

THE HAGUE ABDUCTION CONVENTION AND HUMAN RIGHTS: A CRITIQUE OF THE *NEULINGER* CASE

By

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A. Introduction

In June 2010 the European Court of Human Rights (the “ECHR”) ruled in *Neulinger & Shuruk v. Switzerland*,² in apparent derogation of decades of international jurisprudence, that basic norms of human rights -- at least as expressed in the European Convention on Human Rights (the “European Convention”) -- require (a) that courts in every case under the Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”) must consider the best interests of both the child and the child’s family and (b) that a child should not be returned to its habitual residence, even if that is required by the Hague Convention, if it is not in its best interests to do so.

The essence of the ECHR’s reasoning was as follows:

- i. It is a basic human right of both parents and children that decisions about child custody should be based on the best interests of the individual child and also, to a certain extent, on the best interests of other family members;
- ii. Article 8 of the European Convention, entitled “Right to respect for private and family life” provides that “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society”;
- iii. Therefore, nation states may not take steps pursuant to the Hague Convention that are not in conformity with the best interests of the child; and
- iv. Therefore every Hague case requires a consideration of best interests.

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² *Neulinger and Shuruk v. Switzerland*, 41615/07 [2010] ECHR 1053.

With such simple and simplistic logic the ECHR has purported to overrule thirty years of international case law, has discounted the fundamental purposes of the Hague Convention of deterring international child abduction and of not rewarding international child abduction, and has ensured that any Hague case that follows its precepts will be lengthy and expensive as well as often unfair to the left-behind parent who must now defend what could be almost a custody case on the taking parent's home turf.

The case raises a host of issues. Some of the most significant are:

- Whether the impact of the case will be limited to Europe;
- Whether state courts will limit the precedential value of the specific case to its facts and, in particular to circumstances such as *Neulinger* in which extreme delay in state court proceedings triggered the ECHR's decision;
- Whether the door has been opened to a consideration of best interests in every Hague case;
- Whether state courts will limit a best interests analysis to the exercise of judicial discretion once an exception has been established; and
- Whether the door has been opened to consideration of human rights issues in every Hague case, either through Article 20 or otherwise.

B. Best Interests and the Hague Convention

The central tenet of the Hague Convention has always been that, while any custody determination must be based on an analysis of the child's best interests, that issue should be decided by the courts of the country in the habitual residence from which the child was taken and not by the courts of the country to which a child was wrongfully removed or in which the child was wrongfully retained. The Hague Convention is a jurisdiction-selection treaty; a case brought pursuant to it does not determine the custody of the child but merely determines where that determination shall be made.

The reasons for the Convention are well known. The best way to deter international child abduction is to ensure that international child abduction is not rewarded. In particular, forum shopping in such cases should be discouraged. The best solution is to return abducted children promptly to their habitual residence whose courts are the most appropriate to determine the best interests of children.

Undoubtedly the Hague Convention adopted a "greater good" premise, meaning that it is intended to discourage international child abduction in general even if in any specific case it might perhaps be best for that particular child not to be returned. However, the drafters of the Convention recognized that a balance must be struck between the interest of children in general not to be wrongfully taken from their habitual residence and the need to protect individual children in specific, extreme and unusual cases. For this reason, while the Convention contains

certain exceptions to the rule requiring a child's prompt return to the habitual residence, they are carefully delineated, they are to be narrowly interpreted and even if they are established the courts nonetheless retain a discretion to order the child's return.

States adopted the Convention because they agreed with this philosophy and they expected that their treaty partners would adhere to it. When the United States was considering whether to adopt the Hague Convention, the U.S. State Department explained to Congress that, "The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests." It specifically explained that the grave risk exception "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."³

Courts around the world have consistently applied the Hague Convention in accordance with these fundamental precepts. Thus, the Scottish Court of Session stated that a contention that it was not in the best interests of the parties' children to be returned to France was "out of place in proceedings such as this."⁴ It explained the rule succinctly:

"It is quite plain to us that issues relating to parental responsibility and the best interests of the children are matters appropriate for determination by the Courts of the State of habitual residence and not appropriate for consideration in proceedings such as this. ... The policy of the Hague Convention reflects the fact that the acceding States regard the Courts of the other acceding States as capable of making proper determinations of the kind which we have outlined. Were that not so, the whole machinery of the Convention would be unworkable."

Such statements reflect what has been a global consensus on this issue.

C. Human Rights and the Hague Convention

The Hague Convention drafters debated at length whether to include a human rights exception to the requirement of a child's prompt return to the habitual residence. They ultimately adopted Article 20, whereby a child's return under Article 12 may be refused "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

At first blush, this provision seems to allow courts in all Hague countries to consider the very issues that were before the ECHR in *Neulinger*. However, the relevant "fundamental principles" of "human rights and fundamental freedoms" are not necessarily those of the international

³ Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 19494 (1984).

⁴ *N.J.C. v. N.P.C.* [2008] *CSIH* 34, 2008 S.C. 571.

community at large since they are required to be those of the country in which the Hague case is brought.

