

PRIVATE INTERNATIONAL LAW TOPICS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

SELECTED JUDGMENTS AND DECISIONS (2010-2011)

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I. Introduction

The title of this article may call for an explanation. The European Court of Human Rights renders decisions¹ on all kinds of legal issues, public and private. There is hardly a situation in life on which the Court has not issued a decision.² Yet the

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¹ More properly: “decisions” on the admissibility of applications and judgments on the merits of those applications that the Court considers admissible. Applications that are “manifestly ill-founded” are deemed inadmissible under Art. 35(3)(a) of the European Convention on Human Rights. This peculiarity has been used since the inception of the Convention regime to dispose of the vast majority of applications at the admissibility stage. But decisions of that kind are not necessarily devoid of legal interest. Some – those adopted by a Chamber of the Court – give full grounds for the “manifest” lack of foundation of the applicant’s claims and can be cited as precedent in the Court’s later jurisprudence.

² Those doubting the statement in the text can verify it experimentally. Thus a consultation of the Court’s *hudoc* data base at <www.echr.coe.int> (which contains a full collection of the cases decided by the Court and by the, now defunct, European Commission of Human Rights) using, say, the word “druid” as a search term will yield two decisions and one judgment. The two decisions deal with applications by druids complaining about police regulations applying to the Stonehenge site and interfering with the applicants’ free exercise

Court applies only one body of law, the European Convention on Human Rights and its Protocols. Its sole – eminently important, but also limited – function is to determine whether the Contracting States (the 47 member States of the Council of Europe) are in compliance with the rights guaranteed by the Convention. In practice, this function is carried out through the Court's evaluation of individual applications by those whose rights are alleged to have been violated and who are supposed to have exhausted all domestic remedies before applying to the Court.

The Court was not instituted to apply private international rules, any more than any other kind of ordinary rules of law. In this respect, its role differs from that of the national supreme courts. It also differs from that of the European Court of Justice, a court that, in comparison, is a jack of all trades and which also has quite a number of cases involving the interpretation of private international law regulations. Nothing of the kind exists for the European Court of Human Rights. Its role may to some extent be compared to that of a constitutional court – insofar as the Convention is the functional equivalent of a pan-European catalogue of fundamental rights. Yet it is a court that can neither invalidate a national rule of law or judgment nor give authoritative construction to a national legal norm. The task of the Court will not be to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to the applicants has infringed the Convention.³ This means that private international law cases that come before the Court will be dealt with in a refreshingly, or irritatingly – depending on the preferences of the reader –, undogmatic manner: the most subtle rules of private international law, and the most learned judgments of the national courts on the applicant's case, will be nothing more than facts, the effects of which on the applicant's human rights are the Court's sole concern. Hence the reference to "private international topics" in the title.

Those looking for true private international learning in the decisions of the European Court of Human Rights will be disappointed.⁴ Yet those interested in the confrontation between private international law cases and human rights concepts may be interested in the selection presented here. It is merely a selection though; in some years the Court renders more decisions pertinent to private international law, either directly or indirectly, than can be presented. But most cases are repetitive⁵

of the Druidic religion: Commission decisions of 14 July 1987, *Chappell v. United Kingdom*, No 12587/86 and of 19 October 1998, *Pendragon v. United Kingdom*, No 31416/96.

³ See, e.g., *Von Hannover v. Germany* [GC], judgment of 7 February 2012, Nos. 40660/08 and 60641/08, § 119, and many earlier cases.

⁴ A learned French writer, Louis D'AVOUT, has frequently expressed his discontent with the very idea that the European Court of Human Rights can interfere in the field of private international law; see for instance L. D'AVOUT, *Droits fondamentaux et coordination des ordres juridiques en droit privé*, in E. DUBOUT/S. TOUZÉ (eds), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, Paris 2010, p. 165.

