Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

Florescu, A.S.

Part III
The European Supranational Framework

7 The Court of Justice of The European Union

7.1 Introduction

This chapter focuses on the second sub-research question. It addresses the contribution of the CJEU to the field of child abduction and it inquires whether this Court has adopted a child rights-based analysis to child abduction cases. The inquiry takes into account the specific role of the CJEU within the EU architecture, including the nature and scope of its judgments.

The CJEU functions within a supranational structure, therefore its child abduction case law can be understood subject to a prior incursion into the competences and nature of this Court as well as into the legal system of the EU. Sections 7.2. and 7.3 respectively address these topics. Section 7.4 focuses on the child abduction case law of the CJEU. Chapter 3 identified three core rights of children as key elements to post separation parenting disputes. Chapter 5, brought in new dilemmas specifically for the field of child abduction: (i) primary carer abductions; (ii) domestic violence and child abductions and (iii) immigration considerations. The same chapter showed that these three phenomena are to a certain extent interrelated. Moreover, as explained in Chapter 3, the CRC Committee requires judges to assess all the rights of children relevant to a concrete dispute. In this light, in addition to the three core rights of children, sections 7.4.3.2 and 7.4.3.3 delve into the topics of primary carer abductions and issues of violence against children. Section 7.5 offers some reflections on the balancing between comity and individual rights in the specific context of the CJEU.

7.2 General considerations: competences, constitutionality, human and children's rights

The competence of the CJEU on matters related to child abduction and children's rights is intimately linked with the Union legal acts in the same field. The paragraphs below elaborate first on the competences of the EU, to the extent they are relevant for children's rights in the child abduction context. Then a brief incursion into the engagement of the CJEU with human rights in general and children's rights in particular offers an overview of this Court's legal mandate in this field.

7.2.1 Human rights and private international family law within the EU

At present, the Union can only legislate to the extent Member States have enabled it (the principle of conferral, Article 5(2) TEU). Under the EU Treaties, the Union's competence can be exclusive or shared with the Member States. Private international family law falls under the area of freedom, security and justice (Chapter 3, Title V TFEU). The EU competence in this area is shared with the Member States (Article 4(2)(j) TFEU). The Union's competence is further limited by the principles of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU). The principle of subsidiarity ensures that the Union only acts to the extent the proposed measure cannot be sufficiently achieved by the Member States. Proportionality means that the Union's actions cannot exceed what is necessary to achieve its objectives under the Treaties.

With respect to human rights protection, the revised Article 6 TEU provides that the Charter of Fundamental Rights of the European Union (hereinafter the "EU Charter" or the "Charter")[1] is binding and shall have the same value as the Treaties. Article 6 TEU lists three formal sources of human rights: the EU Charter; the ECHR as a 'special source of inspiration' for EU human rights principles; and general principles of EU law – the body of case law articulated throughout the years by the CJEU drawing on various sources, including the case law of the ECtHR.[2]

Article 6 TEU provides that the Charter shall have the same force as the Treaties. It follows that secondary EU legislation may be tested for its validity against the provisions of the Charter. Also, elevating the Charter to the same status as the Treaties entails that conflicts between competing (Charter) human rights and Treaties' freedoms may be dealt with by the CJEU in the same manner, i.e. by balancing the competing interests at stake.[3]

Further, Article 6(1) TEU and 51(2) of the Charter provide that this instrument does not extend the competences of the Union, nor does it modify or establish a new power or task for the Union. It is also important to note that the Charter provisions are addressed to the EU institutions and to Member States only when they are implementing European Union law.[4] Substantially, the Charter mostly represents a codification of fundamental rights which had already been affirmed in EU law.[5] In addition, some new rights, such as the right to the protection of personal data or the right to a high level of environmental protection have been included.[6] The novelty is that these rights,

1 2000/C 364/01, OJ C/364/1, 18 December 2000.
2 Craig/De Búrca 2011, p. 362.
3 Franklin 2010, p. 137.
4 Article 51 (1) EU Charter; See also CJEU 26 February 2013 C-617/10, ECLI:EU:C:2013:105 (Åklagaren/Hans Åkerberg Fransson) where the CJEU found that states had acted in the interpretation of EU law even where they were not directly transposing EU law but where there was a direct link between national legislation and EU legislation.
5 Groussot/Pech 2010.
6 Groussot/Pech 2010, p. 5.

albeit recognized in various EU law instruments, had not been regarded as fundamental rights until the Charter.[7] Of particular relevance for child abduction cases are the right for respect for private and family life (Article 7 Charter) and the rights of the child (Article 24 Charter). Under Article 24(2) of the Charter, the child's best interests are a primary consideration in all actions relating to children. Further, children have the right to express their views freely and to have their views taken into consideration in accordance with their age and maturity (Article 24 (1) Charter). Finally, pursuant to Article 24(3) of the Charter, children have the right to maintain regular contact with both their parents, unless it is contrary to their interests.

The substance of the Union's competence in international family law matters is now laid down in Article 81 TFEU under the heading 'Judicial cooperation in civil matters.' Thus, the Union may act only to the extent a matter is 'civil', concerns 'judicial cooperation' and has 'cross border implications.'

By adopting the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (the "Brussels II *bis* (Regulation)),[8] the Union established common rules on jurisdiction, recognition and enforcement of judgements in matters of parental responsibility. The Brussels II *bis* Regulation has been replaced by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (the "Brussels II *ter* (Regulation)"),[9] now in force.

The enactment of these Regulations triggered the applicability of the EU Charter and the corresponding obligations of Member States and EU institutions to respect the EU Charter when implementing the EU Regulations.

Externally, Article 3(2) TFEU provides that "the Union shall […] have exclusive competence for the conclusion of an international agreement when […] is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

The Commission considers – based on the CJEU Lugano judgement – that the Union has exclusive external competence in these areas.[10]

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7 Groussot/Pech 2010, p. 5.

8 Published in the Official Journal of the European Union of L 338 of 23 December 2003, pp. P. 0001 – 0029.

9 Published in the Official Journal of the European Union of 2 July 2019, L 178, pp. 1-115.

10 Explanatory Memorandum, Proposal for a Council Regulation of […] establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations, /* COM/2008/0894 final – CNS 2008/0266 */, Brussels, 19 December 2008.

Therefore, only the Union, and not the Member States, may conclude international agreements covering the subject matter of cross border parental responsibilities and child abduction. Nevertheless, by way of exception to the rules on external competence, the Council adopted in 2009 a Regulation authorising Member States to conclude agreements with third states on the subject matter of the Brussels II *bis* Regulation.[11] Therefore as of 2009, the Member States' capacity to enter into agreements with third states is conditioned on the Commission's authorization to start negotiations and enter into the envisaged agreement (Articles 3 and 8 of the 2009 Council Regulation).

7.2.2 The Court of Justice of the European Union: competences, nature and human rights

After the Lisbon Treaty the term 'Court of Justice of the European Union' includes the Court of Justice (the "CJEU") and the General Court.[12] The main decision-making forum is the CJEU; its jurisdiction is detailed in the Treaties, specifically under Article 19 TEU and Articles 251-258 TFEU.[13] The competences of the CJEU depend on the type of action it adjudicates. As the CJEU functions within the EU – a system which has quasi-state institutional structure and rule-making powers – it can decide on the division of powers between the EU and its Member States.[14] Broadly speaking the CJEU may only annul acts of the EU institutions and does not have the power to annul domestic legislation.[15] Even if the CJEU cannot invalidate acts of the Member States, it has established itself as the final arbiter concerning the interpretation of EU law.[16] The main tasks of the CJEU, in its own interpretation, have been to guarantee the primacy, unity and effectiveness of EU law.[17] To-date the European Court of Justice -the predecessor of the CJEU – has developed important doctrines with a constitutional character such as

11 Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, OJ L200/46, 31 July 2009.

