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.

8 The European Court of Human Rights

8.1 Introduction

This chapter continues the focus on the second sub-research question. It addresses the contribution of the ECtHR to the field of child abduction and it inquires whether this Court has adopted a child rights-based analysis to child abduction cases. Over time, the ECtHR has become the most prolific international court in handing down rulings in child abduction cases. By 15 June 2024, the ECtHR had decided on a total of 122 child abduction applications over a time span of 27 years from the first decision of 1 September 1996[1] to the latest judgement analysed here delivered on 16 April 2024.[2]

An overview of the ECtHR case law is relevant for a number of reasons. First, as discussed above, this Court issues binding judgments that can have a significant impact on domestic practice. It follows that its case law has a high potential for harmonising the interpretation of the Child Abduction Convention across the Council of Europe Member States. Second, the ECtHR offers a human rights perspective to the Child Abduction Convention. Even though the ECtHR's material scope is not restricted to children's rights, the Court often refers to the CRC and children's rights in its judgments.[3] It is therefore important to assess on the one hand the extent to which the ECtHR's interpretation meets the rights-based approach identified in Chapter 2 of this dissertation, and on the other hand how the Court has construed the parent-child relationship and the role of primary carers in these cases. Lastly, the Court's extensive reasoning, the inclusion of dissenting opinions in its judgments, as well as the considerable period it takes to reach a judgement, give a unique opportunity to identify the tensions raised in child abduction applications as well as the different considerations which ultimately play a role in adopting a judgement.

As with the previous Chapter, Section 8.2 is dedicated to analysing the context within which the ECtHR operates. Section 8.3 focuses on the child abduction case law of the ECtHR, starting with an overview of the cases and followed by the main themes which have been identified. Section 8.3.3 delves into an analysis of the Court's approach to children's rights. The rights selected for analysis are the same ones as those identified in Chapter 3.

---

1 ECtHR 4 September 1996 no. 26376/95 (*Catherine Irene Laylle v. Germany* (dec.)).

2 ECtHR 16 April 2024, no. 10772/21 (*Fernandes de Arauso v. Romania v. Romania*).

3 For an overview of the relevance of children's rights and CRC to the ECtHR see Fenton-Glynn 2021.

In addition, 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 8.3.3.2 and 8.3.3.3 delve into the topics of primary carer abductions and issues of violence against children. Section 8.4 offers some reflections on the balancing between comity and individual rights in the specific context of the ECtHR.

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

The ECHR was the first 'legislative' achievement of the Council of Europe.[4] It was signed in Rome on 4 November 1950 by the ten members of the Council of Europe.[5] It entered into force on 3 September 1953 and at that time it was primarily seen as a system of human rights control at inter-state level.[6] The ECHR envisaged the creation of a court, but 8 declarations had to be lodged by State parties to the ECHR for such a court to come into being.[7] The ECtHR was finally set up in 1959.[8] Its jurisdiction was optional, in that each Member State was only bound by its jurisdiction after having made a declaration to this effect.[9] The right to individual petition and the jurisdiction of the ECtHR became mandatory to all Member States since the entry into force of Protocol 11 on 1 November 1998.[10]

Similarly to the acceptance of the ECtHR's jurisdiction, the right to individual petition was envisaged in the initial text of the ECHR. Pursuant to Article 25 of the initial text, acceptance of individual petitions was an optional clause requiring a separate declaration to this effect.[11]

The ECtHR is a supranational body whose success depends on the acceptance of its judgments by the national constitutional and supreme courts.[12] As opposed to national constitutional courts, an inherent feature of its supranational character is the principle of subsidiarity according to which the primary obligation to ensure compliance with the rights and

4 Bates 2010, p. 49.
5 van Dijk et al 2006, p. 4.
6 Bates 2010, p. 8.
7 Bates 2010, p. 9.
8 Bates 2010, p. 124.
9 Bates 2010, p. 134.
10 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994, European Treaty Series – No. 155.
11 Drzemczewski 2000.
12 Garlicki 2009, p. 391.

freedoms set forth in the ECHR rests with the Contracting States.[13] Furthermore, as part of this principle the task of the ECtHR is only to secure minimal standards which should be universally accepted, the domestic authorities being free to secure higher levels of protection.[14] The subsidiarity principle is backed up by considerations of state sovereignty and the fact that the ECtHR's judgments lack direct effect.[15]

The ECtHR functions in several formations: single judge, committee of three judges, Chambers of seven judges and a Grand Chamber of 17 judges.[16] Out of these formations it is the Grand Chamber which most closely resembles a national constitutional court, as it can overrule previous precedents and ensure uniformity in the ECtHR's case law.[17]

The ECtHR decides on the interpretation of the ECHR in petitions brought by individual applicants. The ECHR, drafted in 1950 is a general human rights treaty, and its focus is not on children or children's rights.[18] However, over time its case law has developed an extensive body of case law on matters concerning children.[19] It is beyond the scope of this dissertation to analyse the case law of the ECtHR in relation to children. Scholars have noted the potential of litigating the rights of children under the ECtHR.[20] At the same time the ECtHR has been criticised for not always adopting a child rights perspective in its judgments. [21] The ECtHR has been using the CRC and the CRC Committee to support its findings however it was proposed that this Court could enhance its reliance on the CRC in its case law.[22] Fenton-Glynn has noted several deficiencies of the Court's approach to children's rights: the lack of clarity on standing/representation; the insufficient attention to participation rights of children; the subjugation of children rights within the family and finally the overuse of the best interests principle to the detriment of other rights of children.[23] In addition to the Court's substantive approach to the rights of children, other systemic deficiencies, such as an overreliance on subsidiarity and its high workload have equally been noted and they could impact its ability to adopt a child-rights approach.[24]

---

13 Garlicki 2009, p. 391; see also Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013, Council of Europe Treaty Series – No. 213.
14 Garlicki 2009, p. 391.
15 Garlicki 2009, p. 391.
16 Article 26 ECHR.
17 Senden 2011, at p. 19.
18 Fenton-Glynn 2021, p. 1
19 Two books dedicated to the ECtHR case law on children's rights have been published to date, Kilkelly 1999 and Fenton-Glynn 2021.
20 Kilkelly 2014, p. 207; Fenton-Glynn 2021.
21 Kilkelly 2014, p. 207, Peleg 2018, Fenton-Glynn 2021.
22 Kilkelly 2014, p. 207.
23 Fenton-Glynn 2018, pp. 394-396.
24 Fenton-Glynn 2018, pp. 397-398, Huijbers 2017.

Despite these deficiencies, from the perspective of human rights, the ECtHR remains an important actor and trough its jurisdiction in individual petitions it has the potential to adopt a child rights-based approach to cases involving children. The following sections focus on the Court's approach to the rights of children in the context of parental child abduction.

8.3 Child abduction before the European Court of Human Rights

8.3.1 Overview of cases and selection methods

The ECtHR's case law has been selected from the Court's online database, Hudoc where all the decisions and judgments are published, save for the ones decided in a single judge formation under Article 27(1) ECHR.

The search terms "child abduction" yielded 223 results. The French version of the site has been searched using the term "enlèvement" and in the section for 'relevant international law materials' "Haye" – retrieving 18 results. All cases decided until 15 June 2024 have been reviewed. Only the applications where the ECtHR was called to review the ECHR in light of the Child Abduction Convention were considered. Also, cases which had been struck out of the list or dismissed as inadmissible for reasons, other than manifestly ill-founded, were not included.

After review, a total of 122 applications were included in the analysis. They cover both judgments and inadmissibility decisions, where the ECtHR engaged with the substance of the dispute. They have been decided by the Grand Chamber, a Chamber of seven judges, or by a Committee of three judges. Two judgments have been decided by a chamber and subsequently referred to the Grand Chamber.[25] Of the 122 applications, 86 cases (70%) were brought by left-behind parents and 36 by taking parents (30%).

The Court found at least one violation of the Convention in 68 cases (79%) brought by the left-behind parents and in 7 cases (19%) brought by the taking parents. Until the Grand Chamber judgement in the case of *Neulinger and Shuruk v. Switzerland*[26] the Court declared all applications of the taking parents inadmissible or declined to find a violation.[27] In most of the child abduction cases, the adult applicant (the left-behind or taking parent, as the case may be) joined the child to the application to the effect that the children also became parties to the ECtHR proceedings.

25 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland)* and ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

26 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland).*

27 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*) is the first case where the ECtHR delivered a judgement in a case brought by a taking parent. It ultimately found no violation of the ECHR.

The types of complaints submitted to the Court reflected the position of the adult applicants in the domestic child abduction proceedings.[28] Left-behind parents who sought the return of their children have mostly complained before the ECtHR about the non-enforcement of return orders or the length of the domestic proceedings. When the domestic courts refused the return of the child, they complained in Strasbourg about the outcome of the domestic proceedings.

The taking parents submitted their case to the ECtHR after having lost the litigation in national courts. Their complaints in Strasbourg challenged the outcome of domestic proceedings, specifically that courts had disregarded the child's best interests when ordering the return. In addition, all applicants complained on occasion about the fairness of the decision-making process in that the principles of equality of arms or access to court had been denied. In two situations, both the left-behind and taking parents filed different applications to the Court.[29]

Seen from the perspective of the Child Abduction Convention, the complaints of the left-behind parents required the Court to align its case law to the comity considerations of the Child Abduction Convention. Conversely, in the complaints of the taking parents, the rights of the children were central, and the Court was challenged to find an adequate balance between comity and individual children's rights. It is not surprising therefore that the applications of the taking parents stirred more controversy, two of them ultimately becoming landmark cases in this field.[30] In *X v. Latvia*, its second Grand Chamber ruling, the Court has laid down its standard of review, which also represents the current approach to child abduction cases.[31]

The ECtHR's child abduction case law is analysed in section 8.3.2 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 ECtHR has considered the rights of children in its decision-making process (Section 8.3.3). 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 8.3.3.2 includes the Court's perspective on the topic of primary carer abductions whereas Section 8.3.3.3 addresses the Strasbourg Court's approach to child abduction cases raising issues of violence against children.

---

28 From the perspective of children's rights this has been a subject of criticism given that the Court has traditionally assumed that children's interests are identical to their parents: see Fenton-Glynn 2021, p. 257.

29 ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*) and ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*); ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)) and ECtHR 15 January 2015, no 4097/13 (*M.A. v. Austria*).

30 They have been qualified as landmark cases here as they are the only two child abduction judgments which have been delivered by the Grand Chamber: ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland*; ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

31 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

8.3.2 Themes in the ECtHR child abduction case law

8.3.2.1 Non-enforcement of return orders

Non-enforcement of the return orders has been a recurrent complaint of left-behind parents who have argued that the failure of the authorities to execute a final return order resulted in a breach of their family life with the child(dren). These complaints have been filed mainly under Article 8 of the ECHR which protects the right to private and family life. As with many other child abduction applications the applicants have lodged the complaint in their own name and in the name of their children, even if in some cases the children had opposed the return.[32]

The Court's analysis focused on the states' positive obligations to reunite parents with their children.[33] In its interpretation of the state's positive obligations the Court adhered closely to the Hague Convention. For example, the Court emphasised that under Article 11 of the Abduction Convention, domestic authorities are required to act swiftly in proceedings for the return of children.[34] In a number of cases the respondent governments argued that enforcement could not be carried out due to a significant change of circumstances.[35] The significant change was the passage of time which had elapsed between the return order and several failed enforcement attempts to the effect that the children had become accustomed to their new environment. The ECtHR consistently dismissed this argument ruling that states could not invoke their own failure to enforce return orders as a defence.[36]

Upon a closer analysis, it appears that in these judgments the ECtHR did not follow an individualised assessment of children's rights. The best interests of the child were mentioned in passing and they were aligned with the aims of the Hague Convention to have the status quo restored; there was thus a convergence between Article 8 ECHR and the Abduction Convention. In several cases, the return was not enforced due to the chil-

32 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France);* ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*).

33 for e.g. ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania);* ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*); ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*).

34 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, para 102.

35 ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*), ECtHR 22 June 2006, no 7548/04 (*Bianchi v. Switzerland)*; ECtHR 8 January 2008, no 8677/03 (P.P. v. Poland); ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*).

