MALTA

CONSTITUTIONAL COURT

THE HON. MR. JUSTICE -- ACTING PRESIDENT
GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

THE HON. MR. JUSTICE
ROBERT MANGION

Sitting of the 24 th August, 2012

Civil Appeal Number. 52/2012/1

Richard John Bridge personally and as curator *ad litem* for his daughter Ella Bridge as appointed by decree dated 9th July 2012
versus
Attorney General and Department for Social Welfare Standards

1. The present case concerns the issue whether the enforcement of an order to return a child to the jurisdiction from which it had been wrongfully removed [the "Return Order"], in terms of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta), would be in breach of the right to respect for family life of the child itself and of its parent protected under art. 8 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms ["the European Convention"].

2. Plaintiff Ella Bridge (represented in these proceedings by Richard John Bridge) is the daughter of the said Richard John Bridge, the other plaintiff, and of Nicki Lee. Mr Bridge and Ms Lee were divorced in September 2010. Prior to the events which give rise to these proceedings, Ella lived with her father in the United Kingdom, where both her parents – who had joint custody rights – were domiciled. Soon after the divorce decree was issued, Mr Bridge, without obtaining the consent of Ella's mother, moved with the child and his current partner (now his wife) to Malta where he is now settled, thereby in effect abducting the child.

3. Thereupon Ms Lee commenced proceedings in the United Kingdom for the return of the child to the jurisdiction wherefrom it had been wrongfully abducted. The English court made Ella a ward of court and, on the 20 October 2010, it ordered that she be returned. Ms Lee then sought to have the Return Order enforced in Malta in terms of the Child Abduction and Custody Act. The Director of the Social Welfare Standards Department (the "Central Authority" for the purposes of the Act) commenced proceedings under the Act for the enforcement of the Return Order, and the Family Court by judgment of the 26 May 2011 ordered that the child be returned to the United Kingdom. Mr Bridge appealed from this judgment but his appeal was dismissed because it had been filed after the lapse of the time limit for appeal.

4. Mr Bridge then commenced the present proceedings on his own behalf and on behalf of the child, claiming that the enforcement of the Return Order would be in breach of the right to a fair hearing (art. 39(2) of the Constitution of Malta and of art. 6(1) of the European Convention) and of the right to respect for family life (art. 8 of the European Convention). The first court found that there was no violation of the right to a fair hearing, and no appeal was entered from that part of the judgment. It also found that there was no violation of art. 8 of the European Convention in respect of Mr Bridge, but that there was a violation of the said article in respect of Ella. The court motivated its judgment concerning art. 8 as follows:

«Applicant … claims that the court's decision to send the child back to the UK violates his own and her fundamental human right to a family life (section 8 of the ECHR). He bases this claim on the judgement of the European Court of Human Rights in the case Neulinger and Shuruk *vs* Switzerland decided on the 6th July 2010. The court is here reproducing some of the quotations from this case mentioned in the application:

«"*The Court must ascertain whether the domestic Courts conducted an in depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin* (paragraph 139).

«"*Even though he* (the minor) *is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he return on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial. Accordingly the significance disturbance that the second applicant's forced return is likely to cause in his mind must be weighed against any benefit that he may gain from it* (para. 147-8).

«"*As to the problems that the mother's return would entail for her, she could be exposed to a risk of criminal sanctions, the extent of which however remains to be determined. … It is clear that such a scenario would not be in the best interests of the child, the first applicant being probably the only person to whom he relates* (para. 149).

«"*The mother's refusal to return to Israel does not therefore appear totally unjustified. Having Swiss nationality, she is entitled to remain in Switzerland. Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment. The father's capacity to do so may be called into question, in view of his past conduct*

and limited financial resources. He has never lived alone with the child and has not seen him since the child's departure (para. 150).

«"*In conclusion, and in the light of all foregoing considerations, particularly the subsequent developments in the applicant's situation … the Court is not convinced that it would be in the child's interest to return the child to Israel. As to the mother, she would sustain a disproportionate interference with her family life if she were forced to return with her son to Israel. Consequently there would be a violation of Article 8 of the Convention in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced*" (para. 151).

