Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law

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There is one sentence which Kurt Siehr sometimes uses when others, in the course of scientific discussions among colleagues and friends, seem to be discovering a problem that Kurt, with his vast comparative and historical learning in private international law,[1] knows always to have existed: "To some extent, you see, this is nothing new". Or, in biblical terms, *Nihil novi sub sole*. And so it goes with the subject of this contribution: not only has the general theme underlying the contribution – that of the protection of the parties' legitimate expectations in the conflict of laws – recently been dealt with, as have so many other general questions of

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1 *See* his ironic characterization, in verse, of those who share and those who do not share his predilections in this respect :

> "Rechtsvergleich und Rechtsgeschichte
> Machen einen klugen Kopf.
> Auf dies beides nie verzichte,
> Sonst bleibst Du ein armer Tropf!"

K. Siehr, Das internationale Privatrecht der Schweiz 453 (2002).

K. Boele-Woelki, T. Einhorn, D. Girsberger & S. Symeonides (Eds.), Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr, 259-275.

private international law, in a comprehensive article by (not surprisingly) Kurt Siehr himself,[2] but the more specific question of the recognition of rights acquired abroad is known to possess deep historical roots.[3]

And yet, even if the problems themselves are not new, it sometimes happens that novel approaches, or novel justifications of old approaches, appear. This is part of the interest of studying the jurisprudence of the European Court of Human Rights, or of the national courts of contracting states to the European Convention on Human Rights that take their cue from the Strasbourg Court: the Court uses quasi-constitutional public law concepts to address what are at root private law problems; its judges certainly are not routineers of the conflict of laws; and it is perhaps by reason of that conflict of laws naïveté that the human rights approach to classical problems of private international law is sometimes more innovative, and more forceful, than the traditional approaches.[4]

1. Limping Family Law Relationships and the Right to Respect for Family Life

Limping family law relationships – the fact that a status, though validly acquired under one state's system of private international law, is not recognized as valid under another's – used to be, and to some extent still are, considered as part of the facts of private international law life. They are inevitable, it is said, because of the very variety of legal systems: connecting factors vary from country to country, as do conceptions of public policy, views on what is proper jurisdiction of the courts or a proper procedure, and so on. A limping status is an ordinary risk of life. It is for the parties to take proper precautions.

The object of this essay is to show that this view of private international law, if inflexibly maintained by the state of recognition (or rather of non-recognition) of a status acquired judicially or extra-judicially abroad, can come into conflict with human rights norms that are binding on that state.[5]

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[2] K. Siehr, *Vertrauensschutz im IPR*, *in* A. Heldrich, J. Prölss & I. Koller (Eds.), Festschrift für Claus-Wilhelm Canaris, Vol. II, 815 (2007).

[3] Siehr, *ibid*., at 816 (citing Huber's theory of recognition based upon *comitas gentium* as well as the vested rights theory of Beale and Pillet's concept of *droits acquis*).

[4] The present writer has used that explanation in earlier contributions: *see The Impact of Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments*, *in* T. Einhorn & K. Siehr (Eds.), Essays in Memory of Peter E. Nygh, 197, at 198-199 (2004); *Droits de l'homme, droits fondamentaux et droit international privé*, 318 RdC 9, at 21-22 (2005).

[5] The same may be true of other kinds of norms; for member states of a federation it may be true of their obligations under the federal constitution, or, for member states of the European Union, of their obligations under European law: *cf.* Case C-148/02,

This will be shown by reference to the European Convention on Human Rights, the oldest of regional human rights conventions, and the only one that has frequently been applied – in the case law of the European Court of Human Rights – to private law relationships. It is in particular Article 8 of the Convention, guaranteeing the 'right to respect for private and family life', even *de facto* family life, that is relevant in this context.[6]

2. Non-Recognition of Foreign Status Judgments: Three Cases in the European Court of Human Rights

2.1. *Hussin v. Belgium* (2004)

Hussin v. Belgium[7] was the first case which confronted the European Court of Human Rights with the possible violation of substantive provisions of the Convention by the refusal of recognition to a foreign judgment.[8] The decision in the *Hussin* case was taken by the Court under Article 35(3) of the Convention which allows the Court to declare applications inadmissible as being 'manifestly ill-founded'. It should be noted that this is the most common result of an application to the Strasbourg Court; although the Court does not, or not yet,[9] have the right to choose among the cases brought before it and to exercise a form of discretionary review, rejection of applications as 'manifestly ill-founded' allows it to some extent to reduce its work-load. This does not mean that such decisions, if

Garcia Avello, [2003] ECR I-11613; Case 353/06, *Grunkin and Paul*, [2008] ECR I-7639. On grounds of limitation of space, these cases, interesting though they are, will not be discussed here.

