



Child Abduction Cases in the European Court Of Human Rights – Changing Views on the Child’s Best Interests

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Abstract

Case law from the European Court of Human Rights has been important for the interpretation and application of the Hague Convention on International Child Abduction. The decisions both give authority to and complement the Hague Convention. Two landmark cases are the Grand Chamber judgments in *Neulinger and Shuruk v Switzerland* from 2010 and *X v Latvia* from 2013. The article analyses these two judgments, with a main focus on the Court’s application of the principle of the best interests of the child and the procedural requirements for return cases. The article also focuses on the relationship between child abduction cases and public child care cases. In case law after 2013, the Court applies the *X* principles in child abduction cases, while the requirements of *Neulinger* are still applied in public child care cases.

Key words

International child abduction, European Court of Human Rights, the principle of the best interests of the child

1. Introduction¹

This article analyses selected judgments on international child abduction from the European Court of Human Rights (hereafter referred to as ‘ECtHR’ or ‘the Court’) and how they have changed over time. The main focus is the Court’s application of the principle of the best interests of the child, and the balancing of protecting children as a group against international abductions and protecting each individual child against harm. The article also focuses on the relationship between child abduction cases and public child care cases.

Case law from the ECtHR has been important for the interpretation and application of the Hague Convention on International Child Abduction (hereafter referred to as ‘the Hague Convention’ or ‘HC’).² There is no international court or control organ supervising the Hague Convention. In several cases, national courts’ decisions under the Hague Convention have been brought before the ECtHR, and there is considerable jurisprudence from Strasbourg concerning child abduction cases. In the early abduction cases, the Court referred to statements on a parent’s right to be reunited with his or her child that the Court had made in public child care cases. Up to 2010, the Court repeatedly stated that in international child

1. Kvisberg’s PhD thesis on international custody cases and international child abduction was published in 2009. She is a former Norwegian Hague liaison judge in child abduction cases and a member of the Working Group on the draft Guide to Good Practice on Article 13(1)(b) established by the Hague Conference on Private International Law.

2. The Hague Convention on Civil Aspects of International Child Abduction, The Hague 26 October 1980.

abduction cases, the European Convention on Human Rights (hereafter referred to as ‘the Convention’ or ‘ECHR’)³ must be interpreted in light of the Hague Convention. The Court underlined the States’ duties to return abducted children under the Hague Convention, to decide the cases swiftly, and to enforce return decisions effectively. The case law from Strasbourg gave authority to the Hague Convention’s principle that abducted children should be returned to their habitual residence, and the Court’s practice contributed to the influence of the Hague Convention.

In 2010, the Court’s Grand Chamber delivered its first judgment in a child abduction case, *Neulinger and Shuruk v Switzerland*.⁴ By a 16–1 majority, the Court found that to enforce a Swiss return order would violate the applicants’ right to respect for their family life under Article 8 ECHR. The general principles in the judgment seemed to change the Court’s approach to the Hague Convention, and the main point was that Article 8 had to be interpreted in light of both the Hague Convention *and* the United Nation’s Convention on the Rights of the Child (hereafter referred to as ‘the Convention on the Rights of the Child’ or ‘CRC’).⁵ The Grand Chamber described the two limbs of the child’s interests; that the child’s ties with its family must be maintained save for very exceptional circumstances, but also that the child must be ensured development in a sound environment and that a parent is not entitled to measures that would harm the child’s health and development. In return cases, the Grand Chamber required national courts to conduct an ‘in-depth examination’ of the whole family situation.

As shown in section 5, this judgment met strong criticism, and in the case *X v Latvia*⁶ in 2013, the Grand Chamber modified some of the statements in *Neulinger*. In *X*, the Grand Chamber held that the child’s best interests cannot be understood in an identical manner irrespective of whether the court is examining a request for a child’s return under the Hague Convention or an application for custody or parental responsibility. A more nuanced approach was introduced. Return cases were considered different from custody cases, and in return cases, the Court held that the principle of the best interests of the child must be evaluated in the light of the rules in the Hague Convention. The Grand Chamber expressly stated that the expression ‘in-depth examination’ in *Neulinger* did not in itself set out any principle for the application of the Hague Convention by the national courts. The return duty under the Hague Convention is not absolute, and the national court should make an effective examination of each return case, taking all the relevant factors genuinely into account and making a sufficiently reasoned decision.

In the Court’s case law after 2013, the statements from *X v Latvia* have been repeated and applied in child abduction cases. However, in public child care cases, the principles from *Neulinger* continue to be applied, unamended by the *X* judgment.

In this article, I aim to clarify the direction of the Strasbourg jurisprudence, with emphasis on a legal dogmatic analysis. I first present the relevant rules in the European Convention on Human Rights, the UN Convention on the Rights of the Child and the Hague Abduction Convention. In section 3, a brief overview is given of the ECtHR case law in abduction cases up to 2010. The *Neulinger* judgment is analysed in section 4, and reactions to the judgment in section 5. The *X* judgment is analysed in section 6. The law post *Neulinger* and *X*, with the

3. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950.

4. *Neulinger and Shuruk v Switzerland* [GC], no 41615/07, ECHR 2010.

5. Convention on the Rights of the Child, 20 November 1989.

6. *X v Latvia* [GC], no 27853/09, ECHR 2013.

different approaches in child abduction and public child care cases, is discussed in section 7, before a summing up in a conclusion in section 8.

