

# EUROPEAN COURT OF HUMAN RIGHTS

## **Rule 39 – Urgent** **Application No. 27370/10**

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(On behalf of:  
**Christer, Annie and Domenic Johansson)**

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**State Party concerned:**  
**KINGDOM OF SWEDEN**

## Introduction

1. Pursuant to rule 39 of the Rules of the Court on interim measures, applicants herein submit this urgent motion regarding the return of Domenic Johansson, a minor of nine years of age, to the custodial care of his parents Christer and Annie Johansson. This request is made in conjunction with the Johansson's application to this Court filed on June 25, 2010 regarding ongoing violations of the family's Convention rights under Protocol 4, Article 2 [Freedom of Movement]; Article 8 [Right to Respect for Private and Family Life]; Protocol 1, Article 2 [Right to Education]; and Article 9 [Freedom of Thought, Conscience and Religion].
2. Applicants note that interim measures may be granted where there is an imminent risk of irreparable damage to the victim of an ongoing violation of the Convention.<sup>1</sup> The Court's practice directions indicate that circumstances may exist under Article 8 to warrant the granting of interim measures pending the outcome of proceedings before this Court.

### Applicability of *Neulinger and Shuruk*

3. This application for interim measures is made in light of the Grand Chamber's recent ruling in *Case of Neulinger and Shuruk v. Switzerland*<sup>2</sup>, where this Court held that where a child has been separated from a custodial parent for a period of more than three years, the child if returned could be irreparably harmed by the upheaval in his living circumstances. This is a particularly pertinent fact to the instant application because the ongoing state mandated foster care of Domenic Johansson is reaching the point of three years.
4. In the *Case of Neulinger and Shuruk v. Switzerland*, a Belgian national, living in Israel, had divorced with her husband, an Israeli national, and sought full custody of their two year old son Noam. The domestic court in Tel Aviv ordered that the mother was not allowed to remove the child from Israel because she had no other ties to the country and her likelihood of returning with Noam was unlikely. Nonetheless, she secretly took the child to Switzerland in contradiction of Article 13 of the Hague Convention and Israeli criminal law and thereafter refused to return Noam to Israel despite court orders to do so

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<sup>1</sup> ECHR, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 104, 4 February 2005 and ECHR, *Paladi v. Moldova* [GC], no. 39806/05, §§ 86-90, 10 March 2009.

<sup>2</sup> ECHR, *Case of Neulinger and Shuruk v. Switzerland* [Grand Chamber], application no. 41615/07, judgment of 06 July 2010.

in Israel and a judgment of the Swiss Federal Court. Despite being in breach of the Hague Convention, the Grand Chamber held that the child's best interest demanded that he would be better situated to stay in Switzerland with his mother because after three years of time elapsing, Noam would have suffered serious psychological and developmental harm if returned to Israel to be with his father.<sup>3</sup> The Grand Chamber held that: "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."<sup>4</sup>

5. Several key similarities exist between the facts surrounding Domenic in the instant application and those in *Neulinger and Shuruk*. First, there are age similarities between the two children. While Domenic is a few years older than Noam, they both are at ages where a capacity for adaptation still exists which was a factor the Grand Chamber took into consideration when deciding the *Neulinger and Shuruk* case. Furthermore, in both cases the children were separated from their custodial parent(s) within the range of a three year time period. In the case of Domenic, being a few years older than Noam at the time of his taking and being of an age where he could assess what was actually happening, the trauma of the removal would have been far greater than as with Noam.

### Parental Rights

6. The governing case law of this Court dictates that any removal of a child from his natural parents and taking them into public care is a per se interference with the mutual enjoyment of parents with their children guaranteed by Article 8 of the Convention;<sup>5</sup> a right which constitutes a fundamental element of family life.<sup>6</sup> The Court has also held on the matter in *Olsson* that it is an interference of a very serious order to separate a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the [European] Commission rightly observed, it is not enough that the child would be better off if placed in care.<sup>7</sup> The Court requires that extreme

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<sup>3</sup> *Id.*, § 141-151.

<sup>4</sup> *Id.*, § 147.

<sup>5</sup> See e.g. *Olsson v. Sweden*, (No 2) (1992) 17 EHRR 134, [1992] ECHR 13441/87, ECtHR.

<sup>6</sup> ECHR, *Elsholz v. Germany*, ECHR decision of 13 July 2000, Report of Judgments and Decisions 2000-VIII, § 43.

