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

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9 The Relationship Between the two European Supranational Courts

9.1 Introduction

Both the ECtHR and the CJEU have important adjudicative functions in child abduction cases. The child abduction judgments of the CJEU are binding on all EU Member States except for Denmark.[1] The same states are equally bound by the judgments of the ECtHR. In this light, it is important to establish how their case law impacts on domestic courts and whether their approach is consistent, or rather it sets out conflicting standards of human rights protection.

This Chapter aims to contextualise these courts' child abduction case law (Section 9.3) against their interaction in general (Section 9.2). Finally, a conclusion is drawn as to the relationship of these two Courts in child abduction cases and the implications for domestic authorities (Section 9.4).

9.2 General Considerations

To date, there is no formal link between the CJEU and the ECtHR. Since 1994, there have been several attempts to establish an institutional, treaty-based link, between the two supranational courts. One such first attempt ended with the Advisory Opinion 2/94 when the European Court of Justice (as it then was) ruled that the treaties did not permit the European Community's accession to the ECHR.[2] In 2009 the Treaty of Lisbon inserted a new Article 6(2) to the Treaty of the European Union (the "TEU") which envisaged the accession of the EU to the ECHR. Nevertheless, the CJEU once again dismissed this possibility.[3] One of the key grounds for the dismissal was that the EU's accession could undermine the principle of mutual trust underpinning the area of freedom, security, and justice.[4] According to

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1 In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of the Brussels II ter Regulation.

2 CJEU 28 March 1996, C 2/94, ECLI:EU:C:1996:140 (Opinion 2/94; Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms), para 35.

3 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013). First the CJEU considered that accession could undermine the primacy of EU law as the ECtHR would become the final arbiter on matters of EU law (paras 186; 190).

4 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 191.

the CJEU, in this area Member States are presumed to comply with fundamental rights and, save for exceptional circumstances, may not check, on a case-by-case basis, whether such compliance actually existed.[5] The ECtHR in turn requires that a Member State checks whether another Member State has observed fundamental rights. In the opinion of the CJEU such a requirement would render the accession "liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[6]

With the delivery of Advisory Opinion no. 2/2013 the accession of the EU to the ECHR was effectively halted. While Member States have reiterated their commitment to keep the accession on the agenda,[7] it has been argued that there is no prospect of materialisation in the coming years.[8]

These developments have restored the relationship between the two Courts to one primarily based on judicial dialogue through case law and, more rarely, through informal meetings, invitations for conferences or speeches or even private meetings.[9]

The subsequent paragraphs analyse this relationship as it emerges from these Courts own case law and academic commentaries, first from the perspective of the CJEU and subsequently from the perspective of the ECtHR. Particular attention is devoted to mutual trust as understood in the context of the area of freedom, security and justice given that child abduction falls under this area.

9.2.1 The interaction with the ECHR and the ECtHR from the perspective of the CJEU

The CJEU's involvement with human rights has a long history. Even if the founding Treaties did not include human rights guarantees, it gradually became clear that Member States would be reluctant to accept the principles developed by the CJEU, in particular the supremacy of EU law, in the absence of a possibility for this Court to offer protection of human

5 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 192.
6 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 194.
7 See the Declaration issued by the High Level Conference on the Convention System held in Copenhagen, 12-13 April 2018, para 63.
8 Callewaert 2018, p. 1687; it should be also noted that the negotiations for the EU's accession to the ECtHR continue. The latest meeting of the negotiation group took place on 17 March 2023 when the negotiating group adopted a draft accession agreement (see <<https://rm.coe.int/meeting-report-18th-meeting/1680aa9807>>, last accessed on 10 June 2024).
9 Jacobs 2003, p.552; for current developments in the negotiation, see <<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#%7B%2230166137%22:%5B0%5D%7D>>, last accessed on 10 June 2024).

rights similar to that of national constitutions.[10] The CJEU then gradually incorporated human rights as general principles of EU law.[11] Also, since the mid-70s CJEU started citing the ECHR, and attached particular significance to the ECtHR in this regard.[12]