Claims under Article 20 have invariably failed in Hague cases and one commentator asserted that it has "nearly faded without a trace."⁵ Such claims have generally been unsuccessful in the United States. For example:

- When an abducting mother argued that domestic abuse was a serious problem in Poland, so that returning the child there would offend principles of Illinois law that protected women and children from abuse, the Illinois court rejected her argument ruling that any risk of domestic violence was more properly addressed by the "grave risk" exception in the Convention.⁶

- When an abducting father claimed that Article 20 should apply because the Colombian courts had denied him due process and ignored his son's wishes, the Virginia court gave the argument short shrift, stressing that Article 20 must be "restrictively interpreted and applied ... on the rare occasion that return of a child would utterly shock the conscience of the court or offend notions of due process."⁷

- When a parent asserted that the exception should bar a child's return to Germany since that country was not in adequate compliance with the Hague Convention the Florida court flatly rejected the argument.⁸

A rare case in which an Article 20 argument succeeded was before a Wisconsin district court. The aunt of a child who was lost during the chaotic civil war in Somalia had found her and taken her to live in England. Later the child found her mother and visited her in Wisconsin. The aunt petitioned for the child's return to England, claiming that while she had not acquired formal custody in England she had such rights under English law. The petition was dismissed because the child had turned 16 but the court insisted that pursuant to Article 20 it would not have returned the child in any event, because the U.S. Constitution and treaties guarantee a parent's right to the custody, care and control of a minor child as against third parties.⁹

D. Efforts to Limit the Hague Convention

The *Neulinger* case should be considered against the backdrop of a series of objections that have been raised to the philosophy of the Convention and of attempts to limit the Convention by subjecting it to a best interests exception. The proponents of such efforts make the following assertions:

- a. They argue that the Convention was drafted under the false premise that the majority of international abductions were not by primary care providers of children. In fact

⁵ Beaumont, P.R. & McEleavy, P.E., *The Hague Convention on International Child Abduction* 172 (1999).

⁶ *Habrzyk v. Habrzyk*, --- F.Supp.2d ---, 2011 WL 63903 (N.D.Ill.2011).

⁷ *Hazbun Escaf v. Rodriguez*, 200 F.Supp.2d 603 (E.D.Va.2002).

⁸ *Sewald v. Reisinger*, 2009 WL 150856 (M.D.Fla.2009).

⁹ *Mohamud v. Guuleed*, -- F.Supp.2d --, 2009 WL 1229986 (E.D.Wis.2009).

it is mothers who are the typical international child abductors and they do so while providing primary care to the child.

b. They argue that most abductions are to the primary care-provider's country of origin, whose courts may be more appropriate to determine custody issues, especially if the mother has lived overseas for only a short time.

c. They claim that, although the Convention calls for abducted children to be returned expeditiously to their habitual residence many countries do not do so and that if decisions are deferred for months or years, as in *Neulinger*, the benefits of returning a child to the habitual residence are seriously compromised.

d. They claim that the aim of removing the incentive to abduct may not have worked since international abductions continue to rise.

e. They claim that most abductors are fleeing domestic violence so that forcing their return to the scene of the crime is unjust to both mother and child.

f. They claim that the expectation that courts would apply the treaty with a degree of uniformity has been proven to be naïve and erroneous.

g. They argue that the theory of the Hague Convention requires courts in the habitual residence to consider custody issues fairly, quickly and non-parochially, especially applications for international child relocation, but that domestic courts have been far too restrictive in authorizing international relocation so that expatriate parents are more likely to feel the need to "run home" with their children.

E. European Response to Such Arguments

The response to such issues in Europe has been somewhat schizophrenic. On the one hand, the revised Brussels II Regulation (Council Regulation (EC) 2201/2003) significantly tightened the Hague Convention as it applies within the European Union. In particular, Article 11 sharply limits the grave risk exception by precluding its application whenever it is established that there are adequate arrangements to secure the child's protection after its return. This restricts the exception far more than outside the E.U. Additionally, the Regulation requires E.U. courts to use their most expeditious procedure in Hague cases and, unless for exceptional circumstances, to issue a decision within six weeks. By contrast, the Hague Convention itself (Art. 11) merely gives a petitioner the right to request a statement of the reasons for the delay if a decision is not rendered within six weeks.

Consistent with this trend, several European countries that were previously subjected to harsh criticism for not returning abducted children -- Sweden and Germany being good examples -- have now become far more effective enforcers of Hague Convention rights.

On the other hand, the ECHR ruling in *Neulinger* would dramatically loosen and significantly weaken the Hague Convention by subordinating all Hague Convention cases to prevailing human rights norms, specifically including the best interests of the specific child and to some extent of the child's family. Likewise a recent Swiss law on the Hague Convention,¹⁰ which expressly requires the consideration of best interests in all Hague cases in that country, follows a similar trend.