<sup>7</sup> *Olsson*, 11 Eur. H.R. Rep. 259 P. 72.



diligence is required in such matters because of the danger of irreversible harm to both the family structure and the child.<sup>8</sup>

7. While this Court provides a wider margin of appreciation to domestic courts with regard to child care cases, the Court is nonetheless 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.<sup>9</sup> In the instant matter, no obstacles exist towards reunification of Domenic with his custodial parents Annie and Christer. While applicants contest any grounds whatsoever in Domenic's being taken into care, it is clear that the obstacles Swedish social services claim existed when abducting then seven year old Domenic Johansson no longer exist, as Annie and Christer have agreed to do whatever they have to in order to regain the daily care of their son. Yet the delay, as in *Neulinger and Shuruk*, is reaching a period where a return to his natural parents could be problematic to his future development. Thankfully, Domenic remains at an age where he could adapt to the reunification and properly thrive with his natural and loving parents, but that window of time may be dissipating. As it is paramount to keep Domenic's best interest in mind, it will always be better for Domenic to be with his natural parents Annie and Christer. Interim measures must be ordered to prevent further delay on the part of Swedish social services from further impairing Domenic's well being.
8. As detailed in the original application, the main area of contention between the Respondent and the Johansson's was that Domenic was being home educated. The family had been doing so in large part because of their desire to pursue missionary work in India and to be closer to the mother's family [as Annie is a citizen of India]. The Johansson's had sought the textbooks from their local school principal because it was their desire that even while in India Domenic be brought up learning both the Indian and the Swedish curriculum. The end result was that Domenic was dramatically abducted by state social services while on the airplane *en route* to their new life in India helping orphaned children.

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<sup>8</sup> ECHR, *H v. United Kingdom*, (judgment of 8 July 1987, Series A No. 120, pp. 59-63, para. 85.

<sup>9</sup> ECHR, *Case of Neulinger and Shuruk v. Switzerland* [Grand Chamber], *op. cit.*, § 141.

9. As the Court held, “It is in the discharge of a natural duty towards their children - parents being primarily responsible for the “education and teaching” of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.”<sup>10</sup> Second and equally pertinent, that “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”<sup>11</sup>
10. This case personifies an abuse of the dominant majority position. Social services intervened into the private family life of the Johansson’s because they disagreed with the family’s belief system making value judgments which are not permissible under Convention law. Rather than remaining neutral in its functions, the State actively discriminated against the family for holding beliefs which differed from the majority viewpoint. The value judgments made against the Johansson’s by social services, lacking in any serious investigation or provable fact, were then used to destroy the applicant family. These same judgments, which continue to exist without fact or serious evidence, persist in keeping the family separated.
11. As the Johansson’s application of June 25, 2010 establishes, Swedish officials removed Domenic (a citizen of Sweden with a right to citizenship in India) from an international flight solely to prevent his parents from moving to India and from educating him in a manner that is lawful both in India and was lawful at the time in Sweden. Since this extraordinary separation on June 26th, 2009, Mr. and Mrs. Johansson have been allowed extremely limited contact with their son and only under overbearing state supervision. All attempts by the parents to offer alternatives for Domenic’s education, as well as their offers of sincere cooperation on the other minor matters that have since been addressed, have been rebuffed by the Swedish authorities. It now appears obvious that the Swedish government intends to keep permanent custody of this boy simply because his parents wished to move to India and to home school him.

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<sup>10</sup> *Id.*, § 84(e).

<sup>11</sup> *Id.*, § 84(f).



12. This desire to permanently extinguish parental rights, even with all obstacles to reunification being removed, became very apparent when Gotland Social Services motioned the district court to transfer full custody to an extraneous legal guardian. The court refused to issue an interim decision and ruled on 09 December 2011, that Social Services did not have grounds to take such extreme measures. Of note during this hearing is that this was the first time in the more than two and a half years since Domenic was taken into care that the family was allowed to use a lawyer of their own choosing [Ruby Harrold-Claesson, also appearing as co-counsel in this motion].
13. Under the circumstances of the family's moving to India, the State was in no position to take such dramatic means in taking Domenic into state care for being home educated. The United Nations Convention on the Rights of the Child, for example, clearly states that among the most important rights of the child, besides the right to life, are precisely the right to parental love and the right to education. The Convention also explicitly states that parents, being the ones who love their children most, are those most called upon to decide on the education of their children.<sup>12</sup> This guarantee, which requires that the State respect the right of parents to educate their children according to their own religious or philosophical beliefs (beliefs which would include pedagogical beliefs), has also been codified by Article 18(4) of the International Covenant on Civil and Political Rights [ICCPR], Article 5(1)(b) of the Convention Against Discrimination in Education, Protocol 1, Article 2 of the European Convention of Human Rights, Article 26(3) of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights.
14. Furthermore, Article 4 of the ICCPR permits derogation of the rights guaranteed by that instrument in times of national emergency. However, Art. 4(2) prohibits any derogation of certain rights even in times of national emergency. Rights guaranteed by Article 18 are included in the list of rights that are non-derogable even in times of national emergency. Parental rights in education are guaranteed in Art 18(4). Sweden's obligation under the European Convention of Human Rights should be read in a manner which is consistent with its obligations under the ICCPR. Thus, if parental rights in education are

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<sup>12</sup> United Nations, *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 9.2.1990, Articles 5, 18§ 1.

non-derogable even in times of national emergency they fall no more within the margin of appreciation than other fundamental, non-derogable freedoms. The primary premise for Domenic's being taken into custody by Swedish social services for being educated by his parents clearly violates this principle.

