Neutral Citation Number: [2011] EWCA Civ 361

Case No: B4/2010/2832 and B4/2010/2901

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
PRINCIPAL REGISTRY
The Honourable Mrs Justice Pauffley
FD10P02270

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2011

Before :

THE RIGHT HONOURABLE LORD JUSTICE THORPE
THE RIGHT HONOURABLE LORD JUSTICE AIKENS
and
THE RIGHT HONOURABLE LADY JUSTICE BLACK

- -

Between :

(1) KERRY ANN ELIASSEN **(2) TYLER BALDOCK**	**Appellants**
- and -	
STIG ELIASSEN	**Respondent**
-and-	
REUNITE	**Intervener**
The AIRE Centre	**Intervener**

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Henry Setright QC and David Williams (instructed by **Freemans Solicitors**) for the **First Appellant**
Edward Devereux (instructed by **Dawson Cornwell Solicitors**) for the **Second Appellant**
James Turner QC and Ian Cook (instructed by **TLT LLP**) for the **Respondent**
Richard Harrison (instructed by **Bindmans LLP**) for **REUNITE**
Maryam A-Tabib (instructed by **Mischon de Reya)** for **The AIRE Centre,** by way of written submissions.

Hearing dates : 3rd March 2011

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Approved Judgment

Lord Justice Thorpe :

The Issues

1. On 29th November 2010 Pauffley J granted the father's application for a return order under the provisions of the 1980 Hague Convention on the Civil Aspects of Child Abduction. The application had been opposed by the mother and by the half-sister of the children who had been given party status. The children at the heart of this case are Lilly Bo born on 19th May 2004 and Missy Ann born on 10th April 2007.

2. On 6th December an appellant's notice was filed and referred to My Lady, Black LJ, where the appellants' counsel indicated an intention to apply for my recusal. Ultimately that application was not pursued. I will return to the stated ground for that application. My Lady adjourned the application for oral hearing and on 13th December she and Lord Justice Ward granted permission.

3. By her paper order on 8th December, My Lady had stayed the order below requiring the return of the two children by 9th December. I am concerned that there has been a delay of nearly three months between the grant of permission and the hearing of the appeal. The reasons for that delay are under investigation.

4. The appellant's notice advanced two grounds. The first was that the judge had been wrong to reject the mother's defence under Article 13b of the Convention when necessary safeguards identified by the medical expert had not been put in place. The second ground asserted that the judge had failed to apply the decision of the European Court of Human Rights in the case of *Neulinger and Shuruk v. Switzerland (Application 41615/07) [2011] 1 F.L.R. 122* .

5. This decision handed down on 6th July 2010 caused a considerable stir amongst practitioners in the field of international family law. It was commonly understood to undermine the foundations upon which the Hague Convention was built and this court on 12th December decided that it was high time for this prominent case to be considered by the full court for the guidance of the judges of the Division and specialist practitioners.

6. In giving judgment on this appeal the more onerous task is to assess the effect of the decision of the European Court in *Neulinger.* The resolution of the first ground of appeal is altogether straightforward. Accordingly I propose to consider generally the Strasbourg jurisprudence before dealing shortly with the two grounds of appeal.

7. Shortly before the hearing applications for leave to intervene were received from both Reunite and the AIRE Centre. These are well known and highly respected charities who have an obvious interest in the issues of law raised by the appeal. Accordingly they were given the limited leave which each sought, namely to make general submissions on the law without access to the papers or reference to the issues specific to this case. We received Mr Harrison's skeleton, instructed for Reunite, and the skeleton of Ms A-Tabib, acting pro-bono for the AIRE centre. I express my profound gratitude for these interventions. The two skeletons cover different ground but share the hallmarks of objectivity and excellence.

The Background

8. Before considering the case of *Neulinger* it is helpful to set the general scene. In the field of international family law we are generally concerned with instruments that emanate from one of four law givers. They are: the Council of Europe, the European Union, the United Nations and the Hague Conference. These are, of course, very different institutions. Two are regional, two are global. Three are law givers by the creation of conventions which are then available to nations to ratify and internalise within their domestic law, thus creating rights and obligations to the other nations that have made the same election. The European Union, by contrast, imposes international law on Member States by Regulation or Directive. Not all Conventions ratified are internalised; by way of obvious example, the ECHR prior to 1998 and the United Nations Convention on the Rights of the Child.

9. Plainly these creative processes are more than a little haphazard. There is an obvious risk of the competitive production of new instruments causing general confusion as to which should be invoked in particular circumstances. Even more harmful would be outright conflict. The virtues of harmony and collaboration are as important in this field as anywhere. So the notion that the Strasbourg Court had struck an axe blow to the trunk of the 1980 Convention was shocking and perhaps scarcely credible given that the Convention had been in operation for nearly two decades without any criticism from the Strasbourg court.

10. That was not without many attempts by disappointed litigants to assert that a grant or refusal of a return order had breached their human rights. As to the history, Dr Andrea Schulz reviewed the period from first beginnings to 2002 in an article entitled "The 1980 Hague Child Abduction Convention and the European Convention on Human Rights" published in *Transnational Law and Contemporary Problems Vol 12: 355.* She surveyed the period up to 1998 during which not a single referral had been accepted under the Rule then operating. Then in the later period, following the change in the procedure of the court, she concluded that:

> "In order to assess whether the action taken complies with Article 8 or whether it amounts to an interference with one parent's right to respect for his or her family life, the Court examines whether the national authorities have done everything that could have reasonably been expected of them. Here the court relies heavily on the provisions of the Child Abduction Convention. What is listed in those provisions as a duty of a national authority may, in the case law of the Strasbourg Court, reasonably be expected.
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> Therefore when an abducting parent complained against a return order, this was not considered an interference with that parent's right to respect for his or her family life. Where, on the other hand, a left behind parent complained against a non-return, this was generally considered to constitute an interference with Article 8 if the 1980 Convention was applicable between the two States concerned and the conditions for a return under Article 12 were fulfilled but the child was not returned. In its examination, the court did not distinguish

> between cases where the non-return was due to a court order refusing return or due to non-enforcement of an existing return order."

11. In more modern times the case of *Maumousseau* was the first case in which a complaint from a mother against whom a return order had been made was referred for the consideration of the Chamber. The outcome was extremely reassuring to all who believe in the value of the 1980 Convention. In the judgment, to which I will return, the court approved the objectives of the Convention and the balance struck by the Convention in achieving those objectives. The reverberations caused by the later decision of *Neulinger* were all the greater given the endorsement expressed in *Maumousseau*.

12. *Neulinger* is certainly not the last word. We have since received the judgment in the case of *Raban v Romania* and after that the decision in *Van den Berg and Sarri v The Netherlands*. The decision in *Neulinger* was ultimately a decision of the Grand Chamber and we understand that both Germany and the United Kingdom have applied for the decision of the Chamber in *Raban* to be referred to the Grand Chamber.

13. As a matter of chronology, in November the reported cases available to Pauffley J were, of course, *Neulinger* and also the first instance decision of Baker J in *WF v FJ [2010] EWHC 2909 (Fam).*

14. There are now available to us the four decisions of the Strasbourg court and three at first instance since Peter Jackson J has delivered his opinion on *Neulinger* in the case of *DT v LBT [2010] EWHC 3177 (Fam).* Although *Raban* might have been cited to him we were told by Mr James Turner QC that it was not.

15. Mr Edward Devereux who appears for Tyler Baldock, half sister to the two children within the Hague proceedings, has written an excellent skeleton in which he reviews the four Strasbourg cases in sequence and as a connected stream of precedent. He emphasises, correctly, in our view, that it is a mistake to consider Neulinger, or any of the four, in isolation. They must be read in their entirety in order for their true meaning and effect to be revealed. We only differ from Mr Devereux in his perception of that effect.

