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The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – *Abbott, Neulinger, Zarraga*

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THE HAGUE CONVENTION ON CHILD ABDUCTION
AND UNILATERAL RELOCATIONS BY CUSTODIAL
PARENTS: A PERSPECTIVE FROM THE UNITED
STATES AND EUROPE – ABBOTT, NEULINGER,
ZARRAGA

LINDA J. SILBERMAN*

I. Introduction

The Hague Conference on Private International Law has been at the forefront of efforts to deter child abduction across national borders. The 1980 Hague Convention on the Civil Aspects of Child Abduction¹ created both a structure of cooperation among Central Authorities and a unique remedy of return of the child to achieve that objective. The 1980 Convention has been extremely successful, and eighty-six countries are now Parties to the Convention. The subsequent 1996 Hague Convention on the Protection of Children² built on the success of the 1980 Abduction Convention and provided for rules of jurisdiction and recognition of judgments relating to custody and child protection issues more generally, including specific provisions to address the problem of child abduction.³ It also incorporated provisions that continue the emphasis on cooperation among Contracting States.⁴ Professor Robert Spector, who has contributed so much to the development of family law and to international family law in particular, has been an important voice on the issue of child abduction. He has been a member of various United States Department delegations to

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1. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 19 I.L.M. 1501 [hereinafter Hague Abduction Convention].

2. The formal title of the Convention is the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *opened for signature* Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter Hague Protection of Children Convention]. As of October 1, 2011, the Convention has 33 Contracting Parties.

3. For a general overview of the 1996 Protection of Children Convention, see Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L. QUART. 239 (2000), and more recently, Linda J. Silberman, *Cooperative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions*, 323 RECUEIL DES COURS 390-429 (2006) [hereinafter Silberman, *The Hague Children's Conventions*].

4. See Silberman, *The Hague Children's Conventions*, *supra* note 3, at 425-29.

numerous Hague Special Commissions relating to the negotiation and operation of these Conventions.⁵ As the Reporter for the very successful Uniform Child Custody Jurisdiction and Enforcement Act,⁶ he will now take on the difficult task of revising that Act to implement of the 1996 Protection of Children Convention in the United States.

My tribute to Bob for this Symposium focuses on several recent developments the United States and in Europe relating to the 1980 Convention. Some of those developments I applaud – the *Abbott* decision in the Supreme Court of the United States and the recent *Zarraga* and *Povse* cases decided by the European Court of Justice.⁷ Other developments I find troubling, specifically rulings by the European Court of Human Rights⁸ in the *Neulinger v. Switzerland* and *Raban v. Romania* cases.⁹ I am hoping (and guessing) that Bob Spector will share my views.

II. The Supreme Court Decision in Abbott

A. Background

The important 2010 decision of the Supreme Court of the United States in *Abbott v. Abbott*¹⁰ brought the United States into line with the majority of countries interpreting the meaning of “custody rights” under the Abduction Convention. The concept of “custody rights” is central to the operation of

5. Professor Spector and I were both members of the U.S. delegation to Hague Conference Special Commission that negotiated the 1996 Convention and both of us have been members of various U.S. delegations to other Special Commissions on the operation and oversight of both the Abduction and Protection of Children Conventions.

6. Uniform Laws Annotated, Vol. 9 (Part IA) (1999) and pocket part (2010-11).

7. The European Court of Justice in Luxembourg is empowered to decide issues of European Community Law and its interpretation of the Brussels IIbis Regulation that provides for rules on jurisdiction and recognition of judgments in family law matters is binding and must be applied by all domestic courts in all Member States.

8. The European Court of Human Rights in Strasbourg interprets the European Convention for the Protection of Human Rights and Fundamental Freedoms. Those decisions are binding on the Member States, but the rulings are not directly effective within Member States in the way that decisions of the European Court of Justice are. Also, the European Court of Human Rights may order compensation from a Member State to those whose rights may have been violated.

9. These recent cases in the European Court of Human Rights are contrasted with the recent decisions in the European Court of Justice in Lara Walker & Paul Beaumont, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, 7 J. PRIVATE INT'L L. 231 (2011).

