No violation of Article 8 ECHR by Greek authorities regarding the measures taken in a child abduction case

Almost a year ago, the European Court of Human Rights issued a very interesting judgment on the interpretation of Article 8 ECHR, involving a couple (husband Greek, spouse Romanian) living with their two children in the city of Ioannina, Greece. The case found no coverage in Greece (and elsewhere), probably because it was not translated in English. Crucial questions related to the operation of the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation were elaborated by the Court, which ruled that Greek authorities did not violate Article 8 ECHR.

Case M.K. v. Greece (application no. 51312/16), available in French

A comment on the judgment in English has been posted by *Sara Lembrechts – Researcher at University of Antwerp & Policy Advisor at Children's Rights Knowledge Centre (KeKi), Belgium*.

ECHR Rules on Enforcement of Judgments under Brussels I

On 25 February 2014, the European Court of Human Rights ruled in the case of *Avotinš v. Latvia* (application no. 17502/07) that the Brussels I Regulation imposes on Member States a duty to enforce judgments in civil and commercial matters, which triggers the Bosphorus presomption of compatibility of the actions

of the enforcing state with the European Convention.

The judgment, which is only available in French, reveals a lack of knowledge of European private intenational law instruments by the members of the court.

The Court rules that the foundation of the Brussels I Regulation is mutual trust. That's of course correct. It then insists that under the Brussels I Regime, declarations of enforceability are granted almost automatically, after mere formal verification of documents. It thus concludes that under the Regulation, Member States are obliged to enforce foreign judgments, and should thus benefit as requested states from the Bosphorus presumption.

> *49. La Cour relève que, selon le préambule du Règlement de Bruxelles I, ce texte se fonde sur le principe de « confiance réciproque dans la justice » au sein de l'Union, ce qui implique que « la déclaration relative à la force exécutoire d'une décision devrait être délivrée de manière quasi automatique, après un simple contrôle formel des documents fournis, sans qu'il soit possible pour la juridiction de soulever d'office un des motifs de non-exécution prévus par le présent règlement » (paragraphe 24 ci-dessus). À cet égard, la Cour rappelle que l'exécution par l'État de ses obligations juridiques découlant de son adhésion à l'Union européenne relève de l'intérêt général (Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi précité, §§ 150-151, et Michaud c. France, no 12323/11, § 100, CEDH 2012) ; le sénat de la Cour suprême lettonne se devait donc d'assurer la reconnaissance et l'exécution rapide et effective du jugement chypriote en Lettonie.*
>
> *50. Devant les juridictions lettonnes, le requérant soutenait que la citation de comparaître devant le tribunal de district de Limassol et la demande de la société F.H.Ltd. ne lui avaient pas été correctement communiquées en temps utile, de sorte qu'il n'avait pas pu se défendre ; par conséquent, selon lui, la reconnaissance de ce jugement devait être refusée sur la base de l'article 34, point 2, du Règlement. Dans son arrêt du 31 janvier 2007, le sénat de la Cour suprême a écarté tous ses moyens – et, donc, l'application de l'article 34, point 2, du Règlement – en déclarant que, le requérant « n'ayant pas fait appel du jugement, les arguments de son avocat selon lesquels [il] ne se serait pas vu dûment notifier l'examen de l'affaire par un tribunal étranger, n'ont aucune importance ». Cela correspond en substance à l'interprétation donnée à la disposition susmentionnée par la Cour de justice des Communautés*

européennes dans l'arrêt Apostolides c. Orams, aux termes duquel « la reconnaissance ou l'exécution d'une décision prononcée par défaut ne peuvent pas être refusées au titre de l'article 34, point 2, du règlement no 44/2001 lorsque le défendeur a pu exercer un recours contre la décision rendue par défaut et que ce recours lui a permis de faire valoir que l'acte introductif d'instance ou l'acte équivalent ne lui avait pas été signifié ou notifié en temps utile et de telle manière qu'il puisse se défendre » (paragraphe 28 ci-dessus).

This is the part of the reasoning of the court which is plainly wrong. It fails to discuss the relevance of the public policy exception and the margin of appreciation that it offers to requested states to verify whether the state of origin respected fundamental rights.

PRESS RELEASE

The case concerned the enforcement in Latvia of a judgment delivered in Cyprus concerning the repayment of a debt. The applicant, an investment consultant who had borrowed money from a Cypriot company, complained that the Cypriot court had ordered him to repay his debt under a contract without summoning him properly and without guaranteeing his defence rights.

Like the Senate of the Latvian Supreme Court, the Court noted that the applicant should have appealed against the Cypriot court's judgment. It took the view that the Latvian authorities, which had correctly fulfilled the legal obligations arising from Latvia's status as a member State of the European Union, had sufficiently taken account of Mr Avotinš'

PRINCIPAL FACTS

The applicant, Peteris Avotinš, is a Latvian national who was born in 1954 and lives in the district of Riga (Latvia).

On 4 May 1999 Mr Avotinš and F.H.Ltd., a commercial company registered in Cyprus, signed before a notary a formal acknowledgement of his obligation to repay a debt. Mr Avotinš declared that he had borrowed 100,000 United States dollars from F.H.Ltd. and undertook to repay that amount with interest before 30 June 1999. The document stated that it would be governed "in all respects" by the laws of Cyprus and that Cypriot courts would have jurisdiction to hear all disputes

arising from it.