2. The rules

Article 8(1) ECHR states, *inter alia*, that everyone has the right to respect for his or her family life. However, this right is not absolute, and Article 8(2) ECHR permits a public authority to interfere with the right provided that this is in accordance with the law and deemed necessary in a democratic society, *inter alia* for the protection of the rights and freedoms of others. States have both a negative and a positive obligation under Article 8. The negative obligation protects individuals against arbitrary interference from public authorities. In addition, there is a positive obligation on the State inherent in an effective respect for family life. When a child and a parent are separated, the State must take measures with a view to reuniting the child with his or her parent(s). In both contexts, there must be a fair balance between the competing interests of the individual and of the community as a whole, and the State enjoys a certain margin of appreciation.⁷

As shown further on in this article, the decisions in abduction cases reflect this double obligation of Article 8. In some cases, the left-behind parent has complained that the non-return of the child violates this parent's right to family life with the child, and that the State has a positive duty under Article 8 to act and return the child. This is the most common claim. But there have also been cases brought by the abductor, claiming that a return of the child violates this parent's right to family life with the child.

In some cases, the complaint concerns only the parent's rights; in other cases both the parent's and the child's rights; and in a few cases only the child's rights. Most cases have been brought against the receiving State, but there have also been cases against the State of the child's habitual residence.

It is Article 8 ECHR that is most often discussed in child abduction cases, and this is accordingly the focus of this article. In a few abduction cases, there are also decisions on the right to fair trial under Article 6 ECHR⁸ and the prohibition of discrimination in Article 14 ECHR.⁹

The principle of the best interests of the child is not mentioned in the European Convention on Human Rights. This principle is instead set out explicitly in Article 3 of the UN Convention of the Rights of the Child: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This principle is applied also by the ECtHR, and an important question in abduction cases concerns its meaning and weight.

The Hague Convention was negotiated at the Hague Conference on Private International Law in 1980 and has been ratified by 100 States worldwide. There is no international control organ established by the Convention, but there is a Special Commission that meets every four to five years to monitor its practical operation. These meetings gather national experts from the Contracting States: judges, lawyers, civil servants and academics.

In the preamble to the Hague Convention, the State Parties declare that they are firmly convinced that the interests of children are of paramount importance in matters relating to

7. *Keegan v Ireland*, 26 May 1994, § 49 Series A no 290.

8. See eg *HN v Poland*, no 77710/01, 13 September 2005.

9. See eg *Balbontin v United Kingdom*, no 39067/97, 14 September 1999.

their custody. They further declare that they 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.

The main rule in the Hague Convention is Article 12(1), imposing a duty to return wrongfully abducted children forthwith. I use the term ‘abduction’ to cover both removal and retention. An abduction is wrongful according to Article 3 when it is in breach of rights of custody attributed under the law of the State in which the child was habitually resident immediately before the abduction, and this right was actually exercised. Article 11 underlines that return cases shall be handled and enforced swiftly, and that the judicial and administrative authorities have a duty to act expeditiously.

The Hague Convention takes a practical approach in the regulation of abductions. It does not regulate recognition or enforcement of formal decisions, but aims at recovering the child’s factual situation before the abduction; it is meant to restore the *status quo ante*. The underlying principle is that child custody cases should be decided in the State where the child has his or her habitual residence, because this is the appropriate forum where the courts are best placed to protect the child, to evaluate the child’s interests, and to hear the child.

The Convention’s term ‘rights of custody’ is defined in Article 5 (a) and shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence. The term ‘habitual residence’ is not defined, in line with the tradition of the Hague conventions. The idea is that the concept is a purely factual one, and should be decided in each individual case on its own facts. In this article, the expression ‘habitual residence’ describes the State where the child is abducted from, and the ‘receiving state’ is the State where the child is abducted to, and in which the return case takes place. The parents are described as the ‘abductor’/‘abducting parent’ and the ‘left behind parent.’

The Hague Convention has few exceptions from the return duty, and these exceptions are to be interpreted restrictively; the Convention drafters were concerned that otherwise the Convention would end up as a ‘dead letter’.¹⁰

The exception clause that is most similar to a child’s best interests test is Article 13(1)(b), under which there is no duty to return an abducted child if there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The welfare of each individual child will be relevant under this exception, but the threshold is higher than under a child’s best interests test. This is the most litigated exception and also the exception that most often leads to a non-return.¹¹

If more than a year has elapsed since the abduction and the child has settled in his or her new environment, a return can be refused under Article 12(2). The child’s own views are relevant under Article 13(2), where return can be refused if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child’s views. An exception clause that is principally important, but in practice very rarely used, is Article 20, according to which a return may be refused if it would not be permitted by the fundamental principles of the receiving State relating to the protection of human rights and fundamental freedoms.

The Hague Convention is described as protecting the interests of children at a group level, by securing return to the most appropriate jurisdiction where the merits of custody can be

10. Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (1982).

11. Nigel Lowe and Michael Nicholls, Lowe, Everall & Nicholls, *International Movement of Children, Law, Practice and Procedure* (2nd ed, Family Law 2016) 547.

decided, avoiding conflicting custody decisions, discouraging forum shopping and preventing future abductions. In a return case, the court shall not apply a best interests-test; this is a task for the court in the State of habitual residence after the return. However, there are cases where the need to protect the individual child from harm must prevail over the return presumption, and the exception clauses in the Convention provide the legal basis for this protection.¹²

3. ECtHR case law prior to 2010

Up to 2010, the case law from the ECtHR contributed to the influence of the Hague Convention, and gave authority to the principle that abducted children should be returned to their habitual residence after swift proceedings in the receiving State, leaving the merits of the custody case to the court in the child's State of habitual residence.

