CHILD ABDUCTION: RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract This article examines how the European Court of Human Rights has clarified its jurisprudence on how the 1980 Hague Child Abduction Convention Article 13 exceptions are to be applied in a manner that is consistent with Article 8 of the European Convention on Human Rights. It also analyses recent case law of the European Court of Human Rights on how the courts in the EU are to handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of Brussels IIa.

Keywords: Brussels IIa Regulation, case law, child abduction, consistency, European Court of Human Rights, Hague Convention on the Civil Aspects of International Child Abduction.

I. INTRODUCTION

The 1980 Hague Child Abduction Convention establishes procedures to secure the prompt return of children to the State of their habitual residence in cases of wrongful removal or retention (abduction).[1] It assumes that returning children to the State of their habitual residence immediately prior to their abduction is in their best interests; providing only limited exceptions for a child's non-return.[2] Where an exception to the summary return mechanism is established, the courts of the place where the child is present after the abduction (the courts where the child is) generally have a discretion as to whether to return the child to the State of the child's habitual residence.[3]

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[1] Hague Convention on the Civil Aspects of International Child Abduction 1980 (1980 Convention) preamble. There are 90 Contracting States to this Convention. For comprehensive information on the Convention see <www.hcch.net/index_en.php?act=conventions.text&cid=24>.

[2] 1980 Convention, arts 12(2), 13 and 20. The exceptions to returning the child are the child becoming settled due to the passing of time art 12(2); consent or acquiescence by the applicant art 13(1)(a); a grave risk that return will expose the child to harm or place him in an intolerable situation art 13(1)(b); the objection by a mature child art 13(2) and the violation of fundamental human rights art 20.

[3] R Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart 2013) 11 and E Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (1982 HCCH) (Pérez-Vera Report) para 113. However, in a case where the art 13(1)(b) exception has been

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The Brussels IIa Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which came into force in 2004, is binding on Member States within the European Union (EU) and prevails over their national law.[4] It takes precedence over the 1980 Convention and modifies the way the Convention is applied between the Member States in matters governed by the Regulation.[5] One modification of particular note is Article 11 of the Brussels IIa Regulation, which allows the courts of the habitual residence of the child prior to the abduction (the courts of the habitual residence) to insist on the return of the child contrary to a non-return order based on Article 13 of the 1980 Convention given by the courts where the child is.[6]

This article examines how the European Court of Human Rights (ECtHR), under pressure from many sources, including the UK Supreme Court, has clarified its jurisprudence on how the 1980 Convention Article 13 exceptions are to be applied in a manner that is consistent with Article 8 of the European Convention on Human Rights (ECHR). It also analyses the recent case law of the ECtHR on how the courts in the EU are to handle child abduction cases where the courts of the habitual residence have made use of their power under Article 11 of Brussels IIa. The light touch review on the actions of the courts where the child is when they are complying with EU law will be contrasted with the more intense review of the decision of the courts of habitual residence to insist on the return of the child.

The article will consider whether there are still problems with the ECtHR's application of the ECHR to the 1980 Convention and whether the area of actual enforcement still leaves significant discretion to the courts where the child is, not to return the child even after the courts of habitual residence have ordered the return of the child under Article 11 of the Brussels IIa Regulation.

II. ARTICLE 13 OF THE 1980 CONVENTION EXCEPTIONS TO RETURN ORDERS: *X V LATVIA*

A. Background

On 6 July 2010, the Grand Chamber of the ECtHR gave what turned out to be a very controversial decision in *Neulinger v Switzerland*.[7] The decision was

established there is authoritative case law saying that the discretion to return should not be exercised, see Baroness Hale in *Re D (A Child)(Abduction: Foreign Custody Rights)* [2006] UKHL 51; [2007] 1 AC 619 at [55]; and in *Re M (Children)(Abduction: Rights of Custody)* [2007] UKHL 55; [2008] 1 AC 1288 at [45].

[4] EC Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1. (Brussels IIa)

[5] Schuz (n 3) 19; Brussels IIa, art 60(e).

[6] For a full analysis of whether there was a real need to tighten the 1980 Convention see K Trimmings, *Child Abduction within the European Union* (Hart 2013).

[7] (App No 41615/07) ECHR 6 July 2010. The UK Supreme Court said that some of the reasoning of the Grand Chamber 'had caused widespread concern and even consternation', see

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given in the context of the 1980 Convention,[8] and it required that the best interests of the child must be assessed in each individual case.[9] It was further held that this assessment should include an 'in-depth examination of the entire family situation'.[10] This would require an examination of a series of factors 'in particular of a factual, emotional, psychological, material and medical nature'.[11]

The decision has been the subject of debate because it is unclear how such an 'in-depth examination' can truly be consistent with the summary return procedure envisaged by the 1980 Convention.[12] The UK Supreme Court on two occasions asked the ECtHR to reconsider its dicta on this point.[13] On the latter occasion it did so after a chamber of the ECtHR, giving its judgment in *X v Latvia*, had repeated the 'in-depth examination' dicta from *Neulinger* despite the earlier objection to this by the Supreme Court in *re E*. The unanimous Supreme Court said:

> With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction, as Reunite requests us to do, that neither the Hague Convention nor, surely, Article 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be entirely inappropriate.[14]

The Grand Chamber had the opportunity to revisit the requirement set out in *Neulinger* in the rehearing of the chamber judgment in *X v Latvia*.[15]

In the Matter of S (a child) [2012] UKSC 10; [2012] 2 AC 257 (Lord Wilson giving the judgment of the Court at [37] citing the earlier decision of the Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 [22]–[27]).

[8] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Convention and documents related to it are available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=24>.

[9] (App No 41615/07) ECHR 6 July 2010, [138].

[10] (App No 41615/07) ECHR 6 July 2010, [139].

[11] (App No 41615/07) ECHR 6 July 2010, [139].

[12] For example see: The Conclusions and Recommendations of the Sixth Special Commission on the Practical Operation of the 1980 Convention held in June 2011, paras 47–49, <http://www.hcch.net/upload/concl28sc6_e.pdf>; N Lowe, 'A supra-national approach to interpreting the 1980 Hague Child Abduction Convention – a tale of two European Courts: Part 2: the substantive impact of the two European Courts' rulings upon the application of the 1980 Convention' [2012] IFL 170, 176; A Schulz, 'The enforcement of child return orders in Europe: where do we go from here?' [2012] IFL 43, 45–7; L Walker, 'The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*' (2010) 6 JPrivIntL 649, 665–71; Schuz (n 3) 27–9 and J Paton, 'The Correct Approach to the Examination of the Best Interests of the Child in Abduction Convention proceedings following the decision of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)*' (2012) 8 JPrivIntL 547.

[13] *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 [22]–[27]; and *In the Matter of S (a child)* [2012] UKSC 10; [2012] 2 AC 257 [37]–[38].

[14] *In the Matter of S (a child)* [2012] UKSC 10; [2012] 2 AC 257 [38].

[15] (App No 27853/09) judgment of the Third Section on 13 December 2011, [2011] ECHR 2104; judgment of the Grand Chamber on 26 November 2013 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138992>.

The hearing took place in October 2012 and the Grand Chamber handed down its decision on 26 November 2013. The length of time taken to reach a decision indicated the likelihood of a deeply divided court and so it proved to be.

