



20.2.2024

NOTICE TO MEMBERS

Subject: Petition No 0694/2023 by Laura Neumann (Spanish) on the petitioner's fight for custody of her children

1. Summary of petition

The petitioner is a Spanish citizen, a trans woman who was married to a Polish woman in Spain. After the petitioner's transition, the Polish mother moved to her country of origin together with their two minor children. The petitioner reported her ex-partner for illicit removal (international abduction) of their children, but eventually could not bring them back to Spain because a Polish appeal court considered that it would expose them to an undoubted psychological and intolerable situation. In the petitioner's opinion, the judge has deliberately omitted a report of Polish psychological experts and based the sentence on prejudices and ultra-conservative convictions. Moreover, the ruling was not based on the Hague Convention of 1980 (there is no risk to minors, there is no consent and the minors are too young to have their decision taken into account, despite requesting it from psychologists according to the report). Neither did it take into account the availability of help and accompaniment to relatives of LGTBI people by the authorities of Catalonia and Spain, as reflected in the Trans Law of Spain and Catalonia. The court's decision apparently was not aligned with the Charter of Fundamental Rights of the EU, and even the Polish Ombudsman has appealed it before the Supreme Court in Poland. The petitioner refers to the European LGBTIQ Equality Strategy 2020-2025 adopted by the European Commission in 2020 to launch a call to guarantee her rights; she pointed to a biased treatment by the Polish judicial authorities as being a manifest violation of both international family law and minors as well as trans rights.

2. Admissibility

Declared admissible on 27 October 2023. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 20 February 2024

The prevention of child abductions and the regulation of cross-border issues related to parental responsibility are essential parts of the EU policy to promote the rights of the child and core features of EU judicial cooperation. The European Commission is strongly committed to protecting the rights of children, as stated in Article 3(3) of the Treaty on European Union and enshrined in the Charter of Fundamental Rights of the EU. The European Commission reaffirmed its commitment to protect and promote the rights of the child in the 2021 EU Strategy on the rights of the child¹.

The focus of the new rules on judicial cooperation in relation to parental responsibility, introduced by the Brussels IIb Regulation², is on the protection of the best interests of children as a primary consideration in all civil proceedings affecting them. This Regulation provides enhanced protection for children and aims to facilitate cross-border procedures for families, including by simplifying and streamlining the processes for the return of abducted children. The 1980 Hague Convention³, which complements the Brussels IIb Regulation, also seeks to shield children from the detrimental effects of abduction and retention across international boundaries by establishing a procedure for their prompt return. Both instruments have established a cooperation mechanism and instituted central authorities to facilitate collaboration on the child's return, as well as on access rights in cross-border cases, providing assistance to the parties involved.

The Polish court appears to have refused the return on the basis of Article 13(1)(b) of the 1980 Hague Convention which requires a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable position.

When considering the possible existence of such a grave risk, the court of refuge has to take into account the provisions of the Charter of Fundamental Rights of the European Union ('Charter'). It is furthermore the responsibility of Member States, including their judicial authorities, to ensure that fundamental rights are effectively respected and protected in accordance with their national legislation and international human rights obligations.

The Court of Justice of the European Union has ruled that the prohibition of discrimination based on sex, as provided in the gender equality directives, also encompasses discrimination based on gender reassignment. This includes discrimination against individuals who intend to undergo, are undergoing, or have undergone gender reassignment (cases C-13/94, P. v S.; C-117/01 K.B.; C-423/04, Richards and C 451/16, MB). While these rulings pertain to Directive 2006/54 on sex equality in employment and occupation and Directive 79/7 on sex equality in social security, their rationale applies in a horizontal fashion because the Charter of Fundamental Rights of the European Union prohibits sex discrimination across the entire scope of European Union law (Article 21). In light of these considerations, without taking a position on the case at issue since not all facts of which are known to the Commission, a finding of a grave risk for a child within the meaning of Article 13(1)(b) of the 1980 Hague Convention which would be based solely on the fact that the left-behind parent has undergone

¹ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en.

² Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, p. 1–115, applies from 1 August 2022 and replaces Brussels IIa Regulation.

³ Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction>.

gender reassignment, would indeed appear to be problematic.

However, the Commission does not know the full details of the case in question and is therefore not in a position to draw definitive conclusions. In general, in the event of non-compliance with EU law by an incorrect application in practice of the Brussels IIb Regulation and the 1980 Hague Convention, the Commission generally considers infringement proceedings not on the basis of a wrong application in isolated individual cases but only in the presence of a systematic and persistent practice. The Commission is currently not aware of a systemic and persistent practice in relation to the non-return of abducted children to trans parents.

However, it is important to note that a decision of non-return based on Article 31(1)(b) or 13(2) of the 1980 Hague Convention may trigger a special procedure under the Brussels IIb Regulation, allowing the court of the Member State of the child's habitual residence before the abduction (in this instance, the Spanish court) to make a decision on the substance of the rights of custody. This decision may also entail the return of the child to that Member State and if it does, the Regulation treats it as a 'privileged decision,' which overrides the non-return decision in the country of refuge in cases.

Therefore, if the petitioner is dissatisfied with the ruling of the Polish court, apart from using available national means of recourse in Poland to challenge the decision she may have the option of bringing custody proceedings in Spain with the consequence that a decision on the return of the children to Spain would have to be recognised and enforced in Poland overriding the Polish decision.

The Commission strongly condemns any discrimination, violence and hatred against LGBTIQ people. Discrimination against LGBTIQ people is a violation of the Union's founding Treaties and has no place in the European Union. The Commission is implementing its first-ever LGBTIQ equality strategy for 2020-2025. Among other things, the strategy aims to disseminate factual and non-stereotypical information about LGBTIQ people and to foster the exchange of good practices on the inclusion of trans, non-binary and intersex people. The Commission is currently carrying out the mid-term review of the Strategy, which will assess what areas require more focus to fully implement the Strategy by 2025.

Conclusion

While the Commission considers it more appropriate that the petitioner's individual case is dealt with through the appropriate judicial mechanisms at national level, it will continue to take all possible steps, within the limits of its competences, to ensure that Europe has a policy framework that allows trans, nonbinary, and intersex people to live safely, exercise their rights, and fully realise their potential in the EU.