12 Craig/De Búrca 2011, p. 58; for the most recent terminology and composition: << https://curia.europa.eu/jcms/jcms/Jo2_7024/en/#jurisprudences>>, last accessed on 10 June 2024.

13 Craig/De Búrca 2011, p. 59.

14 Hurrelmann/Manolov 2013.

15 Sweet 2009, p. 645.

16 See, *inter alia* ECJ 9 March 1978, C-106/77, [1978] ECR I 0629 (Simmenthal); the CJEU has repeatedly stressed that the courts of the Member States have to disapply national provisions which are contrary to the EU law.

17 CJEU 26 February 2013, C-399/11, ECLI:EU:C:2013:107 (Stefano Melloni v. Ministerio Fiscal), para 60.

supremacy, direct effect or state liability for damages.[18] Scholars view the EU as a complex legal order with no clear hierarchical relationship between EU institutions and national authorities, although the Court regards itself as being on the apex of the EU hierarchy.[19]

The CJEU's role of ensuring that the Treaties are observed by the Member States and the institutions has been considered a constitutional role.[20] Sweet, for example, identified several features which attest to the CJEU's constitutional character. First, the CJEU establishes rights, which are subject to a mechanism of judicial enforcement. Second, its jurisdiction is compulsory and third, the CJEU's means of adjudication are similar to those of national constitutional courts.[21]

At the same time the 'constitutionalising' process of the CJEU has been subject to intense criticism especially due to the fact that the CJEU was not a 'classical constitutional court', i.e. it is not a Supreme Court in a unified system.[22] There are ongoing discussions with the national courts concerning the relationship between the national (constitutional) courts and the CJEU.[23] Furthermore, the development of the constitutional doctrines by the CJEU and its role on the European arena has been constantly shaped by the dialogue with national courts.[24]

In the light of the above it can be seen that the CJEU's position cannot be easily regarded either as that of an international court or a constitutional court. Therefore, the CJEU is arguably a *sui generis* court, which does not fit into traditional patterns.

Over time, the nature of the CJEU has developed alongside the EU. While the EU was initially established to serve economic purposes, it had later on become clear that a more profound path of integration was needed. The CJEU itself in its initial judgments developed principles to serve the achievement of the economic integration goal.[25] Gradually, new principles and values were added, including the respect for fundamental rights.[26] The CJEU's role was seminal in ensuring the effective interpretation of EU law.[27] Scholars stressed that the CJEU's role should be seen from a dynamic rather than static perspective.[28]

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18 Craig/De Búrca 2011, p. 63.

19 Gerards 2011, p. 80; See also ECJ 9 March 1978, C-106/77, [1978] ECR I 0629 (Simmenthal), para 17 and more recently CJEU 26 February 2013 C-617/10, ECLI:EU:C:2013:105 (Åklagaren/Hans Åkerberg Fransson), para 45.

20 Tridimas 2011, p. 737.

21 Sweet 2009, p. 645.

22 Sweet 2010.

23 Sweet 2010.

24 Sweet 2010.

25 For example, ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (Van Gend en Loos); ECJ judgement of 15 July 1964 Case 6/64, ECLI:EU:C:1964:66 (Costa v. Enel); ECJ 5 March 1996, Joined Cases C-46/93 and 48/93, ECLI:EU:C:1996:79 (Brasserie du Pêcheur SA).

26 Senden 2011, p. 27.

27 Craig/De Búrca 2011, p. 63.

28 Craig/De Búrca 2011, p. 64.

The CJEU's engagement with human rights has a long history. Human rights were not originally included in the EU founding treaties; however already since 1969, the CJEU recognised general principles of EU law, including protection for human rights.[29] The development of fundamental rights continued throughout the years, yet it was the Treaty of Lisbon which brought important changes in this field.[30]

The CJEU's human rights case law has been primarily developed through the preliminary reference procedure under Article 267 TFEU.[31] This means that the judgments of the CJEU are open-ended leaving a certain margin of implementation to domestic courts.[32]

On the CJEU's engagement with children's rights, Stalford had noted in 2014 this Court's modest contribution in this regard.[33] She attributed this to the detached and abstract formulation of EU laws relevant to children.[34] Since then, the case law of the CJEU has referred back to Article 24 of the Charter (rights of the child) primarily in (i) proceedings brought under the Brussels II *bis* Regulation and in (ii) cases concerning the free movement of persons.[35] The freedom of movement cases can be further subdivided into (i) family reunification, migration and citizenship and (ii) cases resembling child custody disputes. This Chapter analyses the approach of the Court of Justice to children's rights in the proceedings brought under the Brussels II *bis* Regulation which relate to child abduction. Also, Chapter 10 looks into the approach of the CJEU to the rights of children in cases resembling child custody disputes as these cases expose cases pre-abduction, as explained therein.

7.3 Child abduction in the European Union: The Brussels II *ter* Regulation

7.3.1 Overview

Within the European Union, the Hague Convention is complemented by the Brussels II *ter* Regulation.[36] Brussels II *ter* is the outcome of a three-year long negotiation process, whereby its predecessor, Brussels II *bis* (Regulation),

29 ECJ 12 November 1969, C-29/69, ECR 419 (Stauder v. City of Ulm).
30 At legislative level, prior to the Treaty of Lisbon, provisions concerning the EU's commitment to respect for fundamental rights were included in the Treaty of Maastricht (Article F(2)) and in the Treaty of Amsterdam (Article 6). Also, the CJEU continued its line of case law on general principles of law.
31 Greer, Gerards, Slowe 2018, p. 298.
32 Greer, Gerards, Slowe 2018, p. 298.
33 Stalford 2014, p. 218.
34 Stalford 2014, p. 219.
35 Lonardo 2022, pp.601, 603.
36 Published in the Official Journal of the European Union of 2 July 2019, L 178, pp. 1-115.

was replaced through a unanimous vote in the Council.[37] Under Article 105 Brussels II *ter*, and in so far as child abduction is concerned, the Regulation applies between all Member States with the exception of Denmark, as of 1 August 2022.[38]

Within the European Union, this Regulation contours the CJEU's competence to act in child abduction cases. Also, the enactment of the Regulation triggers the applicability of the EU Charter and the corresponding obligation of Member States and EU institutions to respect the EU Charter when implementing the Brussels II *ter* Regulation. An overview of child abduction under the Brussels II *ter* is thus a prerequisite for a better understanding of the case law of the CJEU in this field and its approach to the rights of children.

Article 96 of the Regulation clarifies that its provisions complement those of the Child Abduction Convention. Indeed, it has been considered that with the Recast of the Brussels II *bis*, the EU has reinforced the relationship of complementarity between the two instruments.[39]

Given that EU law leaves the Hague Convention mechanism largely intact, the overview below only underscores the different elements of the former in relation to the latter instrument. Further, it is important to reiterate that Brussels II *ter* is not restricted to child abduction, rather it covers all civil matters concerning on the one hand divorce, legal separation and marriage annulment and on the other hand the attribution, exercise, delegation, restriction or termination of parental responsibility.[40] Chapter III of this instrument is specifically dedicated to child abduction; however other Chapters (in particular Chapter IV on Recognition and Enforcement and Chapter VI on General Provisions) are equally applicable to intra-EU child abduction cases. Within the EU framework, child abduction is therefore integrated within the wider scope of custody and parental responsibilities. This is a significant difference with important practical consequences compared to the Hague Conference's jurisdictional reach. In the latter situation, not all States Parties to the Hague Convention are at the same time parties to the 1996 Child Protection Convention and/or the Maintenance Convention.