In a number of cases, the ECtHR underlined and supported the return mechanism of the Hague Convention. An early case was *Ignaccolo-Zenide v Romania*¹³ from 2000, where a left-behind mother made a complaint against Romania as the receiving State.

In this case, the ECtHR outlined several principles that were followed in later abduction cases. The Court started by referring to its case law on the positive obligation in Article 8: this includes a parent's right to the taking of measures with a view to being reunited with his or her child, and an obligation on the national authorities to take such action. The Court pointed to several earlier judgments where this had been stated: *Eriksson v Sweden*,¹⁴ *Margareta and Roger Andersson v Sweden*¹⁵ and *Olsson v Sweden (no 2)*.¹⁶ An interesting point is that these cases concerned parents' relationships with children who had been taken into public child care. So in the early child abduction cases, the Court referred to principles developed in public care cases and built the reasoning in abduction cases on the same principles. It will be shown that in recent case law it has been the other way around, and the Court has referred to reasoning from an abduction case in public care cases.

After taking as its starting point the principles from public care cases, the ECtHR turned to the rules on international child abduction, and stated:

[T]he Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.¹⁷

The statement that the ECHR must be interpreted in light of the Hague Convention was repeated in several later cases.¹⁸

The Court also underlined the obligation to act expeditiously. In a case of this kind, the adequacy of a measure was to be judged by the swiftness of its implementation, and this included the execution of the decisions. This emphasis on swiftness is in line with the requirements of the Hague Convention.

12. Torunn Elise Kvisberg, *Internasjonale barnefordelingssaker. Internasjonal barnebortføring* (Gyldendal Akademisk 2009) 74–87.

13. *Ignaccolo-Zenide v Romania*, no 31679/96, ECHR 2000-I.

14. *Eriksson v Sweden*, 22 June 1989, § 71, Series A no 156.

15. *Margareta and Roger Andersson v Sweden*, 25 February 1992, § 91, Series A no 226-A.

16. *Olsson v Sweden (no 2)*, 27 November 1992, § 90, Series A no 250.

17. *Ignaccolo-Zenide v Romania* (n 13) § 95

18. See eg *Sylvester v Austria*, nos 36812/97 and 40104/98, § 57, 24 April 2003 and *HN v Poland* (n 8) § 75.

The *Ignaccolo-Zenide* judgment from 2000 was followed in several later abduction cases, and is representative for the case law from the ECtHR up to 2010. Article 8 ECHR was interpreted in light of the Hague Convention, and the Court held that the States had a duty to restore the family life of the left behind parent and the child by returning the child according to the Hague Convention. The Court referred to the Hague Convention even in a case against Albania, which had not ratified the Convention.¹⁹

In *Iglesias Gil and A U I v Spain*,²⁰ the Court found that Spain, which was the state of the child's habitual residence, had violated Article 8 by not making adequate and effective efforts to secure the left behind parent's rights.

There were also cases brought by the abducting parent, claiming that a return would violate Article 8. In *Paradis and others v Germany*,²¹ the ECtHR did not find that the return violated Article 8. The Court cited the preamble to the Hague Convention about the children's best interests and the States' desire to protect children from the harmful effects of international abduction, and held that the German court, by applying the provisions of the Hague Convention, acted in what it considered to be the children's best interests. The return constituted an interference with the abductor's and children's family life with each other, but the ECtHR found that this interference pursued a legitimate aim, namely the protection of the rights and freedoms of others. Once it had been established that the children had been wrongfully abducted to Germany, the German authorities were obliged to order their return forthwith, according to the relevant provisions under the Hague Convention.

The enforcement of a return order was brought before the ECtHR in the case *Maumousseau and Washington v France*.²² The Court stated:

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.²³

Regarding the enforcement, the Court held that the obligation to reunite parent and child is not absolute, a reunification may not be able to take place immediately and may require preparation. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. In the case, the difficulty with enforcement was a result of the abducting mother's refusal to comply with the return decision. The Court stated that the appropriate authorities should impose adequate sanctions in respect of this lack of cooperation and, 'whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives'.²⁴

19. *Bajrami v Albania*, no 35853/04, ECHR 2006-XIV (extracts).

20. *Iglesias Gil and AUI v Spain*, no 56673/00, ECHR 2003-V.

21. *Paradis and others v Germany* (dec), no 4783/03, 15 May 2003.

22. *Maumousseau and Washington v France*, no 39388/05, 6 December 2007.

23. *ibid* § 69.

24. *ibid* § 83.

