EHRC 2014/96
Europees Hof voor de Rechten van de Mens
26 november 2013, 27853/09.
(Spielmann (President)
Bratza
Raimondi
Ziemele
Villiger
Vajić
Hajiyev
Jočienė
Šikuta
Hirvelä
Nicolaou
Kalaydjieva
Vučinić
Nußberger
Laffranque
Pinto de Albuquerque
Sicilianos)

X
tegen
Letland

Grote Kamer, Internationale kinderontvoering, Schending eerbiediging gezinsleven

[EVRM - 8 ; EVRM - 41 ; Haags kinderontvoeringsverdrag 1980 - 1 ; Haags kinderontvoeringsverdrag 1980 - 3 ; Haags kinderontvoeringsverdrag 1980 - 5 ; Haags kinderontvoeringsverdrag 1980 - 13 ; Haags kinderontvoeringsverdrag 1980 - 14]

» Samenvatting

De eisende partij (hierna: vrouw) met Letse nationaliteit, verkrijgt in 2007 tevens de Australische nationaliteit. De vrouw heeft haar gewone verblijfplaats in Australië. De vrouw is getrouwd maar begint een buitenechtelijke relatie met een man in 2004, bij wie ze eind van dat jaar intrekt als huurder. Op 24 november 2005 voltrekt de scheiding zich tussen de vrouw en haar echtgenoot. Op 9 februari 2005 bevalt de vrouw van een kind (E). Op de geboorteakte wordt geen informatie weergegeven over de vader en er is geen DNA-test afgenomen. De vrouw ontvangt partneralimentatie van haar ex- echtgenoot. Op 17 juli 2008 verhuist de vrouw met haar kind (3,5 jaar) naar Letland.

Op 19 augustus 2008 dient de huidige partner van de vrouw een verzoek tot erkenning in opdat hij als juridisch vader van het kind zal worden geregistreerd. Hij geeft aan dat hij vanaf 2004 een relatie met de vrouw heeft gehad en dat hij altijd als de vader van het kind is beschouwd. De vrouw is volgens hem zonder zijn toestemming met het kind vertrokken naar Letland, hetgeen hij betoogt in strijd is met art. 3 van het Haags Kinderontvoeringsverdrag 1980. Op 6 november 2008 wordt het vaderschap van de man gerechtelijk vastgesteld door de familierechter van de Family Court in Australië en wordt geoordeeld dat beide partijen het gezag over het kind sinds de geboorte hebben gehad.

Op 22 september 2008 ontvangt het Ministerie van Kinderen en Familiezaken in Letland een verzoek van de Australische autoriteiten tot terugkeer van het kind naar Australië op grond van het Haags Kinderontvoeringsverdrag 1980. Op 19 november 2008 neemt de rechtbank (Riga City Zemgale District Court) kennis van het verzoek. Ter terechtzitting betwist de vrouw dat haar partner recht heeft om erkend te worden als vader, nu ze nog steeds getrouwd was met haar echtgenoot op het moment van de geboorte van het kind. De man heeft daarnaast nooit de wens uitgedrukt als vader erkend te willen worden. De vrouw geeft verder aan dat de man agressief en vijandig tegen haar is geweest.

Een vertegenwoordiger van een voogdij- en curatele-instelling (Barintiesa), vastgesteld

door de gemeenteraad van Riga in Letland, verklaart dat het verzoek van de man afgewezen dient te worden omdat de vrouw een alleenstaande moeder is en het kind een band heeft met Letland. De rechtbank verklaart dat het kind zonder de toestemming van de man naar Letland is gebracht, hetgeen betekent dat de teruggeleiding van het kind naar Australië dient te worden gelast. Bovendien oordeelt de rechtbank dat aangezien de Australische rechtbank beide ouders met het gezamenlijk gezag heeft belast, deze uitspraak niet ongedaan kan worden gemaakt op grond van art. 1 en 14 Haags Kinderontvoeringsverdrag 1980.

Op 6 januari 2009 verleent de rechtbank uitstel van executie van het besluit van 19 november 2008 tot de terugkeer van het kind, in afwachting van de beroepsprocedure die de vrouw ingesteld heeft. De vrouw geeft in dit hoger beroep aan dat ze bij vertrek uit Australië de enige ouder was die met het gezag belast is geweest en dat haar kind zal worden blootgesteld aan psychische schade bij terugkeer. Op 26 januari 2009 bevestigt de Regionale Rechtbank Riga (Rigas Apgabaltiesa) het vonnis in eerste aanleg. De vrouw weigert aan de beschikking te voldoen door het kind niet terug te geleiden naar Australië, maar bij een onverwachtse ontmoeting tussen de vrouw en de man heeft hij het kind meegenomen naar Australië.

In september 2009 verwerpt de Australische familierechter alle eerdere beschikkingen met betrekking tot de rechten van beide ouders en oordeelt dat de man als enige ouder verantwoordelijkheid heeft over het kind. De vrouw heeft volgens de rechtbank de mogelijkheid om het kind op te zoeken onder supervisie van een maatschappelijk werker.

Het Hof voor de Rechten van de Mens is van oordeel dat er een onevenredige inbreuk is gemaakt op het recht van de vrouw op eerbiediging van haar gezinsleven, dat de besluitvorming van het nationale recht niet aan de procedurele vereisten voldoet genoemd in art. 8 van het Verdrag en dat de Regionale Rechtbank Riga heeft nagelaten effectief onderzoek te doen naar de beweringen van de vrouw op grond van art. 13 lid 1 sub b van het Haags Kinderontvoeringsverdrag 1980.

beslissing/besluit

» Uitspraak

I. Alleged violation of Article 8 of the Convention

52. Before the Grand Chamber, the applicant claimed to have been a victim, on account of the decision by the Latvian courts to order the return of her daughter to Australia, of an infringement of her right to respect for family life within the meaning of Article 8 of the Convention, which provides:

“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. Applicability of Article 8

53. The Grand Chamber notes that the Government expressly indicated in the proceedings before it that they did not contest that the decisions by the Latvian courts ordering the applicant to send E. back to Australia amounted to interference

with her right to respect for her family life as protected by Article 8 of the Convention.

54. The interference with the applicant's right to respect for her private and family life found above is in breach of Article 8 unless it satisfies the requirements of paragraph 2 of that provision. It thus remains to be determined whether the interference was "in accordance with the law", pursued one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve them.

B. Whether the interference was justified

1. Legal basis

a. The Chamber judgment

55. The Chamber held that the provisions of the domestic law and the Hague Convention indicated in a sufficiently clear manner that, in ascertaining whether the removal was wrongful within the meaning of Article 3 of the Hague Convention, the Latvian courts had had to decide whether it had been carried out in breach of the custody rights as attributed under Australian law, Australia being the State in which the child was habitually resident immediately prior to her removal. While noting that the Australian authorities had ruled on T.'s parental responsibility after the child's removal, it observed that it had merely been confirmed, and not established, that the applicant and T. had enjoyed joint parental responsibility from her birth by virtue of the Australian Family Law Act. The Chamber further noted that the applicant had not been prevented from participating in the proceedings in Australia leading to the above-mentioned ruling or from submitting an appeal and, in addition, that she had not challenged before the national courts the evidence adduced to demonstrate that T. was the child's father. The Chamber assumed that the Latvian court's decision of 19 November 2008 ordering the child's return to Australia, which had become enforceable on 26 January 2009, had been in accordance with the law within the meaning of Article 8 of the Convention.

b. The parties' submissions

i. The applicant

56. Before the Chamber, the applicant maintained that the domestic courts had had no grounds for applying the provisions of the Hague Convention, since she had been raising her daughter as a single parent at the time of her departure for Latvia. She made no submissions to the Grand Chamber on this question.

ii. The Government

57. The Government considered that the interference was indisputably "in accordance with the law", given that it was based on the Hague Convention on the Civil Aspects of International Child Abduction.

c. The Court's assessment

58. According to the Court's settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000 II; *Slivenko v. Latvia* [GC], no. 48321/99, § 100, ECHR 2003 X; and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 341, ECHR 2012-...).

59. The Court observes that the decision to return the child to Australia was taken by the Riga Regional Court on the basis of the Hague Convention of 1980, a text signed

and ratified by Latvia in 1982. Furthermore, the Latvian Civil Procedure Act, section 644 of which governs matters regarding the unlawful removal of children across borders into Latvia, makes its application conditional on express compliance with the Hague Convention, Brussels II bis Regulation and the European Convention on Human Rights.

60. The applicant alleged that at the time of her departure from Australia she had been alone in exercising parental responsibility for her daughter.

61. The Court notes, however, that that issue was expressly examined by the Latvian courts dealing with the application for the child's return. Those courts, while stating that they could neither interpret nor alter it, applied the Australian Family Court's decision of 6 November 2008, which confirmed T.'s paternity and the existence of joint parental responsibility for the child from her birth. In consequence, both the District Court and the Riga Regional Court found that T.'s application complied with the Hague Convention in this respect.

62. Moreover, the Court considers that it is not for it to decide whether the international removal of a child was or was not "unlawful" within the meaning of Article 3 of the Hague Convention. Indeed, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999 I): it is for the domestic courts to resolve problems of interpretation and application of domestic legislation, and of rules of general international law and international treaties (see *Maumousseau and Washington v. France*, no. 39388/05, § 79, 6 December 2007, and *Neulinger and Shuruk*, cited above, § 100). In the instant case, the applicant, in addition to failing to exercise the available remedies to challenge the Australian decision confirming T.'s paternity and the existence of joint parental responsibility for the child at the time of her departure from Australia, which was a direct precondition for application of the Hague Convention, has not shown either that it was impossible for her to challenge the Australian decision or how the domestic courts had erred in that respect.

63. In conclusion, the Court considers that the impugned interference was in accordance with the law within the meaning of Article 8 of the Convention.

2. Legitimate aim

a. The Chamber judgment

64. The Chamber considered that the interference was intended to protect the rights of T. and of the child, which was a legitimate aim for the purposes of Article 8 § 2 of the Convention.

b. The parties' arguments

i. The applicant

65. The applicant did not express a view on this point.

ii. The Government

66. According to the Government, the interference pursued a legitimate aim, namely protection of the rights and freedoms of T. and of his daughter.

c. The Court's assessment

67. The Grand Chamber shares the Chamber's opinion that the decision to order the child's return had the legitimate aim of protecting the rights and freedoms of T. and of E., which, moreover, has not

been challenged by the parties in these proceedings.

3. Necessity of the interference in a democratic society

a. The Chamber judgment

68. With regard to whether the interference was "necessary in a democratic society", the Chamber considered, while noting that it was not its task to take the place of the domestic authorities in determining the existence of a grave risk within the meaning of Article 13 (b), that it had to ascertain whether, in applying and interpreting the Hague Convention, the courts had complied with the requirements of Article 8, particularly in the light of the principles established by the Court in its *Neulinger and Shuruk* judgment (cited above). Turning its attention firstly to the psychologist's report, drawn up at the mother's request following the first-instance judgment, the Chamber found that the Regional Court had dismissed it, on the ground that it concerned the question of custody of the child and that the latter would be protected in accordance with the Australian legislation. In the Chamber's opinion, although the failure to question the child did not raise an issue, given her age, the Regional Court ought nonetheless to have examined the conclusions of the psychological assessment and the objections raised by the *Bāriņtiesa*; moreover, there had been nothing to prevent the court from ordering a psychological report of its own motion.

69. The Chamber further indicated that the courts should also have assessed whether there were other sufficient safeguards to ensure that the return took place in the best possible conditions for the child, particularly with regard to her material well-being in Australia, and the possibility for the applicant to follow her daughter and to maintain contact with her.

70. While observing that the Latvian courts' decision in this case contrasted with the approach taken in other Hague Convention proceedings in Latvia (see *Šneersone and Kampanella*, no. 14737/09, § 94, 12 July 2011), and having both dismissed the Government's argument that the applicant had failed to cooperate and noted the traumatic manner in which the decision had been executed, the Chamber concluded that an in-depth examination of the entire family situation and of a whole series of factors had been absent from the Latvian courts' approach, therefore rendering the interference disproportionate within the meaning of Article 8.

b. The parties' arguments

i. The applicant

71. The applicant considered the Chamber judgment as an exemplary text for assisting domestic authorities in ascertaining the best interests of the child. She noted that, while the Government had expressed regret in their request for referral to the Grand Chamber that the Chamber had not had available to it all the documents in the case file as examined by the domestic courts, it had been their responsibility to submit those documents. She argued that the best interests of the child had not been the goal of the domestic authorities, and considered that psychological reports were the only method of determining the child's best interests; in this case, however, the domestic courts had refused to examine the psychological report submitted by her, thus violating Article 12 of the International Convention on the Rights of the Child (hearing of the child, either directly or through a representative or appropriate body). She emphasised that in determining the "best interests", consideration was generally given to a number of factors related to the child's circumstances and to the circumstances and capacity of the child's potential carers, with the child's

safety and well-being as the paramount concern.

