Neutral Citation Number: [2013] IEHC 549

THE HIGH COURT

FAMILY LAW

[2013 No. 10 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991, AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, AND

IN THE MATTER OF COUNCIL REGULATION 2201/2003, AND

IN THE MATTER OF J. J. (A MINOR)

BETWEEN

J. J.

APPLICANT

AND

L. McL.

RESPONDENT

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 26th day of July, 2013

Introduction

1. The applicant J.J. seeks an order pursuant to Article 12 of the Hague Convention for the return forthwith of the child, J.J., to his place of habitual residence in Belgium for the purpose of enforcing the applicant's rights of custody with respect to the said child.

2. The applicant also seeks a declaration that the respondent wrongfully removed the said child from the jurisdiction of the Courts of Belgium within the meaning of Article 3 of the Hague Convention.

3. The respondent maintains that the child did not acquire a habitual residence in Belgium between the date of his birth on 11th September, 2012, and his retention in Ireland some time between 28th December, 2012 and 6th January, 2013.

4. The respondent alternatively submits that if this Court finds that the infant child became habitually resident in Belgium before the aforesaid retention in Ireland, then this Court should exercise its discretion under Article 13B of the Hague Convention and refuse to order the child's return because such return to Belgium would, in the present circumstances, expose the infant to physical and psychological harm and would otherwise place him in an intolerable situation arising from:-

> (a) the summary orders made by the Belgium Family Court from January, 2013 to date which would result in a transfer of custody to the applicant and which would expose the respondent to potential arrest and financial penalties.
>
> (b) The disproportionate and injurious affects for the personal lives of the mother and baby.
>
> (c) The disproportionate and injurious affects for the financial resources available to the respondent mother, and
>
> (d) Damage to the welfare and interests of the infant child.

5. The child, J.J., was born in Borgerhout, Belgium, on 11th September, 2012.

6. The applicant and the respondent were never married to each other and have had a turbulent on off relationship since they first met in 2006.

Facts not in Dispute

7. (1) The applicant and respondent met in Belgium in 2006.

> (2) The applicant works as a logistic manager for the Fire Services in Antwerp, and has been in his present employment since March, 2012.
>
> (3) The respondent works as a product developer in the beverage industry for an American company which has facilities in the UK and also in the Netherlands.
>
> (4) The respondent moved to Cambridge in the United Kingdom in November, 2007 to take up employment there.
>
> (5) The applicant moved to Cambridge with the respondent and they lived there together until the summer of 2009 when they separated.
>
> (6) The applicant moved to Barcelona where he stayed for about two months.

(7) The applicant and respondent remained in contact with each other while the applicant was in Barcelona, and the applicant returned to Cambridge where, following an incident, the respondent drove the applicant with his belongings to Belgium and gave him STG£2,000.

(8) Some months later the applicant moved to London and the applicant and the respondent started to see each other again in May, 2010.

(9) The respondent purchased a home for herself in Cambridge in August, 2010.

(10)The applicant moved into the respondent's home in October, 2010 and remained there until some time prior to March, 2012 when the applicant commenced employed as a logistics manager for the Fire Services in Antwerp.

(11)The respondent became pregnant in December, 2011.

(12)In June, 2012 the respondent commenced maternity leave and moved to the applicant's apartment in Antwerp. She rented her own house in Cambridge.

(13)On 22nd December, 2012 the applicant and respondent travelled to Ireland to stay with the respondent's family in Donegal.

(14)On 28th December, the applicant left the respondent's family home to stay in a local hotel and returned to Belgium on 6th January, 2013.

(15)On or before 6th January, 2013, the respondent returned to the apartment in Antwerp, removed her belongings and notified the Belgian authorities of her departure and an address for her in Donegal.

Submissions and Evidence

8. The applicant submits that at the time the child was retained in Ireland he was in the joint care and custody of the parties in their home in Belgium where joint parental authority had been exercised and that accordingly, the habitual residence of the child at that time was Belgium.

9. The applicant also asserts that the facts of this case do not bring the applicant within the grave risk exception, and for that reason also the child should be returned to Belgium.

10. The applicant commenced proceedings for the return of the child to Belgium pursuant to the Hague Convention by way of special summons issued on 26th February, 2013, and the applicant had also commenced proceedings in Belgium which resulted in certain orders being made, including a provisional order granting the applicant exclusive parental authority with access rights to the respondent.

