Ref. no. I CKN 992/99

# DECISION

**On 1 December 1999**

The Supreme Court, Civil Law Chamber
deliberating in the panel composed of:

Presiding Judge, Supreme Court Judge – M. Grzelka
Supreme Court Judges: – T. Domińczyk
– K. Zawada (raporteur)
Recording clerk – B. Rogalska

on examining at the hearing held on 18 November 1999
of the case brought by A. P.
with the participation of U. Ch.
regarding the return of a child
following the applicant's cassation
against the decision of the Circuit Court in Warsaw
dated 29 April 1999, ref. no. VI Ca 157/98

r e s o l v e s:

**1) to amend the appealed decision and the decision of the District Court for Warszawa Praga dated 16 December 1998, ref. no. V Nsm 873/98, and to order the participant U. Ch., born on 8 June 1969 in Warsaw, a Polish national, married to A. P., to return minor A. P., daughter of U. and A., born on 1 September 1993 in L. in Cyprus, a Cypriot national, to the applicant A. P., born on 1 December 1961, a Cypriot national;**

**2) to order the participant to pay the amount of PLN 1159,33 (one thousand one hundred and fifty nine 33/100) to the applicant to cover the costs of proceedings in all instances.**

**REASONS**

On 7 August 1998 A. P. applied under the Convention on the civil aspects of international child abduction done on 25 October 1908 at The Hague (Journal of Laws of 1995, no. 108, item 528) for the return of his minor daughter A., abducted from Cyprus to Poland by U. Ch., the applicant's wife and the child's mother (in some documents included in the case file also referred to as U. P.-Ch., U. Ch.-P. or U. P.; the latter name also appears in the version: P[...].

On the basis of the District Court's findings it is known that A. P. and U. Ch. concluded marriage in August 1991 in Cyprus and settled there. On 1 September 1993 their daughter A. was born. After she was born, both parents worked, while the child was taken care of by babysitters. At the age of four, the daughter started attending kindergarten. According to U. Ch., there were conflicts between her and her husband; there were cultural and moral differences between them. On 20 July 1998 U. Ch. left for Poland with her daughter, without informing her husband. Then she filed an application for divorce and notified the Consulate of the Republic of Cyprus in Warsaw of the fact of her stay in Poland with her daughter. A. P. and his daughter A. are Cypriot nationals, while U. Ch. is a Polish national. Before her arrival to Poland, their daughter A. spoke only Greek. Now, minor A. attends kindergarten and accommodates to the new conditions without major problems. According to experts, she demonstrates strong emotional bonds towards both parents. However, the impact of her new environment causes her feel resentment towards her father and uncertainty about his feelings about her. The minor's wishes reflect the image of a complete family residing in Cyprus. Regardless of her permanent residence, she will remain exposed to emotional distress as a consequence of breaking the contact with one of her parents. However, taking into account the age and sex of the child, the absence of the mother would result in not satisfying the psychological and emotional needs of the child.

In its decision dated 16 December 1998, the District Court dismissed the application.

The applicant's appeal against that decision was also dismissed by the Circuit Court in Warsaw, in its decision dated 29 April 1999. Sharing the findings and the opinions of the District Court, the Circuit Court has found out that beyond any doubt the mother has effected a wrongful removal of minor A., within the meaning of Article 3 of the Convention referred to in the application. Its consequence, pursuant to Article 12 of that Convention, should be the order to return the minor to the place of her permanent residence, which is Cyprus. However, in some special cases, as provided for in the Convention, a court may dismiss an application, despite establishing the fact of a wrongful removal of a child. In particular, such a possibility is provided for in Article 13(1)(b) of the Convention. That provision stipulates that the authority of the requested state is not bound to order the return of a child if the person who opposes the child's return establishes that there is a grave risk that such a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. According to the Circuit Court's assessment of the examined case, there are grounds for the application of that provision. Although, according to the words of the minor, she wishes both parents went to Cyprus with her and continued their marriage, the mother does not see the possibility of returning to Cyprus and continuing that marriage. In such a situation, the order to return the minor to the applicant would involve depriving her of her mother's presence, which would cause a psychological harm to her. Though minor A. was brought up in Cyprus, where she had her peer environment, home and she has the memories of that period – all this would not be able to compensate her the absence of her mother.

In the cassation, the applicant's attorney alleged that the Circuit Court's decision violated Article 233(1) of the Code of Civil Procedure and Articles 3 and 12 of the Convention on the civil aspects of international child abduction. The allegation of violation of the latter provision remains in connection with the allegation of violation of Article 13 of that Convention, which has also been raised in the reasons for cassation.

The Supreme Court has considered as follows:

1. The allegation of violation of Article 233(1) of the Code of Civil Procedure is unsubstantiated and as such, it is obviously groundless.