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37 Musseva 2020, p. 130. The voting process is regulated by Article 81(3) of the TFEU requiring a special legislative procedure. The special legislative procedure entails an unanimous vote in the Council after consultations with the European Parliament.

38 According to Recital 96 Brussels II *ter*. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the *TFEU (*OJ C 326, 26.10.2012, p. 299–303*),* Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

39 Biagioni 2023, pp. 1081, 1089. The author comments on the change of terminology of Article 96 Brussels II *ter*, compared to Article 60 of the Brussels II *bis* Regulation which mentioned that the Regulation was to take precedence over the Hague Convention, as opposed to the instrument now in force which uses the word 'complements.'

40 Article (1)(a) and (b) of Brussels II *ter* Regulation.

The scope of Chapter III of Brussels II *ter* Regulation is identical to that of the Hague Convention: it applies to wrongful removals or retentions. The Regulation clarifies that custody includes in particular the right to determine the child's place of residence.[41] As shown in this dissertation, even if the Hague Convention does not define custody, domestic practice has gradually developed in this direction: it is now widely accepted that custody rights exist in favour of a parent who can veto a child's relocation. The Regulation incorporates this definition of custody rights in its text, bringing uniformity across the EU and eliminating therefore any possible confusions.[42]

Brussels II *ter* Regulation also reinforces the requirement for expeditious proceedings laying down a term of six weeks per degree of jurisdiction for delivering a decision and for completing the enforcement of the child's return.[43] Expeditiousness is prioritised even when protective measures are considered; Article 27(5) of Brussels II *ter* Regulation clarifies that such measures (aimed at alleviating concerns over a grave risk to the child) may only be taken provided that they do not delay the return proceedings. Further, one novelty of the Brussels II *ter* is Article 27(6) which allows for a decision ordering the return of the child to be declared provisionally enforceable notwithstanding an appeal and provided that the return of the child is required by the best interests of the child.

Alternative dispute resolution solutions should equally be considered; an aspect which does not feature in the Hague Convention.[44]

Further, the Regulation has added important elements to the return mechanism by (i) tightening the possibilities to refuse the return of the child, (ii) enabling a smoother enforcement procedure and last but not least (iii) enhancing -in certain respects- the rights of children.

Concerning the return mechanism, it has been shown that the Hague Convention prioritises the return of the child, unless domestic authorities find that one of the exceptions to return is applicable. The Brussels II *ter* follows the same principle, however it mandates in Article 27(1) that competent authorities hear the left-behind parent before they refuse the child's return. The same Article requires that when considering the application of Article 13(1) of the Hague Convention, the competent domestic courts first assess whether adequate arrangements have been made to secure the protection of the child upon return. Such a provision represents a codification

41 Article 2(2)(9) of the Brussels II *ter* Regulation.

42 McEleavy has in the past identified a difficulty with this clause, however he considers that for the avoidance of conflicts with the Regulation, Member States should adopt the definition set in the Regulation. See McEleavy 2005, p. 29.

43 Article 24 of the Brussels II *ter* Regulation. Article 28 sets out the six-week term for enforcement, failure to comply entails a right on the left-behind person to request a statement of reasons for the delay. The length of the proceedings has also been one of the aspects advanced by the Commission among the reasons for revisiting the Brussels II *bis* Regulation. In this sense see also Kruger e.a. 2022, p. 172.

44 Article 25 of the Convention.

of the practice of undertakings or mirror orders which is also encouraged by the Hague Conference.[45] The term 'adequate arrangements' is not further defined, leaving thus a margin of discretion to courts concerning the type of arrangements that may be considered adequate in a given situation.

One key point of contention of the Brussels II *bis* Regulation which was extensively discussed during the negotiations for its recast was the so-called overriding mechanism.[46] Article 11(8) of the Brussels II *bis* Regulation ensured that even in the case of a non-return order under Article 13 of the Hague Convention, the authorities of the country of habitual residence could nevertheless issue a certificate of enforcement and request the return of the child.[47] Article 42 of the Brussels II *bis* Regulation provided that the issuance of such a certificate was subject to certain conditions: the child and the parties must have been given the opportunity to be heard; and the issuing court should have taken into account the reasons for and evidence underlying the order issued pursuant to Article 13 of the Hague Convention. The Regulation left no possibility for opposing the Article 42 certificate in the country of refuge, even if the aforementioned conditions had not been complied with.

The Brussels II *ter* has partially maintained this mechanism; it has however integrated it in the wider context of custody litigation.[48] Under Article 29(6) of the Brussels II *ter*, any refusal to return of the child pursuant to Article 13(1)(b) of 13(2) of the Hague Convention can be overridden by a decision on the substance on the rights of custody given in the state of habitual residence. For the purposes of Article 42 Brussels II *ter* the decision on the substance of the custody rights requiring the return of the child is a *privileged* decision. This in turn enables the issuing of an enforcement certificate as per Article 47 of Brussels II *ter*. The Regulation thus allows the courts of habitual residence to retain jurisdiction on the merits of the custody dispute even after a non-return order in child abduction proceedings. After adjudicating the merits -provided that they have taken into account the judgement in the child abduction proceedings- the child shall nevertheless return to the country of habitual residence.[49] A joint reading of the Hague Convention and the 1996 Child Protection Convention would have a similar effect, provided that countries have ratified both instruments.[50] From the perspective of efficiency, the added value of the Brussels II *ter* Regulation, is the removal of exequatur and other formalities for the enforcement of the certificate.[51] As with the Brussels II *bis*, Article 47(3) of Brussels II *ter* mandates that before issuing this certificate the courts shall give the child

45 For a discussion, see Chapter 4 above.
46 Musseva 2020.
47 Beaumont/Holliday 2016, 211-260.
48 In this sense see Kruger et al 2022, p. 177.
49 Kruger et al 2022, pp. 177-178; Biagioni 2023, p. 1086
50 This has also been discussed in Chapter 4 of this dissertation.
51 Musseva 2020, p. 138.

and the parties the opportunity to be heard; it sets restrictions on when a default of appearance can be overlooked and includes an obligation to take into account the reasons of the non-return order issued by the country of refuge. Nevertheless, this certificate is only subject to withdrawal by the same court, either of its own motion or upon an application.[52] The Regulation draws thus a distinction between a certificate requesting the return of the child and other parental responsibility cases which may be opposed on wider (human rights) grounds. For example, under Article 41 Brussels II *ter*, the enforcement of a decision in matters of parental responsibility shall be refused if one of the grounds mentioned in Article 39 exists. These grounds are typical for private international law in general and they include public policy, the best interests of the child or irreconcilable judgments.[53] As discussed above, such possibilities for refusal do not exist if Article 47 of the Brussels II *ter* becomes applicable.

