Case Comments and Perspectives[37]

A Brief Comment on *Neulinger and Shuruk v. Switzerland* (2010), European Court of Human Rights

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The European Court of Human Rights decision in the *Neulinger and Shuruk v. Switzerland* (application No 41615/07, 6 July 2010) case is an unfortunate development in the jurisprudence relating to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abductions* ("the Hague Convention"). The European Convention on Human Rights contains various provisions that are relevant in Hague child abduction cases. In particular, Article 8 (1), providing for a right to respect for family life, has been the subject of opinions by the European Commission, and later the European Court of Human Rights. In earlier cases, an abductor's complaint that an order of return interfered with family life was rejected where national authorities had ordered return of the child pursuant to their obligations under the Hague Convention. Indeed, in several cases, countries have been found in breach of Article 8 for failing to carry out the provisions of the Hague Convention, and in particular for unjustified delays.

Neulinger represents a substantial setback in various ways. The Swiss Federal Court, reversing the decision of a district and appellate cantonal court, had ordered the child returned by the end of September 2007. Proceedings for enforcement of that order were never commenced because shortly thereafter proceedings were brought in the European Court of Human Rights by the abductor and her child, challenging the return order as an interference with family life under Article 8. The President of the Chamber indicated to the Swiss Government that the return order should not be enforced while those proceedings were pending. In June 2009 a Lausanne District Court provisionally granted sole parental authority to the mother for purposes of obtaining identity papers for the child.

In January 2009, a seven-person "initial" Chamber decided 4-3 that there had been no violation of Article 8; the case was then taken up by the Grand Chamber, and in July, 2010, it determined that Switzerland would be in violation of Article 8 if the order of return were now enforced.

The Grand Chamber focused on a point agreed upon by each of the Swiss courts that heard the Hague application – that Article 13 (1) *b)* of the Hague Convention (providing a defense to return if there is a grave risk that return would expose the child to harm or otherwise create an intolerable situation) would justify a refusal to return if the mother could not return with the child to Israel. Although the Swiss cantonal courts determined that the mother's refusal to return was justified, the Swiss Federal Court and the initial chamber of the European Court of Human Rights found that the mother was in fact able to return with the child to Israel and commence proceedings there. Nonetheless, the Grand Chamber of the Court ruled that it would be an interference with her rights to require her to return to Israel with the child. The European Court of Human Rights conceded that a "margin of appreciation" must be afforded to national authorities to make that determination (Para. 145), but it held that it must assess the situation at the time of the enforcement of the return order and not when the return order was made. Analogizing to its case-law on the expulsion of aliens, the Grand Chamber determined for itself that the "settlement" of the child in the new country and the difficulties to an accompanying parent must be taken into account in making that assessment.

A particular troubling aspect of the opinion is its reliance (in Para. 145-47) on Article 12 of the Hague Convention to justify non-return. Article 12 provides that if a case is commenced after one-year of the wrongful removal or retention, return is not required if the child is settled in its new environment. In *Neulinger*, Hague proceedings were instituted in Switzerland well within a year of the abduction, even though it took almost a year to learn the whereabouts of the child. But the Grand Chamber applies the "well-settled" concept to the time the child has been in Switzerland since his abduction in 2005, despite the fact that the delay in the enforcement of the return order can be traced to the proceedings in the European Court itself and its direction not to enforce the 2007 order. Would-be abductors may well take heart from the message sent by *Neulinger*: abduct, hide, and prolong proceedings so that the child can be considered "well-settled".

There is also a lot of "talk" about "best interests" of the child in *Neulinger*. The Grand Chamber insists that the child's best interests "must be assessed in each individual case". It concedes that the task is one for the "domestic authorities", but emphasizes that the "margin of appreciation" is subject to a European supervision. The Court maintains that it has the responsibility to "ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors," as to what would be best for an abducted child in the context of an application for return. But that misconceives the role of a court hearing a petition for return, which under the Hague Convention is to ensure the child's safety and well-being in making an order of return. It is for the courts of the habitual residence to examine the "entire family situation" in making the appropriate custodial decision. Indeed, the Swiss Federal Court had it exactly right: its obligation was to make an appropriate inquiry into the hardships that would confront the abductor if she returned and having determined that the refusal to return was not justified, ordered returned. The Grand Chamber's substitution of its views with respect to the "disproportionate interference" with the mother's life

Note

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resulting from a return order is unfortunate and opens the door to increased abductions by custodial parents.

One cannot ignore the backdrop to the *Neulinger* case and the impact on relocation issues. The abductor-mother desired to relocate to Switzerland, but the Israeli courts refused to lift the *ne exeat* order to allow her to leave Israel and travel with her son to Switzerland. If she were now to return to Israel with the child, it is unlikely that the Israeli courts would permit her to relocate, even were she to continue to keep custody. And it is the relocation issue that lies behind an increasing number of abductions by custodial parents. Unfortunately, *Neulinger* gives comfort to an abducting parent – maybe one who has been refused the right to relocate – by endorsing the possibility of relocating "unilaterally" and insisting upon the right to remain ("Having Swiss nationality, she is entitled to remain in Switzerland", says the Grand Chamber).

The particular procedural posture of Neulinger – a provisional order by the European Court of Human Rights itself that effectively stayed the federal court's order of return two years previously – may limit the case to its facts. It would be unfortunate if it were to have any broader impact.