6 Pioneering studies of the question had been published, before the case law referred to hereafter came into existence, by A. Bucher, *La famille en droit international privé*, 283 RdC 9 at 96-115 (2000); *Id*., L'enfant en droit international privé, 10-12 (2003) and Le couple en droit international privé, 8-14 (2004).

7 Decision of 6 May 2004, no. 70807/01. All judgments and decisions of the Court are available on its website, http://echr.coe.int/echr/en/hudoc

8 A question that had arisen, but had not been decided in the earlier case law of the Court – *Sylvester v. Austria*, decision of 9 October 2003, no. 54640/00, at 6 – was whether non-recognition in Austria of a divorce decree issued by a court in the United States could be considered as a violation of the (procedural) right to a fair trial. This question would reappear, and would be answered affirmatively, in the 2008 case of *McDonald v. France*: *see infra*, section 2.3.

9 The position might change with the entry into force of Protocol No. 14 to the Convention; *see* Art. 12 of that Protocol, which states that an application may also be dismissed if "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

they have been rendered – like *Hussin v. Belgium* – by a full seven-judge Chamber of the Court, do not give the detailed grounds for the dismissal of the application.

The grounds given in the decision in *Hussin*'s case may not be a model of judicial reasoning. But that should not distract from the decision's pioneering nature. The basic facts are these: Mrs. Hussin, a Belgian, was a resident of Siegen in Germany when the local Youth Protection Board, acting on behalf of her two minor children, obtained judgments from the first instance court (*Amtsgericht*) in Siegburg which declared that G., a Belgian national and resident, was the children's natural father and ordered him to provide maintenance for them. The Siegburg court affirmed its jurisdiction over the case by reference to Article 5(2) of the 1968 Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[10] and reasoned that, while matters relating to status were excluded by Article 1(1) of the Brussels Convention, the position was otherwise if, "as in this case, the status matter is linked to an application for a maintenance order".

Mrs. Hussin's efforts to have the German judgments recognized against G. in Belgium failed. The Belgian courts did not share the Siegburg court's construction of the Brussels Convention. They held that the German courts had no jurisdiction to declare G.'s fatherhood; jurisdiction for this matter could not be derived from Article 5(2) of the Brussels Convention but depended on a Belgian-German convention of 1958, under which the Belgian courts had exclusive jurisdiction by virtue of G.'s domicile in Belgium. And as to the maintenance order, this appeared as a 'mere logical consequence' of the decision on fatherhood; since the German courts had no jurisdiction to take the first decision, they had no jurisdiction to order G. to pay maintenance either. Therefore, enforcement in Belgium was denied to both decisions. Mrs. Hussin and her children then brought their case before the European Court of Human Rights.

The European Court first of all decided that its role was not to adjudicate on whether the Belgian courts' refusal of enforcement of the Siegburg court's judgments on grounds of lack of jurisdiction was or was not justified; the true meaning of the Brussels Convention was not a matter for the Strasbourg Court.[11] It then addressed the Hussin's application which was based on Article 8 of the European Convention (right to respect for family life) and on Article 1 of the First Protocol thereto (right to enjoy property – this was intended to apply to the refusal

[10] Under Art. 5(2), "[a] person domiciled in a contracting state may, in another contracting state, be sued […] in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident […]". The Brussels Convention is now replaced by Council Regulation (EC) 44/2001.

[11] At 14.

to recognize the maintenance order). It decided that "the refusal to enforce the judgments of the Siegburg First Instance Court was an interference with the applicants' right to family life as well as with their right to enjoy property".[12] That one sentence in the grounds for the *Hussin* decision is of ground-breaking importance; after all, the Court might have said that not only the true meaning of the Brussels Convention, but also its observance by Belgium were matters of no concern to human rights. That it did not do.

What is more disappointing are the Court's grounds for declaring, nonetheless, that the application was manifestly ill-founded. True, the mere fact that the Court has found an interference with a Convention right is not, in itself, sufficient to enter a finding of violation of human rights; it may be, after all, that the interference can be justified. But that was not truly the object of the Court's examination. It concluded that

> "however, in principle no one can complain of a situation which he himself has contributed to bring about […]. Reviewing the facts of the case, the Court notes that the refusal to enforce the German judgments and the resulting losses apparently stem from the fact that the applicants' initial case would not seem to have been brought before a court of competent jurisdiction, and that this was the reason for their inability to obtain an enforcement order. The Belgian authorities cannot be blamed for their refusal to enforce judgments which appeared to them to have been rendered in disregard of the applicable rules on jurisdiction".[13]

Those grounds are inadequate: how can it be said that the Hussins brought about the Belgian courts' dubious[14] construction of the Brussels Convention?

2.2. *Wagner and J.M.W.L. v. Luxembourg* (2007)

By contrast, the judgment rendered in the next case by the European Court is much more satisfactory. *Wagner and J.M.W.L. v. Luxembourg*[15] involved the judicial adoption in Peru, under Peruvian law, of a child by Mrs. Wagner, a single woman and a Luxembourg national. At the moment of the adoption in Peru, the European Court found, Mrs. Wagner could

[12] At 17 (translated from the French).