36 see most recently ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*).

dren's strong objection thereto.[37] Other than in the case of *M.K. v. Greece*,[38] -discussed below-, the Court has declined to assess the rights of children. Instead, the ECtHR has consistently focused on the obligation of the state to organise preparatory contacts between the children, their parents, and the social workers in view of securing their return.[39] The Court has accepted that coercion was not desirable in this area, however, it has encouraged states to use such measures against the parents.[40] Nevertheless, even when police intervened to remove children, the Court placed the emphasis on the fact that the public prosecutor was also present; no analysis of the child's rights had been undertaken.[41] The Court refrained from delving into the arguments of the parties that return would have exposed the children to violence, or evidence that enforcement attempts resulted in the children's hospitalisation.[42]

So far, the ECtHR has found violations in all but two of the applications concerning non-enforcement of return orders.[43] Also, by and large the judges were unanimous in their finding of a violation of Article 8 ECHR.[44] Only in one case has the Court accepted the government's argument that the passage of time represented a significant change in the circumstances which justified the authorities in refusing to enforce a return order. This was the case of *Serghides v. Poland* and the outcome was highly divided with three out of the seven judges dissenting.[45] In the respective case, after a court judgement ordering the return of the child, and while the proceedings for enforcement were pending, the applicant attempted to re-abduct his daughter. This led the Polish authorities to reverse the return order on the ground that the attempt to re-abduct the child had had a highly negative impact on her which in turn justified a reversal of the return order. Here, the Court found that the change of circumstances relied upon by the domestic authorities was attributable to the applicant rather than to the authorities

37 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania* ECtHR 17 January 2013, no. 61680/10 *(Chabrowski v. Ukraine);*, ECtHR 7 March 2013, 10131/11 *(Raw and others v. France);* ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*); ECHR 17 May 2022, no 20425/20 (Loiry v. Romania); ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*).

38 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).

39 For example, ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)* para 112, ECHR 17 May 2022, no 20425/20 (Loiry v. Romania), para 25.

40 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, para 106.

41 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 86.

42 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 30 and 31.

43 ECtHR 2 November 2010, no 31515/04 (*Serghides v. Poland)*, ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).

44 In addition to the cases discussed below, two other cases were met with dissenting opinions: that of ECtHR 25 January 2000, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, and that of ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)* (these will be discussed in more detail in the section concerning the child's right to be heard).

45 ECtHR 2 November 2010, no 31515/04 (*Serghides v. Poland).*

themselves. The dissent was critical of this approach, however not from the perspective of the 'passage of time' argument but rather as they considered that the length of the abduction proceedings themselves, of over a year, should have been considered unreasonable under Article 8 ECHR.

M.K. v. Greece is the only other case where the ECtHR has found that Article 8 of the Convention had not been breached in a claim concerning the non-enforcement of return order.[46]

This case is worth a more in-depth analysis as children's rights were at the core of the Court's findings.

The case concerned an abduction of a 12-year-old boy from France to Greece. The boy's mother who had sole custody decided to relocate to France with the children. However during a holiday in Greece the father refused to return the boy back to France. Following the mother's petition, by a final judgement of 30 September 2015 the Greek courts found that all the conditions of the Abduction Convention were met and therefore ordered the boy's return. When assessing the child's position, the Greek court ruled that the child did not object to returning to France, but rather that he had merely expressed feelings of loneliness which in the court's view were inherent to living in a new country.[47]

The enforcement of this final judgement proved problematic principally due to the child's adamant refusal to return.[48] This was attested by several reports of social workers conducted at the enforcement stage. Also, almost one year after the final judgement of 30 September 2015 the boy was heard again in court, where he objected to return. When the application was brought to the ECtHR, proceedings in Greece were pending regarding the imposition of fines on the taking father in relation to the abduction of his son. The left-behind mother complained that the Greek authorities had refused to facilitate her son's return to France.

In its reasoning the Court relied heavily on the boy's refusal to return. The Court also criticised the Greek authorities' first order of return for failure to take into account that the boy had a brother who lived with the father in Greece, in other words the Greek authorities did not take into account the entire family situation.[49] The ECtHR also mentioned that the child's right to be heard is guaranteed by several international instruments, including Article 12 CRC, Article 24 EU Charter, the European Convention on the Exercise of Children's Rights, as well as other recommendations of the CoE.[50] In light of all these instruments, taken together with Article 13 of the Hague Convention, the Court considered that there had not been a violation of Article 8 ECHR. Two judges dissented. First, Judge Wojtyczek stressed that in family situations the parent who has the physical custody of

46 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).
47 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 20.
48 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 27.
49 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 90.
50 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 91.

the child also has the capacity to influence the child; therefore the Court -by not finding a violation- is encouraging parents to determine the outcome of proceedings by their own wrongdoings. In the second dissenting opinion, Judge Koskello focused on the rule of law and the fact that "the child's best interests and other rights of the child must operate within the framework of the rule of law".[51] On the facts, her main criticism was that the Greek authorities had placed a strong emphasis on the voice of the child *after* the final judgement in the abduction proceedings. Thus, in her opinion, the Greek authorities used the child's best interests "as a justification […] to re-examine the substance of issues which have already been the subject of final adjudication by the competent courts".[52]

M.K. v. Greece is an outlier in the Court's judgments concerning non-enforcement of child abduction. In two more recent judgments where the children objected to the enforcement of return orders, the ECtHR's reasoning was entirely construed around the states' failure to impose coercive measures on the parents and refrained from addressing the relevance of the children's objections to enforcement.[53] With direct reference to the children, in *Makhmudova v. Russia*, the Court criticised the authorities for failing to prepare the children psychologically and to address the risk of serious psychological trauma that had been identified by the same authorities.[54] Similarly, in the recent case of *Loiry v. Romania*, the Court did not address the relevance of the children's objections to return. Rather, the reasoning focused on the length of the enforcement proceedings and the failure of the authorities to seek assistance from police and child-protection experts or psychologists during the enforcement acts.[55]

8.3.2.2 Fairness of the decision-making process: procedural considerations

Child abduction cases have largely been brought under Article 8 of the Convention. Pursuant to its well-established Article 8 case law, the Court must be satisfied that the decision-making process was fair, meaning that the domestic authorities have allowed each party the opportunity to present their case while taking into account the best interests of the child(ren) involved.[56] Thus, complaints which would more typically fall under Article 6 of the Convention, such as equality of arms, adversarial proceedings,

51 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), dissenting opinion of judge Koskello, para 21.

52 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), dissenting opinion of judge Koskello, para 20.

53 ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia)*, and ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*).

54 ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia)*, para 75.

55 ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*), para 25.

56 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 67; ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*.

reopening of the case by way of extraordinary remedies or length of the proceedings have been analysed under Article 8 of the Convention.[57]

Also, with few exceptions,[58] and similarly to complaints about the non-enforcement of domestic judgments, the applicants in these cases were the left-behind parents.

The most common allegation regarding the fairness of the decision-making process was that the proceedings for the return of the child had lasted longer than the 6-week time limit provided for under Article 11 of the Abduction Convention. The ECtHR found numerous violations on this account, focusing on the states' failure to ensure the speedy reunification of children with their left-behind parents.[59]

In other complaints, the applicants argued that the domestic authorities refused to initiate steps under the Hague Convention and this in turn resulted in a prolonged separation from their children.[60] The ECtHR held that this failure had indeed constituted a breach of Article 8 ECHR.

Applicants also complained under Article 8 of the Convention about equality of arms in that they had not been given the opportunity to be heard or present their case before the domestic courts.[61] The Court also found an infringement of Article 8 ECHR in cases where it was possible to reopen final national proceedings by way of extraordinary remedies.[62]

An overview of these judgments indicates that the Court has incorporated the Articles of the Hague Convention and, as the case may be of the Brussels II *bis* Regulation, into the procedural guarantees of Article 8 of the ECHR. This line of case law has followed closely the Abduction Convention, thus contributing to a uniform application thereof.

---

57 See among others, ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*, ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*; ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; it should be noted that in the past the ECtHR has addressed some of the complaints under Article 6 of the Convention (see for example: ECtHR 13 January 2015, no. 35632/13 (*Hoholm v. Slovakia*) concerning the length of the proceedings which has been analysed under Article 6 of the Convention or ECtHR 25 June 2013, no. 5968/09 (*Anghel v. Italy*) concerning access to court which has been analysed under Article 6 of the Convention)however it seems that in more recent cases (decided After 2019) all complaints related to procedure have been analysed under Article 8 of the Convention.

58 As an exception to the general pattern where left-behind parents have brought procedural complaints regarding the fairness of the proceedings, in ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)* the applicant was a taking mother who alleged that she had not been heard in person in the domestic proceedings and that she has not been informed of the other party's (the left-behind parent) submissions.

59 Among many other cases, see: ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*; ECtHR 04 May 2023, no. 28982/19 (*Baharov v. Ukraine)*.

60 ECtHR 5 March 2002, no. 56673/00 (*Iglesias Gil and A.U.I. v. Spain*).

61 ECtHR 6 November 2008, no 49492/06 (*Carlson v. Switzerland*); ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*; ECtHR 28 November 2023, no. 30129/21 (*Ghazaryan v. Armenia)*

62 ECtHR 3 June 2014, no. 10280/12 (*López Guió v. Slovakia*).

8.3.2.3 The outcome of the proceedings: flawed assessment of key child abduction concepts: habitual residence or custody rights

The Strasbourg Court has also proved instrumental in ensuring that key Hague Convention concepts, such as habitual residence or custody rights are applied in the spirit of this instrument. This required a closer scrutiny, and this does not always sit well with the fourth instance doctrine of the Court. Indeed, the ECtHR had repeatedly stressed that: "it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far they have infringed the rights and freedoms protected by the Convention".[63] The Court indicated that it would intervene solely where there was an appearance of arbitrariness at domestic level.[64] In some child abduction cases, it did indeed find that domestic authorities had delivered arbitrary decisions. For example, it was considered arbitrary that domestic courts ignored foreign custody decisions in child abduction applications.[65] The ECtHR considered that this interpretation of the Hague Convention contradicted the very meaning of this text.[66]

More recently, the ECtHR appears to have delved further into assessing the merits of domestic decisions even beyond situations of arbitrariness. For example, in the case of *Ushakov v. Russia*, the ECtHR looked closely at the way domestic courts have approached the concept of habitual residence.[67] Similarly, in the case of *Michnea v. Romania*, the ECtHR analysed whether the Romanian courts have correctly interpreted the notion of habitual residence in the light of the CJEU's *Barbara Mercredi* judgement.[68] Arguably, such a change in approach – from reviewing domestic decisions only when identifying appearances of arbitrariness to a closer inspection of the reasons put forward- has been justified by the standard adopted following the judgement in the case of *X v. Latvia.*[69] The emergence of this standard of review as well as its impact and challenges shall be discussed into more detail below.

---

63 ECtHR 3 June 2008, no. 19055/05 (*Deak v. Romania and the United Kingdom*), para 66; this position was reiterated in ECtHR 2 September 2003, no. 56838/00 (*Guichard v. France(Dec))*, ECtHR 13 October 2009, no. 37395/08 (*Bayerl v. Germany (Dec*)), ECtHR 5 April 2012, 3684/07 (*Stromblad v. Sweden*), para 92, ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*), para 61.

64 Ibidem.

65 ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary)*.

66 ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary)*, para 81.

67 ECtHR 18 June 2019, no. 15122/17 *(Ushakov v. Russia*), paras 91-93; See also ECtHR 6 June 2023, no. 12083/20 (*Viotto v. Moldova*), para 20 where the Court criticised the Moldovan's courts approach to habitual residence.

68 ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania)*.

69 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia)*.

8.3.2.4 *The emerging standard of review: a genuine assessment of relevant factors*

Most of the cases outlined above have been brought by left-behind parents; the role of the ECtHR in these applications has been to interpret the Hague Convention in light of Article 8 ECHR. Overall, the Court found that there is a convergence between the guarantees of the Hague Convention and those of Article 8 ECHR. Scholars have equally observed that the ECtHR has contributed to the uniform application of the Hague Convention, and they have welcomed these developments.[70]

However, taking parents have also filed applications to the ECtHR; their complaints faced the Court with a more difficult task: that of assessing whether the domestic courts have adequately balanced the relevant rights when deciding to order the return of the child. The majority of the taking parents complained that in ordering the return, the domestic judgments disregarded the best interests of the child. Here, the focus of the analysis under Article 8 ECHR was the proportionality of the interference with the right of the parent (and child) to enjoy the right to family life.