In 2003 F.H.Ltd. sued Mr Avotinš in the court of Limassol (Cyprus), declaring that he had not repaid his debt and seeking an order against him. On 24 May 2004, ruling in his absence, the Cypriot courts ordered Mr Avotinš to repay his debt together with interest and costs and expenses. According to the judgment, the applicant had been duly informed of the date of the hearing but had not appeared.

On 22 February 2005 F.H.Ltd applied to the court for the district of Latgale (Riga) seeking the recognition and enforcement of the Cypriot judgment of 24 May 2004. The company also called for an interim measure of protection.

On 27 February 2006 the Latvian court ordered the recognition and enforcement of the Cypriot judgment of 24 May 2004 and the registration of a charge against Mr Avotinš' property in the land register.

Mr Avotinš claimed that he had became aware, by chance, on 16 June 2006, of the existence of both the Cypriot judgment and the Latvian court's enforcement order. He did not attempt to challenge the Cypriot judgment before the Cypriot courts but appealed in the Regional Court of Riga against the Latvian enforcement order.

In a final judgment of 31 January 2007 the Senate of the Latvian Supreme Court upheld F.H. Ltd.'s claim, ordering the recognition and enforcement of the Cypriot judgment together with the registration of a charge against the applicant's property in the land register. On the basis of that judgment, the court of Latgale delivered a writ of execution and Mr Avotinš complied by repaying his debt. The registered charge on his property was lifted shortly afterwards.

The applicant complained that by enforcing the judgment of the Cypriot court, which in his view was clearly unlawful as it disregarded his defence rights, the Latvian courts had failed to comply with Article 6 § 1 (right to a fair hearing within a reasonable time).

The application was lodged with the European Court of Human Rights on 20 February 2007.

JUDGMENT

Article 6 § 1

The Court noted that the judgment on the merits had been delivered on 24 May 2004 by the Cypriot court and the Latvian courts had ordered its enforcement in Latvia. Having, by a partial decision on 30 March 2010, declared inadmissible the complaint against Cyprus as being out of time, the Court did not have jurisdiction to decide whether or not the court of Limassol (Cyprus) complied with the requirements of Article 6 § 1. It was nevertheless for the Court to decide whether, in ordering the enforcement of the Cypriot judgment, the Latvian judges complied with the provisions of Article 6 § 1 of the Convention.

The Court observed that the fulfilment by the State of the legal obligations arising from its membership in the European Union was a matter of general interest. The Senate of the Latvian Supreme Court had a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia.

Mr Avotinš had argued before the Latvian courts that the summons to appear before the court of Limassol and the statement of claim by the company F.H.Ltd. had not been properly served on him in a timely manner, with the result that he had not been able to defend himself. Consequently, the Latvian courts should have refused the enforcement of the Cypriot judgment.

The Court observed that, in its final judgment of 31 January 2007, the Senate of the Latvian Supreme Court had declared that Mr Avotinš had not appealed against the Cypriot judgment. Mr Avotinš had indeed not sought to lodge any appeal against the Cypriot court's judgment of 24 May 2004. Mr Avotinš, an investment consultant who had borrowed money from a Cypriot company and had signed a recognition of debt governed by Cypriot law with a clause conferring jurisdiction on the Cypriot courts, had accepted his contractual liability of his own free will: he could have been expected to find out the legal consequences of any non-payment of his debt and the manner in which proceedings would be conducted before the Cypriot courts.

The Court took the view that Mr Avotinš had, as a result of his own actions, forfeited the possibility of pleading ignorance of Cypriot law. It was for him to produce evidence of the inexistence or ineffectiveness of a remedy before the Cypriot courts, but he had not done so either before the Senate of the Latvian Supreme Court or before the European Court of Human Rights.

Having regard to the interest of the Latvian courts in ensuring the fulfilment of

the legal obligations arising from Latvia's status as a member State of the European Union, the Court found that the Senate of the Latvian Supreme Court had sufficiently taken account of Mr Avotinš' rights.

There had been no violation of Article 6 § 1 in the present case.

ECHR Rules on State Immunity for Civil Claims for Torture

On 14 January, the European Court of Human Rights delivered its judgment in *Jones v. United Kingdom*, and issued the following press release.

ECHR upholds House of Lords' decision that State immunity applies in civil cases involving torture of UK nationals by Saudi Arabian officials abroad but says the matter must be kept under review.

In today's Chamber judgment in the case of Jones and Others v. the United Kingdom (application nos. 34356/06 and 40528/06), which is not final, the European Court of Human Rights held, by six votes to one , that there had been:

> *no violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights either as concerned Mr Jones' claim against the Kingdom of Saudi Arabia or as concerned all four applicants' claims against named Saudi Arabian officials.*

The case concerned four British nationals who alleged that they had been tortured in Saudi Arabia by Saudi State officials. The applicants complained about the UK courts' subsequent dismissal for reasons of State immunity of their claims for compensation against Saudi Arabia and its officials.