72. The applicant added that, in applying to the Court, her main goal was to challenge the domestic courts' position in various cases relating to the 1980 Hague Convention and to demonstrate the necessity of ensuring the best interests of the child.

ii. The Government

73. The Government noted that the Court imposed a number of obligations on the domestic authorities, and in particular: ensuring that the parents were involved in the decision-making process to a degree sufficient to provide them with protection of their interests (*Iosub Caras*, cited above, § 41), preventing further harm to the child or prejudice to the interested parties, as stipulated by Article 7 of the Hague Convention (ibid., § 34, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, 25 January 2000), ensuring urgent handling of proceedings relating to the return of an abducted child, including enforcement of the decisions taken (*Carlson v. Switzerland*, no. 49492/06, § 69, 6 November 2008), and providing redress to the requesting parent in the event of failure to comply with the six-week deadline provided for in Article 11 of the Hague Convention (ibid., § 55).

74. They considered that these principles should be applied in a manner that would ensure to the maximum extent a balance between the rights of each parent and of the child. Nonetheless, they noted the difficulty of the domestic authorities' task when faced with the international abduction of a child, which did not always allow for protection of the best interests of all parties, and especially those of the child, each party having a different, if not contradictory, definition from that of the others. They further insisted on the clear distinction to be drawn between return proceedings and custody proceedings.

75. The Government considered that the domestic authorities enjoyed a margin of appreciation in applying those principles to the circumstances of each case. The Court's task was not to analyse every detail of the domestic proceedings, but to review whether the decision-making process, seen as a whole, had provided the individuals concerned with the requisite protection of his or her interests (*Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 187, 27 September 2011), since the Court was not a court of fourth instance. Consequently, it could only be otherwise if the shortcomings observed had been decisive for the outcome of the case (*Broka v. Latvia*, no. 70926/01, §§ 25-26, 28 June 2007).

76. In the instant case, they were of the opinion that the domestic authorities had complied with the above principles and had conducted an "in-depth examination of the entire family situation and of a whole series of factors" (*Neulinger and Shuruk*, cited above, § 139), but that the examination of the overall family situation had to differ depending on the case, depending on the existence or not of prima facie concerns or at least of reasonable doubts. Moreover, the risk provided for in Article 13 (b) had to be "grave", in addition to the fact that the child's best interests also required expeditious proceedings.

77. The Government stated that the request submitted by the Australian authorities to the Latvian authorities on 15 September 2008 certified that T. had joint parental authority for the child and that, contrary to the applicant's submissions, the decision of 6 November 2008 did not confer this right on him, but confirmed its existence at the time of his daughter's departure from Australia. Both the Australian and Latvian courts had established that T. effectively exercised his parental responsibilities, that

there were sufficient grounds to presume that T. was the child's biological father and that the applicant, for her part, had made false statements to the authorities in order to obtain advantages.

78. They pointed out that the psychological report had been drawn up on a private basis at the applicant's request, and that the *Bāriņtiesa* was not a judicial institution. Notwithstanding the dismissal of the psychologist's report and the observations from the *Bāriņtiesa*, the courts had examined the family situation in the light of the evidence available to them, which was an inherent part of their jurisdiction, there being nothing in the Court's case-law to call into question that power. The Latvian courts had found that the applicant's departure from Australia with her daughter had been motivated solely by her personal disagreements with T. and that there was no apparent risk of harm to the child in the event of return; it followed that the Latvian authorities had not applied the Hague Convention automatically or mechanically, in disregard of the principles established by Article 8 of the Convention.

79. The Government emphasised that "the understanding and cooperation of all concerned are always important ingredients" in evaluating the individual circumstances of a case (*Maumousseau and Washington v. France*, cited above, § 83, and *Neulinger and Shuruk*, cited above, § 140). They considered, however, that the applicant had demonstrated a lack of cooperation with the Australian and Latvian authorities by ignoring the invitation to take part in the proceedings before the Australian court, by preventing the representatives of the *Bāriņtiesa* from assessing her living conditions with her daughter in Latvia, by hindering contacts between T. and his daughter and by her extremely aggressive conduct towards T. during the proceedings.

80. They also considered that the courts had been correct in dismissing the question of the child's integration into her new environment, given that she had spent only a few months in Latvia.

81. They noted that the courts had not ordered the child's return to her father, but to Australia, thus drawing a clear distinction between the return of the child and the issue of her custody, an approach that had been endorsed by the Court (*M. R. and L. R. v. Estonia* (dec.), no. 13420/12, §§ 47-48, 15 May 2012, and *Tarkhova v. Ukraine* (dec.), no. 8984/11, 6 September 2011). In any event, T.'s financial situation was not such as to prevent him from caring for his daughter.

82. The Government emphasised the need to distinguish the issue of the applicant's relationship with the child, and the risk of this relationship being weakened in the event of return, from the question of a risk to the child's fundamental interests within the meaning of Article 13 (b) of the Hague Convention. As an Australian citizen, the applicant was not faced by insurmountable difficulties if she returned to Australia, since she enjoyed the full spectrum of fundamental rights, in contrast to the applicants in the case of *Neulinger and Shuruk* (cited above). In the present case, both the child and the mother had Australian citizenship; moreover, the mother had access to the labour market, given that she had found a job since her return, and could have access to social benefits. There was no history of family violence or abuse of authority on the part of T., whereas the applicant had demonstrated a lack of cooperation and an aggressive attitude. Lastly, the Government drew the Court's attention to the fact that they could not be held responsible for the decisions taken by the Australian authorities (they referred to *M. R. and L. R.*, cited above).

c. Third-party interventions

i. The Government of Finland

83. The Government noted that the 1980 Hague Convention was based on the best interests of the child and was aimed at protecting the child from the detrimental effects of the abduction, while laying down a number of grounds for refusing a return. They emphasised that Article 11 of the Brussels II bis Regulation, applicable within the European Union, narrowed down even further the exceptions to the child's return, and reflected the view of the EU Member States that the effectiveness of the Hague Convention served the best interests of children and families. They further referred to the United Nations Convention on the Rights of the Child.

84. With regard to the instant case, they considered, in particular, that the obligation on the domestic courts deciding on a child's return to conduct an "in-depth examination of the entire family situation", as the Chamber required in its judgment, contradicted the Hague Convention, which provided that matters concerning custody or residence of the child came under the jurisdiction of the courts of the child's place of habitual residence.

85. Moreover, they considered that the domestic courts were best placed to assess the child's best interests: the Court ought not to take their place, but merely verify whether the requirements of Article 8 had been satisfied. Requiring such an in-depth examination would ultimately level out the differences between the procedure for return and custody proceedings, which would frustrate the meaning of the Hague Convention. They emphasised that the latter text provided for exceptions to the return of the child in Articles 12, 13 and 20.

86. With regard to the psychological report to which the domestic courts had not, according to the Chamber judgment, attached sufficient importance, the Government noted that it had been submitted by the mother to demonstrate the existence of a grave risk in the event of return within the meaning of Article 13 of the Hague Convention. In finding those allegations unfounded, the appeal court had dismissed them under Article 13 of the Hague Convention, within the margin of discretion permitted by and in line with the objective pursued by the Hague Convention. In the light of these arguments, and referring also to the dissenting opinion of judges Myjer and López Guerra annexed to the Chamber judgment, the Government of Finland was of the view that there had not been a violation of Article 8 of the Convention in this case.

ii. The Government of the Czech Republic

87. The Government considered that the Grand Chamber's forthcoming decision would be of considerable importance not only for the respondent State and the Convention system, but also for the operation of the Hague Convention and for countries outside the European continent. They considered that the Hague Convention provided an appropriate procedure, given the serious consequences of abduction for both the child and the parent complaining of the abduction. In order to preclude the harmful effects of abduction, rapid proceedings and a prompt return were required, the Hague Convention being based on the assumption that the restoration of the status quo that existed prior to the unlawful removal was the best starting point to ensure protection of the rights in question. They also referred, in a similar vein, to the Brussels II bis Regulation, applicable within the European Union.

88. The Government further stated that the Hague Convention had explicitly left the issue of custody to the courts of the country of the child's habitual residence and that

refusal of the child's return was provided for in cases of a grave risk to the child. The Government considered that the development of the Court's case-law in this field, the main points of which they set out, undermined the principle of subsidiarity and ran contrary to the aim pursued by the Hague Convention. An "in-depth examination of the entire family situation" amounted to examining the issue of custody itself, and thus slowing down the proceedings, even though the passage of time could play a significant role where the child was heard in the proceedings. In addition, basic fairness should mean that the abducting parent, who was required to prove in a short period of time the existence of a grave threat in the event of the child's return, was deprived of any procedural advantage rather than having access to the courts of the country of his or her choice to determine the merits of a custody dispute.

89. The Government of the Czech Republic noted, in particular, a conflict between the requirement of speed laid down in the Hague Convention and the high standard of proof set out in the Court's recent case-law. Assessment of the best interests of the child differed significantly depending on whether it was carried out in the course of return proceedings before a court in the country to which the child had been taken or whether it took place in the context of custody proceedings by another court in the child's country of habitual residence. As those States who were Parties to both the Convention and the Hague Convention were required to comply with their obligations in respect of both of these texts, they required consistent interpretation and application which reconciled them, it being noted that the Brussels II bis Regulation was even stricter than the Hague Convention. The database created by the Permanent Bureau of the Hague Conference on Private International Law (INCADAT) showed that national courts tended to impose strict application of the Hague Convention, in compliance with its purpose. The Government of the Czech Republic, arguing for a return to the principle of subsidiarity, invited the Grand Chamber to overturn the Chamber judgment and to set limits on the examination of the family situation by the court deciding on an application for a child's return.

iii. Reunite International Child Abduction Centre ("Reunite")

90. *Reunite* noted that the Hague Convention had been designed to facilitate the protection of children who had been subjected to a wrongful cross-border abduction, on the basis of the assumption that, with certain exceptions, the child's prompt return was in his or her best interests. *Reunite* entirely endorsed the Court's summary of the aims and objectives of the Hague Convention in its judgment in the case of *Maumousseau and Washington* (cited above, § 69). It noted in particular that the Hague Convention, an enormously successful convention in combating international child abduction, aimed to protect not adults, but children. It provided for a limited number of exceptions to the child's prompt return, leaving the issues of the child's long-term welfare to the courts in the child's country of habitual residence. The latter thus had the task of conducting an in-depth examination of the situation, in the child's interests, unlike the courts in the State to which the child had been abducted, which, when examining an application for return, were required to make a decision following an examination limited to the framework laid down in the Hague Convention.

91. While observing that the Court, in its case-law, had identified a number of factors central to the proper functioning of the Hague Convention, *Reunite* noted that recent developments suggested that courts were being required to conduct a fuller examination when determining the

exceptions to the child's return. It therefore invited the Grand Chamber to clarify the question of the requirement for an in-depth examination of the entire family situation in the context of the Hague Convention, and to make it clear that this concerned only the compatibility of a return with the Convention and did not call into question the exclusive jurisdiction of the courts in the country of habitual residence to rule on the merits.

d. The Court's assessment

i. General principles

92. The Court considers it appropriate to reiterate at the outset certain principles which must guide it in its examination of the case, and to which it drew attention in its recent judgment in *Nada v. Switzerland* ([GC], no. 10593/08, § 167, 12 September 2012, ECHR 2012-...), in the following terms:

"168. According to established case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 153, and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, Reports 1998-I). Treaty commitments entered into by a State subsequent to the entry into force of the Convention in respect of that State may thus engage its responsibility for Convention purposes (see *Al Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 154, and the cases cited therein).

169. Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see, for example, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131, ECHR 2010; *Al Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18).

170. When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law (see, to this effect, *Al-Saadoon and Mufdhi*, cited above, § 126; *Al-Adsani*, cited above, § 55; and the *Banković* decision, cited above, §§ 55-57; see also the references cited in the ILC study group's report entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law"...)."

93. As regards, more specifically, the question of the relationship between the Convention and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, the Court

reiterates that in the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention (see *Ignaccolo-Zenide*, cited above, § 95; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003 V; and *Maumousseau and Washington*, cited above, § 60) and those of the Convention on the Rights of the Child of 20 November 1989 (see *Maire*, cited above, § 72; *Maumousseau and Washington*, cited above; and *Neulinger and Shuruk*, cited above, § 132), and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Demir and Baykara v. Turkey* [GC), no. 34503/97, § 67, ECHR 2008-...).