There was support for the case law from Strasbourg in legal literature. Walker wrote that the case law of the ECtHR had encouraged a strict construction of the Hague Convention which had strengthened the rights of families.²⁵ Silberman found that the interpretations of the Court had reinforced the structure and mechanisms of the Hague Convention, and had emphasised that the child should not be removed unilaterally by one parent and kept away from the other parent.²⁶ Lowe, Everall and Nicholls held that it was unlikely that a return order made under the Hague Convention would be thought to be in breach of Article 8, and that the rulings from Strasbourg pointed to the contrary.²⁷

However, there were also commentators who questioned the Strasbourg case law. In my PhD thesis from 2008, I wrote that up to then, I had not seen any example that the Court had found a decision under the Hague Convention to be in violation of Article 8. When the Court had stated that ECHR should be interpreted in light of the Hague Convention, this in practice gave the Hague Convention a standing as a human rights instrument, which made it difficult for the Court to conduct a real human rights test of the return cases. I wrote that I would like to see a decision from the Strasbourg Court stating that the child should not be returned if this would be harmful to the child, for instance by referring to the exception clauses in the Hague Convention, and underlining that these exceptions must be applied if it was necessary to protect the individual child against harm. I made reference to a public child care case, where the Court had held that it ‘attach[es] particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular [...] the parent cannot be entitled under Article 8 [...] to have such measures taken as would harm the child’s health and development.’²⁸ I held that the same must apply also in abduction cases.²⁹

4. *Neulinger and Shuruk v Switzerland* 2010

The first child abduction case to come before the Grand Chamber of the Court was *Neulinger and Shuruk v Switzerland*. The case involved a boy born in Israel in 2003 to a Swiss mother and an Israeli father. The mother alleged that the father had joined a radical, ultra-orthodox Jewish sect, and she was worried that he would take the child abroad to a community of this sect. An Israeli court made an order prohibiting the removal of the boy from Israel. The parents divorced in 2005, and the mother was granted custody of the son and the father had access under supervision twice a week. The same year, the mother abducted the child to Switzerland. The father applied for a return of the boy to Israel under the Hague Convention. The Swiss first and second instance courts found that a return would entail a grave risk of harm to the child and dismissed the return application with reference to HC Article 13(1)(b), but on 16 August 2007 the Swiss Supreme court ordered the return of the child.

The mother and child petitioned to the ECtHR on 26 September 2007. The day after, the President of the Chamber indicated to the Swiss government not to proceed with the return,

25. Lara Walker, ‘The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the Un Human Rights Committee: The Danger of *Neulinger*’ (2010) 6(3) *Journal of Private International Law* 649, 681 <<https://doi.org/10.5235/174410410794046288>> accessed 17 June 2019.

26. Linda Silberman, ‘The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, *Neulinger*, *Zarraga*’ (2011) 63 *Oklahoma Law Review* 733, 745.

27. Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children. Law Practice and Procedure* (1st ed, Family Law 2004) 201.

28. *Johansen v Norway*, 7 August 1996, Reports of Judgments and Decisions 1996-III.

29. Kvisberg (n 12) 647–649.

on the basis of the Rules of the Court (Interim Measures) Article 39, and as a result the return procedure in Switzerland was stayed. The ECtHR in chamber ruled (4–3) that there had not been a violation of Article 8,³⁰ but then the case was referred to the Grand Chamber.

The Grand Chamber gave its judgment on 6 July 2010, and found by a 16–1 majority that an enforcement of the Swiss court order would violate Article 8 in respect of both mother and son.³¹ The Court was prepared to accept that the return decision remained within the margin of appreciation of the national authorities. This meant that the decision of the Swiss Supreme Court, at the time it was made, was not found to violate Article 8.

However, in order to assess whether Article 8 was complied with, it was necessary to take into account the developments that had occurred after the Supreme Court’s judgment, and to look at the facts at the time of the enforcement of the impugned measure. If the measure was enforced a certain time after the abduction, that could undermine the pertinence of the Hague Convention. By the time the Grand Chamber gave its judgment, the boy was seven years old. He had lived in Switzerland since he was two, attended school there, spoke only French and had not seen his father in five years. The father had remarried twice since the divorce from the mother, and was being sued in Israel for not paying maintenance in respect of a daughter from his second marriage. The mother could be exposed to a risk of criminal sanctions if she went back to Israel.

The controversy that followed the judgment – elaborated in section 5 below – was not caused by the Court’s evaluation of these facts, but by the general principles that the Court stated in §§ 131–140 of its judgment. The Court started off by stating that in matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must be interpreted taking into account in particular the Hague Convention and the Convention on the Rights of the Child. The decisive issue was whether a fair balance had been struck between the competing interests at stake – those of the child, of the two parents, and of public order – bearing in mind that the child’s best interests must be the primary consideration. The child’s best interests may, depending on their nature and seriousness, override those of the parents, but the parents’ interests, especially in having regular contact with their child, remain a factor when balancing the various interests at stake.

The Court noted that there was a broad consensus, also in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount, and stated:

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 [...]. 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.³²

The Court found that this principle was also inherent in the Hague Convention, which requires the prompt return of the abducted child unless there is a grave risk of harm to the child, HC Article 13(1)(b).

30. *Neulinger and Shuruk v Switzerland*, no 41615/07, 8 January 2009.

31. *Neulinger and Shuruk v Switzerland* [GC] (n 4).

32. *ibid* § 136.

The Court held that in return cases, national courts must assess the situation of each individual child. This requires an evaluation of several factors, and the Court stated:

It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences [...] For that reason, those best interests must be assessed in each individual case.³³

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.³⁴

If *Neulinger* §§ 138 and 139 are read literally, they set aside the Hague Convention, both with regard to the principle of return with few exceptions and without a full test of the child's best interests, and the procedural rules with emphasis on swiftness. It was therefore not surprising that the judgment met strong reactions.