⁵ See the cases in the field of international child abduction that are merely cited, but not analysed, in notes 27 and 34 below.

and, after all, there is much to be said in favour of a selective, rather than exhaustive, approach to knowledge. Also, while care has been given to identifying the most significant Court decisions, no guarantee can be made: the Court deals with an immense number of cases (more than 60,000 cases have been allocated to a judicial formation in 2011 alone), which are tabulated by the registry according to the human rights addressed, not by the areas of national law that were at issue.⁶ In addition, private international law is not the field of activity of the national authorities of the Contracting States that is most likely to lead to violations of Convention rights. That is not, as such, to be lamented. Here, then, is a selection of cases decided in 2010 and 2011.

II. Choice of Law Rules and the Right to Non-Discrimination

The link between choice of law rules and the right to equality before the law, or non-discrimination, is both intimate (it may be said that the purpose, or one of the purposes, of choice of law rules, and especially of multilateral choice of law rules, is to ensure that the rule of non-discrimination is complied with insofar as it justifies, and requires, non-application of the law of the forum to situations with a preponderant foreign element) and highly complex. In short,⁷ the operation of a multilateral conflict rule is not supposed to deny specific benefits to anyone. The principle of non-discrimination will not invalidate its operation, for such a conflicts rule has no substantive content. If a benefit is denied to a person, the true reason will not lie in the forum's multilateral conflicts rule but in the content of the applicable (foreign) law which happens to differ from the forum's own substantive law. The position may however be otherwise where the general principle of equality before the law is not at stake, but, instead, rules of non-discrimination on grounds of specific characteristics which have been determined to be politically undesirable are at issue. Therefore, while choice of law rules which use either nationality, domicile, or habitual residence as the connecting factor in matters of personal sta-

⁶ The Court's *hudoc* data base (above, note 2) has been searched using a number of search terms. The number of cases selected for publication in the Court's printed *Reports* has recently been drastically reduced; the only case pertaining to private international law listed in the "Revised selection of cases for publication in *Reports of Judgments and Decisions 2007-2010*" published by the Court on its web site on 19 December 2011 seems to be the 2010 case of *Neulinger and Shuruk v. Switzerland* (see below, sect. IV.A.).

⁷ The matter has been dealt with elsewhere at some length by the author: see P. KINSCH, *Choice of Law Rules and the Prohibition of Discrimination under the ECHR, Nederlands Internationaal Privaatrecht (NIPR) 2011*, p. 19.

tus will go uncensored by the general principle of equality,⁸ the result can be different where an archaic conflict rule uses as politically incorrect a factor as gender. Two recent cases appear to support these submissions.

A. *Ammdjadi v. Germany*

*Ammdjadi v. Germany*⁹ began as a dispute between spouses of Iranian nationality domiciled in Germany. It involved the application of a clause in the Agreement on Establishment between the German Reich and the Empire of Persia of 1929, according to which all aspects of family law must be governed by the law of the parties' common nationality. This clause happened to operate to the detriment of the wife, who could not obtain, under Iranian law, the compensation of pension rights after divorce to which she would have been entitled if German law had been applied. The Court held

“that, especially in conflict of laws cases, the differentiation for all family issues according to nationality and not to habitual residence is a well-known principle which aims at protecting a person's close connection with his or her home country. Therefore, even though the decisiveness of the habitual residence might arguably be considered preferable with regard to pension rights, the decisiveness of a person's nationality cannot be considered to be without «objective and reasonable justification.»”¹⁰

Apart from the issue of non-discrimination, the Court declared that the applicant's complaints about the German courts' refusal to characterize the compensation of pension rights after divorce as part of the German *ordre public* were “manifestly ill-founded”. “Iranian law also provides for some kind of social protection of the other spouse, namely by means of some alimony and the morning gift,” and the notion of respect for family law (Art. 8 of the Convention) “does not entail an

⁸ Whether that will always remain true of the principle of non-discrimination on grounds of nationality under EU law (Art. 18 TFEU) may perhaps be doubtful, but that does not disprove the point made in the text, quite to the contrary. If choice of law rules using nationality as a connecting factor were to be held incompatible with Art. 18, it would be because it would have been determined that this is implied by the specific political project of European unification, not because using nationality in a choice of law rule would be incompatible with equality generally.

⁹ Decision of 9 March 2010, No 51625/08.

