



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

1959 · 50 · 2009

CASE OF NEULINGER AND SHURUK v. SWITZERLAND

(Application no. 41615/07)

JUDGMENT

STRASBOURG

8 January 2009

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
06/07/2010**

This judgment may be subject to editorial revision.

In the case of Neulinger and Shuruk v. Switzerland,

The European Court of Human Rights, sitting as a Chamber composed of:

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 41615/07) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Swiss nationals, Ms Isabelle M. Neulinger and her son Mr Noam Shuruk (“the applicants”), on 26 September 2007.

2. The applicants were represented by Mr M. Lestourneaud, a lawyer practising in Thonon-les-Bains (France). The Swiss Government (“the Government”) were represented by their Deputy Agent, Mr A. Scheidegger.

3. The applicants alleged in particular that by ordering the return of Noam Shuruk to Israel, the Federal Court had breached their right to respect for their family life as guaranteed by Article 8, taken separately and in combination with Articles 3 and 9 of the Convention. They also claimed that there had been a violation of Article 6, alleging that the Federal Court had adopted an excessively restrictive interpretation of the exceptions to the Swiss authorities' obligation to order the second applicant's return and in doing so had failed to take account of his best interests.

4. On 27 September 2007 the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, not to enforce the return of Noam Shuruk.

5. On 22 November 2007 the Court decided to give notice to the Government of the part of the application concerning the complaint under Article 8. In accordance with Article 29 § 3 of the Convention, it further decided that the admissibility and merits of the case would be examined at the same time. It also decided to give the application priority under Rule 41.

6 The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

7. Written comments were received from Mr Shai Shuruk, the second applicant's father, who had been granted leave under Rule 44 § 2 to intervene as a third party.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8 The applicants were born in 1959 and 2003 respectively and live in Lausanne (Canton of Vaud, Switzerland).

9 The facts as submitted by the parties may be summarised as follows.

10. The first applicant, who is Jewish, decided in 1999 to settle in Israel. There she met an Israeli national, who is also Jewish, and married him on 23 October 2001 in Israel. They had a son, Noam, who was born in Tel Aviv on 10 June 2003. He has Israeli and Swiss nationality.

11. According to the applicants, in the autumn of 2003 the child's father joined the Jewish "Lubavitch" movement, which they have described as an ultra-orthodox, radical movement that is known for its zealous proselytising.

12. Marital difficulties then arose, and the first applicant, fearing that her husband would take her son to a "Chabad-Lubavitch" community abroad for religious indoctrination, applied to the Tel Aviv Family Court for a *ne exeat* order to prevent Noam's removal from Israel. On 20 June 2004 the court made a *ne exeat* order that was to expire when the child attained his majority, that is to say on 10 June 2021, unless annulled by the court in the meantime.

13. In an interim decision of 27 June 2004, the same court granted "temporary custody" of the child to the mother and requested the Tel Aviv social services to draw up an urgent welfare report. The "guardianship" of the child was to be exercised jointly by both parents.

14. In a decision of 17 November 2004, the court, on the recommendation of a social worker, confirmed the first applicant's "temporary custody" of the child and granted a right of "visitation" to the father.

15. On 10 January 2005 the Israeli social services were obliged to intervene. They instructed the parents to live apart, in the interest of the child. That same day, the first applicant filed a complaint with the police accusing her husband of assault.

16. In an injunction of 12 January 2005 the competent judge of the Tel Aviv Family Court, upon an urgent application lodged earlier that day by the first applicant, prohibited the father from entering the child's nursery school or the first applicant's flat, from disturbing or harassing her in any manner whatsoever, and from carrying or possessing a weapon. Restrictions were also imposed on the visitation right granted to the father, who was now only authorised to see the child twice a week under the supervision of the social services at a contact centre in Tel Aviv.

17. The couple's divorce was pronounced on 10 February 2005 with no change in the attribution of guardianship.

18. As the father had defaulted on his maintenance payments to the first applicant, an arrest warrant was issued against him on 20 March 2005.

19. In a decision of 27 March 2005 the competent judge of the Tel Aviv Family Court dismissed an application lodged by the first applicant for the annulment of the *ne exeat* order prohibiting the removal of the second applicant from Israel.

20. On 24 June 2005 the first applicant secretly left Israel for Switzerland with her son.

21. On 27 June 2005 Noam's father contacted the Israeli Central Authority, which was unable to locate the child until 21 May 2006, when Interpol Jerusalem forwarded him a note from Interpol Berne indicating that the first applicant was in Switzerland.

22. On 22 May 2006 the Israeli Ministry of Justice transmitted to the Swiss Federal Office of Justice a request for the return of the child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the "Hague Convention"). In support of its request it indicated, among other things, that Interpol Berne had notified it only the day before that Noam and his mother were living in Lausanne and that the latter had applied for the renewal of her Swiss passport.

23. In a decision of 30 May 2006, delivered upon an application by the child's father, the Tel Aviv Family Court observed that the child was habitually resident in Tel Aviv and that, as of 24 June 2005, the date of the applicants' departure, the parents remained joint guardians of their son, with the mother having temporary custody and the father a right of visitation. The court held that the child's removal from Israel without the father's consent had been wrongful within the meaning of Article 3 of the Hague Convention.

24. On 8 June 2006 the child's father lodged an application with the Lausanne District Justice of the Peace seeking an order for his son's return to Israel. He requested in particular, as an extremely urgent measure, that the Lausanne Passport Office be ordered to retain the applicants' Swiss passports.

25. On 12 June 2006 the Justice of the Peace made an order allowing the application by Noam's father for an extremely urgent measure.

26. Following a new application for an extremely urgent measure, faxed by the child's father on 27 June 2006, the Justice of the Peace, in a provisional measures order made that same day, ordered the first applicant to deposit her and Noam's passports in the registry of the District Justice of the Peace immediately, on pain of criminal sanctions for refusal to comply with the decision of an authority.

27. The first applicant, assisted by counsel, and the legal representative of the father, whose obligation to appear in person had been waived, made representations to the Justice of the Peace on 18 July 2006.

28. In a decision of 29 August 2006, after a hearing, the father's application was dismissed by the Lausanne District Justice of the Peace. The court took the view that, whilst the child's removal had been wrongful within the meaning of Article 3 of the Hague Convention, it had to apply Article 13, first paragraph, sub-paragraph (b), of that Convention, as there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

29. On 25 September 2006 the father appealed against that decision before the Guardianship Division (*chambre des tutelles*) of the Vaud Cantonal Court, which ordered an expert's report and for that purpose appointed Dr. B., a paediatrician and child psychiatrist. In his report, delivered on 16 April 2007, he stated that the child's return to Israel with his mother would expose him to a risk of psychological harm whose intensity could not be assessed without ascertaining the conditions of that return, in particular the conditions awaiting the mother and their repercussions for the child; that the return of the child without his mother would expose him to a risk of major psychological harm; and that the maintaining of the *status quo* would also represent for the child a risk of major psychological harm in the long term.

30. On 30 November 2006, as the first applicant had left the country, the competent judge in Tel Aviv cancelled the indictment for domestic violence that she had initiated in January 2005.

31. On 22 May 2007 the Guardianship Division of the Vaud Cantonal Court dismissed the father's application. Having carried out an additional investigation, and taking into account the expert's report by Dr. B. dated 16 April 2007, it took the view that the child's return carried a grave risk of psychological harm, whether or not he was accompanied by his mother, and would also place him in an intolerable situation. It therefore considered that the conditions of Article 13, first paragraph, sub-paragraph (b), of the Hague Convention were met. Finding however that the child could not be deprived of all relations with his father, it prescribed measures with a view to rebuilding the personal relationship between them.

32. The father lodged a civil appeal with the Federal Court seeking the quashing of the Cantonal Court's judgment and the return of the child to Israel. He alleged that the court had misapplied Article 13, first paragraph,

sub-paragraph (b), of the Hague Convention, principally, and Article 3 of the United Nations Convention on the Rights of the Child, secondarily.

33. In a decision of 27 June 2007, the President of the appropriate division of the Federal Court granted the father's request for immediate suspension of the judgment.

34. In a judgment of 16 August 2007, served on the first applicant's lawyer on 21 September 2007, the Federal Court allowed the father's appeal. The relevant passages of its judgment read as follows:

“3. The object of the Hague Convention on the Civil Aspects of International Child Abduction is to secure the prompt return of children wrongfully removed to or retained in any Contracting State (Article 1, sub-paragraph (a)). The removal or the retention of a child is to be considered wrongful where 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 (Article 3, sub-paragraph (a)). 'Rights of custody' include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5 (a)). In the present case it is not in dispute that the child's removal to Switzerland was wrongful, since the father retained, jointly with the respondent, the right of 'guardianship', which under Israeli law includes the right to decide on the child's residence. Moreover, since the request for return was presented within a period of one year after the removal, the respondent cannot deny either that, in principle, pursuant to Article 12 of the Hague Convention, the child's prompt return should be ordered. The only matter in dispute is therefore the question whether an exception to that return may be applied under Article 13, first paragraph, sub-paragraph (b), of the Hague Convention.

4. According to the appellant, by refusing to order the child's return to Israel, the Cantonal Court misapplied Article 13, first paragraph, sub-paragraph (b), of the Hague Convention.

