

THE INTERACTION BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HAGUE CHILD ABDUCTION CONVENTION

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I. Introduction

The Council of Europe and the Hague Conference on Private International Law (Hague Conference) have a record of a long-standing fruitful working relationship. Possible differences in views have usually been resolved by agreement underlining the complementarity between the two organisations. The interaction between the European Court of Human Rights (hereinafter: the ECtHR) and the Hague Conference has for some time now been on the agenda of both institutions regarding the Court's most recent interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Child Abduction Convention"/ "the Hague Convention").

The Child Abduction Convention addresses the important problem of the unilateral removal of children across international borders, usually by one of the child's parents. The wrongful removal and retention of children across state borders is one negative aspect of the globalisation of our lives due to increased travelling, tourism, studying abroad, etc. that is, the fact that the world is "shrinking" as distances have become smaller.

This Convention was designed to protect children from the harmful effects of their wrongful abduction or retention. It establishes machinery and procedures to ensure their prompt return to the place/State of their habitual residence and to secure protection for rights of access. Even if the Hague Conference has established a wide range of tools to achieve effective implementation and consistency of operation of the Convention,¹ the Hague Convention does not have a procedure for individual or inter-State complaints before an international judicial body. Thus, in Europe the individual applications mechanism under Article 34 of the European Human Rights Convention is frequently used for

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1 Cf. Hans van Loon, 'Interaction between Recent Case-law of the European Court of Human Rights and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*', statement at the 41st Meeting of the Committee of Legal Advisers on Public International Law, Strasbourg, 17 March 2011, p. 3.

complaints about alleged violations of its Articles 6 and 8 as a result of the application of the Hague Child Abduction Convention.

II. Jurisprudence of the ECtHR

1. Relevant case law

In a series of cases, the European Court of Human Rights has through many years expressed its strong support for the 1980 Hague Convention. Thus the Court considered in *Ignaccolo-Zenide v. Romania* (2000) that “the positive obligations that Article 8 of the Convention lays on the Contracting Parties in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. This is all the more so when the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children.”² In *Eskinazi and Chelouche v. Turkey* (2005) the Court also held that the obligations imposed under Article 8 of the Convention must be interpreted in the light of the requirements of the Hague Convention of 25 October 1980³ and the Convention on the Rights of the Child of 20 November 1989 (*Maire v. Portugal*, 2003).⁴

Building further on the *Eskinazi and Chelouche v. Turkey* decision, the Court held in the *Maumousseau and Washington v. France* (2007) judgment the following:

69. “The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that instrument seeks to deter the proliferation of international child abductions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the status quo ante in order to avoid the legal consolidation of de facto situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child’s habitual residence, in accordance with Article 19 of the Hague Convention.”⁵

2 *Ignaccolo-Zenide v. Romania*, 31679/96, judgment of 25 January 2000, § 95.

3 *Eskinazi and Chelouche v. Turkey*, 14600/05, decision of 6 December 2005. See, also: *Iglesias Gil et A.U.I. c. Espagne*, 56673/00, judgment of 29 April 2003, § 51.

4 See *Maire v. Portugal*, 48206/99, judgment of 26 June 2003, § 72.

5 *Maumousseau and Washington v. France*, 39388/05, judgment of 6 December 2007, §69.

However, the *Neulinger and Shuruk v. Switzerland* Grand Chamber judgment of 2010⁶ was perceived by many practitioners as “a sign for alert”. In particular, the judgment was criticised for having given too much weight to the Convention on the Rights of the Child of 1989 and, accordingly, too much importance to the notion of the child’s best interest. In this respect, it should be reminded that the Court has since long held that the Convention cannot be interpreted in a vacuum but in harmony with any relevant rules of international law applicable in the relations between the parties, in particular the rules concerning the international protection of human rights. In recent years, the Court has been further developing this approach (which is explained in paragraphs 131 and 132 of the judgment).