1. The facts

The child was born in Australia in 2005, and although the father's name was not given on her birth certificate the mother (the applicant) and the child lived with the father, in his flat.[16] Both parents were Australian nationals. The mother who was born in Latvia renounced her Latvian nationality so that she could become an Australian national.[17] In July 2008 the applicant removed the child from Australia and took her to Latvia.[18] In November 2008 the Australian Family Court decided that the father and the mother had joint parental responsibility for the child, and had done so since her birth.[19]

The District Court in Latvia ordered the return of the child to Australia in November 2008.[20] The mother appealed this decision on the basis that she had been the sole guardian of the child when she left Australia and that the return of the child would expose her to psychological harm. On appeal the decision was upheld. In relation to the psychological harm covered by Article 13(1)(b) there was expert evidence that there was a risk of psychological trauma to the child if she was immediately separated from her mother, suggesting that there was no risk of harm if she returned to Australia with her mother. There was no further evidence that this harm would occur if the child returned with the mother, nor was there any clear evidence indicating that the mother would not be able to return with the child.[21] As such the risk of harm was unsubstantiated. In reaching its decision the Latvian court recognized that the aim of ordering a return under the instrument was not to separate the parties but rather to have a proper custody hearing in the State of the child's habitual residence.

Unfortunately, after the return was ordered, the actual enforcement of the order was not handled very well. A bailiff lodged an application for enforcement of the order and the mother asked for suspension of the order. A hearing was scheduled for April 2009.[22] However, in March 2009 the father re-abducted the child and took her back to Australia.[23] This highlights the difficulties with these cases and indicates why they need to be handled correctly and quickly by all concerned. Where they are not, the situation is most likely to deteriorate further.

2. Approach of the ECtHR (chamber decision)

The chamber followed the reasoning in *Neulinger* and held that the decision to return the child was in violation of Article 8 of the European Convention on

[16] Grand Chamber judgment, ibid [11]. [17] ibid [9]. [18] ibid [12].
[19] ibid [15]. [20] ibid [21]. [21] ibid [25]–[26].
[22] ibid [27]–[28]. [23] ibid [30].

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Human Rights (ECHR), because the Latvian courts had not carried out an 'in-depth' examination of the entire family situation.[24]

3. Decision of the Grand Chamber

The Grand Chamber held by nine votes to eight that the Latvian authorities had violated Article 8 ECHR. However, the court changed the reasoning in *Neulinger* and national courts are now required to carry out an 'effective' examination of any allegations made in connection with a refusal to return,[25] under the provisions of the 1980 Convention.

B. 'In-Depth' vs 'Effective'

The decision of the Grand Chamber to revise the requirement set out in *Neulinger* is to be welcomed. The requirement to carry out an 'in-depth' examination of the entire family situation placed too high a burden on national courts. Such an assessment would delay proceedings and would be akin to an examination carried out in a custody decision rather than summary return proceedings. The new approach reduces that burden by simply requiring that national courts carry out an 'effective' examination of the exceptions to return contained in the 1980 Convention. This strikes a suitable balance between the summary return mechanism and the best interests of the child. The 1980 Convention contains these exceptions for a reason, and it would be incorrect if allegations of a risk were not properly examined by national courts.

The decision is reasonably clear as the court elaborates on what it means by an 'effective' examination. In order for the examination to be considered effective, two requirements have to be met. Firstly national courts must consider any 'arguable claims'[26] against a return based on the exceptions

[24] *X v Latvia* (App No 27853/09) ECHR 13 December 2011, [78]. For more information on the chamber decision see P Beaumont and L Walker, 'Post *Neulinger* case law of the European Court of Human Rights on the Hague Child Abduction Convention' in Permanent Bureau of the Hague Conference on Private International Law, *A Commitment to Private International Law – Essays in honour of Hans van Loon* (2013 Intersentia) 17, 19–21.

[25] *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [118]. It is excellent that the Grand Chamber revisited this line of case law so quickly. However, given the controversial decision in *Neulinger* and the various discussions and complaints (see nn 12, 13 and 14 above) it is disappointing that only the Czech Republic, Finland and Reunite made submissions in *X* urging the ECtHR to change its approach.

[26] 'Arguable claims' is the standard set by the eight dissenting judges [2]. They claim that they are in 'full agreement' with the judges giving the main majority opinion on the 'general principles' to be applied to child abduction cases under the Hague Convention. The judgment of the eight judges giving the main majority opinion is much less clear on this point than the dissenters. The main majority opinion leaves open the possibility that national judges may need to investigate the 1980 Convention exceptions of their own motion: 'the factors capable of constituting an exception to the child's immediate return in application of Arts 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'. [106].

contained in Articles 12, 13 and 20 of the 1980 Convention. Secondly the court must give a 'sufficiently reasoned opinion' regarding those claims, in order to show that the questions have been effectively examined.[27] The court considers that '[b]oth a refusal to take account of the objections to return … 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'.[28] The court goes on to say that the consideration must not be 'automatic or stereotyped'.[29] Importantly the court then looks to its earlier case law (pre-*Neulinger*) and confirms that the exceptions to return in the 1980 Convention 'must be interpreted strictly'.[30]

All in all the new approach has to be considered a positive step by the Court. It reaffirms the strict application of the 1980 Convention while ensuring the protection of the best interests of the child. Ultimately it confirms that the summary return mechanism created by the 1980 Convention applies in the best interests of all children and requires the return of the child in all child abduction cases unless one of the strictly construed exceptions provided by the 1980 Convention applies.[31] In order to determine when a non-return should be ordered there should be an appropriate examination of the exceptions to ensure that children are protected.[32] Given the problems with delay before the ECtHR,[33] the new approach could be an ideal method of solving these problems, if interpreted correctly. This is because the requirement to give a sufficiently reasoned opinion will allow the ECtHR to review any applications related to the 1980 Convention very quickly. Ideally where the judgment of the national court is clear and adequately reasoned any application could be directly thrown out as inadmissible, thus solving the problem of delay before the ECtHR in the majority of applications. The ECtHR should only take an application forward where it is clear that the national judgments do not give reasons as to why the exceptions do not apply in cases where those exceptions

[27] ibid, majority opinion [106]–[107] and dissent [2].
[28] ibid [107]. [29] ibid. [30] ibid.
[31] Art 13(1)(b) and (2) are designed to protect the interests of the child in the clearly defined situations circumscribed by those exceptions, see Pérez-Vera Report, para 29 available at <http://www.hcch.net/upload/expl28.pdf>.
[32] See the reasoned opinion of the Supreme Court, *In the Matter of S (a child)* [2012] UKSC 10; [2012] 2 AC 257, where it was held that the child should not be returned on the basis of art 13 (1)(b) due to the exceptional nature of the strong evidence relating to the health of the mother and the need to uphold the discretion of the trial judge whose decision to uphold the art 13(1)(b) exception was one that had been open to him to make [35].
[33] For discussions on the problem of delay before the ECtHR see: P Beaumont, 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention of International Child Abduction' (2008) 335 Recueil des Cours 9, 79–80; P Beaumont and L Walker (n 24) 17; A Schulz (n 12) 43, 46 and 46–7; and N Lowe, 'A supra-national approach to interpreting the 1980 Hague Child Abduction Convention – a tale of two European Courts: Part 1: Setting the Scene [2012] IFL 48, 51–2. In *López Guió v Slovakia*, (App No 10280/12) ECHR 3 June 2014, the Hague proceedings were in breach of Article 8 ECHR because they took 22 months. Yet, ironically, the ECtHR took two years and four months to decide the case.

were raised in the national proceedings. It is, however, important that the ECtHR does not treat the 'effective examination' of whether the exceptions to return apply as the same as its prior standard of an 'in-depth' examination of all the circumstances of the case.[34] A lighter touch review is needed where the word 'effective' has to be construed in a manner that is consistent with what is reasonable within the very tight time constraints of a summary return mechanism.[35] The Court needs to accept that maximum 'effectiveness' of the examination is not appropriate, far less required, in a summary return mechanism. Instead a more moderate level of due diligence that can be done in a few weeks is appropriate.

