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Have the Interests of Parents Been Placed at Odds With Those of Their Kidnapped Children?: *Lozano v. Alvarez* and Concerns Over How the U.S. Supreme Court's Newest Precedent Impacts the Return of Internationally Abducted Children

By Vincent Mayo, Esq.

The U.S. Supreme Court recently issued a decision in *Lozano v. Alvarez* which essentially rewards parents who abduct children and flee to another country. *Lozano v. Alvarez*, 134 S. Ct. 1224; 188 L. Ed. 2d 200; 82 U.S.L.W. 4159 (2014). Namely, the Supreme Court refused to toll the one-year automatic return period set forth in Article 12 of The Hague Convention on the Civil Aspects of International Child Abduction (“The Hague Convention” or “the Convention”) while the whereabouts of abducted children are unknown out of concern that tolling could affect a now “resettled” child’s stability. Even if the High Court’s legal analysis on tolling is correct, does its decision unjustly undermine Article 12 and the families it was intended to protect?

Article 12 of The Hague Convention states:

Where a child has been wrongfully removed or retained in terms of Article 3. (Article 3 of the Hague Convention states that removal or the retention of a child is to be considered wrongful where it is “in breach of rights of custody attributed to a person” under the law of the State where the child was a resident prior to being removed and at the time of a removal, the parent’s rights were or would have been exercised but for the removal or retention.) and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

The purpose of Article 12 is to allow the *speedy* return of a wrongfully removed child to the rightful country of origin. It is also intended to prevent “forum shopping” in countries without jurisdiction.

Lozano v. Alvarez involved Petitioner Manuel Lozano and Respondent Montaya Alvarez, who both resided with their minor child in London. *Lozano*, 134 S. Ct. at 1230. Without notice to Mr. Lozano, Ms. Alvarez left England with the minor child in November 2008 and settled in New York. *Id.* Despite his efforts, Mr. Lozano was not able to locate Ms. Alvarez until November 2010 – sixteen months later. *Id.* Mr. Lozano then filed a petition for return of the child in the Southern District of New York pursuant to Article 12 of The Hague Convention. *Id.* Finding that the petition had been filed more than one year after the child began residing in New York and that the alleged concealment of the child did not toll Article 12, the Second District Court denied the petition and the Second Circuit Court affirmed the lower court's ruling on appeal. *Lozano v. Alvarez*, 697 F.3d 41 (2nd Cir., 2012). The U.S. Supreme Court granted Mr. Lozano's petition for *certiorari* due to inconsistencies between the circuit courts of appeals as to Article 12 and the issue of tolling. *Lozano*, 134 S. Ct. at 1231.

The Supreme Court had a difficult decision to make between competing policies. On the one hand, they could hold (as Mr. Lozano petitioned and three federal circuit courts previously held) *Dietz v. Dietz*, 349 Fed. Appx. 930 (5th Cir. 2009). *See also* *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2009); *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009); *Furness v. Reeves*, 362 F.3d 702 (11th



Cir. 2004) that the one year automatic return period should be equitably tolled in cases where a child is abducted and concealed until the child's whereabouts are determined. The Supreme Court could also accept Mr. Lozano's contention that the one-year automatic return period constitutes a statute of limitation, thereby making it subject to tolling. On the other hand, the High Court could hold, as Ms. Alvarez argued, that the Hague Convention's one year period is not subject to nor does it authorize equitable tolling – even if by agreeing with this position, the Supreme Court would essentially reward abducting parents.

Writing on behalf of a unanimous Court that sided with Ms. Alvarez, Justice Clarence Thomas concluded that the one-year period providing an automatic return of an abducted child cannot be tolled. *Lozano*, 134 S. Ct. at 1232. The Supreme Court based its decision in part on the fact that the presumption regarding tolling of U.S. federal and state statutes does not apply to treaties, as courts in other countries have similarly found, unless specifically authorized. “A treaty is in its nature a contract between...nations, not a legislative act.” *Id.* at 1232-1233, *citing Foster v. Neilson*, 27 U.S. 253, 2 Pet. 253, 314, 7 L. Ed. 415 (1829). Further, the International Child Abduction Remedies Act (ICARA), which enacts the Hague Convention, recognizes “the need for uniform

international interpretation of the Convention." 42 U. S. C. §§ 11601-11610, Section 11601(b)(3) (B). The Supreme Court also held that the one year return remedy is not a true statute of limitation since the child's return is still permitted under the Convention, even if it was no longer automatic. *Lozano*, 134 S. Ct. at 1234.

While the Supreme Court issued a unanimous decision, the broader legal community was not in consensus with the Court's ruling. The International Academy of Matrimonial Lawyers (IAML) filed an *Amicus Curie* brief in support of tolling the one year period in cases where an abducted child is concealed. The IAML argued that rather than deterring kidnappings, a ruling against tolling would in fact encourage parents to flee with abducted children and live "underground" in order to gain an advantage in subsequent proceedings initiated after the one year period passes. Brief for the International Academy of Matrimonial Lawyers (IAML) as *Amicus Curie* in Support of Reversal, at 11-12.) The IAML went on to argue that few U.S. and international courts have ordered the return of an abducted child after having made a finding that the child was settled in the new country of residence. *Id.* at 8-10. Such precedent would suggest that a non-offending parent attempting to have their child returned to the home country faces an additional, undue burden that Article 12 was specifically drafted to prevent.

