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Yuliya Chernyak[a)]
https://orcid.org/0009-0001-6968-1882

Child Abduction and Cross-Border Child Protection in Times of Russian-Ukrainian War: Challenges and Comments on the Case-Law

Abstract: Unfortunately, Ukrainian children and their parents are faced with a lot of serious challenges to their rights and the situation as a result of Russian-Ukrainian war. Taking into account these challenges, the author focuses on the rules of two Hague Children's Conventions: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

One of the aims of the article is to compare court decisions, delivered in child abduction cases by Ukrainian courts and courts of the foreign states after February 24, 2022, in order to answer the question about the influence of issues of the security situation in Ukraine on the application of Article 13 (1) (b) of the 1980 Hague Convention.

Attention is also paid to Article 21 of the 1980 Hague Convention and the institution of provisional measures of the 1996 Hague Convention that can be imposed in international child abduction cases, as alternative ways of (judicial) protection of the rights of parents-citizens of Ukraine who remained in Ukraine and lost contact with their children as a result of their removal abroad.

The article also deals with specific issues of jurisdiction of the cases on determining the place of residence under the 1996 Hague Convention and peculiarities of the proceedings on establishing the fact of birth of a child on the temporarily occupied territories

[a)] Assoc. Prof., Institute of International Relations of Kyiv National Taras Shevchenko University, Judge of the Civil Cassation Court within the Supreme Court of Ukraine. E-mail: y.v.chernyak@gmail.com.

of Ukraine, over which Ukraine does not exercise effective control nowadays, particularly applying the rules of the Code of Civil Procedure of Ukraine and the Namibia exception.

All of the abovementioned issues are analyzed, among others, on the basis of the Supreme Court Resolutions.

Keywords: martial law — Ukrainian children — Hague Children's Conventions — child abduction case — jurisdiction – access rights — provisional measures — establishing the fact of birth — temporally occupied territories — Namibian exception

1. Introduction

According to the Office of the General Prosecutor of Ukraine, since February 24, 2022 more than 522 Ukrainian children were killed, more than 1,217 were injured.[1] Ukraine government figures put the number of the forced deportations of Ukrainian children to Russian Federation at 19,500.[2] Millions of the Ukrainian children became internationally displaced because of the Russian invasion in Ukraine. Nearly 1.3 million children migrated and live in the territory of the European Union. In most cases, Ukrainian children were accompanied only by their mothers in European Union states. They have the temporary protection status under the Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (the Temporary Protection Directive 2001/55/EC).[3]

One of the ways warranted by private international law (hereinafter: PIL) for the Ukrainian children and their parents to protect their family law rights during the Russian-Ukrainian war is the application of the Hague Children's Conventions. The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: the 1980

[1] Source: https://www.gp.gov.ua/?fbclid=IwAR1yX7jh5W6Nb86gBHjc2lGvl6I3bNxsyyuOLVa5Ih9dwLV7P5f1IA14RLo [accessed: 5.02.2024].

[2] Source: https://life.pravda.com.ua/society/2023/12/7/258166/ [accessed: 5.02.2024].

[3] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof — URL: https://eur-lex.europa.eu/eli/dir/2001/55/oj [accessed: 5.02.2024].

Hague Convention)[4] is universally accepted instrument that serves to the purpose of the child's return in the cases of the family child abduction, including during and after armed conflicts. The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: 1996 Hague Convention)[5] is applied to ensure the protection of children, with special provisions for the protection of and assistance to children temporarily or permanently deprived of their habitual residence, including in emergency situations, such as war.

2. Child return cases under the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Ukraine accessed to the 1980 Hague Convention according to the Law of Ukraine from January 11, 2006, and it entered into force for Ukraine on September 1, 2006.[6]

At the time, when the 1980 Hague Convention was still at the draft stage, it was assumed that the most likely defendant in child abduction cases would be a father deprived of custody rights who decides unilaterally to remove the child to another place of residence. In fact, the modern reality in Ukraine, as a result of Russia's armed aggression, turned out to be completely different. In the great majority of claims filed under the 1980 Hague Convention, the status of defendant has mother who went abroad with her children during the war. Very often the ground of such claims is not the removal but the retention of a child-citizen of Ukraine who left Ukraine following the verbal agreement of the left-behind father, and these circumstances may be seen by the fathers as wrongful retention of children by their mothers from their usual place of residence in Ukraine. We can model a typical situation that forces a parent, a citizen of Ukraine,

[4] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 [accessed: 5.02.2024].

[5] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children — URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70 [accessed: 5.02.2024].

[6] Law of Ukraine from January 11, 2006 on the Accession of Ukraine to the Convention on the Civil Aspects of International Child Abduction of 1980, "Bulletin of Verkhovna Rada of Ukraine" 2006, № 43.

to apply to the Ministry of Justice of Ukraine (as the body performing the functions of the Central Authority under the 1980 Hague Convention) with a request for assistance in returning the child to Ukraine: in February 2022 after the outbreak of war in Ukraine children came to the Republic of Poland with their mothers upon the consent of their father, but in September 2023 the said mothers did not agree to return with children to Ukraine, and these circumstances may be seen by the fathers as alleged wrongful retention of children by their mothers from their usual place of residence in Ukraine.