11. In considering whether or not the infant was habitually resident in Belgium prior to his retention in Ireland, the court notes that there is considerable conflict between the parties not only concerning the background context of their relationship, but also concerning their respective understanding of what was or was not agreed between them.

12. In considering the differences between the parties, the court has considered para. 3 of the respondent's first affidavit and para. 3 in the replying affidavit of the applicant in which he seeks to answer the claims made by the respondent in that paragraph. The respondent states at para. 3:-

> "I say that my relationship with the applicant was a very turbulent relationship and that I first met the applicant in Belgium in December, 2006. I was offered a job in the United Kingdom and I moved to reside in Cambridge in November, 2007 and the applicant decided to move with me. At this time he had no job and we cohabited in accommodation in Cambridge. I say that we separated in the summer of 2009 due to his severe mood swings, depressive behaviour and controlling behaviour. Following this he relocated to Barcelona and I remained in Cambridge although only a few weeks later he returned to Cambridge requesting to live with me again, which I refused. He returned to Barcelona but six or so weeks later he telephoned and emailed to say that he had lost his job in Barcelona. Because he was suicidal at this point and demanded to see me I agreed to visit him for the weekend in Barcelona where he was staying. After the weekend I returned to Cambridge. I informed the applicant that the relationship was definitely over. Within a week of my return to Cambridge the applicant decided to come to Cambridge. He demanded that I look after him because he had no employment. I felt compelled to meet the applicant at the railway station at Cambridge. I told the applicant again that the relationship was over. The applicant continued to shout at me putting me in fear, jumping into my car, shouting at me, demanding that I support him. I drove to my house in Cambridge and the applicant did get out of the car at that stage. I ran into my house and locked the door. The applicant banged on the door of the house and shouted through the letterbox to be let in. I continued to be very frightened and contacted my sister who, in turn, contacted the police and a report was made on 10th October, 2009, to Cambridge Constabulary. The police did arrive to my home on 10th October, 2009, and the applicant did calm down after this. The following day I drove the applicant with his belongings to Belgium from Cambridge. Because he had no money and demanded money from me, I gave him the sum of STG£2,000. A couple of months later, however, the applicant moved to London t work. He continued to inveigle me to resume the relationship and I refused for some time until I agreed to start seeing him again in about May, 2010 (although at this point I refused to live with him."

13. The applicant's response to the respondent is set out in para. 3 of his first affidavit wherein he states:-

> "The information set out by the respondent at para. 3 of her affidavit is variously false or highly exaggerated in order to lend credence to her skewed version of events and is denied in full. At no stage was I suicidal and I note that the respondent visited me in Barcelona on numerous occasions not merely the single occasion to which she refers. The respondent met me at the train station in Cambridge on the occasion she refers to but locked me out of her apartment despite the fact that my belongings were within. My response was to knock at her door as there was no doorbell and speak through her letterbox. It is the case that the police were called by the respondent, however, they noted at the scene that I was neither drunk nor aggressive. Both the respondent and I were spoken to by the

police and the result was that the respondent gave me my belongings from the apartment. I was not arrested and no official complaint was made. The respondent correctly states that she drove the deponent to Belgium the day after the event in question but omits to mention that we shared a hotel room on route without incident. The respondent correctly notes that our relationship resumed after I returned to England for work reasons and that we commenced cohabiting shortly thereafter."

14. In considering the respondent's more detailed account and comparing it with the applicant's response, the court finds the respondent's account a more credible one and find support for this in the email exchange between the parties of 29th September, 2009, which was exhibited in the respondent's second affidavit and marked LM1 and contains the following email from the respondent to the applicant:-

> "Date: Tuesday, 29th September, 2009, 18.40.04
>
> Hey J.,
>
> I am so sorry that you feel so desperate. I have thought a lot about this situation and realise that this is too overwhelming and something I cannot cope with. I feel suffocated and need some time to get things sorted for myself.
>
> Whatever you do is your decision and responsibility but please speak to your good friends and try not to just put this on me.
>
> L."