2. The process of increasing opening of boundaries has resulted in the growing significance of the phenomenon of taking a child away from his/her state of permanent residence to another state by one of the parents without the permission of the other, which

has become a serious international problem. In cases of such abductions connected with the breakdown of marriage or non-marital relationship (usually, the cases of mixed nationality couples), there is a sudden alteration of child's living conditions, he/she is removed from his/her hitherto environment. In that way, the abducting person usually wants to provide for himself/herself a more favourable standing as regards the proceedings for parental care (authority) over the child.

The Hague Convention on the civil aspects of international child abduction responds to that phenomenon (as well as to instances - which are beyond our consideration here - of detaining a child abroad by the parent whom the child came to visit, as well as difficulties in the exercise of the right to visits experienced by some parents). Its provisions aim at securing a prompt return of a child who has been wrongfully removed (relocated) and at ensuring that the right to custody (Article 1) is respected internationally. In this regard, the Convention provides for uniform substantive norms and norms which specify the methods of cooperation between individual states. It is applicable to a child below the age of 16, provided that directly before the abduction his/her habitual residence was in a state which is a Contracting Party (Article 4). In relations between the Contracting States, the Convention is applicable only when the abduction took place after the Convention had entered into force in those states (Article 35). As an international agreement, it is subject to an autonomous interpretation. It is clear that meeting its objectives requires as uniform interpretation of its provisions as possible by all the Contracting States.

Pursuant to Article 3 of the Convention, the removal is wrongful if the following two conditions have been fulfilled: 1) the right to custody awarded to a particular person individually or jointly with another person, under the legislation of a state in which a child was habitually resident immediately before the removal, was violated, 2) that right was effectively exercised at the moment of removal or would be effectively exercised if the removal did not occur. The cited provision explains that the custody right it refers to may (in particular) result from the legislation itself, as well as from a judicial or administrative decision or settlement. It is assumed that reference made in that provision to the custody right awarded pursuant to the legislation of the state in which a child was habitually resident immediately before the removal, takes into account the whole legal system of that state, together with its binding norms of private international law as regards custody. Thus, only the latter norms refer to the law applicable in respect of custody over a child. Moreover,

pursuant to Article 5(a), "rights of custody" cover in particular decisions determining a child's place of residence.

If it is established that a child has been wrongfully removed within the meaning of Article 3 of the Convention, the relevant authority of the state to which the child was removed should immediately order his/her return, providing that it has received the application for return before the lapse of one year from the date of removal (Article 12(1)). The same decision should also be taken if the application was received later – unless the child is settled in its new environment (Article 12(2)). The cited provisions reflect the assumption made in the Convention that a prompt return of a child to its place of permanent residence before the removal is in the interest of that child. It is because the child returns to its previous environment. At the same time, the conditions based on which courts in a state of the child's permanent residence, having the best access to the information necessary for proper custodial decisions, are to decide on its custody matters, are restored. The last mentioned purpose of an order to return a child that was wrongfully removed is connected with, first of all, regulation contained in Article 19 of the Convention, which stipulates that a decision under the Convention concerning the return of the child does not violate the substance of the custody right (cf. decision of the Supreme Court of 31 March 1999, I CKN 23/99, OSN 1999/11, item 188), secondly, the provision of Article 16 of the Convention, which stipulates that after receiving notice of a wrongful removal or retention of a child, the competent authorities of a state to which a child has been abducted cannot decide on the merits of the custody right until it has been established that requirements for the return of a child stipulated in the Convention are not complied with or a relevant application is not lodged within reasonable time, following the receipt of the notice. As we can see, the purpose of the child return order issued under the Convention is to restore the situation existing before the abduction, i.e. before the violation of the right to custody referred to in Article 3 of the Convention, while the Convention does not give grounds for adjudicating about the merits of rights of custody (cf. decision of the Supreme Court of 4 February 1999, I CKN 921/97 – unpublished).

The aforementioned assumption that ordering an immediate return of a wrongfully removed child is in his/her interest is expressly stated in the Convention's Preamble. It emphasises that the authors of the Convention drawn up the document being convinced that the interests of children are of paramount importance in all matters relating

to their custody – in order to protect children internationally from the harmful effects of their wrongful removal or retention and by ensuring their prompt return to the State of their habitual residence (see decision of the Supreme Court of 1 October 1998, I CKN 825/98 – unpublished). It needs to be added that an opinion that ordering an immediate return of a wrongfully removed child is in his/her interest is also accepted by the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991, no. 120, item 526). Article 11 of that Convention stipulates that State Parties will take measures to combat the illicit transfer and non-return of children abroad; to this end, they will promote the conclusion of bilateral or multilateral agreements or accession to the existing agreements.