94. This approach involves a combined and harmonious application of the international instruments, and in particular in the instant case of the Convention and the Hague Convention, regard being had to its purpose and its impact on the protection of the rights of children and parents. Such consideration of international provisions should not result in conflict or opposition between the different treaties, provided that the Court is able to perform its task in full, namely "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), by interpreting and applying the Convention's provisions in a manner that renders its guarantees practical and effective (see, in particular, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and *Nada*, cited above, § 182).

95. The decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington*, cited above, § 62), taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child" (see paragraph 35 above).

96. The Court reiterates that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see paragraphs 37-39 above).

97. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13, first paragraph, (b)). The Court further notes that the European Union subscribes to the same philosophy, in the framework of a system involving only EU Member States and based on a principle of mutual trust. Brussels II bis Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its Preamble to the best interests of the child (see paragraph 42 above), while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child's best interests must be a primary consideration (see paragraph 41 above).

98. Thus, it follows directly not only from Article 8 of the Convention, but also from

the Hague Convention itself, given the exceptions expressly enshrined therein to the principle of the child's prompt return to his or her country of habitual residence, that such a return cannot be ordered automatically or mechanically (see *Maumousseau and Washington*, cited above, § 72, and *Neulinger and Shuruk*, cited above, § 138).

99. As the Court reiterated in its *Neulinger and Shuruk* judgment (cited above, § 140), the obligations incumbent on States in this connection were defined in the case of *Maumousseau and Washington* (cited above, § 83).

100. The child's best interests do not coincide with those of the father or the mother, except in so far as they necessarily have in common various assessment criteria related to the child's individual personality, background and specific situation. Nonetheless, they cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return in pursuance of the Hague Convention or ruling on the merits of an application for custody or parental authority, the latter proceedings being, in principle, unconnected to the purpose of the Hague Convention (Articles 16, 17 and 19; see also paragraph 35 above).

101. Thus, in the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a "grave risk" (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). This task falls in the first instance to the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation, which, however, remains subject to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; and also *Maumousseau and Washington*, cited above, § 62, and *Neulinger and Shuruk*, cited above, § 141).

102. Specifically, in the context of this examination, the Court reiterates that it does not propose to substitute its own assessment for that of the domestic courts (see, for example, *Hokkanen v. Finland*, cited above, and *K. and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001 VII). Nevertheless, it must satisfy itself that the decision-making process leading to the adoption of the impugned measures by the domestic courts was fair and allowed those concerned to present their case fully, and that the best interests of the child were defended (see *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005 XIII (extracts); *Maumousseau and Washington*, cited above, and *Neulinger and Shuruk*, cited above, § 139).

103. In this connection, the Government considered, in particular, that the overall family situation had to be examined according to the circumstances of each case (see paragraph 75 above). For their part, the third-party interveners, either considered that the requirement of an "in-depth examination of the entire family situation" (*Neulinger and Shuruk*, cited above) conflicted with the Hague Convention (see paragraphs 84 and 88 above), or asked the Court to clarify this question (see paragraph 91 above) and to set limits on the examination of the family

situation by the court deciding on an application for a child's return (see paragraph 89 above).

104. On this point, the Court observes that the Grand Chamber judgment in the case of *Neulinger and Shuruk* (cited above, § 139) to which a number of subsequent judgments referred (see, *inter alia*, *Raban v. Romania*, no. 25437/08, § 28, 26 October 2010; *Šneersone and Kampanella*, cited above, § 85; and, more recently, the decision in *M.R. and L.R.*, cited above, § 37) 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. That wording had already been used by a Chamber in the case of *Maumousseau and Washington* (cited above, § 74), such an in-depth examination having, in fact, been carried out by the national courts.

105. Against this background the Court considers 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.

106. The Court considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention (see *Neulinger and Shuruk*, cited above, § 133).

107. In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: 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. Both 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 to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see *Maumousseau and Washington*, cited above, § 73), 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.

108. Furthermore, as the Preamble to the Hague Convention provides for children's return "to the State of their habitual residence", the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place.

ii. Application of these principles to the present case

109. The Court, which must make its assessment in the light of the situation existing at the time of the impugned measure (see, *mutatis mutandis*, *Maslov v.*

Austria [GC], no. 1638/03, § 91, ECHR 2008-...), notes firstly that, unlike in the case of *Neulinger and Shuruk* (cited above), the circumstances of which were in any event particularly unusual, especially on account of the very considerable passage of time involved, only a short period had elapsed in this case by the time the Latvian authorities received the application under the Hague Convention. The child had spent the first years of her life in Australia and arrived in Latvia aged three years and five months. The application for return was submitted to the central authority two months after the departure from Australia, and the judgments of the District Court and of the Riga Regional Court were delivered four and six months respectively after the applicant and her daughter had arrived in Latvia. Finally, T. encountered E. and began the return journey with her to Australia on 14 March 2009. It follows that not only the submission of the return application to the Latvian authorities, but also the domestic proceedings and the child's return took place within the period of less than one year referred to in the first paragraph of Article 12 of the Hague Convention, which provides for an immediate return in such cases.

110. Moreover, the Court notes that the domestic courts, at first instance and on appeal, were unanimous as to the response to be given to the application for return submitted by T. By a judgment of 19 November 2008, the District Court, which ruled after a hearing attended by both parents, held that the Hague Convention was applicable and granted T.'s application, ordering the child's immediate return to Australia. On 26 January 2009, after a hearing which was also held in the presence of both parents, the Riga Regional Court upheld that judgment.

111. With regard more specifically to the reasoning given by the Latvian courts, the Court notes that at first instance the court dismissed, in a reasoned manner, the applicant's objections to the child's return on the basis of Article 13 of the Hague Convention, notably after having examined the evidence submitted by the parties, including the photographs and copies of e-mails between the applicant and T.'s relatives, as well as witness statements submitted by the applicant. The court, having refused on the other hand to request information from the Australian authorities about T.'s previous convictions and the charges allegedly brought against him, ultimately dismissed the allegation of a risk of psychological danger to the child in the event of her return, finding that the applicant had failed to substantiate it (see paragraph 21 above).

112. The Court observes that the situation subsequently took another form before the Riga Regional Court, the applicant having submitted, in the context of her appeal, a certificate prepared at her request by a psychologist on 16 December 2008, that is, after the first-instance judgment. This document indicated that, while the child's young age prevented her from expressing a preference as to her place of residence, an immediate separation from her mother was to be ruled out on account of the likelihood of psychological trauma (see paragraph 22 above).

113. Yet, whilst the District Court, examining the request for a stay of execution of the return order, took account of that certificate in ordering, in the child's interests, a stay of execution of the return order pending the outcome of the appeal proceedings (see paragraph 24 above), the Regional Court refused to take it into consideration.

114. The Court notes that the appeal court considered that the findings of the psychological report concerned the merits of the custody issue and could not therefore serve as evidence in ruling on the question of the child's return that was before it. In so

doing, and in view of this reasoning, the Riga Regional Court refused to examine the conclusions of the psychological report in the light of the provisions of Article 13 (b) of the Hague Convention, even though it was directly linked to the best interests of the child in that it drew attention to a risk of psychological trauma in the event of immediate separation from her mother (see, conversely, *Maumousseau and Washington*, cited above, § 63).

115. Article 8 of the Convention imposed a procedural obligation on the Latvian authorities, requiring that an arguable allegation of "grave risk" to the child in the event of return, be effectively examined by the courts and their findings set out in a reasoned court decision (see paragraph 107 above).

116. Under Article 13 (b) of the Hague Convention, the courts examining the return request are not obliged to grant it "if the person, institution or other body which opposes its return establishes that ... there is a grave risk". It is the parent who opposes the return who must, in the first place, adduce sufficient evidence to this effect. In the instant case, it was therefore for the applicant to provide sufficient evidence to substantiate her allegations, which, moreover, had to concern the existence of a risk specifically described as "grave" by Article 13 (b). Furthermore, the Court notes that while the latter provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" –, it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13 (b) concerns only the situations which go beyond what a child might reasonably bear. The applicant fulfilled her obligation by submitting a psychologist's certificate concluding that there existed a risk of trauma for the child in the event of immediate separation from her mother. Furthermore, she had also submitted that T. had criminal convictions and referred to instances of ill-treatment by him. It was therefore for the Latvian courts to carry out meaningful checks, enabling them to either confirm or exclude the existence of a "grave risk" (see *B. v. Belgium*, no. 4320/11, §§ 70-72, 10 July 2012).

117. The Court accordingly considers that the refusal to take into account such an allegation, substantiated by the applicant in that it was based on a certificate issued by a professional, the conclusions of which could disclose the possible existence of a grave risk within the meaning of Article 13 (b) of the Hague Convention, was contrary to the requirements of Article 8 of the Convention. The non-adversarial nature of the psychological report did not suffice to absolve the courts from their obligation to examine it effectively, especially as the Regional Court's judicial powers would have enabled it to submit the document for cross-examination by the parties, or even to order a second expert report of its own motion, as permitted by Latvian law (see paragraph 45 above). The issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her should also have been dealt with. The Court further emphasises that, in any event, since the rights safeguarded by Article 8 of the Convention, which is part of Latvian law and directly applicable, represent "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" within the meaning of paragraph 20 of the Hague Convention, the Regional Court could not dispense with such a review in the circumstances of this case.

118. As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see

paragraph 25 above), the Court reiterates that while Article 11 of the said Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an effective examination of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case.

119. In the light of the foregoing, the Court considers that the applicant suffered a disproportionate interference with her right to respect for her family life, in that the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the Convention, the Riga Regional Court having failed to carry out an effective examination of the applicant's allegations under Article 13 (b) of the Hague Convention.

120. It follows that there has been a violation of Article 8 of the Convention.

II. Application of Article 41 of the Convention

121. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

122. As the applicant has made no claim in respect of pecuniary or non-pecuniary damage, the Court considers that no award should be made under this head.

B. Costs and expenses

123. The applicant claimed 1,996.91 Latvian lati (2,858.84 euros (EUR)) for the costs and expenses incurred before the Grand Chamber and submitted a number of documents in support of that claim.

124. The Government considered that the applicant's claims were neither justified nor reasonable, with the exception of a sum of EUR 485.19 which related to costs arising from the journey by the applicant's representative to take part in the hearing before the Court.

125. The Court reiterates that an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. In the present case, and having regard to the information in its possession and to its case-law, the Court considers it reasonable to award the applicant the sum of EUR 2,000 in respect of the costs and expenses incurred in the proceedings before it.

C. Default interest

126. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court,

1. *Holds*, by nine votes to eight, that there has been a violation of Article 8 of the Convention;

2. *Holds*, by ten votes to seven,

(a) that the respondent State is to pay the applicant, within three months, EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into Latvian lati at the rate applicable on the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement

simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Concurring opinion of Judge Pinto de Albuquerque

International parental child abduction is again on the agenda of the Grand Chamber. Three years after having laid down its own standard in *Neulinger and Shuruk*, [noot:1] the Grand Chamber has been called upon to review it, in the context of the same sources of international family law and international human rights law. In other words, the major question put to this Grand Chamber is the theoretical and practical sustainability of its own very recent case-law.

I agree with the finding of a violation of Article 8, but disagree with the equivocal principles set out by the majority in paragraphs 105-108 and its insufficient assessment of the facts of the case. My opinion is divided into three parts. The first part will address the assessment required under the European Convention on Human Rights of return orders in international child abduction cases and the much-proclaimed need for a review of the *Neulinger and Shuruk* standard. The second part will examine the nature of the mechanism established by the Hague Convention on the Civil Aspects of International Civil Abduction and its articulation with the Convention. Finally, in the third part the Convention standard will be applied to the facts of this case, taking into special consideration the inchoate nature of the alleged "right to custody" of the left-behind parent at the moment of removal. [noot:2]

Return orders in international parental child abduction cases under the Convention

Article 8 of the Convention imposes positive obligations on the Contracting Parties to reunite a parent with his or her child, when the latter has been wrongfully removed to or retained in a foreign country by the other parent, and namely to take effective action to enforce a return order in respect of the abducted child to his or her country of habitual residence, [noot:3] to grant a return order [noot:4] or even to bring a return action on behalf of the left-behind parent in the country of habitual residence. [noot:5] These positive obligations must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument. [noot:6] Thus, the Court has committed itself to the Hague Convention's philosophy of restoring the child's situation as it existed before the abduction took place. [noot:7] Accordingly, the court in the host country must order the child's return to his or her country of habitual residence, except when one of the grounds for refusal of return provided for in Articles 13 and 20 of the Hague Convention exists, whilst the court in the country of habitual residence has sole competence in deciding on the merits of the custody dispute. Although return proceedings are urgent and return orders are to be rapidly enforced, *the granting of return orders in international child abduction cases requires a detailed or in-depth assessment of the entire family situation by the court in the host country in the specific context of the return application*. [noot:8] When the decision-making process of the court in the host country or the resulting assessment is deficient, the granting of a return order under the Hague Convention may violate the Convention, since the interference with the child's right to family life with the abducting parent may not be necessary in a democratic society. [noot:9]

That being said, the detailed examination of the child's situation clearly does not replace custody proceedings in the State from which the child was abducted, since the court in the host country is not supposed to proceed to an *ex officio*, free-standing evaluation of the overall merits of the case, based on the assessment of the situation of the child and his or her family and the present and future social and cultural environment. *Only those issues directly related to the child's abduction raised by the return application may be addressed by the court in the host country, and then only in so far as they relate to the urgent and provisional decision on the child's immediate future*. This was and remains the *Neulinger and Shuruk* test. No less, no more. The detailed examination by the court in the host country does not imply any change of jurisdiction over parental responsibility, which remains in the State of the child's habitual residence. Hence, *Neulinger and Shuruk* did not level the basic difference, enshrined in Article 19 of the Hague Convention, between Hague return proceedings and custody proceedings.

