Child Abduction Convention case and national procedural provisions determining who can be a party to the proceedings – currently under scrutiny in Poland

Is a national procedural provision determining who can act as a party to the proceedings capable of temporarily preventing the return of a child ordered within the framework of the HCCH 1980 Child Abduction Convention? This question has been recently answered in the affirmative, as illustrated by the recent developments in a case being currently under scrutiny of both the Polish Constitutional and Supreme Courts.

Context of the case…

A child is born in Poland. Soon after her birth, her mother takes her to Belgium where the child's father lives. The couple separates when the girl is one year old. The woman and her daughter return to Poland.

A procedure conducted within the framework of the HCCH 1980 Child Abduction Convention is pending before a Polish District Court since December 2017. By its decision of January 2018, the District Court orders the return of the child. An appeal against the decision is dismissed by a Regional Court in June 2018.

After the expiration of a delay for the voluntary return of the child, the father lodges an application for a forced return. The application succeeds and the proceedings for the enforcement of the return are initialized. The return of the child, however, does not happen.

As we learn from media coverage of the case at hand, in November 2019, a Belgian court grants exclusive parental care to the father. In what can only be considered as a sudden and tragic event, the day before that ruling was delivered,

the child's mother had passed away. From then on, the girl's grandmother takes care of her.

The child's grandmother lodges an application to join the proceedings in which the decisions of January and June 2018 were adopted. In parallel, she lodges an application to join the proceedings on the enforcement of the return. It is being argued that the grandmother is the child's closest known relative and her factual caretaker and as such she fulfills the requirements needed to be considered as an 'interested person' within the meaning of Article 510(1) of the Polish Code of Civil Procedure. According to that provision '[a]n interested person is anyone whose rights are affected by the outcome of proceedings; such person may join the case at any stage before it is closed at second instance. On joining the case an interested person becomes a party. An order refusing to allow an interested person to join the case may be appealed'.

The application to join the proceedings in which the decisions of January and June 2018 were handed down is dismissed in January 2020. It is decided that the grandmother lacks 'legal interest' to join the proceedings as the outcome of these proceedings does not concern her rights. The appeal brought against this decision is dismissed in June 2020.

… brought before the Constitutional Court …

The grandmother's legal counsels lodge a constitutional complaint before the Polish Constitutional Court. Under Polish law, a constitutional compliant allows to challenge a provision that served as a basis for a final decision on the applicant's freedoms, rights or obligations specified in the Constitution and to request a determination of that provision's non-conformity with the Constitution.

In the constitution complaint in question, the grandmother's counsels are challenging the aforementioned Article 510(1) of the Polish Code of Civil Procedure. They argue that **by not allowing for the participation in the proceedings of the child's grandmother, her relative and sole factual caretaker, this procedural provision violates, inter alia, the applicant's dignity** (Article 30 of the Polish Constitution), **right to legal protection of her family life** (Article 47 read in conjunction with Article 18 of the Constitution according to which 'family' – alongside 'marriage', 'motherhood' and 'parenthood'

– shall be placed under the protection and care of the Republic of Poland) **as well as the right to a fair trial** not barring access to legal protection enshrined in Articles 45(1) and 77(2).

According to the statement of reasons for the complaint, the procedural provision in question is preventing the grandmother from initiating proceedings allowing to determine her rights and from being heard within the proceedings initiated at the request of other applicants. Against this background, while the decision of June 2018 is final, in its judgment of 22 November 2017, III CZP 78/17, the Polish Supreme Court considered that even a final decision ordering the return of a child may be amended, if the best interests of the child concerned so require. It is however unclear whether this is exactly the legal route that the child's grandmother is intending to take.

The constitutional complaint is not directly arguing that the aforementioned procedural provision violates Article 72 of the Polish Constitution which serves as an equivalent of the 'child's best interest clause' known from legal instruments (still, one should keep in mind that the grandmother is the applicant, not the child). Yet, alongside the Charter of Fundamental Rights of the EU [see its Article 24(2)] and Article 3(1) of the UN Convention on the Rights of Children, Article 72 is invoked in the statement of reasons for the complaint.

Interestingly, **in the constitutional complaint, the applicant's counsels are asking for a suspension of the execution of the decision of January 2018 by which the return of the child was ordered**. According to the Act of 30 November 2016 on the Organisation of the Constitutional Court and the Mode of Proceedings Before the Constitutional Court and – more precisely – its article 79(1), '[the Constitutional Court] may issue a provisional decision about the suspension of the execution of a determination in the case with regard to which a constitutional complaint has been lodged with the [Court], if the execution of a judgment […] could cause **irreversible consequences** resulting in serious damage for the complainant, or when the said suspension is justified by an **important public interest** or a different important interest of the applicant'.

In the reported case, the counsels argue that the return of the child would lead to irreversible consequences for the applicant. Irrespectively of the outcome of the constitutional complaint, the return of the child would provoke a total destruction of her family life in its present form. Given the profound emotional relation with

the child, the child's return would be an intolerable damage to the applicant's dignity and integrity as human being. Moreover, according to the counsels, an important public interest also pleads in favour of the suspension. The child is deeply integrated in her social and family environment and she does not speak the language her father uses, while the latter does not speak Polish.

By its order handed down in late August 2020, the Constitutional Court suspends the enforcement of the decision ordering the return of the child to Belgium, at least until the final ruling on the constitutional complaint is delivered in the case now enregistered under no. SK 76/20.

… as well as before the Supreme Court

While it is not the object of our main interest here, it is worth noticing that back in June 2020, an 'extraordinary complaint' was introduced by the General Public Prosecutor against the decision handed down by the Regional Court in June 2018.

An 'extraordinary complaint', introduced back in 2018, may be lodged by the selected public authorities before the Supreme Court to challenge a final judgment.

As we learn from the press release of the Prosecutor's office, the 'extraordinary complaint' at hand seemingly challenges the decision of June 2018 on account of incorrect assessment of the Regional Court that the return of the child would not result in a psychological harm and not place her in an intolerable situation. That arguably incorrect assessment lead to a manifestly incorrect application of Article 13(b) of the HCCH 1980 Child Abduction Convention. Moreover, it seems that it is being argued that a child's return can be ordered only after a thorough examination of the child's situation and the exclusion of circumstances in which there would be a serious risk that the return of the child would expose him/her to physical or mental harm or otherwise place him/her in an intolerable situation. Failing such examination, an order violates the constitutional incarnation of 'child's best interest clause' (Article 72 of the Polish Constitution).