. Ukraine* [3 October 2017] Application no. 21267/14.

<sup>332</sup> ECHR008 ECtHR P.P. v. Poland [8 January 2008] Application no. 8677/03; ECHR037 ECtHR *Cavani v. Hungary* [28 October 2014] Application no. 5493/13; ECHR038 ECtHR *Hromadka and Hromadkova v. Russia* [11 December 2014] Application no. 22909/10.

<sup>333</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07; ECHR025 ECtHR B. v. Belgium [10 July 2012] Application no. 4320/11; ECHR036 ECtHR V.P. v. Russia [23 October 2014] Application no. 61362/12.

<sup>334</sup> ECHR008 ECtHR P.P. v. Poland [8 January 2008] Application no. 8677/03; ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09.

<sup>335</sup> ECHR008 ECtHR P.P. v. Poland [8 January 2008] Application no. 8677/03; ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09.

<sup>336</sup> ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09; ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11.

<sup>337</sup> ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09; ECHR025 ECtHR B. v. Belgium [10 July 2012] Application no. 4320/11.

<sup>338</sup> ECHR045 ECtHR G.S. v. Georgia [21 July 2015] Application no. 2361/13; ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12.

- The failure to grant the applicant the opportunity to present their case in an expeditious manner;<sup>339</sup>
- The failure to take into account the length of the child's abduction;<sup>340</sup>
- The failure of one or both parents to cooperate;<sup>341</sup>
- The failure to maintain family ties between siblings;<sup>342</sup> and
- The failure to be sufficiently thorough in the reasoning behind a domestic decision.<sup>343</sup>

### The Best Interests are Considered Equally with Other Factors

- a) Considered equally with the HCCA's objective of restoring the status quo ante

In eight German cases, the courts made a balance between Article 13(1)(b) HCCA interpreted in the best interests of the child and the Hague Convention's objective of restoring the status quo ante.<sup>344</sup> Courts tend to give precedence to the Convention's objective in the absence of a grave risk which would deem a return against the best interests of the child.

In one case, the court considered the objective of restoring the *status quo ante* less important than the clearly and maturely expressed opposition of the eleven year-old child to return.<sup>345</sup> In another case, the court balanced the best interests of the child, the HCCA's objective of restoring the status quo ante and the judgment issued by an Italian tribunal that stated that the residence of the child should be close to the mother [in Germany].<sup>346</sup> The outcome of this exercise was a non-return decision. Thus, the courts found the best interests of the child and the Italian judgment more important than to strictly adhere to the HCCA's objective.

- b) Considered equally with one of the provisions of the HCCA

In eleven cases, the best interests were considered alongside the grave risk exception of Article 13(1)(b) HCCA.<sup>347</sup> In seven cases, the best interests were considered both alongside Article 13(1)(b) and Article 13(2) HCCA.<sup>348</sup> The best interests were also considered alongside Article 13(2) HCCA in three cases<sup>349</sup> and in another three cases the best interests were considered alongside Article

<sup>339</sup> ECHR023 ECtHR Karrer v. Romania [21 February 2012] Application no. 16965/10.

<sup>340</sup> ECHR025 ECtHR B. v. Belgium [10 July 2012] Application no. 4320/11.

<sup>341</sup> ECHR037 ECtHR Cavani v. Hungary [28 October 2014] Application no. 5493/13.

<sup>342</sup> ECHR046 ECtHR Vujica v. Croatia [8 October 2015] Application no. 56163/12.

<sup>343</sup> ECHR046 ECtHR Vujica v. Croatia [8 October 2015] Application no. 56163/12.

<sup>344</sup> GE008 [27 February 2006] OLG Celle 17 UF 130/05; GE009 [13 January 2009] OLG Stuttgart 17 UF 234/08; GE013 [31 May 2007] OLG Zweibruecken 6 UF 76/07; GE025 [22 September 2006] Brandenburgisches OLG 15 UF 189/06; GE042 [17 July 2007] OLG Nürnberg 7 UF 681/07; GE044 [21 December 2016] OLG Frankfurt/Main 1 UF 301/16; GE047 [18 March 2010] OLG Karlsruhe 2 UF 179/09; GE048 [5 July 2017] OLG Nürnberg 7 UF 660/17.

<sup>345</sup> GE033 [4 November 2010] AG Hamm 3 F 512/10.

<sup>346</sup> GE031 [18 March 2016] OLG Stuttgart 17 UF 44/15.

<sup>347</sup> BG015 [6 March 2013] РЕШЕНИЕ № 424 ОТ 06.03.2013 Г. ПО ГР. Д. № 4453/2012 Г. НА АПЕЛАТИВЕН СЪД - СОФИЯ; BG016 [28 November 2013] РЕШЕНИЕ № 2198 ОТ 28.11.2013 Г. ПО В.ГР. Д. № 3939/2013 Г. НА АПЕЛАТИВЕН СЪД - СОФИЯ; FR051 [22 July 2010] Cour d'appel de Fort de France; FR100 [10 February 2015] Cour d'appel Paris 14/21136; FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761; IT054 [31 October 2007] Cassazione civile 22962/2007; IT055 [17 July 2006] Tribunale Minorenni Bolzano; MA015 Direttur tad-Dipartiment għall-Istandards fil-Harsien Soċjali vs. Sharon Rose Roche Nee Bellamy [30 October 2015] Qorti ta' L-Appell 10/15 PC; NE105 [4 June 2014] Gerechthof Den Haag 200.148.381/01; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272.

<sup>348</sup> FR048 [17 June 2010] Cour d'appel Dijon 10/00967; NE057 [18 January 2012] Gerechthof 's-Gravenhage 200.098.851-01; NE066 [27 June 2012] Gerechthof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechthof 's-Gravenhage 200.110.609-01; NE111 [15 October 2014] Gerechthof Den Haag 200.155.629/01; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE115 [26 January 2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670.

<sup>349</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173; MA009 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1; NE120 [4 March 2015] Gerechthof Den Haag 200.163.913/01.

12 HCCA<sup>350</sup> Lastly, there are three cases in which the best interests of the child were considered equally with the consent of the left-behind parent in the sense of Article 13(1)(a) HCCA<sup>351</sup>

In one Belgian case, the court considered all possible exceptions foreseen in the Hague Convention on Child Abduction (Articles 12, 13 and 20) and then stated that 'all previous considerations do not detract from Article 3(1) UNCRC'.<sup>352</sup> Thus, the best interests of the child are considered separately from and on an equal level with all the HCCA's exceptions to return.

c) Considered equally with the Brussels IIbis Regulation

In two Croatian cases, the best interests were considered equally with Article 11 of the Brussels IIbis Regulation.<sup>353</sup>

d) Considered equally with the child's views

In three cases, the best interests of the child were considered together with the views of the child although not necessarily in light of Article 13(2) HCCA. Thus, the views are seen more broadly than only as the child's objection. In one French case, the court rejected the return based on the determination that a separation between the siblings would not be in their best interests, and on the children's wish to stay in France.<sup>354</sup> In one German case, the best interests were considered in relation to Article 13(1)(b) HCCA but the court decided that return did not endanger the best interests.<sup>355</sup> In addition, the child did not explicitly exclude the possibility to return during his hearing. These two considerations led the court to order the return of the child. In one Dutch case, the court mainly based its decision to refuse return on the objection of the child but also took into account the fact that the child certainly needed assistance and that this is provided for in the Netherlands.<sup>356</sup>

e) Considered equally with the existence of custody rights

In one Maltese case, the court considered the best interests in relation to Article 13(1)(b) HCCA and determined that a return would be harmful and thus against the child's interests.<sup>357</sup> In addition, the court took into account the fact that the father's custody rights were not proven. In another Maltese case, the court first considered that the claim for return was justified in terms of custody rights and verified afterwards whether return would be contrary to the child's wellbeing or not.<sup>358</sup>

f) Considered equally with the establishment of habitual residence

In two cases, the courts determined that the child was now habitually resident in the State of refuge, Italy and Latvia, respectively.<sup>359</sup> In addition, the courts took into account the best interests of the child; this is apparent from the following phrases: 'the return would constitute an intolerable situation for the child, because of the lack of affection and relations in that State'<sup>360</sup> and 'it is not in

<sup>350</sup> CR021 [9 October 2013] Općinski sud u Rijeci R1 O-206/2013; FR031 [8 August 2008] Cour d'appel de Paris 08/05791 and 08/07826; GE016 [23 April 2012] OLG Stuttgart 17 UF 35/12.

<sup>351</sup> GR010 [25 May 2010] Supreme Court of Greece 916/2010; IT041 [12 May 2010] Tribunale minorenni Bari 12/05/2010; SP023 [25 April 2012] Audiencia Provincial de Madrid (Sección Vigésimocuarta) ECLI:ES:APM:2012:11959A.

<sup>352</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>353</sup> CR006 [10 May 2016] Županijski sud u Zagrebu Gž Ob-600/16-2; CR026 [11 October 2016] Županijski sud u Zagrebu 13 Gž Ob-1264/16-2.

<sup>354</sup> FR077 [2 April 2013] Cour d'appel Paris 13/03926.

<sup>355</sup> GE003 [26 February 2010] OLG Nürnberg 7 UF 20/10.

<sup>356</sup> NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>357</sup> MA004 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali v. Josephine Arslan [8 July 2008] Qorti ta' L-Appell 78/2007/1.

<sup>358</sup> MA008 Direttur tad-Dipartiment Għal Standards fil-Harsien Soċjali vs. RR [28 June 2012] Qorti Civili 15/2012.

<sup>359</sup> IT044 [16 June 2009] Cassazione civile 13936/2009; LV018 [11 January 2017] C32344616.

<sup>360</sup> IT044 [16 June 2009] Cassazione civile 13936/2009.

the best interests of the child to separate him from his family (younger brother).<sup>361</sup> In one Czech case, the previous statement of the High Court of Justice of England and Wales, which determined habitual residence of the child in England was considered together with recital 12 of the Brussels IIbis Regulation, in which the best interests of the child are linked to the principle of proximity.<sup>362</sup> The court considered the decision of the High Court of Justice binding for Czech courts, according to Article 11 and 42 of the Brussels IIbis Regulation. Therefore, the Czech court did not apply the 1980 Hague Convention on Child Abduction, but directly recognized the English court's decision as binding. However, the position adopted by the Czech court is questionable, since the decision delivered by the English court was adopted on the merits before the wrongful removal of the child, and therefore did not fall within the scope of application of Article 11(8) of the Brussels IIbis Regulation.

g) Considered equally with an expert report

In two Croatian cases, the child's views were considered together with the report of the Centre for Social Welfare.<sup>363</sup> In one other Croatian case, the report of the Centre for Social Welfare was considered together with evidence provided by the mother on domestic violence: medical documentation, police records and photographs.<sup>364</sup>

h) Other factors

In one Belgian case the court had to decide whether return should be rejected on grounds of a grave risk for the child.<sup>365</sup> The court took several factors into account: the possession of weapons by the father, the physical violence against the mother, the drug problems of the father, the father's lack of interest in the child and the behavioural problems of the child. The best interests of the child were then explicitly discussed with regard to one factor in particular, namely the separation between mother and child. Thus, the best interests of the child were considered equally with all other factors.

In one French case, the court also discussed several factors under Article 13(1)(b).<sup>366</sup> Two of these factors were linked to the best interests of the child: the living conditions in Italy were not contrary to the best interests of the child and the abrupt break between the father and the children was seen as contrary to the best interests of the child. Further, the court considered that the father had never used violence against the children and that potential re-integration efforts that the children need to make in Italy do not pose a grave risk. All factors were considered equally.

In one Latvian case, the court decided to reject the return of the child having considered on an equal basis the mother's lack of interest towards the child, which is contrary to the child's best interests.<sup>367</sup>

In one Maltese case, the court states that it 'is under the responsibility to find a balance between the interests pertaining to the situation, who in this case are the minor's and the parents', and just as important, the public order'.<sup>368</sup> This shows that the best interests of the child were one of the

<sup>361</sup> LV018 [11 January 2017] C32344616.

<sup>362</sup> CZ002 [8 September 2015] Constitutional Court 3742/14.

<sup>363</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>364</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>365</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

<sup>366</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779.

<sup>367</sup> LV031 [21 July 2014] 39068314/C-0683-14/2.

<sup>368</sup> MA016 Sharon Rose Roche [28 July 2016] Prim Awla Qorti Civili (Sede Kostituzzjonali) 81/2015/AF.

three factors taken into account.

In one Dutch case in which return was ordered, the court considered the return in the best interests of the child in general. Next to this, the court considered that the passage of time in itself cannot impede return, that the mother is free to go and visit the child in Scotland so that a separation between them will not happen, and that the Scottish Central Authority contacted the child protection services which would keep an eye out for the best interests of the child.<sup>369</sup>

In one Romanian case, the court linked two factors to the best interests, namely the child's need of stability and the fact that both parents accepted the exercise of visiting rights in Romania. Further, the court considered the non-exercise of parental rights before removal, the father's acceptance of a refusal of return,<sup>370</sup> and the behaviour of the father towards his wife and family.<sup>371</sup>

In one Czech case, the court considered the time-limited agreement between parents regarding the duration of the stay abroad (open-ended and time limited moves) together with Article 8 of the Brussels IIbis Regulation that was considered to be in the best interests of the child.<sup>372</sup>

i) ECtHR

In fifteen cases, the best interests were considered equally with other factors. In *Blaga*, the Court mentioned a range of factors: not only did it argue that domestic authorities had failed to meet the urgency of the situation, it also considered whether the domestic courts examined other aspects of the children's circumstances; whether they had sufficiently balanced the applicant's interest of a right to family life against the competing interest of the other parties; whether the conclusions of psychological evaluation reports had been taken into account, and to what extent the domestic courts had assessed specific risk factors.<sup>373</sup> Seven cases mention the delay in proceedings.<sup>374</sup> The Court also considered the conduct of the domestic authorities<sup>375</sup> as well as of the applicant.<sup>376</sup> In addition, the Court considered whether the domestic jurisdictions had sufficiently considered the family situation.<sup>377</sup> Procedural requirements under Article 8 ECHR were also mentioned as an equally relevant factor.<sup>378</sup>

j) ECJ

In two cases of the ECJ, the best interests were considered equally with other factors. In *Povse v Alpagó*, the Court discussed the possible situation in which the court of the State of refuge orders return and the court of the State of origin awards custody to the parent residing in the State of refuge so that the child is moved needlessly between these two States. With regard to this situation, the Court said that the disadvantages that such moving might entail are subordinate to 'the

<sup>369</sup> NE048 [28 July 2011] *Rechtbank Leeuwarden* 396710/ FA RK 11-4657.

<sup>370</sup> The behaviour of the father alludes to the following he said: 'I do not need the family or the child'.

<sup>371</sup> RO039 [31 October 2006] *Bucharest Tribunal* 24553/3/2006.

<sup>372</sup> CZ005 [20 December 2016] *Supreme Court of the Czech Republic* 2850/2016.

<sup>373</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10, §§81-91.

<sup>374</sup> ECHR001 ECtHR *Monory v. Romania and Hungary* [5 April 2005] Application no. 71099/01; ECHR002 ECtHR *Karadzic v. Croatia* [15 December 2005] Application no. 35030/04; ECHR019 ECtHR *Karoussiotis v. Portugal* [1 February 2011] Application no. 23205/08; ECHR032 ECtHR *Lopez Guio v. Slovakia* [3 June 2014] Application no. 10280/12; ECHR042 ECtHR *Ferrari v. Romania* [25 April 2015] Application no. 1714/10; ECHR044 ECtHR *R.S. v. Poland* [21 July 2015] Application no. 63777/09; ECHR051 ECtHR *McIlwrath v. Russia* [18 July 2017] Application no. 60393/13. It is necessary to note here that we only took into account the cases on the basis of Article 8 and not those on the basis of Article 6 ECHR, which may also find a delay to be an infringement of human rights.

<sup>375</sup> ECHR016 ECtHR *Raban v. Romania* [26 October 2010] Application no. 25437/08; ECHR017 ECtHR *Serghides v. Poland* [2 November 2010] Application no. 3151/04; ECHR029 ECtHR *Prizzia v. Hungary* [11 June 2013] Application no. 20255/12.

<sup>376</sup> ECHR029 ECtHR *Prizzia v. Hungary* [11 June 2013] Application no. 20255/12.

<sup>377</sup> ECHR030 ECtHR *Anghel v. Italy* [25 June 2013] Application no. 5968/09.

<sup>378</sup> ECHR031 ECtHR *Grand chamber X. v. Latvia* [26 November 2013] Application no. 27853/09.

importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents'.<sup>379</sup> The Court repeatedly stated that the right of the child to maintain a relationship with both parents merges into the best interests of the child. Thus, one can say that the best interests are considered equally with the factors of delivering a fair and soundly based court judgment and the need to deter child abduction.

In *C v M*, the ECJ stated the following:

Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal.<sup>380</sup>

Thus, not only the factors concerning the best interests of the child but also other matters that might demonstrate the integration of the child have to be taken into account.

### **The Best Interests are Considered but not Taken into Account**

#### a) The return proceedings are not the right place to assess the best interests

In three cases, the courts found that the assessment of the best interests of the child should not be done during the return proceedings. Each of the courts used a different way to make this clear. The French court stated that 'the best interests of the child referred to in the UNCRC are not in issue here'.<sup>381</sup> The Italian court explained that the court of the State of refuge does not have to make an in-depth assessment on the merits of parental responsibility.<sup>382</sup> Lastly, the Maltese court found that the best interests of the child were to be tackled by the court of the child's former habitual residence.<sup>383</sup>

#### b) Best interests strictly connected to HCCA exceptions

In one case, the court gives clear expression to the idea that the best interests are strictly connected to the HCCA exceptions by stating: 'The Hague Convention is based on the presumption that the best interests of the child is to return immediately to his or her State of habitual residence, unless one or more of the exceptions stated by Article 12, 13 or 20 apply'.<sup>384</sup>

In four cases, the courts stated that the best interests of the child should be taken into account when applying the grave risk exception.<sup>385</sup> However, in none of those cases did this exception apply so the best interests were not taken into account.

In three cases, the best interests were discussed in relation to Article 12 HCCA and the settlement of the child.<sup>386</sup> However, the courts did not consider this Article, and thus the best interests were not, in the end, taken into account.

<sup>379</sup> ECJ002 Case C-211/10 *Povse v Alpagó* [1 July 2010] ECLI:EU:C:2010:400 para 63.

<sup>380</sup> ECJ004 Case C-376/14 *C v M* [9 October 2014] ECLI:EU:C:2014:2268 para 56.

<sup>381</sup> FR033 [30 October 2008] Cour d'appel de Rouen 08/02361.

<sup>382</sup> IT021 [22 July 2014] Cassazione civile 16648/2014.

<sup>383</sup> MA007 *The Director of Social Welfare Standards Department vs. A B C* [26 May 2011] Civil Court 197/2010.

<sup>384</sup> IT060 [7 March 2007] Cassazione civile 5236/2007.

<sup>385</sup> FR006 [9 March 2006] Cour d'appel de Rouen 05/04340; FR074 [20 December 2012] Cour d'appel Agen 12/01694; GE020 [23 July 2008] AG Rostock 11 F 159/08; GE037 [2 February 2011] OLG Düsseldorf II-1 UF 110/10.

<sup>386</sup> RO002 [21 June 2007] Bucharest Tribunal 44091/3/2006; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007; RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007.

#### c) Other

In one French case, the court only referred to the best interests of the child when it said that 'the opinion expressed by the child cannot be accepted as appropriate and in accordance with her best interests'.<sup>387</sup>

In another French case, the mother contended that the German courts would not take the best interests into account. The court merely denies this.<sup>388</sup>

In one Dutch case, the court firstly examined whether the exceptions of Article 12 or 13(1)(b) HCCA could be applied.<sup>389</sup> This was not the case, so the court ordered return. Only after this decision, the court discussed whether a return would be contrary to the child's interests because the mother had said that this would be the case. However, the discussion on the best interests had no influence on the decision.

In one Romanian case, the court of appeal merely stated that the first court 'should clarify all factual aspects related to the social condition of the child, in light of both the immediate return of the child (Article 3 HCCA) and the exceptions (Article 12(2) and 13(1)(b) HCCA'.<sup>390</sup>

#### d) ECtHR

In five cases, the best interests were discussed in the judgment but were not taken into account for the final decision. Although the child was an applicant in *Iosub Caras*, the Court's assessment of the violation of Article 8 ECHR is about the swiftness of the procedure and not about the best interests of the child.<sup>391</sup> Also in *Bajrami*, the left-behind father's right to family life was not discussed from the child's perspective.<sup>392</sup> The authorities' lack of diligence in preventing the abduction in *Tapia Gasca and D. v. Spain* was admittedly manifest, but had been indemnified by the Spanish authorities. The Court found that the authorities had not been lacking in diligence regarding the child's return, despite the absence of results in this respect.<sup>393</sup> In *Kucuk*<sup>394</sup> and in *Chaborowski*,<sup>395</sup> the best interests were only discussed as a matter of principle and not further assessed.

### 3.2. Hearing of the Child

As mentioned in section 2.4.1., the main focus of this research project is the best interests concept and not the hearing of the child in itself. However, this separate part about the hearing of the child was included to examine to what extent the court sought the child's views to assess his or her best interests. In cases of international child abduction, the child's views can be taken into account as an exception to return (Article 13(2) HCCA) but the views of the child can also offer broader insight on what is in the best interests of the child.

Since the hearing of the child was not the focus of the research, the questions on the hearing of the child were not displayed if the correspondent indicated that no explicit or implicit reference is

<sup>387</sup> FR045 [6 August 2009] Cour d'appel Bourges 09/01061.

<sup>388</sup> FR056 [17 February 2011] Cour d'appel Paris 11/00507.

<sup>389</sup> NE007 [23 April 2008] Rechtbank 's-Gravenhage FA RK 08-1877.

<sup>390</sup> RO014 [16 March 2006] Bucharest Court of Appeal 3952/2005.

<sup>391</sup> ECHR005 ECtHR *Iosub Caras v. Romania* [27 July 2006] Application no. 7198/04.

<sup>392</sup> ECHR006 ECtHR *Bajrami v. Albania* [12 December 2006] Application no. 35853/04.

<sup>393</sup> ECHR013 ECtHR *Tapia Gasca and D. v. Spain* [22 December 2009] Application no. 20272/06.

<sup>394</sup> ECHR020 ECtHR *Kucuk v. Turkey and Switzerland* [17 May 2011] Application no. 33362/04.

<sup>395</sup> ECHR027 ECtHR *Chaborowski v. Ukraine* [17 January 2013] Application no. 61680/10.



made to the best interests of the child (see section 2.4.1). This was the case for 505 of the 938 national cases. Thus, it is possible that the child was heard in these cases, but this information was not included in the research. In the remaining 433 cases, the questions on the hearing were displayed and the information gathered is presented in the next sections.

Country	The child is heard	The child is not heard	Unknown
Belgium	4 cases out of 19 (21%)	6 cases out of 19 (32%)	9 cases out of 19 (47%)
Bulgaria	44 cases out of 49 (90%)	4 cases out of 49 (8%)	1 case out of 49 (2%)
Croatia	6 cases out of 21 (29%)	15 cases out of 21 (71%)	0 cases out of 21 (0%)
Czech Republic	1 case out of 9 (11%)	3 case out of 9 (33%)	5 cases out of 9 (56%)
Finland	7 cases out of 19 (37%)	12 cases out of 19 (63%)	0 cases out of 19 (0%)
France	17 cases out of 67 (25%)	11 cases out of 67 (16%)	39 cases out of 67 (58%)
Germany	22 cases out of 38 (58%)	12 cases out of 38 (32%)	5 cases out of 38 (13%)
Greece	5 cases out of 10 (50%)	5 cases out of 10 (50%)	0 cases out of 10 (0%)
Hungary	3 cases out of 14 (21%)	11 cases out of 14 (79%)	0 cases out of 14 (0%)
Italy	9 cases out of 24 (38%)	8 cases out of 24 (33%)	7 cases out of 24 (29%)
Latvia	8 cases out of 14 (57%)	2 cases out of 14 (14%)	4 cases out of 14 (29%)
Malta	6 cases out of 19 (32%)	11 cases out of 19 (58%)	2 cases out of 19 (11%)
Netherlands	52 cases out of 91 (57%)	7 cases out of 91 (8%)	32 cases out of 91 (35%)
Poland	1 case out of 5 (20%)	2 cases out of 5 (40%)	2 cases out of 5 (40%)
Romania	4 cases out of 13 (31%)	9 cases out of 13 (69%)	0 cases out of 13 (0%)
Spain	5 cases out of 17 (29%)	4 cases out of 17 (24%)	8 cases out of 17 (47%)
Sweden	0 cases out of 4 (0%)	4 cases out of 4 (100%)	0 cases out of 4 (0%)
	194 cases out of 433 (45%)	126 cases out of 433 (29%)	114 cases out of 433 (26%)

Table (8) – The hearing of the child

### 1.1.1 The Child is Heard

The child was heard during the proceedings in 194 out of 938 national cases included in this research.

#### Professional Hearing of the Child

When the child is heard, the hearing is mostly carried out by the judges themselves (in 117 cases). In 58 cases, the child was heard by a psychologist or social worker. In six cases, the child was heard by someone else. In one French case, the child was heard by the police services and a psychologist<sup>396</sup> and in another French case, by two female gendarmes.<sup>397</sup> In one German case, the child was heard by the Verfahrensbeistand.<sup>398</sup> In three Dutch cases, the child was heard by the Council for Child Protection.<sup>399</sup>

#### Information on the Hearing

##### Context and/or modalities of the hearing

In five cases, the judgment contained information on the context and/or modalities of the hearing. In two Bulgarian cases, the courts mentioned that the child was heard by the judge

<sup>396</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025.

<sup>397</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>398</sup> GE018 [28 June 2012] OLG Hamm II-11 UF 85/12.

<sup>399</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; NE118 [27 January 2015] Rechtbank Den Haag C-09-474592 - FA RK 14-7679.

in the presence of a social worker.<sup>400</sup> In one Croatian case, the court mentioned that the child was heard in the courtroom in the presence of the judge, a psychologist and the mother. In this case, it was the psychologist who led the hearing by asking questions to the child and by interpreting the child's drawings of his family.<sup>401</sup> In another Croatian case, the court made it clear that the child was heard outside the courtroom, in the Child's Workshop in the premises of the Special Guardian Centre.<sup>402</sup> In one Czech case, the court of third instance mentioned that the child was heard separately from the parents before the lower court.<sup>403</sup>

### Content of the hearing

During the hearing, children mostly spoke about the following topics:

- Whether they want to return to the State of origin or stay in the State of refuge;<sup>404</sup>
- Living circumstances in the State of origin/with the left-behind parent;<sup>405</sup>  
E.g.: the mother's partner beats and belittles the children;<sup>406</sup> difficulties at school in the State of origin; no extended family like in the State of refuge; no fun activities on weekends;<sup>407</sup> the child had no bedroom of his own but slept together with the grandmother; the mother had no time to pay attention to him;<sup>408</sup> the physical punishment by the father;<sup>409</sup> the physical abuse by the father;<sup>410</sup> their home was very dirty and full of garbage, and the father never took the child anywhere;<sup>411</sup>
- Living circumstances in the State of refuge/with the abducting parent;<sup>412</sup>

<sup>400</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПОГР. Д. № 82/2010 Г., Г. О., ВПС-ВНААПЕЛАТИВЕНСЪД - СОФИЯ; BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>401</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40.

<sup>402</sup> CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>403</sup> CZ001 [9 May 2017] Constitutional Court 378/17.

<sup>404</sup> BE015 [16 September 2009] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/903/B; BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG016 [28 November 2013] РЕШЕНИЕ № 2198 ОТ 28.11.2013 Г. ПО В.ПР. Д. № 3939/2013 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG020 [2 August 2013] РЕШЕНИЕ № 6019 ОТ 02.08.2013 Г. ПО ГР. Д. № 4848/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG022 [14 August 2013] РЕШЕНИЕ № 6168 ОТ 14.08.2013 Г. ПОГР. Д. № 3043/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG024 [2 August 2013] РЕШЕНИЕ № 6026 ОТ 02.08.2013 Г. ПОГР. Д. № 2367/2013 Г.НАСОФИЙСКИГРАДСКИСЪД; BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПО ГР. Д. № 13131/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПОГР. Д. № 2445/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG035 [29 April 2014] РЕШЕНИЕ № 2996 ОТ 29.04.2014 Г. ПОГР. Д. № 1063/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР. Д. № 1665/2015 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG041 [17 April 2015] РЕШЕНИЕ № 2552 ОТ 17.04.2015 Г. ПОГР. Д. № 20052/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG056 [5 July 2017] РЕШЕНИЕ № 4875 ОТ 05.07.2017 Г. ПО ГР. Д. № 15417/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG057 [8 June 2017] РЕШЕНИЕ № 1297 ОТ 08.06.2017 Г. ПО ГР. Д. № 2309/2017 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16; F1026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; F1035 [5 October 2009] Helsingin hovioikeus päätös 2581 5.10.2009; F1063 [27 May 2016] Helsingin hovioikeus päätös 851/2016.

<sup>405</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПОГР. Д. № 82/2010 Г., Г. О., ВПС-ВНААПЕЛАТИВЕНСЪД - СОФИЯ; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG041 [17 April 2015] РЕШЕНИЕ № 2552 ОТ 17.04.2015 Г. ПОГР. Д. № 20052/2014 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>406</sup> BE021 [26 April 2010] Voorzitter Rechtbank eerste aanleg Antwerpen 09/8332/A.

<sup>407</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>408</sup> BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>409</sup> BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР. Д. № 1665/2015 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ.

<sup>410</sup> BG047 [30 November 2016] РЕШЕНИЕ № 2261 ОТ 30.11.2016 Г. ПОВ. ГР.Д. № 4904/2016 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ.

<sup>411</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>412</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПОГР. Д. № 82/2010 Г., Г. О., ВПС-ВНААПЕЛАТИВЕНСЪД - СОФИЯ; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г.НАСОФИЙСКИГРАДСКИСЪД; BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG056 [5 July 2017] РЕШЕНИЕ № 4875 ОТ 05.07.2017 Г. ПО ГР. Д. № 15417/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG058 [1 March 2017] РЕШЕНИЕ № 1380 ОТ 01.03.2017 Г. ПОГР. Д. № 13168/2015 Г. НАСОФИЙСКИГРАДСКИСЪД.

- E.g.: the child considers the State of refuge his home and likes to live there;<sup>413</sup>
- Communication with the left-behind parent;  
E.g. by phone,<sup>414</sup> Skype<sup>415</sup> or Tango;<sup>416</sup>
  - The relationship between the child and the parents;<sup>417</sup>  
E.g.: the children perceive the father as violent;<sup>418</sup> the child would like to have contact with the left-behind parent;<sup>419</sup> the child has close contact with the abducting parent;<sup>420</sup> the child has no strong attachment to the abducting parent;<sup>421</sup> vague contact with the left-behind parent;<sup>422</sup> the child has emotional connection with both parents;<sup>423</sup> the child felt offended by and was angry with the left-behind parent;<sup>424</sup> the child misses the left-behind parent;<sup>425</sup> the child has a negative and dismissive attitude towards the father;<sup>426</sup> the child says he does not love his father and that the father was mean;<sup>427</sup>
  - The relationship with other family members,<sup>428</sup>
  - School;<sup>429</sup>

<sup>413</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>414</sup> BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>415</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40.

<sup>416</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>417</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПОГР. Д. № 82/2010 Г., Г. О., ВИС-ВНААПЕЛАТИВЕН СЪД – СОФИЯ; BG012 [21 November 2012] РЕШЕНИЕ ОТ Г. ПО ГР. Д. Г. НА СОФИЙСКИ ГРАДСКИ СЪД № 12501/2012; BG038 [12 February 2015] РЕШЕНИЕ № 991 ОТ 12.02.2015 Г. ПОГР. Д. № 8984/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>418</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>419</sup> BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР. Д. № 5581/2013 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40.

<sup>420</sup> BG009 [9 January 2012] РЕШЕНИЕ ОТ 09.01.2012 Г. ПО ГР. Д. № 14566/2011 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПОГР. Д. № 8240/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG013 [29 June 2012] РЕШЕНИЕ ОТ 29.06.2012 Г. ПОГР. Д. № 17219/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG017 [1 January 2013] РЕШЕНИЕ № 2417 ОТ 01.04.2013 Г. ПОГРАЖДАНСКО ДЕЛО № 13970/2012 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG020 [2 August 2013] РЕШЕНИЕ № 6019 ОТ 02.08.2013 Г. ПО ГР. Д. № 4848/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG031 [19 May 2014] РЕШЕНИЕ № 3533 ОТ 19.05.2014 Г. ПОГР. Д. № 17289/2013 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG032 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПО ГР. Д. № 14888/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG037 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG042 [28 December 2015] РЕШЕНИЕ № 2572 ОТ 28.12.2015 Г. ПОГР. Д. № 4615/2015 Г. НААПЕЛАТИВЕН СЪД – СОФИЯ; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG049 [27 December 2016] РЕШЕНИЕ № 9391 ОТ 27.12.2016 Г. ПОГР. Д. № 3731/2016 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG056 [5 July 2017] РЕШЕНИЕ № 4875 ОТ 05.07.2017 Г. ПО ГР. Д. № 15417/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG058 [1 March 2017] РЕШЕНИЕ № 1380 ОТ 01.03.2017 Г. ПОГР. Д. № 13168/2015 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG059 [13 March 2017] РЕШЕНИЕ № 1665 ОТ 13.03.2017 Г. ПО ГР. Д. № 5889/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG061 [19 April 2017] РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПОГР. Д. № 14820/2015 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>421</sup> BG054 [27 April 2017] РЕШЕНИЕ № 970 ОТ 27.04.2017 Г. ПО ГР. Д. № 1565/2017 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>422</sup> BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПОГР. Д. № 8240/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG013 [29 June 2012] РЕШЕНИЕ ОТ 29.06.2012 Г. ПОГР. Д. № 17219/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>423</sup> BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПО ГР. Д. № 13131/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>424</sup> BG035 [29 April 2014] РЕШЕНИЕ № 2996 ОТ 29.04.2014 Г. ПОГР. Д. № 1063/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>425</sup> BG054 [27 April 2017] РЕШЕНИЕ № 970 ОТ 27.04.2017 Г. ПО ГР. Д. № 1565/2017 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>426</sup> BG059 [13 March 2017] РЕШЕНИЕ № 1665 ОТ 13.03.2017 Г. ПО ГР. Д. № 5889/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>427</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>428</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>429</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180; BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

- Free time;<sup>430</sup>
- Friends.<sup>431</sup>

Further, the person carrying out the hearing of the child was able to gain information on the following topics:

- Living circumstances in the State of origin/with the left-behind parent<sup>432</sup>  
E.g.: the children miss stability in the environment of the mother,<sup>433</sup> the children are traumatized because of the domestic violence they witnessed;<sup>434</sup>
- Living circumstances in the State of refuge/with the abducting parent<sup>435</sup>  
E.g.: the children experience stability and security in the environment of the father,<sup>436</sup> the child has a secure and protected family environment,<sup>437</sup> the child is integrated.<sup>438</sup>

### Insights to the personality and/or behaviour of the child

Nine cases provide insight of the personality and/or behaviour of the child during the hearing. The courts stated the following in this regard:

- The children are able to present emotions and desires;<sup>439</sup>
- The child is considered mature and independent in presenting his preferences;<sup>440</sup>
- The child is very lively, smiling, energetic, loving and with very good physical and mental development for his/her age;<sup>441</sup>
- The child seemed emotionally very warm, behaved very decently and answered the questions succinctly;<sup>442</sup>
- The child was healthy on psychological and physical levels; the child cooperated appropriately, and achieved appropriate contact with the environment; he is very delicate, open and warm;<sup>443</sup>

<sup>430</sup> BG015 [6 March 2013] РЕШЕНИЕ № 424 ОТ 06.03.2013 Г. ПО ГР. Д. № 4453/2012 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>431</sup> BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG015 [6 March 2013] РЕШЕНИЕ № 424 ОТ 06.03.2013 Г. ПО ГР. Д. № 4453/2012 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG021 [7 August 2013] РЕШЕНИЕ № 6069 ОТ 07.08.2013 Г. ПО ГР. Д. № 969/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПО ГР. Д. № 2445/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>432</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПО ГР. Д. № 82/2010 Г., Г. О., ВПС-ВНААПЕЛАТИВЕН СЪД - СОФИЯ; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПО ГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG041 [17 April 2015] РЕШЕНИЕ № 2552 ОТ 17.04.2015 Г. ПО ГР. Д. № 20052/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>433</sup> BE021 [26 April 2010] Voorzitter Rechtbank eerste aanleg Antwerpen 09/8332/A.

<sup>434</sup> BG032 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПО ГР. Д. № 14888/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>435</sup> BG005 [14 June 2010] РЕШЕНИЕ № 549 ОТ 14.06.2010 Г. ПО ГР. Д. № 82/2010 Г., Г. О., ВПС-ВНААПЕЛАТИВЕН СЪД - СОФИЯ; BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПО ГР. Д. № 8614/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД; BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG056 [5 July 2017] РЕШЕНИЕ № 4875 ОТ 05.07.2017 Г. ПО ГР. Д. № 15417/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG058 [1 March 2017] РЕШЕНИЕ № 1380 ОТ 01.03.2017 Г. ПО ГР. Д. № 13168/2015 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>436</sup> BE021 [26 April 2010] Voorzitter Rechtbank eerste aanleg Antwerpen 09/8332/A.

<sup>437</sup> BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПО ГР. Д. № 2445/2014 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>438</sup> BG055 [21 February 2017] РЕШЕНИЕ № 1132 ОТ 21.02.2017 Г. ПО ГР. Д. № 5038/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG059 [13 March 2017] РЕШЕНИЕ № 1665 ОТ 13.03.2017 Г. ПО ГР. Д. № 5889/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>439</sup> BG009 [9 January 2012] РЕШЕНИЕ ОТ 09.01.2012 Г. ПО ГР. Д. № 14566/2011 Г. НАСОФИЙСКИ ГРАДСКИ СЪД.

<sup>440</sup> BG010 [10 July 2012] РЕШЕНИЕ ОТ 10.07.2012 Г. ПО ГР. Д. № 2541/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>441</sup> BG014 [8 February 2013] РЕШЕНИЕ № 230 ОТ 08.02.2013 Г. ПО ГР. Д. № 4529/2012 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>442</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>443</sup> CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

- The child spoke both the Croatian and the Slovenian languages; conversation with the child was established easily and the child was open to giving information; the child was eloquent, she actively participated in the communication, was focused, and talked with a clear understanding of the situation; the child possesses advanced motoric skills;<sup>444</sup>
- The child was hyperactive and eager for attention; was tidy, neatly dressed, established adequate contact and openly answered questions;<sup>445</sup> and
- The child was considered more mature than expected at her age; she answered the questions thoroughly and in a very consistent manner.<sup>446</sup>

In the first three cases, the views of the child were decisive for the final outcome, in the other five cases, the child's views were considered equally with other factors.

In one case, the court mentioned that the social authorities consider the child's reasoning 'typical to younger children'.<sup>447</sup> The child in this case was fourteen years old but according to the medical statement the child was considered to have a lesser degree of maturity than children usually have at her age. She was easily influenced, and it was said that her opinions reflected her mother's opinions. The child had learning problems and problems in consistent understanding. In this case, the child's views were not taken into account.

#### **Hearing contributed to the assessment of the best interests**

In 109 out of the 194 cases in which the child was heard, the hearing contributed to the assessment of the best interests of the child. In nineteen cases, the hearing did not contribute to the assessment of the best interests of the child. In most of these nineteen cases, the courts decided to hear the child but the only information that is given by the court on the hearing is that they did not take the child's views into account so the hearing certainly did not contribute to the best interests assessment. In the remaining 66 cases, it was not clear whether the hearing contributed to the best interests' assessment.

#### **Impact of the child's views on the final decision**

The child's views could influence the final decision in several ways (See Figure (2)):

- The child's views are decisive: 35 cases
- The child's views are decisive, but other factors are considered: 26 cases
- The child's views are considered equally with other factors: 29 cases
- The child's views are considered but not taken into account: 13 cases
- Impact of the child's views is not clear: 6 cases

<sup>444</sup> CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>445</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>446</sup> FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016.

<sup>447</sup> FI022 [15 September 2005] Helsingin hovioikeus Päätös 2933.

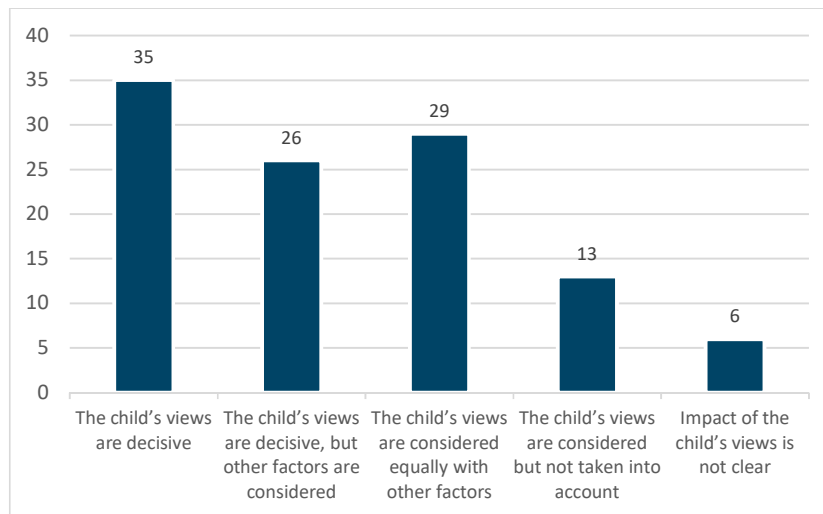


Figure (2) – Impact of the child's views on the final decision

### Decisive

In 35 cases, the child's views were the decisive factor for the final decision of the court. In 34 of these cases, the court decided to reject the return of the child.

In sixteen of the 35 cases, the hearing of the child led to the application of Article 13(2) HCCA. This exception provides that a court can refuse the return if the child objects and has attained an appropriate age and degree of maturity. The age of the children varied from seven to fifteen years old.

In eleven cases, the views expressed by the child during the hearing proved that a return would expose the child to a grave risk according to Article 13(1)(b) HCCA. The views of the child were thus decisive for the decision not to return the child. In these cases, the age of the children varied from two to twelve years old.

In six cases, both Article 13(1)(b) and Article 13(2) HCCA impeded the return of the child. In these cases, the hearing of the child made it clear that a return would expose the child to a grave risk and that the child objects to return. The children in these cases were between five and fifteen years old.

In one case, the hearing of the child showed (1) that the child was settled in the new environment so Article 12(2) HCCA was applied and (2) the objection of the child to return so Article 13(2) HCCA was applied.<sup>448</sup>

Lastly, in one case, the views of the child were decisive but they did not lead to the rejection of the return. In this case, the child herself desired to return to her former State of habitual residence.<sup>449</sup>

### Decisive but other factors considered

<sup>448</sup> BG028 [7 August 2014] РЕШЕНИЕ № 1710 ОТ 07.08.2014 Г. ПО ГР. Д. № 2817/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>449</sup> BG024 [2 August 2013] РЕШЕНИЕ № 6026 ОТ 02.08.2013 Г. ПО ГР. Д. № 2367/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

In 26 cases, the child's views were decisive but not the only factor for the court's final decision.

In six of the 26 cases, the courts decided to order the return of the child mainly based on the hearing of the child. In one of these cases, the child himself said that he wanted to go back to the U.S. to study there.<sup>450</sup> In the second case, the child insisted on living with both parents.<sup>451</sup> This, together with the fact that there was no grave risk for the child upon return, led the court to order the return of the child. In the third case, the court took into account the reports of the psychologists, the hearing of witnesses and a number of photos but the hearing of the child was decisive since this confirmed that there had not been abuses.<sup>452</sup> In the fourth case, there were no signs during the hearing that the children had experienced domestic violence and in addition, adequate arrangements were made in the State of origin.<sup>453</sup> In the fifth case, the child objected to return but the court found that this objection was not unequivocal and clear so that return had to be ordered.<sup>454</sup> In the last case, the children also objected to their return but the court decided that their opinions could not be considered as independent and worthy of consideration in the light of Article 13(2) HCCA since the mother put the children under severe psychological pressure.<sup>455</sup>

In the other twenty cases, the courts decided to reject the return of the child based on the child's views. The other factors considered together with the child's views are:

- Separation from the abducting parent is contrary to the best interests of the child;<sup>456</sup>
- Consent of the left-behind parent;<sup>457</sup>
- Left-behind parent did not exercise the parental responsibility;<sup>458</sup>
- Left-behind parent did not pay maintenance;<sup>459</sup>
- Left-behind parent did not take care of the child;<sup>460</sup>
- Left-behind parent's lack of interest in the child;<sup>461</sup>
- Violent behaviour, alcohol addiction and emotional problems of the left-behind parent;<sup>462</sup>

<sup>450</sup> LV048 [28 August 2015] C32303415.

<sup>451</sup> BG012 [21 November 2012] РЕШЕНИЕ ОТ Г. ПО ГР. Д. Г. НА СОФИЙСКИ ГРАДСКИ СЪД № 12501/2012.

<sup>452</sup> HUN027 [27 June 2016] 9.Pk.500124/2016/28.

<sup>453</sup> BG009 [9 January 2012] РЕШЕНИЕ ОТ 09.01.2012 Г. ПО ГР. Д. № 14566/2011 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>454</sup> GE013 [31 May 2007] OLG Zweibruecken 6 UF 76/07.

<sup>455</sup> GE029 [27 November 2012] OLG Hamm II-11 UF 250/12.

<sup>456</sup> BG017 [1 January 2013] РЕШЕНИЕ № 2417 ОТ 01.04.2013 Г. ПОГРАЖДАНСКОДЕЛО № 13970/2012 Г.НАСОФИЙСКИГРАДСКИСЪД; BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР. Д. № 1665/2015 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г.НАСОФИЙСКИГРАДСКИСЪД; BG049 [27 December 2016] РЕШЕНИЕ № 9391 ОТ 27.12.2016 Г. ПОГР. Д. № 3731/2016 Г.НАСОФИЙСКИГРАДСКИСЪД; BG057 [8 June 2017] РЕШЕНИЕ № 1297 ОТ 08.06.2017 Г. ПОГР. Д. № 2309/2017 Г.НААПЕЛАТИВЕНСЪД - СОФИЯ; BG058 [1 March 2017] РЕШЕНИЕ № 1380 ОТ 01.03.2017 Г. ПОГР. Д. № 13168/2015 Г. НАСОФИЙСКИГРАДСКИСЪД; GE001 [22 December 2016] Oberlandesgericht Hamm 11 UF 194/16.

<sup>457</sup> BG031 [19 May 2014] РЕШЕНИЕ № 3533 ОТ 19.05.2014 Г. ПОГР. Д. № 17289/2013 Г.НАСОФИЙСКИГРАДСКИСЪД; BG037 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>458</sup> BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПО ГР. Д. № 8240/2011 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>459</sup> BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г.НАСОФИЙСКИГРАДСКИСЪД.

<sup>460</sup> BG061 [19 April 2017] РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПО ГР. Д. № 14820/2015 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>461</sup> LV031 [21 July 2014] 39068314/C-0683-14/2.

<sup>462</sup> BG032 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПО ГР. Д. № 14888/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

- Life in the State of refuge is better for the child than that in the State of origin;<sup>463</sup>
- The child's health improved in the State of refuge,<sup>464</sup> and
- Adaptation to the new environment<sup>465</sup>

#### Considered equally with other factors

In 29 cases, the views of the child were considered equally with other factors.

In nine of these cases, the views of the child were considered together with the Article 13(1)(b) HCCA grave risk exception. The following factors were considered in light of the grave risk exception and led the courts, together with the child's views, to decide not to return the child:

It will be traumatic for the child to return because of difficulties in adapting to the school environment;<sup>466</sup>

The lack of an adequate habitat for the children in the State of origin, which *de facto* prevents a stable and well-balanced growth;<sup>467</sup>

- Settlement of the child in his or her new environment;<sup>468</sup>
- A forced return would lead to anxiety, anguish and destabilization;<sup>469</sup>
- Separation from the abducting parent and/or siblings;<sup>470</sup>
- Left-behind parent is not able to properly care for the child;<sup>471</sup>
- Dangerous situation for the child when in custody of the left-behind parent;<sup>472</sup> and
- Left-behind parent has lack of interest in the procedure.<sup>473</sup>

Further, in seven Croatian cases, the courts decided to reject the return of the children since the views of the child and the reports of the Centre of Social Welfare led to the conclusion that a return would be harmful for the child. In one Italian case, the court considered the hearing of the child together with evidence gathered by the administrative and judicial authorities of the U.S. and the Italian court of first instance.<sup>474</sup> The child was not returned as both factors showed the existence of a risk of harm. Also in another Italian case, the non-return decision was based on the objection of the child to return on the one hand and other evidence, namely the reports of the social assistant and psychologist that showed the

<sup>463</sup> BG030 [1 April 2014] РЕШЕНИЕ № 2234 ОТ 01.04.2014 Г. ПОГР.Д. № 14610/2013 Г.НАСОФИЙСКИГРАДСКИСЪД; GR016 [31 March 2009] Court of First Instance of Agirinio 340/2009.

<sup>464</sup> BG059 [13 March 2017] РЕШЕНИЕ № 1665 ОТ 13.03.2017 Г. ПО ГР. Д. № 5889/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>465</sup> BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПОГР.Д. № 1665/2015 Г.НААПЕЛАТИВЕНСЪД – СОФИЯ; BG055 [21 February 2017] РЕШЕНИЕ № 1132 ОТ 21.02.2017 Г. ПОГР. Д. № 5038/2016 Г.НАСОФИЙСКИГРАДСКИСЪД; BG057 [8 June 2017] РЕШЕНИЕ № 1297 ОТ 08.06.2017 Г. ПОГР. Д. № 2309/2017 Г. НААПЕЛАТИВЕНСЪД - СОФИЯ; GE016 [23 April 2012] OLG Stuttgart 17 UF 35/12; MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>466</sup> BG015 [6 March 2013] РЕШЕНИЕ № 424 ОТ 06.03.2013 Г. ПО ГР. Д. № 4453/2012 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>467</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12/05/2010.

<sup>468</sup> BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР.Д. № 5581/2013 Г.НАСОФИЙСКИГРАДСКИСЪД.

<sup>469</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro.

<sup>470</sup> BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР.Д. № 5581/2013 Г.НАСОФИЙСКИГРАДСКИСЪД.

<sup>471</sup> BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР.Д. № 5581/2013 Г.НАСОФИЙСКИГРАДСКИСЪД.

<sup>472</sup> GE004 [22 March 2016] OLG Muenchen Senat fuer Familiensachen 12 UF 1175/15.

<sup>473</sup> GE004 [22 March 2016] OLG Muenchen Senat fuer Familiensachen 12 UF 1175/15.

<sup>474</sup> IT010 [26 September 2016] Cassazione civile 18846/2016.



existence of a grave risk.<sup>475</sup> In one Dutch case, the child's views together with the report of the Council for Child Protection, and the proceedings, showed that a separation between the child and his mother and half-brother would be contrary to his interests and thus led to a rejection of return.<sup>476</sup> In another Dutch case, the child's expressed views made clear that a separation between child and abducting parent would not be in the child's interests.<sup>477</sup> In addition, no adequate measures were taken. These two factors led the court to decide to reject the return.

In four cases, the courts took the child's views into account together with Article 13(1)(b) HCCA and decided to return the child. In the first case, there was a lack of evidence presented during the procedure in order to apply Article 13(1)(b) HCCA, and the child during the hearing did not confirm the accusations concerning the alleged violent behaviour of the father.<sup>478</sup> In the second and third case, the courts determined that there was no grave risk for the child. During the hearing in the second case, the child stated that he misses his mother and sisters.<sup>479</sup> In the third case, the child said that he wanted to return to his mother.<sup>480</sup> Also in the last case, the grave risk was not proven and the attitude of the child towards the father during the hearing confirmed that a return decision would not lead to problems with regard to the best interests of the child.<sup>481</sup>

Also, Article 12(2) HCCA was equally considered with the child's views in two cases. In those two cases, the courts decided to reject the return of the child based on the views of the child together with the fact that the child was integrated in his or her new environment.<sup>482</sup> In one other case, the hearing of the child made clear that he was settled in Malta. However, this was considered together with the idea that 'having the custody of the child decided by the court of the minor's habitual residence is in the child's best interests'.<sup>483</sup> The weighing of these two factors led the court to decide to order the return of the child.

Lastly, the child's views were considered equally with the following factors that are not linked to Article 13(1)(b) or 12(2) HCCA: the fact that the mother prevented the child from keeping in touch with his father for a long time;<sup>484</sup> a very reasoned decision about living arrangements of the child was made in the State of origin;<sup>485</sup> the principle of prompt return of the HCCA,<sup>486</sup> and the appreciation by the court that the habitual residence of the child is now in the State of refuge.<sup>487</sup> The child's views together with the latter factor led to a non-return decision while the child's views together with the other three factors resulted in a return decision.

### Considered but not taken into account

<sup>475</sup> IT011 [25 May 2016] Cassazione civile 10817/2016.

<sup>476</sup> NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460.

<sup>477</sup> NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>478</sup> GE002 [13 June 2016] Amtsgericht Hamm 3 F 89/16.

<sup>479</sup> BG054 [27 April 2017] РЕШЕНИЕ № 970 ОТ 27.04.2017 Г. ПО ГР. Д. № 1565/2017 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>480</sup> MA020 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM.

<sup>481</sup> GE048 [5 July 2017] OLG Nürnberg 7 UF 660/17.

<sup>482</sup> BG018 [10 January 2013] РЕШЕНИЕ ОТ 10.01.2013 Г. ПО ГР. Д. № 13652/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; F063 [27 May 2016] Helsingin hovioikeus päätös 851/2016.

<sup>483</sup> MA002 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1.

<sup>484</sup> F057 [29 January 2015] Helsingin hovioikeus päätös 114 29.5.2015.

<sup>485</sup> F067 [29 August 2006] Korkein oikeus päätös 1903 29.8.2006.

<sup>486</sup> GE003 [26 February 2010] OLG Nürnberg 7 UF 20/10; GE030 [1 March 2005] AG Köln 308 F 27/05; GE042 [17 July 2007] OLG Nürnberg 7 UF 681/07.

<sup>487</sup> IT044 [16 June 2009] Cassazione civile 13936/2009.

In thirteen cases, the views of the child were sought but not taken into account by the court for the final decision.

In four of these cases, the court referred to the low age of the child as a reason not to take the child's views into account.<sup>488</sup> The children in these cases were three,<sup>489</sup> five<sup>490</sup> and seven<sup>491</sup> years old. In four cases, the court did not consider the child mature enough to take his or her views into account.<sup>492</sup>

In four cases, the court was of the opinion that the child was influenced/manipulated by the abducting parent so the views they expressed could not be considered as their own.<sup>493</sup> In one of these four cases, the court found that a seven-year old child cannot construct the following sentences: 'This is my own country', 'Our mother ignores our opinions', and 'Our mother can easily manage to visit us here'.<sup>494</sup> In another of the four cases, the court determined that it is unrealistic that a ten-year old child uses the following terminology: 'benefit', and 'single parent raising his child alone'.<sup>495</sup>

In one case, the warm and happy meeting between father [left-behind parent] and son has led the court to conclude that the child's views were not accurately reflecting reality without expressly blaming this discrepancy on the influence/manipulation by the abducting parent.<sup>496</sup>

In two cases, the court did not take the child's views into account because of the content of these views. In the first case, the child 'did not have a polarising opinion to substantiate a decision on the basis thereof'.<sup>497</sup> In the second case, the child did not expressly say that he did not want to go back to Italy so the court did not further take this opinion into account.<sup>498</sup>

#### **Not clear to what extent the child's views had an impact**

In six cases, the impact of the child's views on the final outcome was not clear.<sup>499</sup>

### **1.2.2 The Child is Not Heard**

In 126 cases out of the 938 national cases included in this research, the courts expressly mentioned that the child was not heard during the legal proceedings.

<sup>488</sup> BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПО ГР. Д. № 13131/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG029 [22 October 2014] РЕШЕНИЕ № 1925 ОТ 22.10.2014 Г. ПОГР. Д. № 2776/2014 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; LV013 [21 June 2017] 3-12/0022-17/9; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

<sup>489</sup> BG029 [22 October 2014] РЕШЕНИЕ № 1925 ОТ 22.10.2014 Г. ПОГР. Д. № 2776/2014 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ.

<sup>490</sup> LV013 [21 June 2017] 3-12/0022-17/9.

<sup>491</sup> BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПО ГР. Д. № 13131/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

<sup>492</sup> FI022 [15 September 2005] Helsingin hovioikeus Päätös 2933; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; SP036 [22 December 2010] Audiencia Provincial de Las Islas Baleares (Sección 4ª) 546/2010.

<sup>493</sup> FI022 [15 September 2005] Helsingin hovioikeus Päätös 2933; HUN16 [6 June 2016] Pk.500132/2016; HUN20 [14 September 2015] Central District Court of Pest 2.Pk.500.188/2015.11; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

<sup>494</sup> HUN16 [6 June 2016] Pk.500132/2016.

<sup>495</sup> HUN20 [14 September 2015] Central District Court of Pest 2.Pk.500.188/2015.11.

<sup>496</sup> GE023 [22 June 2011] OLG Stuttgart 17 UF 150/11.

<sup>497</sup> LV013 [21 June 2017] 3-12/0022-17/9.

<sup>498</sup> SP004 [14 December 2016] Juzgado de 1ª Instancia nº3 de Granada ECLI:JP:2016:723.

<sup>499</sup> BG007 [4 July 2011] РЕШЕНИЕ № 1129 ОТ 04.07.2011 Г. ПО Ч. ГР. Д. № 2056/2011 Г., Г. О., IV С-В НА АПЕЛАТИВЕН СЪД – СОФИЯ; IT012 [8 February 2016] Cassazione civile 2417/2016; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; LV018 [11 January 2017] C32344616; LV028 [21 July 2014] 39068314/C-0683-14/2; LV039 [3 October 2014] C31407414.

## The child is not heard because of his or her age and/or maturity

In the majority of cases in which the child is not heard, the courts just point out that they did not hear the child due to his or her low age,<sup>500</sup> degree of maturity<sup>501</sup> or both.<sup>502</sup> In these cases, the children were between one and ten years old.

In one case, the court stated 'the children do not have the required degree of maturity to be heard, given their young age and the fact that they have been subject to manipulation by their mother's family'.<sup>503</sup> Thus, in this case, the court sees maturity as the overarching consideration, while age and manipulation are seen as parts of maturity.

In some cases, courts provide a more extensive argumentation on why they did not hear the child based on the child's age and/or maturity. These cases are discussed in the sections below.

### a) The child is unable to express his or her views

In two cases, the courts stated that the child is too young to express his or her opinion on the return proceedings.<sup>504</sup> In two other cases, the courts found that the child did not have the degree of maturity to express his or her opinion.<sup>505</sup> The children's age ranged from two to six years old.

In one Latvian case, the child was showing signs of slowed speech and attention deficit disorder according to the medical examination. The court decided therefore not to carry out an interview with the child.<sup>506</sup>

In one other case, the court found that a four-year-old child could not be expected to define his psychological problem, so the hearing was not necessary. In another case, the court found that the hearing was not feasible given the age of the child (eighteen months).<sup>507</sup>

<sup>500</sup> BG001 [23 February 2009] РЕШЕНИЕ ОТ 23.02.2009 Г. ПО ГР. Д. № 508/2008 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11; CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006; CZ010 [28 November 2006] 30 Cdo 1931/2006; CZ012 [5 February 2014] II. ÚS 1116/13; FI021 [7 April 2006] Korkein oikeus päätös 0774/2006; FR056 [17 February 2011] Cour d'appel Paris 11/00507; FR062 [1 December 2011] Cour d'appel Agen 11/01437; FR107 [7 July 2015] Cour d'appel Orléans 15/01258; FR113 [14 April 2016] Cour d'appel Paris 16/02260; GE007 [12 November 2009] OLG Zweibruecken 6 UF 118/09; GE015 [12 June 2013] KG 16 UF 122/13; GE020 [23 July 2008] AG Rostock 11 F 159/08; GE031 [18 March 2016] OLG Stuttgart 17 UF 44/15; GE038 [15 December 2011] OLG Hamm II-11 UF 240/11; GR004 [2015] Court of First Instance of Athens 15/03/2015; GR017 [2006] Court of Appeal of Patras 797/2006; IT030 [23 January 2013] Cassazione civ. sez. I 23/01/2013 n. 1527; IT035 [16 June 2011] Cassazione civile sez. I 16/06/2011 n. 13241; LV021 [24 April 2015] C3143741; LV035 [19 November 2014] C20 2745 14; MA004 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Josephine Arslan [8 July 2008] Qorti ta' L-Appell 78/2007/1; MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali vs. RR [28 June 2012] Qorti Civili 15/2012; MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1; MA016 Sharon Rose Roche [28 July 2016] Prim Awla Qorti Civili (Sede Kostituzzjonali) 81/2015/AF; NE104 [26 May 2014] Gerechtshof Den Haag 200.148.437/01; SP004 [14 December 2016] Juzgado de 1ª Instancia n3 de Granada ECLI: JPI:2016:723; SP014 [19 January 2016] ECLI:ES:APZ:2016:18.

<sup>501</sup> FR039 [25 February 2009] Cour de Cassation 08-18126; IT035 [16 June 2011] Cassazione civile sez. I 16/06/2011 n. 13241; LV035 [19 November 2014] C20 2745 14; NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

<sup>502</sup> FI008 [5 July 2011] Helsingin hovioikeus Päätös 2268; FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR082 [5 July 2013] Cour d'appel Paris 13/11740; MA019 Director of the Department for Social Welfare Standards vs. ABCDE [7 December 2016] Civil Court (Family Section) 179/16 RGM.

<sup>503</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A.

<sup>504</sup> CR001 [3 October 2016] Općinski sud u Osijeku R1 Ob-566/2016-26; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22.

<sup>505</sup> CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16; CZ012 [5 February 2014] II. ÚS 1116/13.

<sup>506</sup> LV035 [19 November 2014] C20 2745 14.

<sup>507</sup> FR100 [10 February 2015] Cour d'appel Paris 14/21136.

b) It would be inappropriate to hear the child

In two cases, the courts stated that it would be inappropriate to hear the child given his or her young age and degree of maturity.<sup>508</sup> The children involved were three and seven years old.

In another two cases, courts also found the hearing of the child inappropriate but based this only on the young age of the child without mentioning the child's maturity.<sup>509</sup> In one of these cases, the child was two and a half years old. The age of the child in the other case is unknown.

c) It is not appropriate to take the child's opinion into account

In three cases, the courts found that the children had not reached the age and maturity at which it is appropriate to take their opinion into account and consequently did not proceed to the hearing.<sup>510</sup> In one Dutch case, the court stated the following:

Generally, the court does not consider children of five years of age to be old and mature, in view of their mental development. However, special circumstances may lead to the conclusion that a child of that age has reached that degree of maturity which justifies taking his or her views into account.<sup>511</sup>

In this specific case, the court concluded that it was 'neither stated nor shown that such special circumstances existed'.<sup>512</sup> The children in these four cases were between five and eight years old.

In three cases, the courts only referred to maturity to justify why the child was not heard: 'The child has not reached the degree of maturity that justifies taking his or her opinion into account'.<sup>513</sup> In one of these cases, the age of the child was unknown; in the other two cases the child was twelve years old. The courts assessed the maturity of the child based on documents submitted on the weak development and the lack of language skills,<sup>514</sup> on the psychological examination<sup>515</sup> and on the child's intellectual disability.<sup>516</sup>

In one case, the court determined that the seven-year-old child had neither the age, nor the maturity at which her possible opinion can be considered decisive.<sup>517</sup> In another case, the court found that the child has not reached an age at which his opinion can make a difference.<sup>518</sup> Thus, their opinion could be taken into account but without a decisive influence on the outcome so the court did not find it necessary to carry out the hearing.

<sup>508</sup> BE035 [20 February 2015] Cour d'appel Bruxelles 2014/JR/73 and 2014/FA/113; FR027 [22 May 2008] Cour d'appel de Paris 07/44064.

<sup>509</sup> BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A; BE033 SS v AS [15 April 2014] Hof van Beroep Antwerpen.

<sup>510</sup> FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761; NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; SP016 [24 March 2017] Audiencia Provincial de Tenerife de La Coruña (Sección 4ª) ECLI:ES:APC:2017:478.

<sup>511</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052.

<sup>512</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052.

<sup>513</sup> NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01.

<sup>514</sup> NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816.

<sup>515</sup> NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028.

<sup>516</sup> NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01.

<sup>517</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

<sup>518</sup> SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15; SE109 [15 June 2017] Svea hovrätt ÖÅ 3883-17.

## The child is not heard because of influence/manipulation

In three cases, the courts decided not to hear the children because of (possible) influence or manipulation. In the first case, the fact that the children have been subject to manipulation by their mother's family is seen as one factor, next to age, that shows that the children do not have the required degree of maturity to be heard.<sup>519</sup> Thus, maturity is the overarching consideration; age and manipulation are interpreted as parts of maturity. In the second case, the court found that the child was subject to serious pressure and this together with his young age of four years led the court to decide not to hear the child.<sup>520</sup> In the last case, the court determined that the child can be manipulated by the father and did not hear the child because of this possibility.<sup>521</sup>

## Hearing is not in the best interests of the child.

In one case, the court found that hearing the child would not be in the best interests of the child due to the risk of anxiety.<sup>522</sup>

## Hearing by another court

In eleven cases, the child was already heard during the first instance proceedings so the court found a second hearing of the child unnecessary<sup>523</sup> or inappropriate.<sup>524</sup>

In three cases, the case was dealt with by a court of third instance, which does not deal with questions of fact but only with questions of law.<sup>525</sup>

Nine Croatian cases, were dealt with by a court of second instance or by the Constitutional Court, and this is an *ex parte*-procedure in Croatia.<sup>526</sup> If the child was already heard in first instance, that would be the only hearing; if the child was not heard in first instance, the second instance court would return the case for a new trial with instructions to hear the child.<sup>527</sup>

In two cases, the courts found that hearing the child has to be done by the court of the State of the former habitual residence that will decide on the parental responsibilities.<sup>528</sup>

<sup>519</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A.

<sup>520</sup> IT030 [23 January 2013] Cassazione civ. sez. I 23/01/2013 n. 1527.

<sup>521</sup> SP010 [8 March 2016] Audiencia Provincial de Barcelona (Sección 18ª) ECLI: ES:APB:2016:2563.

<sup>522</sup> BG004 [14 December 2010] РЕШЕНИЕ № 385 ОТ 14.12.2010 Г. ПО ГР. Д. № 218/2010 Г., Г. К., IV Г. О. НА ВКС.

<sup>523</sup> BG040 [30 November 2015] РЕШЕНИЕ № 2357 ОТ 30.11.2015 Г. ПО ГР. Д. № 3787/2015 Г. НА АПЕЛАТИВЕН СЪД - СОФИЯ; GE010 [31 October 2008] OLG Stuttgart 17 UF 234/08; GE012 [4 March 2008] OLG Düsseldorf II-UF 18/08; GE017 [12 October 2007] OLG Stuttgart 17 UF 214/07; GE036 [7 August 2008] OLG Hamm 11 UF 135/08; GE041 [14 March 2017] OLG Stuttgart 17 UF 37/17; GR010 [25 May 2010] Supreme Court of Greece 916/2010; HUN018 [6 December 2016] Curia Pk.500132/2016; MA003 [27 July 2007] 53/2007/1; MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1.

<sup>524</sup> BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A; SP010 [8 March 2016] Audiencia Provincial de Barcelona (Sección 18ª) ECLI: ES:APB:2016:2563.

<sup>525</sup> GE035 [18 July 2006] BVerfG 1 BvR 1465/05; GR008 [2 July 2012] Supreme Court of Greece; IT006 [27 July 2017] Cassazione civile 18649/2017.

<sup>526</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017; CR006 [10 May 2016] Županijski sud u Zagrebu Gž Ob-600/16-2; CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR017 [3 November 2017] Županijski sud u Puli Gž Ob-275/2017-2; CR018 [29 March 2018] Constitutional Court of the Republic of Croatia U-III-5232/2017; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CR026 [11 October 2016] Županijski sud u Zagrebu 13 Gž Ob-1264/16-2; CR027 [16 June 2017] Općanski sud u Rijeci R1 Ob-649/16.

<sup>527</sup> Information obtained from the Croatian country expert.

<sup>528</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084; HUN030 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

### Hearing considered not necessary

In five Romanian cases, the child was not heard because 'hearing of the child was not asked for and is not mandatory'.<sup>529</sup> In Romania it is only mandatory to hear a child from the age of ten.<sup>530</sup>

In two Hungarian cases, the courts seem to add conditions for the hearing of the child next to age and maturity:

The hearing can only be justified having regard to the age and the level of maturity if there is reason to believe that he or she has an ability of understanding: he or she could decide what his or her interests are and he or she could identify a physical or psychological harm or an intolerable situation.<sup>531</sup>

Since these conditions were not fulfilled, the Hungarian courts did not hear the child.

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<sup>529</sup> RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007; RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006; RO045 [12 May 2011] Bucharest Tribunal 62900/3/2010.

<sup>530</sup> RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007; RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006; RO045 [12 May 2011] Bucharest Tribunal 62900/3/2010.

<sup>531</sup> HUN02 [4 July 2016] Central District Court of Pest 29.Pk.500142/2016/12; HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016.

### 3. Conclusion

#### 3.1. The Best Interests of the Child Principle

The case law analysis offers interesting results with regard to the application and interpretation of the best interests of the child principle. The main research question is if and how judges give substance to the principle. Out of the 1000 cases considered, explicit or implicit references to the best interests of the child were found in 495 decisions. It appears hence that the principle is acquiring importance in international child abduction proceedings in Europe; yet, it is not largely and homogeneously diffused among European states. Furthermore, the utilization of the principle varies significantly on a national basis.

When explicitly referring to the best interests of the child, courts link it to different legal basis.

The rationale of the HCCA is the most recurring basis (182 references). This shows that the principle is commonly considered as exhaustively integrated within the Conventions' system. When referring to the HCCA's rationale, judges apply the best interests of the child principle without referral to any other legal basis.

References based on Article 3 UNCRC were found in 62 cases, while 50 cases refer to other (inter)national legal instruments, such as the ECHR, EU Charter on Fundamental Rights, the 1996 Strasbourg Convention on the Exercise of Children's rights and the Brussels IIbis Regulation.

On the other hand, it is interesting that ECtHR case law is used as a legal basis for the best interests of the child principle in only 26 cases. This may suggest that the case law of the ECtHR has not played a fundamental role in the affirmation and diffusion of the principle at hand among European national courts.

Lastly, a significant number of cases (145) do not refer to any specific legal basis when recurring to the principle but ground the latter on other elements. The best interests of the child is here perceived as an overarching principle that finds its *raison d'être* independently from existing legal instruments or case law. A similar reasoning may apply to the cases in which the principle was referred to implicitly (133), meaning that courts give substance to it and its contents even without explicitly citing it.

The outcome of such consideration is decisive in a majority of cases (in 222 cases among the 495 cases where the principle is considered).

The best interests of the child is the most important and decisive element for non-return decisions in 169 cases, while in the other 53 it is decisive, although considered alongside other factors. In these latter cases, two factors seem to play a significant role: the HCCA's objective to restore the *status quo ante* the abduction, and the willingness to 'punish' the abducting parent through return decisions in order to deter international child abductions.

In 85 cases, the best interests are considered at the same level with other factors, not playing a predominant role in the final decision. The elements that counter-balanced the principle at hand are, mainly, the objective to restore the *status quo ante* according to the HCCA's legal framework, the child's views, and the existence of custody rights already assigned to one of the parents.

In 29 cases, the best interests of the child are referred to but not taken into consideration. This happens mainly when judges believe that non-return proceedings are not the best contexts in

which to assess the best interests of the child, since this is a matter to be considered in the proceeding on the merits.

Courts make extensive reference to the grounds of non-return laid down by the HCCA when giving substance to the principle.

The best interests of the child are often used as a ground for a broader interpretation of the HCCA's grounds of non-return in the context of the application of Article 12(2) HCCA. In fact, research shows that in some cases courts have refused to order the return of the child on the basis of their settlement in the new environment, even if the proceedings had commenced within a year from the wrongful removal or retention; this constitutes an extensive interpretation of Article 12(2) HCCA, which goes beyond the limits laid down for its application.

Quite unsurprisingly, the best interests of the child principle plays a predominant role in the application of Article 13(1)(b), that is closely linked to the wellbeing of the child. Two hundred ninety-seven decisions consider the best interests when discussing the application of this provision as a ground for non-return. It is sobering to underline that the exception *ex* Article 13(1)(b) is commonly interpreted restrictively by the courts, and this means that only grave infringements of the child's interests can justify its application.

The principle is given substance also through the right of the child to express their opinion in non-return proceedings: in 69 cases, the principle at hand is linked to Article 13(2) HCCA, under different perspectives. In particular, courts make reference to the provision assessing the importance of hearing the child in order to determine his/her best interests. In this perspective, the best interests of the child are considered the underlying principle and final objective of Article 13(2) HCCA. For the same reason, courts also use the principle to justify the refusal to hear the child in non-return proceedings, or the refusal to take into account the child's opinion (for reasons of age or maturity, and because the child has not expressed a sufficiently clear and unequivocal objection to return).

Research shows that the principle of the best interests of the child is receiving increasing consideration in the context of HCCA's application in Europe, the latter instrument representing the main international legal framework under which judges give substance to the notion at hand. In fact, the principle of the best interests of the child is frequently used in connection with the HCCA's grounds for non-return, and it can lead to an extensive interpretation of such grounds (namely, in the context of the application of Article 12(2) HCCA). In other cases, and with particular reference to the exception laid down by Article 13(1)(b), the best interests of the child are considered relevant but do not have the effect to expand the scope of application of the HCCA's grounds of non-return.

In conclusion, it is fair to say that courts generally encounter difficulties in assessing the best interests of the child. They obviously tend to respect the main goal of the HCCA, namely that abducted children should in principle return to the country of origin. However, non-return decisions cannot follow mechanical patterns, but must take into account the situation of the specific child. The UNCRC requires the best interests of the (individual) child to be taken into consideration in all cases concerning the child. It is in this sense positive to see how courts have managed to reconcile this principle with the different provisions of the HCCA.

In general, the research identified some recurring patterns in the application of the principle, since courts tend to refer to the same elements when assessing the child's wellbeing:



- The living conditions of the child both in the State of origin and in the State of refuge, which are considered in the light of
  - o the settlement of the child in a certain environment;
  - o the existence of a risk that would subject the child to violence or physically/psychologically intolerable situations.
- The relationship that the child enjoys both with the abducting and the left-behind parent, with the general belief that a stable relationship (when possible) with both parents is in the best interests of the child.

