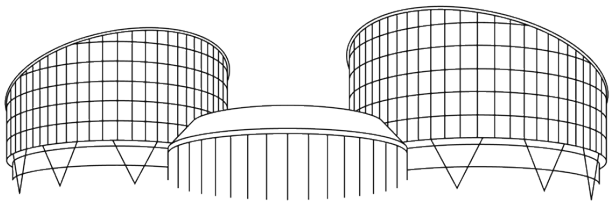

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF NEULINGER AND SHURUK v. SWITZERLAND

(Application no. 41615/07)

JUDGMENT

STRASBOURG

6 July 2010

In the case of Neulinger and Shuruk v. Switzerland,

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

Jean-Paul Costa, *President*,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Elisabet Fura,
Egbert Myjer,
Danutė Jočienė,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
Giorgio Malinverni,
András Sajó,
Nona Tsotsoria,
Zdravka Kalaydjieva, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 7 October 2009 and on 2 June 2010,

Delivers the following judgment, which was adopted on the last-mentioned 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 Neulinger and her son Noam Shuruk ("the applicants"), on 26 September 2007. The first applicant also has Belgian nationality and the second applicant also has Israeli nationality.

2. The applicants were represented by Mr A. Lestourneaud, a lawyer practising in Thonon-les-Bains (France). The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

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 conjunction 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. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 27 September 2007 the President of the Chamber decided to indicate to the Government, under Rule 39, that it was desirable, in the interest of the parties and for the proper conduct of the proceedings before the Court, not to enforce the return of Noam Shuruk.

6. 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. It further decided that the admissibility and merits of the case would be examined at the same time (Article 29 § 3 of the Convention). It also decided to give the application priority under Rule 41.

7 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.

8. On 14 February 2008 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.

9. On 8 January 2009 a Chamber composed of Christos Rozakis, President, Anatoly Kovler, Elisabeth Steiner, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou, judges, and Søren Nielsen, Section Registrar, delivered a judgment. Unanimously, it declared the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible. By four votes to three it found that there had been no violation of Article 8. The separate dissenting opinions of Judges Kovler, Steiner and Spielmann were appended to the judgment.

10. On 31 March 2009 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. The panel of the Grand Chamber granted the request on 5 June 2009. It moreover confirmed the application of the interim measures that had been indicated under Rule 39.

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

12. The applicants and the Government each filed observations on the merits.

13. Observations were also received from Mr Shuruk. However, as they did not comply with the conditions laid down in Rule 44 §§ 2 and 4 of the

Rules of Court, in conjunction with Article 36 § 2 of the Convention, they were not added to the case file.

14. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 October 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. SCHÜRMANN, Head of European law and international human rights section, Federal Office of Justice, *Agent*,
Mr D. URWYLER, acting head of private international law section, Federal Office of Justice, *Counsel*,
Ms C. EHRICH, technical adviser, European law and international human rights section, Federal Office of Justice, *Adviser*;

(b) *for the applicants*

Mr A. LESTOURNEAUD, lawyer,
Ms P. LESTOURNEAUD, lawyer,
Mr M.-E. FAVRE,
Mr Y. ZANDER, *Counsel*,
Ms M. MARQUEZ-LESTOURNEAUD, *Adviser*.

The first applicant was also present.

The Court heard addresses by Mr Lestourneaud, Ms Lestourneaud, Mr Favre, Mr Zander and Mr Schürmann. It also heard the replies of the parties' representatives to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

17. The first applicant, who refers to herself as Jewish, decided to settle in Israel in 1999. There she met an Israeli national, who is also Jewish, and they were married 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.

18. 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.

19. Marital difficulties then arose, and the first applicant, fearing that her husband would take their 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.

20. 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.

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

22. 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. The letter they sent to the parents read as follows:

> "1. We take the view that to maintain a common home and live, as you have been doing, under the same roof is not in the child's interest – and that is an understatement. It appears to us that the environment of constant recrimination and invective created by Shai against Isabelle has caused her permanent stress that may prevent her from fulfilling her role as a mother, when she is already faced with the need to find a job in order to support herself and pay the rent. It should be noted that Shai pays neither the maintenance ordered by the court nor the rent.
>
> We felt that some of Shai's recriminations verged on the absurd. He has decided that the child's illness, like the glandular fever and the epileptic fit that the child has suffered, are the mother's fault. Shai persists in asserting that Isabelle 'is not a good mother'; he does not accept the fact that the child attends nursery school, and claims that the medical certificates are insufficient. We advise Shai to speak to the doctors who are treating the child.
>
> Although he is maintained by Isabelle, Shai demands that the food complies to a very strict degree with Jewish dietary laws, observing one dietary rule or another ...
>
> There is no doubt that living apart will resolve some of these problems.
>
> We find that Shai creates a hostile environment at home – an atmosphere of verbal aggression and threats that terrorise the mother.
>
> In the light of the foregoing, we cannot but find that the mother is exposed to mental harassment and that the maintaining of a common home is harmful to the child.
>
> 2. Under the powers conferred on us by sections 19 and 68 of the Law on legal capacity, we reiterate our warning to Shai, calling on him not to take his child with him to engage in religious proselytising on the public highway, where he encourages passers-by to put on phylacteries and collects donations.

> Likewise, the father is requested not to take the child with him to the synagogue for a whole day at a time.
>
> We emphasise that the provisions on access in respect of the child are intended to bring father and child together for their common activities, and not for other purposes."

23. That same day, the first applicant filed a complaint with the police accusing her husband of assault.

24. 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 access right granted to the father, who was now authorised to see the child only twice a week under the supervision of the social services at a contact centre in Tel Aviv.

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

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

27. In a decision of 27 March 2005, a 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. The judge found, in particular, that there was a serious risk that the mother would not return to Israel with the child after visiting her family abroad, in view of the fact that she had no ties in that country.

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

29. 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.

30. On 22 May 2006 the Israeli Ministry of Justice transmitted to the Swiss Federal Office of Justice an application 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"; see paragraph 57 below). In support of its application 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.

31. 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 had been joint guardians of their son, with the mother having temporary custody and the father a right of access. 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.

32. 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.

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

34. 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 passport and that of Noam immediately with the court registry of the Justice of the Peace, on pain of criminal sanctions for refusal to comply with the decision of an authority.

35. 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.

36. 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, 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.

37. 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 potential 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.

38. On 30 November 2006 the competent court in Tel Aviv cancelled an indictment for domestic violence that the second wife of Noam's father had initiated, as she had left the country.

39. In a letter of 12 March 2007, in connection with the proceedings to secure the child's return, the Israeli Central Authority made the following observations to its Swiss counterpart:

"We acknowledge receipt of your letter dated 7 February 2007. We wish to respond to the questions raised in that letter as follows:

Mr Shuruk states that in the event that the mother refuses to return to Israel, he will take care of the child. He currently lives in an apartment with a roommate, however if the child is returned to Israel, he states that he will immediately secure an apartment to live in with the child. He is currently working and studying at an institution for religious learning, from 9 a.m. to 3 p.m. The child would be in day care/nursery school during those hours. Mr Shuruk points out that prior to the child's abduction to Switzerland, he was in day care as the mother worked. Mr Shuruk advises that his extended family would provide a back-up system for him in the event that he would need assistance from time to time.

The Appeal Court in Switzerland has raised a concern as to how Mr Shuruk can care for the child when his right of access has been restricted. As we stated in our letter to your office dated 28 September 2006, it must be remembered that according to the report of the social worker in Israel, the father and child had a wonderful relationship. There were plans to expand the visitation, to include overnight visits, however these plans were interrupted as a result of the mother's abduction of the child. If the mother were to refuse to return to Israel with the child, she would in effect be agreeing to the father having *de facto* custody, and Mr Shuruk could apply to the Israeli court to grant an order reflecting the new reality.

You further asked what steps could be taken to protect the mother should she return, given her allegations of violence on the part of Mr Shuruk. Mr Shuruk denies all such allegations. Furthermore, we are attaching a copy of the decision of the Tel Aviv Magistrate's Court dated 30 November 2006, together with a translation into English. This decision concerned an indictment filed against Mr Shuruk for allegations of assault by his second wife. As you can see, the complainant apparently left Israel and could not be located, therefore the court cancelled the indictment against Mr Shuruk.

In any event, we wish to draw your attention to the law in Israel that provides protection in cases of allegations of family violence; that law is the Prevention of Family Violence Law 1991. We are attaching a translation of that law into English, and an unofficial translation into French. Section 2 provides for protection orders that can be made. Therefore, if the mother has any concerns for her safety, she can apply to the court in Israel and request any necessary protection. Her allegations should not constitute a basis for the Swiss court to refuse to return the child to Israel.

You informed us that the court ordered a psychological evaluation of the child. We must express our concern in this respect. Such evaluation was not ordered by the lower court, and we wish to inquire as to why it has been ordered at this late stage. It must be remembered that the child was abducted by the mother in *June 2005*. The child has not seen his father in almost two years. During this period he has been subject to the sole influence of the mother. We therefore question what can be gained by a psychological evaluation of the child. It must be remembered that this is a Hague Convention proceeding, and not a custody case. It seems that the mother is trying to prove that the child will be psychologically damaged by being separated from her if he is returned to Israel. However this can be avoided if the mother will act in the child's best interests and return with him. As we stated in our letter of 28 September 2006, the mother does not appear to have any justifiable reason under the Hague Convention to prevent her return ..."

40. In a letter of 30 April 2007 to the lawyer acting for Noam's father, the Israeli Central Authority made the following observations on the question whether the first applicant would be prosecuted or imprisoned if she returned to Israel:

> "... You have requested that we inform you as to the legal consequences that would face the mother, Isabelle Neulinger, should she return to Israel with the child, as a result of the act of abduction of the child.
>
> In terms of criminal consequences for the act of abduction, abduction is an offence under Israel's Penal Law 1977 and carries a possible penalty of imprisonment. *However*, according to the guidelines of the State Attorney of Israel, upon receipt of a criminal complaint of parental abduction, the police are to forward the matter to the Central Authority under the Hague Convention for guidelines as to how to proceed in the matter. The State Attorney's guidelines provide that criminal proceedings should be commenced only in *very exceptional circumstances*. In Ms Neulinger's case, should she comply with an order to return the child to Israel, not disappear with the child upon her arrival to Israel, cooperate with the Israeli authorities and comply with the existing court order for supervised visitation by Mr Shuruk (pending any further decision), the Central Authority for Israel would positively consider instructing the Israel Police to close the criminal file for lack of public interest, provided that Ms Neulinger not commit further acts of abjection with respect to the child.
>
> In terms of civil consequences, we can inform you that the sole consideration in both the Israeli civil courts and Rabbinical courts, when deciding matters such as custody and access, is the best interests of the child ..."

41. In a judgment of 22 May 2007, the Guardianship Division of the Vaud Cantonal Court dismissed the father's appeal. Having carried out an additional investigation, and taking into account the expert's report by Dr B. of 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, 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. Its judgment read as follows:

> "4. (d) ... In response to the questions put to him, expert B. ... states in his conclusions that Noam's return to Israel *with* his mother would expose him to psychological harm, the intensity of which cannot be assessed without knowledge of the conditions of such return, in particular those awaiting his mother and the repercussions which they might have on the child; as regards the child's return to Israel *without* his mother, [the expert] is of the opinion that it would expose him to major psychological harm, as described in detail in the report. In the 'discussion' part of his report the expert emphasises that Noam's situation seems at present to be completely blocked. On the one hand, given his young age and his complete lack of recollection of his first years in Israel, including of his father, any visit to that country without his mother, even a brief visit, and even if the legal situation allowed it, would be psychologically highly traumatic, involving extreme separation-related anxiety and

a major risk of severe depression. On the other hand, the possibility of the mother's return to Israel with Noam, even for a short period, is totally out of the question for the mother. In answer to the question whether Noam's return to Israel might place the child in an intolerable situation, the expert replied that it was 'clearly' the conditions of the child's possible return to Israel that would or would not render the situation intolerable. He observed that, likewise, it was the conditions of his continuing residence in Switzerland that would or would not render his situation there intolerable and that the maintaining of the status quo represented a long-term major psychological risk for the child, with the result that, if there were no understanding between his parents, an agreement would urgently be required between the child protection services of the States of the parents' residence in order to make up for their failure to act.