7.3.2 The approach of Brussels II *ter* to the rights of children

Compared to its predecessor, Brussels II *bis*, and the Hague Convention, Brussels II *ter* Regulation includes more extensive references to the rights of children. For example, the best interests of the child is mentioned no less than 11 times in the Recitals of the Regulation.[54] Recital 19 highlights that this concept shall be interpreted in light of Article 24 of the EU Charter and the CRC. This aligns the Regulation with substantive children's rights, and it is in line with previous suggestions for enhancing the rights of children.[55] Further, the Regulation creates a presumption that the best interests of the child require that jurisdiction is determined in accordance with the criterion of proximity (Recital 20). The best interests of the child is the justification for vesting jurisdiction on matters of parental responsibilities with the courts of habitual residence and reducing to a minimum the possibilities to oppose enforcement or recognition of judgments.[56] The best interests of the child is also a ground for the exceptions to the rule of proximity in vesting jurisdiction. Under the Regulation, it is possible to transfer the jurisdiction from the court of habitual residence to a court best placed to adjudicate the merits provided that the best interests of the child are observed.[57] With respect to child abduction proceedings, alternative dispute resolution may not be used if they are contrary to the best interests of the child.[58] In other words,

52 Article 48(2) of the Regulation.
53 The grounds for non-recognition of parental responsibility judgments mentioned in Article 39 of the Regulation are wider; the most relevant for the perspective of human rights have been included above.
54 Recitals 19, 20, 23, 27, 30, 39, 47, 48, 55, 57, and 84 refer to the best interests of the child.
55 Kruger e.a. 2016, p. 155.
56 See for example Recitals 47 and 55.
57 See for example Recital 27, and Article 12 of the Regulation.
58 Article 25.

the best interests of the child is used both as an underlying premise of the Regulation as well as a justification for its exceptions.

The Brussels II *ter* Regulation further links the best interests of the child with the right to have contact with both parents and the right to be heard. Under Article 27(2) "The court may, at any stage of the proceedings, […], examine whether contact between the child and the person seeking the return of the child should be ensured, taking into account the best interests of the child."

The right to be heard is extensively dealt with in the Brussels II *ter* Regulation. Recital 39 lays down that proceedings for return of the child shall as a basic principle provide a child who is capable of forming their views with "a genuine and effective opportunity to express his or her views and when assessing the best interests of the child, due weight should be given to those views." Further, as with the best interests of the child, Recital 39 draws a link between the Regulation, Article 24 of the Charter and Article 12 of the CRC highlighting the importance of the right to express their view in the framework of the Regulation. Yet, the Regulation refrains from laying down rules on *how* the hearing is conducted; instead it provides expressly that domestic authorities retain discretion on who hears the child and how the child is heard. It is also expressly mentioned that hearing the child is a right and not an obligation, and that it should be assessed in light of the best interests of the child. In addition to the Recitals, the right to be heard has received dedicated attention in Article 21 of the Regulation according to which:

> "1. […], the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.
>
> 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity."

Thus, children must be given the opportunity to express their views in all parental responsibility proceedings, including child abduction. The Regulation underlines that children must not only be given an opportunity to express their views, but that this opportunity must be *effective*. For child abduction however, the objection of a child to return may be overridden by a subsequent decision on custody rendered in the state of habitual residence.[59] Nevertheless, even in such cases, Article 47(3)(b) of the Brussels II *ter* Regulation requires that a certificate ordering the child's return may only be issued after that child has been given the opportunity to express his or

59 Article 29 (6) of the Regulation.

her views. More broadly, the Regulation allows for the non-recognition of parental responsibility judgments if the child has not been given the opportunity to be heard; yet such ground of non-recognition does not apply to the certificate provided for under Article 47 and which is relevant in the case of child abduction.

Further, with respect to the right of the child to be protected from violence, the Regulation includes some provisions which may facilitate the protection of children. Recital 46 encourages cross border cooperation between the relevant authorities in taking measures for protecting the child from a grave risk of harm; however these measures should not delay the return proceedings under the Hague Convention. Recital 69 and Article 56(4) of the Regulation provide that in exceptional circumstances enforcement can be suspended if it exposes the child to a grave risk of physical or psychological harm. However, authorities are at the same time encouraged to take all necessary measures to overcome impediments to enforcement generated by the child's objection voiced after the rendering of the decision. Under Article 56(6), if the grave risk to the child is of a lasting nature the authorities may refuse the enforcement of the judgement.

Overall, the Brussels II *ter* Regulation has generally been welcomed by commentators as remedying some of the shortcomings of the Brussels II *bis* Regulation.[60] Specifically concerning child abduction and children's rights, commentators had highlighted the rigidity of the second chance procedure, the lack of a general provision on hearing children and the failure to harmonise domestic rules on procedures for hearing children.[61] Some of these shortcomings have been remedied in the text of the new instrument. In particular, the Regulation has introduced a provision on hearing children which applies to all parental responsibility proceedings.[62] Also, while not eliminating the second chance proceedings entirely, these proceedings have been integrated into the custody adjudication. This could arguably diminish cross border litigation which is damaging for all parties and in particular for the children involved.[63]

However, it has also been highlighted that the Regulation's approach not to lay down rules concerning hearing of children may lead to difficulties in the recognition and circulation of judgments between Member States – a shortcoming that has been documented and criticised in relation to Brussels II *bis* Regulation.[64]

60 Corneloup/Kruger 2020, pp. 215-245; Ubertazzi 2017, p. 568.
61 Beaumont e.a. 2016; Ubertazzi 2017.
62 Article 21 Brussels II *ter* Regulation.
63 In this sense see Corneloup/Kruger 2020, pp.9-10.
64 Ubertazzi 2017, p. 599, and Beaumont e.a. 2016.

7.4 Child abduction before the CJEU

7.4.1 Overview of cases and selection methods

The CJEU's case law has been selected from this Court's online database, where all the judgments are published.[65] First, all judgments, decisions, views and orders were searched using the search term 'Council Regulation (EC) No 2201/2003 of 27 November 2003'. Second, the same documents were searched using the search term 'Council Regulation (EU) 2019/1111 of 25 June 2019'. This search yielded 12 documents.

All judgments were checked for their relevance for the present dissertation. After reviewing the results, it was found that between 2003 to 14 June 2024 -the cut-off date of this dissertation, the CJEU has delivered 19 preliminary rulings on the interpretation of various provisions of the Brussels II *bis* Regulation related to child abduction. As it has only recently entered into force, no judgments have yet been delivered on the interpretation of the Brussels II *ter* Regulation; yet considering that the latter instrument builds on the former it is to be expected that the CJEU's approach shall be similar. It is therefore important to outline the relevant principles which can be distilled from the CJEU's case law.

The CJEU's child abduction case law is analysed in section 7.4.2 below along the main themes which could be identified from its judgments. This case law overview will enable in turn a more in-depth analysis of the way the CJEU has considered the rights of children in its decision-making process (Section 7.4.3). Chapter 5 has discussed the new social paradigms in which child abductions operate. This Chapter was drafted against the background of primary carer abductions and domestic violence issues. In this light, Section 7.4.3.2 includes the Court's perspective on the topic of primary carer abductions whereas Section 7.4.3.3 addresses this Court's approach to child abduction cases raising issues of violence against children.

7.4.2 Themes in the CJEU's child abduction case law

Most of the cases concerned the interpretation and application of various provisions of Brussels II *bis* Regulation. Important concepts on which the CJEU had the opportunity to decide were the notion of civil matters,[66] habitual residence or rights of custody.[67] Questions submitted to the CJEU also revolved around the enforcement of the return certificate issued under

65 <https://curia.europa.eu/juris/recherche>.

66 CJEU 19 September 2018, C-325/18 and C-375/18 PPU, ECLI:EU:C:2018:739 (Hampshire County Council/C.E. N.E.), CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).

67 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe) (habitual residence); CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E) (rights of custody).

Article 42 Brussels II *bis* after a substantial change in circumstances[68] or where it was arguably issued in violation of the child's right to be heard.[69] Also, in some cases the CJEU indirectly ruled on the relationship between child abduction, discrimination and criminal proceedings[70] or on the relationship between child abduction and immigration law.[71] The CJEU's approach and its general contribution in this field is elaborated upon in the following paragraphs.