Initially the Court declared such complaints inadmissible albeit not by unanimity of votes.[71] The first admissible case was *Maummuseau and Washington v. France* where the ECtHR found by a majority of five votes to two that Article 8 ECHR had not been breached.[72] It is the first case which contains a more elaborate analysis of the child's best interests on the basis of several international instruments, including the CRC, the Hague Convention and the Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly.

Nevertheless, as the dissent shows, the standard for assessment of the child's best interests remained disputed between the Court's judges. Even though the Grand Chamber refused to accept the referral request for *Maummuseau and Washington v. France,* two later cases, *Neulinger and Shuruk v. Switzerland*[73] and *X v. Latvia*[74] were decided in this formation. These two judgments have crystalised the Court's position in child abduction cases and the latter, *X v. Latvia* has cemented the ECtHR's standard of assessment in child abduction cases. These two judgments are analysed into more detail below as they are key in understanding the approach of the ECtHR to child abduction and its position to the best interests of the child within these proceedings.

---

70 Silberman 2004, Duncan 2000.

71 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (Dec)*); ECtHR 16 December 2005, no. 14600/05 (*Eskinazi and Chelouche (Dec*)); ECtHR 12 November 2006, no. 41092/06 (*Mattenklott v. Germany (Dec))*; Court decisions do not include dissenting opinions, however, it is mentioned therein if the judges were unanimous or whether the decision was adopted by a majority. Until 2007, all the decisions taken in child abduction cases where the applicants were the taking parents were decided by a majority.

72 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*).

73 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC)).*

74 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)).*

Neulinger and Shuruk v. Switzerland was accepted for reconsideration by the Grand Chamber following a chamber judgement where the Court had found that Article 8 of the ECHR was not breached.[75] This case concerned the removal of a boy (Noam) by a mother, following her separation from the boy's father and the latter's joining an ultra orthodox religious movement -which he intended to raise his son into. Before the abduction, the mother was the boy's primary carer; she had been granted sole physical custody and the father a supervised access right. At the same time however, under Israeli law they continued to exercise joint guardianship, meaning that the child could not be removed from Israel.

The father's Hague Convention application for the return of his son was initially dismissed by the Swiss courts. However, by a final judgement of 16 August 2007 the Swiss Federal Court reversed the previous judgments and ordered Noam's return to Israel. Pursuant to the court order the return should have been enforced by the end of September 2007.

On 27 September 2007 the ECtHR granted the Rule 39 request and ordered Switzerland not to enforce the return order pending the decision by the ECtHR. The Rule 39 measures were prolonged on 5 June 2009 when the case was referred to the Grand Chamber.

Finally, in view of the continuous suspension of the enforcement, on 29 June 2009 the President of the Lausanne District Court provisionally decided that Noam should live with his mother, suspended the father's right of access and granted her parental authority in order to renew her son's identity papers. The court also noted that the father did not show an interest in wanting a relationship with his son whom he had not seen since he had left Israel in 2005 and that the child had formed a bond with his mother.

The Grand Chamber judgement only dealt with the proportionality of the interference. The Court's focus was on whether the best interests of the child had been observed by the Swiss authorities.

In its reasoning, the ECtHR departed from its standard approach in previous child abduction cases in that it scrutinised closely the judgments of the Swiss authorities. [76] It took notice that the Swiss domestic courts were not unanimous in deciding whether Article 13 of the Hague Convention applied and that the expert report concluded that there was a grave risk of harm to the child in the eventuality of the return. Nevertheless, the ECtHR held that it was prepared to accept that the position adopted by the Federal Court was within its margin of appreciation.[77] It was the factual circumstances *after* the Federal Court's decision which constituted a turning point.[78] Here, the Court stressed that the passage of time was vital for the

75 ECtHR 8 January 2009, no 41615/07 (*Neulinger and Shuruk v. Switzerland* (Chamber)).
76 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 141.
77 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.
78 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.

effectiveness of the Hague Convention.[79] Also, it distinguished the Hague Convention as a procedural instrument from a human rights treaty, the latter being designed to protect individuals on an objective basis.[80] Finding similarities between this case and cases related to the expulsion of aliens, it stressed it was important to take into account the difficulties that Noam would encounter upon his return to Israel considering that he was well integrated into Swiss society and that he had lived there continuously since June 2005.[81] It also looked at the mother's refusal to return to Israel and, after analysing the evidence adduced before the domestic courts, it did not find it 'totally unjustified'.[82]

Therefore, in view of all the elements of the case and considering the developments after the provisional order of 29 June 2009, the Court found that there would be a violation of Article 8 if the Swiss authorities enforced the return order.[83] The judgement was adopted by sixteen votes to one, with 6 judges writing concurring opinions. The one dissent criticised the finding of a 'conditional' violation as opposed to a full-blown violation.[84]

The *Neulinger* judgement spurred significant academic debate.[85] While the outcome was not in itself criticised, scholars submitted that the ECtHR set too high of a threshold for the 'child's best interests' test.[86] It was argued that with the requirement of an in-depth analysis of the child's best interests the ECtHR deviated not only from its previous case law, but it also displayed an incorrect understanding of the Hague Convention.[87] Others deemed that *Neulinger* did not in any way change the Court's case law and that this situation should be seen as an exceptional one.[88]

Rietiker underlined that looking at the best interests of the child on a case-by-case basis was mandated by the principle of effectiveness which is one facet of the teleological interpretation of a treaty as envisaged by Article 31(1) of the Vienna Convention on the Law of Treaties.[89] According to him, the application presented the ECtHR with an isolated situation, to which the Court responded by reconciling principles of treaty interpretation.

The criticism to the Court's judgement did not focus on the two-limb approach to the child's best interests but rather to the requirement of an in-depth examination by the domestic courts coupled with the fact that the

79 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 147.
80 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.
81 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, paras 146 and 147.
82 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 150.
83 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 151.
84 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, dissenting opinion of Judge Zupančič.
85 Walker 2010, p. 649; Silberman 2010, p. 733; Rietiker 2012, p. 377.
86 Walker 2010.
87 Silberman 2010, Walker 2010.
88 Rietiker 2012.
89 Rietiker 2012, p. 15.

violation was found precisely due to the length of the proceedings before the ECtHR.[90]

Post *Neulinger*, the Court looked more into detail at the practicalities of contact between the child and the taking parent. For example, in the Šneersone and Kampanella v. Italy the Court considered that the 'safeguards' in place upon the child's envisaged return to Italy were inadequate.[91] Also, the Court held that the Italian authorities had not duly discharged of the identified risks that the child would suffer a trauma as a result of separation and that the taking parent had not any material resources in Italy and that she was unemployable.[92] Similarly, in the case of *B v. Belgium* the Court held that the taking parent had been the child's primary carer for the first four years of her life, that the psychological reports ascertained a risk of trauma if the child returned without her mother, that the mother was risking a prison sentence and loss of parental rights upon return and finally that the child was well integrated into the environment in Belgium.[93] For all these reasons the Court held that there had been a violation of Article 8 ECHR.

Against this background, on 4 June 2012, roughly two years after the *Neulinger* judgement, the case of *X v. Latvia* was referred to the Grand Chamber, at the request of the Latvian Government. On 15 November 2011 by a majority of five votes to two the ECtHR's Third Section had found a violation of Article 8.[94]

The case concerned the removal of a girl of three years and five months from Australia to Latvia. At the time of the removal (17 July 2008) the father had not acknowledged paternity, and he did not have custody over the child. Following the mother and daughter's departure to Latvia, the father initiated proceedings in Australia for establishing his parental rights. By a judgement of 6 November 2008, the Australian Family Court retroactively recognized the father's paternity and held that he had joint parental responsibility over the girl since her birth.

On 22 September 2008, before his paternity had been acknowledged in Australia, the father then initiated proceedings under the Hague Convention for the return of his daughter to Australia. The Latvian courts were unanimous in allowing the application. The mother's opposition under Article 13(1) (b) of the Hague Convention was dismissed. On appeal, the mother produced a psychological report attesting that an immediate separation from her would cause the child psychological trauma. By a final judgement of 26 January 2009, the Riga Regional Court dismissed the applicant's

90 Silberman 2010, Walker 2010.

91 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*): these safeguards consisted of contact amounting to thirty days within the first year with the parent who had been until that point the child's primary carer.

92 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*): para 94 and 95.

93 ECtHR10 July 2012, 4320/11 (*B v. Belgium*), paras 72-76.

94 ECtHR 13 December 2011, no 27853/09 (*X v. Latvia (Chamber)*).

appeal reasoning that (i) there had been enough evidence that the father had cared for the child prior to her departure from Australia, (ii) the Australian system provided enough safeguards against ill-treatment within the family, (iii) the psychological assessment produced by the applicant concerned custody rights for which the Latvian courts were not competent and (iv) the applicant did not adduce evidence in support of her claim concerning the father's liability for criminal charges in Australia. While the proceedings for enforcement of the return order were pending, on 14 March 2009 the father returned with the daughter to Australia. In September 2009, the Australian Family Court reversed previous judgements and granted the father sole parental rights over his daughter while imposing severe limitations on the applicant's visiting and contact possibilities.

The judgement of the Grand Chamber dealt only with the 'necessity of the interference' requirement under Article 8 of the Convention. Importantly, the Grand Chamber clarified the applicable principles in child abduction cases. In line with its past case law it reaffirmed the necessity of adopting a harmonious interpretation of the relevant international instruments.[95] With particular relevance for child abduction cases the Court stressed that the domestic authorities are not to order the return automatically or mechanically.[96]

Most importantly, the Grand Chamber clarified that the ECtHR did not require an in-depth analysis of the entire family situation for the purposes of Hague Convention proceedings. Instead, the Court put forward a 'new' test: domestic courts must duly consider *arguable* allegations of a grave risk of harm and provide reasoned decisions which are not automatic and stereotyped.[97] Further, the ECtHR discounted the relevance of the passage of time argument from the analysis.[98]

On the facts of the case, the Court found that the applicant had presented an arguable claim that the separation might entail a psychological trauma for the child and that the father had been criminally convicted. The Court found it particularly problematic that the Latvian regional court refused to examine the psychological certificate produced by the applicant and did not carry out further checks in respect of the allegations of criminal convictions of the father and the ill-treatment.[99] Further, as to the separation of mother and child, the Court indicated that the Latvian authorities could have addressed the issue under Article 20 HC, as the rights enshrined in Article 8 ECHR form part of the 'fundamental principles of Latvia related to the protection of human rights and fundamental freedoms'.[100] The ECtHR also expressly stated that the Latvian courts should have dealt with the

95 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), paras 93-94.
96 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 98.
97 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 107.
98 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 109.
99 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), paras 114, 116.
100 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 117.

issue of whether it would have been possible for the mother to follow her daughter to Australia and to maintain contact with her.[101] Such finding is to be corroborated with the Court's statement in the general principles part according to which before ordering a return "courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place".[102] On the basis of all these factors a violation of Article 8 ECHR was found.

The judgement was adopted with nine votes to eight. The dissenting judges expressly pointed out that their disagreement with the majority did not concern the general principles but rather the application of these principles to the facts of the case.[103] In particular, the dissenting judges disagreed with the fact that the reasoning of the Latvian courts had not been sufficiently detailed or that the Latvian courts should have ordered a second expert report and submitted further inquiries to the Australian authorities.

