EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

The best interests of the child in the recent case-law of the European Court of Human Rights[1]

Franco-British-Irish Colloque on family law

Dublin, 14 May 2011

Mesdames et Messieurs, Monsieur le Chief Justice of Ireland,
Chers amis,

Je suis honoré de prendre la parole au cours du colloque franco-irlando-britannique sur le droit de la famille. Je n'ai pas pu suivre les travaux de la journée d'hier, mais je sais que, aussi bien en ateliers qu'en séance plénière, ils ont été actifs et très intéressants. Je vais prononcer mon exposé en anglais. Que mes collègues français, avec à leur tête mon ami Jean-Marc Sauvé, Vice-président du Conseil d'Etat, me pardonnent si j'oublie quelques instants la langue de Molière, et que les autres participants soient indulgents si j'écorche celle de Shakespeare !

Je suis aussi très honoré de pouvoir situer mon intervention de ce matin au cours de ma visite officielle en République d'Irelande. Elle a été organisée par mon ami le Chief Justice John Murray. C'est un plaisir de recevoir le fameux accueil irlandais, si chaleureux. Cent mille "*welcomes*", comme on dit en gaélique. I am sure that all of you who have travelled from neighbouring jurisdictions will agree.

The theme of our colloquy is a very topical one. Across Europe we have been observing and discussing fundamental changes in the traditional model of the family for twenty or thirty years at least. These changes in attitudes and behaviour, which have been accompanied by major advances in medical technology, have left traditional family and civil law in need of development, adaptation and revision. The number of such cases arriving at the Cour in Strasbourg is growing. Applicants who feel that their particular personal and family situations are not adequately recognised in national law invoke the protection of the European Convention on Human Rights. As the Court in Strasbourg has said from the beginning, the Convention is a "living instrument", to be interpreted in the light of present-day conditions. This is the basis of the evolutive character of the case-law of our Court.

Within this increasingly diverse social tableau, I wish to speak this morning of a constant – the child and its best interests.

The principle of protecting the best interests of the child has steadily moved to the forefront of legislation and case-law, in Europe and elsewhere. The pre-eminent place of the child, be it

[1] I am glad to be able to pay a tribute to Mr John Darcy, a member of my private office, for his precious assistance in the preparation of this speech.

in the family or other contexts, is widely reflected in law and case-law at both the national and the international levels. It is the cardinal principle that stands at the core of the most widely-accepted human rights treaty in the world - the United Nations International Convention on the Rights of the Child, signed in New York in 1989. Article 3 of the Convention reads as follows:

> *"1. In all actions concerning children, whether undertaken by public or private social welfare, institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".* [emphasis added]

Of course, the United Nations Convention is not directly judicially reviewed by our Court, but it constitutes an important source of inspiration, and a key for adjudicating cases, mainly when they concern Article 8 of the European Convention on Human Rights (right to respect for private and family life).

I am aware that here in Ireland this has been the subject of much reflection and discussion in recent years, with plans to envisage a children's rights referendum in the near future.

In the Strasbourg case-law, the principle of giving priority to safeguarding the best interests of the child is firmly established. The European Court has invoked it in different contexts over the years, beginning with the re-uniting of children taken into social care with their parents (e.g. *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A, and *Nuutinen v. Finland*, no. 32842/96, ECHR 2000-VIII).

The case that stands out in this context is, in my opinion, last year's judgment of the Grand Chamber in the case of *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, ECHR 2010-…). It stands out because of the detailed consideration given in that judgment to the best interests principle, which makes it the leading authority on this point.

I will very briefly recall the facts, which were rooted in – as so often in family cases – marital conflict and breakdown. The case was brought by a mother and her young son – Isabelle Neulinger and Noam Shuruk, born in Israel in 2003. The mother had unlawfully removed the boy from Israel in 2005 and returned to her native Switzerland. The boy's father – her ex-husband – had sought the child's return despite his apparent lack of interest in his son. The mother raised a defence (or exception) under Article 13b of the Hague Convention on the Civil Aspects of Child Abduction. She argued that she herself could not return to Israel, since she would run the risk of prosecution and conviction for abduction. So if the boy were to eb returned, it would be alone. As he had not seen his father for two years, and the father's behaviour was, to say the least, problematic, this would be contrary to the best interests of the child.

