

No Equitable Tolling in Hague Abduction Convention

By Margaret Ryznar

In early March, the United States Supreme Court handed down the opinion in its most recent international abduction case, *Lozano v. Alvarez*. Justice Thomas wrote for the unanimous Court, holding that American courts cannot toll the one-year period for left-behind parents to file a Hague petition for a child's return -- after which time a defense to return the child can be asserted if the child is now settled in her new environment -- even when the abducting parent concealed the whereabouts of the child.

Lauren Moskowitz, partner at Cravath, Swaine & Moore LLP, represented Ms. Alvarez pro bono. Ms. Moskowitz elaborated upon the decision in an interview for this post:

We are grateful for the Supreme Court's unanimous decision, which makes clear that parents will not be prevented from raising the defense to return that the child is 'now settled' in the United States, a defense that specifically is provided for in the Hague Convention. The Court's decision correctly refused to displace the careful balance of interests that was memorialized in the treaty, which recognizes that in these international custody disputes, the interests of the child are paramount.

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction provides that when a court receives a petition for the return of a child within one year of the child's wrongful removal, the court "shall order the return of the child forthwith." There are several exceptions to this near-automatic return of a child to her country of habitual residence. The exception at issue in *Lozano* is that the court shall order the return of the child unless the petition for return was filed more than a year after the child's wrongful removal and it is shown that the child is now settled in the new environment.

Mr. Lozano, the left-behind father of a girl, argued that American courts should toll this 1-year period when the abducting parent concealed the child's new location. In his case, Mr. Lozano had not realized the mother of his child left the country -- and therefore that he had to file a petition under the Convention -- until more than 16 months after the wrongful removal of the child from their shared home in England.

The mother, Ms. Alvarez, had fled the London home with the child after returning from visiting her sister in New York and suspecting that the child had developed a fear of Mr. Lozano in her absence. Ms. Alvarez also alleged to have suffered abuse throughout their cohabitation, although Mr. Lozano denies being abusive.

Ms. Alvarez and the child stayed in a women's shelter in the United Kingdom for seven months before fleeing to France and then the United States. Once in New York, she sought therapy for the child, who was diagnosed with post-traumatic stress disorder. The child recovered with therapy.

Meanwhile, Mr. Lozano had launched an extensive search for his daughter, finally locating her in New York after the State Department confirmed that Ms. Alvarez had entered the United States. He filed a petition for the return of the child more than 16 months after the mother left England with the child.

The United States District Court for the Southern District of New York denied Mr. Lozano's petition for the return of the child. The Court reasoned that although Mr. Lozano had stated a prima facie case of wrongful removal under the Hague Convention, an exception to return applied because the petition was filed more than one year after the child's wrongful removal and the child was now settled in New York. The District Court declined Mr. Lozano's invitation to toll the one-year period. The United States Court of Appeals for the Second Circuit affirmed.

The United States Supreme Court heard the case to resolve the growing split between the circuit courts on this question. The Court affirmed the Second Circuit, declining to toll the one-year period. The Court rested its decision on the intent of the parties to the Hague Convention, concluding that the countries signing this treaty did not intend the one-year period in Article 12 to be tolled. The Court relied on the lack of a shared backdrop of tolling, as illustrated by the fact that no foreign country has yet allowed the one-year period to be tolled. The Court also highlighted language in the Convention that explicitly started the one-year period on the date of the wrongful removal, without providing for any extensions. The Court finally noted that while equitable tolling is a well-settled remedy in the context of an American federal statute of limitations that sets a time period within which a person must bring a legal action, the one-year period in the Convention is not a statute of limitations.

Justice Alito wrote a concurring opinion to address Mr. Lozano's argument that if American courts failed to toll the one-year period, parents would abduct their children to the United States and conceal their whereabouts until the one-year period expired. Justice Alito pointed out that although American courts lack the ability to equitably toll the one-year period, they have equitable discretion to return a settled child even after the one-year period expired. In other words, although there was not a near-automatic return if the petition was filed after the one-year period, there was no bar to such return if the court determined that factors favoring a child's return outweighed the child's settlement in the new location. It is in this calculation, Justice Alito noted, that a court could take into account the concealment of a child. Justice Alito expressed confidence that this approach protected the child's best interests, which is the principle underlying the Convention.

The case is *Lozano v. Alvarez*, No. 12-820.