The best interests of the child in international child abduction proceedings

The VOICE project

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This project is co-funded by the European Union
The VOICE research – legal analysis

Analysis of case law on international child abductions in Europe to find out:

• Whether and how judges give substance to the notion of the best interests of the child;
• Whether judges hear children in these cases.

Scope:
• Cases decided between March 2005 and December 2017
• 17 national jurisdictions (938 cases) + ECtHR (54 cases) + CJEU (8 cases)
= 1,000 cases
Methodology

Data gathering through a Qualtrics survey:

• General information about the case
• Information about the child’s best interests
• Information about the hearing of the child

Qualitative analysis with NVivo:

• Coding the cases
• National reports
• Overall research report
The best interests of the child
Main findings

The child’s best interests concept is acquiring importance but

- Is not homogeneously spread
- Does not appear broadly

54% (503)  
13% (126)  
33% (309)

No reference  
Implicit reference  
Explicit reference

NATIONAL CASE LAW FROM 17 EU COUNTRIES
Main findings

When judges consider the child's best interests, they focus on **different and heterogeneous factors**.

On the other hand, some **recurent patterns** emerged...

§ Jurisdiction considerations
§ Living conditions
§ Right to maintain relationship with both parents
§ Resolution of conflict between parents
§ Preparation of the child for return
Reference to HCCA rationale

Explicit references to child's best interests are often based on the rationale of the 1980 HCCA (182 cases out of 309).

This means that the child's best interests is considered integrated within the HCCA system:

*The best interests of the child coincide with his/her immediate return to the State of habitual residence. However, this presumption may be rebutted by specific circumstances: the grounds for non-return in articles 12(2), 13, 20 HCCA.*
Reference to HCCA rationale

Two different approaches:

q Broad
   “The best interests are an immanent and fundamental principle permeating the rationale and the HCCA’s framework.” (IT001)

q Strict
§ “The best interests cannot be applied without relation to one of the exceptions incorporated in the HCCA.” (SP027)

In most cases, grounds for non-return are interpreted restrictively.
Interpretation based on: Jurisdiction considerations

Court of the State of habitual residence is the **best authority** to evaluate the interests of the child.

As a consequence, return is in the child's best interests

- For substantial reasons (**return in his/her social, cultural, affective environment**)
- Because **the court of the habitual residence should be able to decide on the merits**.

The **effective and substantial assessment** of the child's best interests is done by the court of habitual residence.
Interpretation based on: Living conditions

Bad living conditions in the State of origin may justify non return (art. 13(b), art. 20 HCCA), when there is a high standard of danger for the child's wellbeing:

• Conditions are incompatible with acceptable socio-economic and psychological standards in State of habitual residence (abuse, irregular attendance at school, negligence in parental care, parent homeless/drug or alcohol addicted/unemployed...)

Wealthier/better conditions in the State of refugee do not justify, *per se*, non return.
Interpretation based on: Right to maintain relationship with both parents

Best interests of the child coincides with the possibility to maintain a **stable relationship with both parents**

§ “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.” (BE035)

However, **primary caregivers play a key-role.**
Other relevant interpretations...

The best interests of the child coincides with:

- **The resolution of conflicts between parents**
  
  Parents were encouraged to cooperate or to try mediation

  A self-regulation of family life is better than an external judicial imposition (IT007)

- **An adequate preparation for return**
  
  Parents should prepare the child and explain reasons for return, in order to avoid the inevitable mental stress associated with it.
The hearing of the child
Research on the hearing of the child

Question:

• To what extent did the court seek the child’s views to assess his or her best interests?

- Child’s views can be taken into account as an exception to return (Article 13(2) HCCA).
- Child’s views can also offer broader insight on what is in the best interests of the child.
Methodology

Reference to the best interests of the child?
- Yes: hearing analysed (435 out of 938 cases)
- No: hearing not analysed (503 out of 938)

Cases that refer to the hearing: 321
- Cases in which one or more children were heard during the procedures: 194
- Cases in which none of the children involved were heard: 127

Cases in which it is unknown whether the child(ren) were heard because no reference was made to the hearing: 114
The child is heard
Impact of the child’s views on the final decision

The child’s views are decisive: 35
The child’s views are decisive, but other factors are considered: 26
The child’s views are considered equally with other factors: 29
The child’s views are considered but not taken into account: 13
Impact of the child’s views is not clear: 6
No link between child’s views and best interests assessment: 85
The child is not heard
Reasons for not hearing the child (I)

Age and/or maturity (age ranged between 1 and 10 years old)

AGE

⇒ Minimum age in national law

MATURITY

AGE & 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 interest are and he or she could identify a physical or psychological harm or an intolerable situation” [two Hungarian cases]
Reasons for not hearing the child (II)

Children requiring additional support

Influence / manipulation

The child’s best interests

National procedures
Conclusion

The principle of child's best interests
Heterogenous content
Many different factors
A strict or broad interpretation of grounds for non-return

Child heard
Yes
- Broader than Article 13(2) HCCA
- Close to the exceptions in general

No
- Protective reflex