The same concerns were also shared by several United States courts of appeals. *Supra*. The Fifth Circuit Court ruled in *Dietz v. Dietz* that the equitable tolling of Article 12 is permitted in child concealment cases. *Dietz*, 349 Fed. Appx. at 930. The Eleventh Circuit supported this position in *Furness v. Reeves* when it stated that the equitable tolling of Article 12 is warranted during the concealment period since otherwise, a "parent who abducts and conceals [a child] for more than one-year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available." *Furness*, 362 F.3d at 723-24.

In response, the Supreme Court presented, *via dicta*, what it viewed as "safeguards" available to non-offending parents in an attempt to put the general legal community at ease over the IAMLs and circuit courts' concerns. First, the Supreme Court stated a parent pursuing the return of a child can claim that the offending parent's efforts to conceal a child essentially prevent the child from becoming settled in their new environment. *Lozano*, 134 S. Ct. at 1236. Such efforts could consist of frequent relocations, a denial of contact with extended family, keeping the child out of school, extracurricular activities, church, etc. *Id.*, citing *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363-1364 (MD Fla. 2002); *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N. E. 2d 662, 666 (1994). Second, the Supreme Court noted that Article 18 of The Hague Convention holds "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, Treaty Doc., at 11. Courts therefore have it within their discretion to order the immediate return of a child outside the terms of Article 12. "[N]either the Convention nor the ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires 'that discovery be allowed or that an evidentiary hearing be conducted' as a right under the Convention." *West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013), quoting *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001). Third, and in a concurring opinion, Justice Samuel Alito added that a court can look at the abducting parent's conduct in deciding to conceal a child as a factor when deciding on the child's settlement. *Lozano*, 134 S. Ct. at 1237.

These arguments, however, do not negate the fact that the Supreme Court's decision essentially creates an emotional, financial and legal struggle between the well-being of abducted children and the rights of their innocent parents. Where the interests of children and their non-offending parents were once aligned in allowing for their swift, automatic return, the *Lozano v. Alvarez* decision potentially pits those interests against one another based on the juridical consequences of the concealment. An abducting parent will have the incentive to turn the proceedings into what essentially constitutes a custodial determination since courts are encouraged to determine if a child has become settled in their new environments after a year. This is based on the fact that settlement requires an examination of numerous factors, including but not limited to the child's age, the stability of their residence, the nature of the relationship with the abducting parent, whether the child attends church and school consistently, whether the child has family and friends nearby, how they have adapted to their new environment, etc. *Lozano v. Alvarez*, 697 F.3d at 57. Such proceedings would also be more laborious and expensive for the non-abducting parent as they would have to litigate in a foreign country. The end effect, in cases where settlement of the child has been established, is that the non-abducting parent will either need to go through "another" custody battle (and face findings made in the prior settlement proceeding detrimental to their case) or give up on having their child returned to their country of origin, thereby losing custody. In those cases where the innocent parent decides to fight, every passing month will be another month in which the child is away from that parent and likely becoming more aligned with the interests of the abducting one. Clearly, such an outcome runs counter to the goal of Article 12 and the purpose of the Hague Convention.

As for the Supreme Court's reliance on Article 18, realistically that Article does not operate like the equitable short cut the High Court believes it to be. Article 12 necessitates a determination of settlement after the one-year period has passed and courts are reluctant to disregard the best interests of the child as it pertains to settlement once they are no longer required to automatically return the child. Trial courts will undoubtedly require some type of initial proceeding addressing best interests in adjudicating the return of an abducted child, even under Article 18. The Hague Convention, Article 12. *See also* the Brief for the International Academy of Matrimonial Lawyers (IAML) as *Amicus Curiae* in Support of Reversal, at 8-10. It should be noted as a counterpoint, however, that even if the Supreme Court had held that the one year period could be tolled, a parent who initiates litigation for the return of their child after the one year period would still have to establish that equitable tolling is warranted. Courts would essentially need to know if the delay in seeking a child's return was because the child was concealed by the other parent or because the requesting parent was simply dilatory in pursuing their rights. Therefore, it would have been incumbent upon the Supreme Court to fashion some expedited process or legal proceeding to adjudicate a finding of equitable tolling. Such a process though would still delay the automatic return of a child pending the adjudication of the tolling issue.

The end result under the Supreme Court's holding, right or wrong, is that the intentional concealment of a child for more than a year essentially bars the swift, automatic return of an abducted child in contrast to the purpose behind Article 12. Worse, it potentially places the interests of abducted children in opposition to those of their non-offending parents. Whether the Supreme Court's conciliatory arguments for the return of children in international abduction cases will indeed mitigate the potential harm caused by the decision in *Lozano v. Alvarez* is yet to be seen.

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