This was followed by an email to the respondent from the applicant:-

> "Date: Tuesday 29th September, 2009, 20.32.32
>
> Hi L.,
>
> Whatever I do is partly your responsibility as well. You know this very well. Or do you really think that I will find a place to stay and a job tomorrow?
>
> Tried to call you (mobile was switched off and you weren't at home according to Muriel). Are you fucking someone else, Kevin or so?? Is that what women mean when they have to sort things out? I honestly don't know the answer. Drunk a couple of beers for my last night. I hope honestly that I will find the courage to end this shit life tonight. Adios,"

Again, the Court prefers the evidence of the respondent.

15. In para. 4 of her first affidavit the respondent states:-

> "I say that I bought a house outside Cambridge in my own name in August, 2010. The applicant continued to harass me to cohabit with him and because I felt unable to stand up to him, I reluctantly agreed to the applicant moving into my home in or around October, 2010. The applicant lost his job at the Ecommerce firm in December, 2010, and appeared suicidal again. However, the relationship was destructive, controlling, very frightening for the respondent due to the applicant's psychological and behavioural problems. There are two complaints of incidents of domestic abuse and harassment that I had to make against him to the police in England. In August, 2011 I asked the applicant to leave informing him once again that the relationship was over. The applicant demanded STG£20,000 from me to enable him to start a new life. He said he would burn down my house unless I gave him this money. I obtained the money and he then became very emotional and said that he would change."

16. The applicant's response to the respondent is as follows:-

> "First, I wish to state at no stage was I suicidal and I am bewildered as to how the respondent infers that I appeared so in December, 2010. Second, the respondent makes vague references to psychological and behavioural problems and refers to two complaints of domestic abuse and harassment to the English police. The timeframe referred to by the respondent in para. 4 covers the period from August, 2010 to August, 2011, yet the respondent neglects to mention that her complaints to the police were made in March, 2010, that is last month. I say that these complaints were made as a spurious *ex post facto* attempt by the respondent to concoct a false history of abuse by myself to bolster her claims in these proceedings. No complaints were made by the respondent at the time because said abuse never occurred and her attempt to conflate non-existing events of 2011 with complaints some two years later, evidences same."

17. Again, the court prefers the respondent's detailed account of events. While he chooses to deal with matters the subject of a recent police complaint which the respondent says in her second affidavit that she made following advice from a member of An Garda Síochána, the applicant does not deal at all with the final part of para. 4 of the respondent's affidavit. His counsel did tell the court that these matters were denied. The court finds further support for the respondent's account in the subsequent payment by her of a sum of STG£12,000 to enable the applicant enrol for an MBA course. Again, the court finds support in the skyped messages exhibited at LM6 in the respondent's second affidavit as support for her assertion that the applicant put pressure on her to go to Antwerp earlier than she wished. Among the matters the following skyped message sent at 8.05 on 23rd April, 2012, by applicant to the respondent states:-

> "So I put it clear…15th you are not here. I quit my job the same day."

18. In para. 5 of her affidavit the respondent states as follows:-

> "In 2011 the applicant was offered a job in Antwerp in Belgium and in March, 2012 he commenced this job as a logistics manager. I continued to live in my home outside Cambridge. I had become pregnant in December, 2011 and the applicant refused to go to Antwerp to take up employment unless I went with him. At this time he had no job whatsoever in England. He had been unemployed for over twelve months. It had been agreed between the applicant

and I while we were still residing in the UK that I would spend my maternity leave in Belgium and that because the company I worked with in the United Kingdom also had a company in the Netherlands, that we would relocate to the Netherlands after my maternity leave was up in July, 2013. The applicant put pressure on me to go to Antwerp earlier than I had intended and he said to me that if I was not in Antwerp by 15th June, 2012, that he would quit his job. I felt compelled to go earlier than I had intended and in June, 2012 I rented out my house in Cambridge and moved to Belgium to join him. I emphasise however that in doing so, I did not decide to relocate to Belgium. My employer was an American company and I had been given maternity leave for one year whilst undertaking to resume work for this employer in July, 2013 as a beverage technologist working in Hilversum in Holland. Therefore, when I joined the applicant in Belgium in 2012, I did so on a temporary basis and I did not thereby acquire an habitual residence in Belgium and nor by reason of Jack's birth in September, 2012 did my child acquire an habitual residence in Belgium. I also say further and in the alternative that the applicant and I never agreed to continue to reside in Antwerp in Belgium or to bring our child up in Belgium and that the only agreement to be construed from our arrangement was that our child would live with me and would share my habitual residence. I say further and/or in the alternative that my habitual residence remained in England."