It is necessary to remind that in March 1, 2022 the Cabinet of Ministers of Ukraine changed the rules for crossing the state border by citizens of Ukraine, approved by Resolution No. 57 dated January 27, 1995, and simplified the procedure for going abroad, in particular: for leaving Ukraine by children who have not reached the age of 16, accompanied by one of their parents, grandmother, grandfather, adult siblings, stepmother, stepfather or other persons authorized by one of the parents in a written statement certified by the guardianship and trusteeship body, is carried out without the notarized consent of the other parent.[7] But it is obvious that the introduction of a simplified procedure for crossing the state border during the martial law in Ukraine is a "secondary" reason for the emergence of judicial disputes in accordance with the Hague Convention of 1980, the main reason, as before the war, is disorder of family relations between parents of children.

The courts of the European Union states have resolved a number of disputes regarding the return of Ukrainian children who have found shelter in the foreign territories. According to the Ministry of Justice of Ukraine, as of January 12, 2024, there were at least eleven cases of actual return of a child to Ukraine after February 24, 2022, on the basis of court decision: the United Kingdom — 2 (1 return to Poland), the Republic of Ireland — 1, Germany — 3, Poland — 1, Hungary — 1, Sweden — 1, Denmark — 2 (1 appeal complaint has been lodged). For example, on October 4, 2022, a Polish court ordered a child's return to Ukraine and the child was handed over to the applicant in the courtroom; on July 12, 2022, a Swedish court ordered the return of a child from Sweden to Ukraine. An Italian court closed the court proceedings regarding return because the applicant stated at the court hearing that he preferred return of the child after the end of martial law. Courts in Poland, the United Kingdom of Great Britain and Northern Ireland, Switzerland, Latvia, Belgium,

[7] Resolution of the Cabinet of Ministers of Ukraine of March 1, 2022, No. 179 on Amendments to the Clause 24 of the Rules for Crossing the State Border by Citizens of Ukraine, "Ofiziyniy Visnuk Ukrainy" 1.04.2022, No. 25.

and Germany closed the proceedings in child abduction cases concerning Ukrainian children by its rulings due to the settlement agreements signed by the parents, which, in particular, provide that the child will stay with the mother abroad until the end of martial law in Ukraine, after that the mother and child will return to Ukraine. The proceedings in a Hungarian court resulted in the mediation agreement. Seven children were returned voluntarily to Ukraine before initiation of the court proceedings regarding return.[8]

But in the majority of cases on a claim for return of the child to Ukraine adjudicated in 2022—2023 the foreign courts delivered non-return decisions (50): Austria — 4, Belgium — 3, Bulgaria — 1, the United Kingdom — 2, Denmark — 1, Estonia — 1, Italy — 2, the State of Israel — 1 (the appeal complaint has been lodged), Mexico — 1, Germany — 6, Norway — 2, Poland — 18, Portugal — 1, Finland — 2, France — 1, Czech Republic — 2, Switzerland — 2. In some cases non-return decision was pursuant to Article 12 (expiration of the one-year period), while in some it was Article 3 of the 1980 Hague Convention as non-grounded application, but mainly it was based on security grounds, with the application of Article 13 (1)(b) of the 1980 Hague Convention for the reason of the war in Ukraine: "returning the child to Ukraine would be associated with a grave risk of physical or psychological harm for the child." In the motivation part of such non-return decisions courts state that the whole territory of Ukraine has been classified as a warzone since February 24, 2022; from the beginning of the military conflict in Ukraine, Russian forces have been using large numbers of missiles and other long-range artillery weapons which have not just affected eastern Ukraine, but have indeed also hit targets in other parts of the country. A further factor that is also pointed by the courts is the overall development of the conflict, specifically, the fact that there are currently no tangible prospects of the conflict being ended; in fact, the trend appears to be towards further escalation.

A general overview of the practice of foreign courts on consideration of cases on the return of Ukrainian children and experience of the International Hague Network of Judges allows to indicate one of the positive trends: more often the judge of the foreign court deciding upon the Ukrainian child return application asks through the International Hague Network of Judges a Liaison Ukrainian Judge information whether the

[8] *Main challenges for the Ministry of Justice of Ukraine as the Central Authority for the implementation of the Convention on the Civil Aspects of International Child Abduction during the ongoing military aggression*, HCCH Roundtable, *Cross-border protection of children from Ukraine. Application of HCCH Conventions*, Friday, January 12, 2024 — URL: https://www.hcch.net/en/secure-portal/other-hcch-meetings/child-protection-ukraine [accessed: 5.02.2024].

certain region in Ukraine (city or town) is under the occupation by Russia (or are there any military operations in this area). The list of territories, in which warfare is (has been) conducted or which are temporarily occupied by Russia, is approved by the Order of the Ministry for Reintegration of Temporary Occupied Territories of Ukraine of December 22, 2022.[9] This list is regularly updated. So, in each particular case the Liaison Judge of the International Hague Network of Judges in Ukraine or the Ministry of Justice of Ukraine may provide a foreign court with the information on security situation in the certain region. From my point of view, this information will contribute to a fair and comprehensive consideration of the case, taking into account the best interests of a child.