«Before proceeding further it has to be said that there were some important facts in this case which were different to those in the one before this court. In the Neulinger Case, the mother had secretly left Israel with the child, then only two years old, in 2004. Therefore until the case was decided in the Swiss courts in 2007 the minor had lived almost exclusively with his mother in Switzerland. The father, who was requesting his return to Israel, belonged to a fanatical ultra-orthodox sect and wanted his child to be brought up in the same way; in fact even the Israeli Social Services had ordered him not to go to the matrimonial home and his access to the child was under supervision.

«In this case, the court feels that most of the content of the application do not reflect the actual facts which led to the litigation. The minor's mother was still visiting her – albeit sporadically – in the UK until a few weeks before applicant left the jurisdiction, and in fact proceedings started days later. It is normal in these cases for some time to elapse before the Central Authority to start the actual proceedings as it is first necessary to locate the minor and this necessarily takes some time. Therefore one cannot accuse the mother of not having acted as soon as possible therefore indicating that she did not wish to lose contact with her daughter. The Family Court also went into great detail in its judgement to explain that it did the necessary enquiry as to whether there was some grave physical or psychological danger to the child before

deciding to repatriate. This Court therefore does not need to reinvestigate this issue and thus it cannot equate this situation to that of the Neulinger [Case]. The court in fact concluded, that "*the child's objection in this case is more relevant to the custody issue and should not be considered as a valid obstacle for the granting of an order for return*".

«This in effect is what is in issue; the Family Court and the Court of Appeal had to decide whether the decision on the custody of the child could be decided in Malta or in the UK and in the latter case the only way for this to be done was to repatriate the minor. The aim of the relative convention is to ensure that the proper forum decides the issue and not allow the parent who flees with the child from that forum to benefit from that act. It is also clear, especially in regard to the Brussels Regulations, that the signatories to the Convention (in this case all European Union members) accepted to have complete faith in each other's courts and tribunals and have no reason to doubt that in the end the right decision is given even though it must be said that custody decisions are often painful even for the court deciding the issue. The refusal to repatriate because of grave danger to the child has to be exercised exceptionally. It is obvious that repatriation causes undue stress on the child who would have settled in the repatriating country but if one were to accept applicant's claim, the Convention would be rendered useless. Unfortunately it was applicant himself, who left the UK with the child knowing he did not have sole custody, who caused this stress.

«The court has no doubt that the applicant and his new partner are taking good care of the minor and she has settled in Malta and would definitely prefer to remain here. The minor also obviously views her father's wife as her mother, and the latter, when testifying, convinced the court that she loves her as her own. It also appears that applicant and his wife are better off financially than the mother and are therefore able to secure a better future for the minor. However these are considerations that have to be taken by the proper forum. The European Court of Human Rights also stated in the case Maumosseau *et vs* France (39388/05) that *"the aim of the Hague Convention*

was to prevent the abducting parent from succeeding in legitimating, by the passage of time operating in his or her favour, a 'de facto' situation which he or she had created unilaterally". The court therefore feels that this fact has aggravated the problem.

«The court also feels that applicant knew, in leaving the UK, that he was taking advantage of the situation and attempt to cut off his ex-wife from their daughter. It should definitely have been up to the UK Courts to decide whether the child should live in Malta with her father and his new family. Applicant also has only himself to blame if he faces criminal charges in the UK and cannot use this argument to persuade the court to decide in his favour.

«There is therefore no doubt that from a purely legal point of view applicant put himself and his daughter in a difficult situation. However in this case the court feels that there is an issue which has made her deliberations more difficult in arriving at a decision. There is little doubt that in normal circumstances, any court would have given custody to applicant. The mother's track record is unfortunately not good in this respect. She conceded custody of her first two children by her previous marriage to her ex-husband and apparently rarely sees them. It is therefore apt to ask: *"Why is she insisting on having custody of Ella?*" For a time she also let applicant take care of her aforementioned children and left the UK for the USA, according to her because she had a health problem. In her past it appears to the Court that she hardly took any care of her children.

«As the court has already made clear, these considerations should properly be made by an English court as there is no doubt that applicant took the child out of her habitual residence in terms of the Hague Convention and Brussels Regulations. But the court feels that the removal of Ella at this stage would be a waste of her precious time and cause her undue stress. The court feels that her right to family life would be tampered with and she has the right to be left with her new family. While making it clear that this case should not be interpreted as having laid down any precedent, as every case has its own particular circumstances, the court therefore feels that Ella's fundamental right to have a family life would be

infringed by her removal. Applicant however should bear the costs of the case because of what has been already said above.»

