Logo

CUREDI076NL008

Question(s) at stake:

Whether the absence of the consent of the mother, the holder of hizanat, when the father, the holder of wilayat, relocates a child abroad constitutes an unlawful removal under the provisions of the Hague Convention on Child Abduction.

Outcome of the ruling:

Hizanat is considered to be a custody right within the meaning of Article 3 of the Hague Convention on Child Abduction. Consequently, failure to obtain the consent of the holder of the right of custody results in a situation of wrongful international removal or retention of a minor under the terms of the Convention.

Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Personal Status, Family and Inheritance

Keywords:

Tag(s):

Author(s):

- Kersten, Fei An (Faculty of Law, Maastricht University, Netherlands)

Country:

Netherlands

Official citation:

The Court of Appeal of The Hague, Judgement 12 September 2017, C/09/534532 / FA RK 17-4654 (Uitspraak Gerechtshof Den Haag, 12 september 2017)

Link to the decision:

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2017:2625

ECLI:

ECLI:NL:GHDHA:2017:2625

Date:

12 September 2017

Jurisdiction / Court / Chamber:

Court of Appeal The Hague

Remedy / Procedural stage:

Second instance, appeal

Previous stages:

- District Court of The Hague, Judgement of 28 July 2017, C/09/534532 / FA RK 17-4654 (Uitspraak Rechtbank Den Haag, 28 juli 2017) ECLI:NL:RBDHA:2017:8480

Subsequent stages:

-

Branches / Areas of law:

Private international law

Facts:

The parties, once married, had a child together who was born in Iran. The mother, father, and child all have Iranian nationality. The mother and father separated in 2013. However, it was not until 18 May 2016 that the father's application for divorce was granted by an Iranian court.

One of the reasons for their separation was the fact that the father, having converted to Christianity, no longer practised Islam, while the mother remained a strict Muslim.

On 21 January 2016, the minor was handed over to the father under a visitation arrangement established by the Iranian court, at the end of which the father did not return the minor to the mother. Before this, all three parties had been domiciled in Iran.

Given that the father could not live freely in Iran because of his conversion, he fled from Iran to Turkey with his current partner and the minor. He arrived in the Netherlands from Turkey on 17 May 2016. At the time, the minor was almost four years old. Since then, the minor has been attending school in the Netherlands.

The mother argues that the father's fleeing with the minor constitutes a case of wrongful transfer under the Hague Convention on the Civil Aspects of International Child Abduction (HCCA), in addition to a violation of Article 42 of the Iranian Family Law.

Hizanat and *wilayat* are both partial custody rights under Iranian family law. According to the mother, she had (partial) hizanat over the minor on 21 January 2016 as she was still married to the father at that time. Therefore, the father should have asked her permission to take the minor abroad.

In support of this argument, the mother submitted a decision of a family court in Iran, dated 9 March 2016, in which she was granted sole hizanat over the child. Furthermore, on 31 July 2016, the father was sentenced to six months in prison by a criminal court in Iran for, among others, failing to return the minor to the mother.

However, according to the father, the mother's consent was not necessary. He argues that, as the sole holder of the wilayat, he did not need the mother's consent to take the minor abroad and therefore did not violate her custody rights.

In view of the father's removal of the child to the Netherlands, the mother applied to the District Court of The Hague for an order for the immediate return of the minor, whereby the mother would be allowed to take the minor with her or have a third party authorized by her to take the minor with her to Iran.

The District Court denied this application on the basis of Article 12(2) of the HCCA. Despite acknowledging wrongful retention, the Court considered the elapsed one-year period since the child's wrongful removal and the child's establishment in the Netherlands as decisive factors in its decision.

The mother (petitioner) then appealed to the Court of Appeal in The Hague, requesting that the decision of the District Court be quashed.

Ruling:

The Court of Appeal overturned the decision of the District Court and ordered the minor's return to Iran.

The Court of Appeal had to determine whether the District Court had rightfully refused the mother's application to return the child to Iran and, therefore, whether it should uphold the District Court's decision.

To do so, it first had to determine whether there had been a case of wrongful removal of the child and, as such, whether there had been a breach of the mother's custody rights.

Iranian law provides for two types of partial custody: *hizanat* and *wilayat*. To answer the question of wrongful removal, the Court of Appeal held that hizanat includes the power to determine the child's place of residence.

As to the question of whether the mother was the partial holder of hizanat, the Court of Appeal considered two potential scenarios.

If it is assumed that the parties were still married, according to Iranian law, they would jointly hold the hizanat. Under these circumstances, the hizanat remained with both parents on 21 January 2016. Alternatively, if it is assumed that the parents were de facto separated on that date, Iranian law stipulates that if the child is younger than seven, the hizanat rests with the mother, unless the parents have disagreed, in which case the court makes the determination. Given that a 7 March 2016 court order granted sole custody to the mother, it is evident that the exception – i.e., parents disagreeing – was applicable here. In light of these facts, the hizanat would be considered to rest with both parties on 21 January 2016.