10. 130 S. Ct. 1983 (2010).

the Convention, and the Court's recognition of the need for an autonomous definition is significant.¹¹

The basic feature of the Abduction Convention is the obligation by Contracting States to "return" a child who has been wrongfully removed from or retained in another Contracting State.¹² A removal is wrongful under the Convention if it is "in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident."¹³ The Convention defines "rights of custody" as including (1) rights relating to the care of the person of the child and (2) in particular the right to determine the child's place of residence.¹⁴ Thus the Convention offers a definition of "custody rights," but the nature of the rights each party has is a function of the law of the habitual residence of the child.¹⁵

It is clear from the negotiating history and the Convention itself that a party who has only access or visitation rights does not have "custody rights" under the Convention. Thus violation of a party's visitation or access rights alone does not give rise to a return remedy under the Convention. However, the question that had divided the lower courts in the United States (as well as courts in other countries) was whether a parent could be said to have a "right of custody" if, in addition to having a right of access, he or she was able (under the applicable law) to restrict the other parent from moving a child across an international border without permission of the other parent. This issue of whether a *ne exeat* right was a "right of custody" within the meaning of the Convention¹⁶ had become particularly controversial for several reasons.

11. The need for autonomous concepts in the Abduction Convention, including that of "custody rights" is discussed in Linda J. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAV. L. REV. 1049, 1857-72 (2005).

12. Hague Abduction Convention, *supra* note 1, at art. 12.

13. *Id.*, art. 3.

14. *Id.*, art. 5 (a).

15. The reference in Article 3 to the "rights of custody" under the "law" of the State in which the child was habitually resident includes a reference to the rules of private internal law, i.e. the conflict of laws rules, of the State of habitual residence. See Elisa Perez-Vera, Explanatory Report, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES AND DOCUMENTS DE LA QUATORZIEME SESSION, TOME III (1982).

16. See, e.g., *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), *cert. denied*, 540 U.S. 1068 (2003); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001). The Eleventh Circuit had taken the opposite view. See *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), *cert. denied*, 543 U.S. 978 (2004).

When the Convention was finalized in 1980, and indeed when the United States completed ratification in 1988, the perception was that most of the abductors were non-custodial fathers who felt marginalized from their children, either because they had limited access rights and/or as a practical matter were being denied the opportunity to develop a real relationship with their children.¹⁷ More recently, however, the large majority of abductors have been custodial parents, primarily mothers.¹⁸ The reasons for these abductions are varied, ranging from situations where the woman is trying to escape from domestic violence to situations where the woman, often living abroad, desires to return to her home country where she will have family and a greater support network.¹⁹ Often, the mother will have been given custody of the child, but in many jurisdictions, the right of custody does not include the right to relocate with the child. Thus, although she may be the custodial parent, the mother is not necessarily free to move to another jurisdiction with the child. Because courts and legislators in numerous countries have taken seriously the psychological studies that emphasize the need for a child to have a continuing relationship with both parents, legal regimes have often made a custodial parent's ability to relocate contingent upon the consent of the non-custodial parent, with a possible judicial override in special circumstances, in order to preserve the non-custodial parent's right of access.²⁰ Thus, many custody agreements or awards of custody will contain a restriction on the custodial parent's right to move with the child, and even in the absence of an express restriction, the laws of many countries may include a requirement that both parents consent in order for a child to be removed from a country. Moreover, upon an application to relocate by the custodial parent, courts have been quite restrictive in permitting relocations when they find it would significantly interfere with the relationship of the child and the non-custodial parent.²¹

17. See Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. LAW & POL. 221, 223-24 (2000).

18. For data and several statistical studies showing the profile of an abducting parent, see Peter Ripley, *A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention*, 4 JOUR. PRIV. INT. LAW 443, 454-55 (2008).

19. See Nicola Taylor & Marilyn Freeman, *International Research Evidence on Relocation: Past, Present and Future*, 44 FAM L. QUART. 317, 330 (2010).

20. See generally Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L. QUART. 341, 351-64 (2010); Tim Carmody, *International Judicial Perspectives on Relocation: Child Relocation: An Intractable International Family Law Problem*, 45 FAM. CT. REV. 214, 215-30 (2007).

21. For an overview of the law on relocation in the international context, see Jeremy D. Morely & James H. Maguire, *International Relocation of Children: American and English*

Thus, more and more custodial parents are *unilaterally* relocating – thereby wrongfully removing the child from the habitual residence. In these situations, it is the non-custodial parent who seeks return of the child under the Abduction Convention.