The Court found that the granting of immunity to Saudi Arabia and its State officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified

restriction on the applicants' access to court. In particular, while there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the weight of authority suggested that the State's right to immunity could not be circumvented by suing named officials instead. The House of Lords had considered the applicants' arguments in detail and dismissed them by reference to the relevant international law principles and case-law. However, in light of the current developments in this area of public international law, this was a matter which needed to be kept under review by Contracting States.

Commentaries on the case are already available here, here and here. More details (still from the Press Release) after the jump.

Principal facts

The applicants, Ronald Grant Jones, Alexander Hutton Johnston Mitchell, William James Sampson (now deceased), and Leslie Walker, are British nationals who were born in 1953, 1955, 1959 and 1946 respectively.

The applicants all claim that they were arrested in Riyadh in 2000 or 2001, and subjected to torture while in custody. Medical examinations carried out on returning to the United Kingdom all concluded that the applicants' injuries were consistent with their allegations.

In 2002 Mr Jones brought proceedings against Saudi Arabia's Ministry of Interior and the official who had allegedly tortured him claiming damages. His application was struck out in February 2003 on the grounds that Saudi Arabia and its officials were entitled to State immunity under the State Immunity Act 1978.

A claim by Mr Mitchell, Mr Sampson and Mr Walker against the four State officials that they considered to be responsible for their torture was struck out for the same reason in February 2004.

The applicants appealed the decisions, and their cases were joined. In October 2004 the UK Court of Appeal unanimously found that, though Mr Jones could not sue Saudi Arabia itself, the applicants could pursue their cases against the individually named defendants. However, this decision was overturned by the House of Lords in June 2006, which held that the applicants could not pursue any

of their claims on the ground that all of the defendants were entitled to State immunity under international law, which was incorporated into domestic law by the 1978 Act.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court), the applicants complained that the UK courts' granting of immunity in their cases meant that they had been unable to pursue claims for torture either against Saudia Arabia or against named State officials. They alleged that this had amounted to a disproportionate violation of their right of access to court. The applications were lodged with the European Court of Human Rights on 26 July 2006 and 22 September 2006, respectively. The Redress Trust, Amnesty International, the International Centre for the Legal Protection of Human Rights and JUSTICE were given leave to submit written comments.

Judgment was given by a Chamber of seven judges, composed as follows: Ineta Ziemele (Latvia), President, Päivi Hirvelä (Finland), George Nicolaou (Cyprus), Ledi Bianku (Albania), Zdravka Kalaydjieva (Bulgaria), Vincent A. de Gaetano (Malta), Paul Mahoney (the United Kingdom), and also Françoise Elens-Passos, Section Registrar.

Decision of the Court

The Court recalled that everyone had the right under Article 6 § 1 to have any legal dispute relating to his or her civil rights and obligations brought before a court, but that this right of access to court was not absolute. States could impose restrictions on it. However, a restriction had to pursue a legitimate aim, and there had to be a reasonable relationship between the aim and the means employed to pursue it (the restriction must be proportionate).

As to the specific test in State immunity cases, the Court referred to its judgment of 2001 in the similar case of Al-Adsani v. the United Kingdom (no. 35763/97). There, the Grand Chamber had explained that sovereign immunity was a concept of international law under which one State should not be subjected to the jurisdiction of another State and that granting immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. That being the case. the decisive question when examining the

proportionality of the measure was whether the immunity rule applied by the national court reflected generally recognised rules of public international law on State immunity. In Al-Adsani, which concerned the striking out of a torture claim against Kuwait, the Court had found it established that there was not, at the time of its judgment in that case, acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the State. There had therefore been no violation of Article 6 § 1.

In the applicants' case, the Court accepted that the restriction on access to court as regards the claims against Saudi Arabia and the State officials had pursued the legitimate aim of promoting good relations between nations. It therefore applied the approach to proportionality set out in Al-Adsani. The main issue of the applicants' case was therefore whether the restrictions on access to court arising from State immunity had been in conformity with generally recognised rules of public international law.

As concerned the claim against the Kingdom of Saudi Arabia, the Court had to decide whether it could be said that at the time Mr Jones' claim had been struck out (in 2006) there was, in public international law, an exception to the doctrine of State immunity in civil proceedings where allegations of torture had been made against that State. The Court considered whether there had been an evolution in accepted international standards on immunity in such torture claims lodged against a State since Al-Adsani. For the Court, the conclusive answer to that question was given by the judgment of the International Court of Justice (ICJ) in February 2012 in the case of Germany v. Italy, where the ICJ had rejected the argument that a torture exception to the doctrine of State immunity had by then emerged. The Court therefore concluded that the UK courts' reliance on State immunity to defeat Mr Jones' civil action against Saudi Arabia had not amounted to an unjustified restriction on his access to court. Therefore there had been no violation of Article 6 § 1 as concerned the striking out of Mr Jones' complaint against Saudi Arabia.

As concerned the claims against the State officials, again the sole matter for consideration was whether the grant of immunity to the State officials reflected generally recognised rules of public international law on State immunity. The Court was of the view, after an analysis of national and international case-law and materials, that State immunity in principle offered State officials protection in

respect of acts undertaken on behalf of the State in the same way as it protected the State itself; otherwise, State immunity could be circumvented by the suing of named individuals. It then turned to consider whether there was an exception to this general rule in cases where torture was alleged. It reviewed the position in international law and examined international and national case-law. It noted that there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials. However, it concluded that the weight of authority was still to the effect that the State's right to immunity could not be circumvented by suing named officials instead, although it added that further developments could be expected. The House of Lords in the applicants' case had carefully examined all the arguments and the relevant international and comparative law materials and issued a comprehensive judgment with extensive references. That judgment had been found to be highly persuasive by the national courts of other States.

