

Re E [2011] EWCA Civ 361

[Eliassen and Baldock v Eliassen and others]

What is at issue?

1. The principle issue for the Supreme Court is the proper approach to be taken to the Article 13(b) defence that a return will not be ordered if it is established that:

“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.”
2. More broadly, the Court has to consider the interaction between the domestic approach to the Convention and that of the European Court of Human Rights following the decision of **Neulinger and Shuruk v Switzerland (Application 41615/07) [2011] 1 FLR 122**.
3. This provision has always been interpreted restrictively but in Neulinger, the European Court of Human Rights gave the impression that a fuller enquiry into the welfare aspects of an Article 13 (b) defence than the UK courts have to date been prepared to undertake ought be made.

The Pertinent Facts

4. On the 29th November 2010 Pauffley J granted the Father’s application for a return order under the provisions of the Hague Convention.
5. On the 6th December 2010 an appellant’s notice was filed. By Order of Black LJ on the 8th December the order requiring the return of the 2 children by the 9th December was stayed.
6. The appellant’s notice advanced 2 grounds:
 - i. That the Judge had been wrong to reject the Mother’s defence under Article 13(b) of the Convention when necessary safeguards identified by the medical expert had not been put in place
 - ii. The Judge had failed to apply the decision of the European Court of Human Rights in the case of Neulinger.
7. The first ground was dealt with swiftly by Thorpe LJ and dismissed in a few paragraphs.

Setting the scene

8. In relation to the second ground of appeal, Thorpe LJ outlined that in the field of international family law practitioners were dealing with instruments from one of four law givers
 - i. The Council of Europe
 - ii. The European Union
 - iii. The United Nations
 - iv. The Hague Conference
9. Difficulty is created not just because two are regional and two global but three of them are law givers by the creation of conventions which are then available to nations to ratify and internalise within their own domestic law which in turn creates rights and obligations to the other nations that have done the same. Conversely, the European Union imposes international law on Member States by Regulation or Directive.
10. This, on any viewpoint, creates a complicated scenario, what Thorpe LJ would describe as “*a little haphazard*”. Confusion arises as to which one of the four ought be invoked in particular circumstances and the worst thing possible would be an outright conflict between two or more.

The Problem

11. The case of **Neulinger** as we have already seen was not so much about whether a child ought be returned or not but centred around the significant issue of enforcement. The Mother argued that there had, in ordering a return of the child, been a breach of her and her sons right to family life as guaranteed by Article 8, together with violation of Article 6 on the basis that the Swiss court had adopted an unduly restrictive interpretation of the exceptions to a return order under the Hague convention.
12. Following the Mother’s application to the Court in Strasbourg, it indicated to the Swiss government that “*it was desirable, in the interest of the parties and for the proper conduct of the proceedings before the court, no to enforce the return . . .*”
13. The majority of the Strasbourg Court found there had been no violation of Article 8. On 31st March 2009 a referral was made to the Grand Chamber and they gave Judgment on the 6th July 2010.

14. In that judgment a number of “*general principles*” were set out which caused “*a considerable stir*”.
15. These principles were:
- i. The Convention cannot be interpreted in a vacuum, but, account is to be taken of any relevant rules of international law.
 - ii. The positive obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in light of the Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction.
 - iii. The Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8.
 - iv. The decisive issue is whether a fair balance between the competing interests at stake, namely those of the child, of both parents and of public order have been struck, within the margin of appreciation afforded to States in such matters (keeping in mind that the child’s best interests must be the primary consideration).
 - v. “The child’s interests” are primarily considered to comprise of two aspects:
 - a. to have his/her ties with his/her family maintained, unless it is proved that such ties are undesirable.
 - b. to have his or her development in a sound environment ensured. (this will depend on a variety of individual circumstances, in particular his/her age and level of maturity, the presence or absence of his/her parents and his environment and experiences.
 - vi. A child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that very instrument, of a number of exceptions to the obligation to return the said child.
 - vii. The task to assess those best interests in each case is therefore primarily one for the domestic authorities. It is they who have the benefit of direct contact with the persons concerned. “To that end they enjoy a certain margin of appreciation, which

remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power”.

- viii. The Court must ensure that the decision – making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully.

“to that end 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.”

The Quartet

15. The Court of Appeal also had to have in mind the four key judgments of the European Court of Human Rights on the particular issue at hand (one of which was **Neulinger**).

16. The case of **Maumousseau and Washington v France (application 39388/05)** was decided on the 6th December 2007 and concerned a Mother wrongfully retaining the parties child in France. Enforcement of the return order resulted in dramatic scenes and the Mother made an application to the European Court of Human Rights alleging violation of Articles 6 and 8 of the Convention. This application failed with the Court observing that:

“ . . . the concept of the child’s “best interests” is also a primary consideration in the context of the procedures provided for in the Hague Convention. Inherent in that concept is the right for a minor not to be removed from one of his or her parents and retained by the other, that is to say by a parent who considers, rightly or wrongly, that he or she has equal or greater rights in respect of the minor”

17. The Court went on to re-emphasise its agreement with the underlying philosophy of the Hague Convention and rejected the argument that a court dealing with a request for the return of a child under the Hague Convention conducts an incomplete assessment of the child’s situation and therefore of its “best interests”.

18. The Court also considered the case of *Raban v Romania (25437/08)* in which judgment was given on the 26th October 2010 and where no violation of Article 8 was found.
19. Finally, the case of **Van den Berg and Sarri v The Netherlands (7239/08)** a decision of the 2nd November 2010 which again found no violation of Article 8.
20. Having considered these cases, along with **Neulinger**, the Court of Appeal found little support for the view that the decision of **Neulinger** requires judges to adopt a different approach in the application of the Convention defences and Article 13(b) in particular.
21. Of key importance to the court was the time lapse in *Neulinger*, for as Thorpe LJ noted:
- “ . . . before the Grand Chambers the key issue was not whether The Hague return order had violated the applicant’s rights but whether their right would be violated if it were now to be executed. Obviously after a delay of three years there had been the most significant changes of circumstances.”*
22. In reaching a decision the Court of Appeal accepted the submissions made on behalf of the AIRE Centre that:
- “For the risk to be sufficiently serious to fall within the scope of Article 13(b), it must be at the very high end of the spectrum of interferences covered by Article 8. Where it is the family situation which is at issue, an investigation into the family situation is required as well as an investigation into other circumstances which might be relevant to deciding whether the situation falls within the scope of Article 13(b). However that investigation is limited to the deciding court satisfying itself that the return to the jurisdiction will be compatible with the Convention. It does not require the same in depth investigation as is required when disputed living arrangements for a child are being decided by a court in the jurisdiction properly seised of such matters”.*
23. The Court concluded by emphasising that on a proper investigation of *Neulinger* and *Raban* any judge evaluating grave risk of harm in the context of an Article 13(b) defence must weigh the immediate and not the ultimate best interests of the child. *(emphasis added)*

24. The decision of the Supreme Court on this matter is now awaited and we will soon see if the UK courts have in fact been striking the right balance between upholding the aims of the Convention and the aim of having regard to a child's welfare.

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