In accordance with Article 13, third paragraph, of the Hague Convention, this court also requested the Israeli Central Authority to provide information about the child's social background, by answering the following questions: 'in the event that, as she has stated, the mother does not return to Israel, who will take care of the child and where will he stay? As the father does not appear to be in gainful employment, who will provide for the child's upkeep? As the right of access has been restricted by judicial decisions, what measures will be taken to ensure that the exercise of the right of access does not harm the child's physical and psychological welfare?' In its letter of 12 March 2007 the Israeli Central Authority did not really answer the questions put to it, so it is impossible to be satisfied about the interests of the child. The Central Authority merely mentioned the appellant's intentions concerning his son if his son should return to Israel without his mother, in the following terms: '[I]n the event that Noam's mother refuses to return to Israel, the father will take care of the child. He currently lives in an apartment with a roommate; however if the child is returned to Israel, he states that he will immediately secure an apartment to live in with the child. He is currently working and studying at an institution for religious learning, from 9 a.m. to 3 p.m. The child would be in day care/nursery school during those hours. Mr Shuruk points out that prior to the child's abduction to Switzerland, he was in day care as the mother worked. Mr Shuruk advises that his extended family would provide a back-up system for him in the event that he needs assistance from time to time.' As to the issue of how Shai Shuruk would be able to take care of the child, given that he has only a restricted right of access, the Israeli Central Authority emphasised: 'As we stated in our findings of 28 September 2006, according to the report of the social worker in Israel, the father and child had a wonderful relationship. There were plans to expand the visitation, to include overnight visits; however these plans were interrupted as a result of the mother's abduction of the child.' The Israeli Central Authority concluded that '[i]f the mother were to refuse to return to Israel with the child, she would in effect be agreeing to the father having *de facto* custody, and Mr Shuruk could apply to the Israeli court to grant an order reflecting the new reality'.

It should be noted that neither the conclusions of the child psychiatrist's report nor the information provided by the Israeli Central Authority are conducive to Noam's return to Israel. Not only would such a return entail a grave risk of exposure to psychological harm, whether or not he is accompanied by his mother, it would also place him again in an intolerable situation. Firstly, the psychiatric expert observes that if the child returns to Israel with his mother, he will risk being exposed to psychological harm whose intensity cannot be assessed without knowledge of the conditions of that return. In that connection, the Guardianship Division is of the opinion that, since the child's removal to Israel, even if his mother accompanies him, may expose the child to psychological harm and since, unlike the 'classic scenario'

envisaged by the Hague Convention, the respondent has custody of her son, she cannot reasonably be required to return to Israel. An additional factor is that the mother's return to Israel would also undermine the child's economic security, since the mother would be required to find a job there, in order to provide not only for her own needs but also for those of her son. The fact that the appellant has never provided for his child's upkeep and that he is known to earn only 300 [Swiss] francs per month cannot be disregarded when the interests of the child are taken into consideration in that context. Lastly, it must be considered that the requirement of the mother's return is disproportionate to the reason for the return: the object of the Hague Convention is to put the child back into the legal situation in which he was before he was abducted. However, the present return is requested in order to allow the appellant to exercise his right to a personal relationship, a right which is shown to have been exercised before the child's departure under the supervision of the social services in the form of two weekly meetings of two hours each. To require a mother to uproot herself in order to permit the exercise of such a restricted right of access, when the child's return certainly entails a risk of grave psychological harm, in view of the conditions of insecurity in which the return will take place, constitutes an intolerable situation for the child within the meaning of Article 13, sub-paragraph (b), of the Hague Convention.

As to Noam's return to Israel without his mother, the expert is of the opinion that it would be psychologically highly traumatic, involving extreme separation anxiety and a major risk of severe depression, which can be explained by his young age and his total lack of recollection of his first years in Israel, including of his father. That element is sufficient for a finding that the condition laid down in Article 13, sub-paragraph (b), is satisfied. In addition, the information provided by the Israeli Central Authority about the arrangements envisaged in the event that the child returns without his mother are, at the very least, a matter for concern: although the appellant has, legally speaking, only a very restricted right of access, under supervision, it is envisaged, according to the information provided by the Central Authority, that the appellant will take his son home (without any guarantee that he will by then have an individual flat) and will thus have *de facto* custody. In that connection, the Israeli Central Authority claims that by refusing to return to Israel with her son, the respondent is implicitly acquiescing in that change of situation – a new reality of which the appellant will then seek validation by the Israeli judicial authorities. That does not correspond to the aim pursued by the Hague Convention, which provides for the immediate return of the unlawfully removed child in order to put it back in the status quo ante. Such a return cannot therefore be ordered on the basis of the Hague Convention, and it is emphasised that there is no doubt that Noam's return to Israel in such circumstances would definitely expose him to a risk of major psychological harm, owing not only to the fact that he would be abruptly separated from his mother, when she has been his principal parental reference since he was born and has been the only one to provide for his upkeep, but also to the fact that he will be just as abruptly faced with a father of whose existence he has just learnt. In the light of the foregoing, the appeal on this point must be dismissed. ...

5. ... In the present case, it is apparent from the file that Noam Shuruk has lived with his mother, who has custody of him, for at least one year in Lausanne. Thus, the Justice of the Peace of the District of Lausanne had jurisdiction, *ratione loci* and *ratione materiae*, to take the disputed protective measure. As to the merits, it is sufficient to state that, since the child has no recollection of his father, owing to the process of physiological amnesia attributable to his very young age, there are valid grounds for avoiding an abrupt reunion, as the welfare of the child requires that the

resumption of a personal relationship with his father should take place calmly and gradually, after he has been properly prepared for that new situation, as may be seen from the expert's convincing submissions on that point. The ground of appeal is therefore ill-founded and must be rejected ..."

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

43. 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.

44. 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 application 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, 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, sub-paragraph (b), of the Hague Convention.

4.1 Under Article 13, 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) of the 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' child-rearing 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, 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 provide 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 'wonderful' 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 'Lubavitch' religious community, as they stand they do not indicate a grave risk that the child would be exposed to harm within the meaning of Article 13, sub-paragraph (b), of the Hague Convention. Whilst such considerations may help to determine which of the two parents offers the best child-rearing 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 Court judges quoted the expert psychiatrist who had referred to the 'judicial risks' that would be entailed 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, 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 Court judges breached Article 13, 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.

..."

45. 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 he withdrew that application after the Court had decided, on 27 September 2007, to indicate interim measures to the Government.

46. Subsequently, the applicants transmitted to the Court a medical certificate issued on 23 February 2009 by Dr M.-A., a paediatrician in Lausanne, which reads as follows:

> "I, the undersigned, certify that I have seen the child Noam Shuruk, born on 10 June 2003, on a number of occasions since 7 October 2005.
>
> On each occasion Noam has been accompanied by his mother, with whom he has a very good relationship.
>
> His behaviour is appropriate and his level of psychomotor development and language are above average. He does not appear to suffer from any psychological trauma or from any emotional or educational deficiencies.
>
> He is a confident boy, capable of forming good relationships, in particular with adults.
>
> He is in good physical health, with little trace of intercurrent infections.
>
> An abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child."

47. In a provisional-measures order of 29 June 2009 the President of the Lausanne District Court, at the request of the first applicant, decided that Noam should live at his mother's address in Lausanne, suspended the father's right of access in respect of his son and granted parental authority to the mother, so as to allow her to renew the child's identity papers. The decision was based on the following grounds in particular:

> "[I]t is noted that the respondent was summoned to appear by court order served at his last known address in Israel.
>
> The letter was returned marked 'gone away', which can be translated as '*parti sans laisser d'adresse*' (gone without leaving a forwarding address).
>
> ... It appears that the mother has custody of the child while parental authority is still held jointly.
>
> The father was apparently required to 'exercise a right of visitation' under the supervision of the social services ...
>
> In the context of the proceedings, the respondent never appeared at the hearings but was represented by counsel, who is apparently no longer acting for his client ...
>
> According to case-law, the wrongful removal of a minor does not in itself preclude the establishment of a new habitual residence for the child in the country to which it has been taken (see Federal Court judgment 125 III 301, *Journal des Tribunaux* 1999 I 500).
>
> In the present case, Noam has been living in Switzerland continuously since June 2005.

He attends school there.

He has family ties there on his mother's side.

He receives medical attention there.

He is also a national of Switzerland,

of which he speaks the language, in this case French.

Interim measures in favour of the applicant were decided by the European Court of Human Rights, which requested the Swiss Government not to return Noam to Israel in spite of the Federal Court's decision.

Despite his legal battle, the respondent has never sought to see his child,

and his place of residence is unknown.

He appears to have lost interest in the present case.

Consequently, the child now has a stable relationship only with his mother.

It is therefore appropriate to allow her application and to decide provisionally that Noam should reside in Lausanne, Switzerland, at the place of his habitual residence, with his mother.

Article 273 § 1 of the Civil Code provides that the father or mother not having parental authority or custody and the minor are reciprocally entitled to maintain such personal relations as may be appropriate in the circumstances.

The right to personal relations is intended to preserve the bond between parents and children ...

The maintaining and development of this bond is obviously beneficial to the child.

Personal relations must accordingly be fostered, unless the child's welfare is endangered.

The scope of personal relations and the manner in which they are carried on should be appropriate to the situation, in other words taking fair account of the particular circumstances of the case.

The child's welfare is the most important assessment criterion (see Federal Court judgment 127 III 295, c 4a).

The entitled person's situation and interests should also be taken into consideration: his or her relationship with the child, personality, place of abode, free time and environment.

Special conditions for the exercise of access rights may be imposed ...

The applicant has requested the withdrawal of the respondent's access right in respect of their son Noam.

In the circumstances of the case, the respondent's access right was already limited by decisions given by the Israeli authorities before the child's departure for Switzerland.

The child has not seen his father since 2005.

They apparently have no common language.

In any event, the resumption of access rights, if requested by the respondent, could only be gradual.

The respondent's place of residence is currently unknown.

In the circumstances it appears appropriate to order the provisional suspension of the respondent's access rights in respect of his son Noam.

The applicant requests that 'parental authority in respect of Noam, born on 10 June 2003, be exclusively and provisionally granted to his mother Isabelle Neulinger in Lausanne for the purposes of renewing his identity papers'.

The applicant has explained that her son, who has dual Israeli and Swiss nationality, currently has no identity documents.

He had a Swiss passport until recently.

However, when it expired the administrative authorities refused to issue him with a new one without the father's consent, as the parties had joint parental authority in respect of the child.

The respondent's place of abode is currently unknown.

The applicant is thus unable to ask him for such consent.

The child lives in Switzerland with her,

and she has custody of him.

The present case, on the merits, admittedly concerns a change in the attribution of parental authority, since the applicant requests that by virtue of Swiss law it be exclusively granted to her.

It may appear that the provisional measure requested, if granted, settles the case on the merits.

However, the requested measure is far more limited in scope since it is only to ensure the possibility of obtaining identity papers for the applicant's child.

The child is a Swiss national resident in Switzerland.

It is therefore necessary for him, like any other citizen, to obtain identity papers.

The applicant's request is therefore granted.

..."

It does not appear, from the information currently before the Court, that either party to the dispute has appealed against that decision.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Protection of the rights of the child

1. United Nations Convention on the Rights of the Child

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

Preamble

"The States Parties to the present Convention,

...

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, ...

Have agreed as follows:

..."

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.

..."