F. The Neulinger Case

i. Facts of the Case

Isabelle Neulinger, a Swiss and Belgian national, emigrated from Switzerland to Israel in 1999. There she met Shai Shuruk, an Israeli citizen. They married in 2001 and lived in Tel Aviv. Both were Jewish but apparently neither was particularly religious at the time of the marriage. Mr. Shuruk then became religious and affiliated with the ultra-orthodox Lubavitch community.

The parties' child, Noam, was born in 2003 in Israel. Shortly thereafter, because the mother's feared that the father would take the child overseas for "religious indoctrination" in a "Lubavitch-Habad" religious Jewish community, the Tel Aviv Family Court issued a ne exeat order that barred the child's removal from Israel. The court also gave interim custody to the mother, parental responsibility to both parents jointly and visitation rights to the father.

Israeli social services issued a court-ordered report finding that the father had created an atmosphere of verbal aggression and threats that had terrorized the mother in their home. The mother also alleged an incident of assault. Consequently the Tel Aviv court severely restricted the father's contact rights.

The parents were then divorced in Israel. In March 2005 the Tel Aviv Family Court denied the mother's application to vacate the ne exeat order, finding that there was a serious risk that the mother would not return with the child to Israel after visiting her family abroad.

In June 2005 the mother clandestinely removed the child from Israel in violation of Israeli law and secreted him in Switzerland.¹¹ The father promptly reported the abduction to the Israeli authorities but it was not until May 2006 that Interpol reported that the child had been found in Lausanne, Switzerland.

Some days later, upon the father's application, the Tel Aviv Family Court ruled that the mother had wrongfully removed the child from his habitual residence in Israel within the meaning of Article 3 of the Hague Convention.

¹⁰ Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults.

¹¹ The father claimed that she smuggled the child through the Sinai desert under the dashboard of a car. Letter from father to ECHR dated Oct. 15, 2009 found at <http://www.scribd.com/doc/21137078/Shuruk-Post-Trial>. In an interview the mother allegedly stated that she had hired a smuggler for the sum of \$30,000 to take her and the child to Sharm El-Sheikh after they had crossed the border from Israel into the Egyptian Sinai peninsula. <http://www.vosizneias.com/25641/2009/01/13/lausanne-switzerland-european-court-of-human-rights-in-strasbourg-orthodox-jewish-movement-fanatical-dangerous-and-radical/>

ii. The Swiss Proceedings

The father promptly applied to the justice of the peace for the district of Lausanne for his son's return under the Hague Convention. The mother successfully asserted the grave risk of harm exception, arguing that (a) the Israeli court had restricted the father's access to two hours a week under social services' supervision; (b) the father had very limited income and was living with a roommate in a small apartment; (c) she could not return to Israel because she would be arrested for criminal abduction; and (d) the child would be in the hands of the Lubavitch "religious cult" if returned to Israel.

On the father's appeal, the Vaud Cantonal Court appointed a pediatrician and child psychiatrist to evaluate the risks of a potential return. His report, issued after a seven month delay, stated that (a) the child's return to Israel with his mother would expose him to a risk of psychological harm whose intensity could not be assessed without ascertaining the conditions of that return and (b) maintaining the status quo would also create a long-term risk of major psychological harm.

Meanwhile the Israeli Central Authority, in response to requests from its Swiss counterpart and the father's lawyer, explained that the Israeli courts would afford the mother substantial protection if she returned the child. It also complained of the long delays in the case, reported that the mother would face criminal charges in Israel only in "very exceptional circumstances" and represented that if she returned the child and complied with further court orders it would "positively consider" instructing the Israeli police to close their file.

In May 2007 the Cantonal Court dismissed the father's appeal, relying on the expert's report and on the length of time that the child had now been in Switzerland. It attached great significance to the expert's conclusion that "the possibility of the mother's return to Israel with Noam, even for a short period, is totally out of the question for the mother." It also found that returning the child without his mother would represent a serious risk for him.

On a further appeal by the father, in August 2007 the Swiss Federal Court overturned the courts below and ordered the child's return to Israel. It found that there was no basis for a finding of grave risk of harm. It ruled that the trial court had not sufficiently explored the issue of the mother's refusal to return to Israel. In particular there was no evidence that she would be imprisoned if she returned and the Israeli Central Authority had stated that if she cooperated with further court orders she would not be. There was also no evidence that the father had not abided by the Israeli court's order of limited supervised visitation and the supervising social worker had reported that the father had fully done so. The Court ruled that the Article 13 exceptions should be applied "restrictively" and that an abductor should not be permitted to take advantage of her unlawful conduct.

iii. The ECHR Proceedings

Having exhausted her efforts in the Swiss courts – which by then had yielded a 2½ year delay -- the mother (and child) petitioned the ECHR. Her primary argument was that the Swiss courts

were violating Article 8 of the European Convention, entitled “Right to respect for private and family life”, which provides that,

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

a. Interim Stay

The mother asked the ECHR to ask the Swiss Government to stay the child’s return to Israel pending the Court’s review of the case and submitted a medical certificate claiming that an “abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child.” The ECHR promptly granted the application and the Swiss Government complied with its request.