On the material scope of the Brussels II *bis* Regulation, it is to be reiterated that Article 1(1)(b) applied to 'civil matters'. The CJEU has adopted a broad interpretation of this notion finding that it covers residential care even if it may formally fall under public law pursuant to the national legislation.[72] The same wide interpretation was extended to wrongful removals; the CJEU ruled that wardship jurisdiction which entailed the transfer of the right to an administrative authority under English law amounted to 'civil matters' and was hence covered by the Brussels II *bis* Regulation.[73] For the CJEU, 'parental responsibilities' is an autonomous notion meaning that the focus shall be on the scope of the application rather than on the formal definition given in national law.[74] Also, proceedings seeking the return of children under the Hague Convention are to be considered 'civil matters' resulting in the Regulation being applicable.[75]

Further, the CJEU has brought an important contribution to the understanding of the term habitual residence. Already in 2009 the CJEU had ruled that habitual residence is to be determined on the basis of the place which reflects some degree of integration of the child in a social and family environment.[76] In order to establish the habitual residence, presence is an important factor and it should be shown that the presence "is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment".[77] The CJEU expressly listed several factors to be taken into account when establishing habitual residence.[78] These are

> "[…] the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality,

68 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
69 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).
70 CJEU 19 November 2020, C-454/19, ECLI:EU:C:2020:947 (Z.W.).
71 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).
72 ECJ 27 November 2007, C-435/06, ECLI:EU:C:2007:714 (C.).
73 CJEU 19 September 2018, C-325/18 and C-375/18 PPU, ECLI:EU:C:2018:739 (Hampshire County Council/C.E. N.E.), para 61.
74 CJEU 21 October 2015, C-215/15, ECLI:EU:C:2015:710 (Gogova/Iliev), para 28.
75 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.), para 43.
76 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), para 44.
77 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), para 38.
78 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), paras 38-42.

> the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child must be taken into consideration
>
> […] the parent's intention to settle permanently with the child in another Member State […] may constitute and indicator of the transfer of habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State
>
> By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is […] an indicator that they do not habitually reside in that State"[79]

Two subsequent cases of *Mercredi v. Chaffe*[80] and *C v. M*[81] respectively, elaborated on the link between habitual residence, lawful moves and wrongful removals.

The case of *Mercredi v. Chaffe* concerned the move of a child from England to the island of Reunion when she was only two months old.[82] The father and mother had separated and the mother moved to another country without informing the father. As the father did not have rights of custody, the movement was lawful within the meaning of the Regulation. The question was therefore which court (either English or French) had jurisdiction to rule on parental responsibility, custody and access rights. Pursuant to Article 8(1) of the Regulation the jurisdiction belongs to the courts where the child is habitually resident at the moment such court is seized. The father had seized the British courts a few days after the mother's move with the baby. Therefore, the answer to the question depended on the assessment of the baby's habitual residence.

In addition to the factors mentioned in the *A* case, the CJEU added 'age' as a particularly important element for assessing the child's habitual residence in the present case. [83] The family environment of young children is determined by the person with whom they live. In cases of infants especially, the CJEU held that their environment depends on the environment of the person who is looking after them. In these cases the relevant factors were considered to be: the reasons for the move by the child's mother to another Member State, the languages known to the mother, her geographic and family origins may become relevant, the family and social connections which the mother and child have with that Member State.

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79 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), paras 39, 40.
80 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe).
81 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.).
82 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe).
83 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), paras 52-54.

The View of Advocate General Cruz Villalon may also provide useful insight into the possible interpretations of habitual residence.[84] Even if he mentioned 'age' as an important factor in assessing the social environment, he also looked at whether the habitual residence could be changed in one day in cases of lawful movements. He pointed out that such an interpretation could arise on the basis or Article 9 of the Regulation.[85] However, in his view allowing flexibility to domestic courts in assessing the habitual residence was of essence. In that vein he did not deem it desirable to include fixed time limits as this would undermine the courts' possibilities to take into account all the relevant factors when establishing the habitual residence.

The question of habitual residence was also brought to the CJEU in a preliminary question brought by the Irish Supreme Court.[86] The case concerned a relocation from France to Ireland pursuant to a provisional judgement of the French courts. After the move, the French courts overturned the initial judgement and ordered that the child lived with the father and awarded the mother access rights. On this basis, the father filed for the return of the child under the Hague Convention. While it was clear that the initial move of the child was lawful, it was not clear whether the retention in Ireland was wrongful within the meaning of Article 2(11) and 11(1) of the Regulation. The assessment on whether the retention was wrongful or not hinged on the habitual residence of the child, i.e. the question being whether the habitual residence of the child had changed from France to Ireland.[87]

In addition to the criteria laid down in *Mercredi,* the CJEU emphasised that courts should weigh in the provisional nature of the measure authorising the departure as well as the fact that a young child resided in a country for about eight months before the stay became unlawful.[88] The fact that the time after the stay becomes unlawful should not be taken into account.

The CJEU did not clarify the concept of habitual residence in the present case. It did not rule out that a child may have acquired habitual residence in Ireland even though the mother knowingly changed residence pursuant to a provisional judgement. Indeed, following the preliminary reference procedure, the Irish courts had ruled that the child did acquire habitual residence in Ireland, therefore dismissing the father's return order.[89]

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84 CJEU 6 December 2010, C-497/10 PPU, ECLI:EU:C:2010:738 (Mercredi/Chaffe), View AG Cruz Villalon.

85 CJEU 6 December 2010, C-497/10 PPU, ECLI:EU:C:2010:738 (Mercredi/Chaffe), View AG Cruz Villalon, para 77.

86 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.).

87 Under Article former Article 11 (1) of the Brussels II *bis* Regulation, a child is to be returned to the country of habitual residence immediately before the wrongful removal. Therefore, if the habitual residence would have been Ireland in this case, there was no need for a return order.

88 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.), para 56.

89 C v. G, SC 419/03; see also the commentary on the case Beaumont/Holliday 2015, pp. 37-56.

Consequently, within the EU habitual residence is determined taking into consideration factors such as integration of the child into the environment, school attendance, family, activities as well as the age of the child. The younger the child the less the focus will be on the child's integration and more on the parent's social environment. Conversely, with older children, courts need to look more at their own integration rather than at the parent's intention.

However, the CJEU has expressly ruled out that habitual residence can be established if the child has never lived in the jurisdiction concerned, even if this was the result of a parent's fraudulent behaviour.[90]

The notion of 'rights of custody' has been submitted on one occasion to the attention of the CJEU.[91] The case concerned a situation where the father of children born outside of marriage could only obtain custody over the children subject to an application in court. As with parental responsibilities, the CJEU stated that 'rights of custody' is an autonomous concept within the EU. However, the Regulation leaves the attribution of rights to custody to national law provided that national law does not breach the EU Charter of Fundamental Rights. In the instant case the fact unmarried fathers needed to either apply in court or seek the other parent's agreement, did not amount to a violation of either Article 7 of the Charter or Article 24.

Further, in a recent case the CJEU has arguably added a new criterion to the determination of 'wrongful removal'. The case concerned the removal of a child by his mother from Sweden to Finland pursuant to a decision adopted in the application of the Dublin III Regulation.[92] The judgement did not focus on the criteria of the Hague Convention; rather the Court found that a transfer decision which was binding on the mother and the child did not amount to a wrongful removal. Such proceedings are thus outside the scope of application of the Hague Convention or Brussels II *bis* Regulation.