2. Concept of the child's "best interests"

49. The concept of the child's best interests stems from the second principle of the Declaration of the Rights of the Child adopted by the United Nations on 20 November 1959. It provides as follows:

"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

50. The term was used again in 1989 in Article 3 § 1 of the Convention on the Rights of the Child:

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

51. Neither the working group during the drafting of the Convention nor the Committee on the Rights of the Child has developed the concept of the child's best interests or proposed criteria for their assessment, in general or in relation to specific circumstances. They have both confined themselves to stating that all values and principles of the Convention should be applied to each particular case (see Rachel Hodgkin and Peter Newell (eds.), *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund 1998, p. 37). In addition, the Committee

has emphasised on various occasions that the Convention must be considered as a whole, with the relationship between the various articles being taken into account. Any interpretation must be consistent with the spirit of that instrument and must focus on the child as an individual having civil and political rights and its own feelings and opinions (ibid., p. 40).

52. The "Guidelines on Determining the Best Interests of the Child" were issued by the United Nations High Commissioner for Refugees (UNHCR). They provide, *inter alia*:

> "The term 'best interests' broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences." (UNHCR Guidelines on Determining the Best Interests of the Child, May 2008)

53. The principle of "the child's best interests" is also embodied in Articles 5 and 16 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women. Article 5 (b) reads as follows:

> "States Parties shall take all appropriate measures:
>
> ...
>
> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

54. Under Article 16 § 1 (d) of that Convention, States are committed to ensuring the following, with regard to equality between men and women:

> "[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; [and] in all cases the interests of the children shall be paramount".

55. Even though the principle does not appear in the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee in its General Comments Nos. 17 and 19 referred to "the paramount interest" of the child in the event of the separation or divorce of its parents. In its General Comment 17 (adopted at its 35th Session, 1989) the Committee stated that if a marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to guarantee, so far as is possible, personal relations with both parents. For abandoned children, special measures must be taken in order to enable them to develop in conditions that most closely resemble those characterising the family environment. In its General Comment No. 19 (adopted at its 39th Session, 1990) the Committee indicated that any discriminatory treatment in regard to divorce, child custody, visiting rights, etc., must be prohibited, unless the paramount interest of the child required otherwise.

56. The European Union's Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009, contains the following Article:

Article 24 – The rights of the child

"1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

B. Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the Hague Convention")

1. Text of the instrument

57. The relevant provisions of the Hague Convention, which came into force in respect of Switzerland on 1 January 1984, read as follows:

"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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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 recognised 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.

...

Article 20

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.

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of cooperation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

2. Consideration of the child's "best interests" in the context of Article 13, sub-paragraph (b), of the Hague Convention

58. The Explanatory Report by Ms Elisa Pérez-Vera on the drafting of the Convention states as follows:

> "... since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any political or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the status quo ...". (paragraph 16, p. 429)

59. However, the Hague Convention contains five exceptions to the principle of the child's prompt return, among which the most commonly invoked exception is that of Article 13, sub-paragraph (b).

60. The French Court of Cassation, the House of Lords and the Finnish Supreme Court have all expressly incorporated the concept of the "child's best interests" into their application of the exception based on a "serious risk" within the meaning of Article 13, sub-paragraph (b), of the Hague Convention.

61. In a case from 2005, the French Court of Cassation stated the following:

> "... under Article 13, sub-paragraph (b), an exception can be made to the child's prompt return only if there is a grave risk of harm or of the creation of an intolerable situation;"

and

> "by virtue of Article 3 § 1 of the [United Nations] Convention on the Rights of the Child, a provision that is directly applicable before the French courts, such circumstances must be assessed with the child's best interests as the primary consideration". (Court of Cassation, First Civil Division, 14 June 2005, appeal no. 04-16942)

62. That court thus upheld a judgment of the Aix-en-Provence Court of Appeal of 13 May 2004, finding as follows:

> "... the child's best interests [had been] taken into consideration by the Court of Appeal, which [had] accordingly reached the conclusion ... that it was appropriate to order the prompt return of the child under the Hague Convention."

63. The Finnish Supreme Court conducted a similar assessment in applying the exception under Article 13, sub-paragraph (b), indicating as follows:

> "... the court had pointed out that a grave risk of harm would not exist if the mother returned to France with her children and ensured that their living conditions were adapted according to their best interests ..." ([27 December 1996] Supreme Court of Finland 1996:151, S96/2489)

64. In a case examined on 16 November 2006 by the House of Lords concerning the abduction of a child from Romania to the United Kingdom, Lord Hope observed:

> "... it is impossible to believe that the child's best interests would be served by his return forthwith to Romania." (*In re D (a child)*, [2006] UKHL 51, [2007] 1 AC 619)

3. The concept of "rights of custody" under the Hague Convention

65. Article 5 (a) of the Hague Convention defines custody rights as "rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence". The Convention recognises that custody 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 the State in which the child had its habitual residence immediately before removal or retention (Article 3 *in fine*). Furthermore, the Explanatory Report on the Convention emphasises the drafters' intention to protect all the ways in which custody of children can be exercised and recognises that there can be wrongful removal or retention even if parents have joint custody of their child:

> "In terms of Article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. ... Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise" (Explanatory

Report by Elisa Pérez-Vera, Acts and Documents of the Fourteenth Session, vol. III, Child Abduction, Hague Conference on Private International Law, paragraph 71, pp. 447-48)

66. The drafters of the Convention created an autonomous definition of custody rights quite apart from domestic-law interpretations of that concept. This autonomous nature was confirmed in the "Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction" (§ 9, p. 3), which stated as follows:

> "... 'rights of custody' as referred to in the Convention on the Civil Aspects of International Child Abduction constitute an autonomous concept, and thus such rights are not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction thereof. ... [T]he award of what is called 'custody' to only one parent under domestic law, does not necessarily mean that all 'rights of custody' within the intent of the Hague Convention have been granted to that parent. Since each domestic legal system has its own terminology for referring to rights which touch upon the care and control of children, and even some English-language systems do not employ the term 'custody', it is necessary to look to the content of the rights and not merely to their name."

67. The autonomous meaning of "rights of custody" was further confirmed during the second meeting of the Special Commission when the following conclusion, among others, was adopted:

> "... the expression 'rights of custody' ... does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention." (Report of the Second Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction held on 18-21 January 1993, p. 4)

68. In addition, according to the Explanatory Report, the Convention is engaged only by issues relating to breaches of custody rights. It does not in principle concern situations arising from breaches of access rights, in particular where the child is taken abroad by its custodian (Explanatory Report, paragraph 65).

4. Domestic case-law concerning the concept of "rights of custody" within the meaning of the Hague Convention

69. The Hague Convention provides no enforcement mechanism or oversight body to ensure that Contracting States implement it. Therefore, it is possible that the case-law of domestic courts relating to the Hague Convention may differ from one Contracting State to another. In practice, there is a lack of consistency in the interpretation of the various judicial bodies as regards the Hague Convention's distinction between custody rights and access rights, more specifically where they have to decide whether to grant the remedy of return to non-custodial parents who hold access rights.

70. However, there seems to be a trend towards a wide interpretation of wrongful removal or retention, thus broadening the scope of custody rights to allow types of parenting other than the holding of custody rights to benefit from the Convention's protection.

71. In the case of *C. v. C.* (England and Wales Court of Appeal; [1989] 1 WLR 654, 657-58), for example, a custodial parent had removed a child from Australia in breach of a restraining order (also called a *ne exeat* order, prohibiting a child's removal from a given geographical area). In that case the child could not be removed without the consent of the non-custodial parent. The court found that the Convention's judicial remedy of return applied. They justified this reasoning by equating the ability to grant or withhold consent for relocation with a custodial "right to determine the child's place of residence".

72. The Family Court of Australia took the same approach in the case of *José García Resina*, where a father lodged an application under the Convention for the return of his children after they had been taken to France by their maternal grandparents (*José García Resina and Muriel Ghislaine Henriette Resina*, [1991] FamCA 33). The Australian court considered both a custody order, which gave the father "reasonable access" to the youngest child, and an injunction restraining both the mother and the father from removing the children from Australia. It ultimately ordered the return of the children pursuant to the Convention because their removal had violated the father's custody rights that had been created by the restraining order. Similarly, the Israeli Supreme Court found that a custody agreement between parents contained a mutual consultation clause for major changes and unusual events, which implicitly included decisions on the residence of the child (*Foxman v. Foxman*, Israeli Supreme Court, 1992). The court thus considered that the father had rights of custody within the meaning of the Convention.

73. It appears that other national courts, in particular in common-law countries, have largely cited the *C. v. C.* case and have followed its general holding that if the custodial parent needs permission from the court or the non-custodial parent before removing the child from a country, a removal without such permission may be regarded as "wrongful" within the meaning of Article 3 of the Hague Convention (see *Re F*, England and Wales Court of Appeal, [1995] 3 WLR 339, where the father had rights of custody, even though the mother had a court order giving her temporary "care and control" and there was no order barring the child's removal).

74. However, the practice of domestic courts is not homogeneous. Thus, for example, the United States Court of Appeals found that access rights coupled with a *ne exeat* clause did not constitute "rights of custody" within the meaning of the Hague Convention (*Croll v. Croll*, 229 F.3d 133, 143, Second Circuit, 2000).

C. Domestic legislation relevant to the implementation at national level of the above-mentioned Conventions

1. New Swiss Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults

75. 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. The Act came into force on 1 July 2009. The sections of the Act referred to 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, 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 interests;

(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 interests."

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."

76. In connection with the federal decree concerning this Act, the Federal Council submitted to Parliament a "dispatch" (*Feuille Fédérale* 2007, pp. 2433-682), of which the relevant passages read as follows:

"**6.4 Return and interests 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, 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 interests. 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 the child had his or her 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 granting 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 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 interests. 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, 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 interests. 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."

2. Concepts of "custody" and "guardianship" in Israeli law

77. The concept of guardianship is defined in Chapter 2 of the Capacity and Guardianship Law 1962. The term custody is not defined as such but is mentioned.

78. Section 14 of that Law provides that "[p]arents shall be the natural guardians of their minor children". In Israel, parents, whether married, divorced or unmarried, are joint and equal guardians of their children. The term "guardianship" may be regarded as equivalent to "parental authority" in other jurisdictions.

79. Guardianship is an automatic right which both parents acquire and can only be restricted or removed in exceptional circumstances (where a Magistrate's Court adopts one of the measures mentioned in section 3(3) or (4) of the Youth (Care and Supervision) Law). This rule is set out in section 27 of the Law.

80. Section 15 defines and describes the role of parents in Israeli law and outlines what parental guardianship entails in the following terms:

> "The guardianship of the parents shall include the duty and the right to take care of the needs of the minor, including his education, studies, vocational and occupational training and work and to preserve, manage and develop his property; it shall also include the right to the custody of the minor, to determine his place of residence and the authority to act on his behalf."

81. Section 17 sets the standard of parents' duties. It states that in exercising their guardianship, "parents [must] act in the best interests of the minor in such manner as devoted parents would act in the circumstances".

82. There is a general presumption that parents should cooperate in taking decisions relating to their guardianship (section 18). However, where no agreement is reached, they may refer to the court to decide the issue (section 19).

83. Section 24 provides that, when parents live apart, they may reach an agreement as to: who is going to have guardianship of the minor, wholly or in part; who is going to have custody of the minor; and what rights the other parent is going to have, in particular as regards contact with the child. Such an agreement is subject to the approval of the court.

84. Under section 25, if the parents cannot reach such an agreement these issues may be determined by the court having regard to the best interests of the child.

85. Section 25 further creates a presumption of custody in favour of the mother for children under six years old unless there are special reasons for directing otherwise.

86. Accordingly both parents share joint decision-making authority regarding their child's place of residence. One parent cannot remove the child from Israel without the permission of the other parent or of a court. If one parent wishes to remove the child from Israel without the other parent's consent, then the parent wishing to leave must apply to the Israeli courts for a relocation order and an order for custody of the child.