4.1 Under Article 13, first paragraph, sub-paragraph (b), of the Hague Convention, in respect of which the Federal Court is entitled to examine matters of compliance freely (section 95(b) Federal Court Act), the judicial authority of the requested State is not bound to order the child's return when the person opposing that return establishes 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.

The exceptions to return provided for under Article 13 of the Hague Convention must be interpreted restrictively; the parent who has abducted the child cannot take advantage of his or her unlawful conduct (judgment 5P.71/2003 of 27 March 2003 recital 2.2, in FamPra.ch 2003 p. 718). Only grave risks must be taken into consideration, excluding any grounds relating to the parents' educational capacities, as the purpose of the Hague Convention is not to attribute parental authority (Federal Court judgment 131 III 334 recital 5.3; 123 II 419 recital 2b p. 425). An exception to return under Article 13, first paragraph, sub-paragraph (b), of the Hague Convention, is therefore not open to consideration unless the child's intellectual, physical, moral or social development is under serious threat (judgment 5P.65/2002 of 11 April 2002 recital 4c/bb in FamPra.ch 2002 p. 620 and the reference cited therein). The burden of proof lies with the person who opposes the child's return (ibid., recital 4b, in FamPra.ch 2002 p. 620 and the reference cited therein).

4.2 The Cantonal Court observed that the case concerned a very young child in the custody of his mother, who had always provided for him. The father, for his part, lived in a religious community where he was fed, and from his activity as a sports and art teacher he had a monthly income of only 300 [Swiss] francs. The custody of the child had been withdrawn from him on account of the atmosphere of fear that he had created at the family home. For the same reason, the Israeli courts ordered him to live separately and prohibited him from approaching the mother's flat. Before the child's removal to Switzerland he had only had a restricted right of visitation, limited to two hours twice a week, under the supervision of the Israeli social services. Concerning the conditions of a possible return of the child without his mother, according to the information provided by the Israeli Ministry of Justice on 12 March 2007, the father, who now shares a flat with one other tenant and still works in an institution for religious education, would be prepared to take care of the child. Taking into account the laconic and not very reassuring nature of this information, together with the expert's report by Dr [...], a psychiatrist, the Cantonal Court considered that a return to Israel involved a risk of psychological harm for the child and might place him in an intolerable situation, whether or not he was accompanied by his mother. The court added that, in view of the father's low income, the return to Israel of the respondent would also undermine the child's economic stability and the mother would have to find a job in order to provide for them both.

In his appeal, the appellant does not criticise the Cantonal Court's finding that there was a grave risk that the child would be exposed to psychological harm if he returned to Israel without his mother. He is of the opinion, however, that such a risk would not exist if the child's mother accompanied him to Israel, as could be reasonably expected of her. As regards that latter hypothesis, the judgment of the Cantonal Court fails to adduce any evidence of such a grave risk of harm, or of any intolerable situation for the child. The expert psychiatrist failed, in particular, to address that question, simply explaining that the risk could not be assessed without ascertaining the conditions of a possible return. As to the appellant's aggressive behaviour towards the respondent, it does not appear from the Cantonal Court's judgment that the child would be threatened directly or indirectly as a result of witnessing such violence against his mother. She stated that the father had complied with the arrangements for his right of visitation and that the visits had gone well. The social worker appointed to supervise the right of visitation had described as marvellous the father-son relationship as established just before the child's abduction by his mother. She has not claimed that the appellant breached the judicial instructions which required him not to approach her flat or to disturb and/or harass her. As to the considerations relating to the father's low income and his ties with the religious community 'Lubavitch', as they stand they do not indicate a grave risk that the child would be exposed to harm within the meaning of Article 13, first paragraph, sub-paragraph (b), of the Hague Convention. Whilst such considerations may help to determine which of the two parents offers the best educational capacities for the purpose of deciding on the attribution of the right of custody – a matter that is decided by the judicial authorities of the place of habitual residence (Article 16 of the Hague Convention) – they are not pertinent, however, for a decision about the return of a child after a wrongful abduction (see recital 4.1 above).

As to the mother's threat not to return to Israel, the judgment of the Cantonal Court did not deal at all with the reasons for her refusal, whereas it should have established the existence of objective circumstances justifying that attitude. The Cantonal judges quoted the expert psychiatrist who had referred to the 'judicial risks' that would be incurred in the event of a return to Israel, without any indication as to whether the

respondent actually faced a prison sentence as a result of the abduction. Supposing that such a risk were proven, she could not be expected to return to Israel with the child – and that would accordingly rule out the return of [the child] in view of the major psychological harm that would be caused to him by the separation from his mother. She made no comment on that question in her reply to the Federal Court; in particular, she has not claimed that immediate imprisonment, or even any criminal sanction at all, would be imposed on her. Neither has she argued that in the event of her return to Israel it would be impossible or very difficult for her to integrate, or, in particular, to find a new job. Consequently, it cannot be said that the mother's return, and therefore that of the child, would be unbearable for economic reasons either. Therefore, as the respondent has failed to establish the existence of reasons that would objectively justify a refusal on her part to return to Israel, it must be accepted that she could reasonably be expected to return to that State of origin accompanied by the child. In these circumstances, it is of no import that the information provided by the Israeli Central Authority (see recital 4.2 above) on which the Cantonal Court based, in particular, its justification of the exception to the child's return as provided for by Article 13, first paragraph, sub-paragraph (b), of the Hague Convention, was deemed not very reassuring, because that information was based only on the hypothesis of the child's return without his mother.

Accordingly, the Cantonal judges breached Article 13, first paragraph, sub-paragraph (b), of the Hague Convention in finding that they were entitled to apply an exception to the child's return to the State of his habitual residence. The appeal must therefore be allowed and the judgment of the court below quashed, without it being necessary to examine the complaint concerning a violation of Article 3 of the Convention on the Rights of the Child. It is incumbent on the respondent to secure the return of the child ... to Israel by the end of September 2007. ...

The Federal Court therefore finds as follows:

1. The appeal is allowed and the judgment of the court below is quashed.
2. The respondent is ordered to secure the return of the child ... to Israel by the end of September 2007.

..."

35. On 20 August 2007, the child's father, through counsel, lodged an application with the Lausanne District Justice of the Peace, who was responsible for the enforcement of the return decision, seeking the appointment of an *ad hoc* administrator for the child who would be entrusted with the organisation of his departure. On 1 October 2007, after the Court had decided on 27 September 2007 to indicate interim measures to the Government, the father withdrew his application of 20 August 2007.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

36. The relevant provisions of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, which

entered into force in respect of Switzerland on 1 January 1984, read as follows:

“Preamble

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:”

Article 1

“The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

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 4

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.”

Article 5

“For the purposes of this Convention –

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.”

Article 11

“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ...”

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. ...”

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:

...

(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.”

Article 14

“In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.”

37. On 21 December 2007 the Swiss Federal Parliament enacted the “Federal Act on International Child Abduction and The Hague Conventions on the Protection of Children and Adults”, for the purpose of clarifying certain notions, especially in relation to the application of the Hague Convention of 1980. To date the Act has not entered into force. The sections relied on by the applicants read as follows:

Section 5: Return and interest of the child

“The return of a child places him or her in an intolerable situation, within the meaning of Article 13, first paragraph, sub-paragraph (b), of the Hague Convention, in particular where the following conditions are met:

- (a) placement with the parent who lodged the application is manifestly not in the child's interest;
- (b) the abducting parent is not, given the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction, or this cannot reasonably be required of that parent; and
- (c) placement in the care of a third party is manifestly not in the child's interest.”

Section 6: Protective measures

“The court dealing with the application for the return of the child shall decide, as required, on the child's personal relations with his or her parents and order the measures necessary to ensure his or her protection.

Where the application for return has been received by the Central Authority, the competent court may, at the request of the Central Authority or any of the parties, order the appointment of a representative or a guardian for the child, or take other protective measures even if the application for return is not yet pending before the court.”

38. In connection with the Federal Decree concerning this Act, the Federal Council submitted to Parliament a “dispatch” (*Feuille Fédérale* 2007, pp. 2433-2682) of which the relevant passages read as follows:

“6.4 Return and interest of the child (section 5)

In order to ensure an application of the Hague Convention of 1980 that is better adapted to the interests of the child, it is necessary for the legislature to specify the various situations in which the return of the child can no longer be taken into

consideration because it would place him or her in a manifestly intolerable situation. The rule in section 5 is not supposed to supersede the provision of Article 13, first paragraph, sub-paragraph (b), of the Hague Convention of 1980. The term 'in particular' means that the list merely enumerates a few situations which – although essential – do not preclude reliance on the clause provided for in the Convention.

Firstly, sub-paragraph (a) refers to the situations in which the child's accommodation by the parent who requested the return is manifestly not in the child's interest. If that is not so, in particular where the parent who lodged the application has an exclusive right of custody or is the only one who could be granted such responsibility, there will not, in principle, be any cause for fear that the child will be placed in an intolerable situation on his or her return and therefore there is no reason why the return should be refused. This will not be the case where it appears obvious to the court that the party lodging the application would not be able to take care of the child.

