

RECHTSLEER/DOCTRINE

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Comment under [Europees Hof voor de Rechten van de Mens, Ferrari tegen Roemenië, arrest van 28 april 2015](#), [Europees Hof voor de Rechten van de Mens, Adžić tegen Kroatië, arrest van 12 maart 2015](#), [Europees Hof voor de Rechten van de Mens, Penchevi tegen Bulgarije, arrest van 10 februari 2015](#), [Europees Hof voor de Rechten van de Mens, M. A. tegen Oostenrijk, arrest van 15 januari 2015](#), [Europees Hof voor de Rechten van de Mens, Hoholm tegen Slowakije, arrest van 13 januari 2015](#), [Europees Hof voor de Rechten van de Mens, Manic tegen Litouwen, arrest van 13 januari 2015](#)

Over the last few years, discussing international parental child abduction has become impossible without considering the case law of the European Court of Human Rights (hereinafter “the Court”). More and more applicants – both the abducting parent, and the left-behind parent – have found their way to the Strasbourg Court. This has resulted in a boom of case law and, consequently, keeping track of all these decisions has become evermore challenging. In order not to get lost in this whirlwind of cases, this article will discuss some of the most recent decisions by the Court.¹ The aim is not to give a detailed analysis of each of these cases, but to point out some interesting and important developments. Two decisions will be dealt with in-depth: *Hoholm v. Slovakia*², a case under the scope of Article 6 of the European Convention on Human Rights (hereinafter “ECHR”), and *M.A. v. Austria*³, a case considering a violation of Article 8 ECHR. Before the analysis of these decisions, a brief introduction will recall the two main international instruments and important case law of the Court.

I. A quick reminder

A. *Relevant international and European rules*

At the international level, the most important instrument to deter and resolve international parental abduction is the 1980 Convention on the Civil Aspects of International Child Abduction (hereinafter “the Abduction Convention”) by the Hague Conference on Private International Law.⁴ The Abduction Convention is a successful instrument, with 93 Contracting States, including all EU Member States.⁵ It introduced a system of administrative cooperation between States by means of centralised authorities to assure the prompt return of

¹ For the purposes of this article the most recent cases are all cases available on the HUDOC search page (<http://hudoc.echr.coe.int>) on the topic of international parental child abduction, rendered after *X v. Latvia*, no. 27853/09, ECHR, 26 November 2013. For an overview, see the table at pages 13 and 14.

² *Hoholm v. Slovakia*, no. 35632/13, ECHR, 13 January 2015.

³ *M.A. v. Austria*, no. 4097/13, ECHR, 15 January 2015.

⁴ Hague Convention on Civil Aspects of Child Abduction, for all relevant information regarding this Convention, see: http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

⁵ For all Contracting States and dates of ratification, see: http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (accessed 5 May 2015).



the child. The Abduction Convention is only applicable when the removal is wrongful, and the lawfulness of a removal is not always easy to determine, as illustrated by *Manic v. Lithuania*.⁶ An unlawful removal can become lawful during the course of domestic proceedings, making the Abduction Convention no longer relevant.⁷ Under the Abduction Convention a removal is deemed unlawful when it “is in breach of rights of custody attributed to a person [...] under the law of the State in which the child was habitually resident”.⁸ The overarching goal of the Abduction Convention is to protect the best interests of the child.⁹ The way to achieve this is by guaranteeing the swift return to the state of habitual residence prior to the wrongful removal.¹⁰ The idea is that the courts of the state of habitual residence are best placed to deal with the merits of the case, that is custody rights.¹¹ The Abduction Convention foresees very limited exceptions to the return order.¹²

When a child is wrongfully removed from one EU member state to another, the Brussels IIa Regulation applies. Article 11 deals with wrongful removal, and is mainly inspired by the Abduction Convention, but makes some significant additional requirements for the member states.¹³ In this respect the child must be heard in all proceedings applying Articles 12 and 13 of the Abduction Convention, unless it would be inappropriate considering the child’s age or degree of maturity.¹⁴ The return judgement has to be delivered within six weeks from the

⁶ *Manic v. Lithuania*, no. 46600/11, ECHR, 13 January 2015. The facts of the case were quite complex. The Lithuanian mother took the child from London to Lithuania for a vacation, but remained there with the child after she notified the father that their relationship was over. She changed her son’s permanent address to Lithuania. The father responded by sending a request to the Vilnius court for the return of his son. Though the Vilnius court recognized that the removal was wrongful, it refused the return because of the strong connection between the mother and the child. It decided that the child could only return together with his mother, which was in fact financially impossible for her. Instead of filing appeal, the father initiated proceedings in the UK. The High Court of Justice in England and Wales decided that the child should permanently reside in Lithuania. The father did not appeal this decision. The case before the Court dealt with the non-enforcement in Lithuania of the British judgment, leading to a violation of Article 8 ECHR.

⁷ Because of the decision of the High Court in England and Wales the case no longer revolved around the wrongful removal of the child, but dealt with the contact rights for the father. See: *Manic v. Lithuania*, para 106.

⁸ Article 3 of the Abduction Convention. Sometimes neither the parties nor the involved authorities recognizes the situation to be a case of international parental child abduction and everyone omits to contact the central authorities. This was the case in *Furman v. Slovenia and Austria: Furman v. Slovenia and Austria*, no. 16608/09, ECHR, 5 February 2015. For the Court this led to a violation of article 8 ECHR by – among other aspects – disregarding the cross-border dimension of the case and by consequently acting less prompt and efficient than what was to be expected. The Court acknowledged that Slovenia was not obliged to apply any measures pursuant to the Abduction Convention. Nevertheless, the abduction took place from Slovenia to Austria, both EU Member States, so they were also obliged under the Brussels IIa Regulation to cooperate. See: *Furman v. Slovenia and Austria*, paras 112 and 122.

