

The Relevance of Religious Law and Religious and Cultural Considerations in International Child Abduction Cases

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This paper will discuss two categories of cases in which religious law and/or religious/cultural considerations might be relevant in determining whether to return an abducted child summarily to the country of his habitual residence. The main focus will be on cases decided under the Hague Convention on the Civil Aspect of International Child Abduction (hereinafter: Convention cases), but there will also be some reference to cases involving countries who are not signatories to that Convention (hereinafter: non-Convention cases)

The first category of cases is those in which the country to which the child would be returned applies religious law in relation to custody of children. In Convention cases, the issue arises as to when the application of religious law might invoke the art. 20 exception as being "not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." In non-Convention cases, the question will arise as to the extent to which the application of the religious law is consistent with the principle of the welfare of the child as understood in the country of refuge. Particular reference will be made to the conflicting English caselaw in non-Convention cases and the implications thereof for Convention cases. .

The second category of cases is those in which the parents belong to different religious or cultural communities and return of the child will involve a radical change in the way of life to which he has become accustomed over a significant period of time. This paper will discuss to what extent religious and cultural considerations may be relevant in determining whether the exceptions to mandatory return in the Hague Convention are established, in particular the grave risk of harm exception (art. 13(b)) and the child objection exception (art. 13(2)). Specific reference will be made to two Israeli cases, in which after protracted litigation, the Supreme Court ordered return of ultra-Orthodox Jewish children to a parent who was not Jewish, despite the children's strong objections, and to the aftermath of these decisions.

In relation to both categories of case, the analysis will include consideration of the doctrines of children's rights and cultural relativism. Finally, practical suggestions will be made as to how children's rights could better be protected in these types of cases, for example by the provision of separate legal representation, by liaison between the judges in the two countries and by the use of mirror orders.

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