Sub-paragraph (b) governs cases in which the appropriateness of the child's return can be assessed only from the standpoint of his or her relationship with the abducting parent. Where the child's accommodation by the parent who requested the return is manifestly not to be taken into consideration, the problem of his or her return to the State of origin will be addressed differently, depending on whether the person who wrongfully removed or retained the child (usually the mother) is or is not in a position to return to that State. If the said parent is not able to do so because, for example, he or she faces a prison sentence that would lead to separation from the child or because the parent has very close family ties in Switzerland (for example following remarriage or on account of a situation of hardship suffered by another family member living in Switzerland), the child's psychological and physical stability may be at stake, because the child would, after the return, be obliged to live apart from his or her parents. Such separation is tolerable only in exceptional cases and must constitute an *ultima ratio*.

Second type of situation: where, given all the circumstances, it cannot reasonably be required of the abducting parent that he or she take care of the child in the State where it had its habitual residence immediately before the abduction (section 5(b)). It is not sufficient for the parent who wrongfully removed or retained the child to state that he or she refuses to return to that State. He or she would also have to be in a situation of hardship such that he or she could not reasonably be expected to return to his or her place of prior residence to await there, with the child, the court's final decision on the attribution of custody. In that context, we have in mind especially those cases in which the mother cannot be guaranteed safe or affordable accommodation outside the home of his or her former partner. One must further take into account those cases in which the parent who has requested the return of the child will not resume the exercise of the right of custody and will not obtain it by court order, whilst the abducting parent is clearly the child's primary carer. In such a case the child would only be taken to the State of origin to await the final attribution of the right of custody to the abducting parent, before coming back to Switzerland again with that parent. Such coming and going would ultimately only have served the purpose of bringing the case before the authorities of the former State of residence. Such a solution would be inadmissible according to the spirit and purpose of the Hague Convention, because it would be incompatible with the child's interest. But the situation would have to be beyond doubt for the Swiss court dealing with the request for return. Unless the circumstances can be established clearly, the court will have to rule that the return to the parent's State of origin is bearable and that, accordingly, the child will not be placed in an intolerable situation such as to justify a decision denying the return under Article 13, first paragraph, sub-paragraph (b), of the Hague Convention.

Sub-paragraph (c) refers to placement with third parties. If the child's return were to lead to separation from the parent who wrongfully removed or retained the child (because return is impossible for that parent or cannot reasonably be required of him or her), it could only be carried out in appropriate conditions if the child were placed with a third party in the State of origin. However, such a solution should only be sought, with the resulting possibility for the competent Swiss court to order the child's return, if placement with a third party is not manifestly contrary to the child's interest. That third condition can be satisfied only if separation from the parent remaining in Switzerland is bearable for the child – which may be the case where he or she has an antagonistic relationship with that parent – and if the foster family receiving the child can provide proper guarantees as to the protection and normal upbringing of the child. In any event, such a situation should only be envisaged as an *ultima ratio*.

It must further be noted that, for the return to be compatible with the child's interests and, in particular, for the conditions of Article 13 of the Hague Convention to be fulfilled, the authority ruling on the matter has to be apprised of the situation prevailing in the State of origin and of the legal provisions in force there. Thus, the parties, and in particular the parents, have a duty to participate in the establishment of the facts. The hearing of the parties in person by the court (section 9(1) and (2)) is therefore of great importance. The new provisions concerning the procedure and the cooperation with the competent authorities of the State of origin also play an essential role. The court must be able to verify whether, and in what manner, it is possible to ensure the child's return (section 10(2)). If it does not succeed in that task, or succeeds only partially, it will not be in a position to weigh up all the consequences that a return might have for the child. The same will be true if it does not succeed in obtaining from the local authorities any reliable assurances as to the conditions of the child's reception and protection, in particular when there is some doubt about the requesting parent's capacity to look after the child properly. In this respect, section 10 is thus directly related to the practical application of section 5."

39. The relevant provisions of the Convention on the Rights of the Child of 20 November 1989, which entered into force in respect of Switzerland on 26 March 1997, read as follows:

Preamble

"... Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ..."

Article 7

"1. The child shall be registered immediately after birth and shall have the right from birth to ... know and be cared for by his or her parents. ..."

Article 9

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will ...”

Article 14

“1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. ...”

Article 18

“1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. ...”

40. Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe on a European Charter on the Rights of the Child states the following as the first of a number of general principles:

“a. Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs; ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicants, pointing out that the competent Israeli court had attributed the right of custody to the first applicant, alleged that there had been a violation of their right to respect for their family life within the meaning of Article 8, taken separately and in conjunction with Articles 3 and 9 of the Convention. Article 8 reads as follows:

“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.”

42. More specifically, the applicants alleged that, unlike the courts below, the Federal Court had disregarded the grave risk of psychological harm and the intolerable situation to which the second applicant would be exposed if he returned to Israel, with or without his mother. They criticised that court for completely dismissing arguments that had nevertheless been substantiated by an expert's report of 16 April 2007, drawn up by a child psychologist. They claimed, moreover, that they were perfectly integrated in Lausanne, where the first applicant had paid employment.

A. Admissibility

43. For the reasons set out in paragraphs 54-69 below, the Government argued that the complaint under Article 8 was manifestly ill-founded and should be declared inadmissible.

44. The Court cannot accept the Government's submissions. It finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. The merits

1. The parties' submissions

(a) The applicants

45. The applicants first denied that Noam's removal from Israel by his mother had been wrongful within the meaning of the Hague Convention. They took the view that the Government had committed a manifest error of judgment in indicating that the decision given on 17 November 2004 by the Israeli court had granted "temporary custody" to the mother.

46. The applicants considered the child's removal to Switzerland to have been lawful, for the following reasons in particular: the father's conduct and death threats against the first applicant had warranted a special measure of protection in her favour that had been granted on 12 January 2005; the father, in the context of a religious fanaticism that he displayed publicly, wanted to impose on his infant son an ultra-orthodox lifestyle and radical religious education without consideration for the child's interest or for the disagreement expressed by the mother; an arrest warrant had been issued against the father on 20 March 2005 for defaulting on maintenance payments and he had had his right of visitation restricted and placed under the supervision of the social services because of his irresponsible conduct; the criminal complaint filed against him in Israel in January 2005 had been

ineffective, the indictment having been cancelled by the court on 30 November 2006; lastly, the child's removal had been lawful by virtue of Israeli Law no. 5722-1962 ("Capacity and Guardianship Act"), of which section 25 provided *in fine* that in the event of disagreement between the parents, children up to the age of six would remain with their mother, and of which section 18 *in fine* expressly authorised either parent to act alone in a matter admitting of no delay, which would especially be the case when the parent had custody of the child.

47. Moreover, the applicants were convinced that the mother would certainly face a criminal sanction if she returned to Israel, and the imposition of such a sanction would unquestionably cause the son major psychological trauma and place him in an intolerable situation. They took the view that the consequences of separating him from his mother, who would most probably have to serve a custodial sentence, would be catastrophic. They invoked as justification for their fears the observations of the expert psychiatrist, who had referred to the "judicial risks" that would be incurred in the event of a return to Israel, but did not however clarify whether the mother actually faced immediate imprisonment as punishment for the abduction (see the judgment of the Swiss Federal Court, paragraph 34 above).

48. In the applicants' submission, the consequences of the first applicant's imprisonment in Israel would be catastrophic for the future of both mother and child. Stressing that the father was unstable, they explained that he had remarried in November 2005 and had then divorced his new wife while she was pregnant. They claimed that, if he were to be separated from his mother as a result of her imprisonment, Noam would certainly not be entrusted to his father in view of the decisions previously given against him, unless they were overturned, and that would be equally as harmful for the child. In their view, Noam would thus probably be placed in care, which the mother refused categorically. The applicants' fears were strengthened by the fact that in their view they had not received any reliable assurance to the effect that the first applicant would definitely not face criminal sanctions or separation from her child, of whom she had custody, if she returned with him to Israel, neither on the part of the Israeli authorities nor in the letter produced by the Swiss Government in support of their observations of 15 February 2008. In a letter of 30 April 2007, a deputy to the Israeli State Attorney, referring directly to the "Penal Law" of 1977, which provided for a custodial sentence for this type of offence, had informed the first applicant that, according to the State Attorney's guidelines, criminal proceedings were commenced only in very exceptional circumstances. The applicants nevertheless considered that, even supposing that the State Attorney's office decided not to prosecute the first applicant, there was nothing to prevent the father from bringing proceedings against her.

49. The applicants pointed out that the expert report by Dr. B. had stressed the existence of an exceptionally grave risk in the event of the child's return to Israel and they submitted that the two lower courts had assessed that risk better than the Federal Court had done. They observed, moreover, that the father had not applied to the domestic courts for a fresh expert opinion. It would therefore not be in Noam's best interest to return to Israel, where he would be obliged to remain until he attained his majority. In that connection the applicants pointed out that they both had Swiss nationality.

50. The applicants further observed that the position taken by the Federal Court and by the Government in the present case did not reflect the findings of the Federal Council or the Swiss Parliament in their scrutiny of the Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults. The applicants argued that this Act ensured that the child's interest was paramount (section 5) and imposed measures of protection and representation for the child's benefit (section 6). They considered it appropriate and pertinent for the present case to quote a few passages from the Federal Council's dispatch concerning the Federal Decree of 21 December 2007 which dealt more specifically with the return of an abducted child. The Federal Council stated as follows: "Where the child's accommodation by the parent who requested the return is manifestly not to be taken into consideration, the problem of his or her return to the State of origin will be addressed differently, depending on whether the person who wrongfully removed or retained the child ... is or is not in a position to return to that State. If the said parent is not able to do so because, for example, he or she faces a prison sentence that would lead to separation from the child ..., the child's psychological and physical stability may be at stake, because the child would, after the return, be obliged to live apart from his or her parents. Such separation is tolerable only in exceptional cases and must constitute an *ultima ratio* ... The court must be able to verify whether, and in what manner, it is possible to ensure the child's return ... If it does not succeed in that task, or succeeds only partially, it will not be in a position to weigh up all the consequences that a return might have for the child. The same will be true if it does not succeed in obtaining from the local authorities any reliable assurances as to the conditions of the child's reception and protection, in particular when there is some doubt about the requesting parent's capacity to look after the child properly." (see the Federal Council's dispatch, paragraph 38 above).