The *Neulinger* judgment was seen as a turning point in the Court’s approach, although the statement that “the obligations imposed under Article 8 of the ECHR must be interpreted in the light of the requirements of the Hague Convention” re-appeared in the Court’s reasoning⁷ as it did in the previous judgments on the matter. Thus it confirmed that the Court intended to continue being strongly inspired by the Hague Convention.

However, the Court added that it was competent to review the procedure followed by the domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the European Convention and especially those of Article 8.⁸ This statement imposes on the national judge dealing with child abduction cases the obligation to take into account the pertinent provisions of the ECHR when applying the Hague Convention. It clearly reiterates that the Court is competent to review whether the Convention has been observed in the national proceedings.

Moreover, in paragraph 139 of the judgment, the Court went much further. It said that when examining the national decision-making process leading to the

6 *Neulinger and Shuruk v. Switzerland*, 41615/07, GC judgment of 6 July 2010.

7 *Ibid.*, § 132.

8 *Ibid.*, § 133: “However, the Court must also bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its own mission, as set out in Article 19, ‘to ensure the observance of the engagements undertaken by the High Contracting Parties’ to the Convention (see, among other authorities, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 93, Series A no. 310). For that reason the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi*, cited above, § 92, and *Carlson*, cited above, § 73)”.

adoption of the impugned measures by the domestic court it “must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.”⁹ This passage provoked many negative comments. Among other reactions, this also led to comments by the Special Commission on the Practical Operation of the 1980 Convention (and the 1996 Hague Child Protection Convention) and not least by the then Secretary General of the Hague Conference on Private International Law, Mr Hans van Loon. They expressed their serious concern in relation to the language used by the Court in some of its judgments, in particular *Neulinger and Shuruk* and *Raban v. Romania*¹⁰.

The main concerns related to the issue whether the “new” language was to be read as a (drastic) change of jurisprudence, requiring “...national courts to abandon the swift, summary procedure approach for a free-standing assessment of the overall merits of the situation”.¹¹ Some months later the then President of the ECtHR, Jean-Paul Costa, in a speech held in Dublin emphasized, however, that the Court in *Neulinger and Shuruk* had had no intent to detract from the Hague Child Abduction Convention (the same message was also taken over by the UK Supreme Court in the *Eliassen* case). In such a situation, in particular in view of the *Raban v. Romania* chamber case, the Hague Conference, the national courts in the States Parties and also the Court itself, were all waiting for an appropriate Grand Chamber case to clarify the issue of the relationship between the ECHR and the Hague Child Abduction Convention.

2. X. v. Latvia

Therefore, when the Panel of five judges accepted the referral of *X. v. Latvia* to the Grand Chamber, that was seen as the occasion to settle the matter. As to the final outcome of the case, the judgment in *X. v. Latvia*¹² pointed to a clearly visible division among the 17 Judges of the Grand Chamber. However, in spite of that division, the Court was unanimous in operating an important

9 See in this respect, *Maumousseau and Washington, op. cit.*, § 74.

10 *Raban v. Romania*, 25437/08, judgment of 26 October 2010

11 Cf. Hans van Loon, mail of 13 January 2012 to the Court, p. 2.

12 *X. v. Latvia*, 27853/09, GC judgment of 26 November 2013.

reassessment of the general principles.¹³ It clearly stated that Article 8 of the Convention does not call for an in-depth examination by the judicial or other authorities of the requested State of the entire family situation of the child in question. This was not a pure clarification but a clear correction which set aside paragraph 139 of the *Neulinger and Shuruk* judgment.

The Court admitted that paragraph 139 “may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors”. Then it continued to explain that against this background it “considered it opportune to clarify that its finding in paragraph 139 of the *Neulinger and Shuruk* judgment does not in itself set out any principle for the application of the Hague Convention by the domestic courts”.¹⁴

As to the general principles, the judgment made a *renvoi* to *Maumousseau*. It thus set the *Maumousseau and Washington v. France* judgment as the leading case in child abduction matters, referring to its paragraph 99, which defined the obligations incumbent on States in this connection. By doing so, the Court in fact confirmed that the *Neulinger and Shuruk* solution was an exceptional one, due to the very specific circumstances of that case and that it was not to be seen as the leading case in all child abduction situations.