The review should have a more narrowly focused approach that only considers the circumstances that are relevant for establishing any of the 1980 Convention exceptions actually pleaded before the court. More general matters that would be relevant to the determination of the best interests of the child if the case concerned the merits of who should have custody and where the child should live in the long run must not be considered.[36]

C. Correct Application of the Law to the Facts

Despite the fact that the new approach appears to strike an appropriate balance between the summary return mechanism envisioned by the 1980 Convention and the best interests of the child, reflected in a strict construction of the exceptions to summary return, the way the principles were applied to the case in hand should be questioned. Although 16 of the 17 judges endorse the new approach,[37] only nine judges believe that there was a violation of Article 8 ECHR in the case. The other eight considered that the Latvian authorities correctly applied the 1980 Convention and did carry out an 'effective' examination.

It is argued that the eight dissenting judges were correct to consider that there was no violation of Article 8 ECHR in the present case. This is because the new approach required an effective examination of the exceptions to return, specifically Article 13(1)(b) grave risk of harm in the present case. On our

[34] Judge Pinto de Albuquerque in his concurring opinion claims that the majority has not really changed the *Neulinger* approach (n 39 of his opinion).

[35] In this respect [118] of the majority's opinion is disappointingly simplistic in asserting that: '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'.

[36] See L Walker and P Beaumont, 'Shifting the Balance Achieved by the Abduction Convention' (2011) 7 JPrivIntL 231, 237–9; Judge Pinto de Albuquerque, in the text of his concurring opinion after n 9 and after n 27; P Beaumont (n 33) 102.

[37] Judge Pinto de Albuquerque agrees with the majority that there has been a violation of art 8 but disagrees with the new approach. Instead he still endorses the requirement for an in-depth examination set out in *Neulinger*. (*X v Latvia* (App No 27853/09) ECHR 26 November 2013; see the 'Conclusion' of the opinion).

analysis the examination by the Latvian courts was effective because the strict standard for applying the exception in Article 13(1)(b) of the 1980 Convention was not met on the facts of this case.[38]

The requirement of grave risk of harm was not met because the harm identified in the psychologist's report would only occur if the child was immediately separated from the mother. There was nothing in the report that suggested the harm would occur simply from returning to Australia. In such a case the mother would then have to prove that there was a sufficient reason for her not to return to Australia in order for the harm to be substantiated.[39] Otherwise the mother should accompany the child to Australia meaning that there would be no risk of harm as there would be no separation.

The dissenting judges share this analysis.[40] They consider that the psychologist's report, contained in her certificate, 'did not directly address the question of the child's return or suggest that it would be in anyway harmful if E. were to return to Australia accompanied by her mother'.[41] Therefore the Latvian court 'did not refuse or fail to take account of the certificate'.[42] They simply did not think it was relevant in the context of the return order which did not require the 'immediate separation' of the child from the mother. However, as well as suggesting that the Latvian court failed to take account of the certificate, the majority also thought that the Latvian court should have done more to determine whether it was feasible for the mother to return with the child.[43] What is particularly worrying is that the majority then made a dangerous attempt to tell the Latvian courts how to apply Article 20 of the 1980 Convention in this case, despite the fact that it had not been raised in the proceedings before the national courts:

> 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 [sic] 20 of the Hague Convention, the Regional Court could not dispense with such a review in the circumstances of this case.[44]

[38] See *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [107], where the requirement is considered to be a procedural obligation to make an assessment of the exceptions.

[39] For example see *MR v Estonia* where a return was ordered and there was no violation of art 8 because the harm would only occur on separation. See also *In the Matter of S (a child)* [2012] UKSC 10 where the harm to the mother would affect the child and place him in an intolerable situation, and P Beaumont and L Walker (n 24) 19–26.

[40] *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [1]–[12].

[41] *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [7].

[42] ibid.

[43] See *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [117]. It was also stated that the Latvian courts should carry out 'meaningful checks' [116] despite the fact that the submissions of criminal convictions and ill-treatment were wholly unsubstantiated.

[44] *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [117].

This is a clear misunderstanding of Article 20 of the 1980 Convention which has rightly been given a very narrow construction in national case law.[45] The Grand Chamber thought it was appropriate for it to say that Article 8 ECHR creates in Latvia, because the ECHR is directly applicable in that country by Latvian law (not directly applicable by ECHR law), a duty on the Latvian courts to investigate of their own motion whether the mother could return to Australia and maintain contact with her child. However, Article 20 of the Hague Convention only applies to human rights that constitute a reason for refusing to return a child. It does not apply to create procedural rights as to how the courts should go about the process of determining whether or not a return of the child would be a breach of human rights or would be contrary to one of the Article 13 exceptions in the 1980 Convention. In any case it is not for the ECtHR to determine what procedural rights, if any, Article 20 of the 1980 Convention generates as this is a matter of national and international law and not ECHR law.

The dissent, correctly, did not refer to Article 20 and they disagreed with the opinion of the majority for a number of reasons.

- There was clearly no legal reason why the applicant could not return to Australia.
- There was nothing in the Latvian court's judgment which affected her right to attain custody of the child and to accompany her back to Australia.
- The allegation that the father had ill-treated her was rejected as wholly unsubstantiated.
- There was no reason for doubting the ability of the Australian authorities to protect the child if necessary.
- The Latvian courts should not be required to search for evidence on the father's behaviour, because the burden of proof lies on the party opposing the return. Therefore the applicant would need to provide suitable evidence to support the Article 13(1)(b) claim and she completely failed to do so.[46]

Given that no concrete evidence was provided except for the psychologist's report, which only gave evidence of harm related to the separation of the mother and child (which did not happen as the mother did go back to Australia in this case), it is unclear how the exception in Article 13(1)(b) could be applicable.[47] As the dissenting judges explained it was up to the mother to provide further concrete evidence on why she could not return with the child.[48]

[45] See P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (OUP 1999) 172–6; K Trimmings (n 6) 116–28, R Schuz, (n 3) 354–69 and INCADAT, <http://www.incadat.com/index.cfm?act=search.result&actie=search&lng=1&sl=2>.

[46] *X v Latvia* (App No 27853/09) ECHR 26 November 2013, [9]–[10].

[47] Some examples of cases where the child was not returned because there was a risk to the mother on return are: *State Central Authority v Ardito*, 20 October 1997, *N.P. v A.B.P.*, [1999] R.D.F. 38 (Que. C.A.) and *In the Matter of S (a child)* [2012] UKSC 10. For further examples of case law on art 13(1)(b) see <http://www.incadat.com/index.cfm?act=text.text&lng=1>.

[48] It is clear from art 13 of the Convention, and confirmed in para 114 of the Pérez-Vera Report (n 3), that the burden of proof lies on the person or body opposing the return.

Making allegations without relevant evidence should not be enough to successfully invoke a 1980 Convention exception.

D. Summary

The new approach established in *X*, which requires an 'effective' examination of any allegations that fall under the exceptions in Articles 12, 13 and 20 is to be welcomed. This approach is much more consistent with the summary return mechanism envisioned by the 1980 Convention. The requirements of an 'effective' examination are also clearly laid out by the majority when they discuss what the law is in this area. Therefore it is hoped that the new approach will be easy for national courts to interpret, and it should be possible for them to apply the new approach consistently with the current best practice under the 1980 Convention.[49]

However, there are still some concerns about the way in which the ECtHR applied the law on the application of Article 8 of the ECHR to the 1980 Convention to this dispute. It is unclear why Article 13(1)(b) was applicable in *X*, or why the Latvian authorities were required to search for evidence that the 1980 Convention requires the abducting parent to provide.