5. Defendants appealed from the finding that there was a violation of art. 8 in respect of Ella, and plaintiffs entered a cross-appeal from the finding that there was no violation of the said article in respect of Mr Bridge.

6. Defendants' first ground of appeal is "that the decisive part of the judgment is inconsistent and is in contradiction with the considerations made by the First Court". Plaintiffs reply that "It is an established principle that the conclusive segment (*parti dispożitiva*) of a judgment is what makes the judgment and, thus, it is essential [only] that this segment be coherent and comprehensible".

7. Indeed, since judicial decisions must be properly motivated[1], the conclusions in the operative part must logically follow from the reasons given by the court for reaching its decision: it is therefore not sufficient that only the operative part be "coherent and comprehensible", as plaintiffs claim.

8. However, this court does not agree with defendants that the operative part of the judgment is inconsistent and in contradiction with the reasons given by the first court. It will be recalled that the first court reached different conclusions regarding the violation of art. 8 of the European Convention with regard to Ella and with regard to Mr Bridge. The reasons for finding a violation in the first case but not in the second are obviously different. One cannot argue, as defendants seem to be doing, that the reasons for not finding a violation in the case of Mr Bridge should have led to a similar conclusion in the case of Ella, and that to find otherwise leads to inconsistency.

9. The reasons which led the first court to find a violation in the case of Ella were that "the removal of Ella at this stage would be a waste of her precious time and cause her undue stress" and that "her right to family life would be tampered with and she has the right to be left with her new family". These reasons may or may not be correct and sufficient from a legal point of view but they

[1] Art. 218, Code of Organisation and Civil Procedure.

certainly cannot be said to be inconsistent with the conclusion reached by the first court.

10. This first ground of appeal is therefore dismissed.

11. Defendant's second ground of appeal is that the first court "based its judgment on a wrong interpretation of Article 8 of the Convention".

12. This court cannot but agree with defendants that the reasons given by the first court, namely that "the removal of Ella at this stage would be a waste of her precious time and cause her undue stress" and that "her right to family life would be tampered with and she has the right to be left with her new family", are insufficient for finding a violation of the right to respect for family life. If these were sufficient reasons for such a finding, then, since any return of an abducted child to its original place of residence inevitably involves waste of time, stress and a degree of "tampering" with her family life, any attempt at enforcing the Child Abduction and Custody Act and the Hague Convention on the Civil Aspects of International Child Abduction ["the Hague Convention"] on which it is based would amount to a violation, which is definitely not the case. Indeed, the European Court of Human Rights, in the case of Maumousseau and Washington *v.* France[2] observed that:

«The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that instrument seeks to deter the proliferation of international child abductions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention.[3]

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2 Application nº 39388/05 – 6 December 2007.

3 Para. 69.

13. There is at least a *prima facie* presumption that a proper application of the Hague Convention, namely the child's return to the jurisdiction from which it was wrongfully removed, – albeit with the unfortunate consequences which it entails – would be in the child's best interests. What remains to be seen is whether, in the circumstances of the particular case, the return of the child would amount to a violation of the right protected under art. 8 of the European Convention:

«ARTICLE 8

«(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

«(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.»

14. That the return of the child to its original place of residence would amount to an "interference by a public authority with the exercise of this right" cannot be denied. That alone, however, is not a violation of the right so long as (i) it is done "in accordance with the law" and (ii) it "is necessary in a democratic society" for any one of the reasons mentioned in art. 8.2.

15. The Return Order was issued under the Child Abduction and Custody Act which gives force of law to certain provisions of the Hague Convention. Among the relevant provisions are those of artt. 3 and 12:

«Article 3

«The removal or the retention of a child is to be considered wrongful where -

«(*a*) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

«(*b*) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

«The rights of custody mentioned in sub-paragraph (*a*) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

«Article 12

«Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. … … …»

16. Since, when Ella was removed from her residence in the United Kingdom, both parents had joint custody rights, the removal was "wrongful" in terms of art. 3. Proceedings for the return of the child were commenced promptly, well before the lapse of the period of one year, and, therefore, the authority was bound to order the return of the child.

