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International Child Abduction - Second Circuit Finds Federal Right of Action for Visitation Rights under Federal Law Implementing the Hague Convention on Civil Aspects of International Child Abduction

Farsheed Fozouni
Southern Methodist University

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INTERNATIONAL CHILD ABDUCTION—
SECOND CIRCUIT FINDS FEDERAL
RIGHT OF ACTION FOR VISITATION
RIGHTS UNDER FEDERAL LAW
IMPLEMENTING THE HAGUE CONVENTION
ON CIVIL ASPECTS OF INTERNATIONAL
CHILD ABDUCTION

*Farsheed Fozouni**

IN *Ozaltin v. Ozaltin*, the Second Circuit rightly concluded that the International Child Abduction Remedies Act (ICARA), the federal statute implementing the Hague Convention on Civil Aspects of International Child Abduction (Convention), creates a federal right of action for parents to exercise visitation rights to their children.¹ Citing to the language of both ICARA and the Convention, the court found “[t]he statutory basis for a federal right of action to enforce access rights under the Hague Convention could hardly be clearer.”² However, the court could have—and should have—gone further to challenge the Fourth Circuit’s previous decision in *Cantor v. Cohen*, which concluded that ICARA does *not* create a federal right of action.³ It is imperative that the Second Circuit’s decision be adopted by other circuits not only because it is legally sound, but also because the alternative would drastically inhibit the visitation rights⁴ of aggrieved parents by limiting their ability to enforce those rights.

In 1988, the Convention came into force in the United States alongside its federal implementation, ICARA,⁵ “to protect children internationally

* J.D. Candidate, SMU Dedman School of Law, 2015; B.A. in International Relations, Austin College, 2010. The author would like to thank his parents and sister for their unconditional love and support as well as the SMU Law Review Association for the opportunity to be published.

1. *See* *Ozaltin v. Ozaltin*, 708 F.3d 355, 372 (2d Cir. 2013).

2. *Id.*

3. *See* *Cantor v. Cohen*, 442 F.3d 196, 204 (4th Cir. 2006).

4. For clarification, section 11602(7) of ICARA defines “rights of access” as “visitation rights.” 42 U.S.C. § 11602(7) (2013).

5. 42 U.S.C. §§ 11601–11 (2006). *See* Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 [hereinafter Hague Abduction Convention].

from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”⁶ In other words, the aim of the Convention was to prevent parents undergoing divorce proceedings from abducting their children and “remov[ing] [them] to a foreign country in an attempt to obtain an advantage in a custody dispute.”⁷ To this end, Congress passed ICARA “to establish procedures for the implementation of the Convention in the United States”⁸ and indicated that “[t]he provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.”⁹ Importantly, ICARA states: “The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.”¹⁰

The Convention and ICARA applied in *Ozaltin v. Ozaltin*, a custody case with facts as complicated as many divorce proceedings. Nurettin Ozaltin (father) and Zeynep Ozaltin (mother) married in 2001.¹¹ They and their two daughters (children) are dual citizens of Turkey and the United States.¹² In December 2010, the mother and father separated, prompting the mother to move the children to New York where she had family.¹³ Roughly two weeks after their separation, the father filed a petition with the Turkish Ministry of Justice, “seeking the return of the children to Turkey pursuant to the Hague Convention.”¹⁴ He subsequently attempted to gain provisional custody of the children in a Turkish family court.¹⁵ However, the court only granted him visitation rights on certain days in New York and permission to bring the children back to Turkey for two weeks “[i]n an apparent effort to give the Father greater access to the children during the summer.”¹⁶

The father failed to return the children to their mother by the court-ordered end date, keeping them two weeks longer than legally permitted.¹⁷ After the children were finally reunited with their mother in Turkey, but before they returned to New York, the father filed a second petition with the Turkish Ministry of Justice.¹⁸ This petition requested that the children be prevented from leaving Turkey pursuant to the Convention.¹⁹ The Ministry rejected the father’s petition, stating that the

6. Hague Abduction Convention, *supra* note 5, at 4.

7. Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act* (42 U.S.C.A. §§ 11601 *et seq.*), 125 A.L.R. FED. 127 (1995).

8. 42 U.S.C. § 11601(b)(1).

9. *Id.* § 11601(b)(2).

10. *Id.* § 11601(b)(4).