Overall, commentators have welcomed the Grand Chamber judgement in the case of *X v. Latvia*.[104] The new test requiring a genuine assessment of arguable allegations of grave risk of harm, was perceived as clear and in line with the overall philosophy of the Hague Convention. However, as with the dissenting opinions, commentators disagreed with the application of the test in practice. On the one hand, it was submitted that the ECtHR test was met even if the Latvian courts did not analyse the findings of the psychological report and did not seek further clarifications from the Australian authorities concerning the criminal convictions of the father.[105] In this view, the examination of the Latvian courts was effective because the strict standard of applying Article 13(1)(b) of the Hague Convention was not met on the facts of the case.[106] It was further argued that the grave risk of harm could only materialise if the child was separated from her mother and the mother did not prove any objective impossibility to return.[107]

Others considered that the Court succeeded in achieving a harmonised interpretation of the ECHR with the Hague Convention.[108] Also, it was highlighted that in *X v. Latvia* as opposed to *Neulinger and Shuruk v. Switzerland*, the Strasbourg Court moved from a material assessment of the child's best interests to a procedural one, while at the same time adopting a wide definition of the 'grave risk'.[109]

Indeed, when looking into the Court's approach to the child's best interests, a clear departure from the *Neulinger* approach can be seen. In

101 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), 117.
102 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), 108.
103 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), dissenting opinion, para 2.
104 Beaumont et. al. 2015; Keller/Heri 2015.
105 Beaumont et. al. 2015.
106 Beaumont et. al. 2015, p. 46.
107 Beaumont et. al. 2015, p. 46.
108 Keller/Heri 2015, p. 288.
109 Keller/Heri 2015, p. 287 and 289.

Neulinger, -as shown above-, the Court made express references to the child's best interests as having two limbs -that of maintaining contact with both parents and the personal development one – while no such reference was made in the case of *X v. Latvia*. In *X v. Latvia,* the child's best interests was approached from a procedural angle. Here, the Court oversaw the domestic process and whether courts had effectively discharged the allegations of grave risk (which included the child's best interests in the narrow sense of the Hague Convention). Also, the Court looked specifically at the child's right to maintain contact with both parents by mandating national authorities to ensure that adequate safeguards were in place in the country of origin and that tangible protection measures were put in place.

The disagreement between scholars and ECtHR judges alike could be approached from the angle of the principle of effectiveness. Under this principle, the Convention guarantees rights that are practical and effective and not theoretical and illusory. The facts of the case show that Latvian courts dismissed the psychological certificate without looking at the specific allegations and that in practice no arrangements had been made for the child to return with her mother. On the contrary, the child had traumatically been separated from her primary carer; the Australian courts granted the father sole parental authority and only allowed visitation from the mother under the supervision of a social worker. Further, she was prohibited from speaking to her daughter in Latvian or to visit or communicate by any means with any childcare facility, preschool or school attended by the daughter, with any parent or child attending such an institution until her daughter reached the age of 11.[110] One cannot escape the conclusion that such harsh conditions were imposed as a sanction for the abduction and not on the basis of a merits assessment of the child's best interests in Australia.[111]

In the judgments and decisions following *X v. Latvia* the ECtHR has continued to apply the same test, both to cases filed by left-behind parents as to those lodged by taking parents. As discussed below, this test appears to have resulted in a shift from the ECtHR's standard of review, from a focus on arbitrariness to a more thorough assessment of the domestic courts' application of the Hague Abduction Convention. This standard shall be discussed in the following subsections with reference to the areas of particular relevance for the present dissertation.

8.3.3 Children's rights in the ECtHR's parental abduction case law

All child abduction cases concern children, and this is evident as the best interests of the child are mentioned in most of the Court's judgments. This does not mean however that these cases follow a child rights-based approach. This section examines in more detail how the Court has incor-

110 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 32.

111 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), concurring opinion of Judge Albequrque.

porated children's rights into its child abduction case law in order to determine to what extent it has adopted a rights-based approach in its child abduction case law.

First, from a procedural point of view it appears that in many applications the parents have joined the children as parties to the proceedings, regardless of whether they were vested with parental responsibility at the time of the application.[112] The Court has accepted without reservations that parents have the right to bring complaints on behalf of their children. For this, the Court has relied on its case law concerning the placement of children in care where it has considered that a person deprived of parental rights may nevertheless file a complaint to the Court on behalf of the children if there is a conflict of interests between that parent and the person exercising parental rights which in turn may lead to the child being deprived of effective protection of their rights under the Convention.[113] This approach has sometimes been criticised for conflating the issue of standing and representation, in that while indeed the child should have standing before the Court in these cases, it sometimes appeared that the interests of the applicant parent and the child were not aligned and that separate representation may have been suitable.[114] For example, in the case of *Raw and others v. France*, the children had vehemently opposed the return to the applicant parent, yet they became parties to the ECtHR application together with that parent. Moreover, the facts of this case showed evidence of violence and neglect towards the children by the parent with whom they joined the proceedings. Specifically, a report had been drawn up by a psychologist and a social worker when the children were aged 14 and 12 years old. That report had established that the children, whose statement had been qualified as credible, lived in a climate of terror created by their mother (left-behind parent) and paternal grandfather who had exposed them to physical and psychological violence.[115] The Court however accepted that the left-behind parent could represent the children in the proceedings. As highlighted in the dissenting opinion of Judge Nussberger, the issue in that case was not so much that of standing, but rather of representation. For her it was clear that the children could claim to be victims of violations. However, them being represented by the left-behind parent was not appropriate in the specific circumstances of the case. She considered that the risk of children being instrumentalised could have been avoided if the parents could not represent their children in cases of conflict of interests between them, unless a national institution confirmed that such a representation corresponded to the best interests of the child. In the same

112 See among many other cases: ECtHR 27 July 2006, no. 7198/04 (*Iosub Caras)*, para 29; ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*); ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*).

113 See ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 51 referring to ECtHR 13 July 2000 nos. 39221/98 and 41963/98 (*Scozzari and Giunta v. Italy* [GC]), paras 138-139.

114 Fenton-Glynn 2021, p 265.

115 Fenton-Glynn 2021, p. 14.

vein, Fenton-Glynn argues that allowing the parents to represent children risks subsuming the rights of children to those of their parents – an aspect which forms also one of the main criticisms to the Court's case law concerning children in general.[116] To date the Court has not laid down clear guidelines in dealing with the representation of children so as to avoid conflict of interests and at the same time to allow their perspective to be presented. However, in other cases concerning vulnerable applicants the Court had contacted National Bar Associations for ensuring representation.[117] No such attempt has been made in child abduction cases. Neither do the Rules of the Court envisage solutions for such situations.

8.3.3.1 The Best Interests of the Child

On the merits, children's rights have been argued in most child abduction applications, in line with the structure of the Abduction Convention. In its case law between 1996 to the first Grand Chamber case of 2010, the Strasbourg Court's understanding of the child's best interests was entirely aligned to the aim and purpose of the Abduction Convention. For example, in a case decided in 2005 the taking parent argued that the return of her daughter ran contrary to the child's best interests. The European Court agreed that the child's best interests were paramount in Hague Convention cases; yet the child's right not to be removed from one parent and retained by the other was an inherent element of the best interests.[118] No further reference was made to the circumstances of the child in the respective case. This approach appears to defer to a collective view of the best interests as opposed to an individualised assessment.[119] In other judgments, the ECtHR further endorsed the Hague Convention's general aim of protection of children to the detriment of any inquiry into individualised best interests assessments.[120]

The first more elaborate articulation of the best interests standard occurred in the case of *Maummusseau and Washington v. France.*[121] Here, the taking parent argued that the domestic courts had failed to take account of her daughter's best interests which should have comprised of an assessment of the risk of separation of a very young child from her mother, an assessment of the situation as a whole and a broader understanding of

116 Fenton-Glynn 2021, p. 257.

117 See for example, ECtHR 11 October 2011, no. 36815/02 (*Dragusin v. Romania*) or ECtHR 13 March 2012, no 1282/05, (*Tatu v. Romania*), referred to in Constantin Cojocariu, *Silencing the Voices of People with Disabilities: Recent Developments before The European Court Of Human Rights*, 3 December 2014, available at << https://strasbourgobservers.com/2014/12/03/silencing-the-voices-of-people-with-disabilities-recent-developments-before-the-european-court-of-human-rights/>>, last accessed on 28 August 2023.

118 ECtHR 16 December 2005, no. 14600/05 (*Eskinazi and Chelouche(Dec*)).

119 In this sense see also Chapter IV above.

120 ECtHR 12 November 2006, no. 41092/06 (*Mattenklott v. Germany (Dec))*; ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (Dec)*).

121 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), paras 68-81.

the concept of 'harm' to the child. [122] The Court's interpretation started by stressing the alignment in the understanding of the best interests between the CRC and the Hague Convention, with the latter allowing for an individualised assessment of the best interests of the child in the context of the exceptions to return.[123] The Court agreed that the French courts had conducted an in-depth examination of the family situation and did not see any reason to further scrutinise the situation of the child upon her return to the United States.[124] The Court also focused on procedure emphasising that all parties had been allowed to present their case fully.[125] The child had also been a party to the ECtHR application. In her regard however, the Court, while noting in passing the CRC Committee's General Comments, found that in view of her age, "taking of testimony […] could have been regarded in the present case as non-decisive."[126]The dissenting judges criticised the majority's approach, specifically as they considered that the abrupt removal of the child from the village by police authorities as well as her strong relationship with her mother did not correspond to her best interests.

Roughly two years after the case of *Mammouseau*, the best interests of the child came again to the fore in the case of *Neulinger and Shuruk v. Switzerland*. Here the ECtHR further clarified its approach to the child's best interests by stressing that it comprises two limbs.[127] First, it is in the child's interests to maintain ties with their family except for cases where the family has proven particularly unfit. Severance of family ties must only occur in very exceptional circumstances, and everything must be done to preserve or if appropriate to rebuild these ties. The second limb of the child's interests is to develop in a sound environment, and Article 8 ECHR prohibits measures that would harm the child's health and development.[128] It further accepted that the child's best interests are the underlying principle of the Hague Convention.[129] The Court also ruled that while the child's interests are to be assessed on a case by case basis and in such assessment domestic courts benefit of a certain margin of appreciation, an automatic or mechanic return under the Hague Convention would run contrary to Article 8 ECHR.[130] The years between *Neulinger* and *X v. Latvia* saw an increase in infringements of Article 8 ECHR motivated by faulty assessments of the child's best interests. *Sneestrone and Kampanella v. Italy* and *B v. Belgium* are illustrative of this change.[131]

---

122 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 64.
123 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 72.
124 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 74.
125 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 76.
126 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 80.
127 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 135.
128 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 136.
129 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 137.
130 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 138.
131 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 10 July 2012, 4320/11 (*B v. Belgium*).

Sneerstrone and Kampanella v. Italy concerned the issuing of a certificate of enforcement by the Italian authorities following a Latvian non-return order of a child. While maintaining the same principles as in *Neulinger,* the Court looked closely at *how* the Italian authorities had assessed *that* child's best interests. They found that the child was at risk of neurotic problems and/or illnesses if separated from the mother and that the Italian authorities had not considered any of the evidence in this regard which had previously been administered in Latvia.[132] The Court also considered that the strict visiting schedule set by the Italian courts was manifestly inappropriate to the inevitable psychological trauma of the child.[133] The best interests of the child in this case was closely linked to the separation from the primary carer and to -what the Court found to amount to- an objective impossibility for her to return to Italy.[134] Similarly, in the case of *B v. Belgium* the ECtHR linked the best interests of the child with the trauma which she would have suffered as a result of the separation.[135] The Court considered that the Belgian authorities were under an obligation to order forensic reports to assess the likelihood that the trauma to which the child may have been exposed to upon return was real.[136]

Nevertheless, overall, the Court's interpretation of the best interests of the child remained faithful to the aims and purposes of the Hague Convention. For example, in *Karrer v. Romania*, it criticised the Romanian authorities for having inadequately assessed the child's best interests. In that particular case, Article 13(1)(b) of the Hague Convention had been applied; yet the ECtHR found that the child's best interests assessment failed to consider reports of the social services, expert reports or whether appropriate arrangements had been in place to secure the child's protection upon return.[137] The Court had thus utilised the requirement of an 'in-depth examination of the family situation' to further the object of return of the Hague Convention. In other cases, it dismissed the applications of the taking parents considering that the domestic courts had carried out such an in-depth assessment of the family situation.[138] In all these cases the taking parents had submitted that they had been the children's primary caretakers and that they were in an objective impossibility to return. Therefore, return would have exposed the children to a grave risk of harm due to the separation from the parents.

---

132 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 93-95.

133 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*), para, 96.

134 For more details on the approach to the separation of the child from the primary cares, see Section 8.3.3.2 below.

135 ECtHR 10 July 2012, 4320/11 (*B v. Belgium*), para 72.

136 ECtHR 10 July 2012, 4320/11 (*B v. Belgium*), para 72.

137 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*, para 46; in the same sense see also ECtHR 6 June 2023, no. 12083/20 (*Viotto v. Moldova*), para 22.