Martial law is the most common but not the only reason for the judicial authority of the requested State to refuse to order the return of the child to Ukraine on the basis of Article 13(1)(b) of the 1980 Hague Convention. For example, according to one of the cases, which was publicized in the Ukrainian media thanks to the lawyers who represented the father, a citizen of Ukraine. In the said case an Estonian court, considering a case on the return of a child to Ukraine, concluded that the very removal of a child from its place of residence in Ukraine without the consent of the child's father was unlawful within the meaning of Article 3 of the 1980 Hague Convention. However, the court refused to return the child to the father, since several criminal proceedings were opened against the mother in Ukraine under Article 126-1 of the Criminal Code of Ukraine — committing domestic violence against the child and his father. Namely, the court stated that it "may refuse to return the child in a situation where the child's mother cannot travel with this child due to criminal proceedings against her, instigated at the request of the father. And if the child's mother cannot return [to Ukraine], this will cause mental suffering to the child." Thus, the child remained in Estonia with the mother who illegally took the child away and against whom a pre-trial investigation is being conducted in Ukraine.[10]

As for the national courts of Ukraine, in peacetime application of the provisions of the 1980 Hague Convention considered mainly cases on the return of children who were in Ukraine to countries of their permanent

[9] The regularly updated list of territories where hostilities continue, or are temporarily occupied by the Russian Federation, is available here: https://zakon.rada.gov.ua/laws/show/z1668-22#Text [accessed: 5.02.2024].

[10] *Hunting or Caring? The Court Returned the Child of the Ukrainian Woman Who Was Taken Away by the French Social Services*, "Mirrow of the Week," 20 December 2023 — URL: https://zn.ua/eng/hunting-or-caring-the-court-returned-the-child-of-the-ukrainian-woman-who-was-taken-away-by-the-french-social-services.htm [accessed: 5.02.2024].

residence. Since the beginning of its operation (November 2017), the Supreme Court has considered almost 60 cases of this category. During the war years, the number of these cases decreased. On the other hand, the Ministry of Justice of Ukraine receives almost every day the applications for child return from a left-behind parent — a father or a mother, who stayed in Ukraine.

Certainly, martial law in Ukraine has influenced the list of circumstances forming the subject of proof in child abduction cases. Particularly the issues of the security situation and restrictions related to the conduct of hostilities and their consequences are added to the "traditional" circle of legal facts of the subject of proof in this category of cases: 1) the fact that the claimant has custody rights over the child; 2) the fact of exercising these rights (i.e., fulfilling parental rights and responsibilities) by the plaintiff at the time of the illegal transfer of the child; 3) the fact of illegal removal or retention of a child, including proving the child's permanent (habitual) place of residence; 4) the grounds for which, in accordance with Articles 12, 13 and 20 of the Convention, the issuance of an order for the return of the child may be refused.

As for the the practice of the Civil Cassation Court within the Supreme Court, it indicates that the very fact of the introduction of martial law in the territory of Ukraine is not a sufficient basis for the satisfaction of the claim on returning the child from Ukraine to the state of his/her previous habitual residence. Each case requires the court to examine the entire history of the child's family relationship with each of his/her parents, to clarify and to compare a number of factors that characterize the child's life in the state of his/her previous habitual residence and in the state to which he/she was removed or kept against the will of one of the parents.

For instance, in case No. 308/1403/20 on ensuring a Ukrainian child's return to Hungary, adjudicated by the Supreme Court in April 2023, the Supreme Court revoked the judgment of the appeal court and upheld (with a change of reasons) the judgment of the court of first instance on the refusal to return the child to Hungary. In its resolution the court established that the minor was taken from Hungary to Ukraine by his parents (plaintiff and defendant) on December 21, 2018, the child's father was also present at the border crossing during his son's removal and gave verbal consent for the child's stay with mother in Ukraine. So, at the time of consideration of the case by the court of cassation (the Supreme Court), the child was four-years-eight-months-old, of which only five months the child lived in Hungary, and since December 21, 2018 (i.e. for more than four years) he has been living in Ukraine with his mother. Then the Court concluded that the child is at an age when he needs an emotional connection with his mother, which is the key to his harmonious development.

On the basis of these facts the Court referred to paragraph b of Article 13 of the 1980 Hague Convention ("there is a grave risk that his or her return would expose the child to psychological harm or otherwise place the child in an intolerable situation") and ruled that a child should not be separated from his mother, the possible separation of the child from his mother and change of his place of residence from Ukraine to Hungary, where the child does not know anyone from the father's side of the family, will be stressful for him, will cause him psychological harm and will not promote his best interests.[11]

In the case No. 344/6604/21 the Supreme Court agreed with the conclusion of the court of appeal that the relevant and admissible evidence examined in this case was sufficient to confirm the plaintiff's right to return the child to the Kingdom of Spain. The defendant (mother) did not prove the circumstances of the child's acclimatization and socialization in Ukraine (the state to which the child was removed). In its resolution the court also referred to the security factor and noted that Ukraine as the Contracting State to the 1989 Convention on the Rights of the Child has an obligation to ensure to the maximum extent possible the survival and development of the child (Article 6 of the Convention). When assessing the return of a child to the Kingdom of Spain it is necessary to take into account the introduction of martial law in Ukraine under the Decree of the President of Ukraine No. 64/22 at 5:30 a.m. on February 24, 2022.[12]

Due to the objective circumstances (war, removal of a child abroad and settlement of a child in his or her new environment), situations when one of the parents applies to the court with the demand to return a child after expiration of one year period, provided in Article 12 of the 1980 Hague Convention, and as a result the authority refuses to order the return of a child, are frequent.