The *Abbott* case presented the precise issue of whether a non-custodial parent who holds a *ne exeat* right preventing the child from leaving the country has a “right of custody” under the Convention that would entitle the non-custodial parent to return of a child when the custodial parent unilaterally removes that child from the habitual residence without the consent of the non-custodial parent (and without such consent being dispensed by a court). The Supreme Court of the United States answered the question in the affirmative in a 6-3 decision, holding that a *ne exeat* right is a “custody right” and endorsing the proposition that the concept of “custody rights” in the Convention calls for an autonomous definition within the context of the Convention.²²

In *Abbott*, the British father and the American mother were living in Chile when the marriage broke down. The Chilean courts granted the mother “daily care and control of the child” and the father was awarded “direct and regular” visitation rights, including every other weekend and the entire month of February. Under Chilean law per statute, Mr. Abbott also had a *ne exeat* right: a right to consent before Ms. Abbott could take her son out of Chile, unless the court found that consent was being unreasonably withheld. Interestingly, Ms. Abbott also obtained her own *ne exeat* order preventing the child’s removal from Chile. In August 2005, while proceedings before the Chilean court were still pending, Ms. Abbott took her son to Texas, without permission from either Mr. Abbott or the court. In February 2006, the mother brought a divorce action in Texas state court and requested a modification of Mr. Abbott’s rights, including her complete right to determine the child’s place of residence. When Mr. Abbott’s request for visitation rights was denied, along with his request to return to Chile with his son, Mr. Abbott filed an action in Texas federal district court, requesting return of his son to Chile under the Convention and ICARA,²³ the federal statute implementing the Convention. The district court denied relief on the ground that Mr. Abbott’s *ne exeat* right did not constitute a

Approaches, INT. FAM. LAW (June 2008), http://www.international-divorce.com/international_relocation_of_children.htm. See also Marly Sattler, *Note: The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction*, 67 WASH. & LEE L. REV. 1709 (2010).

22. *Abbott v. Abbott*, 130 S. Ct. 1983, 1990-91 (2010).

23. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 (2006).

right of custody under the Convention and thus no return was required. The Court of Appeals for the Fifth Circuit affirmed, relying on several other Court of Appeals cases in the United States to that effect.²⁴

The Supreme Court of the United States granted *certiorari* to resolve what it characterized as a conflict among the Circuits on this point. In addition to the conflict among courts in the United States, the highest courts in other jurisdictions, including the House of Lords,²⁵ had recognized *ne exeat* rights as constituting “rights of custody” that would afford a non-custodial parent with such a right the ability to obtain return of the child. Justice Kennedy, writing for a six person majority of the Supreme Court, (which consisted of Chief Justice Roberts and Justices Scalia, Alito, Ginsburg, and Sotomayor) held that a *ne exeat* right held by a non-custodial parent constitutes a right of custody for which the remedy of return could be sought.

B. Analysis of the Majority Opinion

Justice Kennedy’s opinion addressed a number of important issues in resolving that question. He relied not only on the actual text of the Convention but also looked to the objectives of the Convention, citing to both the *travaux préparatoire* and the Perez-Vera Explanatory Report of the Convention. The opinion pointed to both parts of the Article 5 Convention definition of “rights of custody,” which refers to (1) “rights relating to the care of the person of the child” and (2) “in particular, the right to determine the child’s place of residence.”²⁶ The majority, in contrast to the dissent, believed that the “place of residence,” as defined in Article 5, should be understood to encompass the child’s *country* of residence in light of the Convention’s purpose to prevent wrongful removals across international borders.²⁷ This was precisely the argument that Justice Sotomayor had made in her earlier dissent in *Croll v. Croll*,²⁸ where she argued that the specific choice as to whether the child will live in England or Cuba, Hong Kong, or the United States, was precisely the kind of choice that the Convention was designed to protect and that to deny a return remedy for the violation of such a right would “legitimize the very action – removal of the

24. See, e.g., *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), *cert. denied*, 540 U.S. 1068 (2003); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001).

25. *In re D (A Child)*, [2007] 1 A.C. 619 (H.L.) 628, 633, 635, citing to an earlier Court of Appeal decision, *C v. C*, [1989] 1 W.L.R. 654 (C.A.), 658.

26. *Abbott*, 130 S. Ct. at 1990.

27. *Id.* at 1990-91.