¹⁰ The Court added: “In this respect, it must also be noted that the applicant had been free to choose the application of German law, together with her husband, by notarial certification”. Whether this description of German law is entirely accurate is perhaps open to doubt (it seems to be based on the ordinary rules of German private international law – Art. 14(4) EGBGB – rather than on the German-Persian treaty which appears to be governing here). Be that as it may, the particular value given to party autonomy is remarkable and quite in line with postmodern thinking.

obligation on the part of the Contracting State to grant a pecuniary privilege to one spouse, which moreover corresponds to a pecuniary disadvantage to the other spouse.”

B. *Losonci Rose and Rose v. Switzerland*

The other suggested rule – namely that where it is the specific rule of non-discrimination on grounds of gender rather than the general principle of equality that it is at stake, the Convention is less tolerant of the operation of multilateral choice of law rules – is supported by *Losonci Rose and Rose v. Switzerland*.¹¹ This case concerned a complicated form of discrimination between men and women (or husbands and wives) and the interplay between Swiss conflict rules and Swiss substantive law regarding the attribution of names following marriage. What was at stake was the name of Mr Losonci, a Hungarian citizen domiciled in Switzerland, after his marriage to a Swiss citizen, Mrs Rose. Both spouses wished to maintain their own names. But under the Swiss civil code this is not permitted: a family name – normally the name of the husband or, only if the spouses opt for that solution, that of the wife – must be used by both spouses. The couple had chosen to adopt the wife’s name as the family name. The problem was that Article 37 of the Swiss Act on Private International Law provides that the name of a person domiciled in Switzerland is generally determined by Swiss law, save that he may choose to have his name determined by his national law. Mr Losonci (or Losonci Rose, as he now was) tried to use this option. By choosing Hungarian law, he could escape the obligation to bear the family name chosen by the spouses and, instead, could continue to be called Losonci. This procedure would have been entirely feasible if the wife had been Hungarian and her husband Swiss, for the only option that would then have been necessary would have been the option for application of the wife’s national law to her name. But in Mr Losonci’s case, the Swiss courts held that the option of adopting the wife’s name as the family name had already been exercised, which precluded Mr Losonci from exercising a second option, that of applying his national law to determine his name. The European Court held that the Swiss courts’ depriving Mr Losonci of the possibility of choosing the applicable law was discriminatory on grounds of gender, and “very weighty reasons have to be brought forward before a difference of treatment based on the ground of sex alone can be regarded as compatible with the Convention.”

¹¹ Judgment of 9 November 2010, No 664/06.

III. The Right to Recognition of a Status Acquired Abroad

This has been, in recent years, one of the European Court of Human Rights main areas of activity (indeed, of creativity) in the private international law field. The cases of *Hussin v. Belgium*,¹² *Wagner and J.M.W.L. v. Luxembourg*¹³ and *McDonald v. France*¹⁴ have shown that the Convention has the potential for forcing Contracting States to open their systems of private international law to recognition of family relationships acquired under a foreign system, even though such relationships might not be deemed to have been validly created if the forum's conflicts rules were inflexibly applied. This will be the case if the relationship corresponds to a social reality that the European Court is not prepared to disregard. A family relationship validly acquired under a foreign system of conflicts law, whether through a judgment or otherwise, is entitled to protection under human rights law. Yet there are two preconditions: (1) the parties must have acquired the family status in good faith under the foreign system, and (2) the parties' expectation of stability regarding their status must have been a legitimate expectation. Legitimacy will normally depend upon the intensity of the links with the foreign legal system under which the status was acquired. The mere fact that the parties' expectations are entitled to protection does not mean that they can never be disturbed. But such reasons for disturbing their expectations must be assessed against the parties' interest in the stability of their status, in light of the principle of proportionality. That a similar status could not have been acquired under the recognizing forum's own system of conflicts law will not, in itself, be enough.¹⁵ Two more recent cases call for mention here.

A. *Mary Green and Ajad Farhat v. Malta*

*Mary Green and Ajad Farhat v. Malta*¹⁶ arose out of the Maltese authorities' refusal to recognize the validity of a marriage in Libya of a Maltese citizen, Ms Green. The problem was that Ms Green was already married in Malta to Mr X, a citizen of Malta, "according to the rites of the Catholic Church and in conformity with Maltese law." At the time, divorce was unknown in Maltese law.