b. The First ECHR Judgment

On January 8, 2009 the ECHR issued its first judgment in the case.¹² By a 4-3 majority it held that the Swiss judgment did not violate the European Convention. It ruled that:

- The parents had joint parental authority over the child under Israeli law, including the right to determine his residence.
- His removal from Israel rendered the father's contact rights illusory since he lived in Israel;
- Returning the child to Israel complied with the Hague Convention, and would protect the rights and freedoms of the child and his father;
- The mother’s claims concerning the father’s alleged “threatening and fanatical” conduct were effectively refuted by evidence that the Israeli authorities had taken strong and effective measures to limit his access to the child;
- Her claim that she could not return to Israel because she would be arrested was without substance, since most European countries had similar criminal laws and there was no reason to doubt the Israeli assurances that imprisonment was unlikely if she cooperated;

¹² *Neulinger & Shuruk v. Switzerland*, No 41615/07, 8 January 2009.

- Her claim that the child would be placed in the hands of orthodox Jewish religious fanatics was without merit because she had joint parental authority with the father and could influence decisions concerning his education;
- Her claims were also refuted by the fact that she had settled in Israel, had spent six years there, had been employed there by her current employer in Switzerland and presumably had a social network in Israel; and
- The Swiss order had struck a fair balance between the competing interests and had taken into account the child's best interests.

However, the minority opinions were remarkable for displaying judicial ignorance of or disdain for the Hague jurisprudence or disdain for and intolerance towards non-European religious orthodoxy. Merely by way of example, Judge Spielmann stated incorrectly that the father had no Hague Convention right of custody because joint decision-making concerning a child did not create such a right. Judge Steiner insisted that the child should not be returned because a rabbinical court would decide the case (even though the civil courts had exclusively heard the case in Israel) and that the “the religious ultra-Orthodox movement” of Judaism was neither democratic nor European.

c. The Grand Chamber ECHR Judgment

The mother then appealed to the Grand Chamber of the ECHR, comprising 17 judges. This yielded another 18-month delay for the mother. Ultimately, the Grand Chamber ruled in June 2010, by 16 to 1, that the Swiss return order complied with the Hague Convention but that the Court “was not convinced that it would be in the child's best interests for [the child] to return to Israel”; that the mother “would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel”; that the child should not be returned to Israel; and that Switzerland must pay 15,000 Euros to the mother for costs and expenses.¹³ As for the father, the Court stated that his capacity to provide care was questionable, in view of his past conduct and limited financial resources and because he had never lived alone with the child and had not seen him since 2005.

In its ruling the Court made some significant preliminary observations as follows:

- It stated that the concept of the best interests of a child is a fundamental principle of human rights that has been enshrined in many international instruments, including the Convention on the Rights of the Child of 20 November 1989, the Declaration on the Rights of the Child of 20 November 1959, the Convention on the Elimination of All Forms of Discrimination against Women and the European Union's Charter of Fundamental Rights.¹⁴

¹³ *Neulinger and Shuruk v. Switzerland*, 41615/07, §151, §162 (3) [2010] ECHR 1053 (hereafter referred to as “Neulinger”).

¹⁴ *Neulinger* at § 132, §49, § 53, § 56.

- It cited certain references to “best interests” in three Hague cases -- one each from France, England and Finland – in support of the astonishing proposition that courts around the world have regularly relied on best interests analyses in Hague cases.¹⁵ This analysis completely ignored the enormous number of cases from around the world that have held precisely the opposite. Furthermore, the cited English case did not hinge on best interests but on whether the father had rights of custody under Romanian law and, while the House of Lords had sharply criticized the delays in the case, its decision was not based on that ground.¹⁶

- It described with apparent approval the Swiss law,¹⁷ enacted in 2007 but not in force until 2009, that requires Swiss courts to interpret Article 13(b) of the Hague Convention in a far more expansive way than was intended when the treaty was enacted. Article 5 of the Swiss law states that “The return of a child places him or her in an intolerable situation, within the meaning of Article 13, sub-paragraph (b), of the Hague Convention, in particular where the following conditions are met: (a) placement with the parent who lodged the application is manifestly not in the child's interests; (b) the abducting parent is not, given the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction, or this cannot reasonably be required of that parent; and (c) placement in the care of a third party is manifestly not in the child's interests.” In fact, the Swiss law allows -- and indeed encourages -- the Swiss courts to evade and violate the Hague Convention by requiring Swiss courts to conduct best interests analyses before returning abducted children.¹⁸

The Grand Chamber then issued its basic conclusions as to the law, as follows:

- It stated that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law; and that the decisive issue is whether a fair balance was struck between the competing interests of the child, the two parents and public order, within the margin of appreciation given to states in such matters, but bearing in mind that the child's best interests must be the primary consideration.¹⁹

- It found that there is a broad consensus that in all decisions concerning children their best interests must be paramount and may override those of the parents but that the parents' interests, especially in having regular contact with their child, nevertheless are a significant factor.²⁰

- It stated that the child's interest comprises two limbs. On the one hand, the child's family ties must be maintained, unless the family has proved particularly unfit, and should be severed only in very exceptional circumstances, with everything possible being done to

¹⁵ *Neulinger* at §60-64.