The articulation between the Convention and the Hague Convention

The Hague Convention aims at combating international child abduction by the father or the mother through a mixed mechanism of inter-governmental and judicial cooperation. Whenever a child under the age of 16 is unlawfully removed from his or her country of habitual residence by one of the parents, the Hague mechanism purports to restore, as soon as possible, the *status quo* prior to the removal. [noot:10] Three objective conditions are required to establish the unlawfulness of the removal: (1) the existence of custodial rights in respect of the left-behind parent immediately prior to the removal; (2) the effective exercise of these rights prior to the removal; and (3) the determination of the child's habitual residence at the time of removal. No additional subjective element, such as the *mens rea* of the abducting parent, is required. [noot:11] In these circumstances, the child's return to the country of habitual residence is to be ordered by the court in the host country. The return application may be rejected if one of the three conditions referred to above for application of the Hague Convention is not met. [noot:12] The application may also be rejected if the left-behind parent consented to removal or subsequently acquiesces to the removal, or if certain circumstances related to the child's welfare exist, namely if (1) there is a grave risk that the child's return would expose him or her to physical or psychological danger [noot:13] or otherwise place the child in an intolerable situation; [noot:14] (2) a child who has attained a certain degree of maturity objects; (3) the child has settled in the host country and a year has elapsed between the removal and the commencement of the judicial return proceedings; [noot:15] or (4) the fundamental principles of the requested State relating to the protection of the child's human rights would not permit it. [noot:16]

Since the Hague Convention terminology is to be interpreted with regard to its autonomous nature and in the light of its objectives, custodial rights may include rights referred to by the national legislation of the country of habitual residence under a different terminology, and do not necessarily equate to rights referred to as "custody rights" by the law of any particular country. [noot:17] For instance, an unmarried parent who in fact takes care of the child may nonetheless be denied custodial rights. [noot:18] The evaluation of legal and factual issues, such as rights of custody and habitual residence or allegations of grave risk of harm, is a matter for the court or other competent authority deciding upon the return application. [noot:19] Other than as provided for by Article 30 of the Hague

Convention, each Contracting Party to the Hague Convention determines its own rules of evidence in return proceedings. The burden of proof in the case in chief for return is on the left-behind parent and in respect of the defences to return it is on the abducting parent; in some countries, however, different burdens of proof are required depending upon the defence proffered. [noot:20] Although the evidence admitted in return proceedings is not bound by strict *criteria*, the taking and admission of evidence should be governed by the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return. [noot:21]

In view of the lack of any precise regulations on the enforcement procedure in the Hague Convention, the child's return may be ordered to the courts, the central authority or other authorities of the country of habitual residence, or even to the left-behind parent or a third person, the child sometimes being still accompanied by and under the care and control of the abducting parent until the authorities of that State rule otherwise. [noot:22] The return order may be made in conjunction with some protective measures, such as stipulations, conditions or undertakings, as long as they are limited in scope (i.e. do not intrude on custody issues to be determined by the courts of the state of habitual residence) and duration (i.e. they remain in effect only until such time as a court in the country of habitual residence has taken any measures required by the situation). [noot:23]

Hence, *the Hague Convention is basically a jurisdiction selection treaty, but it is not blind to substantive welfare issues concerning the individual child involved, since it imposes an assessment of that child's best interests in Article 13 and of his or her human rights in Article 20.* [noot:24] Only an over-simplistic view of the Hague Convention's general public order purposes and tangible effects on the life of the individual abducted child and his or her parents could support the assertion that this is a merely procedural text. The opposite conclusion is also imposed by the almost universal ratification of the United Nations Convention on the Rights of the Child which reflects the international consensus on the principle of the paramountcy of the child's interest in all proceedings concerning him or her and on the perspective that every child should be viewed as a subject of rights and not merely as an object of rights. [noot:25] Moreover, the sociological shift from a non-custodial abductor to a custodial abductor, who is usually the primary caregiver, warrants a more individualised, fact-sensitive determination of these cases in the light of a purposive and evolutive approach to the Hague defence clauses. [noot:26]

Against this background, the question of the articulation between the Hague Convention and the Convention becomes crucial. The human rights protection mechanisms established by these two international treaties clearly overlap, at least with regard to the defences foreseen in Articles 13 and 20 of the Hague Convention. Ultimately, both conventions provide for the restoration of the *status quo* in international abduction cases, in harmony with the child's best interests and human rights. The problem lies mainly with the alleged "exceptional nature" of the Hague Convention provisions regarding the defences to return and their restrictive interpretation. [noot:27] Between the Scylla of a minimalist and automatic application of the Hague defences to return, which would empty them of any substantive content, and the Charybdis of creating a new, free-standing defence of the child's best interests, overlapping the merits of the custody dispute, the Court has resisted both dangers and chosen the middle solution, which is that the Hague Convention defences to return exhaustively determine what is in the best interests of

the child. However, these defences do include the human rights of the child. And they are to be taken seriously.

In assessing return orders in international child abduction cases, the Court's remit is limited to the child's welfare-based defences to return in the 1980 Hague Convention. The detailed, in-depth examination under the Convention may not, and need not, be wider. It suffices that the available defences to return be interpreted in the light of present-day social conditions, and namely of the sociological trends ascertained in recent years. That was the Grand Chamber's purpose three years ago: Neulinger and Shuruk was a call for an evolutive and purposive interpretation of the Hague Convention.

Hence, the Court must confine itself to examining whether the courts in the host country acted in conformity with the Convention, but it may also enter into the question of whether the Hague Convention was properly interpreted and applied, especially when its interpretation ignores present-day social conditions and its application empties the text of much of its useful effect or even prejudices its ultimate purposes. [noot:28] Under the Convention, the abduction of a child triggers the application of a rebuttable presumption that it is in the best interests of the child to be returned as soon as possible to the country of habitual residence. That presumption must be applied unless there are reasonable grounds to believe that the human rights of the child, including his or her Article 8 rights, would be endangered in the event of return. In order to rebut the said presumption, the applicant must have alleged and proved that giving effect to the presumption would conflict with the child's human rights, namely with his or her right to family life, and the court of the host country must be satisfied that this is the case. [noot:29]

While it is axiomatic that "restrictions" to human rights must be interpreted narrowly, [noot:30] defences to return are not, technically speaking, "restrictions" to any specific human right. Such defences are, in the light of the Convention, mere grounds for rebuttal of a presumption, and they are not necessarily subject to a restrictive interpretation. [noot:31] Thus, in the event of contradictory evaluations of the child's situation, resulting from the confrontation between a restrictive interpretation of the Hague Convention and a purposive and evolutive interpretation of the same text in the light of the Convention, the latter should prevail over the former. Although in virtually all cases the Convention and the Hague Convention march hand in hand, when they do not, it is up to the Convention to guide the way. [noot:32]

The practical effect of this line of reasoning is that, ultimately, the Court has the final word on the assessment of the best interests and the human rights of the abducted child in Europe, be this prior to the execution of the return order or even after its execution. This line of reasoning also impacts on the remit of the courts in the host country in assessing return applications, in so far as they must examine the situation of the child and the family in accordance with the Convention. In Europe, the judge in the host country has to interpret Article 12, 13 and 20 of the Hague Convention in the light of the Convention and the Court's case-law. Such analysis is particularly important in cases of return to States which are not under the jurisdiction of the Court, where the parties will be unable subsequently to bring complaints to the Court if their rights in the country of habitual residence are breached. [noot:33]

In an international mechanism that has no oversight body to ensure the uniformity of the interpretation and implementation of the Contracting Parties' obligations and to sanction recalcitrant States accordingly, there is a real risk that the legislation

implementing the Hague Convention and the case-law of domestic courts applying it are very different from one Contracting Party to another. Reality has proved this risk to be very real. The bitter consequence of this institutional weakness is clear to see: there is little room for progress where such wide discrepancies occur in the functioning of the international mechanism and national authorities are free to give foreign precedent little weight, or no weight at all, for the purpose of interpreting the Hague Convention. In the absence of any meaningful supranational review of the way in which the Contracting States implement, interpret and apply the Hague Convention, courts of Contracting States do as they please, sometimes ostensibly and one-sidedly ruling in favour of the national party. This inherent weakness in the Hague mechanism is magnified by the ambiguous and undefined legal terminology utilised in the Hague Convention and the lack of procedural rules on the conduct of judicial return proceedings, such as on evidentiary hearing, discovery, burden of proof, appeals, stay of orders pending appeals and interim measures. The damaging effect of differing, contradictory and confusing national case-law is further amplified by the fact that the enforcement stage of the return order is not regulated at all in the Hague Convention, and more specifically no legal basis is provided for stipulations, conditions or undertakings imposed on the parties or a system of judicial cooperation for the implementation of "mirror orders". [noot:34]

In this context, the fact that the Court is competent to ascertain whether in applying the Hague Convention the domestic courts secured the human rights set forth in the Convention diminishes the risk of divergent case-law. [noot:35] Moreover, the temptation of *forum shopping* is excluded in a system of human rights protection where all national courts are subject to scrutiny by an international court, which ensures that there is no unjustified interpretation in favour of the abducting parent. Thus, progress in the protection of the child's rights, comity among States and co-operation in cross-border child abduction is furthered by the uniform application of the Hague Convention obligations interpreted in the light of the Convention, at least among the Contracting Parties to the Convention. [noot:36]

In spite of some systemic shortcomings, the Hague Convention has proved to be a crucial instrument in helping to resolve the drama of cross-border parental child abduction. Its positive legacy is undeniable and should be preserved and fostered. Nevertheless, both the universal acknowledgment of the paramountcy of the child's best interests as a principle of international customary and treaty law, and not a mere "social paradigm", and the consolidation of a new sociological pattern of the abducting parent now call for a purposive and evolutive interpretation of the Hague Convention, which is first and foremost mirrored in the construction of the defences to return in the light of the child's real situation and his or her immediate future. A restrictive reading of the defences, based on an outdated, unilateral and over-simplistic assumption in favour of the left-behind parent and which ignores the real situation of the child and his or her family and envisages a mere "punitive" approach to the abducting parent's conduct, would defeat the ultimate purposes of the Hague Convention, especially in the case of abduction by the child's primary caregiver. Such a construction of the Hague Convention would be at odds with the human rights and especially the Article 8 rights of the abducted child in Hague return proceedings, respect for which undeniably merges into the best interests of the child, without evidently ignoring the urgent, summary and provisional nature of the Hague remedy. [noot:37]

The application of the European standard to the facts of the case

It is established that the Latvian courts omitted to consider properly the psychological situation of the child, the child's welfare situation in Australia and the future relationship between the mother and the child were the child to be returned to Australia. [noot:38] In the light of *Neulinger and Shuruk*, these deficiencies in the national proceedings alone would have sufficed to find a violation under Article 8, since they did not comply with the "in-depth" or, in the Grand Chamber's new jargon, "effective" examination required by Article 8. In practical terms, the Grand Chamber applied once again the *Neulinger and Shuruk* test. [noot:39]

The Latvian courts' superficial, hands-off handling of the child's situation was rightly criticised by the Grand Chamber. Having on the one hand taken into consideration the psychologist's report presented by the mother for the purpose of having execution of the return order stayed pending the appeal, but having on the other hand ignored that same report in rendering the appeal judgment, the domestic courts not only contradicted themselves, but failed to consider effectively the report's conclusions as to the serious risks associated with the child's return, and this on the basis of the wrongful argument that the psychologist's report could not serve as evidence to rule out the child's return. [noot:40] The traumatising manner in which the Riga Regional Court's decision was executed and the far-reaching limitations imposed on the mother's access to her daughter by the clearly punitive decision of the Australian family court were additional and regrettable consequences of the Latvian courts' inadequate handling of the case, which failed to prepare the child's physical return and to examine whether effective safeguards of the child's rights were in place in Australia and if the mother was in a position to maintain contact with her child in the event of a return, and, if appropriate, to make such a return contingent upon adequate undertakings, stipulations or orders with a view to not hindering or significantly restricting the mother's contact with the child. [noot:41]

Worse still, the Latvian courts accepted a decision by the Australian court establishing joint parental responsibility of the applicant and T. with effect from E.'s birth, in spite of the fact that the applicant and T. were not married to each other, the child's birth certificate did not name the father and the child was born while the mother was still married to another man. The Australian decision was taken after the removal of the child from Australian territory and with retroactive effect. It appears from the case file that the Australian decision was based on photographs, email printouts and the sole testimony of T. No paternity tests were performed. [noot:42] No witnesses heard. In other words, the Latvian domestic courts did not even consider if the conditions for the application of the Hague Convention had been met, namely if they were dealing with a child abduction in the sense of the Hague Convention. [noot:43]

In reality, it is obvious that the facts of the case at hand do not amount to a child abduction, since T. had no parental rights whatsoever, let alone custodial rights, "immediately before the removal" of the child from Australia, as Article 3 (a) of the Hague Convention requires. Officially the applicant was a single mother and the child had no registered father when they both left Australia on 17 July 2008. From the very day of the child's birth until the day she left Australia, T. not only failed to officially recognise his fatherhood, but even denied his paternity before the Australian public authorities. T. only applied for, and gained, "custodial rights" after the removal of the child, which means that at the time of the removal the mother was *de jure* the sole

person with parental responsibility, including custodial rights, over the child. The Australian court's decision of 6 November 2008 could not be construed in such a way as to circumvent the time requirement of Article 3 (a) of the Hague Convention and to substantiate *ex post facto* an otherwise unfounded return claim. [noot:44]

Conclusion

Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or "effective" evaluation of the child's situation in the specific context of the return application can provide such justice. In layman's terms, *Neulinger and Shuruk* is alive and well. It was and remains a decision laying down valid legal principles, not an ephemeral and capricious act of "judicial compassion".