11. *Ozaltin v. Ozaltin*, 708 F.3d 355, 360 (2d Cir. 2013).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 361.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

Convention did not apply because the children were in Turkey.²⁰ In November 2011, the mother returned to New York with the children and prevented the father from visiting his children in the manner prescribed by the Turkish family court.²¹ The father petitioned the court once again, and his visitation rights were finally upheld.²²

On March 30, 2012, the father initiated an action against the mother in United States District Court, requesting the following pursuant to the Convention: (1) an order to enforce his visitation rights, (2) an order to return the children to Turkey, and (3) a costs award for all legal proceedings.²³ In response, the district court rendered a memorandum opinion ordering the return of the children to Turkey, awarding the father costs that were to be determined when litigation ended, and granting the father visitation rights in the United States until the children's return to Turkey.²⁴ Regarding visitation rights, the court found that section 11603(b) of ICARA explicitly grants federal courts jurisdiction and a right of action by virtue of its language.²⁵

The mother appealed to the Second Circuit, arguing that “federal courts lack subject matter jurisdiction over claims seeking to enforce rights of access.”²⁶ The court of appeals affirmed both the district court's return order and its reasoning that ICARA grants a right of action regarding visitation rights, but vacated and remanded the costs award.²⁷ The *Ozaltin* court found that multiple sections of ICARA clearly confer a federal right of action for redressing violations of visitation rights.²⁸ The court further determined that, “while Article 21 of the Convention may not require a signatory country to establish judicial avenues for enforcing access rights under the Convention, Article 21 does not conflict with the unambiguous recognition of a federal right of action in § 11603.”²⁹

In its analysis, the court reframed the mother's complaint from an argument of jurisdiction to a question of whether section 11603(b) creates a federal right of action.³⁰ The court then cited various sections of ICARA as proof of the statutory authority for such a right of action.³¹ Section 11603(a) provides that state courts and federal district courts “have con-

20. *Id.* at 361–62.

21. *Id.* at 362.

22. *Id.*

23. *Id.*

24. *Id.* at 364–65; *In re S.E.O.*, 873 F. Supp. 2d 536, 545–46 (S.D.N.Y. 2012).

25. *See Ozaltin*, 708 F.3d at 364; *In re S.E.O.*, 873 F. Supp. 2d at 545–46.

26. *Ozaltin*, 708 F.3d at 365.

27. *Id.* at 378.

28. *Id.* at 372.

29. *Id.* at 374.

30. *Id.* at 371 (“Properly framed, the Mother's argument is not *jurisdictional* in nature but instead goes to whether § 11603(b) creates a federal right of action.”). In a footnote, the court states: “As a general matter, [t]he question whether a federal statute creates a claim for relief is not jurisdictional.” *Id.* at 371 n.23 (quoting *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 365 (1994)).

31. *See id.* at 372–73.

current original jurisdiction of actions arising under the Convention.”³² Further, section 11603(b) grants anyone “seeking to initiate judicial proceedings under the Convention . . . for arrangements for organizing or securing the effective exercise of rights of access to a child [to] do so by commencing a civil action . . . in any court which has jurisdiction.”³³ Finally, section 11603(e)(1)(B) indicates that, “in the case of an action for arrangements for organizing or securing the effective exercise of rights of access,” the petitioner must demonstrate such rights by a preponderance of the evidence.³⁴ “Accordingly,” the Second Circuit concludes, “§ 11603 unambiguously creates a federal right of action to secure the effective exercise of rights of access protected under the Hague Convention.”³⁵

Next, the court examined both the language of the Convention and the Fourth Circuit’s analysis in *Cantor v. Cohen*.³⁶ Article 21 of the Convention states, in pertinent part: “An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States.”³⁷ According to the Second Circuit, the court in *Cantor* misinterpreted “Article 21 as stating that access rights can *only* be vindicated by applying to the State Department, which is the United States’[] designated ‘Central Authority’ under the Hague Convention.”³⁸ Instead, “Article 21 . . . provides that efforts to secure rights of access ‘may’ be initiated through an application to a country’s Central Authority, not that they ‘may *only*’ be pursued in this way.”³⁹ Further, the Second Circuit court refers to Article 29 of the Convention, which states: “This Convention shall not preclude any person . . . who claims that there has been a breach of . . . access rights within the meaning of Article . . . 21 from applying directly to the judicial . . . authorities of a Contracting State, whether or not under the provisions of this Convention.”⁴⁰ The court then references State Department regulations, which indicate that petitioning to a “State’s Central Authority ‘is a nonexclusive remedy’ for enforcing access rights” and that Article 29 allows a petitioner “‘to bypass the Convention completely.’”⁴¹

Finally, the court found that the State Department has an “apparent lack of any administrative apparatus for enforcing rights of access,” but rather, “under the Hague Convention[,] must offer *facilitative* services to the petitioner.”⁴² While this role is important, “the State Department it-

32. 42 U.S.C. § 11603(a) (2006); *see also Ozaltin*, 708 F.3d at 372.