51. The applicants further observed that the Federal Court's judgment of 16 August 2007 did not contain any provisions for its enforcement and that this was not disputed by the Government. In the applicants' view, the court should not merely have said that the mother could be "reasonably expected" to return to Israel with her child, in spite of the risks for both of them,

without looking into the harmful consequences that the return might have for the child. They argued that it was for the authorities of the requested State to decide on the arrangements for the child's possible return, not after deciding on the return but before, as if no such measures were taken by the court which ordered the child's return it could not be asserted that an unprepared return would not expose him to situations entailing psychological harm and would not place him in an intolerable situation within the meaning of Article 13, first paragraph, sub-paragraph (b) of the Hague Convention.

52. Lastly, as regards the possibility for the parents to decide jointly on the child's religious education, the applicants expressed their conviction that such a hypothesis had to be ruled out completely, owing to the very existence of the father's radical position, which he had expressed in particular in his submissions to the Court and of which, according to them, the Government were certainly aware. The applicants pointed out in this connection that the father had not denied that he had joined the ultra-orthodox Jewish movement "Lubavitch", which they described as a mystical and ascetic branch of Orthodox Judaism whose members were Hasidic Jews known for their zealous proselytising. In the applicants' submission, the father had attempted to impose on his wife and child a radical lifestyle that required, for example, women to cover their hair and boys to be sent from the age of three to religious "Heder" schools. Moreover, he could not validly deny the fact that his sudden change of conduct and radical religious demands had caused a major conflict within the couple, leading to their divorce, and had brought him into serious trouble with his country's judicial authorities, which in particular had issued an arrest warrant against him for defaulting on maintenance payments. In view of the foregoing, the first applicant believed that it was her duty to remove her child from that environment, which she regarded as fanatical. She pointed out that no judicial guarantee had been forthcoming before her departure, nor was one envisaged in the event of her return, and that the Federal Court had not addressed this question. She added that she was herself Jewish and that she had no intention of cutting her son off from his roots. Thus, since late 2006, he had been attending a municipal secular day nursery one day a week and a private State-approved Jewish nursery school where he was being taught, in addition to the school curriculum of the Canton of Vaud, the basic principles of Judaism.

53. For those reasons, the applicants considered that Noam's return to Israel would constitute an unjustified interference, in a democratic society, with the exercise of their right to respect for their family life as guaranteed by Article 8.

(b) The Government

54 The Government contested the applicants' submissions. Since the applicants had apparently called into question the wrongfulness of the child's removal by his mother, they argued that it did not matter whether "custody" under Israeli law had been attributed to the mother temporarily or permanently, but that it had to be determined who had custody of Noam within the meaning of the Hague Convention, a notion that corresponded in Israeli law to "guardianship", which covered in particular the right to determine the child's place of residence and which was exercised jointly by Noam's parents.

55. In the Government's submission, the dispute in the present case concerned the question whether the conditions set out in Article 13, subparagraph (b), of the Hague Convention, which provided for an exception to the principle of the prompt return of the child, had been satisfied.

56. In reply to the applicants' argument that the Federal Court had not sufficiently taken into account the legal context set out in the Federal Council's dispatch of 28 February 2007, the Government observed that the draft law had been passed on the basis of that dispatch only on 21 December 2007 and that the Act had therefore not yet entered into force. They took the view that neither the draft law nor the related dispatch was pertinent for the settlement of the present dispute and that the Federal Court's judgment had by no means contradicted the principles therein. For whilst the draft law stated, in section 5(b), that the child would be placed in an intolerable situation in the event of return especially where the abducting parent, in the circumstances, would not be able to take care of the child in the State where he or she had been habitually resident at the time of the abduction, or that this could manifestly not be required of that parent, it was still necessary to establish that these conditions were met and there was no evidence of that in the present case. In this connection the Government referred to the following passage from the dispatch: "It is not sufficient for the parent who wrongfully removed or retained the child to state that he or she refuses to return to [the] State [of origin]. He or she would also have to be in a situation of hardship such that he or she could not reasonably be expected to return to his or her place of prior residence to await there, with the child, the court's final decision on the attribution of custody. In that context, we have in mind especially those cases in which the mother cannot be guaranteed safe and affordable accommodation outside the home of his or her former partner." (see the Federal Council's dispatch, paragraph 38 above).

57. The Government observed that in the case of *Maumousseau and Washington v. France* (no. 39388/05, §§ 73 et seq., ECHR 2007-XIII), the Court had stated that the purpose of the Hague Convention being to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she had unilaterally created, the exceptions to the prompt return of the child had to be

interpreted restrictively. In that case, the domestic authorities, after carrying out an in-depth examination of the facts, had not detected any potential risk for the child. They had also pointed out that, contrary to her allegation, the mother would be able to accompany her child to the State of its habitual residence in order to assert her rights there. The Court had taken the view that this was an essential aspect: the fact that the mother had free access to the territory of the State in question and the possibility of bringing her case before the competent courts there. As the procedure had not otherwise been open to criticism in the light of Article 8 of the Convention, the Court had concluded that there had been no violation of that Article.

58. The Government noted that, in the present case, before giving his decision of 29 August 2006, the Lausanne District Justice of the Peace had heard representations on two occasions, 18 July and 29 August 2006, from the first applicant, accompanied by counsel, and from counsel for Noam's father. When the case had come before the Guardianship Division (*chambre des tutelles*), it had ordered an additional act of investigation, namely an expert's report on the second applicant by a child psychiatrist, and it had requested from the Israeli authorities, through the Swiss Central Authority, information on the conditions in which Noam's possible return would take place.

59. Moreover, the Government argued that the first applicant had not submitted to the domestic courts any objective or well-founded reasons why she could not return to Israel. They were of the opinion that the statements she had made in the course of the domestic proceedings showed that the risk she alleged did not constitute the real reason for her refusal to return to Israel, and that it was simply her personal choice, stemming from her wish to live in Switzerland. They noted that it was not until later, in her application to the Court of 25 September 2007, that the first applicant had indicated that she would not return to Israel on account of the intolerable situation that had precisely driven her to leave the country in June 2005. The Government also pointed out that the applicants' family situation had been closely monitored by the social services in Tel Aviv and by the Tel Aviv Family Court, which had in particular prohibited Noam's father from approaching the first applicant's flat or the child's nursery school, from disturbing or harassing the first applicant in any manner, including mentally, and in any place, from using the flat where she lived and from carrying or possessing a weapon (see the judgment of the Guardianship Division dated 22 May 2007, pp. 5 et seq.). It was not in dispute that Noam's father had complied with those measures (see the record of the hearing of 29 August 2006 before the Justice of the Peace, p. 2). In addition, the attitude of the Israeli authorities had shown a real concern for the applicants' safety and well-being (see in particular the letter of 10 January 2005 from two social workers, reproduced in the judgment of the Guardianship Division, p. 4), and there was thus no reason to fear that they

would not react in an appropriate manner in the event of the applicants' return to Israel if the child's father attempted to bother them.

60. The Government further observed that the first applicant herself had decided to settle in Israel in 1999 and subsequently to start a family there, that she had been employed there by a multinational company, and that her son had attended a day nursery there. The Government presumed that, having lived for six years in Israel, the first applicant must have built up a circle of acquaintances, especially as the expert's report by Dr. B. mentioned that she had decided to settle in that country after staying with family there during the holidays, which seemed to prove that she had family ties in Israel.

61. In response to the applicant's fears of possible problems with the Israeli courts, the Government observed that it could be seen from a letter from the Israeli Central Authority, filed with the Guardianship Division by the child's father, that even though child abduction carried a possible custodial sentence under Israeli criminal law, the State Attorney's guidelines provided that the police, upon receipt of such a complaint, should forward the matter to the Israeli Central Authority under the Hague Convention for recommendations on how to proceed. According to those guidelines, criminal proceedings were to be commenced only in very exceptional cases. The Central Authority had added that in the present case it would consider instructing the Israeli police to close the criminal file provided that the first applicant was willing to cooperate with the Israeli authorities, complied with the father's visitation rights and did not disappear again with the child (see the letter of 30 April 2007 appended to the Government's observations). Based on those indications, the Government submitted that the first applicant would not face criminal sanctions and that, contrary to her allegation, the risk of being imprisoned remained unproven. Thus, having regard to the assurances given by the Israeli authorities, there was no cause to fear that in the event of the applicants' return the mother would be imprisoned and therefore separated from her son, because such imprisonment would be at odds with the attitude of the Israeli authorities, who on a number of occasions had shown understanding towards her and concern for the protection of Noam's interests.