⁹ Preamble to the Abduction Convention.

¹⁰ Article 12 of the Abduction Convention.

¹¹ E. PÉREZ-VERA, *Explanatory Report on the 1980 Hague Child Abduction Convention*, 1982, point 19, www.hcch.net/upload/expl28.pdf (accessed 5 May 2015).

¹² Under Article 12 the return can be refused when proceedings are initiated more than one year since the abduction and the child is settled in its new environment. Article 13(1)(a) allows to refuse a return when the person asking for the return did not have custody rights over the child at the time of the abduction or acquiesced in the abduction. A refusal is also possible under Article 13(1)(b) in case of a grave risk that would expose the child to physical or psychological harm or place it in an intolerable situation. When the child objects to the return an exception is possible under Article 13(2), that is when the child has an age and degree of maturity at which it is appropriate to take account of its views. Lastly, for the protection of human rights and fundamental freedoms the return can be denied under Article 20.

¹³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

¹⁴ Article 11(2) Brussels IIa Regulation.



application.¹⁵ There is a stricter application of the exception of “grave risk”: the domestic courts cannot refuse a return based on Article 13(b) of the Abduction Convention when “it is established that adequate arrangements have been made to secure the protection of the child after his or her return”.¹⁶ However, the most important addition is that the Regulation changes the rules when the state of abduction has refused the return based on Article 13(b) of the Abduction Convention. In that case the state of habitual residence prior to the wrongful removal gets a second chance to decide upon the case and can override the decision based on Article 11(8) Brussels IIa of the Regulation. This decision can be complemented by a certificate of enforceability under Article 42 Brussels IIa so that it is immediately enforced in the State of abduction.

B. Important previous case law of the Court

The Court’s interpretation of the Abduction Convention has always been a strict one.¹⁷ That was until the decision of *Neulinger and Shuruk v. Switzerland*. In this case the Court decided that enforcing the return order would lead to a violation of the abducting mother’s and child’s right to family life.¹⁸ The decision was heavily criticised. One of the main critiques was that the decision would jeopardise the speediness of the procedure under the Abduction Convention, which is of paramount importance in child abduction cases.¹⁹ This is because the Court explicitly stated that a return order cannot be applied automatically.²⁰ Moreover, it required domestic courts to make an “in-depth examination of the entire family situation” and to assess the best interest of the child in each case individually.²¹ Because the Court required such intense scrutiny by the national courts, it was feared that this would result in a slippery slope for domestic courts to examine the merits of the case, which goes completely against the principles of the Abduction Convention.²² The Court came to its decision because it found that the child was well settled in its new environment.²³ Under Article 12 of the Abduction Convention this exception can only apply when the proceedings for return were initiated more than one year after the abduction, which was not the case. The risk therefore grew that after this decision abducting parents could possibly be encouraged to prolong the proceedings until

¹⁵ Unless in exceptional circumstances, see: Article 11(3) Brussels IIa Regulation.

¹⁶ Article 11(4) Brussels IIa Regulation.

¹⁷ L. WALKER, “The Impact of the Hague Abduction Convention on the Rights of the Family In the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*”, *J.Priv.Int.L.* 2010, vol. 3, 649.

¹⁸ *Neulinger and Shuruk v. Switzerland*, no. 41615/07, ECHR, 6 July 2010, para 151.

¹⁹ L. SILBERMAN, “Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe - Abbott, Neulinger, Zarraga”, *Oklahoma Law Review*, vol. 63, 733-750; L. WALKER, “The Impact of the Hague Abduction Convention on the Rights of the Family In the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*”, *J.Priv.Int.L.* 2010, vol. 3, 649-682; S. SAROLÉA, “Le retour immédiat de l’enfant déplacé illicitement face à l’écoulement du temps: principe ou option?” (comment under Brussel 11 februari 2010), *RTDF* 2010, 1200, for an a detailed and critical analysis of the case *Neulinger and Shuruk v. Switzerland*. A contrario, see: L. STEVENS, “Internationale parentale ontvoering en het belang van het tijdsverloop: noot bij *Neulinger and Shuruk v. Switzerland*, E.H.R.M. 6 juli 2010 (GK), nr. 41615/07”, *TvMR* 2010, afl. 8, 15-16; R. RIETIKER, “Un enlèvement d’enfant devant la Grande Chambre de la Cour européenne des droits de l’homme: l’affaire *Neulinger et Shuruk c. Suisse* analysée à la lumière des méthodes d’interprétation des traités internationaux”, *Rev.trim.dr.h.* 2012, 410-411.

²⁰ *Neulinger and Shuruk v. Switzerland*, para 138.

²¹ *Ibid*, paras 138 and 139.

²² WALKER, *supra* n 12, 649.

²³ STEVENS, *supra* n 12, 16.



the child would be well settled in its new environment and a return would be made impossible.²⁴

After the controversy in *Neulinger and Shuruk v. Switzerland*, all eyes were on the Court when it had to decide its subsequent case *X v. Latvia*. Although the Court upheld its controversial reasoning from *Neulinger and Shuruk v. Switzerland*,²⁵ it is clear it took (some of) the critique to heart. It tried to close the gap with the Abduction Convention by putting much more emphasis on the importance of the Abduction Convention and its principles, like the prompt return of the child to the State of its habitual residence prior to the wrongful removal.²⁶ It appears the Court is not trying to undermine the Abduction Convention, but will examine in each individual case if the measures taken by national authorities are in line with the rights preserved in the ECHR.²⁷