### **3.2. Hearing of the Child**

The hearing of the child is one of the elements that can provide an answer to the main research question of this study: 'How can judges give substance to the notion of the best interests of the child in judicial proceedings following an international child abduction'. The hearing of the child can lead to a refusal of return on the basis that the child objects (Article 13(2) HCCA), but the hearing of the child can also be taken into account by the courts in a broader way. The child's views can offer insight into what is in the best interests of the child. Thus, the question at hand is whether the courts see the hearing of the child as an opportunity to gain knowledge of what is in the best interests of the child.

The findings show on the one hand that courts take the hearing into account for broader purposes than only to consider the applicability of Article 13(2) HCCA. On the other hand, the courts remain faithful to the exceptions provided in the HCCA. The child's views are taken into account as (additional) evidence for those exceptions. Children's views are taken into account to assess whether they would face a grave risk if they returned, (Article 13(1)(b) HCCA) and to assess whether they have become settled in their new environment (Article 12 HCCA). The child's views on their own are not used as an exception to return in the light of the best interests independent of the HCCA and its exceptions.

In cases where the child was heard but the court decided not to take their views into account, this was mostly due to their young age, lack of maturity, or influence/manipulation by a parent. We found only two cases in which it seemed that the courts would only consider the child's voice when there is a clear objection to return. In these cases, the courts did not take the child's views into account because the child had no polarising opinion on which the decision could be based or because the child did not expressly object to a return in the second case. The courts thus did not hear the child with the purpose of gaining broader insight into their best interests.

Where the child was not heard during the return proceedings, the following reasons were cited: the low age of the child, lack of maturity of the child, influence/manipulation by a parent, the hearing had already been carried out by another court.

In addition, two courts decided not to hear the child because their opinion would not have a decisive effect on the final outcome given their young age (the children were seven years old). The courts decided before the hearing and thus without knowing the child's views that they will not have an influence. Thus, these courts did not see the hearing as an opportunity to gain insight into the best interests of the child.

Some courts make the hearing of the child dependent on the capability of the children themselves to decide what their best interests are and to link their views to the existence of the grave risk exception. This is interesting in different ways: first, it imposes strict conditions on the hearing of the

child that cannot be found in the HCCA or the Brussels IIbis Regulation; second, it is rather rare that courts accept that the child is able to estimate his or her own best interests; and third, the conditions show that the courts expect to gain insights on the best interests of the child through the hearing of the child and even do not want to proceed to the hearing if this is not the case.

It is therefore clear that courts are reluctant to place too much responsibility in the hands of children. While this is an understandable concern, this protective reflex in some cases denies children the opportunity to have their voice included in return proceedings. Other courts seem to get the balance right: hearing the child in order to bring more information on the situation into the proceedings, including information on the need to apply the HCCA grounds for refusing return.

## **Appendices**

## **Annex I – Qualtrics Survey – Outline**

### **Voice – Case Law Analysis**

#### **General Aim**

This research project aims to analyse if and how judges give substance to the best interests of the child in judicial proceedings following an international child abduction (2005 - 2017).

#### **Why this Survey?**

The scope of this research extends to all EU countries and relies on you as a country expert to analyse your national case law. To make sure all country experts analyse the case law in a uniform manner, we kindly ask you to complete this survey for each case you find. Your results will be analysed in NVivo, a software developed for qualitative research.

#### **Aim of the Specific Questions**

The answers to the questions asked in this survey will ideally lead to a general analysis of each EU country with regard to the question if and how judges give substance to the best interests of the child in judicial proceedings following an international child abduction.

Hypothetically, the case law might show that judges interpret the concept of the best interests of the child as a concept that is:

- (1) unnecessary, because they are of the opinion that The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction includes this concept already;
- (2) strictly connected to the exceptions of Article 12, Article 13(1)(a), Article 13(1)(b), Article 13(2) and Article 20 of the Convention;
- (3) connected to the aforementioned exceptions when these exceptions are read expansively; or (4) to be interpreted independently from the Hague Convention and its aforementioned exceptions. Furthermore, the analysed case law might reveal some country-specific patterns, e.g. with regard to the best interest of the child and/or with regard to the hearing of the child in light of finding these best interests.

The case law might show i.a. whether there is a difference in the court's approach regarding the hearing and the best interests of the child depending on the application of Brussels IIbis or the Hague Convention. Specifically, with regard to best interests, we will also be able to analyse whether there has been a difference in discussing the best interests after the landmark case law of the ECtHR on this matter. Regarding the hearing of the child, we can analyse whether there are national patterns concerning (1) the minimum age from which children are considered old enough to be heard, and (2) when judges find children to be mature enough to be heard and to take their views into consideration.

#### **Output**

The results of the complete research will be used to organise two trainings for legal professionals: one pilot training and one full training. The results and training should help legal professionals in their assessment of the best interests of the child in cases of international child abduction.

Furthermore, the results will lead to a research report which will be published. We will keep you updated about publication of this report.

### **Contact**

Should you have any questions about the survey or during the research process, please do not hesitate to contact any of us by email:

[giovanni.sciacaluga@edu.unige.it](mailto:giovanni.sciacaluga@edu.unige.it)

[francesca.maoli@edu.unige.it](mailto:francesca.maoli@edu.unige.it)

[tine.vanhof@uantwerpen.be](mailto:tine.vanhof@uantwerpen.be)

[sara.lembrechts@uantwerpen.be](mailto:sara.lembrechts@uantwerpen.be)

### **Practical information before starting the survey:**

Please use one survey for each case. If you have a case in first instance and appeal, please use two separate surveys. You can only work on one survey at a time. If you close the survey before completion, your answers are automatically saved. To continue where you have left, just click the link in your email. The researchers have direct access to your answers, you do not need to send them yourself. Please save a copy of the full case (in pdf or word) on your own computer for future reference.

### General Facts About the Court Decision

All cases should be about a return procedure following a wrongful removal or retention of a child, as understood by Brussels IIbis and/or the Hague Child Abduction Convention. The analysis concerns cases adopted between 1 March 2005 (entry into force of Brussels IIbis) and 31 December 2017 (start of this project). Other cases should not be included in the analysis.

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Please give this case a sequence number, starting with your country code (e.g. case one for Belgium would be BE001).

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Case reference and/or title (including the name of the court).

Which court decided the case?

- A court of first instance (1)
  - Second instance (2)
  - Third instance (3)
  - European Court of Human Rights (4)
- 

Date of the judgment (dd/mm/yyyy)

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Is this case linked with any other case you discuss (i.e. first instance and appeal)?  
If yes, please enter the case reference and/or title and the sequence number.

- No (1) \_\_\_\_\_
- Yes (2) \_\_\_\_\_

Countries involved:

- The country the child is abducted from (1) \_\_\_\_\_
- The country the child is abducted to (2) \_\_\_\_\_
- The country in which the case is decided (3) \_\_\_\_\_

How old is/are the child(ren) who is/are involved in the procedure at the moment of the judgment?

Age child 1 (1) .....

Age child 2 (2) .....

Age child 3 (3) .....

Age child 4 (4) .....

Age child 5 (5) .....

Age other children (6) .....

Who abducted the child(ren)?

Father (1)

Mother (2)

Other (please specify) (3) .....

What was the decision of the court?

Return (1)

Non-return (2)

Case sent back to previous instance without deciding on the merits (e.g. by the Court of Cassation) (3)

Skip To: Q24 If What was the decision of the court? = Case sent back to previous instance without deciding on the merits (e.g. by the Court of Cassation)

Which legal bases did the court consider? (Multiple answers are possible)

- Hague Convention Art. 12 (1)
  - Hague Convention Art. 13(1)(a) (2)
  - Hague Convention Art. 13(1)(b) (3)
  - Hague Convention Art. 13(2) (4)
  - Hague Convention Art. 20 (5)
  - Other provisions in the Hague Convention (please specify) (6)
- 

- Brussels IIbis Art. 11(2) (7)
  - Brussels IIbis Art. 11(4) (8)
  - Brussels IIbis Art. 11(6-8) (9)
  - Other provisions in Brussels IIbis (please specify) (10)
- 

- None of the above (please specify if possible) (11)
-



### Does the case discuss the best interests of the child?

The best interests of the child have been mentioned in various international instruments and case law regarding children and their rights. Increasingly, the concept plays a role in matters of child abduction as well. This question aims to find whether the court discusses the concept explicitly, implicitly (i.e. not referring to the wording 'best interest/s' but developing an interpretation of what is best for the child in a given situation), or not at all.

- Yes, the best interests are discussed explicitly (1)
- Yes, the best interests are discussed implicitly (for example but not limited to: the child's well-being, development, interests, what is good / better / best / not good / worse / worst for the child etc...) (2)
- No, the best interests are not discussed (if no, the survey ends) (3)

Skip To: Q38 If Does the case discuss the best interests of the child? The best interests of the child have been = No, the best interests are not discussed (if no, the survey ends)

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Display This Question:

If Does the case discuss the best interests of the child? The best interests of the child have been... = Yes, the best interests are discussed <strong>explicitly</strong>

The explicit reference is based on (multiple answers are possible):

- Article 3(1) of the Convention on the Rights of the Child (1)
- The rationale of the Hague Child Abduction Convention (2)
- Other national or international instruments. Please specify which instrument and provide the quote and a translation if this reference is not in English. (3)  
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- The understanding of best interests according to the case law of the European Court of Human Rights. Please specify which case(s). (4)  
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- Other national or international case law. Please specify which court(s) and please provide the quote and the translation if this reference is not in English. (5)  
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- Other. Please specify and please provide the quote and the translation if this reference is not in English (6) -----

Display This Question:

If Does the case discuss the best interests of the child? The best interests of the child have been... = Yes, the best interests are discussed <strong>implicitly</strong>(for example but not limited to: the child's well-being, development, interests, what is good / better / best / not good / worse / worst for the child etc...)

Concerning the implicit reference: please quote the relevant wording in the judgment in the original language and its translation in English.

- Original language (1) -----
  - Translation in English (2) -----
-

### Analysis on the best interests of the child

The following questions aim to find how the court assessed the best interests of the child and what impact this assessment had on the final outcome to order (non-)return. The questions concern both explicit and implicit reference to the 'best interests' principle.

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Does the court link any of the following grounds to decide (non-)return to the best interests of the child, either explicitly or implicitly? (Multiple answers are possible; specifications will be asked in the next question)

- Being settled in a new environment (Art. 12 Hague Convention) (1)
  - Not exercising custody/consent/acquiescence (Art. 13(1)(a) Hague Convention) (2)
  - Grave risk (Art. 13(1)(b) Hague Convention) (3)
  - Objection of the child (Art. 13(2) Hague Convention) (4)
  - Fundamental rights and freedoms (Art. 20 Hague Convention) (5)
  - The court did not refer to any of the grounds for (non-)return as provided by the Convention (6)
- 

Display This Question:

If Does the court link any of the following grounds to decide (non-)return to the best interests of... = Being settled in a new environment (Art. 12 Hague Convention)

How are the best interests in relation to Art. 12 defined by the court, which elements are taken into consideration?

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Display This Question:

If Does the court link any of the following grounds to decide (non-)return to the best interests of... = Not exercising custody / consent / acquiescence (Art. 13(1)(a) Hague Convention)

How are the best interests in relation to Art. 13(1)(a) defined by the court, which elements are taken into consideration?

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Display This Question:

If Does the court link any of the following grounds to decide (non-)return to the best interests of... = Grave risk (Art. 13(1)(b) Hague Convention)

How are the best interests in relation to Art. 13(1)(b) defined by the court, which elements are taken into consideration?

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Display This Question:

If Does the court link any of the following grounds to decide (non-)return to the best interests of... = Objection of the child (Art. 13(2) Hague Convention)

How are the best interests in relation to Art. 13(2) defined by the court, which elements are taken into consideration?

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Display This Question:

If Does the court link any of the following grounds to decide (non-)return to the best interests of... = Fundamental rights and freedoms (Art. 20 Hague Convention)

How are the best interests in relation to Art. 20 defined by the court, which elements are taken into consideration?

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Page Break

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To what extent did the best interests of the child have an impact on the final outcome of the decision?

The best interests of the child were decisive for the Court's decision. Please specify why. (1) -----

The best interests of the child were decisive, although other factors were considered. Please specify which factors and how the balance was made. (2) -----

The best interests of the child were considered equally with other factors. Please specify which factors and how the balance was made. (3) -----

The best interests of the child were discussed, but not taken into account. Please specify why. (4) -----

It is not clear to what extent the best interests of the child had an impact. (5)

Does the court say anything else related to the best interests of the child?

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### Analysis on the hearing of the child

The following questions aim to find to what extent the court sought the child's views to assess his/her best interests. The hearing of the child is not limited to Art. 13(2) of the Hague Convention.

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Is the child heard during the legal procedure?

- Yes, the child is heard (1)
- No, the child is not heard (2)
- Unknown whether the child is heard (if unknown, the survey ends) (3)

Skip To: Q38 If Is the child heard during the legal procedure? = Unknown whether the child is heard (if unknown, the survey ends)

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Display This Question:

If Is the child heard during the legal procedure? = Yes, the child is heard

Is the child heard by:

- The judge (1)
  - A psychologist, social worker or other professional appointed by the court (2)
  - Other professional (please specify) (3)
- 

Unknown (4)

---

Display This Question:

If Is the child heard during the legal procedure? = No, the child is not heard

What arguments does the court use to argue against the hearing of the child? (Multiple answers are possible)

- Age (please specify) (1) .....
- Maturity (please specify) (2) .....
- Influence or manipulation (please specify) (3)  
.....
- Hearing is not in the best interests of the child (please specify) (4)  
.....
- Other (please specify) (5) .....
- None (6)

Skip To: Q38 If What arguments does the court use to argue against the hearing of the child?  
(Multiple answers ar... = Age (please specify)

Skip To: Q38 If What arguments does the court use to argue against the hearing of the child?  
(Multiple answers ar... = Maturity (please specify)

Skip To: Q38 If What arguments does the court use to argue against the hearing of the child?  
(Multiple answers ar... = Influence or manipulation (please specify)

Skip To: Q38 If What arguments does the court use to argue against the hearing of the child?  
(Multiple answers ar... = Hearing is not in the best interests of the child (please specify)

Skip To: Q38 If What arguments does the court use to argue against the hearing of the child?  
(Multiple answers ar... = Other (please specify)

Did the hearing of the child contribute to determine the best interests of the child?

- Yes, hearing contributed to determine the best interests of the child (1)
- No, hearing did not contribute to determine the best interests of the child (2)
- Unknown whether hearing contributed to determine the best interests of the child (3)



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Display This Question:

If Did the hearing of the child contribute to determine the best interests of the child? = No, hearing did not contribute to determine the best interests of the child

Or Did the hearing of the child contribute to determine the best interests of the child? = Unknown whether hearing contributed to determine the best interests of the child

Does the court give any information about the content of the hearing? If yes, please specify.

Yes (1) \_\_\_\_\_

No (2)

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Display This Question:

If Did the hearing of the child contribute to determine the best interests of the child? = Yes, hearing contributed to determine the best interests of the child

Please specify who made the assessment concerning the best interests of the child.

\_\_\_\_\_

\_\_\_\_\_

Display This Question:

If Did the hearing of the child contribute to determine the best interests of the child? = Yes, hearing contributed to determine the best interests of the child

Does the court give any information about the hearing? Please specify how any of these issues were addressed:

- Content of the hearing (1) .....
- The child assessing his or her best interests (2) .....
- Context and/or modalities of the hearing (e.g. through videoconferencing, in the presence of a third party, any particular child-friendly measures ...) (3)  
.....
- Any particular issues or difficulties (e.g. in communicating with the child) (4)  
.....
- Any insights in the personality and/or the behaviour of the child (5)  
.....
- Other relevant matters, please specify (6)  
.....

Display This Question:

If Did the hearing of the child contribute to determine the best interests of the child? = Yes, hearing contributed to determine the best interests of the child

To what extent did the child's views have an impact on the final outcome of the (non-)return decision?

The child's views were decisive for the court's decision, please specify why (1)

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The child's views were decisive, although other factors were considered. Please specify which factors and how the balance was made (2)

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The child's views were considered equally with other factors. Please specify which factors and how the balance was made (3)

-----

The child's views were sought but not taken into account. Please specify why (4)

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It is not clear to what extent the child's views had an impact (5)

Is there anything you would like to add that is not reflected in this survey?

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End of Block: Questions for analysis

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### **Annex II – List of Factors Concerning the Best Interests of the Child**

Factors that courts consider to be in the best interests of the child
To build / maintain / restore the relationship with the parent

The right of the child to build a relationship with each of the child's parents (Article 24(3) of the Charter on Fundamental Rights of the EU)
To return with abducting parent (strong relationship)
The relationship with siblings
Satisfactory psychological and educational environment
Stable and familiar environment
Development in safe environment
Decent living conditions
Suitable education (by parents)
Health & physical development
Balanced growth
Equilibrium
To reduce social-emotional imbalances
Peace, stability and clarity
Clear rules, structure and boundaries
The necessity to learn a foreign language (positive influence from the perspective of educational and general intellectual development)
To not be wrongfully removed / retained
To not become victim of a fait accompli (the wrongful removal)
To restore the status quo ante
The immediate restoration of violated parental responsibility rights
The judge of the State of habitual residence deciding on exercising parental authority & right on personal contact
To provide a <i>Verfahrenspfleger</i> to safeguard best interests in procedural terms (in Germany)

Factors that courts consider to be not contrary to the best interests of the child but not necessarily in the best interests of the child
Living circumstances in the State of habitual residence (small cabin in forest without running water or electricity; general situation in State is not so unsafe and parties lived in secure environment; low standard of living and poor social conditions; lack of income and lack of housing)
Fact that the best interests are less well served in the country of origin than in the country of refuge
Fact that left-behind parent has less financial capacity than the abducting parent
Child would be taken care of in a crèche or by a third party
Placement of the child
Return when adequate measures are taken
Need to readapt (other language / culture)
Inconvenience / nuisance resulting from return
Separation from the abducting parent (only under limited conditions contrary to best interests)
Mere existence of criminal charges and investigations against a parent

Factors that courts consider to be contrary to the best interests of the child
Abuse / maltreatment / physical or psychological harm
Domestic violence (against other parent and / or against child)
Threat of circumcision
Addiction by parents
Weapon possession by parents
Radical ideas of one parent
Psychological instability of parent
Insufficient finances / lack of work of parent
Insufficient hygienic and health-related care
Insufficient pedagogical abilities of parent
Insufficient bond / contact between child and parent
Lack of stability and steadiness
Lack of interests of parent in child
Lack of suitable conditions for raising and educating the child
Lack of adequate place for living
Ambiguity about place of residence of parent
Living in a shelter
Living in a safe house
Child fearing parent
Acute suicide risk of child
Returning to war zone / refugee camp
Political persecutions upon return
Separation from parents
Separation from siblings
Separation from other family members
Interrupting education
Lose knowledge of language
Excessive relocation

Difficulties to readapt to different environment
Prolonged period of lawlessness
Return against wish of the child
Return while child is integrated
Immediate return without being prepared
A return in violation of any of the grounds for refusal
The hearing of the child / to take into account the child's opinions
To search for help to resolve child's loyalty conflict
Parents following system therapy
Long duration of the proceedings
To hear the child when there is a risk of anxiety
Lack of adequate measures (Article 11(4) Brussels IIbis)
Conflicts between parents
Involvement in the dispute between the parents
Repeated violation by parents of judicial decisions concerning habitual residence
To impair access right of parent
To hinder contact between child and one parent
Brutal break from one parent
Disruption of child's equilibrium
The abduction of the child by the parent
Legalize a situation based on injustice (the wrongful removal of the child by one parent, in breach of custody rights of the other parent)
Parents focusing on mutual communication / cooperation / understanding
Mediation to resolve the conflict
Self-regulation of family life
Factors that courts consider to be in the best interests of the child

## **Annex III Country Analysis**

## Belgium

### Country File – Belgium<sup>532</sup>

#### General Data

For Belgium, 36 relevant cases have been identified. A total of 51 children were involved in these proceedings. Twenty-two cases were dealt with in courts of first instance, ten in courts of second instance and four in a court of third instance. In the majority of these cases (56%) the Hague Convention on Child Abduction was the only legal basis considered by the court, in 25% of the cases only Brussels IIbis was considered and in 6% of the cases, Brussels IIbis was considered together with the Hague Convention on Child Abduction.

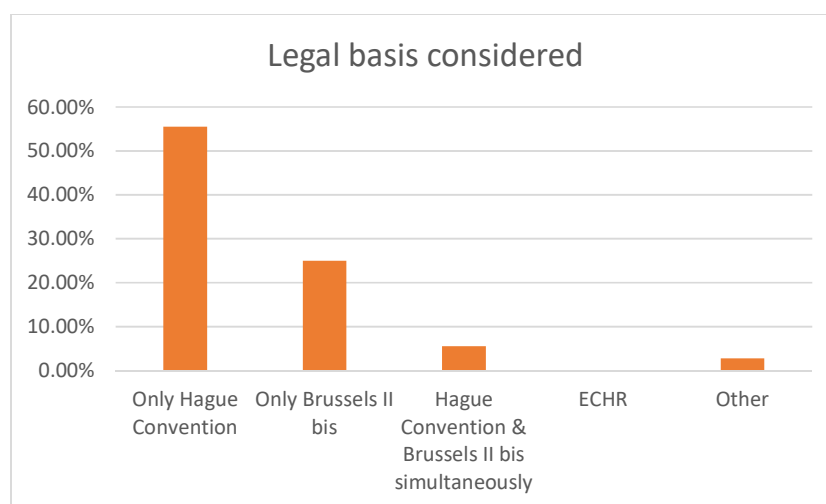


Figure (1) – Legal basis considered

In most of the cases, namely 64%, the court decided that the child did have to return to his or her State of former habitual residence. In twelve cases (or 33%) return was rejected.

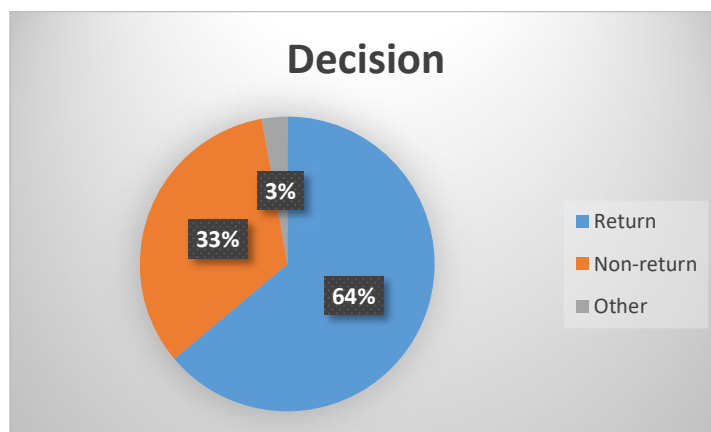


Figure (2) - Decision

<sup>532</sup> The Belgian cases are collected and analysed by Tine Van Hof, VOICE researcher.



In three quarter of the cases it was the mother who abducted the child.

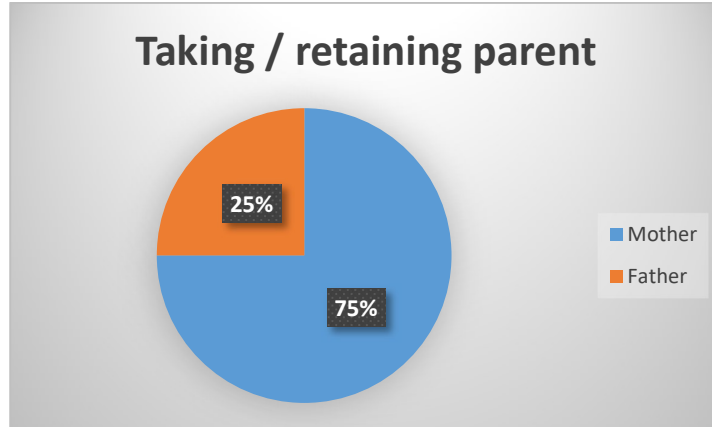


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

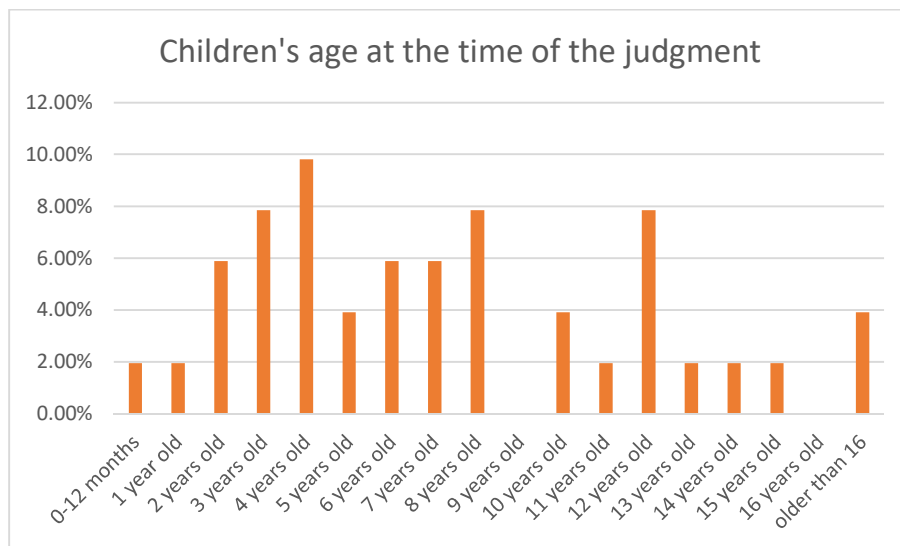


Figure (4) – Children's age at the time of the judgment

### Best Interests of the Child

In 47% of the cases, the courts referred explicitly to the best interests of the child, in 6% of the cases an implicit reference could be found and in 47% of the cases courts did not refer to the best interests at all.

## Reference to the best interest of the child

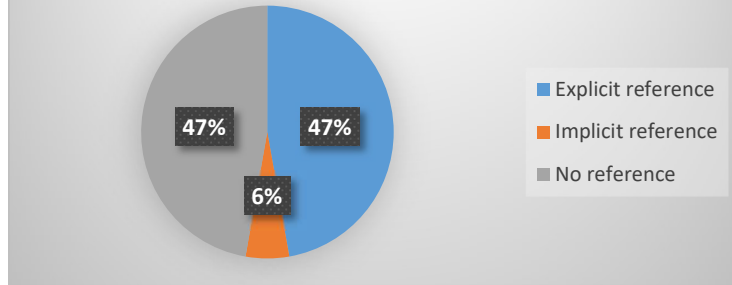


Figure (5) – Reference to the best interests of the child

## Explicit reference

An explicit reference to the best interests of the child can be found in seventeen cases. In five cases this reference was based on Article 3(1) of the Convention on the Rights of the Child<sup>533</sup> and in three cases on the rationale of the Hague Convention on Child Abduction.<sup>534</sup>

The case law of the ECtHR was referred to in three cases. However, the courts in these cases did not refer to the same case. Once reference was made to *Maumousseau and Washington v France*,<sup>535</sup> once to *Neulinger and Shuruk v Switzerland*,<sup>536</sup> and once in general to the case law of the ECtHR on Article 8 of the ECHR.<sup>537</sup>

In most cases, however, the explicit reference to the best interests of the child was not based on one of the mentioned grounds but on other considerations.

In three cases the courts contend that it is in the best interests of the child to be sent back so that the courts in the State of former habitual residence can decide, taking the best interests of the child into account, on parental authority and right on personal contact.<sup>538</sup> In one case however, the court nuances the principle that a prompt return would be in the best interests of the child:

The objectives of the Hague Convention on Child Abduction to discourage international child abduction attempts by ensuring their immediate return to their place of former habitual residence can only be achieved if a quick decision can be made, otherwise the child's interests may have to be sacrificed by almost automatic application of the return order.<sup>539</sup>

Furthermore, some courts stress that the decision should be inspired by seeking the best interests of the child, and not by the aim of punishing the abducting parent for his or her behaviour to the detriment of the child.<sup>540</sup>

The best interests of the child are also repeatedly mentioned with regard to the child's relationship with his or her parents. In one case the importance of this relationship was set out in more general terms: 'Any decision concerning a child must take into consideration the best interests of the child and, in particular, be concerned with guaranteeing his fundamental right to build a fulfilling relationship with each of his parents, regardless of the vagaries of the love life of the parents.'<sup>541</sup> In two cases, the courts expressed the importance of maintaining or restoring the relationship between the child and the left-behind father.<sup>542</sup> In one case, the court found it to be in the interests

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<sup>533</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65; BE005 [5 March 2007] Tribunal de première instance Mons; BE020 [8 March 2010] Rechtbank van eerste aanleg Gent 09/3779/A; BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A; BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

<sup>534</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65; BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113; BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>535</sup> BE018 [11 February 2010] Cour d'appel Bruxelles.

<sup>536</sup> BE030 [4 March 2013] Cour de Cassation C.11.0675.F.

<sup>537</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>538</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65; BE018 [11 February 2010] Cour d'appel Bruxelles; BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113.

<sup>539</sup> BE018 [11 February 2010] Cour d'appel Bruxelles.

<sup>540</sup> BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A; BE030 [4 March 2013] Cour de Cassation C.11.0675.F.

<sup>541</sup> BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113.

<sup>542</sup> BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A; BE028 [15 May 2012] Cour d'appel Bruxelles.

of the children to meet with both their father (who was the left-behind parent) and their mother if she were released from prison.<sup>543</sup>

The situation in the State of former habitual residence led to a different conclusion in two cases. In the first case, the court mentioned that ‘the children are apparently integrated here and it is not in their interests to command their return to the Netherlands in view of the dangerous situation there’.<sup>544</sup> This dangerous situation refers to the behaviour of the father who is said to be extremely violence. Thus, the court found the situation in the State of former habitual residence not in the best interests of the children. In another case, the court states that the interests of the child are not served by staying in Belgium. The court based this conclusion on a report of the social services that stated ‘the child attended a school in the State of former habitual residence that offers special education for children with learning disabilities’.<sup>545</sup> In this latter case, a return was found to be in the best interests of the child.

Lastly, in one case it was mentioned that a separation between mother and child would not be in the best interests of the child.<sup>546</sup>

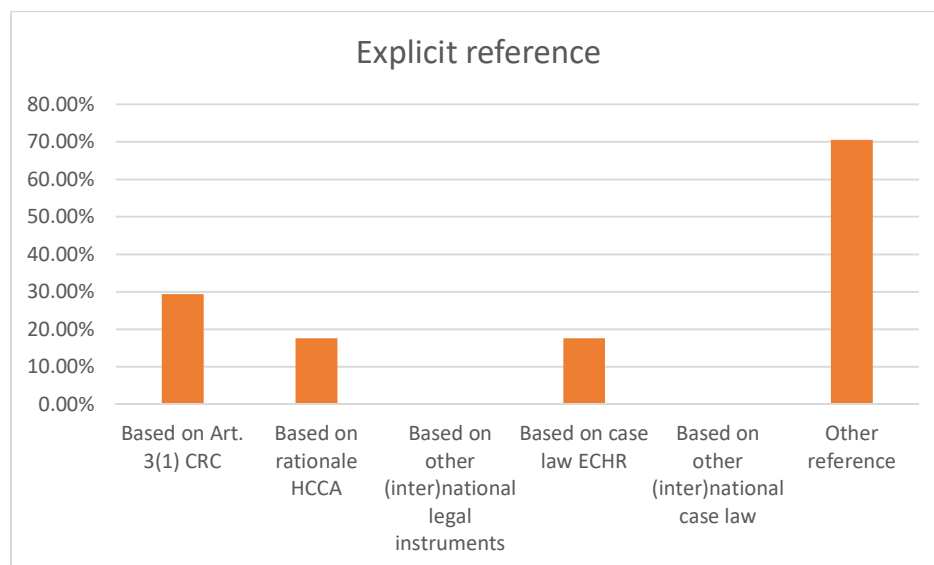


Figure (6) – Explicit reference

### Implicit reference

In two cases, the courts did not refer to the best interests of the child as such but it is apparent from the considerations that they took into account the best interests nevertheless. In the first case the court decided to refuse return because ‘it is not appropriate to again interrupts the children’s education, which has now started here’.<sup>547</sup> This shows that the court did not find it in the best

<sup>543</sup> BE036 [17 June 2016] Cour d’appel Bruxelles 2016/FA/180.

<sup>544</sup> BE011 [19 December 2008] Voorzitter Rechtbank van eerste aanleg Antwerpen, 08/3793/B.

<sup>545</sup> BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A.

<sup>546</sup> BE030 [4 March 2013] Cour de Cassation C.11.0675.F.

<sup>547</sup> BE015 [16 September 2009] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/903/B.

interests of the children to stop the education that they enjoy here to return to their State of former habitual residence. In the other case, the court stated that the safety of the children is not ensured when they return to their State of former habitual residence.<sup>548</sup> In this particular case the safety of the children was threatened since the boyfriend of their mother was violent towards them (mostly when nobody was around), and when the mother was informed she did not appear to respond adequately to the violence.

In one case in which the best interests were discussed explicitly, the court says the following which can be interpreted as being implicitly in the children's best interests: 'Upon their [the children's] return, a file will be opened with the aim to protect and assist them.'<sup>549</sup>

### **Interpretation of grounds for non-return in relation to best interests**

#### **Article 12, 13(1)(a), 13(1)(b), 13(2) and 20 Hague Convention on Child Abduction**

In one case all grounds for non-return together are linked with the best interests of the child. The court said 'all previous considerations do not detract from Article 3(1) Convention on the Rights of the Child'.<sup>550</sup> These 'previous considerations' point to the discussion of the court of Articles 12, 13(1)(a), 13(1)(b), 13(2) and 20 Hague Convention on Child Abduction. Thus, when considering these Articles, one should not forget to take into account the best interests of the child as determined in Article 3(1) Convention on the Rights of the Child.

#### **Article 13(1)(b) Hague Convention on Child Abduction**

In six cases courts referred to the best interests of the child when discussing whether there exists a grave risk that the return would expose the child to physical or psychological harm or place the child in an intolerable situation.

The following factors are considered to be contrary to the best interests of the child: a prolonged period (nearly a year) of lawlessness,<sup>551</sup> physical and psychological violence,<sup>552</sup> the threat of circumcision,<sup>553</sup> and the lack of stability and steadiness.<sup>554</sup> That the child would be taken care of in a crèche or by a third party, on the other hand, is not considered to be contrary to the best interests of the child.<sup>555</sup>

In one case, the court used the best interests to decide on the scope of Article 13(1)(b) and more specifically to define the scope of the phrase 'grave risk'. According to the court 'the question is which treaty [the Hague Convention on Child Abduction or the Convention on the Rights of the Child] should take precedence, or else whether the interests of one parent is more important than the interests of the child'.<sup>556</sup> This question is answered by the court in the following way:

<sup>548</sup> BE021 [26 April 2010] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/8332/A.

<sup>549</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A.

<sup>550</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>551</sup> BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A.

<sup>552</sup> BE021 [26 April 2010] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/8332/A.

<sup>553</sup> BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A.

<sup>554</sup> BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A.

<sup>555</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65.

<sup>556</sup> BE020 [8 March 2010] Rechtbank van eerste aanleg Gent 09/3779/A.

Where the interpretation of the Hague Convention on Child Abduction deals with the content of an Article, more specifically what is the scope of “risk”, the Convention on the Rights of the Child is in itself much more formal: the interests of the child must always be taken into account and they can be opposite to the interests of one parent. The statement that “grave risk” needs to be interpreted strictly so that it only includes war or famine, does not take into account the provisions and purpose of the Convention on the Rights of the Child. Now that this last treaty is more recent, it is logical that this treaty prevails over the Hague Convention on Child Abduction. In addition, this treaty currently provides the greatest legal protection for a child.<sup>557</sup>

Thus, since the Convention on the Rights of the Child prevails, the court decides that the phrase “grave risk” has to be interpreted in a larger manner than just war or famine because otherwise it would not take into account the considerations and objectives of the Convention on the Rights of the Child. However, the Court of Appeal does not follow this reasoning and states: ‘The Court does not follow the reasoning of the first judge that the Convention on the Rights of the Child would take precedence over the Hague Convention on Child Abduction, simply because it is more recent’ and furthermore:

The Court of Appeal assumes an interpretation of the grounds for refusal to return within the boundaries outlined by the Hague Convention on Child Abduction, which also has the interests of the child in mind. A great caution in the discretion of the judge is necessary in order to prevent the Hague Convention on Child Abduction from being a dead letter.<sup>558</sup>

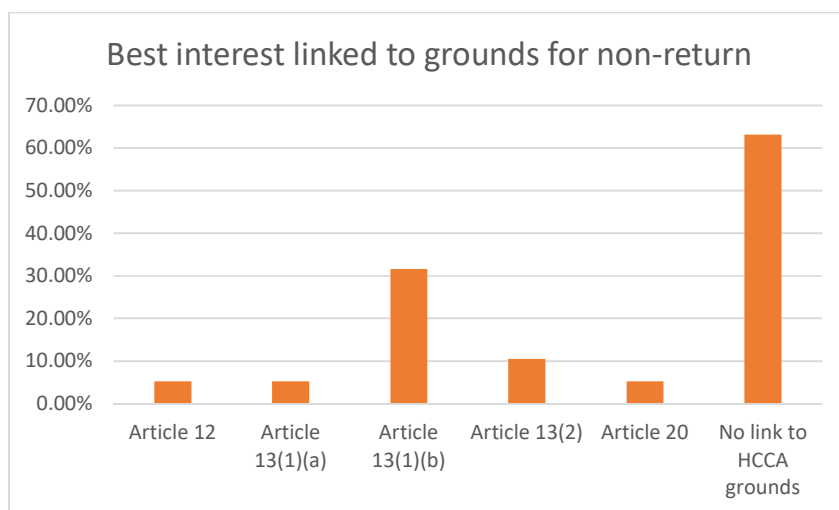


Figure (7) – Best interests linked to grounds for non-return

## Impact of the best interests on the final decision

### The best interests are decisive

In thirteen of the nineteen cases in which the best interests are explicitly or implicitly mentioned, these best interests have turned out to be decisive for the court’s decision. In two cases the courts

<sup>557</sup> BE020 [8 March 2010] Rechtbank van eerste aanleg Gent 09/3779/A.

<sup>558</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

say in their introductory remarks that the main goal of the proceeding is to seek the best interests of the child and take a decision based on this.<sup>559</sup> In a number of cases the courts' final consideration as to why the child does or does not have to return is fully based on the best interests of the child.<sup>560</sup>

### The best interests are considered equally with other factors

In one case the court first discusses all grounds for non-return (namely Articles 12, 13(1)(a), 13(1)(b), 13(2) and 20 Hague Convention on Child Abduction) and afterwards the best interests of the child as defined in Article 3(1) Convention on the Rights of the Child.<sup>561</sup>

In another case the court has to decide whether Article 13(1)(b) can lead to a rejection of return.<sup>562</sup> To take this decision, the court takes into account several factors: the weapon possession of the father, the physical violence against the mother, the drug problems of the father, the lack of interests in the child that the father expresses and the behavioural problems of the child. The best interests of the child are then explicitly discussed with regard to one factor in particular, namely the separation between mother and child. Thus, the best interests of the child were considered among all other factors.

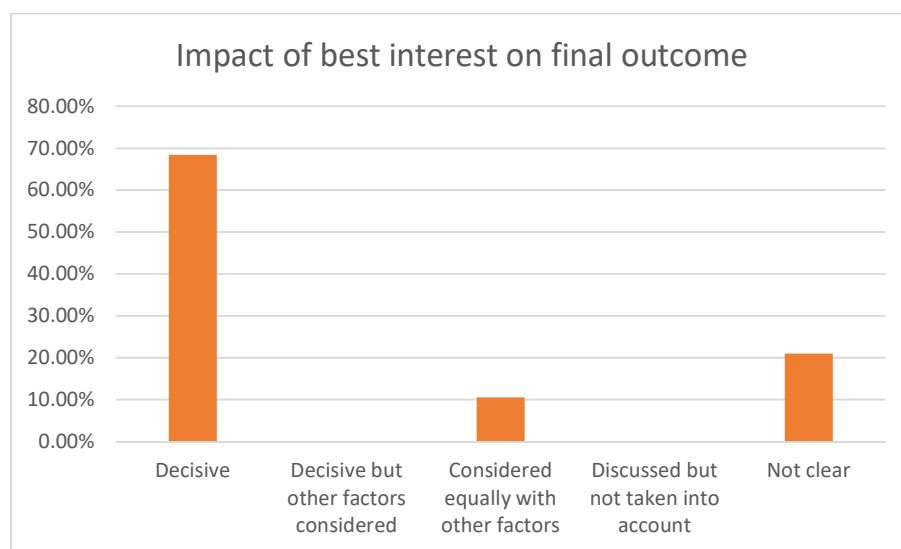


Figure (8) – Impact of best interests on final outcome

## Hearing of the Child

<sup>559</sup> BE009 [24 November 2008] Tribunal de première instance Bruxelles 08/13221/A; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A.

<sup>560</sup> BE008 CG v BS [30 October 2008] Hof van Cassatie C.06.0619.F; BE011 [19 December 2008] Voorzitter Rechtbank van eerste aanleg Antwerpen 08/3793/B; BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A; BE021 [26 April 2010] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/8332/A; BE023 [22 June 2010] Rechtbank van eerste aanleg Gent 10/167/A; BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A; BE028 [15 May 2012] Cour d'appel Bruxelles; BE030 [4 March 2013] Cour de Cassation C.11.0675.F; BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113; BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>561</sup> BE002 H v A [25 October 2005] Hof van Beroep Gent 2004/RK/65

<sup>562</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346.

In four cases, the child was heard; in six cases, the child was not heard and in nine cases it was unknown whether the child was heard.

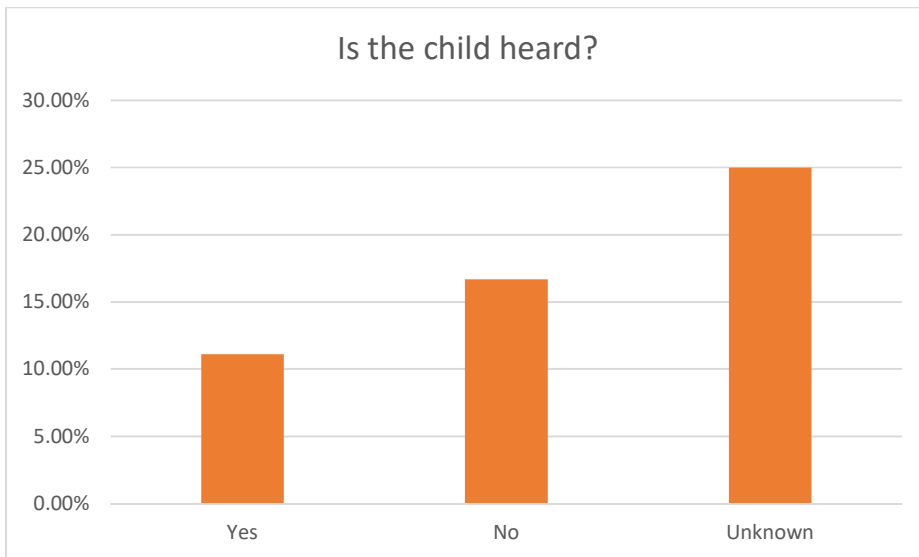


Figure (9) – Is the child heard?



The main reason for not hearing the child is that this would be inappropriate given his or her age. This reason was invoked in five cases with the children's age ranging two and a half years old to seven years old.<sup>563</sup> In two cases in which the age was given as a reason not to hear the child, this was accompanied by the argument that the child also lacked the maturity to be heard.<sup>564</sup> In one case, the court said that the children lacked the maturity to be heard given their young age and the fact that they have been subject to manipulation by their mother's family.<sup>565</sup> Thus, in this latter case maturity is the overarching consideration and age and manipulation are seen as parts of maturity. Lastly, the court in one case considered hearing of the child inappropriate given that the child was already heard in a previous judicial procedure.<sup>566</sup>

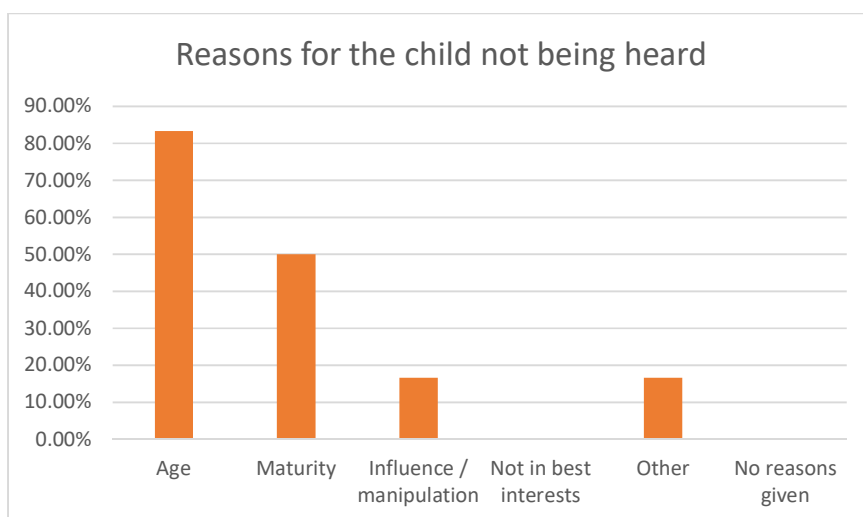


Figure (10) – Reasons for the child not being heard

Only in one of the four cases in which the child was heard, is there information on who carried out this hearing and, in that case, it was a judge.<sup>567</sup>

During the hearing, children mostly spoke about whether they wanted to return, living circumstances with each parent, the relation with their parents, the relation with other family members and school.<sup>568</sup>

Only in one case in which the child was heard, can it be said that the hearing contributed to the determination of the best interests of the child and that the child's views were decisive for the final decision.<sup>569</sup> In this case, the children told during their hearing that they fear the boyfriend of their mother since he beats and belittles them. This physical and psychological violence came to the

<sup>563</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A; BE016 [20 October 2009] Tribunal de première instance Bruxelles 09/9117/A; BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346; BE033 SS v AS [15 April 2014] Hof van Beroep Antwerpen; BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113.

<sup>564</sup> BE024 [23 December 2010] Hof van Beroep Gent 2010/AR/1346; BE035 [20 February 2015] Cour d'appel Bruxelles, 2014/JR/73 and 2014/FA/113.

<sup>565</sup> BE012 [9 January 2009] Président du Tribunal de première instance Bruxelles 08/12903/A.

<sup>566</sup> BE026 [6 October 2011] Rechtbank van eerste aanleg Gent 11/3355/A.

<sup>567</sup> BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>568</sup> BE015 [16 September 2009] Voorzitter Rechtbank van eerste aanleg Antwerpen 09/903/B; BE021 [26 April 2010] Voorzitter Rechtbank eerste aanleg Antwerpen 09/8332/A; BE036 [17 June 2016] Cour d'appel Bruxelles 2016/FA/180.

<sup>569</sup> BE021 [26 April 2010] Voorzitter Rechtbank eerste aanleg Antwerpen 09/8332/A.

attention of the court via the hearing of the children so that this hearing was decisive for the court's decision not to return the children based on Article 13(1)(b) Hague Convention on Child Abduction.

## Bulgaria

### Country File – Bulgaria<sup>570</sup>

#### General data

The collected data included 59 decisions, of which 34 are first instance decisions, 19 second instance, and 5 third instance decisions. The total number of children involved in the cases is 62, spread among different ages as shown in Figure (1).

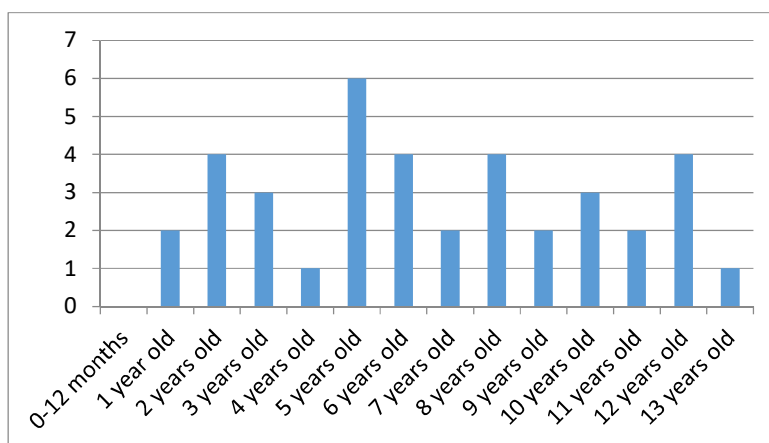


Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (34 decisions), whereas in 22 cases the father was the abductor (in 2 cases it is unknown).

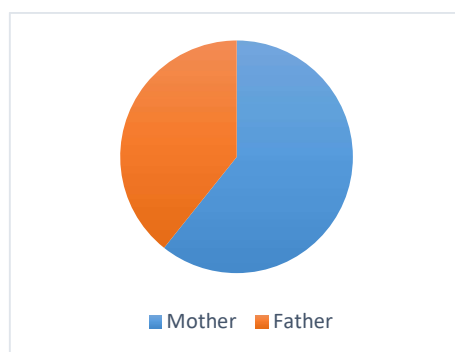


Figure (2) – Taking/retaining parent

Nineteen cases ended up with an order of return, 35 concluded for the non-return of the child. In 5 cases, the result was other.<sup>571</sup>

<sup>570</sup> The Bulgarian cases are collected by Boriana Musseva, Professor University of Sofia.

<sup>571</sup> Cases sent back to previous instance without deciding on the merits.

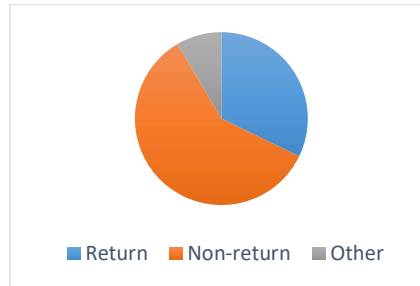


Figure (3) – Decision's outcome

Fifty-two decisions referred to the 1980 Hague Convention legal framework. In two cases, reference was only to Brussels IIbis Regulation (Articles 10 and 7). In one case, it was to the Bulgarian Family Code.

### Best Interests of the Child

Out of 59 decisions, 49 referred, either explicitly or implicitly, to the best interests of the child.

#### Explicit reference

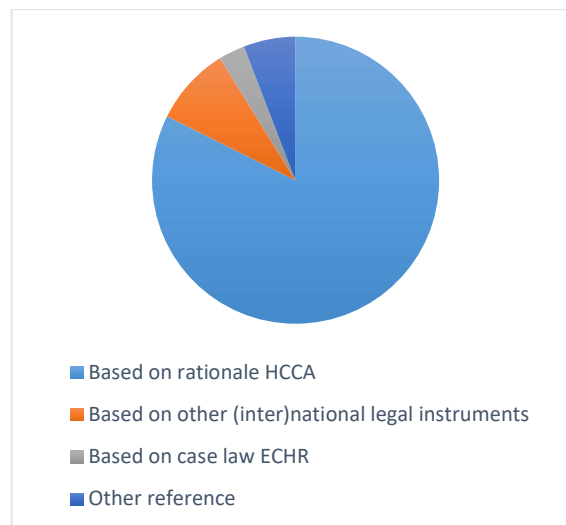


Figure (4) – Basis considered in the explicit reference on the best interests of the child

Explicit references to the concept of the best interests of the child were found in **29 decisions**.

- Twenty-eight (82%) decisions generally based the reference on the **rationale of the 1980 Hague Convention** – for which best interests coincide with the immediate return to the place of habitual residence.
- One (3%) decision referred to the **understanding of the best interests of the child according to the European Court of Human Rights** (no specific reference to case-law).
- Three (9%) decisions referred to the notion of best interests evoking **other (inter)national instruments**.
  - o Bulgarian Family Law (no particular reference to specific dispositions or to the understanding of the best interests of the child under national law available).

### Implicit reference

Implicit references to the best interests were found in **twenty cases**, with the following peculiarities/patterns emerging from the analysis:

- The wellbeing and healthy development of a child strongly depends on the familial and affective integration he/she enjoys with the parents. In case a strong bond only exists with one of the parents – being the bond with the other one very weak – then it is preferable to avoid any separation between the child and the primary caregiver;<sup>572</sup>
- Return is admissible when the left-behind parent has a good relationship with the child.<sup>573</sup> A safe and positive social and working position of the left-behind parent is only an additional factor to be considered;
- A particularly good financial and social situation in the State of refuge ('very good care of the defendant in the State of abduction, the good living conditions, the adaptation of the child in the new environment and the excellent conditions under which he/she is raised and educated') only has significance in the hypothesis of a non-return decision when the situation in the State of origin is capable of negatively and badly affecting the child's wellbeing;<sup>574</sup>
- A strong bond with both parents is crucial for the child. When it comes to very young children and new-borns, the relationship with the mother is usually to be considered of predominant importance in the child's correct development;<sup>575</sup>
- In one case, the wellbeing and needs of the child is entirely assured by his/her grandparents (basic needs entirely satisfied, a stable relationship of attachment and trust is built, the child has adapted very well in the environment in which he/she lives and studies, he/she feels secure and comfortable).<sup>576</sup>

### Interpretation of Grounds for Non-Return in Relation to Best Interests

Reasons for (non-)return in large majority were linked to the Hague Convention.

<sup>572</sup> BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПО ГР. Д. № 8240/2011 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG020 [2 August 2013] РЕШЕНИЕ № 6019 ОТ 02.08.2013 Г. ПО ГР. Д. № 4848/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG033 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПО ГР. Д. № 2445/2014 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG42 [28 December 2015] РЕШЕНИЕ № 2572 ОТ 28.12.2015 Г. ПО ГР. Д. № 4615/2015 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG055 [21 February 2017] РЕШЕНИЕ № 1132 ОТ 21.02.2017 Г. ПО ГР. Д. № 5038/2016 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG061 [19 April 2017] РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПО ГР. Д. № 14820/2015 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>573</sup> BG022 [14 August 2013] РЕШЕНИЕ № 6168 ОТ 14.08.2013 Г. ПО ГР. Д. № 3043/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>574</sup> BG029 [22 October 2014] РЕШЕНИЕ № 1925 ОТ 22.10.2014 Г. ПО ГР. Д. № 2776/2014 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>575</sup> BG040 [30 November 2015] РЕШЕНИЕ № 2357 ОТ 30.11.2015 Г. ПО ГР. Д. № 3787/2015 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ.

<sup>576</sup> BG018 [10 January 2013] РЕШЕНИЕ ОТ 10.01.2013 Г. ПО ГР. Д. № 13652/2012 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

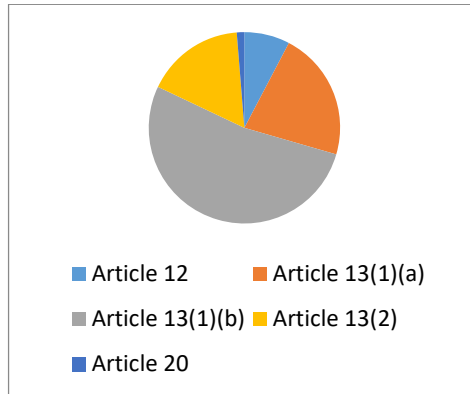


Figure (5) – Link between the best interests of the child and the Hague grounds for non-return.

**Forty-one (53%) cases referred to Article 13(1)(b), with the following patterns emerging:**

- Serious risk arises when the child cannot return to the country of origin accompanied by the abducting parent, when the latter represents the central and pivotal figure for the development and wellbeing of the child. Emotional and psychological distress for the child also arises when return is not possible alongside other pivotal figures (commonly brothers/sisters);<sup>577</sup>
- Grave risk arises in case of danger of sexual harassment;<sup>578</sup>
- Grave risk arises in case the applicant is proven to be violent, alcohol addicted, not to take care of the child or not providing maintenance, whereas there is a close connection with the abducting parent. Non-return is hence preferable;<sup>579</sup>
- Grave risk also arises when return would put the child in a community shelter, without the mother, the grandparents, and without maintenance and attention from the father;<sup>580</sup>
- Serious risk arises when the child is ready to commit suicide in case of return (one reported case with a 12-year-old child).<sup>581</sup>

**Thirteen cases (17%) to Article 13(2), with the following peculiar results:**

- The disposition only applies in presence of a univocal, mature, and clear refusal to return (i.e.: when the child openly declares the he/she would face the risk of committing suicide in

<sup>577</sup> BG011 [18 January 2012] РЕШЕНИЕ ОТ 18.01.2012 Г. ПОГР. Д. № 8240/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG013 [29 June 2012] РЕШЕНИЕ ОТ 29.06.2012 Г. ПОГР. Д. № 17219/2011 Г. НАСОФИЙСКИГРАДСКИСЪД; BG014 [8 February 2013] РЕШЕНИЕ № 230 ОТ 08.02.2013 Г. ПОГР. Д. № 4529/2012 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG017 [1 January 2013] РЕШЕНИЕ № 2417 ОТ 01.04.2013 Г. ПОГРАЖДАНСКОДЕЛО № 13970/2012 Г. НАСОФИЙСКИГРАДСКИСЪД; BG019 [2 August 2013] РЕШЕНИЕ № 6011 ОТ 02.08.2013 Г. ПОГР. Д. № 5581/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG020 [2 August 2013] РЕШЕНИЕ № 6019 ОТ 02.08.2013 Г. ПОГР. Д. № 4848/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG026 [13 January 2014] РЕШЕНИЕ № 271 ОТ 13.01.2014 Г. ПОГР. Д. № 13131/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG031 [19 May 2014] РЕШЕНИЕ № 3533 ОТ 19.05.2014 Г. ПОГР. Д. № 17289/2013 Г. НАСОФИЙСКИГРАДСКИСЪД; BG036 [13 February 2015] РЕШЕНИЕ № 1030 ОТ 13.02.2015 Г. ПОГР. Д. № 8800/2014 Г. НАСОФИЙСКИГРАДСКИСЪД; BG040 [30 November 2015] РЕШЕНИЕ № 2357 ОТ 30.11.2015 Г. ПОГР. Д. № 3787/2015 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG042 [28 December 2015] РЕШЕНИЕ № 2572 ОТ 28.12.2015 Г. ПОГР. Д. № 4615/2015 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ; BG048 [11 April 2016] РЕШЕНИЕ № 2853 ОТ 11.04.2016 Г. ПОГР. Д. № 13674/2015 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>578</sup> BG23 [29 November 2013] РЕШЕНИЕ № 8019 ОТ 29.11.2013 Г. ПОГР. Д. № 6111/2013 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>579</sup> BG32 [26 May 2014] РЕШЕНИЕ № 3731 ОТ 26.05.2014 Г. ПО ГР. Д. № 14888/2013 Г. НА СОФИЙСКИ ГРАДСКИ СЪД; BG039 [16 June 2015] РЕШЕНИЕ № 1296 ОТ 16.06.2015 Г. ПО ГР. Д. № 1665/2015 Г. НА АПЕЛАТИВЕН СЪД – СОФИЯ; BG061 [19 April 2017] РЕШЕНИЕ № 2562 ОТ 19.04.2017 Г. ПО ГР. Д. № 14820/2015 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>580</sup> BG33 [24 July 2014] РЕШЕНИЕ № 5618 ОТ 24.07.2014 Г. ПО ГР. Д. № 2445/2014 Г. НА СОФИЙСКИ ГРАДСКИ СЪД.

<sup>581</sup> BG047 [30 November 2016] РЕШЕНИЕ № 2261 ОТ 30.11.2016 Г. ПОВ. ГР. Д. № 4904/2016 Г. НААПЕЛАТИВЕНСЪД – СОФИЯ.

case of a return; when the child clearly shows how well-settled he/she is in the country of refuge),<sup>582</sup>

- Opposition by the child does not immediately activate the disposition when it is vague, confused, or evidently influenced by the abducting parent (see: in situation of extreme distress, in the fear of disappointing the parent).<sup>583</sup>

**Six (8%) to Article 12**, with no peculiar result

**Seventeen (22%) to Article 13(1)(a)**, with no significant pattern or result emerging from the analysis.

**One to Article 20** (with no particular result emerging since no concrete ground were represented by the parties and the court dismissed this ground for non-return).

### Impact of the best interests on the final decision

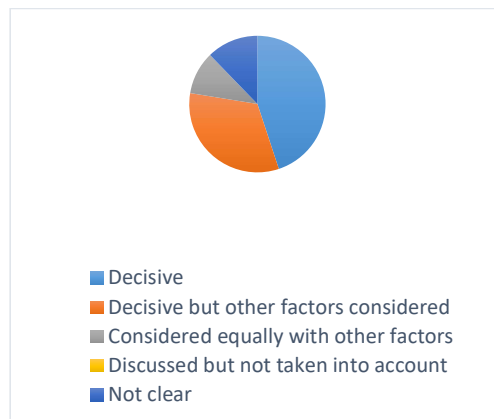


Figure (6) – Impact of best interests of the child on the final outcome of the decision

With regard to the impact of the best interests of the child on the final decision, the best interests were:

- Twenty-two times (45%) Decisive;
- Sixteen times (33%) Decisive, but considered with other factors (no significant result with regard to the other factors considered);
- Five times (10%) Considered equally with other factors (no significant result with regard to the other factors considered);
- Six times (12%) it was not clear.

### Hearing of the child

Out of the 59 cases analysed, the child/children were **heard in 44**; in 4 the hearing did not take place, and in eleven it was impossible to determine whether the audition took place or not.

Reasons against the hearing can be summarized as such:

<sup>582</sup> BG035 [29 April 2014] РЕШЕНИЕ № 2996 ОТ 29.04.2014 Г. ПОГР. Д. № 1063/2014 Г. НАСОФИЙСКИГРАДСКИСЪД.

<sup>583</sup> BG008 [25 July 2012] ОПРЕДЕЛЕНИЕ ОТ 25.07.2012 Г. ПОГР. Д. № 8614/2011 Г. НАСОФИЙСКИГРАДСКИСЪД.

- one time age (two children of nine and seven years);
- one time hearing not in the interests of the child
  - o High risk of anxiety;
- one time other
  - o Child already heard in the first instance, and in the second no new elements to be taken in consideration have arisen.

The **hearing** was **performed by**:

- Judge thirteen times (30%);
- Social worker/psychologist 31 times (70%).

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance at school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child about returning to live in the country of origin.

With regard to the **hearing's impact** on the decision, the following is relevant:

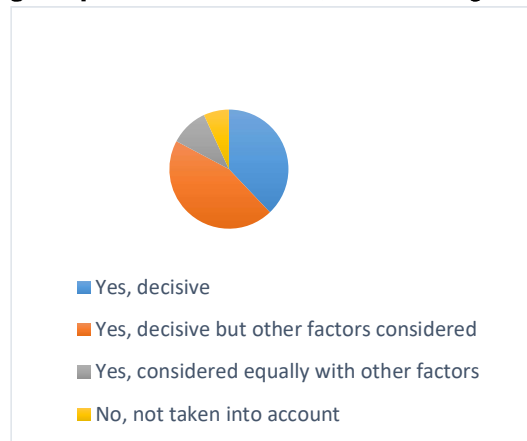


Figure (7) – Impact of the hearing on the best interests of the child

- **Eleven times (31%) Decisive**
  - o The hearing is decisive when the child expressly, maturely, and clearly states his/her preference with regard to a (non-)return option
- **Thirteen times (31%) Decisive, but considered with other factors**
  - o Hearing is decisive although considered with other factors when the child sheds some light on his/her situation/preferences, and the judge sums the results of the hearing with other factors (i.e.: social worker/psychologist's reports, settlement in country of origin/return, factual relationship with both parents)
- **Three times (23%) Considered equally with other factors**
  - o The hearing is useful as a means to support the evidence showed up in the proceeding, either confirming/denying it
- **Two times (8%) Not taken into account**





## Croatia

### Country File – Croatia<sup>584</sup>

#### General data

For Croatia, **27 relevant cases** have been identified. A total of **fifteen children** were involved in these proceedings. **Fifteen cases** were dealt with in courts of **first instance**, **eleven** in courts of **second instance** and **one** in a **court of third instance**. In the majority of these cases (**70%**) the **Hague Convention on Child Abduction** was the **only legal basis** considered by the court. In **11%** of the cases, **Brussels IIbis** was considered **together with the Hague Convention on Child Abduction**.

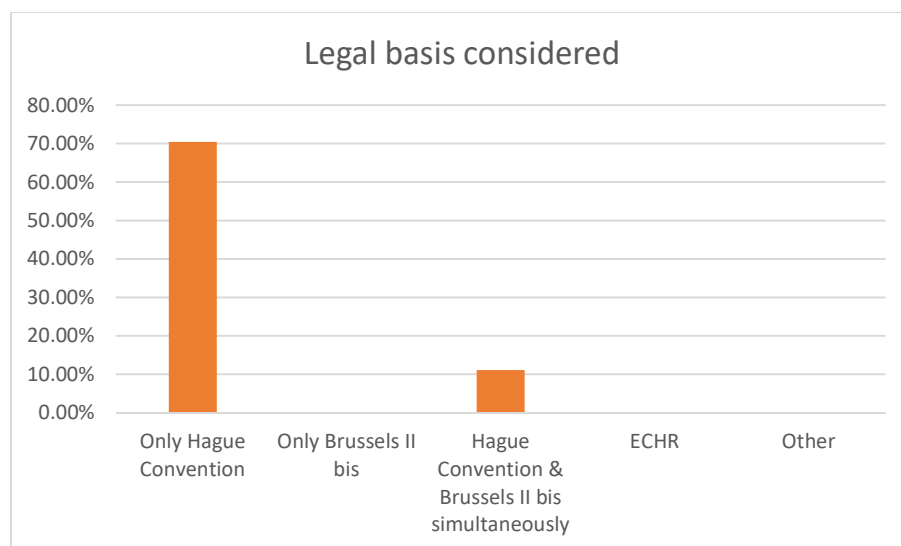


Figure (1) – Legal basis considered

In most of the cases, namely **67%**, the court decided that the child did not have to return to his or her State of former habitual residence. In four cases (or **15%**) the case was sent back to the previous instance without deciding on the merits.

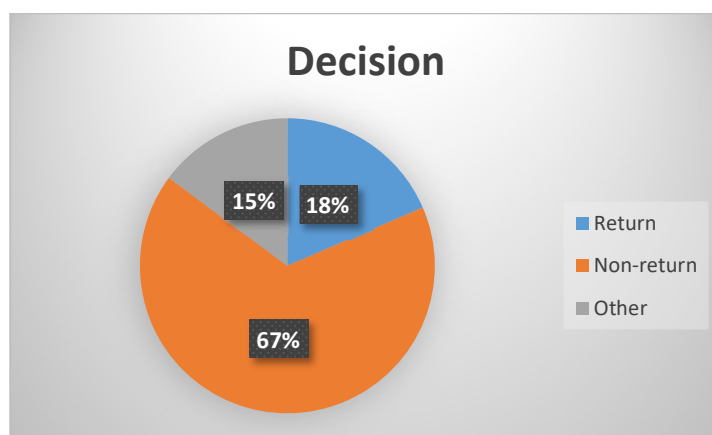


Figure (2) - Decision

<sup>584</sup> The country expert for Croatia is Professor Mirela Župan. She is affiliated with the J. J. Strossmayer University of Osijek.

In a large majority of the cases it was the mother who abducted the child.

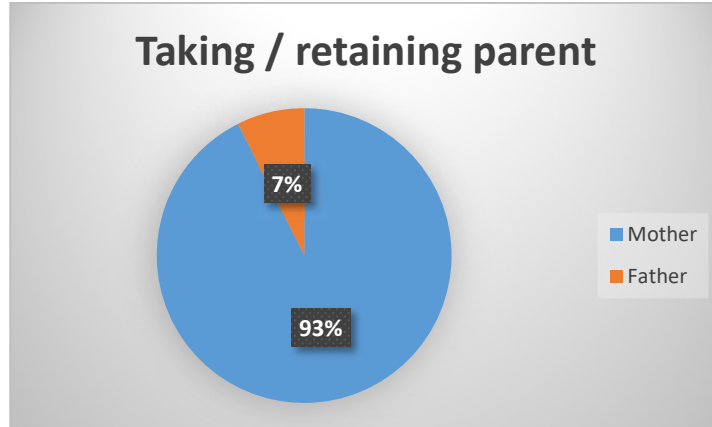


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

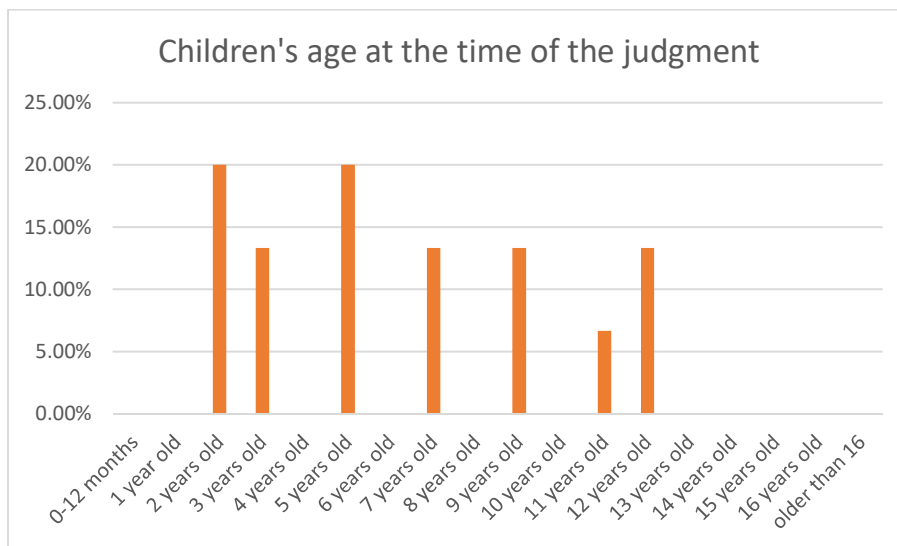


Figure (4) – Children's age at the time of the judgment

### Best Interests of the Child

In 15% of the cases, the courts referred explicitly to the best interests of the child, in 63% of the cases an implicit reference could be found and in 22% of the cases courts did not refer to the best interests at all.

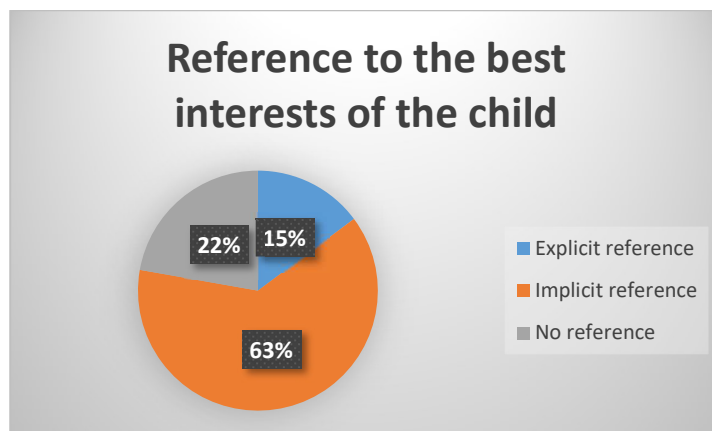


Figure (5) – Reference to the best interests of the child

### Explicit reference

An explicit reference to the best interests of the child can be found in four cases. In every one of these cases, the explicit reference was based on Article 3(1) of the Convention on the Rights of the Child. In one case, the explicit reference was in addition based on the rationale of the Hague Convention on Child Abduction and in another case on the *X v. Latvia and Maumousseau and Washington v. France* cases of the ECtHR.<sup>585</sup>

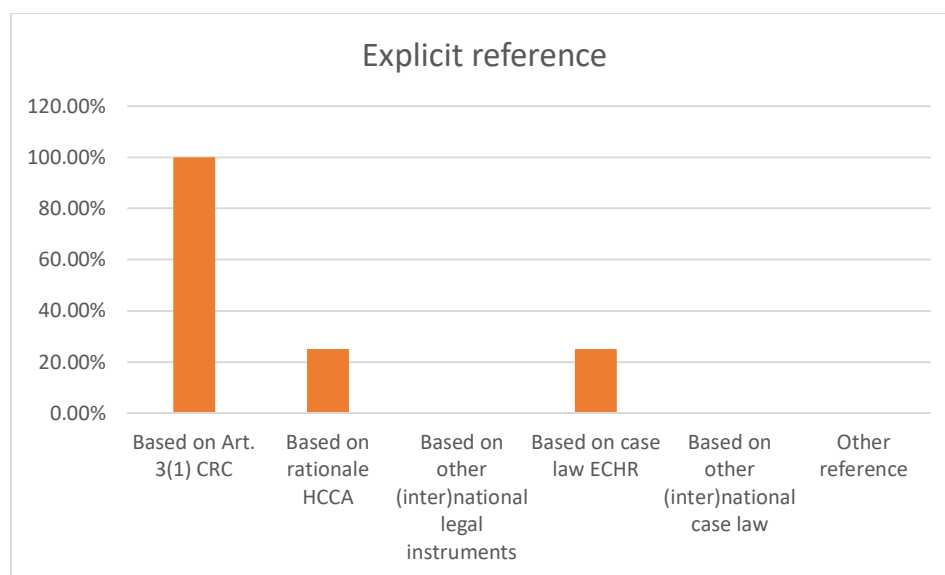


Figure (6) – Explicit reference

### Implicit reference

In seventeen cases the court implicitly referred to the best interests of the child.

In seven of these cases it is indicated by the courts that a separation between the abducted child and his or her mother (in these cases thus the abducting parent) would be contrary to the child's

<sup>585</sup> CR018 [29 March 2018] Constitutional Court of the Republic of Croatia U-III-5232/2017.

wellbeing / best interests. It was said that it is generally acknowledged / well known 'that the mother represents the basis of the child's safety and comfort in his or her first years of life'.<sup>586</sup> In the one case, this argument was used to refuse the return of a three year old;<sup>587</sup> in the other case the same reasoning was used for a child of five years old.<sup>588</sup> Also the fact that the child is very young and has never been separated from the mother, was used to argue that a return would not be in the best interests of the child since it would hamper the child's psychological / emotional development.<sup>589</sup> In the cases it concerned one child of three years old and two children of less than two years old. In one case, the court is of the opinion that a return would 'seriously endanger the child's interests' since the child feels safe and stable with the mother, he expresses a clear wish to continue life with her and the mother meets every need of the child.<sup>590</sup> It is important to notice that in the latter case, the child concerned was twelve years old.