Since, in any case, the hizanat partially rested with the mother on 21 January 2016, which included the power to determine the minor's place of residence, the father should have sought her consent to relocate the minor abroad. The Court of Appeal therefore held that the father had violated the mother's custody rights by failing to obtain her consent. This ruling is in line with that of the District Court.

The Court of Appeal had to then determine whether Article 12(2) of the HCCA was applicable in the present case. Under this provision, an order for the return of the child should not be made if (a) one whole year has elapsed from the date of the wrongful removal and (b) the child is now settled in his or her new environment.

In line with the decision of the District Court of The Hague, the Court of Appeal considered that the one-year period had expired. For Article 12(2) of the HCCA to apply, the child must also have settled in his or her new environment. Contrary to the ruling of the District Court, the Court of Appeal held that this was not the case.

Similarly, the Court held that the exception in Article 13(1)(b) of the HCCA – that the return of a minor should not be ordered if it would result in an intolerable situation for the child – had not been successfully argued by the father. Although the father argued that a return to Iran would result in the child not being able to see him, the Court held that the objective of the HCCA, namely the return of a child in the event of wrongful removal, should be given greater weight than the father's right to family life with the child. In this context, the Court referred to the case of *G.N. v Poland,* App no 2171/14, 19 July 2016.

Furthermore, the Court determined that the exception under Article 20 HCCA was not applicable. It held that the return of the child to Iran would not violate human rights or fundamental freedoms.

The Court therefore ruled that by taking the minor abroad without the mother's consent the father had, within the meaning of Article 3 of the HCCA, unlawfully removed the minor to the Netherlands. Since none of the grounds for refusal were applicable in the present case, the Court ordered the return of the minor to Iran pursuant to Article 12 of the HCCA, in accordance with the mother's request.

Main quotations on cultural or religious diversity:

At first instance

- "Iranian law distinguishes between two legal forms of parental responsibility, namely the hizanat (custody) and the wilayat (guardianship). The hizanat deals with the care and nurturing aspects of parental authority and the wilayat looks after the property interests of the minor and supervising education (including religious education). In addition, according to the IJI, it may be assumed that the wilayat includes the power to determine or change the child's habitual residence, or at least the consent of the holder of the wilayat is required for this. This is the generally prevailing legal view in Islamic legal systems, although no (explicit) legal rules on this can be found under Iranian law. When the parents are married and/or living together, the hizanat accrues to both parents. From the sources

consulted by the IJI, it may be inferred that under Iranian law, the principle is that the hizanat belongs to both the father and the mother, while the wilayat belongs exclusively to the father, or in his absence, to the grandfather in the paternal line. If the child is less than seven years old and the parents are (de facto) divorced, the hizanat for both boys and girls rests with the mother for the first seven years, unless the parents cannot reach an agreement in this regard, in which case this dispute will have to be decided by the court, in the interest of the child. According to the IJI, in the present case, it is highly plausible that under Iranian law, both the father and the mother had parental authority in the sense of the hizanat by operation of law during the marriage and from the child's birth, while it seems sufficiently established that only the father holds wilayat. That means that he ultimately decides whether the child travels from Iran to the Netherlands. Nevertheless, according to the IJI, the circumstance that the mother has a preferential right with respect to the hizanat under Iranian law will also play a role. Finally, the IJI concludes that it is plausible that the mother has had the hizanat from the time of the parents' (de facto) separation given the child's age and thus should have had some say under Iranian law about the minor's relocation. At the same time, however, it seems highly plausible that under Iranian law the father has the ultimate authority to decide on the child's habitual residence outside Iran, since this, as is generally assumed in Islamic legal systems, is linked to having the wilayat." (District Court The Hague, Judgement of 28 July 2017, C/09/534532 / FA RK 17-4654, ECLI:NL:RBDHA:20178480).

- "Unlike the father, the Court does not infer from the IJI report that the father was allowed to transfer the minor to the Netherlands and change his habitual residence without the mother's consent or consultation, assuming that the wilayat would be with the father. Indeed, the IJI concludes that since it is plausible that the mother has had the hizanat from the time of the parents' (de facto) separation, she should have had some say in the move according to Iranian law. Because the father transferred the minor to the Netherlands without consultation with and/or consent of the mother, in the Court's opinion the father infringed the mother's right to care." (District Court of The Hague, Judgement of 28 July 2017, C/09/534532 / FA RK 17-4654, ECLI:NL:RBDHA:20178480).