II. Recent decisions of the Court

Given the number of recent cases, all decided after *X v. Latvia* in 2013, the Court has had plenty of opportunity to fine-tune its approach. The following analysis will scrutinise whether the Court has made any changes in its reasoning or whether it has upheld its previous case-law. It will become clear that in these types of cases the Court continues to hold a very high threshold for States to abide by. In all cases the examination of the Court led to a violation.²⁸

The rights generally invoked in cases of international parental child abduction are the right to a fair trial (Article 6) and the right to family life (Article 8). In a way both rights are also intertwined in these types of cases. The Court has repeatedly held that although Article 8 does not entail any specific procedural requirements, there is inevitably a procedural component in that sense that “the decision-making process leading to measures of interference must be fair, and as such affords due respect to the interests safeguarded by Article 8”.²⁹ Another procedural component of Article 8 is the reasonable time in which proceedings dealing with return decisions have to be taken.³⁰ This leads the Court to decide the case mostly under Article 8 ECHR, although a violation of procedural elements is also at stake.³¹

²⁴ SILBERMAN, *supra* n 12, 744.

²⁵ R. SCHUZ, *The Hague Child Abduction Convention: A Critical Analysis*, Oxford, Hart Publishing, 2013, 27.

²⁶ See for instance *X v. Latvia*, paras 93-94 and 105-106. Para 105 reads: “Against this background the Court considers it opportune to clarify that its finding in paragraph 139 of the *Neulinger and Shuruk* judgment does not in itself set out any principle for the application of the Hague Convention by the domestic courts”.

²⁷ The national courts enjoy a large margin of appreciation to evaluate the best interest of the child in the light of the exceptions of the Abduction Convention. They are best-suited to decide upon the case seeing their direct contact with the concerned parties. The role of the Court is to supervise these national decisions, to see if they were fair and truly correspond to the best interest of the child: *Ferrari v. Romania*, no. 1714/10, ECHR, 28 April 2015, para 46; *X v. Latvia*, paras 101 and 102.

²⁸ In nine out of twelve cases the decision was even unanimous: See table at pages 13 and 14.

²⁹ *Manic v. Lithuania*, para 108; *McMichael v. the United Kingdom*, no. 16424/90, ECHR, 24 February 1995, para 87.

³⁰ *Adžić v. Croatia*, nr. 22643/14, ECHR, 12 March 2015, para 93. In this case the Croatian courts took three years to decide over the return of the child to the USA. This amounted to a violation of Article 8 ECHR. In *V.P. v. Russia* the Court however did recognize that the length of proceedings in international child abduction cases can be influenced by the international elements in those type of cases. See: *V.P. v. Russia*, no. 61362/12, ECHR, 23 October 2014, para 154.

³¹ See for instance: *Ferrari v. Romania*, paras 30 and 31; *Penchevi v. Bulgaria*, no. 77818/12, ECHR, 10 February 2015, para 78.



This article shall continue a discussion of, firstly, a decision in the scope of Article 6 ECHR and subsequently a decision in the scope of Article 8 ECHR. Some aspects of other decisions under Article 8 ECHR will also be highlighted.

A. *Article 6 ECHR: the duration of the length of the proceedings leading to a violation in Hoholm v. Slovakia*

The right to a fair trial is enshrined in Article 6 ECHR. Unlike the case of *Neulinger and Shuruk v. Switzerland* where the length of the proceedings led to the integration of the child in the State of abduction in favour of the abducting parent, the Court in *Hoholm v. Slovakia* came to a different conclusion. The excessive length of the proceedings – seven years –, caused by the national authorities and the Slovakian procedural system, was in violation of Article 6 ECHR.

1. *Facts of the case*

The case concerned a child abduction from Norway to Slovakia. The parents lived together in Norway with their two children. After they got divorced the Norwegian court determined the joint responsibility of the parents and put the care of the children with the Slovakian mother. It also barred the parents from unilaterally removing the children from Norwegian territory without the consent of the other parent.³² Nevertheless, in July 2005 the mother took the children to Slovakia. In December 2005 the father started proceedings under the Abduction Convention in Slovakia for the return of the children to Norway.³³

What follows are seven long years of proceedings in Slovakia (that is even before the case eventually got to Strasbourg) where the case went several times from the District court to the Regional court for appeal, up until the Supreme Court and the Constitutional Court and back. In total the case was examined four times by the ordinary courts, and this both in first instance as on appeal, twice by the Supreme Court and once by the Constitutional Court.³⁴

An important procedural specificity of Slovakia is that the parties can request the Prosecutor General (Hereinafter “the PG”) to exercise his discretionary power to challenge the appeal by way of an extraordinary appeal on points of law before the Supreme Court.³⁵ First the father and later the mother filed a petition to the PG. The father’s request was rejected because the extraordinary appeal would not be available for family matters.³⁶ However, in a later round the mother was allowed an extraordinary appeal. The Supreme Court sent the case back to the lower courts because they had based their decision of return on a – by that time – out-dated social report of the Norwegian central authority.³⁷ Finally, in December 2012, the Regional court decided that it was in their best interest that the children should not be returned to Norway since they wished to stay with their mother, and they had spent more than half of their lives in Slovakia and were well integrated.³⁸ Upon this decision the father filed a complaint in Strasbourg claiming his rights protected by Article 6§1 ECHR taken alone and in conjunction with Article 13 ECHR had been violated due to the length of the proceedings.

³² *Hoholm v. Slovakia*, para 8.

³³ *Ibid*, paras 9 and 11.

³⁴ *Ibid*, para 45.

³⁵ *Hoholm v. Slovakia*, para 14.

³⁶ *Ibid*.

³⁷ *Ibid*, para 21.

³⁸ *Ibid*, paras 25 and 26.