¹² Decision of 6 May 2004, No 70807/01.

¹³ Judgment of 28 June 2007, No 76240/01.

¹⁴ Decision of 29 April 2008, No 18648/04.

¹⁵ For a more detailed description of these cases, see, by the present writer, Recognition in the Forum of a Status Acquired Abroad – Private International Law and European Human Rights Law, in K. BOELE-WOELKI/ T. EINHORN/ D. GIRSBERGER/ S. SYMEONIDES (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, The Hague 2010, p. 259.

¹⁶ Decision of 6 July 2010, No 38797/07.

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As a result, Ms Green had gone to Libya, converted to Islam by means of a declaration – which had the added benefit of automatically dissolving her marriage to a Christian, according to the precepts of Islam and in conformity with Libyan law – and had married Mr Farhat. The spouses then established their matrimonial domicile in Libya. The procedure is not dissimilar to that used in the late 19th century by the Princess de Beaufremont in a classic private international law case, in which the French Supreme Court considered it to be a case of *fraude à la loi*.¹⁷ But we know nothing of Ms Green’s intentions when converting to Islam. The fact remains that when, after some twenty years of residence in Libya, Ms Green and her new husband applied to have their marriage registered in Malta, the Director of the Public Registry refused to do so. The Director claimed that Ms Green had not proven that her first marriage had been dissolved “and that her second marriage had not been polygamous, and therefore [the marriage was] contrary to Maltese public policy.”¹⁸ The Maltese courts upheld this determination.

The applicants complained to the European Court of Human Rights based on their right to family life. The Court, “assuming that there has been an interference with the applicants’ private and family life,” first noted, generally,

“that such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being «in accordance with the law», as pursuing one or more of the legitimate aims listed therein, and as being «necessary in a democratic society» in order to achieve the aim or aims concerned ... A fair balance has to be struck between the competing interests of the individual and of the community as a whole, and the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention”.

Addressing, then, the requirements of Maltese law, it went on to find

“that those requirements fall within the sphere of the respondent State’s public policy, and it cannot be said that the national authorities exceeded their margin of appreciation either in imposing the requirements or in applying them in the applicants’ case. In view of the interests of the community in ensuring monogamous marriages, and those of the third party directly involved, namely the first applicant’s first husband, the Court cannot find that, in the circumstances of the case the domestic courts failed to strike a fair balance between the conflicting interests. Thus, the situation

¹⁷ Cass. civ. 18 March 1878, D.P. 1878, 1, 201; B. ANCEL/ Y. LEQUETTE, *Les grands arrêts de la jurisprudence française de droit international privé*, 5th ed., Paris 2006, No 6.

¹⁸ What was meant was, presumably, public policy within the meaning of Maltese substantive law, not private international law: alternatively, the marriage could have been valid if Ms Green had been able to show that she was domiciled in Libya at the moment of her marriage, which she had also failed to do.

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complained of can be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights of others”.

The *Green* decision is in line with the Court’s holding, in *Wagner and J.M.W.L. v. Luxembourg*,¹⁹ that the application of the rules of private international law of the State of (non-)recognition of a status acquired abroad must, to the extent that it interferes with the parties’ legitimate expectations as to the stability of their family relationship, be justified in accordance with the principle of proportionality. *Green* extends that holding from a status acquired through a foreign judgment (in *Wagner*, a Peruvian adoption judgment) to a status acquired extrajudicially. The inadmissibility decision can be explained by elements specific to the case: *Green* involved the idea of a monogamous marriage, undoubtedly of importance to Maltese (and more generally European) society; moreover, Ms Green’s first husband was still alive and his interests could not be ignored.