33. *Id.* § 11603(b); *see also Ozaltin*, 708 F.3d at 372.

34. *Id.* § 11603(e)(1)(B); *see also Ozaltin*, 708 F.3d at 372.

35. *Ozaltin*, 708 F.3d at 372.

36. *Id.* at 372–74.

37. Hague Abduction Convention, *supra* note 5, at 10.

38. *Ozaltin*, 708 F.3d at 373. *But see Cantor v. Cohen*, 442 F.3d 196, 199–201 (4th Cir. 2006).

39. *Ozaltin*, 708 F.3d at 373.

40. Hague Abduction Convention, *supra* note 5, at 12; *see also Ozaltin*, 708 F.3d at 373.

41. *Ozaltin*, 708 F.3d at 373 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494-01, 10,504 (Mar. 26, 1986)).

42. *Id.*

self does not have authority to enforce access rights,” and prior authorization is not required for parents who prefer to go to court without assistance.⁴³ Although cognizant of the criticism suggesting Article 21 lacks any explicit judicial remedy,⁴⁴ the court concluded: “[E]ven though not *required* under Article 21, federal law in the United States provides an avenue for aggrieved parties to seek judicial relief directly in a federal district court or an appropriate state court.”⁴⁵

The Second Circuit reasonably determined that the plain language of both the Convention and ICARA unambiguously created a federal right of action for parents to enforce their visitation rights. However, the court should have gone further to counter all of the Fourth Circuit’s ostensibly sound arguments. First, there is obvious intent within the Convention to grant an individual the ability to seek judicial relief for visitation rights. Article 5 of the Convention defines “rights of custody” and “rights of access,” the two recognized rights the document is designed to protect.⁴⁶ Throughout ICARA, Congress referenced variations of the phrases “rights under the Convention”⁴⁷ and “actions arising under the Convention”⁴⁸ to indicate that the Act was a statutory implementation of the Hague Convention.⁴⁹ The Fourth Circuit, in *Cantor v. Cohen*, reasoned that Article 21’s failure to explicitly grant a judicial remedy for violations of visitation rights prohibited, by virtue of ICARA’s wording, federal courts from hearing cases regarding such issues.⁵⁰ The Second Circuit logically outlines multiple sections of ICARA, which explicitly grant individuals the ability to petition courts for visitation rights,⁵¹ and quoted articles of the Convention specifically permitting judicial remedies.⁵² The court concluded that, while Article 21 does not require judicial remedies, it may be supplemented by federal law.⁵³ However, the court should to have gone one step further in its reasoning. Specifically, if the Convention explicitly permits judicial relief for visitation rights violations, whether under Article 21 or elsewhere, then ICARA is not *adding* judicial reme-

43. *Id.* at 373–74.

44. *Id.* at 374 (“To be sure, some commentators have criticized the Hague Convention (and Article 21 in particular) for having ‘no firm legal provisions to enforce [access] rights.’” (alteration in original) (citation omitted)).

45. *Id.* The court also cites the Sixth Circuit’s holding in *Taveras v. Taveraz*: “[U]nlike The Hague Convention, the ICARA, 42 U.S.C. § 11603, does provide for judicial remedies for non-custodial parents, namely for rights of access claims (e.g., visitation).” *Id.* (citing to *Taveras v. Taveraz*, 477 F.3d 767, 777 n.7 (6th Cir. 2007)).

46. Hague Abduction Convention, *supra* note 5, at 5.

47. *E.g.*, 42 U.S.C. § 11601(b)(4) (2006).

48. *E.g.*, 42 U.S.C. § 11603(a).

49. Section 11601(b)(1) states that “[i]t is the purpose of this chapter to *establish procedures for the implementation* of the Convention in the United States.” 42 U.S.C. § 11601(b)(1) (emphasis added).

50. *See Cantor v. Cohen*, 442 F.3d 196, 199–201 (4th Cir. 2006).

51. *See supra* notes 33–37 and accompanying text.

52. *See supra* notes 38–43 and accompanying text.