The Court was therefore satisfied that the granting of immunity to State Officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on their access to court. Accordingly, there had been no violation of Article 6 § 1 as regards the applicants' claims against named State officials. However, in light of the developments underway in this area of public international law, it added that this was a matter which needed to be kept under review by Contracting States.

The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective

by Dorothea van Iterson

Dorothea van Iterson is a former Counsellor of legislation, ministry of Justice of the Netherlands[1]

In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante**[3]**.* There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible

for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce "automatically" a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child's habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ's ruling that article 11, para 8, Brussels II bis applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an

abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: "..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State".

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.

Gascon on Povse: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?

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On the basis of the provisions of Articles 11(8) and 42(2) of the Brussels IIa Regulation, the Austrian courts, after a long and tortuous process, ended up

ordering the Povse child's return to Italy, considering that the enforcement system without exequatur introduced by the Regulation at this point didn't allow them to do anything different. This «blind compliance» of the Austrian courts was, in fact, the subject of the complaint against Austria before the European Court of Human Rights (EctHR): both applicants (daughter and mother) complained that the Austrian courts had violated their right to respect for their family life, since they disregarded that the daughter's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation of mother and child.

The basic argument of the Austrian Government against the complaint was to argue that its authorities had merely complied with their obligations under Brussels IIa Regulation and, in accordance with its provisions, they were not entitled to refuse to enforce the return decision nor to rule on its possible negative effects on the child. The Court's decision by majority accepts this argument and declares the application inadmissible. In the opinion of the Court a presumption exists that when a State is limited to meet its obligations as a member of an international organization (in this case, those arising from EU membership), it is also complying with the European Convention on Human Rights (ECHR) if the international organization provides fundamental rights a protection degree equivalent to that derived from the European Convention itself (as with the European Union).

The ECtHR applies to this case the doctrine of "presumption of compliance", which it had previously used in *Bosphorus v. Ireland* (30 June 2005, in a case involving the implementation of Council Regulation No 990/93 concerning trade with the Federal Republic of Yugoslavia), *M.S.S. v. Belgium and Greece* (21 January 2011, in a case regarding the Dublin II Regulation on asylum) and *Michaud v. France* (6 December 2012, final 6 March 2013, concerning the implementation of EU legislation on money laundering and the obligation of lawyers to report suspicious transactions of their clients). In *Povse v. Austria* the focus turns to European Civil Procedure and, more specifically, to Brussels IIa Regulation and the abolition of exequatur in international child abduction matters.

Through this doctrine, the ECtHR seeks to establish an appropriate balance between control and respect for the activities of other international organizations; the Court has stated, in fact, that "the Court may, in the interests of international cooperation, reduces the intensity of its supervisory role" (*Michaud* decision, §

104). In order to decide whether this "presumption of compliance" is applicable, the ECtHR can check three different sets of questions:

a) Check that the international organization, as such, is respectful of fundamental rights in an equivalent way as these are defined in the ECHR. In the case of the EU, this first requirement is recognized without difficulty by the ECtHR, for reasons that need no further explanation here.

b) Check if the specific rule approved by the international organization and that States have the obligation to fulfill is also respectful of the fundamental rights standard set by the ECHR.

In *Povse v. Austria* the ECtHR (§ 80) performs this control when it ascertains that the Brussels IIa Regulation has sufficient mechanisms to control that potential risk to the child has been taken into account at the time of ordering his or her return. The ECtHR does not verify the legitimacy of the return system established by the Regulation from a substantive perspective: in other words, it doesn't check compliance with the right to family life of the rule according to which, if the child's removal is held to be wrongful, he or she must return to the State where he was habitually resident immediately before. But the ECtHR controls indeed that the Brussels IIa Regulation ensures that the decision ordering the return of the child is to be taken after verifying its impact on family and private life of the child, i.e. on his or her fundamental rights. There is, hence, a control on the existence of internal mechanisms to ensure respect for fundamental rights, even if that control is made in the State of origin and can not be made in the requested State. The legislative decision –taken by the European Union when approving the Brussels IIa Regulation– to place those controls exclusively with the court of origin could not in any way be regarded as infringing the right to private and family life, as it is justified by the need to effectively combat international child abduction in the EU context.

c) Check, although in a limited manner, how State authorities have applied the specific rule approved by the international organization. In particular, the ECtHR feels empowered to check whether the rule grants discretion to the national authority, for then the use of such discretion itself may be detrimental to fundamental rights and could be criticized by the EctHR.

In *Povse v. Austria* the ECtHR concluded that Articles 11(8) and 42(2) of the

Brussels IIa Regulation granted no margin for discretion to the Austrian courts required to enforce the Venetian court decision, since the system of the Regulation at this point only allows the law and the courts of the requested State to determine the best way to comply with the order, but does not entitle them to take any decision that may prevent or suspend it, although allegedly it could had the aim of safeguarding fundamental rights.