The relevance for the EU of human rights as laid down in the ECHR was codified in 2009 with the adoption of the EU Charter of Fundamental Rights and the Treaty of Lisbon.[13] Article 52(3) of the EU Charter provides that, to the extent that the Charter includes rights which are guaranteed by the ECHR, their meaning and scope shall be the same as in the ECHR, without prejudice to the Union's possibility to provide for more extensive protection. Thus, the ECHR's rights and freedoms are regarded as a minimum standard in the EU. This Article prevents Member States from being subject to two different standards of human rights protection when implementing EU law.[14] Indeed, as per the explanations to Article 52(3) the aim of this provision was intended to ensure consistency between EU law and the ECHR.[15]

The same explanations clarify that the meaning and scope of the rights shall be interpreted in accordance with the case law of the CJEU and the ECtHR. Furthermore, derived from Article 52(3) of the Charter, substantial amendments to the ECHR shall automatically become the new minimum standard of human rights protection in the EU.[16] It has been considered that the references to the autonomy of the EU law in the context of Article 52(3) of the Charter should be interpreted as allowing the EU solely to raise the ECHR level of protection in respect of EU law rather than to lower it.[17]

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10 The discussions arose in particular with regard to the perceived conflict between the German Basic law and EU. In the famous case of Solange I, the German Constitutional Court held that as long as the EU lacked a structure for protection of fundamental rights similar to the protection offered in the Basic law, the German Constitutional Court had the power to ensure that the EU law was in conformity with the German Constitutional requirements. For commentary see: Monaghan, p. 1453-1454.

11 The ECJ first affirmed the recognition of general principles of EU law, including protection for human rights in the Stauder case (ECJ 12 November 1969, C-29/69, ECLI:EU:C:1969:57 (Stauder v. City of Ulm)). Its position was further refined and developed in the case of Internationale Handesgesellschaft, where the CJEU stated that respect for fundamental rights formed an integral part of the general principles of Community law protected by the Court of Justice. (ECJ 17 December 1970, C-11/70, ECLI:EU:C:1970:114 (Internationale Handesgesellschaft), para 4).

12 Glas/Krommendijk 2017, pp. 2-3.

13 At legislative level, prior to the Treaty of Lisbon, provisions concerning the EU's commitment to respect for fundamental rights were included in the Treaty of Maastricht (Article F(2)) and in the Treaty of Amsterdam (Article 6). Also, the CJEU continued its line of case law on general principles of law.

14 Lock 2009, p. 382.

15 Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14 December 2017.

16 *ibidem*; For a discussion on the impact of the ECtHR's case law on the CJEU, see *infra*, Chapter 7, Section 7.2.

17 Callewaert 2018, p.1699.

Since the entry into force of the EU Charter and after the delivery of Opinion 2/2013, scholars have noted an increased Charter centrism of the CJEU marked by a (selective) reliance on ECHR and ECtHR case law.[18] As with Opinion 2/2013, the area of mutual recognition of judgments has given rise to difficulties in reconciling the position of the two Courts. The intersection between mutual trust and fundamental rights became relevant specifically in cases involving transfers of asylum seekers to another Member State pursuant to the Dublin III Regulation and the transfer of prisoners in the execution of the European Arrest Warrant.

The Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (the Dublin III Regulation)[19] sets out the criteria for the Member State responsible for determining the substance of an asylum application. Article 3 of this Regulation only permits Member States to refuse the transfer of an asylum seeker where "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions" in the Member State where the asylum seeker should be transferred "resulting in a risk of inhuman or degrading treatment."

Initially, the CJEU applied a collective test favouring the return of asylum seekers even when there was a risk of the infringement of their fundamental rights, provided that there were no systemic flaws in the reception system of the Member State responsible under the Dublin Regulation.[20] This test was considered to be in contradiction with the more individualised ECtHR one.[21]

However, in a recent case the CJEU has accepted that in the context of the Dublin process Member States may consider the circumstances of the person subject to the transfer so as to determine whether they face a real risk of inhuman or degrading treatment.[22] This latter approach has been considered more aligned with the one of the ECtHR.[23]

In addition, of specific relevance for the rights of children, it should also be mentioned that even before the entry into force of the Dublin III Regulation, the CJEU had already interpreted the best interests of the child to mean that the asylum application should be processed in the country of presence

18 Callewaert 2018, pp. 1696-1699; Glas/Krommendijk 2017, pp.7-9.

19 Official Journal L 180/31 of 29 June 2013.

20 Callewaert 2018, p. 1702, referring to the CJEU judgement in CJEU 21 December 2011 Joined Cases C-411, 493/10, ECLI:EU:C:2011:865 (N.S. and Others/Secretary of State for the Home Department), para 86.