5. Reactions to *Neulinger*

In The Hague, a meeting of the Special Commission was held in June 2011. In the conclusions from the meeting, the Special Commission noted 'the serious concerns which have been expressed in relation to language used by the court' in its recent judgment *Neulinger and Shuruk v Switzerland*.³⁵ It is unusual for the Special Commission to comment on case law, and even more so on a judgment from a supranational human rights court.

However, the Special Commission made reference to an extrajudicial statement made by President Jean-Paul Costa of the ECtHR. This extrajudicial statement was a speech President Costa had held at an international symposium on family law. The manuscript of the speech was distributed to the Special Commission. In his speech, the President referred to the *Neulinger* judgment § 139, as cited above, and said that it was possible to read this passage as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and as moving away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation. However, the President said that such an understanding would be over-broad:

Neulinger and Shuruk does not therefore signal a change of direction at Strasbourg in the area of child abduction. Rather it affirms the consonance of the overarching guarantees of article 8 with the international text of reference, the Hague Convention. Indeed, it is hard to think of a better example of how the Strasbourg Court looks to a specific international text in order to inform its interpretation of more general Convention provisions.³⁶

33. *ibid* § 138.

34. *ibid* § 139.

35. The Hague Conference, Conclusions and Recommendations of Part I of the Sixth Meeting of the Hague Special Commission, 1–10 June 2011, § 48.

36. The Hague Conference, Doc Info No 5, May 2011: 'Speech given on 14 May 2011 by Mr Jean-Paul Costa, President of the European court of human rights, at an Irish-British-French symposium on family law'.

From a strict legal point of view, this speech and the reference to it in an information document at the Special Commission had little value. A judgment from the ECtHR's Grand Chamber, with a 16–1 majority, cannot be overruled by a symposium speech, even if the speaker was the President of the Court. However, the speech was received as a signal from the Court that the requirements in *Neulinger* should not be read literally.

The very same day the Special Commission in the Hague came to its conclusion, the Supreme Court in London pronounced the judgment *Re E (Children)*.³⁷ The case concerned a family that had been living in Norway, with a Norwegian father, an English mother and two daughters born in 2004 and 2007. The mother abducted the children to England in 2010. The father applied for return under the Hague Convention, but the mother claimed that a return would expose the children to grave risk of harm. The Family Court, the Court of Appeal and the Supreme Court all ordered the return of the children, and the Supreme Court (per Lady Hale and Lord Wilson) also made important comments on the relationship between the Hague Convention and the ECHR in light of the *Neulinger* judgment.

The Supreme Court stated that the *Neulinger* judgment acknowledges that the guarantees in Article 8 have to be interpreted and applied in light of both the Hague Convention and the UNCRC. All three instruments are designed with the best interests of the child as a primary consideration. In every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of the particular child in order to ascertain whether a return would be in accordance with the Convention. Yet that is not the same as a full-blown examination of the child's future. The Supreme Court held that 'it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents'.³⁸ The Supreme Court held that the violation of Article 8 in *Neulinger* arose not from the Swiss courts' proper application of the Hague Convention, but as an effect of the subsequent delay. What the Supreme Court did not spell out, was, as shown above, that the delay was caused by ECtHR procedure.

The *Neulinger* judgment was also criticised, correctly in my view, in legal literature. The Court's statements on the child's best interests and the procedural requirements were too broad and without nuance. Silberman wrote that the decision undermined the efficacy of the Hague Convention. It had created a climate where unilateral relocations, even in the face of express court orders preventing a custodial parent from removing the child, were likely to be encouraged.³⁹ Stephens and Lowe pointed to the danger that *Neulinger* might encourage abductors to delay the return for as long as possible in the hope that the ECtHR decision would have direct application.⁴⁰ Walker found that the *Neulinger* decision had the potential to harm the functioning of the Hague Convention because it was open to interpretation and this might affect the certainty and uniformity achieved over the years by national courts.⁴¹

37. [2011] UKSC 27, judgment 10 June 2011.

38. *ibid* § 26.

39. Silberman (n 26) 742.

40. Victoria Stephens and Nigel Lowe, 'Children's welfare and human rights under the 1980 Hague Abduction Convention – the ruling *Re E*' (2012) 34(1) *Journal of Social Welfare & Family Law* 125, 133.

41. Walker (n 25) 681.

6. *X v Latvia* 2013

Despite the criticism, the Court continued to use the test from *Neulinger* in several child abduction cases,⁴² including the chamber judgment in *X v Latvia*.⁴³ The case concerned a girl born in Australia in 2005, to a Latvian mother and an Australian father. The mother abducted the child to Latvia in 2008. The father applied for a return of the child to Australia under the Hague Convention. The Latvian first instance court ordered the return, and the mother's appeal was dismissed by the appellate court. The mother applied for a suspension of the return order for 6 months, but then the father travelled to Latvia and took his daughter with him back to Australia in 2009.

The mother claimed that the proceedings in the Latvian court had not been fair, and therefore in breach of ECHR Article 6. She claimed that the Latvian court had erred in its interpretation and application of the Hague Convention, and it had disregarded evidence concerning the best interests of the child. Before the appeal court, the mother had presented new evidence in the form of a certificate prepared by a psychologist whom she had instructed, and who found that the child could suffer psychological trauma if she was separated from the mother and sent back to Australia. The mother also claimed to be the sole guardian of the child at the time of the removal from Australia.