16. It is not only helpful to consider the wide field of international family law but also, more narrowly, the function of the Strasbourg Court. For this we are particularly indebted to the expertise of the AIRE centre which specialises in providing information and advice on the European Convention on Human Rights and other international human rights law and on European Union law as it affects individuals.

17. In its skeleton argument it seeks to place the four judgments with which we are principally concerned not as a stream in isolation but in the case law of the ECHR taken as a whole.

18. It submits that, taken in that wider context, the judgment in Neulinger is "an important and timely reminder that Hague proceedings have at their very heart the welfare of the child, this welfare to be determined by the judges in whose jurisdiction the child is or

was lawfully located". Ms A-Tabib's skeleton helpfully analyses the proper function of the Strasbourg Court in paragraphs 10 to 13 which I adopt verbatim:

> "10. The sole purpose of the ECtHR, set out in Article 19 of the ECHR is to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'. The ECtHR is not a 'fourth instance'(*Garcia Ruiz v Spain Application No: 30544/96*). It is not a court of appeal from decisions of national courts.
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> 11. Article 34 of the ECHR provides that 'The Court may receive applications from any person…claiming to be the victim of a violation of the Convention by one of the High Contracting parties of the rights set forth in the Convention or the Protocols thereto.' It only has jurisdiction to determine whether the applicants are victims of a violation or would be victims of a violation were the proposed measure to be carried out.
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> 12. Under Article 35(1) the Court may 'only deal with the matters after all domestic remedies have been exhausted'. The provisions of the Hague Convention are relevant, as a matter of Convention law to any decision taken as to whether a person's ECHR rights have been violated. Under Article 53 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting party **or under any other agreement to which it is a party'** (emphasis added).
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> 13. The Court's role is exclusively to rule on whether states have observed their obligations under the Convention or whether action which they are proposing to take would be compatible with their obligations under the Convention. The Court cannot rule on whether states have complied with their obligations under other international instruments to which they are a party, (such as the Hague Convention or the UN Convention on the Status of Refugees) but it can and does take those obligations into account because of Article 53 ECHR."

19. She also notes that:

> "Under Article 43 of the ECHR within three months of a Chamber judgment, any party can request that the case be referred to the Grand Chamber. A panel of five judges considers whether to accede to the request. Neulinger was referred in this way and the case of Raban v Romania is currently awaiting the decision of the panel"

20. With that introduction we turn to consider the four key judgments of the European Court of Human Rights.

The Quartet

21. The case of *Maumousseau and Washington v France (application 39388/05)* was decided on 6th December 2007. It was the ultimate stage in bitter fighting between the mother, Madame Maumousseau and the father, Mr Washington, over their daughter Charlotte, born on 14th August 2000. The litigation had raged in France and in the United States of America. The mother wrongfully retained Charlotte in France and a return order refused by the Court of First Instance in France was subsequently made by the Court of Appeal and upheld by the Cour de Cassation. Enforcement of the order resulted in dramatic scenes, much publicity and ultimately Charlotte's reception into care.

22. The application by mother and daughter to the European Court of Human Rights alleged violation of Articles 6 and 8 of the Convention. The claim failed and within the judgment of the court is a careful assessment of the interaction of the Conventions (Human Rights, UN Convention and Hague Convention). The analysis is contained in paragraphs 65 to 73 of the judgment which I cite in full:

> "65. The Court would emphasise the specific nature of the present case, arising firstly from its human dimension and particular legal context, and secondly from the questions of principle it raises relating mainly to the compatibility of the obligations imposed on the respondent State in the light of the various international legal instruments that are applicable.
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> 66. The Court notes that since the adoption of the New York Convention on the Rights of the Child of 20 November 1989, 'the best interests of the child' in all matters concerning it, within the meaning of the New York Convention, have been paramount in child protection issues, with a view to the child's development in its family environment, as the family constitutes 'the fundamental group of society and the natural environment for the [child's] growth and well-being', to quote the preamble. As the Court has previously found, this primary consideration may comprise a number of aspects.
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> 67. In matters of child custody, for example, the reason for considering the 'child's best interests' may be twofold: firstly, to guarantee that the child develops in a sound environment and that a parent cannot take measures that would harm its health and development; secondly, to maintain its ties with its family, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots (see *Gnahoré v. France*, no. 40031/98, ECHR 2000-IX).
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> 68. The Court is of the view that the concept of the child's 'best interests' is also a primary consideration in the context of the procedures provided for in the Hague Convention. Inherent in that concept is the right for a minor not to be removed from one of his or her parents and retained by the other, that is to say by a parent who considers, rightly or wrongly, that he or she

has equal or greater rights in respect of the minor. In this connection it is appropriate to refer to Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly which states: 'Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs'. The Court further observes that in the Preamble to the Hague Convention the Contracting Parties express their conviction that 'the interests of children are of paramount importance in matters relating to their custody' and stress their desire to 'protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access'. These stipulations must be regarded as constituting the object and purpose, within the meaning of Article 31 § 1 of the Vienna Convention on the Law of Treaties, of the Hague Convention (see, to that effect, *Paradis and Others v. Germany* (dec.) no. 4783/03, 15 May 2003).

69. The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that instrument seeks to deter the proliferation of international child abductions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention (see, to that effect, among other authorities, *Eskinazi and Chelouche,* cited above).

70. The Court cannot, however, agree with the reasoning of the first applicant when she asserts that a court dealing with a request for the return of a child under the Hague Convention conducts an incomplete assessment of the child's situation and therefore of its 'best interests'.

71. The Court fails to see how the interpretation by the domestic courts of Article 13(b) of the Hague Convention would necessarily be incompatible with the notion of the 'child's best interests' embodied in the New York Convention. It considers, on this point, that it would be desirable if this notion of 'best interests' could always be interpreted in a consistent manner, regardless of the international convention invoked. It notes, moreover, that the New York Convention obliges States Parties to take measures to combat the illicit transfer and non-return of children abroad and that these States

> are urged to enter into bilateral or multilateral agreements or accede to existing agreements – of which the Hague Convention is one (see paragraphs 43 and 44 above).
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> 72. The Court observes that there is no automatic or mechanical application of a child's return once the Hague Convention has been invoked, as indicated by the recognition in that instrument of a number of exceptions to the Member States' obligation to return the child (see in particular Articles 12, 13 and 20), based on objective considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to the case.
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> 73. In the Court's view, if the first applicant's arguments were to be accepted, both the substance and primary purpose of the Hague Convention, an international legal instrument in the light of which the Court applies Article 8 of the Convention would be rendered meaningless, thus implying that the above mentioned exceptions must be interpreted strictly (see, to this effect, the Explanatory Report on the Hague Convention, §34, quoted in paragraph 43 above). The aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she unilaterally created."

23. Paragraphs 69 – 73 in particular demonstrate the Court's emphatic support of the Convention and a clear understanding of the fundamental principles on which it operates.

24. The case of *Neulinger and Shuruk v. Switzerland (Application 41615/07)* focuses not on the making of a return order but on its subsequent enforcement. The application was made by the mother (Swiss and Belgian nationalities) and her son (Swiss and Israeli nationality). The application was lodged on 26th September 2007. The application alleged breach of their right to family life guaranteed by Article 8 and violation of Article 6 on the grounds that the Swiss court had adopted an unduly restrictive interpretation of the exceptions to a return order under the Hague Convention. The return order had been made on 21st September 2007 on appeal to the Federal Court.

25. The father's enforcement application of 20th August 2007 was effectively trumped by the mother's application to Strasbourg, since that court on 27th September 2007 indicated to the Swiss government "that it was desirable, in the interest of the parties and for the proper conduct of the proceedings before the court, not to enforce the return of Noam Shur."