28. 229 F.3d 133 (2d Cir. 2000).

child – that the home country sought to prevent”²⁹ and would allow “parents to undermine the very purpose of the Convention.”³⁰ However, even if “place of residence” referred to “street addresses” (as the dissent claimed), the majority observed that the *ne exeat* right meant Mr. Abbott could prevent the child from living at any street address outside of Chile.³¹ Thus a *ne exeat* right properly fit the definition of a right of custody under Article 5. The majority also believed that Mr. Abbott’s joint right to determine the child’s country of residence fell into the category of “rights relating to the care of the person of the child.” Noting that the choice of residence implicated other aspects of the child’s upbringing, such as language, identity and culture, the majority concluded that these were all areas that “related to the care of the child.”³²

The Court acknowledged that a *ne exeat* right did not fit within traditional notions of physical custody, but emphasized that in interpreting an international convention, courts must forego reliance on local definitions of custody in order to accommodate different legal traditions necessarily reflected in an international convention.³³ Further, it explicitly rejected the dissent’s contention that a *ne exeat* right was merely a “right of access,” characterizing that argument as “illogical and atextual.”³⁴ As the majority explained, the joint right to decide a child’s country of residence does not fit the definition of “rights of access,” which is defined in the Convention as a “right to take a child for a limited period of time.”³⁵

Justice Kennedy’s opinion is also significant in that it focused on the importance of ensuring international consistency in interpretation of the Convention and emphasized that courts should forego definitions that rely on local law usages in order to achieve an autonomous definition of Convention concepts. To that end it gave great weight to the view of the Executive Branch, which it noted was “well informed concerning the diplomatic consequences of the Court’s interpretation, including the likely reaction of other Contracting States and the impact on the State Department’s ability to reclaim children abducted from this county.”³⁶ In addition the Court relied upon decisions on the interpretation of “rights of

29. *Id.* at 133.

30. *Id.*

31. *Abbott*, 130 S.Ct. at 1991.

32. *Id.*

33. *Id.*

34. *Id.* at 1992.

35. *Id.*

36. *Id.* at 1993.

custody” by the courts of other Contracting States³⁷ and gave significant weight to the interpretation advocated by the Hague Conference on Private International Law, which filed an Amicus Brief in support of the proposition that a right of access combined with a veto on the removal of a child from the jurisdiction constituted a “right of custody” under the Convention.³⁸

III. *The Impact of Abbott on Relocation*

The Supreme Court’s recognition of *ne exeat* rights as “rights of custody” will obviously strengthen restrictions on relocation by providing the remedy of return when there has been a breach of such a restriction as in *Abbott*. But that is not to say that the Convention has taken a position on the issue of whether or not relocation should be permitted without the consent of the non-custodial party. States have the power to shape through their own laws whether a “right of custody” exists. A country is free to use its own domestic law to give complete freedom to a custodial parent to relocate. In such circumstances, a parent with only access rights would have no say in determining the child’s place of residence; and without a “right to determine the child’s place of residence” there would be no “right of custody” under the Convention definition and therefore no wrongful removal. The *Abbott* decision may be a catalyst for countries to re-examine their laws on relocation now that there is a general consensus that a unilateral decision on relocation in the face of a *ne exeat* restriction is a breach of “custody rights” that will trigger the Convention remedy of return of the child.³⁹

37. The Court cited decisions of the House of Lords, the Israeli Supreme Court, the Supreme Court of Austria, and the Constitutional Courts of Germany and South Africa. *Id.* It also acknowledged dicta by the Canadian Supreme Court that indicated it might not treat a permanent *ne exeat* order as creating a custody right and observed that the courts in France were divided. *Id.*

38. The Court also cited to the Hague Conference publication TRANSFRONTIER CONTACT CONCERNING CHILDREN: GENERAL PRINCIPLES AND GUIDE TO GOOD PRACTICE (2008) and to the *Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention*, reprinted in 29 I.L.M. 219 (1990) and the REPORT OF THE SECOND SPECIAL COMMISSION MEETING TO REVIEW THE OPERATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1993), both of which indicated that *ne exeat* rights were generally now understood to be “rights of custody” within the meaning of the Convention. *Id.* at 1995.

39. With this emerging consensus that unilateral relocations do constitute abductions, more and more attention has been focused on the question of when relocation by the custodial parent should be permitted. *See, e.g.*, CONCLUSIONS AND RECOMMENDATIONS OF

States might be more open to relocation if there were greater assurance that visitation and access arrangements put in place in connection with permission to relocate by the state of habitual residence would be respected, both by the relocating parent and the courts of the state to which the parent and child are relocating. For example, several state statutes in the United States direct a court to consider whether a foreign jurisdiction has a legal process in place to uphold custody agreements and enforce the visitation rights of non-custodial parents in determining whether to allow a custodial parent to relocate to that country with the child. Whether or not the country of relocation is party to the Hague Convention might be a factor that a court considers when it adjudicates relocation disputes, although it is well understood that the enforcement of access provisions under the Abduction Convention is “weak” and that even Hague countries are not always robust with respect to the enforcement of access rights.⁴⁰ What may be more significant in the future with respect to relocation is the impact of the 1996 Hague Protection of Children Convention, which provides for recognition and enforcement of custody and access orders of Contracting States. Although the State of a new habitual residence can modify a prior custody or access order, the Hague Guide to Good Practice on Transfrontier Contact calls for a court in the State of relocation to be “very slow to disturb arrangements concerning contact made by the court which decided upon the relocation.”⁴¹ Moreover, there are other provisions in the 1996 Convention that can be used to encourage cooperation between courts in connection