138 ECtHR 7 May 2010, no. 26755/10, (*Lipkowsky and Dawn McCormack v. Germany (dec))*; ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*; ECtHR 6 September 2011, no. 8984/11 (*Tarkhova v. Ukraine*), ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec))*.

The Court accepted that the domestic courts had carried out an in-depth examination of the family situation as, for example they had heard the child in court,[139] they had assessed that the child had a good relationship with the left-behind parent and could therefore be left in the care of that parent.[140]

In most of the judgments dealing with the appropriate standard of review to the child's best interests the Court was not unanimous, and where available[141] dissenting opinions revolved precisely around this question. In other words, judges disagreed as to whether the Court's role was merely to assess whether the domestic court's approach to the child's best interests in abduction cases was arbitrary, or on the contrary whether the Court should review the best interests of the child on an individual basis, taking into account the concrete circumstances of the respective case.

The case of *X v. Latvia* was likely referred to the Grand Chamber precisely to clarify these contentious aspects. The Court ultimately found a procedural solution:

"When assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention."[142]

The disagreement within the Court concerned the evidence necessary to meet this test. For the majority, the left-behind parent's previous criminal convictions and the charges against him amounted to arguable claims of a risk of harm to the child. [143] Latvian authorities should have investigated this further. The dissent rejected this position, arguing that the mother should have brought this as evidence.[144] The majority, perhaps influenced by the extremely harsh conditions imposed on the mother and child upon return, argued that child abduction courts needed to consider the future relationship between the mother and the child if the child returned to Australia.[145] Neither the dissenting opinions, nor the academic commentators supporting this view discuss the punitive conditions imposed on the

139 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

140 ECtHR 7 May 2010, no. 26755/10, (*Lipkowsky and Dawn McCormack v. Germany (dec)).*

141 As per Rule 56 (1) of the Rules of Court: 1. "The decision of the Chamber shall state whether it was taken unanimously or by a majority and shall be reasoned." In decisions, dissenting opinions are not published.

142 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 107.

143 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 111.

144 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, joint dissenting opinion at paras 9 and 10.

145 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC),* concurring opinion of Judge Pinto De Albuquerque, summarising the key facts which led the Court in finding a violation of Article 8 of the Convention.

mother upon return by virtue of the Australian judgments or whether it would have been at all legally possible for her to obtain details of another person's (left-behind parent) criminal convictions. In any event, it is per *a contrario* accepted that the immigration position of the taking parent should be a relevant factor in the assessment of a grave risk of harm.[146]

In the cases decided after *X v. Latvia* the Court continued to apply the standard developed therein regardless of whether the adult applicants had been the taking or the left-behind parents.[147] The Court's review of the domestic decisions intensified beyond a mere review of arbitrariness.[148] Also, references to the best interests of the child increased and in some cases, it linked the best interests to specific substantive and/or procedural safeguards. For example, in a situation where due to the domestic court's intervention the status of the child had not been determined by any court, the ECtHR considered that such a state of affairs was manifestly not in the best interests of the child.[149] Also, the Court continued to affirm that the Hague Convention institutes a strong presumption that return is in the best interests of the child.[150] Also, save for exceptional circumstances, it found that the enforcement of return orders, even through coercive means, corresponded to the best interests of the child.[151] The Court clarified that in Hague cases the best interests of the child shall be examined in light of the exceptions to return, -as opposed to a wider, more substantive examination.[152]

In several judgments the applicants' relied on the hearing of children to argue that return was or, as the case may be, was not in their best interests.[153] The sections below delve into the link between the child's best interests and these three other rights: (1) the right to have contact with both parents, (2) the right to be free from violence and (3) the right to be heard.

146 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*, joint dissenting opinion at para 9 and Beaumont et al 2015, at p. 47.

147 See for example ECtHR 18 June 2019, no. 15122/17 *(Ushakov v. Russia*), para 80.

148 See for example the case of ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*) where the ECtHR undertook a detailed assessment of whether the domestic courts' determination of habitual residence corresponded to the approach of the CJEU in the case of CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe). Contrast this with the case of ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary*.

149 ECtHR 3 June 2014, no. 10280/12 (*López Guió v. Slovakia*), para 110.

150 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 135, ECtHR 15 January 2015, no 4097/13 (*M.A. v. Austria*), para 136.

151 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 156.

152 ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*, para 119.

153 For example, ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*), ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*); ECtHR 9 May 2023, no. 46263/20 *(Bercuci v. Romania(dec)).*

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

The first limb of the child's best interests (as identified by the ECtHR) – that of maintaining ties with the biological family-, is similar to the right to have contact with both parents as laid down in Article 9 and 10 of the CRC. Indeed, in child abduction proceedings the Court has given priority to parental ties over relations with the wider biological family. For example, in a case where the child had been abducted by the father but was in practice living with his uncle and cousins the Court held that "[…] keeping the child, who had spent the first six years of his life in Ukraine with his mother, in Georgia in the absence of both parents – *per se* raises questions as to its compatibility with the principle of the best interests of the child".[154]

Overall, the Court's child abduction case law articulates many elements of the right to have contact with both parents in this specific context. As with the best interests of the child, some elements are substantive whereas others reflect a procedural understanding of the concept.

Substantively, the Court has expressly rejected approaches which attribute a gendered element to the right to have contact with both parents. For example, in two applications against Russia, the domestic court had relied on Principle 6 of the 1959 Declaration according to which a child of tender years shall not, save in exceptional circumstances, be separated from the mother.[155] The Court found such an approach unacceptable and incompatible with the ECHR, CRC and the Hague Convention.[156] Similarly, the Court dismissed as inadequate refusals to return a child on the main ground of their attachment to the mother.[157]Also, related to the right of the child to have contact with *both* parents the Court has imposed obligations on the domestic courts to determine the emotional bond of the child with the left-behind parent before assessing that the child would suffer harm if returned without the taking parent.[158]

The approach above supports the aims and purposes of the Hague Convention which is to restore contact with the left-behind parent. Here, there is a convergence between the right of the child to have contact with both parents as laid down in the CRC, Article 8 of the ECHR and the Hague Convention. In many other cases however, the convergence between these instruments was less evident. As Judge Pinto De Albuquerque has highlighted in his concurring opinion in the case of *X v. Latvia*: "both the universal acknowledgment of the paramountcy of the child's best interests as a principle of international customary and treaty law, and not a mere

154 ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 61.
155 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, para 92 and 97; ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*), para 19.
156 ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*), para 19.
157 ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 68.
158 ECtHR 12 March 2015, no. 22643/14, *(Adzic v. Croatia)*, para 90.

"social paradigm", and the consolidation of a new sociological pattern of the taking parent now call for a purposive and evolutive interpretation of the Hague Convention, which is first and foremost mirrored in the construction of the defences to return in the light of the child's real situation and his or her immediate future." In his opinion, the "sociological shift from a non-custodial abductor to a custodial abductor, who is usually the primary caregiver, warrants a more individualised, fact-sensitive determination of these cases in the light of a purposive and evolutive approach to the Hague defence clauses".

Indeed, situations where the grave risk of harm or an intolerable situation to the child arise due to the refusal of the primary carer taking parent to return with the child are among the most contentious cases. In these cases, the parent claims that the child will suffer harm if returned without them and that the parent cannot and will not return with the child.

The change in circumstances and the loss of contact between the child and the taking parent if the child were to return have been put forth before the ECtHR since 2003.[159] Taking parents applying to the Court argued that their children's right to have contact with them would be curtailed if return was ordered as for example sole custody had been granted to the left-behind parent post abduction.[160] The ECtHR did not accept this fact alone to be strong enough to warrant a violation as long as the taking parent had a right or a reasonable expectation to have contact with the child.[161] The Court did not look at how the right to maintain contact with the taking parent would be exercised *in practice* post abduction. The Court became more attuned to the obstacles to return of the taking parent as of the case of *Mammousseau and Washington v. France*; however, the approach remained deferential to the national authorities. The ECtHR did not articulate a standard of review for such situations. *Neulinger and Shuruk v. Switzerland* marked a shift in approach: the ECtHR scrutinised the circumstances of the child upon his return. It held that the mother was facing a serious prison sentence; that prior to the abduction the father had only exercised a limited access right and that post abduction he had never sought to see his child. Further, the child was integrated into the Swiss society. Thus, when balancing all these elements the Court held that it would not be in the child's interests to return. It is clear that the child's best interests in this case were intimately linked with the contact with his mother.

Post *Neulinger*, the Court looked more into detail at the practicalities of contact between the child and the taking parent. For example, in the Šneersone and Kampanella v. Italy the Court considered that the safeguards in place upon the child's envisaged return to Italy were inadequate. They

159 ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*), para 61.

160 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec)),* ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

161 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec)),* ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

consisted of contact amounting to thirty days within the first year with the parent who had been until that point the child's primary carer. Also, it found that the Italian authorities had not duly discharged of the identified risks that the child would suffer a trauma as a result of separation and that the taking parent had not any material resources in Italy and that she was unemployable.[162] Similarly, in the case of *B v. Belgium* the Court held that the taking parent had been the child's primary caretaker for the first four years of her life, that the psychological reports ascertained a risk of trauma if the child returned without her mother, that the mother was risking a prison sentence and loss of parental rights upon return and finally that the child was well integrated into the environment in Belgium.[163] For all these reasons the Court held that there had been a violation of Article 8 ECHR. In both Šneersone and Kampanella v. Italy as in *B v. Belgium* the children had no relationship with their left-behind parents prior to the abduction. Similarly, in *Raban v. Romania* the left-behind parent had only visited the children once and had not undertaken his maintenance obligations.[164] Conversely, where such a relationship existed and the father had given undertakings to alleviate the concerns of the taking parent, the ECtHR accepted that Article 8 ECHR had not been breached. This was the case of *Tarkhova v. Ukraine* where the father had been involved in raising his child prior to departure and he had guaranteed financing the applicant's return together with the child. Similarly in the case of *M.R .and L.R. v. Estonia* the Court noted the undertakings of the left-behind father as well as the fact that the taking mother had been well adjusted into the country of habitual residence, hence the refusal to return was unjustified.[165]

As shown above, *X v. Latvia* represented a milestone in the Court's child abduction case law. From the perspective of the child's right to maintain contact with both parents the ECtHR expressly stated that the Latvian authorities should have assessed if it had been possible for the mother to return with the daughter and to maintain contact with her upon return.[166] Further, the Court stated as a matter of principle that domestic authorities needed to satisfy themselves that adequate safeguards are convincingly provided in the country of origin and that tangible measures of protection are put in place to discharge of known risks.[167]

It also appears that post *X v. Latvia,* the Court has crystalised its approach to the right of the child to have contact with both parents in abduction proceedings. The assessment of the child's right to have contact with both parents here typically concerns an evaluation of the relationship of care between the child and the parents, followed by an assessment of

162 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 94, 95.
163 ECtHR10 July 2012, 4320/11 (*B v. Belgium*), para 72-76.
164 ECtHR 26 October 2010, no. 25437/08 *(Raban v. Romania)*, para 37.
165 ECtHR 15 May 2012, no. 13420/12 (*M.R. and L.R. v. Estonia (dec)).*
166 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 117.
167 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, 108.

the trauma which the child may suffer if returned without that parent. The burden of proof lies on the parent but if for example psychological evaluations have been produced, the domestic courts need to genuinely take into account their findings. Then, to the extent it is established that there is a high risk of the child suffering trauma, it will be assessed whether the taking parent is in an objective impossibility to return. It has been repeatedly stated that "the grave risk of harm to the child cannot arise solely from the separation from the parent who was responsible for the wrongful removal. This separation, however difficult for the child, would not automatically meet the grave risk test.[168] Even when the parent is in an objective impossibility to return, states through cooperation or through undertakings of the left-behind parent may alleviate the concerns and facilitate the return of the child with the taking parent. Also, as mentioned above a demonstrated relationship between the child and the left-behind parent may overturn the arguments related to the objective impossibility of return.[169]

Even though the Court extended the scope of examination beyond arbitrariness, cases decided after 2014 demonstrate that the assessment remains closely aligned to the Hague Convention. The ECtHR only exceptionally finds that domestic courts did not sufficiently reason their decisions, intervening more readily to align the domestic practice to the Hague Convention. For example, cases where the primary taking parents raised issues concerning their financial situation upon return were dismissed if the domestic court reasoned their refusal or if the left-behind parent had offered undertakings to alleviate the concerns.[170] Also, it appears that the Court imposes an obligation on the domestic courts to seek assurances from the courts in the state of habitual residence before refusing to return a child. For example in the case of *E.D. v. Russia* the Court found that the domestic authorities failed to assess whether equivalent treatment was available in Israel and whether return would necessarily entail the separation from the mother.[171] Similarly in the case of *Kukavica v. Bulgaria*, the Court considered that the Bulgarian Supreme Court should have taken further steps to instruct the left-behind parent on the possibilities to convert undertakings into enforceable orders.[172]

168 ECtHR19 July 2016, no. 2171/14, *(G.N. v. Poland)*, para 61, ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 67, ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 56.