In the specific case at hand, the domestic courts not only forwent an in-depth or "effective" evaluation of the child's situation, but even failed to check the conditions of applicability of the Hague Convention in the first place. There was simply no legal basis for the interference with the applicant's right to family life with her child, the removal of the child from Latvia being the only unlawful abduction in this case. Therefore, I find a violation of Article 8 of the Convention.

Joint dissenting opinion of Judges Bratza, Vajić, Hajiyev, Šikuta, Hirvelä, Nicolaou, Raimondi and Nussberger

1. We regret that we are unable to agree with the view of the majority of the Court that the applicant's rights under Article 8 were violated in the present case.

2. We should make it clear at the outset that our difference of opinion with the majority relates not to the general principles to be applied in cases of child abduction covered by the Hague Convention, on which we are in full agreement with the other judges of the Court. In particular, we agree that despite the undeniable impact that return of the child may have on the rights of the child and parents, 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. We further agree that the Article nevertheless imposes on the national authorities of that State, when examining a case under Article 13 (b) of the Hague Convention, to consider arguable claims of a "grave risk" for the child in the event of his or her return and, where such a claim is found not to be established, to make a ruling giving sufficient reasons for rejecting it.

3. Where we part company with the majority is on the question whether, in rejecting the applicant's claim in the present case and ordering the return of her child to Australia, the national courts of Latvia sufficiently complied with those procedural requirements.

4. We note that the Latvian courts, at first instance and on appeal, were unanimous as to the response to be given to the application for return of the child lodged by the child's father.

In a reasoned judgment of 19 November 2008, the District Court, after a hearing attended by both parents, held that the Hague Convention was applicable and granted T' s application, ordering the child's immediate return to Australia. The

court rejected the applicant' s claim under Article 13 of the Hague Convention, holding, on the basis of photographs and copies of e-mails between the applicant and T's relatives, that T had cared for the child prior to her departure for Latvia. While noting that witness statements referred to arguments between the parties and to the fact that T had behaved irascibly towards the applicant and the child, it held that this did not enable it to conclude that T had not taken care of the child. The court dismissed the applicant's claim that the child's return posed a risk of psychological harm to E., as unsubstantiated and as being based on an unfounded assumption.

5. On 26 January 2009, the Riga Regional Court upheld that decision, after a hearing at which both parents were again present and legally represented.

In support of her claim that her daughter's return to Australia would expose her to psychological harm, the applicant submitted for the first time a certificate, prepared at her request by a psychologist, which stated *inter alia* that, given the child's young age, an immediate separation from her mother was to be ruled out, "otherwise the child is likely to suffer psychological trauma, in that her sense of security and self-confidence could be affected."

She further claimed that T had ill-treated her and the child and that he was liable to a prison sentence in Australia in respect of criminal charges brought against him.

6. Central to the majority's view that the Regional Court was in breach of its procedural obligations under Article 8, is the contention that the court refused to take into account the applicant's claim, which is said to have been supported by the certificate and by the witness statements, that the child's return to Australia would expose her to a "grave risk" of harm.

7. We are unable to accept this view, which does not in our opinion do justice to the decision or reasoning of the national courts. As to the certificate, we note that the opinion of the psychologist was confined to the harm to the child which would flow from an immediate separation from her mother. The certificate did not directly address the question of the child's return or suggest that it would be in any way harmful if E. were to return to Australia accompanied by her mother. The Regional Court did not refuse or fail to take the certificate into account. On the contrary, it emphasised that the certificate concerned only the issue of the separation of mother and child, which was a matter relating to custody rights which fell to be determined not by the Latvian courts as the courts of the requested State, but exclusively by the Australian courts. Having regard to the certificate's contents, we see no justification for the view expressed in the judgment that the Regional Court should have gone further by submitting the document for cross-examination, still less that it should have ordered a second expert opinion of its own motion.

8. As to the allegations made by the applicant against T., the Regional Court expressly examined the applicant's claims but dismissed them on the grounds that "no evidence has been submitted which could, even indirectly, support the allegations".

9. It is argued in the judgment that the Regional Court should have done more to examine whether it was feasible for the applicant to return to Australia with the child or whether the return of the child would inevitably have resulted in her separation from her mother. We do not share this view. There was clearly no legal impediment to the return of the applicant; she had not only lived in Australia for several years but had acquired Australian citizenship in 2007. Further, there was nothing in the Regional Court's judgment which affected her right to retain custody

of the child and to accompany her back to Australia. Moreover, it does not appear that she argued before the Regional Court that, for reasons of personal safety or otherwise, she could not under any circumstances contemplate returning to Australia. Certainly, she had alleged that T. had ill-treated her and the child but, as noted above, this allegation was rejected by the court as wholly unsubstantiated. Moreover, the court went on to observe that there were no grounds for doubting the quality of the welfare and social protection provided to children in Australia, given that, according to a sworn affidavit, Australian legislation provided for the security of children and their protection against ill-treatment within the family. We note, in conclusion, that despite her claim before the Regional Court that she had no ties in Australia and that were she to return there she would be unemployed and would have no income, it appears that the applicant has in fact returned to live in Australia, where she has found accommodation and is in employment.

10. We are similarly unpersuaded by the argument implicit in the judgment that the Latvian Courts should have taken the initiative by requesting further information from the Australian authorities about T's criminal profile, previous convictions and the charges of corruption allegedly brought against him. In proceedings under Article 13 of the Hague Convention, the burden lies on the party to adduce evidence to substantiate a claim of "grave risk" if the child were to be returned. As found by the Latvian Courts, the applicant failed to adduce any evidence to support such a claim, even indirectly.

11. While the reasons given by the Latvian courts for ordering the return of E. were shortly expressed, we consider, contrary to the view of the majority, that they adequately responded to the applicant's arguments and that the examination of the claims made by the applicant satisfied the procedural requirements imposed on them by Article 8 of the Convention.

12. In view of this conclusion, all but Judge Bratza would have refused an award of costs; having regard to the fact that the applicant's claim was in the event successful, Judge Bratza voted in favour of the grant of her costs.

» Noot

1. Internationale kinderontvoering blijft een moeilijk vraagstuk, zowel juridisch als emotioneel. Niet alleen vanwege de complexiteit van de wetgeving (zoals besproken in I. Curry-Sumner, "Lappendeken van instrumenten: Een analyse van de uitspraak *J. McB* v. *L.E.*" *EU Handvest Selecties*, Sdu: Den Haag 2013, p. 25), maar ook door het hoog oplopende emotionele kader waarin deze beslissing genomen moet worden. In de huidige zaak ligt dat helaas niet anders.

2. Hoewel het onderwerp voornamelijk wordt beheerst door een internationaal multilateraal verdrag, het Haags Kinderontvoeringsverdrag 1980 (hierna: HKOV), is de Europese Unie inmiddels ook actief geweest op dit gebied. Voorbeelden van deze ontwikkelingen zijn de invoering van EG Verordening nr. 2201/2003 betreffende de bevoegdheid en de erkenning en tenuitvoerlegging van beslissingen in huwelijkszaken en inzake de ouderlijke verantwoordelijkheid, en de intrekking van Verordening nr. 1347/2000 (hierna: Brussel II-bis). Daarnaast heeft het Europees Hof voor de Rechten van de Mens (hierna: EHRM) zich ook uitgelaten over de mensenrechtelijke aspecten van dergelijke handelingen, waarbij uitgebreid is stilgestaan bij de vraag in hoeverre de rechten, vrijheden en beginselen van het Europese Verdrag van de Rechten van de Mens (hierna: EVRM) een rol dienen te spelen in het kader van internationale kinderontvoeringen. Sinds de inwerkingtreding van het Verdrag van

Lissabon wordt ook naar de bepalingen uit het Handvest van de Grondrechten van de Europese Unie (hierna: Handvest) verwezen.

3. Kortom: in het kader van een internationale kinderontvoering dient vaak rekening te worden gehouden met ten minste vier verschillende internationale bronnen (te weten Brussel II-bis, het HKOV, het EVRM en het Handvest), naast de nationale regelgeving op dit terrein. Hoe deze op zichzelf staande internationale instrumenten zich tot elkaar verhouden is een cruciale vraag, vooral gelet op de diverse opstellers van deze instrumenten (i.e. Haagse Conferentie, de Europese Unie en de Raad van Europa). In deze korte annotatie wordt de impact van de interactie tussen het EVRM enerzijds en het HKOV anderzijds voor het internationaal familierecht nader belicht aan de hand van de uitspraak van het EHRM in de zaak *X* t. *Letland*.

4. In de huidige zaak was de situatie relatief eenvoudig omdat de Europese Verordening Brussel II-bis geen rol speelde in de discussie, nu de gepretendeerde ongeoorloofde overbrenging niet tussen EU-lidstaten had plaatsgevonden, maar tussen een EU-lidstaat (Letland) en niet-EU-lidstaat (Australië). Desalniettemin verbleef het kind wel op het grondgebied van een Verdragsluitende Staat van de Raad van Europa, waarbij een beroep op het EVRM wel tot de mogelijkheden behoort (art. 1 EVRM).

Moment van verkrijging van gezag

5. Een aantal problemen is in deze zaak gerezen. De Letse autoriteiten dienden allereerst vast te stellen of er *in casu* sprake was van een ongeoorloofde overbrenging in de zin van art. 3 HKOV. Op grond van dit artikel is er sprake van een ongeoorloofde overbrenging indien het overbrengen of het niet doen terugkeren van een kind geschiedt "in strijd met een gezagsrecht, dat is toegekend aan een persoon, een instelling of enig ander lichaam, alleen of gezamenlijk, ingevolge het recht van de Staat waarin het kind onmiddellijk voor zijn overbrenging of vasthouding zijn gewone verblijfplaats had, en dit recht alleen of gezamenlijk daadwerkelijk werd uitgeoefend op het tijdstip van het overbrengen of het niet doen terugkeren, dan wel zou zijn uitgeoefend, indien een zodanige gebeurtenis niet had plaatsgevonden".

6. Op basis van deze bepaling dienden de Letse autoriteiten vast te stellen of de vader met het gezag was belast ten tijde van de overbrenging naar Letland door de moeder op 17 juli 2008. Toen de moeder het kind naar Letland meenam, was enkel zij met het gezag belast. De vader betwistte niet dat zij *op dat moment* zijn toestemming niet nodig had, omdat hij op dat moment niet met het gezag was belast (art. 3 HKOV). Het probleem rees naar aanleiding van de beslissing van de Australische familierechter op 6 november 2008. In het kader van deze procedure werd het juridische vaderschap van de biologische vader gerechtelijk vastgesteld. Deze beslissing had ook tot gevolg dat de vader geacht werd het ouderlijk gezag te hebben gehad *sinds* de geboorte van het kind. Met andere woorden: zowel de afstammings- als de gezagsrechtelijke betrekkingen werden met terugwerkende kracht toegekend. De centrale vraag is derhalve of het vaststellen van het juridisch vaderschap, en het later "verkrijgen van het gezag" *na* het vertrek van de andere juridische ouder die met het gezag is belast gevolgen heeft voor de al dan niet ongeoorloofde overbrenging van het kind.