[13] At 17.

[14] Be it only because under Art. 28(3), lack of jurisdiction of the originating court is certainly not a valid ground for the denial of recognition to an order of maintenance.

[15] Judgment of 28 June 2007, no. 76240/01, to be reported in the Court's official Reports. The *Wagner* judgment was published in France in 2007 Dalloz 2700, with annotation by Marchadier; 2007 Rev. crit. 807, with annotation by Kinsch; 2008 J.D.I. 183, with a very critical note by d'Avout; Gaz. Pal. Nos. 81 and 82 at 31 (2008), with annotation by Niboyet; briefly noted in Germany in 2007 FamRZ 1529, with annotation by Henrich; and published in Luxembourg in 33 Pas. lux. (doctrine) 225, with annotation by Kinsch.

expect the adoption to be recognised automatically and unconditionally by the civil registrars in Luxembourg. It was only later that this practice, which had been in force from the 1970s to the mid-1990s, was declared illegal by the *Procureur d'Etat* and discontinued. Mrs. Wagner, who had not succeeded in having the child registered under the former practice, was invited to have the Peruvian adoption judgment reviewed by the Luxembourg District Court.

At that stage, the Luxembourg rules on the law applicable to adoption came into play. The reason for this was that at the time, Luxembourg law, following French precedents,[16] still required as a condition for the recognition of a foreign judgment that the foreign originating court should have applied the same law as the one designated by Luxembourg private international law rules, or a law of equivalent content.[17] Now, under Luxembourg private international law the conditions for adopting a child are governed by the law of the adopters' nationality, and under the Luxembourg substantive law of adoption, a full adoption is only possible if it is an adoption by a married couple.[18] Mrs. Wagner was a Luxemburger, she was single, the adoption in Peru was a full adoption. *Ergo* the adoption was denied recognition in Luxemburg.

Mrs. Wagner brought her case in Strasbourg, on her own behalf and on behalf of her adopted child – and won. Characteristically, the Court did not go into the private international law niceties of the relationship between the rules relating to applicable law and the rules relating to the recognition of judgments. That for the Luxembourg courts, an adoption of a Peruvian child by a single Luxemburger was to be denied recognition was considered as a mere fact by the Court. What was of interest to it was whether the policy of the substantive Luxembourg law of adoption was of sufficient weight to prevail against the applicants' interest in having the Peruvian adoption recognised.

The way in which the applicants' interest was taken into consideration under the European Convention on Human Rights was complex – perhaps needlessly so. The Court examined the situation from three different points of view, only to note their ultimate convergence: interference with the right to respect for family life (Article 8); a 'positive obligation', under the same Article 8, for Luxembourg as a contracting state to ensure the protection of the applicants' right to respect for family life organisationally and in terms of judicial procedure; and the right to non-

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16 Civ. 1re 7 January 1964, 1964 Rev. crit. 344.

17 *See*, in the *Wagner* case, Cour d'appel 6 July 2001 and Cass. 14 June 2001, 32 Pas. lux. 10. The requirement was later abandoned, first in France (Civ. 1re 20 February 2007, Rev. crit. 2007, 402), then in Luxembourg, as would appear from Trib. Arr. Luxembourg 10 January 2008, No. 13/2008 (I), unreported.

18 Civil Code, Arts. 370 and 367, respectively.

discrimination in the enjoyment of the same right (Article 14). It will be sufficient for the present purposes to concentrate on interference with the right to respect for family life.[19]

The Court emphasised that the relationship between Mrs. Wagner and the child, as created in Peru, was at least a *de facto* 'family life' relationship within the meaning of Article 8.[20] This, together with Mrs. Wagner's (not unreasonable) belief that it was possible to obtain the automatic recognition of the Peruvian judgment by virtue of the practice of the Luxembourg civil registrars, was sufficient to give rise to an interest in having that relationship protected in Luxembourg, the place of the applicants' residence. Compared to that interest, the application of Luxembourg law's restrictions on full adoption, respectable as their policy aims might be,[21] failed to give due weight to "the child's best interests [which] had to take precedence in cases of that kind". The European Court considered "that the Luxembourg courts could not reasonably disregard the legal status which had been created on a valid basis in Peru and which corresponded to family life within the meaning of Article 8."[22] This was not, after all, a case where a choice was to be made between two candidates for the adoption of an abandoned child – a single woman and a married couple. The adoption had already been effected in Peru, and "the Luxembourg courts could not reasonably refuse to recognise family ties which pre-existed *de facto* between the applicants, thus avoiding a review of the concrete situation at hand".[23] An *obiter dictum* in the judgment implies that if, on the other hand, the Peruvian adoption had been the result of 'child trafficking', then the refusal to recognize it would have been justified.[24]

The *Wagner* case thus shows the combined action of two principles of the European law of human rights, principles which may

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[19] For a fuller analysis under the different points of view chosen by the Court, *see* the annotation in 2007 Rev. crit. at 816-817, *supra* note 15.