62. As the first applicant had declared that, since she alone had to provide for the child financially, it would not at all be in her interest to leave her job in Switzerland, the Government pointed out that she was currently working in Lausanne for the same company that had already employed her in Tel Aviv and they suggested that this would help her to a certain extent to find satisfactory employment rapidly on her return. She would also be able to apply for various State allowances in order to find accommodation and to obtain financial support if need be.

63. In view of all these circumstances, the Government considered that the first applicant had not adduced any pertinent reasons for not returning to

Israel and that the Federal Court had quite rightly interpreted Article 13, sub-paragraph (b), of the Hague Convention as not precluding the return of the child and his mother.

64. The Government also pointed out that, whilst expert B. had indicated in his report that Noam's return to Israel with his mother would expose him to psychological harm of which the extent could not be assessed without ascertaining the conditions of such return, in particular the situation awaiting the mother and the potential repercussions thereof for the child, he had also expressed the opinion that the *status quo* would represent for Noam a major psychological risk in the long term (p. 7 of the report). In the light of the above-mentioned considerations concerning the possibility of the first applicant's return, the Government, observing that Article 13, first paragraph, of the Hague Convention ("if the person ... which opposes its return establishes that ...") placed the burden of proof on the first applicant, took the view that not only had she failed to establish the existence of a grave risk for the child in the event of his return, but also the Swiss authorities' additional investigative measures and other evidence in the file enabled such a risk to be ruled out to a very high degree of probability.

65. As regards the hypothesis of the child's return without the first applicant, the Government noted that the Guardianship Division had obtained information from the Israeli Central Authority on the conditions of such a return and the Authority in its reply of 12 March 2007 (see annex 4 to the Government's observations) had stated that: the father would be prepared to take care of the child and would secure an apartment for that purpose; the child would attend a day-care centre or nursery school while the father was working or studying; and the father's family would be able to provide a back-up system. The Israeli Authority had also explained that if the mother refused to return to Israel with the child, even though she had that possibility, she would be agreeing to the father's custody of the child. The Government took the view that, in view of the attitude of the Israeli authorities in this case, there was no cause to fear that they would not take the necessary measures, in such a situation, to ensure that the child's needs were met in the best possible manner.

66. The Government indicated that the Israeli Authority, in its letter of 12 March 2007, had drawn the attention of the Swiss authorities to the Israeli "Prevention of Family Violence Act" of 1991, which provided for protection orders in the event of allegations of domestic violence (see annex 4 to the Government's observations). The attitude of the Israeli authorities and the measures that had been taken before the first applicant's departure and, as was not disputed, had been complied with by the child's father, proved in the Government's view that the provisions of that law were implemented effectively.

67. In addition, the Government indicated that the Israeli "Capacity and Guardianship Act" of 1962, of which the child's father had submitted an

extract to the Justice of the Peace with his application of 8 June 2006, provided that guardianship included the duty and the right to take care of the needs of the minor, in particular his education and studies, and that in the event of a disagreement over the child's religious education, the matter would be determined by the court deciding on the exercise of guardianship, taking into account the child's best interests. As the first applicant exercised joint guardianship and had custody of her son, there was no reason to fear that she would not be able to exert a decisive influence over her son's religious education if she returned to Israel with him.

68. As regards the applicants' argument that the Federal Court's judgment of 16 August 2007 did not provide for any conditions of enforcement, the Government argued firstly that the court had ordered the child's return based on the principle that the mother could reasonably be expected to accompany him, since she had not indicated any considerations that would objectively justify her refusal to return to Israel, and secondly that there was nothing to suggest in the circumstances that the child's return would expose him to physical or psychological harm or would place him in an intolerable situation. Moreover, the Government took the view that the organisation of the return was primarily a matter for the first applicant, who had brought about the situation by abducting her son. They added, however, that if she had expressed real fears related to specific aspects of a return to Israel to the competent authority for the enforcement of the Federal Court's judgment, namely the Justice of the Peace, the latter could have examined the appropriate measures to be taken. Lastly, they explained that in view of the interim measures indicated in the present case by the European Court of Human Rights, the Swiss authorities had been unable to examine the arrangements for the child's return in any greater detail.

69. Having regard to the foregoing, the Government contended that, taking into account Noam's young age, there was nothing to suggest that his return to Israel with his mother would expose him to serious consequences, and therefore that the balancing of interests by the Federal Court had not constituted a violation of Article 8 of the Convention.

(c) Third party

70. The third party, that is to say Noam's father, argued that the main purpose of the Hague Convention was to provide the parties with a mechanism to restore the *status quo* that existed prior to the child's abduction. In his submission, the procedures contemplated by this international instrument did not give the Court jurisdiction to determine the child's best interests: that question was to be left entirely to the discretion of the home State's authorities, who would be better placed than the Court in that connection.

71. The third party further pointed out that the exercise of the right to respect for private and family life was subject to exceptions, provided they

were in accordance with the law, pursued a legitimate aim and were necessary in a democratic society, and that the States were required, by domestic and international law, to deter the offence of child abduction and to ensure that neither parent would be able to take advantage of illegal conduct.

2. *The Court's assessment*

(a) **The principles developed by the Court in child abduction cases**

72. The Court has had occasion to set out and develop a number of basic principles to guide it when called upon to determine, in cases concerning child abduction, whether the authorities of a State party to the Convention have fulfilled their obligations under Article 8 of the Convention (see, among other authorities, *Maumousseau and Washington*, cited above, §§ 58-83; *Bianchi v. Switzerland*, no. 7548/04, §§ 76-85, 22 June 2006; *Monory v. Romania and Hungary*, no. 71099/01, §§ 69-85, 5 April 2005; *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII; *Karadžić v. Croatia*, no. 35030/04, §§ 51-54, 15 December 2005; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, §§ 48-52, ECHR 2003-V; *Sylvester v. Austria*, nos. 36812/97 and 40104/98, §§ 55-60, 24 April 2003; *Paradis v. Germany*, (dec.), no. 4783/03, 15 May 2003; *Guichard v. France* (dec.), no. 56838/00, ECHR 2003-X; *Ignaccolo-Zenide v. Romania*, no. 31679/96, §§ 94-96, ECHR 2000-I; and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

73. The principles that emerge from the case-law cited in the previous paragraph may be summarised as follows:

(i) The essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities. There are in addition positive obligations inherent in an effective “respect” for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

(ii) The Court's role is not to substitute itself for the competent domestic authorities in regulating the custody and access issues, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretionary powers. In so doing, it must determine whether the reasons purporting to justify the actual measures adopted with regard to the applicant's enjoyment of his or her right to respect for family life are relevant and sufficient under Article 8.

(iii) With specific regard to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a right for parents to measures that will enable them to be reunited with their children and an obligation on the national authorities to take such measures.

(iv) The decisive issue is therefore whether the national authorities have taken all the measures that could reasonably be demanded of them to facilitate the exercise by a parent of his or her rights of custody, access and parental authority as recognised by the applicable law or granted by a judicial decision.

(v) However, the national authorities' obligation to take measures for that purpose is not absolute. The nature and extent of such measures will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them.

(vi) The Convention cannot be interpreted in a vacuum, but in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties.

(vii) 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 the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

(viii) The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). Accordingly, an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.

(ix) In this context, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the return of an abducted child, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with it.

(b) “Object and purpose” of the Hague Convention

74. The Court first notes that since the adoption of the Convention on the Rights of the Child, of 20 November 1989, “the best interests of the child” have been paramount in child protection issues, with a view to ensuring the child's development in its family environment, as the family constitutes “the fundamental group of society and the natural environment for the [child's] growth and well-being”, to quote the Preamble to that

Convention. As the Court has previously found, that primary consideration may involve a number of aspects (see *Maumousseau and Washington*, cited above, § 66; and for the Preamble to the Convention see paragraph 39 above).

75. In matters of custody, for example, establishing the “best interests of the child” may have two purposes: on the one hand, to guarantee the child's development in a healthy environment – and a parent cannot be allowed to take measures that are prejudicial for its health or development; and on the other, to maintain the child's ties with its family, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX, confirmed in *Maumousseau and Washington*, cited above, § 67).

76. The Court is of the view 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. In this connection it is appropriate to refer to Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly which states: “Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs” (see paragraph 40 above). The Court further observes that in the Preamble to the Hague Convention the Contracting Parties express their conviction that “the interests of children are of paramount importance in matters relating to their custody” and stress their desire to “protect children internationally from the harmful effects of their wrongful removal or retention ...” (see, for the full text of the Preamble, paragraph 36 above).

77. The Court is entirely in agreement with the philosophy underlying this 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. Such considerations must also guide the Court in its interpretation of this international instrument. In the light of the very clear and succinct vocabulary used in the first Article of the Hague Convention (“to secure the prompt return” and “to ensure that ... are effectively respected”), it is therefore a matter, once the conditions for the application of that 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 that Convention (see, to that effect, and among other authorities, *Eskinazi and Chelouche*, cited above, confirmed by *Maumousseau and Washington*, cited above, § 69).

78. The Court observes, however, that there is no automatic application of a child's return once the Hague Convention has been invoked, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72). That being said, if the arguments of the abducting parent were to be accepted too readily, the Hague Convention's primary purpose would be rendered meaningless. The above-mentioned exceptions must therefore be interpreted strictly.

(c) Application of the general principles to the present case

79. Turning now to the circumstances of the present case, the Court first observes that, for the applicants, the possibility of continuing to live together is a fundamental consideration which clearly falls within the scope of their family life within the meaning of Article 8 of the Convention, and that Article is therefore applicable (see, among many other authorities, *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII).