This leads to the reduction of the number of cases on the return of a child. At the same time the issue of other, alternative ways of (judicial) protection of the rights of parents-citizens of Ukraine who remained in Ukraine and lost contact with their children as a result of their removal abroad, becomes more relevant. It seems relevant to remind that the purpose of the 1980 Hague Convention, despite its (full) name, is not only to ensure the immediate return of children illegally removed to or retained in any of the Contracting States, but also "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States" (Article 1). The mechanism for

[11] Resolution of the SC of April 5, 2023 in the case No. 308/1403/20 — URL: https://reyestr.court.gov.ua/Review/110147132 [accessed: 5.02.2024].

[12] Resolution of the SC of April 23, 2023 in the case No. 344/6604/21 — URL: https://reyestr.court.gov.ua/Review/109854954 [accessed: 5.02.2024].

implementing this task of the Convention is defined by Article 21 of Chapter IV "Rights of Access." Therefore, the parent who is currently deprived of the possibility to see and communicate with the child can apply for the implementation of the right on access to the child who lives in a foreign country. As for the practice of applying Chapter IV (Article 21 of the Convention) by Ukrainian courts, it is currently insignificant compared to the application of Chapter III "Return of Children."

Another possible way to protect the right to access is to apply to the foreign court of the country where the child currently lives with a statement on the application of temporary protective measures. Article 7(b) of the 1980 Hague Convention imposes on the Central Authorities the obligation to take all appropriate measures to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures. The 1980 Hague Convention is supplemented by the 1996 Hague Convention, which distinguishes two types of provisional measures that can be imposed in international child abduction cases. These are measures for which the authority of the Contracting State where the child is habitually resident has jurisdiction (Article 5) and urgent protective measures that are imposed by the authority of the Contracting state where the child is unlawfully resident (Article 11). Urgent protective measures referred to in Article 11 may be taken by the authorities of any Contracting State in whose territory the child or assets belonging to the child are present, but only in cases of urgency.[13] According to the part 1 of Article 11 of the 1996 Convention the hosting countries have jurisdiction to take urgent measures only. And in compliance with part 2 of Article 11 of the Convention, such urgent measures with regard to a child habitually resident in Ukraine shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10, that is Ukraine, have taken the measures required by the situation.

In Ukrainian law, provisional measures correspond to the institution of securing a claim, and during 2021—2023, the Civil Cassation Court within the Supreme Court has already formed the practice of applying this institution in child abduction cases.

In the Resolution of the Supreme Court of February 14, 2022 in the case No. 754/7569/21 (the case on the father's claim on declaring removal and retention of a child in the territory of Ukraine illegal and the return of the child to his place of permanent residence in Canada) the court concluded that, taking into account the provisions of clause (b) of Article 7(2) and Article 12 of the 1980 Hague Convention, plaintiffs in cases on the

[13] M. Župan, S. Ledić, M. Drventić, *Provisional Measures and Child Abduction Proceedings*, "Pravni Vjesnik" 2019, Vol. 35, No. 1, pp. 9—31.

return of a child to a foreign country may submit to the court a motion to take measures to secure the claim. In particular, such security measures may include banning a child from crossing the state border of Ukraine in any form of accompaniment. After all, the method chosen by the plaintiff to secure the claim is an adequate measure for the purpose of effective execution of judgment, if it is adopted in favor of the plaintiff. However, this method of securing a claim is only available for categories of disputes under the Convention.[14]

Another example of the application of the institution of securing a claim in child abduction case is the Resolution of the Civil Cassation Court of August 31, 2022 in the case No. 545/3933/21 (the case on the father's claim for the return of a child to the previous place of residence in the United Kingdom of Great Britain and Northern Ireland). The plaintiff applied to the Ukrainian court with this claim in December 2021. In January 2022 he filed an application for securing the claim by means of establishing by the court the defendant's obligation to ensure the systematic visits and communication of the child with the father, as well as to provide information about the child. The Supreme Court revoked the resolution of the appeal court and upheld the ruling of the first instance court, which had secured the claim by obliging mother to ensure the visitation and communication of the father with the child during the trial, "taking into account the right of father to personal communication with the child, his attitude to the performance of his duties, the absence of the grounds that limited the right to such communication, as well as the fact that father's meetings with the child and their communication would contribute to the restoration and establishment of emotional relations between father and the child, and this circumstance would correspond to the legal interests of both father and the child, which in turn could eliminate the threat of non-execution or difficulty in the execution of a possible judgment on removing the child."[15]

[14] Resolution of the SC of February 14, 2022 in the case No. 754/7569/21 — URL: https://reyestr.court.gov.ua/Review/103871642 [accessed: 5.02.2024].

[15] Resolution of the SC of August 31, 2022 in the case No. 545/3933/21 — URL: https://reyestr.court.gov.ua/Review/106264394 [accessed: 5.02.2024].

3. Cases on determining the place of residence of a child under the 1996 Hague Convention: The issue of jurisdiction

The 1996 Hague Convention was adopted by Ukraine on the basis of the Law of Ukraine from September 14, 2006[16] and entered into force for Ukraine on February 1, 2008. The said agreement is known as the Hague Convention on cross-border child protection, because it seeks to give international protection to children of up to 18 years of age by establishing: 1) which country has jurisdiction to employ measures to protect a child or their property; 2) which law is applicable for exercising this jurisdiction; 3) which law applies to parental responsibility; 4) that the protection measures are recognized and enforced in all signatory countries; 5) cooperation between signatory countries (Article 1).

