



Planning the Future of Cross-Border Families: a  
Path Through Coordination  
EU Fam's - JUST/2014/JCOO/AG/CIVI/7729



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# Case Law of the European Court of Human Rights on the Application of (Some of) the EU Family Regulations

Patrick Kinsch

University of Luxembourg



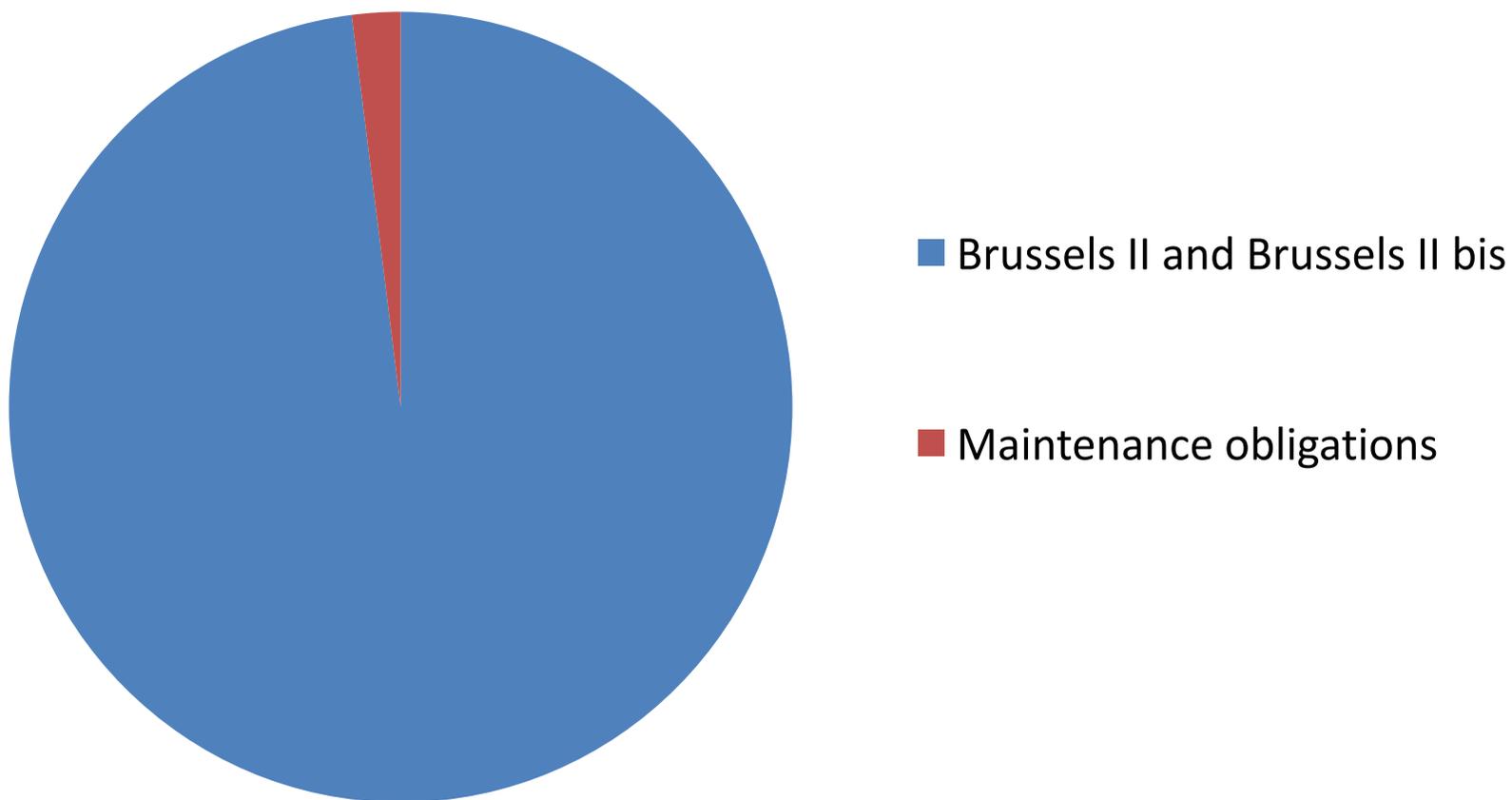
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# A statistical approach

Number of cases



# Two cases relating to Regulation (EC) No. 4/2009 (maintenance obligations)

ECtHR, judgment of 2 December 2014, *Battista v. Italy*,  
No. 43978/09

45. Moreover, the Court notes that there has been civil-law cooperation at European and international level on the issue of the recovery of maintenance payments. It points out that there exist methods for obtaining recovery of debts outside national boundaries, in particular Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, and the New York Convention on the Recovery Abroad of Maintenance. Those instruments were not taken into account by the authorities when applying the impugned measure. They had merely emphasised that the applicant could have travelled abroad using his passport and thus succeeded in evading his obligation.