Consequently the setting out of the legal standard by the Grand Chamber in *X* is a vast improvement on its decision in *Neulinger*, but unfortunately the Court appears to apply its own standard very badly. The reference to Article 20 as a procedural requirement linked to Article 13 is also particularly worrying with the effect that the majority opinion in *X* answers one question but raises more. The majority expected the Latvian courts to be very proactive and once again appeared to substitute its own judgment for the judgment of the national courts as to when the facts of the case support the application of a Hague exception.[50]

[49] The risk that ECtHR case law in this area will not be followed by the UK Supreme Court, seen in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 [22]–[27] and *In the Matter of S (a child)* [2012] UKSC 10; [2012] 2 AC 257 [37]–[38], should disappear. The UK courts simply have to take account of decisions of the ECtHR, they do not have to follow them (Human Rights Act 1998, section 2); however, given that the UK courts were so against the decision given in *Neulinger*, it is questionable why the UK did not intervene in *X v Latvia* and have a dialogue with the ECtHR on the issue, rather than just ignoring the problem (see above n 25).

[50] See the dissenting opinion in the chamber decision *X v Latvia* (App No 27853/09) ECHR 13 December 2011: 'the majority has substituted its assessment concerning the best interests of the child for the assessment of the national courts in their reasoned and non-arbitrary judgments, but without having had . . . the benefit of direct contact with the parties concerned or with the evidence examined in the proceedings. In our opinion, the majority has assumed a function going beyond the competence of this Court'. (Judges Myjer and López Garcia). A similar point is made by the dissenting judges in *Blaga v Romania* (App No 54443/10) ECHR 1 July 2014 in which the majority decided that the national court had violated Art 8 ECHR by upholding the children's objections to return under Art 13(2) of the Hague Convention. Over intrusiveness by the ECHR in the opposite direction to the majority in *X v Latvia*.

III. ARTICLE 11(8) BRUSSELS IIA RETURN ORDERS: *ŠNEERSONE AND KAMPANELLA V ITALY*

A. Background

In *Šneersone and Kampanella v Italy*[51] the ECtHR for the first time dealt with the procedure introduced by Article 11(7)–(8) and Article 42 of the Brussels IIa Regulation. Under this procedure the courts of the habitual residence of the child are authorized, in child abduction cases where a non-return order has been granted by the courts where the child is on the grounds of one of the exceptions in Article 13 of the 1980 Convention, to order the return of the child in an Article 11(8) Brussels IIa judgment.[52] An Article 11(8) judgment ordering the return of the child is automatically enforceable throughout the EU. The only prerequisite for the enforcement of such a judgment is the certification of the decision, in accordance with Article 42 of the Regulation, by the judge of habitual residence who delivered the judgment.

1. The facts

The child was born in Italy in 2002 to an Italian father and a Latvian mother.[53] The parents, who were not married, separated in 2003 and the child lived with his mother.[54] In September 2004, the Rome Youth Court granted custody of the child to the mother with access provisions in favour of the father.[55] The father's appeal against that decision was rejected by the Rome Court of Appeal.[56] In June 2005, an authorization to issue a passport for the child was granted by an Italian court.[57] In February 2006, the father was ordered to make regular child support payments.[58] The father, however, failed to financially support the child which led to the mother lodging a complaint with the Italian police in April 2006.[59] The only income the mother and the child had was money which the maternal grandmother was sending from Latvia.[60] This situation was not sustainable so the mother decided to leave Italy for her native Latvia in April 2006, taking the child with her.[61] Following the mother's departure, the father successfully requested the Rome Youth Court to grant him sole custody of the child.[62] The Court also held that the child was to reside with the father.[63]

[51] (App No 14737/09) ECHR 12 July 2011. For a brief comment on the case see C Simmonds, 'European Case Law Update: *Šneersone and Kampanella v Italy* (App No 14737/09) (Judgment of 12 July 2011) [2011] ECHR 1107' [2011] IFL; and R Bailey-Harris, 'Case Reports: Abduction: Human Rights: *Sneersone and Kampanella v Italy* (App No 14737/09)' [2011] FamLaw 1188–1189.

[52] For a brief analysis of this exception, with references to more detailed writings, see R Schuz (n 3) 23–5.

[53] (App No 14737/09) ECHR 12 July 2011, [7].

[54] ibid.

[55] ibid [8].

[56] ibid [9].

[57] ibid [10].

[58] ibid [11].

[59] ibid.

[60] ibid [12].

[61] ibid.

[62] ibid [14].

[63] ibid [15].

2. Return proceedings in Latvia

In January 2007, the father initiated return proceedings under the 1980 Convention and the Brussels IIa Regulation in Latvia.[64] During these proceedings, the Rīga City Vidzeme District Court requested the relevant authority to assess the child's residence in Latvia and to evaluate the possibility of the child's return to his father in Italy.[65] It was concluded that the 'child's living conditions were beneficial for his growth and development',[66] and that the child's return to Italy 'would not be compatible with his best interests'.[67] That argument was supported by the findings of a psychologist who expressed the view that severance of contact between the mother and the child could 'negatively affect the child's development and could even create neurotic problems and illnesses'.[68] In response to these concerns, the Italian Central Authority sought to assure the Latvian Central Authority that measures would be taken in Italy to ensure that the child and the father receive the necessary psychological help.[69]

The Riga City Vidzeme District Court, nevertheless, refused the father's return application on the grounds of Article 13(1)(b) of the 1980 Convention. In its decision dated 11 April 2007, the Court noted that, due to financial constraints, the mother was unable to accompany the child to Italy, and held that the protective measures offered by the Italian Central Authority could not ensure that the child would not suffer psychologically if he were returned to Italy.[70]

In May 2007, the first instance decision was upheld on appeal by the Riga Regional Court. The appellate court found the protective measures proposed by the Italian Central Authority were 'too vague and non-specific'.[71] The Court also highlighted the fact that the father had not made any effort to establish contact with the child since his removal from Italy in April 2006.[72] Following the rejection of the father's appeal, the mother successfully petitioned the Riga City Vidzeme District Court for sole custody of the child.[73]

3. Proceedings based on Article 11(7)–(8) of the Brussels IIa Regulation

In August 2007, the father lodged a successful request with the Rome Youth Court based on Article 11(6)–(8) of the Brussels IIa Regulation, to override the refusal to return issued by the Latvian courts and to adopt a decision ordering the child's immediate return to Italy.[74] The father proposed that upon the return the child would stay with him and attend a kindergarten where he had been enrolled before his departure from Italy.[75] The father also undertook to enrol the child for Russian-language classes and to provide him with adequate

[64] ibid [17]. [65] ibid [18]. [66] ibid [18]. [67] ibid.
[68] ibid [19]. [69] ibid [20]. [70] ibid [22]. [71] ibid [23].
[72] ibid. [73] ibid [24]. [74] ibid [25]. [75] ibid [28].