According to the general rule of jurisdiction provided by the Convention, measures directed to the protection of the child's person or property should be taken by the judicial or administrative authorities of the Contracting State of the habitual residence of the child (Article 5).

Articles 6 and 7 of the 1996 Hague Convention set out exceptions to the general rule of jurisdiction, that is, the instances in which jurisdiction may lie with the authorities of a Contracting State in which the child is not habitually resident. These exceptions cover three groups of children: 1) refugee children; 2) internationally displaced children; 3) children who were wrongfully removed or retained.

As to the Ukrainian children under the temporary protection, the National Social Service of Ukraine (Central Authority of Ukraine under the 1996 Hague Convention) has constantly underlined that the Ukrainian children are not refugee children and not the children who, due to disturbances occurring in their country, are internationally displaced. Disturbances, according to glossary, mean expressing dissatisfaction of somebody, protest against somebody or something. "The disturbances occurring in their country" means the threat forcing children to leave their country of habitual residence and to obtain the refugee status due to disturbances caused, for instance, by the government of Ukraine, a so-called internal threat. But current situation demonstrates that Ukrainian

[16] Law of Ukraine from September 14, 2006 on the Accession of Ukraine to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, "Bulletin of Verkhovna Rada of Ukraine" 2006, № 43.

children have left and are still leaving Ukraine for a reason of disturbances caused by Russia's aggression, a so-called outside threat. What the cases mentioned in Article 6 of the Convention, such as fleeing from disturbances occurring in their country and obtaining a refugee status, have in common is the reason that is the threat coming from the country of habitual residence.[17] So, it is necessary to stress that Ukraine is not the country creating dangerous life conditions for the children but the aggressor state is Russia. The Ukrainian children were fleeing from military aggression of the neighboring country but not from disturbances caused by the Ukrainian power. Hence, Ukraine as the country is not a source of threat to them. The Ukrainian children have left Ukraine to be granted temporary protection in the territories of foreign states. Exactly in view of this fact, Article 6 of the Convention shall not be applied to the Ukrainian children. Article 5 of the Convention is to be applied following mentioned above.

The "habitual residence of the child" provided by the Article 5 of the 1996 Hague Convention as jurisdictional criterion corresponds to the interests of both the child and justice, and seems quite logical. The judicial or administrative authorities of the Contracting State of the habitual residence of the child are geographically most accessible to the child and can objectively examine the conditions of the child's living and upbringing. From this point of view, general jurisdictional rule of the 1996 Hague Convention prevails over the rules of jurisdiction laid down in the bilateral treaties of Ukraine on legal relations and legal assistance in civil and family matters, which are based on child's nationality as the criterion of jurisdiction in cases concerning legal relations between children and parents.[18] So, national courts of the Contracting States of the 1996 Hague Convention may apply its ground of jurisdiction in a much larger number of cases concerning children-Ukrainian citizens than it is possible under the jurisdictional rules of the bilateral treaties of Ukraine with these states.

On the other hand, the concept of habitual residence of the child, both as the jurisdiction rule and as conflict of laws principle, is not easy to apply and raises a number of practical issues. Because the concept of "habitual residence" is not defined by the 1996 Hague Convention or any other

[17] Report of the National Social Service of Ukraine, HCCH Roundtable, *Cross-border protection of children from Ukraine. Application of HCCH Conventions*, Friday, January 12, 2024 — URL: https://www.hcch.net/en/secure-portal/other-hcch-meetings/child-protection-ukraine [accessed: 5.02.2024].

[18] See e.g. part 3 Article 28 of the Treaty between Ukraine and Republic of Poland on legal assistance and legal relations in civil and criminal cases dated May 24, 1993, "Ofiziyniy Visnuk Ukrainy," 4.12.2006, No. 47.

international instrument, it has to be determined by judicial authorities on a case-by-case basis on the ground of the actual circumstances.

In the European Union, decisions of the CJEU, which provides official interpretation of the European Union Regulations, is a significant help in solving the problem of qualifying the habitual residence of a child as a criterion for determining international jurisdiction. Summarizing the CJEU case-law, habitual residence of the child:

— is determined according to the criterion of proximity and aims to safeguard the best interests of the child;
— in short: it is the place, which reflects some degree of integration by the child in a social and family environment;
— factors to take into account: duration, regularity, conditions, and reasons for the stay; consideration for the child's age; tangible steps as indicators of a change in habitual residence;
— is to be determined on a case-by-case basis for each child.[19]

In many of its resolutions the Supreme Court of Ukraine stated the thesis of the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* that "since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of a child for the purposes of this Convention"[20] and summarized that habitual residence corresponds to a place that reflects a certain degree of integration of the child into the social and family environment, for this purpose the following circumstances should be taken into account: in particular, the duration, regularity, conditions and reasons for staying in the territory of a Member State and the family's move to that state, the child's nationality, place and conditions of school attendance, language skills, as well as the child's family and social relations in that state. Habitual residence is confirmed by the attendance at a (pre)school educational institution, various clubs; it is based on the results of the established circumstances: the child is undergoing a medical examination, the child has friends, hobbies, the child has stable family ties and other facts that indicate that the child considers his or her place of residence to be permanent, comfortable and the place of residence of his or her family.[21]

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[19] See, e.g., Judgments of the CJEU in cases: C-523/07, C-512/17, C-497/10, C-499/15.