21. The applicant's reply to this is contained in para. 5 of his affidavit which states:-

> "The respondent's pregnancy was a planned occurrence that was wanted by both parties and a source of joy. The parties had agreed to move to Belgium prior to the pregnancy and the respondent had already applied for numerous jobs there. I would beg to refer to emails detailing the respondent's applications for jobs in Belgium upon which bundled together and marked with the letters JJ1. I have signed my name prior to the swearing hereof. She considered a position in Hilversum in the Netherlands as she did not obtain any of the positions sought and felt it would be possible for her to work there while living in Antwerp. The job in Hilversum was only ever mooted by the respondent as a possibility and it was certainly never agreed that we would move to the Netherlands. Belgium is and was always intended to be the place of habitual residence of the parties and our child and to this end we signed a co-habitation contract under Belgian law on 7th September, 2012. I beg to refer to a copy of the said contract upon which marked with the letters JJ2. I have signed my name prior to the swearing hereof. Throughout her affidavit the respondent suggests that she was somehow forced, pressurised or compelled by me to do certain things such as resume our relationship or as suggested at para. 5, move to Belgium. The respondent is an independent and educated adult and has never been pressurised or coerced by me into making any decisions. The parties' child, Jack, is habitually resident in Belgium."

22. In holding that the court prefers the evidence of the respondent to that of the applicant, the court acknowledges that this is a summary hearing in which neither party has been tested by cross examination.

Habitual Residence – Applicable Law

23. Article 1 of the Hague Convention states:-

> "The objects of the present Convention are:-
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and
>
> (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."

Article 3 of the Convention provides that:-

> "The removal or the retention of a child is to be considered wrongful where:-
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body either jointly or alone under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised either jointly or alone or would have been so exercised but for the removal or retention."

24. In the course of their respective submissions both parties relied on the Supreme Court judgment of Macken J. in *AS v. CS* [2010] 1 I.R. and the Supreme Court judgment of Fennelly J. in *PAS v. AJS* WJSC – SS delivered in 2004.

25. The latter judgment is particularly apt in the context of the facts of the present case.

26. In the course of his judgment Fennelly J. states:-

> "The Convention deliberately left the notion of habitual residence undefined. The courts of the contracting states have to be free to apply it to the facts having considered all the circumstances of the case. Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a newborn child is incapable of making its choices as to residence or anything else. What the courts have to look at is the situation of their parent and their choices. Where the child has for a substantial period been resident in one country with both its parents while they are in a stable relationship, particularly if they are of the same nationality, the answer will be fairly obvious. This is the normal state of affairs described in a passage from a judgment in one English case which has been widely quoted…Waite J. in *Re B* [1993] 1 F.L.R. 993 at p. 995 stated:-
>
> 'The habitual residence of young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
>
> Habitual residence is a term referring when it is applied in the context of married parents living together to their abode and in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is short or long duration.
>
> All that the law requires for a "settled purpose" is that the parents shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

> Although habitual residence can be lost in a single day, for example, on departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. Logic would suggest that provided the purpose is settled the period of habitation need not be long.'"

Later in the judgment Fennelly J. states:-

> "I do not say that the place of birth of a child is an irrelevant fact. Clearly it will be of prime importance in many cases. The facts of many cases will not be as benign as that of the premature birth during a weekend break in France. I do say, however, that to exclude in every case the possibility of a child being habitually resident in a country where it has never physically been, is to introduce an unjustified restriction into the open and flexible notion adopted by the Convention."

27. Fennelly J. went on to state:-

> "It is also clear that in cases of conflict some or all of the propositions of Waite J. regarding "settled purpose" and "shared intentions" simply may possibly not apply at all. It would be undesirable to lay down rigid criteria for the assessment of situations which are as variable as human nature. However, where the parties have for some time had a settled relationship and shared intentions before a child is born, both parents will normally have equal custody rights which cannot be ruptured unilaterally. However, in situations of deep conflict particular weight must necessarily attach to the relationship of a mother with a newborn child. To quote Butler-Sloss L.J. in *Re F (A minor)* [1992] F.L.R. 548 at 556:-
>
> > 'When the parents separate the child's habitual residence may change and will in due course follow that of the principal carer with whom he resides.'"