# Two cases relating to Regulation (EC) No. 4/2009 (maintenance obligations)

ECtHR, decision of 7 June 2016, *Ore v. Croatia*, No 51506/13

71. The specific feature of the present case is that the applicants sought enforcement of the judgment of a Croatian civil court against a debtor who is a Croatian national but has been living at an unknown address in the United States, a country that is not a party to the Convention and is not bound by any international instrument to give effect to any judgment of Croatian civil courts on its territory. Naturally, in such circumstances the measures at the disposal of the Croatian authorities to comply with their obligation under Article 6 § 1 of the Convention to secure the enforcement of the judgment of 28 January 2003 were rather limited.



# Brussels II (or Brussels II bis) and the right to family life

Two aspects of the right to family life in the context of international child abductions:

*(1) Positive obligations of the contracting States*

*(2) Protection against unjustified interference with existing family life*

“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, bearing in mind, however, that the **child’s best interests** must be the primary consideration.”



# Brussels II (or Brussels II bis) and the right to family life

Case C-211/10 PPU, *Doris Povse v. Mauro Alpago* (ECJ, 1 July 2010)

ECtHR, decision of 18 June 2013, *Sofia Povse and Doris Povse v. Austria*, No. 3890/11 (no violation)

ECtHR, judgment of 15 January 2015, *M.A. v. Austria*, No. 4097/13 (violation)



# Positive obligation to enforce decisions against child abductions

ECtHR, judgment of 21 September 2017, *Sévère v. Austria*, No. 53661/15

“In relations between EU member States the rules on child abduction contained in the Brussels Ila Regulation supplement those already laid down in the Hague Convention. Both instruments associate the best interests of the child with restoration of the status quo by means of a decision ordering the child’s immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child’s best interests”

“In the light of the principles above, according to which the best interests of the children must still be of primary consideration, the Court accepts that a change in the relevant circumstances may exceptionally justify the non- enforcement of a final return order. However, having regard to the State’s positive obligations under Article 8 and the general requirement of respect for the rule of law, the Court must be satisfied that the change in circumstances was not brought about by the State’s failure to take all measures that could reasonably be expected to facilitate the enforcement of the return order”

(conclusion: violation of Art. 8 ECHR)



# Positive obligation to enforce decisions against child abductions

ECtHR, judgment of 1 March 2016, *K.J. v. Poland*, No. 30813/14

“73. In conclusion, in the circumstances of the case seen as a whole and notwithstanding the respondent States’ margin of appreciation in the matter, the Court considers that the State failed to comply with its positive obligations under Article 8 of the Convention.

...

76. Lastly, the Court observes that, as the child has lived with her mother in Poland for over three years and a half, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering the child’s return to the United Kingdom.”



# Protection against unjustified interference with existing family life

- 1) *Interference through the entering of a return order by the courts of what was the habitual residence of the child prior to his or her abduction*

EctHR, judgment of 12 July 2011, *Šneersonė and Kampanella v. Italy*, No. 14737/09

“98. For these reasons the Court concludes that the interference with the applicants’ right to respect for their family life was not “necessary in a democratic society” within the meaning of Article 8 § 2 of the Convention. There has accordingly been a violation of Article 8 of the Convention on the account of the Italian courts’ order for Marko’s return to Italy.”



# Protection against unjustified interference with existing family life

*2) Interference through the enforcing of a return order by the authorities of the state of the present residence of the child*

ECtHR, decision of 18 June 2013, *Sofia Povse and Doris Povse v. Austria*, No. 3890/11 (no violation)



# The potential for a conflict between international obligations of States

ECtHR, decision of 15 May 2012, *M.R and L.R. v. Estonia*, No. 13420/12

“A child’s return **cannot be ordered automatically or mechanically when the Hague Convention is applicable**, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it”



# The potential for a conflict between international obligations of States

ECtHR, decision of 18 June 2013, *Sofia Povse and Doris Povse v. Austria*, No. 3890/11: application of the *Bosphorus* presumption

“85. ... the CJEU made it clear that within the framework of the Brussels Ila Regulation it was for the Italian courts to protect the fundamental rights of the parties involved. Consequently, the applicants’ rights have to be asserted before the Italian courts.

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. .... 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 *Šneerson and Kampanella v. Italy*[ ...]).

87. In sum, the Court cannot find any dysfunction in the control mechanisms for the observance of Convention rights. Consequently, 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.”



# The potential for a conflict between international obligations of States

ECJ, Opinion 2/13 of 18 December 2015, *Accession of the European Union to the ECHR*

“the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”

“In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.”



# The potential for a conflict between international obligations of States

EctHR, Grand Chamber judgment of 23 May 2016, *Avotiņš v. Latvia*, No. 17502/07

“116. ... In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.”