¹⁶ *Re D (a child)*, [2006] UKHL 51.

¹⁷ Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults.

¹⁸ *Neulinger* at §75.

¹⁹ *Id* at §131.

²⁰ *Id* at §135.

preserve personal relations and, if appropriate, to “rebuild” the family. On the other hand, the child’s interest is to ensure its development in a sound environment, and Article 8 prevents a parent from having steps taken that would harm the child’s health and development.²¹

- It stated that the same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of an abducted child unless there is a grave risk of physical or psychological harm or of placing the child in an intolerable situation. “In other words, the concept of the child’s best interests is also an underlying principle of the Hague Convention.” Thus, “the Court takes the view that Article 13 should be interpreted in conformity with the [European] Convention.”²²

- It then stated that Article 8 of the European Convention would bar a child’s return being ordered “automatically or mechanically when the Hague Convention is applicable” and that the child’s best interests will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. “For that reason,” the Court stated, “those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned.”²³

- The Court then insisted that it “must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case.” In this regard it had to ascertain whether the domestic courts had “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.”²⁴

The Court then proceeded to apply its general principles to the facts of the case at hand, and made findings as follows:

- In the view of the domestic courts and experts, Noam’s return could only be envisaged with his mother. But was that conclusion compatible with Article 8? Was the forced return of the child accompanied by his mother, “even though she seems to have ruled out this possibility”, a “proportionate interference” with the right of each applicant to respect for their family life?²⁵

- To assess whether Article 8 has been complied with, it was necessary to consider developments since the Swiss return order. The Court must place itself at the time of the

²¹ *Neulinger* at §136.

²² *Id* at §137.

²³ *Neulinger* at §138.

²⁴ *Id* at §139.

²⁵ *Id* at §144.

enforcement of the impugned measure. Enforcement long after the child's abduction may undermine the pertinence of the Hague Convention, which is essentially a procedural instrument and not a human rights treaty protecting individuals on an objective basis.²⁶

- Guidance may be found in the case-law on the expulsion of aliens where, in assessing whether to expel a child, a court should consider his best interests, particularly the extent of the difficulties he might encounter in the destination country and the solidity of his ties with both countries, together with the seriousness of any difficulties which may be encountered in the destination country by the accompanying family members.²⁷

- The Court noted that Noam had Swiss nationality, had arrived in Switzerland in June 2005 at the age of two, had been living there continuously ever since, had apparently settled well, had attended a municipal secular day nursery and a “State-approved” private Jewish day nursery, attended school in Switzerland and spoke French. Though his age was such that he still had a capacity for adaptation, if he were uprooted again from his habitual environment it “would probably have serious consequences for him, especially if he returns on his own” and his return to Israel “cannot therefore be regarded as beneficial.”²⁸

- The Court stated that the “significant disturbance” that Noam’s “forced return” would likely cause in his mind must be weighed against any benefit that he may gain from it. Here it was noteworthy that restrictions had been imposed by the Israeli courts, even before the abduction, on the father's right of access, authorizing him to see his child only twice a week under the supervision of social services at a contact centre in Tel Aviv. Moreover, it appeared that Noam's father had remarried and had divorced only a few months later, while his new wife was pregnant and had then married for a third time and that his second wife had sued him for failure to pay maintenance for his daughter. “The Court doubts that such circumstances, assuming they are established, would be conducive to the child's well-being and development.”²⁹

- The Court stated that if the mother returned, she “could be exposed to a risk of criminal sanctions, the extent of which, however, remains to be determined.” Criminal proceedings with a possible prison sentence “cannot be ruled out entirely.” It said that such a scenario would not be in the best interests of the child. It found that the mother's refusal to return to Israel “does not therefore appear totally unjustified.” Having Swiss nationality, she was entitled to remain in Switzerland. Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of criminal proceedings and her possible imprisonment. The father's capacity to do so could be called into question, in view of his past conduct and limited financial resources. He had never lived alone with the child and had not seen him since the child's departure.³⁰

²⁶ *Neulinger* at §145

²⁷ *Id* at §146.

²⁸ *Neulinger* at § 147.

²⁹ *Id* at §148.

³⁰ *Neulinger* at §148. The Court made no reference to the father’s submissions to the Court, which it apparently rejected, as to his gainful employment or family circumstances or of his unsuccessful efforts to appear in the case

- In conclusion, the Court ruled that it “is not convinced that it would be in the child's best interests for him to return to Israel.”³¹

- As to the mother, “she would sustain a disproportionate interference with her right to respect for her family life if she were forced to return with her son to Israel.”³²

G. Cases After Neulinger

i. ECHR Cases

The ECHR has considered *Neulinger* in two subsequent Hague cases.

In *Raban v. Romania*, concerning Romania and Israel, the Court applied *Neulinger* in its broadest sense.³³ A Romanian court had ordered that wrongfully-removed children should be returned from Romania to their habitual residence in Israel. A Romanian appeal court had overturned the order because it found (a) that the father had consented to the children remaining in Romania and (b) that there was a grave risk of harm to the children because of the purportedly dangerous conditions with terrorism in Bat Hefer in Israel where they had been living.