169 ECtHR 12 March 2015, no. 22643/14, (*Adzic v. Croatia)*, para 89; ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 78.

170 On undertakings ECtHR *18 October 2016,* no. 49437/14 (*Akdag v. The Netherlands (dec))*, ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*) or ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*; cases where the court accepted the reasoning of domestic courts in situations where the applicants had argued a precarious financial position upon return: ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*; ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*.

171 ECtHR11 January 2022, no 34176/18 *(E.D. v. Russia)*, para 14.

172 ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*, para 19.

At the same time, the case law indicates that certain circumstances may amount to an objective impossibility to return. Immigration status or possible criminal convictions are such situations. For example, in a case where the Court ultimately found a violation of Article 8 ECHR in favour of the left-behind parent, it did nevertheless accord importance to the taking parent being a national of the state of habitual residence coupled with her precarious immigration status in the host country.[173] In the case of *Satanovska and Rodges v. Ukraine* a violation of Article 8 was found on the ground that the domestic courts did not analyse the mother's contention that she could not follow her son due to health, financial and entry visa issues.[174] In addition, in that respective case several psychological reports had been administered indicating that the separation of the child from his mother would result in profound psychological trauma with long-term consequences.[175]

The Court accepted the reasoning of domestic courts who applied Article 13 (b) of the Hague Convention when such application was not solely based on the primary carer status of the taking parent. The additional reasons put forth by domestic courts and endorsed by the ECtHR were that the left-behind parent had refused contact with the child pending abduction proceedings, that it would not be the left-behind parent who would take care of the child upon return but a relative and that the courts in the country of origin had issued custody judgements which heavily restricted the taking parent's contact with her child.[176]

The reasoning of the Court concerning the right of the child to have contact with both parents is closely tailored to how the case was presented before and adjudicated by the domestic courts. For example in *Andersena v. Latvia*, a case involving allegations of domestic violence coupled with the inability to return to the country of habitual residence, the Court declined to intervene on the ground that the applicant had not addressed these concerns before the domestic authorities.[177] Similarly, in the case of *Thompson v. Russia*, the applicant had raised before domestic courts the fact that she could not return to Spain due to the lack of a legal residence permit and income.[178] In refusing the return the domestic court relied on the tender year doctrines and the attachment between a young child and his mother. This was the reason for the ECtHR in finding a violation of Article 8. The Court did not further analyse the other elements which, as the dissent pointed out, were indicative of a systemic problem: that of foreign mothers who cannot obtain a residence order to live with their children after divorce.[179] Similarly, in the case of *M.V. v. Poland*, the domestic courts

173 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 39.
174 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine)*, para 89.
175 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine)*, para 14.
176 ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*), paras 18 and 57.
177 ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*, para 120.
178 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, para 92.
179 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, dissenting opinion of judge Dedov.

had initially dismissed the case for return on the ground that the mother had been the victim of domestic violence and that she was in a financial impossibility to return. Such reasoning had been rejected by the court of last resort, who instead relied on the fact that the mother was the primary carer of a young child which in itself justified a non-return order.[180] The Court found a violation of Article 8 on the ground of the reasoning of the court of last resort. No other reference was made to the relevance of domestic violence and whether that would have justified the application of Article 13 (2) of the Hague Convention.

On this basis, it appears that the ECtHR scrutinises the domestic decision-making process to assess whether there is an objective impossibility for the taking parent to return to the country of habitual residence with the child. The scrutiny is stricter in the case of primary care takers, however primary carer status on its own is not enough to justify a non-return to the country of origin. The Court has indicated that primary carer status coupled with factors such as lack of access to the territory or criminal sanctions in the state of habitual residence could qualify as objective impossibilities to return which should be taken into account by domestic authorities.[181] Defences concerning allegations of financial insecurity may be taken into account as well, however it appears that undertakings of the left-behind parents in this sense were so far perceived sufficient.[182]

Nevertheless, in the recent case of *Verhoeven v. France* the ECtHR appears to depart from its own standards.[183] Here, the applicant submitted that she could not return to Japan, her child's country of habitual residence as she had been subjected to domestic violence and the Japanese court would not grant custody or visitation rights to a parent who is not a Japanese citizen. Throughout the domestic proceedings it was confirmed that Japanese laws do not permit joint parental authority in the case of divorce.[184] It was further confirmed by the Public Prosecutor's Office, and by the French Embassy in Japan that this country did not allow for a visiting visa for a foreign parent wishing to visit their child.[185] A report of a psychologist attested that the separation of the three-year-old child at the time from his main carer can constitute a traumatic event for him; the psychologist recommended a psychiatric expertise of the mother and child for a better assessment of the risk that separation posed for the child.[186] No such forensic report was administered. Instead, the domestic courts reasoned that the allegations of domestic violence of the taking parent had not been proven. The French courts also considered that the applicant had not justified any objective impossibility

180 ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, para 42.
181 ECtHR19 July 2016, no. 2171/14, *(G.N. v. Poland)*, para 64; ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*).
182 ECtHR 18 October 2016, no. 49437/14 (*Akdag v. The Netherlands (dec)).*
183 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*).
184 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), para 23.
185 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 23 and 33.
186 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), para 16.

to reside in Japan, specifically in light of the proposals which had been submitted by the left-behind parent to allow visits between the child and the taking parent. In its assessment the ECtHR examined the application of the Hague Convention, similar to a domestic court: it assessed each of the exceptions to the return of the child as laid down in the Hague Convention. The question for the ECtHR was only whether the domestic courts provided sufficient reasoning.[187] The Court also accepts political justifications as a valid argument. Thus, for the Court France's acceptance without reservations of the ratification of the Hague Convention by Japan seems to preclude it from any review of the concrete circumstances.[188] The Court did not apply its well established test developed in *X v. Latvia* in that it did not look at whether the domestic authorities refuted arguable allegations of grave risk of harm to the child. By disregarding its own case law, the ECtHR became here an enforcer of the comity objectives of the Hague Convention: it followed its policy aims but disregarded individual human rights. In his dissenting opinion Jude Mits observed that the letter and not the spirit of Article 8 ECHR had been followed in this case.[189] The focus of his dissent is both on domestic violence and the ensuing power imbalances it creates and on the parent child separation. In relation to the right of the child to have contact with both parents he emphasises that the French court did not examine the possibility of the mother to return to Japan and have accepted undertakings from the left-behind parent without examining the impact on the child of being separated from his mother.[190]

This case is striking due to the Court's overt departure from its own standards and the minimal engagement with the rights of the child. It is also striking when assessed against the background of the previous cases analysed above where the Court indicated that it would look into immigration and visa issues as part of its assessment of the objective impossibility to return criterion. No such assessment was carried out here; instead the Court remained deferential to the domestic courts, in the face of impartial evidence attesting to a parent's immigration position. Further, no assessment of the relationship of care was carried out either, in stark contradiction to previous judgements. Nor did the Court refer to the CRC and the standards therein. Incidentally, it should be noted that Japan has filed a reservation to Article 9(3) of the CRC, stating precisely that it does not understand Article 9(3) to apply to the right of children to contact with their immigrant parents.[191] In the present case, the legal system in this country resulted in the breakdown of the relationship between the child and the parent that cared most for him.

187 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 56-61.
188 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 56-61, para 63.
189 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), dissenting opinion Judge Mits, para 1.
190 ECtHR 28 March 2024, no. 19664/20 (*c*), dissenting opinion Judge Mits, para 18.
191 This aspect has also been discussed in Section 3.3.1 of this dissertation.

The ECtHR was reluctant to assess, even summarily, the issue of parent-child separation. Furthermore, the ECtHR failed to distinguish between two matters. First as the Court points out, Japan has indeed ratified the Child Abduction Convention and France has accepted this ratification. Second, Japan's ratification does not mean that its legal system is beyond scrutiny in individual cases. The Strasbourg Court failed to distinguish between exceptions to return where laws are assessed for their impact on children in concrete cases and policy considerations leading a state to accept the ratification of the Convention. The former does not exclude the latter. In practice, there may very well be cases where children have been abducted to France by persons who do not face the same immigration obstacles as the child's parent in the *Verhoven* case. In those cases, there is no grave risk of harm to the child. In the case of Ms Verhoven, the argument is not that the French courts should have dismissed the return. The argument is that the immigration position of the child and his mother should have prompted the French courts to assess closer the relationship of care between this child and the mother. The case clearly exhibits an objective impossibility of the parent to return; hence it is for the courts to assess whether the separation from the primary carer exposed the child to a grave risk of harm. From the perspective of the ECtHR, the arguments raised domestically should have clearly been considered arguable. Thus, when applying the *X v. Latvia* test the ECtHR should have determined if the domestic courts had genuinely dismissed such arguable allegations. It is submitted here that the Court's assessment of 'the genuine nature of the dismissal' should have departed from the fact that the taking parent had demonstrated that return results in the child's separation from her. It is difficult to reach any other conclusion based on the objective evidence presented to the case. Furthermore, it should be pointed out that this is hardly a matter of custody adjudication. It is a decision of the domestic courts as to whether the child would be exposed to a grave risk of harm if returned to the country of habitual residence. Had Japan ratified the 1996 Child Protection Convention, Japan would remain competent to decide on the allocation of custody and then the French courts could recognise this judgement – provided it is not contrary to human rights. In the meantime, the French authorities could secure an access right between the child and the left-behind parent so as to ensure that the parent child bond was not broken.

Conversely, it could also be argued that sending the child back is equally a matter of custody adjudication as deciding to refuse the return. In any event, it remains to be seen whether *Verhoeven v. France* marks a return to the pre-Neulinger position of the ECtHR or whether this was an isolated case.

The ECtHR case law analysis therefore indicates that it is the right of the child to have contact with both parents -seen as an element of the child's best interests- which has been essential in the ECtHR's change of approach. While initially the Court did not look into detail at the way this right will be exercised post abduction, this approach gradually changed to the extent

that at the moment the Court conducts a more careful analysis, especially where it appears that a loss of contact with the primary carer is imminent and that such primary carer is in an objective impossibility to return. Nevertheless, the recent case of *Verhoeven v. France* may mark a change in approach although it remains to be seen how this will influence the Court's position on the right of the child to have contact with both parents in abduction proceedings.

8.3.3.3 The right of the child to be protected from violence

Under the ECtHR's case law, the second limb of the best interests assessment in abduction cases is the child's right to develop in a sound environment. The very text of Article 13(1) of the Hague Convention mentions 'a grave risk of harm' to the child. Article 19 of the CRC also enshrines the right of children to be protected from violence.

Similarly to the best interests of the child, 'harm' has a specific understanding in the context of the Hague Convention. It is accepted that not all inconveniences amount to a grave risk of harm, the risk has to go beyond a level which is considered reasonable or acceptable in a given situation.[192] The ECtHR has also endorsed this approach in its case law by reading Article 8 ECHR in light of Article 13(1) of the Hague Convention.[193]

As discussed in the previous Section, in child abduction cases it is often argued that the separation of the child from the taking parent will have important psychological consequences for that child.

This Section focuses on harm to the child, outside the question of separation from the primary carer as this has been discussed above. More specifically the question here is: how has the ECtHR analysed the right of the child to be protected from violence where such harm is not the direct result of the separation from the taking parent?