To avoid possible misinterpretations of the general principles, the *X. v. Latvia* judgment clearly spelled out the basic principles regulating the proceedings for return made under the Hague Convention. Thus, it reaffirmed that such proceedings are distinct from custody proceedings (paragraph 100), that the Court does not propose to substitute its own assessment for that of the domestic courts (paragraph 102), and that the Court’s task is not to take the place of the national courts (paragraph 107).

At the same time the Court reiterated, however, the obligations under the ECHR, i.e., that Article 8 of the Convention imposed on domestic authorities a particular procedural obligation. When assessing an application for a child’s return, the courts must not only consider arguable allegations of a “grave risk” for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. The Court considered that

“[b]oth a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also

13 *Ibid.*, §§ 104-105.

14 *Ibid.*, §105.

to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning Convention, of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague which must be interpreted strictly is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.”

Thus, the Grand Chamber was, as previously mentioned, unanimous as to the necessity to delete the need for “an in-depth examination” of the entire family situation (and of a whole series of factors) from the general principles and also as to the confirmation of the other general principles to be applied in cases of child abduction covered by the Hague Convention. Still, the division among the Judges when it came to the interpretation of the very facts of the case (as to the application of the just mentioned procedural obligations) led to a 9:8 final vote in favour of the finding of a violation in that case.

The majority based the judgment on the lack of reasoning given by the Latvian courts and other alleged procedural flaws of the national proceedings to which the eight dissenting Judges could not agree, as explained in the joint dissenting opinion.

What is then the importance of the *X. v. Latvia* judgment? Will it bring more consistency to the relevant jurisprudence of the Court? Will it have an impact on certain tendencies that have surfaced in the Court (contrary to those in the Luxembourg Court of Justice) towards a broader assessment of the overall (merits of the) situation of the child which are today visible also among family law specialists in different countries? In this respect, is the violation found only a “small procedural violation” – to use the *jargon* of the Court – or is it in reality trying to circumvent the proclaimed general principles of interpretation in child abduction matters?

Before trying to give an answer to some of these questions, I would like to underline that there is definitely a genuine concern among the Judges of the ECtHR that accepting the summary, expeditious procedure, i.e. the speediness requirement of the Hague Convention without calling for the observance of the ECHR safeguards, may leave too much freedom to the national courts in that it might allow for flaws which, normally, would not pass the control of the Convention’s procedural requirements either under the procedural aspect of Article 8 or indeed Article 6. The fear is that because of the short time limits the national authorities might tend to minimize their own task in the return proceedings by automatically or mechanically returning children without any meaningful examination of procedure and the claims or without giving

reasoned decisions when the Hague Convention is applicable. The proper balance of these elements would definitely be of utmost importance for achieving what the Court called a harmonious interpretation of both Conventions.

Most importantly, however, this judgment did what was really urgent to be done, that is, it corrected the general principles by deleting a passage that had inadvertently found its way into the *Neulinger* judgment. The confirmation of the fact that the domestic courts are NOT required to conduct an in-depth examination of the entire family situation (and of a whole series of factors) is of primordial importance. It is the main result of this judgment and will unavoidably have important effects on the future case law of the Court.

The judgment definitely does not give a green light to the Court to shift towards an independent assessment of the overall merits of the situation of the child, i.e. the merits of abduction cases. In my opinion, however, a finding of a non-violation in *X. v. Latvia* would have strengthened the general principles and added to the consistency of the case law. On the other hand, the result as it stands sends a clearer message to national authorities in general not to get “lost in automaticity”. The message is that they should not forget the basic principles of the ECHR when interpreting them together with the Child Abduction Convention.

Therefore, and having in mind also the very strict case law of the European Court of Justice in similar situations – as well as their special procedure – which definitely is looked at in Strasbourg, one might expect that this judgment should stabilize the Strasbourg case law on the matter.