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

87. In their memorial before the Grand Chamber the applicants complained of a violation of their right to respect for their family life within the meaning of Article 8 of the Convention. In addition, they argued that the enforcement of the second applicant's return without the first applicant would constitute inhuman treatment prohibited by Article 3 and a violation

of Article 9, since the second applicant's father could be expected to subject him to the precepts of the "Lubavitch" community, which the applicants described as "ultra-orthodox" and from which the first applicant wished to distance her child permanently.

88. The Court notes, however, that the Chamber declared inadmissible the complaints under Articles 3 and 9 of the Convention for failure to exhaust domestic remedies. Accordingly, the Grand Chamber cannot examine them (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

89. The applicants alleged that there had been a violation of their right to respect for their family life under Article 8 of the Convention, which 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."

1. Applicability of Article 8

90. The Court refers to the following findings in the Chamber judgment:

> "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).
>
> ...
>
> 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."

91. The Grand Chamber subscribes to those findings, which are not in dispute between the parties. It must therefore be ascertained whether the impugned interference met the requirements of the second paragraph of Article 8, that is to say whether it was "in accordance with the law", pursued one or more legitimate aims and was "necessary in a democratic society" in order to fulfil those aims.

2. Justification for the interference

(a) Legal basis

(i) The Chamber judgment

92. The Chamber found as follows (see paragraph 80 of the judgment):

> "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."

(ii) The parties' submissions

(α) The applicants

93. The applicants took the view that the present case did not concern an international child abduction under the Hague Convention. They first argued that Noam's removal from Israel by his mother had not been wrongful within the meaning of that Convention. They submitted 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.

94. 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, on account of the religious fanaticism that he displayed publicly, wanted unilaterally to impose on his infant son an ultra-orthodox and radical religious education and lifestyle 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 access restricted and placed under the supervision of the social services because of his irresponsible conduct; the criminal complaints filed against him in Israel had been ineffective; lastly, the child's removal had been lawful by virtue of

Israeli Law no. 5722-1962 ("Capacity and Guardianship Law"), 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 where the parent had custody of the child.

(β) The Government

95. The Government took the view that the second applicant's removal had been wrongful. Pointing out that the Explanatory Report of April 1981 on the Hague Convention contrasted "rights of custody" with simple access rights, they observed that "[a] questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other". Thus, the question whether joint custody existed had to be determined in each particular case and in the light of the law in force in the country of the child's habitual residence.

96. In the Government's submission, it was clear that, by reference to the definition in Article 5, sub-paragraph (a), of the Hague Convention, Israeli guardianship covered "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" within the meaning of that provision. That interpretation was confirmed by the fact that Article 3 of the Hague Convention expressly mentioned cases where, as in the present case, custody was exercised jointly. It could clearly be seen from the Explanatory Report that this particularly referred to cases of joint custody after the parents had separated or divorced. In this connection the Government stressed that it was expressly envisaged in the Hague Convention that the removal of a child against the wishes of a parent having joint custody, but with whom the child did not live, would be unlawful.

97. The view that joint guardianship was irrelevant as the mother alone had custody, as expressed by Judge Spielmann in his dissenting opinion (appended to the Chamber judgment), was not sufficiently substantiated by the passages of the Explanatory Report cited in that opinion. As regards Judge Spielmann's observation that the Explanatory Report appeared to make a distinction between custody rights and parental authority in the context of children entrusted to an institution, the Government observed that it was apparent from the passage in question that in the event of compulsory placement of the child, custody for the purposes of the Hague Convention would belong to the relevant body. In the Government's submission, as that body was then responsible for taking care of the child's needs and, in particular, for determining its place of residence, that passage also

confirmed that custody within the meaning of the Hague Convention corresponded to guardianship and not to custody in Israeli law.

98. In view of the foregoing, the Government submitted that the Hague Convention was applicable and that the second applicant's removal from Israel had to be regarded as wrongful within the meaning of that Convention. All the authorities dealing with the matter, whether the Israeli and Swiss authorities or the Chamber of the Court, had moreover shared that opinion.

(iii) The Court's assessment

99. The Court notes that the Federal Court's judgment of 16 August 2007 was based mainly on the Hague Convention, which has been incorporated into Swiss law. However, the applicants disputed the applicability of that instrument in the present case because, in their view, Noam's removal from Israel by his mother was not wrongful. The Court must therefore examine whether the Hague Convention constituted a sufficient legal basis on which to order the child's return to Israel.

100. The Court reiterates at the outset that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or to international agreements. The Court's role is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Korbely v. Hungary* [GC], no. 9174/02, § 72, ECHR 2008).

101. In the present case, the second applicant's removal was examined by three domestic courts which all concluded, in duly reasoned decisions, that it was wrongful within the meaning of the Hague Convention. That assessment was confirmed by the Chamber for two main reasons: firstly, even though the first applicant had custody, at least on a provisional basis, the father had guardianship jointly with the mother under Israeli law; secondly, Noam's removal rendered illusory, in practice, the right of access that had been granted to the father.

102. It should also be observed that the concept of custody rights, within the meaning of the Hague Convention, has an autonomous meaning (see paragraphs 66-67 above) since it has to be applied to all the States Parties to that Convention and may be defined differently in their various legal systems. In the present case, it appears that in Israeli law the institution of guardianship is comparable to custody rights under Article 5, first paragraph, (a) of the Hague Convention, which refers in its definition to the right "to determine the child's place of residence". Such right is also included in guardianship. In the present case that right was breached because it was to be exercised jointly by both parents; moreover, there is no

indication that it was not exercised effectively until the child's removal, as required by Article 3, first paragraph, (b) of that Convention.

103. In addition, it is noteworthy that the mother took the child to Switzerland in breach of an order prohibiting his removal from Israel that had been made by the competent Israeli court at her own request. It appears that courts in certain States take the view that breaches of such orders give rise to the application of the Hague Convention (see paragraphs 69-74 above).

104. Lastly, even though in principle the Hague Convention applies only to breaches of custody rights, it can be seen from its Preamble, Article 1 (b) and Article 21 (see paragraph 57 above) that it also seeks to protect access rights. There is no doubt in the present case that the second applicant's removal hindered the possible exercise by the father of the right of access that he had been granted.

105. In view of the foregoing, the Court finds, like the Chamber, that the first applicant removed her child from Israel to Switzerland "wrongfully", within the meaning of Article 3 of the Hague Convention. She thus committed an abduction for the purposes of that Convention, which is therefore applicable in the present case. Accordingly, in ordering the child's return under Article 12 of the Hague Convention, the impugned measure had a sufficient legal basis.

(b) Legitimate aim

106. The Court shares the Chamber's opinion that the decision by the Federal Court to return the child pursued the legitimate aim of protecting the rights and freedoms of Noam and his father, as the parties have moreover not denied before the Grand Chamber.

(c) Necessity of the interference in a democratic society

(i) The Chamber judgment

107. In the Chamber's opinion, the interference that would be constituted by Noam's return would not be disproportionate. In this connection the Chamber noted the many measures that had been taken by the Israeli authorities in order to protect the applicants when they were still living in that country. A return to Israel could be envisaged for the mother and for the child, given that he was still at a perfectly adaptable age (see the Chamber judgment, §§ 80 and 89). As regards the risk of a criminal sanction against the mother, the Chamber found no reason to doubt the credibility of the assurances given by the Israeli authorities in that connection, having regard in particular to the efforts they had made for the mother and child before their departure for Switzerland (ibid., § 90). The Chamber further emphasised that it was in the "best interests" of every child to grow up in an environment that allowed him or her to maintain regular

contact with both parents (ibid., § 91). In addition, there was 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 (ibid., § 92).

(ii) The parties' submissions

(α) The applicants

108. The applicants submitted that, in the present case, it should be borne in mind that the first applicant had custody of the child whilst the father had a limited right of access, under supervision, on account of conduct that all the judges dealing with this case had unanimously found to be unacceptable. In the applicants' submission, that circumstance was of the essence, since it clearly distinguished the present case from *Bianchi v. Switzerland* (no. 7548/04, § 77, 22 June 2006), in which the Court had emphasised that while its role was not to substitute itself for the competent authorities in regulating custody and access issues, it was nevertheless entitled to review under the Convention the decisions that those authorities had taken in the exercise of their power of appreciation.

109. The applicants took the view that the Federal Court's method was significantly different from that adopted by the first two courts in support of their decisions: while those two courts had refused to place too narrow an interpretation on the provisions of the relevant international instruments, the same could not be said for the Federal Court, which had limited the scope of its analysis by deliberately taking an overtly restrictive position. Whilst the courts below had upheld the objection to the child's return, highlighting, in particular, the best interests of the child and the grave risk of psychological harm, and also the intolerable situation which they considered the child would face if he were returned to Israel with or without his mother, the Federal Court had quite simply rejected that approach, even though it was supported by an expert's report, and had declared that the proper solution was in fact to compel the mother, who had custody, to return to Israel with the child, failing which she would be separated from him. However, the first applicant had always declared that she would not return to Israel, not only because of the intolerable situation which had precisely led her to leave that country in June 2005, but also because to do so would mean uprooting herself and her child and would entail problems for her before the Israeli courts. In addition, as she had sole financial responsibility for the child, the first applicant could not reasonably be expected to give up her job in Switzerland. Furthermore, the child and his mother had been fully integrated in the environment and social life of Lausanne for more than four years.

110. In the applicants' submission, the risk that the mother would be imprisoned if she returned to Israel was established and the civil

consequences of separation would be disastrous. They stated that, under Israeli criminal law no. 5737-1977, the mother was liable to very severe criminal sanctions. Contrary to the Federal Court's finding, she would most certainly face such a sanction on her return to Israel and this would undoubtedly constitute, in the applicants' view and as the medical expert had emphasised in his report of 16 April 2007, a major psychological trauma and an intolerable situation for the child, who would in practice experience an immediate and distressing separation from his mother. The applicants stated that the consequences of the mother's imprisonment in Israel would also be disastrous in civil terms for the future of mother and child. They alleged that in such a case, after being separated from his mother when she was sent to prison, Noam would not be entrusted to his father on account of the decisions previously issued against him, his instability and his lack of resources. They pointed out at this stage that the father had remarried on 1 November 2005 but had divorced his new wife, G., on 29 March 2006 while she was pregnant. He had married a third time and proceedings had again been brought against him in 2008, this time by his second wife, for defaulting on maintenance payments in respect of their daughter.

111. The applicants also argued that neither the Israeli authorities nor the respondent Government had given any reliable guarantees that the first applicant would not face criminal sanctions should she return to Israel and that she would not be separated from her child, of whom she had custody. The letter produced by the respondent Government in support of their observations of 15 February 2008 (Annex no. 3 – paragraph 40 above) contained no element capable of precluding with certainty all risk of criminal sanctions against her if she returned to Israel.

112. The applicants also pointed out that in his report of 16 April 2007 Dr B., a medical expert, taking into account the fact that the mother had ruled out her return to Israel owing to the risk of judicial proceedings against her, had concluded that the child's return without his mother would entail major psychological trauma in the form of extreme separation anxiety and a major risk of severe depression.

113. In the applicants' submission, the opinion expressed by the Federal Court and by the respondent Government in the present case did not reflect those expressed by the Federal Council, by legal writers, by the Swiss Parliament or by the main organisations which had been consulted prior to the enactment, on 21 December 2007, of the new Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults.