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psychological help.[76] According to the father's proposal, the mother would be allowed to see the child in Italy for approximately one month a year, during which period she and the child would be authorized to use a house rented by the father (although one half of the rent would have to be covered by the mother).[77]

The Rome Youth Court held that 'the only role left to it' in these proceedings was to make certain that adequate measures were in place to secure the protection of the child upon his return to Italy.[78] With this task in mind, the Court expressed satisfaction that the arrangement proposed by the father was suitable and met the requirements of the Regulation.[79] Consequently, on 21 April 2008 a decision to return the child to Italy and have him reside with the father was issued by the Rome Youth Court.[80]

The mother appealed against the decision and sought to suspend its execution.[81] She argued that the child had not been given the opportunity to be heard in the proceedings, and that the decision had been issued without the court taking account of the arguments used by the Latvian courts in refusing the return under Article 13(1)(b) of the 1980 Convention.[82] The mother also objected that she had not been heard in person in the proceedings.[83] The arguments put forward by the mother were, however, rejected by the Rome Youth Court and a return certificate was issued in accordance with Articles 40, 42 and 47 of the Regulation in July 2008.[84] In August 2008, the Italian Central Authority asked the Latvian Central Authority to act upon the Rome Youth Court's decision from 21 April 2008 and to arrange the child's return to Italy.[85] The mother unsuccessfully appealed against the decision of the Rome Youth Court to the Rome Court of Appeal which reached its decision in April 2009.[86] In July 2009, the bailiff of the Rīga Regional Court in charge of the return order requested the father to re-establish contact with the child.[87] The father, however, did not react to that request.[88]

4. Proceedings before the European Commission

In October 2008, the Republic of Latvia brought an action against Italy before the European Commission in relation to the return proceedings.[89] Latvia relied on Article 227 of the Treaty Establishing the European Community to ask the Commission to bring infringement proceedings against Italy for procedural failings in handling the case.[90] In its reasoned opinion, dated 15 January 2009, the Commission concluded that Italy had violated neither the Brussels IIa Regulation nor the general principles of Union law, and stated that it could 'only review matters of procedure, not substance, and it had to respect the

[76] ibid.
[77] ibid.
[78] ibid [28].
[79] ibid.
[80] ibid.
[81] ibid [30].
[82] ibid.
[83] ibid [31].
[84] ibid.
[85] ibid [32].
[86] ibid [37].
[87] ibid [38].
[88] ibid.
[89] ibid [39].
[90] ibid.

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decisions made by the Italian courts in the exercise of their discretionary powers'.[91] The Commission considered that the right of the child to be heard was not absolute, and what 'had to be taken into account was the level of the child's development'.[92] In relation to the mother the Commission noted that she had been given the opportunity to submit written observations as had the father.[93] Therefore since the 'principle of equality of arms was observed',[94] there was no violation of the Regulation or the UN Convention on the Rights of the Child.[95] The Commission noted that the Italian courts had taken the Latvian decisions into account because the Rome Youth Court had addressed the concerns of the Latvian court that the 'measures envisaged for [the child's] protection on return to Italy were too vague',[96] and had set out specific obligations. The Commission also questioned the decision of the Latvian courts, stating that the fact that the Latvian courts referred to their own civil procedure 'demonstrated that the Latvian courts had devoted attention to [the child's] situation in Latvia instead of the potential consequences of his return to Italy'.[97] 'In short, the Commission had "not discovered any indications" that life in Italy together with his father would expose [the child] to physical or psychological harm or otherwise place him in an intolerable situation'.[98]

5. Proceedings before the European Court of Human Rights

In March 2009, the mother and the child lodged an application against Italy with the ECtHR.[99] The applicants relied in particular on Article 8 of the ECHR.[100] The ECtHR at the time was applying the principles laid down by the Grand Chamber in *Neulinger v Switzerland.*[101]

The Court then sought to determine whether the decision of the Rome Youth Court from 21 April 2009 constituted an interference with the applicants' right to respect for family life, and the decisive issue was whether the interference was 'necessary in a democratic society' within the meaning of Article 8(2) of the ECHR.[102] In particular, the Court sought to answer the question whether 'a fair and proportionate balance between the competing interests at stake—those of the child, of the two parents, and of public order—was struck, within the margin of appreciation afforded to States in such matters.'[103]

[91] ibid [41].

[92] ibid [42]. This seems like a fair conclusion in the present case, as the child was only four at the time, and was not heard by the Latvian courts either. However, compare this with C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247, where the child was nine and a half and the German courts had refused to return the child on the basis of art 13(2) of the 1980 Convention. See L Walker and P Beaumont (n 36) 240–3.

[93] (App No 14737/09) ECHR 12 July 2011, [43].

[94] ibid.

[95] United Nations Convention on the Rights of the Child 1989 (hereafter: 'UNCRC').

[96] (App No 14737/09) ECHR 12 July 2011, [44].

[97] ibid.

[98] ibid.

[99] ibid, [1].

[100] ibid [54].

[101] (App No 41615/07) ECHR, 6 July 2010 discussed above at n 7–11.

[102] ibid [91].

[103] ibid.

The ECtHR stated that despite the fact that the reasoning of the Italian courts was rather 'scant'.[104] The Court 'cannot fail to observe that the Italian courts in their decisions failed to address any risks that had been identified by the Latvian authorities'.[105] This was in particular because several key features such as expert psychologist reports drawn up in Latvia were not expressly mentioned in either the decision of the Rome Youth Court from 21 April 2008 or the Rome Court of Appeal from April 2009.[106]

The Court then sought to ascertain whether the arrangements for the child's protection specified in the Italian courts' decisions could be regarded as having taken account of the child's best interests.[107] When making the assessment, the Court considered several factors: First, there was a strong tie between the mother and the child, and the separation of the child from his mother would have an adverse effect on his psychological development.[108] Second, it was alleged that the mother could not accompany the child to Italy because she did not have sufficient financial means to live there and since she could not speak Italian she could not gain employment.[109] Third, the child and the father had not seen each other for three years and had no language in common.[110] Fourth, the Court also considered that the father had made no effort to establish contact with Marko in the three-year period.[111]

The Court highlighted that the Italian courts did not refer to the dangers to the child's psychological health that had been referred to in the expert psychologist's reports.[112] If the Italian courts had considered the reports unreliable, then they could have obtained reports from a different psychologist.[113] There was also no effort by the Italian authorities to establish whether the house that the child would live in when he returned to Italy would be suitable for him.[114] 'Those conditions, taken cumulatively, leave the Court unpersuaded that the Italian courts sufficiently appreciated the seriousness of the difficulties which Marko was likely to encounter in Italy.'[115] As regards the safeguards established by the Italian courts the Court considered that the arrangements made for the child to spend time with the mother were 'a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between the mother and the child'.[116] Further it was considered that 'the order to drastically immerse a child in a linguistically and culturally foreign environment cannot in any way be compensated by attending a kindergarten, a swimming pool and Russian-language classes'.[117]

Following this the Court concluded that the interference with the applicants' right to respect for their family life could not be regarded as 'necessary in a democratic society' within the meaning of Article 8(2) of the ECHR.[118]

[104] ibid [93].
[105] ibid.
[106] ibid.
[107] ibid.
[108] ibid [94].
[109] ibid.
[110] ibid.
[111] ibid.
[112] ibid [95].
[113] ibid.
[114] ibid.
[115] ibid [95].
[116] ibid [96].
[117] ibid.
[118] ibid [98].

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Accordingly, the Court found that there had been a violation of Article 8 as a result of the order of the Italian courts to return the child to Italy.[119]

B. European Commission v ECtHR: the Danger of Differing Opinions

In this case there were proceedings in relation to the abduction of the child before two sets of national courts (both at different levels), the European Commission of the EU and the ECtHR. The main point in 1980 Convention proceedings is that they are dealt with expeditiously in order to prevent the child becoming settled in the new environment. Extensive proceedings before very different bodies that have diverging opinions are very unhelpful in this context, because in the end it is the child who is caused more suffering. The 1980 Convention provides that decisions on the return of a child are to be taken by the courts in the State where the child is. Brussels IIa has added the possibility in intra-EU cases that the courts of the habitual residence will trump the courts where the child is by taking their own decision ordering the return of the child. *Šneersone* means that we now have the risk of the ECtHR acting as a Court of 4th Instance and trumping the position of the courts in the State of habitual residence.