With or without the *Povse* decision, it is obvious that the implementation of the European civil procedural rules can determine the filing of applications to the EctHR. After the *Povse* decision, it seems clear that these complaints will be resolved by the ECtHR applying the presumption of compliance doctrine. The *Povse* decision may thus serve as a basis for thinking about the control the ECtHR can exercise on the rules integrating the *corpus* of European Civil Procedure Law and on their implementation by national courts.

a) The ECtHR could control, of course, if European civil procedural rules provide for the affected fundamental rights a level of substantive and procedural protection that can be assumed by the ECHR system. As a rule the European legislator is always very careful with these issues, making it difficult to estimate *a priori* the detrimental nature to the fundamental rights of the rules that comprise European civil procedural law. However, casuistry always overflows legislator's forecasts…

For instance, we can think now of the rules establishing minimum standards on service to the defendant of the writ commencing the proceedings, which can be found in Article 14 of the European Enforcement Order Regulation, as well as in the European Order for Payment Procedure Regulation and in the European Small Claims Procedure Regulation. Approving these rules, the European procedural legislator has considered as tolerable certain mechanisms of service without proof of receipt by the debtor, although it is not always easy –at least from my perspective– to assume that the recipient actually received the documents (let's think of deposit of the document in the debtor's mailbox or of postal service without proof). Let's imagine that a default judgment is rendered against a defendant in the State of origin, because the writ commencing the proceedings had been served on him by one of these means and he didn't receive it for reasons that are not attributable to him. The judgment can be certified as European Enforcement Order and the creditor will be able to use it to seek enforcement in another Member State: in that case, the defendant will try unsuccessfully to

prevent enforcement arguing that the judgment had been rendered in violation of his right to a fair trial. If the requested State is sued for that reason in the ECtHR (as happened in *Povse*), it could argue the presumption of compliance doctrine. However, when applying it to the case, could the ECtHR retain that Article 14 (c) of the European Enforcement Order Regulation, by endorsing a "too unsafe" service method, may violate the right to a fair trial arising from Article 6(1) ECHR?

b) The ECtHR should also direct control over the way the court acted in a single case, determining whether or not it had any kind of discretion. For example, if we focus on EU regulations that involve cross-border enforcement, it will be necessary to analyze the terms in which they have implemented the principle of mutual recognition and, in particular, if there is a possibility that the requested court refuses the enforcement of the decision from the court of origin.

In *Povse v. Austria* controversy arose on the occasion of the implementation of one of the pieces of the Brussels IIa Regulation ¬the return of wrongfully removed children– in which the rule granted no discretion to the addressed court: this lack of discretionary leeway drifts from the absence of an opposition to enforcement in which a public policy clause could be activated. Indeed, opposition to enforcement of a foreign decision based on the infringement of public policy is the gateway to the protection of fundamental rights in international judicial cooperation systems. The choice to suppress it or to keep it will have important implications if the issue is examined from the perspective of a potential review by the ECtHR.

(i) In regulations establishing enforcement without exequatur and without public policy clause (Brussels IIa on child abduction and visits, European Enforcement Order, European Payment Order Procedure, European Small Claims Procedure and Brussels III) no critics can be made to the executing State which has not taken into account the possible violation of fundamental rights occurred in the original proceedings and which has not denied or suspended enforcement for this reason (precisely what happened in *Povse v. Austria*). There is, therefore, no control in the State of enforcement, and no further control can either be expected to be made by the ECtHR over the requested State, since the latter could benefit from the presumption of compliance doctrine.

It is perhaps ironic that a lower internal control also determines a lower external

control by the ECtHR. This appearance, however, vanishes if attention is drawn to the following issues:

— Controls exist in the State of origin and they are sufficient to consider the right to a fair trial preserved (which is an issue that could also be scrutinized by the ECtHR, as in *Povse*).

— Eventually the courts' activity in the State of origin may also be subject to the scrutiny of the ECtHR. This, indeed, should be the most logical reaction, as it is more reasonable to blame the court of origin for a fundamental right violation than to blame the enforcement court for failing to offset the effectiveness of a foreign decision adversely affecting a fundamental right (although this sort of control is certainly possible and sometimes necessary). This is, without doubt, the clearest conclusion to be drawn from the *Povse* decision (endorsed by the critics that the ECtHR itself formulates against the applicants for failure to exhaust their means of defense before the Italian courts).

(ii) There are still regulations that maintain the public policy clause as a control tool in the State of enforcement (Brussels I, Brussels Ia –even if exequatur proceedings have been abolished–, Brussels IIa –for any matters apart from child abduction and visits–, and Regulation on Successions and Wills). If the application of one of those regulations in a particular case was under the control of the ECtHR, the question arises to what extent the existence of public policy clause would be relevant to analyze the existence of the elements of the "presumption of compliance". Can we understand that the existence of a "public policy exception" grants the court of enforcement a sufficient degree of discretion, whose exercise could be controlled by the ECtHR?