114. The failure to return the child to Israel would not undermine the international protection system established by the Hague Convention but, on the contrary, would uphold it. In the applicants' submission, whilst the principle of that Convention was to return a wrongfully removed child to

the State of his or her habitual residence with the assistance of the Central Authorities designated for that purpose, it nevertheless had to be emphasised that there was an exception to that principle where the return would expose the child to a grave risk of physical or psychological harm and/or to an intolerable situation (Article 13, sub-paragraph (b), of the Hague Convention). The applicants moreover pointed out that nowadays the Hague Convention was no longer the only instrument providing for assessment in proceedings of this type. They emphasised that the Convention on the Rights of the Child made the best interests of the child a primary consideration in all decisions relating to children. Thus they took the view that the Federal Court should not have disregarded the best interests of the child. In assessing those interests it should have ascertained and weighed up specifically and objectively the consequences of the child's return to Israel, and should have determined and described, before delivering its judgment, the appropriate arrangements that would apply upon the child's return.

115. As regards the possibility that the parents might agree on the child's education, such a scenario could not be envisaged in the present case precisely because of the radical position adopted by the father. The applicants pointed out in this connection that at the time of his marriage to the first applicant on 16 October 2001, Mr Shuruk had not yet adopted a radical religious attitude. It was only from the autumn of 2003, shortly after the child's birth, that the father had, without taking into account the mother's opinion, chosen to join an ultra-orthodox religious movement, thus completely changing the rules of life adopted by the spouses at the time of their marriage. Moreover, Mr Shuruk had not denied that he belonged to the ultra-orthodox Jewish "Lubavitch" movement, which, in the applicants' submission, was a "mystical and ascetic movement" of traditional Hasidic Judaism, whose members engaged in zealous proselytising. Nor had Mr Shuruk denied having also sought to impose on his wife and child a radical way of life which, for example, required women to hide their hair and boys to be sent at the age of three to religious "Heder" schools. In this connection, the first applicant explained that she had no intention of cutting her son off from his roots. Since 2006 he had been attending a municipal secular nursery school one day a week and a private State-approved Jewish day-care centre where, in addition to the school curriculum of the Canton of Vaud, he was being taught the basic principles of Judaism.

116. Lastly, the applicants argued that the child's protection required the authorities of the requested State to have taken all the necessary precautionary measures prior to enforcing the return that had been ordered. They observed that it was apparent in particular from the Government's observations of 15 February 2008 that the Federal Court's judgment of 16 August 2007 did not contain any provisions for its enforcement.

117. For these reasons the applicants concluded that the child'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 protected by Article 8 of the Convention.

(β) The Government

118. The Government observed that whilst a return to Israel would cause the first applicant some inconvenience that she might find unsatisfactory, such problems were inherent in the Hague Convention system and could not render its mechanism inoperable. In the Government's submission it was only where the return entailed violations of human rights that went beyond the interference inherent in the return envisaged by the Hague Convention that such return had to be declared incompatible with the Convention, a situation which, moreover, was envisaged by Article 20 of the Hague Convention. The Government took the view that the exceptions to the child's return had to be interpreted in a restrictive manner if the Hague Convention was not to become a dead letter.

119. The Government further relied on the Court's judgment in *Maumousseau and Washington v. France* (no. 39388/05, 6 December 2007), where it had stated that the aim of the Hague Convention was to prevent the "abducting" parent from succeeding in legitimating, by the passage of time operating in his or her favour, a *de facto* situation which he or she had created unilaterally. In that case the national authorities had stressed, in particular, that the mother, contrary to what she maintained, could accompany her child to the State in which he had his habitual residence in order to assert her rights there. That factor had been regarded as decisive by the Court, as the mother had unrestricted access to the territory of the State in question and could bring proceedings before the competent courts of that State.

120. In the Government's opinion, the arguments put forward in the dissenting opinions, and reiterated by the applicants in their referral request, could not call into question the merits of the assessment by the Federal Court and by the Chamber. It could not be inferred, in the context of the Hague Convention, that the fact that the first applicant was socially integrated in Lausanne prevented her from accompanying the second applicant if he returned to Israel. As she had lived in Israel for six years, she must surely have a certain social network there. In that connection, the Government emphasised that, according to the report by the expert Dr B., she had decided to settle in Israel after spending holidays with her family in that country.

121. As regards the risk of criminal sanctions, the Government took the view that nothing new had emerged from the dissenting opinions or from the applicants' referral request. The Government admitted that it followed from a letter from the Israeli Central Authority, forwarded to the

Guardianship Division by the child's father, that under Israeli criminal law a custodial sentence could be imposed for child abduction. However, guidelines issued by the Israeli State Attorney's Department provided that when the police were dealing with such a case they would transfer it to the Israeli Central Authority responsible for application of the Hague Convention, which would then make recommendations as to the solution to be applied to the case. In this connection the Government observed that, according to the relevant guidelines, criminal proceedings should be brought only in very exceptional cases. The Israeli Central Authority had indicated that in the present case it would consider directing the Israeli police to close the criminal proceedings if the first applicant proved ready to cooperate with the Israeli authorities and to respect the right of access granted to the father by the Tel Aviv Family Court, and if she did not disappear again with the child (see letter of 30 April 2007 appended to the Government's observations of 14 August 2009). In this connection the Government took the view that the Hague Convention system was based on mutual confidence between the States Parties to that instrument and that if a State should fail to comply with its assurances, it would run the risk that the other States might not cooperate with it in the fashion envisaged. The Government thus subscribed to the Chamber's view that no doubt should be cast on the credibility of the assertions in that letter and that the first applicant did not run the risk of incurring criminal sanctions (see Chamber judgment, § 90).

122. The Government further observed that, throughout the domestic proceedings, the first applicant had never adduced the slightest firm evidence relating to the judicial consequences which she would allegedly face in the event of her return. On the contrary, she had asserted at the hearing of 29 August 2006 before the Justice of the Peace that she did not even contemplate returning to Israel and that she did not know what risk she would personally run if she were to return to that country.

123. Lastly, the fact that the second applicant's father had defaulted on his maintenance obligations was also insufficient to preclude the reasonable expectation that the first applicant would return to Israel. In the Government's submission, strictly from the viewpoint of the child's best interests, it would no doubt be preferable for him to grow up having contact with his father, even if the father paid him no maintenance, than to grow up without knowing him.

124. In response to the fears expressed in the dissenting opinions and reiterated by the applicants in their referral request, namely, firstly, that any attempt on the first applicant's part to influence her son's religious education would in all likelihood be unsuccessful and, secondly, that the Chamber had placed confidence, in an abstract fashion, in a legal system whose principles in family-law matters differed, sometimes significantly, from those that were applied in Europe, the Government referred to the

Explanatory Report on the Hague Convention, according to which, when the Convention was being drafted, one of the concerns taken into account was to avoid the risk that decisions given pursuant to that instrument might express "particular cultural, social etc. attitudes which themselves derive[d] from a given national community" and thus, basically, impose "their own subjective value judgments upon the national community from which the child ha[d] recently been snatched" (paragraph 22 of the Report). Furthermore, in the event of disagreement about a child's religious education, the court granting parental authority would decide according to the best interests of the child. Independently of whether the Israeli courts dealing with the case were religious or secular courts, it was noteworthy that they had followed the recommendations of the social worker responsible for the case and had imposed many restrictions on the second applicant's father, even though his conduct was linked with his religious ideas. There was thus no reason to conclude that those courts, on account of the "religious context of the case", would not act in an appropriate manner.

125. The Government further observed that before the applicants had left Israel their family situation had been closely monitored by the Tel Aviv social services and the Tel Aviv Family Court, which had, in particular, prohibited the child's father from approaching the first applicant's flat and the child's nursery school, from disturbing or harassing the first applicant in any way whatsoever, including by mental harassment, and in any place, from using the flat in which the first applicant lived or from carrying or possessing a weapon. The Government pointed out that it was not disputed that the father had complied with those measures (see record of the hearing of 29 August 2006 before the Justice of the Peace).

126. It was also apparent from a letter from the Israeli Central Authority to the Cantonal Court that the Israeli Prevention of Family Violence Law of 1991 made provision for protective measures in the event of allegations of violence within the family (see the letter of 12 March 2007 in Annex 6 to the Government's observations of 14 August 2009). The Israeli authorities' conduct and the measures taken before the first applicant's departure with her son showed that the provisions of that law were applied effectively. In those circumstances, and in the light of the measures taken by the Israeli authorities, the Government submitted that the conduct of the second applicant's father did not constitute a risk within the meaning of Article 13, sub-paragraph (b), of the Hague Convention.

127. Lastly, the applicants' extended stay in Switzerland could not constitute an obstacle to their return pursuant to the Hague Convention. The Government, relying in this connection on the Chamber judgment, took the view in particular that, given the second applicant's young age, he would not be exposed to any risk within the meaning of the relevant provisions.

128. In so far as the applicants had also criticised the judgment of the Federal Court of 16 August 2007 for not containing any provisions for its

enforcement, the Government observed that the enforcement of judgments of the Federal Court was a matter for the cantonal authorities. The Government explained that the competent authority in the present case was the Justice of the Peace of the District of Lausanne, which had delivered the decision at first instance. On 20 August 2007 the child's father had applied to that authority through his counsel to appoint an *ad hoc* guardian for the child with the task of arranging Noam's departure in accordance with the decision of the Federal Court. Following this Court's decision of 27 September 2007 to indicate a stay of execution in the present case, the father had withdrawn his request on 1 October 2007. These were the reasons why, for the time being, the arrangements for the child's return had not yet been decided. The Government further observed that the Federal Court, in its judgment of 16 August 2007, had ordered the child's return on the assumption that the mother could be expected to accompany him. Moreover, primary responsibility for arranging the return lay with the first applicant, who had created the present dispute in the first place by abducting her son. The Government submitted, however, that if the first applicant had expressed actual fears linked with specific aspects of a return to Israel, the competent authority could have examined measures capable of providing a remedy. Moreover, the arrangements for the child's return had not been examined further by the Swiss authorities on account of the interim measures indicated by the Court.

129. The Government expressed the view that, after a stay of more than four years in the host country, it was clearly no longer possible to speak of a "prompt return" within the meaning of the Hague Convention. Moreover, whilst it was true that, at the time of the Federal Court's judgment, it was justifiable to disregard the passage of time, that was no longer the case at present. In other words, the Government's submission is that the authorities competent for the enforcement of the return have the right and the duty to examine the conditions in which the return could be implemented without breaching the applicants' rights.

130. Having regard to the foregoing, the Government were satisfied that the conditions of Article 13, sub-paragraph (b), of the Hague Convention had manifestly not been met in the present case, and that the balancing of the interests involved, even if it entailed difficult consequences for the first applicant, was consistent with that provision and complied with the requirements of Article 8 § 2 of the Convention.

(iii) The Court's assessment

(α) General principles

131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna

Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II; and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI).

132. In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003-V, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see *Maire*, cited above, § 72). The Court has, for example, espoused the provisions of the Hague Convention on a number of occasions, in particular Article 11 when examining whether the judicial or administrative authorities, on receiving an application for the return of a child, had acted expeditiously and diligently, as any inaction lasting more than six weeks could give rise to a request for a statement of reasons for the delay (see, for the text of that provision, paragraph 57 above, and for examples of application, *Carlson v. Switzerland*, no. 49492/06, § 76, 6 November 2008; *Ignaccolo-Zenide*, cited above, § 102; *Monory v. Romania and Hungary*, no. 71099/01, § 82, 5 April 2005; and *Bianchi*, cited above, § 94).

133. However, the Court must also bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its own mission, as set out in Article 19, "to ensure the observance of the engagements undertaken by the High Contracting Parties" to the Convention (see, among other authorities, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 93, Series A no. 310). For that reason the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi*, cited above, § 92, and *Carlson*, cited above, § 73).

134. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington*, cited above, § 62), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX), as is indeed apparent from the Preamble to the Hague Convention, which provides that "the interests of children are of

paramount importance in matters relating to their custody". The child's best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). The parents' interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (ibid.; see also *Haase v. Germany*, no. 11057/02, § 89, ECHR 2004-III, and *Kutzner v. Germany*, no. 46544/99, § 58, ECHR 2002-I, and the numerous authorities cited therein).