C. Decisions under Article 11(7)–(8) of Brussels IIa and the ECtHR

Šneersone shows that decisions of the courts of habitual residence to order an Article 11(8) return are subject to human rights review in the ECtHR when an action is brought against the State of habitual residence.[120] This is, of course, because the courts of habitual residence are exercising discretion under EU law when deciding to override the non-return decision in the courts where the child is.[121] They would also be exercising their discretion under EU law if the abducting parent were to ask the courts of habitual residence to suspend or quash an Article 11(8) return order because of a change of circumstances.[122]

[119] ibid.

[120] See [92] of the *Šneersone* judgment. See also N Mole, 'The complex and evolving relationship between the European Union and the European Convention on Human Rights' (2012) 4 EHRLR 363–8.

[121] Some guidance as to how that discretion should be exercised is given by the *Commission Practice Guide for the application of the new Brussels II Regulation* at 41, see <http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf>.

The *Practice Guide* encourages the judge in the court of habitual residence to contact the judge or judges in the country where the child is to 'be able properly to take account of the reasons for and the evidence underlying the decision on non-return'. The *Guide* also encourages the courts of origin to accept that the abducting parent and child will often not be willing to travel to the country of origin for a hearing and therefore to make use of the Taking of Evidence Regulation (1206/2001) to hear the abducting parent and child in the country of refuge.

[122] Although no appeal is allowed against the issuing of a certificate by the court of origin, art 43(2) of Brussels II bis, this does not prevent an appeal against the underlying art 11(8) return order (see Advocate General Sharpston in her opinion in Case C-211/10 PPU *Povse* [2010] ECR I-6673 at [91]) nor does it prevent the appropriate court in the country of origin from quashing or

Therefore a failure to grant such a request would also be reviewable in the ECtHR if an action is brought against the State of habitual residence.

The decision in *Šneersone* reiterates the *Neulinger* approach of requiring domestic courts to conduct 'in-depth examinations' in child abduction proceedings. In this respect, it has been rightly suggested that the decision is 'somewhat confusing'[123] as, by applying the same principles, it implicitly equates Hague return proceedings (*Neulinger*) with proceedings under Article 11(7)–(8) of the Brussels IIa Regulation (*Šneersone*). Nevertheless, it may be argued that the application of the *Neulinger* approach in the *Šneersone* scenario is still appropriate even after the Grand Chamber decision in *X v Latvia* discussed above. Article 11(7)–(8) proceedings can be treated as more like normal custody hearings where a more in-depth examination of all the circumstances relating to the child's family situation is appropriate before ordering the return of the child.[124] Although it must be avoided that such an in-depth examination takes a long time. Otherwise there is a risk that the child will have settled in the State where he or she is present by the time the courts of the habitual residence have made their decision to order the return of the child.[125] At that stage the delay will often make it against the best interests of the child to insist on his or her return.[126] However, if the court of origin is just ordering the return of the child in order to later determine the custody of the child then arguably the new more limited review standard of an 'effective examination' set out in *X v Latvia* is appropriate.

In *Neulinger*, considerable importance was attached by the ECtHR to the passage of time. If a return order is not enforced promptly, then the late enforcement of the order might constitute a violation of the abducting parent's and the child's right to respect for family life guaranteed by Article 8 of the ECHR.[127] Although enforcement was not the issue in *Šneersone*, it may be expected that the *Neulinger* approach to the enforcement of return orders would be regarded as applicable also to return orders issued by the courts of origin in accordance with Article 11(7)–(8) of the Brussels IIa Regulation. The passage of time is a matter of significant concern in relation to Article 11(7)–(8) proceedings as the child may have spent a lengthy period

suspending the enforcement of the return order granted under art 11(8) of Brussels IIa because of a change of circumstances, see Case C-211/10 PPU *Povse* [2010] ECR I-6673 [81] of the judgment and [97] and [125] of AG Sharpston's opinion.

[123] A Schulz (n 12) 46.

[124] See N Lowe (n 12) 178.

[125] Marko had been in Latvia for almost four years at the time the ECtHR decision was given. A return to Italy at this stage would be entirely inconsistent with the summary return procedure under the 1980 Convention and it is hard to believe how it could be in the best interests of the child.

[126] See Beaumont (n 33) 47–50.

[127] By the time the case was resolved by the ECtHR, the child had been in the state of refuge (Switzerland) for five years, and almost three years elapsed between the date of the return order and the date of the decision of the ECtHR. Given the passage of time, the Court held, by sixteen votes to one that, in the event of the enforcement of the return order, there would be a violation of art 8 ECHR in respect of the mother and the child. Decision of the Grand Chamber in *Neulinger v Switzerland*, (App No 41615/07) ECHR, 6 July 2010.

of time in the State where he or she is present before an order under that Article is issued. Moreover, further delays might occur if the actual enforcement of the Article 11(7)–(8) order is resisted. It has therefore been questioned whether 'the enforcement of such an order can meet human rights standards on timely enforcement of return orders following abduction at all'.[128] This concern appears to be justified, leading to an inevitable conclusion that courts of habitual residence should exercise great caution before using their power under Article 11(7)–(8) of the Brussels IIa Regulation and should act speedily if the return of the child is going to be insisted on.

IV. RECOGNITION AND ENFORCEMENT OF ARTICLE 11(8) BRUSSELS IIA RETURN ORDERS: *POVSE V AUSTRIA*

A. Background

The ECtHR has shown remarkable deference to EU law. On 30 June 2005, the Grand Chamber of the ECtHR gave its decision in *Bosphorus v Ireland*.[129] In this case, the Grand Chamber created a 'presumption of compliance', meaning that if a Member State is complying with EU law and has no discretion whilst doing so, then the ECtHR will not review the application of the EU law in question unless it is regarded as 'manifestly deficient' in how it protects human rights.[130]

The doctrine of 'presumption of compliance' has been criticized as a political gesture on behalf of the ECtHR and for the fact that it applies a much lower standard of protection of human rights to EU law than non-EU law.[131] On 18 June 2013, in *Povse v Austria*, a chamber of the ECtHR applied the doctrine to the Brussels IIa Regulation concerning the abolition of *exequatur* in intra-EU child abduction cases.[132]

1. The facts

In this case Ms Povse and Mr Alpago lived together as an unmarried couple in Italy.[133] Their daughter Sofia was born in December 2006.[134] In January 2008 the couple separated and Ms Povse left the family home with Sofia.[135] In February 2008, Ms Povse removed Sofia from Italy to Austria without the father's consent.[136]

[128] A Schulz (n 12) 47.

[129] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (App No 45036/98) ECHR, 30 June 2005.

[130] *Michaud v France* (App No 12323/11) ECHR, 6 December 2012 [103].

[131] K Kuhnert, 'Bosphorus – Double Standards in European Union Human Rights Protection?' (2006) 2 Utrecht Law Review 177 and 188; P Craig and G De Búrca, '*EU Law*' (5th edn, Oxford University Press 2011) 404 at least in relation to what should happen after the EU accedes to the ECHR.

[132] *Povse v Austria* (App No 3890/11) ECHR, 18 June 2013 [77].

[133] ibid [4].

[134] ibid. Under art 317 of the Italian Civil Code, unmarried parents have joint custody of their children.

[135] ibid [5].

[136] ibid [7].