21 Callewaert 2018, p. 1702, referring to the ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*, para 104.

22 CJEU 16 February 2017, C-578/16 PPU, ECLI:EU:T:2017:590 (C.K. and Others v. Republika Slovenija).

23 Bartolini 2019, p. 96; Callewaert 2018, p. 1704.

rather than in the country of first entry.[24] This reasoning was later codified in Article 8(4) of the Dublin III Regulation.

The European Arrest Warrant has posed similar difficulties in reconciling individual rights with the principle of mutual trust. Here as well, the question was whether a fundamental rights exception could be read into the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the "(EAW) Framework Decision").[25] Under the Framework Decision, Member States were expected to surrender prisoners to countries with appalling prison conditions – amounting to inhuman and degrading treatment under the ECHR.[26] Initially the interpretation of the CJEU was aligned to the ECtHR; the CJEU held that the surrender may be postponed if there was a real risk of inhuman and degrading treatment because of deficient detention conditions in the requesting Member State.[27] More recently however the CJEU has departed from this approach. The recent case of *Puig Gordi and Others* concerned an envisaged transfer from Belgium to Spain of a person who would have been subject to a real risk of infringement of the right to a fair trial on account of being tried by a court lacking jurisdiction for that purpose.[28] The CJEU laid out a two-step approach for domestic courts. First, the courts in the executing jurisdiction must "carry out an overall assessment of the operation of the judicial system of the issuing Member State [in the light of the requirement for a tribunal established by law"[29] Second, they must determine "to what extent the deficiencies identified in the first step […] are liable to have an impact on the proceedings to which the person for whom a European arrest warrant has been issued […]."[30] It was accepted that this test did not go against the individualised review of the ECtHR.[31] However, Callewaert emphasised that such an approach opens the door in favour of mutual trust and against an individualised assessment which would in turn directly conflict with the ECtHR's case law.[32]

Overall, within the EU, the principle of mutual trust has been perceived as contrary to a more individualised approach to human rights considerations. Both Dublin III and EAW cases concern interim proceedings where

24 CJEU 6 June 2013, C-648/11, ECLI:EU:C:2013:367 (The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department).
25 Official Journal L 190, 18 July 2002 P. 0001 – 0020.
26 Glas/Krommendijk 2017, p. 9, referring, among others, to CJEU 5 April 2016, Joined Cases C-404/15 and C-659/15 ECLI:EU:C:2016:198 (Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen).
27 CJEU 5 April 2016, Joined Cases C-404/15 and C-659/15 ECLI:EU:C:2016:198 (Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen), para 94.
28 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 103.
29 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 103.
30 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 106.
31 Callewaert 2023, p. 346.
32 Callewaert 2023, p. 346.

the state of presence should not -in principle- carry out human rights checks of the state where the person should be sent to. These cases expose the tensions between the systems-oriented approach of the CJEU and the person-oriented approach of the ECtHR; the two Courts employ different methodologies, yet commentators argued that until now their positions are not incompatible as such.[33] In respect of both the EAW and Dublin transfers the CJEU has accepted that states may refuse the execution on the ground of fundamental rights. However, the threshold for refusal was set at a high level, requiring both the assessment of systemic flaws and their impact on the individual situation.

9.2.2 The interaction with EU law and the CJEU from the perspective of the ECtHR

Since the Union is not a party to the ECHR, the Strasbourg Court has no jurisdiction to review the compatibility of acts of the EU institutions with the ECHR.[34] The situation is different when complaints concern the Member States' implementation or application of EU acts. Such complaints have been lodged with the Strasbourg Court as early as 1987.[35] The ECtHR's position has been crystallised in the landmark case of *Bosphorus v. Ireland*.[36] This case has cemented the *Bosphorus* doctrine under which a state's action taken in compliance with its international obligations is justified under the ECHR to the extent that such international organisation offers equivalent protection of fundamental rights.[37] There is thus a rebuttable presumption of equivalent protection in such cases.[38] The presumption of equivalent protection applies only to the extent the state has no discretion in implementing legal obligations resulting from its membership to an international organisation.[39]

