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CASE COMMENT

INTERNATIONAL LAW: HONORING THE LETTER AND SPIRIT OF INTERNATIONAL TREATIES

Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014)

*Andres R. Cordova**

FACTS

Petitioner sought to have the Supreme Court equitably toll the one year period for seeking return of his abducted child under Article Twelve of the Hague Convention of International Child Abduction (Convention).¹ Petitioner filed in district court for the immediate return of his child to the United Kingdom.² Article Twelve of the Convention mandates the return of an abducted child when a parent files a petition for the child's return one year or less from the date of abduction.³ After the one year period, the courts must order the child's return unless the child has become settled in its new environment.⁴ Petitioner contended that the concealment of his child by Respondent was an extraordinary circumstance that prevented him from filing within a year of the child's abduction.⁵ The district court denied Petitioner's petition because the one year period in Article Twelve had expired, the common-law doctrine of equitable tolling did not apply to the one year period, and the child had become settled in the United States.⁶ Petitioner appealed the district court's decision to the Second Circuit, which affirmed.⁷ Petitioner then appealed to the Supreme Court of the United States, which granted certiorari in order to determine whether Article Twelve's one year period

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1. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228 (2014).
2. *Lozano v. Montoya Alvarez*, 809 F. Supp. 2d 197, 202 (2011).
3. Convention on the Civil Aspects of International Child Abduction art. 12, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11 [hereinafter Hague Convention]. This remedy is only available where the petitioning parent establishes that the child has been wrongfully removed from the state of its habitual residence. *See id.* art. 3 (defining wrongful removal).
4. Hague Convention, *supra* note 3, art. 12.
5. *Lozano*, 809 F. Supp. 2d at 226.
6. *Id.* Petitioner filed the petition for return on November 10, 2010 and his child was removed from the United Kingdom on July 3, 2009. Thus, the one year period of automatic return had expired. *Id.* at 219.
7. *Lozano v. Montoya Alvarez*, 697 F.3d 41, 45 (2012).

is subject to equitable tolling.⁸ HELD, Article Twelve's one year deadline is not subject to equitable tolling because equitable tolling is contrary to the intent of the parties to the Convention.⁹

II. HISTORY

A. *The Hague Convention*

The Convention is an international treaty whose primary goals are: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) "to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."¹⁰ The Convention is a non-self-executing treaty that has been implemented in the United States by the International Child Abduction Remedies Act (ICARA).¹¹ Under Article Twelve of the Convention, a petitioning parent can seek the immediate return of a child to the child's country of habitual residence when the child has been "wrongfully removed or retained," and "a period of less than one year has elapsed from the date of the wrongful removal or retention."¹² After one year, the "Settled Defense" becomes available, which compels the courts to consider whether the child has become "settled in its new environment."¹³ Article Twelve is intended to discourage parents from abducting children in order to forum-shop in the hopes of gaining a legal advantage in custody disputes.¹⁴

B. *U.S. Common-Law*

A statute of limitation is "[a]law that bars claims after a specified period."¹⁵ A statute of limitations is presumptively subject to equitable tolling.¹⁶ "Equitable tolling is a common-law doctrine that allows a litigant to toll a statute of limitations when the litigant establishes two

8. *Lozano v. Montoya Alvarez*, 133 S. Ct. 2851 (2013).

9. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014).

10. Hague Convention, *supra* note 3, art. 1.

11. International Child Abduction Remedies Act (ICARA), 42 Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended 22 U.S.C. §§ 9001-9011 (2015)).

12. Hague Convention, *supra* note 3, art. 12.

13. *Id.* See *Lozano*, 134 S. Ct. at 1234 ("the expiration of the 1-year period opens the door to consideration of . . . the child's interest in settlement").

14. See Elisa Perez-Vera, Explanatory Report, para. 16 [hereinafter Perez-Vera Report], available at www.hcch.net/upload/exp128.pdf. Elisa Perez-Vera is recognized as the official reporter for the Hague Conference. See *Lozano v. Montoya Alvarez*, 697 F.3d 41, 52 (2012).