135. The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see the numerous references in paragraphs 49-56 above, and in particular Article 24 § 2 of the European Union's Charter of Fundamental Rights). As indicated, for example, in the Charter, "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

136. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006).

137. The same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation (Article 13, sub-paragraph (b)). In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention. Moreover, certain domestic courts have expressly incorporated that concept into the application of the term "grave risk" under Article 13, sub-paragraph (b), of that Convention (see paragraphs 58-64 above). In view of the foregoing, the Court takes the view that Article 13 should be interpreted in conformity with the Convention.

138. It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his

environment and experiences (see the UNHCR Guidelines, paragraph 52 above). For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Kutzner*, cited above, §§ 65-66; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).

139. In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, cited above, § 74).

140. The Court has already had occasion to examine the question whether the conditions of enforcement of a child's return were compatible with Article 8 of the Convention. It defined the obligations of States in such matters in *Maumousseau and Washington* (cited above, § 83) as follows:

> "The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. As to the State's obligation to take positive measures, Article 8 includes the right of a parent – in this case the father – to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action (see, for example, *Ignaccolo-Zenide*, cited above, § 94). However, this obligation is not absolute, since the reunion of a parent with his or her child may not be able to take place immediately and may require preparation. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. In addition, when difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with the decision ordering the child's prompt return, the appropriate authorities should then impose adequate sanctions in respect of this lack of cooperation and, whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives (see *Maire*, cited above, § 76). Lastly, in this kind of case, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the award of

parental responsibility, 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 with whom it does not live. The Hague Convention recognises this fact because it provides for a range of measures to ensure the prompt return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously to ensure the return of children and any failure to act for more than six weeks may give rise to a request for explanations (see *Maire*, cited above, § 74)."

(β) Application of those principles to the present case

141. It is not the Court's task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if he returned to Israel. However, the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of that Convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests.

142. The Court notes that the domestic courts hearing the case were not unanimous as to the appropriate outcome. On 29 August 2006 the Lausanne District Justice of the Peace dismissed the father's application for the child's return, finding that Article 13, sub-paragraph (b), of the Hague Convention was to be applied in the case (see paragraph 36 above). On 22 May 2007 that decision was confirmed in substance by the Guardianship Division of the Cantonal Court of the Canton of Vaud (see paragraph 41 above). However, on 16 August 2007, the Federal Court allowed the father's application and ordered Noam's return. In that court's opinion, the judgment of the Cantonal Court had failed to provide any evidence of a grave risk of harm, or of any intolerable situation for the child, in the eventuality – an acceptable one for the Federal Court – of the mother's return with him to Israel (see paragraph 44 above). Lastly, in a provisional-measures order of 29 June 2009 the President of the Lausanne District Court decided that Noam should live at his mother's address in Lausanne, suspended the father's right of access in respect of his son and granted exclusive parental authority to the mother. He observed in particular that neither the father nor his lawyer had ever appeared at hearings before that court and thus found that the father had lost interest in the case (see paragraph 47 above).

143. Moreover, a number of experts' reports concluded that there would be a risk for the child in the event of his return to Israel. In the first such report, delivered on 16 April 2007 by Dr B., it was 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 possible repercussions for the child. As to the child's return

without his mother, that would also expose him to a risk of major psychological harm (see paragraph 37 above). The second report, drafted on 23 February 2009 by Dr M.-A., concludes that Noam's abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for the child (see paragraph 46 above).

144. It would thus seem that in the view of the domestic courts and experts, Noam's return could only be envisaged with his mother, in any event. Even the Federal Court, the only domestic court to have ordered the child's return, based its decision on the consideration that as there were no grounds objectively justifying the mother's refusal to return to Israel, she could reasonably be expected to return to that country with her child. It must therefore be determined whether this conclusion is compatible with Article 8, that is to say whether the forced return of the child accompanied by his mother, even though she seems to have ruled out this possibility, would represent a proportionate interference with the right of each of the applicants to respect for their family life.

145. Even though doubts in this respect may appear justified, the Court is prepared to accept that in the present case the measure in question remains within the margin of appreciation afforded to national authorities in such matters. However, in order to assess whether Article 8 has been complied with, it is also necessary to take into account the developments that have occurred since the Federal Court's judgment ordering the child's return (see, *mutatis mutandis*, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, 24 April 2003). The Court must therefore place itself at the time of the enforcement of the impugned measure (see, *mutatis mutandis*, *Maslov v. Austria* [GC], no. 1638/03, § 91, ECHR 2008). If it is enforced a certain time after the child's abduction, that may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis. Moreover, whilst under Article 12, second paragraph, of the Hague Convention, a judicial or administrative authority before which the case is brought after the one-year period provided for in the first paragraph must order the child's return, this is not so if it is demonstrated that the child is now settled in his or her new environment (see, to that effect, *Koons v. Italy*, no. 68183/01, §§ 51 et seq., 30 September 2008).

146. The Court takes the view that guidance on this point may be found, *mutatis mutandis*, in its case-law on the expulsion of aliens (see *Maslov*, cited above, § 71, and *Emre v. Switzerland*, no. 42034/04, § 68, 22 May 2008), according to which, in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take into account the child's best interests and well-being, and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural

and family ties both with the host country and with the country of destination. The seriousness of any difficulties which may be encountered in the destination country by the family members who would be accompanying the deportee must also be taken into account (see *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII).

147. As regards Noam, the Court notes that he has Swiss nationality and that he arrived in the country in June 2005 at the age of two. He has been living there continuously ever since. In the applicants' submission, he has settled well and in 2006 started attending a municipal secular day nursery and a State-approved private Jewish day nursery. He now goes to school in Switzerland and speaks French (see the provisional-measures order of 29 June 2009, paragraph 47 above). Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial.

148. Accordingly, the significant disturbance that the second applicant's forced return is likely to cause in his mind must be weighed against any benefit that he may gain from it. In this connection it is noteworthy, as the District Court observed, that restrictions had been imposed by the Israeli courts, even before the abduction, on the father's right of access, authorising him to see his child only twice a week under the supervision of the social services at a contact centre in Tel Aviv (see paragraph 47 above). Moreover, the applicants submitted, without being contradicted by the Government, that Noam's father had remarried on 1 November 2005 and had divorced only a few months later, while his new wife was pregnant. He had then married for a third time. New proceedings had been brought against him in 2008, this time by his second wife, for failure to pay maintenance in respect of his daughter. The Court doubts that such circumstances, assuming they are established, would be conducive to the child's well-being and development.

149. As to the problems that the mother's return would entail for her, she could be exposed to a risk of criminal sanctions, the extent of which, however, remains to be determined. Before the Court the applicants referred to the letter from the Israeli Central Authority of 30 April 2007, which showed that the possibility of the first applicant not being prosecuted by the Israeli authorities would depend on a number of conditions relating to her conduct (see paragraph 40 above). In those circumstances, such criminal proceedings, which could possibly entail a prison sentence, cannot be ruled out entirely (contrast *Paradis and Others v. Germany* (dec.), no. 4783/03, 15 May 2003). It is clear that such a scenario would not be in the best interests of the child, the first applicant probably being the only person to whom he relates.

150. The mother's refusal to return to Israel does not therefore appear totally unjustified. Having Swiss nationality, she is entitled to remain in Switzerland. Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment. The father's capacity to do so may be called into question, in view of his past conduct and limited financial resources. He has never lived alone with the child and has not seen him since the child's departure.

151. In conclusion, and in the light of all the foregoing considerations, particularly the subsequent developments in the applicants' situation, as indicated in particular in the provisional-measures order of 29 June 2009, the Court is 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 if she were forced to return with her son to Israel. Consequently, there would be a violation of Article 8 of the Convention in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

152. The Chamber found that the complaint under Article 6 § 1 of the Convention had to be regarded as constituting one of the essential points of the complaint under Article 8 and that it was not necessary to examine this allegation separately (see the Chamber judgment, § 104).

153. The Grand Chamber considers it appropriate to confirm that finding and observes, moreover, that it has not been disputed before it by the parties.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

154. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

155. The applicants did not submit any claim in respect of pecuniary damage. They took the view that any finding of a violation of Article 8

would provide sufficient redress for the non-pecuniary damage that they had sustained.

156. The Court shares the applicants' opinion and finds that no award should be made in respect of any damage.

B. Costs and expenses

157. In respect of costs and expenses, the applicants claimed a total amount of 53,625 euros (EUR) calculated as follows: EUR 18,158.81 in respect of the domestic proceedings, EUR 13,112.92 for the proceedings before the Chamber, and EUR 22,353.27 for the proceedings before the Grand Chamber.

158. The Government pointed out that the questions referred from the Chamber concerned only part of the initial complaints. Accordingly, they took the view that if the Court were to find a violation of the applicants' rights, a total of 10,000 Swiss francs (CHF), equivalent to approximately EUR 6,667, would be appropriate in the present case to cover the costs and expenses incurred in the proceedings before the domestic courts and before the Chamber. As regards the proceedings before the Grand Chamber, the Government submitted that CHF 7,000 (approximately EUR 4,667) would be an appropriate amount.

159. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of that violation by them (see *Zimmermann and Steiner v. Switzerland*, 13 July 1983, § 36, Series A no. 66, and *Hertel v. Switzerland*, 25 August 1998, § 63, *Reports of Judgments and Decisions* 1998-VI). Moreover, such costs and expenses must have been actually and necessarily incurred and must be reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V, and *Linnekogel v. Switzerland*, no. 43874/98, § 49, 1 March 2005).

160. Having regard to the foregoing, the Court notes that only the complaint under Article 8 has, in the present case, given rise to a finding of a violation of the Convention. The remainder of the application is inadmissible. In addition, it is not certain that the applicants' claims have been sufficiently substantiated to meet in full the requirements of Rule 60 § 2 of the Rules of Court. In any event, they appear excessive, in particular as regards the amount claimed for the proceedings before the Grand Chamber. As Noam's abduction had already been examined in detail by the domestic authorities and by the Chamber, the Court is not convinced that the proceedings before the Grand Chamber, and in particular the hearing of 7 October 2009, required the assistance of five lawyers for a total cost of EUR 21,456.

161. Having regard to the material in its possession and to the criteria developed in its case-law, the Court awards the applicants jointly a total of

EUR 15,000 for costs and expenses, plus any amount that may be payable by them in tax on that award.

C. Default interest

162. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that, in the event of the enforcement of the Federal Court's judgment of 16 August 2007, there would be a violation of Article 8 of the Convention in respect of both applicants;

2. *Holds* unanimously that there is no need to examine separately the applicants' complaint under Article 6;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicants jointly, within three months, EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, to be converted into Swiss francs at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants on that amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 July 2010.

Vincent Berger	Jean-Paul Costa
Jurisconsult	President

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

(a) concurring opinion of Judge Lorenzen joined by Judge Kalaydjieva;
(b) concurring opinion of Judge Cabral Barreto;
(c) concurring opinion of Judge Malinverni;
(d) joint separate opinion of Judges Jočienė, Sajó and Tsotsoria;
(e) dissenting opinion of Judge Zupančič.

J.-P.C.
V.B.

CONCURRING OPINION OF JUDGE LORENZEN JOINED BY JUDGE KALAYDJIEVA

I voted with the majority for finding a violation in the event of the enforcement of the Federal Court's judgment of 16 August 2007, and I also partly endorse the reasoning given for finding a violation. However, I would like to add some comments of my own concerning, in particular, one point where my opinion differs from what is stated in the judgment.

Let me first make it clear that I fully agree with the majority that the Hague Convention is applicable in the present case and also that the applicant acted "wrongfully" within the meaning of that Convention as she brought her child to Switzerland without the necessary authorisation from an Israeli court. Therefore the clear starting point for assessing this case is that the child should be returned to Israel in accordance with Article 12 of the Hague Convention unless the conditions for not doing so in Article 13 of that Convention are fulfilled. I also agree with what is said in paragraph 141 of the judgment that it is not the Court's task to take the place of the competent authorities in examining whether, in the event of a return, there would be a grave risk that the child would be exposed to psychological harm within the meaning of that Article. National courts, having the benefit of direct contact with the persons involved, are better placed to make such assessments and must be accorded a reasonable margin of appreciation. However, it is for the Court to ascertain whether the application of the Hague Convention respected the guarantees of Article 8 of the European Convention on Human Rights.