26. The forgoing summary extracts only the essentials from what had been complex proceedings between the parents in both Switzerland and Israel.

27. The Strasbourg court ruled on 8th January 2009, declaring the complaint under Article 8 admissible and the remainder of the application inadmissible. By a majority it found no violation of Article 8.

28. On 31st March 2009 the applicants requested referral to the Grand Chamber. The request was granted on 5th June 2009, confirming the interim measures of 27th September 2007. Judgment of the Grand Chamber was given on 6th July 2010.

29. The Grand Chamber's statement of "general principles" is contained in paragraphs 131 – 138 of the judgment which we set out in full:

> "131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II; and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI).
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> 132. In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003-V, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see *Maire*, cited above, § 72). The Court has, for example, espoused the provisions of the Hague Convention on a number of occasions, in particular Article 11 when examining whether the judicial or administrative authorities, on receiving an application for the return of a child, had acted expeditiously and diligently, as any inaction lasting more than six weeks could give rise to a request for a statement of reasons for the delay (see, for the text of that provision, paragraph 57 above, and for examples of application, *Carlson v. Switzerland*, no. 49492/06, § 76, ECHR 2008-... ; *Ignaccolo-Zenide*, cited above, § 102; *Monory*, cited above, § 82; and *Bianchi*, cited above, § 94).
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> 133. However, the Court must also bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its own mission, as set out in Article 19, "to ensure the observance of the engagements undertaken by the High Contracting Parties" to the Convention (see, among other authorities, *Loizidou v. Turkey* (preliminary objections), 23 March

1995, § 93, Series A no. 310). For that reason the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi*, cited above, § 92, and *Carlson*, cited above, § 73).

134. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington*, cited above, § 62), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000 IX), as is indeed apparent from the Preamble to the Hague Convention, which provides that "the interests of children are of paramount importance in matters relating to their custody". The child's best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003 VIII). The parents' interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (ibid., and see also *Haase v. Germany*, no. 11057/02, § 89, ECHR 2004 III (extracts), or *Kutzner v. Germany*, no. 46544/99, § 58, ECHR 2002 I, with the numerous authorities cited).

135. The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see the numerous references in paragraphs 49-56 above, and in particular Article 24 § 2 of the European Union's Charter of Fundamental Rights). As indicated, for example, in the Charter, "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

136. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, *Elsholz v.*

Germany [GC], no. 25735/94, § 50, ECHR 2000 VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006).

137. The same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation (Article 13, sub-paragraph (b)). In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention. Moreover, certain domestic courts have expressly incorporated that concept into the application of the term "grave risk" under Article 13, sub-paragraph (b), of that convention (see paragraphs 58-64 above). In view of the foregoing, the Court takes the view that Article 13 should be interpreted in conformity with the Convention.

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 (see the UNHCR Guidelines, paragraph 52 above). For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299 A, and *Kutzner*, cited above, §§ 65-66; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000 IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).

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 (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005 XIII (extracts)). 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 (see *Maumousseau and Washington*, cited above, § 74). "

30. Applying those principles the Grand Chamber ruled, not that the applicants rights had been violated by the order of the Federal Court, but, in paragraph 151:

> "As to the mother, she would sustain a disproportionate interference with her right to respect for her family life if she was forced to return with her son to Israel. Consequently, there would be a violation of Article 8 of the Convention in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced."

31. It is paragraph 139 of the judgment of the judgment cited above that has given rise to the argument that the Grand Chamber has declared that a defendant to a return order application is entitled to a full welfare review in the determination of an Article 13 (b) defence.

32. The case of *Raban v Romania (25437/08)* concluded with the judgment of the Chamber on 26th October 2010. The facts of the dispute are familiar enough. The father (of Israeli and Dutch nationality) applied together with the two children of the family on 22nd May 2008 alleging violation of Articles 8 and 6 of the Convention. The violation allegedly arose in the course of his return application to the Bucharest courts. At first instance he had succeeded, the court finding wrongful retention and dismissing the mother's Article 13(b) defence which rested on the state of insecurity in Israel and the general threat of terrorist attack.

33. That judgment was reversed by the Court of Appeal who not only found that there had been no wrongful retention but also that a return would expose the children to physical harm given that the Israeli home was in a conflict area where citizens feared for their safety. However one of the three judges in the Appeal Court dissented.

34. The judgment of the Strasbourg Court went against the applicants, the court concluding in paragraph 39 that "having particular regard to the State's margin of appreciation in the matter and to the *in concreto* approach required for the handling of cases involving child related matters", the Bucharest court's assessment did not amount to a violation of Article 8 "as it was proportionate to the legitimate aim pursued."

35. However, again the court reiterated the general principles in paragraphs 28 and 29 of the judgment which again I cite in full:

> "28. In its recent ruling in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131 – 140, 6 July 2010, with further references) the Court articulated and summarized a number of principles that have emerged from its case-law on the issue of the international abduction of children, as follows:
>
> (i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001 II).

(ii) The positive obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (*Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003 VII and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000 I).

(iii) the Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi*, cited above, § 92 and *Carlson v. Switzerland*, no. 49492/06, § 73, 6 November 2008).

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, ECHR 2007 XIII), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000 IX).

(v) "The child's interests" are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to have his or her development in a sound environment ensured (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000 VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). 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.

(vi) A child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72).

> (vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299 A, and *Kutzner v. Germany*, no. 46544/99, §§ 65-66, ECHR 2002 I; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000 IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).
>
> (vii) 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 (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005 XIII (extracts)). 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 (see *Maumousseau and Washington*, cited above, § 74).
>
> 29. Moreover, as already stated in *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 164, ECHR 2009 ...:
>
> 'in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention'."

36. In this restatement of general principles it is the second paragraph marked (vii) within paragraph 28 that is much relied upon by those, including the appellant's in this case, who assert that a defence under Article 13(b) requires the court to conduct a full welfare enquiry.

37. Finally I come to the case of *Van den Berg and Sarri v The Netherlands (7239/08)*. This was a decision on admissibility given by the Chamber on 2nd November 2010.

38. The Hague application had been brought by the Italian father for the return of his child living with her Dutch mother in Amsterdam. The court of first instance in Amsterdam refused the return order upholding the mother's Article 13(b) defence. The father's appeal to the Court of Appeal in Amsterdam was unsuccessful. However he succeeded in the Supreme Court which held that the Court of Appeal had not interpreted the provisions of Article 13(b) sufficiently restrictively. The case was remitted and that court ordered return. The mother then appealed to the Supreme Court unsuccessfully. Thus:

    i) The child left Italy in August 2004.

    ii) The Hague Convention application was issued in December 2004.

    iii) In March 2007 the child was returned to Italy.

    iv) In September 2007 the Hague proceedings concluded with the second judgment of the Supreme Court.

39. The mother's complaints to the Strasbourg Court were:

    i) An erroneous interpretation of both habitual residence and of Article 13(b) in violation of Article 8.

    ii) Breaches of Article 6 arising out of unexpedited proceedings and procedural deficiencies.

    iii) The Supreme Court's disregard of its obligation under Article 3 of UNCRC to take account of the interests of the child.

40. These complaints were held inadmissible but in explaining its conclusion again the court reiterated the general principles and again I cite the relevant paragraph in its entirety. The second paragraph (vii) is arguably controversial as is paragraph (iii):

> "In its recent ruling in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131 – 140, 6 July 2010, with further references) the Court articulated and summarized a number of principles that have emerged from its case-law on the issue of the international abduction of children, as follows:
>
> (i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001 II).
>
> (ii) The positive obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (*Maire v. Portugal*, no.