15. Additionally, Article 19 of the Swedish Constitution states that no act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention of Human Rights. Sweden has therefore committed themselves to strict compliance with the literal terms of the Convention and there should therefore be no allowance for a margin of appreciation which violates the parental rights provisions of the Protocol 1, Article 2 or the family rights of Article 8.

### **Best Interests of the Child**

16. The immediate reunification of Domenic Johansson with his custodial parents is paramount to the best interests of Domenic and his social and psychological well being. With nearly three years of separation, due in large part to "bad feelings" and non-relevant issues Social Services have had with the parents; Domenic has been forced to suffer without the love and companionship of his natural parents.
17. The State cannot take such radical methods as separating families simply for the act of home education or because it does not like the religious philosophies of the family; particularly where the weight of the evidence lacks grounds to substantiate such severe measures as to take Domenic into custody and disallow him his right guaranteed in Protocol 4, Article 2 [Freedom of Movement], to travel to India to be with his parents and extended family there. Such a deprivation hinders the evolving capacities of the child and is to the detriment of the best interests of the child standard set in international law.<sup>13</sup>
18. The best interests of the child standard as adopted in Sweden vis-à-vis the Convention of the Rights of the Child states that: "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.

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<sup>13</sup> See e.g.: United Nations, *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 9.2.1990, Article 14.



...”<sup>14</sup> Article 9 of that Convention states that: “1. States Parties shall ensure that a child shall not be separated from his or her parents against their will ...”<sup>15</sup>

19. Sweden has brazenly violated Domenic’s rights under the Convention of the Rights of the Child and under Article 8 of the European Convention of Human Rights. Rather than facilitating reunification, which has clearly been Domenic’s wishes as evidenced by his behavior whenever he is with his natural parents, the Swedish authorities have stalled the process and even sought to extinguish their parental rights all together.
20. Article 24 of the European Union’s Charter of Fundamental Rights and Freedoms clearly states that: “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.”<sup>16</sup> Domenic’s visitation rights, at no fault of his own or his parents, have been continually eroded over the period of his having been taken into state custody. Rather than reunification being sought, Domenic’s rights to the parental love and companionship of his naturally family have been fully discarded by the Swedish authorities.<sup>17</sup>

## Conclusion

21. The Grand Chamber held in the *Case of Neulinger and Shuruk v. Switzerland* that it was in the applicant child’s best interest after three years of separation that reunification with his father was no longer desirable despite that separation having been in violation of the father’s rights, the Hague Convention and court orders both from Israel and Swiss courts. While applicants do not hold the position that separation for a three year period is a reasonable measure for barring reunification or that reunification with a natural parent is not in a child’s best interest when so ordered by a court of competent jurisdiction, the *Neulinger and Shuruk* case nonetheless highlights the urgency of granting interim measures in the Johansson case. In the instant matter, the proper evidentiary standard for custodial removal was ignored in Domenic’s being taken into state mandated care as

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<sup>14</sup> United Nations, *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 9.2.1990, Article 7.

<sup>15</sup> *Id.*, Article 9.

<sup>16</sup> European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), Article 24(3).

<sup>17</sup> See e.g.: ECHR, *Elsholz v. Germany*, ECHR decision of 13 July 2000, Report of Judgments and Decisions 2000- VIII, § 43: “The mutual enjoyment by parent and child or each other’s company constitutes a fundamental element of family life.”



were the due process rights of the Johansson's. Gotland Social Services continues to unlawfully hinder reunification and minimize parental visitation both in violation of Domenic's rights and the parents' rights. Like in *Neulinger and Shuruk*, this separation has been ongoing for nearly three years. We therefore urge the European Court not to wait any longer to impose interim measures in reuniting Domenic with his natural parents, Annie and Christer Johansson, otherwise it may very well be too late for reunification to be facilitated by the time that the Swedish courts resolve the case themselves. This delay has not been the fault of Domenic or his parents. Neither has Domenic's desire to be reunited with his family or his parents' most sincere wishes to have their child back been lessened. The record clearly establishes that no grounds for separation exist at this time. It is incumbent on this court to order reunification while it addresses the violations being complained of in application number 27370/10. Domenic is still at an age where his adaptability and development allow him to be reunited with his natural family and most importantly to do so would be in his best interests. Therefore, the applicants ask that interim measures be granted immediately and without prejudice.

Respectfully pled,



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02 February 2012

Date

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