17. The order was therefore made "in accordance with the law", and the first test set out in art. 8.2 of the European Convention is satisfied.

18. Was the order "necessary in a democratic society", *inter alia* "for the protection of health …, or for the protection of the rights and freedoms of others"? The order was certainly necessary to ensure compliance with the law which is essential for a proper functioning of a democratic society. Nevertheless, since an "automatic" enforcement of a Return Order, made without considering whether, in the concrete circumstances of a particular case, such an enforcement would really be in the best interests of the child, might very well violate the child's right to respect for its family life, the Hague Convention allows the courts of the requested state to refuse the return of the child in certain exceptional circumstances set out in art. 13:

«Article 13

«Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the

child if the person, institution or other body which opposes its return establishes that -

«(*a*) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

«(*b*) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

«The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

«In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.»

19. The starting point, as was remarked above[4], is that the return of the child is in its best interests. It is up to the party opposing the return to show otherwise and to show that the exceptional circumstances set out in art. 13 apply in the particular case. If evidence of such exceptional circumstances is not shown to the satisfaction of the court, then the best interests of the child dictate that it be returned. These factors were taken into consideration by the Family Court in reaching its decision of the 26 May 2011, as the following extract from the judgment shows:

«According to [art. 13(*b*)] of the [Hague] Convention, the court of the requested State is not bound to order the return of the child if "there is a grave risk that his or her return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. Also the said court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of

[4] Para. 13, *supra*.

maturity at which it is appropriate to take account of its views."

«The following legal observations are relevant.

«[1] In the first place, it must be noted that the risk of physical or psychological harm must be 'grave'. On this issue Ward LJ in *Abduction: Grave Risk of Psychological Harm* [1999] (cited in *Family Law Case Library: Children – Prest and Wildblood* [2008] [pg.730] observed that "there is an established line of authority that the court should require a clear and compelling evidence of the grave risk of harm or other intolerability, which must be measured as substantial, not trivial, and of a severity that is much more than is inherent with the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence … the high standard which, in my judgment, it is vital that our courts maintain in order to give full effect to the purpose of the Convention so as to carry out our international obligations. Stringent tests must be enforced, not diluted".

«[2] "The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of the children generally that they should be promptly returned to the country whence they have been wrongfully removed, and it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Hague Convention" (Balcombe LJ *Ibid*. pg. 739].

«[3] It is not for this court to decide the custody dispute, as this matter falls within the competence of the United Kingdom courts which are the proper fora to deal with this issue as the country of the habitual residence of the minor child. In ordering the return of the child this court is not detracting from the Father's legal rights over the child in terms of UK law, but is referring the matter to the proper fora.

«In the present case, the court's opinion is to the effect that the Father has failed to produce satisfactory evidence supporting the defence under article 13(*b*). This opinion is based on the following considerations:-

«Firstly the Father has failed to validly sustain his allegation that the Mother is mentally ill, and therefore

unable to take care of the minor child. This consideration is fortified by the findings of the social worker's report wherein she states, *inter alia*, that "There is evidence to suggest that Ms Lee (the Mother) and Mr Bridge individually, are able to meet Ella's needs. There are no known concerns regarding Ella's health and development. Ms Lee is willing and able to provide a clean, well presented home environment to Ella, where her developmental needs would be met and promoted" [pg. 14].

«Secondly, the Father has failed to prove that sending the child back would put her in grave risk of physical or psychological harm or that the child would be in an intolerable situation. Even though financially he may appear to be in a much better position than the Mother, and that consequently he may give the child a more comfortable life than she would otherwise enjoy with the Mother, this does not *per se*, validly give rise to the defence contained in the above section of law, as [it] pertains to the custody issue, which is to be decided by the UK courts, and not to the wrongful removal issue which falls within the competence of this court.

«In conformity with the above, it is this court's view, that the child's objection in this case to go back to the UK, based on her wish to continue living with the Father in Malta, is more relevant to the custody dispute, and should not be considered a valid obstacle for the granting of an order for return.»