Contrary to the previous views, a second instance court stated the following:

The subject of this procedure is not to determine with which parent the child will live. This was wrongly concluded by the Centre for Social Welfare when indicating that the separation from the mother would cause harm for a child. The subject of this procedure is to establish whether the defendant removed the child illegally from Belgium as a state of common residence of the parties and the child.<sup>591</sup>

In one case, the court did not refuse return because of a separation between the child and his mother per se but because:

A repeated change of the family environment and dynamics at a time when a child expresses a satisfaction with the current situation, could represent a risk for a child's development in the sense of mistrust towards the people who are caring for him and insecurity regarding personal identity.<sup>592</sup>

Next to the separation from the mother, the best interests of the child were also discussed in relation to violent behaviour of the left-behind parent. In one case the court asks itself whether the mother's action, namely the abduction of the child, was actually in the child's interests since there was evidence that the child witnessed physical domestic violence.<sup>593</sup> In another case, the child stated that he was beaten, slapped in the face and pulled by the hair by the father. While the expert opinion of the Child Welfare Home indicated that doubt existed whether the child was a victim of physical violence by the father, the court decided to refuse the return.<sup>594</sup> After the court of second instance sent the case back to the first instance court, the latter court ordered the return. This court relied on the expert opinion of the Child Welfare Home and on the statement of the

<sup>586</sup> CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13.

<sup>587</sup> CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2.

<sup>588</sup> CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13.

<sup>589</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22; CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>590</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>591</sup> CR017 [3 November 2017] Županijski sud u Puli Gž Ob-275/2017-2.

<sup>592</sup> CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>593</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2.

<sup>594</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

child to his guardian *ad litem* that he was joking when he had told her that his father had beaten him.<sup>595</sup>

The following was stated by a court of first instance:

The removal of a child to the unknown environment on the other continent, where the child yet needs to develop relationships with the father's new family and without the persons with whom the child is emotionally connected (mother and brothers) – could be stressful and unfavourable to the child's development.<sup>596</sup>

Furthermore:

The child has been returned to the mother, after staying with the father for two months with difficulties such as: sleep disorder, uncontrolled crying, separation problems and wetting her underpants several times a day. His condition now is much improved and return of the child to the father would cause re-activation of all mentioned problems and also would place the child back into the intolerable situation.<sup>597</sup>

However, the court of appeal argued that 'the court did not beyond any doubt establish that the problems that occurred after returning the child to the mother are connected with the child's stay with the father' and ordered return.<sup>598</sup>

### **Interpretation of grounds for non-return in relation to best interests**

#### **Article 12 Hague Convention on Child Abduction**

In one case, the court refused return because it finds that the conditions for returning the child described in Article 12 are not met.<sup>599</sup> Further, the court takes into account how well the children are adapted and settled in Croatia; the children attended school and day care. However, this judgment seems to be not entirely correct since the time that had elapsed from the wrongful removal was less than one year and both parents were holders of parental responsibility. Therefore, it can be said that the court links Article 12 with the best interests of the child in terms of an extensive explanation of the integration in the new environment of the child.

In the second case, the court refused return of the child based on the report from the Centre for Social Welfare which noted that the child had been well adapted to the new environment and school in Croatia and that a return would represent a risk for the child's development.<sup>600</sup>

#### **Article 13(1)(b) Hague Convention on Child Abduction**

It is apparent from the Croatian case law that the courts pay serious attention to the reports written by the Centre of Social Welfare and the Child's Welfare Home when applying Article 13(1)(b) of the Hague Convention on Child Abduction. The reports of these instances mention several elements, such as: whether the return of the children would pose a risk to

<sup>595</sup> CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16.

<sup>596</sup> CR005 [24 March 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-198/16-13.

<sup>597</sup> CR005 [24 March 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-198/16-13.

<sup>598</sup> CR006 [10 May 2016] Županijski sud u Zagrebu Gž Ob-600/16-2.

<sup>599</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>600</sup> CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

their further development,<sup>601</sup> whether the left-behind parent was violent towards the child,<sup>602</sup> the child's adaption to the new environment,<sup>603</sup> how the child feels in the new environment,<sup>604</sup> the living conditions in Croatia (thus in the state of refuge),<sup>605</sup> the relationship between child and abducting parent,<sup>606</sup> and the working conditions of the abducting parent.<sup>607</sup> In some cases, the Centres also give their opinion on the application of Article 13(1)(b).<sup>608</sup> Courts tend to follow the opinion of these Centres on the application of Article 13(1)(b). In one case, however, the court did not follow the opinion of the Centre of Social Welfare and motivated as follows:

It is correct that the child had a strong emotional relationship with the mother but the subject of this procedure is not to determine with which parent the child will live. This was wrongly concluded by the Centre for Social Welfare when indicating that the separation from the mother would cause harm for a child. The subject of this procedure is to establish whether the defendant removed the child illegally from Belgium as a State of common residence of the parties and the child.<sup>609</sup>

As already mentioned before, the separation from the mother (abducting parent) if the child were returned is also a factor for the courts to reject return based on Article 13(1)(b).<sup>610</sup> However, one second instance court disagreed and stated that 'the child has already suffered from the trauma when separating from the other parent. Therefore, the separation from the mother cannot be used as an exception for the application of Article 13(1)(b)'.<sup>611</sup>

#### **Article 13(2) Hague Convention on Child Abduction**

In two cases the courts decided to take into account the child's hearing in which the child had expressed the wish to stay with the mother and objected to return to the father.<sup>612</sup> In both cases, the courts did not order return.<sup>613</sup> In both cases the children showed that they were completely integrated in Croatia:

It was established, on the basis of the evidences presented and hearing of the child, that the child is completely integrated in the environment which he lives in. The child has social contacts with his family, as well as in school with his peers and friends. He is very good at the Croatian language and engaged in afterschool activities (football).<sup>614</sup>

<sup>601</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>602</sup> CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>603</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>604</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5.

<sup>605</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>606</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>607</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>608</sup> CR014 [30 April 2015] Općinski građanski sud u Zagrebu 168 R1 Ob-62/15-22; CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž Ob-103/15-2; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13.

<sup>609</sup> CR017 [3 November 2017] Županijski sud u Puli Gž Ob-275/2017-2.

<sup>610</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22.

<sup>611</sup> CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017.

<sup>612</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>613</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>614</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40.

And: 'The child feels safe and stable with the mother and he expresses a clear wish to continue living with her. The mother meets all the needs of the child and the child is fully socialized in the environment in which he lives and in the school which he attends in Croatia.'<sup>615</sup> Interesting to notice further is the age of the children: seven years old in the first case and twelve years old in the second.

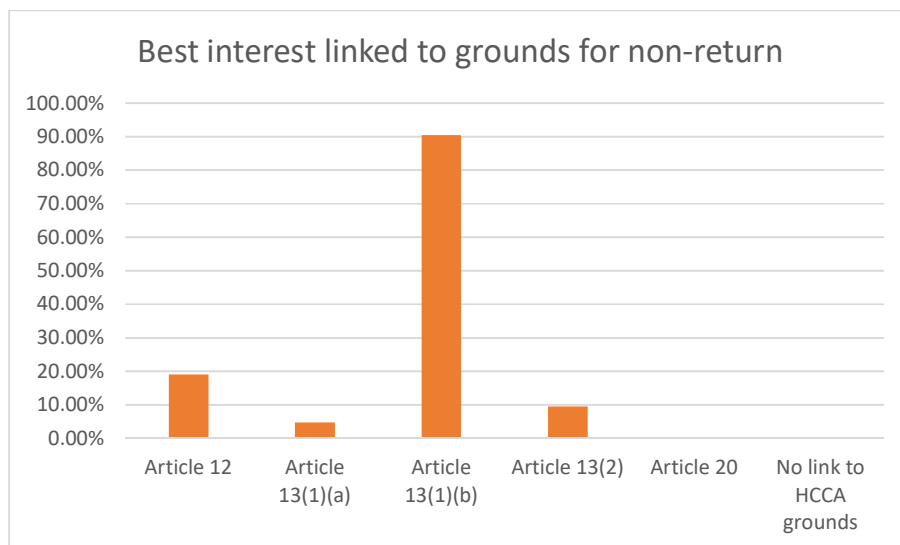


Figure (7) – Best interest linked to grounds for non-return

### Impact of the best interests on the final decision

#### The best interests are decisive

In three cases, the courts decided that return was not in the best interests of the child and Article 13(1)(b) could be applied because of the integration of the child in his or her new environment.<sup>616</sup> In three other cases it was the separation from the mother as abducting parent or the violence of the left-behind parent that was deemed to be contrary to the child's interests and upon which the rejection of return was based.<sup>617</sup>

Further, there are three cases in which the courts decided that returning the child would expose the child to a grave risk and is thus contrary to their best interests.<sup>618</sup>

Lastly, the Constitutional Court was of the opinion that 'the existence of the reasons for (non)application of Article 13(1)(b) needs to be fully grounded on the protection of the best interests of the child'.<sup>619</sup> Thus, the best interests of the child have to be decisive in this regard.

#### The best interests are decisive but other factors were considered

In the only case in this category, the court considered on the one hand whether the separation between the child and the mother would cause serious harm to the child and

<sup>615</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21.

<sup>616</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016.

<sup>617</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>618</sup> CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017; CR005 [24 March 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-198/16-13; CR014 [30 April 2015] Općinski građanski sud u Zagrebu 168 R1 Ob-62/15-22.

<sup>619</sup> CR018 [29 March 2018] Constitutional Court of the Republic of Croatia U-III-5232/2017.



would thus be contrary to the best interests of the child; on the other hand the court considered whether the child and the mother could safely return to Serbia.<sup>620</sup>

### The best interests are considered equally with other factors

In two cases, the best interests were considered equally with the relevant provisions of the Brussels IIbis Regulation.<sup>621</sup> In another two cases, the child's views were considered together with the report of the Centre for Social Welfare.<sup>622</sup> In the last case, the report of the Centre for Social Welfare was considered together with evidence provided by the mother on domestic violence: medical documentation, police records and photographs.<sup>623</sup>

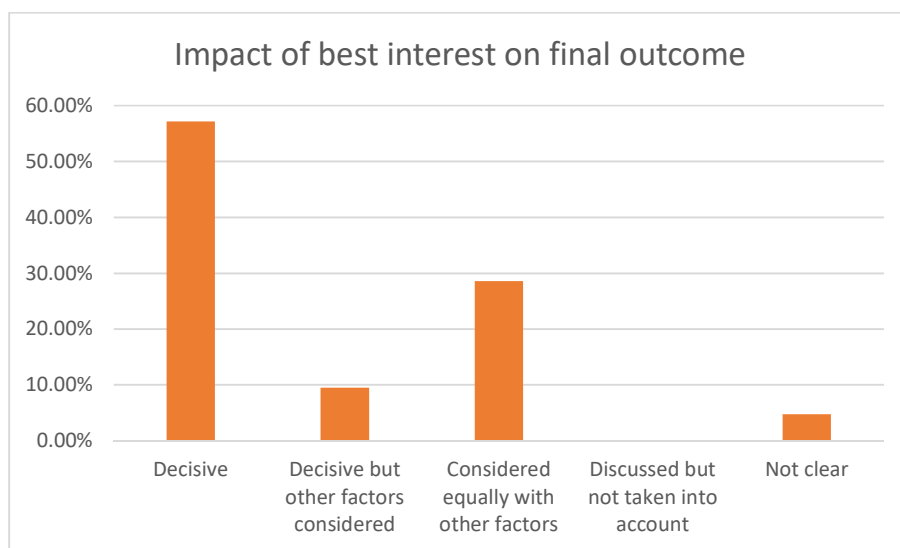


Figure (8) – Impact of best interests on final outcome

## Hearing of The Child

In six cases, the child was heard and in fifteen cases the child was not heard.

Age is one of the reasons for which the child is not heard: this reason was invoked in three cases with the children's age ranging from less than two years old to three years old.<sup>624</sup> One court argued that the child had not 'attained a degree of maturity at which he was able to form his opinion relevant to this procedure'.<sup>625</sup> The main reason for not hearing the child, however, was that the case was dealt with by a court of second instance or by the Constitutional Court and this is an ex parte-procedure in Croatia.<sup>626</sup> If the child was already heard in first instance, this will be the only

<sup>620</sup> CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22.

<sup>621</sup> CR006 [10 May 2016] Županijski sud u Zagrebu Gž Ob-600/16-2; CR026 [11 October 2016] Županijski sud u Zagrebu 13 Gž Ob-1264/16-2.

<sup>622</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>623</sup> CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>624</sup> CR001 [3 October 2016] Općinski sud u Osijeku R1 Ob-566/2016-26; CR003 [27 April 2017] Općinski sud u Osijeku R1 Ob-223/17-22; CR016 [25 May 2017] Općinski građanski sud u Zagrebu 131-R1 Ob-649/17-11.

<sup>625</sup> CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16.

<sup>626</sup> CR002 [2 December 2016] Županijski sud u Zagrebu Gž Ob-1456/2016-2; CR004 [4 July 2017] Županijski sud u Splitu Gž Ob-411/2017; CR006 [10 May 2016] Županijski sud u Zagrebu Gž Ob-600/16-2; CR015 [12 June 2015] Županijski sud u Zagrebu 2 Gž

hearing; if the child was not heard in first instance, the second instance court would return the case to a new trial with instructions to hear the child.<sup>627</sup>

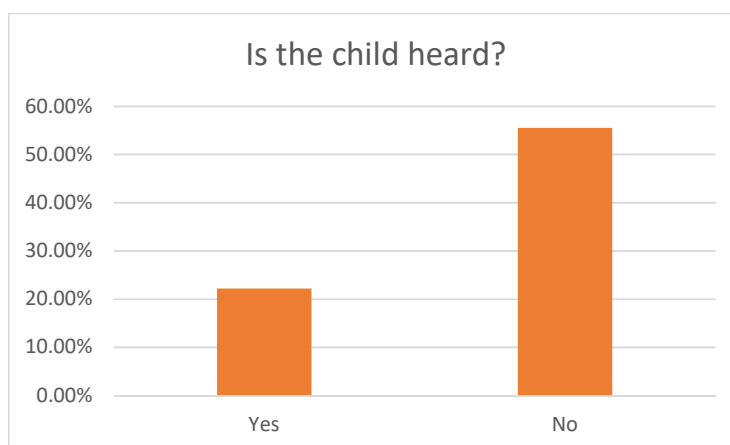


Figure (9) – Is the child heard?

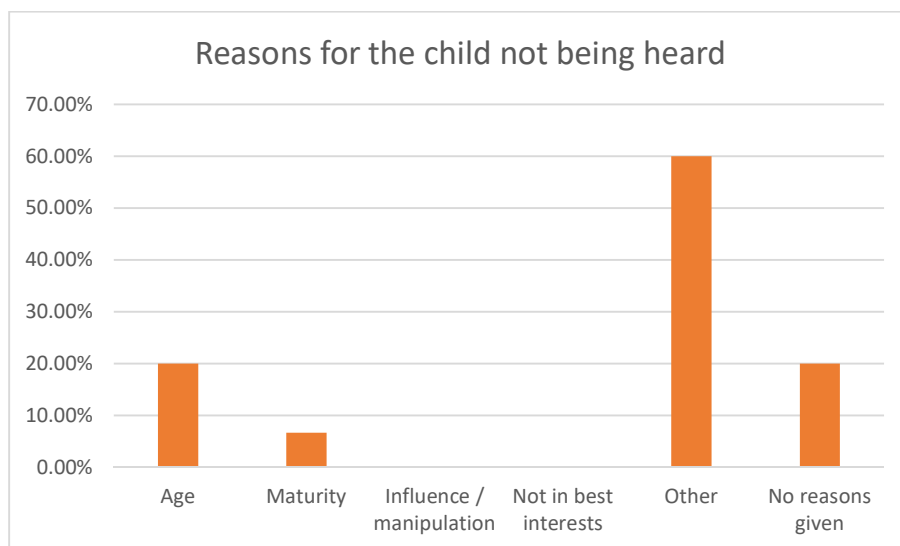


Figure (10) – Reasons for the child not being heard

In most cases in which the child was heard, this hearing was carried out by a social worker or psychologist.<sup>628</sup> Only in one case the child was heard by a social worker or psychologist as well as by a judge.<sup>629</sup>

Ob-103/15-2; CR017 [3 November 2017] Županijski sud u Puli Gž Ob-275/2017-2; CR018 [29 March 2018] Constitutional Court of the Republic of Croatia U-III-5232/2017; CR024 [31 August 2017] Županijski sud u Zagrebu 2 Gž Ob-911/17-13; CR026 [11 October 2016] Županijski sud u Zagrebu 13 Gž Ob-1264/16-2; CR027 [16 June 2017] Općinski sud u Rijeci R1 Ob-649/16.

<sup>627</sup> Information obtained from the country expert.

<sup>628</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>629</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40.



Figure (11) – Professional hearing the child

During the hearing, children mostly spoke about their family, the relation with their parents, communication with the left-behind parent, how they feel in the new environment, school, free-time and friends.<sup>630</sup>

For all cases in which the child was heard, it can be said that the hearing contributed to the determination of the best interests of the child. The assessment of the best interests was, just like the hearing, done by others than the judge. The assessment was made by a psychologist,<sup>631</sup> the expert of the Centre for Social Welfare,<sup>632</sup> the child's special guardian,<sup>633</sup> and afterwards embraced by the courts.<sup>634</sup> Lastly, when the child was heard, his or her view were always considered equally with the report of the Centre of Social Welfare.<sup>635</sup>

<sup>630</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10; CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>631</sup> CR007 [23 December 2016] Općinski građanski sud u Zagrebu 144-R1 Ob-830/16-40; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

<sup>632</sup> CR010 [11 May 2015] Općinski građanski sud u Zagrebu 94-R1O-164/15-5; CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>633</sup> CR023 [26 June 2017] Općinski sud u Splitu R1 Ob-637/2016; CR025 [27 July 2016] Općinski sud u Rijeci R1 Ob-336/16.

<sup>634</sup> However, in one case the court did not follow the opinion of the Centre of Social Welfare (see above, footnote 23).

<sup>635</sup> CR012 [1 July 2015] Općinski građanski sud u Zagrebu 147-R1 Ob-132/15-21; CR013 [13 November 2015] Općinski građanski sud u Zagrebu 130-R1 Ob-439/15-10.

## Czech Republic

### Country File – Czech Republic<sup>636</sup>

#### General Data

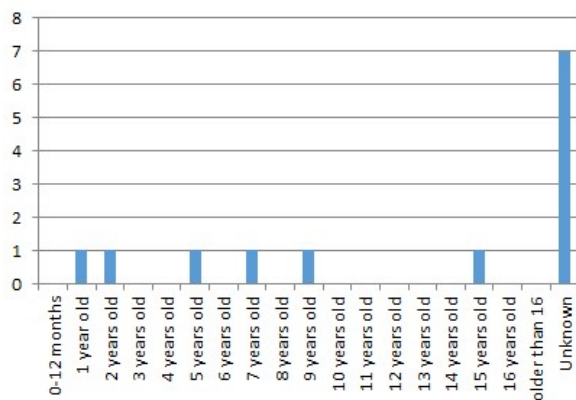


Figure (1) – Age of children involved 1

For Czech Republic, the collected data included eleven decisions emanating from courts of third instance. The total number of children involved in the cases is thirteen, spread among different ages as shown in Figure (1). However, in six cases the information was classified.

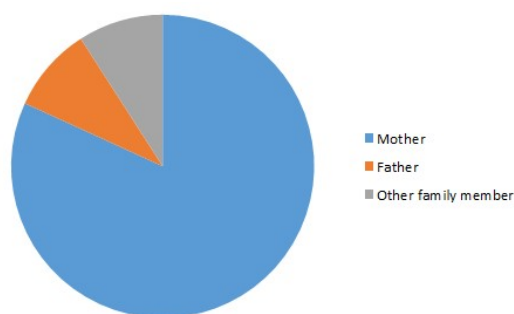


Figure (2) – Taking/retaining parent

In the majority of cases, the abducting parent was the mother (9 decisions), although in 1 case the father was the abductor. In one case, the abductor was another family member (not specified).

As for the outcome of the decision, three cases ended up with an order of return, while two concluded for the non-return of the child. In six cases, the case was sent back to the first instance court.

The large majority of decisions (six) referred to the legal framework of the 1980 Hague Convention on Child Abduction. In one case, only the Brussels IIbis Regulation was applied. In four cases, the court did not refer to any specific legal basis.

#### Best Interests of The Child

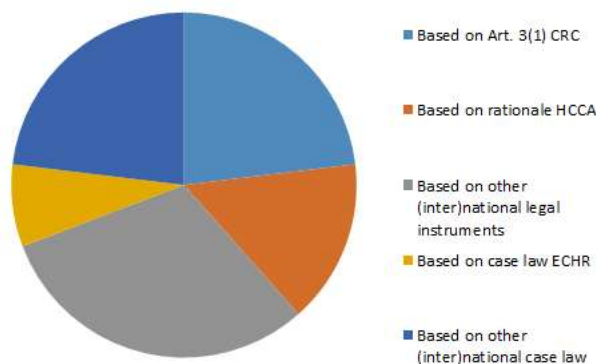
Out of eleven decisions, nine referred (either explicitly or implicitly) to the best interests of the child.

<sup>636</sup> The country expert for the Czech Republic is Lubomír Ptáček.

## Explicit reference

Figure (3) – Basis considered in the explicit reference on the best interests of the child

Explicit references to the concept of the best interests of the child were found in four decisions.<sup>637</sup> Courts referred either to Article 3(1) UNCRC (three decisions),<sup>638</sup> and to recital no 12 of the Brussels IIbis Regulation.<sup>639</sup> In three decisions,<sup>640</sup> extensive reference to the case law of the European Court of Justice,<sup>641</sup> as well as to national case law,<sup>642</sup> was provided (as concerns national case law, courts



have indicated the INCADAT reference numbers).

In two decisions, the court based the reference on the rationale of the 1980 Hague Convention – for which the best interests coincide with the immediate return to the place of habitual residence.<sup>643</sup>

<sup>637</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ006 [19 March 2015] Supreme Court of the Czech Republic c4909/2014; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007; CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>638</sup> CZ006 [19 March 2015] Supreme Court of the Czech Republic 4909/2014; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007; CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>639</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ006 [19 March 2015] Supreme Court of the Czech Republic c4909/2014.

<sup>640</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007.

<sup>641</sup> Case C-376/14 PPU C v M [2014]; Case C-523/07 A [2009]; Case C-497/10 PPU Barbara Mercredi v Richard Chaffe [2010].

<sup>642</sup> [5 April 2002] Østre Landsret, afdeling, B-409-02 [INCADAT cite: HC/E/DK 520]; [17 February 2000] High Court – England and Wales, Re H. (Abduction: Habitual Residence: Consent) 2 FLR 294 [INCADAT cite: HC/E/UKe 478]; [30 August 1999] United States District Court for the District of Colorado, Morris v. Morris 55 F. Supp. 2d 1156 [INCADAT cite: HC/E/USf 306]; [9 January 2001] United States Court of Appeals for the Ninth Circuit, Mozes v. Mozes 239 F.3d 1067 [INCADAT cite: HC/E/USf 301]; [11 May 2005] Oberstes Gerichtshof (Austria) 3 Ob 89/05; [20 October 1994] Supreme Court of Canada, Thompson v Thompson 3 SCR 551, 6 RFL (4th) 290 [INCADAT cite: HC/E/CA 11].

<sup>643</sup> CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007; CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

In one decision,<sup>644</sup> the court recalled the case law of the ECtHR: in particular, *Neulinger and Shuruk v Switzerland*; *Maumousseau and Washington v France*; *Macready v Czech Republic*.

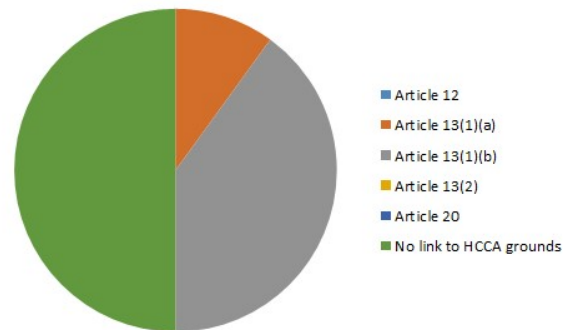


Figure (4) – Link between the best interests of the child and the Hague grounds for non-return

### Implicit reference

Five decisions made an implicit reference to the best interests of the child,<sup>645</sup> considering the child's wellbeing and development, his social integration in the place of genuine habitual residence, who (or which institution) is responsible for securing the child's care and in which modalities, upbringing and maintenance, and also mutual emotional ties between these persons and the child.<sup>646</sup>

### Interpretation of grounds for non-return in relation to best interests

In one decision, the court linked the best interests of the child to the assessment of his/her habitual residence, stating that 'habitual residence is determined by the best interests of the Child especially by proximity of relevant Court to his/her habitual residence'.<sup>647</sup> In another case, the Constitutional Court upheld the thesis of the lower court, for which the child, as a consequence of return in his/her habitual residence, would have returned to the same living conditions as before his/her wrongful transfer.<sup>648</sup>

In one decision, an essential condition for quality and optimality of child's welfare was considered the inherent presence of his mother, who 'represents the only ground for his upbringing'.<sup>649</sup> the child was of a tender age<sup>650</sup> and suffered from autism, therefore the presence of the mother was considered of extreme importance for the child's wellbeing. In this case, the understanding of the best interests of the child was linked to the ground for non-return provided by Article 13(1)(b) HCCA, which allows the court to reject the application for return if the child would suffer a grave risk of harm or would be put in an intolerable situation as a consequence of his or her return in the State of habitual residence.

<sup>644</sup> CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>645</sup> CZ001 [9 May 2017] Constitutional Court 378/17; CZ002 [8 September 2015] Constitutional Court 3742/14; CZ007 [16 December 2014] Constitutional Court 3175/12; CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006; CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006.

<sup>646</sup> CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006.

<sup>647</sup> CZ002 [8 September 2015] Constitutional Court 3742/14.

<sup>648</sup> CZ007 [16 December 2014] Constitutional Court 3175/12.

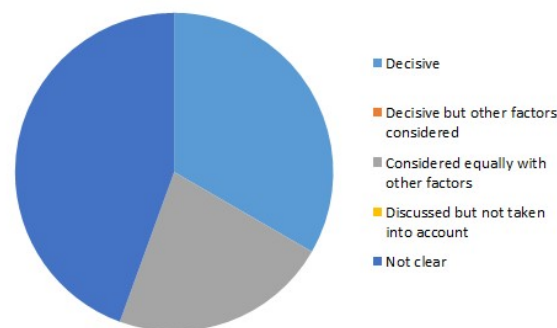
<sup>649</sup> CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006

<sup>650</sup> The age of the child has been classified in the decision, even though the judge mentions the fact that the child is of a tender age.

Among the decisions that linked the best interests of the child to specific grounds for non-return, another three cases referred to Article 13(1)(b).<sup>651</sup> In this regard, courts have considered the conditions of life and of the wellbeing of the child in the country of origin. In one case, it has been stated that ‘courts are obliged to investigate carefully if conditions of Article 13(1)(b) are fulfilled, particularly in cases where such reasons for non-return are actively claimed by participants. Reasons for non-return cannot be shorten only to ‘unambiguous medical diagnosis’, but other circumstances should be taken into account’.<sup>652</sup> Accordingly, in another case the Supreme Court annulled the first instance decision of return of the child, because there was a lack of sufficient findings that immediate return would have exposed the child to a grave risk of harm, for instance a ‘psycho-diagnostic ratio of influence of return not surrounded by mother’.<sup>653</sup> In the latter decision, this factor was also linked to the ground for non-return provided by Article 13(1)(a).

### Impact of the best interests on the final decision

Figure (5) – Impact of best interests of the child on the final outcome of the decision



When the best interests of the child were taken into consideration, the latter was decisive for the court’s decision in three cases.<sup>654</sup> In one decision, the court considered the severe trauma from which the child suffered at the time of proceedings and from which he/she could have suffered in case of return: in this case, the court specified that

reasons for return are not to be limited only to unequivocal medical diagnosis. If the minor at the time when return order is issued suffers is endangered by severe trauma, then is irrelevant who or what inflicted this situation. The Courts then are to carefully adjudicate whether or not the rule of non-return based on Article 13(1) (b) will apply.<sup>655</sup>

Another decision referred to the general purpose of the 1980 Hague Convention, for which the best interests of the child is not to be wrongfully removed or retained from the State of habitual residence, which is has been deemed in accordance with Article 3 UNCRC.<sup>656</sup> In the case in which the child suffered from autism and was of tender age, the court stated that separating mother and

<sup>651</sup> CZ001 [9 May 2017] Constitutional Court 378/17; CZ007 [16 December 2014] Constitutional Court 3175/12; CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006.

<sup>652</sup> CZ001 [9 May 2017] Constitutional Court 378/17.

<sup>653</sup> CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006.

<sup>654</sup> CZ001 [9 May 2017] Constitutional Court 378/17; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007; CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006.

<sup>655</sup> CZ001 [9 May 2017] Constitutional Court 378/17.

<sup>656</sup> CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007.

child through immediate return may have led to psychical decompensation and experience trauma and also to psychical regress and to potential termination of speech development.<sup>657</sup>

In two cases, the best interests of the child were discussed, but other factors were equally considered. In one decision,<sup>658</sup> a predominant factor was the previous statement of High Court of Justice of England and Wales which determined habitual residence of Child in England and which was binding for Czech courts. In another decision,<sup>659</sup> the court considered the time-limited agreement (open-ended moves, time limited moves) between parents as to the length of stay abroad.

## Hearing of The Child

The survey analysed the hearing of the child in those cases in which the court took into account the best interests of the child. Among the nine decisions concerned, in one case the child was heard during the proceedings;<sup>660</sup> in three cases, the child was not heard;<sup>661</sup> in five cases, it was impossible to determine whether an audition took place or not.<sup>662</sup>

In all three cases where the child was not heard, the reason was the age of the child (respectively, twenty months, five years and 'of tender age'). In one case, where the child was five years old, the lack of maturity of the child was also considered.<sup>663</sup>

In the case where the child was heard, the hearing took place with a psychologist, as well as the Central Authority and the guardian ad litem. The hearing was considered decisive for the court's decision, since the child had refused any contact with left behind parent in France, which could indicate risk of severe trauma if return would have applied. However, the hearing's findings were mostly used to justify the application of the ground of non-return of Article 13(1)(b), rather than the ground provided by Article 13(2) and based on the objection of the child. Therefore, the risk of severe trauma that the child could have faced in the former State of habitual residence was the main reason for refusing the return of the child.

<sup>657</sup> CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006.

<sup>658</sup> CZ002 [8 September 2015] Constitutional Court 3742/14.

<sup>659</sup> CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016.

<sup>660</sup> CZ001 [9 May 2017] Constitutional Court 378/17.

<sup>661</sup> CZ009 [27 February 2007] Supreme Court of the Czech Republic 3425/2006; CZ010 [28 November 2006] Supreme Court of the Czech Republic 1931/2006; CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.

<sup>662</sup> CZ002 [8 September 2015] Constitutional Court 3742/14; CZ005 [20 December 2016] Supreme Court of the Czech Republic 2850/2016; CZ006 [19 March 2015] Supreme Court of the Czech Republic 4909/2014; CZ007 [16 December 2014] Constitutional Court 3175/12; CZ008 [5 March 2008] Supreme Court of the Czech Republic 5473/2007.

<sup>663</sup> CZ012 [5 February 2014] Supreme Court of the Czech Republic 1116/13.



## Finland

### Country File – Finland<sup>664</sup>

#### General Data

The collected data included **69 decisions**, of which eighteen are third instance decisions and 52 are second instance decisions. The **total number of children involved in the cases is 65**, spread among different ages as shown in Finland (1).

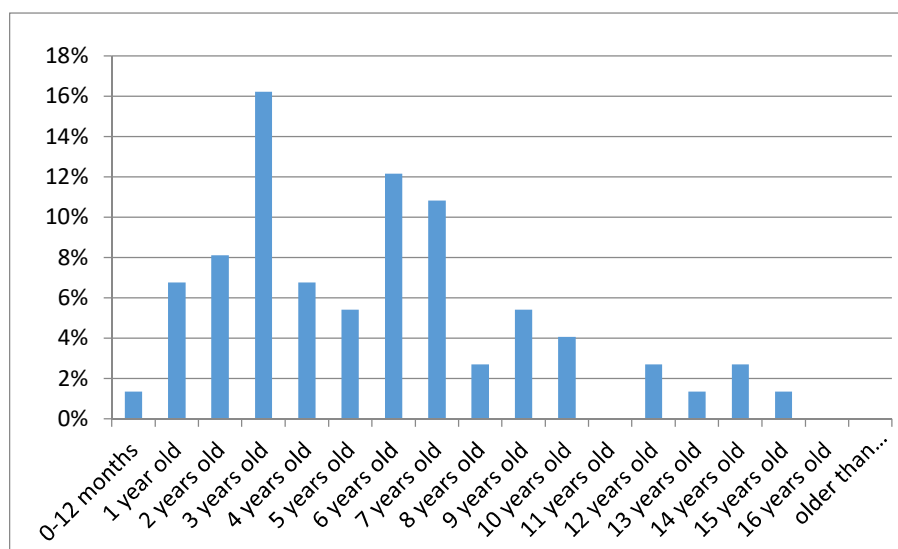


Figure (1) – Age of children involved

In the large majority of cases, the abducting parent was the mother (62 decisions). In 10% of decisions (seven cases) the abducting parent was the father. No decision where the abductor was another family member were registered.

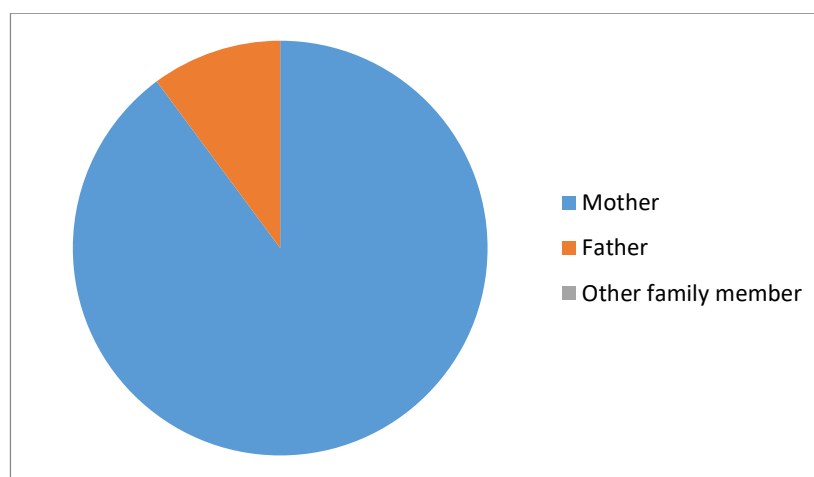


Figure (2) – Taking/retaining parent

<sup>664</sup> The country expert for Finland is Katja Karjalainen.

As for the outcome of the decisions, 54 cases ended up with an order of return, while fifteen concluded for the non-return of the child.

The large majority of decisions referred to the 1980 Hague Convention on Child Abduction legal framework (32 cases). In 24 cases, the Brussels IIbis Regulation was also applied, together with the HCCA provisions. In six cases, the decision referred only to the Brussels IIbis Regulation. In seven decisions, the court referred only to national law, namely to the Act on Child Custody and Rights of Access (n. 186/1994), in which the most important dispositions of the HCCA were copied (see Figure (3)).

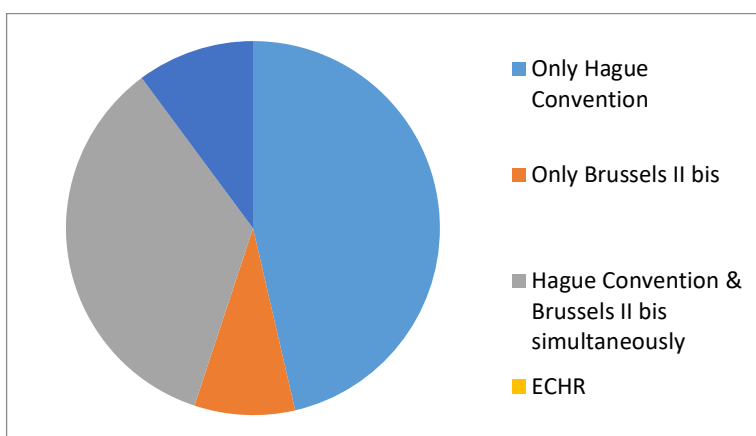


Figure (3) – Legal basis considered

### Best Interests of The Child

Out of 69 decisions, only nineteen decisions referred, either explicitly or implicitly, to the best interests of the child.

#### Explicit Reference

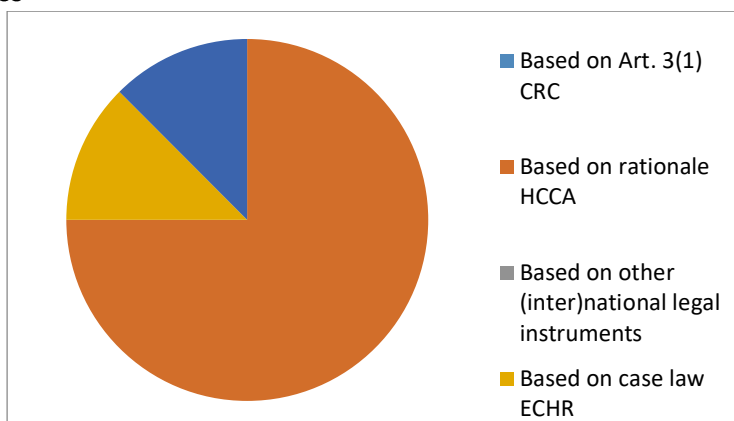


Figure (4) – Basis considered in the explicit reference on the best interests of the child

Explicit references to the concept of the best interests of the child were found in fifteen decisions. Twelve decisions based the reference on the rationale of the 1980 Hague Convention – for which

the best interests coincide with the immediate return in the place of habitual residence.<sup>665</sup> Two decisions also referred to the case law of the ECtHR,<sup>666</sup> evoking the principles stated in *Neulinger and Shuruk v Switzerland* case and in *X v Latvia*.

### **Implicit reference**

Seven decisions made an implicit reference to the best interests of the child.<sup>667</sup> The courts' reasoning mainly took into consideration the adaptation by the children to their new environment (namely, in the State of refuge), their living conditions and day-care in that country.<sup>668</sup> In one case, the court stated that:

The best interests of the child must be regarded on the basis of the relevant provision of the Hague Convention. The Government proposal on Child Custody and Access states that the primary consideration should be how the child has adapted to his or her new environment in Finland and how his or her circumstances here should be evaluated. On the other hand, it must be estimated what kind of effect the return order would have for the development of the child and what kind of circumstances the child would face after the return. When the weighting between the child's circumstances and child's interests is made it is especially important to regard the relationship between the child and his or her parents or other close ones.<sup>669</sup>

In one decision, the court considered that the children (both three years old) had adapted to their new environment in Finland, where they were conducted by the mother and had lived for two years.<sup>670</sup>

In one decision, the court examined the findings of the social services concerning the living conditions of the child in the State of origin, noting that his need for medical care was symptomatic of problems in the living environment; nevertheless, the court considered that sufficient safeguards have been arranged by the local authorities of that country and therefore the child could be returned.<sup>671</sup> The latter considerations concerning the sufficient safeguards in the State of origin were also the base of the court's reasoning in another decision where the child had been abducted from Italy.<sup>672</sup>

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<sup>665</sup> FI008 [5 July 2011] Helsingin hovioikeus päätös 2268/2011; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; FI036 [23 December 2009] Helsingin hovioikeus päätös 3455/2009; FI049 [20 December 2013] Helsingin hovioikeus päätös 3350/2013; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI064 [29 July 2016] Helsingin hovioikeuden päätös 1142/2016; FI065 [14 October 2016] Korkein oikeus 2097/2016; FI067 [29 August 2006] Korkein oikeus päätös 1903/2006; FI068 [3 March 2010] Korkein oikeus päätös 0433/2010; FI070 [18 October 2012] Korkein oikeus päätös 2055/2012; FI072 [15 December 2014] Korkein oikeus päätös 2621/2014.

<sup>666</sup> FI065 [14 October 2016] Korkein oikeus 2097/2016; FI070 [18 October 2012] Korkein oikeus päätös 2055/2012.

<sup>667</sup> FI021 [7 April 2006] Korkein oikeus päätös 0774/2006; FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; FI028 [13 March 2007] Helsingin hovioikeus päätös 866/2007; FI034 [29 September 2009] Helsingin hovioikeus päätös 2509/2009; FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009; FI069 [27 October 2009] Korkein oikeus päätös 2130/2009.

<sup>668</sup> Above the others, FI069 [27 October 2009] Korkein oikeus päätös 2130/2009.

<sup>669</sup> FI021 [7 April 2006] Korkein oikeus päätös 0774/2006.

<sup>670</sup> FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005.

<sup>671</sup> FI028 [13 March 2007] Helsingin hovioikeus päätös 866/2007.

<sup>672</sup> FI034 [29 September 2009] Helsingin hovioikeus päätös 2509/2009.

In one decision, the court considered that the best interests of the child coincided with her return in the State of origin, where custody proceedings were ongoing: this despite her objection to return.<sup>673</sup> The child was fourteen years old.

The objection of the child was also weighed in another case, together with several other elements concerning the child's living conditions in the State of origin and in the State of refuge, with the left-behind father and the abducting mother.<sup>674</sup> The Court did not directly nor simply indirectly imply to the best interests of the child, but this kind of logic can be found behind the Court's reasoning when it weighed different factors: the child was fourteen year old and the father was the sole custodian; the child objected being returned, but was not considered mature enough so that her opinion could be decisive; the child referred as reasons why she did not want to return to Sweden to her father, for instance, that 'at her father's place she need to clean daily' and that her father was strict compared to her mother; at her mother's place 'she can eat in the evening and wear fancy clothes'; in addition, she needed her mother's support in growing as a teenage girl, she felt lonely in Sweden and she was bullied in school - factors which the court did grant credit in its reasoning; also, it turned out that she missed her brother who lived with her father; the medical statement supported the view that she was not mature enough. According to the medical statement the child was considered to have lesser degree of maturity than children usually have at her age; she was considered to be easily influenced and that her opinions reflected her mother's opinions; the child had learning problems and problems in consistent understanding.

### Interpretation of grounds for non-return in relation to best interests

Some decisions linked the understanding of the best interests of the child to specific grounds for non-return provided by the HCCA, namely referring to Articles 12, 13(1)(b) and 13(2).

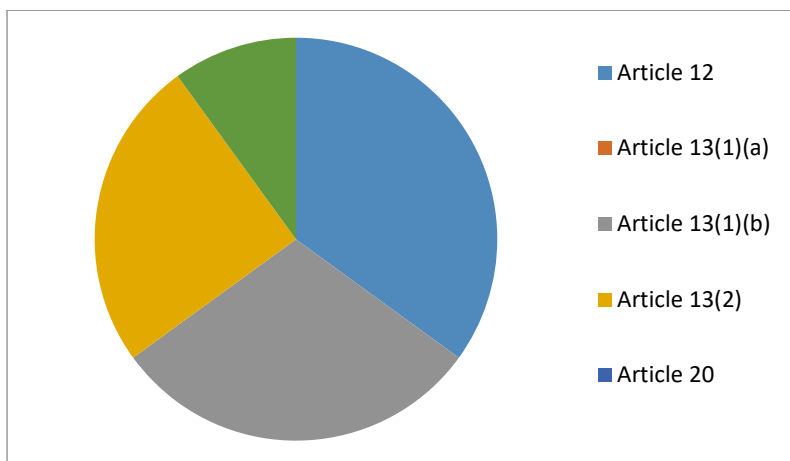


Figure (5) – Link between the best interests of the child and the Hague grounds for non-return.

As concerns Article 12, in seven decisions the courts considered the long period of time elapsed between the abduction and the submission of the application for return by the left behind parent

<sup>673</sup> FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009.

<sup>674</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005.

(in most of cases, between one and two and a half year).<sup>675</sup> The integration of the children in the new environment, proved by their wellbeing, the fact that their needs had been taken into consideration, the existence of a stable and familiar environment convinced the courts to refuse the return of the children, because the latter would have been against their best interests.

In one case,<sup>676</sup> the court acknowledged that the petition for return was made in time (a month after the abduction) and that the delay was caused by Central Authorities involved; nevertheless, the court considered that to return the child would be against her interests because she had strong family ties in her new environment, she spoke the language, she attended school and had hobbies. Also, social Authorities stated that it is recommendable that she continues living in Finland. She also had expressed to the social authorities that she wanted to stay in Finland.

In another decision,<sup>677</sup> the court considered important to contemplate what kind of consequences the return would have caused to the further development of children and what kind of circumstances the children would have faced after return, assessing that – when weighing child's circumstances and his or her interests – especially child's relationship to his or her parents and other next of kin must be noted.

The best interests of the child were also connected to the ground of non-return provided by Article 13(1)(b), in six cases. In four decisions, the courts stated that the child should be returned if sufficient safeguards exist to protect him or her after the return, even in presence of evidence that could show the existence of a certain risk of harm.<sup>678</sup>

Two decisions of 2016 dealt with a peculiar and delicate case: the father, who had taken the child unlawfully (this was undisputed) from Belarus, was politically active there; he and child were granted an asylum status by the Finnish Migration Service. The Finnish Court of Appeal<sup>679</sup> refused the return of the child, considering that

in this case it is obvious that the father cannot return to Belarus. Father has claimed that he has been threatened in Belarus among others that the child would be harmed. As the Asylum status was granted to both the Court has now reason to doubt the claim. Because father cannot return to his country, he has no way of controlling that the child would not be placed under grave risk. Also, if the child is returned to Belarus there is a risk that the child is used as a way to pressure the father to return to Belarus. Thus, exceptional reasons exist not to return the child.

The Court of third instance<sup>680</sup> reversed the judgement and ordered the return of the child, stating in the end of its reasoning that it seemed to be no reason to suspect that the child would have faced a grave risk even though he would return to Belarus. Therefore, the Supreme Court

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<sup>675</sup> FI021 [7 April 2006] Korkein oikeus päätös 0774/2006; FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; FI036 [23 December 2009] Helsingin hovioikeus päätös 3455/2009; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI068 [3 March 2010] Korkein oikeus päätös 0433/2010.

<sup>676</sup> FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006.

<sup>677</sup> FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016.

<sup>678</sup> FI028 [13 March 2007] Helsingin hovioikeus päätös 866/2007; FI034 [29 September 2009] Helsingin hovioikeus päätös 2509/2009; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI072 [15 December 2014] Korkein oikeus päätös 2621/2014.

<sup>679</sup> FI064 [29 July 2016] Helsingin hovioikeuden päätös 1142/2016.

<sup>680</sup> FI065 [14 October 2016] Korkein oikeus 2097/2016.

considered that the child could be returned despite the asylum status, because the child's asylum status was not independent, since it was granted consequently and dependently to the father's asylum status.<sup>681</sup>

With reference to Article 13(2), it is interesting to examine the courts' reasoning in weighing different factors, alongside the objection to return expressed by the child. In four cases,<sup>682</sup> the courts considered that, despite the child's objection, it was in his or her interests to return to the State of origin, either because the child was not considered mature enough so that his/her opinion could be decisive,<sup>683</sup> or because the living conditions in the State of refuge were unstable or unhealthy for his or her wellbeing.<sup>684</sup> It is interesting to note that a certain weight was given to the fact that custody proceedings were ongoing in the State of origin, which was in one case considered a decisive factor, even if the child had objected to return and he/she had been considered mature enough to take into consideration his/her opinion.<sup>685</sup> In one case, the court considered that 'the child does not object to returning to Sweden with such a reasons that they would justify not to return the child'.<sup>686</sup>

### Impact of the best interests on the final decision

In the large majority of cases in which the best interests of the child were taken into consideration, they were decisive for the final outcome of the decision (thirteen cases out of nineteen).

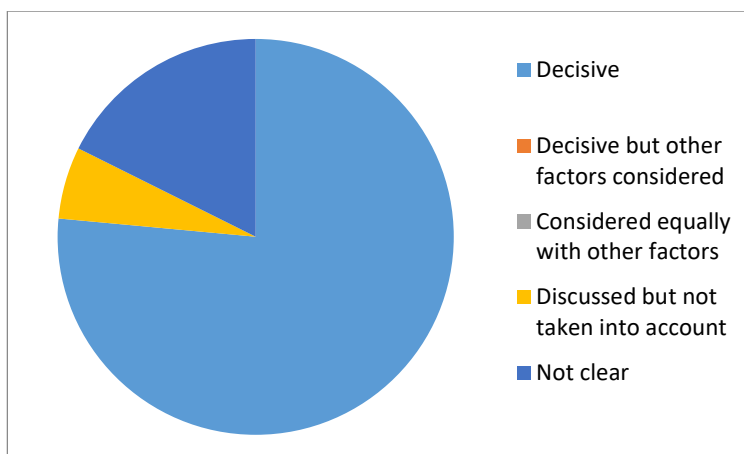


Figure (6) – Impact of best interests of the child on the final outcome of the decision

In six cases, the court considered that the child had adapted to the new environment, examining the living conditions in the country and the wellbeing of the child, concluding that it would have been against his or her interests to be returned to the State of origin.<sup>687</sup> In one of those cases, the court stated that returning the child with special needs after such a long period of time might have

<sup>681</sup> In this case, since most of the findings have been classified, all the grounds for returning the child could not be evaluated.

<sup>682</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009.

<sup>683</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005.

<sup>684</sup> FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009.

<sup>685</sup> FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015.

<sup>686</sup> FI067 [29 August 2006] Korkein oikeus päätös 1903/2006.

<sup>687</sup> FI021 [7 April 2006] Korkein oikeus päätös 0774/2006; FI025 [23 December 2005] Helsingin hovioikeus päätös 4317/2005; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; FI036 [23 December 2009] Helsingin hovioikeus päätös 3455/2009; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI068 [3 March 2010] Korkein oikeus päätös 0433/2010.

been harmful to her development, thus arguing that the return would be against her best interests.<sup>688</sup>

In two cases, the court stated that it is in the best interests of the child that the custody disputes and his or her living arrangements are decided in the state of his or her habitual residence.<sup>689</sup> One decision states that:

Its purpose [of the 1980 Hague Convention] is to promote the best interests of the child and [...] to return a child as promptly as possible back to his or her state of habitual residence. It makes it possible to solve the case in a State where the family lives and which has the best possibilities to get proofs of the best interests of the child.<sup>690</sup>

In that case, the court noted that taking the child from Sweden was in the beginning wrong, but later Swedish Court had granted the sole custody to the abducting mother: therefore, it did not make sense to order the child to be returned to Sweden as the mother has the right to bring her back there immediately.

The courts also gave precedence to other factors despite the child's objection to return, factors which were considered expression of his or her best interests and were in favour of the return in the State of origin.<sup>691</sup>

In one decision, the children's best interests were discussed, but not taken into account.<sup>692</sup> The case concerned three children, two of them were unlawfully taken from the UK to Finland, while the third was not, due to the fact that the left-behind father did not have custody rights over him according to English law. The court concluded by contemplating Article 8 ECHR, noting in blanket manner that – as it was clear that two of the children were taken unlawfully by the mother – in accordance with the Hague Convention they had to be returned. The eldest child could not be returned as the father was not entitled to seek his return. In this case, it is important to underline that the court strongly emphasised the responsibility of the parents as concerns the living conditions of the children.

In three cases, the child's best interests were taken into consideration, but it was not clear whether the assessment had an impact on the final outcome of the decision.<sup>693</sup>

### Hearing of The Child

The survey analysed the hearing of the child in those cases in which the court took into account the best interests of the child. Among the nineteen decisions concerned, in seven cases the child was heard during the proceedings;<sup>694</sup> in twelve cases, the child was not heard.

<sup>688</sup> FI021 [7 April 2006] Korkein oikeus päätös 0774/2006.

<sup>689</sup> FI049 [20 December 2013] Helsingin hovioikeus päätös 3350/2013; FI072 [15 December 2014] Korkein oikeus päätös 2621/2014.

<sup>690</sup> FI049 [20 December 2013] Helsingin hovioikeus päätös 3350/2013.

<sup>691</sup> FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI067 [29 August 2006] Korkein oikeus päätös 1903/2006.

<sup>692</sup> FI070 [18 October 2012] Korkein oikeus päätös 2055/2012.

<sup>693</sup> FI028 [13 March 2007] Helsingin hovioikeus päätös 866/2007; FI034 [29 September 2009] Helsingin hovioikeus päätös 2509/2009; FI065 [14 October 2016] Korkein oikeus 2097/2016.

<sup>694</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006; FI035 [5 October 2009] Helsingin hovioikeus päätös 2581/2009; FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI067 [29 August 2006] Korkein oikeus päätös 1903/2006; FI069 [27 October 2009] Korkein oikeus päätös 2130/2009.

In ten cases, the court did not motivate the decision not to hear the child; in two cases, the hearing did not take place because of the age of the child;<sup>695</sup> in one decision the child's age was not specified, while in the other one the children were nine and eight years old at the time of proceedings.

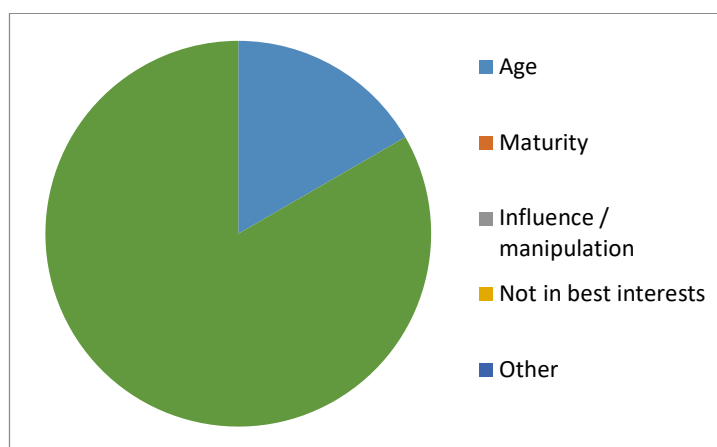


Figure (7) – Reasons against the hearing of the child

In most cases (six out of seven), the child was heard by a **social worker**; in one case, the hearing was conducted by the **judge**.

**In one case the hearing of the child resulted to be decisive** in the court's decisions,<sup>696</sup> since the child had objected in a consistent manner, she was mature, and she was already fifteen years old. This led the court to apply the ground of non-return stated by Article 13(2) HCCA.

In three cases, the findings of the hearing were considered equally with other factors.<sup>697</sup> The courts considered the other evidence deriving from the proceedings. In one decision, the court stated that the capacity of the child to form his opinion and understand the meaning of the return process could have been weakened by the fact that he had been a tool in his parents' disputes.<sup>698</sup> Therefore, the court ordered the return against the objection of the child. In another decision, the child's opinion was taken into consideration, but it was also emphasized that a very reasoned decision was made about living arrangements of the child, considering his/her situation in the State of habitual residence.<sup>699</sup>

In two cases, the child's views were sought but not considered decisive, because the child was not considered to be mature enough and therefore his or her opinion could not be decisive in the decision making.<sup>700</sup>

<sup>695</sup> FI008 [5 July 2011] Helsingin hovioikeus päätös 2268/2011; FI021 [7 April 2006] Korkein oikeus päätös 0774/2006.

<sup>696</sup> FI069 [27 October 2009] Korkein oikeus päätös 2130/2009.

<sup>697</sup> FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015; FI063 [27 May 2016] Helsingin hovioikeus päätös 851/2016; FI067 [29 August 2006] Korkein oikeus päätös 1903/2006.

<sup>698</sup> FI057 [29 May 2015] Helsingin hovioikeus päätös 114/2015.

<sup>699</sup> FI067 [29 August 2006] Korkein oikeus päätös 1903/2006.

<sup>700</sup> FI022 [15 September 2005] Helsingin hovioikeus päätös 2933/2005; FI026 [4 July 2006] Helsingfors Hovrätt Beslut 2144/2006.



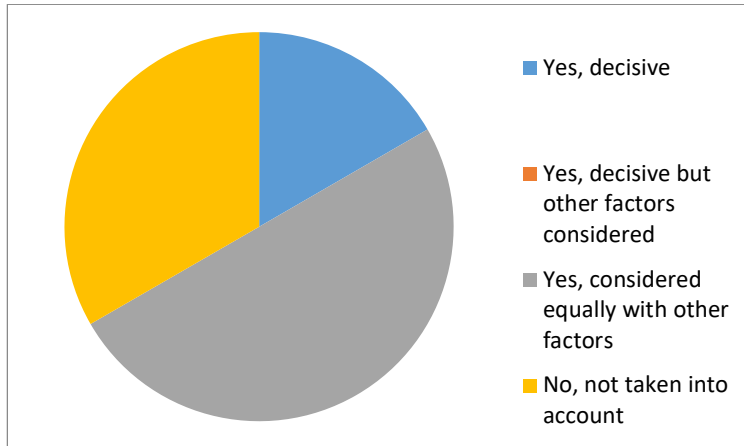


Figure (8) – Impact of the hearing on the best interests of the child

## France

### Country File – France<sup>701</sup>

#### General Data

A total of 161 children were involved in 130 proceedings. No case dealt with in courts of first instance was found since first instance judgments are not published. Ninety-eight cases were dealt with in courts of second instance and 32 in a court of third instance. In the majority of these cases (82%) the Hague Convention on Child Abduction was the only legal basis considered by the court. In twelve cases, Brussels IIbis was considered together with the Hague Convention on Child Abduction and in four cases the court only considered Brussels IIbis.

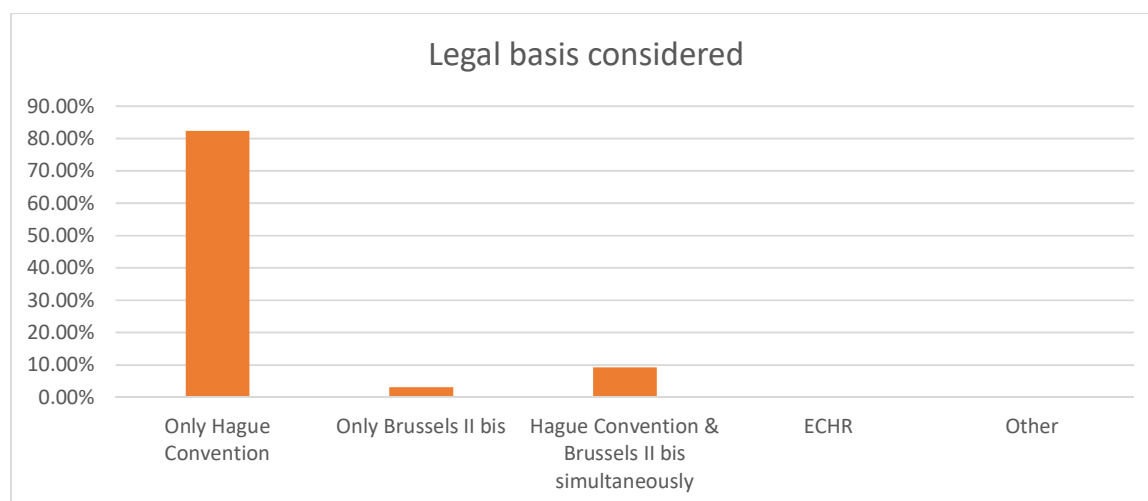


Figure (1) – Legal basis considered

In most of the cases, namely 63%, the court decided that the child had to return to his or her State of former habitual residence; in 34% of the cases the court rejected the return and in 3% of the cases the court of third instance decided to send the case back to the previous instance to decide on the merits.

<sup>701</sup> The French cases are collected and analysed by Tine Van Hof, VOICE researcher.

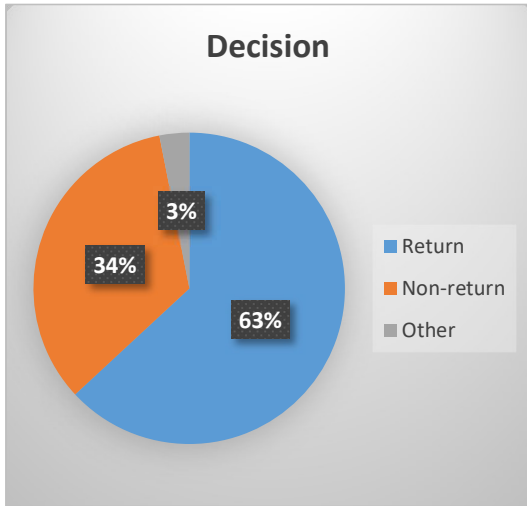


Figure (2) – Decision

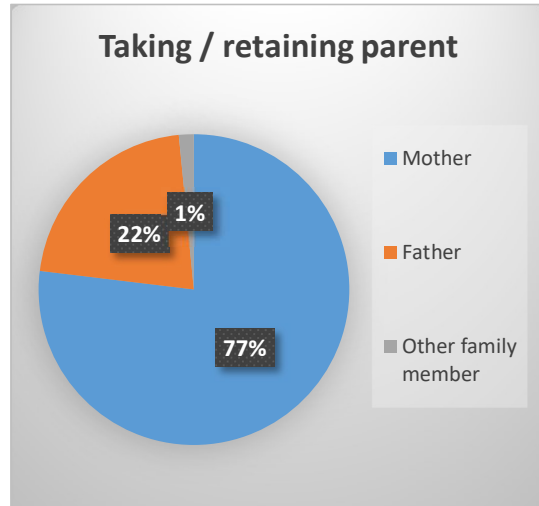


Figure (3) – Taking/retaining parent

Concerning the parties involved, it was in most cases the mother who abducted the child. In one case, the child was abducted by the grandparents,<sup>702</sup> and in another case the child was abducted by her two biological parents who did not have custody rights over the child.<sup>703</sup>

The age of the children involved varied widely.

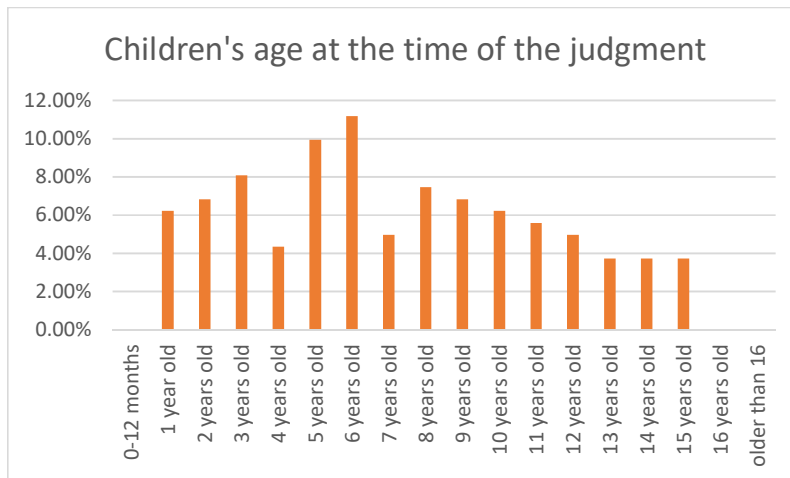


Figure (4) – Children's age at the time of the judgment

<sup>702</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>703</sup> FR026 [17 October 2007] Cour de Cassation 07-11.449.

## Best Interests of the Child

The courts referred explicitly to the best interests of the child in 45% of the cases. An implicit reference was found in 7% of the cases and courts did not refer to the best interests at all in 48% of the cases.

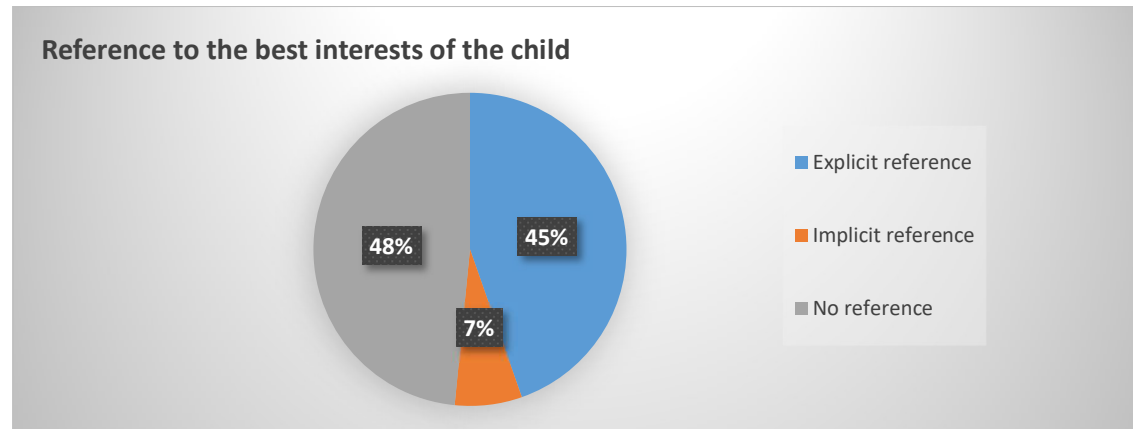


Figure (5) – Reference to the best interests of the child

### Explicit reference

An explicit reference to the best interests of the child can be found in 58 cases. In twenty of these cases this reference was based on Article 3(1) of the Convention on the Rights of the Child and in five cases on the rationale of the Hague Convention on Child Abduction.

In four cases, the courts referred to the case law of the ECtHR but not to one decision of the ECtHR in particular. In three cases, the courts mentioned the following:

It follows from the decisions of the ECtHR that for the interpretation and application of the Hague Convention on Child Abduction the national courts must, in consideration of the best interests of the child, in compliance with the requirements of Article 8 of the European Convention on Human Rights, carry out a [thorough/careful] examination of the concrete implications of the return on the child's situation in order to assess the conditions for such a return and the exceptions laid down by the Hague Convention on Child Abduction.<sup>704</sup>

In one case, the court stated that 'the ECtHR has laid down the principle that the best interests of the child must be the determining factor in the proceedings of the Hague Convention on Child Abduction'.<sup>705</sup> Two of these references to the case law of the ECtHR are situated after the ECtHR decisions in the cases *Neulinger and Shuruk v Switzerland* and *Maumousseau and Washington v France*,<sup>706</sup> and the two others are situated after the decision in the *X v Latvia* case of the ECtHR.<sup>707</sup>

<sup>704</sup> In one case the word 'thorough' was used (FR079 [17 June 2013] Cour d'appel Limoges 13/00223) and in the two other cases the courts used the word 'careful' (FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.).

<sup>705</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>706</sup> FR079 [17 June 2013] Cour d'appel Limoges 13/00223; FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>707</sup> FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

In one case the explicit reference to the best interests of the child was based on case law of the French Court of Cassation. The court of second instance referred to the following quote from the Court of Cassation:

The court of cassation verifies that in the context of the examination of the situation, the judges that decide on the merits grant a paramount consideration to the superior interests of the child which is consecrated by Article 3(1) of the New York Convention of 20 November 1989 on the rights of the child.<sup>708</sup>

In 86% of the cases, however, the explicit reference was based on other grounds.

In 26 cases, the courts mention what factors they find to be in the best interests of the child, contrary to the best interests of the child or not necessarily contrary to best interests of the child.

Firstly, in several cases courts found it to be in the best interests of the child not to return the child. This was based on several reasons: excellent integration in school,<sup>709</sup> adaptation to the new environment,<sup>710</sup> good integration,<sup>711</sup> quality of life that the child enjoys in France,<sup>712</sup> the left-behind parent's right to visit and stay is respected,<sup>713</sup> found balance of the child,<sup>714</sup> and the father's current behaviour.<sup>715</sup> In two other cases, the courts did find returning the child to be in his or her best interests so that co-parenthood could be respected,<sup>716</sup> or so that the child could maintain a personal relationship with both parents.<sup>717</sup> Lastly, in two cases it was found to be in the best interests of the child to take his or her opinion into account and consequently make an exception to the principle of prompt return.<sup>718</sup>

Then, there are certain factors which the courts did not expressly mention as being in the best interests of the child, but of which the court makes clear that they are not contrary to the best interests of the child. These are: the simple application of the Hague Convention on Child Abduction,<sup>719</sup> the living conditions in Italy,<sup>720</sup> the immediate return to Israel,<sup>721</sup> the criminal record of the father dating back more than twenty years and allegations of abuse of children from a previous relationship.<sup>722</sup> In four cases the courts did not refer to any specific factors but decided that the children in question could return to their State of former habitual residence since this was not hindered by the best interests of the child ('in the absence of any circumstance which draws from the best interests of the child that would hinder it').<sup>723</sup>

<sup>708</sup> FR110 [8 January 2016] Cour d'appel Besancon 15/01502.

<sup>709</sup> FR017 [12 December 2006] Cour de Cassation 06-13177.

<sup>710</sup> FR017 [12 December 2006] Cour de Cassation 06-13177.

<sup>711</sup> FR034 [4 November 2008] Cour d'appel Versailles 07/02093; FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726.

<sup>712</sup> FR034 [4 November 2008] Cour d'appel Versailles 07/02093.

<sup>713</sup> FR034 [4 November 2008] Cour d'appel Versailles 07/02093.

<sup>714</sup> FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726.

<sup>715</sup> FR128 [25 October 2017] Cour de cassation, 17-20.063.

<sup>716</sup> FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>717</sup> FR067 [31 May 2012] Cour d'appel Paris 12/05844; FR126 [12 July 2017] Cour de cassation, 17-11.840.

<sup>718</sup> FR112 [1 March 2016] Cour d'appel Paris 15/11722; FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>719</sup> FR048 [17 June 2010] Cour d'appel Dijon, 10/00967.

<sup>720</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779.

<sup>721</sup> FR100 [10 February 2015] Cour d'appel Paris 14/21136.

<sup>722</sup> FR039 [25 February 2009] Cour de cassation 08-18126.

<sup>723</sup> FR069 [13 October 2012] Cour d'appel Paris 12/16322; FR093 [3 July 2014] Cour d'appel Paris 14/09386; FR099 [29 January 2015] Cour d'appel 14/04135; FR104 [28 May 2015] Cour d'appel Caen 15/01495.

Lastly, some things are seen by the court as being contrary to the best interests of the child, such as:

- the child wishes to stay with her father in France;<sup>724</sup> the children are properly integrated in their new environment,<sup>725</sup> a return to Turkey would cause psychological harm.<sup>726</sup>
- In one case a return was found contrary to the best interests of the child due to a combination of the following factors: the father's abilities to meet her basic needs are not established; it would lead to a break with the primary caregiver, loss of an environment and the young age of the child.<sup>727</sup>
- In another case it was not the return in itself that was deemed contrary to the best interests of the child but rather the immediacy of the return.<sup>728</sup> In that case, the court ordered the return within six months since this would allow the mother to organize herself and to ensure that the child is not disturbed by the situation she created.<sup>729</sup>
- Also deemed contrary to the interests of the child is the separation of the child with either the left-behind parent (in all three cases the father),<sup>730</sup> the abducting parent (in this case the mother),<sup>731</sup> or the siblings.<sup>732</sup>
- Then, there were two cases in which nothing was said about the return or a separation being contrary to the best interests of the child. In the first case, the court said that the opinion expressed by the child cannot be accepted as appropriate and in accordance with her best interests because she was only twelve years old at the time she expressed her views, she was in unlawful residence with her father, her father had a position to influence her, the father has psychological problems that are not very compatible with the care of a child.<sup>733</sup> In the second case the court found that the remarks made by the father with regard to radical practice of Islam were worrying and require a cautious decision in the child's interests.<sup>734</sup>

Courts also referred to the concept of the best interests of the child but rather in a theoretical manner without really giving substance to this notion. First, the best interests of the child are referred to in the context the Hague Convention on Child Abduction's underlying principles:

- In four cases, the courts point out that the best interests of the child are infringed by the unlawful abduction or retention and that the purpose of the Hague Convention on Child Abduction, namely restoring the pre-existing situation by the immediate return of the child

<sup>724</sup> FR018 [10 January 2007] Cour d'appel de Nîmes 06/00443. Here the court related this argument to Article 13(1)(b) Hague Convention on Child Abduction.

<sup>725</sup> FR031 [8 August 2008] Cour d'appel de Paris, 08/05791 and 08/07826.

<sup>726</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>727</sup> FR071 [6 December 2012] Cour d'appel Versailles 12/06508.

<sup>728</sup> FR044 [7 July 2009] Cour d'appel Chambéry.

<sup>729</sup> FR044 [7 July 2009] Cour d'appel Chambéry.

<sup>730</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR048 [17 June 2010] Cour d'appel Dijon, 10/00967; FR051 [22 July 2010] Cour d'appel de Fort de France.

<sup>731</sup> FR108 [30 July 2015] Cour d'appel Rouen 15/01974.

<sup>732</sup> FR077 [2 April 2013] Cour d'appel Paris 13/03926.

<sup>733</sup> FR045 [6 August 2009] Cour d'appel Bourges 09/01061.

<sup>734</sup> FR114 [28 April 2016] Cour d'appel Rouen 16/00635.

is thus in the best interests of the child.<sup>735</sup> In two of these cases, the courts added that a return is not necessarily in the best interests of the child when one of the exceptions is applicable.<sup>736</sup> 'Only the exceptions provided for in the above-mentioned provisions, [...] qualify as an interest superior to that resulting from the simple restoration of a lawful situation.'<sup>737</sup> Other factors than the foreseen exceptions however, cannot form an exception to the principles of the Hague Convention on Child Abduction; 'freedom of movement, the right to reside in the place of one's choice and to lead a normal family life cannot have the effect of depriving the Hague Convention on Child Abduction of its effectiveness in the best interests of the child.'<sup>738</sup>

Furthermore, two courts gave expression to the idea that the courts in the State of former habitual residence are best placed to assess the best interests of the child,<sup>739</sup> and in one of these it was said that the court of former habitual residence can best guarantee 'a balanced examination of the rights of each of the parents and the interests of the child'.<sup>740</sup>

In several cases, the courts mention that the circumstances of grave risk and intolerable situation as determined in Article 13(1)(b) Hague Convention on Child Abduction have to be assessed in the primary consideration of the best interests of the child.<sup>741</sup> In some cases, the courts explicitly refer to Article 3(1) UNCRC as legal basis for this obligation.<sup>742</sup> In one case, the court stated that the best interests of the child as determined in Article 3(1) UNCRC have to be the primary consideration to apply the provisions of Articles 12 and 13 Hague Convention on Child Abduction.<sup>743</sup> Lastly, in two other cases the courts stated that according to Article 3(1) UNCRC 'exceptions to return must be considered with the primary consideration of the best interests of the child'.<sup>744</sup>

In two cases, the following was stated:

The exceptions to the immediate return rule of the child in the State of his residence are limited and have to be interpreted strictly. In addition, under the New York Convention on the Rights of the Child, Article 3(1), the circumstances of the return of the child must be considered in primordial consideration of the best interests of the child. In addition, under the terms of the same Convention under Articles 7 and 8, the child has the right to be raised by both parents.<sup>745</sup>

A similar consideration can be found in one other case.<sup>746</sup> In one case, the court referred to a similar right: 'One of the fundamental rights of the child is the right, under the Charter of

<sup>735</sup> FR024 [10 July 2007] Cour de cassation 07-10190; FR048 [17 June 2010] Cour d'appel Dijon, 10/00967; FR055 [17 January 2011] Cour d'appel de Lyon 09/05813; FR104 [28 May 2015] Cour d'appel Caen 15/01495; FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

<sup>736</sup> FR055 [17 January 2011] Cour d'appel de Lyon 09/05813; FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

<sup>737</sup> FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

<sup>738</sup> FR113 [14 April 2016] Cour d'appel Paris 16/02260.