2. Reasoning of the Court: excessive length of proceedings

It was not the first child abduction case against Slovakia that found its way to the Court. In the case of *López Guió v. Slovakia* the Court also found a violation because of the length of proceedings in Slovakia, but then under Article 8 ECHR.³⁹ This explains why the Court rightfully decides there is a violation of Article 6 ECHR.

In its decision the Court reiterates that “the reasonableness of the length of the proceedings has to be assessed in the light of the circumstances of the case and with reference to [...]: the complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant in the dispute”.⁴⁰ Neither the relative complexity of the case, nor the conduct of the applicant raised any problems. Referring to its decision in *López Guió* the Court makes a clear statement about what the domestic return proceedings should investigate. Since *Neulinger and Shuruk v. Switzerland* there has been a fear that the in-depth examination would bring domestic courts to decide over the merits of the case. The Court clearly states here that that is not what it is asking.⁴¹ The subject matter of national proceedings deciding over the return of the child should stick to the standards of the Abduction Convention.⁴² The only three specific questions the national courts in the return proceedings should deal with are: “whether there has been a removal or retention of a child, whether such removal or retention was wrongful, and whether there are any obstacles to the child’s return”.⁴³ In the spirit of the Abduction Convention any other questions, relating to the status of the child or the rights and responsibilities of the parents, should be dealt with by the courts in the State of habitual residence before the removal.⁴⁴ On a side-note it should be mentioned here that it appears the national courts are not completely excused from the thorough “in-depth examination”. Less than a month after this decision, the Court repeated its previous “in-depth examination”-test in the case of *Penchevi v. Bulgaria*.⁴⁵ The specific nature of that case makes it clear why the Court chose to go back to that test, but this makes it of course very difficult for domestic courts to know to what extent they should apply an “in-depth examination”.⁴⁶

Although the Court is hesitant to completely discard the existing system of remedies in international child abduction cases in Slovakia, it has its reservations about a system allowing appeals and extraordinary appeals on points of law that basically undermine the object and purpose of the Abduction Convention.⁴⁷ The Court stresses the “critical importance attached to the passing of time” in abduction cases, especially because the passage of time is usually used as the most important argument not to return children.⁴⁸ The Court also took into account the fact that the father was denied an extraordinary appeal to the PG, and that the length of the proceedings was jointly caused by the national authorities when they required up-to-date

³⁹ *López Guió v. Slovakia*, no. 10280/12, ECHR, 3 June 2014.

⁴⁰ *Hoholm v. Slovakia*, para 44.

⁴¹ *Ibid*, para 47.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Hoholm v. Slovakia*, para 47; *López Guió v. Slovakia*, para 90.

⁴⁵ *Penchevi v. Bulgaria*, para 55. This case dealt with a violation of Article 8 ECHR, but on behalf of the abducting mother. The Court concluded that there was a violation because no real analysis was conducted to give the child a travel document to travel abroad with his mother. In any case it is strange, and nonetheless confusing, that the Court applies a different “in-depth examination” depending whether the applicant is the abducting or the left-behind parent.

⁴⁶ For more information regarding this case, see later II.C.3.

⁴⁷ *Hoholm v. Slovakia*, para 49; *López Guió v. Slovakia*, para 108.

⁴⁸ *Hoholm v. Slovakia*, para 51.



evidence after they examined the evidence with delay.⁴⁹ The Court concluded that the length of the proceedings was excessive and a reasonable time was not met, causing a violation of Article 6§1 ECHR. Moreover, it found that there was also a violation of Article 13 ECHR – taken separately and in conjunction with Article 6 – by denying the father an effective remedy before the Slovakian authorities.⁵⁰

B. Article 8 ECHR: the principles of the Court's case-law as shown in M.A. v. Austria

The right to respect for family life is set out in Article 8 ECHR. Interference by the State is prohibited unless it “is accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁵¹

In the case of *M.A. v. Austria* the Court both examines the Abduction Convention and the Brussels IIa Regulation. The case is a good example of the interaction between these two international instruments.

1. General principles

When dealing with cases of international parental child abduction the Court has adopted a systematic approach to its case law.⁵² Firstly, it establishes whether or not there is “family life” between the applicant and the abducted child. Once this is decided, the Court examines if there is a failure to respect the applicant’s family life.⁵³

The goal of Article 8 is to protect the individual from arbitrary actions by public authorities.⁵⁴ This entails both negative as positive obligations for the State to ensure an effective respect for the right to family life.⁵⁵ What these positive obligations exactly are is not defined. Applied to cases of international child abduction the Court has always found that these positive obligations include “the parent’s right to have measures taken with a view to being reunited with his or her child and an obligation on the national authorities to take such measures”.⁵⁶ However, the positive obligations for the State are not absolute.⁵⁷ The State enjoys a certain margin of appreciation. In any case the State must strive to strike a fair balance between the competing interests of the individuals – both parents and the child – and of the community as a whole.⁵⁸

⁴⁹ *Ibid*, paras 49 and 52.

⁵⁰ *Ibid*, para 57.

⁵¹ Article 8(2) ECHR.

⁵² As an important note, it should be added that it seems the Court takes a slightly different approach when the applicant is the abducting parent. See for instance *Penchevi v. Bulgaria*, paras 62-74. In this case the Court deals with the examination of Article 8 in its traditional way: the accordance with the law of the interference; the pursuit of a legitimate aim; and the necessity in a democratic society.

⁵³ See among others: *Ferrari v. Romania*, para 41; *Hromadka and Hromadkova v. Russia*, no. 22909/10, ECHR, 11 December 2014, para 147.

⁵⁴ In many other cases the Court always repeats that the “mutual enjoyment by parents and children of each other’s company constitutes a fundamental element of family life and is protected under Article 8 of the Convention”. See: *Ferrari v. Romania*, para 43; *Penchevi v. Bulgaria*, para 53.