The ECtHR retains competence to verify in each individual case if the protection existed or whether it was manifestly deficient.[40] In the *Bosphorus case* the ECtHR found that the EU -as an international organisation- was

33 Callewaert 2023, p. 345.

34 ECtHR 10 July 1978, no. 8030/77 (*Confédération Française Démocratique du Travail v. the European Communities, alternatively: their Member States a) jointly and b) severally(dec)).*

35 *Etienne Tete v. France*, no. 11123/84, decision of 9 December 1987; For an overview of the ECtHR's case law with respect to the EU see the ECtHR's research report, available at <http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_Union_Europeenne_EN.pdf>, accessed on 10 April 2013.

36 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*).

37 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 155.

38 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 156.

39 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), paras 156, 158.

40 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 156.

capable of offering equivalent protection of fundamental rights both in light of the substantive and procedural guarantees it offered.[41] On the procedural side, the ECtHR held that the EU system of judicial remedies, even if indirect, amounted to an equivalent protection of fundamental rights.

The *Bosphorus* judgement is important in several respects. First, it applies only to actions of the Member States where no discretion was available as to the implementation thereof.[42] Conversely, where the Member States retain a certain discretion in implementing EU law, they shall remain fully responsible for their actions before the Strasbourg Court.[43] Second, the ECtHR retains the power to review on a case-by-case basis whether the EU provides equivalent protection of fundamental rights. Therefore, if the EU will be found to not have offered equivalent protection in a specific case, the Strasbourg Court will address the substance of the complaint. Such rebuttal will only occur if the ECtHR finds that the protection was 'manifestly deficient in the particular case'.[44]

The *Bosphorus* doctrine remains in force today; the ECtHR has applied it in a handful of subsequent cases, one also concerning child abduction.[45] The same deferential stance was maintained in the case of *Avotins v. Latvia* where the ECtHR's Grand Chamber considered that the enforcement of a debt in Latvia based on a Cypriot judgement complied with Article 6 ECHR, as the Latvian courts had no discretion to refuse the recognition.[46] Here, the Court focused on the applicant's conduct of not raising a certain defence domestically and not requesting a preliminary reference on the matter from the CJEU.[47] It is also important to note that the ECtHR will assess on a case-by-case basis if an applicant had requested domestic courts to file preliminary references to the CJEU; there is a likelihood of an Article 6(1) ECHR infringement if such references had not been filed and the issue in question had never been closely examined by the CJEU.[48]

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41 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 159.

42 Where the Member States had discretion in implementing EU law or in entering into an agreement, the ECtHR reviewed closer such actions. See ECtHR 15 November 1996, no. 17862/91 (*Cantoni v. France*); ECtHR 18 February 1999 no. 24833/94 (*Matthews v. The United Kingdom)*, and more recently ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*.

43 ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*, paras 113 and 115.

44 In the case of *Michaud v. France (*ECtHR 6 December 2012, no 12323/11 (*Michaud v. France))*, the ECtHR rebutted the presumption of equivalent protection. On the facts of that specific case it held that the Conseil D'Etat had refused to refer the question to the CJEU for a preliminary ruling and that there was no judgement of the CJEU rendered on the matter.

45 See for example, ECtHR 10 October 2006, 16931/04 (Cooperative des agriculteurs de Mayenne and Cooperative Laitière Maine-Anjou v. France (Dec)); ECtHR 20 January 2009, no. 13645/05 (*Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. The Netherlands*); ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).

46 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*).

47 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*), para 111.

48 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*), para 111; ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*.

Conversely, in cases where Member States have discretion in implementing EU law, the ECtHR will assess if such discretion has been applied in a manner compatible with the ECHR.