THE FIFTH SPECIAL COMMISSION REVIEWING THE OPERATION OF THE CHILD ABDUCTION CONVENTION 11 (Oct./Nov. 2006) (encouraging attempt to “seek to resolve differences among legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation”). Two recent international judicial conferences addressed the relationship between international relocation and international abduction and formulated principles to guide States in addressing the problem. See Washington Declaration on International Family Relocation (Mar. 23-25, 2010) and The London Conclusion and Resolutions on Relocation (June 30-July 2, 2010), *reprinted as* Appendix A and Appendix B in Elrod, *supra* note 19, at 369-74. A Special Edition in 2010 of The Judges’ Newsletter, published by the Hague Conference, contains presentations given at the Washington Conference. See THE JUDGES’ NEWSLETTER (Int’l Judicial Conference on Cross-Border Family Relocation, Wash. D.C.) Mar. 23-25 2010, (Special Edition No. 1 2010).

40. See Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 48-50 (2003); Marguerite C. Walter, *Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U. L. REV. 2381, 2386-88 (2004).

41. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, TRANSFRONTIER CONTACT CONCERNING CHILDREN: GENERAL PRINCIPLES AND A GUIDE TO GOOD PRACTICE § 8.5.3 (2008).

with relocation. The decision in *Abbott*, which recognizes *ne exeat* rights as “rights of custody,” will likely encourage custodial parents to seek permission from courts to relocate, thereby focusing even more attention on that issue. In turn, mechanisms to effectuate relocation will be more important than ever, and the provisions for cooperation and communication as well as the enforcement of access rights in the 1996 Protection of Children Convention may be helpful in that respect.

IV. The Neulinger and Raban Decisions in the European Court of Human Rights

The *Abbot* decision in the United States and judicial decisions by national courts in other countries, including those in Europe, have treated a parent’s unilateral decision to relocate in the face of judicial, statutory, or contractual restrictions on relocation as a wrongful removal. But recent decisions by the European Court of Human Rights have undermined the efficacy of the Convention to deal with those types of abductions and have created a climate where unilateral relocations even in the face of express court orders preventing a custodial parent from removing the child, are likely to be encouraged.

*Neulinger v. Switzerland*⁴² involved a unilateral relocation by a custodial mother in the face of a *ne exeat* restriction; *Raban v. Romania*⁴³ concerned a unilateral removal by a custodial mother, who then claimed that there had been consent by the husband or alternatively that return would create a grave risk of harm under Article 13(1)(b).

In *Neulinger*, the abduction occurred after the Israeli courts refused to lift a *ne exeat* order to allow the Swiss mother, who had custody of her son in Israel, to travel with her son to Switzerland, probably because they suspected she would not return. The mother then unilaterally removed the child to Switzerland, where she hid the whereabouts of the child for a period of time; nonetheless, the father was able to find the child and file a Hague petition within a year of the wrongful removal. The Swiss Federal Court, reversing the decisions of a district and appellate cantonal court,

42. *Neulinger v. Switzerland*, App. No. 41615/07, (Eur. Ct. H.R. July 6, 2010). For other critical commentary on *Neulinger*, see Linda J. Silberman, *International Decisions, Convention on the Civil Aspects of International Child Abduction — custody rights — ne exeat rights*, 105 A.J.I.L. 108-114 (2011); Lara Walker, *The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of Neulinger*, 6 J. PRIV. INT. L. 649 (2010).

43. *Raban v. Romania*, App. No. 25437/08 (Eur. Ct. H.R. Oct. 26, 2010).

ordered the child returned by the end of September 2007. Proceedings for enforcement of that order were never commenced because shortly after the order was entered, the abductor and her child brought proceedings in the European Court of Human Rights and challenged the return order as an interference with family life under Article 8 (1) of the European Convention on Human Rights.⁴⁴ The President of the Chamber indicated to the Swiss Government that the return order should not be enforced while those proceedings were pending, and in June 2009, a Swiss district court provisionally granted sole parental authority to the mother for purposes of obtaining identity papers for the child. In January 2009, a seven-person “initial” Chamber decided 4-3 that there had been no violation of Article 8; the Grand Chamber then took up the case and in July, 2010, it determined that Switzerland would be in violation of Article 8 if the order of return were now enforced.