<sup>739</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR048 [17 June 2010] Cour d'appel Dijon, 10/00967.

<sup>740</sup> FR048 [17 June 2010] Cour d'appel Dijon, 10/00967.

<sup>741</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR074 [20 December 2012] Cour d'appel Agen 12/01694; FR082 [5 July 2013] Cour d'appel Paris 13/11740; FR085 [25 September 2013] Cour de cassation 12-25.864.

<sup>742</sup> FR039 [25 February 2009] Cour de cassation 08-18126; FR118 [7 December 2016] Cour de cassation; FR121 [24 January 2017] Cour d'appel Paris 16/23798; FR124 [4 May 2017] Cour de cassation 17-11.031.

<sup>743</sup> FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

<sup>744</sup> FR126 [12 July 2017] Cour de cassation, 17-11.840; FR128 [25 October 2017] Cour de cassation, 17-20.063.

<sup>745</sup> FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>746</sup> FR079 [17 June 2013] Cour d'appel Limoges 13/00223.

Fundamental Rights of the European Union, to maintain regular personal relations and direct contacts with both parents respect of which is undeniably in the superior interest of any child.<sup>747</sup>

Several cases are dealt with by the French Court of Cassation and are thus not judged as a full-fledged third instance. The Court of Cassation rather executes a quality check of the judgment in second instance. In this context the Court of Cassation referred to the best interests a couple times in the following way: 'The court of appeal, which ruled in consideration of the interests of the children, legally justified her decision.'<sup>748</sup> In six cases, the Court of Cassation gives slightly more information. In four of these five cases, the Court of Cassation is of the opinion that the Court of Appeal decided correctly, while taking into consideration the best interests of the child, that there was no grave risk or intolerable situation in the sense of Article 13(1)(b) Hague Convention on Child Abduction so that return did not have to be refused.<sup>749</sup> In two other cases, the Court of Cassation did not agree with the judgment of the Court of Appeal and stated the following:

That being determined by motives unfit to characterize, with regard to the best interests of the child, the serious danger incurred by the child in case of immediate return, or the intolerable situation that such a return would create, the Court of Appeal deprived its decision of legal basis.<sup>750</sup>

In the first of these two cases, the Court of Appeal was of the opinion that the grave risk exception was applicable since the father is very busy with his professional activity; the child had never left her mother and does not know her father; the father left to Canada two days after the birth of the child and he only exercised his right of visit only for three days.<sup>751</sup> In the second of these two cases, the Court of Appeal based its decision on the following factors: in Canada the family occupies a small cabin, isolated in the forest, without running water or electricity while in France the three children have two rooms in France <sup>the children</sup> have been schooled since January 2015, the children expressed their apprehension of a definitive return to Canada and the father does not present any element on the material and social conditions in which the children would be received upon return to Canada.<sup>752</sup>

Next to cases in which the courts refer to factors giving substance to the best interests of the child and cases in which the concept is referred to in a theoretical manner, there are some cases in which we can see the interplay between Article 11(4) Brussels IIbis and Article 13(1)(b) Hague Convention on Child Abduction. About this interplay, the following was stated in the Draft Guide to Good Practice on Article 13(1)(b):

The Brussels IIa Regulation reinforces the principle that the court shall order the immediate return of the child and seeks to restrict the application of the exception under Article 13(1)(b) of the 1980 Convention to a strict minimum. Under the Brussels IIa Regulation, the

<sup>747</sup> FR104 [28 May 2015] Cour d'appel Caen 15/01495.

<sup>748</sup> FR109 [23 September 2015] Cour de cassation 15-15.869; FR124 [4 May 2017] Cour de cassation 17-11.031; FR130 [13 December 2017] Cour de cassation 17-23673.

<sup>749</sup> FR083 [10 July 2013] Cour de cassation 13-14562; FR085 [25 September 2013] Cour de cassation 12-25.864; FR096 [19 November 2014] Cour de cassation 14-17493; FR111 [10 February 2016] Cour de cassation 15-19.565.

<sup>750</sup> FR118 [7 December 2016] Cour de cassation; FR129 [16 November 2017] Cour de cassation 17-20.635.

<sup>751</sup> FR118 [7 December 2016] Cour de cassation.

<sup>752</sup> FR129 [16 November 2017] Cour de cassation 17-20.635.



child shall always be returned if he or she can be protected in the State of habitual residence.<sup>753</sup>

In two cases, the measures taken in the State of former habitual residence for the protection of the child were decisive for the decision to return. In one of these cases, the court said that the Public Prosecutor's office cannot oppose to return based on Article 11(4) Brussels IIbis since it does not establish that the protection of the child will be guaranteed to its return and that the best interests of the child are considered in this regard.<sup>754</sup> In the other case, the court stated that all measures for when the children return were taken in their interests so that return could be ordered.<sup>755</sup>

In another case, the court stated the following: 'Considering, finally, that, contrary to Mrs B.'s contention, it cannot be presumed that the German court's ruling on parental responsibility would not take into account the interests of the child and would hinder his relations with a foreign parent'<sup>756</sup>

Lastly, in one case the reference to the best interests of the child cannot really be put into one of the previous categories. The court mentioned that 'the parents are caring enough about their child's interest so that they won't do anything to hurt him. They have done everything since their separation to maintain the links between the three of them'.<sup>757</sup>

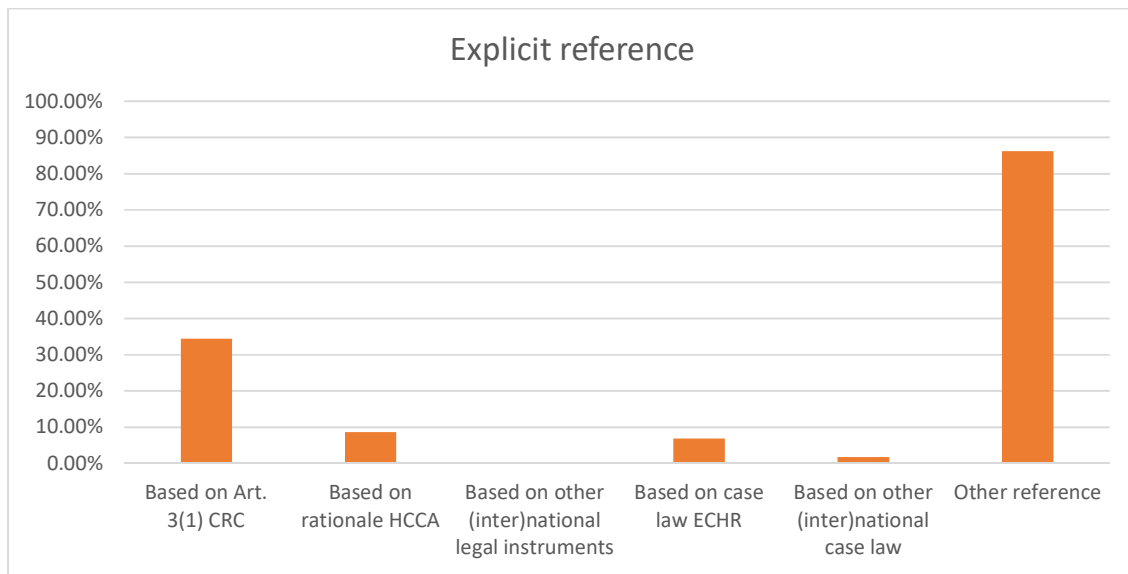


Figure (6) – Explicit reference

### Implicit reference

In nine French cases, the courts' considerations could be interpreted as an implicit reference to the best interests of the child.

<sup>753</sup> Permanent Bureau 'Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' (2017) para 69.

<sup>754</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526.

<sup>755</sup> FR041 [16 April 2009] Cour d'appel de Poitiers 09/00356.

<sup>756</sup> FR056 [17 February 2011] Cour d'appel Paris 11/00507.

<sup>757</sup> FR062 [1 December 2011] Cour d'appel Agen 11/01437.

In three cases the court implicitly considered that a separation between the child and his or her mother or sibling would not be in the best interests of the child. The following phrases were used in this regard: 'A separation would make the child suffer psychological harm related to the feeling of abandonment that he could experience',<sup>758</sup> 'because of his young age and lack of current emotional ties with the father, the taking away of the child out of his French home where he enjoys the intimacy of a mother and a brother he has never left before, would expose him to psychological harm'<sup>759</sup> and 'a brutal return of the child to the father, of which she has necessarily only a distant memory, in a country and with conditions of life totally different from those which she has had for four years, would be all the more traumatic when this return would be accompanied by a separation from the mother'.<sup>760</sup>

In two cases, courts decided not to order the return of the child for the following reasons: 'return would place the child (who lived for more than two years in France with her biological parents who abducted her from her foster parents and her sister) in an intolerable and dangerous situation for her balance'<sup>761</sup> and 'to avoid any risk of disruption of the equilibrium of this little girl and to prevent her from being placed, on her return, in an intolerable situation the consequences of which would be difficult to restore, given her age'.<sup>762</sup> The child in question was five-years old.

In two cases, the living conditions and the child's environment were considered important factors. In the first case, these factors were not satisfactory and led thus to the rejection of return:

The material conditions of the mother's existence are not compatible with the reception of the two teenage girls because of the smallness of her dwelling (two rooms) and the promiscuity resulting from the presence at the maternal home of the two older brothers, one of whom is very violent. Nor can the testimonies show that the mother's home provides a satisfactory psychological and educational environment.<sup>763</sup>

In the other case, nothing was considered wrong with the living conditions: 'Nor has it been demonstrated how the potential living conditions of children in California would be significantly less favourable than those presently enjoyed by their paternal grandparents'.<sup>764</sup>

In two cases, the courts found it to be best for the children to maintain relationships with both parents; 'The indispensable relations of the child with his two separated parents, so that he structures and develops his personality in contact with each of them, are realized by the right of visit and lodging granted to the parent with whom the child does not usually reside'.<sup>765</sup> And:

As to placing the child in an intolerable situation, this is necessarily the case if the parties are unable to approach their standpoints and agree on the framework that will allow Eliot to grow up for the best by assuring him of ongoing relations with both parents. The child has suffered from the radical separation from his mother despite his very young age and will certainly suffer if he would be deprived of his father.<sup>766</sup>

<sup>758</sup> FR006 [9 March 2006] Cour d'appel de Rouen 05/04340.

<sup>759</sup> FR022 [24 May 2007] Cour d'appel de Douai 06/03280.

<sup>760</sup> FR023 [18 June 2007] Cour d'appel de Nancy 05/00474.

<sup>761</sup> FR026 [17 October 2007] Cour de Cassation 07-11.449.

<sup>762</sup> FR097 [12 January 2015] Cour d'appel Colmar 14/02378.

<sup>763</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173.

<sup>764</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>765</sup> FR042 [6 May 2009] Cour d'appel Poitiers 09/00305.

<sup>766</sup> FR120 [20 December 2016] Cour d'appel Colmar 16/04362.

The protection of the child was found satisfactory to return the child in one case: 'It is not seriously questionable that in the United States of America in general, and in the State of California in particular, there is a judicial protection of youth comparable to that of which children are likely to benefit in France.'<sup>767</sup>

## Interpretation of grounds for non-return in relation to best interests

### Article 12 Hague Convention on Child Abduction

In two cases, the courts point out that the provision of Article 12 has to be assessed with regard to the best interests of the child as contained in Article 3(1) UNCRC.<sup>768</sup> Furthermore, it was expressed twice that the exception of integration provided for in Article 12 can qualify as an interest superior to the interest resulting from the immediate return of the child to the State of former habitual residence.<sup>769</sup>

Next to these rather theoretical insights, the courts decided that the child was integrated in his or her new environment and that return would not be in his or her best interests in the following situations: excellent school integration as well as adaptation to the new environment,<sup>770</sup> a stay of more than one year and a good integration in the refuge state,<sup>771</sup> and a stay of two years together with mother, half-brother and sister, enrolment in school for two years and the child speaking and understanding French.<sup>772</sup>

### Article 13(1)(a) Hague Convention on Child Abduction

In one case, the court says the following: 'when the child has been integrated for more than one year into a new environment, and his other parent has expressly or tacitly acquiesced to this non-return, its interest is not necessarily the return to the country of origin.'<sup>773</sup>

### Article 13(1)(b) Hague Convention on Child Abduction

In 42 cases the best interests were linked to the grave risk exception. This was done, first, in a theoretical manner by the statement that the circumstances of grave risk and intolerable situation as determined in Article 13(1)(b) Hague Convention on Child Abduction have to be assessed in the primary consideration of the best interests of the child.<sup>774</sup> In some cases, the courts explicitly refer to Article 3(1) UNCRC as legal basis for this obligation.<sup>775</sup>

Second, by examining the particular factors that could lead to the applicability of the grave risk exception in each case, courts make clear what they understand under the concept of the best interests of the child. The conclusions which the courts reach, can be divided into three categories:

- 1) The situation does not amount to a grave risk and thus return is ordered in the best interests of the child

<sup>767</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>768</sup> FR125 [18 May 2017] Cour d'appel Dijon 16/02039; FR127 [13 July 2017] Cour de cassation, 17-11.927.

<sup>769</sup> FR055 [17 January 2011] Cour d'appel de Lyon 09/05813; FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

<sup>770</sup> FR017 [12 December 2006] Cour de Cassation 06-13177.

<sup>771</sup> FR055 [17 January 2011] Cour d'appel de Lyon 09/05813.

<sup>772</sup> FR127 [13 July 2017] Cour de cassation, 17-11.927.

<sup>773</sup> FR055 [17 January 2011] Cour d'appel de Lyon 09/05813.

<sup>774</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR074 [20 December 2012] Cour d'appel Agen 12/01694;

FR082 [5 July 2013] Cour d'appel Paris 13/11740; FR085 [25 September 2013] Cour de cassation 12-25.864.

<sup>775</sup> FR001 [14 June 2005] Cour de Cassation Y 04-16.942; FR002 [13 July 2005] Cour de Cassation 05-10519 and 05-10521; FR039

[25 February 2009] Cour de cassation 08-18126; FR075 [13 February 2013] Cour de cassation 11-28424; FR110 [8 January 2016]

Cour d'appel Besançon 15/01502; FR118 [7 December 2016] Cour de cassation; FR121 [24 January 2017] Cour d'appel Paris

16/23798; FR124 [4 May 2017] Cour de cassation 17-11.031; FR125 [18 May 2017] Cour d'appel Dijon 16/02039.

- 2) The situation does constitute a grave risk so return is not in the best interests of the child
- 3) The Court of Appeal decided that there was a grave risk so that a return is contrary to the best interests of the child, but the Court of Cassation does not agree. For each of these three categories, the relevant factors considered by the courts will be quoted in full.

### **No grave risk so return was ordered**

In eight cases it was mostly the behaviour of and the conditions with the left-behind parent or in the State of former habitual residence that were discussed.

In the first case in this category, it was proven that the father was neither an alcoholic nor a drug addict, the psychological state of the child was satisfactory, and the father offered the child favourable living conditions in the US, with the assistance of a professional nurse.<sup>776</sup>

In the second case the mother herself had stated before the Brussels Police Service that her children were not in danger at her husband's house.<sup>777</sup>

In case FR010 the court ascertains that in the United States of America in general, and in the State of California in particular, there is judicial protection of youth comparable to that of which children are likely to benefit in France and that furthermore it has not been demonstrated how the potential living conditions of children in California would be significantly less favourable than those presently enjoyed at their paternal grandparents.<sup>778</sup>

In case FR028 the court contended that the father has never used any violence against his children and none of the evidence makes it possible to say that they would at any time have experienced any physical or psychological harm in his presence. Further, the brutal cut of the relationship with their father was contrary to their interests. Therefore, the court concludes that even if the children have adapted perfectly in France, the evidence is not reported that their living conditions in Italy are contrary to their wellbeing and interest and even if the return to their country of origin will require them to readapt, there is not a serious risk that the return will expose the two children to a psychological harm or place them in an intolerable situation.<sup>779</sup>

A criminal record of the father dating back more than twenty years and the allegations that the father abused his children of a first marriage were not found sufficient to constitute a danger.<sup>780</sup>

The court concluded that the father had regularly exercised his parental rights and that now the child was totally cut off from his father so that the application of the principle of the Hague Convention on Child Abduction was in the best interests of the child.<sup>781</sup>

The court states that the mother lived in Makalali, South Africa during her pregnancy and six months after the birth of the daughter and that she does not show that it is impossible for her to return and stay in Makalali. Furthermore, the non-return of the child would hinder the relations

<sup>776</sup> FR001 [14 June 2005] Cour de Cassation Y 04-16.942.

<sup>777</sup> FR002 [13 July 2005] Cour de Cassation 05-10519 and 05-10521.

<sup>778</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

<sup>779</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779.

<sup>780</sup> FR039 [25 February 2009] Cour de cassation 08-18126.

<sup>781</sup> FR048 [17 June 2010] Cour d'appel Dijon, 10/00967.

between the child and her father, who is considered qualified for the child's upbringing and kept contact with his child.<sup>782</sup>

In case FR124 the court took into account many factors to decide that a return is not contrary to the best interests of the child:

- The quality of the health system in Israel is very satisfactory
- People infected with AIDS benefit from free treatment
- The child was followed in Israel for being seropositive
- The antiviral treatment advocated by the Israeli doctor is the same as that prescribed in France
- The father, with the exception of being seropositive, does not suffer from any physical or mental disorder which could represent a danger for the child
- All the tests screening the father for narcotics, with the exception of prescribed cannabis for medical purposes, was negative
- Nothing prevents the mother from returning to live with her daughter in Israel, a State of which she possesses the nationality.<sup>783</sup>

A second group of five cases mostly emphasizes the importance of the relation between the child and his or her two parents.

The court held that the indispensable relations of the child with his two separated parents are realized by the right of visit granted to the parent with whom the child does not usually reside so that he can structure and develop his personality in contact with each of them.<sup>784</sup>

In case FR105 the court concluded that a return would not create a grave risk for the children and that it is in their best interests that such return be ordered, in particular so that co-parenthood can be respected.<sup>785</sup>

The court is of the opinion that the child would necessarily be placed in an intolerable situation if the parties are unable to get closer and agree on the framework that will allow the child to grow up for the best by assuring him of ongoing relations with each of his parents. The child has suffered from radical separation with his mother despite his very young age and will suffer if he were deprived of his father.<sup>786</sup>

The court found that there was no evidence of a grave risk so that the children's best interests and their right to maintain personal relations with both parents required that their return to the State of their former habitual residence be ordered.<sup>787</sup>

Then there is a last case in which the court believed the behaviour of the abducting parent had to stop and therefore the child had to be sent back. The court states that the repeated violation by the mother of judicial decisions fixing the habitual residence of the child in Italy is not in the interest of the child and that these events are traumatic as demonstrated by the agitated behaviour of Maximilian to the brigade of minors.<sup>788</sup> In this case, the mother abducted the child to Paris in August

<sup>782</sup> FR096 [19 November 2014] Cour de cassation 14-17493.

<sup>783</sup> FR124 [4 May 2017] Cour de cassation 17-11.031.

<sup>784</sup> FR042 [6 May 2009] Cour d'appel Poitiers 09/00305.

<sup>785</sup> FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664.

<sup>786</sup> FR120 [20 December 2016] Cour d'appel Colmar 16/04362.

<sup>787</sup> FR126 [12 July 2017] Cour de cassation, 17-11.840.

<sup>788</sup> FR027 [22 May 2008] Cour d'appel de Paris 07/44064.

2005, after which the child was sent back to Italy.<sup>789</sup> Then, the mother abducted the child for a second time to France in November 2007 (the case at hand deals with the second abduction).

### **Grave Risk so Return was Refused**

The reasons for which the courts refuse return can be divided in three rather clear categories: separation from the abducting parent (nine cases), violence / abuse by the left-behind parent (five cases) and integration in the State of refuge (two cases). In three cases, there are other reasons.

#### **Separation**

This category contains cases in which a separation between the abducting parent and the child might occur due to the return of the child to his or her State of former habitual residence while the abducting parent stays in the State of refuge.

In the first case in the category 'separation from the abducting parent', the child was only seventeen months old and his mother cared for him since his birth. If the child had to return, it would not be possible to maintain regular relations with his mother given the distance and the high cost of the trip. The consequent separation would make the child incur a psychological harm related to the feeling of abandonment.<sup>790</sup>

In the second case, the court referred to the child's young age of three years old, the lack of current emotional ties with the father and the intimacy between the child and the mother and a brother whom he has never left before. Thus, return without the mother would expose the child to a psychological harm.<sup>791</sup>

In case FR023, the court contends that the child would have to return to a country with conditions of life totally different from those which she has had for four years, the father's affection and necessary care are not guaranteed and the mother cannot return with the child because of family conflict, violence, and threats from the father.<sup>792</sup>

In another case, the court concluded that the return of a child who spent more than two years in France with her biological parents (who abducted her) and her sister, would place her in an intolerable and dangerous situation for her balance.<sup>793</sup>

In case FR071 the court focuses on the young age of the child (three years old) and states that the abilities of the father to meet the basic needs of the child are not established, a return would mean a break with the primary caregiver and a return would also mean the loss of an environment, in particular the school environment. Thus, a return would expose the child to physical and psychological harm contrary

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<sup>789</sup> FR021 [15 February 2017] Cour d'appel de Paris 06/17206. This case was further not included in the analysis since the best interests of the child were not mentioned either explicitly or implicitly.

<sup>790</sup> FR006 [9 March 2006] Cour d'appel de Rouen 05/04340.

<sup>791</sup> FR022 [24 May 2007] Cour d'appel de Douai 06/03280.

<sup>792</sup> FR023 [18 June 2007] Cour d'appel de Nancy 05/00474.

<sup>793</sup> FR026 [17 October 2007] Cour de Cassation 07-11.449.

to her interests.<sup>794</sup> In this case the mother could not return together with the child because of the domestic violence that the father used against her.

In case FRO97 the father was violent against the mother and there existed a health risk for the child if she had to return to Armenia. Next to these factors, however, the separation from the mother was the decisive one. The court stated that a sudden break with her mother could have serious consequences for her psychological evolution and could lead to a real risk of infantile psychosis. Further, there was a risk of disruption of the child's equilibrium. The court also noted that the consequences of this intolerable situation would be difficult to restore given the child's age (5 years old).<sup>795</sup>

In another case, the father uses psychological violence against the mother and this very likely in presence of the children. The mother found a personal balance in France and a return to Portugal would reactivate a state of stress for her. A return would further pose important material problems since the mother has no other resources than social benefits and it is highly unlikely that she will find a job in Portugal for the period of the procedure, which can be long. To return the children without the mother would not be possible since the children are four and five years old, have always lived with their mother and have been cut off from all relations with their father for fourteen months; they undeniably need the mother to care for them. The father always counted on the mother to care for the children. Thus, it is in their well-understood interest not to live separate from their mother since it would create for them an intolerable situation.<sup>796</sup>

In case FR110 the court refers to the young age of the child (one year old), to the fact that the child never left her mother and does not know her father who is very monopolised by his professional activity to reject the return.<sup>797</sup>

In the last case for which the separation with the abducting parent was the main factor to reject return, the child was only two years old, had always lived with her mother, the mother cannot accompany her daughter upon return and the father does not provide anything to prove that he can take care of his daughter. Further, the remarks about the father practicing a radical Islam are worrying. The court therefore concludes that it would put the child in danger to trust her to her father's care.<sup>798</sup>

All the cases categorized under 'separation from the abducting parent' as a reason for not returning the child, however, show that the separation is rarely a factor standing on its own. The courts also take into account the young age of the child, the (lack of) relation with the left-behind parent, the abilities and behaviour of the left-behind parent and the living conditions in the State of refuge as well as in the State of former habitual residence.

<sup>794</sup> FR071 [6 December 2012] Cour d'appel Versailles 12/06508.

<sup>795</sup> FRO97 [12 January 2015] Cour d'appel Colmar 14/02378.

<sup>796</sup> FR108 [30 July 2015] Cour d'appel Rouen 15/01974.

<sup>797</sup> FR110 [8 January 2016] Cour d'appel Besancon 15/01502.

<sup>798</sup> FR114 [28 April 2016] Cour d'appel Rouen 16/00635.

## Violence/Abuse

In the first case placed in this category, the court says that the father is a violent man, also with regard to his son. This has once more been proven by the threats he expressed recently in three messages. The Hungarian instances provide a certificate in which they remind of existing legislation to protect children. However, the court says that 'the general reminder of existing legislation does not prove that concrete provisions in line with the actual situation of the child have been taken to counter the risk of physical and psychological danger that the return to Hungary would actually put on this two-year-old child' and 'this general certificate does not contain any precise, concrete provisions that are in adequacy with the present situation that could have been taken to ensure the protection of the child after his return'.<sup>799</sup>

In another case, it was not expressly said that the left-behind father was violent but the court mentioned that 'in view of the father's current behaviour' the best interests of the children were not to order the return to the state of their former habitual residence.<sup>800</sup>

The child declared that her father touched her in a sexual way. This declaration together with the fact that the daughter stays with her mother, since one year now, made the court to conclude that a return to the father will place her in an intolerable situation.<sup>801</sup>

In case FR082 the child was not the direct victim of domestic violence, but he was a witness of it. The child had a very strong bond with his mother and the father is unable to exercise his responsibilities for the child's upbringing under conditions guaranteeing health and safety of the child. Furthermore, the social worker said that the child should live with his mother in France to safeguard the emotional sphere and for the greater interests of the child. The court followed the opinion of the investigator and refused return.<sup>802</sup>

In the last case, it was not the left-behind parent – in this case the mother – who was violent towards the child but one of the two elder brothers who is present at the mother's house. This together with the fact that the house has only two rooms, brings the court to the conclusion that the mother's home cannot provide a satisfactory psychological and educational environment.<sup>803</sup>

## Other

In two cases the court decided not to return the child based on i.a. their integration in France. In the first case, the court said that a return to Mauritius would place the children in an intolerable and dangerous situation for their balance given the quality of life the children enjoy and their good integration in France.<sup>804</sup> In the

<sup>799</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526.

<sup>800</sup> FR128 [25 October 2017] Cour de cassation, 17-20.063.

<sup>801</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025.

<sup>802</sup> FR082 [5 July 2013] Cour d'appel Paris 13/11740.

<sup>803</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173.

<sup>804</sup> FR034 [4 November 2008] Cour d'appel Versailles 07/02093.



second case the child was integrated in the social and family life in France, the child found a balance here while the father had not shown any interest in the return of his daughter and had not expressed the wish to see her again. In these circumstances, the court decided that the superior interest of the child requires not to order her return to Ixelles.<sup>805</sup>

In another case it was not necessarily contended that the child was integrated in France, but the court did establish that the child exhibited serious behavioural problems while living with the mother and that the child's behaviour is improved since being in France. Thus, in his interests, return is refused.<sup>806</sup>

In case FR121, the court concluded that an immediate return to the United States would place the child in an intolerable and dangerous situation for his balance because of the psychological fragility of the child.<sup>807</sup>

In the last case within this category, return was refused based on the wish expressed by the child (fourteen years old) to remain with her father. The court said that the child appeared as a very mature child, fully aware of the situation and the facts of the dispute, determined and clear in her expression. In the light of these elements it appears to the court that the immediate return of the child to England, would be such as to create an intolerable situation contrary to the best interests of that child.<sup>808</sup>

### **Elements used by the Court of Appeal to refuse return and deemed unfit by the Court of Cassation**

The following elements were used by the Court of Appeal to motivate the rejection to order the return of the child but were deemed unsatisfactory by the Court of Cassation to apply the grave risk exception:

Changing the new balance of a child of four years,<sup>809</sup> difficulties in maintaining relations between child and mother which would lead to a separation trauma and feelings of abandonment,<sup>810</sup> the child has never left her mother and does not know her father who is very monopolised by his professional activities,<sup>811</sup> the family occupies a small cabin in Canada, isolated in the forest, without running water or electricity while in France the three children have two rooms,<sup>812</sup> in France, the children have been schooled since January 2015,<sup>813</sup> the children expressed their apprehension of a definitive return to Canada,<sup>814</sup> and the father does not present any element on the material and social conditions in which the children would be received upon return to Canada.<sup>815</sup>

### **Article 13(2) Hague Convention on Child Abduction**

<sup>805</sup> FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726.

<sup>806</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>807</sup> FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>808</sup> FR018 [10 January 2007] Cour d'appel de Nîmes 06/00443.

<sup>809</sup> FR075 [13 February 2013] Cour de cassation 11-28424.

<sup>810</sup> FR075 [13 February 2013] Cour de cassation 11-28424.

<sup>811</sup> FR118 [7 December 2016] Cour de cassation.

<sup>812</sup> FR129 [16 November 2017] Cour de cassation 17-20.635.

<sup>813</sup> FR129 [16 November 2017] Cour de cassation 17-20.635.

<sup>814</sup> FR129 [16 November 2017] Cour de cassation 17-20.635.

<sup>815</sup> FR129 [16 November 2017] Cour de cassation 17-20.635.

In three cases the best interests of the child were linked to the exception of objection of the child. In the first case the judge states: 'The judge takes into consideration the opinion expressed by the child, but has every right to appreciate, taking into account the age and the maturity of the child, if this opinion is appropriate and in accordance with the best interests of the child.'<sup>816</sup> In this specific case the judge decided that the opinion expressed by the child 'cannot be accepted as appropriate and in accordance with her best interests'<sup>817</sup> and quotes the following reasons: 'the girl was only twelve years old when she expressed her opinion and the father had a position to influence her'.<sup>818</sup> In the second case, the court found it appropriate to take the opinion of the child into account and stated that 'the best interests of the child command to make an exception to the principle of return to the State of former habitual residence'.<sup>819</sup> In this case the child was fifteen years old and has sufficient maturity, she objected to the return before both courts, she is schooled and well-integrated in France and her elder brother also came to live in France.<sup>820</sup>

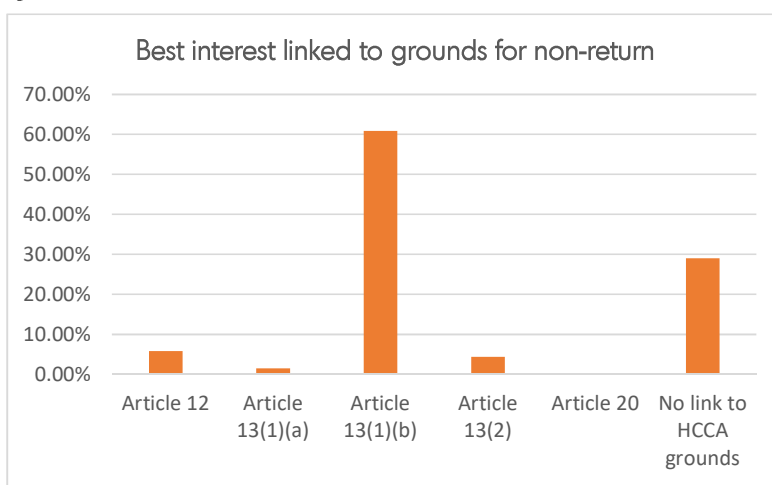


Figure (7) – Best interests linked to grounds for non-return

In the last case, the court states that the circumstances in order to decide on the application of Article 13 of the Hague Convention on Child Abduction must be assessed in primary consideration of the best interests of the child.<sup>821</sup> Also in this case the court decided that it is appropriate to take the child's opinion into account since he is fifteen-year old and has acquired a sufficient degree of maturity. The court states that the feelings expressed by this child characterize an effective opposition to his return.<sup>822</sup>

## Impact of the Best Interests on the Final Decision

### The Best Interests are Decisive

In 25 cases out of the 69 cases in which the best interests are mentioned (explicitly or implicitly), the best interests were decisive for the final outcome of the proceeding.

<sup>816</sup> FR045 [6 August 2009] Cour d'appel Bourges 09/01061.

<sup>817</sup> FR045 [6 August 2009] Cour d'appel Bourges 09/01061.

<sup>818</sup> FR045 [6 August 2009] Cour d'appel Bourges 09/01061.

<sup>819</sup> FR112 [1 March 2016] Cour d'appel Paris 15/11722.

<sup>820</sup> FR112 [1 March 2016] Cour d'appel Paris 15/11722.

<sup>821</sup> FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>822</sup> FR121 [24 January 2017] Cour d'appel Paris 16/23798.

That the best interests were decisive, became clear in different ways. First, some courts mentioned that the exceptions to return have to be assessed in the best interest of the child so that the best interests were in that case the overarching consideration.<sup>823</sup> In one case, the court referred to the case law of the ECtHR and says that according to this case law the best interests of the child have to be the determining factor.<sup>824</sup> The Court of Cassation stated in one case that 'the court of appeal ruled in the best interests of the child, thus legally justifying his decision on that basis'.<sup>825</sup> So the fact that the court of appeal ruled in the best interests of the child, makes that its decision is legally justified.

In several cases, the courts assessed the specific factors of the case and decided that a return would not be in the best interests of the child so that also here, the best interests were the overarching consideration.<sup>826</sup> In some other cases, the courts came to the exact opposite conclusion by following the same steps: the courts assessed the specific factors of the case but decided that it would be in the best interest of the child to return.<sup>827</sup>

Then, some courts said the following or something similar: 'Considering that in the absence of any circumstance which draws from the best interests of the child, that would hinder it, it is advisable to order the return of the child'.<sup>828</sup> This shows that if there would be something that would not be in the best interests of the child, this would change the court's decision. Thus, the best interests of the child are referred to as an overall and decisive check before deciding on the return.

#### **The Best Interests are Decisive but Other Factors were Considered**

In one case the best interests of the child were considered alongside the adequate arrangements (which also have to be in the best interests of the child) and the violence of the father (which is contrary to the best interests of the child).<sup>829</sup> Overall, the best interests of the child were the decisive factor since also the other two factors considered with it are linked to the interests.

#### **The Best Interests are Considered Equally with Other Factors**

In most cases in this category, the best interest were considered alongside the grave risk exception of Article 13(1)(b) Hague Convention on Child Abduction.<sup>830</sup> In one case, the best interests were considered alongside Article 13(1)(b) and Article 13(2) Hague Convention on Child Abduction,<sup>831</sup> and in another case alongside Article 13(2) Hague Convention on

<sup>823</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR039 [25 February 2009] Cour de cassation 08-18126.

<sup>824</sup> FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540.

<sup>825</sup> FR124 [4 May 2017] Cour de cassation 17-11.031.

<sup>826</sup> FR017 [12 December 2006] Cour de Cassation 06-13177; FR022 [24 May 2007] Cour d'appel de Douai 06/03280; FR023 [18 June 2007] Cour d'appel de Nancy 05/00474; FR026 [17 October 2007] Cour de Cassation 07-11.449; FR034 [4 November 2008] Cour d'appel Versailles 07/02093; FR055 [17 January 2011] Cour d'appel de Lyon 09/05813; FR071 [6 December 2012] Cour d'appel Versailles 12/06508; FR082 [5 July 2013] Cour d'appel Paris 13/11740; FR097 [12 January 2015] Cour d'appel Colmar 14/02378; FR098 [13 January 2015] Cour d'appel Aix-en-Provence 14/05726; FR108 [30 July 2015] Cour d'appel Rouen 15/01974; FR110 [8 January 2016] Cour d'appel Besançon 15/01502; FR112 [1 March 2016] Cour d'appel Paris 15/11722; FR114 [28 April 2016] Cour d'appel Rouen 16/00635; FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>827</sup> FR044 [7 July 2009] Cour d'appel Chambéry; FR067 [31 May 2012] Cour d'appel Paris 12/05844; FR120 [20 December 2016] Cour d'appel Colmar 16/04362.

<sup>828</sup> FR069 [13 October 2012] Cour d'appel Paris 12/16322; FR093 [3 July 2014] Cour d'appel Paris 14/09386; FR099 [29 January 2015] Cour d'appel 14/04135; FR104 [28 May 2015] Cour d'appel Caen 15/01495.

<sup>829</sup> FR003 [6 October 2005] Cour d'appel de Paris 2005/16526.

<sup>830</sup> FR051 [22 July 2010] Cour d'appel de Fort de France; FR100 [10 February 2015] Cour d'appel Paris 14/21136; FR105 [4 June 2015] Cour d'appel Aix-en-Provence 15/02664; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>831</sup> FR048 [17 June 2010] Cour d'appel Dijon, 10/00967.

Child Abduction only.<sup>832</sup> The best interests were also considered alongside Article 12 Hague Convention on Child Abduction in one case.<sup>833</sup>

### The Best Interests are Discussed but Not Taken into Account

In case FR033 the court said: 'The best interests of the child referred to in the New York Convention are not in issue here.'<sup>834</sup> Thus, this court is of the opinion that the best interests of the child do not have a place in the return proceedings.

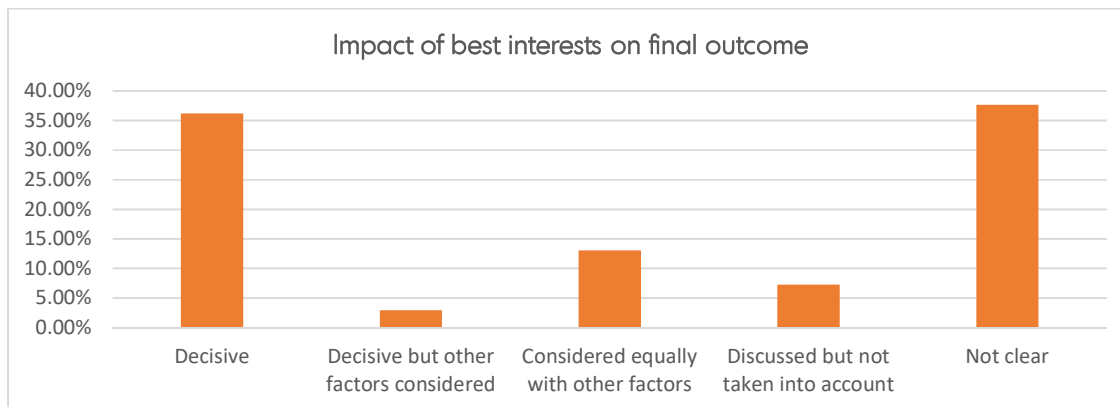


Figure (8) – Impact of best interests on final outcome

## Hearing of The Child

In most cases (30%) it is unknown whether the child was heard, in 13% the child was heard and in 8% the child was not.

In eleven of the seventeen cases in which the child was heard, this hearing was carried out by a judge. In two cases it was another professional who heard the child.<sup>835</sup>

In three of the seventeen cases in which the child was heard, it can be said that the hearing contributed to the determination of the best interests of the child.<sup>836</sup> In all these three cases, the child's views were decisive for the final decision of the court not to return the child.

<sup>832</sup> FR064 [13 April 2012] Cour d'appel Paris 12/06173.

<sup>833</sup> FR031 [8 August 2008] Cour d'appel de Paris, 08/05791 and 08/07826.

<sup>834</sup> FR033 [30 October 2008] Cour d'appel de Rouen 08/02361.

<sup>835</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025 (the child was heard by the police services together with a psychologist); FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540 (two female gendarmes heard the child).

<sup>836</sup> FR026 [17 October 2007] Cour de Cassation 07-11.449; FR112 [1 March 2016] Cour d'appel Paris 15/11722; FR121 [24 January 2017] Cour d'appel Paris 16/23798.

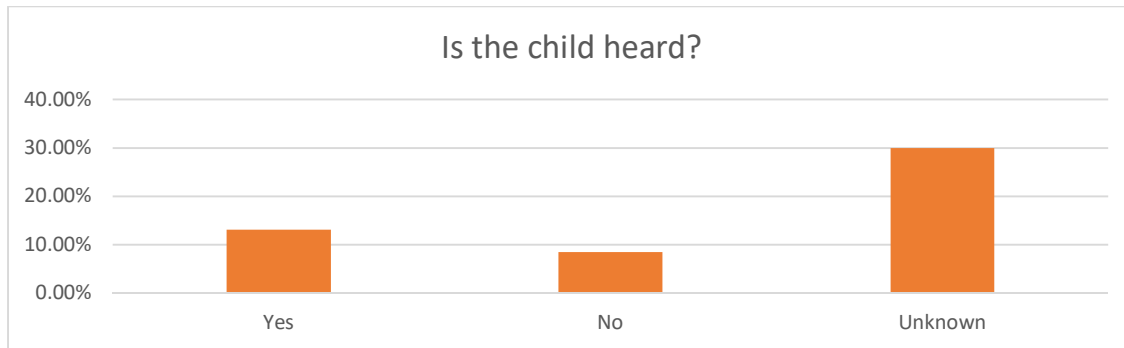


Figure (9) – Is the child heard?



Figure (10) – Professional hearing the child

During the hearing, children mostly spoke about the wish to stay with the abducting parent in the State of refuge,<sup>837</sup> their opposition to return to the State of former habitual residence,<sup>838</sup> the integration in their new environment,<sup>839</sup> the behaviour of the left-behind parent,<sup>840</sup> acquisition of the French language,<sup>841</sup> and the living conditions in the State of former habitual residence.<sup>842</sup>

<sup>837</sup> FR018 [10 January 2007] Cour d'appel de Nîmes 06/00443; FR026 [17 October 2007] Cour de Cassation 07-11.449; FR034 [4 November 2008] Cour d'appel Versailles 07/02093; FR045 [6 August 2009] Cour d'appel Bourges 09/01061; FR064 [13 April 2012] Cour d'appel Paris 12/06173; FR067 [31 May 2012] Cour d'appel Paris 12/05844; FR077 [2 April 2013] Cour d'appel Paris 13/03926; FR112 [1 March 2016] Cour d'appel Paris 15/11722.

<sup>838</sup> FR041 [16 April 2009] Cour d'appel de Poitiers 09/00356; FR045 [6 August 2009] Cour d'appel Bourges 09/01061; FR048 [17 June 2010] Cour d'appel Dijon, 10/00967; FR112 [1 March 2016] Cour d'appel Paris 15/11722.

<sup>839</sup> FR017 [12 December 2006] Cour de Cassation 06-13177; FR026 [17 October 2007] Cour de Cassation 07-11.449; FR031 [8 August 2008] Cour d'appel de Paris, 08/05791 and 08/07826; FR112 [1 March 2016] Cour d'appel Paris 15/11722.

<sup>840</sup> FR015 [30 November 2006] Cour d'appel d'Aix en Provence 2006/1025; FR080 [25 June 2013] Cour d'appel Bordeaux 13/02540; FR121 [24 January 2017] Cour d'appel Paris 16/23798.

<sup>841</sup> FR031 [8 August 2008] Cour d'appel de Paris, 08/05791 and 08/07826.

<sup>842</sup> FR121 [24 January 2017] Cour d'appel Paris 16/23798.

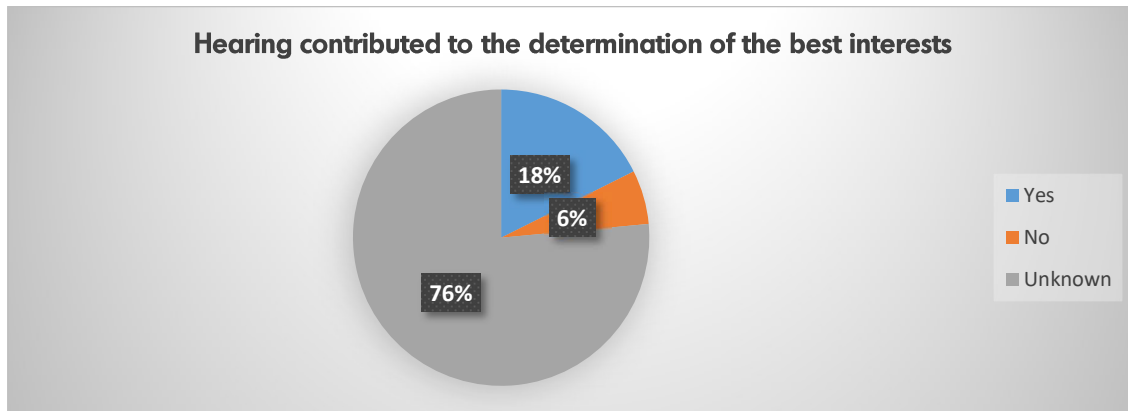


Figure (11) – Hearing contributed to determination of the best interests

The main reason mentioned by courts for not hearing the child, is the child's age. In nine of the eleven cases in which the child is not heard, the courts state that they will not proceed to hearing the child because of his or her young age. In two cases the court also points to the lack of judgment of the child in addition to his or her young age.<sup>843</sup> In these cases children were between one and seven years old. Another reason for not hearing the child mentioned by courts was the child's maturity. In four cases, maturity was discussed together with age,<sup>844</sup> in one case maturity was discussed alone,<sup>845</sup> and in five cases only the child's young age was discussed.<sup>846</sup> In one case, the court was of the opinion that the children 'should be invited to express the reasons for their opposition to their natural judge' in Los Angeles'.<sup>847</sup>

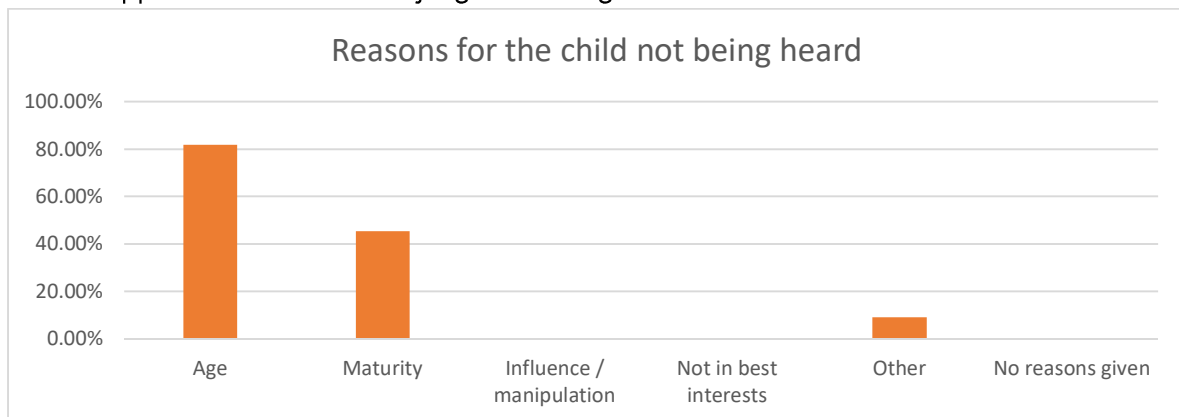


Figure (12) – Reasons for the child not being heard

<sup>843</sup> FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR113 [14 April 2016] Cour d'appel Paris 16/02260.

<sup>844</sup> FR027 [22 May 2008] Cour d'appel de Paris 07/44064; FR028 [4 June 2008] Cour d'appel Grenoble 08/01779; FR082 [5 July 2013] Cour d'appel Paris 13/11740; FR106 [2 July 2015] Cour d'appel Aix-en-Provence 15/08761.

<sup>845</sup> FR039 [25 February 2009] Cour de cassation 08-18126.

<sup>846</sup> FR056 [17 February 2011] Cour d'appel Paris 11/00507; FR062 [1 December 2011] Cour d'appel Agen 11/01437; FR100 [10 February 2015] Cour d'appel Paris 14/21136; FR107 [7 July 2015] Cour d'appel Orléans 15/01258; FR113 [14 April 2016] Cour d'appel Paris 16/02260.

<sup>847</sup> FR010 [27 June 2006] Cour d'appel d'Orléans 06/01084.

## Germany

### Country File – Germany<sup>848</sup>

#### General Data

The collected data included 49 decisions, of which 8 are first instance decisions, 39 second instance, and 2 third instance decisions. The total number of children involved in the cases is 65, spread among different ages as shown in Figure (1).

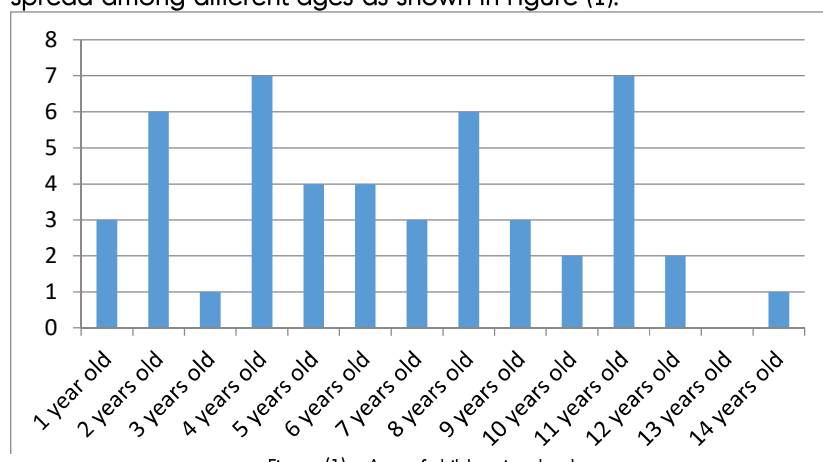


Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (42 decisions), whereas in 7 cases the father was the abductor.

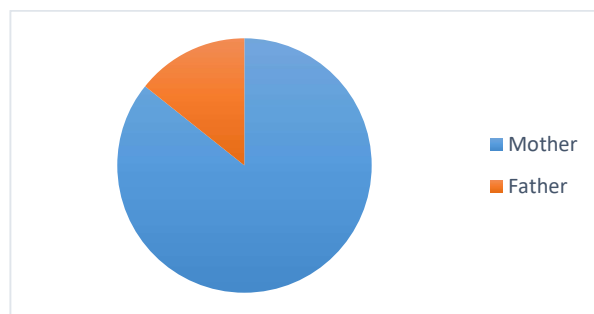


Figure (2) – Taking/retaining parent

Thirty cases ended up with an order of return, seventeen concluded for the non-return of the child. In two cases, the case was sent back to the first instance court.

<sup>848</sup> The German cases are collected and analysed by Giovanni Sciacaluga, VOICE researcher.

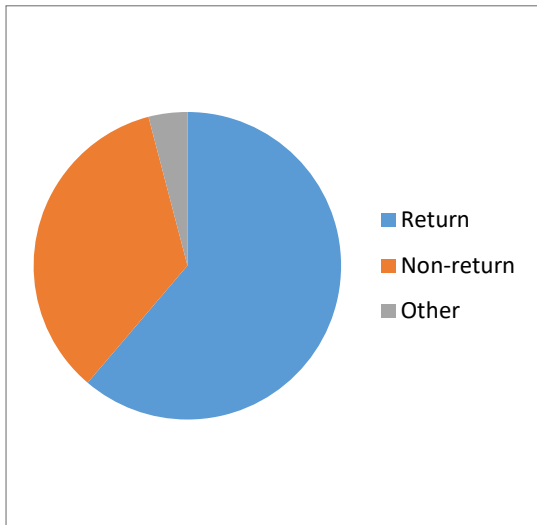


Figure (3) – Decision’s outcome

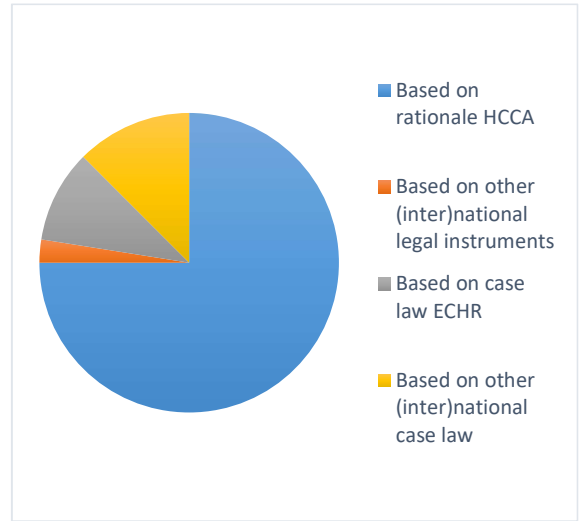


Figure (4) – Basis considered in the explicit reference on the best interests of the child

Thirty-five decisions referred to the 1980 Hague Convention legal framework. In twelve cases, the Brussels IIbis Regulation was also applied, together with the 1980 Hague Convention provisions.



## Best Interests of the Child

Out of 49 decisions, 38 referred, either explicitly or implicitly, to the best interests of the child.

### Explicit reference

Explicit references to the concept of the best interests of the child were found in 32 decisions.

- Thirty decisions based the reference on the rationale of the 1980 Hague Convention – for which best interests coincide with the immediate return in the place of habitual residence;
- Four decisions referred to the case law of the ECtHR, evoking the principles stated by the ECtHR in the *Neulinger and Shuruk v. Switzerland* case (App. No. 41615/07, July 6<sup>th</sup> 2010);
- Five decisions referred to the notion of best interests evoking national case law. One decision (referring to Bundesverfassungsgericht FamRZ 1999, 641, OLG Koblenz FamRZ 1993, 97, OLG Hamm vom 21.08.1998, 5 UF 300/98 - juris, OLG Düsseldorf vom 02.02.2011, 1 UF 110/10) explains that ‘the impairment of the child’s wellbeing associated with the separation of the child from the abducting parent can usually be avoided by having the abducting parent return together with the child’, and that harder living conditions for the abducting parent in the country of abduction do not constitute a sufficient reason to opt for a non-return. On the other hand, according to other case law (BVerfG NJW 1996, 1402, 1403; FamRZ 1999, 85, 87; OLG Karlsruhe FamRZ 2010, 1577, 1578) non-return in the light of HC Article 13(1)(b) usually applies in presence of unusually serious, particularly significant, concrete, and actual impairments to the child’s wellbeing. ‘A return can [therefore] be excluded if it is proved that a child was abused or maltreated and this is to be feared again, if the applicant parent is highly addicted, if returning to a war zone is inevitable, or if as a result of the return an acute suicide risk of the child exists.’ Return is therefore allowed under the Hague Convention in presence of the ‘inevitable consequences of a new change of residence, including a change in another language or cultural area’ (BVerfG, FamRZ 1999, 85, 87).

### Implicit reference

Implicit references to the best interests were found in six cases, with the following peculiar results emerging:

- The disadvantages associated with a separation of the child from the abductor can be avoided when the abducting parent returns together with the child;<sup>849</sup>
- A deep social and familial integration in the country of refuge makes a non-return option preferable;<sup>850</sup>
- Typical burdens arise from the fact that kidnapped children usually identify with the abducting parent and put all their efforts into getting into the new situation. Repatriation is therefore inevitably associated with mental stress. Therefore, it is up to both parents to teach the children why the return is required;<sup>851</sup>
- Where the abducting parent has at any time the (legally permissible) opportunity to take the child back to the country of abduction after having been repatriated to the country of origin, such a back and forth movement of the child cannot be justified: the child would be

<sup>849</sup> GE012 [4 March 2008] OLG Düsseldorf II-UF 18/08.

<sup>850</sup> GE016 [23 April 2012] OLG Stuttgart 17 UF 35/12.

<sup>851</sup> GE017 [12 October 2007] OLG Stuttgart 17 UF 214/07.

treated as a mere object of controversy, regardless of his/her needs (the court opted therefore for a non-return).<sup>852</sup>

### Interpretation of grounds for non-return in relation to best interests

Reasons for (non-)return in large majority where linked of the Hague Convention.

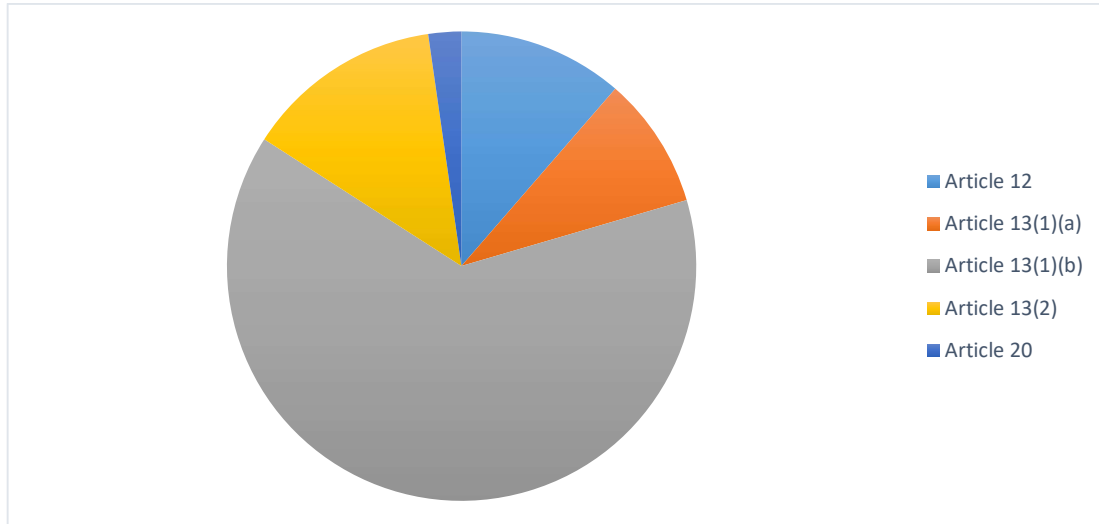


Figure (5) – Link between the best interest of the child and the Hague grounds for non-return.

Twenty-eight cases referred to Article 13(1)(b), with the following peculiar results:

- Serious risk arises when the child cannot return to the country of origin accompanied by the abducting parent, when the latter represents the central and pivotal figure for the development and wellbeing of the child and when the relationship with the other parent is weak/deteriorated (a rupture of the bonding with the closest parent would not only harm the children's possibility to build future sound relationships, but also (and more importantly) their own self-image, spiritual health, and adaptability)<sup>853</sup>
  - o Detail: the impossibility to accompany the child back to the country of origin is usually linked to the violent behaviour of one parent against the other. When there is possibility, in the country of origin, for the abducting and mistreated parent to have a secure and safe accommodation alongside the child, a return decision is allowed. On the contrary, when such a possibility is not at hand, non-return is then preferable for the child;<sup>854</sup>
- Non-return is preferable when the parent in the country of origin is proved to insufficiently care for the child and when no adequate arrangements to secure the protection of the child after his/her return in the country of origin can be granted;<sup>855</sup>

<sup>852</sup> GE031 [18 March 2016] OLG Stuttgart 17 UF 44/15; GE039 [27 February 2003] OLG Stuttgart, Beschluss vom 27.02.2003 - Aktenzeichen 17 UF 277/02.

<sup>853</sup> GE001 [22 December 2016] Oberlandesgericht Hamm, 11 UF 194/16; GE011 [5 May 2008] AG Nuernberg, 110 F 1027/08; GE015 [12 June 2013] KG, 16 UF 122/13; GE024 [27 March 2012] OLG Hamm • Beschluss vom 27. März 2012 • Az. II-11 UF 17/12; GE048 [5 July 2017] OLG Nürnberg, Beschluss vom 05.07.2017 - Aktenzeichen 7 UF 660/17.

<sup>854</sup> GE022 [16 December 2014] OLG Karlsruhe • Beschluss vom 16. Dezember 2014 • Az. 2 UF 266/14; GE037 [2 February 2011] OLG Düsseldorf • Beschluss vom 2. Februar 2011 • Az. II-1 UF 110/10. For cases in which the return was deemed possible, see GE033 [4 November 2010] AG Hamm • Beschluss vom 4. November 2010 • Az. 3 F 512/10; GE038 [15 December 2011] OLG Hamm • Beschluss vom 15. Dezember 2011 • Az. II-11 UF 240/11; GE047 [18 March 2010] OLG Karlsruhe, Beschluss vom 18.03.2010 - Aktenzeichen 2 UF 179/09.

<sup>855</sup> GE004 [22 March 2016] OLG Muenchen Senat fuer Familiensachen, 12 UF 1175/15.

- Risk of stopping an initial settlement and integration in the country of origin does not represent a sufficient harm to the interests of the child capable of impeding his/her return,<sup>856</sup>
- Intolerable situations in case of a return decision exist where the parent from which he/she was abducted showed extremely poor willingness to provide for the child (poor hygienic conditions, lack of care),<sup>857</sup>
- Where a judgment in the country of habitual residence of the child has already given one parent the exclusive parental responsibility, then a return decision from the country of refuge would only expose the child to a double international cross-bordering, infringing his/her interests.<sup>858</sup>

**Six to Article 13(2)**, with the following peculiar results:

- The disposition only applies in presence of a univocal, mature, and clear refusal to return (i.e.: when the child openly declares the he/she would face the risk of committing suicide in case of a return; when the child clearly shows how well-settled he/she is in the country of refuge),<sup>859</sup>
- Opposition of the child does not immediately activate the disposition when it is vague, confused, or evidently influenced by the abducting parent (see: in situation of extreme distress, in the fear of disappointing the parent).<sup>860</sup>

Five to Article 12, with the following peculiar results:

- Inevitable difficulties linked to the return of the child after his/her initial integration in the country of refuge (language course, schooling, possible separation from the abducting parent) are considered as an infringement of the best interests of the child, but they are not that serious to impede a return, when the child may enjoy in the country of origin the relationship with the other parent, the grandparents, former school and former social relationships,<sup>861</sup>
- Non-return is preferable when the "Daseinschwerpunkt" (central point of existence) of the child is by the abducting parent in the country of refuge (such circumstance arises when the child has already built strong and stable familial, cultural, linguistic, and social networks). In such cases, Courts opt for non-return decisions to protect the interests of the child.<sup>862</sup>

Four to Article 13(1)(a), with two significant results concerning the best interests:

- Return considered admissible when it is proved that the parent from which the child was abducted had exercised his right and duty of custody, with constant and regular contacts with his children;<sup>863</sup>
- Return not admissible where the parent from which the child has been abducted poorly exercised his parental duties, also behaving violently with the parent. A return decision, with

<sup>856</sup> GE023 [22 June 2011] AG Duesseldorf, 266 F 381/07 (GE005); OLG Stuttgart • Beschluss vom 22. Juni 2011 • Az. 17 UF 150/11.

<sup>857</sup> GE007 [12 November 2009] OLG Zweibruecken, 6 UF 118/09.

<sup>858</sup> GE039 [27 February 2003] OLG Stuttgart, Beschluss vom 27.02.2003 - Aktenzeichen 17 UF 277/02.

<sup>859</sup> GE018 [28 June 2012] OLG Hamm • Beschluss vom 28. Juni 2012 • Az. II-11 UF 85/12; GE024 [27 March 2012] OLG Hamm • Beschluss vom 27. März 2012 • Az. II-11 UF 17/12; GE033 [4 November 2010] AG Hamm • Beschluss vom 4. November 2010 • Az. 3 F 512/10.

<sup>860</sup> GE013 [31 May 2007] OLG Zweibruecken, 6 UF 76/07; GE029 [27 November 2012] OLG Hamm • Beschluss vom 27. November 2012 • Az. II-11 UF 250/12.

<sup>861</sup> GE013[31 May 2007] OLG Zweibruecken, 6 UF 76/07; GE023 [22 June 2011] OLG Stuttgart • Beschluss vom 22. Juni 2011 • Az. 17 UF 150/11.

<sup>862</sup> GE016 [23 April 2012] OLG Stuttgart, 17 UF 35/12; GE036 [7 August 2008] OLG Hamm 11 UF 135/08.

<sup>863</sup> GE005 [28 December 2007] AG Duesseldorf, 266 F 381/07.

the abducting parent not being able to immediately follow the child, would put him/her in an intolerable situation.<sup>864</sup>

One to Article 20: where the judge applied the disposition with the identical rationale linked to Article 13(1)(b) (no further information).

#### Impact of the best interests on the final decision

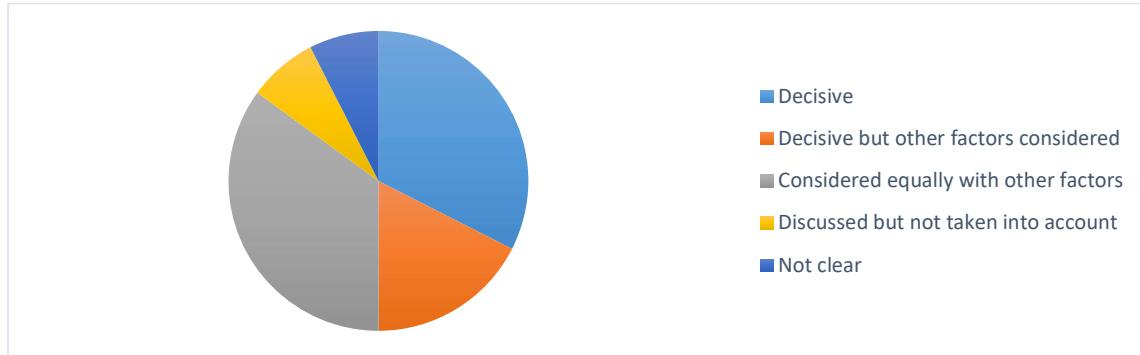


Figure (6) – Impact of best interests of the child on the final outcome of the decision

With regard to the impact of best interests of the child on the final decision, the best interests were:

Thirteen times (33%) Decisive: the best interests of the child is commonly decisive when Article 13(1)(b) of the Hague Convention is applied. More generally, judges usually consider the best interests of the child decisive in the light of the general scope and rationale of the Convention (best interests of the child analysis is hence integrated in the grounds for refusal).

Seven times (18%) Decisive but considered with other factors and fourteen times (34%) Considered equally with other factors: the majority of cases shows that judges make a balance between the notion of best interests of the child itself and the Hague Convention's objective of restoring the status quo ante the abduction. When no significant infringements of the interests of the child arise in case of a return, judges tend to give precedence to the Convention's objective

Three times (8%) Discussed, but not taken into account: the same as above has occurred in these three cases, with a stronger attention to the *status quo ante* restoration.

Three times (8%) Not clear .

#### **Extra information:**

In one case, the Court stated that the "purchase" of custody rights (e.g. the father offering to stop his proceedings in exchange for money) are in no way reconcilable with the child's interest' (non-return was therefore deemed preferable).

## Hearing of The Child

<sup>864</sup> GE011 [5 May 2008] AG Nuernberg, 110 F 1027/08.

Out of the 49 cases analysed, the child was heard in 22; in 12 the hearing did not take place, and in 15 it was impossible to determine whether the audition took place or not.

Reasons against the hearing can be summarized as such:

- 5 times (42%) age
  - o Children up to 2 years are usually not heard;
- 7 times (58%) other
  - o Mainly when the child has already been heard in the first instance and in the second no new elements to be taken in consideration have arisen (reference to the first instance hearing is made by the judge).

The hearing was performed by:

- Judge 18 times (82%);
- Social worker/psychologist 2 times (9%);
- Unknown 2 times (9%).

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance of school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child in returning to live in the country of origin.

With regard to the hearing's impact on the decision, the following is relevant:

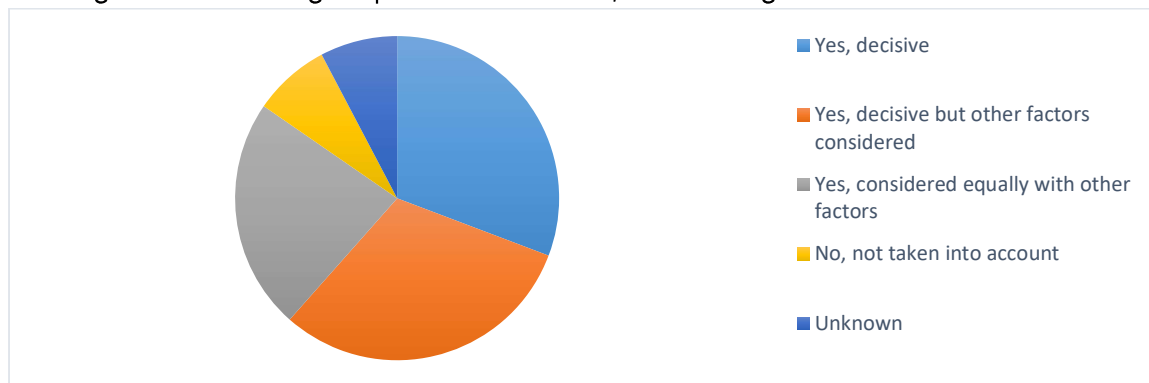


Figure (7) – Impact of the hearing on the best interests of the child

Four times (31%) Decisive: The hearing is decisive when the child expressly, maturely, and clearly states his/her preference with regard to a (non-)return option.

Four times (31%) Decisive, but considered with other factors: Hearing is decisive although considered with other factors when the child sheds some light on his/her situation/preferences, and the judge sums the results of the hearing with other factors (i.e.: social worker/psychologist's reports, settlement in country of origin/return, factual relationship with both parents).

Three times (23%) Considered equally with other factors: The hearing is useful as a mean to support the evidence showed up in the proceeding, either confirming/denying it.

One time (8%) Not taken into account: In one single case, a child has opposed a return option, but a sudden apparition of the father (from whom he was abducted) has shown that his internal attitude toward the parent was completely different from what stated during the hearing.

One-time (8%) Unknown.

## Other Information

### Extra information:

Some significant patterns appear from the case-law analysis:

- Children in Germany are usually heard if they are more than three/four years old;
- The judge usually performs the hearing, but the child is followed during the whole proceeding by a "Verfahrensbeistand", who assists him/her during and who delivers the judge a report concerning the child's situation and best interests;
- The habitual residence of a child is usually considered settled after a period of six months.

## Greece

### Country File – Greece<sup>865</sup>

#### General Data

The collected data included nineteen decisions, of which eight are first instance decisions, seven second instance, and four third instance decisions. The total number of children involved in the cases is 23, spread among different ages as shown in the graph.

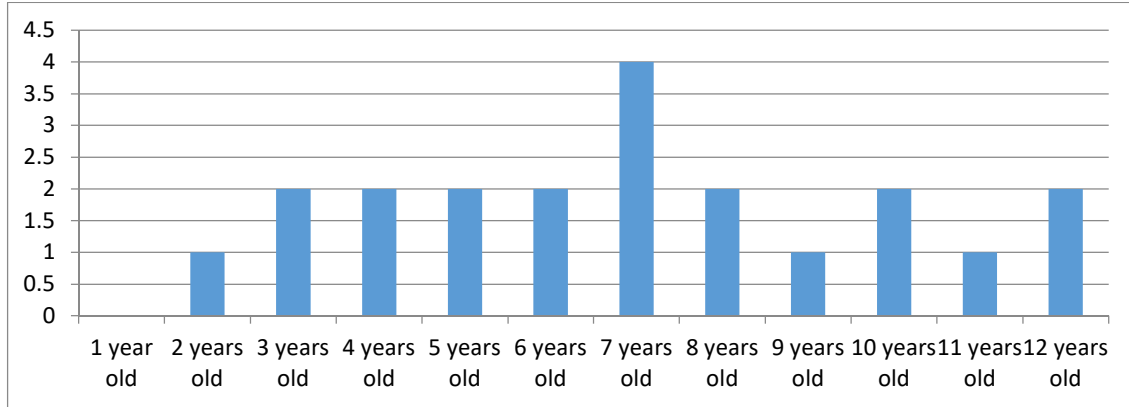


Figure (1) – Age of children involved

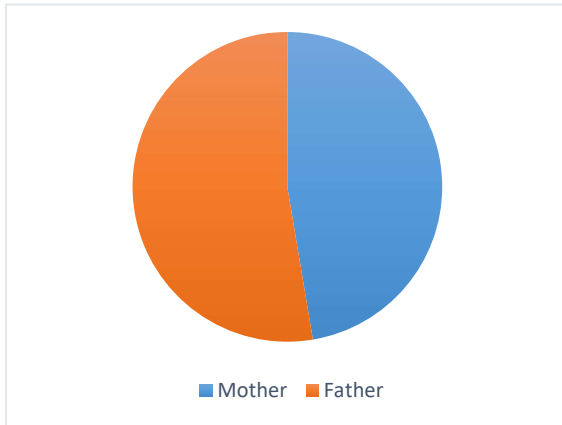
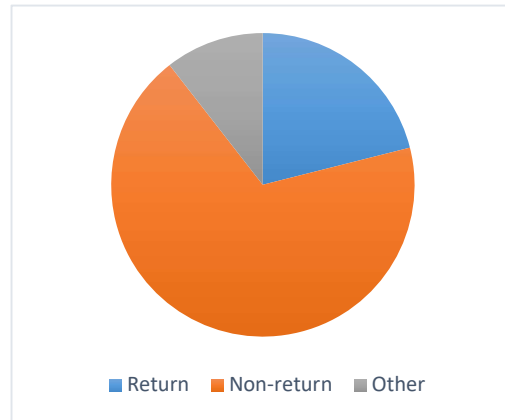


Figure (2) – Taking/retaining parent

Figure (3) – Decision's outcome



In the majority of cases, the abducting parent was the father (ten decisions), whereas in nine cases the mother was the abductor. Four cases ended up with an order of return, thirteen concluded for the non-return of the child. In two cases, the instance was sent back to the first instance court. Fourteen decisions referred to the 1980 Hague Convention, two cases also referred to Brussels IIbis (the remaining cases remain unassigned).

<sup>865</sup> The country expert for Greece is Chrysafo Tsouka.

## Best Interests of The Child

Out of nineteen decisions, ten referred, either explicitly (two cases) or implicitly (eight cases), to the best interests of the child.

### Explicit reference

Explicit references to the concept of the best interests of the child were found in two decisions (the reference was based on national instruments or case law<sup>866</sup>).

### Implicit reference

Implicit references to the best interests were found in eight cases, with the following patterns emerging:

- Grave risk for the child in case of a return exists when the applicant is alcohol-addicted and psychologically unstable (besides being unemployed financially insecure);<sup>867</sup>
- Grave risk exists where the child's return would separate him/her from the parent with whom he/she enjoys the strongest and deepest connection;
- Where the child has adapted in the State of refuge<sup>868</sup> and has clearly objected a return option, judges opt for non-return.<sup>869</sup>

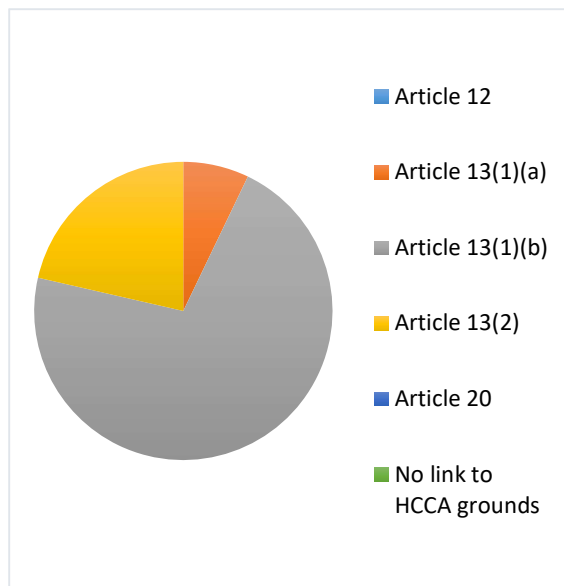
### Interpretation of grounds for non-return in relation to best interests

Reasons for (non-)return were linked to the HCCA in a large majority of cases.