15. BLACK'S LAW DICTIONARY (9th ed. 2009).

16. *Young v. United States*, 535 U.S. 43, 49 (2002).

elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”¹⁷

C. *The Current State of the Law*

Prior to the instant case, the Supreme Court had not addressed the applicability of equitable tolling to the Convention.¹⁸ However, several circuit courts had addressed the issue.¹⁹ Generally, the courts that have found equitable tolling applicable have concluded that: (1) equitable tolling is necessary to deter child abduction by parents seeking access to defenses that would otherwise be unavailable, and (2) the one year period qualifies as a statute of limitations, which is presumably subject to equitable tolling.²⁰ For example, in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the Eleventh Circuit affirmed a district court’s decision to toll the beginning of the one year period to the date when a petitioning parent discovers the whereabouts of his or her child.²¹ The *Furnes* Court concluded that the petitioner had made diligent efforts to locate his child, and therefore, the goals of the Convention would be furthered by denying any benefit to the respondent that derived from the child’s concealment.²² Notably, the *Furnes* court presumed that the one year period in Article Twelve, and codified in ICARA, constituted a statute of limitations.²³

In *Lozano v. Montoya Alvarez*, predecessor to the instant case, the Second Circuit held that Article Twelve is not subject to equitable tolling.²⁴ First, the Second Circuit concluded that the one year period is not a statute of limitations since the remedy of return continued to be available after one year.²⁵ Thus, the Second Circuit rendered irrelevant any presumption that equitable tolling applied to the one year period.²⁶ The Second Circuit relied extensively on the drafting history of the Convention to conclude that equitable tolling was not intended to apply

17. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

18. *Lozano*, 134 S. Ct. at 1231.

19. *See e.g.*, *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004) (indicating that the one year period is subject to equitable tolling where an abducting parent conceals the child’s whereabouts). *Contra Lozano*, 697 F.3d at 45 (holding that equitable tolling is inapplicable to the one year period and the Convention).

20. *Furnes*, 362 F.3d at 723.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Lozano*, 697 F.3d at 52.

25. *Id.* “Unlike a statute of limitations prohibiting a parent from filing a return petition after a year has expired, the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residence.” *Id.*

26. *Id.*

to the Convention.²⁷

II. INSTANT CASE

In the instant case, the Supreme Court affirmed the Second Circuit by holding equitable tolling inapplicable to the one year period provided by Article Twelve.²⁸

First, the Court emphasized that the Convention is a treaty, and therefore, its interpretation is not aided by the general rules of common-law.²⁹ Thus, although statutes of limitations are presumptively subject to equitable tolling at common-law, the Court considered this presumption immaterial.³⁰ Notably, the Court made clear that it considered ICARA irrelevant since ICARA does not address equitable tolling and because ICARA does not purport to alter the Convention.³¹

Second, the Court determined that the parties to the Convention did not intend for equitable tolling to apply to the Convention.³² Notably, Petitioner failed to identify a background principle of equitable tolling shared by the parties to the Convention.³³

Third, assuming *arguendo* that the parties to the Convention shared equitable tolling as a background principle of law, the Court concluded that the one year period is not a statute of limitations since the remedy of return could still be pursued after the one year period.³⁴ Thus, the one year period is not a statute of limitations.³⁵

Finally, the Court addressed Petitioner's argument that equitable tolling should apply to the one year period because its application would further the Convention's goal of deterring child abductions.³⁶ However, the Court noted that the Convention does not pursue this goal at any

27. *Id.* at 52–54 (indicating that the Hague Convention's drafters "saw value in agreeing to a 'single time-limit of one year' and setting aside 'the difficulties encountered in establishing a child's whereabouts.')" (quoting Perez-Vera Report, *supra* note 14, para. 108).

28. *Lozano*, 134 S. Ct. at 1236.

29. *Id.* at 1232–34.

30. *Id.* at 1233.

31. "The provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention." *Id.* (alteration in original) (quoting ICARA § 9001(b)(2)).