48206/99, § 72, ECHR 2003 VII and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000 I).

(iii) the Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi*, cited above, § 92 and *Carlson v. Switzerland*, no. 49492/06, § 73, 6 November 2008).

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, ECHR 2007 XIII), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000 IX).

(v) "The child's interests" are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to have his or her development in a sound environment ensured (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000 VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). 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.

(vi) A child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72).

(vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of

> that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299 A, and *Kutzner v. Germany*, no. 46544/99, §§ 65-66, ECHR 2002 I; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000 IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).
>
> (vii) 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 (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005 XIII (extracts)). 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 (see *Maumousseau and Washington*, cited above, § 74)."

The Autonomous Law

41. It is to be noted that domestic courts do not apply domestic law in the interpretation and application of the Hague Convention. They must apply the autonomous law of the Convention which is to be derived from leading cases in the appellate courts of the States party to the Convention.

42. Given that the common law demands of its judges fully reasoned decisions that uphold the principle of *stare decisis* the courts of common law jurisdictions have made the most significant contribution to the development of the autonomous law of the Convention. But it is not only the common law courts that have recognised that Article 13(b) must be interpreted and applied stringently, restrictively or exceptionally.

43. In the common law courts Mr Harrison cites *Friedrich v Friedrich 78F. 3d 1060 (USA), Thompson v Thompson 119 D.L.R. 4TH 253 (Canada), R v R (2006) IESC 7 (Ireland) and DP v Commonwealth Central Authority (2001) HCA 39 (Australia).*

44. That this is the autonomous law of the Convention cannot be in doubt. There are differing views as to whether that should be the autonomous law. Switzerland at the 5th Special Commission proposed a more liberal interpretation of Article 13(b) but the proposal was rejected by the assembly.

45. Within the European Union the Convention has been modified by Article 11 of Regulation Brussels II bis. The requirement of Article 11(4) to the effect that the court may not uphold an Article 13(b) defence without proper investigation of safety measures available in the requesting state, suggests that between the Member States the approach should be more rather than less stringent.

46. At the second sitting of the Sixth Special Commission fixed for January 2012, States party will have the opportunity to debate a possible protocol to the 1980 Convention which would enable Member States to agree a modification of Article 13(b) if they thought that desirable.

47. That it would require modification of the Article cannot be in doubt. It was the drafters who chose to limit the application of the Article to cases of "grave risk of physical or psychological harm." In the explanatory report Professor Perez-Vera made it plain that the intention of the drafters was that Article 13(b) should be applied "restrictively".

48. In our judgment there is little support for the view that the decision in *Neulinger* requires trial judges to adopt a different approach in the application of the Convention defences and Article 13(b) in particular.

49. We note that there are now three first instance decisions in the High Court rejecting that proposition.

50. We have been greatly assisted by the written submissions of the AIRE Centre. In her skeleton Ms A-Tabib emphasises the importance of the time at which the assessment of the violation must be made. Obviously in time past the date will be the date on which the return was effected. If the return has yet to take place (perhaps because the court has imposed a stay) then the time is not when the final decision was made in the national court but the time at which the European court considers the case.

51. In *Neulinger* the chamber considered that the decision of the Swiss courts had been correct and did not consider it necessary to decide if immediate execution would violate the Convention.

52. However before the Grand Chamber the key issue was not whether The Hague return order had violated the applicant's rights but whether their rights would be violated if it were now to be executed. Obviously after a delay of three years there had been the most significant changes of circumstance.

53. Such a situation need not recur since the court can apply its expedited procedure.

54. The court's failure to apply the expedited procedure in *Neulinger* contributed to the outcome.

55. As to the extent of the duty to investigate Ms A-Tabib submits in relation to paragraph 139 of the judgment in *Neulinger* that States are under a duty to investigate the circumstances that would arise were an order for extradition or return executed. Violation might arise from the act of transfer or from the conditions on return.

56. Importantly Ms A-Tabib submits that:

> "For the risk to be sufficiently serious to fall within the scope of Article 13(b), it must be at the very high end of the spectrum of interferences covered by Article 8. Where it is the family situation which is at issue, an investigation into the family situation is required as well as an investigation into other circumstances which might be relevant to deciding whether the

> situation falls within the scope of Article 13(b). However that investigation is limited to the deciding court satisfying itself that the return to the jurisdiction will be compatible with the Convention. It does not require the same in-depth investigation as is required when disputed living arrangements for a child are being decided by a court in the jurisdiction properly seised of such matters. "

57. I accept the submissions of the AIRE Centre on these points.

58. Equally I select for approval a number of submissions contained in Mr Richard Harrison's persuasive skeleton. Paragraph 6 of Mr Harrison's submissions summarises Reunite's intervention:

> "6. Reunite would respectfully submit that the court should reject the suggestion that the Article 13(b) threshold has been 'lowered'. Reunite submits that it is integral to the effective operation of the Hague Convention that Article 13(b) should be restrictively applied and, in particular, that:
>
> (a) Lowering the threshold would undermine the policy and objectives of the Convention which include the deterrence of child abduction and the prompt return of an abducted child to the country of his or her habitual residence.
>
> (b) Lowering the threshold would be contrary to the welfare interests of children generally and to the interests of the children that feature in individual cases.
>
> (c) The recent ECHR decisions in *Maumousseau and Washington v France* (*'Maumousseau'), Neulinger and Raban v Romania* (*'Raban'*) – properly understood – do not have the effect of lowering the threshold.
>
> (d) There is a substantial body of English and international jurisprudence which emphasises that Article 13(b) is to be applied restrictively."

59. Mr Harrison also emphasises the tension between expedition and investigation. The fuller the enquiry the greater the need for investigation. A return application under the Convention is a summary process which Article 11 of the Convention and Article 11 (3) of the Brussels Regulation require to be completed with maximum expedition. Thus the "in depth examination of the entire family situation" postulated in paragraph 139 of *Neulinger* is undertaken in the context of an application for summary return and will inevitably be substantially more circumscribed than the level of investigation undertaken by a court deciding substantive issues. The task of the court is limited to the immediate decision at hand, return or no. Any proper conclusion about what is in the child's best interest in the medium and long term is inevitably precluded.

60. Mr Harrison demonstrates that the Hague Convention is not just concerned with the welfare of children generally but also with the welfare of the individual child in a

particular case. This is emphasised by Baronness Hale in her speech in *Re M and Another (Children) (Abduction: Rights of Custody) [2008] 1 AC 1288*. At paragraph 12 she wrote:

> "But it should not be thought that the Convention is principally concerned with the rights of adults. Quite the reverse. The Preamble explains that the contracting States are 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody' and
>
> 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure that their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'"

In the following passage a little later in that paragraph she continued with a quotation from paragraph 25 of the Explanatory Report of Professor Perez-Vera upon which she then commented:

> "However, at para 25 [Professor Perez-Vera said]:
>
> 'The Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part these exceptions are only concrete illustrations of the overly vague principle where by the interests of the child are stated to be the guiding criterion in this area.'
>
> Hence the Convention is designed to protect the interests of children by securing their prompt return to the country from which they have been wrongfully been taken, but recognises some limited and precise circumstances when it will not be in their interests to do so. "

61. Mr Harrison adds that paragraphs 68 and 69 of the European Court of Human Rights in *Maumousseau* endorsed the promotion of the best interests of the child as a primary consideration in the procedures which the Hague Convention provides.

62. Mr Harrison again reminds us of the speech of Baronness Hale in *re D (A Child))* [2006] UKHL 51. Of Article 13(b) she wrote at paragraph 51:

> "It is obvious, as Professor Perez-Vera points out, that the limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated. The Authorities of the requested State are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of Article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Hague Convention to require it. A restrictive application

> of Article 13 does not mean that it should never be applied at all."