Figure (4) – Basis considered in the explicit reference on the best interests of the child

Ten cases referred to Article 13(1)(b), with the following peculiar results:

- Serious risk arises when the applicant suffers from mental-illness, alcohol or drug addiction,



clearly behaves violently with the child;<sup>870</sup>

<sup>866</sup> Court of Justice, (C- 523/2007, C- 497/2010).

<sup>867</sup> GR004 [2015] Court of First Instance of Athens 15/03/2015.

<sup>868</sup> GR018 [2006] Court of Appeal of Thessaloniki 101/2006.

<sup>869</sup> GR016 [2009] Court of First Instance of Agirinio 340/2009; GR 008 Supreme Court of Greece.

<sup>870</sup> GR010 [2010] Supreme Court of Greece 916/2010.



- It also arises when the child is clearly settled in the new environment and a return decision would eradicate him/her from there, creating anxiety and psychological distress.<sup>871</sup>

Three cases referred to Article 13(2), with no peculiar result emerging. One case referred to Article 13(1)(a), with no peculiar result emerging

### Impact of the best interests on the final decision

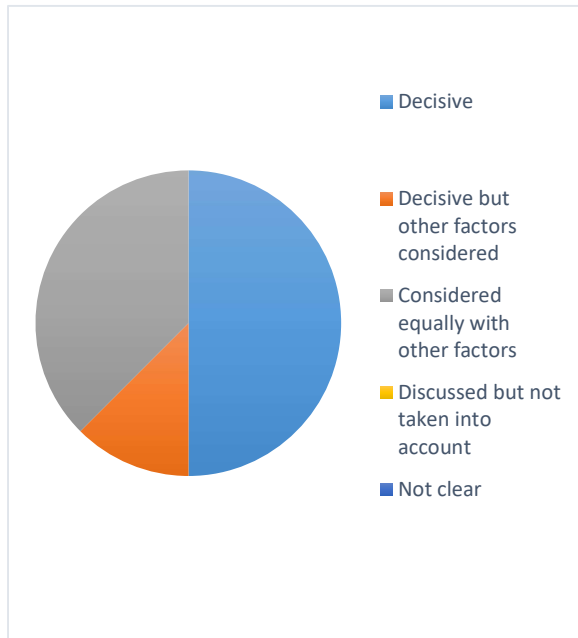


Figure (5) – Impact of best interests of the child on the final outcome of the decision

Four times (50%) Decisive: The best interests of the child are commonly decisive when Article 13(1)(b) of the Hague Convention is applied. More generally, judges usually consider the best interests of the child decisive in the light of the general scope and rationale of the Convention.

One time (13%) Decisive but considered with other factors: The court examines the living conditions in both states in order to determine where the interests of the child can be better granted.

Three times (38%) Considered equally with other factors.

### Hearing of The Child

Out of the nineteen cases analysed, the child/children were heard in five; in five the hearing did not take place, and in nine cases it was impossible to determine whether the audition took place or not.

Reasons against the hearing can be summarized as such:

<sup>871</sup> GR002 [2016] Court of First Instance of Thessaloniki 242/2016; GR016 [2009] Court of First Instance of Agirinio 340/2009.

- Two times (50%) age
  - o Only one case specifies the age: three and five years old;
- Two times (50%) other
  - o Either third instance proceeding or hearing already performed in previous instances with no need to hear the child again.

The hearing was performed by:

- Judge: four times (80%);
- Social worker/psychologist: one time (10%).

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance of school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child in returning to live in the country of origin.

With regard to the hearing's impact on the decision, the following is relevant:

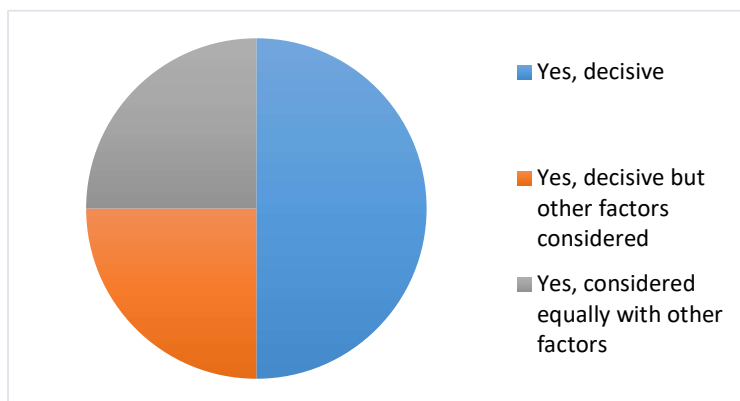


Figure (6) – Impact of the hearing on the best interests of the child

Two times (50%) Decisive, one time (25%) Decisive, but considered with other factors and one time (25%) Considered equally with other factors.

**Extra information:**

In one case, the hearing took place in the police station of the village where the child lived, and in presence of some relatives of the father.

**Hungary**

**Country File – Hungary<sup>872</sup>**  
**General Data**

For Hungary, 26 relevant cases have been identified. A total of 26 children were involved in these proceedings. Nine cases were dealt with in courts of first instance, ten in courts of second instance and seven in a court of third instance. In 50% of the cases the courts considered both the Hague Convention on Child Abduction and Brussels IIbis as legal bases. In 23% of the cases, Hungarian

<sup>872</sup> The country expert for Hungary is Fanni Murányi. She is a PhD Candidate at Eötvös Loránd University (Budapest).

national law and more specifically Act III of 1952 on the Code of Civil Procedure was considered as legal basis. In 15% of the cases, the Hague Convention on Child Abduction was the only legal basis considered and in one case only Brussels IIbis was considered as legal basis.

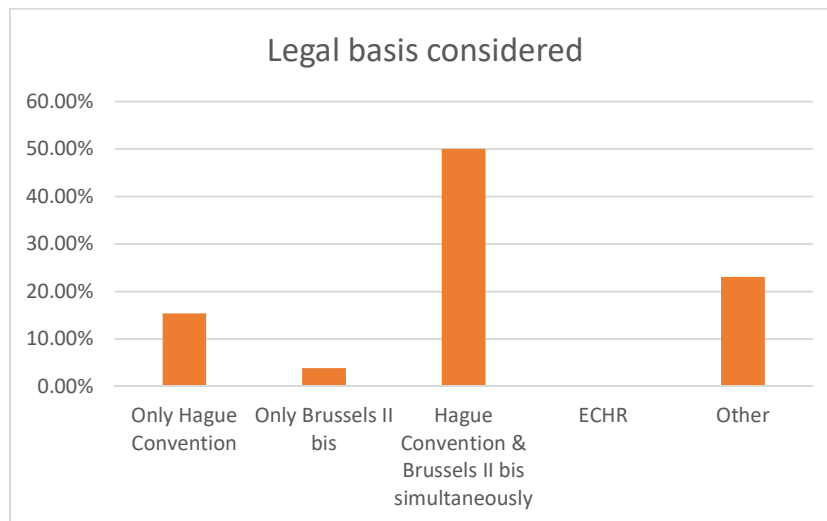


Figure (1) – Legal basis considered

In most of the cases, namely 65%, the court decided that the child had to return to his or her State of former habitual residence.



Figure (2) – Decision

Concerning the parties involved, it was in most cases the mother who abducted the child.

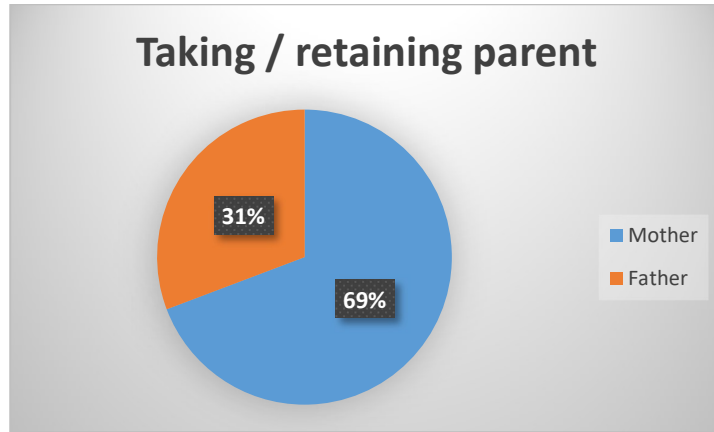


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

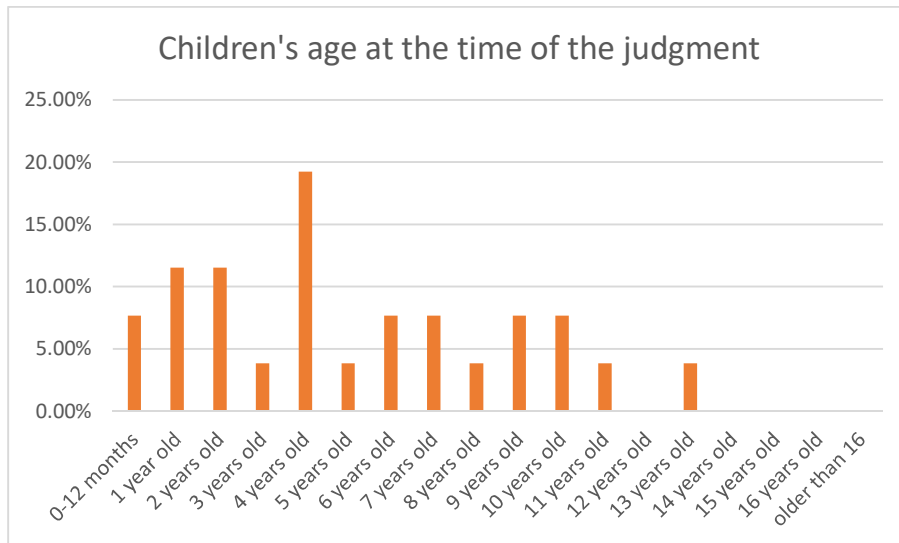


Figure (4) – Children's age at the time of the judgment

## Best Interests of the Child

In 46% of the cases, the courts referred explicitly to the best interests of the child, in 23% of the cases an implicit reference could be found and in 31% of the cases courts did not refer to the best interests at all.

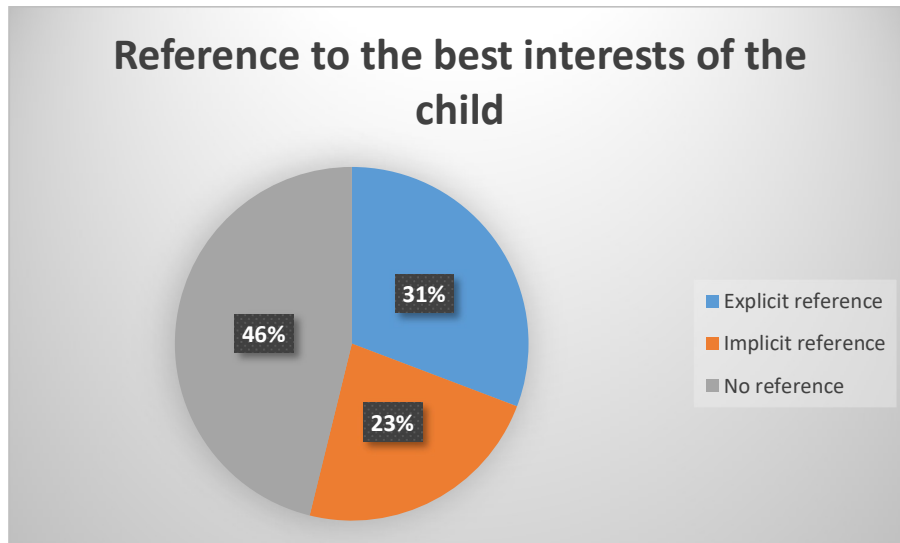


Figure (5) – Reference to the best interests of the child

### Explicit reference

An explicit reference to the best interests of the child can be found in eight cases. This reference was based on (inter)national legal instruments (in one case), (inter)national case law (in five cases) and on the rationale of the Hague Convention on Child Abduction (in one case). Further, in half the cases the explicit reference was based on other grounds.

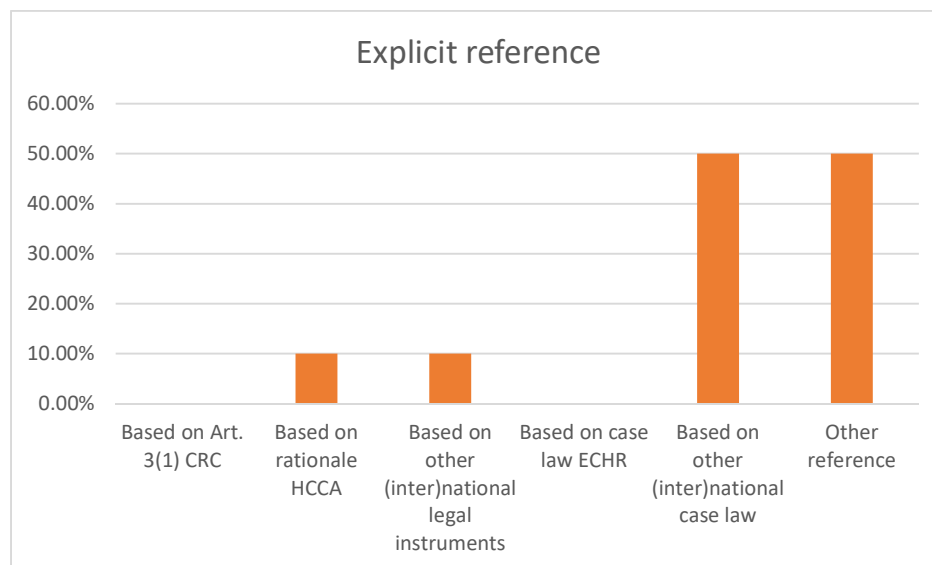


Figure (6) – Explicit reference

In the case in which reference to the best interests of the child was made based on an (inter)national legal instrument, the court referred to Brussels IIbis and stated the following:

The Regulation – as the Hague Convention on Child Abduction – presumes that the immediate return of the child to his/her former habitual residence ensures the best interests of the child and this presumption can be rebutted only in exceptional cases (Article 13 of the Hague Convention on Child Abduction).<sup>873</sup>

In four of the five cases in which the explicit reference was based on (inter)national case law, the courts quoted the Curia (the highest judicial authority in Hungary). The following quote was cited in three cases: 'The best interests of the child are primarily the immediate reconstruction of the violated parental responsibility rights.'<sup>874</sup> Also another quote was cited in two cases: 'The legal interest protected by the Convention is to provide the integrity of parental responsibilities in accordance with the best interests of the child.'<sup>875</sup> In one case, the Hungarian court referred to the *Mercredi v Chaffe* case of the Court of Justice of the European Union (C-497/10 PPU). The court mentioned that 'the best interests of the child have to be taken into account as it was emphasized in the case *Mercredi v. Chaffe*.'<sup>876</sup>

In two cases reference to the best interests was made with regard to the separation between the child and the abducting parent. One court states: 'The child's safety – which is in his/her fundamental interests – is ensured by the proximity of the parent and not necessarily the location.'<sup>877</sup> The same court states in another case:

The child is only one and a-half-year old, he/she is an infant. According to the court, this is a special situation where the best interests of the child have to be taken into account. Several Articles of Brussels IIbis state that the best interests of the child have to be taken into account and in the court's view, the infant-age is a special age when the child really needs his/her mother, the separation from his/her mother would cause a serious harm.<sup>878</sup>

In one case the best interests are mentioned to explain the relation between Article 13(1)(b) Hague Convention on Child Abduction and Article 11(4) Brussels IIbis:

Article 11(4) of Brussels IIbis confined Article 13 of the Hague Convention on Child Abduction presuming that the best interests of the child is the immediate return to the former habitual residence and this presumption is only rebuttable under particular, unique circumstances.<sup>879</sup>

### **Implicit reference**

In one case, the court discusses first which elements cannot be considered by the court of the State of refuge to decide on the return of the child. This is apparent from the following quotes: 'The references to the Irish or Hungarian living circumstances, to the child's physical and mental development, to the child's placement, these should all be examined during the procedure on parental responsibility.'<sup>880</sup> On the other hand, the court points to the importance of not being

<sup>873</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>874</sup> HUN18 [6 December 2016] Curia, Pk.500132/2016; HUN29 [24 January 2017] Curia Pfv.II.22.448/2016/6.

<sup>875</sup> HUN27 [17 June 2016] 9.Pk.500124/2016/28; HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

<sup>876</sup> HUN10 [21 June 2013] Central District Court of Pest Pk.500205/2017.

<sup>877</sup> HUN02 [4 July 2016] Central District Court of Pest 29.Pk.500142/2016/12.

<sup>878</sup> HUN10 [21 June 2013] Central District Court of Pest Pk.500205/2017.

<sup>879</sup> HUN29 [24 January 2017] Curia Pfv.II.22.448/2016/6.

<sup>880</sup> HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016.

separated from the caring parent: 'It is evident that the child would suffer from the separation from his mother with whom he has a close connection. For the child, safety means the closeness of his caring parent, regardless of the child's residence.'<sup>881</sup> Thus, it seems that living circumstances, physical and mental development and placement do not suffice as factors to reject the return, while the separation between child and caring parent can be a sufficient argument to reject return.

In the second case in which the court implicitly referred to the best interests the court said that 'the parents could prepare the child for living in another country (if he/she has to move) and for abandoning his/her environment and friends in a proper way.'<sup>882</sup> Thus, the court deems this preparation important for the child.

In the last case, the court said that 'the separation from his mother could cause a trauma for the child'.<sup>883</sup> This situation would thus be clearly contrary to the child's interests.

### **Interpretation of grounds for non-return in relation to best interests**

#### **Article 13(1)(b)**

In one case the return was rejected based on Article 13(1)(b) since the court did not deem the return to be in the best interests of the child: 'During the procedure, the applicant could not be located, his residence was not justified. The execution of this request does not serve the best interests of the child.'<sup>884</sup>

In all other cases in which Article 13(1)(b) was considered the courts summed up factors that are not sufficient to refuse return: the low age of the child,<sup>885</sup> difficulties caused by change of environment,<sup>886</sup> and physical abuse when it's a one-off event.<sup>887</sup> On the other hand, factors that make return acceptable include: the child would return to a well-known milieu where he has spent eight years, the child does not have language difficulties or difficulties in understanding and the child's housing, school and living conditions are ensured.<sup>888</sup>

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<sup>881</sup> HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016.

<sup>882</sup> HUN20 [14 September 2015] Central District Court of Pest 2.Pk.500.188/2015.11.

<sup>883</sup> HUN22 [22 November 2016] Curia Pfv.II.21.836/2016/6.

<sup>884</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>885</sup> HUN08 [4 April 2016] Central District Court of Pest 24.Pk.500057/2016/9.

<sup>886</sup> HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

<sup>887</sup> HUN31 [17 May 2017] Budapest-Capital Regional Court 50.Pkf.633.413/2017/5.

<sup>888</sup> HUN22 [22 November 2016] Curia Pfv.II.21.836/2016/6.

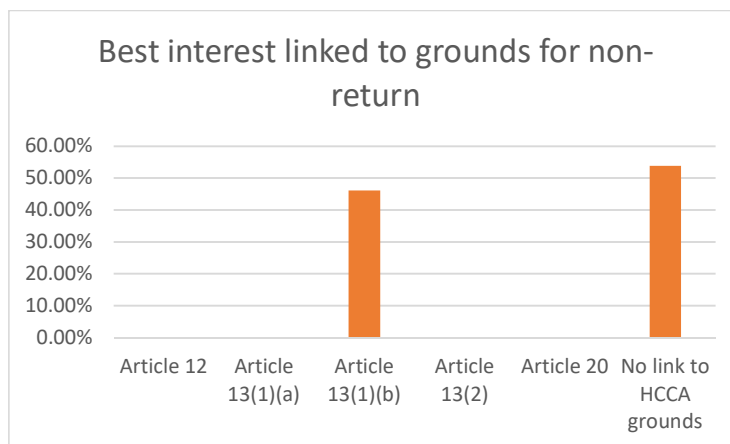


Figure (7) – Best interest linked to grounds for non-return

### Impact of the best interests on the final decision

In three cases the best interests were considered decisive but other factors were considered such as: consent of the left-behind parent,<sup>889</sup> the objection of the child,<sup>890</sup> and lack of evidence on the applicant’s wage and living conditions.<sup>891</sup> The decision to refuse return was based on Article 13(1)(a) in one case,<sup>892</sup> and Article 13(1)(b) in another case.<sup>893</sup> In one case the child was returned.

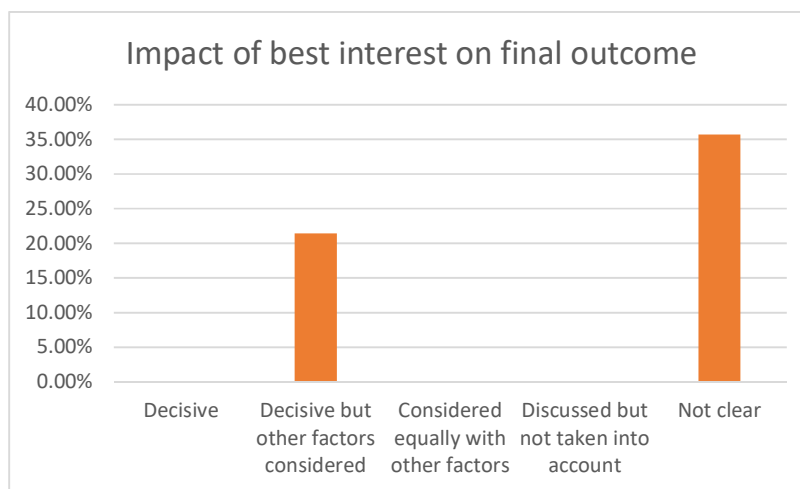


Figure (8) – Impact of best interests on final outcome

### Hearing of The Child

In three cases, the child was heard and in eleven cases, the child was not.

<sup>889</sup> HUN10 [21 June 2013] Central District Court of Pest Pk.500205/2017.

<sup>890</sup> HUN22 [22 November 2016] Curia Pfv.II.21.836/2016/6.

<sup>891</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>892</sup> HUN10 [21 June 2013] Central District Court of Pest Pk.500205/2017.

<sup>893</sup> HUN25 [16 March 2016] Pk.500360/2016.



The main reason mentioned by courts for not hearing the child, is the child's age. Courts decided not to hear children of seven months,<sup>894</sup> one year,<sup>895</sup> four years,<sup>896</sup> and seven years old<sup>897</sup> because of their age. Another reason for not hearing the child mentioned by courts of second instance was that the child was already heard in first instance.<sup>898</sup> In two cases, the court seems to add conditions for the hearing of the child next to age and maturity:

The hearing can only be justified having regard to the age and the level of maturity if there is reason to believe that he/she has an ability of understanding: he/she could decide what his/her interests are and he/she could identify a physical/psychological harm or an intolerable situation.<sup>899</sup>

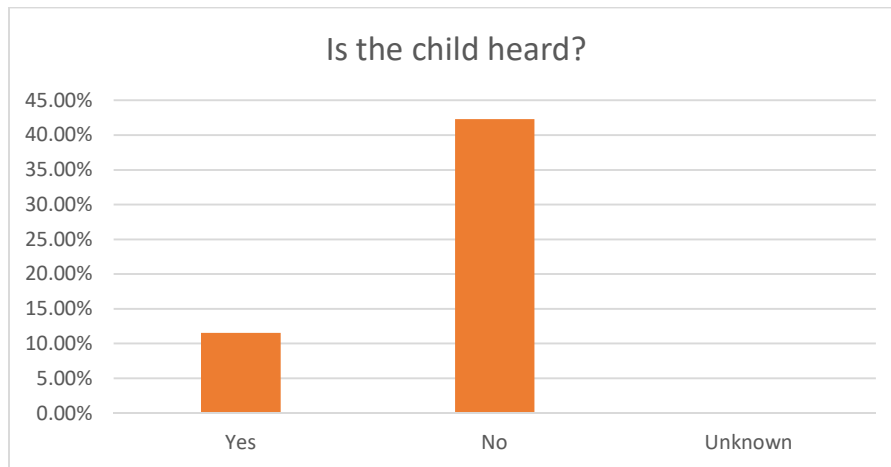


Figure (9) – Is the child heard?

<sup>894</sup> HUN25 [16 March 2016] Pk.500360/2016.

<sup>895</sup> HUN08 [4 April 2016] Central District Court of Pest 24.Pk.500057/2016/9.

<sup>896</sup> HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016; HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

<sup>897</sup> HUN30 [28 March 2017] Central District Court of Pest 28.Pk.500.039/2017/27.

<sup>898</sup> HUN18 [6 December 2016] Curia, Pk.500132/2016.

<sup>899</sup> HUN02 [4 July 2016] Central District Court of Pest 29.Pk.500142/2016/12; HUN23 [7 September 2016] Central District Court of Pest 31.Pk.500228/2016.

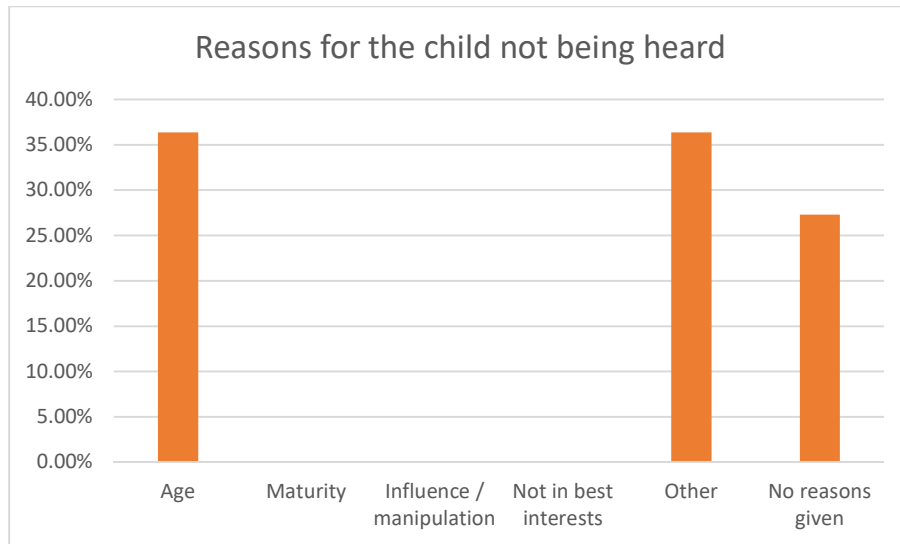


Figure (10) – Reasons for the child not being heard

In two of the three cases in which the child was heard, this hearing was carried out by a judge.<sup>900</sup> Only in one case it was a social worker / psychologist who heard the child.<sup>901</sup> Lastly, it can be said that even when the child was heard, this hearing did not contribute to the assessment of the best interests of the child and the child's views were not taken into account for the final decision. The courts decided not to take the child's views into account because they were of the opinion that the child was influenced and that the expressed views were not his/her own.

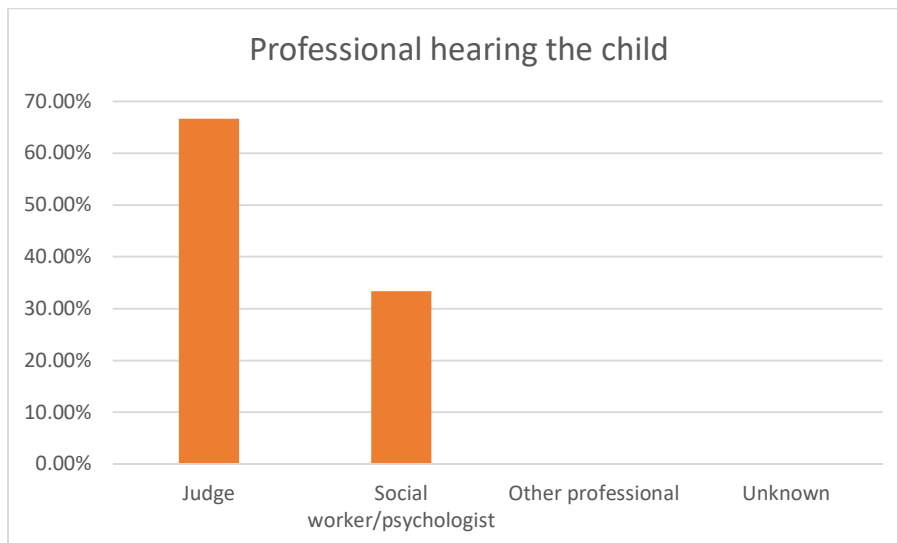


Figure (11) – Professional hearing the child

During the hearing, children mostly spoke about their family, the relation with their parents, communication with the left-behind parent, how they feel in the new environment, school, free-time and friends.<sup>902</sup>

<sup>900</sup> HUN16 [6 June 2016] Pk.500132/2016; HUN20 [14 September 2015] Central District Court of Pest 2.Pk.500.188/2015.11.

<sup>901</sup> HUN27 [17 June 2016] 9.Pk.500124/2016/28.

<sup>902</sup> HUN16 [6 June 2016] Pk.500132/2016; HUN20 [14 September 2015] Central District Court of Pest 2.Pk.500.188/2015.11.

## Other Information

The court in one case said the following:

The Hague Convention on Child Abduction emphasises the best interests of the child and provides it by ordering the child's return in principle and by the combination of the Articles 12, 13 and 20 of the Convention. The child's return can be refused in principle only if it would be incompatible with the best interests of the child, and/or it would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. It is further narrowed by the Preamble and Article 11 of the Brussels IIbis Regulation.<sup>903</sup>

With this the court emphasises the rationale of the Hague Convention on Child Abduction and the relation with Brussels IIbis.

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<sup>903</sup> HUN25 [16 March 2016] Pk.500360/2016.

## Italy

### Country File – Italy<sup>904</sup>

#### General data

The collected data included **69 decisions**, of which 58 are third instance decisions and 11 are first instance decisions. The total number of **children involved** in the cases is **90**, spread among different ages as shown in Figure (1).

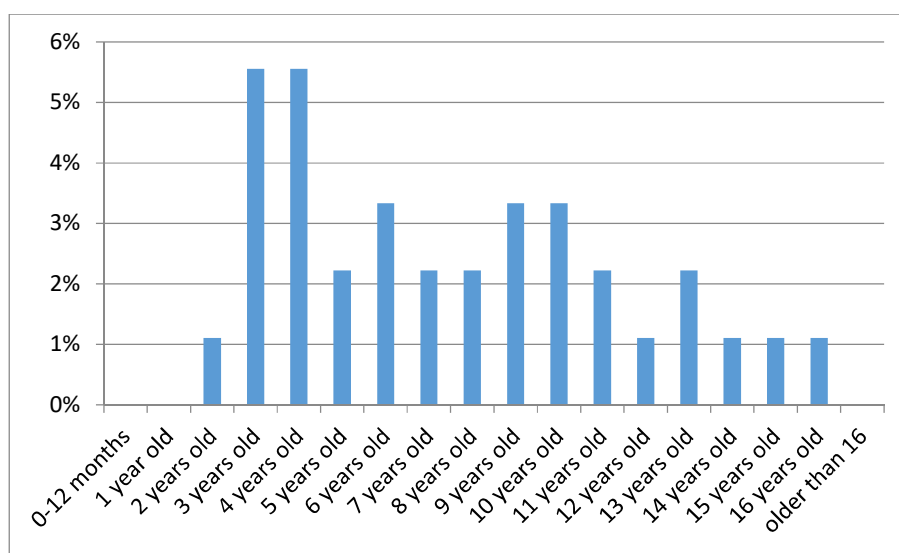
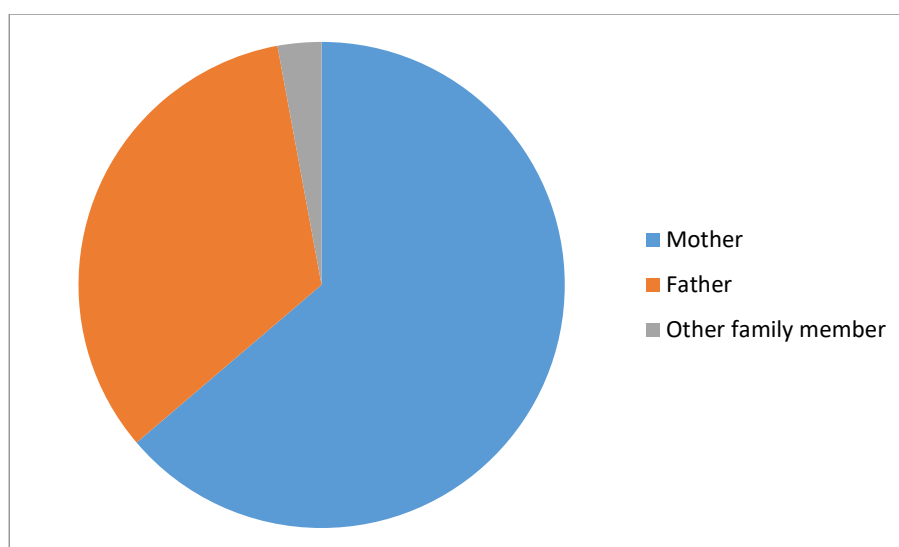


Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (44 decisions), although in 23 cases the father was the abductor. In two cases, the abductor was another family member (respectively, an aunt and a grandfather).



<sup>904</sup> The Italian cases are collected and analysed by Francesca Maoli, VOICE researcher.

Figure (2) – Taking/retaining parent

As for the outcome of the decision, 24 cases ended up with an order of return, while 32 concluded for the non-return of the child. In fourteen cases, the case was sent back to the first instance court.

The large majority of decisions referred to the 1980 Hague Convention on Child Abduction (HCCA) legal framework. In eight cases, the Brussels IIbis Regulation was also applied, together with the HCCA provisions (see Figure (3)).

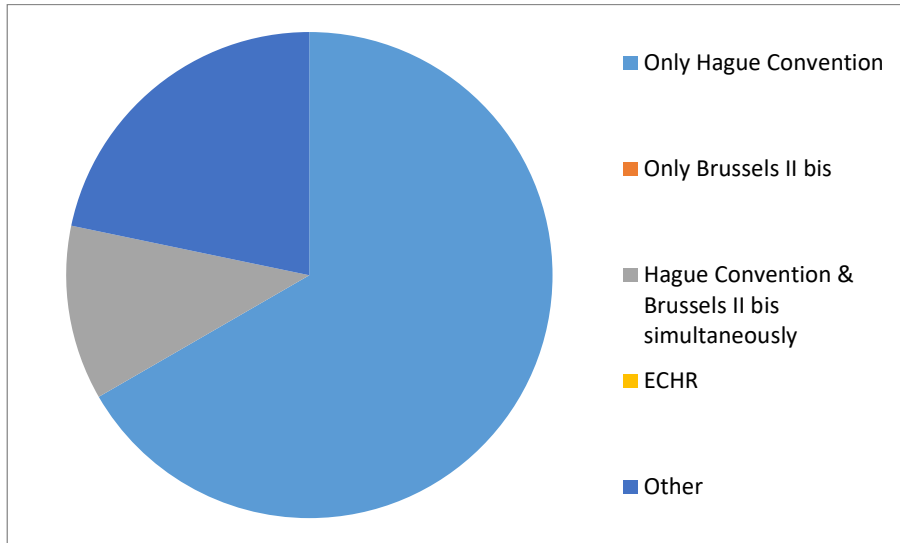


Figure (3) – Legal basis considered

### Best interests of the child

Out of 69 decisions, only 24 decisions referred, either explicitly or implicitly, to the best interests of the child.

### Explicit reference

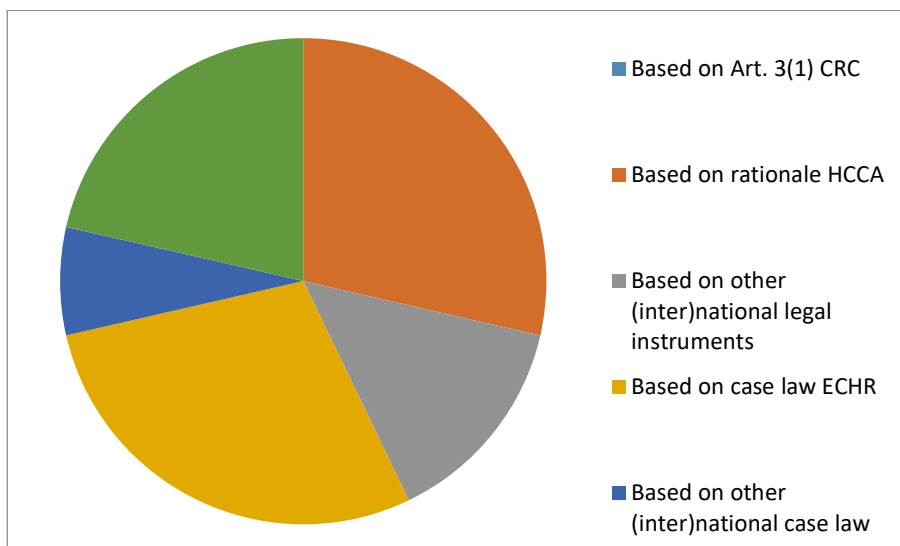


Figure (4) – Basis considered in the explicit reference on the best interests of the child

Explicit references to the concept of the best interests of the child were found in fifteen decisions.

The higher percentage of decisions based the reference on the rationale of the HCCA (nine decisions)<sup>905</sup> – for which the best interests coincide with the immediate return in the place of habitual residence – and on the case law of the ECtHR (four decisions). As concerns the latter, two decisions evoked the principles stated by the ECtHR in the *Neulinger and Shuruk v Switzerland* case;<sup>906</sup> one decision recalled the *Lombardo v Italy* judgment with reference to the best interests of the child as interpreted by the ECtHR;<sup>907</sup> in another decision, the court did not refer to any specific case, but to the case law of the ECtHR on Article 8 ECHR in general.<sup>908</sup>

In another decision,<sup>909</sup> the Court referred to Article 12 of the UNCRC and to Articles 3 and 6 of the 1996 Strasburg Convention on the Exercise of Children’s rights, with particular reference to the opportunity to hear the child in order to assess his or her best interests. Indeed, the reference to the 1996 Strasburg Convention in relation to the best interests of the child is rather peculiar in the case law.

Among the explicit references to the best interests of the child, one decision also connected the latter to the notion of habitual residence of the child, following the case law of the Court of Justice of the European Union (ECJ, C-111/2017, 8 June 2017, according to which the notion of habitual residence under the Reg. 2201/2003 ‘has to be interpreted in function of the best interests of the child’).<sup>910</sup>

<sup>905</sup> IT001 [14 December 2017], Cassazione civile 30123/2017; IT015 [12 May 2015] Cassazione civile 9638/2015; IT018 [3 October 2013] Tribunale Minorenni di Cagliari 3.10.2013; IT021 [22 July 2014] Cassazione civile 16648/2014; IT030 [23 January 2013] Cassazione civile 1527/2013; IT039 [14 July 2010] Cassazione civile 16549/2010; IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007; IT056 [10 August 2007] Cassazione civile 17648 /2007; IT060 [7 March 2007] Cassazione civile 5236/2007.

<sup>906</sup> IT011 [25 May 2016] Cassazione civile 10817/2016; IT014 [29 July 2015] Cassazione civile 16043/2015.

<sup>907</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015.

<sup>908</sup> IT021 [22 July 2014] Cassazione civile 16648/2014.

<sup>909</sup> IT006 [27 July 2017] Cassazione civile 18649/2017.

<sup>910</sup> IT001 [14 December 2017], Cassazione civile 30123/2017.

It is worth mentioning a decision of a first instance court, which avoided to rule on the return or non-return of the child and instead instructed the parties to initiate a mediation procedure, in the light of the fact that:

a decision of non-return won't solve the conflict between the parents, conflicts that will negatively affect the children. [...] This immediate conclusion of the proceeding, even if compliant with the law, will risk to violate one of the immanent principles of our legal systems, the beacon that guides the juvenile judge in adopting its decisions, which is the principle of the best interests of the child, since the parents are willing to try mediation.<sup>911</sup>

In other words, mediation was considered the path that corresponded best with the best interests of the child.

### **Implicit reference**

Nine decisions made an implicit reference to the best interests of the child.<sup>912</sup> In the majority of these cases (seven), the court examined whether the return would have been good for the wellbeing and subsequent development of the child.<sup>913</sup> Courts have made assessments on the relationship between the child and the abducting parent, examining whether that relationship could have been healthy for the child,<sup>914</sup> and have examined the context of the life of the child both with the mother and with the father.

In one case, the Court adopted a broad interpretation of Article 13(1)(b) HCCA, taking into account the educative attitude of the parent having rights of custody, since the unsuitability to guarantee adequate material conditions of child-care is a circumstance which exposes the child to physical and psychological risks.<sup>915</sup>

In another case, the court of third instance overturned the first instance decision, because the court did not consider adequately the risk for the child's development in case of return, despite the evidence collected during the proceedings.<sup>916</sup> In particular, the court failed in

conducting any autonomous prognostic verification concerning the risk for the psychophysical development of the child deriving from her return to the United States and from the exercise of rights of custody mainly by the father, in the light of the persisting illnesses of the left-behind parent and behavioural manifestation stemming from them.<sup>917</sup>

<sup>911</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015.

<sup>912</sup> IT010 [26 September 2016] Cassazione civile 18846/2016; IT012 [8 February 2016] Cassazione civile 2417/2016; IT032 [5 October 2011] Cassazione civile 20365/2011; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007; IT054 [31 October 2007] Cassazione civile 22962/2007; IT055 [17 July 2006] Tribunale Minorenni Bolzano 17.7.2006.

<sup>913</sup> IT010 [26 September 2016] Cassazione civile 18846/2016; IT012 [8 February 2016] Cassazione civile 2417/2016; IT032 [5 October 2011] Cassazione civile 20365/2011; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007.

<sup>914</sup> IT032 [5 October 2011] Cassazione civile 20365/2011; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007.

<sup>915</sup> IT032 [5 October 2011] Cassazione civile 20365/2011.

<sup>916</sup> IT010 [26 September 2016] Cassazione civile 18846/2016.

<sup>917</sup> IT010 [26 September 2016] Cassazione civile 18846/2016.

In another decision, the court established that the father's environment was characterized by customs and habits which were absolutely inadequate for a young child, as well as dangerous for her healthy mental and physical development.<sup>918</sup>

In rejecting the application of Article 13(1)(b), the court in one case also examined the possible consequences of the return on the wellbeing of the child, making a broad assessment on the conditions of life of the child in the State of habitual residence and on the attitude of the left-behind parents.<sup>919</sup>

In two cases, courts have connected the best interests of the child to the exception to immediate return provided by Article 13(1)(b) HCCA, with reference to the notion of intolerable situation.<sup>920</sup> In particular, it has been stated that the return would have constituted an intolerable situation for the child because of the lack of an adequate environment for the stable and well-balanced growth: among the elements that contributed to the environment being inadequate, the court mentioned irregular attendance at school and negligence of the mother in taking care of the children with reference to, for instance, clothes, personal care, homework, food.<sup>921</sup> The other decision connected the intolerable situation to the lack of affections and relations in the State of habitual residence.<sup>922</sup>

### **Interpretation of grounds for non-return in relation to best interests**

Seventeen decisions linked the understanding of the best interests of the child to specific grounds for non-return provided by the HCCA.

The large majority of decisions (fifteen) referred to Article 13(1)(b), which allows the court to reject the application for return if the child would suffer a grave risk of harm or would be put in an intolerable situation as a consequence of his or her return in the State of habitual residence. In this regard, courts have conducted an in-depth examination of the conditions of life and of the wellbeing of the child in the country of origin, evaluating the social environment in which the child would live in case of return, in order to determine if that environment would have been suitable for his or her mental and physical development.<sup>923</sup> Accordingly, a broad interpretation of Article 13(1)(b) allowed the courts to take into account the educative attitude of the parent having rights of custody, since the unsuitability to guarantee adequate material conditions of child-care is a circumstance which exposes the child to physical and psychological risks.<sup>924</sup>

As already mentioned, in two decisions the courts have considered that the lack of an adequate habitat for the children, which de facto prevented a stable and well-balanced growth, constituted an intolerable situation according to Article 13(1)(b) of the Hague Convention.<sup>925</sup>

<sup>918</sup> IT010 [26 September 2016] Cassazione civile 18846/2016; IT012 [8 February 2016] Cassazione civile 2417/2016.

<sup>919</sup> IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011.

<sup>920</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009.

<sup>921</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010.

<sup>922</sup> IT044 [16 June 2009] Cassazione civile 13936/2009.

<sup>923</sup> IT010 [26 September 2016] Cassazione civile 18846/2016; IT011 [25 May 2016] Cassazione civile 10817/2016; IT014 [29 July 2015] Cassazione civile 16043/2015; IT015 [12 May 2015] Cassazione civile 9638/2015.

<sup>924</sup> IT012 [8 February 2016] Cassazione civile 2417/2016; IT032 [5 October 2011] Cassazione civile 20365/2011; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; IT039 [14 July 2010] Cassazione civile 16549/2010; IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007; IT054 [31 October 2007] Cassazione civile 22962/2007; IT055 [17 July 2006] Tribunale Minorenni Bolzano 17.7.2006.

<sup>925</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010; IT044 [16 June 2009] Cassazione civile 13936/2009.



In one case, the Court stated that the return would have been 'contrary to the best interests of the child', because it had been verified that the child, who had arrived in Italy with bed wetting problems and growth deficit, in four months had experienced an exponential improvement in her physical development.<sup>926</sup> Therefore, a forced return would have determined anxiety, anguish and destabilization.

In two decisions,<sup>927</sup> the best interests of the child were evaluated in the interpretation and application of **Article 12** of the Hague Convention, since it was connected to the rationale of the general rule of immediate return of the child to his or her habitual residence. In one case, the order of return was based – among others – on the findings that the child resulted well integrated in the State from which he/she was abducted.<sup>928</sup>

The best interests of the child were also connected to the ground of non-return provided by Article 13(2) of the Hague Convention, from the perspective of the right of the child to express his or her opinion.<sup>929</sup> In particular, the child's objection to return was evaluated, in the light of the best interests of the child, in coordination with the possible risk for psychophysical development that the child could have suffered in case of return. In one case, the court assessed that the evaluation concerning the risk for the psychophysical development of the child deriving from her return to the United States was even more necessary in the light of the firm opposition of the child to being returned; therefore, the decision of non-return was based both on Article 13(1)(b) and on Article 13(2).<sup>930</sup> In another decision, the Court stated that the child (heard by the judge with the assistance of an expert psychologist) had repeatedly declared that she wanted to stay with her father and that she had demonstrated to have spontaneously developed her choice: therefore, a forced return would have exposed her to a serious risk from a psychological point of view.<sup>931</sup>

### **Impact of the best interests on the final decision**

In the large majority of cases in which the best interests of the child were taken into consideration, the latter had been decisive for the final outcome of the decision (thirteen decisions). In particular, the wellbeing of the child in the country of origin has constituted the main assessment for the final statement, since courts often built their reasoning upon the conditions of life that the child would have faced because of return.<sup>932</sup> In the cases in which the decision was grounded on the grave risk of harm exception of Article 13(1)(b) HCCA, the latter was interpreted on the basis of the best interests of the children.<sup>933</sup> In one case, the court stated that mediation would have been the best solution in the specific case, according to the best interests of the children, even if this would lead to a disapplication of the relevant legal framework.<sup>934</sup> In another decision, the court stated that the

<sup>926</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>927</sup> IT021 [22 July 2014] Cassazione civile 16648/2014; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011.

<sup>928</sup> IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011.

<sup>929</sup> IT001 [14 December 2017], Cassazione civile 30123/2017; IT006 [27 July 2017] Cassazione civile 18649/2017; IT010 [26 September 2016] Cassazione civile 18846/2016; IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>930</sup> IT010 [26 September 2016] Cassazione civile 18846/2016

<sup>931</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>932</sup> IT010 [26 September 2016] Cassazione civile 18846/2016; IT012 [8 February 2016] Cassazione civile 2417/2016; IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011; IT051 [18 May 2007] Tribunale minorenni Ancona 1742/2007.

<sup>933</sup> IT011 [25 May 2016] Cassazione civile 10817/2016; IT014 [29 July 2015] Cassazione civile 16043/2015; IT032 [5 October 2011] Cassazione civile 20365/2011.

<sup>934</sup> IT017 [5 March 2015] Tribunale minorenni Bologna 5.3.2015.

HCCA is centred upon the best interests of the child, which is of paramount importance, and according to the Convention the best interests of the child are presumed to coincide with the immediate return in the State of habitual residence. In this context, the court stated that the exceptions stated by Articles 12, 13 and 20 HCCA cannot be interpreted restrictively: the best interests of the child may justify a broader interpretation of the grounds of non-return provided by the Convention.<sup>935</sup>

It is also worth mentioning that, in one case, the best interests of the child were decisive for the outcome of the decisions under the profile of the child's right to be heard in proceedings.<sup>936</sup> The court of third instance decided to send back the case to the court of first instance because of the violation of the duty to hear the child in the proceedings. The hearing of the child was considered of outmost importance, since it confirms the child's role as a party of the proceedings, also in the light of the weight given to the child's opinion by Article 13(2) HCCA.

In four cases, the best interests of the child were discussed, but other factors were equally considered, e.g. the assessment concerning the absence of a grave risk of harm in the country of origin.<sup>937</sup> In one case, the court stated that the children were habitually resident in the State in which they were conducted.<sup>938</sup> In another decision, the court decided not to return the children on the basis of the fact that the mother agreed to their transfer in Italy; however, the court also stated that - even if the mother had not agreed - the return could not be ordered because of the application of the grave risk of harm exception.<sup>939</sup>

In three cases the best interests assessment was not decisive for the court's decision, since the latter had been made in respect of a more strict interpretation of the legal framework provided by the HCCA.<sup>940</sup> Hence, the court of the State to which the child has been abducted avoided to make an in-depth assessment on the merits of parental responsibility, believing in the necessity to limit its evaluation on the existence of the prerequisites stated by the HCCA, and on the absence of any ground for non-return stated by Articles 12 and 13.<sup>941</sup> In another case, the court stated that the HCCA is based on the presumption that the best interests of the child is to return immediately to his/her State of habitual residence, unless one or more of the exceptions provided by Articles 12, 13 or 20 apply.<sup>942</sup>

In four cases, the child best interests were taken into consideration, but it was not clear whether the assessment had an impact on the final outcome of the decision.<sup>943</sup>

## Hearing of The Child

The survey analysed the hearing of the child in those cases in which the court took into account the best interests of the child. Among the 24 decisions concerned, in nine cases the child was

<sup>935</sup> IT056 [10 August 2007] Cassazione civile 17648 /2007.

<sup>936</sup> IT006 [27 July 2017] Cassazione civile 18649/2017.

<sup>937</sup> IT054 [31 October 2007] Cassazione civile 22962/2007; IT055 [17 July 2006] Tribunale Minorenni Bolzano 17.7.2006.

<sup>938</sup> IT044 [16 June 2009] Cassazione civile 13936/2009.

<sup>939</sup> IT041 [12 May 2010] Tribunale minorenni Bari 12.5.2010.

<sup>940</sup> IT018 [3 October 2013] Tribunale Minorenni di Cagliari 3.10.2013; IT021 [22 July 2014] Cassazione civile 16648/2014; IT060 [7 March 2007] Cassazione civile 5236/2007.

<sup>941</sup> IT021 [22 July 2014] Cassazione civile 16648/2014.

<sup>942</sup> IT060 [7 March 2007] Cassazione civile 5236/2007.

<sup>943</sup> IT015 [12 May 2015] Cassazione civile 9638/2015; IT030 [23 January 2013] Cassazione civile 1527/2013; IT035 [16 June 2011] Cassazione civile 13241/2011; IT039 [14 July 2010] Cassazione civile 16549/2010.

heard during the proceedings; in eight cases, the child was not heard; in seven cases, it was impossible to determine whether the audition took place or not.

The most recurring reason given by courts against the hearing was the age of the child (two cases):<sup>944</sup> children were, respectively, four and eight years old. In four cases, no argument was given against the hearing.

In most cases, the child was heard by the judge. In only one case it resulted that the judge also had specific competences in dealing with children (being an honorary judge who is also qualified as juvenile neuro-psychiatrist).<sup>945</sup> In one case, the judge was assisted by an expert psychologist.<sup>946</sup> In one case the child was also heard by a social worker.<sup>947</sup>

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance at school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child in returning to live in the country of origin.

In no case the hearing of the child resulted to be decisive in the courts' decisions, even in conjunction with other factors. In five cases, the findings of the hearing were considered equally with other factors. The courts considered the other evidence deriving from the investigation conducted by administrative and judicial authorities of the States involved. In three cases, the hearing's results were considered as a corroborating evidence in the application of the grave risk of harm exception provided by Article 13(1)(b) of the Hague Convention. In two cases, it was not clear whether the hearing of the child had an impact on the final decision.

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<sup>944</sup> IT030 [23 January 2013] Cassazione civile 1527/2013; IT035 [16 June 2011] Cassazione civile 13241/2011.

<sup>945</sup> IT011 [25 May 2016] Cassazione civile 10817/2016.

<sup>946</sup> IT050 [1 June 2007] Tribunale Minorenni Catanzaro 1.6.2007.

<sup>947</sup> IT033 [13 December 2011] Tribunale minorenni Milano 3089/2011.

## Latvia

### COUNTRY FILE – LATVIA<sup>948</sup>

#### General data

The collected data included 51 decisions, of which 30 are first instance decisions, 20 second instance, and 1 third instance decision. The total number of children involved in the cases is 45, spread among different ages as shown in the figure below.

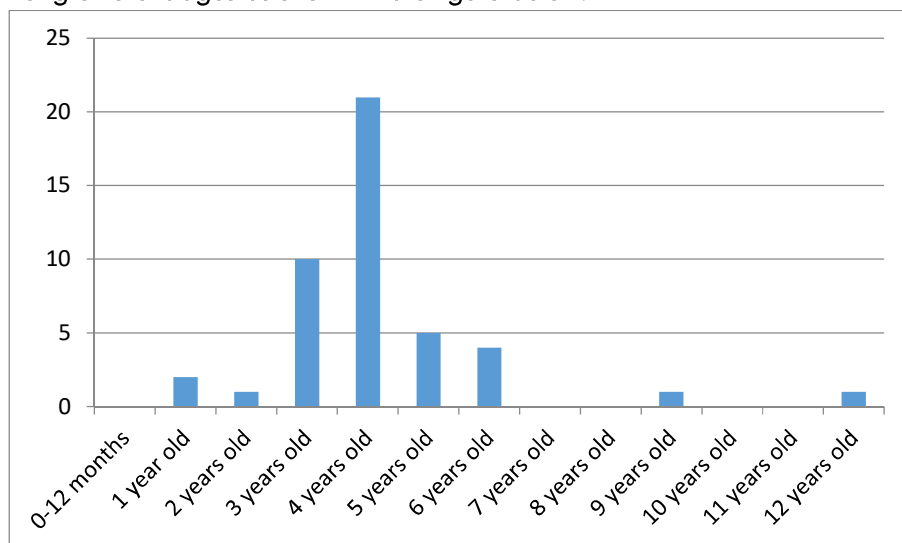


Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (39 decisions), whereas in 12 cases the father was the abductor.

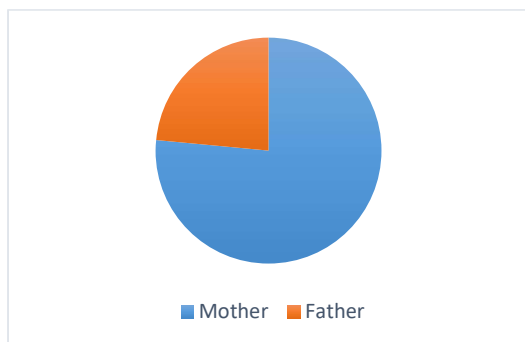


Figure (2) – Taking/retaining parent

Thirty-three cases ended up with an order of return, eighteen concluded for the non-return of the child.

<sup>948</sup> The country expert for Latvia is Inese Druviete.

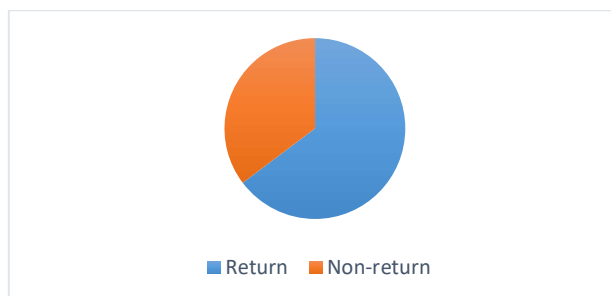


Figure (3) – Decision's outcome

Forty-two decisions referred to the 1980 Hague Convention legal framework. Nine cases referred to both the Convention and the Brussels IIbis Regulation.

### Best Interests of the Child

Out of 51 decisions, 14 referred, either explicitly or implicitly, to the best interests of the child.

#### Explicit reference

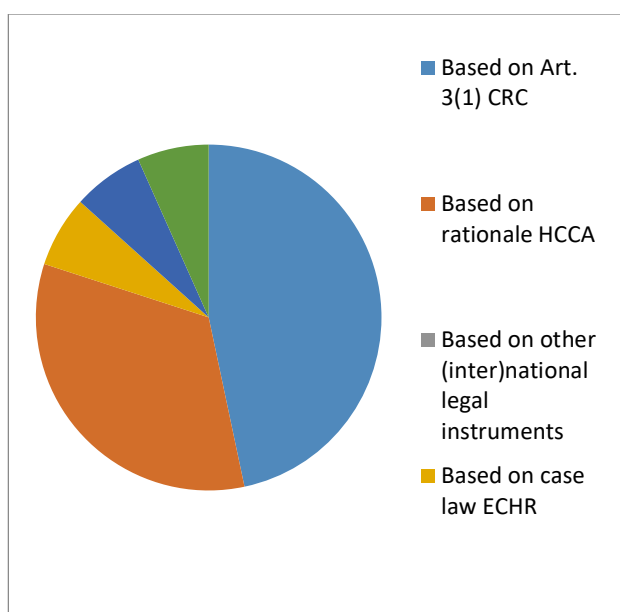


Figure (4) – Basis considered in the explicit reference on the best interests of the child

Explicit references to the concept of the best interests of the child were found in nine decisions.

- Seven decisions referred to Article 3(1) UNCRC
- Five decisions based the reference on the rationale of the 1980 Hague Convention – for which best interests coincide with the immediate return in the place of habitual residence.
  - o One decision referred to the case law of the ECtHR, evoking the principles stated in decisions of 26 November 2013, case *X v. Latvia*, claim No. 27853/09, and *G.S. v. Georgia*, No. 2361
  - o One decision referred to national law: Children's protection law Article 6 (1): any binding instruments concerning children shall take the interests and rights of the child as a priority

- One other (not specified)

### Implicit reference

Implicit references to the best interests were found in five cases, with no peculiar result emerging

### Interpretation of grounds for non-return in relation to best interests

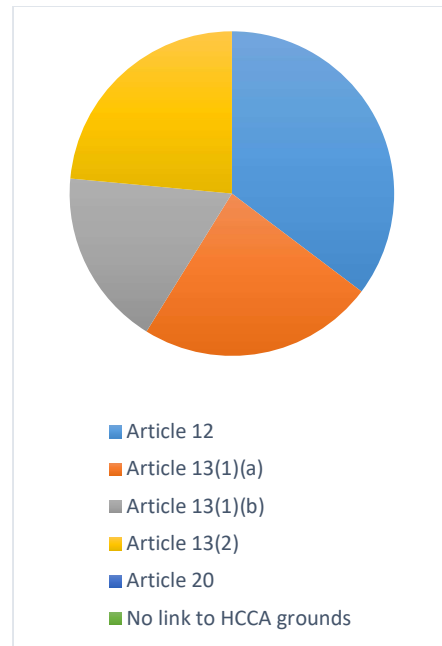


Figure (5) – Link between the best interests of the child and the Hague grounds for non-return.

Reasons for (non-)return in large majority where linked to the Hague Convention.

- Three (18%) cases referred to Article 13(1)(b), with the following particular results:
  - The mere existence of criminal charges and investigations against a person does not prove/necessarily entail a potential breach of the best interests in accordance with Article 13 (1)(b);<sup>949</sup>
- Four (24%) to Article 13(2), with the following particular results:
  - The objection of the child must be clear and independent. Evidence is needed in order to assess whether or not a child is under significant parental influence;<sup>950</sup>
- Six (35%) to Article 12, with the following particular results:
  - Linguistic knowledge is a crucial factor to determine where the environment in which the child is settled is located;<sup>951</sup>
- Four (24%) to Article 13(1)(a), with one significant result concerning the best interests:
  - The best interests of the child argument is usually decisive when through a return decision the child can enjoy the care and the presence of both parents in the country of origin.<sup>952</sup>

<sup>949</sup> LV039 [3 October 2014] No. C31407414.

<sup>950</sup> LV040 [5 November 2014] No. C31407414.

<sup>951</sup> LV041 [14 August 2015] No.C-2354-15/11.

<sup>952</sup> LV035 [19 November 2014] No. C20 2745 14.

## Impact of the best interests on the final decision

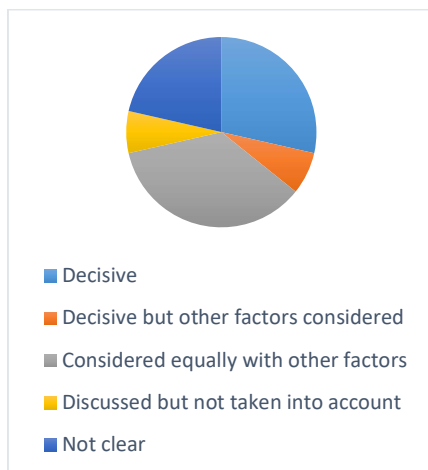


Figure (6) – Impact of best interests of the child on the final outcome of the decision

With regard to the impact of the best interests of the child on the final decision, the best interests of the child were:

- Four times (29%) Decisive;
- One time (7%) Decisive, but considered with other factors
  - o The opinion of the child was considered representative of his/her interests;<sup>953</sup>
- Five times (36%) Considered equally with other factors
  - o Explanation: balance is commonly made with the notion of habitual residence and settlement of the child in a particular location;<sup>954</sup>
- One time (7%) Discussed, but not taken into account;
- Three times (21%) Not clear.

## Hearing of The Child

Out of the 51 cases analysed, the child/children were heard in 8; in 2 the hearing did not take place, and in 41 it was impossible to determine whether the hearing took place or not.

Reasons against the hearing can be summarized as such:

- Two times age
  - o Two and four years old;
- One time maturity and other at the same time
  - o A four-year old child with slowed speech and attention deficit (as witnessed by medical examination).<sup>955</sup>

The hearing was performed by:

- Social worker/psychologist seven times (9%);
- Unknown once.

<sup>953</sup> LV019 [7 March 2017] No. C32344616.

<sup>954</sup> LV048 [28 August 2015] No.C32303415.

<sup>955</sup> LV035 [19 November 2014] No. C20 2745 14.

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance of school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child in returning to live in the country of origin.

With regard to the hearing's impact on the decision, the following is relevant:

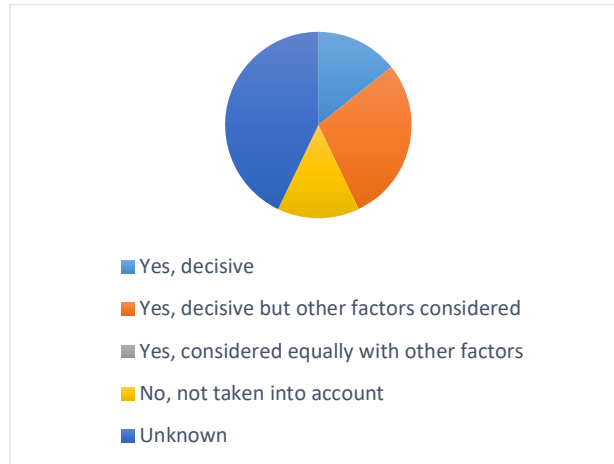


Figure (7) – Impact of the hearing on the best interests of the child

- One time (14%) Decisive
  - o Child's views considered representative for his/her best interests;
- Two times (29%) Decisive, but considered with other factors (not specifiable);
- One time (14%) Not taken into account;
- Three times (43%) Unknown.



## Malta

### Country File – Malta<sup>956</sup>

#### General Data

For Malta, 22 relevant cases have been identified. A total of sixteen children were involved in these proceedings. Ten cases were dealt with in courts of first instance, ten in courts of second instance and two in a court of third instance. In a small majority of these cases (55%) the Hague Convention on Child Abduction was the only legal basis considered by the court. In 45% of the cases, Brussels IIbis was considered together with the Hague Convention on Child Abduction. In one case (5%) the court also considered the European Convention on Human Rights. In most of the cases, namely 68%, the court decided that the child had to return to his or her State of former habitual residence.

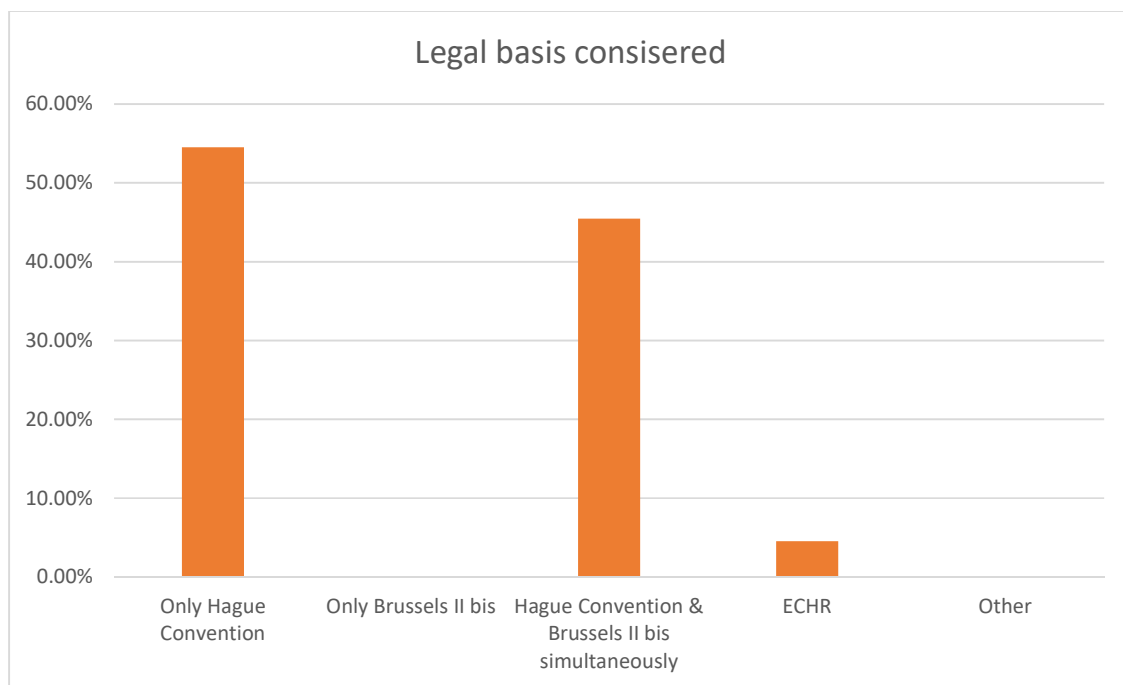


Figure (1) – Legal basis considered

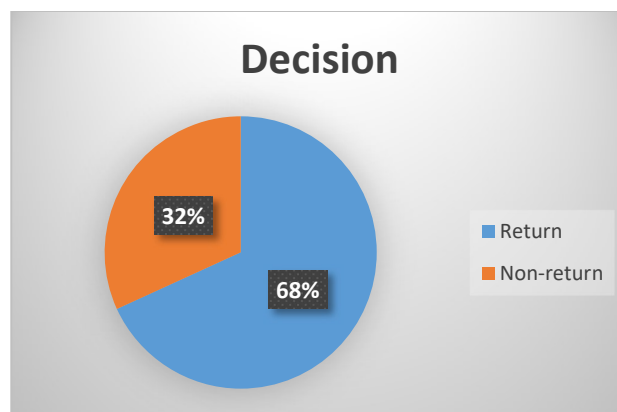


Figure (2) - Decision

<sup>956</sup> The country expert for Malta is Clement Mifsud-Bonnici. He is an associate at Ganado Advocates.

In most cases it was the mother who abducted the child, although the majority was smaller than the average when looking at all countries and at the statistics published by the Hague Conference on Private International Law.

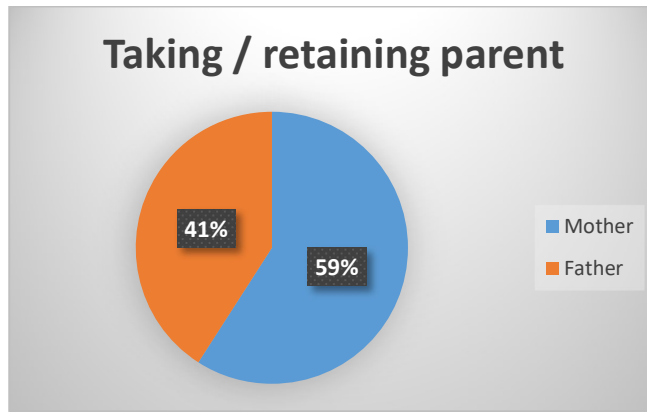


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

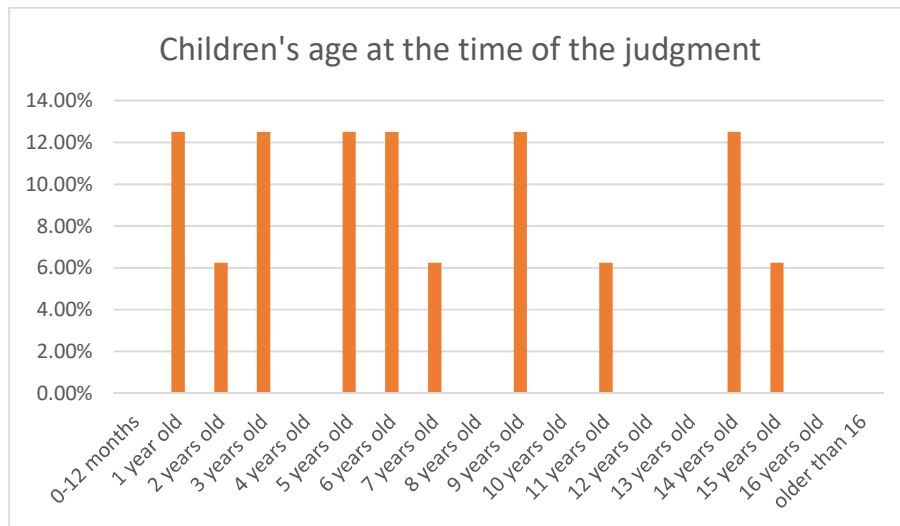


Figure (4) – Children's age at the time of the judgment

### Best Interests of the Child

In 77% of the cases, the courts referred explicitly to the best interests of the child, in 9% of the cases an implicit reference could be found and in 14% of the cases courts did not refer to the best interest at all.

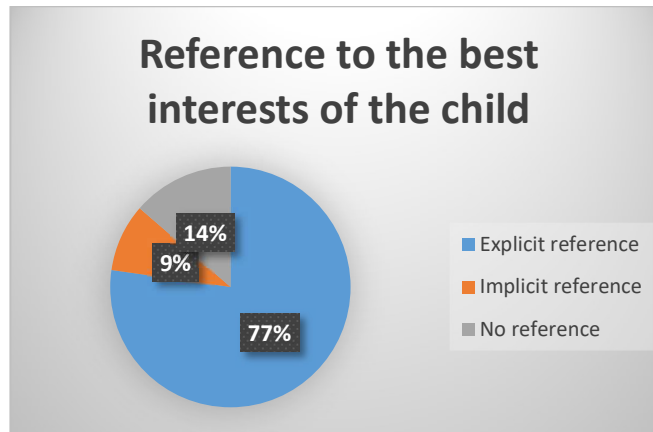


Figure (5) – Reference to the best interests of the child

### Explicit reference

An explicit reference to the best interests of the child can be found in seventeen cases. In every one of these cases, the explicit reference was based on the rationale of the Hague Convention on Child Abduction. In some cases, the explicit reference was in addition based on other grounds.

In two cases, reference was made to Article 3(1) of the Convention on the Rights of the Child.<sup>957</sup>

In two cases, the explicit reference was also based on case law of the European Court of Human Rights. Reference was made to *X v. Latvia* in MA013<sup>958</sup> and to *Maumousseau and Washington v. France and Neulinger and Shuruk v. Switzerland* in MA015.<sup>959</sup>

In several cases, the court referred to other case law in which the best interests of the child were mentioned. The following quote could be read in two cases:

The general principle is that in the ordinary way any decision relating to the custody of the children is best decided in the jurisdiction in which they have normally resided. The general principle is an application of the wider and basic principle that the child's welfare is the first and paramount consideration.<sup>960</sup>

This quote gives expression to the rationale of the Hague Convention on Child Abduction that a prompt return of the child to the State of former habitual residence and the subsequent decision on custody in that State is in the best interests of the child. Furthermore, in one case the court referred to the English case *C v B [Abduction: grave risk] [2005][EWHC 2988]* per Potter J, and quotes: 'The threshold for an Article 13 defence is not to be decided on the basis of straightforward welfare considerations, but according to the higher standard of serious risk of harm.'<sup>961</sup> This indicates the idea that the exceptions to the principle of prompt return have to be applied in a

<sup>957</sup> MA006 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Anita Maria Horry nee Montebello [3 December 2010] Qorti ta' L-Appell 251/2010/1; MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali vs. RR [28 June 2012] Qorti Civili 15/2012.

<sup>958</sup> MA013 Direttur tad-Dipartiment Ghal Standards Fil-Harsien Socjali vs. Jessica Farrugia [5 December 2014] Qorti ta' L-Appell 14/2014/1.

<sup>959</sup> MA015 Direttur tad-Dipartiment ghal-standards fil-Harsien Socjali vs. Sharon Rose Roche Nee Bellamy [30 October 2015] Qorti ta' L-Appell 10/15 PC.

<sup>960</sup> In MA002 the court referred to 'English court – Judge Johnson' (MA002 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1.), in MA020 to 'Re F (1991) 1 FLR – Lord Justice Neill' (MA020 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM).

<sup>961</sup> MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali vs. RR [28 June 2012] Qorti Civili 15/2012.

strict manner and that the concept of best interests do not have a place in this application.