⁵⁵ See among others: *M.A. v. Austria*, para 104; *Hromadka and Hromadkova v. Russia*, para 149.

⁵⁶ *Adžić v. Croatia*, para 92; *M.A. v. Austria*, para 105.

⁵⁷ *M.A. v. Austria*, para 106.

⁵⁸ *Ferrari v. Romania* no. 1714/10, para 44; *M.A. v. Austria*, para 106.



The Court interprets these positive obligations in the light of the Abduction Convention and the Convention on the Rights of the Child.⁵⁹ Even in cases where the Abduction Convention was not directly applicable to the case, the Court will rely on its general approach, referred to by the Court as its “Hague Convention case law” in *V.P. v. Russia*.⁶⁰ The most important consideration is the best interest of the child. Since *X. v. Latvia* the Court has made it clear that the prevention and the immediate return of the child fall within this scope.⁶¹

Since the speed of the return proceedings is key under the Abduction Convention, the Court holds that “the adequacy of a measure is to be judged by the swiftness of its implementation”.⁶² The Court has always underlined the “urgent handling” of these cases because “the passage of time can have irremediable consequences for the relations between the child and the non-parent”.⁶³ That is why both the Abduction Convention and the Brussels IIa Regulation foresee a timeframe of six weeks for the return of the child.⁶⁴

2. Facts of the case

The Italian father petitioned the central authorities for the return to Italy of his daughter, wrongfully removed by her Austrian mother to Austria in February 2008.⁶⁵ The Austrian court decided not to allow such return. Given her very young age, the girl would be exposed to a grave risk under Article 13(b) of the Abduction Convention.⁶⁶ The father unsuccessfully appealed this decision and the Austrian courts awarded the mother sole custody over the child.⁶⁷

In compliance with Article 11(8) of the Brussel IIa Regulation, the father then initiated the so-called ‘second chance’ proceedings asking again to order the return of his daughter, but this time before the Italian courts. The Italian court complied with the request and decided in July 2009 that the child should return to Italy, but that she should live with her mother. The mother would therefore be helped by the local social services department to obtain accommodation in Italy. Only if the mother would not return with the child, the girl should stay with her father.⁶⁸ The court issued a certificate of enforceability under Article 42 of the Brussels IIa Regulation. With this certificate, the decision was immediately enforceable in Austria.

⁵⁹ And other international law applicable between the Contracting Parties: See for instance: *Ferrari v. Romania*, para 45; *Neulinger and Shuruk v. Switzerland*, para 132; *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECHR, 25 January 2000, para 95.

⁶⁰ See for instance two cases with Russia: Russia has ratified the Abduction Convention on 1 October 2011, but the acceptance of other Contracting States happened after this date. However, even if at the time of the events the Abduction Convention did not apply to the case, the Court will indirectly apply it through its developed case-law. See: *Hromadka and Hromadkova v. Russia*; *V.P. v. Russia*. Also important to know is that the fact that a State does not have a frame work set up for fighting child abduction, can lead to a violation of Article 8 ECHR. See: *Hromadka and Hromadkova v. Russia*, para 157.

⁶¹ *Ferrari v. Romania*, para 44; *X v. Latvia*, para 95.

⁶² *Adžić v. Croatia*, para 94; *M.A. v. Austria*, para 109.

⁶³ *Adžić v. Croatia*, para 94; *M.A. v. Austria*, para 109; *Blaga v. Romania*, no. 54443/10, ECHR, 1 July 2014, para 72.

⁶⁴ In the Abduction Convention the six week time period is not obligatory, but can give rise to a request for explanations. See Article 11 of the Abduction Convention and Article 11(3) of the Brussel IIa Regulation.

⁶⁵ *M.A. v. Austria*, para 8.

⁶⁶ *Ibid*, para 15.

⁶⁷ *Ibid*, paras 18-22.

⁶⁸ *M.A. v. Austria*, paras 23 and 24.



The father then attempted to enforce the Italian judgement in Austria. This led to proceedings before the Austrian Supreme Court, which in their turn led to a preliminary ruling before the Court of Justice of the European Union (Hereinafter “the CJEU”).⁶⁹ In its decision of 1 July 2010 the CJEU confirmed that a change of circumstances that could be harmful to the best interest of the child should not obstruct the enforceability of the judgement. Any change of circumstances should be dealt with before the courts of the Member State (of the EU) of origin after the return.⁷⁰ Subsequently, the Austrian Supreme Court dismissed the appeal by the mother and sent the case back to the first-instance court to enforce the Italian judgement. The enforcement did not take place.⁷¹

In the hope to see his rights enforced, the father successfully filed another claim before the Italian courts for the return of his daughter.⁷² The Italian court issues a certificate of enforceability. The mother then continued to fight the enforcement of this decision all the way up to the Austrian Supreme Court, where the Supreme Court upheld its earlier decision (after the ruling of the CJEU) that any change in circumstances should be dealt with by the Italian courts.⁷³ When the case then got sent back to the Austrian first-instance court, the judge tried to persuade the parents to reach a workable compromise, in order to avoid any trauma to the child when the return order would have to be enforced. The father informed the court that he did not want an extra hearing with the mother, but he agreed that they should reach a solution to make the return to Italy as least traumatic as possible. The mother wanted to participate in the hearing, but at the same time blocked any further steps by appealing the courts’ competence.⁷⁴ Then she brought her case before the Court alleging a violation of Article 8 ECHR, which was declared inadmissible.⁷⁵ Because the Italian judgement ordering the return of the child was still not enforced, the father filed an application before the Court claiming a violation of his rights protected under Article 8 ECHR.