63. Mr Harrison ends his submission with the following citation from the decision in *Van den Berg and Sarri v Netherlands* :

> "The Court has previously found that the Hague Convention system does not apply its basic rule – that a child should be returned to its state of habitual residence, *i.e.* to the *status quo ante* – automatically or mechanically (see above: 'general principles', under (vi)). The Hague Convention's premise is to avoid permitting one parent to create unilaterally, by wrongfully removing a child, a situation favourable to him or herself in respect to the child. There exist in the Hague Convention several exceptions to this basic rule, amongst others to the one laid down in Article 13(b), which exceptions are, however, to be interpreted restrictively according to the Explanatory Report on the Hague Convention (relevant sections of which are cited above) so as not to impede its basic rule."

64. Again I accept all these submissions.

65. There is a fundamental implausibility in the notion that the European Court of Human Rights would in one paragraph proclaim its ringing support for the aims and objectives of the Hague Convention and in the next require the full scale welfare investigation which would undermine those objectives.

66. It is plain to me that the court in *Neulinger* did not intend to introduce any revision to the clear principles stated by the court in *Maumousseau*, cited with approval in all three of the following cases.

67. I note that in none of the four cases has the court concluded that the grant or the refusal of the return order breached Convention rights. Only in *Neulinger* was a prospective return held to be in violation of Convention rights in consequence of gross delay for which the Strasbourg court was itself largely responsible.

68. There can be no doubt that the policy underlying the 1980 Hague Convention is clear. The welfare of children is of paramount importance. It is in the interests of children to be protected from the harmful effects of abduction. Minimising the damage to the child demands expedition. On return, full investigation of custody and other issues can then be made by the court of habitual residence best placed to undertake a full investigation. This point is emphasised in paragraph 19 of Professor Perez-Vera's report:

> "In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of Article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e.

> custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken – in which case the violated custody rights were exercised *ex lege* – as to a removal in breach of a pre-existing custody decision."

69. In the assessment of an Article 13(b) defence the court's focus must be on the child's interests in the sense of evaluating whether the return would entail specific risks and not on the child's wider welfare within the context of the underlying family problems and disputes, which have probably given rise to the abduction and which will have to be investigated and addressed after the child's return. On a proper understanding of paragraph 139 of *Neulinger* and the second paragraph (vii) of *Raban* the judge evaluating grave risk of harm in the context of an Article 13(b) defence must weigh the immediate and not the ultimate best interests of the child.

70. I conclude by questioning whether the European Court of Human Rights can contribute to the interpretation of the Hague Convention. That is the function of the courts that apply the Convention when deciding applications for return orders. The function of the European Court is only to consider whether the national courts, in exercising that function, have violated any of the rights guaranteed by the Convention.

The judgment below

71. I turn now to consider the appeals against the judgment of Pauffley J. Mr Henry Setright QC marked his arrival in the case by substituting for the skeleton argument settled by his junior, Mr David Williams, a very full skeleton extending to some 39 pages. Of course, in the main, he was developing the submissions, which we reject, on the effect of the decisions in *Neulinger* and *Raban*.

72. The second appellant, Tyler Baldock, has since after the joinder, been represented by Mr Edward Devereux who, in a skilful argument, presented to us the European decisions as a quartet and persuasively suggested that they should be read as such. In an agreed division of labour, in oral submission Mr Setright concentrated on his criticisms of the judgment below and Mr Devereux on the European case stream.

73. As to Mr Devereux's submissions I have already stated my contrary conclusions.

74. As to Mr Setright's submissions on the judgment below, it is apt to record how the case before us has developed over the regrettably extended period between trial and appeal.

75. The decisions in *Raban, Van den Berg* and of Peter Jackson J at first instance were not available to Pauffley J.

76. Furthermore the decision in *Neulinger* was very lightly relied upon by the respondents. We have a transcript of the oral submissions below. This is how Mr Williams put his case:

> "I certainly don't think that *Neulinger* results in any very significant change in approach. The suggestion that one has to

> consider the best interests of the child does not mean that one converts Hague proceedings into paramount welfare proceedings at all, because there are best interests presumptions within the Convention itself, is the way I would submit it can be interpreted.
>
> And so when *Neulinger* says that the best interests of the child must be considered, really, although it does not say so specifically, all it is saying, in one sense, is there are already presumptions about the best interests of the child that the international community has all agreed upon, and that those best interests will usually prevail, unless a defence is made out."

77. Mr Devereux who followed after simply said:

> "My Lady, I am not going to trouble the court with submissions on *Neulinger*, because I don't think the court is being helped by them, and it seems to me that this is not the time or place to develop them."

78. Given the way that the respondents had put their case the direction of Pauffley J is, in my opinion, impeccable. In paragraph 9 she stated:

> "It is also necessary to have regard to, and read domestic jurisprudence in light of, the decision of the European Court of Human Rights in the case of *Neulinger and Shuruk v. Switzerland (Application 41615/07)* and in particular to consider the children's best interests. A child's return cannot be ordered automatically or mechanically. His 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. Those best interests must be assessed in each individual case."

79. In her final paragraph the *Neulinger* theme returns when she concluded:

> "It must follow, when I review the children's welfare needs from a personal development perspective, I conclude that it is overwhelmingly in their best interests to return to Norway for their futures to be decided there. They are very young children. By no stretch of the imagination could it be said that they have put down roots in this country. They will be returning to an environment where both parents will be living, albeit at a little distance from one another. There is no substance to the Article 13(b) defence and on *Neulinger* grounds as well, I consider their welfare needs point emphatically to a summary return."

80. In the court below this was a classic case in which the plaintiff countered the Article 13(b) defence with proposals to safeguard the mother and children on return,

principally by making the home available to them for their sole occupation and by providing them with periodical payments. At the heart of the matter was the mother's vulnerable personality as to which the judge had the benefit of the expert appraisal of Dr Kolkiewicz.

81. Furthermore the judge had the advantage of information as to the protective measures in Norway supplied to her by Judge Anne-Marie Selvaag. Judge Selvaag is the International Network Judge for Norway and she gave her assistance in response to a request from the office of the Head of International Family Justice.

82. An argument run below, and perhaps the main plank of the appellant's case on appeal, was that Dr Kolkiewicz had advised that all protective measures must be in place in advance of return to reduce the mother's anxiety and the risk of non-compliance or breach.

83. The judge recorded this requirement in paragraph 31and gave her response in paragraphs 32 and 33. It is worth citing those paragraphs in full:

> "31. Mr Williams strongly urges a series of conditions precedent to the children's return. He argues that if the protective measures are to be effective they must be real rather than illusory. They must, says Mr Williams, have teeth. Dr Kolkiewicz was clear in advising that it was of the utmost importance that the protective measures were in place in a way that was verifiable before the return was effected so as to reduce the risks to the mother's psychological wellbeing. Mr Williams suggests that the only way to provide the degree of protection advised by Dr Kolkiewicz as essential is to make the return order conditional upon the key components being documented prior to the return. And he cites six matters requiring verification in writing.
>
> 32. I have considered but ultimately rejected those arguments because in my assessment there is now ample evidence to substantiate that in relation to each factor, the measures required are already or will be in place as soon as the children return to Norway. The father has already withdrawn his complaint to the police. He has given the clearest undertakings, as already recounted, abiding the first hearing before the Norwegian court. There is statutory social and psychological support as Judge Selvaag has confirmed. The discussions between Dr Kolkiewicz and Dr Hvidsten substantiate in the most tangible way possible how readily available psychological assessment and treatment will be when the mother returns to Skein. The father has already undertaken to provide the mother with financial support by the Affidavit he swore last Thursday. His solicitors are in funds in the sum of 4,000 NKR so that, in advance, monies will be made available to the mother for the first four weeks.