The father then appealed to the ECHR pursuant to Article 8 of the European Convention. The ECHR denied the appeal, stating that it should not disturb a state court finding on such issue absent a clear showing of arbitrariness.

The Court did not address the fact that the evidence of consent was minimal. Nor did it did not address the highly suspect Romanian decision that life in the Israeli town was inherently dangerous based solely on reports by Amnesty International and the US State Department, which had never been shown to the father and which, according to the dissenting judge on the Romanian appeal, had not mentioned the specific town or area. Instead the Court focused on the best interests of the children, insisting that “the concept of the child's best interests should be paramount in the procedures put in place by the Hague Convention” and that “[c]onsideration of what serves best the interests of the child is therefore of crucial importance in every case of this kind.” The Court stressed that in a Hague case the courts in the state where the child is located must determine what is best for the child. It found that it was most significant that the children in question had become well integrated in their new environment in Romania.

In sharp contrast in a Dutch - Italian case³⁴ the ECHR cited *Neulinger* but gave it short shrift. The Dutch courts had ordered that a child abducted by her mother from Italy to the Netherlands should be returned to Italy. The mother complained to the ECHR that the process had been flawed and had taken far too long. The ECHR simply found that Dutch proceedings that lasted

by video or other electronic means. Letter from father to ECHR dated Oct. 15, 2009 found at <http://www.scribd.com/doc/21137078/Shuruk-Post-Trial>.

³¹ *Id* at §151.

³² *Id*.

³³ *Raban v. Romania*, [2010] ECHR 1625 (26 Oct. 2010).

³⁴ *Van Den Berg & Sarri v Netherlands*, 7239/08 [2010] ECHR 1947.

for more than 2.9 years, with five court instances, two appeals and efforts at mediation, were not unreasonably lengthy.

ii. English Cases

The English courts have had some occasion to consider the impact of the *Neulinger* case and thus far have uniformly discounted its effect.

In one case Baker J. stated that he expected that *Neulinger* would have little impact. He opined preliminarily that “it will be an extremely rare case where a court concludes that: (a) a child has been wrongfully removed in breach of a parents' rights of custody; (b) none of the defences in Articles 12 or 13 is established; but (c) nevertheless an order for the summary return of the child would infringe Article 8 of ECHR.”³⁵

In another case the English court considered *Neulinger* in the context of a mother's claim that her three children should not be returned to Italy because of the grave risk that resulted from the physical, sexual and emotional abuse that she had suffered for many years.³⁶ The Court again discounted *Neulinger*'s significance, stating that it “does not bring about a sea change in the way that these cases should be approached.” The Court acknowledged that a broad view of *Neulinger* would require the court to carry out “an in-depth examination of the entire family situation” in every case, which would defeat the very purpose of the Convention and contravene existing English precedent.

Nonetheless, the outcome in the case is significant. The Court upheld the grave risk of harm exception, not because the children would be exposed to physical abuse if returned, although the Court did hold that the children had witnessed violent incidents, but because the level of domestic violence against the mother was sufficient to prevent her return to Italy with the children, and that it would be unwise of her to do so, and that if the children were separated from their mother they would undoubtedly be exposed to a grave risk of emotional harm. The Court may have adopted a somewhat wide interpretation of Article 13(b) in light of the issues raised in the *Neulinger* case.

H. An Evaluation of the *Neulinger* Case

Reviewing the entire history of the *Neulinger* case leads this author to some extremely disturbing conclusions.

Overall, the collective conduct of the various courts that handled the *Neulinger* case was deplorable. Instead of resolving the matter promptly the Swiss courts allowed the case to drag on for two years despite the fundamental requirement that Hague cases be concluded promptly. The ECHR then made the matter far worse by taking three more years to decide the case. Such delays are completely inexcusable and in and of themselves constitute a violation of the basic rights of a

³⁵ *WF v RJ* [2010] EWHC 2909 (Fam).

³⁶ *Re T* [2010] EWHC 3177 (Fam).

left-behind parent and a litigant. The fact that they are committed by the judiciary does not excuse their commission, particularly when the ECHR itself has consistently found in other cases that such serious delays in enforcing Hague Convention rights, when committed by nation states, are reprehensible and in violation of human rights.³⁷ It is little short of astonishing that the Court did not refer to the violation by the Swiss authorities of the obligation to resolve Hague cases promptly, and within six weeks if possible, and did not refer to or seek to explain or defend its own failure to handle the case diligently. The hypocrisy of a human rights court reprimanding other courts for inexcusable delays while creating massive delays in its own cases is glaringly self-evident.

The *Neulinger* decision quite obviously rewards and encourages bad conduct. The mother was rewarded for surreptitiously kidnapping a 2-year old child in express violation of the clear orders of an Israeli court and then using the criminal nature of her own actions to bootstrap the claim that she cannot or will not return the child. It is reprehensible that the Court allowed the mother's own criminal acts to form the central element in its decision that the child should not be returned and that Switzerland should pay damages to her for having ultimately, even if belatedly, applied the Convention appropriately. The mother's acts were not only criminal under Israeli law but would be criminal if committed in many countries in Europe and in the United States.