32. *Id.*; see *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (indicating that the courts are tasked with interpreting treaties in a manner that is "consistent with the shared expectations of the contracting parties") (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

33. As a matter of fact, "Lozano concede[d] that in the context of the Convention, 'foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that we have.'" *Lozano*, 134 S. Ct. at 1233 (quoting Transcript of Oral Argument at 19-20, *Lozano*, 134 S. Ct. at 1233 (No. 12-820)).

34. *Id.* at 1234.

35. *Id.*

36. *Id.*

cost.³⁷ In the Court's view, applying equitable tolling to the one year period would essentially rewrite the Convention.³⁸ Further, the Court noted that concealment is generally considered a negative factor when determining whether the Settled Defense applies.³⁹ Thus, the doctrine of equitable tolling is not needed in order to deal with concealment.⁴⁰

III. ANALYSIS

A. *The Applicable Rules of Interpretation*

In deciding the instant case, the Supreme Court emphasized that different rules of interpretation apply to international treaties and domestic legislation.⁴¹ Domestic legislation is enacted "against a background of common-law principles," whereas, international treaties are essentially compacts between parties the parties to a treaty.⁴² Thus, when interpreting a treaty, the intent of the parties is dispositive.⁴³ By focusing its analysis on the intent of the parties to the Convention, the Court announced to the international community that the United States will not obscure the meaning of the treaties to which it is a signatory. This message is especially meaningful as applied to the Convention because of ICARA.

Arguably, the Court could have concluded that United States common-law applied to the interpretation of the Convention since ICARA is federal legislation.⁴⁴ However, the Court rejected this approach without much discussion.⁴⁵ The Court's analysis on this point opens the door to conflicts between implementing statutes and their underlying international treaties. For example, what result would the Court reach if confronted with implementing legislation that is properly considered a statute of limitations? Further, what if the intent of the parties to the treaty is unclear? In the wake of *Lozano*, the answers to these questions are not clear.⁴⁶

37. *Id.*

38. *Id.* at 1235.

39. *Id.* at 1236.

40. *Id.*

41. *Id.* at 1233–34.

42. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991).

43. *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900).

44. Most courts that have found equitable tolling applicable have done exactly this. See e.g., *Furnes*, 362 F.3d at 723.

45. *Lozano*, 134 S. Ct. at 1233–34. "Congress' mere enactment of implementing legislation did not somehow import background principles of American law into the treaty interpretation process, thereby altering our understanding of the treaty itself." *Id.*

46. One possible solution would be for the eradication of implementing statutes and the

B. *The Intent of the Parties to the Hague Convention*

The parties to the Convention did not intend for equitable tolling to apply to its provisions.⁴⁷ As the Court noted, the drafters of the Convention wrestled with the one year deadline.⁴⁸ Nonetheless, the drafters chose the deadline in order to create a bright-line rule for when a child's interests should take precedence over the interests of the child's petitioning parent.⁴⁹ Thus, the Court refused to second-guess Article Twelve.⁵⁰

C. *Is the One Year Period a Statute of Limitations?*

The Court's decision to address whether the one year period is a statute of limitations was unnecessary since the Court had already concluded that ICARA was immaterial to its analysis and that the drafters of the Convention did not intend for equitable tolling to apply.⁵¹ Nonetheless, the Court addressed the issue, possibly in an attempt to avoid more complex constitutional issues, such as whether common-law presumptions could theoretically apply to implementing legislation.⁵²

A statute of limitation is "[a]law that bars claims after a specified period."⁵³ Thus, if the one year period is a statute of limitations, a petitioner under Article Twelve would be barred from seeking the remedy of return after one year. However, this is not the case.⁵⁴ The Court made clear that the one year period is not a statute of limitations since the remedy of return continues to be available after one year.⁵⁵ The expiration

distinction between self-executing and non-self-executing treaties since treaties are arguably effective at the moment of their ratification under the Supremacy Clause. See Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) (suggesting that all treaties should be enforceable at the moment of ratification pursuant to the Supremacy Clause).

47. See Perez-Vera Report, *supra* note 14, para. 107 (indicating that the fixed one year period, "although perhaps arbitrary," was the best option).

48. *Id.*

49. *Id.*

50. *Lozano*, 134 S. Ct. at 1232.

51. *Id.* at 1233–34.