These arguments were accepted by the Swiss courts at first and second instance, and they refused the request to return the boy. But they were ultimately over-ruled by the Federal Court (*le Tribunal fédéral*). It emphasised that the exceptions foreseen in the Hague Convention were to be interpreted restrictively, and that it was for the parent opposing return to establish them. Ms Neulinger had not discharged her burden of proof, since her claims about prosecution and of having no means of support in Israel had not been substantiated. The Federal Court ordered the return to take within 9 days of the judgment being served. The mother rapidly submitted an application to Strasbourg. She also filed a Rule 39 request for an interim measure to prevent return until the case had been decided. This was in September

2007. In January 2009, a Chamber of the Court gave judgment, finding – by a 4/3 majority – that there had been no violation of Article 8. In June of that year the case was accepted for re-hearing in the Grand Chamber. Judgment was given on 6 July 2010.

The Grand Chamber came to a different conclusion from the Chamber. This did not mean disavowing the decision of Switzerland's highest court (or even of the Chamber). The Federal Court's decision was accepted as being within the national authorities' margin of appreciation. It was not for the European Court to conduct the Hague Convention proceedings itself, or to scrutinise the conclusions of the Swiss courts in the manner of a court of further appeal (fourth instance).

And yet the Grand Chamber did directly review the facts of the case, and did, effectively, prevent the return of the boy to Israel.

The crucial factor was time. Taking the approach used in deportation cases, the Court adopted a contemporaneous perspective. It considered both applicants' situation and interests at the time of its judgment, which came nearly 3 years after the Federal Court ruling and 5 years after the illegal removal of the boy.

The passage of time takes on special negative significance in child abduction situations. It can have irremediable consequences on relations between parent and child. In recognition of this, and with the intention of countering it, the Hague Convention lays great emphasis on speed and diligence in applying its procedures for the return of children. The European Court has, in effect, imported this requirement into Article 8 of the Convention (e.g. *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECHR 2000-I, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, 24 April 2003). In child abduction cases, where it has mainly been the "dispossessed" parent complaining, the Court has used the contents of the Hague Convention as a detailed yardstick. Failure to take the steps spelled out in that Convention will strongly suggest a violation of Article 8, as quite a few decided cases show (*Maire v. Portugal*, no. 48206/99, ECHR 2003-VII, *Monory v. Romania and Hungary*, no. 71099/01, 5 April 2005).

The situation was different in *Neulinger*. There was no suggestion of a lack of diligence on the part of the Swiss, or Israeli, authorities. In actual fact, most of the waiting time was when the case was under consideration at two levels of jurisdiction in Strasbourg. But it would have been unfair to make the applicants bear the consequences of this, as the situation was not really of their making, beyond the simple fact of introducing an application and requesting referral to the Grand Chamber.

With the best interests of the child uppermost in its mind, the Grand Chamber considered the boy's current situation – he was highly integrated in Switzerland. To remove him would cause him significant disturbance, and this must weigh heavily in the balancing exercise. On the other side of the scales, the benefits to the child of being returned without his mother to a rather uncertain family situation in Israel were scant. The reading on the scales was clear; the Grand Chamber stated it was "not convinced that it would be in the child's best interests for him to return to Israel". And it held (by 16 votes to 1) "that, in the event of the enforcement of the Federal Court's judgment, there would be a violation of Article 8 of the Convention in respect of both applicants".

The *Neulinger* judgment raised questions in certain quarters. First of all, it was criticized by the "*Tribunal fédéral*" itself, when some of its members came to the Court at Strasbourg last

December for a working seminar. There was also concern at the possible implications of the judgment for the application of the Hague Convention (an international instrument) in States parties to the ECHR (a regional one). This stemmed from a statement in paragraph 139 of the judgment, where the Court said it

"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".

It is possible to read this passage as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation. But that is over-broad – the statement is expressly made in the specific context of proceedings for the return of an abducted child. The logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full.

I do not need to go into the matter in any detail. It has recently been explored at length by Lord Justice Thorpe and his colleagues on the English Court of Appeal, Lord Justice Aikens and Lady Justice Black. In the judgment in the *Eliassen* case last month, they reviewed the relevant European case-law and concluded that it is not at odds with the purpose or design of the Hague Convention. As they noted, the *Neulinger* judgment does not depart from the earlier Chamber judgment in *Maumousseau and Washington v. France*, no. 39388/05, ECHR 2007-XIII. In that case the European Court stated that it was "entirely in agreement with the philosophy underlying the Hague Convention". *Neulinger* does not suggest otherwise.

Nor does it call into question the methodology of those national courts who take an explicitly restrictive approach to the permitted defences/exception in Article 13b. In *Maumousseau and Washington*, Mme Maumousseau criticised the assessment of the French courts as incomplete. The European Court rejected this strongly, observing that such an argument would render the substance and primary purpose of the Hague Convention meaningless.