In a different case, the CJEU has used the freedom of movement rules of Article 21 TFEU to find that criminal laws whereby national child abduction is less severely punished than international (inter-EU) abduction amounted to an unjustified restriction on EU citizens' freedom of movement.[93] In yet other cases, the CJEU has clarified that it is exceptionally possible for the courts of the country of habitual residence to transfer jurisdiction to the courts where the children had been abducted to if it found that the latter courts were better placed to adjudicate the case.[94]

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90 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.); CJEU 8 June 2017, C-111/17 PPU, ECLI:EU:C:2017:436 (O.L./P.Q.).

91 CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E).

92 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.), para 2.

93 CJEU 19 November 2020, C-454/19, ECLI:EU:C:2020:947 (Z.W.).

94 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK).

It is important to note that the most controversial preliminary references concerned the so-called second chance proceedings.[95] These cases have also exposed the approach of the CJEU to the individual rights of children and shall be addressed in the dedicated sections below.

7.4.3 Children's rights in the CJEU's parental abduction case law

An overview of the case law indicates that this Court has principally referred back to the Brussels II *bis* Regulation whenever questions regarding the rights of children arose. This has enabled the Court to provide guidance to Member States for enhancing the uniform application of the Regulation, to the detriment of an individualised approach to the rights of children.

7.4.3.1 The best interests of the child

The best interests of the child has been raised in many of the preliminary references submitted to the CJEU. Already from the beginning, the CJEU emphasised that securing the best interests of the child represents the overarching aim of the Regulation which in turn must be interpreted in light of Article 24 of the EU Charter.[96] In practice, the CJEU has relied on the best interests of the child when ruling on (1) the interpretation of habitual residence,[97] (2) the transfer or retention of jurisdiction after a wrongful removal,[98] (3) the relationship between the Regulation with other EU or international law,[99] suspension of enforcement,[100] and on the enforceability of the Article 42(2) certificate.[101]

For example, in cases focusing on the determination of habitual residence, the best interests of the child was understood in the sense of Recital 12 of the Brussels II *bis* Regulation, linking the best interests of the child with the criterion of proximity for the determination of habitual residence.[102] On

95 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago); CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz). These cases are qualified as controversial in light of the debates they have generated in scholarship and on the basis of the emerging discussions for a recast of the Brussels II bis Regulation.

96 ECJ 11 July 2008, C-195/08 PPU, ECLI:EU:C:2008:406 (Rinau), para 51.

97 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.);CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe); CJEU 8 June 2017, C-111/17 PPU, ECLI:EU:C:2017:436 (O.L./P.Q.); CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.).

98 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP); CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK).

99 CJEU, 12 May 2022, C-644/20, ECLI:EU:C:2022:371 (W.J/L.J and J.J.).

100 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.).

101 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).

102 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago); CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz).

the question of habitual residence, while affirming the principles mentioned above, the CJEU has ruled that the best interests of the child do not require an interpretation different from the one offered by these principles.[103] In the respective case the interpretation was that habitual residence cannot be established if a child has never lived in a specific place.[104] On substance, it can be inferred that the best interests of the child is intimately linked to the integration of the child in a particular environment; however, it appears that the CJEU's approach is to highlight what the best interests of the child is not rather than what that right entails. In the case of *Rinau*, the CJEU has equally linked the best interests of the child substantively with the stability and harmony of the family and procedurally with the efficiency of the administration of evidence.[105]

In a case concerning the retention of jurisdiction after a wrongful removal to a third state, the CJEU considered that it would be against the best interests of the child for a state to retain jurisdiction indefinitely.[106] The dispute in that case concerned a situation that may have exposed inconsistencies or overlaps between the 1996 Hague Convention and the Brussels II *bis* Regulation.[107] Also, the CJEU has accepted that a court that has jurisdiction on the merits may exceptionally allow the transfer of jurisdiction to the court where the child has been wrongfully removed provided that such transfer is not likely "to have a negative impact on the emotional, family and social relationships of the child concerned".[108] It is however important to stress that CJEU's acceptance of this possibility was accompanied by emphasising that courts must "systematically decline to exercise the power to request a transfer provided for in Article 15(1)(b) of that Regulation".[109]

Further, the CJEU has linked the best interests of the child with the need to be provided with sufficient resources, resulting in a finding that habitual residence of the child for the purposes of maintenance obligations can change following a wrongful removal.[110]

7.4.3.2 The right of the child to have contact with both parents: the relevance of children's rights to primary carer abductions

The CJEU has equally referred to the right of the child to have contact with both parents and to Article 24(3) of the EU Charter which specifically enshrines this right.[111] The Court's case law draws a close link between this

103 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.), para 64.
104 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.), paras 52-53.
105 ECJ 11 July 2008, C-195/08 PPU, ECLI:EU:C:2008:406 (Rinau), para 95.
106 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP), para 58.
107 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP), para 53.
108 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK), para 50.
109 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK), para 49.
110 CJEU, 12 May 2022, C-644/20, ECLI:EU:C:2022:371 (W.J/L.J and J.J.), para 66.
111 CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 63.

right and the best interests of the child. For example, in *Detiček v. Sgueglia* the CJEU has reiterated the underlying presumption of the Hague Convention, namely that wrongful removals deprive the child of the possibility to maintain contact with both parents.[112] In this case, it has equally affirmed that "a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interests underlying that fundamental right".[113]

The case of *Povse v. Alpago* raised the question of parent-child separation.[114] It is illustrative of the Court's approach to this important topic and for this reason a more dedicated analysis is undertaken in the subsequent paragraphs. Moreover, this case was subsequently sent to the ECtHR and it will later be discussed herein in the context of the relationship between these two supranational courts.[115]

Povse v. Alpago concerned the unlawful removal of a girl from Italy to Austria by her mother. The Austrian authorities had dismissed the father's application for the child's return to Italy on the ground that the return would be contrary to Article 13(b) Hague Convention. The domestic courts' reasoning is not evident from the CJEU's judgement; however, from the ECtHR's subsequent judgement it appears that the rationale was the separation of the child from her mother. The mother had also accused the father of domestic violence, including death threats.[116]

Meanwhile, upon the request of the father, the Italian court considered that it retained jurisdiction to adjudicate the merits of the custody dispute and issued an order for return of the child pursuant to Article 11(8) of the Regulation. By the same judgement of 10 July 2009, the Italian court issued the enforcement certificate under Article 42 of the Regulation.

The case was referred to the CJEU by an Austrian court (*Oberster Gerichtshof*) in the context of the father's request for enforcement of the Article 42 certificate and the ensuing return order of the child to Italy.

The question relevant for the present study reads as follows:

> "Can the second State [*i.e.* Austria] refuse to enforce a judgement in respect of which the court of origin [*i.e.* the Italian court] has issued a certificate under Article 42(2) of the regulation if, since its delivery, the circumstances have changed in such a way that the enforcement would now constitute a serious risk to the best interests of the child?"

112 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Jasna Detiček/Maurizio Sgueglia), para 55.
113 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Jasna Detiček/Maurizio Sgueglia).
114 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
115 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).
116 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).

Advocate General Sharpston in her View clarified that the change of circumstances mentioned by the Austrian Government related to the fact that the mother would most likely refuse to return to Italy with the child and that, by the time the enforcement were to take place the child would have lived most of her life in Austria, separated from her father.[117]

Before answering this preliminary question the CJEU ruled that a judgement requesting the return of the child by the state of habitual residence pursuant to Article 11(8), does not have to be a final judgement in that state.[118] In this context it stressed that the need to deter child abductions taken together with the child's right to maintain contact with both parents take precedence over potential hardships the child might suffer as a result of moving between two countries.