7. Hoewel deze vraag uitvoerig door de Letse autoriteiten is bediscussieerd, werd deze vaststelling terecht niet door het EHRM getoetst (*X* t. *Letland*, par. 62. Zie verder *García Ruiz* t. *Spanje*, EHRM 21 januari 1999 (GK), nr. 30544/96, par. 28; *Maumousseau en Washington* t. *Frankrijk*,

EHRM 6 december 2007, nr. 39388/05, «EHRC» 2008/32 m.nt. Brems, par. 79; *Neulinger en Shuruk* t. *Zwitserland*, EHRM 6 juli 2010, nr. 41615/07, «EHRC» 2010/93 m.nt. Rutten, par. 100). De taak van het EHRM is namelijk niet om feitelijke onjuistheden te toetsen. De Letse autoriteiten hebben mijns inziens terecht geconstateerd dat de vraag of de vader op 17 juli 2008 met het gezag was belast een vraag was die naar het recht van Australië diende te worden beantwoord. Het kind had immers onmiddellijk voorafgaand aan de overbrenging zijn gewone verblijfplaats in Australië. Volgens het recht van Australië brengt een gerechtelijke vaststelling vaderschap met zich mee dat het gezag vanaf dat moment ook terugwerkt. Achteraf gezien was de vader op 17 juli 2008 wel met het gezag belast, ondanks het feit dat hij op 17 juli 2008 zelf niet met het gezag belast was.

8. Vanuit Nederlands perspectief is dit moeilijk te begrijpen. De twee manieren om juridisch vader te worden buiten het huwelijk en adoptie zijn erkenning (art. 1:203 en 1:204 BW) en de gerechtelijke vaststelling vaderschap (art. 1:207 BW). Hoewel de afstammingsrechtelijke gevolgen van de gerechtelijke vaststelling terugwerken tot en met de geboorte (art. 1:207 lid 5 BW), is dat niet het geval bij erkenning (art. 1:203 lid 2 BW). Ondanks dit verschil hebben beide procedures geen gevolgen voor het gezag. Bovendien, als een vader die een procedure in Nederland aanspant na de overbrenging van een kind waarover hij geen gezag heeft, en hij op basis van deze procedure met het gezag wordt belast, dan werkt het gezag niet terug. Hetzelfde geldt in het kader van een verzoek tot gerechtelijke vaststelling.

9. Bijvoorbeeld: stel dat een ongehuwd paar in Nederland woont en de biologische vader het kind niet heeft erkend. De moeder neemt het kind zonder toestemming of medeweten van de biologische vader mee naar het buitenland. Na het vertrek dient een bijzonder curator namens het kind en op aanmoediging van de vader een verzoek tot gerechtelijke vaststelling in bij de Nederlandse rechter op grond van art. 1:207 lid 1 BW. Het verzoek wordt ingewilligd omdat hij de biologische vader is (art. 1:207 lid 1 BW). Op grond van art. 1:207 lid 5 BW werkt deze beslissing met betrekking tot de afstammingsrechtelijke gevolgen terug tot aan de geboorte van het kind. De vader verkrijgt echter via deze beslissing niet automatisch het gezag (art. 1:253b BW). Indien hij het gezag wenst te verkrijgen, dan zou hij op grond van art. 1:253c BW een verzoek tot het verkrijgen van gezag moeten indienen bij de rechtbank.

10. Het is meerdere malen in Nederlandse jurisprudentie vastgesteld dat de latere verkrijging van het gezag door de achtergebleven ouder geen effect heeft op het al dan niet geoorloofde karakter van de overbrenging of achterhouding. Zie bijvoorbeeld de uitspraak van Gerechtshof ’s-Hertogenbosch van 1 oktober 2013 (*JPF* 2014/39 m.nt. Curry-Sumner). In deze zaak hadden partijen van 2007 tot ongeveer 2012 een affectieve relatie met elkaar gehad. Uit de relatie van partijen waren twee kinderen geboren. Hoewel de man beide minderjarige kinderen heeft erkend, heeft hij slechts gezag over het oudste kind. De kinderen hebben zowel de Israëlische als de Nederlandse nationaliteit. De man heeft de Nederlandse en de vrouw de Israëlische nationaliteit. Op 21 april 2012 heeft de vrouw buiten medeweten van de man beide minderjarige kinderen naar Israël meegenomen. Op 21 maart 2013 hebben partijen aanvaard dat het Haags Kinderontvoeringsverdrag 1980 niet van toepassing is op het jongste kind aangezien de man geen gezag over dat kind heeft. Bij vonnis van 3 maart 2013 heeft het *Supreme Court* in Israël bepaald dat de vrouw met de oudste zoon naar Nederland dient terug te keren, maar dat het jongste kind in Israël mag blijven. De man heeft daags voor het vertrek van de kinderen een verzoek

ingediend in Nederland om met het gezag over het jongste kind te worden belast. Na het vertrek is dit verzoek ingewilligd. Deze beslissing heeft echter geen effect gehad op het al dan niet ongeoorloofde karakter van de overbrenging door de moeder op 21 april 2012.

11. Desalniettemin kan men vraagtekens zetten bij deze conclusie, niet ten opzichte van de juistheid van de conclusie maar met betrekking tot de wenselijkheid van de oplossing. Ten tijde van de overbrenging had de moeder (de verzorgende ouder) geen redelijke verwachting dat zij de toestemming van de biologische vader nodig had, zij vertrok met een *legitimate expectation* dat haar vertrek geoorloofd was. De stappen die in gang zijn gezet waardoor er uiteindelijk toch sprake was van een ongeoorloofde overbrenging hebben zich allemaal voorgedaan na haar vertrek. Het is slechts een consequentie van de werking van het materieel Australisch familierecht en de daaruit voortvloeiende terugwerkende kracht die aan het gezagsrecht is toegekend waardoor deze situatie is komen te ontstaan. Het feit dat het EHRM deze feitelijke constatering niet heeft, en niet mocht toetsen heeft mijns inziens geleid tot de beslissing die is gegeven. Mijns inziens had men hier wel degelijk een beroep op fundamentele beginselen van de rechten van de mens kunnen doen, omdat het beginsel zo fundamenteel is in vele landen in de wereld.

12. Het beginsel van *nullum crimen, nulla poena sine praevia lege poenali* (d.w.z. "zonder voorafgaande wettelijke strafbepaling is er geen strafbaar feit, geen straf") is een fundamenteel beginsel in het strafrecht van ten minste alle Europese landen. Het beginsel is bovendien ook neergelegd in grondwetten over de hele wereld die betrekking hebben op zowel het civiele als het strafrecht (bijv. clause 3, art. I, sec. 9, VS Grondwet (verplichting op federaal niveau) en clause 1, art. I, sec. 10, VS Grondwet (verplichting op staatniveau), sec. 7, Nieuw Zeeland Grondwet, art. 39 Japanse Grondwet, art. 5, Sec. XXXVI, Braziliaanse Grondwet, art. 2 Franse *Code Civil*, art. 169 Iraanse Grondwet etc.). Mijns inziens had men hier veel meer mee moeten doen in Letland dan er uiteindelijk mee is gedaan. Een beroep op art. 20 HKOV behoort mijns inziens tot de mogelijkheden.

Schending van artikel 8 EVRM

13. De vaststelling dat er sprake was van een inmenging in het familieleven van de moeder op grond van art. 8 lid 1 EVRM werd door alle partijen aanvaard (*X* t. *Letland*, par. 53-54). Met betrekking tot de vraag of een dergelijke inmenging gerechtvaardigd kon worden op grond van art. 8 lid 2 EVRM, kwam het EHRM snel tot de conclusie dat aan de eerste twee voorwaarden werd voldaan (namelijk "bij wet is voorzien", *X* t. *Letland*, par. 58-63, en "nastreven van legitieme doeleinden", *X* t. *Letland*, par. 67). Het probleem doet zich voor met betrekking tot de derde voorwaarde, namelijk of de maatregel "noodzakelijk was in een democratische samenleving". Het EHRM herinnert aan het principe dat in gevallen van kinderontvoering de Verdragsluitende Staten bij het EVRM zich hebben verplicht om dit Verdrag te interpreteren in het licht van de vereisten van de verplichtingen die voortvloeien uit art. 8 EVRM.

14. Vooral in het kader van de vaststelling of de genomen maatregel noodzakelijk was in een democratische samenleving, diende de rechter een balans te vinden tussen de belangen van het kind en die van de ouders (*Maumousseau en Washington* t. *Frankrijk*, reeds aangehaald, par. 60; *Nada* t. *Zwitserland*, EHRM 12 september 2012 (GK), nr. 10593/08, «EHRC» 2012/217 m.nt. Scheltema, par. 107). Juist in het kader van deze belangenafweging werd het EHRM door veel partijen verzocht om duidelijkheid te verschaffen over de

precieze reikwijdte van de verplichting. Het EHRM heeft voor het eerst in *Neulinger en Shuruk* t. *Zwitserland* aangegeven dat een "in-depth examination of the entire family situation" diende plaats te vinden (*Neulinger en Shuruk* t. *Zwitserland*, reeds aangehaald, par. 139). Dit uitgangspunt is vervolgd in een aantal latere zaken, bijvoorbeeld *Raban* t. *Roemenië*, EHRM 26 oktober 2010, nr. 25437/08, par. 28; *Šneersone en Kampanella* t. *Italië*, EHRM 12 juli 2011, nr. 14737/09, «EHRC» 2011/145 m.nt. Morijn, par. 85; *M.R. en L.R.* t. *Estland*, EHRM 15 mei 2012, nr. 13429/12, par. 37. In het licht van de onduidelijkheid omtrent de reikwijdte van deze verplichting, heeft het Hof in *X* t. *Letland* nader uitleg gegeven met betrekking tot de "in-depth examination of the entire family situation".

Twee voorwaarden

15. In tegenstelling tot *Neulinger en Shuruk* lijkt nu de Grote Kamer van het EHRM van mening te zijn dat er slechts rekening dient te worden gehouden met twee voorwaarden wil men het HKOV op een EVRM-conforme manier uitleggen (*X* t. *Letland*, par. 103-104). Ten eerste, factoren die een rol zouden kunnen spelen bij het slagen van een uitzonderingsgrond om het kind terug te geleiden "must be genuinely taken into account by the requested court". Ten tweede dienen deze factoren in het licht van art. 8 EVRM te worden beoordeeld. Vooral in het kader van de toetsing van de art. 13 lid 1 sub b HKOV uitzonderingsgrond (namelijk de zogenaamde 'ernstig risico'-grond) dient de rechter te motiveren waarom de beslissing is genomen. De Grote Kamer heeft bevestigd dat zowel een weigering om rekening te houden met bepaalde factoren die onder de reikwijdte van de uitzonderingsgronden kunnen vallen, als een onvoldoende motivering voor de beslissing om een beroep op de uitzonderingsgronden niet in te willigen, zouden kunnen leiden tot strijdigheid met art. 8 EVRM. Een "in-depth examination of the entire family situation" lijkt op basis van mijn lezing van de uitspraak van de baan (*X* t. *Letland*, par. 103-106). Slechts rechter Pinto de Albuquerque is een andere mening toegedaan (*X* t. *Letland*, concurring opinion van Pinto de Albuquerque. Zie ook de *disenting opinions* van Bratza, Vajić, Hajiyev, Šikuta, Hirvelä, Nicolaou, Raimondi en Nußberger waarin duidelijk is dat zij de mening van Pinto de Albuquerque niet delen).

Belang van het kind

16. Een cruciale vraag die wederom aan het EHRM is voorgelegd betreft de mate waarin de rechter bij een verzoek tot teruggeleiding beslist moet oordelen over het belang van het kind. Een verzoek tot teruggeleiding onder het HKOV is van oudsher bedoeld als een ordemaatregel en niet als een inhoudelijke beslissing omtrent de hoofdverblijfplaats van het kind (zie bijvoorbeeld voor een zeer recent voorbeeld Rb. Den Haag 4 maart 2014, ECLI:NL:RBDHA:2014:2725, waarin werd gezegd: "In het Verdrag is niet geregeld welke rechterlijke autoriteit in geval van een rechtstreeks bij de rechter ingediend verzoek tot teruggeleiding bevoegd is daarvan kennis te nemen. De beslissing op een op het Verdrag gebaseerd verzoek tot onmiddellijke teruggeleiding is geen beslissing ten gronde, doch heeft het karakter van een ordemaatregel. Gelet op de systematiek van het Verdrag moet worden aangenomen dat een op het Verdrag gebaseerd verzoek tot teruggeleiding van een kind dat beweerdelijk ongeoorloofd is overgebracht vanuit de verdragsluitende staat waar het zijn gewone verblijfplaats heeft naar een andere verdragsluitende staat, of in die andere staat wordt vastgehouden, slechts kan worden ingediend bij de rechter van de staat waar het kind zich bevindt.")