The decision of the Court of Human Rights is troubling, particularly as regards its understanding and interpretation of the Abduction Convention. The Swiss courts had considered the Article 13(1)(b) defense (where return can be refused if there is a grave risk that return would expose the child to harm or otherwise create an intolerable situation) and determined that the mother was able to return with the child to Israel and commence proceedings there. But the Grand Chamber ruled that the situation must be assessed at the time of the enforcement of the return order – that is over two years after the return order was made and more than 4 years after the initial abduction. Then the Grand Chamber determined for itself that the “settlement” of the child in the new country and the difficulties the mother faced if she returned to Israel were sufficient factors to establish that enforcement of a return order would interfere with family life. The Court of Human Rights insisted that it had the responsibility to “ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors” as to what would be best for an abducted child in the context of an application for return. But that inquiry misconceives the role of a court hearing a petition for return, which under the Convention is to ensure the child’s safety and well-being in making an order of return. The assessment of the “entire family situation” is for the courts of the habitual residence to make in its merits determination of custody. The Grand Chamber’s analysis also misconceives the role of

44. Article 8(1) of the European Convention on Human Rights provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” *See* European Convention on Human Rights, *opened for signature* Nov. 4, 1950, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (entered into force Sept. 3, 1953).

Article 12 of the Abduction Convention, which provides a defense to return if the child is settled in its new environment, but only when the Hague return proceedings are commenced after one-year of the wrongful removal or retention. As noted, proceedings under the Hague Convention were instituted in Switzerland well within a year of the abduction; nonetheless the Grand Chamber applied the “well-settled” concept to the time the child had been in Switzerland since the abduction. Would-be abductors may well take heart from the message sent by *Neulinger*: abduct, hide, and prolong proceedings so that the child can be considered “well-settled.”

In a subsequent decision, *Raban v. Romania*, the Court of Human Rights again failed to correctly interpret the Abduction in the context of a unilateral relocation by the mother. In *Raban*, the parties had “joint custody” when the mother took the child from Israel to Romania. The two children had been born in Israel and the parents had lived for a number of years in Israel with their children. Upon divorce, the Israeli court ordered that the parents have “joint custody” of the children. The mother and children purchased a roundtrip ticket to Romania, ostensibly to visit the wife’s mother, but once in Romania the mother announced that she and the children would not return to Israel. The husband filed a Hague petition in Romania and the first instance court in Romania ordered the children returned, rejecting arguments by the mother that the husband had consented that the children could go to Romania and that the state of insecurity in Israel created a “grave risk of harm” to the children. In a 2-1 decision the appellate court reversed, finding that the father had given his consent for the children to remain in Romania until his financial situation improved and that the possibility of terrorist attacks in Israel created a “grave risk of exposing the children to intolerable physical harm.” The father (on both his own behalf and that of the children) filed a petition with the European Court of Human Rights. The European Court considered the question as one which involved the applicants’ right to family life protected under Article 8 of the European Convention on Human Rights. The Court characterized its task as one of determining whether the national court had struck a fair balance between the competing interests of the child, the parents and the public order – within the margin of appreciation afforded to the States in such matters. Relying upon that “margin of appreciation,” the Court of Human Rights found that the national court had sufficient evidence to conclude that the father had given his consent to the relocation and that the children were well-integrated and well taken care of by their mother. The Court emphasized that its task was not to reassess the

evaluation by the domestic authorities, unless there was clear evidence of arbitrariness, which it did not find in the present case.

One might, of course, ask why the same “margin of appreciation” did not suffice to uphold the return order by the Swiss authorities in *Neulinger*. Moreover, what is troubling in both *Neulinger* and *Rabin* is the failure of the Court of Human Rights to correctly interpret and apply the provisions of the Abduction Convention. In relying upon the fact that the children were integrated into their new environment and well-cared for, the Court permitted an inquiry that the Convention authorizes only if a year has elapsed since the alleged abduction and the commencement of proceedings. In both *Neulinger* and *Rabin*, the Court of Human Rights effectively expanded the “grave risk” of harm exception to include a “well-settled” exception that the Convention itself does not condone. Moreover, the Court of Human Rights misconceives the role of a court hearing a petition for return by allowing a broader substantive “best interests” inquiry to be made by the authorities in the refuge state.