[20] On the assimilation of *de facto* and *de jure* family life, the Court (§ 117) cited its earlier case law: *X., Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, *Reports* 1997-II, 619, § 37.

[21] The Court accepts that the restriction of a full adoption to married couples can to some extent serve to protect the child's interests (§ 126), but it also notes that the majority of member states of the Council of Europe allow, without restrictions, adoptions by single persons (§ 129).

[22] § 133.

[23] § 135.

[24] § 126, citing Recommendation 1443(2000) of the Parliamentary Assembly of the Council of Europe ('International Adoption: Respecting Children's Rights'), in which the Assembly – in a wording noted by the Court (at § 42) – "fiercely opposes the current transformation of international adoption into nothing short of a market regulated by the capitalist laws of supply and demand, and characterized by a one-way flow of children from poor states or states in transition to developed countries."

originally have been principles of public law but which can serve private law aims: proportionality and the protection of legitimate expectations. For the judgment in *Wagner* does not lay down an inflexible rule of automatic and unconditional recognition of all foreign adoptions, and it does not aim at the indiscriminate displacement of all conflict of laws rules. It does not hold that in every case the law of the state of origin of a judgment (or more generally of a status acquired abroad) must prevail over the law of the state of recognition. Interference by the law of that state may be justified. In addition, there is an additional element required before the question of justifying the interference with the right to respect for family life even arises: this is the parties' legitimate expectation of stability of the status acquired abroad. 'Family life' does not exist by reason of the mere fact that a foreign authority, chosen by the parties, has attached that label to a given relationship. In particular, cases of *fraus legis* in the creation of the legal relationship abroad, where the parties would be aware that the relationship was artificially brought about, have no claim to protection under the European Convention.

The reason for which the Court concluded, in the *Wagner* case, that there was a legitimate expectation to protect was very special, possibly even unique; it had to do with a dysfunction of the civil registry service, which (unbeknownst to Mrs. Wagner) did not apply the law as it stood. In other cases, where that dysfunction is no longer present, it is to be supposed that it will be the link between the relationship and the state of its creation that will be considered as giving rise to a legitimate expectation as to its stability; what exactly has to be the intensity of that link – a real and substantial link, a preponderant link, or even an exclusive link – will have to be determined as future cases arise for decision.

Also, there is no reason to suppose that only the refusal to recognize a foreign status on grounds of differing choice of law rules can be an interference with the right to protection of family life. The *Wagner* case can serve as a precedent for cases involving other types of refusals as well.[25]

[25] Thus application of the rules of the state of recognition on the *jurisdiction* of the originating court can be an interference with effects quite similar to the application of the Luxembourg rules on applicable law in *Wagner*. That issue has been brought before the Court in a (pending) application against Switzerland: *Michel v. Switzerland*, no. 3235/09, arising out of the refusal of recognition of an adoption judgment rendered in a state (Mexico) other than the state of domicile of the adoptive parents, as required by Art. 78 of the Swiss PIL statute. *See* K. Siehr in D. Girsberger *et al.*, Zürcher Kommentar zum IPRG, 2nd ed., commentary on Art. 78, para. 9 (2004), who deems the rule of Art. 78 justified by the superior capacity of the courts of the parents' domicile to check the conformity of the

2.3. *McDonald v. France* (2008)

The issue of recognition of a foreign status judgment came again before the Court in the case of *McDonald v. France*.[26] The case concerned the denial, by the French courts, of recognition to a divorce decree entered by a Florida court. The ground for denial was one drawn from a provision of the French Civil Code: Article 15 of the Code provides for jurisdiction of the French courts over cases in which persons of French nationality are defendants, and this was traditionally construed, *prater* or even *contra legem*, to provide for exclusive jurisdiction, preventing recognition to any foreign judgment given against a French national – a solution not abandoned until a case decided in 2006,[27] after the *McDonald* case was adjudicated upon in the French Supreme Court in 2004.[28] McDonald (an American diplomat) was married to a French woman. His case was one of the last to be decided according to the old construction of Article 15, and his Florida divorce was denied recognition. So McDonald brought an application against France in the European Court.