20. It will be noted that the Family Court carefully distinguished the issue whether the child should or should not be returned from the issue of who should be granted custody: only the first issue was relevant to the proceedings before the court, and the issue of custody was correctly left open, to be dealt with in the proper forum.

21. Since this is not an appeal from the decision of the Family Court, it is not the task of this court to review in the merits the reasons given by the Family Court for its decision, or to reconsider its conclusions. Its task is to ascertain whether there was a violation of the child's right to respect for its family life, and, for this purpose, what is required of this court is to establish whether the Family

Court took all relevant factors into account in order to ascertain that it respected the principles of legality, necessity and proportionality in ordering the return of the child. In the view of this court, the Family Court did indeed make a prudent analysis of the relevant factors and, after considering the different versions of the facts presented by both parents, it carefully weighed and balanced the conflicting interests involved.

22. Plaintiffs dispute the findings of the Family Court, claiming that Ms Lee is unreliable and cannot be trusted with the custody of the child. They also produce extracts from her Facebook page to support their arguments. This court reiterates that the purpose of the present proceedings is not that of determining the issue of custody: the question is whether returning the child to the jurisdiction where the issue of custody may be lawfully determined will violate its right to respect for family life. Moreover, if the child is returned it will not necessarily be placed in the custody of the mother since it has been made a ward of court.

23. For these reasons, the documents produced by plaintiffs in their reply are not relevant to the issue before this court, and they are to be removed from the records.

24. It may very well happen that, if Mr Bridge were to commence proceedings for custody before the proper court – as he ought to have done at the very outset, thus sparing the child this ordeal – custody may be granted to him, if the best interests of the child so require. If, on the other hand, the best interests of the child require otherwise, then there is all the more reason why Ella should be returned to the jurisdiction where this matter may be finally determined.

25. The truth of the matter is, as the Family Court correctly determined, that there is no cause for fear that the child will be subjected to harm or that it will be placed in an intolerable situation on its return and therefore there is no reason why the return should be considered a breach of its right to respect for family life.

26. Plaintiffs also insist that this court should take the time factor into account. In essence, their argument is that the removal of the child from its habitual residence, albeit wrongful, is now a *fait accompli* consolidated by the

lapse of time. They argue, in effect, that, even if the return might have made sense had it been executed promptly, now that Ella has been living in Malta for close to two years it will cause too serious a disruption in her life. Rather cynically, in the view of this court, they state that if they are unsuccessful in the present proceedings, they intend to take their case to the European Court of Human Rights in Strasbourg and that court "will take some time to consider the case". Irrespective of the merits, the fact that they will "have availed themselves of the legal remedies and made recourse to justice as are available to them in a democratic society", thereby prolonging the issue, will, in the view of plaintiffs, convert a wrongful fact into a right. This argument, say plaintiffs, is based on the judgment of the European Court of Human Rights in the case of Neulinger and Shuruk *v.* Switzerland[5], which had this to say on the matter of the time factor:

«… … … in order to assess whether Article 8 has been complied with, it is also necessary to take into account the developments that have occurred since the … judgment ordering the child's return. The Court must therefore place itself at the time of the enforcement of the impugned measure. If it is enforced a certain time after the child's abduction, that may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis. Moreover, whilst under Article 12, second paragraph, of the Hague Convention, a judicial or administrative authority before which the case is brought after the one-year period provided for in the first paragraph must order the child's return, this is not so if it is demonstrated that the child is now settled in his or her new environment.»[6]

27. However, the lapse of time, alone, is not sufficient: the circumstances obtaining "at the time of the enforcement of the impugned measure" must still be such as to harm the child's interests if the return is enforced. In

[5] Application nº 41615/07 – 6 July 2010.

[6] Para. 145.

the Neulinger case, the child's father, who was requesting its return to Israel after it had been taken to Switzerland by the mother, belonged to a radical sect and he subjected the child to religious indoctrination. His conduct was such "that all the judges dealing with this case had unanimously found to be unacceptable"[7]. It is also relevant to point out that custody, by order of the competent authority in Israel, had been granted to the mother, and the father only had visitation rights. Moreover, since he had disturbed and harassed the mother – also by death threats – on various occasions, he was ordered not to approach her flat and restrictions were imposed on his access rights: he was authorised to see the child only twice a week under the supervision of the social services at a contact centre in Tel Aviv. He also defaulted on his maintenance payments and an arrest warrant was issued against him.