These recent decisions by the European Court of Human Rights are disappointing and are in tension with the effective operation of the Hague Abduction Convention. This trend is directly opposite to earlier positions taken by the Court, which had rendered interpretations of the European Convention that reinforced the structure and mechanisms adopted in the Hague Convention.⁴⁵ Numerous rulings by the Court had rejected complaints by abductors that orders of return by domestic courts pursuant to the Convention interfered with family life. In particular, the Court had previously rejected the argument that return of the child in the absence of the custodial mother would create an intolerable situation, thereby providing a defense to return under Article 13(1)(b).⁴⁶ Although stressing “best interests of the child,” the Court had previously emphasized that the child should not be removed unilaterally by one parent and kept away from the other parent,⁴⁷ and appeared to accept that “best interests” are consistent with a narrow construction of the Article 13 exceptions.⁴⁸

45. For an extensive overview of the case law in the European Court of Rights on numerous issues in respect of the Hague Abduction Convention, see the Hague lectures by Paul R. Beaumont, *The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction*, 335 RECUEIL DES COURS 13-103 (2008).

46. See *Maumousseau & Washington v. France* (App No 39388/05) (Eur. Ct. H.R., Jan. 8, 2008). For a more detailed discussion of the *Maumousseau* case in this respect, see Beaumont, *supra* note 44, at 61-64.

47. See Walker, *supra* note 41, at 664; see also Beaumont, *supra* note 44, at 37-39.

48. See Beaumont, *supra* note 44, at 61-63.

V. *The European Court of Justice and the Zarraga Case*

Not all the developments in Europe are so discouraging. In the recent judgment, *Zarraga v. Pelz*,⁴⁹ the European Court of Justice held that the order of return of a child to Spain by the Spanish court — the habitual residence of the child — was immediately enforceable in Germany notwithstanding a German court's refusal to return the child on application for return under the Hague Convention. The Brussels *Ibis* Regulation⁵⁰ sets forth rules for jurisdiction and recognition of judgments in family law matters. Several provisions relate specifically to child abduction issues, including sub-paragraphs 7 and 8 of Article 11 of the Regulation, which provide that if the court of the State that was the habitual residence of the child prior to the wrongful removal requires return of the child, that judgment is enforceable and overrides the refusal to return by another court.⁵¹ In *Zarraga*, the Spanish court, which was the habitual residence of the child and the parents, provisionally awarded custody to the father and access to the mother. The mother moved to Germany, and following a period of access with the child in Germany refused to return the child to

49. Case C-491/10PPU, *Zarraga v. Pelz*. The decision is available on the Hague Incadat data base at HC/E/1043.

50. See Council Regulation (EC)No.2201/2003 of Nov. 27, 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility [hereinafter the Brussels *Ibis* Regulation]. The Brussels *Ibis* Regulation is directly applicable in all EU Members States, with the exception of Denmark, and prevails over national law. For an excellent overview of the Regulation, see Peter McEleavy, *Private International Law: Brussels Ibis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition*, 53 INT. & COMP. L. QUART. 503 (2004).

51. The Regulation imposes certain procedural steps that must be taken to activate the override. Pursuant to Article 11(6) of the Brussels *Ibis* Regulation, a court of a Member State that has issued a decision of non-return based upon Article 13 of the Abduction Convention must immediately transmit a copy of its decision together with the relevant documents to the competent court in the Member States where the child was originally habitually resident. Article 11(7) requires the court of original habitual residence, if it is not already seised of the matter by one of the parties, to notify the parties and invite them to make submissions within three months in order for the court to examine the question of custody. If the left-behind parent succeeds in the court of the original habitual residence in obtaining an order of custody and return of the child, Article 11(8) provides that such a decision prevails over the earlier judgment of non-return under the Abduction Convention and is enforceable pursuant to the enforcement procedures of the Regulation. For a more detailed discussion of these provisions, see Peter McEleavy, *The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?*, 1 J. OF PRIV. INT. L. 5 (2005).