However, the principle that a competent authority of the requested state should promptly order the return of a wrongfully removed child has not been carried out in an absolute way. It is because an assumption that ordering as soon as possible the return of a wrongfully removed child is in his/her interest, in some exceptional situations proves to be unsuccessful. In those cases, the same consideration which supports the aforementioned principle, i.e. taking into account the interest of a child, gives rise to refusal of returning the child who has been wrongfully removed. Therefore, in the Convention on the civil aspects of international child abduction, five exceptions have been formulated, where a competent authority in the requested state may, despite the wrongful removal of a child within the meaning of Article 3 of the Convention, refuse to return that child. Although the very necessity to make these restrictions did not give rise to doubts, there were concerns, however, about their excessive extension in practice, as that could cause a risk that the Convention would not meet its objectives.

Despite a wrongful removal of a child within the meaning of Article 3 of the Convention, a competent authority of the requested state may refuse his return if: 1) a person opposing the child's return demonstrates that the applicant was not exercising his custody right at the time of removal or retention or that he had consented to removal or retention (Article 13(1)(a)); 2) a person opposing the child's return demonstrates that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(1)(b)); 3) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views (Article 13(2)); 4) application for the return of the

child was received by a competent authority of the requested state after one year from the wrongful removal or retention and the child is settled in his or her new environment (Article 12(2); 5) the return of the child is against the fundamental principles of the requested state as regards the protection of human rights and fundamental freedoms.

The exception cited as second is crucial, both for practice in general, as well as for the facts of the case. As it follows from the published statements informing of the functioning of the Convention on the civil aspects of international child abduction, after the initial judgments, especially those passed by lower instance courts, that proved the concerns of the authors of the Convention as regards the possibility of extensive application of Article 13(1)(b), finally the restrictive interpretation of this provision, which corresponds to the intentions of the authors of the Convention, prevails in the case law of the Contracting States.

According to the opinions, which are representative for this kind of interpretation (Polish case law, see in particular Decision of the Supreme Court of 7 October 1998, I CKN 745/98 – unpublished), Article 13(1)(b) of the Convention only refers to "the grave risk" of physical or psychological injuries to which a child could be exposed as a result of returning to his or her place of permanent stay; in consequence, also other unfavourable situations for a child, which are in that provision equalled with the harm mentioned, must also be as much serious. Any other nuisance or inconvenience are not sufficient. It is often stressed that the Convention would lose its significance if Article 13(b) was not interpreted precisely.

With regard to the aforementioned remarks, it is indicated, for example, that Article 13(1)(b) of the Convention refers to cases where there is a risk of violence towards a child or sexual abuse of a child by the applicant, or – where the applicant is an alcohol or a drug addict, or evades work.

On the other hand, the argument which is frequently raised by the perpetrators of a child removal or retention saying that the consequences of separation of a child as a result of the order of return from the perpetrator are adverse for a child does not, in principle, justify the application of the analysed provision. As we know, the Convention aims, for the reasons mentioned, at ensuring the return of a child that was wrongfully removed or retained. It is understood that the realisation of that aim usually involves inconveniences and negative experiences for a child. They are, however, a kind of "inherent

costs" connected with the realisation of the aforementioned aim, serving the interest of a child. At the same time, the order to return the child does not envisage his/her separation from the perpetrator of abduction. That is because such a judgment is only to restore the situation existing before the abduction. It does not, however, involves the decision as to the custody rights towards a child; which may be decided later and lead to the resolution "where and with whom the child is to stay." Thus, the purpose of the Convention will be attained also in the case of the perpetrator's return together with the child. If the return of the perpetrator together with the child does not encounter objective obstacles but the perpetrator does not want to return together with the child, it could be assumed that he/she considers his/her own interest more important than the interest of the child he/she refers to, and which he/she himself/herself endangered by effecting the abduction. That is why the opinion that it is impossible to take into account, within the limits of the analysed provision, the negative consequences of the separation of the child from the perpetrator as a result of the return order has become particularly widely accepted in relation to situations where the return of the perpetrator together with the child meets no objective obstacles. In particular, the perpetrator's fear of being held criminally liable for this act after his/her return is not considered such an objective obstacle. That is because when abducting he/she should have been aware of the consequences of the act.

The problem is more complicated in cases of small children abducted by a person who dominated in the child's hitherto life (usually the mother).

Above all, the position challenging the grounds for special treatment of these cases from the point of view of the application of Article 13(1)(b) of the Convention should be cited here. First of all, it is raised that the Convention refers to only one age limit of children, namely the upper one, which is 16 years of age, that conditions the application of the Convention's provisions. Moreover, it is being referred to the fact that the typical risk of harm that could be involved in the return of the child in the examined group of cases, is eliminated by the Convention by way of other kinds of regulations. Pursuant to Article 13(1)(a) of the Convention, and in fact with regard to its Article 3(b), there is no obligation to return a child if it is demonstrated by a person who opposes the return of that child that the applicant actually did not exercise the custody right during the abduction. Such a regulation refers in particular to such situations where the mother who abducted the child was in fact

the only person who exercised the custody right. On the other hand, Article 12(2) of the Convention allows to take into account, when other conditions contained in that provision have been met, the fact of settlement in new conditions, which is particularly valid in cases of small children. Thus, pursuant to the presented position, the consequences for a small child of the order for its return because of separation from the mother who hitherto dominated in his/her life and who effected the abduction, are not sufficient to justify the dismissal of the application pursuant to Article 13(1)(b) of the Convention – as it is in other cases. In particular, it is the case when there are objective grounds for the return of the mother together with the child.