Habitual Residence – Conclusion

28. The reality of this case would appear to be that the respondent agreed to go to the applicant's apartment in Antwerp and live with him there for a period of time to enable him to assist her in preparing for the birth of their child, and also to enable him to be involved in the early parenting of their child.

29. The respondent went to Antwerp in the hope that the relationship would work out and her intention was to spend her maternity leave there with the applicant and then to resume work in the Netherlands. The choice of the applicant's apartment as a base for the commencement of family life was due primarily to the respondent's maternity leave and the fact that the applicant had full time employment in Antwerp. By the time the applicant and respondent travelled to Ireland to spend a two week holiday with the respondent's family in Donegal, the respondent had enrolled the child in a crèche in Hilversum in the Netherlands.

30. In considering the impact of these matters on the question of habitual residence, the court also acknowledges that part of the judgment of Fennelly J. where he states that in a situation of deep conflict particular weight must attach to the relationship of a mother with a new born child. The court has considered this matter and holds that the weight to be attached to this relationship is not such as to outweigh the weight to be attached to the implication that arises from the parties agreement to live together in Antwerp in the applicant's apartment prior to and following the birth of the child, and at least prior to the Christmas holiday it appears that the respondent intended to stay there until her maternity leave expired.

31. Although the parties only lived together for a relatively short period following the birth of the child, the court holds that this period of time as well as the respondent's intention when she commenced her maternity leave obliges it to hold that the habitual residence of the child at the relevant time was Belgium.

Best Interest Argument

32. There is no provision expressly requiring a court hearing an application pursuant to the Hague Convention to make the best interests of the child its primary consideration. Nevertheless, this does not mean that the best interests of the child are not at the forefront of the Court's mind. This view is further supported by the provisions of Article 11 of Council Regulation (EC) No 2201/2003 ("Brussels II revised"), which strengthens and (under article 60) takes precedence over the Hague Convention in cases between member states of the European Union (apart from Denmark). Recital (12) to the Regulation points out that "*the grounds of jurisdiction in matters of parental responsibility . . . are shaped in the light of the best interests of the child, in particular on the criterion of proximity"*.

33. The respondent in this matter has argued that this Court should decline to order the return of the infant in this matter on foot of the application of Article 13(b) of the Convention which states that the requested State may decline if "*there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"* and ultimately it is in the "best interests" of the infant not to be forced to return to Belgium. This Court must, in light of the respondents submissions, consider whether the "best interests" of the child must be determined before the procedural mechanisms of the Hague Convention are applied and secondly whether, even if the former is not relevant, the Court can invoke Article 13b and refuse the return of the infant given its determination that Belgium was the country in which the infant was habitually resident immediately prior to the wrongful retention by the respondent.

34. In considering the application of the "best interests" test in Hague Convention applications, it is necessary for this Court to examine the jurisprudence emanating from the European Court of Human Rights as the relationship between the ECHR and the Hague Convention has been recently considered in numerous cases before that Court. Article 8 of the European Convention on Human Rights provides as follows: -

> "Article 8 – Right to respect for private and family life
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

35. From the above it appears that the ECtHR, in carrying out its assessment, must examine whether a measure is (i) in accordance with law, (ii) pursues a legitimate aim in light of Article 8 of the Convention, and (iii) can be regarded as necessary in a democratic society. In terms of our domestic legislation, s.2 of the European Convention on Human Rights Act 2003 provides the following: -

> "(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

36. This Court must thus be cognisant of the obligation to interpret and apply any statutory provision or rule of law in a manner compatible with this jurisdiction's obligations under the Convention. In that regard this Court has considered the recent relevant jurisprudence emanating from the European Court of Human Rights. The most recent relevant judgment of the Grand Chamber is that given in the case of *Neulinger and Shuruk v Switzerland* 41615/07 [2010] ECHR 1053. The Court held, by 16 votes to 1, that basic norms of human rights – at least as expressed in the European Convention of Human Rights – require (a) that courts in every case under the Hague Convention must consider the best interests of both the child and the child's family and (b) that a child should not be returned to its habitual residence, even if that is required by the Hague Convention, if it is not in his or her best interests to do so.