B. *Negrepointis-Giannisis v. Greece*

*Negrepointis-Giannisis v. Greece*²⁰ resulted in a judgment declaring that Greece had, by failing to recognize an American adoption judgment, breached the applicant’s rights under an impressive number of Convention provisions: the right to family life (Art. 8), but also the right to non-discrimination in the enjoyment of rights provided by the Convention (Art. 14), the right to property (Art. 1 of the first Protocol to the Convention) and even the procedural right to the effectiveness of judgments obtained, as a corollary to Article 6’s fair trial guarantee.²¹

¹⁹ Above, note 13.

²⁰ Judgment of 3 May 2011, No 56759/08. Case note by P. FRANZINA, in *Diritti umani e diritto internazionale* 2011, p. 609.

²¹ Although not new (*McDonald v. France* – above, note 14 –, decided in 2008, is a precedent), this last element justifies a short methodological comment. It is true that it follows from the holding in *Hornsby v. Greece* (judgment of 19 March 1997, *Reports* 1997-II, p. 496) that there is such a procedural right to enforcement of a judgment obtained. But *Hornsby* was a case involving the non-enforcement in Greece of a Greek judgment, which means that the entirely separate issue of recognition of foreign judgments as a precondition for their enforcement in the forum did not arise. And, while it is possible without great difficulty to extend the *Hornsby* holding to foreign judgments whose recognition has already been granted by a prior judgment in the forum or is otherwise uncontested (see the judgments of 1 April 2010, *Vrbica v. Croatia*, No 32540/05, and of 18 November 2010, *Romańczyk v. France*, n° 7618/05), the transformation of the human rights based obligation to recognize foreign judgments (and, perhaps, to disregard possible substantive defences provided for by the forum’s law of the recognition of foreign judgments) into a mere corollary of the right to a fair trial still appears problematic. In favour of the procedural approach, see however A. BUCHER, *La dimension sociale du droit international privé – Cours général*, *Recueil des Cours* vol. 341 (2010), p. 303 *et seq.*

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The applicant had been adopted by his uncle who was a monk. And not just any monk, but a monk and bishop of the Eastern Orthodox Church of Christ, the Greek Orthodox Church whose “canons and sacred traditions” enjoy Constitutional²² and legal recognition in the Greek legal system. Under the rules of the Church, monks cannot adopt children, just as they cannot marry. Yet this rule had not prevented the applicant’s uncle, an Orthodox bishop in Detroit, Michigan, from adopting the applicant, who was at that time a student in the United States. The parties maintained their adoptive relationship for some 14 years until the uncle’s death. The death resulted in a fight over the monk’s succession, including real estate in Greece. An aunt succeeded in obtaining a ruling from the Areios Pagos, the Supreme Court of Greece, holding that the canonical rule against adoptions by monks was part of not only the civil law of Greece (whereas the rule against monks’ marriages was removed in a reform act of 1982), but also of public policy within the meaning of Greek private international law. As a result, the applicant’s American adoption could not be recognized, nor could the applicant inherit the deceased’s estate.

The European Court considered the decision to be unjustified. Again, the Court considered that Greece’s non-recognition of the Michigan adoption decree interfered with the applicant’s rights, which required justification. Greece did enjoy a margin of appreciation in assessing what should be the requirements of its public policy. But – as the Court has always held – “the domestic margin of appreciation goes hand in hand with a European supervision.”²³ In this case, the Court found that a “pressing social need” for the interference was not shown. The canonical rules, considered to be binding rules of civil law, were too old (dating from the first millennium) to reflect the present-day condition of Greek society, when a legislative reform in 1982 had abolished the civil effects of the more important rules prohibiting monks from marrying.

Greece attempted to have the adverse judgment reviewed by the Court’s Grand Chamber, presumably because the Chamber ruling was considered to have given insufficient deference to the State’s appreciation in a delicate matter touching upon the Church-State relationship. The application for review was denied.²⁴

²² Art. 3 of the Greek Constitution.

²³ See the judgment of 7 December 1976, *Handyside v. United Kingdom*, Series A, No 24, § 49.

²⁴ Press release ECHR 286 (2011) of 14 December 2011.