In cases involving transfers pursuant to the Dublin III Regulation it has found infringements of Article 3 on the ground that Member States should not have simply assumed that applicants will be treated in accordance with the Convention standard, they should have verified how the respective Member State applied the legislation asylum in practice.[49]

The case of *Bivolaru and Moldovan v. France* is the first where the ECtHR, after applying the Bosphorus doctrine, found that human rights protection in the requesting country was manifestly deficient.[50] The case concerned the execution and transfer of prisoners from France to Romania in furtherance of the EAW. Under the Court's case law a risk of inhuman and degrading treatment to the person whose surrender is sought constitutes a legitimate ground for refusing the execution of a European Arrest Warrant (the "EAW").[51] Here, the ECtHR found that the French authorities had no discretion in implementing the EAW given that the parameters for implementation had been strictly delineated by the CJEU, and that the latter had sufficiently established case law in the matter.[52] On the facts of the first case (Moldovan), the Court criticised the French Courts for overreliance on stereotypical and insufficient declarations of the Romanian authorities; the Court considered established (on the basis of its own previous case law) that the prison conditions in Romania exposed the applicant to a real risk of inhuman and degrading treatment.[53] In the case of Bivolaru, the ECtHR assessed whether the execution of the arrest warrant was in contradiction with the non-refoulement obligation under the Geneva Convention.[54] The Court considered it is not competent to assess whether the grant of refugee status in one Member State confers the same rights in all Member States.[55] It then considered that the EAW framework decision does not provide for a ground of non-execution based on refugee status.[56] The Court considered acceptable that the French authorities would review the grant of refugee status by the Swedish authorities and it paid particular attention to the time which had elapsed between the grant of the refugee status and the execution of the EAW.[57] Overall it found that the French authorities did not have

49 ECtHR 21 January 2011, no. 30696/09 (*M.S.S. v. Belgium and Greece* [GC]); ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*.

50 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 126.

51 ECtHR 9 July 2019, no. 8351/17, *(Romeo Castaño v. Belgium*), paras 82-91.

52 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 114 and 115.

53 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 126.

54 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 134.

55 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 135.

56 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 136.

57 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 137-141.

before them "a sufficiently sound factual basis on which to find a real risk of breach of Article 3 of the Convention and to refuse to execute the EAW on that ground."[58]

The approach of the ECtHR is to be contrasted to that of the CJEU in that the former assesses on a case by case basis whether applicants are exposed to a real risk of inhuman or degrading treatment in the country of return. However, under its established *Bosphorus* doctrine the ECtHR presumes that the EU Member States offer an equivalent protection. This presumption applies only where Member States retain no discretion in implementing EU law. The ECtHR has held to date that the presumption of equivalent protection has been rebutted both in Dublin III transfers and EAW cases on account of systemic deficiencies in the countries of return – documented through sources such as reports of NGOs or other human rights organisations.

9.3 The relationship between the CJEU and the ECtHR in child abduction cases

It has become evident that the principle of mutual trust underpinning the area of freedom, security and justice has been a significant source of friction between the two Courts. Together with the Dublin system and the EAW, child abduction falls within the same area of EU competence, and unsurprisingly tensions between the two Courts have been noted in this field as well.[59] This section addresses the interaction between the two Courts in child abduction cases, first from the perspective of the CJEU and subsequently from the perspective of the ECtHR.

So far, the CJEU's references to either the Strasbourg Court or the Human Rights Convention have been scarce. One such reference can be found in the case of *J.McB. v. L.E.* where the CJEU relied on the ECtHR case law on Article 8 to support its findings that the attribution of parental responsibilities remained within the competence of Member States.[60] The question in that case was whether the attribution of parental responsibilities in national law which did not allow unmarried fathers to automatically gain custody over children was contrary to the father's right to family life under Articles 7 and 24 of the EU Charter. In the other case, the CJEU relied on the ECtHR's case law to call for the speedy implementation of return orders.[61] This case concerned an extrajudicial possibility of suspending the enforcement of a return order. In both judgments the CJEU's interaction with the Strasbourg Court was rather cursory and as highlighted, principally used to support its own findings.

58 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 141.
59 Walker/Beaumont 2011; Silberman 2010; Lamont 2019.
60 CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E), para 54.
61 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.), para 77.