In appeal

- "The mother argues that on 21 January 2016, the father unlawfully transferred the minor abroad within the meaning of Section 3 HKOV because this was done in violation of her custody rights. She argues that the hizanat deals with the care and upbringing aspects of parental authority and that the person to whom the hizanat belongs has the right to determine the minor's place of residence. If parents do not live together due to divorce or any other reason, the hizanat over a child up to the age of seven belongs to the mother. […] [The] father should therefore have asked [the mother's] permission to take the minor abroad." (para. 8)

- "[The father] explained that the wilayat, which deals with looking after the property interests of the minor and supervising its upbringing, includes the power to determine the residence of the minor. In his view, on 21 January 2016, the mother could at most have been (partially) in charge of the hizanat and not the wilayat. The father, on the other hand, was solely in charge of the wilayat. Therefore, the father could take the minor abroad without the mother's consent, so there is no violation of the mother's custody rights." (para. 9)

- "The Court of Appeal is of the opinion that the [District] Court ruled on good grounds that there was an unauthorized transfer within the meaning of Article 3 HCCH of the minor by the father. The Court of Appeal takes into account that the mother at the time (partially) held the hizanat and the hizanat also includes the power to determine the minor's place of residence". (para. 10)

- "[U]nder Iranian law, as long as parents are married, they hold joint hizanat. If the child is under the age of seven and the parents live (de facto) separately, the hizanat rests solely with the mother, unless the parents have not reached an agreement on the matter, in which case this is decided by the court. […] Since in any case the hizanat rested with the mother on 21 January 2016, the father should have asked her permission to relocate the minor abroad. By not seeking this consent, the father violated the mother's custody rights." (para. 10)

Main legal texts quoted in the decision:

International law

- Articles 3, 12(2), 13(1)(b), and 20 of the Hague Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983)

Iranian law

- Article 42 of the Family Law

Cases cited in the decision:

- *G.N. v Poland*, App no 2171/14, 19 July 2016

Commentary:

The Recognition of Hadana and Wilaya as Custody Rights in Light of the Hague Convention on Child Abduction

This case is one of many examining the partial custody rights of *hadana* and *wilaya* recognized in Islamic family law in light of the Hague Convention on Child Abduction (HCCA). Here, the Hague Court of Appeal provides a clear overview of its interpretation of Islamic family law and how these custody rights should be assessed.

The HCCA was adopted to protect children internationally from the harmful effects of their wrongful removal or retention. Each signatory state undertakes to secure the return of children who have been wrongfully removed or retained in another contracting state and to ensure that rights of custody and access under its domestic law are effectively respected in other contracting states.

According to Article 3 HCCA, the removal or retention of a child is wrongful if it is in breach of custody rights vested in a person, institution, or other body, jointly or severally, under the law of the state in which the child was habitually resident immediately before the removal or retention.

The concept of custody rights has been given an autonomous meaning in the Convention, namely “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence” (Article 5). Such rights, according to Paragraph 84 of the HCCA’s Explanatory Notes, may be exercised individually or jointly. A custody right within the meaning of Article 5 of the HCCA does not necessarily entail the actual power of the parent to decide on the child’s place of residence. For example, it is sufficient that a parent has the right to present the child’s residence to a court ruling, the right to jointly decide on the child’s residence, or the authority to grant consent to a change of residence – rather than the exclusive power to dictate the child’s residence (Ibili and Olland 2019: 24–26).

This autonomous meaning is particularly relevant given that the existence of “custody” is determined by the habitual residence of the child (immediately) before the allegedly unlawful retention or removal. National courts may therefore be required to assess foreign national law when applying the Hague Convention.

In the present case, the Dutch Court of Appeal had to determine whether the mother’s hizanat constituted a right of custody within the meaning of Article 5 of the HCCA and, as such, whether, in the absence of the mother’s consent, the father, the holder of the wilayat, had unlawfully taken the minor abroad. These Iranian forms of custody rights are particularly interesting in comparison with Dutch law, which only recognizes joint and sole custody. Therefore, in its ruling, the Dutch Court based its decision on an expert opinion by the International Legal Institute for Private International and Foreign Law, also known as IJI.

According to this report, Iranian law distinguishes between two legal forms of parental responsibility: hizanat (custody) and wilayat (guardianship). While hizanat deals with the care and upbringing aspects of parental authority, wilayat deals with the protection of the minor’s property interests and the supervision of education. Under Iran’s version of Islamic law, the principle is that the hizanat belongs to both the father and mother, while the wilayat belongs to the father alone. However, if the child is under the age of seven and the parents have de facto separated, the hizanat belongs exclusively to the mother*,* unless the parents have not reached an agreement on the matter, in which case it is decided by the court in the interests of the child (for a more detailed assessment of these custody rights and their recognition in the Netherlands, see also CUREDI089NL001.)