IV. International Child Abduction and the Right to Family Life

A. The Hague Child Abduction Convention

The Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction is one of the most successful international instruments in the field of private international law. The reason for its success is, of course, the efficiency of the cooperation between Central Authorities organised by the Convention, whose aim it is “to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”.²⁵ There are, however, exceptions to the child’s return to the State of his or her habitual residence, the most important of which is that provided for in Art. 13(b): where “there is 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.”

For a number of years, the European Court of Human Rights counted among the Hague Convention’s most loyal allies, deciding that the right to family life implied a “positive obligation” for the Contracting States to the European Convention to comply with Hague Convention requests for the return of children.²⁶ It is undoubted that such cases still exist.²⁷ But in the 2010 case of *Neulinger and Shuruk v. Switzerland*,²⁸ the Grand Chamber of the Court decided that the Swiss courts’ decision to comply with a Hague Convention request for the return of a child to Israel, the State of his habitual residence prior to his unilateral removal to Switzerland by his mother, amounted to a violation of the right to respect for family life – the right of the child to be left with his mother and primary carer, but also the abducting mother’s own right not to be forced to return with her son to Israel. The decision was grounded on various considerations, including the Israeli father’s unstable and violent temper, but above all the passage of time since the mother and

²⁵ Preamble, para. 2.

²⁶ Seminal cases include *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, No 31679/96, *ECHR* 2000-I; *Iglesias-Gil and A.U.I. v. Spain*, judgment of 29 April 2003, No 56673/00, *ECHR* 2003-V, and *Maire v. Portugal*, judgment of 26 June 2003, No 48206/99, *ECHR* 2003-VII. Conversely, it was held that an applicant not having rights of custody within the meaning of the Hague Convention had no case for relying on a “positive obligation” to order the child’s return to him: decision of 2 September 2003, *Guichard v. France*, No 56838/00, *ECHR* 2003-X. See generally P.R. BEAUMONT, *The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction*, *Recueil des Cours* vol. 335 (2008).

²⁷ For cases which do not disturb the functioning of the Hague process see, during the period under review, *Serghides v. Poland*, judgment of 2 November 2010, No 31515/04; *D.M. v. Luxembourg*, decision of 18 January 2011, No 58919/09; and cf. *Raban v. Romania*, judgment of 26 October 2010, No 25437/08.

²⁸ Judgment of 6 July 2010 [GC], No 41615/07.

child resettled in Switzerland, which the Court found would likely cause “significant disturbance” for the child in the case of a forced return. *Ex factis jus oritur*.

Neulinger and Shuruk was not, to say the least, universally well received.²⁹ It is true that the judgment bluntly and perhaps undiplomatically states that “the Court must ... place itself at the time of enforcement of the impugned measure. ... If it is enforced a certain time after the child’s abduction, that may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis”³⁰ – a clear indication of the Court’s view on the hierarchy of international conventions. It might have been preferable to emphasise that the Hague Convention itself (Art. 13(b)) would have given the Swiss courts the ability to refuse to comply with the order to return the child to Israel on grounds quite similar to those used by the Court, but this the *Neulinger and Shuruk* Court did not wish to do.³¹

In a later, similar case, however, *X. v. Latvia*,³² that was exactly how a Chamber of the Court resolved the issue. The case concerned the decision of the Latvian authorities to enforce an order of return of a child to Australia, contested on grounds similar to the Swiss judgment in *Neulinger and Shuruk*. The Court avoided the appearance of placing Latvia before an obligation to choose between compliance with its obligations under the European Convention and compliance with its Hague Convention obligations towards Australia by pointing out that the concept of the child’s “best interests” is a common concern of both conventions, and that

²⁹ It has been much criticised by commentators who value the efficiency of the Hague Convention model (and who prefer the earlier decision by a Chamber of the Court in *Maumousseau and Washington v. France*, judgment of 6 December 2007, No 39388/05, which had decided otherwise in similar circumstances). A compromise approach has been suggested in decisions by the English judiciary: *Eliassen and Baldock v. Eliassen* [2011] EWCA Civ 361, and on appeal *Re E (Children)* [2011] UKSC 27. The judgment of the Supreme Court lucidly explains (at para. 6) the change in the paradigm case in the field of international child abduction, from the case of a “dissatisfied parent who did not have the primary care of the child snatching the child away from her primary carer,” which the authors of the 1980 Hague Convention had in mind, to a situation, typical of present day conditions, where the primary carer takes advantage of the ease of international travel to “leave with the children, usually to go back to her own family.”