Lastly, there are cases in which the court refers to legal literature in which more theoretical insights on the best interests of the child are discussed. Firstly, reference was made to Balcombe LJ in *Abduction: Grave Risk of Psychological Harm* [1999] [cited in *Family Law Case Library: Children – Prest and Wildblood* [2008][pg.739] in which the general approach towards the best interests of the child of the Hague Convention on Child Abduction is reiterated:

The scheme of the Hague Convention on Child Abduction is that in normal circumstances it is considered to be in the best interests of the children generally that they should be promptly returned to the country whence they have been wrongfully removed, and it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Hague Convention on Child Abduction.<sup>962</sup>

Furthermore, reference was made twice to the book of Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th Edition 2007), Oxford University Press<sup>963</sup> in which attention is given to the compatibility of the Hague Convention on Child Abduction with Article 3 of the Convention on the Rights of the Child. The following part of this book is quoted by the courts:

The fact that an individual child's interests are not the paramount consideration when determining a return application prompts the question as to the 1980 Convention's compatibility with the requirement under Art 3 of the UN Convention on the Rights of the Child 1989 that in all actions concerning children (...), the best interests of the child shall be a primary consideration.

In any event, surely the most persuasive argument is that by providing admittedly limited exceptions to the obligation to return, the Hague Convention on Child Abduction does, in principle, pay sufficient regard to the interests of each individual child especially as it is not determining the merits of any custody dispute but rather the forum in which that dispute must be determined. At any rate, it was this line of argument that led the German Constitutional Court in *G and G v. Decision of OLG Hamm* to rule that the 1980 Convention was compatible with the UN Convention.<sup>964</sup>

<sup>962</sup> MA007 The Director of Social Welfare Standards Department vs. A B C [26 May 2011] Civil Court 197/2010.

<sup>963</sup> LOWE, N. and DOUGLAS, G., *Bromley's Family Law*, 10<sup>th</sup> edition, Oxford University Press 2007, ISBN 9780406959515, 1248p.

<sup>964</sup> MA006 *Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Anita Maria Horry nee Montebello* [3 December 2010] Qorti ta' L-Appell 251/2010/1; MA018 *Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Katya Vella Bamber* [30 October 2016] 350/15 AL.

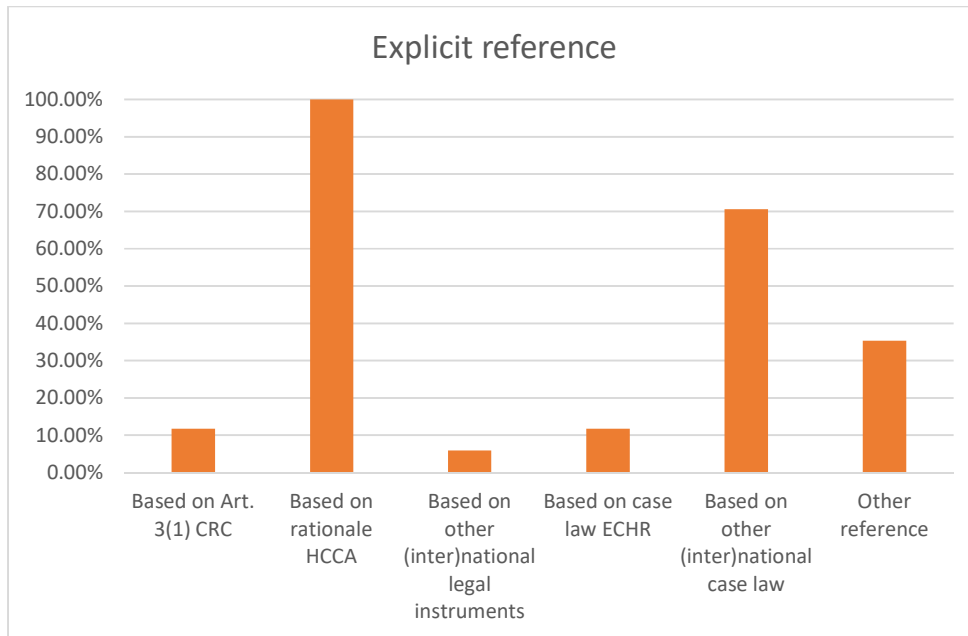


Figure (6) – Explicit reference

### Implicit reference

In two cases the court implicitly referred to the best interests of the child. In the first case<sup>965</sup> the court refers to the wellbeing of the minor ('However, the Court is of the view that the principal issue is not a legal, but a factual one. As any other case relating to family problems, this Court is obliged to safeguard, above all considerations, the wellbeing of the minor'). This concept can be seen as a synonym of best interests. In the other case, the court mentions that 'it would be harmful to send the child back'.<sup>966</sup> Also this can be seen as an implicit reference to the best interests of the child since the court expresses what it deems not good for the child.

### Interpretation of grounds for non-return in relation to best interests

#### Article 12 Hague Convention on Child Abduction

In one case the best interests of the child were linked to the principle of the Convention enshrined in Article 12 by stating that the illicit abduction of the child by the mother was not in the best interests of the child and that return had to be ordered based on this Article.<sup>967</sup>

In two other cases, the best interests were mentioned in relation to the child's settlement in his or her new environment. The courts were of the opinion that it was best for the child to stay in the new environment based on the following factors: attachment to abducting parent and family,<sup>968</sup> progress at school,<sup>969</sup> and being in a critical stage in life (i.e. adolescence and education).<sup>970</sup>

<sup>965</sup> MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>966</sup> MA004 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali v. Josephine Arslan [8 July 2008] Qorti ta' L-Appell 78/2007/1.

<sup>967</sup> MA011 The Director of Social Welfare Standards Department vs. A B [18 September 2004] Civil Court (Family Section) 583/2013.

<sup>968</sup> MA014 Direttur tad-Dipartiment għall-Instandards fil-Harsien Soċjali vs. Sharon Rose Roche nee Bellamy [24 July 2015] Court of Magistrates (Gozo) 10/2015.

<sup>969</sup> MA014 Direttur tad-Dipartiment għall-Instandards fil-Harsien Soċjali vs. Sharon Rose Roche nee Bellamy [24 July 2015] Court of Magistrates (Gozo) 10/2015.

<sup>970</sup> MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

## Article 13(1)(b) Hague Convention on Child Abduction

The Constitutional Court explicitly referred to the best interests when discussing Article 13 of the Hague Convention on Child Abduction. The Court stated that 'it is under the responsibility to find a balance between the interests pertaining to the situation, who in this case are the minor's and the parent's, and just as important, the public order'.<sup>971</sup> With this the Court seems to imply that it is within the best interests of the child to apply Article 13(1)(b), yet it is not possible to do this at the cost of conflicting with Article 8 of the ECHR and Article 3 of the UNCRC.

## Article 13(2) Hague Convention on Child Abduction

In case MA009 the court stated that 'basing one's decision on the child's desires would not be in the minor's best interests given his tender age'.<sup>972</sup> In this case the child was five years old at the time of the judgment. Because of the age of the child, the court decided not to hear the child so the statement that the child's desires are not in his or her best interests, is an appreciation in principle of the judge.

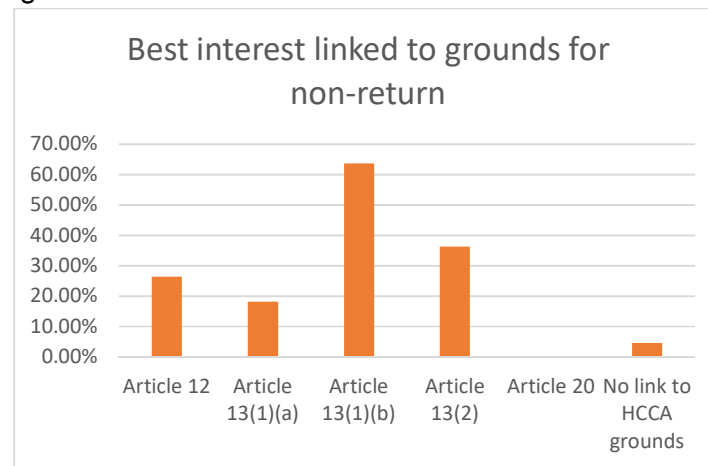


Figure (7) – Best interests linked to grounds for non-return

## Impact of the best interests on the final decision

### The best interests are decisive

In two cases the courts decided not to order the return of the child based on the best interests of the child. The courts cite the following reasons: a return would create issues 'from many angles' for the child,<sup>973</sup> and the child wanted to stay in Malta and the court deemed that it had to 'give due weight to the child's wishes'.<sup>974</sup>

In case MA011 the court found it contrary to the best interests of the child to restrict contact between the minor and his father and therefore ordered the return.<sup>975</sup>

<sup>971</sup> MA016 Sharon Rose Roche [28 July 2016] Prim Awla Qorti Civili (Sede Kostituzzjonali) 81/2015/AF.

<sup>972</sup> MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1.

<sup>973</sup> MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>974</sup> MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1.

<sup>975</sup> MA011 The Director of Social Welfare Standards Department vs. A B [18 September 2004] Civil Court (Family Section) 583/2013.

In three cases the courts are of the opinion that the best interests of the child are best served by returning to the State of former habitual residence since the courts in that state are the competent forum to analyse and judge upon the issues with regard to custody and care of the child.<sup>976</sup>

#### **The best interests are decisive but other factors are considered**

In the first case, the court believed that 'having the custody of the child decided by the court of the minor's habitual residence was in the best interests of the child'.<sup>977</sup> In addition, the court took into account the hearing of the fourteen year-old child that said to be happy in Malta. Balancing these two considerations, the court decided to order return.

In the second case, the best interests of the child were considered together with the father's custodial rights and the fact that the abduction of the minor by the mother without the father's consent was illicit.<sup>978</sup> In the end, the court ordered the return based on the consideration that returning the child would not lead to a grave risk.

#### **The best interests are considered equally with other factors**

In most cases in which the best interests are just one of the factors considered, the courts apply the Hague Convention on Child Abduction (does the left-behind parent have custody; was the abduction / retention illicit; was there any psychological or physical harm?) and then consider the best interests of the child as an extra safeguard before eventually taking a decision.<sup>979</sup>

#### **The best interests are discussed but not taken into account**

In case MA007 the court finds that the best interests of the child are to be tackled by the court of the State of former habitual residence. Thus, the concept of the best interests of the child is mentioned but not taken into account for the decision at hand.<sup>980</sup>

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<sup>976</sup> MA006 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Anita Maria Horry nee Montebello [3 December 2010] Qorti ta' L-Appell 251/2010/1; MA010 Michael Caruana [14 August 2012] Qorti Civili Prim' Awla (Gurisdizzjoni Kostituzzjonali) 63/2012; MA018 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. Katya Vella Bamber [30 October 2016] 350/15 AL.

<sup>977</sup> MA002 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1.

<sup>978</sup> MA013 Direttur tad-Dipartiment Ghal Standards Fil-Harsien Socjali vs. Jessica Farrugia [5 December 2014] Qorti ta' L-Appell 14/2014/1.

<sup>979</sup> MA004 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali v. Josephine Arslan [8 July 2008] Qorti ta' L-Appell 78/2007/1; MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Socjali vs. RR [28 June 2012] Qorti Civili 15/2012; MA015 Direttur tad-Dipartiment ghal-standards fil-Harsien Socjali vs. Sharon Rose Roche Nee Bellamy [30 October 2015] Qorti ta' L-Appell 10/15 PC.

<sup>980</sup> MA007 The Director of Social Welfare Standards Department vs. A B C [26 May 2011] Civil Court 197/2010.

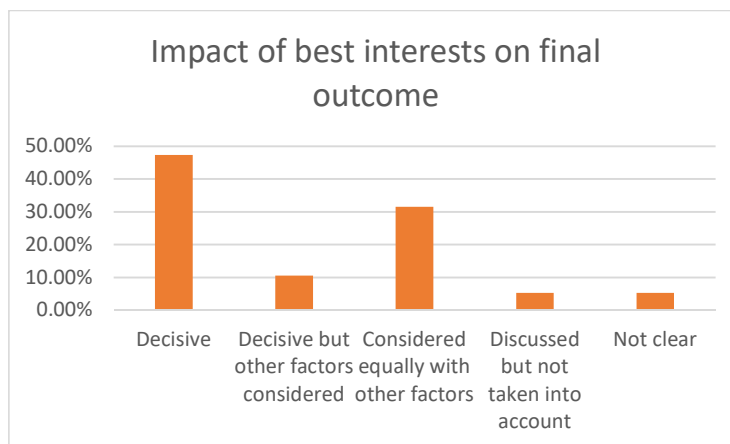


Figure (8) – Impact of best interests on final outcome

## Hearing of the Child

In eleven cases, it was clear that the children were not heard, in six cases the children were heard and in two cases it was unclear whether the child was heard.

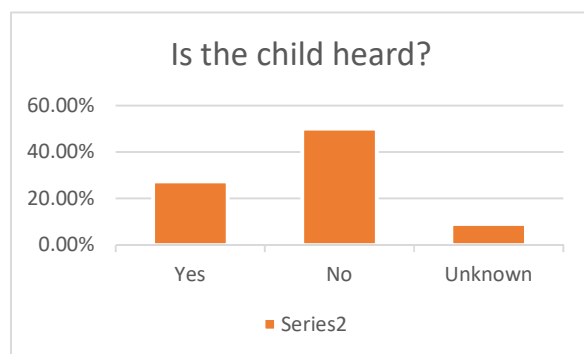


Figure (9) – Is the child heard?

The main reason mentioned by courts for not hearing the child, is the child's age. In five of the eleven cases in which the child is not heard, the courts state that the child is not heard because of his or her 'tender age'.<sup>981</sup> In these cases children were between four and seven years old. Another reason for not hearing the child mentioned by courts of second instance was that the child was already heard in first instance.<sup>982</sup>

<sup>981</sup> MA004 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali v. Josephine Arslan [8 July 2008] Qorti ta' L-Appell 78/2007/1; MA008 Direttur tad-Dipartiment Ghal Standards fil-Harsien Soċjali vs. RR [28 June 2012] Qorti Civili 15/2012; MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1; MA016 Sharon Rose Roche [28 July 2016] Prim Awla Qorti Civili (Sede Kostituzzjonali) 81/2015/AF; MA019 Director of the Department for Social Welfare Standards vs. ABCDE [7 December 2016] Civil Court (Family Section) 179/16 RGM.

<sup>982</sup> MA003 [27 July 2007] 53/2007/1; MA009 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. Michael Caruana [3 August 2012] Qorti ta' L-Appell 15/2012/1.



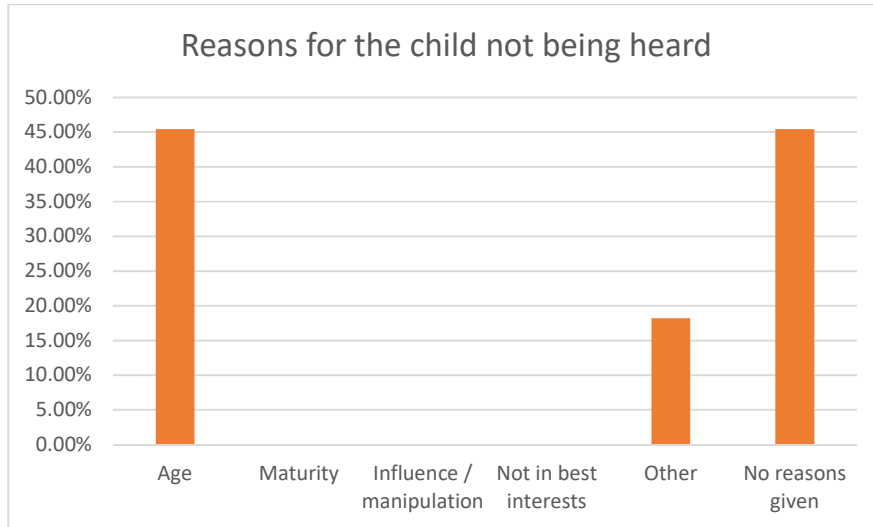


Figure (10) – Reasons for the child not being heard

In four of the six cases in which the child was heard, this hearing was carried out by a judge.<sup>983</sup> Only in one case it was a social worker or psychologist who heard the child.<sup>984</sup>

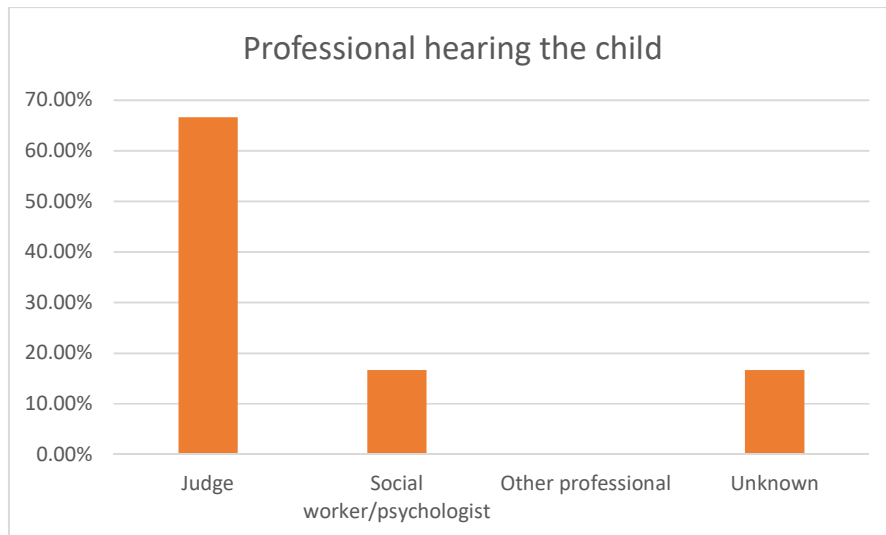


Figure (11) – Professional hearing the child

In four of the six cases in which the child was heard, it can be said that the hearing contributed to the determination of the best interests of the child.<sup>985</sup>

<sup>983</sup> MA002 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1; MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1; MA007 The Director of Social Welfare Standards Department vs. A B C [26 May 2011] Civil Court 197/2010; MA010 Michael Caruana [14 August 2012] Qorti Civili Prim' Awla (Gurisdizzjoni Kostituzzjonali) 63/2012.

<sup>984</sup> MA020 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM.

<sup>985</sup> MA001 Direttur tad-Dipartiment ghal-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004; MA002 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. X [15 July 2007] 53/2007/1; MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1; MA020 Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM.

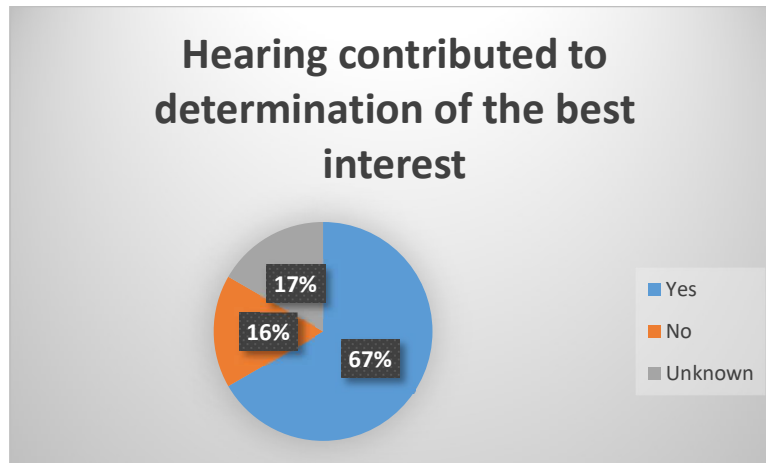


Figure (12) – Hearing contributed to determination of the best interests

In one out of these four cases the views expressed by the child during the hearing were decisive for the final decision. In this case, the court stated that the child was of ‘mature age’ and ‘the child’s objection to return must be given due weight’.<sup>986</sup> The child in question was fifteen and a half years old.

In one case, the child’s views were decisive for the final outcome but other factors were considered as well. In this case, the court stated that the child was ‘sufficiently mature’ and that the court ‘felt obliged to respect the child’s wishes’.<sup>987</sup> In this specific case the child was fourteen years old and she expressed the wish to stay in Malta. The other considerations of the court were the following: ‘the child was in a critical stage in her life (i.e. adolescence and education), and therefore, the court inferred that this was not to be unsettled’ and ‘there was no grave risk associated with the return of the minor in the UK and the consequent access to her father’.<sup>988</sup>

In two cases, the child’s views were considered equally with other factors. In the first case, the court stated that ‘the only substantial argument the defendant has in his favour is the fact that when the minor was given a hearing in court, he stated that he was happy in Malta and that he was performing very well in school’.<sup>989</sup> It seems that the court considered the hearing to be relevant, given the minor’s age (fourteen years old) and realized that him settling in Malta was an element to take into account. The other element taken into account by the court was the quote by Judge Johnson: ‘The general principle is that in the ordinary way any decision relating to the custody of the children is best decided in the jurisdiction in which they have normally resided’.<sup>990</sup> In this case, return was ordered. In the second case, ‘the child was missing his mother and wanted to be with her again, denying any kind of objection to the return back to the United States of America with his mother’.<sup>991</sup> Next to this, the court considered that ‘it did not appear that the return of the child

<sup>986</sup> MA005 Director for Social Welfare Standards vs. Nigel Barton [3 December 2010] Court of Appeal 242/2010/1.

<sup>987</sup> MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>988</sup> MA001 Direttur tad-Dipartiment għall-Harsien tal-Familja vs X [6 October 2004] Civil Court (Family section) 147/2004.

<sup>989</sup> MA002 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali vs. X [15 July 2007] 53/2007/1.

<sup>990</sup> MA002 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali vs. X [15 July 2007] 53/2007/1.

<sup>991</sup> MA020 Direttur tad-Dipartiment għal Standards fil-Harsien Soċjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM.

to the United States of America to bear any risk of physical or psychological harm' and decided to return the child.<sup>992</sup> In this last case, the child was nine years old.

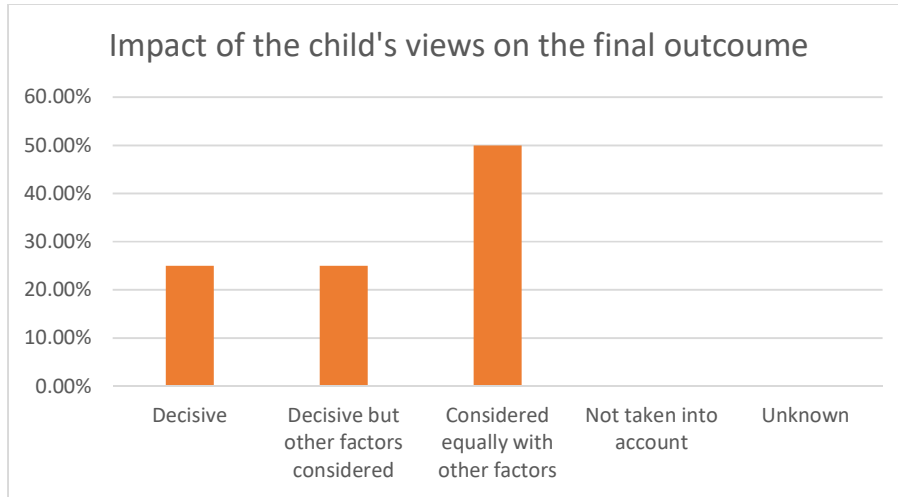


Figure (13) – Impact of the child's views on the final outcome

<sup>992</sup> MA020 Direttur tad-Dipartiment ghal Standards fil-Harsien Soċjali vs. A B C [14 September 2017] Qorti Civili (Sezzjoni tal-Familja) 217/17 RGM.

## Netherlands

### Country File – Netherlands<sup>993</sup>

#### General Data

For the Netherlands, 168 relevant cases have been identified. A total of 188 children were involved in these proceedings. 115 cases were dealt with in courts of first instance, fifty in courts of second instance and three in a court of third instance. In the majority of these cases (96%) the Hague Convention on Child Abduction was the only legal basis considered by the court. In 2% of the cases, Brussels IIbis was considered together with the Hague Convention on Child Abduction.

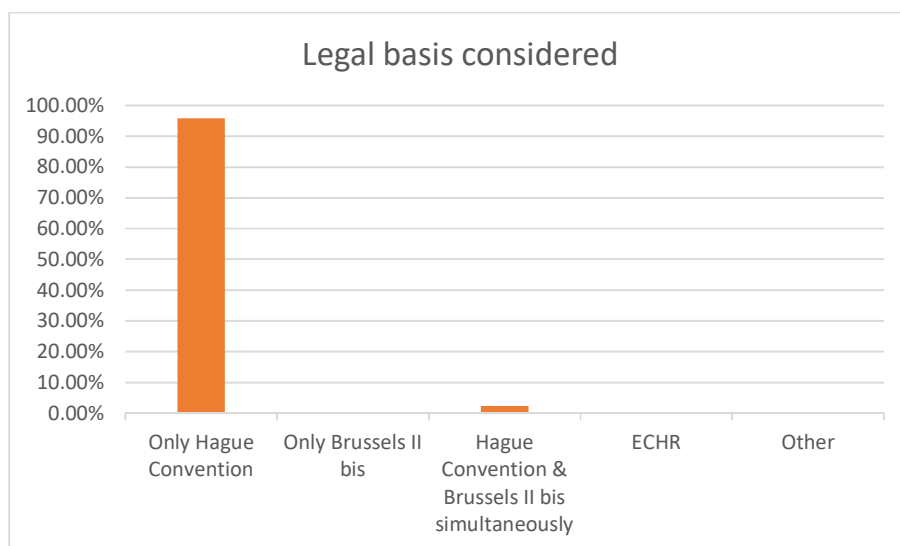


Figure (1) – Legal basis considered

In most of the cases, namely 76%, the court decided that the child had to return to his or her State of former habitual residence.

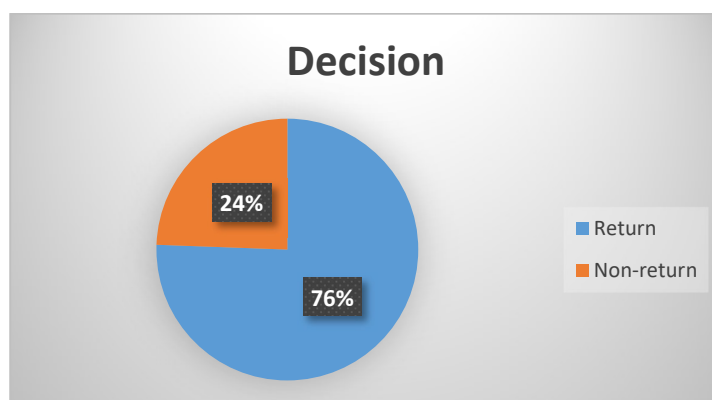


Figure (2) - Decision

In most cases it was the mother who abducted the child.

<sup>993</sup> The Dutch case law was collected and analysed by Tine Van Hof, VOICE researcher.

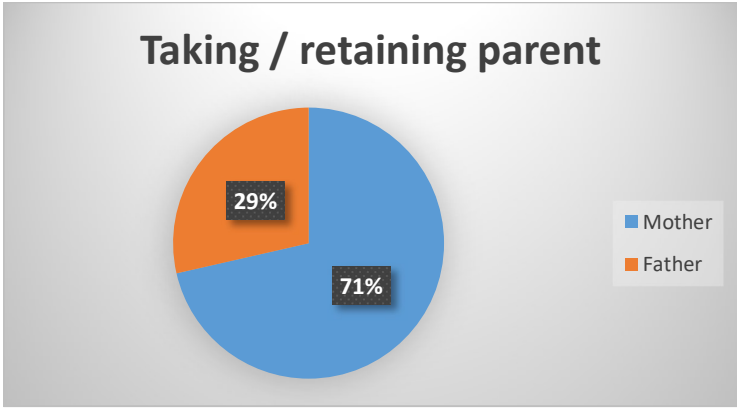


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

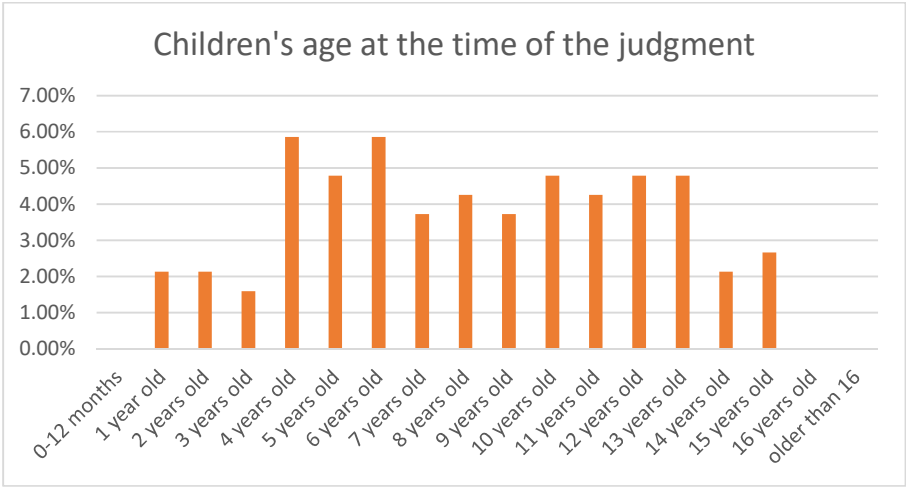


Figure (4) – Children's age at the time of the judgment

## Best Interests of the Child

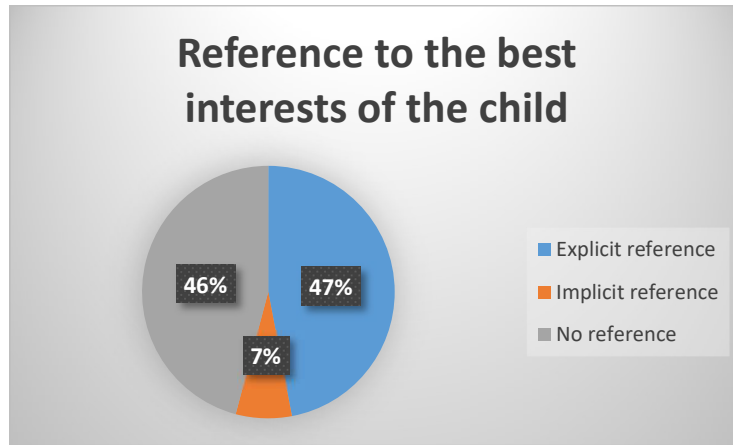


Figure (5) – Reference to the best interests of the child

### Explicit reference

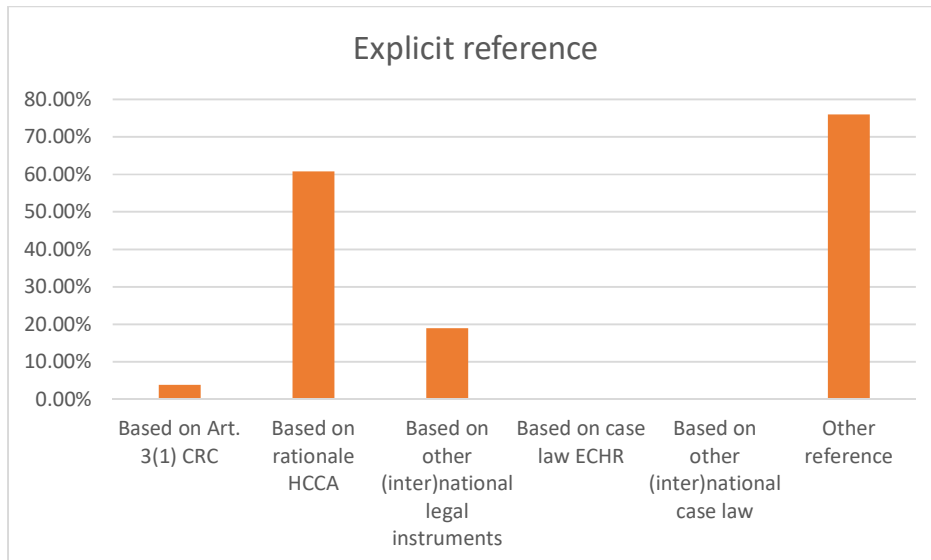


Figure (6) – Explicit reference

An explicit reference to the best interests of the child can be found in 79 cases. In three cases this reference was based on Article 3(1) of the Convention on the Rights of the Child<sup>994</sup> and in 48 cases on the rationale of the Hague Convention on Child Abduction.

In fifteen cases the explicit reference to the best interests of the child was based on another (inter)national legal instrument namely Article 8 ECHR. One court makes clear which interests are covered by this Article: 'In the context of the ECHR - which is also in a legal sense of the same order as the Abduction Convention - the interests of parents as well as the interests of children must be

<sup>994</sup> NE007 [23 April 2008] Rechtbank 's-Gravenhage FA RK 08-1877; NE048 [28 July 2011] Rechtbank Leeuwarden 396710/ FA RK 11-4657; NE115 [26 January 2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670.

taken into account.<sup>995</sup> In several cases, the courts point out that the Hague Convention on Child Abduction is intended to serve the interests of minors.<sup>996</sup> In some other cases this leads to the conclusion that 'a separate assessment of the best interests of the child in the context of Article 8 ECHR in conjunction with the Convention cannot be an option'.<sup>997</sup> Thus, the courts are of the opinion that the assessment of the best interests is already inherently done by assessing the provisions of the Hague Convention on Child Abduction. In some cases, it is pointed out what the purpose of the interest inherent in the Hague Convention on Child Abduction is:

The court considered that Article 8 ECHR should be viewed in conjunction with the grounds for refusal stated in the Convention, whereby the best interests of the child are paramount. The purpose of this interest is to preserve the children's links with their families, and therefore with both parents, and to ensure that their development takes place in a safe environment.<sup>998</sup>

In most cases, however, the explicit reference to the best interests of the child was not based on one of the mentioned grounds but on other considerations.

In two cases, the explicit reference was based on Article 18 Hague Convention on Child Abduction. The courts stated the following:

This provision is seen as an expression of the principle that the Hague Convention on Child Abduction does not in any way prevent the application of another arrangement that is more favourable to the child. The interests of the child remain the guideline when making a decision about the return.<sup>999</sup>

In one case, the court, when faced with an Article 20 Hague Convention on Child Abduction argument, stated the following:

In the present case, the assessment of Article 20 will have to take account of the extent to which a breach of the protection of the father's rights also constitutes a breach of the child's rights. If it is assumed that a violation of the father's rights also means a violation of the rights of the child, the application of Article 13(1)(b) will be discussed. This point of view is often used in the literature. If repatriation would entail a violation of the father's rights, but a refusal of repatriation is in conflict with the rights and interests of the child and therefore constitutes a violation of the rights of the child, it seems plausible in the spirit of the Abduction Convention to assert the best interests of the child as the primary factor in the weighing of these two conflicting interests.<sup>1000</sup>

<sup>995</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01.

<sup>996</sup> NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393. Similar phrases are used in two cases: NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816.

<sup>997</sup> NE159 [26 June 2017] Rechtbank Den Haag C/09/530932/ FA RK 17-2942; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841/ FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416. A similar wording could be found in one other case: NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122.

<sup>998</sup> NE074 [3 maart 2013] Rechtbank Den Haag 431060 - FA RK 12-8574; NE075 [13 February 2013] Gerechtshof Den Haag 200.120.294/01; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE111 [15 October 2014] Gerechtshof Den Haag 200.155.629/01; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382/ FA RK 17-1272.

<sup>999</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056; NE049 [22 September 2011] Rechtbank 's-Gravenhage 398865 - FA RK 11-5528.

<sup>1000</sup> NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01.

Several courts give expression to the principle of the Hague Convention on Child Abduction and make clear that the interests of the child are incorporated in the Hague Convention on Child Abduction. Indeed, the Convention is based on the premise that international child abduction is generally in conflict with the best interests of the child. A rapid return of the child to the State of his or her former habitual residence limits the harmful effects of the abduction and is thus seen as being in the best interests of the child. However, this premise can be deviated from in exceptional circumstances, namely when one of the grounds for refusal provided for in the Convention applies.<sup>1001</sup> In one case, the court makes clear that a return can only be refused when return poses a risk of putting the child in physical or mental danger, which 'goes beyond the fact that return would not be in the best interests of the child'.<sup>1002</sup>

In a large number of cases, the courts use the following paragraph:

The basic principle is that return is in the interest of the minors and that return is only refused in exceptional circumstances. This means that the court in the requested State may not already consider the strict conditions set out in Article 13(1)(b) of the Convention to have been met on the sole ground that the best interests of the children are not served in the country of origin as well as in the country of the court seized. After all, the balancing of interests as to where the minors should ultimately have their main residence must take place in proceedings on the merits and does not, in principle, fit in with these proceedings, in which only a measure of order is adopted. In addition, the imminent separation of a child from one of the parents can only justify the conclusion that there is a serious risk that a child is exposed to the danger as referred to in Article 13(1)(b) of the Convention under strict conditions.<sup>1003</sup>

Some courts add the following: 'Moreover, when applying it [Article 13(1)(b)], it [the court] is not allowed to anticipate a possible (change of) custody decision by the court of the country of origin after the child's return.'<sup>1004</sup>

This paragraph actually holds five premises, which are mentioned separately in other cases:

- 1) Return is in the child's interests;<sup>1005</sup>
- 2) Return can be refused but only in exceptional circumstances;<sup>1006</sup>

<sup>1001</sup> NE048 [28 July 2011] Rechtbank Leeuwarden 396710 / FA RK 11-4657; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE094 [3 January 2014] Rechtbank Den Haag C/09/449170 FA RK 13-6486; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE101 [23 April 2014] Rechtbank Den Haag C/09/461795 FA RK 14-1789; NE104 [26 May 2014] Gerechtshof Den Haag 200.148.437/01; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453.

<sup>1002</sup> NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01.

<sup>1003</sup> NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

<sup>1004</sup> NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.

<sup>1005</sup> See footnote 1001.

<sup>1006</sup> See footnote 1001 and in addition: NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.



- 3) Return cannot be refused solely because the best interests of the child are better served in the State of refuge;<sup>1007</sup>
- 4) Return can be refused based on the imminent separation of the child from one parent but only under strict conditions;<sup>1008</sup>
- 5) When deciding on return, the court cannot anticipate the outcome of the custody decision by the court in the State of former habitual residence;<sup>1009</sup>
- 6) Only the courts of the State of former habitual residence are competent to balance the interests as to where the child should have his or her main residence.<sup>1010</sup>

In one case, the court emphasizes that 'it is the judge on the merits in the country of former habitual residence who must decide which arrangements after the divorce of the father and the mother serve the interest of the child the best'.<sup>1011</sup>

In other cases, the courts refer to the purpose of the best interests of the child. As mentioned before for cases in which the best interests reference was based on the ECHR, courts sometimes point out that 'the purpose of this interest [best interest's test] is to preserve the child's links with his or her family and to ensure that his or her development takes place in a safe environment'.<sup>1012</sup>

The courts deem the requirement to preserve the child's links with his or her family to be ensured even when the abducting parent does not want to accompany the child upon return if this is the parent's own free choice and if it is proven that the left-behind parent can take care of the child after he or she has returned.<sup>1013</sup>

In some cases, the best interests were discussed in relation to the separation between the abducting parent and the child. In one case, both the first and the second instance court decided that it was contrary to the best interests of the two children to be separated from their mother and sister in view of their young age and in view of the ratio of the Abduction Convention to respect and preserve family life.<sup>1014</sup> In another case, the court deemed it not in the best interests of the child to be separated from the mother, who is the primary caregiver of the child.<sup>1015</sup>

<sup>1007</sup> NE029 [28 April 2010] Gerechtshof 's-Gravenhage 200.062.009-01; NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02; NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>1008</sup> NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113.

<sup>1009</sup> See footnote 1002.

<sup>1010</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE094 [3 January 2014] Rechtbank Den Haag C/09/449170 FA RK 13-6486; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871.

<sup>1011</sup> NE111 [15 October 2014] Gerechtshof Den Haag 200.155.629/01.

<sup>1012</sup> NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE066 [27 June 2012] Gerechtshof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechtshof 's-Gravenhage 200.110.609-01; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01; NE104 [26 May 2014] Gerechtshof Den Haag 200.148.437/01; NE105 [4 June 2014] Gerechtshof Den Haag 200.148.381/01; NE120 [4 March 2015] Gerechtshof Den Haag 200.163.913/01.

<sup>1013</sup> NE066 [27 June 2012] Gerechtshof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechtshof 's-Gravenhage 200.110.609-01; NE120 [4 March 2015] Gerechtshof Den Haag 200.163.913/01.

<sup>1014</sup> NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE082 [24 July 2013] Gerechtshof Den Haag 200.128.978.01.

<sup>1015</sup> NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01.

Some other cases cannot be placed in one of the previous categories. In several cases, the courts refer to the best interests of the child without giving further explanation. Courts state the following or similar phrases: 'There is no evidence that the best interests of the child are opposed to his or her return.'<sup>1016</sup>

In two cases, the courts refer to the best interests of the child when arguing why return would be contrary to those interests. In the first case, the court say the following: 'In view of her very young age [4 years old] and in view of the ratio of the [Abduction] Convention, namely respect for and preservation of family life, the court considered her return to Sudan to be contrary to the child's interests.'<sup>1017</sup> In the second case, the court finds return to be contrary to the child's interests since 'the child is rooted in the Netherlands to such an extent that the application for repatriation to [country] must be rejected'.<sup>1018</sup>

In one case, the court refers to the best interests of the child to explain why return would be in the best interests of the child: 'It is in the interest of the minor to re-establish as soon as possible contact with the father, whose contact he had been deprived of for a long time.'<sup>1019</sup>

Lastly, courts make suggestions to parents in the best interests of the children; to return together with the children to the State of former habitual residence,<sup>1020</sup> to follow system therapy,<sup>1021</sup> to focus on better mutual communication,<sup>1022</sup> and to cooperate with each other.<sup>1023</sup>

### **Implicit reference**

In some situations, courts found that the return of the child would place the child in an intolerable situation when a separation from the abducting parent and/or siblings would occur.<sup>1024</sup> In another case, the court decided that the child would be placed in an intolerable situation if she returned since she is terrified of her father (left-behind parent) and shows aversion towards him.<sup>1025</sup> Thus, returning the children in these cases is implicitly contrary to the best interests of the child.

In some cases, the courts decide not to return the child based on the living conditions in the State of former habitual residence. The following situations were considered by the courts: peace, stability and clarity cannot be offered,<sup>1026</sup> it is not demonstrated that the child will be cared for in a suitable housing and upbringing facility,<sup>1027</sup> the children would be placed in the same educational situation as before their departure and this is threatening for their mental and physical development,<sup>1028</sup>

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<sup>1016</sup> NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE076 [22 March 2013] Gerechtshof Den Haag 200.122.635.01; NE086 [4 September 2013] Gerechtshof Den Haag 200.131.396-01; NE125 [6 October 2015] Rechtbank Den Haag C/09/494358/ FA RK 15-6305.

<sup>1017</sup> NE099 [11 April 2014] Rechtbank Den Haag 460671 - FA RK 14-1301.

<sup>1018</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>1019</sup> NE167 [3 October 2017] Gerechtshof Den Haag 200.222.224/01.

<sup>1020</sup> NE003 [18 September 2007] Rechtbank 's-Gravenhage FA RK 07-4889 293262.

<sup>1021</sup> NE124 [3 June 2015] Gerechtshof Den Haag 200.169.291/01.

<sup>1022</sup> NE130 [21 January 2016] Gerechtshof Den Haag 200.181.959/01; NE142 [10 August 2016] Gerechtshof Den Haag 200.194.171/01; NE145 [12 October 2016] Gerechtshof Den Haag 200.199.457/01.

<sup>1023</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01.

<sup>1024</sup> NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE091 [19 December 2013] Rechtbank Den Haag C/09/453796; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>1025</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01.

<sup>1026</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853.

<sup>1027</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

<sup>1028</sup> NE096 [11 February 2014] Rechtbank Den Haag C/09/457267 FA RK 13-10264.

and the child's safety is to be feared since the child is a witness to the frequent and serious mistreatment of his mother and the father continues to express serious threats against her.<sup>1029</sup>

In one case the court stated the following:

It has been established before the court that the minor currently does not want to return to South Africa and that when he returns to South Africa the minor will be lost to such an extent that he will be harmed in his development. This is precisely what the [Hague Convention on Child Abduction] aims to prevent.<sup>1030</sup>

That the child would be harmed in his development upon return can be read as implicitly being contrary to the best interests of the child.

In one case, the court finds that the children have to return despite their clear opposition. This decision by the court can be read as being based on the best interests of the child since the court states the following:

With the mother and the mother's partner there are more and clear rules, structure and boundaries, which both children, in view of their ADHD problems, greatly need in order to be able to develop properly, but which can be experienced as annoying and difficult by them.<sup>1031</sup>

Lastly in three cases, the implicit reference to the best interests is not directly linked to the decision whether or not to return. The courts mention the following in these cases: 'It is important for the development of the child that help is sought to resolve his loyalty conflict, so that he can feel free to have contact with both parents again',<sup>1032</sup> 'It is essential that professional assistance for the child is called in',<sup>1033</sup> and 'A stable living environment is essential for their mental and physical wellbeing'.<sup>1034</sup>

### **Interpretation of grounds for non-return in relation to best interests**

<sup>1029</sup> NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>1030</sup> NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838.

<sup>1031</sup> NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241.

<sup>1032</sup> NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114.

<sup>1033</sup> NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734.

<sup>1034</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01.

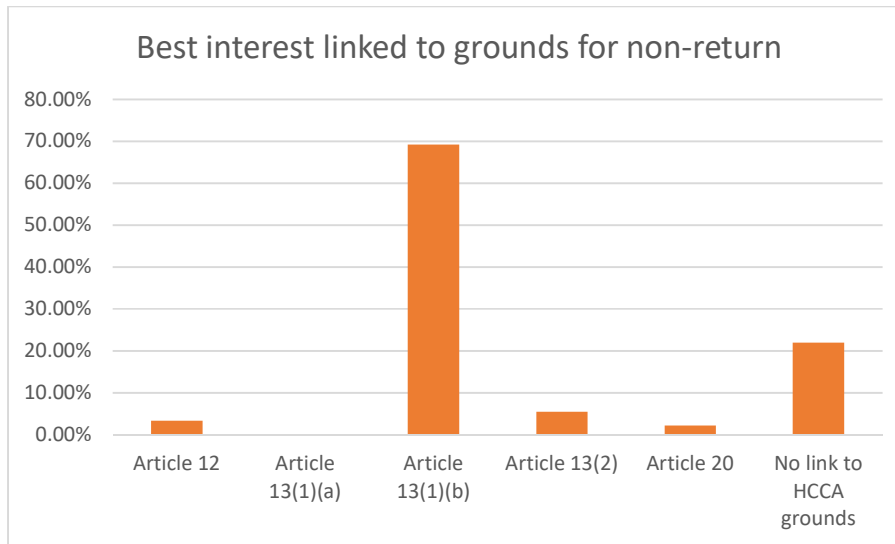


Figure (7) – Best interests linked to grounds for non-return

### Article 12 Hague Convention on Child Abduction

The best interests of the child were linked to Article 12 of the Hague Convention on Child Abduction in three cases.

In the first case, the court finds that Article 12 is applicable but then refers to Article 18 of the Hague Convention on Child Abduction and says that

This provision is seen as an expression of the principle that the Hague Convention on Child Abduction in no way precludes the application of another provision that is more favourable to the child, in particular in the case such as the present one, in which the one-year period of Article 12 of the Convention has been exceeded and the child has now been integrated into the new environment. Even then, the best interests of the child remain the guiding principle when taking a decision on the return and it will be possible to order the return of the child if the best interests of the child so require.<sup>1035</sup>

In the second case, the court reiterates that the exception provided for in Article 12 is based on the best interests of the child:

The ratio of the given one-year period is precisely to find a balance between on the one hand, giving a reasonable period of time to trace a minor in order to return and, on the other hand, the fact that a child becomes more rooted over time in the country to which he or she has been abducted, with the result that return may no longer be considered in the best interests of the child.<sup>1036</sup>

In the last case, the court decides that the return must be refused in the interests of the child.<sup>1037</sup> This decision is based on an assessment of 'the bond of the child with the State of former habitual residence compared to the bond of the child with the State of refuge'.<sup>1038</sup> To assess the bond with

<sup>1035</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

<sup>1036</sup> NE118 [27 January 2015] Rechtbank Den Haag C-09-474592 - FA RK 14-7679.

<sup>1037</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>1038</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

the country of refuge, 'both the physical and emotional bond that the minor has now acquired with his or her place of residence should be considered. It is not only about the new family relationship, but also about more external relationships, such as other family, friends, sports and school'.<sup>1039</sup> Factors considered by the court in this specific case are the following: the minor is three years old, he lives together with his mother and both his grandparents, he goes to kindergarten, he speaks Dutch well, he plays with children from the neighbourhood, the child has contact with almost all family members, and the mother is the primary attachment figure. On the other hand, to assess the bond with the country of former habitual residence, it is important 'to what extent the minor is (still) rooted in that country'.<sup>1040</sup> Here, the court considers the following: there is no safety net of trusted people who can take care of the minor if the mother is (temporarily) unavailable due to illness in the country of former habitual residence, the father did not attempt to visit the child and there is no certainty about whether the father will be sufficiently present after the child's return.

### Article 13(1)(b) Hague Convention on Child Abduction

In 63 cases the best interests were linked to the grave risk exception. This was done, first, in a theoretical manner. In 46 cases, the courts follow more or less a same line of thought. This line of thought starts with the statement that 'the basic principle [of the Hague Convention on Child Abduction] is that return is in the best interests of the child and that return will only be refused in exceptional circumstances'.<sup>1041</sup> One of these exceptional circumstances is the grave risk exception of Article 13(1)(b), of which the courts say the following: 'The purpose and purport of the Convention imply that the ground for refusal referred to in Article 13(1)(b) of the Convention must be interpreted restrictively'<sup>1042</sup> and 'appeals to this effect can only be granted in extreme situations'.<sup>1043</sup> Then,

<sup>1039</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>1040</sup> NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>1041</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

<sup>1042</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; Rechtbank Utrecht FA RK 09-9511 - 352593, 07/01/2010; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE043 [3 March 2011] Rechtbank 's-Gravenhage 382368 FA RK 10-9903; NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>1043</sup> NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE155 [11 April

courts point out what can certainly not be taken into consideration while assessing the application of Article 13(1)(b): 'The court in the requested State may not consider that the strict conditions laid down in this Article have already been met solely on the ground that it considers that the best interests of the child are less well served in the country of origin than in the country of the court seized'<sup>1044</sup> and 'When applying it [Article 13(1)(b)], he is not allowed to anticipate a possible (change of) custody decision by the court of the country of origin after the child's return.'<sup>1045</sup> On the other hand, the courts are of the opinion that 'the imminent separation of a child from the abducting parent can justify the conclusion that there is a grave risk but only under strict conditions'.<sup>1046</sup> A last thought mentioned by courts is that 'after all, the balancing of interests with regard to where the child should ultimately have his or her main residence must take place in proceedings on the merits - in the country of origin - and does not fit in with these proceedings, in which only an disciplinary measure is taken'.<sup>1047</sup>

In three cases, the courts referred to the best interests of the child in the context of Article 8 ECHR in the sense that the left-behind parent invoked this Article to argue that the return had to be rejected in the best interests of the child.<sup>1048</sup> In response, the courts firstly point out that the Hague

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2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>1044</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE022 [7 January 2010] Rechtbank Utrecht FA RK 09-9511 - 352593; NE029 [28 April 2010] Gerechtshof 's-Gravenhage 200.062.009-01; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE043 [3 March 2011] Rechtbank 's-Gravenhage 382368 FA RK 10-9903; NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446; NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>1045</sup> NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416.

<sup>1046</sup> NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

<sup>1047</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE133 [12 May 2016] Rechtbank Den Haag C/09/508628 / FA RK 16-2604; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784 / FA RK 16-2675; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838 / FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551 / FA RK 17-1338; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272.

<sup>1048</sup> NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816; NE072 [11 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393.

Convention on Child Abduction also intends to serve the interests of the child.<sup>1049</sup> Secondly, the courts say that they already weighed up the best interests earlier in their decision.<sup>1050</sup> In all three cases the latter implicitly means that the courts took into consideration the best interests of the child when examining the applicability of Article 13(1)(b) since this was the only Article discussed before this paragraph.

Next to referring to the best interests of the child in a theoretical manner, courts make clear what they understand under the concept by examining the particular factors that could lead to the applicability of the grave risk exception in each case. The conclusions to which the courts come, can be divided into two categories: the situation does not amount to a grave risk and thus return is ordered in the best interests of the child or the situation does constitute a grave risk so return is not in the best interests of the child. For both categories, the relevant factors considered by the courts will be quoted in full.

#### **No grave risk so return was ordered**

There are several reasons mentioned that were not sufficient to justify a rejection of return. Those reasons can be classified into six groups: reasons that have to do with the left-behind parent (28 cases), the abducting parent (25 cases), the child (one case), the State of former habitual residence (twenty cases), the State of refuge (one case) or other/general reasons (seven cases). Each group will be discussed below.

#### **Left-behind parent**

In 28 cases, the abducting parent argues that the child cannot be sent back to the left-behind parent since the latter cannot take proper care of the child for reasons such as: a general bad parenting situation (the mother claims that the father has no own house, lives with his parents, is unemployed and has a drugs and alcohol problem),<sup>1051</sup> housing problems and a gambling addiction,<sup>1052</sup> the way of parenting (the mother claims that the father has no own house, lives with his parents, is unemployed, has a gambling addiction and that he has a needlessly harsh way of upbringing),<sup>1053</sup> alcohol addiction,<sup>1054</sup> never had a share in the child's upbringing,<sup>1055</sup> inability of the grandparents to care for the child given their age and health,<sup>1056</sup> general inability to take care,<sup>1057</sup> intention to circumcise the children,<sup>1058</sup> took poor care in the past,<sup>1059</sup> has insufficient time to take proper care,<sup>1060</sup> is working a lot and says abroad regularly.<sup>1061</sup> In eight cases the courts finds these arguments not sufficiently proven.<sup>1062</sup>

<sup>1049</sup> NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816; NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393.

<sup>1050</sup> NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816; NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393.

<sup>1051</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853.

<sup>1052</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052.

<sup>1053</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052.

<sup>1054</sup> NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01.

<sup>1055</sup> NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01.

<sup>1056</sup> NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01.

<sup>1057</sup> NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263.

<sup>1058</sup> NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01.

<sup>1059</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412.

<sup>1060</sup> NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871.

<sup>1061</sup> NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514.

<sup>1062</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE036 [10 November 2010] Gerechtshof 's-Gravenhage 200.074.846-01; NE058 [26 January 2012] Rechtbank

In some other cases, it was not entirely clear which argument the abducting parent invoked, but the courts stated the following: 'The court did not find that the [left-behind parent] was not able to take proper care of the care and upbringing of the child.'<sup>1063</sup>

In other cases, the accusations were of a different order: mistreatment of the child,<sup>1064</sup> abuse, poor hygiene and neglect,<sup>1065</sup> risk of honour killing,<sup>1066</sup> humiliation and mistreatment of the child,<sup>1067</sup> physical and psychological abuse of the child,<sup>1068</sup> abandonment or neglect,<sup>1069</sup> domestic violence witnessed by the children,<sup>1070</sup> and sexual abuse.<sup>1071</sup> Also in these cases the courts found the accusations not sufficiently proven.

In five cases, the courts expressly point to the fact that the left-behind parent can sufficiently offer what the child needs: 'The father has a strong bond with his family and can therefore count on their availability, if necessary,'<sup>1072</sup> '[The father] was prepared to be extra vigilant and, if necessary, to offer protection on this point [mother made statements about sexual games],'<sup>1073</sup> 'The father would keep his promise to call in help for both minors,'<sup>1074</sup> 'The mother now has sufficient insight into the specific (medical) problems of the minor and the extra care he needs in this context',<sup>1075</sup> and 'The father would keep his promise and that for this reason the minor would also receive the necessary help in the United States of America'.<sup>1076</sup>

Another point touched upon by the courts that leads to a decision to return the child is the willingness of the left-behind parent to make a contact arrangement with the other parent.<sup>1077</sup> Also the willingness of the left-behind parent to pay for or provide accommodation and other (financial) support for the abducting parent and child are factors that lead the courts to decide to return the child.<sup>1078</sup>

Finally, some other remarks made by the court with regard to the left-behind parent are: 'The father cannot be criticised for not having played a role in the minor's life after December 2006. After all, it was the mother who transferred the minor to the Netherlands, in violation of the father's unilateral

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Groningen 408087 FA RK 11-9263; NE060 [22 February 2012] Gerechtshof 's-Gravenhage 200.100.312-01; NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514.

<sup>1063</sup> NE148 [18 January 2017] Rechtbank Den Haag C/09/522838/ FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551/ FA RK 17-1338; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932/ FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303/ FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841/ FA RK 17-5272.

<sup>1064</sup> NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446; NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816.

<sup>1065</sup> NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01.

<sup>1066</sup> NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113.

<sup>1067</sup> NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514.

<sup>1068</sup> NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734.

<sup>1069</sup> NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008.

<sup>1070</sup> NE154 [10 April 2017] Rechtbank Den Haag C/09/527551/ FA RK 17-1338; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932/ FA RK 17-2942; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.

<sup>1071</sup> NE163 [17 August 2017] Rechtbank Den Haag C/09/535841/ FA RK 17-5272.

<sup>1072</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853.

<sup>1073</sup> NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104.

<sup>1074</sup> NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446.

<sup>1075</sup> NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01.

<sup>1076</sup> NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122.

<sup>1077</sup> NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303/ FA RK 17-4555.

<sup>1078</sup> NE142 [10 August 2016] Gerechtshof Den Haag 200.194.171/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364/ FA RK 16-5719; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932/ FA RK 17-2942.



right of authority',<sup>1079</sup> 'The mere fact that the mother has less financial capacity than the father is insufficient [to reject the return]',<sup>1080</sup> 'The child lived with the father in a family relationship in Suriname. It was neither stated nor shown that the minor was not doing well there. The minor went to school there',<sup>1081</sup> 'It did not appear that a possible temporary stay with his father would create an unbearable situation for him',<sup>1082</sup> and 'It did not appear that the safety of the child in the presence of the father was at stake'.<sup>1083</sup>

### Abducting parent

In 25 cases, the courts found that it was not sufficiently established that the abducting parent would be arrested upon return<sup>1084</sup> or stated that an arrest of the parent would not necessarily lead to a grave risk for the child.<sup>1085</sup>

The courts also state repeatedly that they are of the opinion that the abducting parent can return together with the child to the State of former habitual residence at least for the time of the court proceedings on the merits.<sup>1086</sup>

In other cases, courts point out that it is not established that a return of the child will lead to a separation from the abducting parent.<sup>1087</sup> Sometimes the courts go further and say that even if the child were separated from the parent, this would not automatically lead to a grave risk for the child.<sup>1088</sup>

Finally, some other remarks made by the court with regard to the abducting parent:

The court disregarded the mother's assertion that, under Surinamese law, she, as a woman, had no control over the children during the marriage, since this assertion was contested by the father and, moreover, it did not appear that the mother had no control over the minors before the children were transferred to the Netherlands.<sup>1089</sup>

<sup>1079</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337/ FARK 08-9154.

<sup>1080</sup> NE088 [30 September 2013] Rechtbank Den Haag C/09/446821 FA RK 13-5412.

<sup>1081</sup> NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02.

<sup>1082</sup> NE143 [8 September 2016] Rechtbank Den Haag C/09/515364/ FA RK 16-5719.

<sup>1083</sup> NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.

<sup>1084</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337 / FARK 08-9154; NE052 [26 October 2011] Rechtbank 's-Gravenhage 401885 FA RK 11-6722; NE106 [12 August 2014] Rechtbank Den Haag C/09/469095 FA RK 14-5113; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE142 [10 August 2016] Gerechtshof Den Haag 200.194.171/01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431 / FA RK 16-8008; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382 / FA RK 17-1272; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932 / FA RK 17-2942; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555.

<sup>1085</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337/ FARK 08-9154; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838/ FA RK 16-9179.

<sup>1086</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052; NE043 [3 March 2011] Rechtbank 's-Gravenhage 382368 FA RK 10-9903; NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774 / FA RK 17-1453; NE160 [26 July 2017] Rechtbank Den Haag C/09/534303 / FA RK 17-4555; NE163 [17 August 2017] Rechtbank Den Haag C/09/535841 / FA RK 17-5272; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166 / FA RK 17-5416; NE167 [3 October 2017] Gerechtshof Den Haag 200.222.224/01.

<sup>1087</sup> NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01.

<sup>1088</sup> NE148 [18 January 2017] Rechtbank Den Haag C/09/522838/ FA RK 16-9179; NE154 [10 April 2017] Rechtbank Den Haag C/09/527551/ FA RK 17-1338; NE158 [7 June 2017] Gerechtshof Den Haag 200.214.696/01; NE159 [26 June 2017] Rechtbank Den Haag C/09/530932/ FA RK 17-2942.

<sup>1089</sup> NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469.

The fact that the mother is not proficient in the German language is not practical but cannot lead to the conclusion that there is a serious risk of the youngest child being exposed to physical or mental danger.<sup>1090</sup>

### Child

In this category, only one case can be classified. In that case, the court states that it 'disregards the mother's assertion that the child has suicidal tendencies.'<sup>1091</sup>

### State of former habitual residence

In twenty cases in which several different States of former habitual residence are involved, the courts consider that the competent authorities of the State of former habitual residence involved can sufficiently offer protection,<sup>1092</sup> medical care and assistance,<sup>1093</sup> and general care and assistance.<sup>1094</sup> In two cases, the courts also consider that the abducting parent has sufficient opportunity to litigate about the child's principal place of residence and/or to request a change of the care scheme before the courts of the State of former habitual residence.<sup>1095</sup>

The fact that certain things such as socio-economic conditions,<sup>1096</sup> standard of living,<sup>1097</sup> the political situation,<sup>1098</sup> special care provisions,<sup>1099</sup> and the education system<sup>1100</sup> are possibly less favourable in the State of former habitual residence does not lead to a grave risk for the child according to the courts.

Finally, some other remarks made by the court with regard to the State of former habitual residence. In one case, the court said the following:

The general situation in Guatemala is not so unsafe. Parties live in Guatemala for more than ten years; the minor was born there and has lived there all her life. Parties have always lived in a secure environment and have taken care of precautionary and safety measures, which can also be realised upon the return of the minor. The fact that the minor and the mother have nevertheless been robbed once, whether or not under threat of a firearm, is regrettable and can have traumatising consequences, but does not lead to the conclusion that the minor is in a (structurally) unsafe situation.<sup>1101</sup>

<sup>1090</sup> NE156 [19 April 2017] Rechtbank Den Haag C/09/527774/ FA RK 17-1453.

<sup>1091</sup> NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104.

<sup>1092</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE164 [30 August 2017] Rechtbank Den Haag C/09/536166/ FA RK 17-5416.

<sup>1093</sup> NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE156 [19 April 2017] Rechtbank Den Haag C/09/527774/ FA RK 17-1453.

<sup>1094</sup> NE070 [10 October 2012] Gerechtshof 's-Gravenhage 200.112.675-01; NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393; NE109 [9 October 2014] Rechtbank Den Haag C-09-472712 - FA RK 14-6871; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE123 [21 April 2015] Rechtbank Den Haag C-09-484326 - FA RK 15-1734.

<sup>1095</sup> NE083 [25 July 2013] Rechtbank Den Haag C/09/443918 FA RK 13-4122; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382/ FA RK 17-1272.

<sup>1096</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680/ 353052; NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008.

<sup>1097</sup> NE147 [23 December 2016] Rechtbank Den Haag C/09/520431/ FA RK 16-8008.

<sup>1098</sup> NE065 [16 May 2012] Rechtbank 's-Gravenhage 416478 - FA RK 12-2446.

<sup>1099</sup> NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE148 [18 January 2017] Rechtbank Den Haag C/09/522838/ FA RK 16-9179.

<sup>1100</sup> NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469.

<sup>1101</sup> NE022 [7 January 2010] Rechtbank Utrecht FA RK 09-9511 - 352593.

In another case, the court stated that 'the fact that dyslexia counselling can only take place outside school hours in Austria does not constitute a circumstance within the meaning of Article 13(1)(b) of the Convention'.<sup>1102</sup>

### **State of refuge**

In one case, the court explicitly stated that 'the mere fact that, according to the mother, the minor has attached himself to his new environment during his stay in the Netherlands does not mean that on his return to Portugal he will be in an unbearable situation'.<sup>1103</sup>

### **Other/general reasons**

In some cases, the court merely states that there is no sufficient proof that the return would cause harm to the child.<sup>1104</sup>

In one case, the court states the following:

The fact that the minor has not always received the help and care he needs is insufficient, however worrying, for the father to successfully invoke the aforementioned ground for refusal in the present proceedings. Moreover, it appears that various initiatives have been started up in the care of the minor.<sup>1105</sup>

In another case, the court finds that the lack of income and a home on the part of the father do not lead in themselves to an unbearable situation.<sup>1106</sup>

## **Grave risk so return was refused**

### **Separation**

In the first case, the court based its decision mainly on two factors.<sup>1107</sup> On the one hand, the relation between the child and the father and on the other, the uncertainty that the mother could return together with the child. With regard to the first factor, the court observed that the child 'made a traumatized impression [during the hearing] and evidently experienced return to Australia as a burden. The child is terrified of the father and shows aversion to him'. The father on his turn 'stated at the hearing that the child is afraid of him and that she will need a lot of psychological help and guidance. He believes, however, that the request for return should be continued'. This led the court to the conclusion that the father is 'more focused on [his] interest than on that of the child' and that 'this does not show that he has sufficient understanding of the problems of the child'. With regard to the second factor, 'it is important that the mother currently has a partner in the Netherlands with whom she expects a child. As a result, her future is already in the Netherlands, and it is uncertain whether she, even if this is only temporary [...], could return to Australia with the child'. Thus, 'this could mean that the child would have to go to Australia without her mother, who

<sup>1102</sup> NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114.

<sup>1103</sup> NE062 [6 March 2012] Rechtbank Zutphen 407290 FA RK 11-8934.

<sup>1104</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337/ FARK 08-9154; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE135 [7 June 2016] Rechtbank Den Haag C/09/508784/ FA RK 16-2675.

<sup>1105</sup> NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816.

<sup>1106</sup> NE160 [26 July 2017] Rechtbank Den Haag C/09/534303/ FA RK 17-4555.

<sup>1107</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01.

is her primary caregiver'. Next to these two main factors on which the court based its decision, it was also mentioned that 'the child now has regressive behaviour. She suffers from nightmares, wets her bed, cries a lot and clings to the mother'. And reference was made to the Psychological / Pedagogical Analysis in which it was said that 'the return to Australia has probably to be seen as a road that will cause great damage to the development of the child'.

In the second case, it is not the separation from the abducting parent but from a sibling that would constitute a grave risk if return is ordered.<sup>1108</sup> In that regard the court states that 'the two children have a good relationship and have spent their entire lives together as a family and together they experienced radical events, such as the separation of their parents'. The court decides that a separation from the sibling would bring the child in an intolerable situation and bases this decision on all the circumstances and 'the rationale of the [Abduction Convention] that relates to respect for and conservation of family life'.

In case NE081, a return would mean a separation of the twins from both their mother and their older sister, which is, considering their young age and considering the ratio of the Convention that relates to respect for and conservation of family life, contrary to their interests.<sup>1109</sup> In addition, the father's place of residence is not clear since he has been registered for many years in the Netherlands and works there as a cab driver. There is thus a risk that the children would return to their State of former habitual residence without even one parent living there. The court of appeal confirmed the decision of the first court based on the same arguments – the separation is contrary to the child's interests in view of the ratio of the Convention.<sup>1110</sup>

In another case, the court briefly states that a return would mean the separation of the child from his mother and that this would put him in an intolerable situation.<sup>1111</sup>

In case NE099, the court based its decision mainly on two factors: the separation of the child from her father and half-sister and the relation with the mother and the State of former habitual residence.<sup>1112</sup> With regard to the first factor, the court considers that the child 'has a close bond with her father and her half-sister, while in the event of her return to Sudan she will de facto be completely separated from them' since 'there is a lack of financial means to implement an international contact arrangement and the possibilities to maintain contact with the Netherlands by telephone and internet with the mother in Sudan are very limited'. With regard to the second factor, the court states that the child 'has no emotional bond with her mother and does not speak Arabic while her mother does not speak English'. Furthermore, upon return the child 'will end up in a completely different culture from the Western culture in which she grew up'. Thus, the court decides that a separation from the father and the half-sister would bring the child in an intolerable situation and bases this decision on her young age of four years, all the circumstances discussed and 'the rationale of the treaty that relates to respect for and conservation of family life'.

In case NE119, the court determines that the child 'is very attached to both his mother and his half-brother' so that a separation would lead to an intolerable situation for the child.<sup>1113</sup> Further, it is certain that a return would cause separation since the half-brother cannot return because of his

<sup>1108</sup> NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912.

<sup>1109</sup> NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932.

<sup>1110</sup> NE082 [24 July 2013] Gerechtshof Den Haag 200.128.978.01.

<sup>1111</sup> NE091 [19 December 2013] Rechtbank Den Haag C/09/453796.

<sup>1112</sup> NE099 [11 April 2014] Rechtbank Den Haag 460671 - FA RK 14-1301.

<sup>1113</sup> NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460.

autistic disorder and the mother cannot return either since she needs to take care of the half-brother.

The last case in which separation was the main reason for rejecting the return, the child expressed that he 'experiences his safety and security only with his mother and his loyalty lies completely with her'.<sup>1114</sup> The court thus determined that the child's 'fear of losing his mother and having to live with his father is very great and insurmountable'. This was considered together with other factors: a Bulgarian judge decided that the child will have his main residence with the father, the father did report the mother so she may come into contact with the criminal authorities upon return and it did not appear that any child protection measure had already been taken in Bulgaria to ensure the child's protection after return.

### **Violence / Abuse**

In the first case under this category, the father mistreated the mother and this caused fear among the children.<sup>1115</sup> Furthermore, the court took into account that the mother did not succeed to avert the threatening situation with the means available to her before (report the situation to the police and call in the aid of the emergency services) so that it was not to be expected that she would succeed on her return. Lastly, the court finds that the mother does not have sufficient possibilities to protect the minors against further threats in their development since the continuation of aid that the children receive will depend on the father's willingness to pay for it.

In the second case, it was also the father who seriously mistreated the mother while the child was present at home.<sup>1116</sup> Furthermore, the father frequently and seriously threatened the mother and continues to threaten her. This makes the court say that not only the mother's safety but also the child's safety is to be feared. The court also took into account the following factors: the mother does not have her own social network in the Czech Republic (the child's country of former habitual residence) so that the mother is completely dependent on the father, the mother cannot reasonably be expected to return to the Czech Republic with the child and also contact with the child will not be possible taking into account the safety of the mother. Thus, the return of the child will result in her being separated from the mother and having to live with her father.

### **Other**

In case NE013, the child is residing in a Dutch organisation for youth care and the court decided not to change this situation and thus, not to return the child mainly because 'both parents show insufficient pedagogical insight into the worrying development of the minor'.<sup>1117</sup> The court quotes the report of the Council for Child Protection which states that the child 'is a very vulnerable boy, who is going through a worrying development. He has below-average intelligence and exhibits characteristics of ADHD. He exhibits externalising behaviour, such as attentional problems. He is restless and listens badly.' Then the court explains what is problematic about the parents' perspective: 'The mother does agree to the removal of the minor at the moment but thinks that in the foreseeable future it will be possible to resume the upbringing herself. Thus, it seems that she is insufficiently aware of her own limitations and those of the minor.' The father, on the other hand, 'does not demonstrate any awareness of the need to make provision for this vulnerable child to

<sup>1114</sup> NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>1115</sup> NE096 [11 February 2014] Rechtbank Den Haag C/09/457267 FA RK 13-10264.

<sup>1116</sup> NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>1117</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

ensure that, in the event of possible return, adequate provision will first and foremost be made for the child to be cared for in a suitable housing and upbringing facility'. Given these circumstances, the court considers in addition that 'the mere transmission by the Central Authority of the report of the Council to the Spanish emergency services is not sufficient to safeguard the vulnerable position of the minor' and thus, that the child does not have to return but has to stay in the Dutch organisation for youth care.

In the second case, there were two possible scenarios for return of the children.<sup>1118</sup> Since the mother does not have immediate access to independent accommodation in the country of the children's former habitual residence, the mother would end up in an emergency shelter together with the minors – assuming that they could be accommodated in such a shelter. In the other scenario, the children would live with the father. However, the father has never been a long-term independent carer and he has not been in contact with the minors for almost a year. The court decided that both scenarios lead to a danger for the development of the minors in view of their very young age and high degree of vulnerability. Furthermore, it has become clear that the children are, for the first time in a long time, in a stable situation. Thus, the court decides to reject their return.

### **Article 13(2) Hague Convention on Child Abduction**

In three cases in which Article 13(2) was discussed and linked to the best interests of the child, the court decided that the child did not have to return.

In the first case, the court started with a description of the child; the child is fifteen and a half years old and is a 'polite, of above average intelligence, independent boy'.<sup>1119</sup> In this case the child himself went to see his father who lived in another country and the court stated that the child 'took matters into his own hands, after a number of years had shown that both his parents did not make sufficient efforts in his interests, including maintaining contact with both his parents, and that no improvement in this situation was to be expected'. In the second case, the child made clear before the court that he does not want to return to South-Africa and the court decided thus that 'the minor will get lost to such an extent that he will be harmed in his development'.<sup>1120</sup> Since this is 'exactly what the [Abduction] Convention aims to prevent' according to the court, the child was not sent back. In case NE122, the court stated the following:

A return to Belgium evokes a great feeling of insecurity at the moment, as the child has very little confidence in his environment, especially due to the traumatising events of 11 September 2014.<sup>1121</sup> For the child - as he himself sees it - help is needed to process the events and to restore contact with his father. The assistance already obtained in the Netherlands seems to be starting to show a positive trend.<sup>1122</sup>

Thus, the court decided that it was best for the child not to return.

In one case, the children made their objection clear but the court, basing itself on the report of the Council for Child Protection, found that the children were not mature enough to take their opinion

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<sup>1118</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01.

<sup>1119</sup> NE041 [17 February 2011] Rechtbank 's-Gravenhage 383332 - FA RK 10-10269.

<sup>1120</sup> NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838.

<sup>1121</sup> On 11 September 2014, the father of the child, together with the former stepfather, lifted him by force and put him in a car in order to make him return to Belgium. In addition, the former stepfather used a knife against the grandmother on mother's side.

<sup>1122</sup> NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

into account and consequently took a decision based on what the court considers to be in the best interests of the children.<sup>1123</sup> This is apparent from the following quotes:

The children clearly indicate that they are opposed to returning to their mother. This resistance is tangible/understandable, because the children have a warm bond with their father and in the pedagogical approach of the father there seems to be more freedom and less structure and limitations, which is particularly experienced as attractive for adolescents. Also the father seems to spend a lot of time and attention on fun and creative activities for the children. With the mother and the mother's partner there are more and clear rules, structure and boundaries, which both children, in view of their ADHD problems, greatly need in order to be able to develop properly, but which can be experienced as disturbing and difficult by them.