McDonald's case was not brought on the basis of a violation of the right to respect for family life (Article 8 of the Convention). Choosing to found the application on Article 8 would have been speculative indeed, since the Court had held in the 1986 case of *Johnston v. Ireland*[29] that a right to divorce was implied neither by Article 8 nor by any other provision of the Convention. Therefore McDonald chose, as the ground for his application, the right to a fair trial (Article 6), asking the Court to extend to a foreign judgment its earlier holding[30] that for proceedings in the same State, effective enforcement of a judgment rendered is an integral part of the 'trial' for the purpose of the fair trial guarantee of Article 6 of the Convention; and submitting that refusal of recognition (in the conflict of laws sense) to a foreign judgment is to be treated as a

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adoption with the child's interests – an opinion cited and followed by the Swiss Federal Tribunal in its decision on the *Michel* case, judgment of 25 June 2008, BGE 134 III 467, 472.

[26] Decision of 29 April 2008, no. 18648/04, published in 2008 Rev. crit. 830, with annotation by Kinsch; 2009 J.D.I. 193, with annotation by Marchadier.

[27] Civ. 1re 23 May 2006, 2006 J.D.I. 1377, with annotation by Chalas; 2006 Rev. crit. 870, with annotation by Gaudemet-Tallon.

[28] Civ. 1re 30 March 2004, 2005 Rev. crit. 89, with annotation by Sinopoli; 2005 J.D.I. 790, with annotation by Barrière Brousse.

[29] Judgment of 18 December 1986, Series A, no. 112; *see also F. v. Switzerland*, judgment of 18 December 1987, Series A, no. 128, § 38.

[30] *Hornsby v. Greece*, judgment of 19 March 1997, Reports 1997-II, 510.

case of refusal of effective enforcement of that judgment. This argument was upheld, in principle, by the Court – an important, but not self-evident holding.[31]

Was the interference with the applicant's right to effective recognition of the American divorce decree justified? McDonald submitted that it was not; he pointed out that Article 15 of the French Civil Code was the archetype of an unreasonable and indeed discriminatory rule. One might well wish to sympathise with this view. Why then, was it rejected by the Court? For a reason that is not devoid of interest. In fact, McDonald had initially applied for a divorce in France, at a moment when he himself was resident with his wife in France; the divorce proceedings introduced by him in Marseilles were rejected by the *tribunal de grande instance* in accordance with French law. Instead of appealing the Marseilles ruling, he brought fresh proceedings in – well, in Florida, which was *not* the spouses' common domicile, nor the wife's residence, but had become the plaintiff's own temporary place of residence. Under the Florida law of jurisdiction, this apparently was sufficient. The French Supreme Court, when affirming the refusal of recognition of the Florida divorce, had emphasised that the Florida rule was hardly less exorbitant than the rule of Article 15 of the Civil Code, so that denying recognition to the McDonald divorce was "neither a violation of the right to a fair trial nor an inadmissible discrimination".[32] The decision of the European Court is similar, but it puts the stress on McDonald's procedural behaviour rather than on a comparison of the abnormalities of French and of American law. It starts by quoting from *Hussin v. Belgium*: "however, in principle no one can complain of a situation which he himself has contributed to bring about." Then:

> "The Court notes that before bringing an action before the American courts for a judgment which he then asked the French courts to

[31] *See* the text, *infra*. In *Sylvester v. Austria* (*supra* note 8), the question had been left open. This question is to be distinguished from a case where the applicant complains of the ineffectiveness of the enforcement measures taken by a state who does recognize the foreign judgment, a case where reference to the *Hornsby* precedent is clearly appropriate, *see, e.g.*, *Huc v. Romania and Germany*, judgment of 1 December 2009, no. 7269/05, § 45. – In favour of the extension to the non-recognition of foreign judgments of the holding in *Hornsby*, *see*, prior to *McDonald v. France*, in Russian case law, Federal Commercial Court for the Moscow District 22 February and 2 March 2006, 2006 Rev. crit. 642, with annotation by Litvinski; *see also* E. Guinchard, *Procès équitable (article 6 CESDH) et droit international privé*, *in* A. Nuyts & N. Watté (Eds.), International Civil Litigation in Europe and Relations with Third States, 199 at 214-216 (2005); F. Marchadier, Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme, nos. 273 *et seq*. (2005).

[32] Civ. 1re 30 March 2004, above note 29. *Cf.* Sinopoli's apposite comment that the Supreme Court's decision is based on 'equality in the realm of the exorbitant' ('égalité dans l'exorbitant'), 2005 Rev. crit. at 99.

> enforce, the applicant should have appealed the judgment of the *tribunal de grande instance* of Marseilles […] which he himself had chosen for his initial divorce application. Therefore the French authorities cannot be blamed for the refusal to enforce a judgment which appeared to them to have been applied for in an attempt to impair, by virtue of the applicant's refusal to take the necessary action, the applicable procedural rules".[33]

The reasoning in the *McDonald* decision is not perfect,[34] but the ultimate holding of the Court is clearly correct: there can be no obligation on a state, including a contracting state to the European Convention, to recognise a judgment obtained on a jurisdictional basis that is as fragile, internationally speaking, as the plaintiff's temporary residence. The perceived misuse of this kind of jurisdictional rules by claimants had been termed 'jurisdictional fraud' in earlier French case law,[35] and it would not appear that France's obligations under the European Convention change anything about that position: there is, in the case of a divorce decree fraudulently obtained, no legitimate expectation of the party having obtained it. In such a case, refusal to recognize the status obtained abroad cannot be considered as an interference – neither an interference in the procedural right to a fair trial nor, in other cases, an interference in the right to respect for family life.