[20] *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, Hague Conference on Private International Law, 2014, p. 40.

[21] Resolution of the Supreme Court of 08 March 2023 in the case No. 607/23708/21— URL: https://reyestr.court.gov.ua/Review/109479775; Resolution of the Supreme Court of 1 November 2022 in the case No. 201/1577/21 — URL: https://reyestr.court.gov.ua/Review/107291658 [accessed: 5.02.2024].

Professor Mateusz Pilich rightly notes that the 1996 Hague Convention provides for a high degree of intensity of a person's ties with the territory of the state. This is difficult to achieve if it is only a temporary movement of a child between states. In other words, leaving Ukraine for Poland only with the aim to protect oneself from the danger of war does not automatically entail the loss of the previous residence in the former state and the creation of a new permanent residence abroad, especially when the child does not show signs of integration into the host society, does not attend school there, does not make efforts to learn the language, etc.[22]

According to the case-law, depending on the factual circumstances of each individual case, some Ukrainian children may have kept their habitual residence in Ukraine and some children may have acquired a new habitual residence outside of Ukraine.

According to the part 2 of Article 5 of the 1996 Hague Convention, subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the state of the new habitual residence have jurisdiction over this child. It means that jurisdiction follows the habitual residence of the child so that when the child's habitual residence changes to another Contracting State, the authorities of the State of the new habitual residence will have jurisdiction.

The application of this jurisdictional rule in Ukrainian case-law is illustrated by two resolutions of the Supreme Court in cases on determining the child's place of residence. Both cases concern a child — a citizen of Ukraine who left Ukraine for another state. However, the time when this departure took place and other circumstances in these cases differ.

Situation 1. It was established by the court and not disputed by the parties that the minor child, a citizen of Ukraine, resides in the Federal Republic of Germany, has been granted a permit for temporary residence dated May 25, 2021, until May 24, 2024, and enrolled in the first grade of a primary school located in the Federal Republic of Germany.

The Supreme Court, in essence, stated:

The plaintiff (the child's mother) filed to the Ukrainian court a lawsuit for determining the child's place of residence in July 2021, so it was after the child had acquired the right for temporary residence in the Federal Republic of Germany.

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[22] M. Pilich, *Jurysdykcja i prawo właściwe dla stosunków między rodzicami a dzieckiem w relacjach polsko-ukraińskich,* "Problemy Prawa Prywatnego Międzynarodowego" 2022, Vol. 31, p. 34 — URL: https://journals.us.edu.pl/index.php/PPPM/article/view/14798/11691 [accessed: 5.02.2024].

The claim in this case is not subject to the jurisdiction of the national courts of Ukraine. That is why the courts of previous instances had no legal grounds to consider the claim on the merits. The courts should apply paragraph 1 of part one of Article 255 of the Code of Civil Procedure of Ukraine, according to which the court shall close the proceedings by its ruling if the case is not subject to review by the court to which the statement of claim has been submitted.[23]

Situation 2. The court of the first instance was considering a case following the mother's claim on determining the child's place of residence and the father's counterclaim on determining the child's place of residence. The court of the first instance closed the proceedings on the counterclaim on the basis of paragraph 1 of part one of Article 255 of the Ukrainian Code of Civil Procedure, considering that this claim was subject to the jurisdiction of the Irish court (as the court of the state where a child now resides). The Court of appeal canceled this judgment and reverted the case for the new consideration by the court of the first instance. The Supreme Court left the judgment of the court of appeal unchanged, for the following reasons:

In this case the Supreme Court found that both at the time of the opening of the proceedings in this case on May 31, 2021, in the initial claim, and at the time of the filing of the counterclaim on June 9, 2021, in the dispute over the child's place of residence, the permanent place of residence of both the boy's parents — the parties to the case, and the child himself was in Ukraine. This fact was not disputed by the parties. As a result of the military aggression of the Russian Federation against Ukraine, the plaintiff and her son left Ukraine, in particular, according to copies of their passports, they crossed the border of Ukraine with Romania on March 6, 2022 and subsequently arrived in Ireland, where they have been living until then.

Thus, given that the child's permanent place of residence at the time of the opening of the proceedings was Ukraine, the relevant Ukrainian court has jurisdiction to resolve this dispute over the child's place of residence.[24]

It is necessary to mention that in this case the Supreme Court applied not only Article 5 of the 1996 Hague Convention, but also Article 75

[23] Resolution of the Supreme Court of June 28, 2023 in the case No. 372/2558/21 — URL: https://reyestr.court.gov.ua/Review/111998989 [accessed: 5.02.2024].

[24] Resolution of the Supreme Court of June 12, 2023 in the case No. 359/2356/21 — URL: https://reyestr.court.gov.ua/Review/111647645 [accessed: 5.02.2024].

(part 1) of the Law of Ukraine on PIL,[25] which states the principle of *perpetuatio fori* (the principle of inadmissibility of change of jurisdiction): "Jurisdiction of the courts of Ukraine for cases with a foreign element is determined at the time of the opening of the proceedings in the case, despite the fact that in the course of the proceedings the grounds for such jurisdiction disappeared or changed."