The ECtHR in chamber concluded 5–2 that there had been a violation of Article 8. The Chamber applied the test from *Neulinger* (in §§ 72 and 73), and held that the Latvian courts had failed to take into account a range of factors in assessing the child's best interests. The Latvian courts' approach also lacked the necessary in-depth examination of the entire family situation.

The case was referred to the Grand Chamber, which in a judgment on 26 November 2013 by a 9–8 majority upheld that there had been a violation of Article 8.⁴⁴ While there are differences between *Neulinger* and *X*, and the Grand Chamber seemed to change its attitude towards the Hague Convention in *X*, it is worth noticing that the results were the same in the two cases: returns under the Hague Convention were found to violate Article 8.

The Grand Chamber clarified its view on the relationship between the Hague Convention and the ECHR in its general comments in §§ 92–108. Sixteen of the seventeen judges agreed on these principles. The Court started by reiterating that in the area of international child abduction, the obligations imposed by Article 8 must be interpreted in light of the Hague Convention and the Convention on the Rights of the Child. The Court stated that 'the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child"'.⁴⁵ This statement is important, because the Court seems to distinguish between different concepts of the best-interests test in different areas of child law.

Going on to analyse the meaning of the child's best interests in return cases, the Court reiterated that there is a broad consensus that the best interests of children must be paramount in all decisions concerning them. This idea is inherent in the Hague Convention, which associates this interest with restoration of the *status quo* by means of a decision ordering the child's immediate return, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests. This explains the existence of exceptions in the Hague Convention, specifically Article 13(1)(b) which applies in the event of a grave risk of harm to the child.

42. Eg *Raban v Romania*, no 25437/08, 26 October 2010.

43. *X v Latvia*, no 27853/09, 13 December 2011.

44. *X v Latvia* [GC] (n 6).

45. *ibid* § 95.

In the Court's view, it follows directly not only from Article 8 but also from the exceptions in the Hague Convention itself, that a return of an abducted child cannot be ordered automatically or mechanically. However, the Court explained that the child's best interests 'cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return in pursuance of the Hague Convention or ruling on the merits of an application for custody or parental authority'.⁴⁶ Underlining that an application for a return under the Hague Convention is distinct from custody proceedings, the Court held that in a return case:

[T]he concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13(a)) and the existence of a "grave risk" (Article 13(b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).⁴⁷

After this clarification of the meaning of the child's best interests in return cases, the Court referred directly to *Neulinger* and said that the judgment 'may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors'.⁴⁸ The Court held:

Against this background the Court considers it opportune to clarify that its finding in paragraph 139 of *Neulinger and Shuruk* does not in itself set out any principle for the application of the Hague Convention by the domestic courts.⁴⁹

In doing so, the Court considered that an harmonious interpretation of the ECHR and the Hague Convention could be achieved, provided that two conditions were observed:

Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention.⁵⁰

The Court stated that Article 8 imposes particular procedural obligations on the domestic authorities. In a return case, the court must consider arguable allegations of a grave risk of harm to the child in the event of return, and must give specific reasons in the light of the circumstances of each case. Both a refusal to take account of objections which could be relevant under the exceptions in the Hague Convention, and insufficient reasoning in such rulings, would be contrary to the requirements of Article 8 and also to the aim and purpose of the Hague Convention. Due consideration of such allegations is necessary, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly.

46. *ibid* § 100.

47. *ibid* § 102.

48. *ibid* § 104.

49. *ibid* § 105.

50. *ibid* § 106.

The sixteen judges who agreed on these general principles split sharply when applying the principles to the facts of the case. Eight of the judges pointed to the fact that the Latvian appellate court had refused to take account of the certificate from the psychologist, and had not considered whether it was possible for the mother to follow her daughter to Australia and maintain contact with her. The decision-making process had not met the procedural requirements inherent in Article 8, in that it failed to carry out an effective examination of the mother's allegations under Article 13(1)(b).

Eight other judges were unable to accept that view. They held that the psychologist's certificate was confined to the harm the child would experience not from being returned to Australia, but from being separated from her mother. The mother was an Australian citizen, and there was no legal impediment to her return. Australian legislation would provide for the security of the child against alleged ill-treatment from her father. These eight judges found no violation of Article 8.

The last judge, Pinto de Albuquerque, found that the case did not amount to a child abduction because the father had no parental rights at the time of the removal of the child from Australia. He also repeated the requirements of *Neulinger*, and underlined the need for an in-depth evaluation of the child's situation. He found a violation of Article 8.

While the *Neulinger* judgment was met with criticism (see section 5 above) the *X* judgment has been supported, both in itself and as a necessary correction to *Neulinger*. At the Hague Conference, there was a new meeting of the Special Commission in October 2017. In the Conclusions and Recommendations from this meeting, there was a separate point on 'European Court of Human Rights case law'. The Special Commission noted the developments in *X*, in particular the general principles in §§ 92–108, where the Court stated that an application for return made under the Hague Convention is distinct from custody proceedings, and that the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which are to be interpreted strictly.⁵¹

The legal commentaries welcomed the new judgment, rightly in my view. Beaumont and others wrote that the new approach established in *X*, which requires an effective examination of any allegations that fall under the exceptions in the Hague Convention, is to be welcomed. In their view, this requirement strikes a suitable balance between the summary return mechanism and the best interests of the child.⁵² Lowe wrote that the *X* judgement meets some of the criticisms of *Neulinger*:

The majority judgment means that the ECtHR has stepped back from the brink of outright confrontation with the global view that the 1980 Convention is designed to be a summary remedy with in-built safeguards to protect individual children from harm rather than directly to promote their best interests, which is the function of the court subsequently charged to determine any custody issues.⁵³

51. The Hague Conference, Conclusions and Recommendations of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions 10–17 October 2017, § 17.