3. Reasoning of the Court: failure to enforce a return order

In *M.A. v. Austria* one of the main questions was what national authorities can do when the abducting parent does not want to cooperate and refuses to enforce the return order?⁷⁶

The Court repeated that, “coercive measures against children are not desirable in this sensitive area or might even be ruled out by the best interest of the child”.⁷⁷ Although it is true that the State has to do everything in its power to reunite the parent and child, sometimes the passage of time does not allow for an immediate reunion, but requires preparatory measures. The particular circumstances of each case will determine the nature and extent of such measures.⁷⁸ Understanding and co-operation is key, and there is an onus on the State to make such co-operation possible, while at the same time limiting coercion.⁷⁹ In other cases the Court has considered the use of coercive measure against the abducting parent. In many States the

⁶⁹ *Ibid*, paras 27-32.

⁷⁰ Case C-211/10 PPU, *Doris Povse v Mauro Alpage* [2010] ECR-I-6673, at 83.

⁷¹ *M.A. v. Austria*, paras 34-39.

⁷² *Ibid*, para 40.

⁷³ *Ibid*, paras 44-49.

⁷⁴ *Ibid*, paras 51-53.

⁷⁵ *Sofia Povse and Doris Povse v. Austria*, no. 3890/11, ECHR, 18 June 2013.

⁷⁶ For the Court’s reasoning on a violation of Article 8 ECHR by not enforcing a return order, see: *Ignaccolo-Zenide v. Romania*.

⁷⁷ *M.A. v. Austria*, para 107; *Ignaccolo-Zenide v. Romania*, para 106.

⁷⁸ *M.A. v. Austria*, para 106.

⁷⁹ *Ibid*, para 106.



abducting parent can be charged with criminal proceedings because of the abduction.⁸⁰ In a preceding case of *Cavani v. Hungary* the Court found that criminal proceedings against the abducting parent are not incompatible with the Convention rights. It repeated that, “the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live”.⁸¹

It is the obligation of the State to take all measure it could be reasonably expected to take to ensure the return of the child. These measures have to be swift and adequate while striking a fair balance between the interests of the child, the parents and the public order.⁸² That is the test for the Austrian authorities in this case. The Court then applies its general principles to the facts of the case. It found that the first part of the proceedings were not unreasonable. The referral by the Austrian Supreme Court to the CJEU was necessary.⁸³ Nevertheless, the proceedings following the referral were too slow. The Court recognizes that the case is complicated and not all delays were due to the Austrian authorities; also the Italian authorities caused a delay by not replying, the applicant started a new round of proceedings in Italy and the parents did not want to cooperate with each other.⁸⁴ However, the Court noted that, “the lack of co-operation between separated parents is not a circumstance which by itself may exempt the authorities from their positive obligations under Article 8 ECHR”.⁸⁵ The fact that the return order at the time of the judgment is still not enforced, is an important factor for the Court.⁸⁶ Since time is such an important issue in child abduction cases, it is up to the State to put in place an effective and timely framework for the enforcement of return orders.⁸⁷ The Court even states that the presumption that the return is in the best interest of the child stands, as long as the return decision remains in force.⁸⁸ The Court suggests that specific proceedings for a speedy enforcement should apply in these types of cases.⁸⁹ That was not the case here and therefore, the Court concludes that there is no effective protection of the right to family life for the applicant.⁹⁰ One could counter that the Court has now placed too high an expectation of the abilities of the state. If the parents systematically obstruct each other, then what should Austria have done to avoid a violation? The Court does not offer a solution.

⁸⁰ In Belgium for instance the unlawful removal is sanctioned in Articles 431 and 432 of the Belgian Criminal Code.

⁸¹ *Cavani v. Hungary*, no. 5493/13, ECHR, 28 October 2014, para 52; *Ignaccolo-Zenide v. Romania*, para 106.

⁸² *M.A. v. Austria*, para 111.

⁸³ *Ibid*, para 127.

⁸⁴ *Ibid*, paras 128-129 and 132.

⁸⁵ *Ibid*, para 132.

⁸⁶ *Ibid*, para 133.

⁸⁷ *Ibid*, para 135.

⁸⁸ *Ibid*, para 136. The reasons were given in the case of *Hromadka and Hromadkova v. Russia*: “the “abductor” parent should not be permitted to benefit from his or her own wrong, should not be able to legalise a factual situation brought about by the wrongful removal of the child, and should not be permitted to choose a new forum for a dispute which has already been resolved in another country. Such presumption in favour of return is supposed to discourage this type of behaviour and to promote “the general interest in ensuring respect for the rule of law”, see *Hromadka and Hromadkova v. Russia*, para 152. It should be said though, that the Court in *V.P. v. Russia* says that this presumption is rebuttable in the sense that when too much time has passed between the abduction and the enforcement of the return order, this could lead to a violation of Article 8 ECHR. This is of course based on its ruling in *Neulinger and Shuruk v. Switzerland: V.P. v. Russia*, para 136.

⁸⁹ *M.A. v. Austria*, para 136.

⁹⁰ *Ibid*, paras 137 and 138.