In April 2008, the father sought the return of the child under the 1980 Convention.[137] The Leoben Regional Court dismissed this on the grounds that there was a grave risk of psychological harm to the child, within the meaning of Article 13(1)(b) of the 1980 Convention.[138]

In 2009, the father sought a return order based on Article 11(8) of the Brussels IIa Regulation in the Tribunale per i Minorenni di Venezia.[139] The court also issued a certificate under Article 42 of the Brussels IIa Regulation.[140]

The Loeben District Court dismissed the application on the basis that returning Sofia to Italy represented a grave risk of psychological harm to the child.[141] Mr Alpago appealed. The Leoben Regional Court overturned the decision and ordered that Sofia be returned to Italy.[142] Ms Povse appealed the decision and sought that the decision for enforcement should be dismissed.[143] The Austrian Supreme Court decided to stay proceedings and to refer several questions to the CJEU for a preliminary ruling.[144] On 1 July 2010 the CJEU issued its preliminary ruling that the Italian courts had jurisdiction and that the judgment from the Tribunale per i Minorenni di Venezia to return Sofia should be enforced.[145]

On 13 July 2010, the Austrian Supreme Court, following the preliminary ruling, dismissed Ms Povse's appeal, stating that if her circumstances had changed she should apply to the Tribunale per i Minorenni di Venezia as the competent court.[146] However, the Tribunale per i Minorenni di Venezia refused to stay its decision that the child should be returned, withdrew Ms Povse's custody rights and awarded sole custody of Sofia to her father.[147] The father then sought to enforce the Article 11(8) Brussels return order judgment in the Austrian courts and the proceedings continued for several more months.[148]

On 4 October 2012 the Wiener Neustadt District Court issued a decision as to the next steps to be taken in the enforcement proceedings. The judge noted in particular that a continuation of the path chosen by the parents, namely the use of the child in the conflict between them would lead to the child's traumatization, especially if the parents unbending position eventually led to an enforcement of the return orders by coercive measures as a last resort. He noted that the best interests of the child required the parents to reach a workable compromise. The judge proposed a meeting to be held in the presence of both parents. The father did not agree to participate in a hearing with the mother and insisted on his rights to have the return order enforced.[149]

Finally on 20 May 2013, five years and three months after Ms Povse had originally removed Sofia from Italy to live in Austria, the Wiener Neustadt

[137] ibid [10]. [138] ibid [15]. [139] ibid [20]. [140] ibid [28].
[141] ibid [26]. [142] ibid [27]. [143] ibid [29]. [144] ibid [30].
[145] ibid [31]. (For the CJEU ruling see C-211/10 PPU [2010] ECR I-6673).
[146] *Povse* (ECHR) [32]. [147] ibid [35]. [148] ibid [46]. [149] ibid [47].

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District Court ordered the second applicant to hand over the child to her father, by 7 July 2013, and stated that in the case of failure to comply coercive measures would be applied.[150]

The family situation at the time of the hearing in the ECtHR on 18 June 2013 showed that since their arrival in Austria in February 2008 Sofia had lived with her mother. In 2009 the mother entered into a relationship with a new partner. She gave birth to a son in March 2011. The mother, her new partner and the two children lived in a common household. Sofia did not speak Italian and had not seen her father since mid-2009.[151]

The length of time that passed from the initial abduction to the case being brought before the ECtHR once again highlights the difficulties with these cases and why they need to be handled quickly and correctly from the outset.[152] The ECtHR needs to be much more modest in child abduction cases and recognize that due to the inevitable delays in its own decision-making process it should not attempt to apply its own rulings to the case before them but rather make in principle judgments intended to affect the way Central Authorities and courts apply the Convention or the Brussels IIa Regulation to subsequent cases.

2. Approach of the ECtHR (chamber)

Following the reasoning in *Bosphorus*, the chamber, accepting that the decision by the Austrian courts to enforce the return orders interfered with the applicants' right to respect for their family life under Article 8 of the ECHR, held that the interference was in accordance with the law.[153]

3. Decision of the ECtHR (chamber)

The ECtHR, sitting as a chamber of seven judges, decided by a majority that Ms Povse and Sofia's application for a breach of their Article 8 ECHR rights was inadmissible as manifestly ill-founded.[154]

B. Correct Application of the Law to the Facts

The decision by the ECtHR to once again reaffirm the doctrine set out in *Bosphorus* is concerning and risks affecting the Article 13 rights under the 1980 Convention. In *Povse* the Court reiterated its findings that the EU protects fundamental rights in a manner equivalent to that of the ECHR.[155] Their view was that as long as Austria had implemented their EU law obligations without exercising any discretion then the presumption of compliance would apply.[156]

[150] ibid [50].
[151] ibid [51].
[152] For a critique of the length of time taken by the ECtHR to deal with child abduction cases and the impossibility of making that Convention work properly when judicial decision-making takes years see Beaumont (n 33) 79–80.
[153] *Povse* (ECHR) [70]–[74].
[154] ibid [89].
[155] ibid [77].
[156] ibid [78].

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The presumption can only be rebutted if, in the circumstances of the particular case, it is considered that the protection of Convention rights was 'manifestly deficient'.[157]

In *Povse*, the Court considered whether the presumption of compliance could be rebutted. They noted that the Brussels IIa Article 42 certificate did not leave the court with discretion due to the fact that the return order had to be recognized and enforced, without any ability to oppose its recognition.[158] The Court pointed out that there were safeguards in place in that a certificate of enforceability could only be issued by the court of habitual residence if the parties had been given an opportunity to be heard, including the child if appropriate due to age and maturity, and the reasons for and the evidence underlying the refusal of the court where the child is present to return the child under Article 13 of the 1980 Convention had been taken into account.[159] They noted that the Austrian Court had made use of asking preliminary questions of the CJEU in this case. The CJEU had confirmed that a return order under Article 11(8) of Brussels IIa accompanied by an Article 42 certificate could not be reviewed in the courts where the child is present, nor refused enforcement on the grounds that the return would cause the child harm due to a change in circumstances.[160] It also noted that any change in circumstances had to be brought before the courts of habitual residence.[161] The court held that as Austria could not and did not exercise discretion, that it had done nothing more than fulfil its obligations resulting from its membership of the EU.[162]

However, the ECtHR did not consider the possible future impact of the element of coercion introduced by the Austrian Court. The Austrian court ordered the return of the child to the father and that if necessary 'coercive measures' should be used.[163] Neither the 1980 Convention nor the Brussels IIa Regulation requires the use of 'coercive measures' to enforce the return order. Under Brussels IIa the 'enforcement procedure is governed by the law of the Member State of enforcement'.[164] The method of execution of the transfer of custody from one parent to another would need to be both effective and equivalent to measures used in domestic orders in order to comply with EU law. The simple order to permit the use of 'coercive measures' if necessary may well be required by the Austrian courts in order to treat the Italian order in a way equivalent to an Austrian order or at least in order to meet the minimum standard of 'effectiveness' that the CJEU might deem necessary under EU law. However, if the court had specified a particular coercive measure, for example

[157] For an example of a case where the presumption does not apply because EU law leaves discretion to a Member State that enables it to avoid a violation of the ECHR, see the judgment of the Grand Chamber in *MSS v Belgium and Greece* (App No 30696/09) ECHR 21 January 2011, [338]–[340].
[158] *Povse v Austria* [79].
[159] ibid [80].
[160] ibid [81].
[161] ibid.
[162] ibid [82].
[163] [50]. See Schuz (n 3) 47–9. Although in most cases return orders are complied with without the need to rely on coercive measures, a significant number of States do allow physical force to remove the child.
[164] Brussels IIa, art 47(1).

to remove the child from the mother by physical force against the clearly expressed will of either or both of them, it would seem beyond doubt that this is a matter of national law and not EU law as it goes beyond the requirements of the principles of equivalence and effectiveness under EU Law.[165]