4. Peculiarities of the proceedings on establishing the fact of birth under martial law

Military actions of the Russian Federation in Ukraine have led to new categories of cases. For many Ukrainian people the following question has become relevant: Can a child born in the occupied territory of Ukraine (e.g. in Kherson or Mariupol) obtain Ukrainian documents? According to the circumstances of typical cases, a woman gives birth to a child in a city that was fully (partially) occupied at the time, so she and her husband cannot obtain a medical document required for the state registration and obtaining a birth certificate at the registry office (cannot register civil status acts in the usual administrative procedure). Therefore, they ask the Ukrainian court to establish the fact that their child was born in Ukraine.

Such fact is established in a separate proceeding — a type of separate (non-litigious) civil proceeding in which civil cases are considered to confirm the presence or absence of legal facts relevant to the protection of the rights, freedoms and interests of a person. Article 317 of the Code of Civil Procedure of Ukraine provides for a special procedure for establishing the fact of birth/death of a person in the territory where martial law or a state of emergency has been introduced, or in the temporarily occupied territory of Ukraine, defined as such in accordance with the law. Significant amendments to Article 317 of the Code of Civil Procedure of Ukraine were introduced by the Law of Ukraine No. 2345-IX dated July 1, 2022 on amendments to certain legislative acts of Ukraine regarding the peculiarities of proceedings in cases of establishing the fact of birth or death of a person in martial law or a state of emergency and in the

[25] Law of Ukraine on Private International Law, June 23, 2005, "Bulletin of Verkhovna Rada of Ukraine" 2005, № 32.

Temporarily Occupied Territories (entered into force on August 7, 2022).[26] These amendments relate to several procedural issues: jurisdiction, circle of applicants, time limits for consideration of the case and execution of the issued judicial decision. An application for establishing the fact of birth of a person under martial law or on the temporarily occupied territory may be filed with any local court outside such territory of Ukraine administering justice, regardless of the applicant's place of residence. The circle of persons who may file an application has been expanded — in addition to parents, family members, guardians, trustees, an application may be filed by a person who maintains and educates a child. Article 317 of the Code of Civil Procedure of Ukraine establishes immediate consideration upon receipt of the relevant application to the court and immediate execution of the judgment which is not suspended as a result of appealing.

In Resolution of November 23, 2022 in the case No. 759/7001/22 (on the application for establishing the fact of the birth of a male child in Simferopol, Autonomous Republic of Crimea, Ukraine; establishing information about his parents: mother — citizen of Ukraine; father — citizen of Ukraine) the Supreme Court underlined that the applicant is not obliged to provide the court with a written refusal of the civil registry office to register the birth: "The rejection to open proceedings in the case of establishing the fact of birth in the temporarily occupied territory of Ukraine on the grounds of prior failure to apply to the civil registry office, failure to receive a refusal to conduct state registration of birth and the need to further appeal such a refusal in administrative proceedings is not based on the provisions of the current legislation, since the establishment of such a fact by the court is directly provided for in Article 317 of the Civil Procedure Code of Ukraine, which does not require applicants to take other."[27]

In order to establish the fact of a person's birth under martial law or in the temporarily occupied territory of Ukraine the court researches and evaluates not only a medical certificate of the child's stay under the supervision of a medical institution of the form No. 103-1/o, approved by the order of the Ministry of Health of Ukraine No. 545 of 8.08.2006, but also other documents which confirm the facts of a person's birth, namely: an individual pregnancy card of a woman, an act of witnesses on the birth of a child (parents, friends, neighbors), present at the birth, in case of birth of a child outside a health care facility etc.

[26] The Law of Ukraine on amendments to certain legislative acts of Ukraine regarding the peculiarities of proceedings in cases of establishing the fact of birth or death of a person in martial law or a state of emergency and in the Temporarily Occupied Territories, July 1, 2022, "Ofiziyniy Visnuk Ukrainy," 16.08.2022, № 63.

[27] Resolution of the Supreme Court of November 23, 2022 in the case No. 759/7001/22 — URL: https://reyestr.court.gov.ua/Review/107677136 [accessed: 5.02.2024].

Among the most significant questions is this category is the one regarding the assessment of documents issued in the uncontrolled territories as evidence of the fact of birth of a child. Very often the applicant submits a medical birth certificate and/or marriage certificate issued by the occupation authorities of the Russian Federation in order to confirm the fact of person's birth. As a result, the Ukrainian judicial practice faced the task to decide whether to accept or to refuse the acceptance of these documents as evidence. According to parts one through three of Article 9 of the Law of Ukraine of 15.04.2014 (as amended by the Law of Ukraine of 29.06.2023) on Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine, state and local government bodies that are formed in accordance with the Constitution of Ukraine and the laws of Ukraine, their officials and officers in the temporarily occupied territory act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine. Any bodies, their officials and officers in the temporarily occupied territory and their activities are illegal if these bodies or persons are established, appointed or elected in a manner not provided for by law.[28] So, the general rule is that any act (decision, document) issued by the bodies and/or persons referred to in part two of Article 9 of the law in question is invalid and does not create legal consequences. But it is necessary to point the exception, provided by the third part of the above Law of Ukraine, for documents confirming the fact of birth, death, registration (dissolution) of marriage in the temporarily occupied territory, which are attached to the application for state registration of the relevant civil status act.