A word of caution, however, regarding *McDonald*. That the Court should have treated the refusal to recognize a foreign divorce as an interference with the – purely procedural – right to a fair trial turns *McDonald* into a precedent that might be difficult to handle in future, different, cases where a party's legitimate expectations *are* at stake, and where the issue of justification of the interference therefore arises. Justification, as *Wagner v. Luxembourg* shows, involves the principle of proportionality. Clearly, the balancing of interests inherent in an exercise of proportionality will become more difficult, and less transparent, if the policy aims of the applicable substantive law are to be weighed against a purely procedural right. That issue did not arise and could not arise in *McDonald*, where the reason for the interference was itself procedural – the perceived lack of jurisdiction of the Florida court. It can, and will, arise in other cases.

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[33] At 10 (translated from the French).

[34] Thus, the Court does not appear to have given consideration to a small, but potentially important, fact: there are differences between the choice of law rules that apply in France and in Florida, and the applicable substantive law of divorce is not necessarily the same. It might well have been to no avail for McDonald to appeal the Marseilles ruling.

[35] Cour d'appel Paris 18 June 1964, *De Gunzburg*, 1967 Rev. crit. 340 (Mexican divorce).

3. From the Recognition of Judgments to the Recognition of a Status Acquired otherwise than through a Judgment

The European cases presented above all happen to concern the acquisition of a status through judicial intervention abroad. One of them – *McDonald v. France* –, which applies a purely procedural right, cannot be extended to situations that have been acquired otherwise than judicially. But the holdings of *Hussin v. Belgium* and, above all, *Wagner v. Luxembourg* are not limited to the recognition of judgments. This can be shown by briefly looking at two cases decided not by the European Court of Human Rights, but by national courts of contracting states which apply the European Convention. These cases concern public law incidents of a family law status, in the field of immigration law.

The first case is *Singh v. Entry Clearance Officer, New Delhi*, a case decided by the English Court of Appeal.[36] It can serve as a reminder that, although under most national laws, adoptions are effected through the intervention of the courts, that is not invariably so. In *Singh*, an Indian child had been adopted in India by a couple of British residents of Indian origin, through a Sikh religious ceremony – in legal terms, a private ceremony. According to Indian law the adoption formally transferred parental rights from the natural parents to the adoptive parents. The adopted child had applied for entry clearance to join his adoptive parents in Britain for settlement. This was refused *inter alia* because the Indian adoption was not recognized by the UK, so that they were not 'adoptive parents' within the meaning of the relevant immigration regulations. On appeal, it was held, that this could not be decisive once the case was considered under Article 8 of the European Convention:

> "The narrow question for decision is whether, in the specific circumstances of this particular case, the relationship between this little boy and his adoptive parents constitutes 'family life' for the purposes of Article 8 of the Convention. […] The question we are required to answer would never have been raised but for one fact: this boy and his adoptive parents come from a society and embrace a faith which hold to a view of adoption sufficiently different from our own that our law refuses to afford recognition to what I have no doubt was in their eyes, as in the eyes of their community generally, a ceremony of the most profound emotional, personal, social, cultural, religious and indeed legal significance."[37]

[36] [2004] EWCA Civ. 1075, [2005] Q.B. 608.
[37] At [57], *per* Munby J.

Considering that "in our multi-cultural and pluralistic society the family takes many forms",[38] the Court held, in substance, that respect for the cultural identity of the parties to the adoption and for their legitimate expectations justified giving effect to a "relationship between adoptive parent and child in circumstances where the adoption, although valid by the *lex loci celebrationis*, is not recognised in our domestic law."[39]

The second is a case decided by the Luxembourg Administrative Court on 3 October 2005.[40] It concerned an application for a residence permit by a citizen of Madagascar who had been married, in a same-sex marriage celebrated in a Belgian town on the Belgo-Luxembourg border,[41] to a Belgian citizen resident in Luxembourg. The Ministry refused to grant him a residence permit, and the applicant appealed to the Administrative Court. The Court, without subjecting the case to a conflict of laws analysis, applied Article 8 of the European Convention and held that: (1) the two men *were* married, since that resulted from the Belgian marriage ceremony, (2) this was not contrary to Luxembourg public policy, since Luxembourg law allows same-sex partners to contract a registered partnership, if not a formal marriage, and that therefore (3) "the Grand-Duchy of Luxembourg cannot deny the right to stay to the spouse of a Belgian national who is a resident of Luxembourg and enjoys close personal, professional and social links with that country in which he has lived and worked for ten years, regardless of the fact that a same-sex marriage is at stake. If it did, it would be self-contradictory and interfere in a disproportionate and unjustified manner with the right of the applicant to respect for his private and family life within the meaning of Article 8."[42]

The judgment of the Administrative Court is certainly not without faults – it would have been preferable for the Court to take into consideration Luxembourg's ratification of the Hague Marriage Convention of 1978,

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38 At [63].