In child abduction cases, it has sometimes been argued that the child will be exposed to a grave risk of harm due to the aggressive behaviour/abuse towards the child by the left-behind parent or another private person[194]; due to exposure of the child to domestic violence against the taking parent,[195] or war in the country of habitual residence.[196] Also, in some cases

192 See Chapter IV above for a discussion concerning the grave risk of harm exception under the Child Abduction Convention.

193 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 116; ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 56.

194 Violence towards the child: ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec)*), ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, ECtHR 26 March 2019, no. 37043/16 *(Nedelcu v. Romania (dec));* ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; another private person: ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*).

195 Domestic violence against the taking parent: ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)); ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*, ECtHR 12 May 2022, no. 64886/19 *(X. v. The Czech Republic)*.

196 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

evidence of neglect upon return has been presented coupled with the fact that the children would be placed in foster care.[197] Other than the situations where harm was connected to war, the instances of harm addressed in the Court's case law are closely related to the rights of children against wider debates on domestic violence and contact rights which are at the heart of this dissertation.

The Court's approach to these cases has followed the test developed in *X v. Latvia*: domestic courts must take into account and provide adequate reasoning to arguable allegations of abuse. On some occasions the ECtHR had the opportunity to build on its existing case law on aspects such as corporal punishment. More often however, it has refrained from departing from the reasoning of the domestic courts.

In one of the early cases, the children had objected to return on the ground that their father had often applied inappropriate punishing methods.[198] The domestic court had accepted that these statements had been accurate, however it saw no reason to refuse the return. Also, even though the children, -aged nine years old at the time-, objected to return, the domestic court considered that "nothing suggested that [they] were particularly mature for their age."[199] The ECtHR also accepted this reasoning, ultimately finding that the applicant and her children had remedies available in Canada (country of habitual residence) to defend their interests, should that become necessary. The case of *Blaga v. Romania* also concerned the refusal of children to return, motivated in part by the use of corporal punishment by their father.[200] In its reasoning the Court did not accord any weight to the allegations of violence, finding on the contrary that the domestic courts had not adequately balanced "the applicant's interests of a right to family life against the competing interests of the other parties in the case."[201] Consequently, in the Court's view the domestic court had not sufficiently protected the best interests of the children.[202] In the case of *Raw and Others v. France*, the children, aged 14 and 12 at the time, had described a climate of terror created by their mother and maternal grandfather including physical and psychological violence, neglect and alcoholism.[203] In the same case the authorities of the country of habitual residence were considering the placement of the children in residential care, if returned without the father.[204] In its reasoning, the ECtHR did not pay any dedicated attention to the substantive considerations concerning the potential risk of violence to children.

197 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*.
198 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*).
199 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*).
200 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 135.
201 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 137.
202 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 137.
203 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 14.
204 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 34, 36.

More recently, the ECtHR reached a different conclusion in a case concerning allegations of corporal punishment against the children by their left-behind father.[205] Domestic courts had dismissed the allegations of violence considering that "occasional acts of violence such as those which were proved by the recordings adduced in the file, would not reoccur often enough to pose a grave risk ... under Article 13 § 1 (b) of the Hague Convention."[206] The Court heavily criticised the domestic authorities, specifically relying on the absolute nature of the right of children to be protected from violence. The Court referred to a previous judgement[207] where it had condemned in absolute terms domestic corporal punishment and highlighted that "children's dignity cannot be ensured if the domestic courts were to accept any form of justification for ill-treatment, including corporal punishment."[208] It also specifically rejected the deferential approach to the capacity of the Italian system to protect the children from violence.[209] It can be inferred that in such cases the Court would consider that a return order under the Hague Convention may only be appropriate if the domestic authorities seek concrete assurances and are satisfied that the children will no longer be at risk of being disciplined if returned. Nevertheless, the right of the children not to be subject to violence was less prominent in other factually similar cases.[210] In *Moga v. Poland* the domestic courts established that the applicant had been violent towards the taking parent and that the children had witnessed the violence. Domestically, the father's behaviour to leave his daughter crying in the room and the physical violence of the paternal grandfather had also been considered, together with the violence against the taking parent, to amount to a grave risk of harm to the child.[211] However, the ECtHR's analysis of the violence against the children was minimal. On the one hand, without any further emphasis on the rights of children, it did not consider that the Polish courts' analysis had been 'manifestly misguided'.[212] On the other hand, it considered that, given the separation of the parents, the argument concerning the risk of the children witnessing violence was misplaced.[213] This is surprising because it discounts existing research showing that the risk of violence increases with parental separation and it may be the highest immediately in its aftermath.[214] Also, the ECtHR has relied on social science research in find-

205 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*.
206 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 14.
207 ECtHR 3 October 2017, no. 23022/13 *(D.M.D. v. Romania)*.
208 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 36.
209 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, paras 44-45.
210 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*; ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*.
211 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 32.
212 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 67.
213 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 67.
214 See also Chapter 5 above.

ing violations of the Convention in other cases.[215] Similarly, in the case of *M.V. v. Poland* where the witnesses had recounted instances of the applicant using physical violence towards the child and the taking parent, the ECtHR limited its assessment to the length of the proceedings without any further incursions into the relevance of the acts of violence in the specific context of the Hague Convention.[216] In the case of *Ciocarlan v. Romania*, the taking mother had alleged domestic violence as a ground of non-return. Here, the domestic courts had nevertheless ordered the child's return following a hearing of the 9-year-old child who had declared that the mother had been violent to her and that she wished to return to The Netherlands.[217] The ECtHR deferred to the approach of the domestic authorities.

The case of *P.D. v. Russia* concerned an opposition to return to Switzerland on the ground that while in the care of the left-behind parent, the child's half brother had been sexually abused by S. – a friend of the half sister's father. S. had been convicted in Switzerland and contact between him and the half brother had been prohibited; no such prohibition of contact with respect to the child subject to return had been made. Therefore, return of the child exposed her to harm due to a risk of revenge or further criminal offences by S.[218] The ECtHR accepted as valid this reasoning of the domestic court; it did not impose any further obligations to secure protective measures in Switzerland.[219]

In other cases, the child was at risk of violence due to a security situation in the state of habitual residence. In the case of *Y.S. and O.S. v. Russia*, the applicant argued that the "child's return to Ukraine would put her physical and emotional well-being at risk in view of the ongoing military conflict on the territory of the DPR."[220] In this case the domestic courts had addressed these arguments and had found that the risk was a general consequence of living in a conflict zone and that such risk could have been adequately addressed by the Ukrainian authorities.[221] For the ECtHR this approach did not amount to a genuine assessment of arguable allegations of risk. In particular, the Russian courts did not address a situation which had been documented from a wide range of sources attesting the human rights violations and human casualties.[222] The domestic courts did not take into

215 ECtHR 4 December 2003, no. 39272/98 *(M.C. v. Bulgaria)*, para 164 where the Court has relied on social science evidence on the evolving understanding of how rape is experienced by victims.
216 ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, paras 77-81.
217 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).
218 ECtHR 3 May 2022, no 30560/19 (*P.D. v. Russia*) para 24.
219 ECtHR 3 May 2022, no 30560/19 (*P.D. v. Russia*), para 44. The relied instead on the absence of such protective measures to find that the domestic courts had adequately taken into account arguable allegations of grave risk.
220 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 59.
221 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.
222 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.

account the views of the child (aged 10 at the time) nor did they rule on the availability and adequacy of effective protection measures or whether the applicant would have timely access to justice following return.[223]

In finding a violation of Article 8 ECHR, the Court clearly undertook a more detailed assessment of the allegations of violence. The dissenting judges criticised this position on account of the impossibility to comply with the speediness requirement while at the same time obliging courts to look on their own motion for other evidence.[224]

8.3.3.4 The right to be heard

The right to be heard is one of the core principles of the CRC.[225] Article 13(2) of The Hague Convention includes a dedicated exception to return, according to which authorities in the country of habitual residence may refuse the return they find that "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account of its views."[226]

Cases brought to the ECtHR included on many occasions references to children's wishes as recorded by the domestic authorities.[227] Early on it appeared that children's wishes may conflict with the return mechanism; the ECtHR role was then to strike an adequate balance between the aim of the Hague Convention, the rights of the child and those of their parents. In the case of *Ignaccolo Zenide v. Romania* decided in 2000, Judge Maruste dissented on the ground that the human rights of children had been disregarded in that case. Specifically, the children had objected to the enforcement of the return orders and Judge Maruste considered that enforcing the return against the express wishes of children was tantamount to violence against them.[228] Several of the judgements where the children's opinion is central to the Court's decisions have been met with dissenting opinions revolving around the relevance of the children's wishes in proceedings.[229]

---

223 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.

224 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), joint dissenting opinion of Judge Lemmens, Dedov and Elósegui, para 7.

225 For an overview see also Chapter 3 of this dissertation.

226 For a discussion concerning Article 13(2) please refer to Chapter IV above.

227 See among many other cases: ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*); ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), ECtHR 7 March 2013, 10131/11 *(Raw and others v. France),* ECtHR 1 February 2018, no 51312/16 (*M.K.v Greece*), ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

228 ECtHR 25 January 2000, no. *31679/96* (*Ignaccolo-Zenide v. Romania),* dissenting opinion Judge Maruste.

229 For example: ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)* or ECtHR 1 February 2018, no. 51312/16 (*M.K.v Greece*).

For example, in the case of *Raw and Others v. France* the two children aged 14 and 12 at the time, objected strongly to returning to the United Kingdom resulting in the need of their hospitalisation.[230] The ECtHR judgement omitted references to the children's rights to be heard other than that their objections were not immutable given that the younger child had later chosen to return to the United Kingdom.[231] Similarly, in the case of *Blaga v. Romania,* the Romanian authorities had given decisive weight to the objections to return of the children aged 9 and 11 at the time of the hearing.[232] The Court criticised the domestic courts for hearing younger children as they were below the minimum domestic legal age.[233] Also, the Court considered that under Article 13 (2) of the Hague Convention the child's voice cannot amount to a veto right to removal, and that the courts should have considered more broadly the family situation and the circumstances upon return.[234] The Court reached the opposite conclusion in the case of *M.K. v. Greece* where it found that the child's right to be heard was a key element to consider in any proceeding concerning the child.[235] Here the Court relied on Article 12 of the CRC and other international instruments in accepting that the domestic authorities have been correct in refusing to enforce a final judgement on account of the child's objections.[236]

M.K. v. Greece indicates that the Court had considered Article 13(2) of the Hague Convention in light of the CRC. The paragraphs below include an overview of the Court's position on the children's right to be heard in abduction proceedings along the elements of Article 12 of the CRC.