Thus, final non-return orders issued pursuant to Article 13(b) Hague Convention may be overruled by non-final return orders issued by the authorities in the state of habitual residence. The CJEU further asserted that once a certificate of enforcement had been issued, there were no possibilities for opposing the return in the country of presence, this certificate being automatically enforceable pursuant to Recital 24 and Articles 42(1) and 43(2) of the Regulation.[119]

The CJEU resolved in a similar manner the question concerning a change in the circumstances, which would constitute a serious risk to the best interests of the child. It considered that this aspect was a matter of substance, which fell within the competence of the state of habitual residence.[120] Therefore, in this case only the Italian courts were competent to adjudicate on the serious risk to the child's best interests entailed by the return. Assuming that these courts were to consider such risk justified, they retained sole competence to suspend their own enforcement order.[121]

In its reasoning, the CJEU stressed the principle of mutual trust as the basis for the Regulation.[122] Indeed, according to the CJEU, in view of this principle the Hague Convention states should trust that the child's best interests shall be best protected by the authorities of the state of habitual residence.

It should also be noted that the CJEU shared the view of the Advocate General in this case. With respect to the best interests of the child the Advocate General outlined that the Regulation adopted a more comprehensive concept of the child's best interests, which is generally applicable to the

117 CJEU 16 June 2010, C-211/10, ECLI:EU:C:2010:344 (Povse/Alpago), View of AG Sharpston, paras 117 & 118.
118 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), paras 62, 67.
119 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), para 70.
120 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), para 81.
121 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
122 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), paras 40, 59.

detriment of an individualised approach.[123] In the Advocate General's View it was in the interests of children in general to return to their country of habitual residence and the final decision as to the child's best interests is within the competence of these courts and not (even in exceptional circumstances) for the Hague Convention courts.[124]

Consequently, the CJEU considers the 'child's best interests' as a matter of substance which is to be ultimately addressed by the courts of the child's habitual residence. The same reasoning goes for the child's right to maintain contact with both parents. This right is only mentioned as an underlying principle of the Regulation. The CJEU has so far refrained from making any reference as to the practical application of this principle and consequences for the child if for example the taking parent would be in an objective impossibility to return. As to the child's best interests, the CJEU's approach is that these are matters of substance to be entirely assessed by the courts with jurisdiction on the merits, i.e. the courts in the country of habitual residence.

In more recent cases, the CJEU has referred to the right of the child to maintain on a regular basis a personal relationship and direct contact with both parents when finding that the Polish Commissioner for Children's Rights and the Prosecutor General acted in breach of Article 11(3) of the Brussels II bis Regulation when they used the power to suspend enforcement proceedings of the return order.[125] Also, in the case of *RG and SF* the CJEU has linked this right to expeditious proceedings.[126]

7.4.3.3 The right of the child to be protected from violence

The CJEU has not directly addressed the right of the child to be protected from harm in its child abduction case law. Several cases decided so far have touched on this aspect: harm was connected to the separation from the taking parent[127] or to allegations of violent behaviour by the left-behind parent.[128] In none of these cases has the CJEU elaborated on the notion

123 CJEU 16 June 2010, C-211/10, ECLI:EU:C:2010:344 View of AG Sharpston, para 28; for the approach to the child's best interests concept under the Hague Convention see *supra* Chapter IV.

124 It should be recalled that in this study the term 'Hague Convention courts' or 'the courts of the state of refuge' has been used to refer to the courts vested with a Hague Convention application. The CJEU usually uses the term 'courts of the state of refuge' to refer to the aforementioned courts. Also, the term '(courts of) the state of habitual residence' or 'courts of origin' has been used to refer to the courts which normally have jurisdiction on the merits of the custody dispute, i.e. the courts where the child is to be returned. The CJEU usually uses the term '(courts of) the state of origin'.

125 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.).

126 CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 52.

127 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia); CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).

128 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).

of harm under the Regulation. One specific reference made in the case of *Detiček v. Sgueglia* may become relevant for approaches to harm. Here, the CJEU has accepted that the right to maintain a personal relationship and direct contact with both parents may only be overridden by "another interest of the child of such importance that it takes priority over the interests underlying that fundamental right."[129]

7.4.3.4 The right to be heard

The Brussels II *bis* Regulation had also included the right of the child to be heard, albeit more restrictively than the Brussels II *ter* Regulation. Article 11(2) provided that "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age or degree of maturity." Trimmings found that this provision of the Regulation resulted in an automatic inquiry into the views of the child which appears to be virtually unheard of in non-European Union States.[130] Thus, she concludes, credit is to be given to the Regulation for exhibiting a more child focused approach.[131] However, in a subsequent report commissioned by the European Parliament practitioners warned that in some cases hearing of the child in cases where the circumstances of the case allowed for ordering the return could interfere with the timeliness of the proceedings.[132]

Additionally, Article 42(2)(b) Brussels II *bis* Regulation provided that a judge may issue a certificate for return solely if "the child was given the opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity". However, the CJEU ruled that it is solely for the courts issuing the Article 42 certificate to assess if the child has indeed been given the opportunity to be heard.[133]

Article 42(2)(b) was the basis of the preliminary reference in the case of *Andoni Aguirre Zarraga v. Simone Pelz* – the only CJEU case discussing the child's right to be heard.[134] The preliminary reference was filed after the Spanish authorities had issued an Article 42 certificate for the return of a child from Germany to Spain.[135] The German authorities had denied the return on the basis of Article 13(2) Hague Convention, i.e. the fact that the child objected to return. At the same time, Spanish authorities had issued the Article 42 certificate for the return of the child. The child had not been

129 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia).
130 Trimmings 2013, p. 236.
131 Trimmings 2013, p 236.
132 Cross-border parental child abduction in the European Union, Study for the LIBE Committee European Parliament 2015.
133 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 69.
134 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).
135 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).

heard in Spain, therefore the German courts considered that the issuance of the certificate had been in breach of Article 42(2)(a) whereby such a certificate may only be issued if the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The CJEU stressed that it was only for the courts in the state of origin – in this case the Spanish courts- to review the lawfulness of the certificate. In other words, there was no possibility for the courts of the requested state (here the German courts) to evaluate whether the child had been given the opportunity to be heard, this being a matter solely for the authorities which should hear the child. The CJEU also looked at Article 24 of the EU Charter which covers the rights of the child. It stressed that the hearing of the child was not an absolute right, yet whenever a court decides this is necessary it must offer the child a genuine opportunity to express his views.[136] However, according to the CJEU it is only for the courts of the child's habitual residence to examine the lawfulness of their own judgments in the light of the EU Charter.[137] One facet of the mutual trust principle is that the Member States' legal systems provide effective and equivalent protection of fundamental rights.[138] Therefore, the interested parties should bring any human rights-based challenge before the Spanish courts, as these courts had jurisdiction over the merits of the custody dispute pursuant to the Regulation.[139] The CJEU noted that the proceedings in that case were still pending in Spain, therefore it was still possible to appeal. Again, in line with its previous judgement it held that no action could be taken in the Member State of presence against an enforcement certificate issued pursuant to Article 42 of the Regulation, even if it had been issued contrary to the requirements of the Regulation interpreted in accordance with the EU Charter.[140]

The CJEU partially shared Advocate General Bot's views.[141] One aspect raised by the Advocate General and not addressed by the CJEU concerned the Member State where the child should be heard so as to comply with the requirements of Article 42 of the Regulation. In the Advocate General's view, the silence of the Regulation on this point could be interpreted to mean that if the child had been heard in one Member State (in this case in

136 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 66.
137 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 69.
138 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 70.
139 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 71, 72.
140 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 74, 75.
141 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), View of AG Bot delivered on 7 December 2010.