It is clear that the public policy clause can be used to refuse the enforcement of decisions that have been obtained violating fundamental rights or whose content itself violates a fundamental right. From this point of view, the ECtHR could criticize a national court for not using it in a particular case: like it or not, the existence of a public policy clause places the enforcement court in a position to guarantee the violated fundamental right, precisely a position it would not have if cross-border enforcement would be articulated through a system which did not include the public policy exception. This conclusion, however, should be made subject to a condition: the invocation of the public policy exception by the person against whom enforcement has been sought, since in the European procedural

system in civil matters the breach of public policy can't be ascertained by the court on its own motion. Hence, the absence of an active defense by the debtor places the enforcement court in the same position of "no discretion" that exists in regulations with no public policy exception.

This review and this definition of public policy will certainly be carried out by the ECtHR with the aim to control the way in which the courts exercise discretion; and this control on discretion, in itself, does not constitute direct control or attack against European civil procedure rules. However, if we take into account the fundamentals of this control and the context in which it operates, it is clear that the door is open to revision and, with it, to definition by the ECtHR about what should be understood for "public order" in the context of the implementation of European civil procedure rules.

ECHR Upholds Abolition of Exequatur

On 18 June 2013, the European Court of Human Rights delivered its judgment in *Povse v. Austria.*

Readers will recall that the Court of Justice of the European Union had also delivered a judgment in the same case in 2010. Marta Requejo had reported on the case and summarized the facts here.

The case was concerned with a dispute relating to the custody of a child under the Brussels IIa Regulation. A return order had been issued by an Italian court. As the Brussels IIa Regulation has abolished exequatur with respect to return orders, the issue was whether an Austrian court was compelled to enforce an Italian order despite the allegation that the Italian court might have violated human rights.

The Strasbourg court held that the return order could be challenged before the court of origin, and that it would always be possible to bring proceedings against

Italy should such challenge fail. The abolition of exequatur, therefore, was not dysfunctional from the perspective of the European Court of Human Rights.

> *86. The Court is therefore not convinced by the applicants' argument that to accept that the Austrian courts must enforce the return order of 23 November 2011 without any scrutiny as to its merits would deprive them of any protection of their Convention rights. On the contrary, it follows from the considerations set out above that it is open to the applicants to rely on their Convention rights before the Italian Courts. They have thus far failed to do so, as they did not appeal against the Venice Youth Court's judgment of 23 November 2011. Nor did they request the competent Italian court to stay the enforcement of that return order. However, it is clear from the Italian Government's submissions that it is still open to the applicants to raise the question of any changed circumstances in a request for review of the return order under Article 742 of the Italian Code of Civil Procedure, and that legal aid is in principle available. Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy (see, for instance neersone and Kampanella v. Italy, no. 14737/09, 12 July 2011, concerning complaints under Article 8 of the Convention in respect of a return order issued by the Italian courts under the Brussels IIa Regulation).*
>
> *87. In sum, the Court cannot find any dysfunction in the control mechanisms for the observance of Convention rights. Consequent]y, the presumption that Austria, which did no more in the present case than fulfil its obligations as an EU member State under the Brussels Ila Regulation, has complied with the Convention has not been rebutted.*

H/T: Maja Brkan

A Judgment of the ECHR at the

Intersection between International Child Abduction, Parental Responsibility and Migration Law

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By a judgment of 30 July 2013 (available only in French), a Chamber of the European Court of Human Rights found that Switzerland had violated its obligations under Article 8 of the European Convention on Human Rights in a cross-border case concerning the return of a minor and his custody (application No. 33169/10, *Polidario* v. *Switzerland*; a press release in English may be found here).

Article 8 of the Convention enshrines the right to respect for private and family life. It provides that 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".

In 2001, the applicant, Catherine Polidario, a national of the Philippines, had a child with a Lebanese man who had acquired Swiss nationality. A few months later, Ms Polidario, then an illegal immigrant, was ordered to leave the country. She returned to the Philippines with the child. In 2004 she signed an *affidavit* authorising the father to have his son back in Switzerland. The father did not return his son to the Philippines, although the affidavit made clear that he was to keep the child just "for the holidays".

Despite the fact that Ms Polidario held custody rights and parental authority in respect of the child, her attempts with the Swiss authorities to obtain his return to the Philippines were unsuccessful (the State of Philippines, by the way, is not a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction).

While proceedings were pending in Switzerland concerning the custody of the child, Ms Polidario asked the Swiss immigration authorities for leave to remain in the country, as a means to exercise her parental rights and to maintain a relationship with her son.

Finally, from 2010, custody of the child was awarded to the father and Ms Polidario was granted access rights which had to be exercised in Switzerland, whereas she had no authorisation to stay in the country.

In its judgment, the Court recalled at the outset that, pursuant to Article 8 of the European Convention, States must not only refrain from interfering with an individual's private and family life. Positive obligations arise from the said provision along with negative ones, requiring States to adopt measures aimed at ensuring the actual enjoyment of family rights. This implies, *inter alia*, that the rights relating to the relationship between a parent and his or her child should be determined by the competent authorities on the ground of the legally relevant elements, and not on the ground of the mere fact that a *de facto* situation has eventually consolidated over time ("et non par le simple écoulement du temps").