³⁰ § 145.

³¹ § 141: “It is not the Court’s task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if he returned to Israel. However, the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of that convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child’s best interests.”

³² Judgment of 13 December 2001, No 27853/09.

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“[e]mphasizing the paramount interests of the child in matters of this kind, the procedural fairness enshrined by Article 8 § 2 of the Convention provides that national courts must pay due respect to the arguable claims brought by the parties in the light of Article 13 (b) of the Hague Convention. This is to ensure that a child’s return is granted in his or her best interests and not as a purely procedural measure provided for by the Hague Convention, which is an instrument of a procedural nature and not a human rights treaty”.³³

The result was the same: compliance with the order to return was a violation of the right to family life.

There are other cases of enforcement of return orders under the Hague Convention, where the Court refused to find a violation of the right to family life.³⁴ At any rate, this type of human rights litigation means that the national courts’ decisions to comply with return orders made pursuant to the Hague Convention are no longer necessarily the end of the matter.

B. The Brussels II *bis* Regulation

In the years before *Neulinger and Shuruk*, the Hague Convention mechanism had been “improved on,” in the European Union framework, by Council Regulation (EC) No. 2201/2003 (“Brussels II *bis*”). Arts. 11(8), 40 and 42 of the Regulation allow the courts of the Member State of the child’s habitual residence to order the immediate return of the child – even regardless of a prior judgment of non-return pursuant to Art. 13 of the Hague Convention. The order benefits from automatic enforceability in the other Member States “without the need for a declaration of enforceability and without any possibility of opposing its recognition” on the European enforcement order model.³⁵

Inherent in this type of hyper-efficiency is a potential for conflict with the European Convention on Human Rights: what if compliance with the return order is considered, in a *Neulinger and Shuruk* situation, to be a violation of the parties’ right to respect for family life? There are no cases *yet* in which this potential would

³³ § 72. It is remarkable how a difference in context can affect the meaning of a judicial phrase, such as the reference to the “purely procedural” nature of the Hague Convention.

³⁴ *Van den Berg and Sarri v. The Netherlands*, decision of 2 November 2010, No 7239/08; *Lipkowsky and McCormack v. Germany*, decision of 18 January 2011, No 26755/10.

³⁵ The European enforcement order for uncontested claims (Regulation (EC) 805/2004) was the first implementation, in civil matters, of the decision at the Tampere European Council of 15 and 16 October 1999 to do gradually away with the exequatur procedure for judgments rendered within the Union. Since then, others have followed.

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have turned into an actual case before the Court,³⁶ but *Šneersone and Kampanella v. Italy*³⁷ at least illustrates its existence. Ms Šneersone and her child were living in Italy when the father's access rights were judicially established. The mother subsequently left for her home country, Latvia, taking the child with her in violation of the Italian judgment. The father obtained from the Italian courts orders for the return of the child, first by on the basis of the Hague Convention, then – after the Latvian authorities had refused to comply with the return order, by reference to Art. 13(b) of that Convention – on the basis of the Brussels II *bis* Regulation. While the Latvian authorities continued to delay compliance with the Italian order, Ms Šneersone applied to the European Court and succeeded in obtaining a judgment against Italy: the very issuing of a return order amounted, in the circumstances of her case, to a violation of Ms Šneersone's and her child's right to respect for family life – for reasons inspired by the *Neulinger and Shuruk* case.

³⁶ If it does, the Court might have to take a decision on an issue of principle, namely whether to allow an exception to its case law requiring the courts of the State of enforcement of a foreign judgement to review the compliance, by the courts of the state of origin, with the standards (however defined) of the European Convention (*Pellegrini v. Italy*, judgment of 20 July 2001, No 30882/96, *ECHR* 2001-VIII), in the interest of the European Union's free movement of judgments programme.

³⁷ 12 July 2011, No 14737/09.