Both children show an insufficient (self-)reflective capacity. At the moment, they are not able to make a sufficiently objective and stable assessment of their experience of father, mother and mother's partner, the context of their upbringing and what this means for them individually.

#### **Article 20 Hague Convention on Child Abduction**

Only in one case the best interests of the child were linked to Article 20. In that case the court stated the following:

In the present case, the assessment of Article 20 will have to take account of the extent to which a breach of the protection of the father's rights also constitutes a breach of the child's rights. If it is assumed that a violation of the father's rights also means a violation of the rights of the child, the application of Article 13(1)(b) will be discussed. This point of view is often used in the literature. If repatriation would entail a violation of the father's rights, but a refusal of repatriation is in conflict with the rights and interests of the child and therefore constitutes a violation of the rights of the child, it seems plausible in the spirit of the Abduction Convention to assert the best interests of the child as the primary factor in the weighing of these two conflicting interests.<sup>1124</sup>

#### **Impact of the best interests on the final decision**

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<sup>1123</sup> NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241.

<sup>1124</sup> NE169 [18 October 2017] Gerechtshof Den Haag 200.214.696/01.

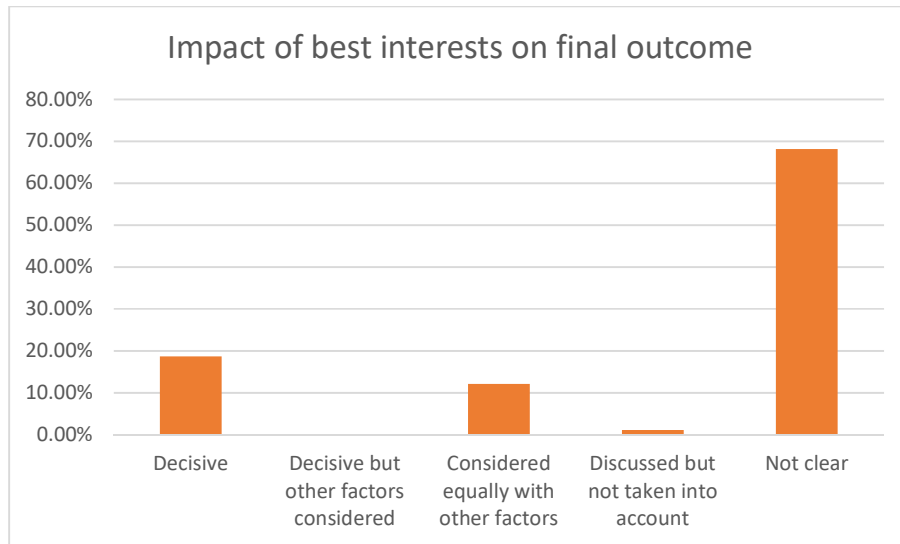


Figure (8) – Impact of best interests on final outcome

### The best interests are decisive

In seventeen out of the 91 cases in which the best interests are mentioned (explicitly or implicitly), the best interest were decisive for the final outcome of the proceeding.

In seven cases, the courts found that separation of the child from the abducting parent and/or siblings is contrary to the child's interests or would put the child in an intolerable situation (which is implicitly contrary to the best interests of the child) and decided therefore not to return the child.<sup>1125</sup>

In two cases, the court decided to accept the child's objection to return;<sup>1126</sup> in one of these cases the court stated that it 'finds the view of the child most important'.<sup>1127</sup>

In two cases, the court merely stated that 'return has to be refused based on the best interests of the child'.<sup>1128</sup>

In one case, the court analysed whether Article 12 Hague Convention on Child Abduction would be applicable and decided that it was indeed.<sup>1129</sup> However, the court did not stop its analysis here but instead, referred to Article 18 of the Convention and examined whether it would be in the best interests of the child to be sent back, regardless of his integration in the new environment. In the end, the court indeed decided that the child had to be sent back in his best interest.

In the other cases, courts found the return to be contrary to the best interests of the child for several reasons: both parents are unqualified to take care of the child so the child had to stay in the Dutch facilities,<sup>1130</sup> the situation in Morocco would be threatening and the mother did not succeed to

<sup>1125</sup> NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE082 [24 July 2013] Gerechtshof Den Haag 200.128.978.01; NE091 [19 December 2013] Rechtbank Den Haag C/09/453796; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01.

<sup>1126</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>1127</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01.

<sup>1128</sup> NE099 [11 April 2014] Rechtbank Den Haag 460671 - FA RK 14-1301; NE131 [27 January 2016] Gerechtshof Den Haag 200.182.337/01.

<sup>1129</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056.

<sup>1130</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.



avert the threatening situation with the means available to her before,<sup>1131</sup> the child would be harmed in his development,<sup>1132</sup> a stable living environment is essential and this cannot be offered upon return,<sup>1133</sup> and returning the child to the father would not be safe due to the mistreatment of the mother by the father.<sup>1134</sup>

In one case, it can be said that the court based the decision to return the child on the court's idea of what would be in the best interests of the child, namely more and clear rules, structure and boundaries.<sup>1135</sup>

### **The best interests are considered equally with other factors**

In six cases in this category, the best interests were considered alongside Articles 13(1)(b) and 13(2) Hague Convention on Child Abduction.<sup>1136</sup> In two cases, the best interests were considered equally with Article 13(1)(b) Hague Convention on Child Abduction,<sup>1137</sup> and in another case equally with Article 13(2) Hague Convention on Child Abduction.<sup>1138</sup>

In one case in which return was ordered, the court considered the return in the best interests of the child in general. Next to this, the court considered that the passage of time in itself cannot impede return, that the mother is free to go and visit the child in Scotland so that a separation between them will not happen, and that the Scottish Central Authority contacted the child protection services which will look out for the child's interests.<sup>1139</sup>

In another case, the court mainly based its decision to refuse return on the objection of the child but took also into account the fact that the child certainly needs assistance and that this is provided for in the Netherlands.<sup>1140</sup>

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<sup>1131</sup> NE096 [11 February 2014] Rechtbank Den Haag C/09/457267 FA RK 13-10264.

<sup>1132</sup> NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838.

<sup>1133</sup> NE137 [15 June 2016] Gerechtshof Den Haag 200.191.084/01.

<sup>1134</sup> NE149 [31 January 2017] Rechtbank Den Haag C-09-523181 FA RK 16-9339.

<sup>1135</sup> NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241. See the wording of the court in the text to footnote number 39.

<sup>1136</sup> NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE066 [27 June 2012] Gerechtshof 's-Gravenhage 200.107.467-01; NE067 [28 August 2012] Gerechtshof 's-Gravenhage 200.110.609-01; NE111 [15 October 2014] Gerechtshof Den Haag 200.155.629/01; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE115 [26 January 2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670.

<sup>1137</sup> NE105 [4 June 2014] Gerechtshof Den Haag 200.148.381/01; NE155 [11 April 2017] Rechtbank Den Haag C/09/527382/ FA RK 17-1272.

<sup>1138</sup> NE120 [4 March 2015] Gerechtshof Den Haag 200.163.913/01.

<sup>1139</sup> NE048 [28 July 2011] Rechtbank Leeuwarden 396710/ FA RK 11-4657.

<sup>1140</sup> NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

## Hearing of the Child

In most cases it is unknown whether the child was heard, in 31% the child was heard and in 4% the child was not.

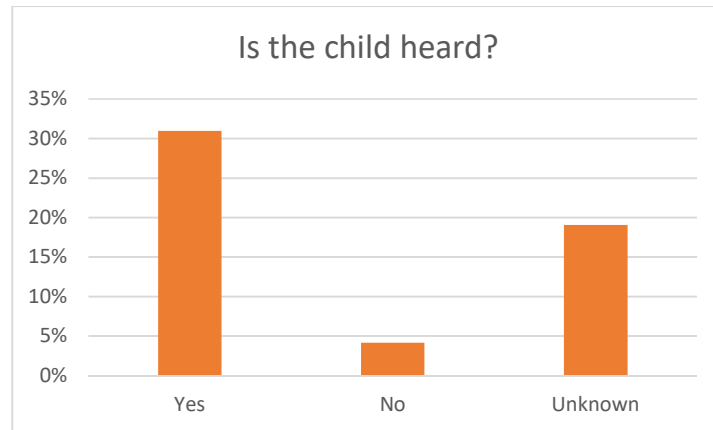


Figure (9) – Is the child heard?

In 48 of the 52 cases in which the child was heard, this hearing was carried out by a judge. In three cases it was the Council for Child Protection who heard the child<sup>1141</sup> and in one case it was unknown who heard the child. In seven of the 52 cases in which the child was heard, it can be said that the hearing contributed to the determination of the best interests of the child.<sup>1142</sup> In four of these seven cases, the child's views were decisive for the final decision of the court,<sup>1143</sup> in two the child's views were considered equally with other factors. In one of those two cases, the court took into account the child's view as well as documents and the proceedings and decided that a separation from the mother and sibling would be contrary to the child's interests.<sup>1144</sup> In another case, it was the child's views that made clear that separation from the mother and living with the father would not be in the best interests of the child but the decision was also based on the lack of adequate measures and the likelihood that the return would mean that the child had to go back to the father.<sup>1145</sup>

During the hearing, children mostly spoke about their relation and communication with the left-behind parent,<sup>1146</sup> the behaviour of the left-behind parent,<sup>1147</sup> their wish to return to the left-behind

<sup>1141</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; NE118 [27 January 2015] Rechtbank Den Haag C-09-474592 - FA RK 14-7679.

<sup>1142</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>1143</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838, 13/05/2014; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>1144</sup> NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460.

<sup>1145</sup> NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>1146</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056; NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE022 [7 January 2010] Rechtbank Utrecht FA RK 09-9511 - 352593; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE086 [4 September 2013] Gerechtshof Den Haag 200.131.396-01; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE115 [26 January 2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01.

<sup>1147</sup> NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE115 [26 January

parent,<sup>1148</sup> living conditions in the State of former habitual residence,<sup>1149</sup> wish to stay in the State of refuge / with the abducting parent,<sup>1150</sup> their opposition to return to the State of former habitual residence / to the left-behind parent,<sup>1151</sup> loyalty towards both parents,<sup>1152</sup> how they feel in the new environment,<sup>1153</sup> free time,<sup>1154</sup> and friends.<sup>1155</sup>



Figure (10) – Professional hearing the child

2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670; NE118 [27 January 2015] Rechtbank Den Haag C-09-474592 - FA RK 14-7679; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01.

<sup>1148</sup> Rechtbank Utrecht FA RK 09-9511 – 352593, 07/01/2010.

<sup>1149</sup> NE034 [22 September 2010] Gerechtshof 's-Gravenhage 200.072.826-01; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE041 [17 February 2011] Rechtbank 's-Gravenhage 383332 - FA RK 10-10269; NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838; NE122 [1 April 2015] Gerechtshof Den Haag 200.164.318.01; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02.

<sup>1150</sup> NE002 [15 November 2006] Gerechtshof 's-Hertogenbosch R200601056; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE041 [17 February 2011] Rechtbank 's-Gravenhage 383332 - FA RK 10-10269; NE057 [18 January 2012] Gerechtshof 's-Gravenhage 200.098.851-01; NE077 [3 May 2013] Rechtbank Den Haag 438494 FA RK 13-1781; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838; NE111 [15 October 2014] Gerechtshof Den Haag 200.155.629/01; NE115 [26 January 2015] Rechtbank Den Haag C-09-478905 FA RK 14-9670; NE119 [5 February 2015] Rechtbank Den Haag c-09-467694 FA RK 14-4460; NE120 [4 March 2015] Gerechtshof Den Haag 200.163.913/01; NE139 [22 June 2016] Gerechtshof Den Haag 200.191.597/01; NE150 [6 February 2017] Gerechtshof Den Haag 200.206.805/01; NE153 [22 March 2017] Gerechtshof Den Haag 200.210.840/01 en 200.210.840/02.

<sup>1151</sup> NE009 [3 July 2008] Gerechtshof Amsterdam 200006307/01; NE017 [25 July 2009] Rechtbank 's-Gravenhage 340916 - FA RK 09-5104; NE019 [17 September 2009] Rechtbank 's-Gravenhage 343776 - FA RK 09-6241; NE030 [29 April 2010] Rechtbank 's-Gravenhage 360892 - FA RK 10-1791; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE055 [1 December 2011] Rechtbank 's-Gravenhage 404763 - FA RK 11-7912; NE072 [1 November 2012] Rechtbank 's-Gravenhage 423601 FA RK 12-5393; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE086 [4 September 2013] Gerechtshof Den Haag 200.131.396-01; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114; NE114 [20 January 2015] Rechtbank Den Haag C-09-476363 - FA RK 14-8514; NE118 [27 January 2015] Rechtbank Den Haag C-09-474592 - FA RK 14-7679; NE120 [4 March 2015] Gerechtshof Den Haag 200.163.913/01; NE121 [18 March 2015] Gerechtshof Den Haag 200.164.496-01; NE143 [8 September 2016] Rechtbank Den Haag C/09/515364 / FA RK 16-5719; NE145 [12 October 2016] Gerechtshof Den Haag 200.199.457/01.

<sup>1152</sup> NE012 [27 November 2008] Rechtbank 's-Gravenhage 316133 08-5853; NE037 [10 December 2010] Rechtbank Utrecht 377894 / FA RK 10-8214; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE081 [7 July 2013] Rechtbank Den Haag 441214 FA RK 13-2932; NE107 [27 August 2014] Rechtbank Den Haag 469896 - FA RK 14-5469; NE125 [6 October 2015] Rechtbank Den Haag C/09/494358/ FA RK 15-6305.

<sup>1153</sup> NE029 [28 April 2010] Gerechtshof 's-Gravenhage 200.062.009-01; NE103 [13 May 2014] Rechtbank Den Haag C-09-461904 - FA RK 14-1838; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114.

<sup>1154</sup> NE058 [26 January 2012] Rechtbank Groningen 408087 FA RK 11-9263; NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4.

<sup>1155</sup> NE061 [27 February 2012] Rechtbank Rotterdam 410379 FA RK 12-4; NE112 [22 October 2014] Rechtbank Den Haag C-09-473314 FA RK 14-7114.

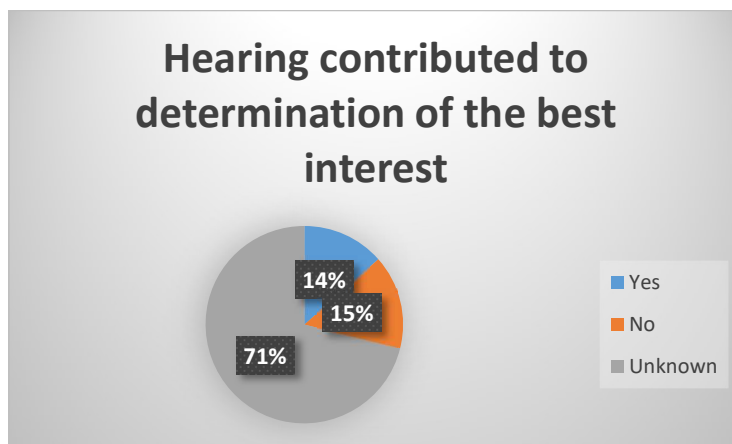


Figure (11) – Hearing contributed to determination of the best interests

The reason for which the courts did not hear the child was mostly maturity (in six of the seven cases) and age (in four of the seven cases). The children involved in the latter cases were four,<sup>1156</sup> five,<sup>1157</sup> and eight years old.<sup>1158</sup>

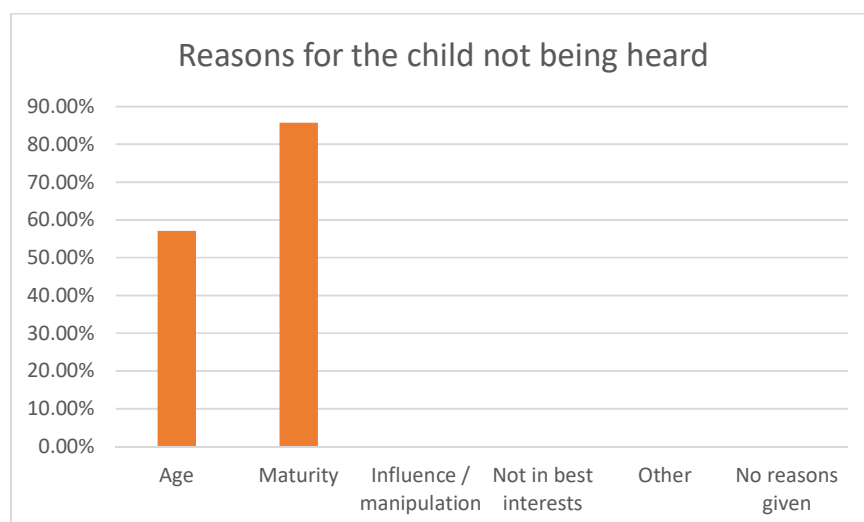


Figure (12) – Reasons for the child not being heard

In three cases, maturity was discussed together with age. In the first case in which this was done so, the court stated the following:

Generally speaking, the court does not consider children of five years of age to be old and mature, in view of their mental development. However, special circumstances may lead to the conclusion that a child of that age has reached that degree of maturity which justifies taking his or her views into account.<sup>1159</sup>

<sup>1156</sup> NE104 [26 May 2014] Gerechtshof Den Haag 200.148.437/01.

<sup>1157</sup> NE021 [7 January 2010] Rechtbank's-Gravenhage FA RK 09-9680 / 353052.

<sup>1158</sup> NE014 [10 April 2009] Rechtbank's-Gravenhage 324337 / FARK 08-9154. In one case the age of the child was unknown (NE068 [22 August 2012] Rechtbank's-Gravenhage 422276 FA RK 12-4816).

<sup>1159</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052.

In that specific case, the court concluded that it was 'neither stated nor shown that such special circumstances existed'.<sup>1160</sup> A second case in which maturity is considered together with age, the court does quite the opposite, namely focus very much on the specific case instead of on general theoretical insights. The court states:

The minor is still very young and, on the basis of the documents submitted, the court finds that his development is weak and that he lacks language skills, which makes it difficult for him to express himself. On the basis of the case file, the court is convinced that, in so far as it would make statements indicating opposition to its return to Belgium, the minor has not reached a degree of maturity that justifies taking his opinion into account. In these circumstances, the court does not consider it opportune to charge the minor with a hearing.<sup>1161</sup>

In the third case, the court merely states that the child 'does not have an age or degree of maturity which would justify taking her opinion into account'.<sup>1162</sup>

In two of the three cases in which only maturity was given as a reason not to hear the child, the courts concluded that 'the child had not reached the degree of maturity that justifies taking his or her opinion into account'.<sup>1163</sup> This conclusion was based on documents such as the psychological examination in one case.<sup>1164</sup> In the other case the court also referred to the submitted documents that proved the lack of maturity of the child, also in view of the child's intellectual disability.<sup>1165</sup> Thus, in these two cases the courts used maturity as a reason not to hear the child at all and not to determine the degree of importance that has to be attached to the child's views.

In the last case in which only maturity was considered, the court decided not to hear the child in view of what the Council for Child protection had reported on the degree of maturity of the child.<sup>1166</sup>

In the only case in which only age was considered, the court stated that 'the age of the child already prevents her from being heard within the meaning of the provisions applicable to this matter'.<sup>1167</sup> The child in this case was four, almost five years old.

## Other Information

In one case the court states the following:

The UNCRC, as well as the Hague Convention on Child Abduction, is based on the principle that international child abductions should be considered to be generally contrary to the best interests of the child, so that the return of the child on the basis of the Hague Convention on Child Abduction as such does not conflict with Article 3(1) of the UNCRC.<sup>1168</sup>

<sup>1160</sup> NE021 [7 January 2010] Rechtbank 's-Gravenhage FA RK 09-9680 / 353052.

<sup>1161</sup> NE068 [22 August 2012] Rechtbank 's-Gravenhage 422276 FA RK 12-4816.

<sup>1162</sup> NE014 [10 April 2009] Rechtbank 's-Gravenhage 324337/ FARK 08-9154.

<sup>1163</sup> NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028; NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01.

<sup>1164</sup> NE098 [24 March 2014] Rechtbank Den Haag C-09-460002 FA RK 14-1028.

<sup>1165</sup> NE102 [7 May 2014] Gerechtshof Den Haag 200.144.832/01.

<sup>1166</sup> NE013 [7 January 2009] Gerechtshof 's-Gravenhage 200.019.995-01.

<sup>1167</sup> NE104 [26 May 2014] Gerechtshof Den Haag 200.148.437/01.

<sup>1168</sup> NE007 [23 April 2008] Rechtbank 's-Gravenhage FA RK 08-1877.

To decide on the specific case, the court takes into consideration that the minor was taken to the Netherlands by the mother via Canada, Greece, Jordan and England and that in the short time she was in the Netherlands the minor stayed with the mother at various places of residence and finally - in connection with her mother's stay in a psychiatric institution - was placed in a foster family. Furthermore, the court considers the following:

In view of the pending extradition request, it is uncertain whether the mother can stay in the Netherlands, so that the minor - in the event of non-refoulement - runs the risk of being left alone, without a mother, in the Netherlands. It was argued at the meeting that, partly in view of this history and current situation, the minor desperately needs structure and stability. In view of the specific circumstances of the case, the minor's return to her father in Canada cannot be regarded as contrary to the minor's best interests.

## Poland

### Country File – Poland<sup>1169</sup>

#### General data

For Poland, five relevant cases have been identified. The few number of cases that could be collected is due to the fact that cases are not systematically published in Poland. This made the collection of case law very difficult. A total of five children were involved in the proceedings. One case was dealt with in a court of first instance and four in courts of second instance. In all these cases the Hague Convention on Child Abduction was the only legal basis considered by the court.

In most of the cases, namely 80%, the court decided that the child did have to return to his or her State of former habitual residence. In one case (or 20%) return was rejected.

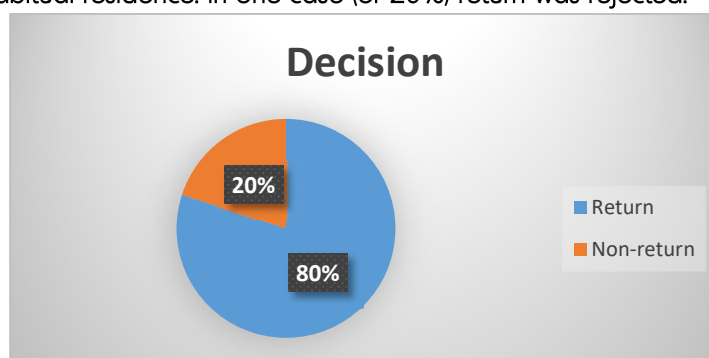


Figure (1) - Decision

In 80% of the cases it was the mother who abducted the child.

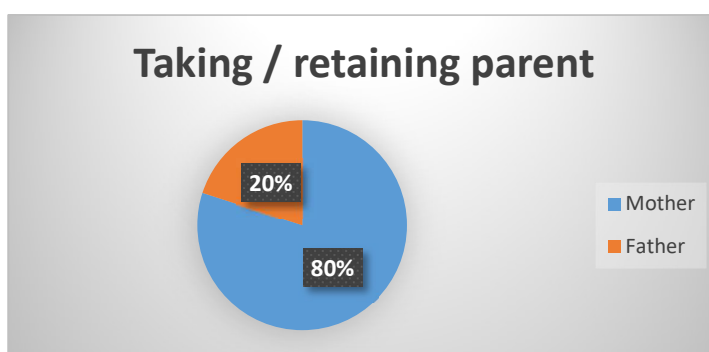


Figure (2) – Taking/retaining parent

The children involved in the proceedings were rather young: between two and six years old.

<sup>1169</sup> The country experts for Poland are Karolina Sikorska (for PL001 and PL002) who obtained her PhD in European Private Law at the University of Groningen and Kamila Kaczmarek (for PL003, PL004 and PL005) who is a PhD Candidate in Family Law at the University of Antwerp.

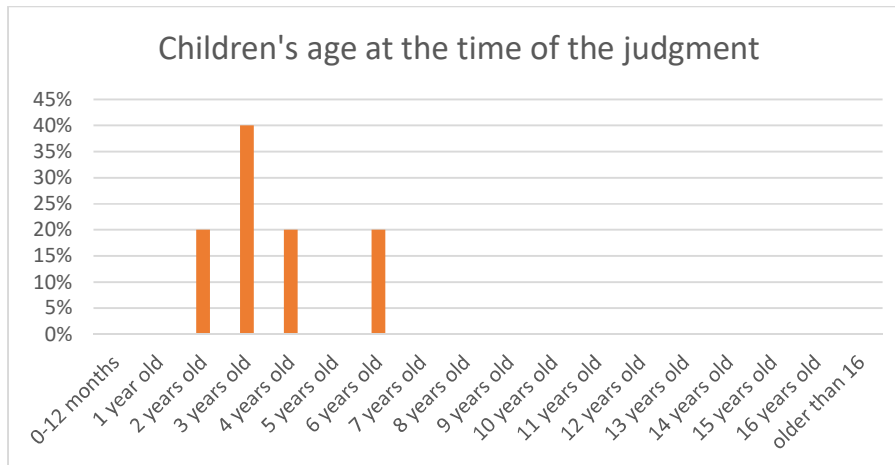


Figure (3) – Children’s age at the time of the judgment

### Best Interests of The Child

In 40% of the cases, the courts referred explicitly to the best interests of the child and in 60% of the cases an implicit reference could be found.

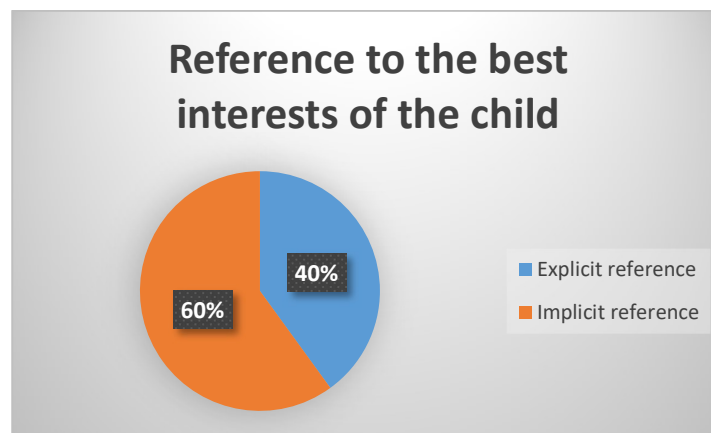


Figure (4) – Reference to the best interests of the child

#### Explicit reference

An explicit reference to the best interests of the child can be found in two cases. In both cases the reference was based on the rationale of the Hague Convention on Child Abduction.<sup>1170</sup>

In addition, one case referred to the case law of the ECtHR and more specifically to *Neulinger and Shuruk v Switzerland*.<sup>1171</sup> In this same case, reference was also made to two distinct judgments of the Polish Supreme Court in which the best interests are explicitly mentioned. These judgments, however, are older and therefore not taken up directly in the study. First, the court cited the

<sup>1170</sup> PL001 [26 November 2015] Sad Rejonowy w Białymstoku IV Nsm 413/15; PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.

<sup>1171</sup> PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.



following phrase of the judgment III CZP 48/92 of 12 June 1992:

Speaking of the interpretation and application of the provisions of the Hague Convention on Child Abduction, taking into account the provisions of the Convention on the Rights of the Child, it is necessary to take into account the provisions of the second of the aforementioned Conventions [...] which show that the 'interests of the child' is a principle primary and superior in every action regarding the child.<sup>1172</sup>

Second, the court referred to judgment II CKN 855/97 of 16 October 1998 in which the following was stated: 'The notion "the interests of the child" corresponds to the "wellbeing of the child" present in the Polish law.'<sup>1173</sup>

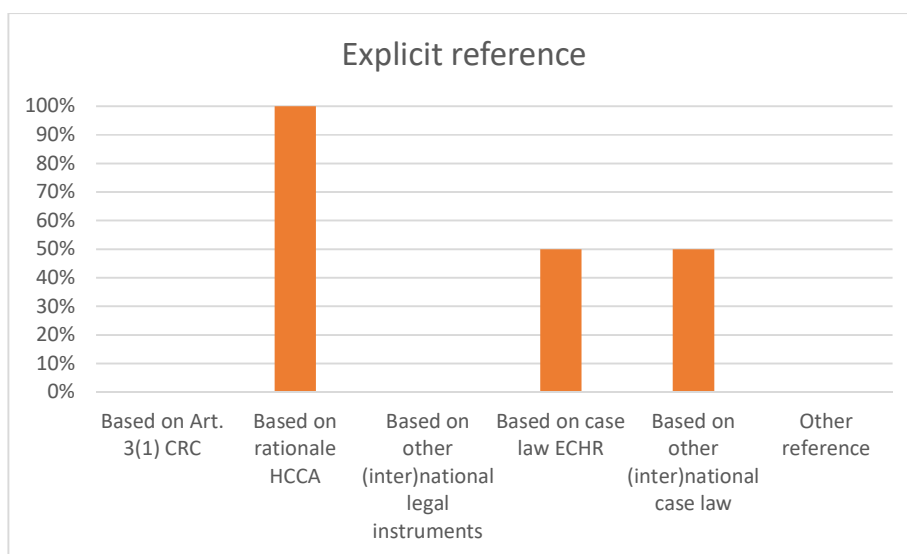


Figure (5) – Explicit reference

### Implicit reference

In three cases, the courts implicitly referred to the best interests of the child.

In the first case, reference is made to the principle of prompt return of the Hague Convention on Child Abduction and the viewpoint that this is in the best interests of the child:

The Convention is aimed at ensuring the return of the unlawfully abducted child. The achievement of this goal is connected with various inconveniences and negative experiences for the child. However, they are inevitable for the realization of the said purpose, which is serving the good of the child.<sup>1174</sup>

In the other two cases, the implicit reference to the best interests is based more on the specific situation of the case. In PL004, the court considered that the good of the child opposes the ordering of the return for the following reasons: the child has adapted to the current educational environment, her mental needs (i.e. a sense of security, care and belonging and a stimulation of cognitive and emotional-social development) have been fulfilled, the separation of the child from the mother may be traumatic for the child and may seriously disrupt her further development and

<sup>1172</sup> PL002 [15 April 2016] Sad Okręgowy Białystok II Wydział Cywilny Odwoławczy II Ca 217 / 16.

<sup>1173</sup> PL002 [15 April 2016] Sad Okręgowy Białystok II Wydział Cywilny Odwoławczy II Ca 217 / 16.

<sup>1174</sup> PL003 [20 April 2016] Okręgowy w Ostrołęce I Ca 82/16 Sad.

the mother cannot be forced to return with the child.<sup>1175</sup> In PL005, the court is of the opinion that 'the mere fact of abducting a two-year-old child from his environment, taking him away from his mother who has been bringing him up so far and bringing him to a country where they speak a different language is a sufficient proof of inadequate behaviour towards the child'.<sup>1176</sup> Thus, the father's arguments that he fulfils his obligations to his son and has created good conditions for him in the State of refuge and that they have a strong emotional connection, are not reasons to refuse to return the child. The court also adds that 'the child abduction was an act of lawlessness, which cannot be justified by the participant's efforts to improve the child's good in the new place of his stay or the child's adaptation to the new environment in which he found himself after the abduction'.<sup>1177</sup>

### **Interpretation of grounds for non-return in relation to best interests**

#### **Article 13(1)(b) Hague Convention on Child Abduction**

In the first of two cases in which the best interests of the child are linked to Article 13(1)(b) Hague Convention on Child Abduction, the court interprets the exception and states:

Inconvenience or nuisance resulting from a return are not sufficient to refuse the return of the child. Although returning to the United Kingdom and adapting to a new environment may cause some problems for the child and may affect his wellbeing, the lack of contacts and bond with his father would cause even more harm.<sup>1178</sup>

The court adds that 'for the healthy development of the child, he should be given the possibility to have a relationship with both parents'.<sup>1179</sup> Thus, the court deems the relationship of the child with both parents more important for the child than the possible problems that a return might cause.

In the second case, the court decided that the return of the child could not be ordered since this would amount to an intolerable situation for the child.<sup>1180</sup> A return of the child would also mean the separation of the child from the mother. With regard to this separation, the court considered that 'the separation of the child from the mother may be traumatic for the child and may seriously disrupt her further development'. Thus, the court decided that the wellbeing of the child opposes the ordering of the return of the child.

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<sup>1175</sup> PL004 [24 April 2017] Sad Okregowy z Suwalkach I Wydzial Cywilny I Ca 119/17.

<sup>1176</sup> PL005 [26 November 2015] Sad Okregowy w Gliwicach III Ca 1088/15.

<sup>1177</sup> PL005 [26 November 2015] Sad Okregowy w Gliwicach III Ca 1088/15.

<sup>1178</sup> PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.

<sup>1179</sup> PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.

<sup>1180</sup> PL004 [24 April 2017] Sad Okregowy z Suwalkach I Wydzial Cywilny I Ca 119/17.

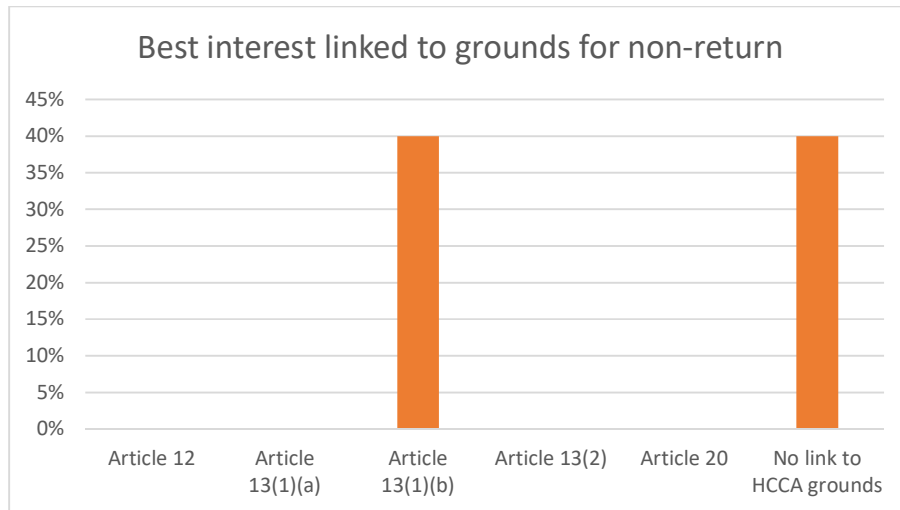


Figure (6) – Best interests linked to grounds for non-return

## Impact of the best interests on the final decision

### The best interests are decisive

In four of the five cases, the best interests of the child were decisive for the final decision.

Only in one of these four cases, the court decided not to return the child based on the best interests. The decision to refuse return was based on the risk that a separation between the child and her mother (the abducting parent) could cause for the child's further development.<sup>1181</sup>

In the three other cases, the best interests of the child were the decisive factor to decide to order the return of the child to his or her State of former habitual residence. In one case, the court deemed the possibility to have a relationship with both parents of utmost importance for the child's healthy development.<sup>1182</sup> In the second case, the court says that 'the good of the child will be respected if the factual and legal situation before abduction will be restored'.<sup>1183</sup> This consideration is in line with the Hague Convention on Child Abduction's principle that a return is in the best interests of the child. In the last case in this category, the court considered that 'the mere fact of abducting a two-year-old child from his environment, taking him away from his mother who has been bringing him up so far and bringing him to a country where they speak a different language is a sufficient proof of inadequate behaviour towards the child'.<sup>1184</sup> Thus, this situation has to be restored in the good of the child.

### The best interests are considered equally with other factors

In one case, the best interests are a factor amongst others. The court heard reports by psychologists and testimonies by expert witnesses from the psychological centre, which had assessed the circumstances of the case based on the child's general interests and wellbeing.<sup>1185</sup> These were one means of evidence for the court. In addition, the court considered the principle of The Hague

<sup>1181</sup> PL004 [24 April 2017] Sad Okregowy z Suwalkach I Wydzial Cywilny I Ca 119/17.

<sup>1182</sup> PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.

<sup>1183</sup> PL003 [20 April 2016] Okregowy w Ostrolece I Ca 82/16 Sad.

<sup>1184</sup> PL005 [26 November 2015] Sad Okregowy w Gliwicach III Ca 1088/15.

<sup>1185</sup> PL001 [26 November 2015] Sad Rejonowy w Bialymstoku IV Nsm 413/15; PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16.

Convention on Child Abduction and the applicability of the grave risk exception of Article 13(1)(b) and concluded that there were no contraindications to the return of the child to the United Kingdom.

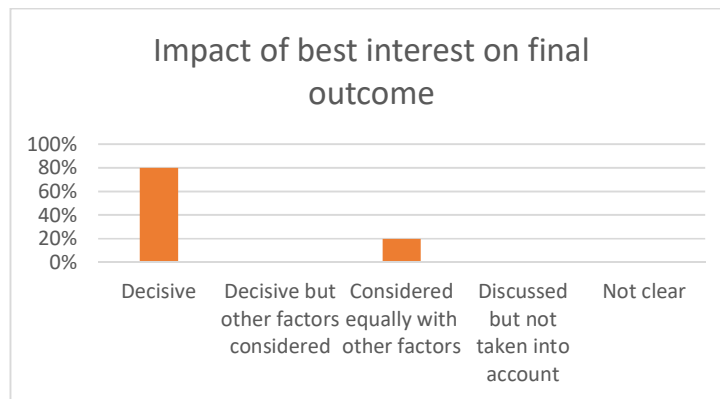


Figure (7) – Impact of best interests on final outcome

### Hearing of The Child

Only in one case, the child was heard during the proceedings. In two cases, the child was not heard and in two cases it was unclear whether the child was heard.

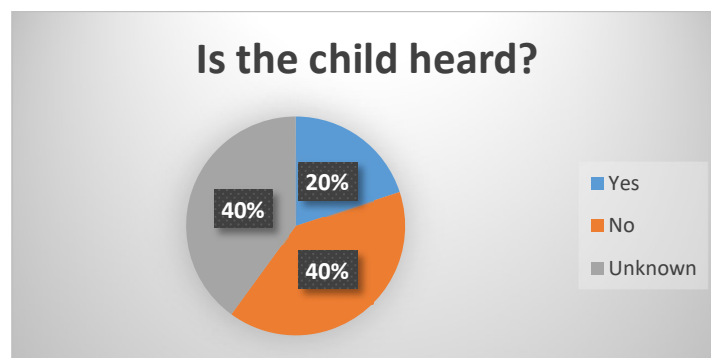


Figure (8) – Is the child heard?

In two cases in which the child was not heard, the courts gave no reasons for the decision not to hear the child.<sup>1186</sup> In the only case in which the child was heard, the hearing was carried out by psychologists.<sup>1187</sup> The hearing did contribute to the assessment of the best interests of the child as examined by the psychologists based on his general interests and wellbeing. However, the impact of the child's views on the final outcome was unclear.

### Romania

#### Country File – Romania<sup>1188</sup>

##### General Data

<sup>1186</sup> PL002 [15 April 2016] Sad Okregowy Bialystok II Wydzial Cywilny Odwolawczy II Ca 217 / 16; PL003 [20 April 2016] Okregowy w Ostrolece I Ca 82/16 Sad.

<sup>1187</sup> PL001 [26 November 2015] Sad Rejonowy w Bialymstoku IV Nsm 413/15.

<sup>1188</sup> The country expert for Romania is Anca Magda Voiculescu.

The collected data included 51 decisions, of which 39 are first instance decisions and 11 are second instance decisions. The total number of children involved in the cases is 46, spread among different ages as shown in Figure (1).

Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (42 decisions), although in 9 cases the father was the abductor.

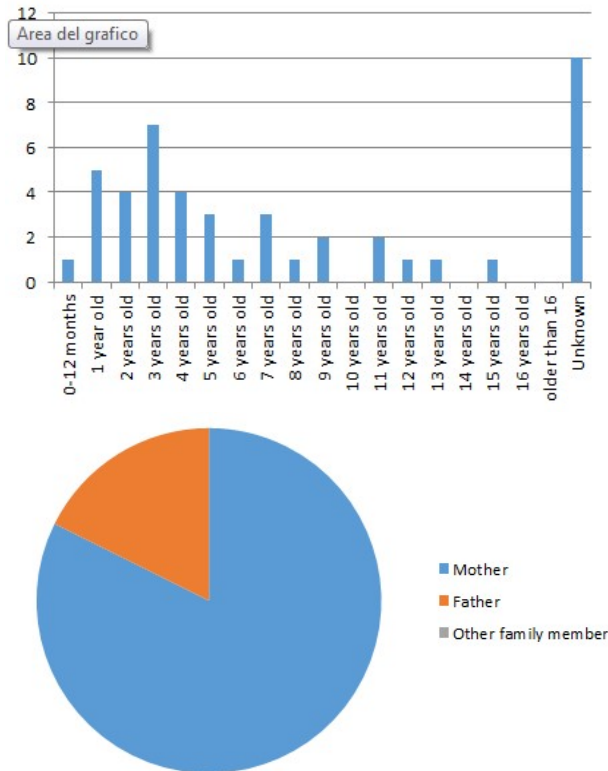


Figure (2) – Taking/retaining parent

As for the outcome of the decision, twelve cases ended up with an order of return, while twenty concluded for the non-return of the child. Nineteen cases were registered in which the application was withdrawn by the applicant.

The large majority of decisions referred to the 1980 Hague Convention on Child Abduction legal framework (27 decisions). In three cases, the Brussels IIbis Regulation was also applied, together with the HCCA provisions. In one case, the judge only referred to the Brussels IIbis Regulation (see Figure (3)).

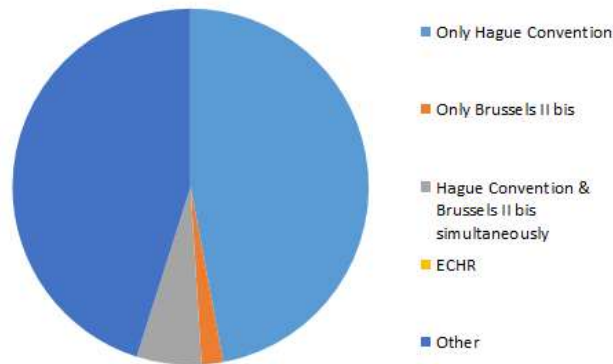


Figure (3) – Legal basis considered

## Best Interests of The Child

Out of 51 decisions, only thirteen decisions referred, either explicitly or implicitly, to the best interests of the child.

### Explicit reference

Explicit references to the concept of the best interests of the child were found in four decisions.<sup>1189</sup> One decision based the reference both on the rationale of the HCCA – for which the best interests coincide with the immediate return in the place of habitual residence – and on Article 3(1) UNCRC.<sup>1190</sup> Another decision referred to Article 3(1) UNCRC and to national legal instruments adopted for the ratification of the HCCA, considering that the integration of the two children in the new environment and the risks that they could have faced in case of return to Israel led to the conclusion that the court could refuse the return.<sup>1191</sup> The third decision based the reference on another decision by German authorities which stated that there were established rights of visit only at the domicile of the child in Romania.<sup>1192</sup> The fourth decision did not base the reference on any legal instruments or case law, but stated that it was in the best interests of the child to develop in an adequate environment and not to be exposed to additional trauma.<sup>1193</sup>

### Implicit reference

Nine decisions made an implicit reference to the best interests of the child. In five decisions, the best interests were evaluated in the light of the social integration of the child in the State in which he/she was illicitly conducted.<sup>1194</sup> The courts analysed the integration of the child in the new environment, his/her social conditions, health conditions, and the interaction with other children at home and at school institutions. In one case, the court stated that these elements could not be appreciated because of the young age of the child.<sup>1195</sup>

<sup>1189</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007; RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

<sup>1190</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

<sup>1191</sup> RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

<sup>1192</sup> RO039 [31 October 2006] Bucharest Tribunal 24553/3/2006.

<sup>1193</sup> RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>1194</sup> RO002 [21 June 2007] Bucharest Tribunal 44091/3/2006; RO014 [16 March 2006] Bucharest Court of Appeal 3952/2005; RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>1195</sup> RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007.

In another three cases, the courts considered whether the return would have exposed the child to a psychological peril, by creating a lack of emotional equilibrium:<sup>1196</sup> on the basis of this evaluation, the courts refused the return of the child.

In one case, the court stated that 'it cannot be considered to be in the best interests of the child to legalize a situation based on injustice: wrongful retention of the child by the father, in breach of custody rights of the mother'.<sup>1197</sup>

### **Interpretation of grounds for non-return in relation to best interests**

Ten decisions linked the understanding of the best interests of the child to specific grounds for non-return provided by the HCCA. The majority of decisions referred to Articles 12 and 13(1)(b) HCCA. As concerns Article 12 (six decisions),<sup>1198</sup> while considering the best interests of the child, courts have examined the level of integration of the latter in the new environment in order to decide for his/her return or non-return. All decisions refused the return of the child on these basis, a part from one decision in which the small age of the child (one year and five months) prevented the court from assessing the integration and return was therefore ordered.<sup>1199</sup> It is interesting to note that in one case the court considered that the integration of the child in the environment of the State of destination could not result in non-return to the state of origin, as such line of reasoning could legalize an unlawful situation, namely wrongful retention of the child in Romania, in breach of custody rights attributed to the father.<sup>1200</sup>

With reference to Article 13(1)(b) (five decisions),<sup>1201</sup> the courts examined the lifestyle and parental attitude of the left-behind parent, concluding that it was better for the child not to be returned (e.g. the violent attitude of the father was considered, as well as the unstable financial conditions, or the general attitude which suggested that the parent was not responsible enough to take care of the child). In one case, the return was refused because the child had developed psychogenic mutism.<sup>1202</sup>

The best interests of the child were also connected to the ground of non-return provided by Article 13(1)(a) HCCA (three cases), which refers to the situation in which the left-behind parent did not effectively exercise the rights of custody at the time of removal or retention, as well as to hypothesis of consent and acquiescence to the removal/retention. In one case, the court examined the attitude and the behaviour of the left-behind parent (the father), considering that he did not have enough financial resources and he did not pay sufficient attention to take care of the child.<sup>1203</sup> In two cases,

<sup>1196</sup> RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010; RO045 [12 May 2011] Bucharest Tribunal 62900/3/2010; RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>1197</sup> RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007.

<sup>1198</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007; RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007; RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

<sup>1199</sup> RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007.

<sup>1200</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

<sup>1201</sup> RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006; RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>1202</sup> RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>1203</sup> RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006.

the court also considered the fact that the left-behind parent had given up the application for exclusive custody on the merits.<sup>1204</sup> In one decision, the court appreciated the fact that the judicial authorities in the State of origin did not attribute to the left-behind parent custody rights.<sup>1205</sup>

In three decisions, the best interests of the child were connected to his or her objection to return according to Article 13(2) of the Hague Convention.<sup>1206</sup> However, the courts did not produce any additional reasoning other than the fact that the child did not want to return in the State of origin, and his/her views could be taken into consideration.

### Impact of the best interests on the final decision

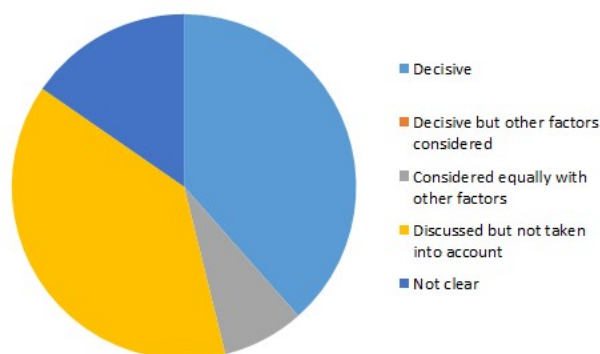


Figure (4) – Impact of best interest assessment

When the best interests of the child were taken into consideration, the latter had been decisive for the final outcome of the decision in six cases, since they constituted the main reasoning of the court.<sup>1207</sup> In one case, the best interests of the child were inferred by his/her integration in the new environment in Romania, also considering the fact that the left-behind father had accepted the situation and could not provide financial and material conditions for the child in Germany.<sup>1208</sup> In another case – decided by the first instance court<sup>1209</sup> and by the Court of appeal<sup>1210</sup> – the courts considered explicitly to be in the best interests of the children to live in a stable and secure environment, in which they had integrated and which was not available in Israel because behaviour of the left-behind father. In another case, the non-return was decided on the basis of the objection of the child; in particular, the hearing of the child was qualified as a tool to determine his/her best interests.<sup>1211</sup> In another case, the court appreciated that ‘the health condition of the child had been determined by his parents living together. After separation of parents, the child gained a relative equilibrium which the court pursued to preserve by non-return’.<sup>1212</sup> In another case, the best interests were decisive in order for the Court of Appeal to send the case back to the

<sup>1204</sup> RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006.

<sup>1205</sup> RO002 [21 June 2007] Bucharest Tribunal 44091/3/2006.

<sup>1206</sup> RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010; RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010.

<sup>1207</sup> RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006; RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010; RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>1208</sup> RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006.

<sup>1209</sup> RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006.

<sup>1210</sup> RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006.

<sup>1211</sup> RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010.

<sup>1212</sup> RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.



first instance court: the Court of Appeal established the criteria according to which the first instance court should have appreciated the best interests of the child.<sup>1213</sup>

In another four cases, the best interests were discussed, but not taken into account: in fact, the courts analysed the child best interests in the light of his/her integration and wellbeing in the new environment, but ended up rejecting the application of Article 12 HCCA or denying the return of the child on the basis of other grounds.<sup>1214</sup>

In one case,<sup>1215</sup> the best interests of the child were considered equally with other factors: in particular, they were related to the need of stability of the child and the fact that the left-behind father had accepted the exercise of visitation rights in Romania, giving up the application for exclusive custody; also, the court took into account non-exercise of parental rights before removal, acceptance of refusal to return the child to Germany subsequent to removal and behaviour of the father towards wife and family.

In two cases, the best interests of the child were taken into consideration, but it was not clear whether the assessment had an impact on the final outcome of the decision.

### Hearing of the child

The survey analysed the hearing of the child in those cases in which the court took into account the best interests of the child. Among the thirteen decisions concerned, in four cases the child was heard during the proceedings.<sup>1216</sup> In nine cases, the child was not heard, and the courts did not give any reasoning against the hearing.

In three cases, the Romanian expert which conducted the analysis on Romanian case law and filled in the Qualtrics surveys indicated that the hearing of the child was not conducted because in Romanian law it is not mandatory to hear children under ten years old.<sup>1217</sup> In four cases, the hearing of the child was not conducted because 'it had not been requested' by the parties.<sup>1218</sup> In two cases, the hearing of the children was not asked for because it had already been conducted in the first instance phase of litigation.<sup>1219</sup>

In all four cases where the child was heard, the hearing was conducted by the judge. In one case, the judge was assisted by a psychologist during the hearing.<sup>1220</sup>

<sup>1213</sup> RO014 [16 March 2006] Bucharest Court of Appeal 3952/2005.

<sup>1214</sup> RO002 [21 June 2007] Bucharest Tribunal 44091/3/2006; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007; RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007; RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007.

<sup>1215</sup> RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006.

<sup>1216</sup> RO002 [21 June 2007] Bucharest Tribunal 44091/3/2006; RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007; RO041 [22 June 2006] Bucharest Tribunal 10835/3/2006; RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010.

<sup>1217</sup> This was the case in RO014 [16 March 2006] Bucharest Court of Appeal 3952/2005; RO045 [12 May 2011] Bucharest Tribunal 62900/3/2010; RO049 [20 August 2009] Bucharest Tribunal 2553/3/2009.

<sup>1218</sup> RO008 [18 September 2007] Bucharest Tribunal 22978/3/2007; RO037 [28 November 2007] Bucharest Tribunal 27988/3/2007; RO039 [31 October 2006] Bucharest Tribunal; 24553/3/2006; RO040 [1 March 2007] Bucharest Court of Appeal 24553/3/2006.

<sup>1219</sup> RO042 [27 November 2006] Bucharest Court of Appeal 10835/3/2006; RO044 [12 September 2011] Bucharest Court of Appeal 59698/3/2010.

<sup>1220</sup> RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010.

In one case, the hearing of the child resulted to be decisive in the court's decisions, since the objection of the child was the only reason for non-return.<sup>1221</sup>

In the other three cases, the hearing did not contribute to determine the best interests of the child, since it has not been taken into account by the courts in assessing the best interests of the child. In one case, the opinion of the child was not taken into consideration due to small age and influence of the mother.<sup>1222</sup>

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<sup>1221</sup> RO043 [24 March 2011] Bucharest Tribunal 59693/3/2010.

<sup>1222</sup> RO006 [17 December 2007] Bucharest Tribunal 37505/3/2007.

## Spain

### Country File – Spain<sup>1223</sup>

#### General data

The collected data included 36 decisions, of which 1 is a first instance decision, and 35 second instance. The total number of children involved in the cases is 41, spread among different ages as shown in the graph.

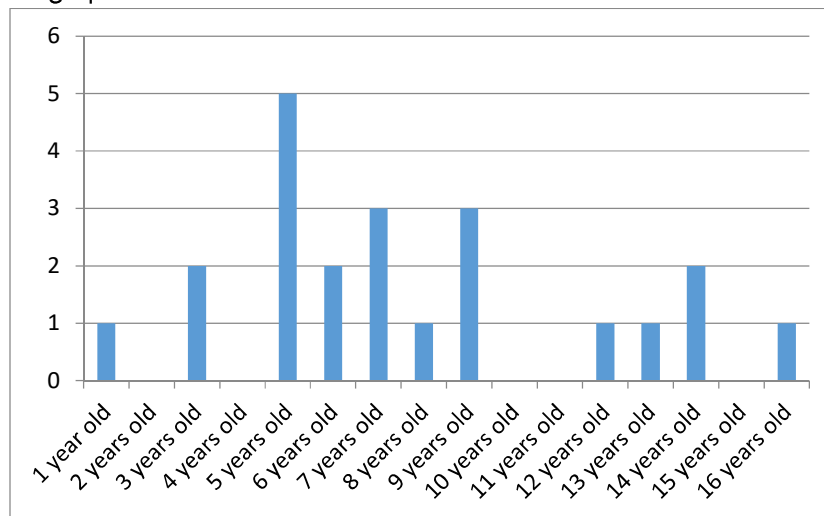


Figure (1) – Age of children involved

In the majority of cases, the abducting parent was the mother (31 decisions), whereas in 5 cases the father was the abductor.

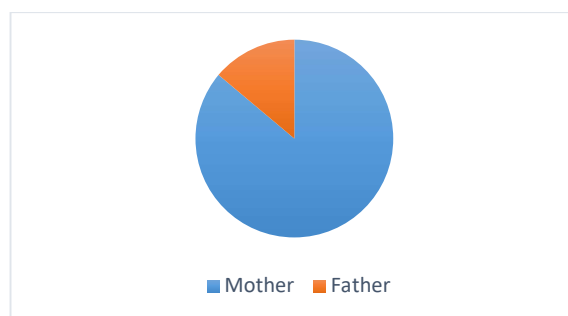


Figure (2) – Taking/retaining parent

Twenty-seven cases ended up with an order of return, nine concluded for the non-return of the child.

<sup>1223</sup> The country expert for Spain is Mónica Herranz.

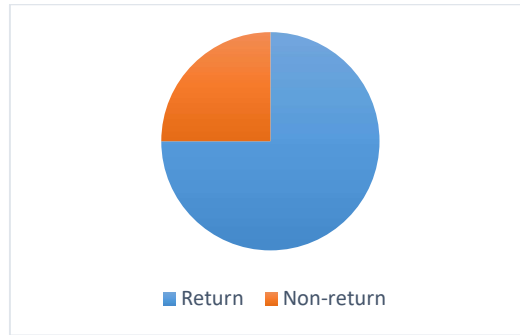


Figure (3) – Decision's outcome

Twenty-four decisions referred to the 1980 Hague Convention only; ten cases also to Brussels IIbis, and one case to the 1996 Hague Convention.

### Best Interests of the Child

Out of 36 decisions, 17 referred, either explicitly or implicitly, to the best interests of the child.

#### Explicit reference

Explicit references to the concept of the best interests of the child were found in ten decisions.

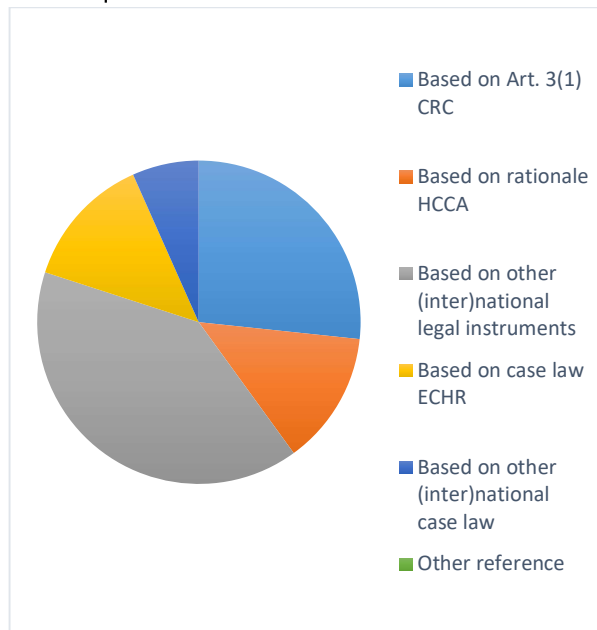


Figure (4) – Basis considered in the explicit reference on the best interests of the child

- Two decisions based the reference on the rationale of the 1980 Hague Convention – for which best interests coincide with the immediate return to the place of habitual residence;
- Four decisions referred to Article 3(1) of the UNCRC;
- Two decisions referred to the case law of the ECtHR, evoking *Johansen v. Norway* 7 August 1996, and *Bronda v. Italy* 9 June, 1998 *Ciliz v. Netherland*, 11 of July, 2000;<sup>1224</sup>

<sup>1224</sup> SP016 [24 March 2017] ECLI:ES:APC:2017:478 Audiencia Provincial de Tenerife de La Coruña (Sección 4ª); SP017 [21 April 2017] ECLI:APGR:2017:486 Audiencia Provincial de Granada (Sección 5ª).

- One decision referred to the notion of best interests evoking national case law<sup>1225</sup>
  - o Constitutional Court, decision number 16/2016, 1 February 2016 (ECLI:TC:2016:16): ‘When the resolution of a case affects a child, the constitutional decision has to take into account the best interests of the child, adopted by the Convention on the Rights of the child (Article 3(1)) In Spanish law the best interests of the child is the guiding and inspiring principle of all the decisions adopted by the public powers, judicial and administrative authorities’;
- Six referred to other (inter)national legal instruments
  - o Spanish Organic Law 8/2015, of July 22, on the modification of the protection system for children and adolescents.<sup>1226</sup>
  - o Article 24 of the Charter of Fundamental Rights of the European Union.<sup>1227</sup>
  - o Law of protection of the children 1/1996.<sup>1228</sup>
  - o Declaration of United Nations 1959 the rights of the child.<sup>1229</sup>

### Implicit reference

Implicit references to the best interests were found in seven cases.

- Best interests are to be considered as a key element in the decision;<sup>1230</sup>
- According to the 1980 Hague Convention, the best interests is usually granted through the repatriation of the child;<sup>1231</sup>
- The interests of the child come before the interests of the parents.<sup>1232</sup>

### Interpretation of grounds for non-return in relation to best interests

Reasons for (non-)return in large majority where linked of the Hague Convention.

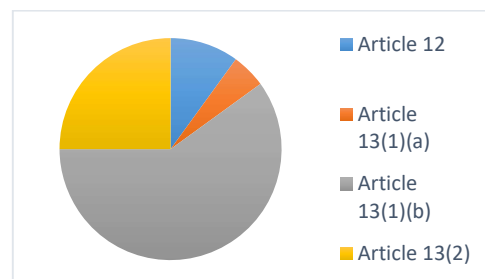


Figure (5) – Link between the best interests of the child and the Hague grounds for non-return.

- Twelve cases referred to Article 13(1)(b), with the following significant results:
  - o Serious risk in case of a return arises when in the country of origin the parents or child’s caretaker do not have a job, house, and family. In such a case, it is preferable

<sup>1225</sup> SP016 [24 March 2017] ECLI:ES:APC:2017:478 Audiencia Provincial de Tenerife de La Coruña (Sección 4ª).

<sup>1226</sup> SP016 [24 March 2017] ECLI:ES:APPO:2016:760; ECLI:ES:APC:2017:478 Audiencia Provincial de Tenerife de La Coruña (Sección 4ª); SP017 [21 April 2017] ECLI:APGR:2017:486 Audiencia Provincial de Granada (Sección 5ª); SP032 [11 November 2007] Decision Number: 463/2007 (Audiencia Provincial de Málaga).

<sup>1227</sup> SP032 [11 November 2007] Decision Number: 463/2007 (Audiencia Provincial de Málaga).

<sup>1228</sup> SP009 [27 October 2016] ECLI: ES:APV:2016: 3706 Audiencia Provincial de Valencia (Sección 10ª).

<sup>1229</sup> SP024 [21 March 2012] ECLI:ES:APM:2012:4853A Audiencia Provincial de Madrid (Sección 24ª).

<sup>1230</sup> SP004 [14 December 2016] ECLI: JPI:2016:723 - Juzgado de 1ª Instancia n3 de Granada; SP008 [14 April 2016] ECLI:ES:APTF:2016:1389 - Audiencia Provincial de Tenerife (Sección 1ª); SP030 [5 June 2006] Decision number: 00133/2006 (Audiencia Provincial de Pontevedra Sección 1ª).

<sup>1231</sup> SP010 [8 March 2016] ECLI: ES:APB:2016:2563 Audiencia Provincial de Barcelona (Sección 18ª).

<sup>1232</sup> ECLI:ES:APL:2006:256A.

- for the child not to return to the country of origin, where he/she would suffer exceedingly from a socio-economic point of view;<sup>1233</sup>
- Serious risk arises in case of return when the child is well-settled in the State of refuge and has his/her new habitual residence there: a return would expose him/her to serious spiritual and emotional distress;<sup>1234</sup>
  - Non-return is preferable when in case of a return the child would be separated from the applicant (in case he/she is the pivotal parental figure for the child) or from a brother/sister too (in case he/she is a central figure for the wellbeing and adequate development of the child);<sup>1235</sup>
- Five to Article 13(2), with the following peculiar results:
    - In one decision, the best interests of the child is described as an abstract concept to be interpreted case by case<sup>1236</sup>
    - Only clear, mature, and unequivocal opposition by the child activates the disposition;
  - Two to Article 12, with no significant elements resulting;
  - One to Article 13(1)(a) with no significant elements resulting.

### Impact of the best interests on the final decision

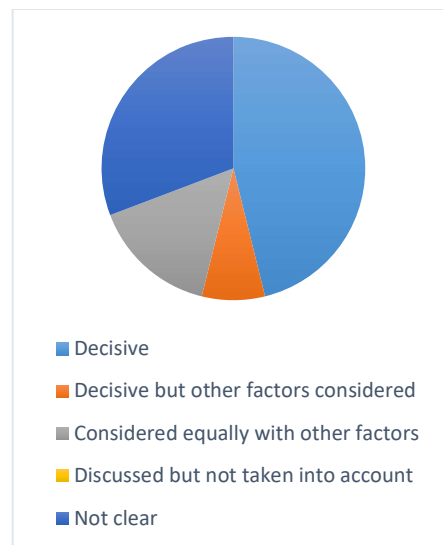


Figure (6) – Impact of the best interests of the child on the final outcome of the decision

With regard to the impact of the best interests of the child on the final decision, the best interests of the child were:

- Six times (33%) Decisive
  - Explanation: the best interests of the child is commonly decisive when Article 13(1)(b) of the Hague Convention is applied. More generally, judges usually

<sup>1233</sup> SP008 [14 April 2016] ECLI:ES:APTF:2016:1389 - Audiencia Provincial de Tenerife (Sección 1ª)

<sup>1234</sup> SP009 [27 October 2016] ECLI: ES:APV:2016: 3706 Audiencia Provincial de Valencia (Sección 10ª); SP024 [21 March 2012]ECLI:ES:APM:2012:4853A Audiencia Provincial de Madrid (Sección 24ª).

<sup>1235</sup> SP028 [23 May 2016] ECLI:ES:APL:2006:256A ; SP032 [11 November 2007] Decision Number: 463/2007 (Audiencia Provincial de Málaga) (SP032).

<sup>1236</sup> SP029 [22 June 2006] Decision number:131/2006 (Audiencia Provincial de León (Sección 1ª).

- consider the best interests of the child decisive in the light of the general scope and rationale of the Convention
- In one case, the Court states that the best interests of the child only becomes relevant in relation to one of the exceptions of the Convention;<sup>1237</sup>
- One time (18%) Decisive, but considered with other factors;
- Two times (34%) Considered equally with other factors
  - Lack of care from the left-behind parent and consent to international movement
  - Integration of the child in his/her new environment;
- Four times (8%) Not clear.

Extra information:

- In two cases, it emerges that domestic violence between the parents has not been considered as a factor affecting the interests of the child in case of a return decision.

### Hearing of The Child

Out of the 36 cases analysed, the child/children were heard in 5; in 4 the hearing did not take place, and in 27 it was impossible to determine whether the hearing took place or not.

Reasons against the hearing can be summarized as such:

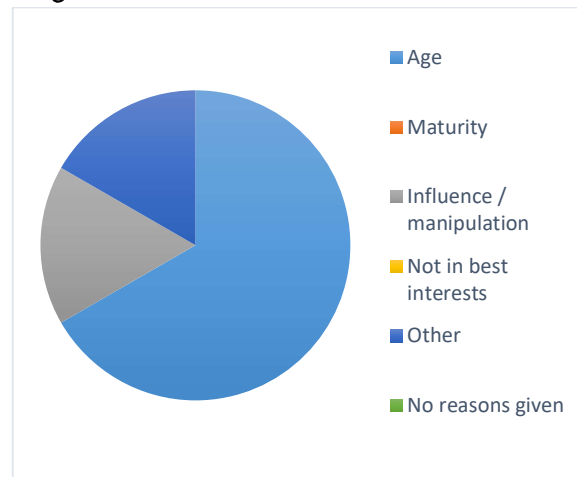


Figure (7) – Reasons against the hearing of the child

- Four times (67%) age
  - No clear pattern: one, six, seven, and fourteen years old children have not been heard due to age considerations;
- One time (17%) influence/manipulation<sup>1238</sup>
  - Manipulation by one parent;
- One time (17%) other<sup>1239</sup>

<sup>1237</sup> SP027 [4 April 2006] ECLI:ES:APB:2006:5294A.

<sup>1238</sup> SP010 [8 March 2016] ECLI: ES:APB:2016:2563 Audiencia Provincial de Barcelona (Sección 18ª).

<sup>1239</sup> SP010 [8 March 2016] ECLI: ES:APB:2016:2563 Audiencia Provincial de Barcelona (Sección 18ª).

- Child has already been heard in the first instance and in the second no new elements to be taken in consideration have arisen (judge bases his reasoning on the first hearing's results).

The hearing was performed by:

- Judge four times (80%);
- Social worker/psychologist one times (10%).

The hearing mainly addressed the living conditions of the child in the country of origin (e.g. attendance at school, social relationships, the way in which the left-behind parent took care of the child), the relationship between the child and the parents, and the opinion of the child in returning to live in the country of origin.

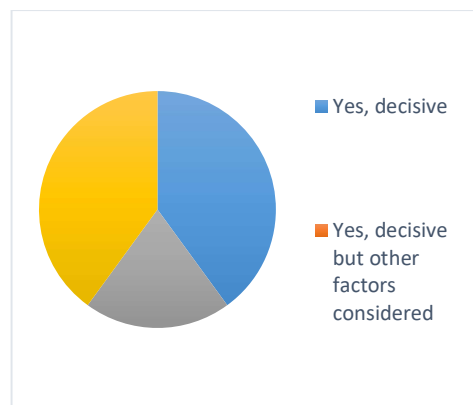


Figure (8) – Impact of the hearing on the best interests of the child

With regard to the hearing's impact on the decision, the following is relevant:

- Two times (31%) Decisive;
- One time (23%) Considered equally with other factors
  - Social and affective integration in the country of origin;
- Two times (8%) Not taken into account
  - In one case the child was not mature enough.

## Other Information

Some significant patterns appear from the case-law analysis:

- Hearing of children in Spain is not compulsory for children under twelve years old under national law. Judges are still able to perform the hearing for minors under twelve years old;
- Judges often rely on psychologists and their reports in order to determine the child's interests.



## Sweden

### Country File – Sweden<sup>1240</sup>

#### General Data

For Sweden, 110 relevant cases have been identified. A total of 169 children were involved in these proceedings. Eighty-nine cases were dealt with in courts of first instance, nineteen in courts of second instance and two in a court of third instance. In a majority of these cases (87%) the Hague Convention on Child Abduction was the only legal basis considered by the court and in 4% of the cases, Brussels IIbis was considered together with the Hague Convention on Child Abduction.

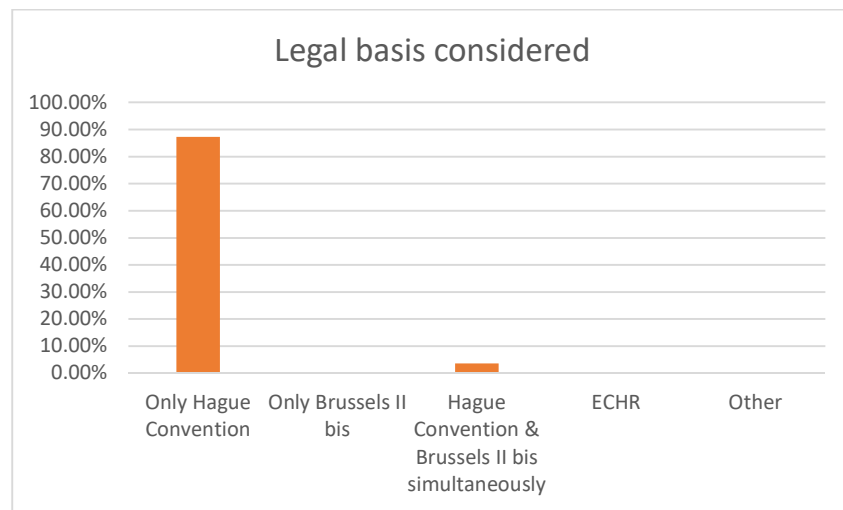


Figure (1) – Legal basis considered

In most of the cases, namely 81%, the court decided that the child had to return to his or her State of former habitual residence.

<sup>1240</sup> The country expert for Sweden is Tekla Kristiansson. She is a master student at the University of Uppsala and writes her master thesis on international child abduction under supervision of Prof. Dr. Maarit Järnterä-Jareborg.

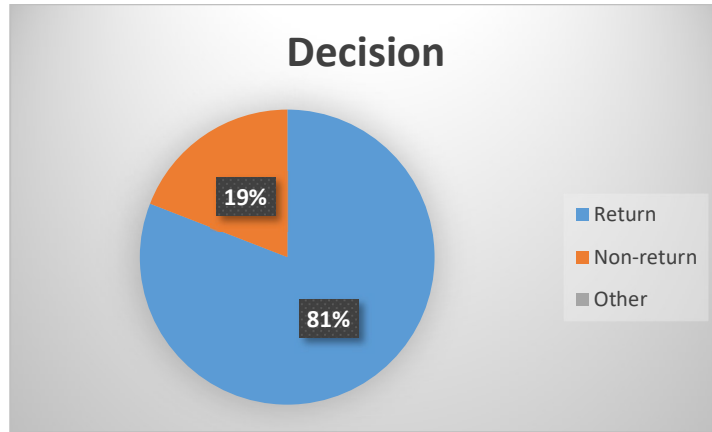


Figure (2) – Decision

In most cases it was the mother who abducted the child.

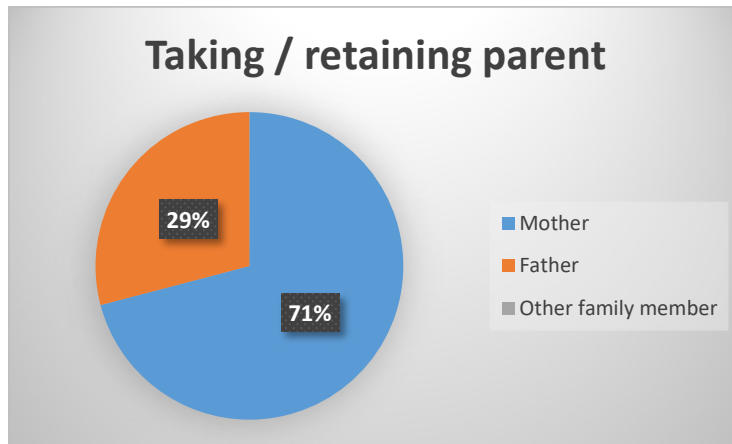


Figure (3) – Taking/retaining parent

The age of the abducted children varied widely.

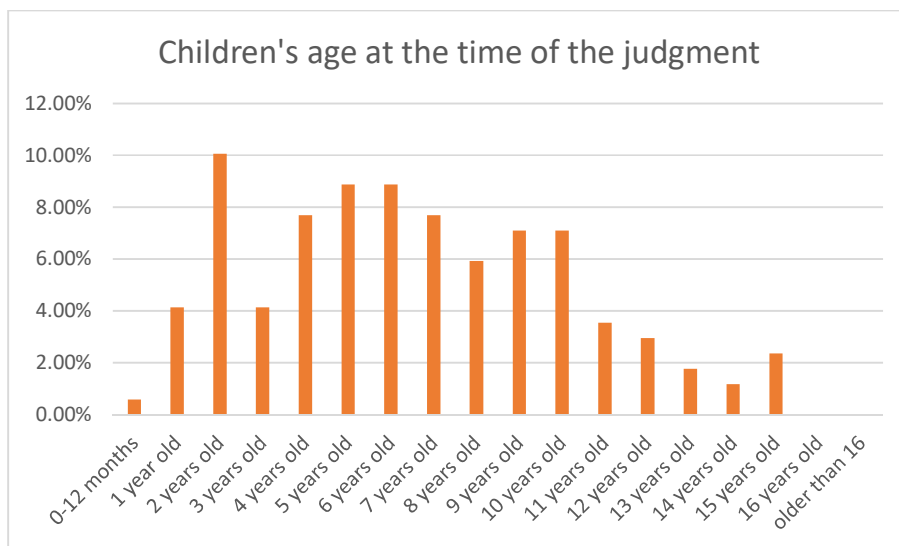


Figure (4) – Children's age at the time of the judgment

## Best Interests of the Child

In 4% of the cases, the courts referred explicitly to the best interests of the child, in 96% of the cases courts did not refer to the best interests at all. This are remarkable percentages if we compare them to the percentages in the other country reports. This can be explained as follows:

The Swedish courts often explicitly state that the grounds for refusal in the Hague Convention are the only grounds that can be considered when determining whether or not to return the child. Hence, there is no scope for independently considering the best interests of the child in a Hague Convention abduction case.<sup>1241</sup>

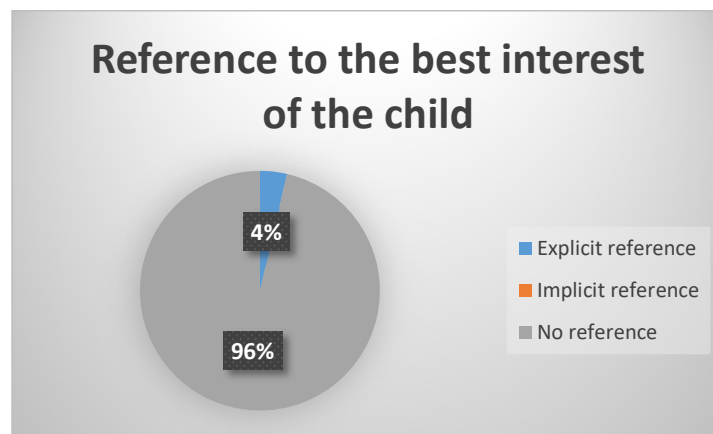


Figure (5) – Reference to the best interests of the child

### Explicit reference

In all of the four cases in which reference is made to the best interests of the child this reference was explicit and based on Swedish national case law.