Along these lines, in the recent *Lopez Guio v. Slovakia*¹⁵ judgment the Court did not proceed with the examination of the substantive issues of the Slovakian Constitutional Court’s judgment. Remaining at the procedural level, it found that Slovakia had failed to provide the applicant with an effective procedural framework for the return of the child under the Hague Convention in compliance with Article 8 of the Human Rights Convention. Moreover, the Court basically accepted a lower court’s opinion holding that in Slovakia existed a systemic problem in relation to return proceedings under the Hague Abduction Convention, which destroyed the object and purpose of that treaty.

15 No. 10280/12, Judgment of 3 June 2014.

III. Conclusion

To sum up, the Court's position seems to be that, in principle, the 1980 Hague Convention is important and applicable in abduction cases where proceedings on return of children are speedy and could thus avoid harmful effects of their wrongful abduction or retention as much as possible. However, if the enforcement comes some time after the child's abduction, this may undermine the pertinence of the 1980 Hague Convention in such a situation, it being essentially an instrument of a procedural nature (and not a human rights treaty protecting individuals on an objective basis). In other words, when the principle of the immediate return of an abducted child, which is the basis of the Hague Convention, does not materialize within a reasonable time – for whatever reason this may happen – the principle has to be moderated by other considerations, as the one of the best interest of the child.¹⁶

Therefore, and in view of the Court's holding that it must place itself at the time of the enforcement of the impugned measure (*Neulinger*, paragraph 145), it is all the more important to accelerate this type of proceedings in Strasbourg as well.

In this respect, and drawing on my own experience within the Court, in particular on what had happened in the *Neulinger and Shuruk* case while it was pending before the First Section, my subsequent experience with the *M.R. and L.R. v. Estonia* case, with which the First Section of the Court dealt within less than three months, the last week's *Lopez Guio v. Slovakia* judgment which took two years before the ECtHR, but also having in mind the practice of the Luxembourg Court, I would make the following procedural suggestion:

- In my opinion, it is of utmost importance that the ECtHR introduces a special speedy procedure for dealing with such type of urgent situations as are child abduction cases.

Nowadays, since in 2009 the Court introduced a new prioritization policy concerning the order in which it deals with cases, this is clearly possible without any further changes of the Rules of the Court. According to this policy, the Court takes into consideration the importance and urgency of the issues raised when deciding the order in which cases are to be dealt with. Child abduction cases fall into the so-called category I., referring to the most important applications. They are thus to be dealt with more rapidly.

16 *Koons v. Italy*, 68183/01, 30 September 2008. Cf. D. Rietiker, 'Un enlèvement d'enfant devant la grande chambre de la Cour européenne des droits de l'homme : « L'affaire *Neulinger et Shuruk c. Suisse* analysée à la lumière des méthodes d'interprétation des traités internationaux »' 90 *Rev. trim.dr.h.* (2012) p. 394.

In practice, this is to be done first and foremost at the Section level. The task falls to the case lawyers who receive and filter the applications. It is for them to put the application on a faster track, to alert the national judge and the Section Registrar and through them also the Section President of any such case (what *de facto* happened in *M.R. and L.R. v. Estonia*) so as to accord it priority. All of them together bear responsibility for speedy dealing with urgent cases. Also, putting such cases on a faster track would definitely avoid the application of long lasting interim measures as was, unfortunately, the case in *Neulinger and Shuruk*. It is clear that a prolonged application of interim measures “freezes” the situation and may thus lead to a “fundamental change of the situation” – as happened in the *Neulinger* case.

Alongside my critical remarks (which, in part, are also self-critical!) it should not be forgotten that the Court has by a large body of its case law considerably helped reinforce the operation of the Child Abduction Convention, not only in Europe. In this respect, the *X. v. Latvia* judgment has an important role to play as it reiterated the general principles of the Court’s case law at stake. If, in addition, some speedy procedures are consequently applied and observed, the Court will be in possession of all the elements necessary for a harmonious interpretation of both the European Human Rights Convention and the 1980 Hague Convention in order to achieve the paramount goal – to act in the best interest of the child.