On the other hand, in its extensive child abduction jurisprudence, the ECtHR has relied on many occasions on the Brussels II *bis* Regulation and on the case law of the CJEU.[62] It should be recalled that under the TFEU, the Brussels II *bis* Regulation (now repealed) became a part of Member States' domestic law. Similarly to the Hague Convention, the ECtHR has interpreted Article 8 ECHR in light of the Brussels II *bis* Regulation.[63] For example, the ECtHR has relied on the provisions of the Regulation to find that failure to hear the left-behind parent as required by the Regulation amounted to an infringement of Article 8 ECHR.[64] The same approach was adopted when it came to complaints about the length of the abduction proceedings: the text of the Regulation served as a basis for finding an infringement of Article 8 ECHR.[65]

The ECtHR has also relied on the CJEU's case law to find infringements of Article 8 for lack of domestic courts compliance with such case law. *Michnea v. Romania*, discussed in the preceding Chapter of this dissertation, is a case in point.[66] Here the ECtHR analysed carefully how the Romanian courts had applied the CJEU case of *Mercredi v. Chaffe*, and ultimately found a violation of Article 8 ECHR on the ground of incorrect application by the domestic courts. The ECtHR has also relied on the EU principle of mutual trust to support its findings that deference to the authorities in the country of habitual residence was necessary and called for by EU law.[67] Thus, in this line of case law, the ECtHR bolstered the uniform application of Union law.

However, in its assessment of EU law the ECtHR has reached a different conclusion to the CJEU: that mutual trust does not call for a blind deferral to the authorities in the country of habitual residence. For example, in the case of *O.C.I. v. Romania* which involved allegations of violence against the children, the Strasbourg Court considered that "the existence of mutual trust between child protection authorities does not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual

62 ECtHR 1 February 2011, no. 23205/08 (*Karoussiotis v. Portugal)*; ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*); ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)); ECtHR 15 January 2015, no 4097/13 (M.A. v. Austria); ECtHR14 January 2020, no. 10926/09 (*Rinau v. Lithuania*); ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*); ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*; ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

63 ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*), para 70.

64 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania),* para 55.

65 ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*), paras 71, 76.

66 See Section 8.2.1.3. above; ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*).

67 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

residence are capable of dealing with cases of domestic child abuse."[68] In this case, the children had suffered occasional acts of violence at the hands of their father. The domestic courts had ordered their return nevertheless on the ground that the violence was not 'grave' enough, that it would not reoccur and that the Italian authorities would protect them against potential violence.[69] No evidence or assurances had been sought on the actual protection measures upon return. Here, it is evident that the ECtHR required a more individualised assessment of the risks upon return.

The ECtHR was also seized in highly controversial proceedings regarding the former Article 11(8) of the Brussels II *bis* Regulation. It should be recalled that under this Article the authorities of the country of habitual residence could override a judgement of non-return under Article 13(b) HC and secure the return of the child to the state of habitual residence.[70] Such situations expose different views of two jurisdictions: on the one hand the courts in the country of refuge have found that the child would be exposed to a grave risk of harm if returned. On the other hand, the authorities in the country of habitual residence, after having considered the reasoning under Article 13(b) HC may nevertheless find that such risk will not materialise and order the return nevertheless. These proceedings gave in practice a final say over return to the authorities in the child's country of habitual residence. Under the Regulation, these authorities should carefully consider the allegations of grave risk of harm, and take into account the rights of the child. However, as demonstrated by case law this has not always happened.[71]

From the perspective of the Strasbourg Court the outcome is different depending on the State party against which the application is filed. When the complaint was filed against the state of habitual residence that had issued the enforcement certificate in disregard of previous a non-return in the country of the child's presence, the ECtHR was not restricted by its own *Bosphorus* doctrine.[72] In such situations, the authorities have full discretion in issuing an overriding order and, in addition, they have to comply with the requirements of Article 42 of the Regulation.[73] In the case of Šneersone

68 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 45.

69 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, paras 42-46.

70 In this sense see also Chapter VII, Section 7.4.1. above.

71 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); See also Beaumont/Walker/Holliday 2016.

72 The ECtHR has dealt with this situation in the case of *Šneersone and Kampanella v. Italy*, no. 14737/09, judgement of 12 July 2011.