Neulinger and Shuruk does not therefore signal a change of direction at Strasbourg in the area of child abduction. Rather it affirms the consonance of the overarching guarantees of Article 8 with the international text of reference, the Hague Convention. Indeed, it is hard to think of a better example of how the Strasbourg Court looks to a specific international text in order to inform its interpretation of more general Convention provisions (as per Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties). I would point out that the Hague Convention did not create any court or official body to provide authoritative interpretation of its provisions.

Lord Justice Thorpe and his colleagues also looked at two more recent child abduction cases decided at Strasbourg:

- the judgment in *Raban v. Romania*, no. 25437/08, 26 October 2010, finding no violation where the domestic courts decided that the children should not be returned to their father in Israel;
- and the decision in *Van Den Berg and Sarrí v. The Netherlands*, where the Court rejected the complaint of the mother about the return of her daughter to Italy.

Taken with *Maumousseau* and *Neulinger*, these four cases were described as a "quartet". I do hope that the quartet has not generated any cacophony !

I can provide an update regarding the *Raban* case. There the domestic court decided against the return of the children firstly because it doubted from the facts that this was really a situation of unlawful retention. It also relied on the children's successful integration into their new surroundings in Romania – their mother's country. In finding that there was no violation of Article 8, the Chamber at Strasbourg noted *inter alia* that the Romanian court had paid "particular consideration to the paramount interests of the children".

The applicant requested referral of the case to the Grand Chamber. Somewhat unusually, his request was supported by two States, Germany and the United Kingdom. These argued that the implication of *Raban* seemed to be that if a national court is to meet its positive obligations under Article 8 of the ECHR when applying the Hague Convention, it must look to the general welfare of the child and act in accordance with its long-term interests. This would not be consistent with the Hague Convention.

At the time of the *Eliassen* judgment, the referral request was still pending. It has since been considered and rejected, giving the *Raban* judgment the quality of *res judicata*. According to Article 44 § 2 (c) of the Convention, a Chamber judgment becomes final when the panel of the Grand Chamber rejects the request to refer the case to the Grand Chamber.

The best interests principle is, as I indicated earlier, of broad application. My colleague and friend, judge Anne Power will no doubt discuss it further later this morning when she speaks on the topic of the recognition of new families. She and I both listened to the arguments put forward at a hearing in Strasbourg last month in the case *Gas and Dubois v. France*. This is at least partly what their application is about. Mme Gas is the long-time companion of Mme Dubois, who gave birth to a daughter eleven years ago conceived through artificial means. While they have lived together ever since as a family unit, they complain that it is not possible for Mme Gas to establish a parental link to the girl by the procedure of simple adoption, this being available only to married couples. Suffice it for me to say that the applicants, the Government and the intervening third parties framed their arguments in terms of the girl's best interests (a video recording of the hearing, with English translation, can be viewed on the Court's website). By the way, our system of recording and webcasting our Court's hearings was established with the generous assistance of Ireland, and we are very grateful to it. I take this occasion to express my thanks to the Irish authorities publicly.

This leads me to remark that while the prominence of the best interests principle is well established, what it requires in a given set of circumstances must be ascertained case by case, with all Convention-protected rights and interests being brought into the balancing exercise. The role of the European Court is <u>not</u> – as you know, and as we often repeat at Strasbourg – a fourth instance one. Rather, the principle of subsidiarity gives it a role that, while unique, is subsidiary. This is not a merely a point of abstract theory. There are certain types of case, and cases involving children are probably the clearest example, where direct contact with the

persons involved is critical. It has happened that in child custody or abduction cases, the European Court also hears the other parent (*Sylvester v. Austria*, *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII). But it remains rare because, in principle, the case is between the applicant(s) and the defending State, not between private persons. And while the views of the child or children, where known, will be taken into account (e.g. *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, ECHR 2004-V) there is no practice at Strasbourg to organise separate representation of children in cases involving them. This is a subject of reflection for the future, at least for the most sensitive cases.

The remark has been put to me in Strasbourg by one Government Agent that the distance from the European Court to a district or local court dealing with family disputes is a very long one. Our Court is aware of that, and so concentrates instead on aspects that lend themselves more readily to external, *a posteriori* scrutiny – the diligence of the authorities, the opportunities accorded to the persons concerned to defend their interests, procedural fairness, the giving of sufficient and adequate reasons for interfering with respect for family life. Only in extreme cases will the Court directly criticise the actual decision on the merits that has been made by the competent national authorities (e.g. *Haase v. Germany*, no. 11057/02, ECHR 2004-III).

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I will conclude my remarks at this point, since there is much ground to cover this morning. Time permitting, I will be happy to take any comments or questions from the floor.

Thank you very much for your attention.