17. Desalniettemin zijn sinds de inwerkingtreding van het Verdrag veel

aspecten van het fenomeen van kinderontvoering veranderd. Twintig jaar geleden werd het kind vooral door de niet-verzorgende ouder ontvoerd, terwijl in 2014 de meeste ontvoeringen door de verzorgende ouder worden gepleegd (zie bijvoorbeeld de statistieken in *Preliminary Document No 8 A (update) of November 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, te raadplegen op de website van de Haagse Conferentie, www.hcch.net).

18. Volgens rechter Pinto de Albuquerque heeft deze verandering in de socio-juridische context van kinderontvoering veel effect op de manier waarop deze zaken dienen te worden behandeld. Hij stelt dat een feitengestuurde, maatwerkoplossing meer dient te worden aangewend om ervoor te zorgen dat de doeleinden van het HKOV nog steeds worden gewaarborgd in teruggeleidingsprocedures.

19. Hij stelt: "Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or 'effective' evaluation of the child's situation in the specific context of the return application can provide such justice. In layman's terms, Neulinger and Shuruk is alive and well. It was and remains a decision laying down valid legal principles, not an ephemeral and capricious act of 'judicial compassion'" (Conclusie, *concurring opinion* rechter Pinto Albuquerque).

20. Hoewel duidelijk is dat een verzoek tot teruggeleiding niet "automatically or mechanically" zou moeten worden beoordeeld (*X* t. *Letland*, par. 98), hoeft mijns inziens de rechter die over een verzoek tot teruggeleiding moet beslissen geen grondige belangenafweging uit te voeren ten aanzien van het belang van het kind. In die zin ben ik tevreden met de verzachting van *Neulinger* die door *X* t. *Letland* is bewerkstelligd. Het probleem dat Jeppesen en Jonker aansnijden met betrekking tot het belang van kinderen en het belang van het individueel kind is volgens mij in dit kader niet juist (C. Jeppesen de Boer en M. Jonker, "X v Latvia Child Abduction Grand Chamber", ECHR Blog, 17 december 2013, echrblog.blogspot.nl/2013/12/x-v-latvia-child-abduction-grand.html). Het belang van het individuele kind wordt niet verwaarloosd of opgeofferd in kinderontvoeringszaken, het is echter dat deze belangenafweging door een *andere* rechter dient te worden beslecht. In het kader van de onderhavige casus, rijst niet de vraag ***of*** het belang van het kind een rol moet gaan spelen (daar is hopelijk iedereen het over eens dat het wel het geval moet zijn), maar ***voor welke rechter*** de discussie zich dient af te spelen. Ik ben het dus in die zin niet eens met de conclusie dat het belang van het individuele kind in kinderontvoeringszaken wordt opgeofferd voor het belang van kinderen in algemene zin.

21. In zijn *concurring opinion* verwijst rechter Pinto de Albuquerque naar het feit dat "the Hague Convention is basically a jurisdiction selection treaty, but it is not blind to substantive welfare issues concerning the individual child involved, since it imposes an assessment of that child's best interests in Article 13 and of his or her human rights in Article 20". Mijns inziens is hier sprake van een misvatting. Art. 13 en art. 20 HKOV zijn niet bedoeld om een integrale belangenafweging in de

terugeleidingsprocedure in te voeren. Deze artikelen zijn bedoeld om de hoofdregel van terugkeer enigszins te verzachten in uitzonderlijke gevallen wanneer er een gegronde reden is om het kind niet terug te sturen. De rechter die moet oordelen over een verzoek tot teruggeleiding dient derhalve zich niet te mengen in de vraag of het kind beter af is in land A of land B. Die vraag dient door de rechter van de staat van oorsprong te worden beslecht.

22. Een dergelijke inmenging zou immers afbreuk doen aan het fundamentele beginsel van het HKOV, namelijk "eerst terug, dan praten" (zie bijvoorbeeld H. van Loon, 'Internationale kinderontvoering. Mensenrechten en IPR', in T. De Boer *et al* (reds.), *Strikwerda's conclusies*, Kluwer: Deventer 2011, p. 306). De spanning tussen een ordemaatregel en een grondige belangenafweging is natuurlijk al in *Neulinger en Shuruk* in gang gezet waarbij "[i]nstead of distinguishing return proceedings from custody proceedings the Court is insisiting on an in-depth analysis of the entire family situation in order to ascertain the child's best interests in Convention proceedings, thus almost equating to custody proceedings" (P. Beaumont en L. Walker, "Post *Neulinger* case law of the European Court of Human Rights on the Hague Child Abduction Convention", in: *A commitment to private international law*, Intersentia: Antwerpen 2013, p. 17-30).

Extra beroepsmogelijkheid

23. Het EHRM moet mijns inziens ervoor zorgen dat het het belang van het kind niet schaadt door de indruk te wekken dat er een extra inhoudelijke toetsing van de uitzonderingsgronden mogelijk is. Nederland en veel andere landen hebben juist de beroepsinstanties verminderd (art. 13 lid 8 Uitvoeringswet Internationale Kinderontvoering), om ervoor te zorgen dat er sneller kan worden gehandeld. Het idee dat het EHRM de beslissing van de rechter opnieuw inhoudelijk toetst ten aanzien van de uitzonderingsgronden en de motivering daarvan, kan de indruk wekken dat er een extra beroepsmogelijkheid is waar kansen liggen. Als men meer nadruk zou leggen op concentratie van rechtsmacht, beperken van nationale beroepsmogelijkheden, en snellere procedures (ofwel dat men binnen de Europese Unie bijvoorbeeld de verplichting van beslissing binnen zes weken, zoals neergelegd in art. 11 lid 3 Brussel II-bis Verordening, waarmaakt) dan zouden we, mijns inziens, vaker in het belang van het kind opereren.

Conclusie

24. Volgens mij is deze casus nopend vanwege de materieelrechtelijke oplossing ten aanzien van de terugwerkende kracht van het gezag na een gerechtelijke vaststelling in Australië. Als de biologische vader het gezag had gekregen, maar dit gezag niet had teruggewerkt tot aan de geboorte van het kind, dan was er geen probleem geweest. De vraag rijst of men eerder een oplossing moet zoeken om de scherpe randen van de uiteenlopende manieren om materieelrechtelijk om te gaan met het gezag te verzachten, dan dat men voorwaarden zou moeten creëren ten opzichte van de motiveringsplicht in het kader van een beroep op art. 13 lid 1 sub b HKOV. Men zou natuurlijk internationale afspraken kunnen maken waarin zou kunnen worden afgesproken wanneer er *in ieder geval* sprake is van een ongeoorloofde overbrenging, of wanneer er *in ieder geval* geen sprake is van een ongeoorloofde overbrenging.

25. Bovendien is het goed dat het EHRM mijns inziens inmiddels een duidelijker onderscheid heeft gemaakt tussen enerzijds de terugeleidingsprocedures en anderzijds de gezagsprocedures. Het is in het belang van het kind dat een rechter die moet beslissen over een verzoek tot teruggeleiding snel en efficiënt de beslissing kan nemen. Op deze wijze kan

de situatie sneller hersteld worden naar zoals het was onmiddellijk voorafgaand aan de overbrenging of achterhouding. De verzachting van *Neulinger en Shuruk* t. *Zwitserland* is wenselijk zodat men geen "in-depth analysis of examination of the entire family situation" nodig heeft, maar een "in-depth analysis of the exception grounds listed in the Hague Abduction Convention 1980". Het belang van het kind wordt geen ondergeschoven kindje, want dat is juist wat de rechter van het land van de gewone verblijfplaats moet beoordelen. Als wij geen vertrouwen hebben dat deze beoordeling goed zal geschieden, dan ligt het probleem ergens anders volgens mij.

I. Curry-Sumner,

» Voetnoten

[1]

Neulinger and Shuruk v. Switzerland (GC), no. 41615/07, 6 July 2010.

[2]

Any reference in this opinion to "the Convention" is to the European Convention on Human Rights, "the Hague Convention" is to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the "EU Regulation" is to Council Regulation (EC) no. 2201/2003 of 27 November 2003, "the Court" is to the European Court of Human Rights and the "Special Commission" is to the Special Commission on the practical operation of the Hague Convention. Furthermore, I will refer to the parent unlawfully deprived of his or her custodial rights as the "left-behind parent" and to the parent who unlawfully removed or retained the child as the "abducting parent". The country to which the child is unlawfully removed or where he or she is unlawfully retained will be referred as the "host country" and the country from which the child has been unlawfully removed or from which he or she has been unlawfully retained as the "country of habitual residence".

[3]

The leading case is *Ignaccolo-Zenide v. Romania*, no. 31679/96, 25 January 2000.

[4]

The leading case is *Monory v. Romania and Hungary*, no. 71099/01, 5 April 2005.

[5]

The leading case is *Iglesias Gil and A.U.I. v. Spain*, no. 56673/90, §§ 57-59, 29 April 2003.

[6]

Article 31, para. 3 (c) of the Vienna Convention on the Law of Treaties. See, among other authorities, *Ignaccolo-Zenide*, cited above, § 95; *Monory*, cited above, § 81; and *Iglesias Gil and A.U.I*, cited above, § 61. However, the positive obligation to act when faced with child abduction also applies to non-Contracting States of the Hague Convention (see *Bajrami v. Albania*, no. 35853/04, 12 December 2006, and *Hansen v. Turkey*, no. 36141/97, 23 September 2003).

[7]

Maumousseau and Washington v. France, no. 39388/05, § 69, 6 December 2007.

[8]

Neulinger and Shuruk, cited above, § 139.

[9]

The leading case is, evidently, *Neulinger and Shuruk*, cited above, which was followed by *Šneersone and Kampanella v. Italy*, no. 14737/09, 12 July 2011, and *B. v. Belgium*, no. 4320/11, 10 July 2012.

Nonetheless, it is important to note that since *Neulinger and Shuruk* the Court has found most similar complaints inadmissible (see *Van den Berg and Sarrì v. the Netherlands* (dec.), no. 7239/08, 2 November 2010; *Lipkowsky and McCormack v. Germany* (dec.), no. 26755/10, 18 January 2011; *Tarkhova v. Ukraine* (dec.), no. 8984/11, 6 September 2011; *M.R. and L.R. v. Estonia (dec.)*, no. 13429/12, 15 May 2012; and *Chernat and others v. Romania* (dec.), no. 13212/09, 3 July 2012). In brief, the prudent implementation of *Neulinger* did not open the door to a flood of similar judgments. The much-proclaimed risk of imminent demolition of the Hague mechanism after *Neulinger* has proved unfounded.

[10]

International child abduction involves either the child's unlawful removal from one country to another or the unlawful retention of the child within a foreign country. In view of the facts of the case, this opinion will deal only with the first aspect and will refer to the left-behind parent as the paradigmatic example of the person, institution or other body envisaged by Article 3 (a) of the Hague Convention. The two underlying premises of the Hague Convention are, firstly, that the court of habitual residence is best placed (*forum conveniens*) to resolve the merits of the custody dispute, since the bulk of the relevant evidence is available in that location, and secondly, that abduction is detrimental to the child's development, because the child is forced to leave behind the primary caregiver parent, family relatives and the known social and cultural environment. In fact, when the Hague Convention was prepared, the sociological stereotype of the abducting parent was that of a foreign, non-custodial father who was not willing to accept the mother's existing custody over the child, and unlawfully removed the child from his or her country of habitual residence. Since the 1990s this has no longer been true, the majority of cases nowadays being the foreign, custodial mother who leaves, for multiple reasons, the family's country of habitual residence after the termination of her relationship with the child's father. Consequently, if the evidentiary premise still holds true today, the substantive one does not.

[11]

See *Thomson v. Thomson*, [1994] 3 S.C.R. 551, which held that the mother's knowledge of an order preventing a child's removal from Scotland was not essential. In fact, the Hague Convention does not distinguish between intentional and negligent removal of a child (see *Mattenklott v. Germany (dec.)*, no. 41092/06, 11 December 2006).

[12]

Some courts have entertained other "procedural" defences, such as "fugitive disentitlement", waiver and "unclean hands" (for a summary, see Federal Judicial Center, International Litigation Guide, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, 2012, pp. 91-98).

[13]

National courts have discussed whether return would expose the child to such a danger in cases of return to a zone of war, civil unrest, generalised violence, hunger, disease, pollution, adjustment problems, difficult living conditions, a situation of child neglect, abuse, post-traumatic stress disorder and separation trauma (see, among others, French Court of Cassation judgments no. 11-28.424 of 13 February 2013, and no. 10-19905 of 26 October 2011; Italian Court of Cassation judgments no. 22962of 31 October 2007,and no. 10577 of 4 July 2003; *Simcox v. Simcox*, 511 F.3d 594 (6th Cr. 2007); *Blondin v.*

Dubois, 238 F.3d 153 (2d Cir. 2001); and *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996)).