39 At [81]. Munby J. relied on two facts in this respect: "The first is the fact – and fact it is – that this child has been brought up to regard the adoptive parents as his real parents and believes them to be precisely that. The second is the fact – and fact it is – that this little boy cannot understand why he remains separated from his parents, a state of affairs that the Adjudicator found 'causes distress for all parties', indeed 'great distress' to the adoptive parents." *Ibid*., at [90].

40 2006 BIJ 7, with annotation by Kinsch.

41 Under Art. 46 of the Belgian PIL Code, by derogation from the general rule subjecting the substantive validity of a marriage to the national laws of both spouses, a same-sex marriage is to be celebrated in Belgium once either spouse is either a national of, or habitually resident in, a country the law of which allows same-sex couples to marry. The Belgian legislature considered this rule to be required by the principle of non-discrimination between heterosexual and homosexual couples, despite the risk of 'matrimonial tourism' that it entails, *see* J.-Y. Carlier, *Le Code belge de droit international privé*, 2005 Rev. crit. 11 at 32.

42 At 8 (translated from the French).

under which the Belgian marriage might well have been recognized[43] without recourse to the European Convention. It can serve, nonetheless, as an additional illustration of the fact that the precedents in the European Court of Human Rights examined above can be applied to a status acquired by means other than a judgment.

Finally, case law in the field of constitutional rights (a field akin to that of human rights guaranteed by international instruments) shows that for fundamental rights to become relevant, it may not even be strictly required that a status should have been acquired, geographically, abroad. The German Constitutional Court held that, at least for the purposes of the social security effects of marriage (the case concerned a claim for payment of a widow's pension), a marriage which had been celebrated in contravention of the formal requirements of the *lex loci celebrationis* by an Anglican army chaplain in Germany, could be validated by reference to Article 6 of the German Basic Law, a provision similar to Article 8 of the European Convention: the marriage was celebrated in 1947 between a member of the British occupying forces and a German civilian; it was invalid if considered under the forum's choice of law rules but valid if considered under English rules[44]; and – decisively – as long as the husband was alive the parties considered themselves validly married on the basis of the English law ceremony.[45]

4. A Rule of Human Rights Law – or of Private International Law?

Considered together, all of the cases examined can stand for a general idea. A status validly acquired from the point of view of a foreign system of conflicts law, whether through a judgment or otherwise, is entitled to protection under human rights law – specifically, in the European context,

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[43] With one proviso: as Peter Nygh pointed out, it is not entirely clear that same-sex marriages, which were not known in 1978, are covered by the Convention: *see* P. Nygh, *The Hague Marriage Convention – A Sleeping Beauty?*, *in* A. Borrás *et al.* (Ed.), Liber Amicorum Georges A.L. Droz, 253 at 259 (1996).

[44] *Cf.* Dicey, Morris & Collins on the Conflict of Laws, 14th ed., vol. II, Rule 66(4) (2006). And *see* K. Lipstein, *A Modern Common Law Marriage – Armed Forces of Occupation*, *in* J. Basedow, K. Hopt & H. Kötz, Festschrift für Ulrich Drobnig, 381 (1998).

[45] BVerfG 30 November 1982, 62 BVerfGE 323. A later decision of the German Federal Court (the Supreme Court in civil matters) has held otherwise in a similar case involving a marriage in Germany before a priest of the Greek Orthodox Church; it decided that the holding of the Constitutional Court is applicable only to recognition of marriages as a matter incidental to a public law claim: BGH 13 March 2003, 2004 IPRax 438, with annotation by Mäsch at 421. Mäsch points out that this kind of restrictive distinguishing is inappropriate.

under the right, guaranteed by the European Convention, to protection of private and family life and perhaps, in some contexts, under the right to effective enforcement of judgments. There is one precondition: the status must have been acquired in good faith by the parties under the foreign system, and the parties' expectation of stability of their status must have been a legitimate expectation. Legitimacy will normally depend upon the intensity of the links the situation has with the foreign legal system under which the status was acquired. That the parties' expectations are entitled to protection does not mean that they can never be disturbed. But such reasons for disturbing them as may exist under the law of the state of recognition must be assessed against the parties' interest in the stability of their status, in light of the principle of proportionality. It will not be enough that a similar status could not have been acquired under the recognizing forum's own system of conflicts law.