The ECHR also provides a tremendous reward for delaying tactics. Practitioners in this field know all too well that courts in many countries allow cases to drag on far too long, but now the ECHR has officially endorsed the benefits of such tactics.

The decision is also noteworthy for the flimsy quality of its judicial reasoning. The Court made key findings without supporting evidence and it relied upon its own conceded speculation on significant points. Its reliance on the possibility of criminal charges in the courts of the habitual residence as a key reason for not returning the abducted child gives an abductor the gift of a defense whenever she has broken a state's criminal laws by abducting a child. Its acceptance of the mother's representation that she would not go to Israel if her son was sent there is not merely speculative but is in fact absurd. A mother who asserts that her child would suffer incurable lifelong trauma if separated from her can hardly argue that she would abandon her child if he went back to their prior residence. The judgment contains not one word of criticism for the mother's conduct of kidnapping a child across international borders in violation of court orders. To the contrary, in consistently describing the father and his religious affiliation in extremely negative terms it approaches an endorsement of her actions.

One matter that is left unsaid in the judgment is the extent to which the Court's own biases played a role in the case. Certainly the case was replete with references, sometimes derogatory, to rabbinical courts, ultra-orthodox Jewish fanatics and religious indoctrination which were apparently in sharp opposition to the European democratic values that should be protected by the European Convention. Perhaps it is purely coincidental that *Neulinger* and *Raban* were both cases in which the ECHR relied on extraordinarily dubious grounds to refuse to have children returned to Israel, but certainly the Court's reasoning in both of those cases does nothing to negate such thoughts.

³⁷ *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, (2003) 37 E.H.R.R. 17; *H.N. v. Poland*, No. 77710/01, (2007) 45 E.H.R.R. 46.

However, the most significant problem with the *Neulinger* case is that if the language in the decision is given full effect it will completely undermine the Hague Convention. The purported requirement of individual forensic evaluations in every Hague case is in complete derogation of the fundamental concepts of the Hague Convention. It would make every Hague case far longer and more expensive and it would undoubtedly lead to the denial of return petitions in many cases. It would favor the abducting parent who would now always be on her home turf before what might well be a more sympathetic forum while the left-behind parent would need to support what would perhaps be almost a complete custody case in a foreign country with which he might have no familiarity. The Hague Convention requires courts to return abducted children expeditiously so that the courts in the country of habitual residence can promptly determine what is best for them. The *Neulinger* court demonstrated little understanding of that mechanism and every intention of undermining it.

In general the *Neulinger* judgment shows that the judicial application of broad human rights principles to specific cases – by judges who obviously have their own world outlook and biases - - can be extremely subjective, completely unpredictable, quite unfair to other parties and entirely unsatisfactory.

In conclusion, the initial English response to the *Neulinger* case should be followed. The case should be limited to those cases in which there has been an extreme violation of the terms or spirit of the Hague Convention, primarily or perhaps exclusively in cases in which the child's return is delayed for grossly excessive periods of time.

Neulinger: An Update

After this article was written there were two significant decisions on the relevance and applicability of the *Neulinger* case by the European Court of Human Rights and one by the U.K. Supreme Court.

While the U.K. court found that *Neulinger* did not require the U.K. to change its interpretation or application of the Hague Convention, the ECHR applied *Neulinger* broadly in two cases in 2011. In the first ECHR case the Court quashed Italy's application of the Hague Convention and endorsed a mother's abduction of a child to Latvia. In the second case the Court quashed Latvia's application of the Hague Convention so as to endorse a mother's abduction of a child to Latvia.

Šneersonė

In *Šneersonė and Kampanella v. Italy (ECHR Application no. 14737/09)* the ECHR applied *Neulinger* in a broad way to override an Italian return order that had been issued after an admitted international child abduction from Italy to Latvia.

In April 2006 the child's unmarried mother unilaterally took the parties' son from their habitual residence in Rome, Italy to her native Latvia where she retained him. She claimed that she did so because the father was not paying child support and she could not afford to remain in Italy.

Under a prior Italian court order she had sole custody and the father, with whom she was not married, had extensive access rights. Apparently the Italian order provided the father with "rights of custody" for Hague Convention purposes, since a Latvian court subsequently confirmed that the Convention applied.

