

Commentary: Supreme Court Cases

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

Other Supreme Court Cases

Abbott v. Abbott,
560 U.S. 1 (2010)

Chafin v. Chafin,
133 S. Ct. 1017 (2013)

Equitable Tolling | Return Despite Article 12 Defense | Delay | Settlement

Article 12 sets forth a two-prong defense to the return of a child: (1) where a proceeding has commenced after the expiration of one year from the time of wrongful removal or retention, the court shall order the return of the child unless (2) the child is now settled in his or her new environment.

In the *Lozano* case, father's petition was filed sixteen months after the child was wrongfully removed from the United Kingdom. Father argued that the time period in Article 12 should be equitably tolled because the child's location was concealed by mother. The district court rejected father's equitable tolling argument and denied the petition on the basis that the Article 12 defense had been proven and the child was settled in New York.

Facts

Before mother removed the child from London in July 2009, the child lived only in the United Kingdom. Claiming father abused her and the child, mother left the United Kingdom for New York with the child. Father attempted, unsuccessfully, to locate them. He contacted mother's family members and sought court orders compelling family, medical providers, and legal counsel to disclose the child's whereabouts. By March 2010, father determined that the child was no longer in the United Kingdom and filed an application for the child's return with the U.K. Central Authority. That application was received by the U.S. Central Authority approximately one week later. The U.S. Central Authority confirmed that the child was in the United States. Father located the child in New York and filed an application for return with the district court in the Southern District of New York. A period of over sixteen months had transpired from the time of the child's removal from England to the filing of the father's petition in the United States.

At trial, the district court found that although father established a prima facie case for the child's return, mother successfully asserted an Article 12 defense. The court rejected father's argument that the time that the child had been concealed by mother should equitably toll the one-year period. The Supreme Court granted certiorari to determine the question of equitable tolling and resolve conflicting decisions among the circuits.¹

1. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231 (2014) (comparing *Yaman v. Yaman*, 730 F.3d 1, 12–16 (1st Cir. 2013) (equitable tolling is not available) versus *Duarte v. Bardales*, 526 F.3d 563, 568–70 (9th Cir. 2008) and *Furnes v. Reeves*, 362 F.3d 702, 723–24 (11th Cir. 2004) (equitable tolling available)).

Discussion

The Supreme Court considered the application of equitable tolling in the context of U.S. statutes. Equitable tolling is a common-law principle and has long been a part of American jurisprudence. Equitable tolling applies to a statute of limitations, unless doing so is inconsistent with the terms of the statute in question.

The Hague Convention, however, is a treaty and not a statute. Courts must look to the intent of the parties to the treaty. The Supreme Court noted that nothing suggested that the parties to the Hague Convention intended that equitable tolling apply to the Article 12 defense.

The Court observed that signatories to the Convention did not share a common-law background. Accordingly, it would be inappropriate to import an American principle of jurisprudence into an international agreement absent evidence that this was intended. The Court also found that most of the signatory nations considering the issue had declined to accept the application of equitable tolling in the context of an Article 12 defense.

The Court also noted that Article 12 is not a statute of limitations and as such, there is no general presumption that equitable tolling applies. Unlike a statute of limitations, the passage of the one-year period in Article 12 does not eliminate the remedy of return, as the proponent of the defense must also establish that the child has become settled.

The Court recognized that equitable tolling might promote one of the aims of the Hague Convention, to deter abductions. However, it also observed:

We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child's interest in choosing to remain, Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy. The same is true of the child's interest in settlement. *See supra*, at 2; *see also In re M*, [2008] 1 A.C. 1288, 1310 (Eng. 2007) (opinion of Baroness Hale of Richmond) ("These children should not be made to suffer for the sake of general deterrence of the evil of child abduction worldwide."). We are unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty.²

The Court declined to equate the inapplicability of equitable tolling to a reward for the parent that successfully conceals a child for the period of one year. The Court took note of court decisions in the United States and other countries finding that the circumstances of concealment of the child prevented the stable attachments that would contribute to the "settlement" of the child.

Return Despite Article 12 Defense. The concurring opinion addressed the discretion of courts to order a child's return even after the child has become settled.³ It noted that

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

3. The majority opinion declined to address this issue. Despite the fact that the district court found that the child was settled, father failed in his appeal to the Second Circuit to challenge the trial court's decision not to exercise that discretion in favor of ordering the child's return.

the issue of settlement is not an exclusive consideration. Article 18⁴ permits the exercise of a court's discretion to return a child despite the expiration of Article 12's one-year period. The concurring justices also note that Article 12 places no limits on the discretion conferred on a court by Article 18 and identified other factors that might be considered when evaluating whether to order a child's return.

4. International Child Abduction Convention art. 18, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 98 ("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.").