37. The *Neulinger* case concerned the enforcement of a return order in respect of a child (the second applicant) who had been wrongfully removed to Switzerland by his mother (the first applicant). The father, who lived in Israel, had joint guardianship of the child. The Swiss Federal Court had rejected the first applicant's claim, under article 13b of the Hague Convention, that there was a grave risk that returning the child to Israel would lead to physical or psychological harm or otherwise place him in an intolerable situation. The Grand Chamber of the European Court of Human Rights, however, held that to enforce the order would be an unjustifiable interference with the right to respect for the private and family lives of mother and child, protected by article 8 of the European Convention on Human Rights. The Court "*was not convinced that it would be in the child's best interests for [the child] to return to Israel*" or that the mother "*would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel*". In respect of the father, the ECtHR stated that his capacity to provide care was questionable, in view of his past conduct and limited financial resources and because he had never lived alone with the child or seen him since 2005. In its ruling the Grand Chamber stated that the concept of the "*best interests*" of a child was a fundamental principle of human rights that has been enshrined in many international instruments, including the Convention on the Rights of the Child of November 1989, the Declaration on the Rights of the Child of 20 November 1959, the Convention on the Elimination of All Forms of Discrimination against Women and the European Union's Charter of Fundamental Rights. The Court observed that the same philosophy is inherent in the Hague Convention which requires the prompt return of an abducted child unless there is a grave risk of physical or psychological harm or of placing the child in an intolerable situation and stated "*the concept of the child's best interests is also an underlying principle of the Hague Convention*" and thus "*the Court takes the view that Article 13 should be interpreted in conformity with the [European] Convention"*.

38. Of critical importance was the Court's observation that the Hague Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. The decisive issue was whether a fair balance was struck between the competing interests of the child, the two parents and public order, within the margin of appreciation given to states in such matters but bearing in mind that the child's best interests must be the primary consideration. The Court expressed the view that in all decisions concerning children their best interests must be paramount and may override those of the parents but that the parents' interests, especially in having regular contact with their child, nevertheless are a significant factor. 39. The more recent case of *X v. Latvia* (ECHR App. 27853/09 decided by the Third Chamber 13th Dec 2011) was expressly relied upon by the respondent mother in the case currently before this Court. The ECtHR held that the child's "best interests" had to be a primary consideration in the context of the procedures provided for in the Hague Convention. Furthermore, national courts also had the duty to make an in-depth examination of the entire family situation. Emphasizing the paramount interests of the child in matters of this kind, the procedural fairness enshrined by Article 8(2) of the ECHR 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 was 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. The ECtHR held that in light of the above the respondent State had failed to carry out an in-depth examination of all relevant factors when deciding to return the applicant's child under the Hague Convention on the Civil Aspects of International Child Abduction and this amounted to a violation of Article 8(1) of the Convention.

40. In many respects the factual circumstances in this case reflect those of the matter before the Court however there are two critical differences; in *X v Latvia* the child was three years old and the mother had lived in Australia for approximately four years prior to the wrongful act. This is in sharp contrast to the set of circumstances in the matter currently before this Court in which the respondent mother resided for approximately three months prior to the birth of the infant J and thereafter a further three months.

41. In *X v. Latvia* the applicant lived in Australia and obtained citizenship in 2007. She met T and developed a relationship in 2004 and in 2005 gave birth to a daughter while living with T. In 2008 the applicant left Australia with her daughter and returned to Latvia. T. then filed a claim with the Australian courts seeking to establish his parental rights in respect of the child. The Australian court decided that T. and the applicant had joint custody of the child and that the case would be further reviewed once the child was returned to Australia. Once the competent Latvian authorities received notification from the Australian authorities, they heard representations from the applicant, who contested the applicability of the Hague Convention claiming that she had been the child's sole guardian. The Latvian courts granted T.'s request concluding that it was not up to them to challenge the conclusions reached by the Australian authorities concerning his parental responsibility. Consequently, the applicant was ordered to return the child to Australia within six weeks. On appeal, the applicant claimed that the child was well integrated in Latvia and submitted a psychologist's report stating that the child should not be separated from her mother. Her appeal was dismissed. In March 2009 T. met the applicant, took the child and returned with her to Australia. Ultimately, the Australian courts ruled that T. was the sole guardian and that the applicant was only allowed to visit the child under supervision and was not allowed to speak to her in Latvian.