Thus, the Court added, where the custody of a child is disputed, appropriate measures (including those preparatory measures as may be necessary in order to allow a parent and a child to reunite) should be taken rapidly, since the passage of time may entail irreparable consequences for the family relationships at stake. This was particularly true in the circumstances, in view, among other things, of the age of the child, of the fact that the proceedings in respect of return were brought by the applicant while residing in the Philippines and of the limited financial resources available to the applicant herself.

The Court conceded that, starting from 2010, measures had been taken by the Swiss authorities with a view to ensuring the effective exercise of the applicant's right to entertain regular contacts with the child, although this right – failing an authorisation to reside in Switzerland – had to be exercised by Ms Polidario as an illegal resident, thereby in the absence of a full legal entitlement ("sans bénéficier d'un statut juridique"). The Court further conceded that, in the meanwhile, notably after the procedure in Strasbourg had been initiated, the situation had improved thanks to a temporary permit of stay issued in favour of Ms Polidario.

Yet, according to the Court, the fact remains that the Swiss authorities, by failing

to proceed rapidly in respect of the return of the child and his custody and by refusing to issue the applicant with a residence permit, have in fact prevented Ms Polidario to effectively exercise her rights as a parent for six years, *i.e.* from the time of the abduction of the child, in 2004, until 2010.

In the Court's view, this amounted to a violation of Article 8 of the Convention.

Kinsch on Recent ECHR Cases Relating to PIL

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and a member of the Luxembourg bar, has posted Private International Law Topics before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011) on SSRN.

> *This is a presentation of the case law of the European Court of Human Rights in cases decided in 2010 and 2011 involving questions touching on private international law. The selection includes the following themes: Choice of law rules and the right to non-discrimination. – The right to recognition of a status acquired abroad. – International child abduction and the right to family life.*
>
> *As a general matter, it is worth recalling that the task of the Court is not to review domestic law in abstracto, but to determine whether the manner in which it was applied to the applicant has infringed the Convention. This means that private international law cases that come before the Court will be dealt with in a refreshingly, or irritatingly – depending on the preferences of the reader –, undogmatic manner: the most subtle rules of private international law, and the most learned judgments of the national courts on the applicant's case, will be nothing more than facts, the effects of which on the applicant's human rights are the Court's sole concern.*

The paper was published in the last volume of the *Yearbook of Private*

International Law.

ECHR Finds Immunity Violates Right to Access to Court

We should have reported earlier about this interesting judgment of the European Court of Human Rights of June 29th, 2011 (*Sabeh El Leil v. France*), where the Great Chamber of the Court ruled that France violated Article 6 of the European Convention by failing to give access to a court to an ex-employee of the Koweiti embassy in Paris suing his employer after it had dismissed him in 2000.

The ECHR had already ruled a year before in *Cudak v. Lithuania* that while sovereign immunities coud justify limiting the right to access to courts, preventing employees of embassies from suing their employers was a disproportionate limitation to their right when they were neither diplomatic or consular staff, nor nationals of the foreign states, and when they were not performing functions relating to the sovereignty of the foreign state.

In *Sabeh El Leil*, the French Courts had mentioned that the employee had "additional responsabilities" which might have meant that he was involved in acts of government authority of Koweit. The European court finds that the French courts failed to explain how it had been satisfied that this was indeed the case, as the French judgements had only asserted so, and had not mentioned any evidence to that effect.

Here are extracts of the Press Release of the Court:

> ***An accountant, fired from an embassy in Paris, could not contest his dismissal,in breach of the Convention***
>
> ***Principal facts***
>
> *The applicant, Farouk Sabeh El Leil, is a French national. He was employed as an accountant in the Kuwaiti embassy in Paris (the Embassy) as of 25 August*

1980 and for an indefinite duration. He was promoted to head accountant in 1985.

In March 2000, the Embassy terminated Mr Sabeh El Leil's contract on economic grounds, citing in particular the restructuring of all Embassy's departments. Mr Sabeh El Leil appealed before the Paris Employment Tribunal, which awarded him, in a November 2000 judgment, damages equivalent to 82,224.60 Euros (EUR). Disagreeing with the amount of the award, Mr Sabeh El Leil appealed. The Paris Court of Appeals set aside the judgment awarding compensation. In particular, it found Mr Sabeh El Leil's claim inadmissible because the State of Kuwait enjoyed jurisdictional immunity on the basis of which it was not subject to court actions against it in France.

Complaints, procedure and composition of the Court

Mr Sabeh El Leil complained that he had been deprived of his right of access to a court in violation of Article 6 § 1 of the Convention, as a result of the French courts' finding that his employer enjoyed jurisdictional immunity.

The application was lodged with the European Court of Human Rights on 23 September 2005 and declared admissible on 21 October 2008. On 9 December 2008, the Court's Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected.

Decision of the Court

Access to a court (Article 6 § 1)

Referring to its previous case-law, the Court noted that Mr Sabeh El Leil had also requested compensation for dismissal without genuine or serious cause and that his duties in the embassy could not justify restrictions on his access to a court based on objective grounds in the State's interest. Article 6 § 1 was thus applicable in his case.