53. *See Ozaltin v. Ozaltin*, 708 F.3d 355, 374 (2d Cir. 2013).

dies, but *restating* what the Convention already grants and confers.⁵⁴

Further, there are additional indications that the Convention intended to grant judicial means of vindicating visitation rights. For instance, Article 30 builds on the explicit right of action granted in Article 29⁵⁵ by providing that “[a]ny application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention . . . shall be admissible in the courts or administrative authorities of the Contracting States.”⁵⁶ Importantly, Article 41 states: “Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its . . . accession to this Convention . . . shall carry no implication as to the internal distribution of powers within that State.”⁵⁷ This article ensures that the United States’ constitutional distribution of powers remains intact, leaving the power to determine the jurisdiction of federal courts in the hands of Congress,⁵⁸ which exercised this power by passing ICARA. Finally, Article 42 limits reservations to Articles 24 and 26 only.⁵⁹ Although the United States made reservations to those two articles,⁶⁰ they do not pertain to or impact the visitation rights provisions in the Convention.⁶¹ The Second Circuit could and should have indicated that the court in *Cantor* clearly misinterpreted the Convention, placing the United States in violation of its own laws⁶² and of international law.

The implications of neglecting the impact of the Second Circuit’s decision in *Ozaltin* cannot be overstated. As the court discussed, the State Department is to be facilitative, not adjudicatory.⁶³ The State Department has devoted significant time on facilitative services for Convention cases, but it “does not have authority to enforce access rights” itself.⁶⁴ If the Second Circuit’s opinion is disregarded or ignored by other circuits,

54. In his dissent in *Cantor v. Cohen*, Judge Traxler said it best: “On its face, the unqualified phrase [in ICARA] ‘rights under the Convention’ encompasses ‘rights of access’ as well as ‘rights of custody.’” 442 F.3d at 208 (Traxler, J., dissenting). While the Second Circuit referenced Judge Traxler’s dissent for another reason, it is unclear why this important point was not given the same attention.

55. See *supra* notes 40–41 and accompanying text. *Ozaltin*, 708 F.3d at 372 n.25.

56. Hague Abduction Convention, *supra* note 5, at 12 (emphasis added).

57. Hague Abduction Convention, *supra* note 5, at 15 (emphasis added).

58. See U.S. CONST. art. III, § 2, cl. 2.

59. Hague Abduction Convention, *supra* note 5, at 15.

60. See *id.* at 2.

61. See *id.* at 10–11.

62. Treaties are “equivalent to an act of the legislature” when they are “self-executing” or when “Congress has . . . enacted implementing statutes.” *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (internal quotation marks omitted).

63. See *Ozaltin v. Ozaltin*, 708 F.3d 355, 373 (2d Cir. 2013).

64. See *id.* The court gave an example of the State Department’s role: “For instance, the State Department ‘has engaged in time-consuming efforts in many cases to identify practicing family lawyers in the jurisdiction where a child is located who are willing to serve as counsel for a petitioning parent on a pro bono or reduced-fee basis.’” *Id.* (quoting Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 48 (1990)).

the potential impact on parents is enormous, as there would be no direct means of enforcing their visitation rights. But, more importantly, the effect on children is even worse. To illustrate, “studies have shown that leaving the country and prohibiting contact between a parent and child has the same deleterious effect on the child regardless of which parent has the custody right.”⁶⁵ Finally, if the federal court system continues to misinterpret ICARA and the Convention, it may put the United States in jeopardy of violating or interfering with international obligations—something courts have been loath to do.⁶⁶

In *Ozaltin v. Ozaltin*, the Second Circuit corrected a grievous and illogical mistake made by the Fourth Circuit in finding that ICARA creates a federal right of action to enforce one’s parental visitation rights pursuant to the Convention. By analyzing the plain language of both the federal statute and the Convention, the Second Circuit appropriately concluded that neither text could be clearer on the creation of judicial avenues of relief to vindicate one’s visitation rights. However, the Second Circuit could have gone further by citing additional examples of the Convention that make explicit references to the creation of the right of action, and by specifying that ICARA merely *executes* those provisions under federal law. Unless the Supreme Court considers this issue in the near future, it is imperative that other circuits follow the Second Circuit’s lead in promoting an unambiguously granted federal right of action as a means of enforcing visitation rights. The alternative could cause devastating situations where parents are prevented from exercising their lawful visitation rights, and children suffer the consequences because the legal system failed in the one thing it is duty-bound to do: to uphold justice.

65. Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 *FORDHAM INT’L L.J.* 308, 311, 355 (1997) (explaining that granting one parent custody and one parent visitation rights is done “because it is best for the child to have the influence of both parents.”).

66. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (“For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.”) (alteration in original) (internal quotation marks omitted).