42. The European Court of Human Rights was called upon to assess whether the decision-making process leading to the interference with the applicant's Article 8 rights had been fair and such as to afford due respect to her interests safeguarded by that provision. Such an interference could not be regarded as "*necessary in a democratic society*" if, among other things, the persons concerned were prevented from being sufficiently involved in the decision-making process and if the domestic courts failed to conduct an in-depth examination of the entire family situation and of factors of an emotional, psychological and medical nature. In this connection, the Court reiterated that the concept of the child's "best interests" was a primary consideration in the procedures provided for in the Hague Convention.

43. Before the Latvian courts the applicant had relied on several grounds in order to establish that the child's return to Australia would not serve the child's best interests, in particular the psychologist's report which indicated that the child would be exposed to psychological harm if she was separated from her mother. However, the Latvian courts had failed to consider the clear conclusions of that report, despite the fact that the requirement for procedural fairness enshrined in Article 8 obliged the national courts to pay due respect to the arguable claims brought by the parties in order to ensure that the child's return would be ordered only in his or her best interests and not as a purely procedural measure. In that connection, the Hague Convention had to be seen as an instrument of

a procedural nature and not as a human-rights treaty. The Latvian courts had further omitted to assess the child's material well-being if returned to Australia, or the mother's ability to follow and maintain contact with her there. They had thus failed to carry out an in-depth examination of the entire family situation and all relevant factors, and had rendered the interference disproportionate. The Latvian court should have assessed whether there had been other sufficient safeguards in place in order to make sure that the child's return would have been in her best interests. That assessment should have included at least a consideration of whether the mother would be able to follow and maintain contact with the child if returned to Australia.

44. The Latvian Court of Appeal had not considered the psychological report and had thus disregarded its clear conclusions signalling a risk of psychological damage in the event the child were separated from her mother. The Court concluded (by 5 votes to 2) that the respondent State had failed to uphold Article 8 of the Convention. On 4th June 2012 the case was referred to the Grand Chamber at the Government's request and that hearing was heard on the 10th October 2012 and as indicated in a press release from the ECtHR in June 2013 the decision of the Grand Chamber is still outstanding thus both *Neulinger* and the Third Chamber judgment in *X v. Latvia* represents the current position of the European Court of Human Rights in relation to this net point.

45. Other relevant case law from the ECtHR involving applications lodged by the abducting parent include the case of *Maumousseau and Washington v. France* (15.11.2007). The first applicant, a French national, had married a US citizen and with him had a daughter (the second applicant). The mother had refused to return to the US after a trip to France which the father had consented to. The first applicant argued that the child's return to the US, as ordered by a court in the State of New York, was not in her interest and placed her in an intolerable situation as she was still an infant. The Court took the view that the French courts had "*conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person . . . In doing so, [they] did not identify any risk that [the child] would be exposed to physical or psychological harm in the event of her return*". The Court was therefore satisfied that the child's best interests, which lay in her prompt return to her habitual environment, were taken into account in the French courts. Accordingly, there was no breach of article 8, considered in the light of article 13b of the Hague.

Convention and Article 3.1 of the UNCRC

46. In the case of *Sneersone and Kampanella v. Italy* (12.07.2011) the ratio of *Neulinger* was applied by the European Court of Human Rights in a broad manner. The case concerned the Italian courts' decision to order the return to his father in Italy of a young boy living with his mother (the first applicant) in Latvia. The Court held that there had been a violation of Article 8. The decisions of the Italian courts had given scant reasoning and did not constitute an appropriate response to the psychological trauma that would inevitably stem from a sudden and irreversible cutting of the close ties between mother and child. In addition, the courts had not considered any other solutions to ensure contact between the child and his father.

47. From the foregoing it is clear that the *Neulinger* judgement of the Grand Chamber is hugely significant and with that in mind it is imperative that this Court considers the judgment of the United Kingdom Supreme Court in *Re E (Children)* [2011] UKSC 27 which considered the implications of the *Neulinger* judgment on the operation of the Hague Convention.

48. The Supreme Court concluded that the Hague Convention and the Brussels II revised Regulation have been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration. The Court acknowledged that there may well be ways in which they could be developed further but opined that if a court faithfully applies their provisions it too will be complying with article 3.1 of the UNCRC. In reviewing *Neulinger*, the Supreme Court identified that the decisive issue was whether a fair balance had been struck between the competing interests of the child, the parents and of public order, bearing in mind that the child's best interests must be the primary consideration and the child's interests comprised two limbs: maintaining family ties and ensuring his development within a sound environment, not such as would harm his health and development. The Supreme Court stated that the Hague Convention was premised on the same rationale i.e. the requirement for the prompt return of the abducted child unless there is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The Supreme Court however identifies two paragraphs in the *Neulinger* judgment as being problematic. These two paragraphs are those of 138 and 139 and are cited here in full:-

> "138. It follows from article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. ... For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities . . .
>
> 139. In addition, the court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully. . .. To that end the court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."