The rule, or the methodology, thus formulated is a rule of the law of human rights that becomes relevant *if* the forum's rules of private international law would not recognize the status. In that case, the role of human rights law, and ultimately of a reviewing court such as the European Court of Human Rights, is to correct the result of the application of the forum's conflict rules. But is that truly necessary in all circumstances? It is submitted that it is not, and that it is much more desirable for the forum's private international law rules to accept voluntarily, in appropriate cases, to recognize a status acquired otherwise than in conformity with the forum's own rules.

The necessary techniques of private international law already exist or are under development. Old or new, they imply a departure from the traditional view – or the 'classical approach'– under which the validity of any situation, however and wherever created, should be assessed by reference to the choice of law rules of the forum.[46] That certainly is one way of dealing with the diversity of existing laws and systems of private international law. It does have all the advantages, together with all the drawbacks, of disciplining the parties' taking advantage of the possibilities that may be open to them under a foreign system of private international law; and it avoids some of the pressure on the forum's *own* system of private law (to adapt and to stay in line with foreign innovations), that is the almost inevitable consequence of a liberal system of recognition

[46] The 'classical approach' has only recently been defended, in a firm (but not doctrinaire) spirit, by A.V.M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement*, 311 RdC 9 (2004) (published in 2009), *see* in particular nos. 33 (while "legal truth is relative as it is restricted to the community in question" … "for each community, there can be only one legal truth, truth is indivisible"), 208, 430 *et seq*., 507.

which allows the parties to 'opt in to one country's law' and to 'opt out of another's',[47] to acquire a status abroad and yet to have it recognized in the forum.

The opposite approach – adopting a liberal system of recognition,[48] with the side-effect of favouring the indirect extension of party autonomy to the field of family law – has exactly converse attractions and disadvantages. The choice between these two approaches cannot, ultimately, be made on purely legal grounds. It is a political choice, and perhaps – though this may be a matter for debate – one that is too serious to be left to the lawyers.

The cases on which this essay is based show, at any rate, a possible compromise solution between the two approaches (which represents, at the same time, a minimum which even a European state willing to maintain the traditional approach can only disregard under peril of censure from Strasbourg). This solution implies a careful modernization of the recognition regime for foreign-acquired status rights – careful, because regard is given to the concrete circumstances and to the degree to which the parties' legitimate expectations are truly involved.

The form which such a regime can take in private international law terms is another question. One possibility would be to create a system of statutory rules of recognition, specific to the various areas of family law, that would be sufficiently flexible to take into consideration all of the relevant factors. Another one, and one that does seem attractive to the present author, is a general clause along the lines of Article 9 of the recently proposed Book 10 of the Dutch Civil Code, which provides that "[i]f legal

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[47] E. O'Hara & L. Ribstein, The Law Market, at 13 *et passim* (2009) – a brilliant (and rather cheerful) study of the direct and indirect effect of such a system of recognition, in a variety of fields (the law of companies, contracts and arbitration, but also family law and property law).

[48] *See* the characterization of the 'split conflicts system' of the Swiss PIL Act of 1987 by F. Vischer, *General Course on Private International Law*, 232 RdC 9 at 231-233 (1992). At p. 246 (the concluding words of his Course), Vischer writes that this system "takes into account the justified expectation of the parties as to the stability of acts validly performed under a legal order and as such can, from the point of view of the forum, claim justification. It openly admits the relativity of all conflicts solutions." – Other instances of the recognition principle are the Hague Marriage Convention of 1978 (*supra* text at n. 43); for judicial divorces and annulments Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility; the case law of the Supreme Court of Israel which allows a status acquired abroad by Israeli citizens to be registered with the Population Registry without regard to the law applied (T. Einhorn, Private International Law in Israel, nos. 471, 519 and 649 (2009)); or the 'méthode de la reconnaissance' that is being developed in French legal writings, *see* P. Lagarde, *La reconnaissance, mode d'emploi*, *in* Vers de nouveaux équilibres entre ordres juridiques, Liber Amicorum Hélène Gaudemet-Tallon 481 (2008).

consequences ensue from a fact by virtue of the law that is applicable according to the private international law of a concerned foreign state, the same legal consequences may be attached to that fact in the Netherlands – even where this would depart from the law that is applicable according to Dutch private international law – to the extent that failure to attach such legal consequences would constitute an unacceptable violation of the parties' justified expectations or of legal certainty."[49] Resolving the highly technical question of identifying the best technique in conflicts terms is, naturally, the proper province of private international lawyers.

[49] Proposal, Tweede Kamer der Staten-Generaal, 2009-2010, no. 32137. *See* Struycken, *supra* note 46 at no. 447, for the translation given above and for a critical commentary on an earlier draft. *Cf.* also the notably more restrictive solution given by Art. 19 of the Belgian PIL Code.