The Restrictive Approach of the Hague Child Abduction Convention — Its Limits and Potential (summary)

Mari KITADA
Lecturer, Kyorin University

The 1980 Hague Child Abduction Convention presupposes that children wrongfully removed or retained in any Contracting State should be returned promptly to the State of their habitual residence, where the family courts should decide their custody, namely substantive matters. For that reason, judges tend to interpret the grounds for refusal restrictively to speed the process of a return order.

The Convention was drafted under the assumption that a non-custodial father took his child from a custodial mother when only one parent has custody rights. In the current situation, both parents can gain custody even after divorce. Statistically, about 70% of parents abducting the children are mothers. Since the assumption at drafting of the bill is different from the current situation, it is said that the restrictive interpretation of article 13 (1)b 'grave risk' exception should be carefully reviewed.

In Neulinger and Shuruk v Switzerland (App no 41615/07, 6 July 2010) where the abduction by the mother, the primary caregiver, arose from domestic violence perpetrated by her husband, the Grand Chamber of ECtHR held that the return order held by the Swiss Court in the restrictive manner would be in breach of article 8 of the ECHR, if the order was enforced. This judgment caused confusion because it was regarded as requesting the practice of considering first "the best interests of individual children" by relaxing the restrictive interpretation. If this is the Grand Chamber's true meaning, it will call for a major change to introduce the idea of family law into the Hague return procedures based on the idea of private international law. Later, in X v Latvia (App no 27853/09, 26 Nov 2013), the Grand Chamber held the same view and tried to suppress the excessive ruling on the Neulinger judgement to resolve the confusion. It seemed to show a tendency to emphasize further protection of the best interests of the children faced with the "Grave Risk" after return orders.

In the UK, the Supreme Court made two judgments, Re E [2011] UKSC 27 and Re S [2012] UKSC 10 to show the British view on the Neulinger judgment. It stated that article 13(1)b should be "applied" rather than being interpreted restrictively. It presented a new approach of the the "Child-Centric" view.

The author considers that there is a limit to the conventional restrictive interpretation. The ECtHR and the UK adopt different approaches, but, both have reasonably modified the traditional way in that they emphasized the child's best interests more than in previous rulings. In this respect, the author supports these slightly relaxed, intermediate approach over the traditional and excessive Neulinger's decision. However, the author thinks that, since it is necessary to screen cases for which if the Hague return procedure is to be implemented, consideration of other grounds for return or refusal of return will need further investigation