49. The Supreme Court concluded at .10, para. 22 that the European Court of Human Rights had "*taken the factual description of what the French courts did at para. 74 of Maumousseau and turned it into a requirement. In doing so, the Court gives the appearance of turning the swift, summary decision making which is envisaged by the Hague Convention into the full-blown examination of the child's future in the requested state which it was the very object of the Hague Convention to avoid*". Furthermore, in countries which are party to the Brussels II revised Regulation, the court of the requested state would not have jurisdiction to make that decision.

50. The Supreme Court sought to distinguish the *Neulinger* case on its facts and upheld the position taken by Aikens L.J. in the Court of Appeal that:-

> "it is not for the Strasbourg court to decide what the Hague Convention requires. Its role is to decide what the ECHR requires" and proceeded to state at para. 26 that:-"The most that can be said, therefore, is that both *Maumousseau* and *Neulinger* acknowledge that the guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full

> blown examination of the child's future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents. The violation in *Neulinger* arose, not from the proper application of the Hague Convention, but from the effects of subsequent delay."

51. Whether or not it is the case that the European Court of Human Rights was influenced by the significant delay involved in the *Neulinger*, this Court is of the view that it is difficult to reconcile the views expressed by the UK Supreme Court with the subsequent cases of the European Court of Human Rights which have endorsed the ratio of *Neulinger* in the absence of such delays as existed in that case, *e.g. Sneersone* and *X v. Latvia*.

The Application of Article 13b

52. Article 13b of the Convention provides that the judicial or administrative authority of the requested state is not bound to order the return of a child if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

53. The question of what constitutes grave risk and the threshold that should be set for behaviour that raises this defence was dealt with in the Supreme Court by Denham J. in *AS v. PS,* Keane J. and Barron J. consenting. In that case there were allegations of sexual abuse of the child by the applicant and the Supreme Court held that the exception to the requirement to return a child under the Convention should be strictly construed and in the course of her judgment Denham J. stated:-

> "The law on grave risk is based on Article 13 of the Hague Convention as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.
>
> This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.
>
> The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

54. In considering the written submissions of the respondent and applicant on grave risk, the court has also had regard to the judgment of Finlay Geoghegan J. in *I.P. v. T.P.* [2012] I.E.H.C. 31 and the judgment of MacMenamin J. in *T.V.M.* delivered on 4th July, 2008.

55. In assessing what is in the child's best interests it is necessary to consider the entire family situation at present. The relationship between the applicant and the respondent has broken down. The respondent has a home in Cambridge in the UK and good employment there which she proposes to resume. The applicant has fulltime employment in Belgium and an apartment there. If the child is returned to Belgium the relationship between the respondent and infant will be sundered, at least for a period of time. While no psychiatric or psychological reports were submitted, the court accepts the respondent's submission that the best prospect this child has of stability and continuity in the infancy of his life lies in his remaining in the primary care of his mother.

56. Accordingly, the court holds that the best interests of the child require that he remain with his mother and not be returned to Belgium.

57. A final question arises concerning whether or not the child will be exposed to grave risk of physical or psychological harm or an otherwise intolerable situation if returned to Belgium.

58. Best interests and grave risk do not necessarily coincide, especially in the case of older children. However, where a newly born child or infant is concerned, absent any exceptional circumstances, it is well established that a stable relationship between the infant and its mother is critical to its early development. Any interference with this relationship could constitute a grave risk to the child's psychological development and thereby cause the child psychological harm. In this case the court has the affidavit evidence of the respondent concerning the applicant's mental health and parenting skills. If the respondent is correct in her assertions about the applicant's mental health and parenting skills, then especially given that the child is an infant there is a grave risk that a summary return to Belgium would expose the child to psychological damage.

59. The court holds that the respondent has not only established that it is in the best interests of the child that he not be returned to Belgium, but has also established that the child would be exposed to a grave risk of psychological harm if returned to Belgium at this stage of his development. Accordingly, the court refuses the application.