> 33. As I see it, Mr Williams' quest, on the mother's behalf, for documentary confirmation of so many matters as conditions precedent to return – when the extant material is of good quality and reliable – is little more than a bid to delay the children's return to Norway. Dr Kolkiewicz said it was of the utmost importance that protective measures were verified before the return. By the various processes already described, I consider they have been and very adequately so."

84. At first instance this was a very standard Hague case. That there had been a wrongful removal was not in issue. A return order was inevitable unless the mother could pass through the narrow gate of Article 13(b). The judge had to weigh the benefits to the children of a return order against the risks. In weighing that balance the judge directed herself correctly as to the law. She reached a firm conclusion. In paragraph 36 she held that there was "no substance" in the contention that the mother's subjective reaction to a return order would constitute a grave risk of physical or psychological harm to the children. In the final paragraph, already cited, her conclusion was "overwhelming".

85. All the points raised by the appellants are simply answered by a scrutiny of the judgment. The appeal was necessary to provide this court with an opportunity to review the recent decisions of the European Court of Human Rights. But a careful review of the proceedings below, submissions as well as evidence, only point to the conclusion that the judge delivered an admirably fair and clear conclusion on the issues that she had to decide.

86. At the conclusion of the argument we dismissed the appeal, only reserving our reasons. We took that course to enable the parties to focus on the practical arrangements that must be made for this long delayed return.

87. There are two footnote points to this judgment.

88. First I question how it was that Tyler Baldock, the mother's child by a previous relationship, was given party status. It was Pauffley J who granted the application for her to be joined as a party. We were told that the application had been opposed by the father. No transcript or note of the judge's reasons were available to us and the judge's decision was not the subject of any appeal. However with the advantage of hindsight it is questionable whether the resulting costs to public funds were really necessary.

89. The second footnote concerns the operation of the International Judicial Network. Practitioners need to understand that only this jurisdiction and the Netherlands maintain offices for International Family Justice fully resourced to provide both an internal and external service. In other jurisdictions the Network Judge is unlikely to have any administrative, let alone legal, support. Equally the Network judge is more likely than not to have a case load unrelieved to reflect the calls of the Network function.

90. Accordingly it is important that requests for information or assistance should never be extravagant and should, ideally, be passed through the International Office to ensure

that any questions are concise and relevant. Judgments in that area are better taken by the office which has the accumulated experience of good practice.

91. Since Hague proceedings in our jurisdiction are often hard fought in the adversarial sense, it is not uncommon for one counsel or the other to frame questions for judicial response that he believes will enhance his case. This consideration strengthens the need for objective editing.

92. In this case, on 25th November Judge Selvaag answered five questions that had been transmitted to her by the office. Her responses were detailed and thorough running to three and a half typed sheets of A4. Pauffley J's clerk sent them to counsel at 15:20 on that day and at 16:25 Mr Williams asked the judge to transmit further questions arising out of Judge Selvaag's answers to questions one and four. On the following morning Pauffley J transmitted the additional questions to the office lawyer who, on my instructions, declined to trouble Judge Selvaag further. That afternoon the clerk to Pauffley J informed the Bar that the judge was content with the decision that Judge Selvaag should not be troubled further.

93. It should be clearly understood that the decision to preclude a further enquiry of Judge Selvaag was essentially an administrative decision. I had no knowledge of the case or the issues that it raised. The decision was taken by me not as a Lord Justice but as Head of International Family Justice with general responsibility for international judicial collaboration. Finally it should be noted that the General Affairs Committee of the Hague Conference endorsed a resolution passed at the 5th Special Commission to produce a good practice guide governing international judicial collaboration. Following a number of meetings of an expert group the draft is now completed and will be presented to the 6th Special Commission for endorsement.

94. Some confusion as to the boundary between my judicial and management responsibilities resulted in the recusal application referred to in Paragraph 2 above.

Lord Justice Aikens:

95. I agree that this appeal should be dismissed. I agree with the reasons of Thorpe LJ. I have also read in draft the judgment of Black LJ and I agree with the remarks that she has made. With considerable diffidence I venture some comments of my own because of the far-reaching nature of some of the arguments that were raised on behalf of the appellant mother and on behalf of Tyler Baldock before us.

96. The two arguments on which I wish to comment were advanced more especially by Mr Devereux on behalf of Tyler Baldock and adopted by Mr Setright on behalf of the appellant mother. The first is that in Hague Convention proceedings the English courts must, in the light of four decisions of the ECtHR, viz. *Maumousseau, Neulinger, Raban* and *Van den Berg,* treat the child's best interests as "a primary consideration" or "the primary consideration". In doing so it must, before it makes a decision, therefore carry out as comprehensive an enquiry in relation to the particular family circumstances as is required on the facts of the case so that the proceedings overall are fair and so that the proceedings do justice to the parties and the child in such a way as to secure their guarantees in the ECHR, particularly Article 8.

97. The second is that the effect of the Human Rights Act 1998 is that there is now a separate and distinct defence to an application to return under Article 12 of the Hague Convention quite apart from that set out in Article 13(b) of that Convention. It is said that there is, effectively, a "defence" in the terms of Article 20. Article 20 of the Hague Convention provides:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms".

The UK did not include that provision in the schedule to the 1985 Act which incorporated the Hague Convention into domestic law. The argument is that the terms of Article 20 are now part of UK law by virtue of the incorporation of the ECHR into domestic law by the Human Rights Act 1998 ("HRA"). Accordingly, it is said that Article 20 now provides an independent "defence" to an application to a requested state to return a child under Article 12 of the Hague Convention. Mr Devereux submitted that Pauffley J erred in failing to adopt either of the principles advanced in those two arguments.

98. The Hague Convention is a worldwide convention. I agree with Thorpe LJ that its terms have an "autonomous" meaning in the sense that they are not to be interpreted as if they are simply domestic legislation; nor should the terms be interpreted with the baggage of domestic canons of construction or case law. There are, of course, "autonomous" aids to the construction of the Hague Convention in the form of its preamble, the statement of its objects in Article 1, the Explanatory Report by Ms Elisa Pérez-Vera on the drafting of the Convention and the provisions of Section 3 of the Vienna Convention on the Law on Treaties 1969. I accept also that it is also to be regarded as a "living" Convention which must take account of subsequent relevant Conventions such as the United Nations Convention on the Rights of the Child.

99. However, there is no court with international jurisdiction to give a definitive interpretation of the Hague Convention in the way that the ECJ can give definitive rulings on EU Treaties or Regulations or the International Court at the Hague can rule on the interpretation of other international treaties. And the only way that the Hague Convention can be modified is by further international agreement, which is a slow and cumbersome process.

100. What I find difficult to accept is the suggestion, apparently advanced, that the ECtHR has jurisdiction to interpret the provisions of the Hague Convention. On the contrary, I accept the submission of Ms A-Tabib, advanced on behalf of The AIRE Centre, that the sole purpose of the ECtHR, as set out in Article 19 of the ECHR, is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". The function of the ECtHR is therefore to receive applications from any person "claiming to be the victim of a violation of the [ECHR] by one of the High Contracting Parties of the rights set forth in the [ECHR] and the Protocols thereto": Article 34. Furthermore, it is not a court of appeal from national courts and, in accordance with public international law principles, it will only deal with a matter after all domestic remedies have been exhausted: Article 35(1).

101. It is, I think, also important to recall Article 53 of the ECHR, which provides that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party". In the context of the present case, the rights conferred by the ECHR on individuals have to be considered in the light of the rights and obligations of States (and so, indirectly, individuals) that are contained in the Hague Convention.