Spain. Further custody proceedings took place in Spain in which neither the mother nor child participated because the Spanish court would not grant a request by the mother that she and the child be allowed to leave Spain were they to attend. During the course of the Spanish proceedings, the father also filed an application in Germany for return of the child under the Hague Abduction Convention. Return was ordered by the first instance court in Germany but overturned on appeal on the basis of the child's objections under Article 13(b)(2). Shortly thereafter, the Spanish court rendered a decision awarding sole custody to the father. Subsequently, the Spanish court issued a certificate pursuant to Article 42 of the Brussels *Ibis* Regulation, which entitles the Spanish judgment to immediate recognition and enforcement in Germany.⁵² The first instance court in Germany refused to enforce the judgment on the ground that the Spanish judgment had been rendered in violation of human rights, specifically Article 24 of the Charter of Fundamental Rights of the European Union, because the child had not been heard in the Spanish proceedings. On appeal by the father, the German appellate court referred the question to the European Court of Justice. The ECJ held the Spanish order enforceable, emphasizing that under Article 11(8) of the Brussels *Ibis* Regulation, the court of the original state of habitual residence has exclusive jurisdiction to decide whether the child is to be returned. Accordingly, the Spanish return order was immediately enforceable and any challenge should have been made in the Spanish court.⁵³

52. Article 42 provides that an order for return of the child shall be recognized and enforceable in another Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin. Under paragraph (2) of Article 42, the judge who delivers a judgment ordering return of the child under Article 11(8) shall issue the certificate only if the child and the parties were given an opportunity to be heard and the court has taken into account the reasons that the court of another Member State had refused return of the child.

53. In a recent article in the *Journal of Private International Law*, Lara Walker and Paul Beaumont criticize the issuance of the Article 42 certificate by Spain in circumstances where the child was not heard in the Spanish proceedings pursuant to Article 42. My own view on that issue is different. Although the objections of the nine-and-a-half year-old child were the basis of the German appellate court's refusal to return, the first-instance court in Germany had found that the child was not sufficiently mature for those views to be given decisive weight. Moreover, the mother would not make the child available in Spain because she was not assured that she could leave Spanish territory if she appeared with the child. The child's views were known, and the Spanish court should be able to decide for itself how much weight to accord those views, particularly in light of the fact that the child had been in the de facto custody of the mother for the past two years. For a different assessment of the issue by Walker and Beaumont, see Walker & Beaumont, *supra* note 9, at 239-48.

The *Zarraga* case follows from an earlier decision of the European Court of Justice, *Povse v. Alpage*,⁵⁴ involving a situation where the parties were unmarried and the mother took the child from Italy where they were living to Austria, despite an order from the Italian court preventing the mother from removing the child from the jurisdiction. Although the Austrian court refused return of the child, the Italian court subsequently issued an order of return pursuant to Article 11(8) of the Brussels *Ibis* Regulation. The European Court of Justice held that the Italian order of return, although in connection with a provisional custody order, came within Article 11(8) and was properly certified. Accordingly, it was required to be enforced in Austria. The Court noted that any argument about changed circumstances should have been raised before the Italian court, which was the court of the State of habitual residence.

It remains to be seen whether there will be any attempt to pursue the *Zarraga* matter before the European Court of Human Rights in light of the “best interests” gloss that the Human Rights Court has imposed on the Abduction Convention. Should that occur, the European Court of Human Rights should acknowledge the division of power between the courts of the Member State of original habitual residence and the Member State to which the child has been taken. This allocation along with a principle of mutual trust and confidence has been reinforced by the European Court of Justice in its decisions in *Zarraga* and *Povse*. Substantive judgments, including concerns about violation of fundamental human rights or any change of circumstances affecting the best interests of the child, are to be raised exclusively before the competent court of the Member State of original habitual residence. The Brussels *Ibis* Regulation rests on the principle that control of the merits is given to the court which has jurisdiction, which also has an obligation to secure and protect fundamental rights.

VI. Conclusion

The Hague Abduction Convention has been a major force in remedying international child abductions, and the Supreme Court’s decision in *Abbott* was an important step in ensuring that the Convention continue in that role. Within the European Community, the Convention has been strengthened through the provisions of the Brussels *Ibis* Regulation that give primacy to an order of return by the habitual residence over a non-return decision by the refuge state, and the European Court of Justice has given a strong endorsement to that proposition in its two recent decisions in *Povse* and

54. Case C-211/10 PPU (Eur. Ct. of Justice, May 3, 2010).

Zarrega. Unfortunately, the European Court of Human Rights has become an intrusive and undermining force in the efforts to remedy international parental child abduction. As noted earlier, in both *Neulinger* and *Rabin*, the Court of Human Rights misconstrued the Convention in various ways and created a substantive “best interests of the child” overlay without regard to the important private international law principle in the Convention that the appropriate court to make that “best interests” assessment is that of the State of the original habitual residence. That is not to ignore the extreme case where return should not be ordered, but the basic architecture of the Convention is sound and should not be altered.