80. The applicants did not agree that the removal of Noam from Israel by his mother was wrongful within the meaning of the Hague Convention and therefore denied that the dispute fell within the scope of that instrument. The Court notes that under the Hague Convention, the removal or retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person, alone or jointly, under the law of the State in which the child was habitually resident immediately before the removal or retention (Article 3, first paragraph, sub-paragraph (a)). The notion of “rights of custody” within the meaning of the Hague Convention includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5, sub-paragraph (a)). The Court takes the view that in the present case the child's removal to Switzerland was wrongful, since, in accordance with the decision of 27 June 2004, the father exercised “guardianship” jointly with the mother and in the Israeli legal system this included the right to determine the child's place of residence. Moreover, the removal of Noam rendered illusory, in practice, the right of access (Article 4, first paragraph) that had been granted to the father by the decision of 17 November 2004. Accordingly, it was unquestionably wrongful within the meaning of the Hague Convention.

81. Moreover, it is not in dispute that the Federal Court's order for the child's return constituted for the two applicants an “interference” within the meaning of the second paragraph of Article 8 of the Convention.

82. In the present case, the Court notes that the Federal Court's decision ordering the return was based on the provisions of the Hague Convention, for the purpose of protecting the rights and freedoms of Noam and his

father, an aim that is recognised as legitimate within the meaning of the second paragraph of Article 8 of the Convention (see, on this issue, *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

83. The Court will therefore endeavour to determine whether that interference was “necessary in a democratic society” within the meaning of the second paragraph of Article 8 of the Convention, interpreted in the light of the above-mentioned international instruments, the decisive issue being whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation enjoyed by States in such matters.

84. The applicants complained about the reasoning that was ultimately adopted by the Federal Court in its decision granting the application of Noam's father (see, *mutatis mutandis*, *Maumousseau and Washington*, cited above, §§ 58-81). The central question that the Court must address is therefore whether the conditions for an exception to the child's prompt return, under Article 13, first paragraph, sub-paragraph (b), of the Hague Convention, are met in the present case, or whether the Federal Court interpreted that clause too restrictively, as contended by the applicants, who also complained about the manner in which that court ordered the child's return to Israel, focussing on the fact that the judgment of 16 August 2007 did not contain any provisions for its enforcement. Those two aspects will be dealt with successively by the Court.

(i) Arguments submitted against the child's prompt return

85. The applicants alleged that if Noam returned to Israel there was a grave risk that he would be exposed to physical or psychological harm, within the meaning of Article 13, first paragraph, sub-paragraph (b), of the Hague Convention. In this connection they referred in particular to the father's conduct and death threats against the first applicant; the religious fanaticism that he publicly displayed; his desire to impose unilaterally on his infant son a lifestyle and an ultra-orthodox radical religious education with no regard for the child's interest or for the disagreement expressed by the mother; the arrest warrant issued against him on 20 March 2005 for defaulting on maintenance payments; the restrictions imposed on his right of visitation which had to be exercised under the supervision of the social services as a result of his irresponsible behaviour; and the ineffectiveness of the criminal complaint filed against him in Israel in January 2005, the proceedings having been discontinued on 30 November 2006.

86. As regards the allegations concerning death threats and religious fanaticism, the Court would point out the various measures taken by the Israeli authorities and courts in order to protect the applicants when they were still living in the country. On 20 June 2004 the Tel Aviv Family Court, on the first applicant's request, made a *ne exeat* order in respect of Noam

that was to expire when the child attained his majority. On 10 January 2005 the Israeli social services ordered the parents to live apart, in the interest of the child. On 12 January 2005 the competent judge of the Tel Aviv Family Court prohibited the father from entering Noam's nursery school or the first applicant's flat, from disturbing or harassing her in any manner whatsoever and from carrying or possessing a weapon. Restrictions were also imposed on the father's right of access, after which he was only allowed to see his son under the supervision of the social services at a contact centre in Tel Aviv. Lastly, an arrest warrant was issued against him on 20 March 2005 for defaulting on maintenance payments. Moreover, as regards the alleged ineffectiveness of the criminal complaint against him, in respect of which proceedings were discontinued on 30 November 2006, the Court observes that the discontinuance was due to the first applicant's departure. In addition, it appears that Noam's father complied with the measures ordered by the domestic authorities. In conclusion, in view of the authorities' efforts it cannot be said that they were unable or unwilling to protect the applicants against potentially fanatical or aggressive conduct on the part of the father. There is no reason to believe that the situation would be any different after the applicants' return to Israel (see, to the same effect, *Eskinazi and Chelouche*, cited above).

87. The applicants further considered that the Federal Court had not taken sufficient account of the legal context set out in the Federal Council's dispatch of 28 February 2007. They seemed to infer from this dispatch that it was practically out of the question to return a child if the abducting parent was prevented from going back to the State of origin because he or she faced a prison sentence there and would thus be separated from the child. This would also be true if the parent failed to obtain reliable assurances from the local authorities as to the child's reception and protection. The Court observes that the Act corresponding to this dispatch has not yet entered into force. In any event, the Court agrees with the Government that the Federal Court's judgment of 16 August 2007 is not at all incompatible with the dispatch or the draft law in question.

88. The applicants observed that, in his report of 16 April 2007, the expert B. had indicated that the child's return to Israel without his mother would expose him to major psychological harm. In this connection the Court considers that it is necessary to examine whether a return to Israel may be envisaged for the mother. It points out that the mother had herself decided, in 1999, to settle in Israel and later to start a family there with the father of her child. She lived there for six years and must therefore have built up a social network to a certain extent in Israel. Moreover, she was employed there by a multinational company and is now apparently working for the same company in Lausanne. As the first applicant has not put forward any other reasons why she would not be able to live in Israel, the

Court considers that she can reasonably be expected to return to that country.

89. Moreover, the Court is satisfied that this is also the case for the child, who, having been born on 10 June 2003, is still at a perfectly adaptable age. In addition, according to the Israeli authority's reply of 12 March 2007, if the mother decided to remain in Switzerland, the father would be prepared to take care of the child and would secure an apartment for that purpose, the child could attend a day-care centre or nursery school while the father was working or studying, and the father's family would be able to provide a degree of support.

90. The applicants also contended that the first applicant would be highly likely to face a criminal sanction if she returned to Israel. They took the view that imprisonment could not be ruled out and that such an eventuality would have very serious consequences for the child, who would probably be taken into care. In this connection they submitted that the Israeli authorities had not given any reliable assurance that the first applicant would be exempt from criminal sanctions. The Court does not share that view. It would first observe that the abduction of a minor is an ordinary criminal offence that is probably punishable in all the member States of the Council of Europe (see, for Switzerland, Article 220 of the Criminal Code). Secondly, it finds no reason to doubt the credibility of the assurances given by the Israeli authorities, having regard in particular to the efforts they had made for the mother and child before their departure to Switzerland.

91. In view of the foregoing, whilst it is aware that the applicants' return to Israel may entail a certain degree of inconvenience, the Court is of the opinion that this would largely be the result of a decision taken unilaterally by the first applicant herself. There is no doubt that it is in the "best interest" of every child to grow up in an environment that allows him or her to maintain regular contact with both parents (see, in particular, the first paragraphs of Articles 7, 9 and 18 of the Convention on the Rights of the Child, paragraph 39 above). In the Court's view, the first applicant's responsibility and duties towards her family required her to seek to reach an agreement with the child's father, especially concerning the conditions of the child's education and residence and on the rights of custody and access.

92. Lastly, in the applicants' submission, the religious fanaticism that Noam's father had displayed allegedly precluded any participation by the mother in the child's education. They argued that it was her duty to remove her child from the fanatical environment of the ultra-orthodox Lubavitch movement and that there were no judicial guarantees of protection against the influence of the child's father. The Court acknowledges that the religious education of children is a matter for both parents (see, for example, Article 14 § 1 of the Convention on the Rights of the Child, paragraph 39 above). However, it observes that the first applicant exercises the child's

guardianship jointly with the father, in accordance with a decision of the Tel Aviv Family Court of 27 June 2004. The Court agrees with the Government that there is no evidence to suggest that the first applicant would be unable to influence her son's religious education or that the Israeli authorities and courts would be unable to prevent the father from sending him to a religious "Heder" school.

93. In these circumstances the Court takes the view that, having regard to the margin of appreciation afforded to the authorities in such matters, the return decision was based on relevant and sufficient reasons for the purposes of Article 8 § 2, read in the light of Article 13, first paragraph, subparagraph (b) of the Hague Convention, and that it was proportionate to the legitimate aim pursued.

(ii) Provisions for enforcement of the return decision

94. The applicants observed that the Federal Court's judgment of 16 August 2007 did not contain any provisions for the enforcement of their return to Israel, as the Government have not in fact disputed. In the applicants' submission, the court should not have stated merely that the mother could be "reasonably expected" to return to Israel with her child, without first establishing the harmful consequences that such a return might have for the child.

95. The Court reiterates that the conditions of enforcement of the return of an abducted child do not fall outside its scrutiny (see, among other authorities, *Maumousseau and Washington*, cited above, §§ 84 et seq., where the Court found that there had been no violation of Article 8, taking the view that the circumstances of that case even justified police intervention). It further reiterates that there is an obligation of promptness in the enforcement of the return of an abducted child, and this must be taken into account in the adoption of practical measures for the purpose of ensuring that judicial decisions are effective (*ibid.*, § 84).