102. I therefore accept Ms A-Tabib's submission that the ECtHR cannot rule on the bare question of whether a State has complied with its obligations *under the Hague Convention*. I would go further. It is not, I respectfully suggest, a part of the ECtHR's function to indicate whether it approves or disapproves of the principles of the Hague Convention, although it has, of course, emphatically supported them. Nor, save to the limited extent I shall explain, can it be the function of the ECtHR to *interpret* the provisions of the Hague Convention. The ECtHR's task is, I most respectfully suggest, to consider whether a domestic court, as an emanation of a High Contracting Party, has, in dealing with a matter, violated one or more of the ECHR rights of a litigant when considering the issues before it. I accept, therefore, that if a domestic court is said to have interpreted the Hague Convention in a manner which violates the ECHR rights of a litigant, then the ECtHR must rule on that. But in doing so, it will be concentrating on the alleged violation of the relevant Article of the ECHR, not the correct interpretation of the Hague Convention.

103. It is obvious, as the ECtHR has observed in *Maumousseau, Neulinger* and subsequent cases, that if a court in the "requested country" makes an order pursuant to Article 12 of the Hague Convention for the return of a child to the country of its habitual residence after the child's wrongful removal to or retention in another country, then that order will almost inevitably be an interference with respect for the private and family life of the child and also the abducting parent, within Article 8(1) of the ECHR. The same must be true in respect of the rights of the child and the left-behind parent, if an order not to return the child is made under Article 13(b) of the Hague Convention or the other specified exceptions to Article 12. However, I find it difficult to envisage how an order in either case could not be "in accordance with the law", within Article 8(2) of the ECHR, unless the domestic court's decision was perversely contrary to the provisions of the Hague Convention. Moreover, the fact that, so far, it is only in *Neulinger* that the ECtHR has found a breach of Article 8(2) and there only because of the delay in the *execution* of the order for return under the Hague Convention, suggests that the scope for breaches of Article 8(2) in *making* orders under the Hague Convention is very limited indeed.

104. Therefore, it seems to me that when the ECtHR is considering whether a domestic court has secured the guarantees of the ECHR when applying and interpreting the provisions of the Hague Convention, the ECtHR has to look at whether there has been a breach of ECHR rights in the light of the obligations imposed on states by the Hague Convention. To my mind, this must be so whether the ECtHR is considering whether the Article 8 rights or Article 6 rights of a party have been infringed. I understand that to be the effect of the statements of the ECtHR in paragraph 132 of *Neulinger,* (quoted by Thorpe LJ at [29] above), repeated at paragraph 28 (ii) of *Raban*, (quoted by Thorpe LJ at [35] above).

105. In *Neulinger, Raban* and *Van den Berg,* the ECtHR has stated that when the ECtHR is considering whether a domestic court, when applying and interpreting the Hague Convention has secured the guarantees of the ECHR, the ECtHR must see the decision making process of the domestic court was fair and "allowed those concerned to present their cases fully". The ECtHR has further stated that, to that end the ECtHR:

> "…***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 make 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 (see *Maumousseau and Washington,* cited above §74". [My emphasis].

106. That wording, which was first used in *Neulinger* and was then repeated, *verbatim,* in *Raban* and *Van den Berg,* (complete with incorrect sub-paragraph numbering in the last two cases), is said to have its origins in paragraph 74 of the ECtHR's judgment in *Maumousseau.* However, the ECtHR did not say in that paragraph that the ECtHR "must ascertain" whether the domestic courts had conducted an in-depth examination and so forth. The ECtHR said:

> "***In the present case, as the Court has already observed,*** 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, as requested of them, what the best solution for [the child] in the context of a request for her return to the United States of America, the country of her birth". [Emphasis added by me].

107. What appears to have happened in the three subsequent cases is that this statement of fact has become translated into a kind of standard against which the ECtHR will judge whether the domestic courts have fulfilled their ECHR obligations. In each of *Neulinger, Raban* and *Van den Berg,* the ECtHR has cited *Maumousseau* paragraph 74 for the proposition set out at [105] above. In my respectful view, it is no such thing.

108. Therefore, it seems to me that the statement quoted at [105] above is not to be regarded as the ECtHR's interpretation of any specific procedural requirements under the Hague Convention provisions, because, for the reasons I have given, the ECtHR cannot be a tribunal whose function it is to interpret those provisions except in the limited sense I have indicated. Nor do I understand the ECtHR to be dictating, for the purposes of Article 6 of the ECHR, a specific, detailed, procedure that must be used by domestic courts in carrying out their functions when there is an application to return a child under the provisions of the Hague Convention. The ECtHR's only concern, in seeing whether a domestic court has fulfilled its Article 6 obligations, must be whether the parties to a Hague Convention proceedings have received a fair

trial within a reasonable time by an independent and impartial tribunal established by law.

109. Therefore I would agree with Thorpe LJ's statement at [69] above that the quoted statement of the ECtHR can only be read as demanding that when domestic courts are deciding whether or not to make an order for the return of a child under the Hague Convention, they have to weigh the immediate and not the ultimate "best interests" of the child. If the domestic courts of the requested state were to do more then there would be a danger that the requested state's courts would be usurping the proper function of the courts of the child's habitual residence, as Baroness Hale pointed out at [51] of *re D (A Child) (Abduction: custody rights) [2007] AC 619.*

110. It follows from all I have said that, contrary to what I understand to be the submissions of Mr Setright and Mr Devereux, I do not accept that there is a clear and constant line of jurisprudence of the ECtHR which means that when an English court is considering whether or not to return a child pursuant to the Hague Convention, it has to carry out a more comprehensive enquiry in relation to the particular family circumstances, whether or not it would be as comprehensive as it would in a full-scale welfare enquiry. What is required is that the Hague Convention be interpreted correctly and in a manner consistent with ECHR rights and that the procedure adopted be fair.

111. There is one last comment I wish to make in relation to the first of the two arguments raised on the basis of the ECtHR cases. There is nothing in the decisions of the House of Lords or Supreme Court that suggests that when a court in a requested state has to consider whether or not to order the return of a child to its habitual residence under the Hague Convention, it must engage in an extended welfare enquiry. Indeed, the need for promptness in decision making, in order to protect what the preamble to the Hague Convention states is "the paramount importance of the interests of children in matters relating to their custody", has been emphasised by Baroness Hale in *re M and Another (Children) (Abduction: Rights of Custody) [2008] 1 AC 1288* at [12], quoted by Thorpe LJ at [60] above. If the quoted statements of the ECtHR at [105] above are thought to be at variance with the approach which has been approved by the House of Lords and consistently adopted by this court in Hague Convention cases, then we must follow the approach of the final court of appeal in this jurisdiction until told otherwise by a decision of the Supreme Court. That rule is clear from such decisions of the House of Lords as *R (on the application of Purdy) v DPP [2010] 1 AC 345* at [34] per Lord Hope of Craighead, and *R (on the application of RJM) v Sec of State for Work and Pensions [2009] 1 AC 311* at [59]- [67] per Lord Neuberger of Abbotsbury.

112. Lastly, I consider the argument that there is now a "separate" "defence" under Article 20 of the Hague Convention to an application for an order for the return of a child under the Hague Convention by virtue of the incorporation of the ECHR into English domestic law. I have already set out the terms of Article 20. In *re D (Abduction: Rights of Custody) [2007] 1 AC 619* at [65], Baroness Hale of Richmond (with whom the other law lords agreed) noted that the 1985 Act had not incorporated Article 20 into English law. But Baroness Hale also noted that under section 6 of the HRA it is unlawful for a public authority in the UK, such as a court, to act in a way which is incompatible with a person's ECHR rights. Thus "in this way, the court is bound to give effect to the [ECHR] rights in Hague Convention cases just as in any

other. Article 20 of the Hague convention has been given domestic effect by a different route". However, as I understand this statement, this means no more than UK courts, when interpreting and applying the Hague Convention, must do so in a manner which is in accordance with the ECHR rights of those involved in a case. It is noticeable that in *re M (FC) and another (FC) (Children) (FC) [2008] 1 AC 1288* at 56, Baroness Hale said that Article 20 of the Hague Convention and the ECHR did not take matters further in that case. In general if a court has performed its duties in accordance with its ECHR obligations, no further question could or should arise.