In the present case it is not in dispute that the return of the second applicant to Israel without his mother would expose him to a grave risk of psychological harm. This was recognised by all Swiss courts involved in the case and even by the child's father. The respondent Government also agreed with this finding. The Court can therefore, in my opinion, regard that as an established fact without further examination.

However, the judgment of the Federal Court is based on the assumption that "it must be accepted that [the first applicant] could reasonably be expected to return to [Israel] accompanied by the child". Similarly the Chamber found it "necessary to examine whether a return to Israel [might] be envisaged for the mother" and concluded that since she "ha[d] not put forward any other reasons why she would not be able to live in Israel, ... she [could] reasonably be expected to return to that country" (paragraph 88 of the Chamber judgment).

I disagree with these findings and do not find that the majority has addressed them convincingly for the following reasons:

The Hague Convention deals with wrongful removals of children and creates an obligation for the Contracting Parties to secure the expeditious return of the children concerned to the State from which they were removed.

It cannot be interpreted in such a way that it obliges the parent or, for that matter, any other person responsible for the abduction to return to that country as well. Nor does such an obligation, to my knowledge, follow from other Swiss law. If the Hague Convention were to be applied in such a manner, the reality would be that a person could be "condemned" to live outside his or her country of origin for a considerable number of years with all the complications that would entail, just because it is considered in the best interests of a child to have access to the other parent. This would in my opinion run counter to the right to respect for, *inter alia*, private life as guaranteed by Article 8 of the Convention as well as the guarantees on freedom of movement as embodied in Article 2 of Protocol No. 4 (see, for example, *mutatis mutandis*, *Riener v. Bulgaria*, no. 46343/99, 23 May 2006, and *Gochev v. Bulgaria*, no. 34383/03, 26 November 2009). Accordingly, I find it irrelevant for the decision to be taken under the Hague Convention to look into whether a person has pertinent motives not to live in a certain country, which is the way it was decided in this case – and furthermore I find it improper to do so as only that person himself or herself can reasonably be the judge of such matters. In this respect it is striking that the Federal Court, as well as the Chamber, found that the first applicant could reasonably be expected to return to Israel, whereas the Israeli Family Court in its decision of 27 March 2005 stated that "she had no ties in that country" (paragraph 27 of the judgment).

The fact that the first applicant acted "wrongfully" within the meaning of the Hague Convention is in my opinion only relevant for determining whether an obligation to return a child at all arises under that Convention. In this respect it should not be overlooked that she had in fact done what could reasonably be expected of her in the situation she faced, namely to ask the Israeli court to lift the ban on the child's removal from Israel. However, her request was rejected without any apparent consideration of her personal situation or the best interests of the child. Her reaction to the consequences of such a categorical refusal is understandable, albeit "wrongful" under the Hague Convention.

That being said, it is, however, my understanding of the Federal Court's judgment that it did not – and could not – impose any *legal* obligation on the first applicant to take up residence in Israel. Accordingly the judgment could not be enforced against her personally if she refused to leave Switzerland and it is unclear whether in that case the judgment could be enforced at all, as it is based on the assumption that she accompanies the child. On the other hand, it seems to be the intention in this part of the reasoning in the judgment to put moral pressure on the first applicant to return to Israel with the second applicant. In my opinion it is at least doubtful that under certain circumstances – if at all – a court of law may be entitled to base a decision of this kind on considerations of a moral character without any basis in law. In any event, in the present case it had

the unfortunate effect that it exempted the Federal Court from drawing the inevitable conclusion that the return of the child alone would not be justified under Article 13 of the Hague Convention. I do not in any way suggest that the Federal Court deliberately relied on this reasoning in order to circumvent that Article of the Convention. On the contrary, I am convinced that this was not the case, and that the decision was made with the best intentions to comply with the obligations under the Hague Convention. However, the effect was, in my opinion, that Article 13 was not properly assessed and that accordingly there would be a violation of Article 8 of the European Convention on Human Rights in the event of the enforcement of the Federal Court's judgment of 16 August 2007, irrespective of any subsequent developments in the applicants' situation.

I would like to add the following final remarks in order to avoid any misunderstanding as to the intentions behind my separate opinion. It cannot in any way be understood as casting doubt on the Hague Convention, which is an extremely important international instrument in the fight against child abduction. Nor has it been my intention to question the application of that Convention in this Court's case-law to date. But it is my opinion that the circumstances of this case are unique in so far as it is undisputed that it was clearly in the best interests of the second applicant to stay with his mother irrespective of her country of residence. I do not recall any other case before the Court where the return of a child was ordered in similar circumstances. Accordingly, to refuse the return of the second applicant in this particular case would in no way undermine the normal application of the Hague Convention.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

Whilst I agree with the finding that there would be a violation of Article 8 of the Convention if the decision ordering the second applicant's return to Israel were to be enforced, I would like to add the following remarks.

1. The return of the second applicant has not been advocated – neither by the Swiss Federal Court nor by the Swiss Government – without taking into account his particular situation.

The Federal Court has always accepted that the second applicant would have to return with his mother and has regarded this as a *sine qua non*:

> "Supposing that [the] risk [of the mother's detention on her arrival in Israel] 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." (see paragraph 44)

In turn the Government have submitted that "the authorities competent for the enforcement of the return have the right and the duty to examine the conditions in which the return could be implemented without breaching the applicants' rights" (see paragraph 129).

2. The judgment places great emphasis on the risk of criminal proceedings against the mother and of subsequent imprisonment (see paragraph 150).

I recognise, as everyone does, that this risk makes it impossible to envisage a return.

The risk must therefore be removed and I believe that it would be possible if the competent Israeli authorities were to provide the Swiss authorities and the mother with reliable assurances that proceedings would not be brought against her for child abduction.

3. However, I would still not find that sufficient.

In my view, it is also necessary for the return of the child and his mother, and their resettlement in Israel, to take place in a calm atmosphere that is conducive to their well-being.

A number of conditions would thus have to be fulfilled, such as appropriate accommodation for the mother and her child, and suitable employment for the mother.

In addition, the mother should be entitled to bring proceedings, in particular to obtain a review of parental authority and the father's right of access.

4. Lastly, I fear that the non-return of the child to Israel could have harmful consequences for his future, as Israel is the country where he was born and where he has his roots, and his situation *vis-à-vis* his country remains irregular.

5. Subject to all the precautions that I have mentioned – and others which I may have overlooked – I would be prepared to accept that the applicant's return might not entail a violation of Article 8 of the Convention.

6. I am unable to accept that the passage of time is sufficient to change an "unlawful" situation into a "lawful" one.

I do not wish to endorse the first applicant's conduct and, to a certain extent, justify child abductions that survive the passage of time notwithstanding legal action against the abductor.

I am against anything that could be seen as amounting to acceptance of attitudes that would result in the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 becoming a dead letter.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

On 8 January 2009 I found with the majority of the judges in the Chamber that Noam's return to Israel would not entail a violation of Article 8. I now affirm, again with the majority, that the rights set forth in that provision would be breached in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

I must provide some explanation as to the reasons why I have now come to see this case in a different light and have departed from my previous position. Those reasons relate to a number of factors, which have all arisen since the delivery of the Chamber judgment.

1. The aim of the Hague Convention is to prevent the abducting parent from succeeding in legitimating, by the passage of time operating in his or her favour, a wrongful situation which he or she brought about unilaterally. It must, however, be recognised, that the longer an abduction lasts, the more difficult it becomes to demand the child's return, because the situation created by the abduction is consolidated by the passage of time.

As the Court stated in a recent judgment:

> "[I]n this kind of case, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the return of an abducted child ... require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent with whom he or she does not live"[1].

In other words, it is therefore a matter, once the conditions for the application of the Hague 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.

It should be noted in this connection that the Hague Convention itself, in Article 11, requires the relevant judicial or administrative authorities to act expeditiously in proceedings for the return of children, and any failure to act within six weeks may give rise to a request for a statement of reasons.

As to Article 12, it provides that where a child has been removed and a period of less than one year has elapsed from the date of the removal, the authority concerned must order the return of the child forthwith (first paragraph). Where a period of more than one year has elapsed since the date of the removal, the authority must also order the return of the child, unless it is demonstrated that the child is now settled in its new environment (paragraph 2).

Noam was born on 10 June 2003. He arrived in Switzerland on 24 June 2005, a few days after his second birthday. The Israeli Central Authority

1. *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, 22 April 2010 (not final at the time of adoption of the present judgment).

was not able to locate him until 21 May 2006, and the next day the Israeli Ministry of Justice sent a request for the child's return to the Federal Office of Justice in Berne.

The judicial proceedings in Switzerland began on 8 June 2006, when Noam's father applied to the Lausanne District Justice of the Peace to secure the child's return to Israel. They ended with a judgment delivered by the Federal Court on 16 August 2007 and served on the first applicant's lawyer on 21 September 2007. In that judgment, the higher court ordered Noam's mother to make arrangements for the child's return to Israel before the end of September 2007.

The child was then some four years and three months old. He had spent about two years in Switzerland and roughly the same amount of time in Israel.

The Chamber of the Court gave its judgment on 8 January 2009, and that of the Grand Chamber was adopted on 2 June 2010.

Noam is now seven years old. He has spent two years of his life in Israel and five in Switzerland.

I am of the opinion that after so much time has passed, the restoration of the status quo ante is simply no longer possible to envisage.

2. The Chamber had accepted that the mother could be required to return to Israel with her son. She had lived there for six years and it could be supposed that she still had a certain social network there. As regards the risk that she might be sentenced to imprisonment if she returned to Israel, the Chamber had relied on the assurances given by the Israeli authorities. However, it would seem that any waiver of criminal sanctions by those authorities would depend on a number of conditions related to the first applicant's conduct. It cannot therefore be taken for granted that the letter from the Israeli Central Authority of 30 April 2007 contained firm assurances that the first applicant would not face any criminal sanctions. There would then be an issue as to who would take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment.

3. The Chamber had taken the view that Noam's removal to Switzerland was unlawful because the father held, jointly with the mother, rights of guardianship, which included, under Israeli law, the right to determine the child's place of residence (see Article 5 of the Hague Convention). The mother had not therefore been entitled to decide unilaterally where her son should live. In addition, that removal had rendered illusory, in practice, the right of access that had been granted to the father. The very purpose of Noam's return to Israel would therefore be to enable him to know his father and build a relationship with him.

The Chamber had granted a certain weight to the report of Dr B., a child psychiatrist, according to whom there was a significant risk that Noam might be affected in his adolescence by the absence of a father figure,

especially when he found out under what circumstances he had been separated from his father.

It can be seen, however, from the order of 29 June 2009, which was made after the Chamber's judgment and is the most recent domestic court decision in the present case, and against which the parties have apparently not appealed, that the father's current abode is unknown, that he has never sought to see his son since the child has been living in Switzerland, and that he now seems to have lost interest in the case. Moreover, the applicants alleged, without being contradicted by the Government, that the father had remarried on 1 November 2005 but had divorced his new wife, while she was pregnant, only a few months later. In their submission, he had then married a third time and proceedings had been brought against him in 2008 by his second wife for defaulting on maintenance payments in respect of his daughter.

4. Lastly, one further reason has led me to review my position: the Federal Act on International Child Abduction, which entered into force on 1 July 2009 and therefore after the judgment of the Federal Court and that of the Chamber. Section 5 of that Act seeks to crystallise the exception provided for in Article 13, sub-paragraph (b), of the Hague Convention, on account of the difficulties in interpreting that provision that have been encountered by the Swiss authorities responsible for its application.