96. Turning back to the present case, the Court considers that the Federal Court rightly found that the first applicant could reasonably have been expected to accompany the second applicant and that there was no evidence to suggest that a return in such circumstances would expose the child to physical or psychological harm or would place him in an intolerable situation. It also shares the Government's view that the organisation and conditions of the second applicant's return were primarily matters for the first applicant, who had perpetrated the abduction. Moreover, the Court does not consider unfounded the Government's argument to the effect that the first applicant could have approached the competent authority for the enforcement of the Federal Court's judgment, namely the Justice of the Peace for the Canton of Vaud, who could have assisted her in preparing the child's return. Lastly, the Court observes that the enforcement of the return was suspended following the request for interim measures dated

27 September 2007. Consequently, there can be no speculation about a possible failure on the part of the respondent State as regards making provisions for Noam's return to Israel.

97. In these circumstances the Court concludes that the conditions of enforcement of the child's return have not breached Article 8.

(iii) Conclusion

98 In the light of the foregoing, there has been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 3, 6 AND 9 OF THE CONVENTION

Admissibility

99. The applicants contended that the decision ordering Noam's return had breached other provisions of the Convention.

100. They argued, first, that to enforce the departure of the child without his mother would constitute inhuman treatment prohibited by Article 3, since the father, as he had himself acknowledged, would then submit his child, immediately and unilaterally, to the precepts of the ultra-orthodox religious community "Lubavitch". Essentially for the same reasons, the applicants alleged that there had been a breach of the freedom of religion guaranteed by Article 9 of the Convention.

101 The Court reiterates that the purpose of the principle of the exhaustion of domestic remedies is to afford Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Thus the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Ankerl v. Switzerland*, cited above, § 34). In the present case the Court must observe that the applicants did not raise their complaints under Articles 3 and 9, even in substance, before the domestic courts. It follows that these complaints must be rejected on the ground of non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

102. The applicants further invoked a violation of Article 6. They took the view that, by adopting an excessively restrictive interpretation of the exceptions to Switzerland's obligation to order the second applicant's return, the Federal Court had not taken the child's best interests into account.

103. The Court is of the opinion that this complaint is closely linked to that concerning the procedural limb of Article 8. In this connection, it

reiterates that the interests protected by Article 6 § 1 and Article 8, respectively, are different in nature. Thus, Article 6 affords a procedural safeguard, namely the “right to a court”, in the determination of one’s “civil rights and obligations” (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18); whereas not only does the procedural requirement inherent in Article 8 cover administrative and judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for, inter alia, family life (see, for example, *B. v. the United Kingdom*, 8 July 1987, §§ 63-65 and 68, Series A no. 121, and *Bianchi*, cited above, § 112). The difference between the purpose pursued by the respective safeguards afforded by Article 6 § 1 and Article 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see *McMichael v. the United Kingdom*, 24 February 1995, § 91, Series A no. 307-B; but contrast *Golder*, cited above, §§ 41-45; *O. v. the United Kingdom*, 8 July 1987, §§ 65-67, Series A no. 120; and *Bianchi*, cited above, § 113).

104. In the present case, however, the Court takes the view that the complaint under Article 6 § 1 of the Convention must be regarded as constituting one of the essential points of the complaint under Article 8 (see, to the same effect, *Karadžić*, cited above, § 67; *Sylvester*, cited above, §§ 73-77; and *Bianchi*, cited above, § 114). Accordingly, it finds that it is not necessary to examine this allegation separately under Article 6 of the Convention.

105 It follows that these complaints must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by four votes to three that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 8 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- (a) opinion of Judge Kovler;
- (b) opinion of Judge Steiner;
- (c) opinion of Judge Spielmann.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE KOVLER

(Translation)

Not being in agreement with the conclusions of the majority, and endorsing the comments of Judges Spielmann and Steiner, I wish to set out the additional reasons why I voted against the majority opinion.

In cases that are as sensitive as this one, where the Court traditionally regards the rights of the child in a divided family as paramount (I refer in this connection to the significant number of cases cited in paragraph 72), the Court often focuses on the conditions (material and psychological) in which the child would have to live with each parent respectively (see, in particular, *Ismailova v. Russia*, no. 37614/02, 29 November 2007).

In the case of the infant Noam, it is of the utmost importance to note that as soon as marital difficulties appeared, provisional custody then guardianship were granted by the Israeli judicial authorities to the mother (see paragraphs 13 and 14). Subsequently, after the intervention of the Israeli social services, the parents were ordered to live apart in the interest of the child; then the Family Court, in an injunction of 12 January 2005, prohibited the father from entering the child's nursery school or the first applicant's flat, and from *carrying or possessing a weapon* (*sic*). Lastly, the various decisions granting custody of the child to the mother were confirmed on 10 February 2005 with the parents' divorce, without there being any change in the attribution of guardianship, which thus continued to be exercised by the mother. There is no reason to question the merits of all these decisions, which attest to the existence of a real breakdown in the relationship between father and son. In addition, we learn that the father defaulted on maintenance payments to the first applicant and an arrest warrant was thus issued against him on 20 March 2005 (paragraph 18). In addition to these factors, which do not support the father's cause, there are the facts referred to in paragraphs 48 and 49.

In these circumstances it is most surprising to note that the Family Court refused to grant the first applicant's request to annul the *ne exeat* order prohibiting the removal from Israel of Noam, who thus became his father's hostage, as it were.

There is no point in dwelling here on the details of the judicial battle that followed the mother's departure with her son to Switzerland, but I must say that I understand the reasons for the decisions of the Lausanne Justice of the Peace (paragraph 28) and of the Guardianship Division of the Vaud Cantonal Court (paragraph 31), which rightly took the view that the child's return to his father would have exposed him to psychological and even physical harm. By contrast, it seems to me that the judgment of the Federal Court of 16 August 2007 was manifestly too formal and failed to have regard to the spirit of the Hague Convention, in particular Article 13 thereof,

the primary purpose of which is to protect the interests of the child, while the interests of the parents remain secondary. There is nothing to prevent the father from coming to Switzerland to see his son or from participating in his education by modern means of communication, until the child is an adult and can decide for himself. In short, Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe is as relevant as ever in stating that “[c]hildren must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs; ...”. I regret that the Swiss Federal Court and our Court have taken decisions that are at odds with that recommendation.

DISSENTING OPINION OF JUDGE STEINER

(Translation)

I regret that I am unable to agree with the majority in this case.

Above and beyond the legal problems occasioned by its international context, the case of Neulinger and Shuruk raises an ethical question of the utmost significance: what level of protection must be guaranteed to a person under the European Convention on Human Rights in relation to a third State whose legal system does not necessarily incorporate the guarantees which the Convention affords to everyone within the jurisdiction of States Parties to that instrument?

I note at the outset that the case concerns a child, also having Swiss nationality, who lives with his mother in Lausanne and is threatened with being “returned” to a third country, which is the father's country of residence. This situation, moreover, falls within the context of an ongoing family-law dispute involving private interests, which are clearly conflicting, and international constraints.

The principal issue that I wish to highlight, and which was the decisive reason for my opposition to the opinion adopted by the Chamber (by a very slight majority), is that of the child's interest – an interest which, according to our own case-law on family disputes under Article 8 of the Convention, must prevail over all other considerations. I will then point out what, in my view, is the mother's interest that also should be taken into consideration and protected under the Convention.

In my opinion, as regards the fundamental question whether the child's interest has been taken into account, the judgment does not provide a convincing response. Apart from the fact that the Chamber devotes only a single paragraph to such an important question, and even then treats it as a subsidiary issue, the judgment addresses the central point of the case, namely its religious context, in a most summary manner.

Some unease can be detected in the manner in which that question was addressed and determined in the judgment. In taking the view that “there is no evidence to suggest that the first applicant would be unable to influence her son's religious education or that the Israeli courts would be unable to prevent the father from sending him to a religious ‘Heder’ school” (paragraph 92 *in fine* of the judgment), the Chamber displays an excessive formalism and a theoretical optimism that are not supported by any material in the case file.

An excessive formalism, because the majority in the Chamber seem to have adopted a “procedural” viewpoint, placing their confidence, in an abstract manner, in a legal system whose principles in matters of family law, being inspired by traditional religious law which regulates questions of

personal status, are sometimes significantly different from those with which we are familiar in Europe.

A theoretical optimism, because the majority seem to disregard the fact that disputes arising under the family law of the third State in the present case, and in particular matters concerning marriage, divorce, maintenance, guardianship and adoption, are justiciable only before religious courts, namely the rabbinical courts.

Moreover, when one considers the path followed by the father which led him to join an ultra-orthodox religious movement, one is entitled to have very serious doubts about the real possibilities for the mother to influence choices that are based more on religious precepts than on the child's interest.

If I have rightly understood the motivation underlying the first applicant's arguments, she desires that her son, whilst not being cut off from his roots but receiving a religious education for that purpose, should be brought up to respect the principles of tolerance and secularism that prevail in the States Parties to the Convention. Whilst it is certainly appropriate, as guaranteed by Article 2 of Protocol No. 1 to the Convention, to respect the parents' "religious and philosophical convictions" in their choice of education for their children, it must nevertheless be ensured that, in the event of disagreement, the parents are placed on an equal footing, as is moreover required by Article 5 of Protocol No. 7, which reads: "[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution".