52. Paul Beaumont, Katarina Trimmings, Lara Walker and Jayne Holliday, 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' (2015) 64(1) *International and Comparative Law Quarterly* 39–63, 43 <<https://doi.org/10.1017/S0020589314000566>> accessed 17 June 2019

53. Nigel Lowe, 'Strasbourg in Harmony with The Hague and Luxembourg over Child Abduction' in Katharina Hilbig-Lugani and others (eds), *Zwischenbilanz, Festschrift für Dagmar Coester-Waltjen* (Verlag Ernst und Werner Gieseking, 2015) 543–553, 546.

7. The law post *Neulinger* and *X*

7.1 Child Abduction – The *X* Principles

In both *Neulinger* and *X*, the Grand Chamber concluded that a return of the child would violate ECHR Article 8. Important elements of the Court's statements in *Neulinger* are unamended by *X*, and will apply in child abduction cases under the Hague Convention, as well as in other cases involving children's rights. The impact of *Neulinger* in public child care cases is discussed in section 7.2. below.

Before *Neulinger*, the Court had repeatedly stated that Article 8 must be interpreted in light of the Hague Convention. In *Neulinger*, the Court held that Article 8 must be interpreted taking into account the Hague Convention *and* the Convention on the Rights of the Child, and this was upheld in *X*. The double reference to both the Hague Convention and the Convention on the Rights of the Child means that when deciding a child abduction case, a court must respect both the effectivity of the return mechanism in the Hague Convention and the need to protect each individual child. This gives national courts a broader and more nuanced perspective on abduction cases than prior to 2010, when the Court referred only to the Hague Convention.

In *Neulinger*, the Court made an important statement about the two limbs of the child's interests; that the child's ties with its family must be maintained save for very exceptional circumstances, but also that the child must be ensured development in a sound environment, so that a parent is not entitled to measures that would harm the child's health and development. This statement is not set aside by the *X* judgment, and will still apply.

However, in *X*, the ECtHR clarified and even distanced itself from some of the statements in *Neulinger* in relation to child abduction cases. The Court specified that the child's best interests cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return under the Hague Convention or an application for custody or parental responsibility. This perspective on the child's best interests being evaluated in light of the type of application is not as clear in the *Neulinger* judgment.

The *X* judgment confirms that the return mechanism under the Hague Convention is consistent with Article 8. The Grand Chamber accepted that the Hague Convention is based on children's best interests at a group level, on a presumption that a return will be in the interests of the individual child, and that this child's best interests should be evaluated in a custody proceeding before the court in the child's habitual residence after return. The Hague Convention's objectives of prevention and immediate return of abducted children correspond to a specific concept of the best interests of children. However, importantly, the Court also stated that non-returns may be justified, in accordance with the exception clauses in the Hague Convention.

To be in line with the *X* judgment, national courts in abduction cases must give due consideration to any objection to the return that is capable of falling within the exceptions in Articles 12, 13 and 20 of the Hague Convention. However, the exception clauses are to be interpreted strictly. The courts' reasoning must be sufficiently detailed, and not automatic and stereotyped.

What the Court did not uphold was the requirement in *Neulinger* § 139 to conduct an 'in-depth examination of the whole family situation' in return cases. In *X* § 105, the Court expressly stated that this passage did not in itself set out any principle for the application of the Hague convention by national courts. Instead, national courts must conduct an effective examination of the exceptions in the Hague Convention. The national courts must take the relevant factors genuinely into account, and make a sufficiently reasoned decision.

This clarification from the Court makes it possible for national courts to continue their swift procedure in return cases, but at the same time adhere to the human rights standards which the Court set for the national procedures.

The Court's case law after *X* shows that the Court has substituted the *Neulinger* principles with the *X* principles in child abduction cases, and that it is the requirements set out in *X* that apply in such cases. The Court has decided several child abduction cases after the *X* judgment, and in these cases the Court has referred to the statements in *X*, without any reference to *Neulinger*.

In *K J v Poland* the Court said:

The general principles on the relationship between the Convention and the Hague Convention, the scope of the Court's examination of international child abduction applications, the best interests of the child and on the procedural obligations of the States, are laid down in the Court's Grand Chamber judgment in the case of *X v Latvia* [...] §§ 93–102.⁵⁴

The Court went on to refer to 'a number of other judgments concerning proceedings for return of children under the Hague Convention', and named several other judgments, among them *Maumousseau and Washington* and *Ignaccolo-Zenide*, but not *Neulinger*.

In *Hromadka and Hromadkova v Russia*, the Court stated that in cases of international child abduction 'the Court has presumed, save for certain exceptions, that the best interests of the child are better served by the restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of abduction (see *X v Latvia* [...] §§ 96–97 and 106–107).⁵⁵ Again, there was no reference to *Neulinger* in the Court's general comments on the relationship between the ECHR and the Hague Convention.