52. If the one year period is a statute of limitations, the Court's short dismissal of Petitioner's contention that ICARA is domestic legislation which opens the door to the application of United States common-law would require more attention. Further, ICARA explicitly states that it does not purport to alter the Convention. ICARA § 9001(b)(2). However, what result if this was not the case?

53. BLACK'S LAW DICTIONARY (10th ed. 2014).

54. Hague Convention, *supra* note 3, art. 12.

55. See generally *Lozano*, 134 S. Ct. at 1233. The alternative would require courts to distinguish between claims and remedies of the same name that nonetheless differ in terms of the judicial standards attached to their granting.

of the one year period merely permits the child's best interests to take precedence by way of the Settled Defense.⁵⁶ Although many courts have disagreed with the Court on this point, the Court's conclusion appears to promote uniformity.⁵⁷

D. *Petitioner's Policy Argument*

Petitioner argued that equitable tolling should apply to the one year period in order to promote the Convention's goal of deterring child abductions.⁵⁸ The Court agreed "that the Convention reflects a design to discourage child abduction."⁵⁹ However, the Court disagreed that this presumes the applicability of equitable tolling.⁶⁰ On this point, the Court first noted that the Convention does not pursue the goal of deterring child abduction at all costs.⁶¹ Instead, the drafters intended for the Convention to have a shifting framework with bright-line thresholds.⁶² In this way, the Convention could account for the needs of individuals as well as the general goals for which it was drafted.⁶³

Interestingly, the Court did not discuss equitable discretion under Article Eighteen.⁶⁴ Instead, the Court indicated that concealment is commonly considered a negative factor under the Settled Defense.⁶⁵ The concurring opinion discussed equitable discretion and the courts' ability to order return even where a child is settled.⁶⁶ As a result, the concurring opinion potentially elevated the extent of equitable discretion wielded by the courts even though the Settled Defense appears to be non-

56. See Perez-Vera Report, *supra* note 14, para. 25 (indicating that a determination of the child's best interests is the guiding criterion of the exceptions to return).

57. Courts no longer have to consider whether return during the one year period is a different remedy or claim as return subject to the Settled Defense after the one year period. See *supra* text accompanying note 56.

58. *Lozano*, 134 S. Ct. at 1235–36.

59. *Id.* at 1235.

60. *Id.*

61. *Id.*

62. See Perez-Vera Report, *supra* note 14, para. 107 (indicating that the fixed one year period, "although perhaps arbitrary," was the best option).

63. See *Lozano*, 134 S. Ct. at 1235–36.

64. The Court mentioned that American courts have found that the concealment of children is a negative factor under the Settled Defense. *Id.* at 1236.

65. *Id.*

66. *Id.* at 1237–38 (Alito, J., concurring). The concurring opinion believes that "Article 12 places no limit on Article 18's grant of discretionary power to order return." *Id.* at 1237. Article Eighteen states: "[t]he provisions of this Chapter [including Article Twelve] do not limit the power of a judicial or administrative authority to order the return of the child at any time." *Id.* Thus, the concurring opinion believes that Article 18 renders equitable tolling unnecessary. *Id.* Further, contrary to Article Twelve, the concurring opinion opined that courts retain equitable discretion to return a child even after the child has become settled in its new environment. *Id.*

discretionary.⁶⁷

IV. CONCLUSION

In the instant case, the Court sent a message to the international community that the U.S. will not alter the terms of the treaties to which it is a signatory. However, the Court's brief analysis concerning the effect of ICARA may prove unworkable for lower courts in cases where implementing legislation calls for the application of common-law doctrines such as equitable tolling. Further, the Court brushed over the extent of equitable discretion wielded by the courts under Article Eighteen. By doing so, a court split will likely develop as to the contradictory language found in Articles Eighteen and Twelve. The preferable approach would be to consider concealment a negative factor when determining whether a child has become settled. However, the concurring opinion went too far by indicating that the courts should retain the power to return children at any time, even after becoming settled.

67. The courts "shall also order the return of the child, unless it is demonstrated that the child is now settled. Hague Convention, *supra* note 3, art. 12.