The Court of Appeal in the present case considers that hizanat includes the power to determine or change the child’s habitual residence. The Court does not explain this position explicitly. It is clear from the first instance decision that, according to the IJI, it may be assumed that wilayat includes the power to determine or change the child’s habitual residence and that this right is exclusively vested in the father. As such, the report states that it is he who will ultimately

decide whether the child travels from Iran to the Netherlands. However, the IJI concludes that the mother had the hizanat and as such should have had “some say” in the minor’s relocation under Iranian law. By not specifying the extent of the mother’s say in the matter, the IJI report does not make clear its position on the extent to which the mother should have a say in the child’s relocation. It merely recognizes that the mother, as the holder of the hizanat*,* had “some say”. This aspect is, however, crucial in determining whether there is a right of custody within the meaning of Article 5 of HCCA and, as such, whether an unlawful removal has taken place.

The District Court concluded on the basis of the report that the mother’s consent *was* required in the present case. The Court of Appeal follows this ruling without providing any additional arguments as to why the hizanat should be considered to fall within the scope of custody within the meaning of Article 5 HCCA (see Court of Appeal of The Hague, Judgement of 16 December 2021, ECLI:NL:GHDHA:2021:2498).

In cases where the situation is reversed – i.e., the mother with the hizanat takes the child abroad without the consent of the father, the holder of the wilayat – Dutch courts have come to a similar conclusion, so that the holder of the hizanat needs the consent of the holder of the wilayat in order to take a child abroad (District Court of The Hague, Judgement of 10 April 2017, ECLI:NL:RBDHA:2017:4894; District Court of The Hague, Judgement of 11 February 2014, ECLI:NL:RBDHA:2014:3537).

The custody rights of hizanat and wilayat (often simply referred to as “hadana” and “wilaya”) are derived from Islamic family law. Types of partial custody can also be found in common law systems such as South Africa. Depending on the exact content of these rights, Dutch courts have determined that they constitute custody rights within the meaning of Article 5 of the HCCA (see District Court of ‘s-Gravenhage, Judgement of 7 October 2008, ECLI:NL:RBSGR:2008:BG0578).

As previously mentioned, Dutch family law only provides for joint or sole custody. However, in 2020, the Minister for Legal Protection proposed a bill introducing a new form of parental custody: partial custody (*Parliamentary documents* II 2018/19, 33836, nr 45). According to the explanatory memorandum to the bill (*Memorie van Toelichting Wet Deelgezag*), partial custodians are given the power and responsibility to make day-to-day decisions about the care and upbringing of the child, together with the custodial parent or guardian.

Third parties who have a close personal connection with the upbringing and care of the child may be granted this right at the joint request of the current custodians and future custodian. For the child, partial custody provides greater clarity about the role of this third party and guarantees that contact with this person or persons will be maintained. Until July 2023 the bill had not been submitted to Parliament.

Literature related to the main issue(s) at stake:

- Emon, Anver M. and Urfan Khaliq. 2016. *Private International Law, Islamic Law, and Cross-Border Child Abduction*. Toronto.
- Gosselain, Caroline. 2002. “Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States”. Permanent Bureau of the Hague Conference on Private International Law (7).
- HCCH. 1980. “Outline: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”. *Hague Conference on Private International Law*, available at <https://shorturl.at/uEPX9> accessed 13 October 2022.
- Ibili, Fatih and A. C. Olland (eds). 2019. *Internationale kinderontvoering*. Deventer: Wolters Kluwer.
- McGlinn, Sen. 2000. “Family Law in Iran”. *Islamic Family Law*. Leiden: University of Leiden.
- Pérez-Vera, Elisa. “Explanatory report”, available at <https://shorturl.at/oQW57> accessed 13 October 2022.
- Sabreen, Mudasra. 2017. “Custody in Islamic Law: A Law Based on Presumptions”. *Islamic Studies* 56 (3/4): 223–244.
- Strikwerda, Luc and Sierd J. Schaafsma. 2019. *Inleiding tot het Nederlandse internationaal privaatrecht*. Deventer: Wolters Kluwer.
- US State Department. “The Hague Convention on the Civil Aspects of International Child Abduction: Legal Analysis”. Office of Children’s Issues, US Department of State, available at <https://shorturl.at/iDFL5> accessed 25 December 2023.
- Yassari, Nadjma, Lena-Maria Möller, and Imen Gallala-Arndt. 2017a. “Synopsis”. In Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries*, 325–353. The Hague: Asser Press.
- Yassari, Nadjma, Lena-Maria Möller and Imen Gallala-Arndt (eds). 2017b. *Parental Care and the Best Interests of the Child in Muslim Countries.* The Hague: Asser Press.

Disclaimer

The translation of this decision/judgement is the author’s responsibility.

Suggested citation of this case-law comment:

Kersten, Fei An (2024): The Recognition of Hadana and Wilaya as Custody Rights in Light of the Hague Convention on Child Abduction, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI076NL008, https://doi.org/10.48509/CUREDI076NL008.