73 As per Article 42 of the Regulation, These conditions are: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; (b) the parties were given an opportunity to be heard; and (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

and Kampanella v. Italy, while fully endorsing the provisions of the Regulation, the ECtHR had criticised the Italian authorities for failing to properly take into account the risks to the child and his situation upon return.[74] Relying on the provisions of the Regulation which enable the protection of children upon return, the ECtHR criticised the Italian authorities for their failure to implement such protection in practice. In other words, the ECtHR found a violation of Article 8 ECHR on the ground that the domestic courts had not complied with Article 42 of the Brussels II *bis* Regulation.

Conversely, when the application was directed against the authorities of the country of refuge which, under the Brussels II *bis* Regulation had no discretion and they had to enforce the return order, the *Bosphorus* doctrine substantially limited the ECtHR's scope of review. This has happened in the case of *Povse v. Austria* where the applicants had complained that the Austrian authorities had limited themselves to ordering the enforcement without examining the well-being of the child.[75] On the merits, this case equally touched upon the issue of separation of the child from the primary carer and domestic violence. After accepting that the Bosphorus doctrine was applicable, the ECtHR could not deal with the merits of the allegation. Importantly, the Court indicated that the applicants could have claimed a violation of their rights before the Italian Courts.

9.4 Conclusion: children's rights and the intersection between the CJEU and ECtHR in child abduction cases

Commentators have highlighted the fundamentally different approaches of the CJEU and the ECtHR to child abduction cases and the ensuing difficulty for national domestic courts in consistently applying their case law.[76] On the one hand, the CJEU has focused on mutual trust to the detriment of any individualised assessment of children's rights. On the other hand, the ECtHR's requirement that courts consider all arguable allegations of grave risk is clearly favouring a case-by-case review of the situation in the country of habitual residence and the actual risk of harm which the child may be incurring. Indeed, these approaches to the resolution of child abduction cases are different, however -it is argued here- they are not irreconcilable. Rather, the two Courts are offering complementary protection which could in turn contribute to a more robust protection of the rights of children across the EU Member States.

For a better understanding of the European supranational Courts' child abduction case law, this Chapter has proceeded by outlining their interac-

74 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 93-98.
75 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec), para 57.
76 Walker/Beaumont 2011; Lamont 2019, Silberman 2010.

tion in general as well as situations which have or continue to generate debates concerning potential conflicts. Their respective competences and type of decision-making have been discussed in the previous chapters. The comparison drawn in this chapter does not assume that their adjudicative powers are identical. Rather, the approach taken here is that of assessing subject matters over which both Courts have jurisdiction and inquiring whether the competence of these two Courts has led to tensions, or whether their approach could be reconciled or reinforced in light of their different roles.

It has been shown that the EU area of freedom, security, and justice, which encompasses the Dublin transfers, the European Arrest Warrant and child abduction has given rise to substantial tension between the two Courts. Mutual trust, and specifically the balance between mutual trust and fundamental rights has been the main source of division and it has equally been highlighted by the CJEU in its rejection of the EU's accession to the ECHR.[77] Indeed, within the EU, mutual trust requires a presumption that fundamental rights are observed in the country of return whereas this may not always reflect the reality.

However, as the Dublin and the EAW cases show, so far both Courts have succeeded in reconciling their case law. Arguably under the influence of the ECtHR, the CJEU has adjusted its case law and it now accepts that Member States may consider the individual circumstances of the person subject to the transfer.[78] The CJEU has adopted a similar position to the EAW cases. The latest CJEU judgement may arguably have set too high of a threshold for a human rights review, in that the CJEU has imposed a duty for Member States to first assess the deficiencies of a system as a whole before any individualised review of the human rights at stake. However, the interaction of the two supranational Courts through their case law is in continuous flux and it remains to be seen how the balance between mutual trust and human rights will be struck in subsequent decisions.

Child abduction should also be analysed in light of the Courts' broader mandate and their interaction in the other two fields mentioned above. As highlighted by Bartolini, the EU rules on child abduction, at least until the entry into force of the Brussels II *ter* Regulation, did not allow for any derogation from the principle of mutual trust.[79] This was the result of the automatic application of the Article 42 certificate of the Brussels II *bis* Regulation. Be that as it may, it does not follow that the Regulation, and the ensuing CJEU case law were contrary to the ECtHR. Rather, the two Courts complemented each other with the ECtHR ensuring that the Brussels II *bis*- as it then was- could be applied in accordance with the rights of the children.