Such a position, however – as it is correctly being raised – is difficult to accept with regard to infants abducted by the mother. Special kind of relations which are present between a mother and a baby make it possible to accept separation of a child from its mother only in extremely exceptional cases. Such an assessment is not changed by the fact that in a given case, the return of a mother with her child does not encounter objective obstacles and that she does not want to accompany him/her only because she sets her own interest above the interest of her child. However, it is not possible to make the mother return together with her child, while the child's development may be seriously disturbed without her. Therefore, regardless of the assessment of the reasons for the refusal of the mother to return with the abducted baby, the interest of the baby opposes the return order that would lead to separating the baby from the mother with the aforementioned consequences; as a result – in such a case, the application should be dismissed pursuant to Article 13(1)(b) of the Convention.

As it expressly follows from Article 13(1)(b) of the Convention, the burden of proof of the circumstances stipulated therein relies on the perpetrator of abduction.

3. In the light of the facts of the case established, the objection with regard to violation of Article 3 of the Convention that was raised in cassation must be considered incorrect. It follows from the findings, as it was assumed by the Circuit Court, that the participant perpetrated a wrongful removal of her daughter within the meaning of the mentioned provision. In particular, it is beyond any doubt that the applicant, pursuant to that provision, had a custody right under the Cypriot law regulating the relations between parents and children, the text of which has been submitted by the Cypriot Ministry of Justice and Public Order and enclosed with the application.

On the other hand, two other objections raised in the cassation are right.

The facts of the case established, contrary to the position of the Circuit Court, did not give the reason to apply Article 13(1)(b) of the Convention. Juxtaposing the aforementioned opinions on the Convention's assumption and on the necessity of a restrictive interpretation of its Article 13(1)(b) with the motifs of the appealed decision requires that that decision be considered as a typical example of inadmissible extensive application of the cited provision. The return of a wrongfully abducted child of the minor A.'s age to the state of his/her permanent residence may not, according to the Convention, be hampered by his/her possible separation from the mother and unspecified psychological harm that could result from such a separation. Especially that the participant did not demonstrate, and as we know, the burden of proof of the grounds for the application of Article 13(1)(b) of the Convention was placed on her side, that there were objective grounds that made it impossible for her to accompany her child. It needs to be emphasised once again that proceedings under the Convention are not, as such conclusions could be drawn from some findings and statements of the courts of the first and second instance, proceedings with regard to custody (parental authority) over a child.

There are no grounds for the application in the case of other provisions allowing to dismiss the application with regard to the return of an wrongfully abducted child within the meaning of Article 3 of the Convention, either. That, on the other hand, excludes the recognition that the appealed decision, regardless of the correctness of the objection of violation of Article 13(1)(b) of the Convention, is, all in all, in compliance with law. In case of Article 13(1)(a), Article 12(2), Article 13(2) of the Convention, the lack of possibility of applying them against the background of the established facts of the case is just evident. Whereas, as regards Article 20 of the Convention, it needs to be emphasised that this provision makes it possible for Polish courts to dismiss the application for the return order for a child who was wrongfully removed within the meaning of article 3 of the Convention if the effects of the return with regard to the child, as well as to the abducting person, could not be reconciled with the basic principles of the Polish legal order in the field of human rights and fundamental freedoms. And the facts of the case do not give rise to assumption that such a situation takes place here.

Since the facts of the case established do not demonstrate that there exists any of the five exceptions enabling the dismissal of the application regardless of the fact that

the abduction was wrongful within the Meaning of Article 3 of the Convention – the application should be allowed pursuant to Article 12 of the Convention.

The groundlessness of the objection against the violation of the provisions of the proceedings (Article 233(1) of the Code of Civil Procedure) raised in the cassation enabled the Supreme Court to pass the judgment amending the previous decision (Article $393^{15}$ of the Code of Civil Procedure). It needs to be emphasised that the request for dismissal of the appealed decision, included in the cassation, was not binding for the Supreme Court. The Supreme Court is only bound in cassation proceedings by the scope of appeal and grounds for cassation (Article $393^{11}$ of the Code of Civil Procedure).

The costs of the proceedings have been decided pursuant to Article 108(1) in connection with Article 13(2) and Article 520(2) of the Code of Civil Procedure.