28. After the mother abducted the child, proceedings were commenced in Switzerland for the child's return. In the course of those proceedings, the court commissioned a psychological report and it was advised that returning to Israel would expose the child to a risk of psychological harm. The request for the return of the child was therefore dismissed. This decision was however reversed on appeal. The mother thereupon commenced proceedings before the European Court of Human Rights which by an interim measure requested the Swiss Government not to return the child to Israel in spite of the Swiss court's decision.

29. The factors which led the European Court of Human Rights to conclude, five years after the abduction, that a return would violate the right to respect for family life were the following:

«As regards Noam, the Court notes that he has Swiss nationality and that he arrived in the country in June 2005 at the age of two. He has been living there continuously ever since. In the applicants' submission, he has settled well and in 2006 started attending a municipal secular day nursery and a State-approved private Jewish day nursery. He now goes to school in Switzerland and speaks French.

[7] Para. 108.

Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial.»[8]

30. The extreme circumstances of the Neulinger case certainly do not occur in the present case, where the Family Court found that there was no evidence that sending the child back would put it in grave risk of physical or psychological harm or that the child would be in an intolerable situation in terms of Art.13(b) of the Hague Convention. Moreover, unlike the Neulinger case, where the child was very young when it was removed from Israel and, after the lapse of five years between abduction and final judgment, it had no recollection of any connection with that country and could not speak the language, in Ella's case these factors are not present.

31. This court must base its judgment on the circumstances obtaining at the present time, not on its assessment of what the circumstances may possibly be in the future if the outcome is further delayed until the matter is finally determined before the Strasbourg Court. If anything, this is an argument against granting a stay of execution of a final judgment on the mere allegation by the losing party of a violation of human rights. Moreover, there is no certainty that the European Court will find plaintiffs' application admissible, or that it will take as long as it did in Neulinger to deliver judgment, or, indeed, even if this were to happen, that the circumstances will have changed by then. This court cannot base its judgment on conjectures and suppositions.

32. Plaintiffs also argue that, if returned to England at the present time, Ella will be placed in an intolerable situation, in violation of her fundamental rights. The father has now severed his ties with England and they cannot go back to their former residence. Moreover, he believes that he has reason to fear that, if he returns to England, he will be subject to criminal prosecution for child abduction.

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[8] Para. 147.

33. This court recalls that Ella is now a ward of court. The requirement of mutual trust between the courts of different Member States leads this court to believe that the English courts are fully capable of making the necessary arrangements to secure the well-being of a ward of court. Indeed, the return of Ella to England will inevitably cause a degree of inconvenience, at least as much as, and possibly more than that to which she was subjected when she was uprooted in the first place. This is inevitable and is to be regretted, but it is not sufficient to justify disregarding the requirements of the Hague Convention, nor does it amount to a violation of the right to family life.

34. Accordingly, since the enforcement of the Removal Order is necessary for securing the return of the child in its best interests in terms of the Hague Convention, and the measure is clearly necessary and proportional to this need, there is no violation of art. 8 of the European Convention.

35. This court therefore upholds defendants' appeal and finds that the execution of the Return Order would not violate Ella's right to respect for its family life.

36. We now move on to consider plaintiffs' cross-appeal against the finding that there was no violation of art. 8 of the European Convention in the case of Mr Bridge. They explained their ground of appeal as follows:

«Respondent understands that the first court, whilst finding that the best interests of the minor require that she may not be compelled to return to the UK, also wished to penalize the respondent, whom it considered to be the cause of the current wearying legal situation.

«Respondent humbly submits that he has always been consistent in safeguarding the best interests of his daughter Ella and that the decision to settle in Malta with his new family effectively brought a level of stability and emotional well-being in Ella's life that was not available to her in England. He humbly insists that he has always acted in good faith and has made various attempts to get Nicky Lee to resume contact with Ella, including offering to finance the travel. He has in the past paid bus tickets for Nicky Lee to visit Ella and is willing to pay for the travel

required for Nicki Lee to visit Ella now. However, Nicki Lee has refused all attempts at mediation.