[14]

A problematic strict construction of Article 11 (4) and (8) of the EU Regulation has rendered the defences meaningless and thus practically eliminated all checks in the host country (ECJ, *Rinau*, case C-195/08PPU, judgment of 11 July 2008; *Detiček*, case C 403/09PPU, judgment of 23 December 2009; *Povse*, case C-211/10, judgment of 1 July 2010; and *Zarraga*, case C-491/10PPU, judgment of 22 December 2010).

[15]

National courts have considered such factors as duration and stability of residence in the new environment, participation in school and extracurricular activities and language fluency (see *Friedrich v. Friedrich*, cited above, and *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998).

[16]

Although not literally restricted to the child's human rights, this defence has been interpreted as providing only for these, since Article 20 was intended to enact a "very strictly qualified form of *ordre public*" (Conclusions on the main points discussed by the Special Commission, 1989, para. 38), some arguing that Article 20 is already covered by the earlier grounds for refusing to return a child, listed under Article 13 (Report of the second Special Commission meeting, 1993, response to question 30 of Part III).

[17]

It was stressed in the Special Commission that the term "habitual residence" as well as the term "rights of custody" should normally be interpreted in an international way and not by reference to a specific national law (Conclusions on the main points discussed by the Special Commission, 1989, para. 9, Report of the second Special Commission meeting, 1993, response to question 5 of Part III, Recommendation 4.1 of the fourth meeting of the Special Commission, Report on the fifth meeting of the Special Commission, 2006, para. 155, and Conclusions of the Special Commission, 2012, para. 44). As the US Supreme Court has noted, custody rights must be determined "by following the text and structure of the Convention…. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage…" (*Abbott v. Abbott*, 130 S. Ct. 1983, 1990 (2010).

[18]

Report of the third Special Commission meeting, 1997, para. 13. So-called "inchoate custody rights" have been accepted by some jurisdictions, such as England (*Re B. (A Minor) (Abduction)*, (1994) 2 FLR 249, *Re O. (Child Abduction: Custody Rights)*, (1997) 2 FLR 702, *and Re G. (Abduction: Rights of Custody)* (2002) 2 FLR 703) and New Zealand (*Anderson v. Paterson* [2002] NZFLR 641), but rejected by others, such as Ireland (*H.I. v. M.G.* (1999) 2 ILRM 1) and Northern Ireland (*VK and AK v. CC*, (2013) NIFam 6). As shall be demonstrated below, the concept of "inchoate custody rights" cannot be reconciled with the Court's, the European Court of Justice's and the House of Lords' case-law.

[19]

Conclusions and Recommendations of the Special Commission, 2012, paras. 13, 36 and 80.

[20]

Report and conclusions of the Special Commission, 2002, para. 64.

[21]

Recommendation 3.7 of the fourth meeting of the Special Commission, 2001; Guide to good practice under the Hague Convention, Part II – Implementing Measures, 2003, para. 6.5.

[22]

Report of the second Special Commission meeting, 1993, response to question 1 of Part III. A court, when making a return order, should make it as detailed and specific as possible, including practical details of the return and the coercive measures to be applied if necessary (Guide to good practice under the Hague Convention, Part IV – Enforcement, 2010, paras. 4.1 and 4.2 of the executive summary).

[23]

In some jurisdictions, mostly common-law countries, these stipulations may range from non-enforceable undertakings assumed by the left-behind parent to the possibility to secure a "mirror order", i.e. an order made by the court in the country of habitual residence that is identical or similar to a previous order made in the host country (Recommendations 1.8.2 and 5.1 of the fourth meeting of the Special Commission, Report on the fifth meeting of the Special Commission, 2006, paras. 228 and 229; and Recommendations 1.8.1 of the fifth meeting of the Special Commission; Guide to good practice under the Hague Convention, Part I - Central Authority Practice, 2003, para. 4.22).

[24]

See the Pérez Vera Report, para. 25: "these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area". This statement must be read in conjunction with the view that the principle of the best interests of the child resembles "more closely a sociological paradigm than a concrete juridical standard" (para. 21).

[25]

Article 3 § 1 of the United Nations Convention of the Rights of the Child (1989) acknowledges a principle of customary international law which had already been reflected in the preamble of the Hague Convention, stating that "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody…". This is also in accordance with principle III B 2 of the Committee of Ministers' Guidelines on child-friendly justice, 2010, Articles 4 and 29 (a) of the African Charter on the Rights and Welfare of the Child, 1990, and the UNHCR Guidelines on Determining the Best Interests of the Child, 2008.

[26]

See in this direction House of Lords, in *re M (FC) and another (FC) (Children) (FC)*, [2007] UKHL 55, and *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; French Court of Cassation judgment no. 04-16.942 of 14 June 2005; Italian Court of Cassation judgment no. 10577 of 4 April 2003; High Court of Australia, *DP v Commonwealth Central Authority* [2001] HCA 39; Supreme Court of New Zealand, *Secretary for Justice v. HK*, judgment of 16 November 2006; and Conclusions of the Special Commission of 2012, para. 42.

[27]

The Pérez-Vera Report, paras. 25, 34 and 116; Recommendation 4.3 of the 2001 meeting of the Special Commission; Recommendation 1.4.2 of the fifth meeting of the Special Commission; Report on the

fifth meeting of the Special Commission, 2006, paras. 155 and 165; and Recommendation 4.3 of the fourth meeting of the Special Commission; and 42 U.S.C. § 11601(a)(4) ("narrow exceptions"), the US Department of State, Hague International Child Abduction Convention, Text and Legal Analysis, at 10510, and the Federal Judicial Center, International Litigation Guide, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, 2012, p. 64.

[28]

When national authorities apply international treaties, the Court's role is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention (see *Waite and Kennedy v. Germany [GC]*, no. 26083/94, § 54, ECHR 1999 I, and *Korbely v. Hungary [GC]*, no. 9174/02, § 72, ECHR 2008). The same applies to the Hague Convention (see *Neulinger and Shuruk*, cited above, § 133; *Šneersone*, cited above, § 85, 12 July 2011; and *B v. Belgium*, cited above, § 60). Sometimes the Court not only criticises the interpretation of the relevant legal framework (see *Monory*, cited above, § 81, and *Carlson v. Switzerland*, no. 49492/06, § 77, 6 November 2008), but also the inadequacy of the legislation itself (see *Iglesias Gil and A.U.I.*, cited above, § 61).

[29]

The court of the host country does not necessarily have to be satisfied beyond any reasonable doubt on both the return requirements and the defences to return, since nothing suggests that the required standard of proof is anything other than the ordinary balance of probabilities (see *M.R. et L.R. v. Estonia* (dec.), cited above, § 46, and *Re E (Children) (Abduction: Custody Appeal)*, (2011) UKSC 27). Indeed, the provisional and summary nature of return proceedings speaks in favour of this lighter standard of proof.

[30]

Klass v. Germany, judgment of 6 September 1978, Series A no. 28, § 42, and *The Observer and The Guardian v. the United Kingdom*, 26 November 1991, Series A, no. 216, § 59.

[31]

As the High Court of Australia in *D.P. v. Commonwealth Central Authority*, [2001] HCA 39, the South African Supreme Court in *Sonderup v. Tondelli*, 2001 (1) SA 1171 CC, and the UK Supreme Court in *Re E. (Children) (Abduction: Custody Appeal)*, [2011] UKSC 27, rightly concluded, there is no need for the defence provisions to be narrowly construed. Nor is there any need for an additional test of exceptionality to be added to the defence provisions (*Re M. (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55).

[32]

This is not an oddity of the European human rights protection system (see Article 34 of the Inter-American Convention on International Return of Children, 1989).

[33]

The clearly disproportionate decision of the Australian Family Court of September 2009 to prohibit the mother to converse with her own daughter in Latvian speaks for itself! A child's Article 8 rights may be severely damaged after return to States not bound by the Convention, without any practical legal avenue for the applicant before the Court.

[34]

The need for an additional protocol to the Hague Convention which would codify

basic guarantees and obligations in the enforcement stage of the return order, enshrine a binding mechanism of uniform interpretation of the Hague Convention and oversee the States Parties' compliance with their obligations is patent. The lessons learned with the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, 1980, and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996, could provide some guidance therein.

[35]

The same applies obviously in the inter-American human rights system, where the Inter-American Commission has already found that the making of a return order pending an appeal does not breach the American Convention on Human Rights and thus reviewed the Argentine court's decision in return proceedings under a supranational standard (report no. 71/00, *X and Z v. Argentina*, 3 October 2000, paras. 38, 51 and 56).

[36]

It is also not irrelevant to refer to the persuasive force of the Court's case-law, which may play a role in the way non-European countries apply the Hague Convention. Conversely, the case-law of the inter-American and African human rights systems could also influence the way in which the European courts and the Court apply the Hague Convention. A rich dialogue could emerge among international courts, which would promote the development of universal legal standards and further the progress of children rights.

[37]

I am not ready to accept the easy critique that we cannot have our cake and eat it, meaning that an "in-depth" investigation in urgent and expeditious proceedings is almost equivalent to squaring the circle. First, as already explained, the subject-matter of the investigation is limited by *Neulinger* to the specific context of the return application. Second, having had the benefit of intervening in many family-law cases, including Hague Convention cases, I am convinced that a thorough, limited and expeditious investigation is perfectly feasible if judges strictly control its timetable. An "in-depth" judicial enquiry does not have to be obtuse, ill-defined and self-indulgent.

[38]

In the *X. and Z. v. Argentina* case, cited above, para. 60, the Inter-American Commission found that the evaluations of the child conducted by a psychologist and a court-appointed social worker, who interviewed both parents and the child, did not breach the right to fair, impartial and rapid proceedings.

[39]

At first sight, it appears that the majority distances itself from the principles of *Neulinger and Shuruk* (see paragraph 107 of the judgment). But this is an illusory impression. The majority also calls for an "effective examination of allegations made by a party" (see paragraph 118). The replacement of the adjective "in-depth" by the adjective "effective" does not change much, especially if one takes in account that the Grand Chamber still understands that the Court's remit includes the assessment of the substantive aspect of the child's "human rights" when evaluating return orders (see paragraph 117). In other words, the present judgment does not really change the *Neulinger and Shuruk* standard.

[40]

Similar omissions were censured in *B. v. Belgium*, cited above, § 72, and *Sneersone*, cited above, § 95.

[41]

As occurred in *Sylvester v. Austria*, no. 36812/97 and no. 40104/98, 24 April 2003, and in *Mattenklott*, cited above.

[42]

In *Mattenklott v. Germany*, cited above, the return order was based on a paternity test taken by the unmarried father and the presumption of exercise of custody rights at the time of removal, resulting from the father's occasional access to the child prior to that moment.

[43]

So-called inchoate child custody rights have been the subject-matter of two cases before the Court. In *Balbontin v. the United Kingdom*, no. 39067/97, 14 September 1999, the Court confirmed the domestic courts' interpretation to the effect that even were they to grant the unmarried applicant parental responsibility after the removal of the child from the UK, this would not make the removal of the child unlawful *ex post facto*. In *Guichard v. France*, no. 56838/90, 2 September 2003, the Court found inadmissible the application made by an unmarried father who did not have custody rights when the child was removed from France, although he had officially recognised his son prior to birth. Based on this case-law, the ECJ adjudicated a similar case in which an unmarried father did not take steps to obtain custody rights prior to the child's removal from the country of habitual residence. The child's removal to another country represented "the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20(2)(a) TFEU and Article 21(1) TFEU, and of her right to determine the child's place of residence" (*J. McB. v. L. E.*,C-400/10 PPU, judgment of 5 October 2010, para. 58). Finally, in *In Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, the House of Lords held that *de facto* custody is not sufficient to amount to rights of custody for the purposes of the Hague Convention. Since at the time of the removal the mother had sole custody of the child, the subsequent attribution of custody rights to the registered father could not render the removal wrongful. The UK courts were not bound by the finding of the Australian court in this regard. In *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, Baroness Hale clearly endorsed *In Re J* as the governing authority in this area.

[44]

This finding is not invalidated by the Australian Central Authority's declaration that at the time of the child's removal from Australia T. had joint parental responsibility over E. Firstly, that declaration was not binding for the Latvian authorities. Secondly, since the concept of "custody rights" has an autonomous meaning in the Hague Convention, the Australian declaration cannot, in the unique circumstances of the case and in the light of the Convention, ascribe "custody rights" to T. for the purpose of triggering the mechanism of the Hague Convention.