77 CJEU 18 December 2014 Advisory Opinion 2/2013 ECLI:EU:C:2014:2454, para 191.

78 CJEU 16 February 2017, C-578/16 PPU, ECLI:EU:T:2017:590 (C.K. and Others v. Republika Slovenija).

79 Bartolini 2019, p. 101.

The case of *Zarraga* offers a good illustration of the complementarity between the two Courts. First, it should be recalled that in this case the Spanish authorities had issued an overriding return order in breach of Article 42 of the Brussels II *bis* Regulation, and this certificate had to be enforced in Germany. The German courts considered that the enforcement would be against the child's right to be heard. The CJEU did not read any exception in the text of the Regulation which would have allowed the German authorities not to enforce the Article 42 certificate. It was solely for the Spanish authorities to withdraw such certificate, their failure to do so did not have any consequences towards their German counterparts.

It is herein argued that the commentaries to the case of *Zarraga* have so far failed to place this case in the systemic context of the two European supranational Courts. From the perspective of the system, it was not the German authorities, but rather the ECtHR which could have remedied the 'defect' of the overriding return order issued in Spain. In other words, a complaint of the child (represented by the taking parent) to the ECtHR that the issuing of the certificate was in breach of their right to be heard under Article 8 and 6 of the ECHR, would have given this Court the possibility of assessing the compliance with the individual rights of the child by the Spanish authorities.[80] Such a complaint would have focused on the failures of the Spanish authorities that had discretion in issuing the certificate and not on the German authorities that had to enforce the overriding return order and consequently lacked discretion within the meaning of the *Bosphorus* doctrine. In other similar cases raising issues under the Regulation, the ECtHR has shown a clear willingness to interpret the provisions of Article 8 in the light of the Brussels II *bis* Regulation.[81] Thus, the ECtHR has found breaches of Article 8 ECHR on the ground that the domestic authorities had not heard the left-behind parent as required under the Brussels II bis Regulation.[82] In a similar case, where the Italian authorities had issued an overriding certificate without duly taking into account the situation of the child, the ECtHR has found an infringement of Article 8 of the Convention.[83] The case of *Povse v. Austria* which was ultimately declared inadmissible is also indicative of the ECtHR willingness to contribute to the proper application of the Brussels II *bis* Regulation. Here the applicant complained against Austria which had to enforce the overriding return order and hence

80 It should equally be noted that under Rule 39 of the Rules of Court applicants have the possibility to request the suspension of domestic proceedings until the ECtHR has issued a judgement in the matter. The ECtHR has already applied Rule 39 in child abduction cases. See for example, ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC)*); ECtHR10 July 2012, 4320/11 (*B. v. Belgium*).

81 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*); ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*).

82 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania).*

83 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*).

had no discretion within the meaning of the *Bosphorus* doctrine. The ECtHR even indicated that the applicants should have filed the complaint against the Italian authorities, and should that have been the case, the ECtHR could have reviewed on human rights grounds the overriding return order.[84]

In light of the overview above, it is herein concluded that the two Courts approach the rights of children in different ways. Taken together, they have the potential of contributing to a more robust application of children's rights across the European Union.[85] With respect to the rights of children, the CJEU has focused on mutual trust and on the return of the children to their country of habitual residence. Within the EU, the Brussels II *ter* Regulation has laid down the right of children to be heard in child abduction proceedings and it has included direct references to the CRC – aspects which can have an important impact on further embedding the rights of children at legislative level across the Union. However, the CJEU has been reluctant to read into the text of the Regulation exceptions which would allow for an individualised assessment of children 's rights. Nevertheless, the ECtHR has this possibility, provided that children and parents bring applications before this court. The ECtHR has shown its willingness to incorporate the guarantees of the Brussels II *bis* Regulation into the text of Article 8 of the ECtHR and to further check on a case-by-case basis whether domestic courts are applying this Regulation in accordance with human rights.

84 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)), para 86.

85 It should be clarified that these conclusions solely apply to countries being simultaneously bound by the Brussels II *ter* Regulation and the ECtHR, meaning all the countries of the European Union with the exception of Denmark. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of the Brussels II ter Regulation.