Germany) this was enough to be able to consider that the child had been given the opportunity to be heard in another Member State.[142] Thus, the Spanish authorities could take into account the statements of the child given before the German courts, and therefore it could be assumed that the child had effectively had the opportunity to be heard in Spain. Therefore, according to AG Bot, the child had been given the opportunity to be heard as required under Article 42 of the Regulation and Article 24 of the Charter. In his opinion, thus, proceedings in different Member States should not be seen as separate proceedings, but rather as complementary components of one and the same set of proceedings.[143] Even though the CJEU did not ultimately incorporate in its judgement this part of AJ Bot's opinion, such reasoning may prove particularly interesting for the content of the child's right to be heard. A *prima facie* conclusion would be that such an analysis would not *per se* go against Article 12 of the CRC, provided that there would be an obligation for the Spanish authorities (in this case) to show that they have given *due weight* to the views of the child. In other words, it would be a clear advancement for children's right to be heard if courts were to give an explanation as to how they have taken their view into account. Nevertheless, it does not appear that this was the intention of AG Bot. Also, the CJEU's position, as expressed above, leaves little room for oversight on its part of the way children are heard.

7.5 Conclusions: balancing comity with individual rights

This Chapter has addressed the EU's approach to parental child abduction. It has been shown that the EU's competence in international child abduction is subsumed to its wider role in judicial cooperation in civil matters and the cross-border recognition of judgments. Indeed, the principle of mutual trust and the important role of the CJEU in affirming it in child abduction case law have equally been noted in academic commentaries.[144]

At legislative level, the Brussels II *ter* Regulation has brought an important contribution to both cross-border cooperation and individual children's rights. In line with previous legislative initiatives, the Regulation which is now in force, mandates that domestic authorities enforce return orders if adequate arrangements for the protection of the child are in place in the country of habitual residence. Member States remain competent to assess on a case-by-case basis the existence of such adequate arrangements, and no clarification on their content has yet emerged from the CJEU's case law. Also, from the perspective of harmonisation, parental responsibilities have

142 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 99.

143 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 96.

144 Walker/Beaumont 2011, p. 239; Lamont 2019, p. 236.

received a uniform definition across the European Union. The right to veto a relocation is an integral element thereof and the conferral of such right at national level will trigger the qualification of a cross border removal as unlawful within the meaning of the Brussels II *ter* Regulation. Lastly, this Regulation has integrated child abduction proceedings within the wider context of custody litigation, allowing, albeit on an exceptional basis, children to remain in a jurisdiction while proceedings on the substance of the custody rights are pending in another jurisdiction.

From the perspective of children's rights, while the Regulation is replete with references to the best interests of the child, little clarification as to the substance is given. The same presumption as in the Hague Convention applies: that the best interests of the child are best served by the return mechanism. Within this framework, domestic authorities retain discretion to decide on an individual basis on the circumstances where it would be against the best interests of the child to depart from this presumption. Nevertheless, the Regulation clearly links the best interests of the child with the right to maintain contact with both parents and the right to be heard. It clarifies that courts should examine how to ensure contact between the child and the person seeking the return and it provides that the assessment of the best interests of the child should be guided by the child's views. The lack of any guidance on how the child's hearing should take place, albeit a shortcoming of the Regulation, could be attributed to the Union's lack of competence in domestic civil procedural law, coupled with the requirement for unanimity in passing legislation in the field of cross-border cooperation in civil matters. Further, the Regulation also allows for the suspension of enforcement, in exceptional circumstances, if enforcement would expose the child to a grave risk of harm, an option which is not envisaged by the Hague Convention, and which could improve the practical application of The Convention.

On the other hand, the CJEU's case law has reflected a clear deference to mutual trust to the detriment of an individualised assessment of the relevant rights of children. The Court has set important rules on habitual residence and has favoured a child-centred interpretation thereof, by encouraging courts to assess the child's place of integration. It should be noted that in preliminary reference proceedings, the CJEU's role is primarily to give binding guidance to domestic courts, rather than to adjudicate the dispute in question.[145] The CJEU has accepted that the child's right to have contact with both parents -which militates in favour of return- can exceptionally be overridden by another interest of the child of such importance that it takes priority over the interests underlying that fundamental right."[146] Nevertheless, the CJEU has so far refrained from giving any guidance on how domestic courts should interpret in substance the best interests

145 Tridimas/Tridimas 2004, pp.125-145.
146 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia).

of the child, or on how to strike the balance between individual children's rights and mutual trust.

The strongest criticism to the CJEU's child abduction jurisprudence has emerged in the context of the overriding return mechanism under Articles 11(8) of the Brussels II *bis* Regulation.[147] Here, the CJEU has insisted on the primacy of mutual trust resulting in an absolute deferral to the state of habitual residence for always retaining the power to decide on a child's return.[148] On the basis of the presumption of equivalent protection of fundamental rights, the CJEU has held that a breach of the child's right to be heard cannot result in a refusal to enforce an Article 42 certificate, issued in breach of the conditions of the Brussels II *bis* Regulation.[149]

Indeed, as it has been pointed out, the CJEU has failed to scrutinise whether the child's return would be in reality safe.[150] Such an approach has also been criticised for failure to reflect a child-centred approach and to give effect to Article 24(3) of the EU Charter.[151]

More broadly, research on the application of Articles 11(6)- 11(8) of the Brussels II *bis* Regulation has revealed systemic deficiencies in this area across Member States.[152] Following a domestic case law review, Beaumont and others showed that only 73% of children over six-year-old have been heard in domestic proceedings; that judges do not explain in their judgments or in the Article 42 certificate how they have given children the opportunity to be heard, why children have not been heard, other than for reasons of age alone.[153] Moreover, contrary to Article 42(2)(c) of the Brussels II *bis* Regulation, it has been shown that judges do not consistently show how they have taken into account the non-return order and that this is at times rendered difficult due to the lack of reasons for non-return or due to a failure of hearing all parties during the Article 11(6)-11(8) proceedings.[154]

It is important to note that within the EU, the Commission has the possibility to remedy such systemic deficiencies through infringement proceedings under Articles 258-260 of the TFEU; however, it did not act in this direction during the period the Brussels II *bis* Regulation had been in force.

Returning to the CJEU, an overview of its case law indicates that indeed, this Court has been so far willing to refer to the rights of children primarily where such references supported the child's return and the goals of Brussels II *bis* Regulation.[155] This notwithstanding, and with reference to

147 Bartolini 2019; Beaumont e.a. 2016.
148 Bartolini 2019, p. 100.
149 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 59-61.
150 Bartolini 2019, p. 106.
151 Bartolini 2019, p. 106.
152 Beaumont e.a. 2016, pp. 241-248.
153 Beaumont e.a. 2016, p. 241.
154 Beaumont e.a. 2016, p. 248.
155 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 52.

the overriding return mechanism of the Brussels II *bis,* it should equally be stressed that the text of Article 42 left no room for interpretative discretion. It is therefore questionable to what extent the CJEU could have provided for a (more) child rights-based interpretation of these provisions.

Finally, it should be noted that the revised mechanism laid out in Brussels II *ter* has yet to receive scrutiny by the CJEU. It is to be hoped that this Court will employ the enhanced children's rights guarantees to trigger harmonisation in favour of children's rights at national level – an aspect which it has failed to do under the previous legal framework.