Under the heading "Return and interest of the child", that section provides in particular that a child is placed in an intolerable situation, within the meaning of Article 13, sub-paragraph (b), of the Hague Convention, where the following conditions are met:

(a) Firstly, where the child's placement with the parent who lodged the application is manifestly not in the child's interest. That condition appears to me to have been fulfilled in the present case in view of the personality of Noam's father, as it emerges from several passages in the judgment. Moreover, the father's capacity to take care of the child may be called into question, in view of his past conduct and limited financial resources. He has never lived alone with the child and has not seen him since his son left Israel.

(b) Secondly, where the abducting parent, in the circumstances, is not in a position to take care of the child in the State where the child had his or her habitual residence at the time of the abduction, or manifestly cannot be so required. That condition also appears to me to have been fulfilled. As the Court rightly observes, the mother's refusal to return to Israel does not appear entirely unjustified. Having Swiss nationality, she is entitled to remain in Switzerland. Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of her imprisonment (paragraph 150 of the judgment).

In conclusion, it is therefore mainly the passage of time, in conjunction with the discovery of the real personality of Noam's father, that led me to

change my assessment of the issues in this case and to conclude that the child's return to Israel would not be in his interest.

JOINT SEPARATE OPINION OF JUDGES JOČIENĖ, SAJÓ AND TSOTSORIA

1. We voted with the majority in finding that, in the event of the enforcement of the Swiss Federal Court's judgment of 16 August 2007, there would be a violation of Article 8 of the Convention.

However, we also think that such a return in execution of the Federal Court's judgment (which orders the mother to secure the return of the child to Israel without additional conditions) would have constituted a violation of Article 8 of the Convention in so far as the Federal Court, in applying the Hague Convention, did not give proper consideration to the applicants' rights under Article 8 of the Convention.

2. Given that the first applicant acted "wrongfully", within the meaning of the Hague Convention, by abducting her child and bringing him to Switzerland without authorisation from an Israeli court, it follows that this Convention is applicable in the present case.

3. The Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities. (see, among other authorities, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I). On the other hand, we emphatically agree with the majority that the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the European Convention on Human Rights and especially those of Article 8 (see paragraph 133 of the judgment). In the present case the issue is therefore whether the guarantees of Article 8 were secured by the Swiss Federal Court in respect of both applicants when deciding on and ordering the second applicant's forced return to Israel.

4. In applying Article 13 of the Hague Convention the Federal Court was of the opinion that 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 ... *Only grave risks* must be taken into consideration, *excluding* any grounds relating to the parents' child-rearing capacities ..." (quoted in paragraph 44, emphasis added). However, it was bound to secure the guarantees of Article 8 of the European Convention on Human Rights (see paragraph 133). The gravity of the risk has to be understood in harmony with and in the light of the Convention. The public order interest that consists in denying any advantage to someone's unlawful conduct cannot preclude other rights-based considerations, in particular that of the best interest of the child. The Hague Convention itself enables such a balanced approach in its Article 13.

The proper approach in the application of Article 13 of the Hague Convention would be a balanced consideration of the rights protected in

Article 8, keeping in mind that in this context the proper balance can be established only if the best interest of the child is a primary consideration. For example, when a national authority is required to undo the harmful effects of the wrongful removal or retention of a child, it has to take into consideration the consequences of the return for the child; in other words it has to apply the Hague Convention in a forward-looking manner. A restrictive concept of grave risks may preclude a balanced assessment. Moreover, the application of Article 13 of the Hague Convention should entail a comprehensive analysis as suggested by sub-paragraph (b) of that Article, which specifically demands the avoidance of "intolerable situations" resulting from the return of the child.

We find that, as a result of the above-mentioned restrictive interpretation, the Federal Court failed to attribute proper weight to the interests and rights protected by Article 8, together with other Convention rights (in particular Ms Neulinger's dignity as an autonomous person).

5. The Federal Court failed to provide reasonable grounds for its dismissal of Dr B.'s expert opinion, which had been ordered and accepted by the Vaud Cantonal Court. According to that opinion 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 potential repercussions for the child (see paragraph 37). The Federal Court also failed to consider the impact of the father's limited rights of access and the potential financial hardship. These are paramount considerations to be addressed in applying Article 8, even if the specific decision concerns the return of a child wrongfully removed. Of course, given the specific nature of the situation, the weight of the different factors (for example, the weight of public order in relation to dissuasion of abduction) differs from what is applicable in "ordinary" child placement cases. National courts, having the benefit of *direct contact* with the persons involved, are better placed to make such assessments and must be accorded a reasonable margin of appreciation.

6. The judgment of the Grand Chamber identifies a number of considerations that it finds relevant *today* in order to assess whether Article 8 has been complied with. The majority's approach indicates that in the application of the Hague Convention, Article 8 of the Convention requires a future-oriented approach, which can serve the best interests of the child.

We find that the overwhelming majority of those considerations were applicable as of 16 August 2007. The Court in particular refers to integration into the new environment (see paragraph 145) and to the seriousness of the difficulty the child and his mother are likely to encounter in the country of destination (see paragraph 146). In 2007 the child, having spent two years in Switzerland was already settled in his new environment.

This was demonstrated in the domestic proceedings. The Court finds that this was so when it refers to nursery school attendance from 2006 onwards. However, this factor was disregarded by the Federal Court. The Court also finds that the pre-2007 restrictions on the father's right of access are relevant in the assessment of the risks for the child's well-being in the event of his return to Israel (see paragraphs 22 and 24.) Once again, the consideration of these factors is expressly precluded by the Federal Court's deliberately restrictive interpretation of the Hague Convention. Finally, in the view of the majority, the criminal sanctions that the mother might face in the event of her return are also a relevant risk for the child's well-being. Given that the mother is probably the only person to whom the child relates, such a risk is one that the Court finds not to be acceptable in 2010. But the facts and the resulting risks were already the same in 2007.

7. The Federal Court recognised that the child's return without his mother would entail a grave risk for him but it found that the mother could reasonably be expected to accompany him to Israel and that the above risk did not therefore exist.

In the Federal Court's view, the mother had failed to provide objective reasons to justify her preference not to return. In particular it found that the possibility of her prosecution in Israel did not amount to an objective reason as it did not satisfy the burden of proof that she was required to discharge in accordance with its restrictive interpretation of Article 13 of the Hague Convention. The reasoning of the Federal Court implies that in the absence of objective reasons the mother has a duty to return with her child. However, the uncontested legal obligation to take personal care of one's child does not entail an unconditional duty to do so at *any* place of residence, in total disregard of the Convention rights of the care provider. In its reasoning the Federal Court disregarded the possibility and related risk that the child might not be accompanied by his mother; the underlying assumption that the mother has to follow the child indicates a disregard of the mother's Article 8 rights, her freedom of movement and her personal autonomy. In this connection, we are in full agreement with the concurring opinion of Judge Lorenzen, joined by Judge Kalaydjieva.

8. We agree with those judges that the decision of the Federal Court was certainly made with the best intentions to comply with the obligations under the Hague Convention. However, the effect was, in our opinion, that Article 13 of the Hague Convention was not properly assessed in the light of the Convention and therefore the judgment of the Federal Court of 16 August 2007 violated Article 8 of the European Convention on Human Rights irrespective of any subsequent developments in the applicants' situation.

DISSENTING OPINION OF JUDGE ZUPANČIČ

1. I have voted against finding a conditional violation of Article 8, in other words, finding that there *would be* a violation in the event of the enforcement of the Federal Court's judgment of 16 August 2007. In my opinion, for two reasons, there has already been a violation of Article 8 of the Convention.

2. It is clear that the violation would have fully materialised, that is to say, the Swiss court's decision would have been executed, were it not for this Court's own imposition of an interim measure (under Rule 39 of the Rules of Court).

3. In this and a few other senses the violation has clearly been consummated in Switzerland.

4. This Court has never addressed, as potential violations, mere executions of final judgments (the reverse is true, however, for non-executions).

5. If a violation is found by this Court, it refers to the final decision in the domestic jurisdiction – rather than its mere execution.

6. In more practical terms, the hypothetical violation found by the majority now probably prevents the applicants from reopening the proceedings in the domestic courts. Moreover, under Swiss law, which has been in the laudable forefront of this development, a finding of a clear violation by this Court, rather than merely a hypothetical one concerning the execution of a final judgment, would necessitate not only reopening in a domestic court.

7. For it is now clear that such reopening would also require the Swiss domestic court to follow this Court's judgment, not only in its operative part but also in its reasoning.

8. If that were not the case – and this has also become clear – the applicants could then come back to the European Court of Human Rights and request that the domestic judgment, such as it might be, be brought into line with the Court's judgment.

9. The second of those two reasons is not merely pragmatic. It raises the important question of the extent to which the judgments of the European Court of Human Rights are in fact binding on national courts.

10. But it is of course the first reason which is decisive, because it implies that the violation *vel non* for this Court may hinge upon the simple fact of the execution *vel non* of a final domestic judgment – and execution in the present case has, moreover, been suspended only because of our own imposition of an interim measure (under Rule 39).

11. My substantive objection to the majority judgment, however, derives from its completely warped reliance on *Maumousseau and Washington v. France* (no. 39388/05, 6 December 2007).

12. Like cases should be decided alike. It is clear that the fact patterns in both cases are analogous, except that the risk for the mother in *Maumousseau and Washington*, had she returned to the United States of America, would have been much greater, including possible arrest at the border, not to mention the 25,000 United States dollar deposit and the fact that she could only have seen her child in the presence of a guard in the courthouse for about half an hour – these being just some of the draconian conditions imposed by the family court judge in the first-instance family court of New York State.

13. If anything, the situation in the *Maumousseau and Washington* case was considerably worse, when compared to the situation in the present case.

14. It is therefore clear that the *Neulinger and Shuruk v. Switzerland* case straightforwardly reverses the Section III case of *Maumousseau and Washington v. France*.

15. This is very easy to prove. The respondent in the present case, the Swiss Government, relied squarely on the Section III judgment in *Maumousseau and Washington* (see paragraph 119 of the judgment).

16. In *Maumousseau and Washington*, the Section's majority – but see my dissenting opinion! – stated that the aim of the Hague Convention was to prevent the "abducting parent" from succeeding in legitimating, by the passage of time operating in his or her favour, a *de facto* situation which he or she had brought about unilaterally (*nemo auditur propriam turpitudinem allegans*). The Section chose to disregard the best interest of the child contingent upon the passage of time and other factors concerning the father.

17. It follows that in terms of *stare decisis*, the reliance of the Swiss Government upon *Maumousseau and Washington* was inescapably logical.

18. The Swiss Government was free *a fortiori* to take it for granted that the fact pattern in *Neulinger and Shuruk*, when compared with the situation in *Maumousseau and Washington*, was considerably less disadvantageous to the mother and to the child. There the child had in the end been brutally snatched from the hands of the mother and delivered to the father in New York, with whom the girl, among other things, had never lived alone before.

19. Suffice it to say, as I have already explained my position in the *Maumousseau and Washington* case, that the Swiss authorities in their *stare decisis* reliance on the latter had every reason to believe that in *Neulinger and Shuruk* the Court would *a fortiori* take the position that there would have been no violation had the child in fact been sent back to Israel.

20. Inexplicably, the Grand Chamber panel rejected the request for referral of *Maumousseau and Washington.*

21. Nevertheless, the issue, wrongly decided in *Maumousseau and Washington*, has now ricocheted and the Court has reached, despite the hypothetical nature of the violation found here, a reasonably correct decision.

22. It follows inexorably that *Neulinger and Shuruk* is a complete reversal of *Maumousseau and Washington* and its "logic".

23. It is certainly bizarre to quote *Maumousseau and Washington* as if it were a case not only compatible with but actually supportive of the outcome in *Neulinger and Shuruk*.