Litigation was promptly initiated in both Latvia and Italy, the ultimate outcome of which was as follows:

- The Latvian courts held that the child should not be returned to Italy. They determined that there was a "grave risk of harm" to the child within the meaning of Article 13(b) of the Hague Convention because (a) it was financially "impossible" for the mother to follow the child to Italy; and (b) a psychologist's report found that the child was suffering psychological stress and anxiety in connection with his potential return to Italy. The psychological report was requested -- and apparently selected -- by the mother's lawyer.
- The Italian courts held that the child must be returned. They first determined that he had been wrongfully abducted. They then were required to consider, pursuant to Article 11(4) of the Brussels II bis regulation, whether adequate arrangements had been made to secure his protection upon his return to Italy from any identified risks within the meaning of Article 13 (b) of the Hague Convention. In that regard, they ruled that although it would be preferable if the mother came back to Italy with her child, the father's proposed alternative arrangements -- for the child to live with him, for language assistance and psychological counseling to the child, and for the mother to stay in a specified house in Italy during her visitation times -- were adequate to satisfy Article 11(4). Accordingly they ordered that the child should be returned forthwith.

Latvia then complained to the ECHR that the Italian return order violated the rights of the mother and the child to respect for their family, as guaranteed by Article 8 of the European Convention on Human Rights.

Relying primarily on *Neulinger*, the ECHR agreed with Latvia. The Court criticized the Italian courts' failure to provide detailed reasoning. In particular, they had not considered: (a) the risk that the child's separation from his mother might leave him with neurotic problems or an illness, (b) the father's failure to visit his son in Latvia since 2006 or (c) whether the father's home was suitable for a young child.

The ECHR, citing *Neulinger*, stated that 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 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."

The Court's decision is frankly astonishing for its failure to criticize the mother's conduct in abducting the child in the first place and for its failure to address the fact that the Article 13(b) exception should not be invoked when the abducting parent is the one who creates the risk by refusing to return with the child.

The ECHR decision endorses international parental child kidnapping and constitutes an extremely dangerous precedent.

X v. Latvia

Equally disturbing is the case of *X v. Latvia* (ECHR Application 27853/09) decided on December 13, 2011.

Here the child was taken from her habitual residence in Australia to Latvia by the Latvian mother. The father in Australia commenced a Hague proceeding promptly and the Latvian court, after a hearing, promptly issued a return order. On appeal the mother asserted that the child would suffer psychologically if she were returned to Australia without her mother and supported this assertion with a psychologist's report and she claimed that she did not have the financial resources to return there. The appeal failed in January 2009.

Almost three years later the ECHR ruled that the Latvian return order violated Article 8 of the European Convention because the Court disregarded the psychologist's report and did not sufficiently consider "what would happen as regards the child's material well-being if returned to Australia."

Two judges dissented, asserting that, "Our Court's function in such matters is merely to verify whether the national authorities followed adequate procedures and conducted a balanced and reasonable assessment of the respective interests of each person" and that "In the present case there is no indication that the Latvian courts disregarded the required procedures or arrived at unreasonable or arbitrary conclusions."

Re E (Children)

By contrast, the decision of the U.K. Supreme Court in *Re E (Children)* [2011] UKSC 27 was sensible and logical. Admittedly, its task was made far easier by the fact that the English system worked efficiently in two critical respects.

First, even though the Hague case was heard by a trial court and two appeal courts, including the U.K.'s most senior court, the entire case was fully and finally resolved in only nine months.

Second, the trial court sensibly required the parties to select a psychological expert jointly to make recommendations as to potential protective measures and to opine as to their sufficiency.

The English mother of two children had taken them to the U.K. from their home in Norway. She claimed that the father had been violent and abusive. The psychiatrist who was selected by both parties issued reports which warned that the mother's condition might deteriorate into self-harm and suicidality if she had to return to Norway. However, the psychiatric report also stated that she would be sufficiently protected if certain protective measures were put in place.

The trial court determined that the child must return to Norway once the suggested protective measures were secured. That determination was upheld on appeal to the Court of Appeal and then to the Supreme Court.

The Supreme Court explained that the Hague Convention and the obligation under Article 8 of the European Convention should be read together to require the state to ensure the reunion of children with their parents. If a State does not comply with its Hague Convention obligations and as a consequence a child is not reunited with its left behind parent then the State may be in breach of the European Convention.

The decisive issue under Article 8 is whether a fair balance had been struck between the competing interests of the child, the parents and the wider society's interest in public order, bearing in mind that the child's interests will be a primary consideration.

The *Neulinger* case had found a violation arising from delays in its procedural arrangements and not as a result of any procedural flaw within the domestic arena.

The essence of the Supreme Court's legal opinion was that,

“The Hague Convention is designed to strike a fair balance between those two interests. If it is correctly applied it is most unlikely that there will be any breach of article 8 or other Convention rights unless other factors supervene. *Neulinger* does not require a departure from the normal summary process, provided that the decision is not arbitrary or mechanical. The exceptions to the obligation to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to the children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be.”

Applying these principles the Court ruled that the protective measures supplied the necessary protection.

Overview

The ECHR cases yielded diametrically opposed results to that in the UK court. There will remain great uncertainty in this area as long as the European Court chooses to require that state court decisions be based on broad “best interests” criteria without giving priority to the interest of ensuring that children be reunited with their parents. Although the Supreme Court distinguished *Neulinger* on the ground that it was based on the unusual procedural delays which did not exist in *Re. E*, the rulings in *Šneerson* and *X v. Latvia* were not founded on that basis.