For the reasons I have just given, however, I am not convinced that this situation will really obtain if the child is returned, and there is no proof of such an outcome in the case file either.

In these circumstances, being inspired by a precautionary principle in the interest of both mother and child, I consider that the respondent State overstepped its margin of appreciation. No compelling grounds can be invoked to justify such a serious interference, affecting the private and family life of mother and child, and this interference is not therefore necessary in a democratic society.

DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

I do not agree with the majority's conclusions and am of the opinion that there has been a violation of Article 8 of the Convention.

1. I first submit that there was no wrongful removal and that, accordingly, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, and in particular Article 3 thereof, is not applicable. I would like to emphasise in this connection that the first applicant had been granted a right of custody in respect of her son¹. An interim decision of 27 June 2004 had given her temporary custody of Noam (paragraph 13 of the judgment). On the recommendation of a social worker the attribution of custody to the first applicant had been confirmed by the court on 17 November 2004 (paragraph 14 of the judgment). As regards “the law, a breach of which determines whether a removal or retention is wrongful, in the [Hague] Convention sense”, it is indeed “a matter of custody rights”².

2. The fact that guardianship was to be exercised jointly with the father and that, under Israeli law, the right to determine the child's residence is one of the attributes of guardianship, is totally irrelevant in my opinion. What matters is that the mother, and she alone, was granted custody³. That, moreover, is what distinguishes the present case from *Maumousseau and Washington v. France* (where custody of the child had been granted to the

¹ The *Explanatory Report* on the Hague Convention by Ms Elisa Pérez-Vera (<http://hcch.e-vision.nl/upload/exp128.pdf>) states as follows: “it is ... clear that the characterization of the removal or retention of a child as wrongful is made *conditional upon the existence of a right of custody* which gives legal content to a situation which was modified by those very actions which it is intended to prevent. ... we are confronted in each case with the removal from its habitual environment of a child *whose custody had been entrusted to and lawfully exercised by a natural or legal person*.” (p. 428, paragraphs 9 and 12, emphasis added).

² *Explanatory Report*, cited above, p. 444, paragraph 65. The report adds: “Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent” (ibid., pp. 444 and 445, paragraph 65, footnote omitted).

³ The *Explanatory Report*, cited above, appears moreover to make a distinction between the right of custody and parental authority in the context of children entrusted to an institution or any other body: “... if a child were entrusted, by virtue of a judicial or administrative decision (i.e. compulsory placement of the child) to such a body in the country of its habitual residence, the parent who sought to obtain the actual enjoyment of custody rights would stand little chance of being able to invoke the provisions of the Convention. In fact, by virtue of the fact that such bodies would as a rule exercise jurisdiction, *except as regards the possible recognition of parental authority*, such a claim would not come within the scope of the Convention, since custody, in the sense understood by the Convention would belong to the body in question.” *Explanatory Report*, cited above, p. 451, paragraph 82 (emphasis added).

father) and from *Eskinazi and Chelouche v. Turkey* (where parental authority and custody were exercised jointly).

3. The Hague Convention, which – I repeat – is in my view inapplicable in the present case, provides in Article 5 that “ ‘rights of custody’ ... include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence”¹. The interpretation by the Federal Court², which incorporated into its reasoning the notion of “guardianship” as provided for by Israeli law, leads to the absurd result of depriving the child's mother of one of the attributes of the right of custody, namely the possibility of living with the child at the place of residence she considers the most appropriate and where she has established her home³. The possibility of living together at the chosen place of residence is in fact necessary if the obligation of care in the best interest of the child is to be fulfilled “effectively”. It is also noteworthy that in the present case the Israeli social services had ordered the parents to live apart in the interest of the child (paragraph 15 of the judgment).

4. In the light of the requirements of Article 8 of the Convention, the Federal Court's decision that the mother could be “reasonably expected” to return to Israel with her child is disproportionate. Moreover, in paragraphs 74 to 76 of the judgment, the Court points out that the “child's best interests” must be a primary consideration in any decision on such matters and that “[c]hildren must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs” (see Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly)⁴. However, the majority have failed to apply those principles in the present case.

¹ “.... leaving aside the possible ways of protecting the child's property” *Explanatory Report*, cited above, pp. 451 and 452, paragraph 84.

² For a critical commentary on the judgment of 16 August 2007, see the note by A. Bucher, in *AJP/PJA*, (*Aktuelle Juristische Praxis*), 12/2007, pp. 1588 et seq.

³ A. Bucher (op. cit., p. 1588) criticises the Federal Court's judgment as follows: “*Das Urteil beginnt mit einem krassen Fehler. Der Ausgangspunkt für die Feststellung, dass das Haager Abkommen anwendbar ist, sei die Verletzung des 'Sorgerechts' ('droit de garde' in der offiziellen Version) des in Israel verbliebenen Vaters*” (“The judgment begins with a glaring error. The finding that the Hague Convention was applicable seems to have been based on the premise that the right of custody of the father who remained in Israel had been breached” (free translation)). According to this author, the Federal Court was mistaken to include the determination of the child's residence among the attributes of custody rights, without taking into consideration the fact that, precisely, the child's father no longer had custody rights. The author adds that, according to the Federal Court, the child's relations with its father were confined to a restricted right of access, i.e. for two hours a week, under the supervision of the Israeli social services.

⁴ The *Explanatory Report* on the Hague Convention also refers to Recommendation No. 874 (1979) (see the *Explanatory Report*, cited above, p. 431, paragraph 24) and to its “first general principle”.

5. In this connection I wish simply to point out that the conduct displayed by the father had led the Israeli social services to order the parents to live apart (paragraph 15 of the judgment and paragraph 3 of my opinion). The competent judge of the Tel Aviv Family Court had prohibited the father from entering the nursery school or the first applicant's flat and from carrying or possessing a weapon (paragraph 16 of the judgment). An arrest warrant had been issued against him for defaulting on maintenance payments (paragraph 18 of the judgment). His right of access had been restricted (paragraph 16 of the judgment). The mother had even obtained a *ne exeat* order (paragraph 12 of the judgment), fearing that the father might leave the country with Noam to join a religious community abroad. As regards the considerable difficulties that the child would encounter in the event of his return to Israel, I thus agree entirely with the considerations expounded by Judge Kovler in his dissenting opinion.

6. I would like to complete my opinion by adding that, even supposing, for the sake of argument, that the Hague Convention does apply, the order for the child's return would be incompatible with the requirements of Article 13 of that convention, since the child, who has lived with his mother for more than two years in Switzerland, would be placed in an "intolerable situation" within the meaning of that provision. As Judge Kovler observes in his dissenting opinion, the Lausanne District Court and the Guardianship Division of the Vaud Cantonal Court had correctly considered that the child's return to his father would expose him to psychological and even physical harm (see also paragraphs 28 and 31 of the judgment).

7. I do not find the reasons given by the majority at paragraphs 88 to 93 of the judgment sufficiently convincing to allow me to conclude that the order for the child's return was proportionate.

8. Those reasons fail to convince me because:

(a) the return of the mother with her child would be very difficult to envisage, since she is socially integrated in Switzerland, where she works for a company in Lausanne;

(b) the child has now lived in Switzerland for a number of years;

(c) the fact that the father would be prepared to look after the child should the mother remain in Switzerland is a wholly irrelevant argument in the light of the particularly distressing background to the case (see paragraphs 11 to 19 of the judgment and paragraph 5 of my opinion);

(d) the mother faces a criminal sanction if she returns to Israel and a custodial sentence cannot be ruled out;

(e) in the light of the particularly distressing background to the case (see paragraphs 11 to 19 of the judgment and paragraph 5 of my opinion), any attempt by the first applicant to reach an agreement with the father would have been, and continues to be, in all likelihood bound to fail;

(f) any attempt by the first applicant to influence her son's religious education would also, in all likelihood, be bound to fail.

9. Even though I am very reluctant to endorse the arguments of my colleague Judge Steiner as to “the central point of the case, namely its religious context”, I do share her view that “the Chamber displays ... a theoretical optimism that [is] not supported by any material in the case file”.

10. I am therefore unable to concur with the conclusion reached by the Chamber in paragraph 93 of the judgment that “[i]n these circumstances ..., having regard to the margin of appreciation afforded to the authorities in such matters, the return decision was based on relevant and sufficient reasons for the purposes of Article 8 § 2, read in the light of Article 13, first paragraph, sub-paragraph (b) of the Hague Convention, and ... was proportionate to the legitimate aim pursued”.

11. In short, and from a perspective of the primacy of fundamental rights, including in a context of private international law¹, I would conclude that there has been a violation of Article 8 of the Convention.

¹ See Patrick Kinsch, *Droits de l'homme, droits fondamentaux et droit international privé, Collected Courses of the Hague Academy of International Law*, volume 318 (2005), pp. 193-203, paragraphs 151-155 (concerning the influence of German Constitutional Law) and pp. 204-209, paragraphs 156-160 (concerning generalisation in respect of human rights).

The Hague Convention itself, in Article 20, provides: “The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”. The scope of this provision is however somewhat uncertain. See the *Explanatory Report* by Ms Elisa Pérez-Vera, *op. cit.*, pp. 461 and 462, paragraph 118.