7.2 Public Child Care Cases – The *Neulinger* Principles

As shown in section 3 above, the Court's starting point in *Ignaccolo-Zenide* was case law from public child care cases. The Court's reasoning was built on the similarities between reuniting a parent with an abducted child and reuniting a parent with a child taken into public care. In both instances, the legal issue is the inherent positive obligation in Article 8 and the Court's interpretation and application of this obligation.

In recent judgments on public child care, the Court has applied principles formulated in a child abduction case. The Court discussed the relevance of *Neulinger* in public child care cases in *R and H v The United Kingdom*. The Court held that although *Neulinger* concerned the relationship between Article 8 and the Hague Convention, the principle of the best interests of the child set out in *Neulinger* § 136 were equally applicable to domestic care and adoption proceedings.⁵⁶ This case was decided before the Grand Chamber's judgment in *X*.

I have not found any public child care case in which the Court comments on the relevance of the *X* judgment in such cases. However, in several public child care cases decided after the *X* judgment, ECtHR has referred to the child best-interests statements in *Neulinger* without any reference to the *X* judgment or reservations as to the modifications of the principles set out in *X*.

54. *KJ v Poland*, no 30813/14, § 51, 1 March 2016.

55. *Hromadka and Hromadkova v Russia*, no 22909/10, § 151, 11 December 2014.

56. *R and H v the United Kingdom*, no 35348/06, § 74, 31 May 2011.

As an example, the Court referred to *Neulinger's* general statements on the importance of the child's best interests and these interests' role under Article 8 in *Mohamed Hasan v Norway*. The Court reiterated that there is a broad consensus, also in international law, supporting that in all decisions concerning children, their best interests are of paramount importance: 'see, among other authorities, *Neulinger and Shuruk v Switzerland* [...] § 135'.⁵⁷ The Court also held that the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, and 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. The Court referred to 'among many other authorities, *Neulinger and Shuruk*, cited above, § 136'.⁵⁸ This part of *Neulinger* was not amended by the Court in *X*, and will apply also in child abduction cases; see section 7.1 above.

However, in public child care cases, the Court has also upheld the procedural requirements established in *Neulinger* § 139. The Court stated in *YC v United Kingdom*:

As to the decision-making process, what has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able fully to present their case (see *Neulinger and Shuruk*, cited above, § 139 [...]). Thus it is incumbent upon the Court to 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 would be the best solution for the child (see, mutatis mutandis, *Neulinger and Shuruk*, cited above, § 139).⁵⁹

This is the part of *Neulinger* that the Grand Chamber commented on, and in practice overturned, in *X* § 105.

The Court's reference to *Neulinger* § 139 must imply that the *Neulinger* requirements still are applicable in public child care cases, and that the modifications in *X* are reserved for abduction cases. This is in line with the Court's reasoning in *X* that in the area of international child abduction, the obligations imposed by Article 8 must be interpreted in the light of the requirements of the Hague Convention and the Convention on the Rights of the Child, and that the child's best interest cannot be understood in an identical manner in return cases and in cases on custody and parental responsibility.

8. Conclusion

The European Court of Human Rights has set some important requirements that national courts must fulfil in child abductions cases. These requirements both give authority to and complement the Hague Convention.

Looking back to 2010, it was in my opinion time for the ECtHR to take a more active approach to international child abduction cases. As has been demonstrated in this article,

57. *Mohamed Hasan v Norway*, no 27496/15, § 149, 26 April 2018.

58. *ibid* § 150.

59. *YC v the United Kingdom*, no 4547/10, § 138, 13 March 2012.

I support the ECtHR's statement that Article 8 must be interpreted in light of both the Hague Convention and the Convention on the Rights of the Child. This was the Court's starting point in both *Neulinger* and *X*. This double reference enables the Court to make a human rights test of the return cases, and not only to repeat and apply the regulations of the Hague Convention.

The Court described the two limbs of the child's interests: that family ties must be maintained, but also that a parent cannot be entitled to have measures taken that would harm the child's health and development. These important points of the *Neulinger* judgment are not amended by the *X* judgment, and apply in child abduction cases and public child care cases alike.

However, the Court's description of the child's best interests test and the requested depth of evaluation in *Neulinger* went too far in abduction cases, and the Court made a necessary back step in *X*. In public child care cases, national courts must conduct a '*Neulinger* test': an in-depth examination of the entire family situation and the series of factors described by the Court. In abduction cases, the national courts must apply the '*X* test': an effective examination of the exceptions in the Hague Convention, taking the relevant factors genuinely into account, and making a sufficiently reasoned decision.

In my view, the Court in the general principles in *X* found the right balance between protecting children as a group against international abductions and restoring *status quo ante*, and protecting each individual child from harm. Still, the fact remains that return cases under the Hague Convention can be very difficult to decide. As McElevy has pointedly described, the challenge in finding the correct equilibrium between the promotion of return and the protection of individual children has always been a very real one.⁶⁰ This fact is clearly illustrated by the *X* judgment, where 16 judges agreed on the general principles, and split 8–8 when applying the principles to the facts of the case.

60. Peter McElevy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection' (2015) 62 *Netherlands International Law Review* 365, 367 <<https://doi.org/10.1007/s40802-015-0040-z>>.