The Court then observed that the concept of State immunity stemmed from international law which aimed a promoting good relations between States through respect of the other State's sovereignty. However, the application of absolute State immunity had been clearly weakened for a number of years, in particular with the adoption of the 2004 UN Convention on Jurisdictional

Immunities of States and their Property. That convention had created a significant exception in respect of State immunity through the introduction of the principle that immunity did not apply to employment contracts between States and staff of its diplomatic missions abroad, except in a limited number of situations to which the case of Mr Sabeh El Leil did not belong. The applicant, who had not been a diplomatic or consular agent of Kuwait, nor a national of that State, had not been covered by any of the exceptions enumerated in the 2004 Convention. In particular, he had not been employed to officially act on behalf of the State of Kuwait, and it had not been established that there was any risk of interference with the security interests of the State of Kuwait.

The Court further noted that, while France had not yet ratified the Convention on Jurisdictional Immunities of States and their Property, it had signed that convention in 2007 and ratification was pending before the French Parliament. In addition, the Court emphasised that the 2004 Convention was part of customary law, and as such it applied even to countries which had not ratified it, including France.

On the other hand, Mr Sabeh El Leil had been hired and worked as an accountant until his dismissal in 2000 on economic grounds. Two documents issued concerning him, an official note of 1985 promoting him to head accountant and a certificate of 2000, only referred to him as an accountant, without mentioning any other role or function that might have been assigned to him. While the domestic courts had referred to certain additional responsibilities that Mr Sabeh El Leil had supposedly assumed, they had not specified why they had found that, through those activities, he was officially acting on behalf of the State of Kuwait.

The Court concluded that the French courts had dismissed the complaint of Mr Sabeh El Leil without giving relevant and sufficient reasons, thus impairing the very essence of his right of access to a court, in violation of Article 6 § 1.

Just satisfaction (Article 41)

The Court held, by sixteen votes to one, that France was to pay Mr Sabeh El Leil 60,000 euros (EUR) in respect of all kind of damage and EUR 16,768 for costs and expenses.

Article 24 Brussels I, abuse of proceedings and Article 6 ECHR

In an interesting case concerning jurisdiction in a maintenance case, the Dutch Supreme Court – clearly doing justice in the individual case – ruled that jurisdiction may be based on Article 24 Brussels I in spite of the respondent contesting jurisdiction (LJN BL3651, Hoge Raad, 09/01115, 7 May 2010, *NJ* 2010, 556 note Th.M. de Boer). It considered that in this particular case contesting jurisdiction constituted abuse of proceedings. It upheld the decision by the Court of Appeal that considered that declining jurisdiction would constitute a violation of the right of access to justice guaranteed by Article 6 ECHR since it would make it impossible for the claimant to have the case examined on the substance.

The facts that led to this ruling are as follows. Parties, ex spouses, both have the Dutch nationality but are domiciled in Belgium. In 2001 they obtained a divorce in the Netherlands. The District court also awarded maintenance for the (ex-) wife and their three children, but in appeal this decision was reversed due to lack of resources of the husband. In 2003, the woman turns to the Justice of the Peace in Zelzate, Belgium, again requesting maintenance (€ 1000 per child and € 3.500 for herself per month). The man argues that not the Belgian, but the Dutch court has jurisdiction. The Justice of the Peace accepts jurisdiction, but does not award the maintenance. The woman lodges an appeal at the Court of First Instance (District Court) in Ghent, Belgium. The man again contests jurisdiction of the Belgian court, this time successfully. The court in Ghent declines jurisdiction, considering that Article 6 of the Belgian-Dutch Enforcement Convention of 1925 (!) confers jurisdiction upon the Dutch court since the maintenance is connected to a divorce obtained in the Netherlands. It refers the case to the District Court in The Hague, Netherlands.

In The Hague court – meanwhile we are in 2006 – again the man invokes the exception of jurisdiction, now arguing that it is *not* the Dutch court, but the *Belgian* court that has jurisdiction pursuant to the Brussels I Regulation. The District court, however, accepts jurisdiction (incorrectly) considering that the

Belgian judgment regarding jurisdiction is to be recognized, and awards part of the maintenance considering that the man does have sufficient resources after all (€ 193,31 per child and € 1.691,43 for the ex-spouse per month). The man lodges an appeal, once again contesting jurisdiction of the Dutch court. The Court of Appeal correctly concludes that the Brussels I Regulation applies (and not the Belgian-Dutch Enforcement Convention, see Art. 69). It considers that the Dutch court does not have jurisdiction pursuant to Art. 2 or 5(2) Brussels I (the ex-spouses are domiciled in Belgium and it concerns an independent maintenance claim), and that only Art. 24 on tacit submission can serve as a basis for jurisdiction.

It is under these circumstances that the Court of Appeal considers that the man contested jurisdiction of the Belgian court, arguing that the Dutch court had jurisdiction, but when the case was transferred to the Netherlands, changed his position without a valid reason, contesting jurisdiction of the Dutch court. This constitutes abuse of proceedings under Dutch law. Where the Dutch court would decline jurisdiction, the wife would not have access to court to have her claim decided on the merits. As mentioned above, the Supreme Court ruled that the Court of Appeal under these circumstances rightfully based its jurisdiction on Art. 24 Brussels I.

Though there may be a little tension (?) with the generally rigid approach of the ECJ in relation to the Brussels I Regulation, denying arguments based on abuse of proceedings (such as in the Gasser case), I believe this Dutch judgment to be the only just solution in this case.