In two of the three cases, the courts mentioned the following: 'In its assessment the court must always take into account the best interests of the child, compare NJA 2013 s 1143.'<sup>1242</sup> Also in the third case, the court referred to case NJA 2013 s 1143.<sup>1243</sup> Case NJA 2013 s 1143 is a case from the Swedish Supreme Court in which the Court stated the following:

The refusal grounds in the Hague Convention on Child Abduction manifest the assessment of the best interests of the child which must be made in situations of this kind. As the Council on Legislation<sup>1244</sup> stated during its examination of the proposed 1989 Act [which incorporated the Hague Convention on Child Abduction in Swedish law] it is possible in assessing if the child by being returned would be put in an intolerable situation to consider if an enforcement clearly would be against the best interests of the child [...].

<sup>1241</sup> Information provided by the country expert.

<sup>1242</sup> SE074 [2 February 2016] Stockholms tingsrätt, Å 15498-15; SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

<sup>1243</sup> SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17.

<sup>1244</sup> The Council on Legislation is a Swedish Government agency made up by judges from the Supreme Court and the Supreme Administrative Court. Its task is to check whether a proposed law does not conflict with existing legislation or might cause other problems of legal nature (e.g. when the proposed law goes against the rule of law ('Swedish Legislation – How Laws are Made' (Government Offices of Sweden, 3 April 2018) < <https://www.government.se/how-sweden-is-governed/swedish-legislation---how-laws-are-made/> > accessed 24 October 2018; 'Makes Laws' (Sveriges Riksdag, 2 March 2018) <<http://www.riksdagen.se/en/how-the-riksdag-works/what-does-the-riksdag-do/makes-laws/> > accessed 24 October 2018).

In the fourth case, the court referred to case SE106 in which the following is stated:

According to the [Svea hovrätt], the starting point for assessing the risk of the mental health of the child is [...] that symptoms of stress or anxiety that may be assumed to be caused by the return and the process around it, generally do not constitute grounds to refuse a return. However, if the child shows symptoms beyond what may be assumed to be associated with the issue of relocation or there are clear indications that the child has an extraordinary sensitivity to changes, then there may be grounds for another assessment.<sup>1245</sup>

The court then concluded the following:

Both parties have stated that [the child] is a well-adjusted and healthy girl. No investigation has been presented that speaks to a different conclusion. There is therefore no such exceptional situation that, because of an extraordinary sensitivity in the girl, would be against her best interests to be returned.<sup>1246</sup>

### **Interpretation of grounds for non-return in relation to best interests**

#### **Article 13(1)(b)**

The Supreme Court mentioned several factors that have to be taken into consideration when deciding on the grave risk exception in its case NJA 2013 s 1143: the child's age, development, relation to the parents, family and social and emotional attachment. In two analysed cases, the courts referred to the Supreme Court's case and reiterated the factors.<sup>1247</sup>

In one case the court stated that returning the child would mean that the child would be separated from the mother, the child's primary caretaker, and returned to the father, who would be a stranger to her. The child was just nine months old. According to the court, under these circumstances returning the child would place the child in an intolerable situation, as it would be against her best interests.<sup>1248</sup> This decision was, however, overruled in second instance. The court of second instance stated that the starting point when assessing a child abduction case is that it is in the best interests of the child to be returned. The court then discussed the circumstances in the case relating to Article 13(1)(b) and concludes that the case does not constitute an exceptional situation where returning the child would be against the best interests of the child.<sup>1249</sup>

### **Impact of the best interests on the final decision**

#### **The best interests are decisive**

In all four cases the court considered the best interests together with Article 13(1)(b). Only in one case the court decided that returning the child would be contrary to the best interests of the child.<sup>1250</sup> As mentioned before, however, this decision was overruled in the second instance

<sup>1245</sup> SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

<sup>1246</sup> SE109 [15 June 2017] Svea hovrätt ÖÅ 3883-17.

<sup>1247</sup> SE074 [2 February 2016] Stockholms tingsrätt, Å 15498-15; SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

<sup>1248</sup> SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17.

<sup>1249</sup> SE109 [15 June 2017] Svea hovrätt ÖÅ 3883-17.

<sup>1250</sup> SE086 [7 April 2017] Stockholms tingsrätt Å 2670-17.

case.<sup>1251</sup> Also in the two other cases, the court decided that returning the child does not conflict with the best interests of the child.<sup>1252</sup>

## Hearing of The Child

In the four cases in which the best interests of the child were explicitly or implicitly discussed and thus, the question whether the child was heard was displayed, the courts did not hear the child. In one case, the Court mentioned: 'The child has not reached an age where his opinion can make a difference.'<sup>1253</sup> Thus, the age of the child – seven years old – was the reason for not hearing the child.

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<sup>1251</sup> SE109 [15 June 2017] Svea hovrätt ÖÅ 3883-17.

<sup>1252</sup> SE074 [2 February 2016] Stockholms tingsrätt, Å 15498-15; SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

<sup>1253</sup> SE106 [16 October 2015] Svea hovrätt ÖÅ 7714-15.

## **Annex IV Court Analysis**

## Court of Justice of The European Union

Court File – Court of Justice Of The European Union<sup>1254</sup>

### General Data

From the case law of the Court of Justice of the European Union eight cases were deemed relevant for our research. A total of twelve children were involved in these proceedings.

In all eight cases it was the mother who abducted or retained the child.

The age of the abducted children varied widely.

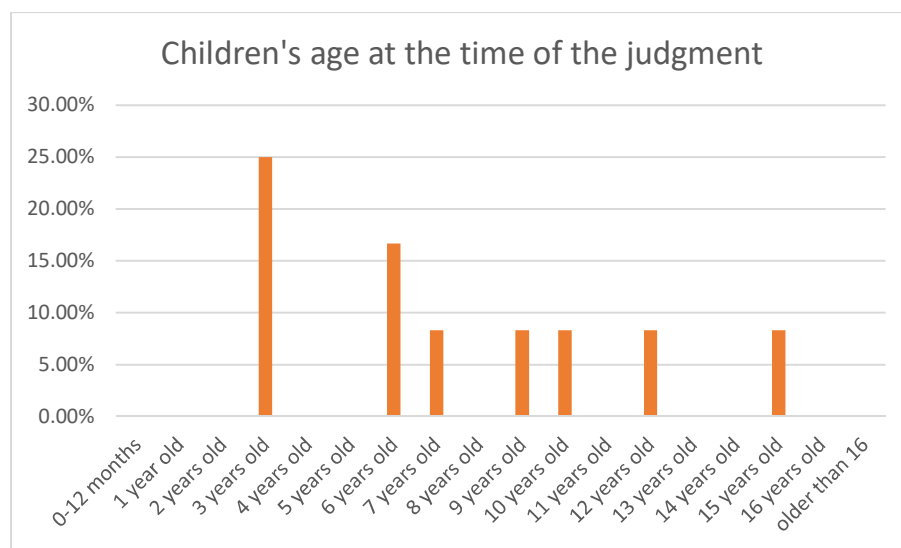


Figure (1) – Children's age at the time of the judgment

<sup>1254</sup> The cases of the Court of Justice of the European Union are collected and analysed by Tine Van Hof, VOICE researcher.

## Best Interests of the Child

In all eight cases there was an explicit reference to the best interests of the child and in all cases this reference was based on either the Brussels IIbis Regulation or the Charter of Fundamental Rights of the European Union. As will be apparent from the following paragraphs, the ECJ does refer to the concept of the best interests, but in most cases the Court does not discuss how to give content to this concept. There are, however, two exceptions. First, in Case C-403/09 *Detiček v Sgueglia*, the Court states that the assessment of interests must be based on 'objective considerations relating to the actual person of the child and his or her social environment'.<sup>1255</sup> Second, in Case C-400/10 *McB v LE*, the Court states that for deciding on custody of the child and rights of access to the child, the following facts have to be taken into account: 'The circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take responsibility of caring for the child.'<sup>1256</sup> The court adds: 'The taking into account of those facts is apt to protect the best interests of the child.'

All other references to the best interests are a reference to the concept without giving content to it. It has to be clarified, however, that most of the following references to the best interests were not specifically made in a child abduction context.

Firstly, the ECJ refers in several cases to the best interests of the child when discussing Brussels IIbis' rules of jurisdiction and the concept of proximity: 'According to recital 12 in the preamble to Regulation No 2201/2003, the grounds of jurisdiction in matters of parental responsibility established by the Regulation are shaped in the light of the best interests of the child, in particular the criterion of proximity.'<sup>1257</sup> In one case the Court adds to this the following: 'It follows that the Regulation proceeds from the idea that the best interests of the child must come first.'<sup>1258</sup>

Furthermore, the ECJ also refers to the best interests of the child when discussing Article 12(3) Brussels IIbis concerning the choice of forum. The Court says in this regard:

It should be emphasised here that, as is apparent from Article 12(3)(b) of Regulation No 2201/2003 – which in any event makes the applicability of the prorogation of jurisdiction provided for by that paragraph conditional [...] also on the jurisdiction of the courts of the Member State chosen being in the best interests of the child – recourse to that prorogation cannot in any case be contrary to those best interests.

In addition the Court states the following: 'Where a court is seized of proceedings in accordance with Article 12(3) of Regulation No 2201/2003, the best interests of the child can be assured only by an examination, in each individual case, of whether the prorogation of jurisdiction sought is in accordance with those interests [...]'.<sup>1259</sup>

<sup>1255</sup> ECJ001 Case C-403/09 *Detiček v Sgueglia* [23 December 2009] ECLI:EU:C:2009:810 para 60.

<sup>1256</sup> ECJ007 Case C-400/10 *McB v LE* [5 October 2010] ECLI:EU:C:2010:582 para 62.

<sup>1257</sup> ECJ001 Case C-403/09 *Detiček v Sgueglia* [23 December 2009] ECLI:EU:C:2009:810 para 35; ECJ004 Case C-376/14 *C v M* [9 October 2014] ECLI:EU:C:2014:2268 para 50; ECJ005 Case C-656/13 *L v M* [12 October 2014] ECLI:EU:C:2014:2364 para 48; ECJ008 Case C-296/10 *Purrucker v Vallés Pérez* [9 November 2010] ECLI:EU:C:2010:665 para 84. The criterion of proximity means 'that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility' (Provision 12 Preamble Brussels IIbis).

<sup>1258</sup> ECJ005 Case C-656/13 *L v M* [12 October 2014] ECLI:EU:C:2014:2364 para 48.

<sup>1259</sup> ECJ005 Case C-656/13 *L v M* [12 October 2014] ECLI:EU:C:2014:2364 paras 49 and 58.



The best interests of the child are also mentioned in the context of issuing a certificate and the recognition and enforcement of judgments. The Court states with regard to the issue of a certificate:

Before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the best interests of the child and all the circumstances of the individual case, the judgment to be certified was made with due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child [...].<sup>1260</sup>

Concerning the recognition of judgments, the Court says the following:

Article 23(a) of Regulation No 2201/2003 requires that a decision to refuse recognition must take into account the best interests of the child. Recourse to the public policy rule in Article 23(a) of that Regulation should thus come into consideration only where, taking into account the best interests of the child, recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, in that it would infringe a fundamental principle. In order to comply with the prohibition laid down in Article 26 of the Regulation of any review of the substance of a judgment given in another Member State, the infringement would have to constitute a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order.<sup>1261</sup>

Lastly,

The enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.<sup>1262</sup>

Furthermore, the ECJ mentions the best interests of the child in relation to hearing the child according to Article 24(1) of the Charter of Fundamental Rights of the EU. The Court reminds that:

[I]t is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child.<sup>1263</sup>

The Court continues by pointing out that

<sup>1260</sup> ECJ003 Case C-491/10 Aguirre Zarraga v Pelz [22 December 2010] ECLI:EU:C:2010:828 para 68.

<sup>1261</sup> ECJ006 Case C-455/15 P v Q [19 November 2015] ECLI:EU:C:2015:763 paras 38-39.

<sup>1262</sup> ECJ002 Case C-211/10 Povse v Alpago [1 July 2010] ECLI:EU:C:2010:400 para 83.

<sup>1263</sup> ECJ003 Case C-491/10 Aguirre Zarraga v Pelz [22 December 2010] ECLI:EU:C:2010:828 para 63.

[I]t is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.<sup>1264</sup>

Concerning the circumstances of the hearing the Court states the following:

Where [a] court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the best interests of the child and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.<sup>1265</sup>

Lastly, the best interests of the child are mentioned in connection to Article 24(3) of the Charter of Fundamental Rights of the EU concerning the right to maintain a relationship with both parents: 'One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child.'<sup>1266</sup> However, the Court does admit that exceptions on this rule are possible:

It is true that, under Article 24(3) of the Charter, an exception may be made to the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child. It follows that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right. However, a balanced and reasonable assessment of all the interests involved, which must be based on objective considerations relating to the actual person of the child and his or her social environment, must in principle be performed in proceedings before the court with jurisdiction as to the substance in accordance with the provisions of Regulation No 2201/2003.<sup>1267</sup>

## **Impact of the best interests on the final decision**

### **The best interests are considered equally with other factors**

In two cases the best interests were considered equally with other factors. In Case C-211/10 *Povse v Alpago*, the Court discusses the possible situation in which the court of the State of refuge orders return and the court of the State of origin awards custody to the parent residing in the State of

<sup>1264</sup> ECJ003 Case C-491/10 *Aguirre Zarraga v Pelz* [22 December 2010] ECLI:EU:C:2010:828 para 64.

<sup>1265</sup> ECJ003 Case C-491/10 *Aguirre Zarraga v Pelz* [22 December 2010] ECLI:EU:C:2010:828 para 66.

<sup>1266</sup> ECJ001 Case C-403/09 *Detiček v Sgueglia* [23 December 2009] ECLI:EU:C:2009:810 para 54; ECJ002 Case C-211/10 *Povse v Alpago* [1 July 2010] ECLI:EU:C:2010:400 para 64; ECJ007 Case C-400/10 *McB v LE* [05 October 2010] ECLI:EU:C:2010:582 para 60.

<sup>1267</sup> ECJ001 Case C-403/09 *Detiček v Sgueglia* [23 December 2009] ECLI:EU:C:2009:810 paras 58-60.

refuge so that the child is moved needlessly between these two States. With regard to this situation, the Court says that the disadvantages that such moving might entail are subordinate to 'the importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents'.<sup>1268</sup> The Court repeatedly stated that the right of the child to maintain a relationship with both parents merges into the best interests of the child. Thus, one can say that the best interests are considered equally with the factors of delivering a fair and soundly based court judgment and the need to deter child abduction.

In Case C-376/14 *C v M*, the ECJ states the following:

Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal.<sup>1269</sup>

Thus, not only the factors concerning the best interests of the child but also other matters of fact that might demonstrate the integration of the child have to be taken into account.

### **Hearing of The Child**

As the ECJ deals only with the legal questions posed to it, the hearing of the child did not come up and cannot be assessed in this report.

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<sup>1268</sup> ECJ002 Case C-211/10 *Povse v Alpagó* [1 July 2010] ECLI:EU:C:2010:400 para 63.

<sup>1269</sup> ECJ004 Case C-376/14 *C v M* [9 October 2014] ECLI:EU:C:2014:2268 para 56.

## European Court of Human Rights

### Court File – European Court of Human Rights<sup>1270</sup>

#### General Data

For the European Court of Human Rights, 54 child abduction cases have been identified in which the Court has referred to the best interests of the child, either explicitly or implicitly. In eleven of these cases, individual judges have formulated separate opinions. Even though separate opinions – whether (partly) concurring or dissenting – are not part of the main judgment and thus not decisive for the Court’s reasoning in the outcome of the case, they give an insight in core points of debate or discussion in the judgment. Where separate opinions have been quite detailed or illustrative in their interpretation of the best interests of the child, either explicitly or implicitly, reference to the individual judges’ point of view has been included in the analysis.

A total of 75 children were involved in the proceedings. All cases refer to Article 8 ECHR (the right to respect for private and family life) as the legal basis for the judgment. The Court did not decide on return or non-return, but instead determined whether the return proceedings amounted to a violation of Article 8 ECHR (in 44 cases or 81%) or not (in ten cases or 19%).

In a large majority of the cases, the abducting or retaining parent is the mother (85%, 46 cases), as opposed to the father in only seven cases (13%). In one case, the child was abducted by his paternal grandparents (see Figure (1)).<sup>1271</sup>

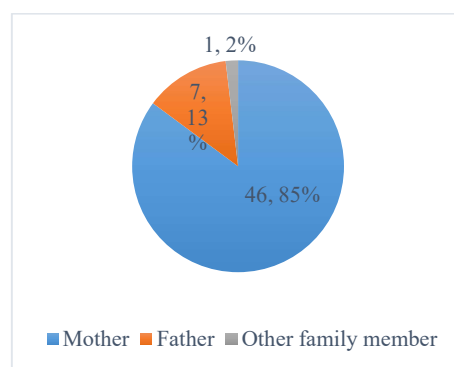


Figure (1) - Taking / retaining person

The age of the children at the time of the decision varied between four and twenty years old. None of the identified children were between zero and three years of age and seven of them (9%) were above sixteen at the time of the proceedings. This, the ages of the children are higher in these proceedings than in the national case law. This can be explained by the fact that a considerable amount of time may pass between the actual abduction and the Court’s judgment, as all domestic remedies should be exhausted first (this mean two, three or sometimes even four national instances) and proceedings before the ECtHR are often quite lengthy.

#### Best Interests of the Child

<sup>1270</sup> The cases of the European Court of Human Rights are collected and analysed by Sara Lembrechts, VOICE researcher.

<sup>1271</sup> ECHR049 ECtHR E.S. v. Romania and Bulgaria [19 July 2016] Application no. 60281/11.

### Explicit reference

An explicit reference to the best interests of the child could be found in 47 cases (87%; see Figure 2). In a large majority (30 cases, 64%), this reference was based on ECtHR case law. Most of these cases refer either to *Neulinger and Shuruk* (six cases)<sup>1272</sup> to *X. v. Latvia* (six cases),<sup>1273</sup> or to both (nine cases). The Court also often refers to its judgments in *Maumousseau and Washington* (thirteen cases),<sup>1274</sup> *Ignaccolo-Zenide* (nine cases),<sup>1275</sup> *Iosub Caras* (five cases),<sup>1276</sup> *Shaw* (five cases),<sup>1277</sup> *Adzic* (four cases),<sup>1278</sup> *Raw and others* (three cases),<sup>1279</sup> *Gnahoré* (two cases),<sup>1280</sup> *Maire* (two cases)<sup>1281</sup> and *Blaga* (two cases).<sup>1282</sup>

Article 3(1) UNCRC was mentioned in 26% of the cases (twelve cases). In 34% of the cases (sixteen cases), the reference to the best interests of the child was based on the rationale of the Hague Convention. The judgments are diverse however in the way in which this rationale is interpreted. On the one hand, cases may prioritise the restoration of the status quo ante and find the child's immediate return to his or her country of habitual residence to be in the best interests of the child. On the other hand, the Convention's rationale is said to leave room for exceptions, in accordance with a best interest's assessment.

Five cases (11%) contained a reference to other international legal instruments to define the best interests of the child. Two of these<sup>1283</sup> refer to Article 8 ECHR, two others<sup>1284</sup> mention the UN Committee on the Rights of the Child's General Comment no. 14 on the best interests of the child. (This comment is relatively new, dating only from 2013, which explains why it has not been used in the older cases.) In *Neulinger and Shuruk*,<sup>1285</sup> also dating from before the publication of General Comment no. 14, General Comments 17 and 19 of the UN Human Rights Committee are mentioned to refer to the paramount interests of the child in the event of separation or divorce of

<sup>1272</sup> ECHR015 ECtHR *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07.

<sup>1273</sup> ECHR031 ECtHR *X. v. Latvia* [26 November 2013] Application no. 27853/09.

<sup>1274</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05.

<sup>1275</sup> ECtHR *Ignaccolo-Zenide v. Romania* [25 January 2000] Application no. 31679/96 (this case is not included in the present analysis).

<sup>1276</sup> ECHR005 ECtHR *Iosub Caras v. Romania* [27 July 2006] Application no. 7198/04.

<sup>1277</sup> ECHR022 ECtHR *Shaw v. Hungary* [26 July 2011] Application no. 6457/09.

<sup>1278</sup> ECHR041 ECtHR *Adzic v. Croatia* [12 March 2015] Application no. 22643/14.

<sup>1279</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11.

<sup>1280</sup> ECtHR *Gnahoré v. France* [19 September 2000] Application no. 40031/98 (this case is not included in the present analysis).

<sup>1281</sup> ECtHR *Maire v. Portugal* [26 June 2003] Application no. 48206/99 (this case is not included in the present analysis).

<sup>1282</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10. Cases that are mentioned only once in relation to the best interests of the child are ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01; ECHR021 ECtHR *Sneerson and Campanella v. Italy* [12 July 2011] Application no. 14737/09; ECHR023 ECtHR *Karrer v. Romania* [21 February 2012] Application no. 16965/10; ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11; ECHR039 ECtHR *M.A. v. Austria* [15 January 2015] Application no. 4097/13; ECHR044 ECtHR *R.S. v. Poland* [21 July 2015] Application no. 63777/09. Cases outside the scope of this project include ECtHR *Nuutinen v. Finland* [27 June 2000] Application no. 32842/96; ECtHR Grand Chamber *Scozzari and Giunta v. Italy* [13 July 2000] Application no. 39221/98; ECtHR *Sylvester v. Austria* [24 April 2003] Application nos. 36812/97 and 40104/98; ECtHR Grand Chamber *Sommerfeld v. Germany* [8 July 2003] Application no. 31871/96; ECtHR Fourth Section *Tiemann v. France and Germany* (decision) [27 April 2004] Application nos. 47457/99 and 47458/99; ECtHR Second Section (decision) *Eskinazi and Chelouche v. Turkey* [6 December 2005] Application no. 14600/05; ECtHR Grand Chamber *Üner v. the Netherlands* [18 October 2006] Application no. 46410/99; ECtHR Grand Chamber *Mazlov v. Austria* [22 March 2007] Application no. 1638/03; ECtHR *Plaza v. Poland* [25 January 2011] Application no. 18830/07; ECtHR *Karoussiotis v. Portugal* [1 February 2011] Application no. 23205/08; ECtHR *Emre v. Switzerland* [11 October 2011] Application no. 5056/10; ECtHR First Section *M.R. and L.R. v. Estonia* (decision) [15 May 2012] Application no. 13420/12.

<sup>1283</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05; ECHR018 ECtHR *Dore v. Portugal* [1 February 2011] Application no. 775/08.

<sup>1284</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13; ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12.

<sup>1285</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07.

his or her parents. Neulinger and Shuruk is the only case that also refers to other national or international case law, in this case of the French Court of Cassation, the House of Lords and the Finnish Supreme Court. However, exact references to this case law are not further specified. Another five cases (11%) interpret the best interests of the child without referring to any specific legal basis.<sup>1286</sup>

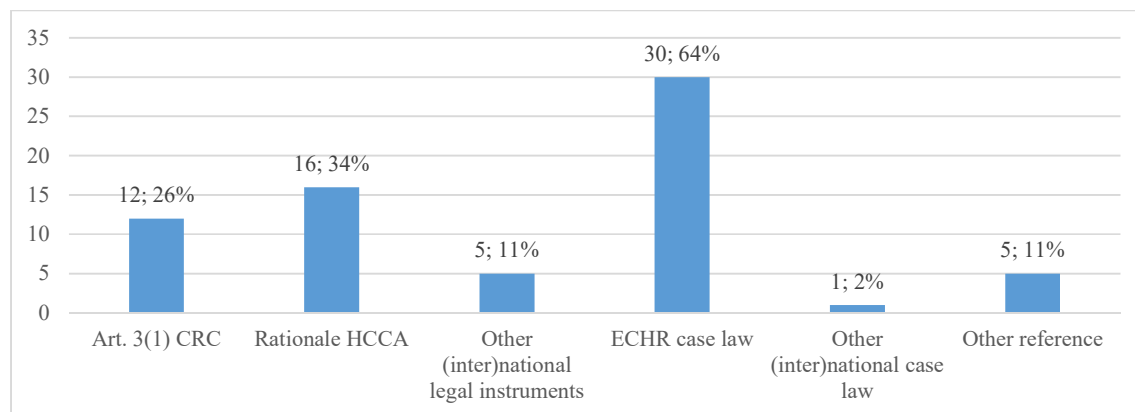


Figure (2) - Legal basis for explicit reference

On several occasions, the Court has made explicit reference to the best interests of the child while at the same time giving a substantive explanation of what the concept may entail. In Neulinger and Shuruk, the Court stated that '[t]he best interests of the child, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.'<sup>1287</sup>

Further, the possibility that the mother could be exposed to criminal proceedings, which might even entail a prison sentence upon return, is not in the best interests of the child, the mother being the child's only reference person.<sup>1288</sup> In Maumousseau and Washington, the notion of best interests is interpreted to mean the following: to guarantee that the child develops in a sound environment and that a parent cannot take measures that would harm the health and development of the child (§67); to maintain ties with the family, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from his or her roots (§67); to have a right not to be removed from a parent and be retained by the other (§68); and to be protected against wrongful removal or retention (§68).<sup>1289</sup>

In Sneersone and Kampanella, the Court finds that '[t]he child's interests are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to be allowed to develop in a sound environment (...)'.<sup>1290</sup> From G.S. v. Georgia, it becomes clear that the mutual enjoyment by parent and child of each other's

<sup>1286</sup> ECHR001 ECtHR Monory v. Romania and Hungary [5 April 2005] Application no. 71099/01, §83; ECHR002 ECtHR Karadzic v. Croatia [15 December 2005] Application no. 35030/04, §52; ECHR003 ECtHR Bianchi v. Switzerland [22 June 2006] Application no. 7548/04; ECHR009 ECtHR Koons v. Italy [30 September 2008] Application no. 68183/01, §48; ECHR012 ECtHR Övüs v. Turkey [13 October 2009] Application no. 42981/04, §63.

<sup>1287</sup> ECHR015 ECtHR Grand Chamber Neulinger and Shuruk v. Switzerland [6 July 2010] Application no. 41615/07, §138; ECHR021 ECtHR Sneersone and Kampanella v. Italy [12 July 2011] Application no. 14737/09, §85; ECHR041 ECtHR Adzic v. Croatia [12 March 2015] Application no. 22643/14, dissenting opinion op judge Dedov, p. 29.

<sup>1288</sup> ECHR015 ECtHR Grand Chamber Neulinger and Shuruk v. Switzerland [6 July 2010] Application no. 41615/07, §149.

<sup>1289</sup> ECHR007 ECtHR Maumousseau and Washington v. France [6 December 2007] Application no. 39388/05, §§67-68.

<sup>1290</sup> ECHR021 ECtHR Sneersone and Kampanella v. Italy [12 July 2011] Application no. 14737/09, §85.

company constitutes a fundamental element of family life and is protected under Article 8 of the Convention. In this case, 'keeping the child, who had spent the first six years of his life in Ukraine with his mother, in Georgia in the absence of both his parents - per se raises questions as to its compatibility with the principle of the best interests of a child'.<sup>1291</sup>

In *Monory*, the Court recalls that the best interests of the child are paramount. In the Court's view, it was justified for national authorities to hold that 'eight months after the removal from Hungary, [...] the child had adapted to her new environment and [...] it was in her best interests to remain in Romania with her mother'.<sup>1292</sup> In *Karadzic*<sup>1293</sup> and *Koons*<sup>1294</sup> the best interests of the child justify limitations to the use of coercion in the area of international child abductions. If contact between the child and his or her parents would be contrary to the best interests of the child, national authorities must strike a fair balance.<sup>1295</sup> Also in *Bianchi*, the Court points out that national authorities must strike a fair balance between the different interests at stake, including the best interests of the child. Furthermore, this case specifies that insufficient action by the local authorities puts the child at risk of becoming alienated from his father, which would be contrary to his best interests.<sup>1296</sup> Similarly, in *Övüs*, the Court considered the ongoing separation between the children and their mother over the last three years to be contrary to the children's best interests.<sup>1297</sup>

Also when enforcing the child's return, the guarantees set forth in Article 8 of the Convention shall apply in a manner subject to the best interests of the child. This argument is developed in *Shaw*, where the Court refers to guidance on this point in the ECtHR case-law on the expulsion of aliens. Along these lines:

in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take into account the best interests of the child and wellbeing, and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural and family ties both with the host country and with the country of destination.<sup>1298</sup>

Importantly, the best interests of the child may not necessarily coincide with the best interests of his or her siblings.<sup>1299</sup> The court thus places emphasis on each individual child.

In *Maumousseau and Washington*, the Court considers it would be desirable if the notion of 'best interests' would always be interpreted in a consistent manner, regardless of whether the HCCA or the UNCRC is invoked. Taking measures and conclude agreements to combat child abductions are in the best interests of the child.<sup>1300</sup>

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<sup>1291</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13, §61.

<sup>1292</sup> ECHR001 ECtHR *Monory v. Romania and Hungary* [5 April 2005] Application no. 71099/01, §83.

<sup>1293</sup> ECHR002 ECtHR *Karadzic v. Croatia* [15 December 2005] Application no. 35030/04, §52.

<sup>1294</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01, §48.

<sup>1295</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01, §48.

<sup>1296</sup> ECHR003 ECtHR *Bianchi v. Switzerland* [22 June 2006] Application no. 7548/04, §80 & §99. See also ECHR037 ECtHR *Cavani v. Hungary* [28 October 2014] Application no. 5493/13.

<sup>1297</sup> ECHR012 ECtHR *Övüs v. Turkey* [13 October 2009] Application no. 42981/04, §63.

<sup>1298</sup> ECHR022 ECtHR *Shaw v. Hungary* [26 July 2011] Application no. 6457/09, §75.

<sup>1299</sup> ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12, §99.

<sup>1300</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05, §71.

### **Implicit reference**

Seven cases (13%) do not contain an explicit reference to the best interests of the child, but do discuss the concept implicitly.<sup>1301</sup> In addition to these seven cases, however, some cases in which an explicit reference to the best interests occurs, contain implicit references as well that are insightful for this analysis.

Factors that may implicitly hint at an interpretation of the best interests of the child but do not use this concept explicitly, include the mutual enjoyment by parent and child of each other's company and the corresponding positive obligation on States to take measures to facilitate such contact.<sup>1302</sup> Also, formulations related to the swiftness of implementation have an implicit link to the best interests of the child. Such formulations refer to the passage of time, which can have irremediable consequences for the relations between the children and the parent who does not live with them,<sup>1303</sup> and to the relationship between parents and children, which should not be determined by the mere effluxion of time.<sup>1304</sup> Some cases also mention that 'the use of coercive measures against children is not desirable'.<sup>1305</sup> The formulation 'the wish to protect the child, considered as the foremost victim of the trauma caused by its removal or retention'<sup>1306</sup> in *Macready* could be considered an implicit reference as well, as is the phrase 'the deterioration of the emotional connections between the applicant and his daughter, an occurrence which was subsequently amplified by the behaviour of the child's mother' in *Serghides*.<sup>1307</sup> In *Gajtani*, the Court considers multiple hearings of a child who experiences a loyalty conflict to be "traumatising" and thus implicitly contrary to the best interests of the child.<sup>1308</sup> Inevitable separation from the primary caregiver, as indicated in *V.P. v. Russia*, is another example of an implicit reference.<sup>1309</sup> In *Koons*, national authorities had sufficiently protected the best interests of the child, but the child's parents were given a rap on the knuckles for not recognising the disastrous impact of their conflict on their child,<sup>1310</sup> which can be considered an implicit reference as well.

### **Interpretation of grounds for non-return in relation to the best interests of the child**

#### **General exceptions to return under the HCCA**

In light of Article 8 ECHR, the HCCA exceptions to return impose a procedural obligation on domestic authorities. Without specifically referring to the best interests of the child, the Court explains the following in *X. v. Latvia*:

<sup>1301</sup> ECHR004 ECtHR *Lafargue v. Romania* [13 July 2006] Application no. 37284/02; ECHR005 ECtHR *Iosub Caras v. Romania* [27 July 2006] Application no. 7198/04; ECHR006 ECtHR *Bajrami v. Albania* [12 December 2006] Application no. 35853/04; ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03; ECHR014 ECtHR *MacReady v. Czech Republic* [22 April 2010] Application nos. 4824/06 and 15512/08, §62; ECHR034 ECtHR *Rouiller v. Switzerland* [22 July 2014] Application no. 54443/10; ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §111.

<sup>1302</sup> ECHR001 ECtHR *Monory v. Romania and Hungary* [5 April 2005] Application no. 71099/01; ECHR006 ECtHR *Bajrami v. Albania* [12 December 2006] Application no. 35853/04.

<sup>1303</sup> ECHR004 ECtHR *Lafargue v. Romania* [13 July 2006] Application no. 37284/02; ECHR005 ECtHR *Iosub Caras v. Romania* [27 July 2006] Application no. 7198/04; ECHR014 ECtHR *MacReady v. Czech Republic* [22 April 2010] Application nos. 4824/06 and 15512/08.

<sup>1304</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03.

<sup>1305</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03.

<sup>1306</sup> ECHR014 ECtHR *MacReady v. Czech Republic* [22 April 2010] Application nos. 4824/06 and 15512/08, §62.

<sup>1307</sup> ECHR017 ECtHR *Serghides v. Poland* [2 November 2010] Application no. 3151/04, §70.

<sup>1308</sup> ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §111.

<sup>1309</sup> ECHR036 ECtHR *V.P. v. Russia* [23 October 2014] Application no. 61362/12, §139.

<sup>1310</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01, §§53-56.



when assessing an application for a child's return, the courts must not only consider arguable allegations of a 'grave risk' for the child in the event of return but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of [Article 8 ECHR] and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (...), is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it<sup>1311</sup>

Exceptions to return can be made in the following situations: when the child is settled in his or her new environment and more than one year has elapsed between the date of the abduction and the initiation of proceedings (Article 12(2) HCCA); when custody rights were not exercised at the time of the abduction, the abduction was consented to or acquiesced in (Article 13(1)(a) HCCA); when there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(1)(b) HCCA); when the child objects to return and has attained an age and maturity at which it is appropriate to take these views into account (Article 13(2) HCCA); or when return would not be permitted by the protection of human rights and fundamental freedoms (Article 20 HCCA).

A number of judgments refer to the existence of general exceptions to return and explicitly link these to the best interests of the child. Again in *X. v. Latvia*, the Court mentions that,

in the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a 'grave risk' (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).<sup>1312</sup>

The same wording is used in *G.S. v. Georgia*.<sup>1313</sup> Also in *Phostira Efthymiou and Ribeiro Fernandes*, the Court links the best interests of the child to Article 12, Article 13(1)(a), Article 13(1)(b) and Article 20 HCCA.<sup>1314</sup> Notably, the exception to return on the basis of the child's objections under Article 13(2) HCCA is not included in these enumerations. In *Ferrari*, reference is made to the objections to return falling within the scope of Articles 12, 13 and 20 HCCA, but no reference is made to the best interests of the child.<sup>1315</sup>

<sup>1311</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, §107.

<sup>1312</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, §101.

<sup>1313</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13, §46.

<sup>1314</sup> ECHR040 ECtHR *Phostira Efthymiou and Ribeiro Fernandes v. Portugal* [5 February 2015] Application no. 66775/11, §41.

<sup>1315</sup> ECHR042 ECtHR *Ferrari v. Romania* [25 April 2015] Application no. 1714/10, §48.

## Article 13(1)(b) HCCA

Most of the references to grounds for non-return and the best interests of the child in the ECtHR case law are related to Article 13(1)(b) HCCA. Six cases have made an explicit link between best interests and a risk of harm, another six made the link (also) implicitly.

In *Maumousseau*, the Court fails to see how Article 13(1)(b) HCCA would be incompatible with the child's best interests under Article 3 UNCRF.<sup>1316</sup> The two dissenting judges, however, argued that

[t]he passage of time, whether licit or illicit, is determinative to the best interests of the child. The child at a tender age who has been in a certain domestic setting in which he or she feels secure would be traumatised if he or she were to be displaced. This is precisely what Article 13 (b) of the Hague Convention hints at. What counts, in other words, is the wellbeing of the child in the setting to which the child has not only become accustomed, but which has structural influences on the development of his or her personality. To uproot the child in order to vindicate the abstract juridical goals (...), goes against most basic human good sense.

The dissenting judges argue that 'one need not be a child psychologist or paedo-psychiatrist to understand that a child who has been with her mother all her life, once she has laid down her roots in the stable setting of a small French village, will be traumatised if those roots are cut and the child forcibly sent to the State of New York'.<sup>1317</sup> In their view, the best interests of the child requires a reassessment of the case by the Grand Chamber, to prevent a best interests' assessment from becoming subordinate to a strict formalistic logic resulting from the illegal nature of the retention.

In the *Neulinger and Shuruk* case the Court explained that it is not its task to take the place of the competent authorities in examining whether return would imply a grave risk of harm within the meaning of Article 13(1)(b) HCCA.<sup>1318</sup> The child's return to Israel without the mother was considered to be against his best interests.<sup>1319</sup> According to the joined separate opinion of judges Jociene, Sajo and Tsotsoria, '[t]he public order interest that consists in denying any advantage to someone's unlawful conduct cannot preclude other rights-based considerations, in particular that of the best interests of the child. The Hague Convention itself enables such a balanced approach in its Article 13'.<sup>1320</sup> Furthermore, a balanced consideration of Article 13 HCCA requires the best interests of the child to be a primary consideration.<sup>1321</sup>

Two other concurring judges in *Neulinger and Shuruk* pointed out that 'it was undisputed that it was clearly in the best interests of the second applicant to stay with his mother irrespective of her

<sup>1316</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05, §71.

<sup>1317</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05, Dissenting opinion of judge Zupancic, joined by judge Gyulumyan, p. 40.

<sup>1318</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, §141.

<sup>1319</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, §151.

<sup>1320</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, Separate opinion of judges Jociene, Sajo and Tsotsoria, §4.

<sup>1321</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, Separate opinion of judges Jociene, Sajo and Tsotsoria, §4.

country of residence'.<sup>1322</sup> In the same case, another concurring judge recognised a violation of Article 13(1)(b) HCCA, given that the child's placement with his father would be manifestly not in the best interests of the child. This judge elaborates that

the father's capacity to take care of the child may be called into question, in view of his past conduct and limited financial resources. He has never lived alone with the child and has not seen him since his son left Israel. (...) [I]t is therefore mainly the passage of time, in conjunction with the discovery of the real personality of Noam's father, that led me to change my assessment of the issues in this case and to conclude that the child's return to Israel would not be in his interest.<sup>1323</sup>

In *B. v. Belgium*, the Court states that the domestic authorities had taken the best interests of the child into account by considering that the child should return with the abducting parent. However, it was most unlikely that the mother would return, as she incurred a term of imprisonment and loss of parental authority in the USA. In addition, the best interests' assessment was not satisfactory, as the courts had not sufficiently analysed whether the potential psychological risks of return would expose the child to an intolerable situation within the meaning of Article 13(1)(b) HCCA. The mother was the child's only reference person and separation would have harmful consequences for the healthy development of the child.<sup>1324</sup>

Also in *X. v. Latvia*, the Court found that the domestic authorities had not sufficiently considered the claims of a grave risk and had not provided sufficient reasoning as to why the claims under Article 13(1)(b) HCCA were rejected,<sup>1325</sup> an argument that has later on been repeated in several other ECtHR-judgments.<sup>1326</sup> In *G.S. v. Georgia*, for example, the Court held that the psychological trauma the child suffered as a result of the death of his sister was a relevant factor to be considered during the boy's return proceedings. However, the Court did not agree it amounted to a 'grave risk', as domestic authorities failed to explain what those risks implied exactly.<sup>1327</sup> Exceptionally, return after a considerable lapse of time (e.g. after four and a half years of domestic procedures in *Severe*) may be considered a grave risk of further traumatisation for the children, even if return had previously been considered to be in the children's best interests.<sup>1328</sup>

An implicit link between Article 13(1)(b) HCCA and the best interests of the child could be found in *Sneersone and Kampanella*. In this case, the Italian courts had failed to address any risks within the meaning of Article 13(1)(b) HCCA and thus had not lived up to their obligations under the Convention. Such risks had been identified by Latvian psychologists and included that the child was well-adjusted to living with his mother; that separation from his mother would adversely affect his development and might create neurotic problems, illnesses or both; that strong ties had been

<sup>1322</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, Concurring opinion of judge Lorenzen, joined by judge Kalaydjieva, p. 55.

<sup>1323</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07, Concurring opinion of judge Malinverni, p. 58.

<sup>1324</sup> ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11, §64 & §70.

<sup>1325</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, §107 & §118.

<sup>1326</sup> ECHR040 ECtHR *Phostira Efthymiou and Ribeira Fernandes v. Portugal* [5 February 2015] Application no. 66775/11, §§41-45; ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13; ECHR050 ECtHR *G.N. v. Poland* [19 July 2016] Application no. 2171/14.

<sup>1327</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13, §54.

<sup>1328</sup> ECHR052 ECtHR *Severe v. Austria* [21 September 2017] Application no. 53661/15, §§112-114.

formed between the child and his mother; that the mother could not join the child to Italy due to insufficient financial means; that there was no common language between the father and his child; that the child had never lived without the mother; and that the child had not seen the father for three years. The response the Italian authorities had foreseen (i.e. attending a kindergarten, a swimming pool and Russian language classes) was considered 'manifestly inappropriate'.<sup>1329</sup>

In *X. v. Latvia*, another implicit reference to the best interests of the child may be read in the argument that it is up to the parent who opposes return to provide evidence to substantiate allegations of physical or psychological harm or an otherwise intolerable situation, as provided for under Article 13(1)(b) HCCA. While the provision is not restrictive as to the exact nature of 'grave', the Court establishes that it concerns only 'the situations which go beyond what a child might reasonably bear'.<sup>1330</sup> The interpretation of this phrase, as well as its (implicit) link to the best interests of the child, has been subject to considerable debate within the Court. For example, in *G.S. v. Georgia*<sup>1331</sup> and *K.J. v. Poland*,<sup>1332</sup> the Court held that the harm entailed in Article 13(1)(b) HCCA cannot arise solely from separation from the parent who was responsible for the wrongful removal or retention. In the latter case, the break-up of the marriage and the mother's fear that the child would not be allowed to leave the UK fell short of this requirement, even more so in light of the fact that apparently, the child was 'adaptable, was in good physical and psychological health, was emotionally attached to both parents and perceived Poland and the United Kingdom as on an equal footing'.<sup>1333</sup>

A similar line of reasoning had been established earlier on, e.g. in a dissenting opinion to *Phostira Efthymiou and Ribeira Fernandes*, where judges Steiner and Sicilianos specified in that regard that 'emotional consequences', without further clarification, do not seem to go beyond the inconveniences necessarily linked to the situation experienced in the event of a return and would not exceed the gravity threshold required by section 13(b). In their view, 'if the return of a young child is refused whenever a psychologist considers that such a return would have "emotional consequences" for him or her, the Hague Convention risks being deprived of its meaning and purpose'.<sup>1334</sup>

For dissenting judge Dedov in *Adzic*,

owing to the age of the child and his mother's constant care of him since birth, the child was emotionally primarily attached to her; and (...) separating them and returning and transferring the child to a different environment would be traumatising for the child for the purposes of Article 13 (b) of the Hague Convention.

Judge Dedov even states that:

<sup>1329</sup> ECHR021 ECtHR *Sneerson and Campanella v. Italy* [12 July 2011] Application no. 14737/09, §§93-97.

<sup>1330</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, §116. On providing evidence, see also ECHR048 ECtHR *K.J. v. Poland* [1 March 2016] Application no. 30813/14, §64 and ECHR050 ECtHR *G.N. v. Poland* [19 July 2016] Application no. 2171/14, §60.

<sup>1331</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13, §55.

<sup>1332</sup> ECHR048 ECtHR *K.J. v. Poland* [1 March 2016] Application no. 30813/14, §67. See also ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11, joint dissenting opinion of judges Berro-Lefèvre and Karakas, p. 29.

<sup>1333</sup> ECHR048 ECtHR *K.J. v. Poland* [1 March 2016] Application no. 30813/14, §65.

<sup>1334</sup> ECHR040 ECtHR *Phostira Efthymiou and Ribeira Fernandes v. Portugal* [5 February 2015] Application no. 66775/11, dissenting opinion of judges Steiner and Sicilianos, §6.

[c]hildren up to seven years old are usually emotionally attached to their mothers (as in the present case); the environment does not matter to them, and separation would lead to distress and trauma. This means that a “risk” within the meaning of Article 13 always exists for such children. Between the ages of seven and thirteen the environment becomes more important and a return therefore becomes more realistic, unless there is a “risk” which should be considered as really “grave”. Hence, the threshold for a non-return decision should increase with the development of the child. And lastly, children older than, say, thirteen should have the right to decide for themselves and express their own opinion. The Hague Convention does not provide for any of the above options.<sup>1335</sup>

The logic of this dissenting opinion seems contrary to the goal and structure of the HCCA. While the judge would prefer an absolute right of decision for the child as of 13, the HCCA provides for the possibility of an objection, but also for taking into account the principle of return and the exception of a grave risk.

In *Raban*, Article 13(1)(b) HCCA was mentioned, but no link was made to the best interests of the child.<sup>1336</sup>

### Article 13(2) HCCA

None of the analysed judgments make an explicit link between Article 13(2) HCCA and the best interests of the child. Implicitly, however, the best interests are linked to the child’s objections in four cases. In *Blaga*, the Court accepts that Article 13(2) can be an independent exception to refuse return. However, even if the child has attained sufficient age and maturity, the provision does not imply that children can voice a veto in the process of deciding whether or not they should be returned. Other aspects of the child’s circumstances may be taken into consideration as well.<sup>1337</sup> Similarly, the Court held in *Rouiller* that the child does not have a right to decide where to live. The child’s preference to stay in Switzerland did not amount to an objection when interpreting Article 13(2) strictly.<sup>1338</sup> In *Gajtani*, the Court further specifies that Article 13(2) HCCA does not in any way impose an obligation on domestic authorities to hear the child.<sup>1339</sup> It follows from these examples that the Court is reluctant to equalise the child’s views (or objections) with the best interests of the child. Arguably, however, the Court mistakenly confuses Article 13(2) HCCA with ‘the child expressing a preference regarding his or her place of residence’.<sup>1340</sup>

In a separate opinion to *Raw and others*, judge Nussberger implicitly refers to Article 13(2) HCCA in arguing that it is not in the best interests of children to be represented by the parent they have clearly opposed to return to.<sup>1341</sup> The judge regrets that the Court does not offer a solution for this conflict of interests, which is ‘neither in the best interests of the children, nor in the interest of a fair

<sup>1335</sup> ECHR041 ECtHR *Adzic v. Croatia* [12 March 2015] Application no. 22643/14, p. 28.

<sup>1336</sup> ECHR016 ECtHR *Raban v. Romania* [26 October 2010] Application no. 25437/08, §37.

<sup>1337</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10, §78.

<sup>1338</sup> ECHR034 ECtHR *Rouiller v. Switzerland* [22 July 2014] Application no. 54443/10, §73.

<sup>1339</sup> ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §113.

<sup>1340</sup> ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §112.

<sup>1341</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11, partly concurring and partly dissenting opinion of judge Nussberger, §§4-7.

trial before the Court.<sup>1342</sup> In the same case, dissenting judge Lemmens argues that the domestic authorities were acting in the best interests of the children when founding their refusal to return them to their mother on the basis of their objections (i.e. implicitly referring to Article 13(2) HCCA).<sup>1343</sup>

In a fifth case, *Koons*, the Court explains that the child has been heard and has always strongly opposed return to the USA. Article 13(2) HCCA is not mentioned, but the Court considers that the national authorities have made all necessary efforts to protect the best interests of the child – especially in light of the difficulty of the situation, characterised by continuing disputes between the parties and their inability to put the wellbeing of their child at the heart of their concerns.<sup>1344</sup>

## Article 12 HCCA

Also for Article 12 HCCA, no explicit link was made between the exception and the best interests of the child. However, in four cases, an implicit link was made between the child having settled in his or her new environment and his or her best interest. In *Monory*, for example, the Court implicitly relates the best interests of the child to her degree of adaptation in her new environment. In particular, the Court recalled

the interests of the child are paramount in such cases. Thus it may well have been justified, eight months after the removal from Hungary of the applicant's daughter, for the courts to hold that the child had adapted to her new environment and that it was in her best interests to remain in Romania with her mother although, at that time, no final decision had established her residence there (...).<sup>1345</sup>

In *Hromadka and Hromadkova*, a similar assessment is made. The child was nine years old and had lived with the mother in the State of refuge for the last six years. Against this background,

the Court considers that (...) the child has settled in her new environment in Russia, and that her return to her father's care would have run contrary to her best interests (...). [The father] himself admitted that after such a long – in comparison to the child's life – passage of time the enforcement of the judgment of 2 June 2011 could be harmful to his daughter and would not be in her best interests.<sup>1346</sup>

Finally, also in *Vilenchik*, implicit reference is made to Article 12 HCCA. The Court refers to the boy's settlement in his current environment in Ukraine and notes that in the circumstances of the case, a removal to the USA would be contrary to his best interests.<sup>1347</sup>

In *Ferrari*, the application of Article 12 HCCA by the domestic authorities was mentioned but not linked to the best interests of the child.<sup>1348</sup>

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<sup>1342</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11, partly concurring and partly dissenting opinion of judge Nussberger, §6.

<sup>1343</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11, dissenting opinion of judge Lemmens, §3.

<sup>1344</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01, §§55-56.

<sup>1345</sup> ECHR001 ECtHR *Monory v. Romania and Hungary* [5 April 2005] Application no. 71099/01, §83.

<sup>1346</sup> ECHR038 ECtHR *Hromadka and Hromadkova v. Russia* [11 December 2014] Application no. 22909/10, §163.

<sup>1347</sup> ECHR053 ECtHR *Vilenchik v. Ukraine* [3 October 2017] Application no. 21267/14, §51.

<sup>1348</sup> ECHR042 ECtHR *Ferrari v. Romania* [25 April 2015] Application no. 1714/10, §53.

In *B. v. Belgium*, the Court considers the fact that the child has resided for more than two years in Belgium, speaks Dutch and is perfectly integrated. However, in order to be in line with the HCCA, the Court should not have considered this factor in this case, since the proceedings were brought just within the one year-time period. Article 12 was therefore not applicable. In this case the Court, without explicitly mentioning the best interests of the child, the Court states that enforcing the return judgment would be an infringement of Article 8 ECHR.<sup>1349</sup>

### Article 20 HCCA

Other than the general references in *X. v. Latvia*, *G.S. v. Georgia*, *Phostira Efthymiou and Ribeiro Fernandes and Ferrari* (see above), the content of Article 20 HCCA is elaborated only once, again in *X. v. Latvia*, where the Court states that the rights safeguarded under Article 8 ECHR represent fundamental principles relating to the protection of human rights and fundamental freedoms within the meaning of Article 20 HCCA.<sup>1350</sup> No link with the best interests of the child was made.

### Article 13(1)(a) HCCA

The exception under Article 13(1)(a) HCCA is not further specified in any of the judgments. In *Carlson*, the Court reaffirms that ‘the notions of “consent” and “acquiescence” should be interpreted restrictively and that they have to be expressed unequivocally and unconditionally.’<sup>1351</sup> The father’s consent to the retention is also mentioned in *Raban*.<sup>1352</sup> However, none of these cases have mentioned Article 13(1)(a) HCCA, nor have they established a link to the best interests of the child.

### Impact of the best interests of the child on the Court’s reasoning

The best interests of the child had an impact in 52 cases (see Figure (3)).<sup>1353</sup>

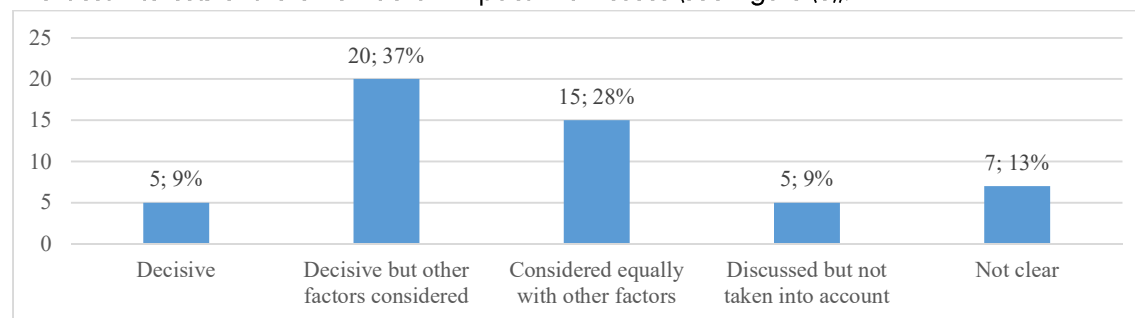


Figure (3) - Impact of the best interests of the child on the final decision

In five cases (9%), the best interests of the child have been decisive for the Court’s reasoning. Both in *Maumousseau*<sup>1354</sup> and in *Koons*,<sup>1355</sup> the Court finds no violation of Article 8 ECHR because

<sup>1349</sup> ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11, §74.

<sup>1350</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, §117.

<sup>1351</sup> ECHR010 ECtHR *Carlson v. Switzerland* [6 November 2008] Application no. 49492/06, §77.

<sup>1352</sup> ECHR016 ECtHR *Raban v. Romania* [26 October 2010] Application no. 25437/08, §37.

<sup>1353</sup> This number (52) is lower than the amount of cases in which the best interests of the child is discussed (55), because in two cases the concept only appears in the dissenting opinion and thus is not decisive. In one case, the best interests are not discussed.

<sup>1354</sup> ECHR007 ECtHR *Maumousseau and Washington v. France* [6 December 2007] Application no. 39388/05.

<sup>1355</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01.

domestic authorities had taken those measures that were necessary to protect the best interests of the child. In *Carlson*, the Court specifies that it would be in the best interests of the child to obtain a rapid decision for prompt return to his habitual environment. The Court links this decision to the father's right to family life under Article 8 ECHR.<sup>1356</sup> Similarly, in *Frisancho Perea*, a violation of Article 8 ECHR was found on the basis of the long duration of the case, which was also interpreted in light of the best interests of the child.<sup>1357</sup> Finally, in *Sneersone and Kampanella*, the Court found that the decision to return the child to Italy constituted a violation of Article 8 ECHR on the basis of an insufficient consideration of the best interests of the child by the national authorities. In particular, the domestic authorities had failed to address the lack of effort by the child's father to seek contact with his child, the potential dangers to the child's psychological health, the inadequacy of the intended safeguards to ensure the child's wellbeing after separation from his mother, as well as the lack of alternative solutions to ensure contact between the child and his father.<sup>1358</sup>

In another twenty cases (37%), the best interests of the child were decisive, but other factors were considered as well. Such factors may relate to the circumstances of the applicant (usually one of the child's parents) whose rights under Article 8 ECHR had been violated but may also include implicit references to the best interests of the child. In *Bianchi*, for example, the Court found a violation of Article 8 ECHR because insufficient action by the national authorities resulted in parental alienation, which was, according to the Court, not only a violation of the father's right to family life, but also contrary to the best interests of the child.<sup>1359</sup> The factor most often referred to in addition to the best interests of the child is the lapse of time caused by the authorities' own handling. This was mentioned in eleven cases.<sup>1360</sup>

Other factors include:

- the failure to take, without delay, all measures that could reasonably be expected from the authorities;<sup>1361</sup>
- the failure to consider whether the abducting parent could return with the child or to prevent unavoidable separation between the child and the primary caregiver;<sup>1362</sup>
- the jeopardy of the present or future relations between the parents and their children;<sup>1363</sup>
- the failure to respect the applicant's contact or visiting rights;<sup>1364</sup>
- the failure to meet procedural requirements under Article 8 ECHR;<sup>1365</sup>

<sup>1356</sup> ECHR010 ECtHR *Carlson v. Switzerland* [6 November 2008] Application no. 49492/06, §§80-81.

<sup>1357</sup> ECHR043 ECtHR *Frisancho Perea v. Slovakia* [21 July 2015] Application no. 383/13, §77.

<sup>1358</sup> ECHR021 ECtHR *Sneersone and Kampanella v. Italy* [12 July 2011] Application no. 14737/09, §§98-93.

<sup>1359</sup> ECHR003 ECtHR *Bianchi v. Switzerland* [22 June 2006] Application no. 7548/04, §99.

<sup>1360</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03; ECHR022 ECtHR *Shaw v. Hungary* [26 July 2011] Application no. 6457/09; ECHR039 ECtHR *M.A. v. Austria* [15 January 2015] Application no. 4097/13; ECHR040 ECtHR *Phostira Efthymiou and Ribeira Fernandes v. Portugal* [5 February 2015] Application no. 66775/11; ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13; ECHR048 ECtHR *K.J. v. Poland* [1 March 2016] Application no. 30813/14; ECHR049 ECtHR *E.S. v. Romania and Bulgaria* [19 July 2016] Application no. 60281/11; ECHR050 ECtHR *G.N. v. Poland* [19 July 2016] Application no. 2171/14; ECHR052 ECtHR *Severe v. Austria* [21 September 2017] Application no. 53661/15; ECHR053 ECtHR *Vilenchik v. Ukraine* [3 October 2017] Application no. 21267/14.

<sup>1361</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03; ECHR037 ECtHR *Cavani v. Hungary* [28 October 2014] Application no. 5493/13; ECHR038 ECtHR *Hromadka and Hromadkova v. Russia* [11 December 2014] Application no. 22909/10.

<sup>1362</sup> ECHR015 ECtHR Grand Chamber *Neulinger and Shuruk v. Switzerland* [6 July 2010] Application no. 41615/07; ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11; ECHR036 ECtHR *V.P. v. Russia* [23 October 2014] Application no. 61362/12.

<sup>1363</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03; ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09.

<sup>1364</sup> ECHR008 ECtHR *P.P. v. Poland* [8 January 2008] Application no. 8677/03; ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09.

<sup>1365</sup> ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09; ECHR028 ECtHR *Row and others v. France* [7 March 2013] Application no. 10131/11.



- the failure to perform an in-depth review of the family situation or the risks linked to it;<sup>1366</sup>
- the failure to strike a fair balance between conflicting interests;<sup>1367</sup>
- the failure to grant the applicant the opportunity to present their case in an expeditious manner;<sup>1368</sup>
- the failure to take into account the length of the child's abduction;<sup>1369</sup>
- the failure of one or both parents to cooperate;<sup>1370</sup>
- the failure to maintain family ties between siblings;<sup>1371</sup> and
- the failure to be sufficiently thorough in the reasoning behind a domestic decision.<sup>1372</sup>

In fifteen cases (28%), the best interests were considered equally with other factors. In *Blaga*, the Court mentions a range of factors: not only does it argue that domestic authorities had failed to meet the urgency of the situation, it also considers whether the domestic courts examined other aspects of the children's circumstances, whether they had sufficiently balanced the applicant's interest of a right to family life against the competing interest of the other parties, whether the conclusions of psychological evaluation reports had been taken into account and to what extent the domestic courts had assessed specific risk factors.<sup>1373</sup> Seven cases mention the delay in proceedings.<sup>1374</sup> (It has to be noted there that only the cases on the basis of Article 8 are taken into account and not those on the basis of Article 6, which may also find a delay to be an infringement of human rights.) The Court also considers the conduct on behalf of the domestic authorities<sup>1375</sup> as well as of the applicant.<sup>1376</sup> In addition, the Court considers whether the domestic jurisdictions had sufficiently considered the family situation.<sup>1377</sup> Procedural requirements under Article 8 ECHR were also mentioned as an equally relevant factor.<sup>1378</sup> In *Iosub Caras* the Court considers the best interest of the child implicitly by stating that 'the adequacy of a measure was also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time could have irremediable consequences for the relations between the children and the parent who did not live with them'.<sup>1379</sup> The court considered this swiftness (in the best interest of the child) together with the fact that the national court should not have issued a decision on the merits.

<sup>1366</sup> ECHR024 ECtHR *Ilker Ensar Uyanik v. Turkey* [3 May 2012] Application no. 60328/09; ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11.

<sup>1367</sup> ECHR045 ECtHR *G.S. v. Georgia* [21 July 2015] Application no. 2361/13; ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12.

<sup>1368</sup> ECHR023 ECtHR *Karrer v. Romania* [21 February 2012] Application no. 16965/10.

<sup>1369</sup> ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11.

<sup>1370</sup> ECHR037 ECtHR *Cavani v. Hungary* [28 October 2014] Application no. 5493/13.

<sup>1371</sup> ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12.

<sup>1372</sup> ECHR046 ECtHR *Vujica v. Croatia* [8 October 2015] Application no. 56163/12.

<sup>1373</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10, §§81-91.

<sup>1374</sup> ECHR001 ECtHR *Monory v. Romania and Hungary* [5 April 2005] Application no. 71099/01; ECHR002 ECtHR *Karadzic v. Croatia* [15 December 2005] Application no. 35030/04; ECHR019 ECtHR *Karoussiots v. Portugal* [1 February 2011] Application no. 23205/08; ECHR032 ECtHR *Lopez Guio v. Slovakia* [3 June 2014] Application no. 10280/12; ECHR042 ECtHR *Ferrari v. Romania* [25 April 2015] Application no. 1714/10; ECHR044 ECtHR *R.S. v. Poland* [21 July 2015] Application no. 63777/09; ECHR051 ECtHR *McIlwrath v. Russia* [18 July 2017] Application no. 60393/13.

<sup>1375</sup> ECHR016 ECtHR *Raban v. Romania* [26 October 2010] Application no. 25437/08; ECHR017 ECtHR *Serghides v. Poland* [2 November 2010] Application no. 3151/04; ECHR029 ECtHR *Prizzia v. Hungary* [11 June 2013] Application no. 20255/12.

<sup>1376</sup> ECHR029 ECtHR *Prizzia v. Hungary* [11 June 2013] Application no. 20255/12.

<sup>1377</sup> ECHR030 ECtHR *Anghel v. Italy* [25 June 2013] Application no. 5968/09.

<sup>1378</sup> ECHR031 ECtHR *Grand chamber X. v. Latvia* [26 November 2013] Application no. 27853/09.

<sup>1379</sup> ECHR005 ECtHR *Iosub Caras v. Romania* [27 July 2006] Application no. 7198/04.

In five cases (11%), best interests were discussed in the judgment but were not taken into account in the final decision. Also, in *Bajrami*, the left-behind father's right to family life was not discussed from the child's perspective.<sup>1380</sup> The authorities' lack of diligence in preventing the abduction in *Tapia Gasca and D.* was admittedly manifest but had been indemnified by the Spanish authorities. The Court found that the authorities had not been lacking in diligence regarding the child's return, despite the absence of results in this respect.<sup>1381</sup> In *Küçük*<sup>1382</sup> and in *Chaborowski*,<sup>1383</sup> the best interest were only discussed as a matter of principle and not further assessed.

In another seven cases (15%), the impact of the best interest assessment on the outcome of the case was not clear from the judgment.<sup>1384</sup>

## Hearing of The Child

As proceedings before the ECtHR are mainly conducted in writing, personal hearings are exceptional. In principle, children could be heard when they are an applicant to the case,<sup>1385</sup> but in none of the 55 cases analysed has the Court heard a child directly. In six cases (10%), however, the Court has elaborated on the hearing of the child in national jurisdictions prior to the ECtHR-proceedings (see also Article 13(2) HCCA above).

The hearing played a role in the Court's assessment of the best interests of the child in four cases. In all of these, the hearing was considered equally with other factors. In *Koons*, the Court refers to the fact that the child had always strongly opposed the idea of having to return to the left-behind parent. The Court also referred to the long-lasting separation conflict between the child's parents and their inability to put the best interests of the child at the heart of their concerns.<sup>1386</sup>

In *Raw & others*, the Court states that the children had clearly demonstrated their objection to return to their mother in the UK. However, the Court considers the fact that these views are not necessarily unchanging, as at some point, one of the children had voluntarily left the father's house to join the mother. The Court further specifies that the HCCA and Brussels IIbis do not include an obligation to follow the children's views.<sup>1387</sup> In *Blaga*, even though the children's objections had been decisive on a domestic level despite their low age (only one of the three children had been over ten years old and met the legal minimum age), the Court nuances that the child's views are only one of multiple reasons to decide on return.

The ECtHR highlights that domestic courts should also consider other aspects of the child's circumstances and should balance competing interests – including the risks entailed by a potential

<sup>1380</sup> ECHR006 ECtHR *Bajrami v. Albania* [12 December 2006] Application no. 35853/04.

<sup>1381</sup> ECHR013 ECtHR *Tapia Gasca and D. v. Spain* [22 December 2009] Application no. 20272/06.

<sup>1382</sup> ECHR020 ECtHR *Küçük v. Turkey and Switzerland* [17 May 2011] Application no. 33362/04.

<sup>1383</sup> ECHR027 *Chaborowski v. Ukraine* [17 January 2013] Application no. 61680/10.

<sup>1384</sup> ECHR004 ECtHR *Lafargue v. Romania* [13 July 2006] Application no. 37284/02; ECHR011 ECtHR *Stochlack v. Poland* [22 September 2009] Application no. 38273/02; ECHR012 ECtHR *Övüs v. Turkey* [13 October 2009] Application no. 42981/04; ECHR014 ECtHR *MacReady v. Czech Republic* [22 April 2010] Application nos. 4824/06 and 15512/08; ECHR018 ECtHR *Dore v. Portugal* [1 February 2011] Application no. 775/08; ECHR047 ECtHR *Henrioud v. France* Application no. 21444/11; ECHR054 ECtHR *Mansour v. Slovenia* [21 November 2017] Application no. 60399/15.

<sup>1385</sup> ECtHR, Rules of Procedure, Rule 63, [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

<sup>1386</sup> ECHR009 ECtHR *Koons v. Italy* [30 September 2008] Application no. 68183/01, §§55-56.

<sup>1387</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11, §94.

separation from the children's current environment, the question whether the children could quickly readapt in case of return.<sup>1388</sup> In *Rouiller*, the Court elaborates on the fact that the child does not have a right to freely choose where to live, but that other factors – although unspecified – should be considered. In this case, the child's preference to stay in Switzerland could not be interpreted as an objection to return, an exception which should be interpreted strictly.<sup>1389</sup> In addition, the Court mentions it has consulted the summary of the child's hearing before the domestic authorities and has respected the child's wish for certain parts of the record to remain confidential.<sup>1390</sup>

In *Gajtani*, the child's views were not decisive due to a loyalty conflict. The Court interpreted the child's objection as a wish to take away his mother's responsibility regarding the abduction, as the child feared to be cut off from his mother when taking contact with his father.<sup>1391</sup> The Court further specifies that Article 13(2) HCCA does not contain an obligation to hear the child.<sup>1392</sup> In *Bianchi*,<sup>1393</sup> it is unknown whether the hearing contributed to determine the best interest of the child.

### Other Information

Other relevant information on the best interest of the child can be found in a number of separate opinions.

The way in which the ECHR relates to the HCCA in terms of the best interest of the child is elaborated in detail by judge Pinto de Albuquerque in his concurring opinion to *X. v Latvia*. He states that:

the Hague Convention is basically a jurisdiction-selection treaty, but it is not blind to substantive welfare issues concerning the individual child involved, since it imposes an assessment of that best interest of the child in Article 13 and of his or her human rights in Article 20. (...) Ultimately, both [the ECHR and the HCCA] provide for the restoration of the status quo in international abduction cases, in harmony with the best interest of the child and human rights. (...) Between the Scylla of a minimalist and automatic application of the Hague defences to return, which would render them void of any substantive content, and the Charybdis of creating a new, free-standing defence of the best interest of the child, overlapping the merits of the custody dispute, the Court has resisted both dangers and chosen the middle solution, which is that the Hague Convention defences to return exhaustively determine what is in the best interest of the child. However, these defences do include the human rights of the child. And they are to be taken seriously. In assessing return orders in international child abduction cases, the Court's remit is limited to the child's welfare-based defences to return in the Hague Convention. (...) The detailed, in-depth examination under the Convention may not, and need not, be wider. It suffices that the available defences to return be interpreted in the light of present-day social conditions, and namely of the sociological trends ascertained in recent years. That was the Grand Chamber's purpose three years ago: *Neulinger and Shuruk* was a call for an evolutive and purposive interpretation of the Hague Convention. (...) Under the

<sup>1388</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10, §§77-81.

<sup>1389</sup> ECHR034 ECtHR *Rouiller v. Switzerland* [22 July 2014] Application no. 54443/10, §§70-73.

<sup>1390</sup> ECHR034 ECtHR *Rouiller v. Switzerland* [22 July 2014] Application no. 54443/10, §69.

<sup>1391</sup> ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §107.

<sup>1392</sup> ECHR035 ECtHR *Gajtani v. Switzerland* [9 September 2014] Application no. 43730/07, §113.

<sup>1393</sup> ECHR003 ECtHR *Bianchi v. Switzerland* [22 June 2006] Application no. 7548/04.

Convention, the abduction of a child triggers the application of a rebuttable presumption that it is in the best interest of the child to be returned as soon as possible to the country of habitual residence. That presumption must be applied unless there are reasonable grounds to believe that the human rights of the child, including his or her Article 8 rights, would be endangered in the event of return. (...) The practical effect of this line of reasoning is that, ultimately, the Court has the final word on the assessment of the best interest and the human rights of the abducted child in Europe, be this prior to the execution of the return order or even after its execution. This line of reasoning also impacts on the remit of the courts in the host country in assessing return applications, in so far as they must examine the situation of the child and the family in accordance with the Convention. In the Member States of the Council of Europe, the judge in the host country has to interpret Articles 12, 13 and 20 of the Hague Convention in the light of the Convention and the Court's case-law. (...) A restrictive reading of the defences, based on an outdated, unilateral and over-simplistic assumption in favour of the left-behind parent and which ignores the real situation of the child and his or her family and envisages a mere 'punitive' approach to the abducting parent's conduct, would defeat the ultimate purposes of the Hague Convention, especially in the case of abduction by the child's primary caregiver. Such a construction of the Hague Convention would be at odds with the human rights and especially the Article 8 rights of the abducted child in Hague return proceedings, respect for which undeniably merges into the best interest of the child, without evidently ignoring the urgent, summary and provisional nature of the Hague remedy. (...) Taking human rights seriously requires that the Hague Convention operates not only in the best interest of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interest of each individual child who is subject to Hague return proceedings.<sup>1394</sup>

In *B. v Belgium*, two concurring judges point out that it is not up to the ECtHR to rule upon the best interest of the child, and even less to substitute its own vision for that of domestic courts. Rather, the Court should examine whether, in the application and interpretation of the provisions of the HCCA, the domestic courts and tribunals have respected all the guarantees of Article 8 ECHR.<sup>1395</sup> In particular, the partly dissenting opinion of judge Lopez Guerra joined by judge Motoc in *Blaga* reveals that the judges do not believe that this Court can deem the Romanian courts' determination of what constituted the best interest of the children as 'unsatisfactory'.<sup>1396</sup> On the other hand, the facts in *R.S. v Poland* made the dissenting judges argue that

[i]n giving effect to the paramount interest of the children, when that interest was so intimately linked to the plight in which the mother had found herself, including in this regard her new place of residence, the domestic courts had to perform an exceptionally delicate balancing exercise. There is nothing to show that this exercise was not carried out correctly. In the context of the applicant's very hostile attitude towards his wife and the trauma suffered by the children because of their father's behaviour, it was legitimate

<sup>1394</sup> ECHR031 ECtHR Grand chamber *X. v. Latvia* [26 November 2013] Application no. 27853/09, concurring opinion of judge Pinto de Albuquerque, relevant passages selected from pp. 41-48.

<sup>1395</sup> ECHR025 ECtHR *B. v. Belgium* [10 July 2012] Application no. 4320/11, concurring opinion of judges Tulkens & Keller, §8.

<sup>1396</sup> ECHR033 ECtHR *Blaga v. Romania* [1 July 2014] Application no. 54443/10, partly dissenting opinion of judge Lopez Guerra joined by judge Motoc, p. 32.

to consider that the best interest of the children would not be served by their immediate return to Switzerland.<sup>1397</sup>

In *Özmen*, the concurring judges regret that there is not enough guidance as to how to combine considerations arising from the obligation to protect the best interest of the child in relation to other relevant factors.<sup>1398</sup>

In *Serghides*, the dissenting judges pointed out that even though it may not be in the child's best interest to return to the United Kingdom today, this should not have prevented the Court from concluding Article 8 had been violated, hinting at a lack of consideration by the majority on this point.<sup>1399</sup>

In *Raw*, partly concurring and partly dissenting judge Nussberger explains that parents representing their child in abduction cases leads to an instrumentalization of the child-victim in adult conflicts. This is contrary both to the best interest of the child as well as to the child's right to a fair trial before the ECtHR. According to judge Nussberger, parents should be denied the right to represent their children in such cases, unless there is a decision by a competent national institution confirming that the prosecution of an application before the Court is in the best interest of the child.<sup>1400</sup>

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<sup>1397</sup> ECHR044 ECtHR *R.S. v. Poland* [21 July 2015] Application no. 63777/09, joint dissenting opinion of judges Nicolaou, Wojtyczek and Vehabovic, §5.

<sup>1398</sup> ECHR026 ECtHR *Özmen v. Turkey* [4 December 2012] Application no. 28110/08, concurring judge Keller, joined by judge Sejo, §11.

<sup>1399</sup> ECHR017 ECtHR *Serghides v. Poland* [2 November 2010] Application no. 3151/04, joint dissenting opinion of judges Mijovic, Bianku and De Gaetano, §6.

<sup>1400</sup> ECHR028 ECtHR *Raw and others v. France* [7 March 2013] Application no. 10131/11, partly concurring and partly dissenting opinion of judge Nussberger, §6.