Lady Justice Black:

113. I agree with both Thorpe LJ and Aikens LJ and gratefully rely upon their analyses of the issues with which they deal. I do not want to say more on the first ground of appeal but I would like to add a few paragraphs of my own in relation to the impact of the decision in *Neulinger.*

114. As my Lord, Lord Justice Thorpe, has said, it is important not to consider *Neulinger* in a vacuum. It seems to me that *Maumousseau* which precedes it reveals similar thinking, as do *Raban* and, most recently *Van den Berg* which come after it.

115. In *Maumousseau*, the ECtHR expressed itself "entirely in agreement with the philosophy underlying the Hague Convention" which it saw (see paragraph 69, cited above by Thorpe LJ) as protecting children from the trauma caused by removal or retention by restoring the previous *status quo* as soon as possible and leaving the issues of custody and parental authority to be determined by the courts of the child's habitual residence. In refusing to accept the arguments of the applicant mother, Ms Maumousseau, it indicated its intent that "both the substance and primary purpose" of the Convention should not be "rendered meaningless", and spoke of the need to interpret the exceptions strictly, recording that the "aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she unilaterally created" (paragraph 73). Its endorsement of the strictness of the exceptions is emphasised by the reference back in paragraph 73, with approval, to paragraph 34 of the Explanatory Report on the Hague Convention which includes these words:

> "….it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."

116. The ECtHR did not accept Ms Maumousseau's assertion that a domestic court dealing with a request for the return of a child under the Hague Convention conducts an incomplete assessment of the child's situation and therefore of its best interests (see paragraph 70) and observed at paragraph 72 that

> "there is no automatic or mechanical application of a child's return once the Convention has been invoked, as indicated by the recognition in that instrument of a number of exceptions to the member States' obligation to return the child (see in particular Articles 12, 13 and 20), based on objective

> considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to each case."

117. *Neulinger* does not, in my view, evince an intention to depart fundamentally from the approach of *Maumousseau* and in particular from the approval in that decision of the philosophy of the Hague Convention. The majority judgment certainly contains nothing explicitly disapproving of *Maumousseau* and such reference back as there is to that decision is in terms that appear, on the contrary, to indicate an intention to build upon it.

118. In paragraph 140 of *Neulinger*, the Court expressly referred to *Maumousseau*, saying:

> "The Court has already had occasion to examine the question of whether the conditions of enforcement of a child's return were compatible with Article 8 of the Convention. It defined the obligations of States in such matters in the case of *Maumousseau and Washington*…."

There follows an extensive citation from paragraph 83 of *Maumousseau* culminating in this passage recognising the need for urgent handling of such cases:

> "Proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live. The Hague Convention recognises this fact because it provides for a range of measures to ensure the prompt return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously to ensure the return of children and any failure to act for more than six weeks may give rise to a request for explanations…."

119. In paragraphs 136 and 137 of *Neulinger* (cited above by Thorpe LJ), the ECtHR acknowledged the alignment of the Article 8 jurisprudence and the Hague Convention, commenting that "the same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation (Article 13, subparagraph (b)). In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention". It went on to note also that certain domestic courts have expressly incorporated the child's best interests into the application of the term grave risk under Article 13(b) and I observe, in passing, that from paragraphs 60 and 64, we can see that the Court considered that the House of Lords had done so in *In re D (a child)* [2006] UKHL 51.

120. *Raban* also, in the summary at paragraph 28 (cited by Thorpe LJ above) of the principles "articulated and summarized" in *Neulinger*, returned to *Maumousseau* and recognised (see paragraph 28(vi)) that a "child's return cannot be ordered

automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the children (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment".

121. Paragraph 139 of *Neulinger*, and its later incarnations in *Raban* and *Van den Berg*, must therefore be read in the light of the endorsement by the ECtHR of the aims and objectives of the Hague Convention, of the system of restrictively interpreted exceptions which enables the individual child's best interests to be properly accommodated within the Hague Convention scheme, and, importantly, of the obligations that the Hague Convention imposes on States to act speedily, thus protecting children from "the irremediable consequences" of "the passage of time". That is the context in which the "in depth examination of the entire family situation" has to take place.

122. Also an important part of the context of the decision in *Neulinger* is the factual situation in that case which, by the time of the Court's decision, was a far cry from the normal "hot pursuit" of a Hague abduction application. The child had arrived with his mother in Switzerland from Israel in June 2005. An Article 13(b) defence was successful in the lower Swiss courts but return was finally ordered by the Federal Court in August 2007. The father applied immediately to the Swiss courts for enforcement of that decision but withdrew that application in October 2007 when the Court indicated interim measures to the Swiss Government. The date of the decision of the Court was July 2010, 5 years after the child first came to Switzerland. The Court expressly said (paragraph 145) that, in considering whether Article 8 had been complied with, it was necessary to take into account the developments that had occurred since the Federal Court ordered the child's return. Its conclusion (see paragraph 151) was reached "in the light of all the foregoing considerations, particularly the subsequent developments to the applicants' situation, as indicated in particular in the provisional measures order of 29 June 2009". The provisional measures order (the grounds for which are set out at paragraph 47 of the *Neulinger* judgment) referred, amongst other things, to the father never having sought to see his child and having apparently "lost interest in the present case".

123. Having regard to all of these matters, it would be extraordinary if paragraph 139 contemplated an approach to Hague cases which represented a radical departure from established practice in the domestic courts and which risked jeopardising the aims and objectives of the Hague Convention and I do not think that that was what was intended at all.

124. I agree with Thorpe LJ that paragraph 139 must be interpreted in a way that recognises that the task of the court hearing a Hague return application is limited to the immediate decision at hand, return or no, and that the court has to make that decision without delay because the child's interests will normally be served by a speedy return to his country of habitual residence in order that arrangements for his medium and longer term future can be resolved there. The circumstances of the particular case have to be investigated ("*in concreto*" as the ECtHR puts it) but that investigation will always be circumscribed by the fact that its focus is the determination of whether the familiar exceptions (defences as they are often mislabelled in our courts) in the Hague Convention are established and, if so, what order should be made as to return and by the fact that the investigation must not,

itself, provoke the very delay that the Hague Convention is designed to avoid and that can be so harmful. This is the approach taken by the courts in this jurisdiction at present, the precise extent of the investigation being a matter for the discretion of the trial judge in the light of the individual circumstances.

125. It follows that, for these reasons, I do not see *Neulinger* as requiring a change to the present approach to Hague Convention applications in this jurisdiction or to the existing jurisprudence upon the basis of which our courts make their determination of such applications. The limitations on the reach of the ECtHR in the Hague Convention field, explained by Aikens LJ, are a further reason why I take this view. Indeed, the anxiety provoked in those who work in the field of international child abduction by the *Neulinger* decision might even, I think, have been a little puzzling to the ECtHR, given that it was intent on interpreting "the obligations that Article 8 imposes on the Contracting States ….taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980….and the Convention on the Rights of the Child of 20 November 1989" (see paragraph 132 of *Neulinger*) and "review[ing] the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8" (see paragraph 133, ibid) rather than seeking to impose its views on the interpretation or development of the Hague Convention upon all or any of the signatories to that Convention.