These provisions of the law are consistent with the Advisory Opinion of the International Court of Justice of June 21, 1971 "Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)" that is known as the Namibia exception and was repeatedly upheld by the ECHR (*Loizidou v. Turkey*, judgment of December 18, 1996, *Cyprus v. Turkey*, judgment of May 10, 2001, *Mozer v. the Republic of Moldova and Russia*, judgment of February 23, 2016). In this opinion the International Court of Justice states that UN member states are obliged to recognize the illegality and invalidity of the continuing presence of South Africa in Namibia, "while official documents issued by the South African government on behalf of or in relation to Namibia are illegal and

[28] Law of Ukraine on Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine, April 15, 2014, "Bulletin of Verkhovna Rada of Ukraine" 2014, № 26.

invalid, this invalidity cannot be applied to acts such as the registration of births, deaths and marriages."[29]

In the abovementioned case No. 759/7001/22 on the application for establishing the fact of the birth of a male child in Simferopol, Autonomous Republic of Crimea, Ukraine, applicants submitted among other documents also a copy of the birth certificate of a male child, issued on March 1, 2022 by the so-called Yalta City Civil Registration Department of the Department of Civil Registration of the Ministry of Justice of the Republic of Crimea. By its Resolution of November 23, 2022 in this case Supreme Court, bearing in mind the Namibia exception as indicated by the ICJ and the ECHR, determined that the obligation to ignore, not to take into account the actions of the existing *de facto* bodies and institutions (occupation authorities) is far from absolute, the recognition of acts of the occupation authorities in the limited context of protecting the rights of residents of the occupied territories does not legitimize such authorities in any way. The Court underlined that when considering an application for establishing the fact of birth in the temporarily occupied territory of Ukraine in accordance with Article 317 of the Code of Civil Procedure of Ukraine documents submitted by the applicant to confirm the fact of birth in the temporarily occupied territory of Ukraine, in particular, documents issued by the bodies and institutions of self-proclaimed entities located in the occupied territory of Ukraine, are evaluated by a court in conjunction with other evidence.

According to the Unified State Register of Court Decisions of Ukraine, Ukrainian courts have considered, from February 24, 2022, more than 5,000 cases on establishing the fact of birth, death, marriage or its dissolution in the temporarily occupied territories of Ukraine according to Article 317 of the Code of Civil Procedure of Ukraine, within a separate proceeding.

5. Conclusions

Temporary protection given for the Ukrainian children under the Temporary Protection Directive 2001/55/EC does not influence the 1980

[29] ICJ, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Regulation 276 (1970) Advisory Opinion of 21 June 1971" — URL: https://www.icj-cij.org/sites/default/files/case-related/53/053-19710621-ADV-01-00-EN.pdf [accessed: 5.02.2024].

Convention: the retention of the child abroad by one of the parent against the will of another may be considered wrongful in the meaning of Articles 3 and 5 of the Convention and return decision could be delivered. When considering the case on return of a child the family situation must be considered comprehensively, and the court's decision must find the best interests of the child. The security factor is one of the basic ones. At the same time, the court should assess all circumstances of the case (individuality of the child; the relationship between the child and parents in the past; care, protection and safety of the child (the ability of each parent to take care of the child personally); maintaining stability in the child's environment (it concerns the place of residence (home), school, friends); the child's right to health; the child's right to education) and listen to the child's opinion (when he/she has the opportunity to express it: usually from school age) about his/her desire to live with one of his/her parents.

It is necessary to note one positive approach by the foreign courts where in some cases on the return of a child to Ukraine they consider delivering instead of non-return order the decisions approving amicable agreements of the parties. In such agreement there were mentioned the time of return and the temporary access schedule between a child and left-behind parent for the period until the end of the war. One more positive trend is that more often the judge of the foreign court deciding upon the return application asks, through the International Hague Network of Judges, the current Ukrainian Liaison Judge for the information whether the certain region in Ukraine (city or town) is under the occupation by Russia (or are there any military operations in this area). There are several foreign court decisions on return of Ukrainian child which were delivered, including having taken into account the information on security situation in certain region provided by the Ukrainian Liaison Judge or by the Ministry of Justice of Ukraine.

In some cases Ukrainian left-behind parents do not want to submit the return applications. In some cases it is because one-year period, provided in Article 12 of the 1980 Hague Convention, has lapsed, and applicants prefer to decide the issue of access. And in some cases, when applicants got the non-return court order, the only possibility to maintain contact with the child is to submit the access application. As a result we can presume the increase of the number of access applications under Article 21 of the 1980 Hague Convention.

One of the starting points of the 1996 Hague Convention application is that Ukrainian children who have been relocated to foreign countries and have found shelter there during the Russian-Ukrainian war are not refugees, due to the fact that Ukraine is not a state creating dangerous situation for children, the aggression state is the Russian Federation. So,

measures directed to the protection of the Ukrainian child's person or property should be taken under the 1996 Hague Convention first of all by the judicial or administrative authorities of the Contracting State of his or her habitual residence according to Article 5 of the Convention.

Ukrainian court practice has already established the position that the legal assessment of documents submitted by the applicant to confirm the fact of birth in the temporarily occupied territory of Ukraine, in particular, documents issued by the bodies and institutions of self-proclaimed entities located in the occupied territory of Ukraine, is provided by a civil court in conjunction with other evidence when considering an application for establishing the fact of birth in the temporarily occupied territory of Ukraine in accordance with Article 317 of the Code of Civil Procedure of Ukraine. It is the court's decision to establish such a fact that is the basis for state registration of birth and for entering information about the child's parents by the civil registry office at the place of the court decision.

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