Although in most cases coercion is not necessary, it is not unknown for Member States to use physical force to remove the child.[166] It should be noted that the national law of Austria explicitly permits the 'court to request the child welfare authority to assist in the enforcement of a return order' including 'the temporary placement of a child in an institution after a physical taking away from the abductor, if necessary'.[167] This is consistent with the ECtHR's view that the use of sanctions should not be ruled out in the event of unlawful behaviour by a parent, 'although coercive measures against children are not desirable in this sensitive area'.[168]

In *Povse*, the ECtHR considered whether the presumption of compliance could be rebutted because the '… protection of Convention Rights was manifestly deficient'.[169] The applicants had argued that returning Sofia to Italy would cause her serious psychological harm and would constitute a gross violation of the right of both applicants to respect for their family life.[170] The Court ruled that the protection of human rights under Brussels IIa was not manifestly deficient as the applicants had not exhausted their rights in the Italian courts to get the Italian return order changed or stayed in the light of a change of circumstances.[171] At first glance, this seems reasonable. The applicants could have done more to argue in the Italian courts that due to the change of circumstances it was no longer in Sofia's best interests to return her to Italy. Yet, here was a child who had not seen her father since she was three years old. She did not speak Italian, her father's native language. Her mother had a new partner and child, making it impractical for her mother to accompany Sofia to Italy. Sofia lived as part of this new family unit.

To advocate return at this stage for a child of seven years, especially with the additional threat of coercion on enforcement, would seem to be contrary to the child's best interests and clearly risk causing her psychological harm as a result of the need to satisfy Brussels IIa. However, it is important to remember that it is the abducting parent that has engineered these changes and she should not be able to benefit from this. The only way to have avoided too much harm to the

[165] P Craig and G De Búrca (n 131) ch 8.

[166] Schuz (n 3) 48 and the 1980 Convention *Guide to Good Practice, Part IV, Enforcement* (HCCH 2010) especially 1.5–1.9, available at <http://www.hcch.net/upload/guide28enf-e.pdf>.

[167] 'Enforcement of Orders Made under the 1980 Convention—A Comparative Legal Study', drawn up by Andrea Schulz, First Secretary (Preliminary Document No 6 of 2006) Part I, <http://www.hcch.net/upload/wop/abd_pd06e2006.pdf>.

[168] *Cavani v Hungary* (App No 5493/13) 28 October 2014 [52][59].

[169] *Povse v Austria* [87].

[170] ibid [64].

[171] If the appeal failed in the Italian courts, the applicants would be able to lodge an application with the ECtHR against Italy, see *Šneersone and Kampanella v Italy* (App No 1437/09) ECtHR, 12 July 2011 discussed above.

child would have been for the Austrian courts to uphold the request for her return in the original Hague return proceedings when the mother could have gone back to Italy with her child before she entered into a new relationship. By the time the Article 11(8) Brussels IIa return order was made by the Italian courts in July 2009 the child had been away from Italy and her father for 17 months and the risk of causing serious harm to the child by returning her to Italy without the mother had become quite significant. The need to return the child quickly is fundamental to the return process. When that does not occur there may be no good legal solution due to the inevitable delays caused by getting and trying to enforce an Article 11(8) Brussels IIa return order and the uncompromising nature of the winner-takes-all approach of such an order. The judge in Wiener Neustadt District Court looking at the case on 4 October 2012 had the correct view, that the parents' behaviour was the cause of Sofia's traumatization and that they needed to negotiate a workable compromise for the sake of their child. The priority at this stage in proceedings should have been to minimize further trauma and build in steps to gently reintroduce Sofia to her father rather than simply enforcing the return of the child to a father she no longer knew and a country she had no familiarity with.

C. Summary

The approach taken in *Povse* reaffirms the decision in *Bosphorus* that EU law provides the necessary equivalent protection for the ECHR so that where a Member State of the EU is applying EU law without exercising any discretion it is presumed to be in compliance with the Convention. Austria was seen as not exercising discretion when they ordered the enforcement of the Italian Article 11(8) Brussels IIa Regulation return order, as there were no grounds for refusal. The court of refuge has no option but to enforce the order when accompanied by an Article 42 certificate even if the certificate violates fundamental rights, as the responsibility to review the conformity of its judgment with the ECHR is the responsibility of the national courts of habitual residence.[172]

However, it is argued that the ECtHR failed to identify that Austria may have to exercise a degree of 'discretion', which goes beyond the requirements of the Brussels IIa Regulation when dealing with the actual enforcement of the return order if certain specific coercive measures have to be carried through. An enforcing court does have discretion when it comes to using coercion for actual enforcement as long as it has the same discretion when enforcing national custody orders. This discretion should be subject to human rights review.

[172] Case C-491/10 PPU *Zarraga v Pelz* [2010] ECR I-14247 [69].

V. CONCLUSION

Šneersone and *Povse* although decided by different chambers of the ECtHR are reconcilable. *Povse* decides that the country in the EU where the child is present is immune from review by the ECtHR when the courts there have been following the requirements of the Brussels IIa Regulation to recognize and enforce an Article 11(8) Brussels IIa return order from the country of habitual residence. This is so because the courts where the child is present have no discretion—they must recognize and enforce the return order. However, *Povse* does not deal with the crucial issue in practice of what happens when the Article 11(8) return order is to be actually enforced. This is still a matter of national law subject to the EU law principles of effectiveness and equivalence. If coercive measures are needed in the country where the child is present in order to force the child to go to the country of habitual residence this is not a matter where the national enforcement authorities have no discretion under EU law and therefore should be reviewable by the ECtHR.

Šneersone shows that the decision of the courts of habitual residence to order an Article 11(8) return are reviewable in the ECtHR when an action is brought against the State of the child's habitual residence because, of course, the courts of habitual residence are exercising a discretion under EU law when deciding to override the non-return decision in the courts where the child is present. They would also be exercising their discretion under EU law if the abducting parent were to ask the courts of habitual residence to suspend or quash an Article 11(8) return order because of a change of circumstances. Therefore a failure to grant such a request would also be reviewable in the ECtHR if an action is brought against the State of habitual residence.

In *X v Latvia* the Grand Chamber of the ECtHR is effectively unanimous in concluding that the national courts where the child is after the abduction must properly investigate whether the Article 12, 13 or 20 1980 Convention exceptions apply, at least when an arguable claim is made that one of the exceptions applies, and give a sufficiently reasoned judgment as to whether they apply. The national courts must not go beyond that to assess the custody of the child or to make a free-standing assessment of whether the return of the child is in the child's best interests. It is the unanimous view of the Grand Chamber that the best interests of the child in 1980 Convention cases are upheld by the courts where the child is present properly applying the exceptions to return set out in the 1980 Convention. Thus the ECtHR has returned to its excellent position on this special approach to the 'best interests of the child' analysis in 1980 Convention cases that was seen in its case law before the Grand Chamber judgment in *Neulinger*. The difficult problem remaining is the tendency of some judges in the ECtHR to not give enough discretion to the national judges in the way in which they apply the 1980 Convention exceptions to return in individual cases. Deference should be shown to national judges unless they

have clearly failed to give reasons why any exceptions pleaded in the case before them did not apply.

As a general rule the ECtHR needs to desist from preventing the enforcement of a 1980 Convention return order in cases where a challenge is pending to the compatibility of such an order with the ECHR unless the ECtHR can create a fast-track procedure for cases where it does order the non-enforcement of such orders and can dispose of such cases within 6–8 weeks of them being lodged in the Court. The Court of Justice of the EU achieves such a fast track in PPU cases. Too much harm is done to an individual child by allowing the enforcement of a 1980 Convention decision to be delayed pending the very lengthy standard process in the ECtHR, which often takes several years.