«Other than the matter of respondent's good faith, he further submits that in line with jurisprudence of the ECtHR, on the occasions that the court found that the minor's fundamental right to family life had been violated by a removal order, the court has consistently found that the same fundamental right of the parent with whom the child is located had also been violated.

«Respondent humbly submits that there is one removal order on the cards and once it is established that the removal order constitutes an interference with the respect for family life that was not "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, such interference was unjust for the father as was unjust for the daughter.

«Respondent Richard Bridge has shown that had he to follow his daughter to the UK pursuant to a return order, his family life would be wrecked. He is married to Julia Dyson-Bridge and is under a legal and moral obligation to provide maintenance to his spouse, his daughter Ella and his step-son Elliot. If he returns to the UK, he would have no place where to live, no job, and no way of providing for his family. He would have to surrender his passport and face criminal prosecution instigated by the biological mother. He would thus be separated from all members of his family for an indefinite time.

«… … … the first court stated that "[a]pplicant also has only himself to blame if he faces criminal charges in the UK and cannot use this argument to persuade the court to decide in his favour". Respondent understands that such a position may be justified within the context of retributive justice, *i.e*., that respondent must suffer the legal consequences of his actions as a form of penalty. However, it must be stressed that respondent was unaware at the time that his transfer to Malta would entail such complications. Additionally, if the consequence of his forced return to the UK is tantamount to a violation of his right to family life, then the fact that he is legally responsible for the present situation is less relevant than the violation itself and does not make the violation less prejudicial to his fundamental rights.

«… … …
«In this case, respondent has no comfort from the UK Central Authority that he would not be prosecuted and would not face a prison sentence on return. On the contrary, the email exchange between the biological mother and the appellant Director reveals that Nicki Lee is intent on pursuing criminal proceedings. »

37. Insofar as the cross-appeal is based on the argument that when "the minor's fundamental right to family life had been violated by a removal order, … the same fundamental right of the parent with whom the child is located had also been violated", it is obviously ill-founded in the light of this court's finding that there has been no violation of the child's right.

38. In addition, plaintiff will surely realise that his family rights are not the only ones involved: the court must balance the rights of all interested parties, including those of the mother who instigated these proceedings precisely because her own family rights had been interfered with. Certainly, when the decision to abduct the child was taken, no regard was had then to the mother's right to a fair hearing and to respect for her family life. This court is not a court of criminal jurisdiction, and it is not its task to "penalise" Mr Bridge; however, in balancing the rights of the parties it surely cannot use the argument that the parent who, by his actions, has opened himself to criminal prosecution, ought, for that very purpose, be preferred to the parent who, in a way, is also a victim of those actions.

39. Moreover, the fact that the child's best interests are paramount – and it has now been determined that the child's interests are best protected by her return in compliance with the Hague Convention – should surely be relevant also in this context, and should not be put aside because the father took the law in his own hands and is now fearing the consequences.

40. This court appreciates Mr Bridge's desire to accompany his daughter when she is returned to England. It also appreciates that this will entail serious inconveniences. However, again, the requirement of mutual trust between the courts of different Member States leads this court to believe that the judicial system of the courts of the country of residence will not impose

unreasonable and unnecessary hardships, in view also of the interests of the child. Indeed, the presence of the child and both parents in the proper jurisdiction will surely expedite the final settlement of the custody issue and also of the matter of the child's future place of residence. It will be in the interest of all concerned that this be done according to law and not by unilateral action of one or other of the parties.

41. Defendants' cross-appeal is therefore dismissed.

42. For the above reasons the court disposes of the appeal as follows:

a. the appeal of the Advocate General and the Department for Social Welfare Standards is upheld: the finding that there was a violation of Ella's right to respect for family life is revoked; the stay of the Removal Order is also revoked; the court finds that there was no violation of art. 8 of the European Convention in respect of Ella, and the Removal Order is therefore upheld;

b. the cross-appeal of plaintiffs Richard John Bridge *proprio et nomine* is dismissed, and the finding that there was no violation in respect of John Bridge *proprio* is confirmed; and

c. all costs are to be borne by plaintiff Richard John Bridge *proprio*.

Giannino Caruana Demajo	Joseph Zammit McKeon
	Robert G. Mangion
President	Mr. Justice
	Mr. Justice

< Final Judgement >

----------END----------