C. Article 8 ECHR: other aspects

1. Length of the proceedings

The case of *M.A. v. Austria* dealt specifically with the failure to enforce the return order. However, there is not a final enforceable return order in all child abduction cases. In many cases of international parental child abduction the domestic court declines the return based on the fact that too much time has passed since the abduction and that the child is settled in its new environment. These are the remains of *Neulinger and Shuruk v. Switzerland*. Nonetheless, it seems times have changed and the Court, in line with the Abduction Convention, is much stricter about the swift timeframe at the domestic level. For instance in *Adžić v. Croatia* the domestic courts took three years to render a final decision and this was found to be too long.⁹¹ In *Ferrari v. Romania* the time period was much shorter, thirteen months, and even this period was deemed excessively long by the Court.⁹²

2. Hearing of the child: not a right to veto

When the best interest of the child is the most important principle to follow in child abduction cases, one could assume much importance is attached to the opinion of the child. Both the Abduction Convention and the Brussels IIa Regulation stress the significance of the opinion of the child, when the child is mature enough to be heard.⁹³ Despite this wording, in reality the opinion of the child is not so evident. This can be illustrated by the case of *Blaga v. Romania* where the mother had abducted her three children from the USA to Romania. At the time of the abduction the oldest child was ten years old and the two other children (twins) were almost eight.⁹⁴ In the proceedings for return, within a year after the abduction, all children had freely expressed their wish to stay in Romania. Under Romanian law ten years is the minimum age to take the child's view into account. Because the oldest child was eleven and clearly expressed her wish to stay, the judge considered that the opinion of the younger twins should also matter since separating the children would be too traumatic for them.⁹⁵

The Court in its decision stated that although the opinion of children has to be taken into account, "their opposition is not necessarily an obstacle to their return".⁹⁶ The Court agrees that although only the oldest child met the national lawful required age to be heard, the conditions to rely on Article 13(2) of the Abduction Convention were met. The Bulgarian court had motivated its decision to hear all children sufficiently.⁹⁷ What is more problematic according to the Court is the weight the domestic court attributed to the opinion of the children. The Bulgarian court had refused the return solely based on the refusal of the children. This is not in accordance with Article 13(2) of the Abduction Convention, which

⁹¹ *Adžić v. Croatia*, para 97.

⁹² The Court refers also to other cases that were deemed to be excessively long, where the time frame for the proceedings were 12 months (*Monory v. Romania and Hungary*, no. 71099/01, ECHR, 5 April 2005, para 82), 11 months (*Karrer v. Romania*, no. 16965/10, ECHR, 21 February 2012, para 54), or even less than a year (*Strömblad v. Sweden*, no. 3684/07, ECHR, 5 April 2012, para 93). See: *Ferrari v. Romania*, para 54.

⁹³ In Article 13(2) of the Abduction Convention it is one of the exceptions to the return order; in Article 11(2) of the Brussels IIa Regulation the child *has* to be heard in proceedings under Article 12 and 13 of the Abduction Convention.

⁹⁴ *Blaga v. Romania*, paras 6 and 8.

⁹⁵ *Ibid*, para 20.

⁹⁶ *Ibid*, para 66.

⁹⁷ *Ibid*, para 78.



only allows for the “possibility” to hear the child, it is not an obligation.⁹⁸ The right of the child to be heard does not equal a right to veto to the return.⁹⁹ The Court notes that also other factors should be put on the scale before the national court can refuse the return.¹⁰⁰

3. *Prevention of international parental child abduction can lead to a violation*

The prevention of a wrongful removal can also lead to a violation of Article 8 ECHR.¹⁰¹ In *Penchevi v. Bulgaria* the mother wanted to take her son with her while obtaining her master’s degree and then her doctorate degree abroad in Germany, but could not do so without the consent of the father. Although the parents were divorced and the abusive father could not even see his child due to a restraining order, under Bulgarian law both parents had to give their consent for any kind of travel abroad of the child. The mother had obtained permission to take her child abroad with her, but the Bulgarian Supreme Court upheld its “established and binding case-law” that one parent alone could not decide to travel abroad with the child because this would essentially not be in the best interest of the child.¹⁰²

In its analysis the Court did not find this specific condition in Bulgarian law to be a disproportionate limitation of the right to family life. However, the Supreme Court of Bulgaria had applied this provision overly formalistic and did not conduct an actual analysis of the facts of the case. The Court observed that the Supreme Court had not taken into account the previous restraining order of the father; the fact that it was not the father but the grandparents who actually took care of the child while the mother was abroad; the sufficient financial means of the mother; the fact that the mother wanted to travel with the child to Germany where there were no real and specific risks for the travel; the care of the mother; the fact that the child adapted well in Germany; and elements of psychological, emotional, material or medical nature. Moreover, the court proceedings dealing with the travel of the child abroad lasted too long, two years and eight months. These elements amounted to a violation of Article 8 ECHR.¹⁰³

D. *Article 8 ECHR: the Court gives its most recent state of the art*

The biggest problem after *Neulinger and Shuruk v. Switzerland* in cases of international parental child abduction has been that there is no more clarity of the standards that national courts have to meet. In its most recent decision of *Ferrari v. Romania* the Court made an effort to shed some light on the situation. The Court made an outline of the obligation the State has to meet in order to respect the right to family life under Article 8 ECHR, interpreted in the light of the Abduction Convention.¹⁰⁴

Firstly, the national authorities, meaning the national courts, have to examine if one of the exceptions to an immediate return applies, especially when the exception is raised by one of the parties.¹⁰⁵ An automatic return is out of the question.¹⁰⁶ Secondly, whatever the outcome

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Penchevi v. Bulgaria*, para 105.

¹⁰² *Penchevi v. Bulgaria*, para 22.

¹⁰³ *Ibid.*, para 69.

¹⁰⁴ This reasoning of the Court was already largely formulated in *X v. Latvia*, paras 106 and 107.