The CRC Committee has interpreted Article 12 of the CRC as imposing a positive obligation on states to hear all children, irrespective of their age and maturity. The assessment of their age and maturity is to be undertaken in the next step, when authorities decide on the weight to attach to children's views.[237] The ECtHR took a different approach in child abduction cases. For the ECtHR it was important to stress that children of a young age are not capable of forming their own views.[238] For example, in *Roche v. Malta* the Court agreed with the Maltese government that a child of less than 4 years

230 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 30 and 31.
231 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France),* para 94.
232 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 20.
233 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 79.
234 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), paras 80-82.
235 ECtHR 1 February 2018, no. 51312/16 (*M.K .v. Greece*), para 91.
236 ECtHR 1 February 2018, no. 51312/16 (*M.K. v. Greece*), paras 91-93. For a more elaborate description of the facts and reasoning in this case, please refer to Section 8.3.2.1 above.
237 See CRC Committee General Comment no. 12 (2009); For an assessment of Article 12, please refer to Chapter 3 of this dissertation.
238 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))* (the child was under 4 years old), ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*) (the children were 11 and 9 years old – the Court's criticism focused in particular on hearing the two 9 year old children), ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*), para 42 (children were aged 6 and 4 at the time), ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec))* (the child was 5 year old).

old was not capable of expressing his views on the matter.[239] Also, in the case of *Levanda v. Ukraine*, the Court dismissed the applicant's complaint that the domestic courts had failed to obtain her son's opinion by arguing that a five year old child had not reached the age and maturity to decide for himself what was in his best interests.[240] The same view was reiterated in 2020 in *Voica v. Romania* where the Court accepted that children of four and six years old are not of an age and maturity to be heard directly in court.[241]

Further, under Article 12 of the CRC, a child's opinion should be given due weight in light of their age and maturity.[242] Chapter 3 of this dissertation has touched upon the discussions around the requirement to give children's opinions due weight. It is worth reiterating here that in principle the biological age of a child should not alone be determinative of the weight to be accorded to a child's view.[243] For children, the way their view is heard is essential and has a key role in determining the weight to be accorded to their declarations.[244] The ECtHR has not attached any importance in its child abduction case law on how the views of the children are obtained. Rather, the Court has been critical of the weight accorded by domestic courts to children's views, when their views have been determinative in refusing the return. In the case of *Blaga v. Romania*, the three children subject to return were 9 and 11 years old at the time of the hearing. While pointing out that the nine year old siblings had been under the minimum age for being heard in court, the ECtHR had reluctantly accepted that the domestic court relied on Article 13(2) of the Hague Convention.[245] The Court nevertheless found a violation of Article 8 of the Convention on the ground that the domestic courts had attached excessive weight to children's voices.[246] This finding was supported by the text of the Hague Convention and its Explanatory Protocol. Also, in a case concerning children of 14 and 12 years old the ECtHR highlighted that their views were not immutable and as such the French authorities should have intensified their enforcement efforts.[247]

In other cases, where the children's opinion supported a return order the ECtHR was less critical of the domestic courts' approach. For example, in the case of *Van den Berg and Sarri v. The Netherlands*, the domestic courts relying on the direct hearing of a six year old child found that she had demonstrated a level of maturity for her opinion to be taken into consideration.[248] The domestic courts noted in particular that the child had shown not to

239 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.
240 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec))*.
241 ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*), para 70.
242 CRC Committee, General comment No. 12 (2009), paras 28-31.
243 CRC Committee General Comment no. 12 (2009), para 29.
244 CRC Committee General Comment no. 12 (2009), para 29.
245 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), no. 54443/10, 1 July 2014, para 78.
246 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), no. 54443/10, 1 July 2014, para 80.
247 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 94.
248 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*.

have a negative attitude towards her father and she was unharmed in her relationship with him. In its inadmissibility decision the ECtHR attached importance to the fact that the child had been heard by the domestic courts and that they had deemed that she had reached a level of maturity sufficient for her opinion to be taken into consideration. Similarly, in the case of *Ciocirlan v. Romania*, the domestic authorities had ordered the return of the children relying, *inter alia,* on the declaration of the 9-year-old daughter that she wished to return to the country of habitual residence.[249] As opposed to previous cases where the domestic courts had been criticised for taking into account the opinions of a 9 year old, in this case the ECtHR mentioned such hearing as rightly supporting a finding of return.[250]

Exceptionally, the Court has accepted that children's opinion was decisive, or important as the case may be in refusing the return. The case of *M.K. v. Greece* analysed above concerned the refusal to return of a 12-year-old boy. Here, the Court linked its child abduction case law with its case law concerning the children's opinions in custody disputes and reframed the analysis to focus on the right of the child to participate in proceedings concerning him.[251] Also, in the case of *Y.S. and O.S. v. Russia* the domestic courts had not considered the views of a 9-year-old child on account that she had not reached the minimum age to be heard and in any event her wishes reproduced in a forensic report did not amount to an objection to return; rather they concerned a custody determination.[252] In finding a violation of Article 8 ECHR the Court pointed out that the domestic authorities had failed to consider the views of the child.[253]

One further aspect which is relevant to the right of the child to be heard, and which has been addressed from the perspective of the CRC in Chapter III, is the type of participation: direct or indirect and whether a child should have independent representation.

Applicants have complained of issues such as the failure of the domestic authorities to appoint an independent representative to the child in domestic proceedings.[254] The ECtHR has rejected these arguments in general terms finding that there is no obligation under the Hague Convention to hear children directly.[255] In turn, in its case law the Court has condoned and encouraged the administration of forensic reports for ascertaining the children's wishes or any other aspects concerning the substance of Hague Convention proceedings.

249 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).
250 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)), para 21.
251 ECtHR 1 February 2018, no. 51312/16 (*M.K.v Greece*), para 91, referring to ECtHR 3 December 2015 no. 10161/13 (*M and M v. Croatia),* para 171.
252 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), paras 31 and 67.
253 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 98.
254 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.
255 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.

8.4 Conclusions: balancing comity with individual rights

Through its extensive child abduction case law spanning over 27 years, the ECtHR has become the most prolific international court in this area. Until the first Grand Chamber judgement of 2010, the ECtHR's rulings were fully aligned with the Hague Convention's underlying policy aim of returning children to their country of habitual residence. Although some internal tensions could be observed within the Court's judges, until *Neulinger* the ECtHR did not carry out an individualised assessment of the rights of children in abduction cases. Instead, it relied on the Hague Convention's general aim to protect children to dismiss allegations of breaches of the best interests of the child. This approach in turn received the support of private international law commentators and of the Hague Conference.[256]

Starting with *Neulinger* the ECtHR mandated that domestic authorities carry out 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, […] 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."[257] This judgement triggered substantial criticism due to what was seen as the Court's jeopardising the careful balance of the Hague Convention between return and the merits of the custody dispute.[258] *Neulinger* was the first case where the ECtHR found a violation of Article 8 ECHR in an application of a taking parent; however the Court had used the test before, in the case of *Maummusseau*.

The ECtHR has subsequently refined its approach to child abduction, and it now follows the criteria adopted in the Grand Chamber judgement of *X v. Latvia*. Under this new test, domestic authorities must consider arguable allegations of grave risk of harm and give reasoned decisions that are not automatic or stereotyped. The ECtHR's new approach has been positively received as suitable for striking the delicate balance between comity and individual rights. However, as already visible from the dissenting opinions, the practical application of the 'arguable allegations of grave harm' remained contested. In particular, the extent to which authorities must seek assurances and verify the situation of the child upon return is unclear. In other words, how should the capacity of the system in the country of habitual residence to protect the child be determined? Procedurally, the Court is requiring that domestic authorities must satisfy themselves that adequate safeguards exist and that tangible measures of protection are put in place in the country of habitual residence.

Further, it appears that since the cases of *Neulinger* and *X*, the Court has moved toward a more individualised assessment of children's rights

256 Walker 2010; Silberman 2004, for a discussion on the reactions to Neulinger, including that of the Hague Conference: Kvisberg 2019, pp. 98-99.

257 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 139.

258 McEleavy 2015; Beaumont et. al. 2015; Silberman 2010, Walker/Beaumont 2011.

in abduction cases. Such individualised assessment has primarily been procedural, in line with the Court's overall tendency towards a procedural review of human rights. The Court has focused on the evidence administered at domestic level and the position of the parties. Nevertheless, along this primarily procedural position, the ECtHR has also delineated some important principles of adjudication in child abduction cases.

First, the Court has consistently upheld the mechanism of the Hague Convention by clearly endorsing the Convention's presumption in favour of the child's return. It has moved from arbitrariness – a more deferential standard of review – to a closer scrutiny of domestic decisions whenever it found that these authorities had departed from the Hague Convention. This is most evident in the Court's approach to cases concerning the issue of habitual residence where the Court has closely scrutinised whether the domestic authorities have correctly interpreted the notion of habitual residence. The Court has also mandated domestic authorities to assess whether adequate standards of protection exist in the country of habitual residence.[259] It has accepted undertakings of the left-behind parents as viable alternatives for discharging of the grave risk of harm.[260] Even more, when the domestic court did not accept the undertakings, it found a violation of the Convention on the ground that it did not explore further the possibility of converting the undertakings into mirror orders.[261] This approach indicates that the ECtHR continues to contribute substantially to the application of the Hague Convention across Council of Europe Member States.

Second, the ECtHR has made important contributions to the substantive understanding of the child's best interests' principle. It has defined the best interests as comprising two limbs: to maintain ties with the family and to develop in a sound environment.[262] These two limbs are closely connected with Articles 9, 10 and 19 of the CRC. Further, in determining the first limb – that of maintaining ties with the family, it has expressly rejected gendered approaches which resemble the tender years doctrine where courts have automatically linked the best interests of infants to their mothers. Moreover, the Court has shown a willingness to assess the relationship of care in the context of child abduction proceedings. Here, as a departure from the principle of return, it has been accepted that a primary carer's objective impossibility to return to the country of habitual residence can amount to a grave risk of harm to the child. Here, the Court has found a link between the best interests of the child and the relationship of care between the child and the primary carer. In the Court's reasoning, a child may be exposed to a grave risk of harm where the primary carer is in an objective impossibility

259 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 79.

260 ECtHR 6 September 2011, no. 8984/11, (*Tarkhova v. Ukraine*), ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec)*), ECtHR 18 October 2016, no. 49437/14 (*Akdag v. The Netherlands (dec)*).

261 ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*.

262 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*).

to return. Precarious immigration status may amount to an objective impossibility to return.[263] It is important to note that while the relationship of care is important and the ECtHR takes into account the primary carer status of the taking parent, the Court remains reluctant in finding a violation of Article 8. For example, a demonstrated relationship of care between the child and the left-behind parent will tip the balance in favour of the child's return.[264]

Nevertheless, it appears that the second limb of the child's best interests, that of developing in a sound environment, remains underdeveloped in the Court's case law. Here, other than in the case of *O.C.I v. Romania*, the ECtHR has not analysed allegations of grave risk of harm stemming from the behaviour of the left-behind parent. Also, the Court did not analyse allegations of neglect against the children.[265] Overall, it does not appear that the ECtHR has adopted a consistent approach to allegations of violence against children. It should be recalled that in Chapter V the concept of violence against children was discussed within the wider context of domestic violence. The child abduction case law of the ECtHR shows that the domestic violence against the taking parent was brought as an exception to return, as well as other allegations of violence against children, ranging from the behaviour of the left-behind parent to the situation in the country of return. When looking at the arguable allegations of grave risk, the findings are mixed. In the case of *O.C.I. v. Romania* it has condemned corporal punishment in absolute terms.[266] However, in other cases where violence against children by the left-behind parent was equally raised, the ECtHR refrained from analysing these allegations.[267] In the case of *Ciocarlan v. Romania*, the Court emphasised the child's declarations attesting to the violence of the taking parent to support a finding of return. Conversely, in *P.D. v. Russia* the risk of sexual assault was enough for the Court to not require that further assurances on the part of the authorities in the country of habitual residence are sought.

Robinson has argued in favour of an assessment of cases involving violence against children under the angle of Article 3 of the ECHR.[268] To this, it is important to add that from the perspective of the rights of children, the risk of harm should be assessed from the perspective of the child. This means that risks which are not grave for an adult may be so for a child, depending on their particular situation.

263 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine).*
264 ECtHR 12 March 2015, no. 22643/14, *(Adzic v. Croatia).*
265 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France).*
266 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania),* para36.
267 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland*); ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; ECtHR 7 March 2013, 10131/11 *(Raw and others v. France).*
268 Robinson 2023.

Further, whenever the violence was linked to the situation in the state of habitual residence, the Court has mandated that domestic courts look at existing reports documenting the situation.[269]

Finally, similar to cases concerning violence, it should also be noted that the Court's examination of the child's right to the heard in the context of abduction cases needs further alignment to the CRC. Here the Court has sometimes criticised domestic courts for taking into account the children's views or for refusing to enforce return orders on that basis.[270] In other cases, the ECtHR has expressly endorsed the domestic courts approach of relying on the children's views.[271] Exceptionally it has found that the children's views were decisive of the outcome.[272] Furthermore, as opposed to the CRC Committee which links the child's best interests to the right to be heard, no such correlation is made in the ECtHR's case law. While the Court's reliance on the right to be heard in some cases is welcomed, a more consistent approach could arguably provide better guidance to domestic authorities dealing with child abductions.

Overall, the case law overview indicates that the Court has consistently contributed to the correct application of the Hague Convention. Since 2010, more room for individual children's rights has been created and the court has outlined the elements of the child's best interests in abduction proceedings as well as procedural requirements for authorities dealing with abduction cases. Immigration considerations as well as the child's relationship of care are important elements to take into account, however, on their own they are unlikely to result in an infringement of Article 8 ECHR. There is more room for the Court to refine its position to the rights of children, and in particular the right to be heard and the right to be free from violence, and to further harmonise the interpretation of these rights with the CRC.

269 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

270 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*.

271 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*; ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

272 ECtHR 1 February 2018, no 51312/16 (*M.K.v Greece*).