Information Note on the Court's case-law No. 132

July 2010

Neulinger and Shuruk v. Switzerland [GC] - 41615/07

Judgment 6.7.2010 [GC]

Article 8

Article 8-1

Respect for family life

Order for return of child with mother to father's country of residence from which it had been wrongly removed: *forced return would constitute a violation*

Facts – The first applicant, a Swiss national, settled in Israel, where she got married and the couple had a son. When she feared that the child (the second applicant) would be taken by his father to an ultra-orthodox community abroad, known for its zealous proselytising, the Family Court imposed a ban on the child's removal from Israel until he attained his majority. The first applicant was awarded temporary custody, and parental authority was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour. The parents divorced and the first applicant secretly left Israel for Switzerland with her son. At last instance, the Swiss Federal Court ordered the first applicant to return the child to Israel.

In a Chamber judgment of 8 January 2009, the European Court held, by four votes to three, that there had been no violation of Article 8 of the Convention (see Information Note no. 120).

Law – Article 8: In the opinion of the national courts and experts, the child's return to Israel could be envisaged only if he was accompanied by his mother. The measure in question remained within the margin of appreciation afforded to national authorities in such matters. Nevertheless, in order to assess compliance with Article 8, it was also necessary to take into account any developments since the Federal Court's judgment ordering the child's return. The Court took the view that it could be guided on this point, *mutatis mutandis*, by its case-law on the expulsion of aliens and the criteria on which to assess the proportionality of an expulsion order against a minor who had settled in the host State. In the present case, the child was a Swiss national and had settled very well in the country where he had been living continuously for about four years. Even though he was at an age (seven years old) where he still had a significant capacity for adaptation, the fact of being uprooted again would probably have serious consequences for him and had to be weighed against any benefit that he was likely to gain from it. In this connection, it was noteworthy that restrictions had been imposed on the father's right of access before the child's abduction. Moreover, the father had remarried twice since then and was now a father again but had failed to pay maintenance for his daughter. The Court doubted that such circumstances would be conducive to the child's well-being and development. As to the mother, her return to Israel could expose her to a risk of criminal sanctions, such as a prison sentence. It was clear that such a situation would not be in the child's best interests, his mother probably being the only person to whom he related. The mother's refusal to return to Israel was not therefore totally unjustified. Even supposing that she agreed to return to Israel, the father's

capacity to take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment could be called into question, in view of his past conduct and limited means. Moreover, the father had never lived alone with the child and had not seen him since the child's departure at the age of two. The Court was thus not convinced that it would be in the child's best interests for him to return to Israel. As to the mother, she would sustain a disproportionate interference with her right to respect for her family life. Consequently, there would be a violation of Article 8 in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

Conclusion: violation (sixteen votes to one).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.