¹⁰⁵ Under Article 12, 13 or 20 of the Abduction Convention.



of the case, return or no return, the national court has to make a sufficiently reasoned decision. The exceptions for return have to be applied strictly, but the specific and detailed circumstances of every case have to be taken into account and the decision has to be based on those circumstances.¹⁰⁷ An automatic or stereotyped reasoning is not permissible. This is to guarantee that the factors that could lead to an exception to the return are effectively examined.¹⁰⁸ Thirdly, the length of the proceedings has to be swift and adequate. Any delays in the procedure could lead to a violation of Article 8 ECHR.¹⁰⁹

III. Conclusion

It is obvious from the most recent decisions decided by the Court that cases of international parental child abduction are very complex cases where there is never a clear-cut answer. That is why the Court holds on to its case-by-case approach. Every case needs to be scrutinised in the light of the ECHR individually. This, of course, does not make it easy for States or for the parents involved. What is clear is that the Court after *Neulinger and Shuruk v. Switzerland* has softened the edges of its reasoning. Firstly, it has now decided several decisions in favour of the left-behind parents that therefore one should no longer fear that abducting parents are empowered by the Courts' precedent. Secondly, the Court has repeatedly emphasised the importance of swift domestic procedures in line with the Abduction Convention and the Brussels IIa Regulation and has penalised the States that did not abide by this principle. So this is what remains: very high thresholds for the States. This is important; as the Court has to assure that the expectations for the States are high so that these cases can be resolved quickly. As was shown by *Hoholm v. Slovakia*, sometimes the proceedings are simply unacceptably protracted. However, in other cases, like *M.A. v. Austria*, the fault does not lie with the State, but with the parents themselves. One could ask if the Court was right to come to a violation. This balance between State responsibility and party responsibility is a difficult one to make. States have to be efficient and correct when performing an assessment of the entire situation, while ensuring there is no violation of the rights of the child, the abducting parent or the left-behind parent – and the preference is to perform this assessment within six weeks' time. Given that there will always be an aggrieved party due to the highly personal and controversial circumstances, one simply has to ask; is it even possible for States to overcome all these hurdles?

¹⁰⁶ See for instance also *Hromadka and Hromadkova v. Russia*, para 152. In this case the factors to take into account for the best interest of the child are repeated, copying *Neulinger and Shuruk v. Switzerland*: "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".

¹⁰⁷ *Ferrari v. Romania*, paras 47 and 48.

¹⁰⁸ *Ibid*, para 48.

¹⁰⁹ *Ibid*, para 49.



	Case	Application number	Date decided	Applicant	Invoked Convention rights ¹¹⁰	Violation?	Final?	Unanimous decision?
1	Ferrari v. Romania	1714/10	28/04/2015	Left-behind parent	Art. 8 ¹¹¹	Yes	No	Yes
2	Adžić v. Croatia	22643/14	12/03/2015	Left-behind parent	Art. 8	Yes	Yes	Dissenting opinion judge Dedov
3	Penchevi v. Bulgaria	77818/12	10/02/2015	Abducting parent and the child	Art. 8 an art. 2 of Protocol No. 4 to the Convention ¹¹²	Yes, but only of art. 8	Yes	Yes
4	Furman v. Slovenia and Austria	16608/09	05/02/2015	Left-behind parent	Art. 8 ¹¹³	Yes, but only in respect of Slovenia	Yes	Yes
5	M.A. v. Austria	4097/13	15/01/2015	Left-behind parent	Art. 8	Yes	Yes	Yes
6	Hoholm v. Slovakia	35632/13	13/01/2015	Left-behind parent	Art. 6§1 and art. 13 ¹¹⁴	Yes, both for the invoked rights alone as in conjunction with each other	Yes	Yes

¹¹⁰ The invoked rights only address the ones relevant for the topic of international parental child abduction and the ones actually investigated by the Court. In some cases more violations of other provisions of the Convention were alleged.

¹¹¹ The applicant also invoked Article 6, but the Court, relying on the principle of *jura novit curia*, considered the complaint to fall under Article 8 ECHR. The applicant invoked Articles 14 and 17 too, but these were manifestly ill-founded: *Ferrari v. Romania*, paras 30-31 and 57-58.

¹¹² The applicants also invoked Articles 6§1 and 13, but the Court did not consider if there was a violation since they relied on the same factual circumstances: *Penchevi v. Bulgaria*, para 78.

¹¹³ The applicant also invoked Articles 6§3 (a), (d) and (e), but these complaints were found to be manifestly ill-founded: *Furman v. Slovenia and Austria*, paras 141 and 142.

¹¹⁴ The applicant also invoked Article 8, but the Court considered that part of the complaint was already examined under Article 8 and the other part was rejected for non-exhaustion of domestic remedies: *Hoholm v. Slovakia*, paras 65 and 66.



7	Manic v. Lithuania	46600/11	13/01/2015	Left-behind parent	Art. 8	Yes	Yes	Joint dissenting opinion judges Spano and Kjølbro
8	Hromadka and Hromadkova v. Russia	22909/10	11/12/2014	Left-behind parent and the child	Art. 8 ¹¹⁵	Yes	Yes	Yes
9	Cavani v. Hungary	5493/13	28/10/2014	Left-behind parent and the two children	Art. 8	Yes	Yes	Yes
10	V.P. v. Russia	61362/12	23/10/2014	Left-behind parent	Art. 8	Yes	Yes	Yes
11	Blaga v. Romania	54443/10	01/07/2014	Left-behind parent	Art. 8	Yes	Yes	Partly dissenting opinion judge López Guerra joined by judge Motoc over violation art. 6§1
12	López Guió v. Slovakia	10280/12	03/06/2014	Left-behind parent	Art.8 ¹¹⁶	Yes	Yes	Yes

¹¹⁵ The applicants also invoked Article 13, but this issue overlapped with the merits of the main complaint under Article 8 and was not examined: *Hromadka and Hromadkova v. Russia*, paras 173 and 174.

¹¹⁶ The applicants also invoked Articles 6, but the Court only examined the complaint under Article 8 ECHR since it found the scope of the complaint to fall under Article 8 ECHR. The applicant also invoked a violation of articles 1, 7, 11 and 12 of the Abduction Convention. The Court rejected these claims since they fall outside the scope of its jurisdiction *ratione materiae*: *López Guió v. Slovakia*, paras 77 and 114-115.

